A Dialectic of Deference and Dissent

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[Note: This is a short portion of (uncorrected proofs of) Chapter 9 of *Law's Rule* (OUP 2022, forthcoming)—A Table of Contents of this book is attached. *Law's Rule* argues that the rule law promises protection and recourse against the arbitrary exercise of power through the distinctive instrumentalities of law. And further that the rule of law can be robust in a polity—law can *rule* in the political community—only when all of its members, and not merely the legal or ruling elite, take responsibility for holding each other, and especially law's officials, to account under the law. Robust mutual accountability is the animating spirit of the rule of law.]

C9.P1 Law is sovereign—this is the bold thesis defended in Part I [of *Law's Rule*]. This chapter begins an effort in this second part to answer a series of serious challenges to this bold thesis. Perhaps the most salient such challenge is implicit in the recitation of facts opening the previous chapter. There we observed the marked decline of the rule of law in many countries around the world and learned of concerted efforts, by ruling authorities and rogue bands of citizens, to defy and subvert the law. The rule of law condemns subversion and defiance of law. Yet the rule of law relies on robust practices of accountability; it encourages protest, resistance, whistleblowing, even defiance of those who illegitimately speak in the name of law. It appears, then, that fidelity is on a collision course with finality.

C9.P2 Fidelity demands that *law alone* is the final arbiter, not the understanding of any individual, official, or institution. "The ultimate touchstone of constitutionality," Justice Frankfurter insisted, "is the Constitution itself and not what we have said about it."[1] Law rules in and through the practical reasoning of officials and citizens, but the meaning and force of law is often contested. Thus, inevitably, what the *law says* is always what some person or institutional *spokesperson says* it says. We always receive law in translation, as it were. But, if univocal law is to rule, and not any (or every) person, there must be some one person or institution that speaks law authoritatively and uniquely. Put it another way. Law vests legitimate governing power in individuals, and defines and authorizes institutions and modes of exercising this power, but, then,

[1] Graves v. New York ex rel. O'Keefe (Frankfurter, J. concurring), 306 U.S. 446 (1939).

it seems that law can rule only if legal subjects regard as final the directives of legally authorized individuals and the institutions through which they work.

C9.P3 If that is the case, then finality displaces fidelity: fidelity insists on accountability, but finality evades it. However, if accountability-holding involves active challenge, dissent, and even protest, refusing to accept as final the decisions of legal authorities, then the challengers have the last word. The mantle of finality falls on their shoulders. Everyone is a judge in his own eyes. Fidelity drives out finality. The rule-of-law snake eats its tail.

C9.P4 This antinomy threatens to undermine the intelligibility of the ideal of law's sovereignty. We cannot proceed with our discussion of the variety of challenges facing our conception of the rule of law until we answer this pressing challenge. This chapter will not explain away the tension between finality and fidelity by rejecting one or the other. Rather it will seek to manage the delicate dialectic between them—more precisely, between deference and dissent—that lies at the heart of the rule of law.

C9.P5 We begin our answer to this challenge by filing some of the sharp edges off the opposing positions we have just considered.

C9.P6 Finality is the idea that political order and constraint of political power are possible only if law is settled, and it is commonly thought that law can be settled only if some person or institution has final say about the law. However, a reasonable doctrine of finality allows appeals to and challenges to authoritative decisions. It recognizes the value of a hierarchical structure of decision-making, and insists that challenges go through a regulated hierarchical process and that they must stop with the decisions made at the apex of the hierarchy. Legal scholars Henry Hart and Albert Sacks, for example, argued that "decisions which are the duly arrived at result of duly established procedures . . . ought to be accepted as binding upon the whole society unless and until they are duly changed."[2] Authority at the apex of a hierarchy settles two things: what *the law says* and what *we should do* given what the authority says that the law says.

C9.P7 Fidelity also recognizes complexity. Law fails to rule, we have argued, if those who speak for the law—or, rather, speak *the law*—escape accountability, but it also fails if everyone is a judge in his or her own eyes. For then we have simply shifted unaccountability from the One

[2] Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, William N. Eskridge, Jr. and Philip P. Frickey, eds. (Westbury, NY: Foundation Press, 1995), 4.

to the Many. Fidelity recognizes that law is an *institutionalized* discipline of public practical reasoning. That is, the norms of law have meaning and force because they are embedded in a disciplined practice of practical reasoning, and that practice is realized in a complex web of institutions. Thus, fidelity tethers accountability to substantive rules and principles of law, and to its institutional structures and processes. Fidelity informs our inquiries concerning what law says and what we may or must do when those in power speak in the name of law.

C9.P8 These considerations do not eliminate the tension between finality and fidelity, but they give it a sharper focus and bring two key questions clearly into view: Who says? and So what? The first recognizes that we always receive the law in translation, through what someone says the law says. The second recognizes that law acts through those who act in its name. The first concerns where responsibility for saying what the law says should lie; the second concerns how others should act with respect to those who speak and act in its name. The dialectic between deference and dissent pervades answers to each of these questions.

[Large section deleted.]

C9.S2 ## So What?

C9.P21 Law's rule is robust in a political community, we have argued, only when there is a robust, community-wide network of mechanisms and practices of accountability. Accountability involves not only making and publicly expressing judgments that disagree with the decisions of authorities but also demanding the authorities' reasons for their decisions and actions, assessing those reasons, and acting on those assessments. Accountability-holding sometimes takes the form of protest, resistance, or even defiance of authorities. Even more than the question, who says?, the tension between finality and fidelity forces us to face the question, so what? When does the accountability on which robust rule of law depends fundamentally call for actions contrary to the orders of authorities? We cannot be happy with the answer that we must always obey authorities even when wrong; but neither can we be entirely happy with the answer that dissent and defiance are required whenever, in one's judgment, the authorities are wrong. Law's rule can be effective only when there is wide scope for accountability and, consequently, room for civil dissent; but even dissent that claims legal warrant can threaten the rule of law. Unconditional deference to authorities would eviscerate fidelity; unlimited protest would undermine the protection that the rule of law promises. Again, this question entangles us in the dialectic between deference and dissent.

C9.P22 Because this issue is complex, we will proceed carefully, keeping several important distinctions in view. First, we should distinguish two groups of dissenters, because the actions available to them and the rules that apply to them are likely to be different. One group includes *officials*. Their dissenting actions may involve, for example, noncompliance with the orders of their superiors or other government departments, or leaking information that other officials would like to keep under wraps. The other group includes *nongovernment actors*, including individuals and organizations of civil society.

C9.P23 Second, we must distinguish civil dissent from the more familiar form of protest, civil disobedience. *Civil disobedience* involves violation of law in an effort to bring some wrong or injustice to public attention. *Civil dissent* is law-focused protest or resistance. Its aim is to hold officials accountable to the law, acting in name of the law, not against it. Such accountability-holding protest may involve defiance of the orders of the authorities, as a way of challenging their actions or decisions, or their claims to act with legal warrant. Civil dissenters act on their judgment that the authorities got the law wrong. Inevitably, conscientious civil dissent pits the officials' view of the law with that of dissenters.

C9.S3 ## *Civilian Resistance*

C9.P24 One more distinction. With respect to the activities of civilians, dissent may follow regular channels or move outside such channels. *Regular channels* include, for example, the courts, offices of ombudsmen, public meetings confronting elected officials, and various uses of public media. As we have seen in previous chapters, protests and challenges made through these regular channels are major weapons in the rule of law's accountability arsenal. To authoritarian (or authoritarian-leaning) governments, they represent threats and are major targets of government attempts to disable checks on their power. If the rule of law is to be robust in a political community, its law must provide and protect wide civilian access to these channels. Moreover, civilians' rights to participate without penalty must not depend on the correctness of their views of the law. The authorities bear the onus of demonstrating good faith and sound warrant for their activities.

C9.P25 The potentially more controversial channels of protest are *irregular*, among them defiance, demonstration, and disruption. Even in the best-case scenario, where there is a robust array of regular channels for civil dissent, the rule of law recognizes the legitimacy of some modes of irregular dissent. This is because regular channels are expensive, available only to

those with resources to make use of them, and usually limited to individuals or small groups. Irregular modes of dissent engage a wider public that can give voice to collective grievances. They make public the necessary involvement of the community in the continuing task of demanding accountability of those who exercise governing power. In less than ideal conditions, where regular channels are few, weak, compromised, or unavailable to wide sectors of the community, irregular channels may be the only means for achieving some degree of accountability of government power wielders.

C9.S4 ## Defiance

C9.P26 Recall our discussion in Chapter 2 of Mrs. Marsh's challenge to the town regulation that prohibited solicitation without a permit. Authorities of Chickasaw, Alabama, denied her request for a permit to distribute religious literature in front of the town's post office. She refused to comply, defied the town's order, and was arrested and convicted of the crime of remaining on premises after she was ordered to leave. Mrs. Marsh challenged the town's regulation and her conviction, arguing that they violated her constitutional rights to freedom of religion and freedom of expression. The state of Alabama supported the town's prohibition and its action against Mrs. Marsh. The case eventually went to the US Supreme Court.[3] The state argued that the corporate owner of the town had a right to control the inhabitants of Chickasaw just as homeowners are entitled to regulate guests on their property. Mrs. Marsh challenged that argument, and the Court agreed with her. It argued that since Chickasaw performed the functions of a municipality and the corporation took on the role of government, it was subject to constitutional limits on the exercise of governmental power.

C9.P27 Mrs. Marsh's defiance of the orders of town authorities initiated a challenge to its exercise of power that was ultimately successful. Town officials were duly authorized agents of government, but their orders lacked legal warrant and, on that ground, Mrs. Marsh defied them. When the Supreme Court affirmed her challenge, it vacated her conviction for defying the order. In effect, the Court recognized the act as legally innocent. This is in accord with the rule of law; it recognizes that there are limits to required deference to the orders of authorities. This thought is familiar. Even the military recognizes such limits. Soldiers are obligated to refuse to obey manifestly illegal orders. Mrs. Marsh refused to comply with the orders of town officials; she did

[3] Marsh v. Alabama, 326 U.S. 501, 506, and 508–510 (1946).

not refuse to obey the law. Her defiance challenged the legal standing of the order, not its morality or justice. Defiance of authorities is not necessarily disobedience of the law.

C9.P28 The rule of law allocates different responsibilities to dissenters and authorities regarding the judgment of the legality of the authorities' order. Dissenters are responsible for exercising their best judgment regarding the law. Challengers must consider both the weight of substantive arguments for and against the legality of the order and the weight of authoritative determinations of the matter of the order's legality. Thus, challengers considering defiance may conclude that on their best judgment they must defer to the authority's determination, even if they judge that the determination is mistaken, because the weight of all these reasons taken together makes defiance unjustified. On the other hand, reasons for deference may be defeated, when matters have not been fully and fairly determined and strong arguments compel the judgment that the orders lack legal warrant, provided that the costs to the community of defiance are not excessive.

C9.P29 Authorities also bear responsibilities. They must respect the right of noncompliance, and the law must recognize a defense against prosecution for violation, when the dissenter's judgment is sincere, considered, not a manifestly unreasonable reading of the law, and, again, the costs to the community are not excessive. To put any greater burden on dissent—requiring, for example, that the judgment of the authorities' legal warrant be correct such that dissenters act at their peril—would put dissent beyond most ordinary citizens, reserving it only for those with sophisticated knowledge of the law or with financial resources sufficient to engage a skilled lawyer.

C9.P30 The rule of law depends on community-wide participation in accountability-holding. Law must provide opportunities for and protection of challenges to law and legal authorities that are essential parts of this accountability-holding. Law must recognize a qualified right of conscientious defiance of legal orders, a right that allocates responsibility for its exercise to both authorities and dissenters.

C9.S5 Demonstration, Disruption, and Spillover Disobedience

C9.P31 Some noncompliance is quiet, but dissent is often public and noisy. Demonstrations of opposition to authorities and their judgments and orders may involve loud denunciations. The rule of law does not demand decorum; it requires respect, and willingness to listen and engage in public discourse, but it does not require silence or submission. Demonstrations typically are disruptive; they inevitably cause public inconvenience and discomfort. They especially make

authorities uncomfortable—that is often their aim. The legitimacy of dissent in the view of the rule of law depends on dissenters acting on their best judgment of the law (considering both substantive reasons and reasons of authority) and costs to the community; disruption, inconvenience, and discomfort are often not sufficient to defeat the legitimacy of dissent. Here, again, the rule of law recognizes the delicate dialectic of deference and dissent.

C9.P32 The extremes are easy to identify. If causing any inconvenience or disturbance could defeat the legitimacy of dissent, a valuable mode of public accountability-holding would be silenced. On the other hand, violence against the lives or personal security of persons is beyond the pale of rule-of-law legitimacy, as is violation of reasonable criminal laws. In cases that fall between these extremes, authorities and dissenters must exercise nuanced judgment. Authorities must weigh protection of the community against the need for effective means of community involvement in holding authorities accountable and the need for recourse against the arbitrary exercise of power. In view of the importance of accountability-holding dissent, authorities should lean toward tolerance of noisy and disruptive activities. They must also recognize that challenges to their authority are likely to elicit in them a response inconsistent with their commitment to the law. They are likely to confuse a challenge to their orders with a threat to law-based order. Dissenters, in turn, must recognize that the premise of legitimacy of their protest is their commitment to the law and the demand that authorities comply with it. This requires adherence to law and especially to respecting the rights of persons and property protected by the law. They must also recognize that the psychology of collective action can easily cloud and compromise their judgment.

C9.P33 People who engage in demonstrations or defiance are rarely single-minded; grievances with different sources are likely to motivate and complicate their actions. Civil dissent can spill over into civil disobedience. Disruption may involve not only defiance of legally questionable orders but also violation of clearly valid laws. Such actions are likely to fall beyond limits recognized by the rule of law. We may still welcome such actions as legitimate exercises of democratic rights of protest, but their justification will have to come from a theory of the grounds and limits of civil disobedience, not rule-of-law-inspired civil dissent. Justified civil disobedience may go beyond the limits of justified civil dissent.

C9.P34 With these considerations clearly in mind, it is possible to sort some troubling cases of protest. In April 1963, the Southern Christian Leadership Conference (SCLC) planned a march

in Birmingham, Alabama, to protest the injustices of racial segregation. The city prohibited demonstrations without a permit and granted authorities nearly unlimited discretion to grant or deny such permits. The SCLC requested a permit, but city authorities made clear that under no circumstances would it grant the permit. An orderly march took place over Easter weekend as planned, defying city authorities. Marchers acted on the judgment that the city ordinance and refusal of city officials to permit the march unconstitutionally denied the marchers their rights to protest peacefully. Fred Shuttlesworth and several other marchers were arrested and convicted of violating the city's ordinance. Six years later, the US Supreme Court declared the ordinance unconstitutionally broad and reversed the convictions. The Court wrote, "[A] person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license."[4]

C9.P35 Shuttlesworth and his colleagues fall clearly within the legitimating conditions we have just laid out. The Court in this case agreed. However, the same cannot be said for those who engaged in the demonstration at the US Capitol on January 6, 2021. These demonstrators also acted in defiance of authorities. Their aim was to challenge the results of the 2020 presidential election, which they loudly charged was "stolen." At the time of this writing, the full story of what happened on that day has not yet reached the public, but the following is clear. Some of those who participated believed (or at least said) that they were acting in defense of the Constitution, but their views were manifestly without merit and declared to be so, after full hearings in over sixty courts. Moreover, the protesters did not merely defy orders of authorities, they bludgeoned police officers and journalists, smashed windows and doors of the Capitol, trashed offices in the building, stole items from offices of members of Congress, seriously threatened the security and lives of members of Congress and their staffs, and violently interfered with the Senate's attempts to carry out its constitutional responsibilities. This was not a case of legitimate civil dissent; it was a demonstration that erupted into violent violations of some of the most fundamental laws of the land. Despite their professed "love" of the Constitution,[5] the actions of these protesters trashed it and the fundamental principles of the rule of law that it serves.

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[4] Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969).
[5] As reported by Bart Gellman, "January 6 was Practice," *The Atlantic*, January/February 2022, at 32.

LAW'S RULE

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