

# IN PRAISE OF HOSTILITY: ANTIAUTHORITARIANISM AS FREE SPEECH PRINCIPLE

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Kudos.

Eight years after graduating as valedictorian of your law school, and having toiled as editor-in-chief of the law review, you have finally made it Big. A familiar name in *The New York Times*, you have helped establish a string of major precedents by winning one federal appeal after another for your venerable white shoe law firm, and for your fabulous accomplishments, the firm has made you the youngest partner in its one-hundred-year history. But complacent gratification was never your style. Eager to embrace challenges, you left the firm to work as a law professor and, within ten years, became an eminent constitutional law scholar at a name-brand school on the East Coast. Now, twenty-five years after graduating from law school, you find yourself in the most enviable position in the legal profession: Chief Justice of the United States.

You look outside the windows in your corner office at the Supreme Court onto a sparkling spring afternoon in Washington, D.C., resplendent with cherry blossoms. You feel blessed, and without being smug, you marvel at your status as the most prominent judge in America; your every word recorded for posterity and studied by legions of law students, professors, lawyers, and judges.

Your moment of serene reflection is about to be interrupted, however. Your secretary, with manifest dismay, quietly knocks on your door. She says, "Chief Justice, there's something that you should see, if you haven't already." She hands you a copy of *Hustler* magazine, a magazine so smutty that purveyors of *Playboy* and *Penthouse* would have primly, and at least publicly, ab-

jured subscribing to it.<sup>1</sup> “Look at page 15,” your secretary dolefully instructs you. You nervously thumb through the magazine’s pages of filth and flesh, and on page 15, you see an ad parody featuring you—or, rather, a fictitious “you” that has been brazenly concocted by *Hustler*’s editors—casually recounting with bemused satisfaction your first time having sex. In the parody, “you” tell the interviewer that your first time took place in an outhouse . . . while you were drunk . . . with your mother.<sup>2</sup>

Two minutes after reading the *Hustler* parody, you are mortified to realize the inevitable: numerous people at the Supreme Court building—your colleagues, the staff, and, perhaps worst of all, the nameless throng of visitors from mannerly provincial locales like Bowling Green, Kentucky, who populate the audience during oral arguments—have no doubt seen this parody. You soon discover from your distraught clerks that the parody has gone viral in cyberspace, and it is relentlessly surfacing on countless websites. Your friends, everyone from appellate court judges to your high school prom date, have emailed you, shocked and empathetic. You hear snickering from some teenage students, impudently attired in backwards baseball caps, who are touring the Court building as you walk past them in the hall. And, after a day consumed by silent angst, your eighty-one-year-old mother has called you from her home in a suburb of Milwaukee, her voice choked by sobs of torment.

Should *Hustler* be entitled to publish such a parody about you? If you are a public figure or public official—if you are “intimately involved in the resolution of important public questions or, by reason of [your] fame, shape events in areas of concern to society at large”<sup>3</sup>—then, according to the Supreme Court in *Hustler Magazine v. Falwell*, yes.<sup>4</sup> And because you are, after all, the Chief Justice of the United States, you probably are a public official as the Court defines it, and so it is highly unlikely, if not impossible, that you will be able to sue *Hustler*

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1. RODNEY A. SMOLLA, *JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL* 38 (1988) (describing *Hustler* as incomparably more offensive than *Playboy* and *Penthouse*).

2. The facts are derived from *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

3. *Id.* at 51 (quoting *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in result)).

4. *See id.* at 50–51.

for money damages for having inflicted ruthless emotional distress upon you.

Considering the emotional devastation that such a decision can unleash, the Court, one would expect, should have varnished its decision with a splendid justification. But it did not—not by a long shot. And there is something troubling about that. The Court in *Hustler* made public figures and public officials appallingly vulnerable to emotional injury, thereby violating basic expectations for moral decency.

In this Article, I explain that the Court in *Hustler* arrived at the correct decision by denying the right of public officials and public figures the right to recover for money damages, but I argue that the Court failed to offer a serviceable justification. Instead, the Court offered a rationale that was inapplicable to the facts of the case, and, even if granted every due allowance, would suffer from theoretical incoherence. This Article posits a robust adjudicative principle, derived from the pre-Founding history of speech regulation in England, that should be used by courts to resolve a number of thorny First Amendment issues.

The Article is organized as follows. Part I sets the background by explaining that civility—an indispensable moral value—is imperiled when the courts prohibit public officials and public figures from suing for damages inflicted by outrageously offensive speech. Part I argues that civility is more than good manners; civility is essential for the well-being of both society and the individual. Indeed, Part I shows that the common law has traditionally prohibited speech that humiliates others, especially the sort of nastiness initiated by *Hustler*. Therefore, Part I insists that any case that sanctions a departure from this norm of civility requires an exceptional justification.

Part II summarizes how the Supreme Court in *Hustler*, while sanctioning such a departure, failed to offer anything that could be called an exceptional justification. The Court in *Hustler* denied notable public officials and public figures the right to sue speakers who subjected them to shocking humiliation. The Court reasoned that certain famous people figured so conspicuously in public affairs that information about them should be disseminated in an uninhibited and robust manner. By having access to such information, the audience, according to the Court, presumably would be better able to assess the public officials and public figures that were targeted by the speech. In other words, the Court believed that protection for offensive

speech, including vilely abusive speech, was necessary to aid the audience in its search for truth.

Part II argues that although the Court's ruling in favor of *Hustler* is defensible, the Court's reliance on the search for truth is misguided in two respects. First, the Court in *Hustler* stumbles—miserably, in fact—in applying this ostensive search for truth justification to the facts in the case, which are not amenable to the search for truth in the form the Court described. Second, even if the facts of *Hustler* were pliable for the justification from truth, that justification, in the abstract, is conceptually incoherent and the Court should not have chosen it in the first place.

Part III begins the Article's project of developing an alternative justification for the Court's decision in *Hustler*. That justification derives from the axiom that a culture of antiauthoritarianism is essential for a political society dedicated to popular sovereignty. The Article makes its case by describing in detail a society—one quite different from contemporary America—in which the people are formally expected to defer to the authority of Great Men and other luminaries. Such a society, Part IV will suggest, was England in the late sixteenth and early seventeenth centuries. To bolster public hierarchy, English courts forbade speakers from degrading public officials and public figures. In a telling inverse of the Court's *Hustler* decision, the English courts meted out punishment for offensive speech in proportion to the prestige enjoyed by the offended party: nobles were entitled to more protection than commoners from offensive speech; the king was entitled to more protection than anyone else. Part V explains how King James I justified such disparate treatment by invoking his status as God's lieutenant on earth who, like God, should be obeyed without question. Although King James's arguments may appear absurd today, they spoke to an early modern English society that accepted a strict social hierarchy as both natural and necessary.

Part VI transplants the discussion to colonial America in the early eighteenth century where the conditions for antiauthoritarianism were fertile. Unlike England, America lacked the stable communities and traditional authorities that could rein in individualism. Young people left their parents, chose marital partners in the absence of, or in opposition to, parental approval, and moved from one town to another, seeking better opportunities. Americans therefore appreciated the rewards and pleasures of individualism and resisted authoritarian stric-

tures. Part VI also explains how antiauthoritarianism manifested itself in the United States Constitution and its most salient source of interpretation, the *Federalist Papers*.

Part VII focuses on other sources. I examine the taunting, hyperbolic collection of insults against the king that constitutes the bulk of the text in the Declaration of Independence. I also look to Thomas Paine and other Americans whose untamed barbs against His Majesty exhibited an almost feral antiauthoritarianism. The Americans' rebelliousness could not help but be noticed by foreign observers. Edmund Burke, the brilliant conservative member of the English parliament, both admired and feared it. The French aristocrat Alexis de Tocqueville saw it as emblematic of America's pervasive individualism. So powerful was the public discourse of antiauthoritarianism in the colonies that those whom we contemporaries now have apotheosized—Founding Fathers like John Adams—felt bitterly disrespected by their fellow Americans, who unblushingly thwarted their authority in public and failed to show even a glimmer of gratitude for the best men.

Part VIII will return us to the world of legal cases by developing antiauthoritarianism as an adjudicative principle. I refine the concept of antiauthoritarianism by explaining how it can underwrite speech that is subversive and hostile. Yet I also explain how antiauthoritarian speech can be prohibited, in some circumstances, to reinforce authoritarian regimes like the military. I then address more ambivalent settings like primary and secondary schools which, on the one hand, should cultivate independence and critical thought among students but, on the other hand, must shelter minors from hurtful speech. The Article concludes in Part IX.

## I. CIVILITY MATTERS

In denying public officials and public figures the right to sue those who subject them to fiercely humiliating speech, the Supreme Court has made these public officials and public figures undeserving of civility—a cause for moral distress given that civility is vital for both society and the individual. In this Part, I explain the importance of civility to impress upon the reader that a most persuasive justification must be tendered to rationalize legal deviations from it.

Notwithstanding its conventional affiliation with politeness, civility is more than good manners.<sup>5</sup> Civility is indispensable as the social glue that holds a community together by preempting conflict.<sup>6</sup> It is “the sum of the many sacrifices we are called to make for the sake of living together.”<sup>7</sup> Civility, so conceived, is the means by which we obtain societal peace.<sup>8</sup> Consider here the etymological intimations of civility’s function as a social adhesive; we find the word civility in *civilization* and *civil society*.<sup>9</sup>

Yet civility’s value transcends its contributions to society. It proves crucial for the well-being of the individual by protecting her dignity.<sup>10</sup> An individual derives her sense of self-worth in large part from how others treat her.<sup>11</sup> Accordingly, institutions that have sought to control individuals also have sought systematically to denigrate them.<sup>12</sup> The renowned sociologist Erving Goffman narrated such examples of systematic degradation, which otherwise might constitute the tort of emotional distress, in “total institutions”—institutions dedicated to the

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5. As the philosopher Thomas Hobbes morosely observed long ago, without civility, the life of man is “poor, nasty, brutish, and short.” THOMAS HOBBS, *LEVIATHAN* 76 (Edwin Curley ed., Hackett 1994) (1651); see also John M. Kang, *Manliness and the Constitution*, 32 HARV. J.L. & PUB. POLY. 261, 293–97 (2009) (same) [hereinafter Kang, *Manliness*]; John M. Kang, *The Uses of Insincerity: Thomas Hobbes’s Theory of Law and Society*, 15 L. & LITERATURE 371, 378–81 (2003) (arguing that civility is the basis for civil society) [hereinafter Kang, *Insincerity*].

6. Kang, *Manliness*, *supra* note 5, at 293–94; Kang, *Insincerity*, *supra* note 5, at 378–81.

7. STEPHEN L. CARTER, *CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY* 11 (1998).

8. Kang, *Insincerity*, *supra* note 5, at 378–81.

9. For further etymological connections deriving from “civility,” see Kang, *Manliness*, *supra* note 5, at 293–94.

10. See ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 128–29 (1995); see also DAVID A. J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 196–97 (1986).

11. This thesis has found support from sociologists. See POST, *supra* note 10, at 128–29. The University of Chicago sociologist George Herbert Mead examined how a person derives his sense of individual identity by belonging to some group and by adopting the group’s view of himself. GEORGE H. MEAD, *MIND, SELF, AND SOCIETY: FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST* 135–226 (Charles W. Morris ed., 1964) (“What goes to make up the organized self is the organization of the attitudes which are common to the group. A person is a personality because he belongs to a community, because he takes over the institutions of that community into his own conduct.”). *Id.* at 162. Therefore, one may infer that if a community constantly violates the norms of civility toward a particular individual and abuses her, that individual will experience difficulty in developing a stable sense of self.

12. See POST, *supra* note 10, at 128.

complete regulation of the individual, such as prisons, concentration camps, and mental hospitals.<sup>13</sup>

Given the centrality of civility to the individual's well-being, it is unsurprising that the common law of libel, which currently finds expression in different state jurisdictions, seeks to protect "the standing of the person in the eyes of others."<sup>14</sup> To wit, the common law does not burden the plaintiff with the task of proving that the speaker misstated a *fact* about the victim; under the common law, hurtful *opinions* about the plaintiff are also actionable.<sup>15</sup> This latter view is explained in part by Justice Stewart's observation about what is morally at stake in libel law: "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being . . ."<sup>16</sup> Consider how insulting opinions, not simply facts, can injure the "essential dignity and worth of every human being."

Be that as it may, contrary to Justice Stewart's declaration, not "*every* human being" is entitled to the same degree of protection against offensive speech, or so the Supreme Court has ruled.<sup>17</sup> In the next section, I discuss how the Court in *Hustler Magazine v. Falwell* made clear that "public figures" do not enjoy the protection afforded ordinary citizens.<sup>18</sup> I will explain

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13. See generally ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* 12-92 (1961). Goffman observed:

The recruit comes into the [total institution] with a conception of himself made possible by certain stable social arrangements in his home world. Upon entrance, he is immediately stripped of the support provided by these arrangements. In the accurate language of some of the oldest total institutions, he begins a series of abasements, degradations, humiliations, and profanations of self. His self is systematically, if often unintentionally, mortified.

*Id.* at 14.

14. POST, *supra* note 10, at 128.

15. Cases define libel as the "malicious defamation of a person" that exposes him to "public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse." See, e.g., *Johnson City v. Cowles Com'ns, Inc.*, 477 S.W.2d 750, 752 (Tenn. 1972) (quoting a Tennessee law defining libel); *State v. Haider*, 150 N.W.2d 71, 72 (N.D. 1967) (quoting a North Dakota law defining libel); *Ragland v. Household Fin. Corp.*, 119 N.W.2d 788, 790 (Iowa 1963) (quoting an Iowa law defining libel).

16. *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966).

17. *Id.* at 92 (emphasis added).

18. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988).



why the Court's reasons for this decision are dreadfully unconvincing.

## II. THE UNPERSUASIVE RATIONALE IN *HUSTLER MAGAZINE V. FALWELL*

Thus far, I have stressed the presumptive indispensability of civility. I also have summarized how the common law has historically enabled those subject to public ridicule to sue for damages. The Supreme Court in *Hustler Magazine v. Falwell*, however, exempted public officials and public figures from the right to be entitled to civility. In this section, I summarize the Court's rationale in *Hustler* and explain why it is wanting.

The story of *Hustler* involves two men who appeared to be utter opposites. On-air host of the "Old Time Gospel Hour," the Reverend Jerry Falwell was a conservative and extraordinarily influential Baptist preacher who publicly condemned pornography.<sup>19</sup> Larry Flynt was the eccentric, foul-mouthed publisher of the scandalously X-rated magazine *Hustler*.

For years, Flynt raged against Falwell and other leaders of what the former derided as "organized religion."<sup>20</sup> Flynt resented their moral denunciations of pornography and angrily mocked them as blowhard hypocrites.<sup>21</sup> In November 1983, Flynt raised his loathing to new heights by publishing a now infamous parody of Falwell.<sup>22</sup> The parody was meant to spoof the Campari Liqueur ads popular in the 1980s, in which a contrived interviewer asked a celebrity about her "first time," with the latter phrase playing with the double entendre of the celebrity's first time sipping Campari and her first time trying sex.<sup>23</sup> *Hustler's* ad parody depicted Falwell casually narrating his first time having sex with his mother.<sup>24</sup> The cruel ribaldry by *Hustler* unleashed on Falwell can be best conveyed by reproducing the parody in its entirety:

Falwell: My first time was in an outhouse outside Lynchburg, Virginia.

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19. SMOLLA, *supra* note 1, at 108–09.

20. *See id.* at 56.

21. *See id.* at 22–23, 153.

22. *See id.* at 22.

23. *Id.*

24. *Id.* at app. I.

*Interviewer: Wasn't it a little cramped?*

Falwell: Not after I kicked the goat out.

*Interviewer: I see. You must tell me all about it.*

Falwell: I never *really* expected to make it with Mom, but then after she showed all the other guys in town such a good time, I figured, "What the hell!"

*Interviewer: But your mom? Isn't that a bit odd?*

Falwell: I don't think so. Looks don't mean that much to me in a woman.

*Interviewer: Go on.*

Falwell: Well, we were drunk off our God-fearing asses on Campari, ginger ale and soda—that's called a Fire and Brimstone—at the time. And Mom looked better than a Baptist whore with a \$100 donation.

*Interviewer: Campari in the crapper with Mom . . . how interesting. Well, how was it?*

Falwell: The Campari was great, but Mom passed out before I could come.

*Interviewer: Did you ever try it again?*

Falwell: Sure. . . . lots of times. But not in the outhouse. Between Mom and the shit, the flies were too much to bear.

*Interviewer: We meant the Campari.*

Falwell: Oh, yeah, I always get sloshed before I go out to the pulpit. You don't think I could lay down all that bullshit *sober*, do you?<sup>25</sup>

Accompanying the parody was an unexpectedly guarded disclaimer written in tiny but readable letters at the bottom: "Ad Parody—Not To Be Taken Seriously."<sup>26</sup> *Hustler's* table of contents also echoed that the depiction of Falwell was "Fiction" and "Ad & Personality Parody."<sup>27</sup> These lawyerly addendums

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25. *Id.*

26. *Id.*

27. *Id.* at 2–3.

were unable to salve the wounded Reverend Falwell, whose staffer secured him a copy of the salacious magazine.<sup>28</sup> "I somehow felt that in all of my life I had never believed that human beings could do something like this," he lamented.<sup>29</sup> "I really felt like weeping."<sup>30</sup> He felt like doing something more than weeping: Falwell sued Flynt and his magazine for \$45 million.<sup>31</sup>

Falwell presented three causes of action against Flynt: one for invasion of privacy, the second for libel, and the third for emotional distress.<sup>32</sup> Falwell lost on the first two claims.<sup>33</sup> On the invasion of privacy claim, Falwell lost because he failed to show, in accordance with Virginia law, that Flynt appropriated Falwell's name or likeness for "advertising."<sup>34</sup> After all, *Hustler's* parody was not an advertisement, just a spoof of one.<sup>35</sup> Falwell also was unable to persuade the jury that he was a victim of libel because a libel claim in Virginia required the plaintiff to show the defendant had made an inaccurate factual representation regarding the plaintiff.<sup>36</sup> But *Hustler* had never made any representations of fact; it offered only parody.<sup>37</sup> The jury thus denied recovery on the libel claim.<sup>38</sup> Falwell, however, won \$150,000 on the claim for emotional distress, a verdict upheld by the federal appellate court.<sup>39</sup> Flynt appealed the verdict on the claim of emotional distress, and the U.S. Supreme Court eventually decided in his favor.<sup>40</sup> Chief Justice William Rehnquist, writing for the Court, did not deny that the parody was reprehensible, yet insisted that it deserved First Amendment protection.<sup>41</sup>

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28. *Id.* at 1.

29. *Id.* at 3.

30. *Id.*

31. *Id.*

32. Falwell v. Flynt, No. 83-0155, 1985 U.S. Dist. LEXIS 20586, at \*1 (W.D. Va. Apr. 19, 1985), *aff'd*, 797 F.2d 1270 (4th Cir. 1986).

33. *Id.* at \*1-2.

34. *Id.*

35. *Id.*; see also SMOLLA, *supra* note 1, at app. I.

36. Falwell, 1985 U.S. Dist. LEXIS 20586, at \*2.

37. *Id.*; see also SMOLLA, *supra* note 1, app. I.

38. Falwell, 1985 U.S. Dist. LEXIS 20586, at \*2.

39. See Falwell v. Flynt, 797 F.2d 1270, 1273, 1278 (4th Cir. 1986).

40. Hustler Magazine v. Falwell, 485 U.S. 46, 57 (1988).

41. *Id.* at 50-57.

For support, Chief Justice Rehnquist argued that offensive, even abhorrent, speech was entitled to protection under certain circumstances so that the audience would be more likely to discover some truth. “At the heart of the First Amendment,” he declared, “is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.”<sup>42</sup> The essence of Chief Justice Rehnquist’s position rested on the justification—what I will call the justification from truth—that the First Amendment should enable the audience to consider diverse views to arrive at better ideas of the truth.<sup>43</sup>

I will attend to Chief Justice Rehnquist’s specific arguments, which are intractably flawed. But for now, consider the abstract proposition that he has offered. The justification from truth Chief Justice Rehnquist invoked, as its name suggests, presents itself as a magnanimous bid to promote truth by having the audience deliberate over competing perspectives and ideas. So Chief Justice Rehnquist announced in *Hustler*: “[T]he freedom to speak one’s mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth . . . .”<sup>44</sup>

So stated, this formal dedication to deliberation and its aspiration to discover truth might appear rather attractive. But the justification from truth is actually crippled by paradox, for the justification, while outwardly in the service of robust deliberation over a “marketplace of ideas,”<sup>45</sup> in fact undermines it. Chief Justice Rehnquist, in the name of helping people to deliberate a diversity of views to discern the truth, overturned a jury decision<sup>46</sup> that was the formal product of deliberation and the search for truth. That is, the jury in the *Hustler* case presumably vetted competing evidence, mulled over a diversity of information and, after sustained deliberation, made informed conclusions about truth—that Falwell had been unjustly injured by *Hustler*’s parody and thus was entitled to compensation. Yet Chief Justice Rehnquist overturned the jury’s decision, in the interest of furthering the very thing that the jury had *already*

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42. *Id.* at 50.

43. *Id.* at 50–51.

44. *Id.* (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503 (1984) (internal quotations omitted)).

45. *Id.* at 52.

46. *Id.* at 57.

done in its deliberations—search for truth. The justification from truth presupposes that the people, not the government, should be empowered to decide matters of truth for themselves. Chief Justice Rehnquist, however, a nonelected government official with life tenure, wielded the justification from truth to overturn the decision of the jury, the quintessential representative of the people, to uphold the Court's own vision of what was true.

Even if we were to put aside for now whether this justification from truth is plausible in the abstract, none of the precedents that Chief Justice Rehnquist marshals—precedents embodying the justification from truth—bear any resemblance to the facts of *Hustler*. What he offers instead is a paradigmatic example of that which law professors implore their students to eschew—flabby legal reasoning.

Chief Justice Rehnquist argues that a string of Supreme Court cases used the justification from truth to underwrite speech and that the facts in *Hustler* are similar to the facts in those cases. According to Chief Justice Rehnquist, then, *Hustler's* parody also should be upheld by the justification from truth: “[T]he freedom to speak one’s mind is not only an aspect of individual liberty—and thus a good unto itself,” he recited, “but also is essential to the common quest for truth . . .”<sup>47</sup> These words are taken from *Bose Corp. v. Consumers Union of United States*.<sup>48</sup> By quoting *Bose Corp.*, Chief Justice Rehnquist implicitly reassures us that the logic in that case can be transposed to the circumstances of *Hustler Magazine v. Falwell*.

But the facts in the two cases are distinguishable. In *Bose*, *Consumer Reports* published an unflattering review of the Bose 901 loudspeakers.<sup>49</sup> The review, according to the Court, “describ[ed] the system and some of its virtues” yet noted that:

[the] individual instruments heard through the *Bose* system seemed to grow to gigantic proportions and tended to wander about the room. For instance, a violin appeared to be 10 feet wide and a piano stretched from wall to wall. With orchestral music, such effects seemed inconsequential. But we

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47. *Id.* at 50–51 (quoting *Bose*, 466 U.S. at 503 (1984) (internal quotation marks omitted)).

48. 466 U.S. at 503.

49. *Id.* at 487–88.

think they might become annoying when listening to soloists.<sup>50</sup>

*Consumer Reports* then followed with a warning:

We think the *Bose* system is so unusual that a prospective buyer must listen to it and judge it for himself. We would suggest delaying so big an investment until you were sure the system would please you after the novelty value had worn off.<sup>51</sup>

One could assert that these and other statements by *Consumer Reports* amounted to the libel-like tort called product disparagement, as *Bose* did in vain before the Supreme Court.<sup>52</sup> But one cannot deny that the published assessments by *Consumer Reports*, a periodical formally dedicated to informing the public, were attempts to help the audience discern the truth about a product's value.<sup>53</sup>

*Hustler's* parody, by contrast, was, by its own admission, an "Ad parody—Not To Be Taken Seriously" and a "Fiction."<sup>54</sup> What made the parody so naughty and, to the readers of *Hustler*, presumably droll, was not that it contained a modicum of truth or potential truth, but instead that it was an unbounded exercise in raw juvenilia, whose narrative plausibility could only be savored in the realm of fantasy. Unlike *Consumer Reports*, Larry Flynt's pornographic magazine never sought to educate the public or help it discern the truth. In this light, read again the Court's appropriation in *Hustler* of its words from *Bose*: "[T]he freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole."<sup>55</sup> How can *Hustler's* parody be "essential to the common quest for truth"? More precisely, what "truth" is being earnestly pled by the parody? The parody itself claims that it is "Not To Be Taken Seriously."<sup>56</sup>

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50. *Id.* at 488.

51. *Id.*

52. *See id.* at 488.

53. *See id.* at 494–96 (discussing *Consumer Reports* employment of a sound engineer to examine the *Bose* sound system and to publish his findings).

54. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 48 (1988); SMOLLA, *supra* note 1, at app. I.

55. *Hustler*, 485 U.S. at 50–51 (quoting *Bose*, 466 U.S. at 503–04) (internal quotation marks omitted).

56. SMOLLA, *supra* note 1, at app. I; *see also Hustler*, 485 U.S. at 48.

Chief Justice Rehnquist, however, proceeded to insist that *Hustler's* parody was an heir—a distant and rather shabby heir, he admitted—to a long line of parodies without which “our political discourse would have been considerably poorer . . .”<sup>57</sup> He elaborated:

Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate. Nast’s castigation of the Tweed Ring, Walt McDougall’s characterization of presidential candidate James G. Blaine’s banquet with the millionaires at Delmonico’s as “The Royal Feast of Belshazzar,” and numerous other efforts have undoubtedly had an effect on the course and outcome of contemporaneous debate.<sup>58</sup>

Read the last sentence again: “[political parodies] have undoubtedly had an effect on the course and outcome of contemporaneous debate.”<sup>59</sup> Even if this were true, the parodies which are assembled by Chief Justice Rehnquist bear no relation to *Hustler's* spoof. His examples from history are pregnant with political or social criticism, whereas *Hustler's* gag is rife with nonsense. The cartoons of Nast and McDougall bristle with the message of moral indictment and the call for reform.<sup>60</sup> Even the cartoon portraying Washington as an ass meant to criticize the first president’s mistakes and cast as undeserving his vaunted authority.<sup>61</sup> Chief Justice Rehnquist was, then, correct to say that absent such biting commentary “our political discourse would have been considerably poorer.”<sup>62</sup> The *Hustler* parody is in a different league, however. Although its subjects are Falwell and his mother, the parody cannot be read as criticizing Falwell for having sex with his mother. *Hustler's* parody, indeed, disclaims *any* interest in participating in the sort of “po-

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57. *Hustler*, 485 U.S. at 55.

58. *Id.* at 54–55.

59. *Id.* at 55.

60. See JAMES FORD RHODES, 7 HISTORY OF THE UNITED STATES FROM THE COMPROMISE OF 1850 TO THE MCKINLEY-BRYAN CAMPAIGN OF 1896, at 25 (1920) (describing the biting and relevant political criticisms by Nast against the corruption of Tweed and his cohorts); ROBERT L. GAMBONE, LIFE ON THE PRESS 32 (2009) (describing the McDougall’s cartoon as an indictment of political corruption by the rich).

61. *Cf. Hustler*, 485 U.S. at 54.

62. *Id.* at 55.

litical discourse" Chief Justice Rehnquist referenced in support of the parody; the parody, in *Hustler's* own words, was "Not To Be Taken Seriously."<sup>63</sup>

Chief Justice Rehnquist worried that "[w]ere we to hold [in favor of Falwell], there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject."<sup>64</sup> *Webster's Dictionary*, he continued, "defines a caricature as 'the deliberately distorted picturing or imitating of a person, literary style, etc. by exaggerating features or mannerisms for satirical effect.'"<sup>65</sup> So the operative definition of caricature for Chief Justice Rehnquist is *exaggeration*. And, faithful to his definition, all of Chief Justice Rehnquist's recited examples from history indeed harp on the theme of exaggeration: the cartoon of Washington is meant to exaggerate his purported obtuseness in the eyes of his detractors; Nast's cartoon of the Tweed Ring is meant to exaggerate the Ring's vast and corrupt power; McDougall's cartoon is meant to exaggerate how Blaine had been bought off by moneyed interests. *Hustler's* parody, by contrast, does not exaggerate anything; it is utter fabrication.

The justification from truth, at least as Chief Justice Rehnquist employs it, thus would seem unable to underwrite First Amendment protection for *Hustler's* parody. In the next Part, I will introduce an alternative to Chief Justice Rehnquist's invocation of truth.

### III. ANTIAUTHORITARIANISM DEFINED

In this Part, I will argue that we should protect speech like *Hustler's* parody—patently hostile speech directed at either prominent public figures, like Reverend Falwell, or public officials. The rationale for protecting such speech should not turn on whether the speech furthers truth, as Chief Justice Rehnquist suggested, for I have already shown that his rationale is unviable. Rather, the rationale should draw from the principle of antiauthoritarianism.

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63. SMOLLA, *supra* note 1, at app. I (emphasis added); see also *Hustler*, 485 U.S. at 57 (reaffirming the finding that the parody lacked factual representation).

64. *Hustler*, 485 U.S. at 53.

65. *Id.* at 53–54 (quoting WEBSTER'S NEW UNABRIDGED TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 275 (2d ed. 1979)).



Antiauthoritarianism, as I define it, opposes conditions where leaders, simply because they are politically or socially elevated above the people, can assert an epistemic authority to understand the truth in ways that are not accessible to the people at large.

Put conversely, antiauthoritarianism's opposite—authoritarianism—involves “a high degree of submission to the authorities who are perceived to be established and legitimate in the society in which one lives.”<sup>66</sup> Authoritarians believe that “proper authorities should be trusted to a great extent and deserve obedience and respect.”<sup>67</sup> They “tend to assume that officials know what is best and that critics do not know what they are talking about.”<sup>68</sup> So too, authoritarians “view criticism of authority as divisive and destructive, motivated by sinister goals and a desire to cause trouble.”<sup>69</sup> Lastly, authoritarians “reject the idea that people should develop their own ideas of what is moral and immoral, since authorities have already laid down the laws.”<sup>70</sup> As I will explain later,<sup>71</sup> our Constitution is not dedicated to authoritarianism but to *antiauthoritarianism*. By protecting the right of persons to deliver the sorts of outrageous insults like those of *Hustler Magazine*, the First Amendment adheres faithfully to its principle of antiauthoritarianism and nourishes a culture conducive to the Constitution's commitment to popular sovereignty. The sort of “upward contempt” Larry Flynt leveled against Jerry Falwell is not therefore an aberration from the Constitution's dedication to antiauthoritarianism, only an extreme version of it.<sup>72</sup>

The term “popular sovereignty,” which I have connected with antiauthoritarianism, will evoke issues of politics and the Reverend Falwell was not, of course, a public official.<sup>73</sup> Yet he should have been treated like one for purposes of First Amendment analysis because he exercised keen influence on a large

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66. BOB ALTEMEYER, *THE AUTHORITARIAN SPECTER* 6 (1996).

67. *Id.* at 9.

68. *Id.*

69. *Id.*

70. *Id.* at 11.

71. See *infra* Part VI.

72. The phrase is taken from William Ian Miller, *Upward Contempt*, 23 *POL. THEORY* 476 (1995).

73. *Hustler Magazine v. Falwell*, 485 U.S. 46, 57 (1988) (affirming that Falwell was a “public figure,” not a public official).

number of people with regard to politics. As the Supreme Court noted in *Hustler*, Falwell was a “public figure” and therefore should have been treated the same as an influential public official.<sup>74</sup> The Court stated that Falwell was “the host of a nationally syndicated television show and was the founder and president of a political organization formerly known as the Moral Majority. He [was] also the founder of Liberty University in Lynchburg, Virginia, and [was] the author of several books and publications.”<sup>75</sup> *The New York Times*, reflecting on Falwell’s death, said “political experts agree he was enormously influential.”<sup>76</sup> Falwell himself was unembarrassed about testifying during trial against *Hustler* that he had been named “an influential American” in a *Good Housekeeping* magazine poll and that the poll found him to be “[l]ast year, second most-admired American behind the President.”<sup>77</sup> And Falwell had, according to the *Times*, “helped pull off what had once seemed an impossible task: uniting religious conservatives from many faiths and doctrines by emphasizing what they had in common.”<sup>78</sup> Falwell was “convinced . . . that there was a ‘moral majority’ out there among these more than 200 million Americans sufficient in number to turn back the flood tide of moral permissiveness, family breakdown and general capitulation to evil and to foreign policies such as Marxism-Leninism.”<sup>79</sup> What Falwell specifically had in mind was a campaign to lead millions of conservatives to repeal laws which permitted pornography, prohibited discrimination against homosexuals, and protected a woman’s right to an abortion.<sup>80</sup> And he had formidable resources, including a substantial number of followers, to sustain this campaign.<sup>81</sup> Falwell, then, was as powerful as a high

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74. *Id.*

75. *Id.* at 57 n.5.

76. Peter Applebome, *Jerry Falwell, Moral Majority Founder, Dies at 73*, N.Y. TIMES, May 16, 2007, at A1.

77. SMOLLA, *supra* note 1, at 102.

78. See Applebome, *supra* note 76.

79. *Id.*

80. See *id.*; see also SMOLLA, *supra* note 1, at 103, 105, 108.

81. Rodney Smolla offers this account: “In the twenty-eight years from its genesis to the Larry Flynt trial [Falwell’s church] grew to 28,000 members, the second-largest church congregation in America. Falwell’s electronic ministry [became] . . . a veritable empire of evangelism. . . . By 1985, 500 radio stations . . . were carrying his daily half-hour program.” SMOLLA, *supra* note 1, at 96. Further, Falwell testified at trial against *Hustler* that “for the fiscal year ending in June of 1985 the ag-

profile politician, and like the latter, could command deference from others based significantly on his stature.

Such deference, however, is inconsistent with the spirit and logic of the Constitution, as I will explain in subsequent parts.

#### IV. THE HAZARDS OF DISRESPECTING THE MONARCH

I contend that the vibrant antiauthoritarianism that animates certain varieties of extremist speech is a natural outcome of, and, is conducive to sustaining the conditions necessary for, America's constitutional democracy. The logic of the Constitution rests on the foundation that the people themselves, not their leaders, are sovereign.<sup>82</sup> Accordingly, leaders—whether governmental or, in Falwell's case, private—who are able to command exceptional and potentially reflexive deference from the people are a threat to that democracy. We need speech like that of *Hustler's* parody because it helps to sustain a societal ethos that counteracts the tendency of leaders to acquire and expect excessive deference.

I will begin to make the case for this thesis rather obliquely by asking the reader to reflect on the question of what type of political society would invert the rule that Chief Justice Rehnquist wrought in *Hustler*. Chief Justice Rehnquist made the most prominent public figures subject to offensive criticism and mockery while extending legal remedies to ordinary citizens who were victims of emotional distress. Imagine a world that did the opposite—affording the greatest legal protection from offensive speech to the most prestigious public figures.

Such a society would have to be organized as something other than a constitutional democracy where the people are sovereign. It would have to be a society that subscribes to the inviolability of political hierarchy and that formally rejects the notion that social inferiors should be permitted to disparage their betters. In such a hierarchical, antidemocratic society, rulers and other men of stature would be worried about parodies like *Hustler's*. This world was England in the early seventeenth century, what historians call the reign of the Stuart monarchy, named after King James, son of Queen Mary Stuart. Here was a

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gregate budget for all of the various ministries he directed was approximately one hundred million dollars." *Id.* at 98.

82. See *infra* Part VI.

political regime that was formally authoritarian, meaning that it expected its subjects to confer reflexive obedience to its leaders, chief among them King James.<sup>83</sup> As I will explain in detail, King James premised his justification for absolute monarchy in the early 1600s on two lines of argument.<sup>84</sup> First, King James held himself out either as God's lieutenant on earth or as a kind of god himself.<sup>85</sup> Second, he presented himself as the father of all the commonwealth's people.<sup>86</sup> What is crucial about these justifications is that they rely exclusively on the propriety of subjects' acceding to the epistemic authority of the monarch.<sup>87</sup> King James, in other words, urged the people to stop thinking about public affairs and to leave the grave matters of political and religious truth (which were frequently the same thing) to a king, like himself, who claimed divine appointment and was seen as the symbolic father of his peoples.<sup>88</sup>

To maintain his exalted status, King James had to be vigilant about patrolling public discourse against statements that could be interpreted as criticizing, or worse, mocking his authority. Or, to return to our initial example, under King James's authoritarian rule, a knave like Larry Flynt could not be left free to publish a parody that depicted King James having sex with his mother in the royal outhouse, for such mockery would invite jeers that would threaten to chip away at the solemn edifice of his authority.<sup>89</sup> In this Part I discuss the legal measures King James took to punish those like Flynt. And then, in the next Part, I explain the political arguments that King James summoned to justify his censorship.

Begin with libel law under King James. His authoritarian perspective found powerful iteration in early modern England's common law of libel. There were two features of England's seventeenth-century libel law that favored public figures like the king.

First, by 1605, English libel law forbade "an epigram, rhyme, or other writing [which amounted] to the scandal or contumely

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83. See *infra* Parts IV–V.

84. See *infra* Part V.

85. See *infra* notes 192–94 and accompanying text.

86. See *infra* notes 203–07 and accompanying text.

87. See *infra* Part V.

88. See *id.*

89. See *infra* notes 118–20 and accompanying text.

of another."<sup>90</sup> Thus, unlike the Virginia libel law in *Hustler Magazine v. Falwell*, libel law in early modern England did not permit truth to serve as an affirmative defense.<sup>91</sup> "It is not material, whether the libel be true or false," sternly declared the English common law of 1605.<sup>92</sup> Under the common law, parodies like that in *Hustler* could amount to libel, too.<sup>93</sup>

Second, whereas Chief Justice Rehnquist in *Hustler* made prominent figures painfully vulnerable to mockery by the public, England under King James did precisely the reverse by making public criticisms of notables, especially the king, the worst form of libel.<sup>94</sup> The Star Chamber, the court that served to protect England's highest officials and nobles, formally established the latter view in the 1606 case known as the *Libellis Famosis* (Scandalous Libels).<sup>95</sup> Every libel, the Star Chamber began, "is made either against a private man, or against a magistrate or public person."<sup>96</sup> If the libel "be against a private man, it deserves a severe punishment; for although the libel be made against one, yet it incites all those of the same family, kindred, or society to revenge, and so tends *per consequens* to quarrels, and breach of the peace . . . ."<sup>97</sup>

If the libel "be against a magistrate, or other public person, it is a greater offence . . . ."<sup>98</sup> For such libels "concern[] not only the breach of the peace, but also the scandal of government . . . ."<sup>99</sup> And, the Star Chamber continued, "for what greater scandal of government can there be than to have corrupt or wicked magistrates to be appointed and constituted by the King to govern his subjects under him?"<sup>100</sup> Moreover, "greater imputation to the state cannot be, than to suffer such corrupt men to sit in the sacred seat of justice, or to have any

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90. 3 EDWARD COKE, *The Case de Libellis Famosis*, in THE REPORTS OF SIR EDWARD COKE 254, 254 (John Henry Thomas & John Farquhar Fraser eds., Joseph Butterworth and Son 1826).

91. *See id.*

92. *See id.*

93. *Id.*

94. *Id.* at 255.

95. *Id.* at 254.

96. *Id.* at 255.

97. *Id.*

98. *Id.* (emphasis omitted).

99. *Id.*

100. *Id.*

meddling in or concerning the administration of justice.”<sup>101</sup> In sum, greater punishment was due for libels against “a magistrate or other public person” than private men because libels against the latter were libels against the government.<sup>102</sup> More precisely, they were libels against the legitimacy of governmental authority, the very basis of political order.

James Stephen, the celebrated English judge and historian, elaborated this view.<sup>103</sup> Writing two hundred years after the *Libellis Famosis*, Stephen remarked that “[t]wo different views may be taken of the relation between rulers and their subjects.”<sup>104</sup> On one view, Stephen wrote, “the ruler is regarded as the agent and servant, and the subject as the wise and good master who is obliged to delegate his power to the so-called ruler because being a multitude he cannot use it himself . . .”<sup>105</sup> Under this regime, Stephen explained, “[e]very member of the public who censures the ruler for the time being exercises in his own person the right which belongs to the whole of which he forms a part.”<sup>106</sup> He—the citizen—“is finding fault with his servant [who is also the leader].”<sup>107</sup> In words that could have come from Chief Justice Rehnquist, Stephen continued that “[t]o those who hold this view fully and carry it out to all its consequences there can be no such offence as sedition.”<sup>108</sup>

Under a monarchy, on the other hand, things are different. Stephen observed that “[i]f the ruler is regarded as the superior of the subject, as being by the nature of his position presumably wise and good, the rightful ruler and guide of the whole population, it must necessarily follow that it is wrong to cen-

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101. *Id.*

102. *Id.*

103. See 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 299 (London, MacMillan & Co. 1883).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 299–300.

108. *Id.* at 300. Chief Justice Rehnquist in *Hustler* quoted Justice Frankfurter when the latter said that “[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures.” 485 U.S. 46, 51 (quoting *Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944)). Chief Justice Rehnquist continued “[s]uch criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to ‘vehement, caustic, and sometimes unpleasantly sharp attacks.’” *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

sure him openly . . . .”<sup>109</sup> Even if the ruler is “mistaken[,] his mistakes should be pointed out with the utmost respect, and that whether mistaken or not no censure should be cast upon him likely or designed to diminish his authority.”<sup>110</sup>

More than abstract principle, the early-seventeenth-century prohibition against dishonoring the monarch was attributable to pressing political concerns about rebellion and political chaos, neither event being unfamiliar to an early modern England that had seen political violence, felt the threat of civil war, and could recall the public beheading of monarchs for political crimes.<sup>111</sup> So worried was the Puritan clergyman and historian Richard Baxter that he counseled other historians in seventeenth-century England to be mindful not to rebuke even “bad rulers”: “There is a great deal of difference between a true historian, and a self-avenger in the reason of the thing, and in the effects: to dishonour bad rulers while they live, doth tend to excite the people to rebellion, and to disable them to govern . . . .”<sup>112</sup>

Perhaps no one was more worried about the political danger of seditious libel, understood as including parody, than King James.<sup>113</sup> For King James had arrived as king of England under disquieting circumstances.<sup>114</sup> First, he had big shoes to fill. His deceased predecessor, the shrewd Queen Elizabeth, brought prosperity at home, defended against foreign invasion, and was beloved by her subjects.<sup>115</sup> Second, unlike Elizabeth, King James was a foreigner, a Scotsman.<sup>116</sup> Third, King James’s family was clouded in infamy as his mother, Mary Stuart, Queen of Scots, had been beheaded by nobles for treason and was, to the arousing suspicion of Anglican England, reputed to have been a crypto-Catholic, in league with Vatican-controlled Spain and Rome.<sup>117</sup> King James, therefore, unlike his predecessors, anxiously sought to supply public justifications for his authority,

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109. STEPHEN, *supra* note 103, at 299.

110. *Id.*

111. CYNTHIA SUSAN CLEGG, *PRESS CENSORSHIP IN JACOBAN ENGLAND* 10–11 (2001).

112. 1 RICHARD BAXTER, *THE PRACTICAL WORKS OF RICHARD BAXTER* 749–50 (George Virtue, 1838).

113. *See* FREDERICK SEATON SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND 1476–1776: THE RISE AND DECLINE OF GOVERNMENT CONTROL* 107–10 (1965).

114. *Id.* at 107–09.

115. *Id.* at 107–08.

116. *Id.* at 108.

117. *Id.* at 110.

something that in hindsight was both understandable and, by officially welcoming slumbering subjects to consider the nature of political authority, risky.<sup>118</sup>

King James himself voiced his insecurities. He privately fretted to his son that England's subjects would misinterpret the monarch's most trivial gestures and, brimming with ignorant resentment, would revolt. He observed:

It is a trew old saying, That a King is as one set on a stage, whose smallest actions and gestures, all the people gazingly doe behold: and therefore although a King be neuer so præcise in the discharging of his Office, the people, who seeth but the outward part, will euer iudge of the substance, by the circumstances . . . .<sup>119</sup>

The king's remarks, he anxiously rued, can be susceptible to distortion and "breed contempt, the mother of rebellion and disorder."<sup>120</sup>

Given this consternation, King James took pains to control seditious libel, or to have his subordinates do so. The means that the king and his assistants employed are telling illustrations of how they intended to shore up regal authority. Begin with the story of a lawyer, the hapless Oliver St. John. In 1615, St. John, a noted Marlborough attorney, had written a letter to the mayor and permitted him to circulate it among the justices of the peace, thus rendering the letter a precariously public declaration.<sup>121</sup> The letter was a spirited denouncement of King James's efforts to impose a "benevolence" on the people (an amusing euphemism for what we would call a tax) without Parliament's consent.<sup>122</sup> St. John alleged that "this kind of Benevolence is against Law, Reason, and Religion."<sup>123</sup> King James, St. John fumed, had violated a "great and solemn oath taken at his Coronation, for the maintaining of the laws, liberties, and customs of this noble realm . . . ."<sup>124</sup> St. John was just beginning:

118. *See id.* at 108.

119. KING JAMES I, *Basilicon Doron*, in KING JAMES VI AND I: POLITICAL WRITINGS 1, 49 (Johann P. Sommerville ed., 1994) [hereinafter KING JAMES I, *Basilicon Doron*].

120. *Id.*

121. *See* FRANCIS BACON, *Prosecution of Oliver St. John*, in 5 THE LETTERS AND THE LIFE OF FRANCIS BACON 130, 132 (James Spedding ed., London, Longmans, Green, Reader, & Dyer 1869) [hereinafter, BACON, LETTERS].

122. *Id.*

123. *Id.*

124. *Id.* at 133.



“What prosperity can there be expected to befall either our King or Nation, when the King shall, haply of ignorance or (as I hope) out of forgetfulness and unheediness, commit so great a sin against his God as is the violating of [oath] . . . ?”<sup>125</sup> Adding to the charge of sacrilege, St. John vented that King James was guilty of “that grievous sin of perjury” for which he could be “*ipso facto* excommunicated.”<sup>126</sup> Consider the commentary about epistemic authority that St. John had asserted. He argued that the king, by violating the standards of “Law, Reason and Religion,”<sup>127</sup> was a hypocrite and a fool; this was the sort of dangerously impious refutation of authority that likely would have tickled Larry Flynt.

But whereas Flynt won on appeal, the Star Chamber would have convicted St. John for seditious slander against the king.<sup>128</sup> The great philosopher and scientist Francis Bacon, King James’s attorney general at the time, prosecuted St. John.<sup>129</sup> What is conspicuous about Bacon’s arguments in court is that they do not appear to be arguments at all, at least not the kinds of arguments that the legal academy would expect in a formal proceeding. The “arguments,” rather, appear to be bloated paeans to the Greatness of King James.<sup>130</sup> Bacon remains oddly silent about whether St. John’s indictments had any merit.<sup>131</sup> For someone of Bacon’s reputed brilliance, such behavior would appear baffling, maybe even embarrassing.<sup>132</sup> Upon reflection, however, it makes perfect sense, and I will have more to say about it later on.<sup>133</sup>

For now, note that Bacon addressed St. John’s claims that King James’s imposition of benevolence was “against Law, Reason, and Religion,”<sup>134</sup> and note how Bacon repeatedly glori-

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125. *Id.*

126. *Id.*

127. *Id.* at 132.

128. *Id.* at 135, 137.

129. *Id.* at 136.

130. *See id.* at 136–46.

131. *See id.* at 136.

132. Perhaps one may observe, along with President John Adams, that “Bacon, the great Bacon, was fond of paradoxes.” *Letter from John Adams to Benjamin Rush*, (Oct. 8, 1809), in *THE SPUR OF FAME: DIALOGUES OF JOHN ADAMS AND BENJAMIN RUSH 1805–1813*, at 169, 169 (John A. Schutz & Douglas Adair eds., 2001).

133. *See infra* notes 150–51 and accompanying text.

134. BACON, *supra* note 121, at 132.

fies King James's virtue and intelligence.<sup>135</sup> Start with St. John's allegation that King James's tax was against religion. Bacon declared that St. John's accusation of blasphemy by King James was "a blaspheming, of the King himself."<sup>136</sup> This was no ordinary king, Bacon reminded at trial.<sup>137</sup> King James possessed a "goodness and grace [that] is comparable (if not incomparable) unto any of the Kings his progenitors."<sup>138</sup> Noticeably evading St. John's claim that King James's proposed tax was unlawful, Bacon called the judges' attention to how King James had stalwartly protected English Anglicanism against the heretical tentacles of the Catholic pope in Rome.<sup>139</sup> The king, Bacon called the judges to remember, is "the principal conservator of true religion through the Christian world" and "hath awaked and re-authorized the whole party of the reformed religion throughout Europe . . ."<sup>140</sup> King James, Bacon insisted, had "summoned the fraternity of Kings to enfranchise themselves from the usurpation of the See of Rome."<sup>141</sup> Against this backdrop, St. John's suggestion that King James should be "excommunicated" for his "sin" of taxation was disgraceful, Bacon objected.<sup>142</sup> According to Bacon, St. John had "slandered and traduced the King our Sovereign. . . ."<sup>143</sup>

What about St. John's accusation that King James's tax was against "reason"? Here too Bacon does not directly discuss the benevolence. He instead opts to extol how richly learned is his King: "His Majesty, as for learning amongst Kings he is incomparable in his person; so likewise hath he been in his government a benign or benevolent planet towards learning . . ."<sup>144</sup> It is because of King James that "those nurseries and gardens of learning (the Universities) were never more in flower nor fruit."<sup>145</sup>

And as for the question of whether King James's benevolence was legal, Bacon wonders aloud how anyone could even ponder

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135. *E.g., id.* at 141.

136. *Id.*

137. *Id.*

138. *Id.*

139. *See id.* at 142.

140. *Id.*

141. *Id.*

142. *Id.* at 133.

143. *Id.* at 137.

144. *Id.* at 143.

145. *Id.*

this question given that no king before King James had so respected the laws. "For the maintaining of the Laws, which is the hedge and fence about the liberty of the subject, I may truly affirm it was never in better repair," Bacon affirmed.<sup>146</sup> Besides, Bacon pointed out, King James was not even required to respect the judges, who were not, strictly speaking, *judges*, but "a kind of council of the King's by oath and ancient institution," yet King James, in his confident magnanimity, "useth them so indeed."<sup>147</sup> Bacon continued, there was never a king "that did consult so oft with his Judges, as my Lords that sit here know well."<sup>148</sup>

Why does the splendidly intelligent Francis Bacon not directly address the question of whether St. John's arguments had merit? Bacon provides an inkling of an answer in his explanation to the Star Chamber about the danger posed by St. John's speech. St. John's words were more than offensive, Bacon warned. They could have caused "discontent against the State; if whence mought have ensued matter of murmur and sedition."<sup>149</sup> With this in mind, if Bacon publicly had disputed the substance of St. John's criticisms, he would have been implicitly conceding that St. John had the right to have his arguments heard and discussed in a public forum. Stated otherwise, in such a scenario Bacon would have raised the commoner St. John to the political level of King James by formally pitting the merits of the former's arguments against those of the latter. This, Bacon prudently refused to do. He lit upon a different tack: He sang lavish praises to King James's intellect and virtue. Bacon declared to the Star Chamber that King James was the lone guardian of true Christianity; the pious lover of laws and a great friend of judges; a commendable scholar and a protective nurturer of higher education.

Did King James's proposed tax violate, as St. John alleged, "Law, Reason, and Religion"?<sup>150</sup> Bacon's responses implied that simply posing this question before the Star Chamber was prepos-

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146. *Id.*

147. *Id.* King James himself had written that "the Judges are but the Delegates of the King, and that the King may take what causes he shall please to determine, from the determination of the Judges, and may determine them himselfe." King James I, *Prohibitions de Roy*, in 1 THE STRUGGLE FOR SOVEREIGNTY: SEVENTEENTH-CENTURY ENGLISH POLITICAL TRACTS 14, 14 (Joyce Lee Malcolm ed., 1999).

148. BACON, *supra* note 121, at 143.

149. *Id.* at 137.

150. *Id.* at 132.

terous. By refusing to accord the substance of St. John's accusations any serious review, Bacon used the trial proceedings to affirm the authority of the King while, at the same time, ridiculing the temerity of the commoner St. John to question the integrity of that King.<sup>151</sup> What Bacon did *for* King James was in a sense the opposite of what Chief Justice Rehnquist did *to* Reverend Falwell. Whereas Chief Justice Rehnquist was interested in protecting the right of ordinary citizens—commoners, in the parlance of sixteenth-century England—to engage in unfettered mockery of their most prominent leaders, Bacon, as the King's attorney general, was committed to maintaining the status quo hierarchy of such leaders. To do so, Bacon wanted to make the King, the highest government official, immune to anything that whiffed of criticism, whereas Chief Justice Rehnquist, in his desire to protect speech that skewered public figures, sought to make such figures exceptionally vulnerable to the most beastly of taunts.

St. John, with his charges of blasphemy and dishonesty, did not demonstrate what Judge James Stephen called the "utmost respect" for King James.<sup>152</sup> But after his punishment, St. John would. After finding that St. John was guilty of slandering the king, the judges of Star Chamber subjected him to imprisonment plus a fine of £5000.<sup>153</sup> As it usually did for slanderers under King James's reign, however, the Star Chamber afforded St. John an opportunity to make a public confession of his crime.<sup>154</sup> St. John, knowing that the Star Chamber rarely enforced its punishment against those who showed suitable remorse, confessed.<sup>155</sup> The Star Chamber's leniency could have been impelled by various motives, including the government's difficulty in extracting a whopping £5000, even from Marlborough's better lawyers such as St. John. But there might have been a political reason as well. The public ceremony of confessing one's slander against the king potentially yielded a useful benefit for the monarchy by helping to restore hierarchi-

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151. It is a rhetorical technique that those who are superior sometimes inflict against those inferior. See DON HERZOG, POISONING THE MINDS OF THE LOWER ORDERS 161–62 (2000) (describing this dynamic in regard to the heroic warrior Odysseus towards the contemptible old man Thersites).

152. See STEPHEN, *supra* note 103, at 299.

153. BACON, *supra* note 121, at 147.

154. *Id.* at 147.

155. *Id.*

cal order in a society where political hierarchy was, as I will explain in Part V, formally regarded as natural and right.<sup>156</sup>

St. John's groveling apology before the Star Chamber brims with the tropes of deference to regal authority. St. John addressed the "Right Honorable Lords" that his purpose was to "make public confession of that wicked and wretched offence . . ." <sup>157</sup> This opener already set the terms of St. John's speech. His would be a comprehensively penitential enterprise, dedicated to exhuming the "wicked" and "wretched" remains of his misconduct. St. John told the judges that he utterly regretted his statements, which were "reproachful and blasphemous against the majesty of our most gracious King . . ." <sup>158</sup> St. John publicly admitted that he was but a "miserable delinquent." <sup>159</sup> Nay, what he did was more than truant; his slanders, St. John cried, were an affront to God because as the *Bible* says, the king is God's "anointed," and therefore, a kind of god in his own right. <sup>160</sup> Note how this biblical reference resonates with King James's announcement at Whitehall Palace, where he later declared that "even by God himselfe [kings] are called Gods." <sup>161</sup>

As part of his performance of self-abasement, St. John read aloud before Star Chamber this passage from *Psalms* 89:51: "That he that blasphemeth the King blasphemeth also (therein) even the God of Heaven himself. His words are Thine enemies have reproached thee O Lord, because they have reproached the footsteps of thine anointed." <sup>162</sup> St. John made another allusion to the king as god when he recited this passage from *Proverbs*: "That the wrath of the King is as messengers of death, and that provoketh him unto anger sinneth against his own soul." <sup>163</sup> St. John contritely recited more excerpts from the Bible before the Star Chamber. One passage blankly conceded that the king was beyond challenge: "Where the words of the King is, there is power, and who shall say

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156. See *infra* Part V.

157. BACON, *supra* note 121, at 147.

158. *Id.*

159. *Id.*

160. *Id.* (quoting *Psalms* 89:51).

161. KING JAMES I, *A Speech to the Lords and Commons of the Parliament*, in POLITICAL WRITINGS, *supra* note 119, at 179, 181 [hereinafter KING JAMES I, *Speech to Parliament*]. I have modernized some of the more archaic spelling by James.

162. BACON, *supra* note 121, at 147.

163. *Id.* at 148 (quoting *Proverbs* 16:14, 20:2).

unto him what doest thou?"<sup>164</sup> In another recitation before the Star Chamber, St. John appeared to suggest that attributing bad motives to the king was a sin because "no man can sound the heart of the King."<sup>165</sup> St. John offered another quote as well, this one hinting at his appropriately low station vis-à-vis King James: "That a man wandering from his own place is as a bird wandering from her nest."<sup>166</sup> All of these biblical selections, ostentatiously announced before the Star Chamber, amounted at once to a ceremony of self-degradation for St. John and a grand avowal of the king.

St. John was a bit character in the historical drama that was Stuart England, but his case helps illustrate the monarch's intolerance of speech that was reproachful of the king. The celebrated explorer and writer Sir Walter Raleigh landed in trouble for writing a history of King James deemed by the king's representatives to be "too sawcie in censuring princes."<sup>167</sup> But King James's angriest moods were reserved for those statements that impugned his mother<sup>168</sup> and therefore, he is, in his own fashion, symbolically linked to the Reverend Jerry Falwell and serves as a good foil to explore the quite different libel laws that informed the lives of both men.

Unlike Falwell's mother, King James's mother—Mary, Queen of Scots<sup>169</sup>—was famous in her own right, a quintessential "public official," as the Supreme Court would say.<sup>170</sup> Nobles tried Mary for treason in 1586 and executed her in 1587.<sup>171</sup> King James became King of England in 1603 and he apparently never sought to avenge his mother's death.<sup>172</sup> Enter the historian Edward Ayscue.<sup>173</sup> In 1607, he published *A historie containing the warres, treaties, marriages, betweene England and Scot-*

164. *Id.* (quoting *Ecclesiastes* 8:4).

165. *Id.* (quoting *Proverbs* 25:3).

166. *Id.* (quoting *Proverbs* 27:8).

167. CLEGG, *supra* note 111, at 96.

168. The historian Cyndia Clegg writes that King James's "Achilles' heel" was "his sensitivity about his mother . . ." *Id.* at 94.

169. *Id.* at 95.

170. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270–71 (1964) (holding that public officials should expect caustic attacks partly because of their notoriety and power).

171. MAGNUS MAGNUSON, *SCOTLAND: THE STORY OF A NATION* 380 (2000).

172. CLEGG, *supra* note 111, at 37, 95.

173. *Id.* at 94.

*land*.<sup>174</sup> Ayscue gave these reasons for why King James may have refused to pursue his mother's persecutors:

For though good nature might worke in his majestie a due commiseration over the Queene his mother her lamentable end: yet wel weighing the quality and measure of her offence, the lawful and orderly proceeding against her . . . and considering how much her life afterwards would prejudice not only the safety of two royal persons, but withal the quiet estate of the whole Island; the most prudent King wel ore-saw, what wrong he might have enough unto himselfe by entering into any violent course.<sup>175</sup>

While the statements do not rise to *Hustler's* level of outrageousness, Ayscue characterized "Mary as traitorous and her son as self-serving."<sup>176</sup>

King James was hardly pleased. He conveyed to the Earl of Salisbury, the king's chief minister,<sup>177</sup> the following sentiments regarding Ayscue's book:

I have accidentally found no good part in it . . . and thinking it to touch her so nearly to whom I do owe so great a duty, besides the blemish it gives myself, I must repress it, and specially by not suffering the book to go forth; and if that be already past remedy, that they may be recalled.<sup>178</sup>

He instructed Salisbury to "think upon the fittest way to make [Ayscue] know [the King's] terror."<sup>179</sup> One problem with showing Ayscue this regal terror was that, unbeknownst to King James, Ayscue had been dead for a while.<sup>180</sup> Undeterred, King James had the Archbishop arrest a suitable proxy in Ayscue's son, who "pray[ed] to obtain the King's pardon and his liberty."<sup>181</sup> King James, apparently appeased by the public plea for mercy, released Ayscue's son.<sup>182</sup>

This was not the only time that King James expressed extreme sensitivity about depictions of him or his family. Before

174. *Id.*

175. *Id.* at 95.

176. *Id.* at 96.

177. *Id.* at 12.

178. *Id.* at 94.

179. *Id.* at 94–95.

180. *See id.* at 95.

181. *Id.*

182. *Id.*

his ascension to the British throne, he, as a young king of Scotland, tried unsuccessfully to extend his jurisdiction to England and have the English poet Edmund Spenser punished for publishing his masterpiece *The Faerie Queene*, which, King James felt “contained some dishonourable effects (as the King deems thereof) against himself and his mother deceased.”<sup>183</sup> After King James assumed the English monarchy, his contemporary, the writer Samuel Daniel, bewailed privately that writing “a true history” was “a liberty proper only to commonwealths, and never permitted in kingdoms but under good princes.”<sup>184</sup> The apprehensive Daniel reassured King James that the former would “tread as tenderly on the graves of his magnificent predecessors as he possibly could.”<sup>185</sup> The British historian Christopher Hill remarks that “[t]he many revisions and modifications which [Daniel] made to his verse *The Civil Wars* between 1595 and 1607 show how hard he was trying.”<sup>186</sup> Other writers never got this far. King James forbade publication of William Camden’s *History*<sup>187</sup> and delayed Sir George Buc’s *Richard III* and Lord Falkland’s *Edward II* by decades.<sup>188</sup> “Histories are lately come abroad,” the poet William Drummond of Hawthornden remarked in the 1640s, safely removed from the reign of Elizabeth and King James, “allowed and approved by the present rulers of the state, which to read in the days of Queen Elizabeth and King James was treason and capital.”<sup>189</sup>

Seen from our perch of constitutional democracy, it is too easy to dismiss King James’s censorship as churlish hypersensitivity. Instead, King James’s motives were deeply political. As I explain in the next Part, he had virtually no choice but to prohibit even the vaguest of criticisms against his rule.<sup>190</sup> King James had built his reign upon the theory that he had to be obeyed as an absolute monarch. As the head of an authoritarian regime, King

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183. *Id.* at 93.

184. CHRISTOPHER HILL, 1 THE COLLECTED ESSAYS OF CHRISTOPHER HILL: WRITING AND REVOLUTION IN 17TH CENTURY ENGLAND 43 (1985).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 43–44.

189. *Id.* at 44.

190. See *infra* Part V.



James could not, therefore, risk permitting even the slightest semblance of public censure from his subjects.<sup>191</sup>

In the next Part, I discuss what sort of justifications King James marshaled for his authority. An examination of these justifications will fortify our understanding of authoritarian regimes.

#### V. AUTHORITARIANISM'S SOLEMN EXPECTATIONS

I now explore the details of King James's claim for absolute authority. One line of argument, as mentioned, was that the king was God's lieutenant on earth or, indeed, that the king was himself a god. Consider King James's declaration in 1610, to the assembled members of Parliament at his palace in Whitehall: "The State of MONARCHIE is the supremest thing upon earth: For Kings are Not onely GODS lieutenant upon earth, and sit upon GODS throne, but even by GOD himselfe they are called Gods."<sup>192</sup> If this had been true, one logical conclusion would have been that the king, like God, was permitted to do anything and for any reason. King James was not hesitant to embrace this latter conclusion. He declared:

Kings are justly called Gods, for that they exercise a manner or resemblance of Divine power upon earth: For if you wil consider the Attributes to God, you shall see how they agree in the person of a King. God hath power to create, or destroy, make or unmake at his pleasure, to give life, or send death, to judge all, and to bee judged nor accomptable to none . . . but God onely.<sup>193</sup>

Even as King James explains to the public the basis for his authority, he makes emphatic in the last line that he is not accountable to anyone, except God. This astonishing claim of authority was repeated elsewhere in his speech. Like God, a king was said by King James to have power "[t]o raise low things, and to make high things low *at his pleasure . . .*"<sup>194</sup>

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191. *See id.*

192. KING JAMES I, *Speech to Parliament*, *supra* note 161, at 181.

193. *Id.*

194. *Id.* (emphasis added).

Other times, King James conscripted the Bible for support. His passage of choice was Paul's sermon in *Romans* 13.<sup>195</sup> King James argued that Paul "bids the *Romans obey* and serve [the king] *for conscience sake . . .*"<sup>196</sup> This injunction held fast, King James argued, even though Paul had in mind heinous leaders like Emperor Nero—or as King James called him, "that bloody tyrant, an infamie to his age, and a monster to the world, being also an idolatrous persecutor, as the King of *Babel* was."<sup>197</sup> Nonetheless, King James hastened to add, St. Paul urged the Romans to confer unstinting obedience: "Idolatrie and defection from God, tyranny over their people, and persecution of the Saints, for their profession sake, hindred not the Spirit of God to command his people under all highest paine to give them all due and heartie obedience for conscience sake . . ." <sup>198</sup> That being so, King James indignantly continued, "what shamelesse presumption is it to any Christian people now adayes to claime to that unlawfull libertie, which God refused to his owne peculiar and chosen people?"<sup>199</sup> In a middling concession to modesty, King James seemed to acknowledge that the king lacked God's perfection, but that the king, like God, had to be complied with. Where the king was "wicked," the people still had to obey him as "Gods Lieutenant

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195. Paul's sermon reads:

1. Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God.
2. Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation.
3. For rulers are not a terror to good works, but to the evil. Wilt thou then not be afraid of the power? do that which is good, and thou shalt have praise of the same:
4. For he is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to *execute* wrath upon him that doeth evil.
5. Wherefore *ye* must needs be subject, not only for wrath, but also for conscience sake.
6. For this cause pay ye tribute also: for they are God's ministers, attending continually upon this very thing.

*Romans* 13. Observe how the language is not necessarily subject to conscription by absolute monarchy. This feature does not saddle King James, however. See KING JAMES I, *The Trew Law of Free Monarchies*, in POLITICAL WRITINGS, *supra* note 119, at 62, 71–72 [hereinafter KING JAMES I, *Trew Law*].

196. KING JAMES I, *Trew Law*, *supra* note 195, at 71.

197. *Id.* at 71–72.

198. *Id.* at 72.

199. *Id.*

in Earth” and “without resistance, but by sobbes and teares to God . . . .”<sup>200</sup> So unquestionable was the king’s authority.

Others agreed. Sir Richard Morison—scholar, diplomat, and ardent supporter of King Henry VIII—wrote in 1586 that:

God maketh kings, especially where they reign by succession. God took away Prince Arthur and would King Henry VIII to be our head and governor. Will we be wiser than God? Will we take upon us to know who ought to govern us better than God? God made him king; and made also this law, Obey your king.<sup>201</sup>

Notice Morison’s repugnance for the notion that people should think for themselves: “Will we be wiser than God?” Who are we “to know who ought to govern us better than God?” “God made him king . . . Obey your king.” The Anglican bishop John Poynt (sometimes spelled “Ponet”) began the first chapter of his 1556 *Short Treatise of Political Power* with this dour account of people’s capacity for reason:

As oxen, sheep, goats, and other such unreasonable creatures cannot for lack of reason rule themselves, but must be ruled by a more excellent creature, that is man; so man, albeit he have reason, yet because through the fall of the first man his reason is wonderfully corrupt, and sensuality hath gotten the upper hand, *is not able by himself to rule himself, but must have a more excellent governor.*<sup>202</sup>

Poynt argues that some are, by nothing more than birth, condemned to ignorance and passions while others are entitled to deference on weighty political matters because of their “excellence.”

The King counted himself the most excellent of all, and he used the grammar of patriarchy to bolster his epistemic authority and, by extension, his right to censor material that would be unflattering to him. Such elevation was meant to make the King’s authority invulnerable to moral challenge and to dis-

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200. *Id.*

201. SIR RICHARD MORISON, HUMANIST SCHOLARSHIP AND PUBLIC ORDER: TWO TRACTS AGAINST THE PILGRIMAGE OF GRACE 117 (David Sandler Berkowitz ed., 1984).

202. John Ponet, *A Short Treatise of Political Power, and of the True Obedience Which Subjects Owe to Kings and Other Civil Governors, with an Exhortation to all True Natural Englishmen*, in FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT 696, 696–97 (Oliver O’Donovan & Joan Lockwood O’Donovan eds., 1999) (emphasis added).

courage people from envisaging themselves as worthy of weighing political matters. Thus King James gravely imparted to his son Prince Henry that kings are “Fathers of families: for a King is trewly *Parens patriae* [father of the nation] . . . .”<sup>203</sup> A good king, as distinct from a tyrant, King James told Henry, is one who is the people’s “naturall father and kindly Master . . . .”<sup>204</sup> The self-limitations that were seemingly imposed on the King by this consoling ethical distinction were subsequently clarified and rendered tenuous by King James. Rather than dwelling on the ways of a “kindly Master,” King James told Parliament in 1610 that kings, as fathers of their people, may do whatever they please, just as regular, nonmonarchical fathers may do whatever they please to their children.<sup>205</sup> King James announced:

Now a Father may dispose of his Inheritance to his children, *at his pleasure*: yea, even disinherit the eldest upon just occasions, and preferre the youngest, according *to his liking*: make them beggers, or rich at his pleasure; restraine, or banish out of his presence, as hee findes them give cause or offence, or restore them in favour againe with the penitent sinner: *So may the King deale with his Subjects.*<sup>206</sup>

Fathers may, according to King James, do whatever they please, secure in their unassailable authority. Lest there be any doubt, King James hedged his metaphors to stress that children (and by extension, subjects) lacked any right to dislodge the authority of the father (the king) for the children were like the body, which was in the service of the head, the father:

So as (to conclude this part) if the children may upon any pretext that can be imagined, lawfully rise up against their Father, cut him off, [and] choose any other whom they please in his roome; and if the body for the weale of it, may for any infirmitie that can be in the head, strike it off, then I cannot deny that the people may rebell, controll, and displace, or cut off their king at their owne pleasure . . . .<sup>207</sup>

Thus King James sought to reinforce his authority as a grand patriarch.

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203. KING JAMES I, *Speech to Parliament*, *supra* note 161, at 181.

204. KING JAMES I, *Basilicon Doron*, *supra* note 119, at 20.

205. See KING JAMES I, *Speech to Parliament*, *supra* note 161, at 182.

206. *Id.* (emphases added).

207. KING JAMES I, *Trew Law*, *supra* note 195, at 78.

A contemporary American reader may wonder how people in early modern England could adopt these eccentric justifications for political obedience. The primary answer is that the rhetoric urging absolute obedience to kings reflected the reigning ethos of the sixteenth and early seventeenth centuries in England. In other words, the arguments for obeying the king were just one more, albeit grand, discursive illustration of a world that sought to organize itself by strict hierarchy and its corresponding expectations for deference.<sup>208</sup>

One must understand that, as the historian Gordon Schochet remarks of early modern England:

[B]efore a man achieved social status—if he ever did—he would have spent a great many years in various positions of patriarchal subordination, passing successively from the rule of his father to that of a master, an employer, a landlord, and perhaps a magistrate.<sup>209</sup>

It is true that today we occupy different roles within society,<sup>210</sup> but the hierarchy referenced by Professor Schochet was organized by patriarchy.<sup>211</sup> Various relationships of hierarchy—a master and servant, teacher and student, employer and worker, landlord and tenant, clergymen and congregant, and magistrate and subject—were all understood as identical to the relationship of father and children.<sup>212</sup> This patriarchalism was “supported by an official and regularly taught ideology that corresponded to, justified, and rationalized life as it was actually experienced by the illiterate and inarticulate masses of seventeenth-century Englishmen.”<sup>213</sup> In the next Part, I explain how the American Constitution embodied an ethos of antiauthoritarianism that was quite different from the deferential attitude demanded by King James.

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208. There were political reasons for this sort of talk as well. Namely, by insisting that the king was above reproach, the Anglicans could indirectly thwart the claims by the Pope. See GODRON J. SCHOCHET, *PATRIARCHALISM IN POLITICAL THOUGHT: THE AUTHORITARIAN FAMILY AND POLITICAL SPECULATION AND ATTITUDES ESPECIALLY IN SEVENTEENTH-CENTURY ENGLAND* 90 (1975).

209. *Id.* at 66.

210. See generally DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY*, 148–81 (1989); JUDITH SHKLAR, *ORDINARY VICES* 75–78 (1984).

211. SCHOCHET, *supra* note 208, at 66.

212. *Id.*

213. *Id.*

## VI. THE EMERGENCE OF THE ANTIAUTHORITARIAN CONSTITUTION

King James's tight regulation of speech, alien to our liberal constitutionalist eyes, derived from a political regime that he viewed as being formally dedicated to supporting the absolute authority of the monarch. About 150 years later, across the Atlantic, the American colonists would embark on a very different political enterprise, one dedicated not to absolute monarchy, but to a constitutional democracy premised on the sovereignty of the people. Under this constitutional democracy, political leaders would be formally subordinate to the people. Instead of deference from the people, leaders in this new world of constitutionalism would have to be accountable to them.

Under the logic of popular sovereignty in the Constitution, the people would not submit to their leaders but would, for better or ill, think for themselves. Stated differently, the Constitution sought to denude leaders of their charisma, and hence sought to preempt conditions in which people obeyed them in ways that fostered authoritarianism. Embedded in this notion is a principle of First Amendment jurisprudence. Because the people are sovereign under the Constitution, *Hustler's* twisted parody or the sorts of seditious libel that were forbidden under King James must be allowed. St. John's libel and *Hustler's* parody were criticisms of figures who held themselves out as leaders deserving of deference because of their moral stature. Such leaders, if granted an uncritical deference, can represent authoritarian threats to the Constitution's commitment to popular sovereignty. By mocking them—by meanly deriding them—the speakers are not contributing to some storied search for truth, but are reflecting and exemplifying an ethos of anti-authoritarianism that underwrites the Constitution's dedication to popular sovereignty.

In this Part, I show in detail how the Constitution is dedicated to a principle of antiauthoritarianism. In the next Part, I show how colonial Americans reflected this culture of skepticism in displays of disrespect for their leaders and supposed social betters.

A. *Popular Sovereignty in the Constitution*

Although the U.S. Constitution does not explicitly refer to antiauthoritarianism, the spirit of antiauthoritarianism animates much of the Constitution.

The Preamble of the Constitution establishes that the people are the source of governmental authority:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>214</sup>

It is significant that the Constitution begins with the phrase, “We the People.” This invocation of “We the People” signals that the Constitution is an enactment of popular sovereignty, not the product of absolute monarchy. That the Constitution is a creature of the people acquires support from the fact that the Constitution is dedicated to the well-being of the people alone. The Constitution, the Preamble announces, provides for the *common* defense and promotes the *general* welfare. Not intended to enrich a successive line of aristocrats, the Constitution was meant to secure liberty *to ourselves and our posterity*. The Constitution also is designed to establish justice, which presupposes a formal commitment to be fair to everyone in the polity.<sup>215</sup>

The Framers also stressed that the Constitution guaranteed the people—not their leaders or an aristocracy—the right of sovereignty.<sup>216</sup> James Wilson of Pennsylvania, a future Supreme Court Justice and the most scholarly of the Framers, discussed the meaning of the Preamble. In urging the Constitution’s ratification, without an amended bill of rights, Wilson stressed that the Preamble signified that “the supreme power resides in the people.”<sup>217</sup> He elaborated: “[The Constitution] is announced in *their* name—it receives its political existence from *their* authority: they ordain and establish. What is the necessary conse-

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214. U.S. CONST. pmb.

215. *Id.* Other manifestations of popular sovereignty in the Constitution were the Ninth and Tenth Amendments. The Ninth Amendment reads, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX. And the Tenth Amendment reads, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

216. See John M. Kang, *Appeal to Heaven: On the Religious Origins of the Constitution Right of Revolution*, 18 WM. & MARY BILL. RTS. J. 281, 281–94 (2010).

217. JAMES WILSON, *Remarks in Pennsylvania Convention to Ratify the Constitution of the United States*, in 1 COLLECTED WORKS OF JAMES WILSON 178, 193 (Kermit L. Hall & Mark David Hall eds., 2007).

quence? Those who ordain and establish have the power, if they think proper, to repeal and annul."<sup>218</sup> England's Magna Carta, Wilson argued, was "supposed to have been made, at some former period, between the king and the people."<sup>219</sup> According to the Constitution, however, "the citizens of the United States appear dispensing a part of their original power in what manner and what proportion *they* think fit."<sup>220</sup> The people "never part with the whole; and they retain the right of recalling what they part with."<sup>221</sup> In short, "the citizens of the United States may always say, WE reserve the right to do what we please."<sup>222</sup>

Like Wilson, Alexander Hamilton argued that a bill of rights against governmental abuse was superfluous given that the Constitution situated complete authority in the people.<sup>223</sup> Hamilton declared that "the people surrender nothing; and as they retain every thing, they have no need of particular reservations."<sup>224</sup> The Preamble, he explained, "is a better recognition of popular rights, than volumes of those aphorisms, which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics, than in a constitution of government."<sup>225</sup>

James Madison, generally regarded as the architect of the Constitution,<sup>226</sup> similarly argued in *Federalist* No. 39 that the Constitution was "republican," meaning that it "derives all its powers directly or indirectly from the great body of the people . . ."<sup>227</sup> "It is evident," he wrote, "that no other form [of government] would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution, or with that honorable determination which animates every votary of freedom, to rest all our political experiments on

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218. *Id.*

219. *Id.* at 196.

220. *Id.* (emphasis added).

221. *Id.*

222. *Id.*

223. See THE FEDERALIST NO. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

224. *Id.*

225. *Id.*

226. E.g., FORREST McDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION 72 (1992).

227. THE FEDERALIST NO. 39, *supra* note 223, at 241 (James Madison).



the capacity of mankind for self-government.”<sup>228</sup> To emphasize the legal power of the people in America, Madison informed the reader that other nations that tout themselves as republican fell short of their claims. “Holland,” he objected, “in which no particle of the supreme authority is derived from the people, has passed almost universally under the denomination of a republic.”<sup>229</sup> So too Venice, which congratulates itself as a republic, is actually controlled by “a small body of hereditary nobles” who exercise “absolute power over the great body of the people.”<sup>230</sup> As for the government of England, which has “been frequently placed on the list of republics,” it “has one republican branch only, combined with a hereditary aristocracy and monarchy . . . .”<sup>231</sup> What distinguishes the government envisioned by the Constitution from these pretended republics, Madison argued, is that the former derives its authority “from the great body of the society, not from an inconsiderable proportion, or a favored class of it . . . .”<sup>232</sup>

As a corollary to their insistence on popular sovereignty, the people also regarded their leaders with keen suspicion, as I explain in the next section.

#### B. *Skepticism Regarding Leaders*

King James saw his authority as sacred and absolute. The Constitution’s Framers, however, were skeptical that public leaders were any more virtuous than ordinary men. So Madison remarked in *Federalist* No. 51:

But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls would be necessary.<sup>233</sup>

Because angels did not govern, constitutional limits on leaders were necessary.

To limit leaders, the Constitution first sought to restrain the charismatic power that enabled leaders in places like early

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228. *Id.* at 240.

229. *Id.*

230. *Id.*

231. *Id.* at 240–41.

232. *Id.* at 241.

233. THE FEDERALIST NO. 51, *supra* note 223, at 322 (James Madison).

modern England to summon reflexive deference. The Constitution's most prominent attempt was its prohibition against the federal government's bestowing of titles of nobility.<sup>234</sup> Article I, Section 9 states:

No Title of Nobility shall be granted by the United States: And no Person holding any Office . . . shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.<sup>235</sup>

Article I, Section 10 also declares that “[n]o State shall . . . grant any Title of Nobility.”<sup>236</sup> Concerning this part of the Constitution, Hamilton remarked in *Federalist* No. 84 that “[t]his may truly be denominated the corner stone of republican government for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people.”<sup>237</sup>

There also were constitutional encumbrances placed on the presidency, the office that was the closest analogue to kingship. Most notably, the president would not enjoy the sort of unthinking obedience that was formally owed King James. The president, unlike the king, only enjoys the “executive Power” under the Constitution.<sup>238</sup> And according to the Constitution, the president “shall hold his Office during the Term of four Years.”<sup>239</sup> Hamilton commented that “[i]n these circumstances, there is a total dissimilitude between *him* and a king of Great Britain, who is an *hereditary* monarch, possessing the crown as a patrimony descendible to his heirs forever . . .”<sup>240</sup> The president, unlike King James, could not invoke divinity or patriaralism to justify his rule.<sup>241</sup> Instead, under a democratic regime, the Constitution required him to protect and defend a document written in the name of the people:

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—“I do solemnly swear (or affirm) that I will faithfully execute the Office of Presi-

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234. U.S. CONST. art. I, § 9, cl. 8.

235. *Id.*

236. U.S. CONST. art. I, § 10, cl. 1.

237. THE FEDERALIST NO. 84, *supra* note 223, at 512 (Alexander Hamilton).

238. U.S. CONST. art. II, § 1, cl. 1.

239. U.S. CONST. art. II, § 1, cl. 2.

240. THE FEDERALIST NO. 69, *supra* note 223, at 416 (Alexander Hamilton).

241. *See id.*

dent of the United States, and will, to the best of my Ability, preserve, protect, and defend the Constitution of the United States."<sup>242</sup>

Should the president fail to execute his duties, he, like any federal officer, could be removed from office.<sup>243</sup> So Hamilton remarked in *Federalist* No. 69 that the president "would be liable to be impeached, tried, and, upon conviction of . . . high crimes or misdemeanors, removed from office" whereas "[t]he person of the King of Great Britain is sacred and inviolable; there is no constitutional tribunal to which he is amenable . . ."<sup>244</sup> There is "no punishment," Hamilton added, "to which [the king] can be subjected, without involving the crisis of a national revolution."<sup>245</sup>

The president, furthermore, lacked the powers of a king to make and unmake laws.<sup>246</sup> Article I, Section 1 of the Constitution stipulated that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States . . ."<sup>247</sup> If the president disapproved of the legislation, his veto could be overridden by two-thirds of each house of Congress.<sup>248</sup> So, too, although the Constitution permits the president to adjourn Congress "in Case of Disagreement between them, with Respect to the Time of Adjournment,"<sup>249</sup> the king could "even dissolve the Parliament."<sup>250</sup>

Even the constitutional provision which made the president the "Commander in Chief"<sup>251</sup> did not grant him unlimited powers during war. Hamilton stressed that as commander-in-chief, the President's authority was "nominally the same with that of the king of Great Britain, but in substance much inferior to it."<sup>252</sup> "The president," Hamilton explained, "will have only the occasional command of such part of the militia of the na-

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242. U.S. CONST. art. II, § 1, cl. 8.

243. U.S. CONST. art. II, § 4 states: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

244. FEDERALIST NO. 69, *supra* note 223, at 416 (Alexander Hamilton).

245. *Id.*

246. *Id.* at 416–17.

247. U.S. CONST. art. I, § 1.

248. U.S. CONST. art. I, § 7, cl. 3.

249. U.S. CONST. art. II, § 3.

250. THE FEDERALIST NO. 69, *supra* note 223, at 419 (Alexander Hamilton).

251. *See* U.S. CONST. art. II, § 2, cl. 1.

252. THE FEDERALIST NO. 69, *supra* note 223, at 417–18 (Alexander Hamilton).

tion, as by legislative provision may be called into the actual service of the Union."<sup>253</sup> On the other hand, "[t]he king of Great Britain . . . [has] at all times the entire command of all the militia within [his] several jurisdictions."<sup>254</sup> In addition, as commander-in-chief, the President exercises "nothing more than the supreme command and direction of the military . . . as first general and admiral . . ." but "that of the British king extends to the *declaring* of war, and to the *raising* and *regulating* of fleets and armies; all of which, by the constitution . . . would appertain to the legislature."<sup>255</sup>

As the constitutional limits on the President suggest, the Framers did not rely exclusively on the public virtue of their leaders. Indeed, the blunt constitutional constraints on the President suggest that the Framers were quite skeptical that leaders possessed the moral authority to decide what was best for the people.

## VII. ANTIAUTHORITARIANISM IN PUBLIC DISCOURSE

A primary reason why King James's invocations of absolute monarchy resonated with many seventeenth century English subjects was because those subjects' nonpolitical lives were structured by inflexibly hierarchical relationships where reflexive obedience was owed to superiors.<sup>256</sup> Likewise, in colonial America the ethos of antiauthoritarianism that was embodied in the Constitution resonated with the mood of the colonists.

### A. *The Declaration of Independence*

The colonists' most spirited expression of antiauthoritarianism was the Declaration of Independence. Against the tradition of absolute monarchy, the American colonists asserted the rights of the people:

That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foun-

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253. *Id.* at 417.

254. *Id.*

255. *Id.* at 418 (emphasis in original).

256. See generally SCHOCHET, *supra* note 208 (discussing extensive hierarchical and authoritarian relationships, including familial, employment, and religious relationships, in sixteenth and seventeenth century England).

ation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.<sup>257</sup>

Although familiar, this passage, juxtaposed against the rhetoric of early modern England, is striking. In the Declaration's words, no government, whether justified in the name of God or patriarchalism, was immune from challenge: "whenever *any* Form of Government becomes destructive of these ends." So too the Declaration stated that the people themselves, not some venerated superior, would determine whether resistance to government was warranted: The people may organize their government "in such form, as to *them* shall seem most likely to effect their Safety and Happiness."

The Declaration did more than defend the people's right of revolution. On behalf of the people, the Declaration jabbed a sharp finger at King George, and later raised a furious fist at him, attempting to arouse in the reader anger against English rule.<sup>258</sup> The Declaration's parade of condemnation against the king was indeed the bulk of the Declaration itself, and was so lengthy that all of it cannot be quoted in this Article. What I wish to highlight is the tone, or rather, the change in tone, that the Declaration gradually assumed as it presented its grievances. The Declaration began its criticism against the king in an impersonal, vaguely legal style:

[The king] has refused his Assent to Laws, the most wholesome and necessary for the public good. He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.<sup>259</sup>

But within the next few lines, the Declaration lobbed its first barb, calling the king a tyrant: "He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only."<sup>260</sup>

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257. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

258. *See id.* at para. 3–15 (listing King George's abuses of power).

259. *Id.* at para. 3–4.

260. *Id.* at para. 5.

Next, the Declaration rebuked the king for having the audacity to oppose the colonists' manly courage: "[the king] has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people."<sup>261</sup> In a conspicuous historical reversal, the Declaration situated manliness in the people themselves, not a powerful patriarchal king, and the people's anger was said to be justified in having their manliness affronted by the king.

Later, the Declaration reached the height of its indignation against the King:

He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people. He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation. . . .

A Prince whose character is thus marked by *every act which may define a Tyrant*, is unfit to be the ruler of a free people.<sup>262</sup>

These words are neither measured terms nor the stuff of mature restraint. Rather, they are hyperbolic caricatures whose exuberant resentment against the King recalls *Hustler's* nasty parody against the Reverend Falwell, another powerful public figure.

Arguably, no colonial American figure more famously embodied this antiauthoritarianism than Thomas Paine, to whom I turn next.

#### B. Paine's Common Sense

On the eve of the Revolution, any sensible effort to dissuade the King of his regal charisma had to begin by debunking the monarchy's narrative of divine origins. King James had asserted that he was God's anointed.<sup>263</sup> Thomas Paine, in his exceptionally popular 1776 pamphlet *Common Sense*, could not disagree more.<sup>264</sup> Paine began by wondering aloud "how a race

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<sup>261</sup> *Id.* at para. 7.

<sup>262</sup> *Id.* at para. 26, 27, 30 (emphases added).

<sup>263</sup> See *supra* Part V.

<sup>264</sup> See generally THOMAS PAINE, COMMON SENSE (1776), reprinted in THOMAS PAINE, COLLECTED WRITINGS 5 (Eric Foner ed., 1995).

of men came into the world so exalted above the rest, and distinguished like some new species . . . .”<sup>265</sup> Paine answered his question as follows: “In the early ages of the world, according to the scripture chronology, there were no kings . . . .”<sup>266</sup> He explained that “government by kings was first introduced into the world by the Heathens, from whom the children of Israel copied the custom.”<sup>267</sup> According to Paine, “[t]he Heathens paid divine honors to their deceased kings, and the christian world hath improved on the plan by doing the same to their living ones.”<sup>268</sup> He exclaimed, “How impious is the title of sacred majesty applied to a worm, who in the midst of his splendor is crumbling into dust!”<sup>269</sup> Thus, Paine concluded with deliberate irony that the divine right of kings was “the most prosperous invention the Devil ever set on foot for the promotion of idolatry.”<sup>270</sup>

Continuing his caustic retort against King James’s story of monarchic origins, Paine surmised that:

[I]t is more than probable, that could we take off the dark covering of antiquity, and trace [kings] to their first rise, that we should find the first of them nothing better than the principal ruffian of some restless gang, whose savage manners or pre-eminence in subtlety obtained him the title of chief among plunderers; and who by increasing in power, and extending his depredations, overawed the quiet and defenceless to purchase their safety by frequent contributions.<sup>271</sup>

Paine subsequently warned that no king could logically trace his origins to some ultimate, let alone divine, beginning, because “few or no records were extant in those days, and traditional history stuffed with fables, it was very easy, after the lapse of a few generations, to trump up some superstitious tale, conveniently timed, Mahomet like, to cram hereditary right down the throats of the vulgar.”<sup>272</sup>

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265. *Id.* at 12.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at 16.

272. *Id.* at 17.

England was no exception. Its monarchic origins were anything but the result of popular consent, Paine asserted:

When William the Conqueror subdued England, he gave them law at the point of the sword; and until we consent, that the seat of government, in America, be legally and authoritatively occupied we shall be in danger of having it filled by some fortunate ruffian, who may treat us in the same manner, and then, where will be our freedom? where our property?<sup>273</sup>

Paine's chief objection, however, was not against the purported logic of monarchic succession but the vices that it bred:

But it is not so much the absurdity as the evil of hereditary succession which concerns mankind. Did it ensure a race of good and wise men it would have the seal of divine authority, but as it opens a door to the *foolish*, the *wicked*, and the *improper*, it hath in it the nature of oppression.<sup>274</sup>

More dangerous than pedestrian arrogance, the monarchs, Paine argued, saw themselves as deserving submission from their subjects. "Men who look upon themselves born to reign, and others to obey," Paine wrote, "soon grow insolent; selected from the rest of mankind their minds are early poisoned by importance . . ."<sup>275</sup>

### C. *A Parade of Upward Contempt*

The spirit of antiauthoritarianism manifest in the Declaration of Independence and Paine's *Common Sense* was emblematic of the American personality. Astute foreign thinkers' observations, such as those of Edmund Burke, the archly conservative member of the British Parliament, are useful in making this connection. Burke counseled England to make peace with America on the eve of the Revolutionary War.<sup>276</sup> Chief among his reasons was his fear that America would never surrender to an authoritarian monarchy.<sup>277</sup> Burke argued that:

In this Character of the Americans, a love of Freedom is the predominating feature which marks and distinguishes the

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<sup>273.</sup> *Id.* at 43.

<sup>274.</sup> *Id.* at 18.

<sup>275.</sup> *Id.*

<sup>276.</sup> See EDMUND BURKE, *Speech of Edmund Burke, Esq., on Moving His Resolutions for Conciliation with the Colonies*, in 1 SELECT WORKS OF EDMUND BURKE 221, 236 (1999).

<sup>277.</sup> See *id.* at 237.



whole: and as an ardent is always a jealous affection, your Colonies become suspicious, restive, and intractable, whenever they see the least attempt to wrest from them by force, or shuffle from them by chicane, what they think the only advantage worth living for.<sup>278</sup>

Burke added: "This fierce spirit of Liberty is stronger in the English Colonies probably than in any other people of the earth . . ."<sup>279</sup>

Burke uttered these words to Parliament in 1775, but as late as the 1830s, the young French traveler to America, Alexis de Tocqueville, made a complimentary observation about the colonies' antiauthoritarianism. Tocqueville first observed of aristocratic nations like France:

As in aristocratic societies all citizens are placed at a fixed post, some above the others, it results also that each of them always perceives higher than himself a man whose protection is necessary to him, and below he finds another whom he can call upon for cooperation.<sup>280</sup>

At the top of this hierarchy stood, of course, the king.<sup>281</sup> By contrast, "[i]n democratic centuries," Tocqueville continued, "when the duties of each individual toward the species are much clearer, devotion toward one man becomes rarer: the bond of human affections is extended and loosened."<sup>282</sup> Tocqueville remarked, "Aristocracy had made of all citizens a long chain that went from the peasant up to the king; democracy breaks the chain and sets each link apart."<sup>283</sup>

Between Tocqueville's observations, issued in the 1830s, and Burke's in 1775, Americans themselves voiced a strident anti-authoritarianism. Take Abraham Bishop. Bishop was not the likeliest candidate to challenge the American aristocracy.<sup>284</sup> No son of an oppressed rural class, his was a privileged life: He was a lawyer who had clerked in Philadelphia, a 1778 graduate

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278. *Id.*

279. *Id.*

280. 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 483 (Harvey C. Mansfield & Delba Winthrop eds. & trans., 2000).

281. *See supra* Part V.

282. TOCQUEVILLE, *supra* note 280, at 483.

283. *Id.*

284. *See* GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 271 (1992).

of Yale College, and the son of a respected mayor of New Haven.<sup>285</sup> “Whatever private demons he had within him,” writes the historian Gordon S. Wood, “were unleashed on the bewildered and frightened Federalist gentry of Connecticut.”<sup>286</sup> In the 1790s Bishop had distributed pamphlets charging the Federalists with creating a Constitution that had failed to live up to its democratic aspirations and in practice catered to monarchists.<sup>287</sup> Bishop implored the people to realize that those so-called social betters, the local gentlemen, who made them “doff their caps” and “bow their heads” were sustained by “delusions.”<sup>288</sup> These self-styled gentlemen, Bishop continued, were “the great, the wise, rich, and mighty men of the world” who were “well fed, well dressed, chariot rolling, caucus keeping, levee revelling federalists.”<sup>289</sup> And they fooled the common people with their “charming outsides, engaging manners, powerful address, and inexhaustible argument.”<sup>290</sup> Such men “are able to say more and argue better on the wrong side of the question than the people are on either side of it.”<sup>291</sup>

Their rhetorical gifts, Bishop argued, were matched only by their haughtiness. “Imagine,” he wrote:

the luxurious courtier who must have his pease and salmon before the frost has left the earth, or the ice the river, and who loathes the sight of vegetable or animal food in the season of it; who rides in a gig with half a dozen lacqueys behind him; who curses every taverner, excommunicates every cook, and hecks over the table because his eggs were not brought to him in a pre-existent state.<sup>292</sup>

Bishop thus urged the common people to pierce the illusion that their leaders and social betters were presumptively deserving of uncommon respect. “Why should,” he asked, “ninetenths of ordinary people” defer “with fear and awe” to these “deceiving few”?<sup>293</sup>

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285. *Id.*

286. *Id.*

287. *Id.* at 271–72.

288. *Id.* at 273.

289. *Id.* (quotation marks omitted).

290. *Id.* at 274 (quotation marks omitted).

291. *Id.* (quotation marks omitted).

292. *Id.*

293. *Id.* at 273.

As Professor Wood, perhaps the nation's foremost authority on America in the late eighteenth century, has observed, Bishop was not alone:

Everywhere in the early Republic northern aristocrats were besieged relentlessly, mercilessly, in print and in speeches, not only by alienated gentlemen like Bishop who had gone to Yale but, more important, by countless numbers of common ordinary people who had never been to college—artisans, traders, and businessmen—and who themselves had felt the deprivations and humiliations of being common and ordinary and were bent on revenge.<sup>294</sup>

"Such men," Professor Wood explained, "were sick and tired of being dismissed as factious, narrow, parochial, and illiberal and were unwilling to defer any longer to anyone's political leadership but their own."<sup>295</sup> Here was an independence, then, that was radically individualistic. As summarized by Professor Wood:

The problem with America, complained Samuel Mitchill of New York in 1800, was that everybody wanted independence: first independence from Great Britain, then independence of the states from each other, then independence of the people from government, and lastly, the members of society be equally independent of each other.<sup>296</sup>

Authority of "every sort," Wood stated, "seemed unable to resist these endless challenges."<sup>297</sup> Wood added, "by what right did authority claim obedience? was the question being asked of every institution, every organization, every individual."<sup>298</sup> It looked "as if the Revolution had set in motion a disintegrative force that could not be stopped."<sup>299</sup>

One manifestation of this disintegrative force was the then breathtaking assumption by Americans that no one, including experts, held a monopoly on truth. "Everything was being left to the reader, or the listener, or the voter, or the buyer—each person—to decide," Wood remarked.<sup>300</sup> King James, you will

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294. *Id.* at 275.

295. *Id.* at 275–76.

296. *Id.* at 308 (internal quotation marks omitted).

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.* at 361.

recall, had claimed to be the guardian of the “true religion,”<sup>301</sup> and hence presented himself as the greatest expert on religion.<sup>302</sup> In that capacity, he required subjects to obey him as head of the Anglican Church.<sup>303</sup> In colonial America, however, the clergyman Abel Sargent announced that each individual was “considered as possessing in himself or herself an original right to believe and speak as their own conscience, between themselves and God, may determine . . . .”<sup>304</sup> Americans, compared to their European predecessors, were freer to join and leave religious congregations.<sup>305</sup> Because no congregation could expect to hold onto its followers, churches fought with each other for prospective members.<sup>306</sup> Each church “claimed to be right, called each other names, argued endlessly over points of doctrine, mobbed and stoned and destroyed each other’s meeting houses.”<sup>307</sup>

The massive proliferation of churches in America was a testament to this fragmentation of Christian authority.<sup>308</sup> In America, one found, for example, not just Presbyterians, but many stripes of Presbyterians: New School Presbyterians, Cumberland Presbyterians, Springfield Presbyterians, Reformed Presbyterians, and Associated Presbyterians.<sup>309</sup> Such multiplication of sects also occurred within Baptism.<sup>310</sup> This proliferation of religious diversity stood in sharp contrast to the monopoly on religious truth formally invoked by King James, the self-styled Anointed One.<sup>311</sup>

Americans refused to bow to established leaders in other areas as well. Dr. Benjamin Rush, one of the most important leaders of the Revolution, was furious that historians failed to defer to him, a Founding Father, in putting into words what

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301. FRANCIS BACON, *Charge Against Oliver St. John*, in BACON, LETTERS, *supra* note 121, at 142.

302. *See id.*

303. J. ALLANSON PICTON, MAN AND THE BIBLE: A REVIEW OF THE PLACE OF THE BIBLE IN HUMAN HISTORY 49 (1909).

304. WOOD, *supra* note 284, at 332.

305. *Id.*

306. *See id.*

307. *Id.*

308. *See id.* at 332–33.

309. *See id.*

310. *Id.* at 333.

311. *See supra* Part V.

had happened during the Revolution.<sup>312</sup> Rush collected documents about the Revolution studiously for his memoir, but later ceased his efforts: “perceiving how widely I should differ from the historians of that event, and how much I should offend by telling the truth, I threw my documents into the fire and gave my pamphlets to my son Richard.”<sup>313</sup> Witness too a letter from John Adams, dated February 27, 1805, to his trusted friend Rush.<sup>314</sup> Reflecting on his contributions to the nation, the former President worried whether he would be shown the proper gratitude given that the people, instead of deferring to the truth as Adams saw it, were instead “deceived” by “a dozen volumes of lying newspapers and pamphlets . . . .”<sup>315</sup>

Elsewhere, Charles Nisbet, the Scottish clergyman and first president of Pennsylvania’s Dickinson College, bemoaned in 1789 that Americans, even those of modest education, were overly confident in their powers to discern the truth on any issue.<sup>316</sup> Exasperated, he quite expected that Americans would churn out books such as “Every Man his own Lawyer,” “Every Man his own Physician,” and “Every Man his own Clergyman and Confessor.”<sup>317</sup> Though hyperbolic, Nisbet was somewhat accurate. As Professor Wood summed up: “Every conceivable form of printed matter—books, pamphlets, handbills, posters, broadsides, and especially newspapers—multiplied and were now written and read by many more ordinary people than ever before in history.”<sup>318</sup> Reverend Samuel Miller rued in 1800 that much of the intellectual leadership of the country had fallen into “the hands of persons destitute at once of the urbanity of gentlemen, the information of scholars, and the principles of virtue.”<sup>319</sup> Unlike pre-Revolutionary America, “the society of the early Republic had thousands upon thousands of obscure ordinary people participating in the creation of this public opin-

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312. See *Letter from Benjamin Rush to John Adams* (Aug. 14, 1805), in *THE SPUR OF FAME*, *supra* note 132, at 31, 32–33.

313. *Id.* at 33.

314. *Letter from John Adams to Benjamin Rush* (Feb. 27, 1805), in *THE SPUR OF FAME*, *supra* note 132, at 22.

315. *Id.* at 23–24.

316. See WOOD, *supra* note 284, at 361.

317. *Id.*

318. *Id.* at 363.

319. *Id.* 363–64.

ion.”<sup>320</sup> Not satisfied with publication, ordinary people acted on their presumed knowledge as well. The journal *Medical Repository* bewailed in 1817 that whereas Europe had professional pharmacists, America did not.<sup>321</sup> In Paris, London, and Edinburgh, pharmacy was, the *Repository* noted, “a profession [which was] *scientific, exclusive, and privileged*,” but in New York, ordinary people were selling medicine on the streets.<sup>322</sup> “The result of all these assaults on elite opinion and celebrations of common ordinary judgment,” Professor Wood maintained, “was a dispersion of authority and ultimately a diffusion of truth itself to a degree the world had never before seen.”<sup>323</sup>

Especially telling was the oration of Isaac Chapman Bates, a Yale graduate, lawyer, and member of the House of Representatives.<sup>324</sup> Speaking in 1805 on the occasion of the twenty-ninth anniversary of America’s Independence, Bates groaned that “the *chartered* messengers of slander travel through the Union.”<sup>325</sup> “Have you never heard,” Bates angrily asked, “that [President John] Adams, was a ‘*hoary-headed traitor?*’ that [President George] Washington was “*a coward? a murderer? the vilest of hypocrites?*”<sup>326</sup> Bates was appalled: “With what honest indignation must [Washington or Adams] frown from the realms of day at such unparalleled abuse! A crime so unnatural, so brutal, no tears can wash away; no sufferings can expiate.”<sup>327</sup> The characterization of these invectives as “crimes” politically connected Bates’s mindset to that of the Star Chamber under King James.<sup>328</sup> Like Bates, the Star Chamber certainly would have decreed such insults to be crimes, as it had done for the criticisms of Oliver St. John.<sup>329</sup> The Star Chamber, however, operated in a culture founded on social and political hier-

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320. *Id.* at 364.

321. *Id.* at 361.

322. *Id.*

323. *Id.*

324. See *Memoir of Hon. I. C. Bates, Late United State Senator From Massachusetts*, in 3 THE AMERICAN REVIEW: A WHIG JOURNAL 186, 186–89 (New York, George H. Colton 1846).

325. ISAAC C. BATES, AN ORATION PRONOUNCED AT NORTHAMPTON, JULY 4, 1805, at 6.

326. *Id.*

327. *Id.*

328. For discussion of the Star Chamber, see *supra* notes 95–102 and accompanying text.

329. See *id.*

archy in which truth often was defined by the monarch.<sup>330</sup> Bates, on the other hand, lived in an early-nineteenth-century America where “truth” was, as a matter of convention, in the eye of the beholder.<sup>331</sup> “Truth is the foundation of virtue; of all happiness here; of all hope hereafter,” Bates declared.<sup>332</sup> “But lying has become so in use, that truth is out of fashion; quite thrown aside, as the uncouth garment of a Gothic age . . . .”<sup>333</sup>

What Bates condemned as a morally chaotic America in 1805 perhaps would have struck Chief Justice Rehnquist, writing 180 years later in *Hustler*, as slightly amusing. Chief Justice Rehnquist protected the very sort of speech that had galled Bates. Chief Justice Rehnquist did so, not to increase moral chaos, but because he wanted the audience to deliberate a diversity of ideas and opinions.<sup>334</sup> Yet, as suggested by the examples I have marshaled, the right of ordinary people to verbally abuse their leaders and social betters was not logically predicated on the search for truth. Rather, the right was a natural extension of a constitutional democracy where the people formally asserted political sovereignty, and where leaders were regarded as both accountable to the people and inherently suspect, partly because of the power they wielded. Speech that insulted President Adams as a “hoary-headed traitor” and President Washington as “a coward” was to be expected in America’s constitutional democracy as manifestations of a vigorous, if at times, insolent, antiauthoritarianism.

### VIII. DEVELOPING AN ADJUDICATIVE PRINCIPLE

In this Part, I refine and flesh out the principle of antiauthoritarianism as an adjudicative principle. I explain when the principle should be applied and when it should not. Although I cannot canvass every area of First Amendment jurisprudence, I consider three categories: those circumstances in which the

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330. See VICTOR STATER, *THE POLITICAL HISTORY OF TUDOR AND STUART ENGLAND: A SOURCEBOOK* 41–42 (2002) (discussing the monarch’s control over the court).

331. See BATES, *supra* note 325, at 6–7.

332. *Id.* at 6.

333. *Id.*

334. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (“[T]he freedom to speak one’s mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth . . . .” (quoting *Bose Corp. v. Consumers Union of the United States*, 466 U.S. 485, 503 (1984))).

principle would generally justify the speech; those in which the principle would generally not justify the speech; and those circumstances in which the answer is unclear.

A. *Those Circumstances Where Antiauthoritarianism  
Would Justify Speech*

The circumstances that would be most likely to justify speech in terms of the antiauthoritarian principle are those in which the speaker is engaging in rebuke or mockery of leaders who exercise unusual influence over political affairs. The Reverend Jerry Falwell was certainly one such leader.<sup>335</sup> Other examples are available from those seminal Supreme Court cases where the justices grappled with questions of clear and present danger and political speech spiked with profanity.

1. *Subversive Speech*

Those classic cases that introduced the clear and present danger test are not remembered for being grounded in what I have called the principle of antiauthoritarianism. They are now noteworthy for the eloquent opinions authored by Justices Holmes and Brandeis, who defended speech to aid the audience's desire to discover the truth. Dissenting in *Abrams v. United States*,<sup>336</sup> Justice Holmes observed that:

[T]he ultimate good desired is better reached by a free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.<sup>337</sup>

Although these words captivated generations of judges, their substantive message is disputable. Certainly it is not at all clear that the search for truth is, as Justice Holmes insisted, “at any rate . . . the theory of our Constitution.”<sup>338</sup> In fact, Justice Holmes's arguments do not afford a serviceable principle of adjudication.

The facts of *Abrams* illustrate this problem. *Abrams* and five other defendants were all Russian citizens, and some of the ac-

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335. See *supra* notes 74–81 and accompanying text.

336. 250 U.S. 616 (1919).

337. *Id.* at 630 (Holmes, J., dissenting).

338. *Id.*



cused were self-described “rebels,” “revolutionaries,” and “anarchists” who proclaimed that they “did not believe in government in any form . . . .”<sup>339</sup> During America’s war against Germany in World War I, Abrams and his confederates planned to distribute circulars that opposed America’s war effort.<sup>340</sup> They sought to do so, not because they supported Germany but because they felt America’s war with Germany was a pretext for attacking their homeland of Communist Russia.<sup>341</sup> For their political criticisms, Abrams and others were convicted of violating the Espionage Act of 1917.<sup>342</sup> The speakers were indicted under several counts.<sup>343</sup> One count charged the speakers with “disloyal, scurrilous and abusive language about the form of government of the United States . . . .”<sup>344</sup> A second charged them with language “intended to bring the form of government of the United States into contempt, scorn, contumely, and disrepute . . . .”<sup>345</sup> A third charged the speakers with intending “to incite, provoke and encourage resistance to the United States in said war.”<sup>346</sup>

Justice Clark penned the majority opinion, which has been summarily ignored and rendered ignoble; in its place, Justice Holmes’s dissent has ensconced itself in history as one of the most famous Supreme Court opinions.<sup>347</sup> Justice Holmes would have overturned Abrams’ and his cohorts’ convictions as a violation of their First Amendment rights, and some of Justice Holmes’s language appeared to question the constitutionality of the Espionage Act itself.<sup>348</sup> Justice Holmes argued that the

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339. *Id.* at 617–18 (majority opinion).

340. *See id.* at 619–21.

341. *Id.* at 620.

342. *Id.* at 616–17.

343. *Id.*

344. *Id.* at 617.

345. *Id.*

346. *Id.*

347. *See, e.g.,* Vincent Blasi, *Reading Holmes Through the Lens of Schauer: The Abrams Dissent*, 72 NOTRE DAME L. REV. 1343, 1343 (1997) (referring to “Holmes’s famous dissent in *Abrams*”); David R. Dow & R. Scott Shieldes, *Rethinking the Clear and Present Danger Test*, 73 IND. L.J. 1217, 1227 n.83 (1998) (“It was also in his *Abrams* dissent that Holmes made his famous statement that the freedom of speech is meant to protect the marketplace of ideas. . . .”); G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 319 (1996) (referring to “the famous words from Holmes’s *Abrams* dissent”).

348. *See Abrams*, 250 U.S. at 631 (Holmes, J., dissenting).

basic principle of the First Amendment is the search for truth.<sup>349</sup> Despite its prominence, Justice Holmes's reliance on the search for truth does not produce principled outcomes. He suggests that Abrams's speech should be protected so that the audience can deliberate and weigh it against competing arguments.<sup>350</sup> Justice Holmes accordingly argues that the "ultimate good desired is better reached by a free trade in ideas" and that "the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ."<sup>351</sup>

Justice Holmes fails to understand that the search for truth is a double-edged sword that can be wielded to protect the speaker, but also can be used to prosecute her on the other. Consider that the United States Congress that enacted the Espionage Act of 1917 presumably deliberated long and hard about passing the Act.<sup>352</sup> After all, there were competing imperatives: the instinct to protect the nation in the face of war and the desire to protect the First Amendment.<sup>353</sup> The members of Congress presumably debated the bill and its various contents. Therefore, the members of Congress probably immersed themselves in the sort of "free trade in ideas" that Justice Holmes idealized in his *Abrams* dissent. If that is the case, then the search for truth can be enlisted to justify, not condemn, the Espionage Act. We can make an analogous case for the jury that convicted Abrams. Like Congress, juries are charged with the task of meaningful deliberation. When the jury convicted Abrams and his cohorts, it presumably weighed competing evidence and sought to consider different interpretations of the Espionage Act. Again, barring any misconduct, the jury's decision to convict should not have been overturned in the name of the search for the truth; rather, the search for truth can support the jury's decision.

Justice Holmes's rather curious account of "truth" also is worth noting. He states that "the *best* test of truth is the power of the thought to get itself accepted in the competition of the

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349. *See id.* at 630.

350. *Id.*

351. *Id.*

352. John Wigmore emphatically argued that Congress had excellent reasons to prohibit Abrams's speech. *See* John H. Wigmore, *Abrams v. U.S.: Freedom of Speech and Freedom of Thuggery in War-Time and Peace-Time*, 14 ILL. L. REV. 539 (1920).

353. *Abrams*, 250 U.S. at 540–44 (discussing the threats to American security posed by those like Abrams).

market.”<sup>354</sup> If that is so, then Congress’s decision to pass the Espionage Act and the jury’s decision to convict Abrams of having violated said Act would be the products of two deliberative bodies—Congress and the jury—having accepted the view that has managed to get itself accepted in the marketplace of ideas. Justice Holmes, therefore, cannot logically invoke the search for truth to protect Abrams while, in the same breath, denying the legitimacy of the decisions by Congress and the *Abrams* jury.

A better jurisprudential approach derives from the principle of antiauthoritarianism and its attendant commitment to nurture an ethos of hostility to authority. Examine the words uttered by Abrams and his codefendants in their printed circulars:

[President Woodrow Wilson’s] shameful, cowardly silence about the [American] intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington and vicinity.

...

[President Wilson] is too much of a coward to come out openly and say: “We capitalistic nations cannot afford to have a proletarian republic in Russia.”

...

[H]is Majesty, [Mr.] Wilson and the rest of the gang; dogs of all colors!<sup>355</sup>

Here is the same lively antiauthoritarianism as in the hotly antimonarchical language of the Declaration of Independence.<sup>356</sup> Indeed, broad parallels can be drawn between the words of *Abrams* and those of *Hustler*: Both assail social betters without apology. By circulating his pamphlet, Abrams was expressing a spiteful refusal to confer any respect for the authority of President Wilson. It is an act that should call to mind the Declaration’s analogous refusal to defer to a king whom the Declaration inveighed as a “tyrant.”<sup>357</sup> Although such vitriol

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354. *Id.* at 630 (Holmes, J., dissenting) (emphasis added).

355. *Id.* at 620 (majority opinion).

356. *See supra* Part VIIA.

357. *See supra* note 262 and accompanying text.

might be offensive, it is a means to cultivate a mentality that is vital for constitutional democracy.

This vitriol can extend, as *Hustler Magazine v. Falwell*<sup>358</sup> made clear, to profanity. Here too, constitutional protection should be afforded in the name of protecting antiauthoritarianism. *Cohen v. California* is a useful illustration of the benefits this extension would offer.<sup>359</sup>

## 2. Profane Political Speech

Walking inside the halls of a Los Angeles courthouse with women and children present, Paul Robert Cohen wore a jacket emblazoned with the words "Fuck the Draft."<sup>360</sup> For this, he was convicted of violating a California law which prohibited "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person [by offensive conduct]."<sup>361</sup> On appeal, the Supreme Court overturned the conviction.<sup>362</sup> Justice Harlan, writing for the Court appeared to invoke something other than the justification from truth. Instead of urging the audience to deliberate the substance of Cohen's profane criticism, Justice Harlan did precisely the opposite by consoling those who, begrudgingly, had to endure Cohen's profanity that they need not have considered his message at all.<sup>363</sup> Those "persons confronted with Cohen's jacket," Justice Harlan reassured, "were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences."<sup>364</sup> "Those in the Los Angeles courthouse," unlike the latter, "could effectively avoid further bombardment of their sensibilities simply by averting their eyes."<sup>365</sup> Notice how Justice Harlan does not rest his opinion on the belief that Cohen's message can contribute to some collective discovery of truth.

Unlike Justice Holmes in *Abrams* and Chief Justice Rehnquist in *Hustler*, Justice Harlan in *Cohen* turns to a different justifica-

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358. 485 U.S. 46, 56 (1988).

359. 403 U.S. 15 (1971).

360. *Id.* at 16.

361. *Id.* (quoting CAL. PENAL CODE § 415 (1872) (repealed 1974)).

362. *Id.* at 26.

363. *Id.* at 21.

364. *Id.*

365. *Id.*

tion for speech. He explains that Cohen was trying to express who he is to the world:

For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.<sup>366</sup>

Although the search for truth extolled by Justice Holmes and Chief Justice Rehnquist emphasized the benefits of free speech for the *audience*, Justice Harlan's proffered justification looks to the potential benefits for the *speaker*. The Constitution, Justice Harlan tells us, "leaves matters of taste and style . . . largely to the individual."<sup>367</sup> "Taste" and "style" can be components of expression by which the speaker wishes to do more (or something other than) convey information for deliberation by others; they can be aesthetic emblems of identity by which an individual tells the public who he is. And we should refrain from using the law to give force to our disgust or contempt, Justice Harlan warns, lest we violate the principle that "one man's vulgarity is another's lyric."<sup>368</sup> Justice Harlan thus sought to protect the individual's desire to actualize himself in public through expressions of taste and style even if those expressions were offensive to society's prim notions of taste and style.

Justice Harlan's justification of self-actualization seems to share little resemblance with Justice Holmes's and Chief Justice Rehnquist's justification of truth. The former values the right of individual expression for the speaker's own sake; the latter values free speech for the sake of the audience. The former is willing to protect what the speaker already regards as the truth about her identity; the latter protects the right of the audience to mull over competing ideas of truth.

Despite these differences, the two justifications share the same defect: Both lack a principled method to sustain their respective ends. Recall that the justification from truth sought to protect a diversity of views for the audience to deliberate. The

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366. *Id.* at 25.

367. *Id.*

368. *Id.*

justification, however, permits the government to select which ideas come before the audience. Other times, the justification, while paying outward homage to democracy, permits a judge to overturn legislation that is the product of democratic deliberation by the people or their elected representatives.

The justification from self-actualization likewise suffers from a contradiction in logic. On the one hand, the justification seeks to protect an individual's right to actualize himself through his public expression. Yet if self-actualization is paramount, the justification must also logically permit the people as a whole acting through their government to actualize themselves *against* the individual. Therefore, the justification from self-actualization fails as an adjudicative principle.

This failure is on display in Justice Harlan's *Cohen* opinion. Justice Harlan unproblematically stressed Cohen's desire to express his "taste" and "style," but we must remember that the people of California, through their elected representatives, also sought to express their conceptions of taste and style by forbidding "offensive" conduct that "maliciously and willfully disturbed the peace or quiet of any neighborhood or person . . ." <sup>369</sup> Justice Harlan comes to Cohen's defense by arguing that the semicaptive audience in the courthouse "could effectively avoid further bombardment of their sensibilities simply by averting their eyes."<sup>370</sup> This is consolation bordering on the absurd. "Averting their eyes" would not have prevented the bystanders from continuing to think about Cohen's profanity and the insolent audacity by which it was paraded in, of all places, a courthouse. One could try to defend Cohen by saying that the depth of his passion could be registered only by coarse vulgarity.<sup>371</sup> But one could surmise that Californians felt no less strongly about their beliefs and yearned to express these beliefs in an indelible manner by codifying them into law and punishing those like Cohen. Given that not only the individual but the community as well can have very firm beliefs about morality, Justice Harlan's facile recitation in *Cohen* that "one man's vulgarity is another's lyric" is rendered futile as a matter of adjudicative principle.

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369. CAL. PENAL CODE § 415 (1872) (repealed 1974).

370. *Cohen*, 403 U.S. at 21.

371. According to Justice Harlan, "[t]he defendant testified that he wore the jacket . . . as a means of informing the public of the depth of his feelings against the Vietnam War and the draft." *Id.* at 16.

Courts have effortlessly used justification of self-actualization to support not just the individual's right against the government but the actions of the government against those of the individual. Consider the Supreme Court's treatment of obscenity. *Miller v. California* established the Supreme Court's present definition of obscenity.<sup>372</sup> In that case, the Court declared that obscenity does not deserve any First Amendment protection largely because it is offensive to the community.<sup>373</sup> That is, obscenity, according to the Court, is undeserving of protection because society has the right to self-actualize as a moral community against the competing desires of an individual to actualize himself through the possession or expression of obscenity. In all, the Court's definition of obscenity contains three factors; two of the three factors hinge on what the community regards as obscenity. According to the Court, the first factor for determining obscenity is if "'the average person, applying contemporary *community standards*' would find that the work, taken as a whole, appeals to the prurient interest."<sup>374</sup> The second factor stipulated that the work is obscene if "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable *state law*"<sup>375</sup>—in other words, as defined by a law passed to assert the community's moral self-conception.

Instead of the justification of self-actualization, a better alternative is the principle of antiauthoritarianism. What is valuable about Cohen's speech is that it permits him to express his outrage against the government with untrammelled insolence. Cohen could have emblazoned on the back of his jacket a number of less offensive words: "Stop the Draft," "End this Draft," "The Draft Is Immoral," "The Draft Means Death." But in proclaiming "Fuck the Draft," Cohen adheres to a tradition in American democracy that permits dissidents to express their antiauthoritarianism publicly. The profanity matters for the First Amendment not principally because of issues of "taste" and "style" as Justice Harlan indicated. The profanity matters

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372. 413 U.S. 15 (1973).

373. *See id.* at 24 (denying constitutional protection for obscenity partly because it is "patently offensive" under "contemporary community standards").

374. *Id.* (emphasis added) (quoting *Roth v. United States*, 354 U.S. 476, 489 (1957)).

375. *Id.* (emphasis added).

because it is emblematic of something more than intellectual dissent: hostility to government authority. Cohen is doing something more than publicly rejecting the government's authority to require the draft; he is rejecting too the government's authority to discipline him for his offensive profanity.

This is not to suggest that all forms of antiauthoritarian speech are justified under any circumstances. To that end, in the next section, I sketch a condition in which antiauthoritarian speech would be barred precisely because it is antiauthoritarian.

*B. When Antiauthoritarian Speech Would be Prohibited in the Name of Authoritarianism*

One of the few conditions where antiauthoritarianism would not justify speech is within the military by those who are soldiers. Article 88 of the Uniform Code of Military Justice prohibits speech deemed contemptuous of governmental leaders as well as Congress and the state legislatures:

Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Governor or legislature of any State, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.<sup>376</sup>

The justifications for Article 88 are reflected in the facts of *United States v. Howe*.<sup>377</sup> During the Vietnam War, Henry Howe, a second lieutenant in the U.S. Army, was convicted of violating Article 88 for displaying to the public a sign that read, "LET'S HAVE MORE THAN A CHOICE BETWEEN PETTY IGNORANT FASCISTS IN 1968," and on the other side of the sign the words, "END JOHNSON'S FASCIST Agression [sic] IN VIET NAM."<sup>378</sup> Such speech generally should be protected in the name of antiauthoritarianism.

But Howe's situation is different. He was not a civilian like Larry Flynt who need not defer to the authority of a Jerry Falwell. As a soldier, Howe was formally obligated to defer to his commander and part of that deference entails refraining from

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376. 10 U.S.C.A. § 888 (2006).

377. 37 C.M.R. 429 (1967).

378. *Id.* at 431–32.



publicly disparaging his commander-in-chief.<sup>379</sup> Whereas constitutional democracy might benefit from the raw antiauthoritarianism of a Larry Flynt, one could imagine that serious risks to national defense can result from a situation where soldiers are legally permitted to flaunt orders and publicly disparage the President. Therefore, it is logical that Howe would be convicted of violating Article 88, as he was.<sup>380</sup> Writing for the military appeals court, Judge Kilday upheld Howe's conviction by stating:

The evil which Article 88 of the Uniform Code seeks to avoid is the impairment of discipline and the promotion of insubordination by an officer of the military service in using contemptuous words toward the Chief of State and the Commander-in-Chief of the Land and Naval Forces of the United States.<sup>381</sup>

Clearly, Howe showed insubordination toward his Commander-in-Chief, the President, when he called President Johnson's military campaign a "fascist aggression [sic]."<sup>382</sup> Such statements are inconsistent with life as a soldier. The Supreme Court affirmed this view in *Parker v. Levy*.<sup>383</sup> Writing for the Court, then-Justice Rehnquist argued:

This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. . . . The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."<sup>384</sup>

The military's principal objective accordingly differs from that of civilian society. Then-Justice Rehnquist continued, quoting from another Supreme Court case, *In re Grimley*<sup>385</sup>:

An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as

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379. *See id.* at 434–35.

380. *Id.* at 431.

381. *Id.* at 437 (internal citation omitted).

382. *Id.* at 432.

383. 417 U.S. 733, 743 (1974).

384. *Id.* at 743 (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955)).

385. 137 U.S. 147 (1890).

to the right to command in the officer, or the duty of obedience in the soldier.<sup>386</sup>

Although these words are recited by the Supreme Court, their logic seems to derive from the practical necessities of national security.

In addition, there is another, perhaps less obvious, justification for prohibiting soldiers from expressing contempt for both their leaders as well as legislatures. To justify *Howe's* conviction under Article 88, Judge Kilday quoted copiously from Chief Justice Warren's 1962 James Madison Lecture at New York University.<sup>387</sup> He quoted the following passage from Chief Justice Warren's lecture:

It is significant that in our own hemisphere only our neighbor, Canada, and we ourselves have avoided rule by the military throughout our national existences. This is not merely happenstance. A tradition has been bred into us that the perpetuation of free government depends upon the continued supremacy of the civilian representatives of the people. To maintain this supremacy has always been a preoccupation of all three branches of our government.<sup>388</sup>

Judge Kilday commented:

The Chief Justice could have added that our neighbor, Canada, and the United States are the two great English-speaking countries of the Western Hemisphere. Both nations have a long tradition based upon Anglo-Saxon jurisprudence which has consistently subordinated the military to the civilian in Government. We would surely be ill-advised to make an exception for the civilian soldier which would inevitably inure to the advantage of the recalcitrant professional military man by providing an entering wedge for incipient mutiny and sedition.<sup>389</sup>

Judge Kilday's observations, along with those of Chief Justice Warren, suggest that speech by a soldier that appears to be antiauthoritarian towards civilian leaders can theoretically re-

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386. *Parker*, 417 U.S. at 744 (quoting *Grimley*, 137 U.S. at 153); see also *Burns v. Wilson*, 346 U.S. 137, 140 (1953) ("[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . .") (plurality opinion).

387. See *Howe*, 37 C.M.R. at 438–39.

388. *Id.*

389. *Id.* at 439.

dound to the benefit of another set of leaders who, throughout history, have been more powerful than the people themselves. By prohibiting soldiers from publicly deriding their civilian leaders, Article 88 in effect also tries to prevent the military from taking steps to undermine the Constitution's commitment to a regime where the people, not the military, exercises ultimate authority.

C. *Uncertain Situations: Grade, Middle, and High Schools*

For purposes of applying antiauthoritarianism as adjudicative principle, grade, middle, and high schools pose less straightforward implication than the military described in *Howe* or the public sidewalks in *Abrams*. Schools have competing imperatives. On the one hand, schools are responsible for teaching students about civil liberties, including the Constitution's right of free speech.<sup>390</sup> On the other hand, schools must exercise discipline and teach deference to the school's authorities.<sup>391</sup> That is, a school is dedicated to both the cultivation of a certain species of antiauthoritarianism as well as the inculcation of its opposite.

There is, however, a way to parse the two in a principled manner. Begin with *Tinker v. Des Moines Independent Community School District*.<sup>392</sup> Fifteen-year-old John Tinker wore a black armband in 1965 to protest American military involvement in Vietnam and to call for a truce.<sup>393</sup> His high school forbade him from wearing the armband and suspended Tinker until he decided to remove it.<sup>394</sup> The school insisted that the armband would disrupt the classroom.<sup>395</sup> The Supreme Court overturned the school's suspension as a violation of Tinker's First Amendment right of speech.<sup>396</sup> One can easily imagine how the armband functioned as an expression of hostility toward the government's authority.

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390. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1150 (3d ed. 2006).

391. *Id.*

392. 393 U.S. 503 (1969).

393. *Id.* at 504.

394. *Id.*

395. *Id.* at 505.

396. *Id.* at 514.

Justice Fortas, writing for the Court, appeared to nod in this direction. He announced that “[i]n our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students.”<sup>397</sup> He also quoted with approval the words of Justice McReynolds’s majority opinion from *Meyer v. Nebraska*<sup>398</sup>:

In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.<sup>399</sup>

The words of both Justices McReynolds and Fortas reflect the antiauthoritarianism I have advocated. The spirited antagonism toward authoritarian figures expressed by the Declaration of Independence, Thomas Paine, and in its more tawdry forms, Larry Flynt, would not have been possible if students had been inculcated in their schools to obey every aspect of institutional authority.

On the other hand, schools are custodians for the care of children and, as such, schools may regulate speech in a manner that seeks to protect children from undue harms.<sup>400</sup> *Bethel School District No. 403 v. Fraser* is a good illustration of when such regulation is proper even if the speech evinces a hostility for authority.<sup>401</sup> Fraser, a student at the public Bethel High School, gave a provocative speech before an audience of six hundred high school students during an assembly.<sup>402</sup> The purpose of Fraser’s speech was to endorse his friend for student council office.<sup>403</sup> The speech read as follows:

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397. *Id.* at 511.

398. 262 U.S. 390, 402 (1923).

399. *Tinker*, 393 U.S. at 511–12 (quoting *Meyer*, 262 U.S. at 402).

400. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (justifying the prohibition of speech on a high school campus that could be hurtful to minors).

401. *Id.*

402. *Id.* at 677–78.

403. *Id.* at 687 (Brennan, J., concurring in the judgment).

I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.

Jeff is a man who will go to the very end—even the climax, for each and every one of you.<sup>404</sup>

Although offensive, the idiotic juvenilia pales in comparison to *Hustler's* raunchy parody. Moreover, Fraser's speech teems with antiauthoritarianism in its defiance of what school officials might think.<sup>405</sup> But where *Hustler* catered to an adult audience that chose to view its contents, Fraser had a captive audience because the students were required to attend the public assembly or study hall.<sup>406</sup> Also worth mentioning is that the audience included fourteen-year olds<sup>407</sup> and some "students appeared to be bewildered and embarrassed by the speech."<sup>408</sup> The school determined that Fraser had violated a rule prohibiting obscene language in the school and accordingly punished him with suspension and removal of his name from the list of candidates for graduation speaker.<sup>409</sup>

The Supreme Court upheld Fraser's punishment.<sup>410</sup> Chief Justice Burger justified the punishment as a means to prevent breaches of civility.<sup>411</sup> He explained that a school must "take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students."<sup>412</sup> The Chief Justice elaborated: "The undoubted freedom to advocate un-

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404. *Id.*

405. "In fact, two of Fraser's teachers with whom he had discussed the contents of the speech in advance informed him that the speech was 'inappropriate and that he probably should not deliver it' and that his delivery of the speech might have 'severe consequences.'" *Id.* at 678 (majority opinion).

406. *See id.* at 677.

407. *Id.*

408. *Id.* at 678.

409. The school code read: "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." *Id.* at 678.

410. *Id.* at 679–80.

411. *See id.* at 681–83.

412. *Id.* at 681.

popular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."<sup>413</sup>

#### IX. DEAR MR. BURNS, GET LOST!

With the possible exception of some experts in the State Department and a few unusually prescient scholars, it must have come as a surprise to most Americans; it was big surprise to me, anyway: In parts of the Middle East and North Africa where Muslim fundamentalism is a mainstay and where political leaders enforce an unapologetic authoritarianism and nurture an intractable hatred against Western constitutionalism, something unexpected happened: massive protests erupted.<sup>414</sup> The protests were not against America the Great Satan but were directed instead against local authoritarian leaders themselves.<sup>415</sup> The protests included various slogans, critiques, and calls for reform. Yet this parade of resentments was not limited to pious indignation. There were impish taunts against the status quo that were acerbic and mischievous.

The uprising in Tunisia is illustrative. A poor fruit seller, fed up with police abuse, had immolated himself in December 2010 in a busy public square as an act of protest.<sup>416</sup> The incident provoked demonstrations, first in the provinces and then the capital. Then the demonstrations spread to Egypt, Bahrain, Yemen, Libya, and other Arab countries.<sup>417</sup> In Tunisia, the protestors gathered around the building housing Prime Minister Mohamed Ghannouchi.<sup>418</sup> They sprayed graffiti and wrote on paper which they tacked to the wall.<sup>419</sup> A reporter for the *New Yorker* summarized:

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413. *Id.*

414. A useful interactive chart was compiled by the *Washington Post*. See *Middle East and North Africa in Turmoil*, WASH. POST, <http://www.washingtonpost.com/wp-srv/special/world/middle-east-protests/> (last visited June 16, 2011). The *New York Times* also developed an interactive catalogue of the protests. See *Arab World Uprisings: A Country-by-Country Look*, N.Y. TIMES, <http://www.nytimes.com/interactive/world/middleeast/middle-east-hub.html> (last visited Nov. 5, 2011).

415. See, e.g., Liam Stack & Katherine Zoepf, *Syrians Defy Leaders in Biggest Demonstration Yet in Capital*, N.Y. TIMES, Apr. 16, 2011, at A4.

416. Steve Coll, *The Casbah Coalition*, NEW YORKER, Apr. 4, 2011, at 34.

417. *Id.*

418. *Id.*

419. *Id.*

The wall displayed caricatures, political cartoons . . . . One sign read, "Dear Our Government . . . Get Lost!" . . . . Several images pasted on the wall depicted Mr. Burns, the fictional nuclear power plant owner on "The Simpsons," to whom Ghannouchi bears an unfortunate resemblance.<sup>420</sup>

One cannot help but compare this exhibition of roguishness to the cartoon depicting George Washington as an ass that Chief Justice Rehnquist mentioned in *Hustler*,<sup>421</sup> or to Thomas Paine's denouncement of the King as an heir to a cheap thug who procured power through guile and violence.<sup>422</sup> No one knows, of course, whether the protests in Tunisia portend that it will follow America on the road to constitutional democracy. But if rambunctiously antiauthoritarian caricatures and spoofs continue to flood Arab nations' public discourse, then perhaps one day we very well may see a more robust culture that favors limited government and fears the hazards of political deference. Surely, a sign that such a moment has galvanized would be the shameless surfacing of a parody in one of Tunisia's publicly accessible pornographic magazines featuring a contrived Prime Minister Ghannouchi . . . doing a mock interview for a Campari advertisement . . . where he recounts . . . being drunk in an outhouse . . . having sex with his mother.

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420. *Id.*

421. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 54 (1988).

422. See PAINE, *supra* note 264, at 16.