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Authoritarianism and the Rule of Law

LYNNE HENDERSON*

INTRODUCTION

Erwin Chemerinsky began his foreword to the 1989 *Harvard Law Review's* Supreme Court issue with the statement "[b]y any standard, the 1988-1989 Supreme Court Term was momentous."¹ And it is not difficult to justify his characterization or an accompanying concern about a dramatic shift in constitutional adjudication in the United States when viewing the Court's term, which "narrowed abortion rights, limited government affirmative action programs, restricted the scope of civil rights laws, permitted capital punishment of juveniles and the mentally retarded, approved drug testing and constricted the availability of habeas corpus."²

While many liberal-progressive constitutional scholars have noted the "conservative" shift in the Court's decisions and are voicing concern and proposing alternative strategies,³ it is the thesis of this Article that the problem is authoritarianism, not conservatism per se.⁴ While conservatism may mean a sense of caution or a respect for tradition that is not absolute or inflexible,⁵ authoritarianism represents inflexibility and oppression.

* Professor of Law, Indiana University School of Law at Bloomington. I thank Paul Brest, Donald Ehrman and Robin West for their help and encouragement, as well as their patience with my kvetching, throughout the writing of this article. I also want to express my gratitude to Jost Delbrück, Don Gjerdingen, Marjorie Kornhauser, Robert Weisberg and Frank Michelman for their interest, time and help with various drafts, and to Lauren Robel for giving me a central, clarifying insight. The article benefitted enormously in its early stages from comments made by the participants in the University of Texas Faculty Workshop and an Indiana University colloquium. Finally, I am grateful to the Cleveland-Marshall fund for supporting the initial research for the article.

1. Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 44 (1989).

2. *Id.* Although this Article does not seek to defend the proposition, it may be that we are at the juncture of another of Professor Ackerman's "transformative" constitutional moments, a kind of critical realignment in the Court's constitutional decisionmaking as a result of changes in the federal judiciary. Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 545 (1989).

3. See Collins & Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189 (1988); West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641 (1990) [hereinafter West, *Constitutionalism*].

4. See West, *Constitutionalism*, *supra* note 3, at 655-57 & n.26; Brisbin, *Conservative Jurisprudence in the Reagan Era*, 19 CUMB. L. REV. 497, 526-28 (1989) (authoritarianism is major element of conservatism).

5. See Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990); Wilson, *Justice Diffused: A Comparison of Edmund Burke's Conservatism with the Views of Five Conservative Academic Judges*, 40 U. MIAMI L. REV. 913 (1986).

Consistent with authoritarianism, much of the Court's jurisprudence in the last few years appears to manifest inflexibility, lack of compassion, and approval of oppression. Indeed, during the past decade, there has been an increasing concern about the growth of right-wing authoritarianism in the United States: The American political turn to the right in the 1980s, together with the resurgence of active manifestations of racism,⁶ anti-semitism and nativism,⁷ provide reason to consider authoritarianism and its relation to law. This Article argues that there has been a parallel increase in authoritarianism in legal thought and judicial practice in the United States during this same period that should be of great concern to those who view law as an institution for human progress.

Recently, the words "authoritarian" and "authoritarianism" have frequently appeared in legal scholarship.⁸ After the Supreme Court's decision in *Bowers v. Hardwick*,⁹ several scholars expressed open concern about the Court's decision, noting that it was authoritarian both in its reasoning and its result.¹⁰ But thus far, it does not appear that scholars have examined

6. Lee & Fernandez, *Legislative Responses to Hate-Motivated Violence: The Massachusetts Experience and Beyond*, 25 HARV. C.R.-C.L. L. REV. 287, 287, 319, 325 (1990).

7. Nativist sentiment has sometimes taken the form of the enactment of "English-only" laws in a number of states by referendum, with "[t]he margins of victory [being] usually overwhelming." Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293, 293 (1989). Congress has also considered an "English-only" bill. *Id.* at 303-05. Nativism and xenophobia against immigrants are part of American history, and the "English-only" movement could be said to be the most recent manifestation of prejudice. *See id.* at 325-30. *But see* Barringer, *A Land of Immigrants Gets Uneasy About Immigration*, N.Y. Times, Oct. 14, 1990, at E4, col. 1 (scholars disagree about intensity of nativism and hostility towards U.S. immigrants in 1980s).

8. For a short list, see Gordon, *Law and Disorder*, 64 IND. L.J. 803 (1989) [hereinafter Gordon, *Disorder*]; Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152 (1989); Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988) [hereinafter Michelman, *Law's Republic*]; Reich, *Law and Consciousness*, 10 CARDOZO L. REV. 77 (1988); West, *The Authoritarian Impulse in Constitutional Law*, 42 U. MIAMI L. REV. 531 (1988) [hereinafter West, *Authoritarian Impulse*].

9. 478 U.S. 186 (1986).

10. West, *Authoritarian Impulse*, *supra* note 8; Michelman, *Law's Republic*, *supra* note 8, at 1494-99. This use of the word "authoritarian" may reflect the concerns of liberal-progressive scholars with the Reagan administration's political agenda of reconstituting the federal judiciary to conform to a particular "conservative" political vision. The lack of sympathy for progressive or liberal legal arguments a number of the new judges have manifested has reinforced these concerns. Charles Reich has written:

Recent decisions by the Supreme Court mark the rise of an authoritarian jurisprudence—authoritarian in its processes and in the results. This authoritarian jurisprudence is consistent with the goals pursued for the last eight years by the Reagan Administration: to select for the federal bench only those judicial candidates with a demonstrated lack of empathy, absence of understanding of or sympathy for the powerless, and a consciousness that is narrowly limited to their own position in the social hierarchy.

Reich, *supra* note 8, at 80. Brisbin has also criticized the statism of the Reagan judiciary. Brisbin, *supra* note 4, at 528.

The rise in concern about authoritarianism does appear to correspond to changes in the

the significance of authoritarianism as a separate influence on law and legal thinking. Accordingly, this Article explores authoritarianism in detail, examining the ways in which legal thought and constitutional jurisprudence in particular serve to reinforce authoritarianism, while also being authoritarian in their own right. It seeks to describe and explore current authoritarian manifestations in American constitutional law, as embodied in legal scholarship and decisions of the Supreme Court. This Article assumes that, for the most part, our practice includes deference and obedience to the authority of judicial decisions, as well as reliance on them in political discourse, and that accordingly, these decisions can and do play a role in the creation and support of authoritarianism.¹¹ Because the judiciary plays a significant role in determining who "loses his freedom, his property, his children, even his life,"¹² because the focus of much legal scholarship is on the courts, and because what judges decide counts as law, this Article will focus on legal scholarship about the judiciary and its relation to authoritarianism, examining authoritarian models of judicial decisionmaking in terms of both process and substance.

Although there is considerable literature on *authority*, legal authority and "legitimate" authority,¹³ Anglo-American jurisprudential and legal literature concerning authoritarianism itself appears to be sparse; authoritarianism is often viewed as the opposite of authority.¹⁴ Rather than struggle to properly define what authority is, this Article argues that it may be more useful to consider what authoritarianism—generally viewed as a perversion of

membership of the Supreme Court (and the federal courts generally) during the Reagan administration, an administration that had not only a conservative, but arguably authoritarian vision of law and legal process across almost every dimension. That is, President Reagan appointed judges who would interpret or apply existing law to achieve the political goals of dismantling affirmative action, prohibiting abortion, eradicating procedural protections for criminal defendants and so on, goals that the administration had been unable to achieve by appeal to the other "political" branch—Congress. Gary L. Bauer, a domestic policy advisor to President Reagan and a leading conservative, has indicated that Reagan "has been able to appoint many Federal judges whose rulings could eventually make policy of views that conservatives were not able to push through Congress," including abolishing affirmative action and abortion. Roberts, *Reagan's Social Issues: Gone but Not Forgotten*, N.Y. Times, Sept. 11, 1988, at E4, col. 4 (paraphrasing Bauer).

11. See Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1209-36 (1989) (discussing the hegemonic function of law and legal discourse in the treatment of labor issues in the United States prior to the passage of the Wagner Act).

12. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) [hereinafter Cover, *Violence*].

13. See, e.g., *AUTHORITY: NOMOS I* (C. Friedrich 1958); *AUTHORITY REVISITED: NOMOS XXIX* (J. Pennock & J. Chapman 1987); J. RAZ, *THE AUTHORITY OF LAW* (1979) [hereinafter J. RAZ, *AUTHORITY*]; J. RAZ, *THE MORALITY OF FREEDOM* (1986) [hereinafter J. RAZ, *MORALITY*]; R. SENNETT, *AUTHORITY* (1980).

14. See J. VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* (1986); see also *infra* notes 39-51, 139-43 and accompanying text.

authority—means.¹⁵ “Authoritarian” and “authoritarianism” do *not* mean conservative, right-wing, fascist or communist; rather, these words describe a continuum of relationships to, and uses of, authority. Authoritarianism may simply mean unquestioning obedience to authority, “blind” obedience, or, as Hannah Arendt defined the term, obedience to traditionally constituted authorities out of an attitude of acceptance.¹⁶ But authoritarian and authoritarianism also are used to describe personal epistemologies and political structures and practices that are directly threatening to human freedom and dignity. Legal scholars may have had this substantive meaning in mind when they referred to the Court’s decisions as authoritarian.¹⁷

Substantive authoritarianism means opposition to the “liberal” values of tolerance of ambiguity and difference, insistence on obedience to rules, insistence on conformity, and use of coercion and punishment to ensure that obedience. Frequently associated with xenophobic nationalism or ethnocentrism,¹⁸ authoritarianism in the substantive sense is premised on a suspicious and distrustful view of human nature and is frequently linked, both on a personal and political level, to racism, anti-semitism and patriarchy.¹⁹ Substantive authoritarianism oppresses in the name of order and control. This form of authoritarianism may reach the extreme level it did in Nazi Germany and Stalinist Russia or appear in milder forms, as it did during the McCarthy era in the United States, when, as a result of fear, hatred and extreme nationalism, the government, with private and judicial support, used law to persecute and punish citizens for being “un-American.”²⁰

Authoritarianism need not be based only in active coercion and oppression of disfavored groups by government. The government may also allow authoritarianism to flourish by omission—by permitting other institutions or persons to coerce and oppress others in the interest of maintaining control. Thus, much of the history of slavery in the United States could be characterized as government authoritarianism by omission in the interests

15. Cf. Shklar, *Giving Injustice Its Due*, 98 YALE L.J. 1135 (1989) (understandings of justice may be aided by understanding its opposite).

16. Arendt, *What Was Authority?*, in *AUTHORITY: NOMOS I*, *supra* note 13, at 81, 82.

17. See, e.g., Michelman, *Law's Republic*, *supra* note 8, at 1520-24; Luban, *supra* note 8, at 2165-86.

18. A. PERLMUTTER, *MODERN AUTHORITARIANISM* 79-81 (1981).

19. See *infra* notes 85-86, 108-110 and accompanying text.

20. See S. LIPSET, *POLITICAL MAN* 169-73 (1981). For a description of the McCarthy era, see V. NATAVSKY, *NAMING NAMES* (1980). See also *Scales v. United States*, 367 U.S. 203 (1961) (Smith Act membership clause upheld); *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961) (upholding registration requirement of Subversive Activities Control Act of 1950); *Nelson v. County of Los Angeles*, 362 U.S. 1 (1960) (upholding dismissal of employee for refusing to answer congressional committee on grounds of “insubordination”); *Dennis v. United States*, 341 U.S. 494 (1951) (upholding convictions under Smith Act).

of maintaining order and national and party unity.²¹ Other examples include the government largely ignoring oppression of and violence against African-American women,²² and a long history of governmental tolerance of private oppression of women and children through violence.²³

Because law is a major tool of social and political power, and because it is the primary instrument for a government to legitimate itself and accomplish its objectives, law is vulnerable to "capture" for substantively authoritarian purposes. Law may always be authoritarian in the formal sense, because a major premise of law is that people will accept and obey it absent some extraordinary justification.²⁴ Yet, a jurisprudential preoccupation with the duty to obey law and the authority of law²⁵ overlook law's tendency to validate and facilitate oppression and violence, whether by the state directly or by private actors with tacit state approval. Judges may participate in authoritarian uses of law by unquestioning obedience to rule and other authorities, by using stereotypical reasoning, by upholding the status quo and hypostatizing power relationships, and by taking a punishing attitude towards disobedience.²⁶ As Robert Cover noted and David Luban recently argued, the Supreme Court, in the case of *Walker v. City of Birmingham*,²⁷

21. For an excellent summary of the interests in avoiding confrontations over slavery and of the omissions to do anything to end the practice within the context of racism and xenophobia, see J. MCPHERSON, *BATTLE CRY OF FREEDOM* 490-510 (1988).

22. See Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F 139, 157-60.

23. See Mahoney, *Legal Images of Battered Women: Redefining the Issues of Separation*, 43 STAN. L. REV. ____ (1991) (forthcoming); Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F 23.

24. For a formally authoritarian description of the insider's view of legal authority, see Soper, *Legal Theory and the Claim of Authority*, 18 PHIL. & PUB. AFF. 209 (1989).

25. As examples of the continuing argument that people must obey the law absent some extraordinary reason, see K. GREENAWALT, *CONFLICTS OF LAW AND MORALITY* (1987); Soper, *supra* note 24, at 212-13, 224, 229 (suggesting it is moral to obey the law); see also Henderson, *Whose Nature? Practical Reason and Patriarchy*, 38 CLEV. ST. L. REV. ____ (1990) (forthcoming) [hereinafter Henderson, *Whose Nature?*] (discussing John Finnis' theory of the morality of obedience to authority).

26. For articles describing authoritarian judicial practices, see Luban, *supra* note 8; Forbath, *supra* note 11; Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) [hereinafter Cover, *Nomos and Narrative*]. Robert Gordon has written in a humorous way that late nineteenth century legal scholars

somehow persuaded themselves that the legal reinforcement of free contracting did not implicate the coercive power of the state. Of course a party who relies on legal enforcement is not engaging in a private transaction in the sense that an agreement to have lunch is a private transaction. If things go wrong, he hopes to have the option of having his interpretation of the deal backed up by state force—up to and including the 101st Airborne Division or National Guard if defendant resists enforcement.

Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U.L. REV. 195, 213 (1987) (footnote omitted).

27. 388 U.S. 307 (1967).

engaged in authoritarian decisionmaking by holding that civil rights marchers could be punished for disobeying an injunction the Court had declared unconstitutional. Professor Luban concluded that the Court in *Walker*, "[f]acing a choice between the anti-authoritarian consequences of liberal constitutionalism and the overwhelming desire to maintain reverence for authority, . . . opted for the latter."²⁸

With the decline of liberal thought and politics in the United States, much of the constitutional jurisprudence of the 1980s has become particularly facilitative of authoritarian uses of law by providing theoretical justifications for those uses. A distrust of judges and judicial power exercised in a certain liberating way has been the target of some "conservative" scholars. Thus, arguments by conservative constitutional scholars invariably seek to curtail the ability of judges to interpret positive law by demanding obedience to law, narrowly defined. The demand on the part of some scholars for strict adherence to original intent, obedience to text, deference to the political branches—particularly the executive branch—and strict fidelity to precedent and *stare decisis*, combined with arguments emphasizing stability, order, predictability and control, is especially troubling. To the extent that such positivist views of judging can be associated with authoritarian legal systems, these arguments can legitimate tyranny. To the extent that adherence to text and legislative command renders judges powerless to prevent legally constructed oppression or repression, the likelihood of formal authoritarianism in law, at a minimum, increases.²⁹

Other scholars make more substantively authoritarian arguments. Judge Posner's visions of human nature, law and the need for acceptance of authority have been criticized elsewhere as being authoritarian³⁰ and will be criticized here as well. Additionally, some communitarian or civic republican scholars present the danger of substantive authoritarianism. For these scholars, community and public virtue take priority in law; one does not have to be an atomistic, selfish liberal to be concerned that arguments that the community takes precedence provide a justification for "aggressive

28. Luban, *supra* note 8, at 2185-86.

29. Although emphasis on obedience to rules or texts can sometimes restrain a judge from approving an authoritarian practice or reaching an authoritarian result, obedience to authority cannot be said to be neutral or even necessarily good. The outcome of obedience depends on the goodness or badness of the authority, the oppressive or liberating effects of a rule. For example, Justice Kennedy's concurrence in *Texas v. Johnson*, 109 S. Ct. 2533, 2548 (1989), professes obedience to precedent and the perceived command of the first amendment in reaching what could be considered a non-authoritarian result—concluding that a state cannot regulate or punish the political expression of burning the flag of the United States. But four other justices disagreed both as to the content of the rule and precedent and with the result. Rules and obedience will never bind judges in the way that many scholars assume, and arguments for obedience may be used to support authoritarian outcomes as easily as non-authoritarian outcomes. See *infra* notes 252-86 and accompanying text.

30. See *infra* notes 287-88.

majoritarianism"³¹ and repressive, punitive or oppressive uses of law against outsiders.

There are, however, some avenues of scholarship that exist or are being explored which could combat the tendency to use law in authoritarian ways. In the conclusion of this Article, I will suggest that there are at least two major alternatives to authoritarian legal thought which are consistent both with legality and with humanitarian systems. My choice of these alternatives is based not only on the fact that they are at least descriptively and theoretically inconsistent with authoritarianism, but also on the existence of empirical evidence suggesting the value of these approaches in combatting authoritarianism. These two alternatives are the jurisprudence of strong rights and individual human dignity³² and the feminist/minority/humanist jurisprudence of understanding and care for others.³³ These two orientations somewhat resemble the different models of moral decisionmaking developed by Kohlberg and Gilligan; rather than being seen as antagonistic, the models might very well be capable of combination, as suggested by the writings of some scholars.³⁴ These approaches both share the similar concerns of valuing human beings and of resisting cruelty, subordination and oppression, in whatever guise.

I. AUTHORITARIANISM AND ITS RELATION TO LAW

This section examines authoritarianism in more detail and develops a description of authoritarianism in relation to law. It begins with a very brief summary of the literature on authority, noting that even in this literature the connection between authority and authoritarianism is often

31. This felicitous phrase is Suzanna Sherry's. See Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 614 (1986).

32. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978); R. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986).

33. While the ethic of care is associated with the work of feminist legal scholars, it is not confined to feminist jurisprudence. See, e.g., K. KARST, *BELONGING TO AMERICA* (1989); Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988); Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987) [hereinafter Henderson, *Legality*]; Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987); West, *Economic Man and Literary Woman: One Contrast*, 39 MERCER L. REV. 867 (1988) [hereinafter West, *One Contrast*].

34. For a moral philosopher's discussion of the Kantian ethic and the ethic of care, see L. BLUM, *FRIENDSHIP, ALTRUISM, AND MORALITY* (1980); Blum, *Gilligan and Kohlberg: Implications for Moral Theory*, 98 ETHICS 472 (1988). For scholarship drawing both on notions of rights and on notions of responsiveness and understanding, see Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987); Lawrence, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) [hereinafter Matsuda, *Reparations*]; Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) [hereinafter Matsuda, *Racist Speech*].

present. It then examines in more detail the literature on authoritarianism and begins to describe how the literature might relate to law. Next, the section examines more thoroughly the relation of authoritarianism to law, first generally and then through the writings of scholars who have been concerned with the relationship of law and authoritarianism.

A. *Why Authority?*

A posited human "need" for authority has led to numerous attempts to define or describe authority—hence, "legitimate" authority—and to distinguish it from authoritarianism. Yet, often unstated assumptions about human nature and the need for authority arising from those assumptions influence the definitions of authority used by scholars. These assumptions themselves may be based on authoritarian beliefs, and appear across a broad range of the literature on authority, including philosophy and the social sciences.

A common justification of the human need for authority relationships has been that of a parent to a child.³⁵ Thus, a common argument for authority and the requirement of *obedience* to authority is that the child's obedience to her parents is natural and essential for her well-being. As true as it is that young humans are neither physically nor cognitively able to survive by themselves in even simple worlds, an emphasis on the child's obedience rather than on the parents' nurturance and education of their children in itself manifests an authoritarian view of human nature. As the child grows older and develops cognitive, experiential and emotional skills, absolute obedience to parental authority is neither biologically required nor healthy for the child in a liberal democratic society. The wise parent recognizes the developing child and loosens the bonds of authority accordingly.³⁶ The authoritarian family, as embodied in the classic Victorian patriarchal family, with its emphasis on the wicked child and obedience to a father who was a "full-bodied authoritarian, who took his particular morality very seriously and threatened and/or delivered extreme punishment for 'moral' waywardness"³⁷ creates a rigid and punitive personal morality that emphasizes obedience to authority. Under the authoritarian view that stresses authority as primary in the family, the parents impose a narrow and conventional morality on the child. They are repressive, punitive and

35. See, e.g., R. SENNETT, *supra* note 13, at 15; Arendt, *supra* note 16, at 81, 97.

36. Cf. E. SAGAN, FREUD, WOMEN, AND MORALITY 160-94 (1988) (suggesting that loving and nurturing children is important to the development of conscience and moral autonomy and moral capacity).

37. A. MILLER, FOR YOUR OWN GOOD 4-6 (2d ed. 1984); E. SAGAN, *supra* note 36, at 57. See generally Lifton & Strozier, *Waiting for Armageddon*, N.Y. Times, Aug. 12, 1990, § 7 (Book Review), at 1, col. 1.

require absolute obedience to parental authority, whether it is for the child's well-being or not. Tyrannizing children with physical punishments and refusing to recognize their individual humanity can render them incapable of individual moral autonomy and empathy for others, and may also increase their capability for cruelty to themselves and others.³⁸

The authoritarian parenting model hardly seems a worthy justification for a posited need for authority, although it might very well produce those prone to adopt authoritarian approaches to life. Similarly, the human search for, or belief in, a transcendental Being also has been posited as proof of a need for authority. Even if beliefs and religions serve a basic human desire for connection to a greater Being or reassurance against the anxiety of death and meaninglessness, those that terrorize their adherents by being rigid and punitive—authoritarian, in other words—do not, however, seem to merit emulation.

Nonetheless, it seems indisputable that these common authoritarian arrangements reinforce attitudes about the perceived need for authority. Although authoritarian backgrounds or religions can produce morally autonomous individuals, they are more likely to produce authoritarians who willingly obey rules, punish those who deviate from rules, and defend the primacy of authority for ordering human affairs. As a matter of speculation, the vast majority of us may have been sufficiently shaped by authoritarian upbringing and practices that we have all absorbed a belief in a natural human need for authority, at either a conscious or unconscious level. And, to the extent that we are shaped by a belief in the necessity of authority and are accustomed to authority, it may be difficult (if not impossible) to break away from thinking that something in human nature requires authority and punishment for defiance of authority.

Arendt made a different, more subtle argument about this posited need for authority that may capture another reason why we seek authority. Authority, for Arendt, was grounded in traditions and "gave the world the permanence and durability which human beings need precisely because they are mortals—the most unstable and futile beings we know of."³⁹ Although Arendt made this point in 1958, before the current concern with post-modernism, the post-modern threat of groundlessness was in part the subject of Arendt's essay. For many of us, outside guides, authorities and commands *do* shelter us from the anxiety of uncertainty and the reality of our own death, appearing to give us a guide to a meaningful, well-regarded life. But authority may simply fulfill the *function* of other needs; it is not a need in

38. See A. MILLER, *supra* note 37, at 8-9; S. OLINER & P. OLINER, *THE ALTRUISTIC PERSONALITY* 179-85 (1988) (describing the difference in childrearing practices of parents of those non-Jewish individuals who helped rescue or aid Jews in Nazi Europe); E. SAGAN, *supra* note 36, at 209-10 (psychodynamic interpretations).

39. Arendt, *supra* note 16, at 112.

and of itself. It may be that when we are most threatened with death anxiety we seek authority or certainty and are vulnerable to authoritarianism. The more chaos seems to threaten us, the more rigid we may become.⁴⁰ If it is true that authority serves to shelter us from uncertainty, death anxiety, meaningless or groundlessness, perhaps we should address those issues rather than abdicating our responsibility for ourselves and others by deferring to authority

Scholars have had difficulty defining authority in contrast to other guides to human behavior and choice. Authority has been defined as communication capable of "reasoned elaboration,"⁴¹ tradition⁴² and "rational consent of agents to obey rules and officials installed according to proper procedures."⁴³ It is that which serves as a "preemptive" reason for acting—a person obeys even if the authority is, in her own judgment, mistaken. A person "treats [authority] as . . . a reason for judging or acting in the absence of understood reasons, or for disregarding at least *some* reasons which . . . would in the absence of the [authority] have sufficed to justify proceeding in some other way"⁴⁴ Authority is power and violence for some, although others dispute that connection.⁴⁵ It is the ordering of existence through rules,⁴⁶ or it is "an attempt to interpret the conditions of power."⁴⁷ One author, who has recognized the threat of authoritarianism latent in authority, sought to insulate authority from authoritarianism by defining "rightly instituted" authority as "a mode of coordination that treats individuals with the respect due them without requiring each to possess an impossibly high degree of knowledge about every sector of social life or an unreasonably high level of civic virtue." It is "an appropriate mode of coordination"⁴⁸ for accomplishing things in large, pluralistic societies. John Finnis has argued that in order for human groups to achieve *any* coordination in pursuing common goals, "[t]here must be either unanimity, or authority"⁴⁹ Although his definition of authority resembles that of a necessary coordinating device, his claim about the need for authority is more absolute. His assertion that human groups cannot accomplish anything

40. See Connolly, *Modern Authority and Ambiguity*, in *AUTHORITY REVISITED: NOMOS XXIX*, *supra* note 13, at 9, 17-19, 22.

41. Friedrich, *Authority, Reason, and Discretion*, in *AUTHORITY: NOMOS I*, *supra* note 13, at 28, 29.

42. Arendt, *supra* note 16, at 112 (authority grounded in past).

43. Connolly, *supra* note 40, at 13.

44. J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 234 (1980) (emphasis in original) (adapting Joseph Raz's definition); see J. RAZ, *MORALITY*, *supra* note 13, at 38-49.

45. Hardin, *Does Might Make Right?* in *AUTHORITY REVISITED: NOMOS XXIX*, *supra* note 13, at 215; Ball, *Authority and Conceptual Change*, in *id.* at 41, 52-54.

46. Jones, *On Authority: Or, Why Women are not Entitled to Speak*, in *id.* at 152, 153.

47. R. SENNETT, *supra* note 13, at 19.

48. Connolly, *supra* note 40, at 19.

49. J. FINNIS, *supra* note 44, at 232.

without obeying authority or having absolute agreement suggests a suspicious view of human nature. Finnis does appear to exclude from the realm of possibility other human solutions to coordinating problems.⁵⁰ Yet, human culture is too rich and diverse to leave us with the stark options of absolute agreement or absolute deference to authority.⁵¹

Whatever the definition of authority, however, the *absence* of authority is frequently asserted as the equivalent of social chaos—anarchy, in the negative sense, on a scale of the Reign of Terror—because of beliefs about the way humans *are*: individuals pursuing their own ends to the exclusion of others, individuals full of anti-social, wicked aggressions that must be repressed.⁵² As one author has observed, claims about the need for authority are often grounded in a vision of human behavior as “intrinsically bellicose” and conflict-riddled; if this is true, “[t]he rules of authority . . . provide sanctuary from the dangers of social intercourse.”⁵³ A belief in the violence of human nature and the “consequent need for social regulation”⁵⁴ has led many social theorists to assert the need for authority, order and control; yet as anthropologist Renato Rosaldo observes, analysts seldom examine the causes of social violence and chaos. Instead, “chaos appears more as a trope for use in debate[,] . . . an only half-revealed threat of ‘what would happen if . . .’”⁵⁵ Further, “[t]he vision of chaos following the collapse of the sociocultural order induces a feeling of panic,” because the nature of such a collapse is left nightmarishly vague.⁵⁶ Indeed, the terror at the prospect of chaos may lead to a desire for rigid control, increasing the likelihood of authority becoming authoritarian.

Arguments regarding the necessity for authority, from social chaos or from permanence, beg the question of whether authority itself is a need or whether it is a functional adaptation to fill other needs. While it is true that we probably are better off having some coordination or agreement on things such as on which side of the road to drive, it does not necessarily follow that authority, rather than custom, tradition, habit or practice, is necessary to this end. It is certainly not clear that humans by nature (rather than because of culture) must have *coercive* authority to accomplish coordination.

In much the same manner as argument from presupposed needs for authority and the threat of social chaos, *legal* authority becomes a necessary

50. This point is developed in Henderson, *Whose Nature?*, *supra* note 25.

51. See R. ROSALDO, *CULTURE AND TRUTH* (1989) (cultural anthropologist's analysis suggesting humans improvise and influence culture, including adjusting to contingencies and coordinating responses).

52. See *supra* notes 35-38.

53. Jones, *supra* note 46, at 157.

54. R. ROSALDO, *supra* note 51, at 99.

55. *Id.* at 100.

56. *Id.*

premise for scholars, rather than being a phenomenon that fulfills certain functions (and, tautologically, legitimate authority is legal authority, which tells us nothing about the goodness or badness of the authority). To the extent that we have not abandoned the belief, "usually attributed to Hobbes, that without regulative norms people become pathologically violent,"⁵⁷ law becomes unquestionably necessary because law is the way to keep "everybody from tearing everybody to bits."⁵⁸ This vision, in turn, fosters authoritarian attitudes toward law.

B. The Meaning of Authoritarianism

Authoritarianism has at least two different meanings: one simply of unquestioning obedience to authority, and one of obedience combined with the use of authority to repress, punish and oppress human beings. Obedience to authority itself might best be described as formal authoritarianism—it is solely concerned with the process of identifying authoritative commands or directions and then following them. Substantive authoritarianism, on the other hand, not only entails the process of obeying commands or rules, but also involves oppression and punishment.

Hannah Arendt argued that formal authoritarianism was justified.⁵⁹ To Arendt, authoritarianism meant obedience to legitimate authority and hierarchy as a matter of acceptance of traditionally constituted, past authority. She defended traditional modes of willing authoritarian obedience, arguing that authority by definition was based on legitimate power. The power was legitimate because it had been "assumed and 'proven' by . . . a source beyond or above the ruler."⁶⁰ Legitimacy originated "outside the range of human deeds,"⁶¹ either because it sprang from a transcendent source, or because the human sources had existed in the past. Authority provided permanence, stability and certainty.⁶² Authority transcended both power and those individuals holding power;⁶³ resort to coercion or force meant that authority had failed.⁶⁴ Thus, authoritarianism signified obedience to authority out of acceptance, not because of reason, coercion or fear.⁶⁵

Arendt's belief in the need for authority led her to distinguish authoritarian structures from totalitarian structures in order to protect governmental and social systems that she respected, as well as to defend against what she

57 Rosaldo, *While Making Other Plans*, 58 S. CAL. L. REV. 19, 26 (1985).

58. *Id.* (quoting H. SULLIVAN, *THE INTERPERSONAL THEORY OF PSYCHIATRY* 213-14 (1953)).

59. Arendt, *supra* note 16, at 81.

60. *Id.* at 83.

61. *Id.* at 82-83.

62. *Id.* at 112.

63. *Id.* at 110.

64. *Id.* at 82.

65. *Id.*

saw as the regrettable modern decline in authority from critique arising from the extreme authoritarianism of Nazi Germany and Stalinist Russia. For Arendt, as long as authoritarian governments did not do away with human freedom entirely, they were not tyrannical and were not to be condemned. Authoritarian systems—systems that contained a complex of demands for obedience—were acceptable to Arendt; she argued that “[h]istorically, . . . authoritarian forms of rule did not wish to abolish, but to limit freedom, and these limitations were felt necessary to protect and safeguard liberty.”⁶⁶

In instances of obedience to a benign authority, there are not many serious problems in Arendt’s definition of authoritarianism: authoritarianism is hardly a pejorative term if the accepted authority is good. Obedience to *good* rules or authorities, even if they are grounded in the past and even if the obedience is grudging or unwilling, in many instances is morally better than disobedience. Thus, it is better to obey the command not to murder even if one feels homicidal impulses toward a person than to disobey; obedience to traffic rules—a frequently used example of the need for authority—makes more sense than disobedience. But this observation does not establish that authority per se is good or that it is necessary in all instances. Even obedience to a good rule may have unfortunate effects, and simultaneous obedience to several good rules may be impossible.⁶⁷

Arendt’s defense of traditional sources of authority should not strike legal scholars as unfamiliar or strange. Much of law is based on following traditions and respecting legal authority and process. Undoubtedly, most lawyers believe that law is necessary to the ordering of human affairs, and some believe that respect for legal authority is essential to human happiness and moral behavior. Therefore, the legal actor generally accepts legal authority as good, although she may dispute particular exercises of that authority. The precepts of that authority are followed and obeyed and defended out of this acceptance.⁶⁸ Arendt made the observation that the founding fathers and the Constitution, as sources of authority, played the same role in the United States as the founding of Rome had played for the authoritarian Roman empire.⁶⁹ Similarly, a number of constitutional scholars and judges have argued that the source for authority is in the past—in the founding constitutional moment, the super-human, parental qualities of the drafters and the text.⁷⁰ Because the authority of the founding moment is good, the Constitution’s authority is good. The goodness of the founders

66. *Id.* at 83.

67. For an elaboration of this point, see Henderson, *Whose Nature?*, *supra* note 25.

68. See West, *Authoritarian Impulse*, *supra* note 8, at 531.

69. Arendt, *supra* note 16, at 109-10; see also Michelman, *Law’s Republic*, *supra* note 8, at 1515-16 (summarizing Hanna Pitkin’s characterization of the founding moment).

70. See *infra* text accompanying notes 208-39.

becomes the goodness of the Constitution; the authority of the Constitution therefore must never be challenged because it is good. Although this argument conflates legal and moral norms and simply makes the legal the right and the good, it is not an unfamiliar posture. Rather, it resembles Arendt's description of the role of the founding moment in authoritarian systems.

The argument for uncritical acceptance of authority can quickly lead to more severe forms of authoritarianism. As soon as uncritical acceptance of and obedience to authority become the norm, the accepted authority has the power to oppress, to punish, to repress and to dominate. For example, the well-known Milgram studies provide a chilling example of authority's power to command obedient persons to inflict pain on others in order to punish them.⁷¹ Arendt sought to preserve the value of obedience to authority by distinguishing authoritarianism from totalitarianism, but even authoritarianism in her formal sense—obeying because the authority is accepted by tradition and practice—can quickly become authoritarianism in a substantive, negative sense. While her distinction between totalitarian and authoritarian illustrates a point on a continuum that ranges from benign or humanistic authority to gulags or death camps, unfortunately the distinction has deflected attention from description and analysis of repressive regimes that are not totalitarian, that is, completely dominant over their citizenry.⁷² For example, the United States government used Arendt's distinction to legitimate a difference in policies toward brutal right-wing regimes and those on the left, thereby muddying the point that some authoritarian governments are more repressive in more ways than others, whether they are right-wing dictatorships such as the Pinochet regime in Chile, or communist dictatorships such as the Romanian regime of Ceausecu.⁷³

Accordingly, the term authoritarian has taken on a different connotation in much political and psychological writing, one that is negative and critical. In this context, authoritarianism embodies specific combinations of personal, group and political orientations and outcomes. In some ways, authoritarianism is a difficult concept because so often it is more of a tone or orientation rather than an easily identifiable category of definitive traits or characteristics. Further, authoritarian refers both to an individual's use of and attitude toward authority as well as to particular political structures

71. S. MILGRAM, *OBEEDIENCE TO AUTHORITY* (1974) (describing experimental studies which test an individual's willingness to obey authority even when she believes she is inflicting pain on the experimental subject; generalizing from evidence that obedience to a perceived authority might explain the willingness of "moral" people to commit atrocities on others; Milgram suggests that the problem is authority, not authoritarianism).

72. Amos Perlmutter has termed the distinction "unproductive" both descriptively and analytically in analyzing political systems. See A. PERLMUTTER, *supra* note 18, at 62-71.

73. The distinction was stressed by Jeanne Kirkpatrick to offer a reason for U.S. support of oppressive right-wing dictatorships. M. FRENCH, *BEYOND POWER* 340 (1985).

with many of the same characteristics. Generally, however, the authoritarian world-view holds a vision of human beings as monsters; this vision pervades its justifications for authority, control, punishment, and obedience.⁷⁴ Authoritarian systems and individuals may be more or less repressive, punitive and hostile to certain beliefs, activities or groups. They may be leftist or right-wing in their ideologies and politics, but they nevertheless share some common characteristics.

Perhaps as a result of the history of the United States and the original concerns of researchers, right-wing authoritarianism has been the primary focus of research on authoritarian movements in this country and on the authoritarian personality.⁷⁵ For example, Professor Lipset has argued that, historically, the authoritarian political orientation in the United States has been a combination of social conservatism and nativism with nineteenth-century visions of laissez-faire economics.⁷⁶ In the United States, authoritarian movements have been associated with traditional moralism, support for the status quo, the belief in the necessity of maintaining order, an emphasis on obedience to government as essential to avoid anarchy, and antipathy toward new ideas.⁷⁷

Similarly, concern with right-wing movements was the impetus for research on the authoritarian individual. The notion of the authoritarian personality⁷⁸ was developed by some members of the Frankfurt school in exile in the United States as part of an effort to understand what influenced the rise of nazism and anti-semitism in Germany.⁷⁹ The notion of the authoritarian personality still has descriptive force, although interest and research support virtually disappeared during the Cold War era.⁸⁰ Although there has been much dispute about the psychodynamic interpretations of the authors, the validity of the usual instrument used to measure "authoritarian" personality (the *F*-scale)⁸¹ and other portions of the study, subsequent studies and measures have resulted in similar descriptions of what constitutes an authoritarian orientation. According to a number of studies, the authoritarian

74. H. KELMAN & V. HAMILTON, *CRIMES OF OBEDIENCE* 23-52 (1989). I do not intend to say here that humans are incapable of behaving like monsters; such a claim would be silly as well as false. The irony is that such monsters are so often *obeying* an authority and have injected authoritarian values. See S. MILGRAM, *supra* note 71.

75. S. LIPSET & E. RAAB, *THE POLITICS OF UNREASON* 3-4 (2d ed. 1978).

76. S. LIPSET, *supra* note 20, at 169, 432-33.

77. S. LIPSET & E. RAAB, *supra* note 75, at 7-20.

78. See T. ADORNO, E. FRENKEL-BRUNSWIK, D. LEVINSON & R. SANFORD, *THE AUTHORITARIAN PERSONALITY* (abr. ed. 1982) [hereinafter *THE AUTHORITARIAN PERSONALITY*].

79. *Id.* at vii, xiii, 1-11.

80. Samelson, *Authoritarianism from Berlin to Berkeley: On Social Psychology and History*, 42 J. Soc. ISSUES 191 (1986).

81. Kelman and Hamilton, for example, criticize the "format and wording of items" used in the *F*-scale, where "the authoritarian response to each item is also the 'agree' response." H. KELMAN & V. HAMILTON, *supra* note 74, at 279.

individual values and follows rules. She is rigid, inflexible and intolerant of difference.⁸² The prototypical authoritarian person has a low tolerance for ambiguity, adopts conventional behaviors and beliefs and is prone to negative stereotyping. Authoritarians may be cynical, distrustful, intolerant, moralistic, anti-democratic and nationalistic.⁸³ Authoritarians are unlikely to have much empathy for the suffering or pain of others⁸⁴ and are likely to be prejudiced against racial, religious and ethnic "outgroups."⁸⁵ Further, authoritarians tend to support patriarchal beliefs, prejudices and stereotypes about women and sexuality.⁸⁶

Authoritarians obey and demand obedience to authority's commands simply *because* they are commands, and they hold a harshly punitive attitude toward those who do not comply.⁸⁷ The authoritarian does not hold independent judgments about the goodness or value of rules and finds challenges to rules or settled understandings deeply threatening. The authoritarian individual obeys authority either to escape punishment or because she has thoroughly introjected—made a part of her identity—the authoritative definition of her status and role.⁸⁸ Thus, strict compliance with rules can arise *either* from fear or introjection of authority. Erich Fromm posited that the authoritarian masochistically obeys those hierarchically above her and sadistically punishes those beneath her or deviant from her, whether she is conscious of the sado-masochistic dynamic or not; obeying and pleasing the authority is the most important goal for the authoritarian.⁸⁹ The

82. G. ALLPORT, *THE NATURE OF PREJUDICE* 395-409 (25th ann. ed. 1979); S. OLINER & P. OLINER, *supra* note 38, at 255-59; cf. A. MILLER, *supra* note 37; E. SAGAN, *supra* note 36 (psychoanalytic/dynamic descriptions).

83. S. LIPSET, *supra* note 20, at 476-88.

84. G. ALLPORT, *supra* note 82, at 434-36; S. OLINER & P. OLINER, *supra* note 38, at 174.

85. The authors of *The Authoritarian Personality* found a strong correlation between ethnocentrism and authoritarianism in their study. See *THE AUTHORITARIAN PERSONALITY*, *supra* note 78, at 193-94, 353-73. See generally G. ALLPORT, *supra* note 82.

86. See Henderson, *Whose Nature?*, *supra* note 25.

87. For example, several studies have found a correlation between authoritarian attitudes and support for capital punishment in the United States. See Cowan, Thompson & Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53, 69 (1984) (variables significantly predicting first ballot votes in a simulated jury study were the "Legal Authoritarianism" score and the attitude toward the death penalty; the two attitudes were highly intercorrelated); Thompson, Cowan, Ellsworth & Harrington, *Death Penalty Attitudes and Conviction Proneness*, 8 LAW & HUM. BEHAV. 95, 97 (1984) (summarizing research); H. VIDMAR & P. ELLSWORTH, *PUBLIC OPINION AND THE DEATH PENALTY* 1260-61 & n.78 (1974) (discussing research on the relationship of authoritarianism to intolerance and punitiveness).

88. E. FROMM, *ESCAPE FROM FREEDOM* 180, 186-89 (1969); H. KELMAN & V. HAMILTON, *supra* note 74, at 268, 317, 322.

89. E. FROMM, *MAN FOR HIMSELF* 148-59 (1947); E. FROMM, *supra* note 88, at 163-90; see also McConahay, Mullin & Frederick, *The Uses of Social Science in Trials with Political and Racial Overtones: The Trial of Joan Little*, 41 LAW & CONTEMP. PROBS. 205, 217 (1977) ("The authoritarian is servile and obsequious in a subordinate position, but takes out all of his or her pent-up hostility and frustration upon those perceived to be in violation of the conventional norms of society.").

authoritarian's emphasis on obedience enables her to persecute, torture or oppress others without guilt and perhaps even with pleasure at the behest of the idealized or introjected authority.⁹⁰ Authoritarians have the "[t]endency to be on the lookout for, and to condemn, reject, and punish people who violate conventional values."⁹¹ They reject "the subjective, the imaginative, the tender-minded,"⁹² (meaning the compassionate); the authoritarian view of human nature is negative and suspicious, in keeping with a Hobbesian vision of the world.⁹³

A more recent study suggests that authoritarians may fall into two general categories. Rule authoritarians are those who obey political authority to avoid punishment but are generally alienated from authority; role authoritarians are those who obey out of a sense of obligation and identification with their role in the state.⁹⁴ "Rule orientation represents compliance with power; role orientation, [moral] obligation to obey authority."⁹⁵ The authors found that both orientations to authority correlate with those measures of authoritarianism that have been devised.⁹⁶ In terms of citizenship and politics, rule-oriented authoritarians

see it as their task to follow the rules: to respect authorities' demands, do what is required of them, and stay out of trouble. In return, they expect the government to uphold the rules and thus protect their basic interests and ensure societal order. . . . Role-oriented citizens, who identify with the nation and are involved in their roles within it, have a higher set of expectations. They want to be and to perceive themselves as good citizens who meet their role obligations by actively supporting the government and faithfully obeying its demands. [T]hey expect the government to uphold the integrity of their roles by ensuring high status for the nation They support policies that contribute to enhancing their sense of status⁹⁷

To the extent that they have a higher status and "tend to be caught up in the workings of the authority structure,"⁹⁸ the role-oriented authoritarians can be quite supportive of and active in authoritarian oppression of others.⁹⁹ Thus it might be that role-oriented authoritarians, because they so often hold positions of power or authority themselves, should be of greatest concern, because they are also likely to be both active and efficacious in

90. THE AUTHORITARIAN PERSONALITY, *supra* note 78, at 157, 361; E. FROMM, *supra* note 88, at 186-88.

91. THE AUTHORITARIAN PERSONALITY, *supra* note 78, at 157.

92. *Id.* at 157.

93. *Id.* at 148.

94. H. KELMAN & V. HAMILTON, *supra* note 74, at 317.

95. *Id.* at 291.

96. *Id.* at 278-79.

97. *Id.* at 268.

98. *Id.* at 272.

99. *Id.* at 318.

perpetuating oppression, subordination and punishment of despised groups. Rule-oriented authoritarians are more compliant: "They do what is necessary and no more"¹⁰⁰ and, although they obviously will cooperate with authoritarian oppression, they may be less likely to initiate it.

In summary, then, the authoritarian individual is preoccupied with hierarchy, power and obedience. Authoritarians are likely to be rigid, inflexible, ethnocentric and punitive. Intolerance and distrust of anything different and of human nature generally combine to capture a *particular* cluster of orientations to authority and rules. In contrast, the anti-authoritarian tends to be economically and socially egalitarian, trusting of others, tolerant, flexible, empathic, non-stereotypical in thought, and ready to take moral responsibility for choices and actions.¹⁰¹

Authoritarian political systems are characterized by "repression, intolerance, [and] encroachment on the private rights and freedoms of citizens."¹⁰² Authoritarian governments take various forms and use various mechanisms to assure state hegemony in society, with greater or lesser degrees of success. Although such governments may depend on "centralized executive control and coercion"¹⁰³ and the need for command and obedience, they do not necessarily deny "constitutional authority, the Rule of Law and functional representation."¹⁰⁴ Rather, the modern authoritarian state simply makes order and stability, and thus obedience, its "absolute priority."¹⁰⁵ Political authoritarianism rejects strong or pluralistic forms of democracy, as well as liberalism and democratic socialism, but it is not inconsistent with a token form of democracy. To maintain an authoritarian regime, the leaders must have mass support of and agreement with the system, because the state cannot be maintained solely by coercive force at all times.¹⁰⁶ Competing authorities must be co-opted or disabled, and power must be concentrated in the state; therefore, authoritarian governments seek to dominate "by arresting, subverting, or destroying autonomous individual, collective, and institutional behavior."¹⁰⁷ Further, and related to the authoritarian personality, authoritarian governments arise from "radical nationalism; antiliberalism; antiparlamentarism; an antibourgeois ethos; and anti-Semitism and racism."¹⁰⁸

100. *Id.* at 273.

101. THE AUTHORITARIAN PERSONALITY, *supra* note 78, at 475; H. KELMAN & V. HAMILTON, *supra* note 74, at 261-306.

102. A. PERLMUTTER, *supra* note 18, at 7-8.

103. *Id.* at 24.

104. *Id.* at 25.

105. *Id.*

106. Mass support or popular support may be coerced or courted, but modern authoritarian governments need and rely on general support or acquiescence in order to consolidate their power. *See id.*, *passim*.

107. *Id.* at 25.

108. *Id.* at 78.

The connection between the development of authoritarian government and authoritarian personality, while not proven, is at least descriptively useful: "[a]uthoritarianism is an orientation that is both cultural and structural."¹⁰⁹ If a culture reproduces authoritarian attitudes, and its citizens are raised to be authoritarians, there is little reason to believe that a regime that is oppressive and intolerant cannot exist under the Rule of Law.

The above discussion of the authoritarian personality and the authoritarian political state captures the paradigm of the authoritarian. Not every authoritarian person or state necessarily has all of the traits associated with the descriptions; persons with authoritarian personality characteristics can be quite kind towards their friends and family or reference group, for example, and authoritarian governments may tolerate some deviance, some free speech, and so on. But recurring themes in all manifestations of authoritarianism are an overriding concern with obedience to authority, its directives and rules; an emphasis on order, predictability and stability; and a punitive and suspicious attitude toward others. Historically and presently, there appears to be some relationship between authoritarian government and personality on the one hand, and racism and anti-semitism on the other. There is some indication as well that authoritarian governments and persons insist on the maintenance of patriarchy and male dominance.¹¹⁰

The authoritarian attitude is learned and culturally defined, not innate. Learned cultural attitudes toward authority affect attitudes toward one of our most powerful primary references for authority, law. In fact, oppressive, or substantive, authoritarianism is probably meant by many *legal* scholars when they refer to the authoritarian or to authoritarianism in their writings.¹¹¹ The orientation of a person or culture to the authority of law can be as authoritarian as an orientation to military authority, parental authority or religious authority, with equally good or bad results. The next section discusses the implications that the authoritarian attitude holds for law.

C. Authoritarianism and Law

It might be that law and formal authoritarianism are always closely linked and that much of legal thinking is conducive to authoritarianism. Formal or substantive authoritarianism may be completely compatible with law because of law's concern with rules, rule-following, hierarchies of authority,

109. *Id.* at 170.

110. *Id.* at 85-88; THE AUTHORITARIAN PERSONALITY, *supra* note 78, at 191-94, 208; G. ALLPORT, *supra* note 82, at 395-408; cf. M. FRENCH, *supra* note 73, at 345-56 (discussing authoritarianism's relation to patriarchy).

111. Robert Gordon's article comparing the treatment of speech issues in the United States and Great Britain is a good example of the use of the term in the sense described here. Gordon, *Disorder*, *supra* note 8; see also Michelman, *Law's Republic*, *supra* note 8.

and its recourse to coercion to ensure obedience. Further, recurrent political and scholarly concerns with obedience to law and the power of legal actors to decide upon or to legislate punishments can quickly reinforce law's relationship to authoritarianism. Finally, law and legality may be sources of authority that are always at risk of becoming authoritarian in the substantive sense, because law is interconnected with state and private forms of power.

It should not be considered bizarre at this point to note that law and politics are related or that law is a particular form of political practice, but I do not intend to defend that proposition here.¹¹² It should, however, be obvious to legal scholars that law governs allocations of power among persons and institutions, and power is the subject of politics.¹¹³ The proximity of law to state power and the invocation of the state's coercive mechanisms, even in the so-called private law fields, are enough to support the claim that law and *state* power are closely related. Law is also political in that it helps to determine allocations of *social* power.¹¹⁴ Nevertheless, some scholars resist the notion that authoritarianism and legal thinking are related. Scholars have made arguments about law's inconsistency with authoritarianism and also about the ability of the Rule of Law to protect us from authoritarianism. Yet, neither set of arguments is entirely persuasive.

Despite our cultural assumption that the Rule of Law automatically prevents tyranny and oppression—the bicentennial celebration of the Constitution was notably silent about the fact that the original document legitimated the enslavement of an entire race of people¹¹⁵—this section argues that there is nothing intrinsic to the Rule of Law that prevents authoritarianism. Indeed, there is a paradox present in the understanding of the Rule of Law in this culture, including the legal culture. On the one hand, the Rule of Law is invoked as a guaranty against tyranny. On the other hand, it is invoked to require unquestioning obedience to law, no matter what its content. Both of these claims emphasize process although, under some views, the Rule of Law embodies the substantive values of rights, liberties and liberal democracy. Another tension identified by Margaret Radin exists in legal scholarship between what she terms “instrumental” views and

112. See Spann, *Pure Politics*, 88 MICH. L. REV. 1971 (1990); Michelman, *Bringing the Law to Life: A Plea for Disenchantment*, 74 CORNELL L. REV. 256 (1989) [hereinafter Michelman, *A Plea*]; West, *Constitutionalism*, *supra* note 3.

113. See Michelman, *Law's Republic*, *supra* note 8; Michelman, *A Plea*, *supra* note 112.

114. See Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 309-15 (1989); West, *Constitutionalism*, *supra* note 3. See generally Michelman, *A Plea*, *supra* note 112; Schlag, *Images of the Political: The Normative and the Epistemic* (paper presented at the Dec. 9, 1989 Conference on Constitutional Law and Theory in a Conservative Era) (unpublished manuscript on file with the *Indiana Law Journal*).

115. See Marshall, *Commentary: Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).

"substantive" views of the Rule of Law. This tension reflects the paradox as well: "The instrumental conception [of the Rule of Law] is a model of government by rules to achieve the government's ends, whatever they may be. The substantive conception is a model of government by rules to achieve the goals of the social contract: liberty and justice."¹¹⁶

For many legal scholars, as well as political actors, the privileged understanding of the Rule of Law and its virtues¹¹⁷ endows it with the substantive characteristic of preventing tyranny and oppression.¹¹⁸ As E.P. Thompson wrote in his historical study of the oppressive Black Act in England, the development of the Rule of Law is usually seen as an "unqualified human good."¹¹⁹ Familiar to most are the favorable views of the Rule of Law captured by Thomas Paine's declaration that in America, "the Rule of Law is King"¹²⁰ and the statement that the government of the United States is a government of laws, not men [sic].¹²¹ Although historical development of the idea that law binds the politically powerful and the governors as well as the governed was an unquestionable improvement over the abuses of whimsical and arbitrary tyrants, this fact alone does not ensure that the Rule of Law is the Rule of *good* Law, as Joseph Raz has written.¹²² Even the prime virtue of the Rule of Law, that all are bound by it, does not dictate the *content* of the law.

116. Radin, *Reconsidering the Rule of Law*, 69 B.U.L. REV. 781, 792 (1989).

117. I want to stress that by observing that our confidence in the ability of the Rule of Law to protect us from authoritarianism is misplaced does not entail *any* claim that the Rule of Law virtues do not have real value or are insignificant. The Rule of Law virtues are important, but they alone do not invariably protect against oppression. In criticizing aspects of legality's ethic of rule- (or standard-) following, I am *not* claiming that all rules are bad or that rule adherence is necessarily bad. I am asserting that it is mistaken to assume that the Rule of Law is an absolute safeguard against abuses of power and authoritarian oppression. Similarly, *good* rules should be implemented and followed, but just because something is a rule does not automatically mean that it is good or right; and even rules seen as good may have oppressive or dehumanizing effects that we should not and cannot ignore. I argue this point in the context of a rule requiring no distinction on the basis of race and in the context of the first amendment's prohibition on regulation of speech. See Henderson, *Whose Nature?*, *supra* note 25.

118. See, Sen. George Mitchell's statements during Oliver North's testimony in the Iran-Contra hearings: "The rule of law is critical in our society. It's the great equalizer, because in America everybody is equal before the law. However important and noble an objective, and surely democracy abroad is important and is noble, it cannot be achieved at the expense of the rule of law in our country." W. COHEN & G. MITCHELL, *MEN OF ZEAL* 170 (1988). "We have to respect the rule of law until we can change the law itself, because otherwise the rule of law will be reduced to the law of rule." *Id.* at 182. I must admit, I stood up and cheered when Sen. Mitchell spoke those words.

119. E. THOMPSON, *WHIGS AND HUNTERS* 266 (1975). But see Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977) (a critique similar to the one here).

120. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 18 (1984) (quoting T. PAINE, *COMMON SENSE AND OTHER POLITICAL WRITINGS* 32 (N. Adkins ed. 1953)).

121. Michelman, *Law's Republic*, *supra* note 8, at 1499-1500.

122. J. RAZ, *AUTHORITY*, *supra* note 13, at 211, 227.

There is nothing intrinsic to the Rule of Law that entails absolute or even partial protection of individuals or groups from tyranny and oppression, despite our habitual use of the Rule of Law in this sense.¹²³ It is perfectly consistent to have an authoritarian state under the Rule of Law, for although the Rule of Law establishes that "government shall be ruled by the law and subject to it," the form of government under law may be a dictator, an oligarchy or a democracy.¹²⁴ For example, South Africa is an authoritarian state operating under Rule of Law principles, but it cannot be termed a free society even though it is a democracy for the white minority and has a written constitution.¹²⁵ Similarly, the government of the United States has tyrannized whole populations, including African-Americans, Native Americans and Japanese Americans, under the Rule of Law.

Further, the Rule of Law has another authoritarian aspect: the Rule of Law requires obedience to authorities constituted by law and signifies the state's power of social control. Although Spiro Agnew and Edwin Meese might be caricatures of this meaning, their (at times exaggerated) "law and order" rhetoric hardly diminishes its force, even among legal scholars. As Joseph Vining has asserted, law depends on obedience: "Any theory [of law], indeed any conception of system in human affairs, contains an unstated and usually unexamined assumption that people will follow the law. If people don't follow the law, they could be required to."¹²⁶ And as Robert Cover so eloquently reminded us, the agents and institutions of the law have the power to compel obedience by force if it is not forthcoming and to punish disobedience.¹²⁷ Finally, as Margaret Radin has noted, the Rule of Law assumes that "rules are supposed to *rule*"¹²⁸ no matter what their moral content. Thus, the Rule of Law may be malicious or benign, and laws and rules may be harsh and punitive or humanitarian.

For one dedicated to law, it is difficult to appreciate that law often facilitates the abuse of power and is both directly and indirectly implicated in human suffering: the Hart-Fuller debate about whether Nazi Germany

123. *Id.* at 210, 220-21.

124. *Id.* at 212.

125. See, e.g., Kentridge, *The Pathology of a Legal System: Criminal Justice in South Africa*, 128 U. PA. L. REV. 603, 604-06 (1980); Potts, *Criminal Liability, Public Policy, and the Principle of Legality in the Republic of South Africa*, 73 J. CRIM. L. & CRIMINOLOGY 1061 (1982).

126. J. VINING, *supra* note 14, at 156.

127. Cover, *Violence*, *supra* note 12; see also Luban, *supra* note 8, at 2176-86 (discussing the authoritarian nature of the Supreme Court's decision in *Walker v. City of Birmingham*, 388 U.S. 307 (1967)); Forbath, *supra* note 11 (resort to use of federal and state force to enforce injunctions against the labor movement); Apel, *Custodial Parents, Child Sexual Abuse, and the Legal System: Beyond Contempt*, 38 AM. U.L. REV. 491, 491-94 (1989) (discussing the jailing of a mother for contempt of court when she refused to disclose the whereabouts of her child in order to prevent court-ordered visitation rights of the child's father).

128. Radin, *supra* note 116, at 809 (emphasis in original).

did or did not have law—a debate that has continued in various forms¹²⁹—might reflect the legal scholar's wish to deny law's complicity with evil.¹³⁰ Hart had argued that the natural law argument that law must meet the "minimum requirements of morality"¹³¹ or not be law at all was mistaken: to conflate what is and what ought to be "will serve . . . only to conceal the facts."¹³² The problem of Nazi Germany was not that law was invalid as "contravening the fundamental principles of morality," but that for some reason, the separation of law and morals "acquired a sinister character in Germany."¹³³ Fuller responded that law must have an inner morality to be law at all, claiming that Nazi Germany's laws violated that inner morality by violating the Rule of Law virtues of nonretroactivity, publicity and disregard of the duly promulgated legal texts that were in place, and that therefore Germany had no law during the Nazi regime.¹³⁴ In defense of the Rule of Law's virtue, Fuller wrote:

To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system. When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints imposed by the pretence of legality . . . it is not hard for me, at least, to deny to it the name of law.¹³⁵

Füller was correct in stating that Rule of Law virtues *do* exclude some methods of using law to realize authoritarian goals: requiring that government and its officials be bound by the law, requiring that laws be applied equally and forbidding the use of secret or retroactive laws can diminish abuse.¹³⁶ Yet, because Rule of Law virtues are not inconsistent with evil law, these procedural goods under the Rule of Law are a necessary but

129. See R. DWORKIN, *LAW'S EMPIRE* 101-08 (1986) (denying issue has any relevance); Finnis, *On Reason and Authority in Law's Empire*, 6 *LAW & PHIL.* 357, 368-70 (1987). Richard Posner makes a similar point in his recent book. R. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 229-39 (1990) [hereinafter R. POSNER, *JURISPRUDENCE*].

130. Thus, Ronald Dworkin never satisfactorily answered how Judge Siegfried should decide a case in Nazi Germany involving the lack of contract rights for Jewish people under the interpretive theory developed in *Law's Empire*. See R. DWORKIN, *supra* note 129, at 104-08.

131. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 618 (1958).

132. *Id.* at 629.

133. *Id.* at 618.

134. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *HARV. L. REV.* 630, 650-56 (1958).

135. *Id.* at 660.

136. See J. FINNIS, *supra* note 44, at 273-74.

insufficient safeguard against authoritarian regimes.¹³⁷ Authoritarianism is *not* arbitrariness, whim, or caprice—it is unrelenting insistence on obedience and punishment of those who disobey. Thus law, like all forms of normative authority, can easily carry within it the seeds of oppression, intolerance and demands for blind obedience without necessarily violating Rule of Law precepts. Unless one stretches the meaning of the Rule of Law to include the substantive requirements of reciprocity, fairness, and respect for persons on the part of the state,¹³⁸ there is little to prevent authoritarian abuses under law. The Rule of Law may therefore offer little more than symbolic comfort to those concerned with the use of law to oppress and punish human beings.

Joseph Vining is a legal scholar who has been concerned with the relationship of law to authoritarianism. But he has concerned himself primarily with defending common law legal method and practice, as well as the internal morality of law, against what he sees as the growth in the law of bureaucratic formalism and diffusion of responsibility. His book entitled *The Authoritative and the Authoritarian*¹³⁹ manifests a general tendency on the part of legal thinkers to use the terms authoritarian or authoritarianism as a contrast to what law properly is. Thus, Vining variously refers to authoritarianism as blind obedience, the tyranny of personal authority, and simple obedience.¹⁴⁰ According to Vining, authoritarianism is the state of affairs that occurs when the Rule of Law is ignored: he uses it to mean governments run by charismatic, man-on-a-white-horse leaders, regimes of pure power and tyranny,¹⁴¹ or government by impersonal bureaucracy.¹⁴² For Vining, authoritarianism signifies, as one reviewer noted, “a world of madness, solitude, detachment, resistance, disillusionment, distrust, overlooking, mockery, indifference, strategy, process, bondage, death, passivity, pain, nature, doubt, enmity, meaninglessness, and power.”¹⁴³ This description of horrors that can arise in authoritarian regimes is *not* authoritarianism.

Further, Vining backs away from some of the implications of authoritarianism for law and legality; he seems to be ambivalent about relinquishing obedience and formal authoritarianism. The authoritative is still that which

137 This is true despite Lon Fuller's confidence that perfection of the Rule of Law virtues, or the internal morality of law, would converge with the good. See L. FULLER, *THE MORALITY OF LAW* 153-86 (1977).

138. *Id.* at 786, 791. Radin refers to these notions as those that are embodied in the “substantive” version of the Rule of Law, which combines the procedural requirements of the “instrumentalist” conception with the achievement of the “goals of the social contract: liberty and justice.” Radin, *supra* note 116, at 792.

139. J. VINING, *supra* note 14.

140. See, e.g., *id.* at 124, 157, 166.

141. *Id.* at 157.

142. *Id.*

143. Miller, *The Glittering Eye of Law*, 84 MICH. L. REV. 880, 881-82 (1986).

commands obedience;¹⁴⁴ perhaps it is his insistence on obedience to proper legal authority that leads him to observe that "there is much of the authoritarian woven into law" and that "a little authoritarianism is a good thing."¹⁴⁵ To the extent that it is not a good thing, Vining appears to assume that the internal methods of legal practice and thought within the common law method will prevent authoritarianism in law.

In contrast to Fuller and Vining, two legal scholars, Robert Cover and Robin West, have made substantial contributions to understanding legal authoritarianism. These two scholars have explored aspects of legal authoritarianism in the greatest depth and consistency across their work, and although each explore only one side of the authoritarian coin, they both have explored the relation of law to oppression and abuse. The work of Robert Cover is concerned with the punitive, oppressive and violent aspects of law; the work of Robin West addresses the problem of uncritical obedience to law and legal authority.

The lack of scholarly acknowledgment, until very recently, of Cover's suggestion that law has too often been a mechanism for state violence and human oppression indicates the difficulty legal scholars have in acknowledging that law can be oppressive as a matter of course, rather than as an occasional exception.¹⁴⁶ Perhaps no other scholar has been more concerned with the violent and punitive nature of law than Cover. His journey began with his study of judicial enforcement of the fugitive slave laws in *Justice Accused*¹⁴⁷ and ended in an assertion that law was not an instrument of the state. He wrote that he was an "anarchist . . . with anarchy understood to mean the absence of rulers, not the absence of law."¹⁴⁸ By this statement, Cover may have meant to reiterate Paine's statement that it is the Rule of Law that is king, but it seems to have rested more on Cover's belief that law is a site of struggle over meaning.¹⁴⁹ For Cover, law was not state power or even an instrument of government, but rather is *any* social understanding of normative authority:¹⁵⁰ "[T]here is a radical dichotomy between the social organization of law as power and the organization of

144. See J. VINING, *supra* note 14, at 123, 185.

145. *Id.* at 148.

146. A striking example can be found in the contributions to the *Yale Law Journal* issue published in memory of Cover. See Essays, 96 YALE L.J. 1727 (1987). But see Forbath, *supra* note 11 (examining court-sanctioned violence in "private" sector against the labor movement prior to the Wagner Act); Luban, *supra* note 8 (discussing the authoritarian action by Supreme Court in *Walker v. City of Birmingham*); Winter, *Transcendental Nonsense, Metaphoric Reasoning and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1223-24 (1989) ("Law is two parts violence and three parts hope.").

147. R. COVER, *JUSTICE ACCUSED* (1975).

148. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U.L. REV. 179, 181 (1985) [hereinafter Cover, *Folktales*].

149. *Id.* at 181; Cover, *Nomos and Narrative*, *supra* note 26, at 9-10.

150. Cover, *Folktales*, *supra* note 148, at 182.

law as meaning."¹⁵¹ Further, "in the domain of legal meaning, it is force and violence that are problematic."¹⁵² Law was the normative and interpretive commitment of a community; it was meaning accompanied by such strong commitment that it could lead to *active* resistance to other interpretations. While pure legal meaning was, for Cover, divorced from power and coercion, judicial violence had to be tested against community commitments.¹⁵³ Because, for Cover, "[a] legal world is built only to the extent that there are commitments that place bodies on the line,"¹⁵⁴ violence might be the only way to assure the dominance of one legal interpretation over another. One need not accept that law is whatever someone is prepared to put her body on the line for to gain an appreciation of Cover's exposure of the punitive and oppressive aspects of the American constitutional system or the authoritarian nature of the judiciary and the state.

Cover argued that the state sought to control law, its means of social control, in part through its "imperfect monopoly over the domain of violence."¹⁵⁵ He asserted that judges invoke and implement state violence by insisting on obedience to their orders and sacrificing "legal meaning to the interest in public order."¹⁵⁶ Judges, according to Cover, most typically applied a "statist" approach to law, denying the efficacy of alternative community interpretations.¹⁵⁷ But legal meanings developed by committed communities were law as much as the meanings developed by the courts. He noted, "the jurisgenerative principle by which legal meaning proliferates . . . never exists in isolation from violence. Interpretation always takes place in the shadow of coercion. Courts, at least the courts of the state, are characteristically 'jurispathic,'"¹⁵⁸ literally killing off alternative legal meanings.¹⁵⁹

Cover also described a kind of "process authoritarianism" by describing the jurisdictional reasons given by judges to "place the violence of administration beyond the reach of 'law.'"¹⁶⁰ He argued that judges promoted substantive authoritarianism through procedure, both by asserting their own power to punish and by deferring to state violence. Judges, by using "jurisdictional excuses to avoid disrupting the orderly deployment of state power and privilege," reinforced authoritarianism.¹⁶¹ In his examination of

151. Cover, *Nomos and Narrative*, *supra* note 26, at 18.

152. *Id.* at 25.

153. Cover, *Folktales*, *supra* note 148, at 191.

154. Cover, *Violence*, *supra* note 12, at 1605.

155. Cover, *Nomos and Narrative*, *supra* note 26, at 52.

156. *Id.* at 55.

157. *Id.* at 54-58, 67.

158. *Id.* at 40.

159. *Id.* at 40, 53.

160. *Id.* at 56.

161. *Id.* at 67.

Supreme Court cases, Cover argued that the Court had adopted what was in fact a substantively authoritarian stance towards its equity jurisdiction in injunction cases, "equity [being] 'strong' when the court is aligned with state violence and 'weak' when the court is a counterweight to that violence."¹⁶² Private resistance—resistance to state law by citizens—was subordinated to a "regime of obedience—of state superiority" and "public order."¹⁶³ Thus the Supreme Court's approval of the punitive use of state violence by a court in *Walker v. City of Birmingham*,¹⁶⁴ which held that citizens had the duty to obey even unconstitutional lower court injunctions, was, for Cover, pure authoritarianism.

The rule of [*Walker*] subordinates the creation of legal meaning to the interest in public order. It is the rule of the judge, the insider, looking out. It speaks to the judge as agent of state violence and employer of that violence against the "private" disorder of movements, communities, unions, parties, "people," "mobs." Even when wrong, the judge is to act and is entitled to be obeyed. The signal *Walker* sends the judge is to be aggressive in confronting private resistance, because his authority will be vindicated .¹⁶⁵

Thus, the Justices were both morally irresponsible and implicated in state violence and statist law.¹⁶⁶ When asked to enjoin the *state* from engaging in violence, as in, for example, the Los Angeles police chokehold case,¹⁶⁷ the Court used "jurisdictional excuses to avoid disrupting the orderly deployment of state power and privilege."¹⁶⁸ Using the reasons of federalism, separation of powers, deference to "majoritarian branches" and, in the case of lower court judges, obedience to hierarchy, Cover argued that the Court's jurisdictional principles "align the interpretive acts of judges with the acts and interests of those who control the means of violence."¹⁶⁹

In *Violence and the Word*,¹⁷⁰ Cover opposed the interpretivist turn in legal scholarship, pointing out that "[i]legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life."¹⁷¹ Legal interpretation, unlike literary interpretation, was political and was "either played out on the field of pain and death or it is something less (or more) than law."¹⁷² Legal interpretation,

162. *Id.* at 56.

163. *Id.* at 55.

164. 388 U.S. 307, 320-21 (1967).

165. Cover, *Nomos and Narrative*, *supra* note 26, at 55; see Luban, *supra* note 8, at 2176-86.

166. Cover, *Nomos and Narrative*, *supra* note 26, at 58.

167. *Los Angeles v. Lyons*, 461 U.S. 95 (1983).

168. Cover, *Nomos and Narrative*, *supra* note 26, at 58.

169. *Id.* at 57.

170. Cover, *Violence*, *supra* note 12.

171. *Id.* at 1601.

172. *Id.* at 1606-07.

as judges engaged in it, was "(1) a practical activity, (2) designed to generate credible threats and actual deeds of violence, (3) in an effective way."¹⁷³ For example, the ideology of punishment justified to the judge and to others the violence of the criminal law.¹⁷⁴ Drawing on Milgram's study of obedience to authority,¹⁷⁵ Cover argued that institutional roles facilitated the imposition of violence.¹⁷⁶ Although Cover did not make the argument, his description of judges bears some resemblance to that of role authoritarians. Consistent with Milgram's observations, Cover argued that when judges interpret the law they shelter themselves from the violent implications of their role as interpreters and they set into motion violence within institutional roles, giving persons permission to inflict pain that insulates them from inhibition.¹⁷⁷ Judges thus identify with and are active in perpetuating state violence; that violence in turn limits the possibility of finding common meaning and "law."¹⁷⁸

While Cover emphasized the punitive and violent nature of law to demonstrate that judicial practices embody substantive authoritarianism, Robin West has focused more on unquestioning submission to authority and legal imperatives in much of her work. Although West generally has used the term authoritarian in a formal sense of unquestioning obedience to rules in the belief that the authority is good, a use similar to that of Arendt,¹⁷⁹ she has not ignored the potential for oppression in the submission to authority. Her criticism of law and economics and of liberal legal theory discusses obedience to authority, but her work criticizing the law and literature movement tends, like Cover's criticism, to focus more on law's potential for violence and oppression. West has argued that all three of these schools of thought have tended to celebrate legal authority and obedience to law without acknowledging the oppression, subjugation and domination such celebrations of law entail.

Submission to power, blind obedience to authority and the resulting immoral consequences of abdicating moral responsibility are concerns throughout West's writing. She has argued that the authoritarian element of law and economics scholarship is captured in its use of consent as a proxy for the good. Thus, her critique of Posner's normative law and economics theory effectively used Kafka's narratives of relationships to authority and to law to demonstrate that consensual transactions fail to serve as meaningful proxies either for autonomy or for an individual's well-

173. *Id.* at 1610.

174. *Id.* at 1608.

175. S. MILGRAM, *supra* note 71.

176. Cover, *Violence*, *supra* note 12, at 1615.

177. *Id.* at 1614-15.

178. *Id.* at 1628-29.

179. Conversation with Robin West (Nov. 25, 1988).

being.¹⁸⁰ Using excerpts from Kafka's stories to provide illustrations of consensual transactions, West argued from a psychodynamic approach that people consent to transactions that not only make them less well off, but also make them objectively miserable. People consent to a number of things that are objectively harmful to them in order to please hierarchical authority (the whipping scene in Kafka's novel *The Trial*),¹⁸¹ because at some level they crave punishment and expiation of guilt,¹⁸² or because they have agreed to and acquiesced in the authority's imperatives.¹⁸³

West posits throughout the article that obedience to authority is something people might crave "because it feels good to be ruled and to be denied"¹⁸⁴ or that obedience is an instinctually "ingrained need."¹⁸⁵ One need not accept her tentative psychodynamic explanations for obedience that does not, at the moment of obeying, originate in fear of authority. Perhaps another of her suggested reasons for obedience is better supported by her arguments: consensual submission to authority becomes a functional way to abdicate moral responsibility and choice. Certainly in a post-modern era when "everything is up for grabs,"¹⁸⁶ deference to authority in order to avoid anxiety and groundlessness, seems to fit both with Kafka's literature and with some of our current legal practice.¹⁸⁷ Submission seldom comes from fear—at least not directly¹⁸⁸—but may be the most functional way to avoid moral choice and responsibility for that choice:

Obedience to legal rules to which we would have consented relieves us of the task of evaluating the morality and prudence of our own actions, a task that would be time-consuming and perhaps beyond our powers. If we want to lead moral lives, both for the sake of virtue and for the sake of others, the best way to do so may be simply to obey. Our tendency to legitimate lawful authority may have good or evil consequences, depending upon the moral value of the legal system to which we have submitted and the moral quality of the relationship between state and citizen that our consent nurtures.¹⁸⁹

Picking up on the theme of abdication of moral responsibility in a piece on authoritarian constitutional interpretation, West has argued that we have

180. West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985) [hereinafter West, *Authority*].

181. *Id.* at 395-96.

182. *Id.* at 416, 421-22.

183. *Id.* at 416-17.

184. *Id.* at 420 (discussing *The Refusal*).

185. *Id.* at 423.

186. This phrase was introduced into the scholarly lexicon by Arthur Leff. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1249.

187. West, *Authority*, *supra* note 180, at 420.

188. *Id.* at 423; see also I. YALOM, *EXISTENTIAL PSYCHOTHERAPY* 261 (1980) (individuals will embrace authority to avoid responsibility).

189. West, *Authority*, *supra* note 180, at 424 (footnote omitted).

delegated our moral choices to courts, which in turn defer to the authority of the constitutional text and obey the text rather than confront the moral dimension of the problem.¹⁹⁰ An authoritarian judge answers constitutional law questions by reference to the authoritative text and obedience to that text or its framers. We submit ourselves to the text or delegate moral choice to such judges "because we have abandoned the project of our own moral self-governance."¹⁹¹ We mistake the authority of law for the good: legal authority becomes the equivalent of the moral good, and the question we ask becomes "what does the legally authoritative text tell us to do?" West argues that in the process, the question of the good or evil of a constitutional practice, rule or provision is lost. By asserting that the authoritarian orientation is "amoral"¹⁹² or "agnostic"¹⁹³ as to value, West has overlooked the fact that the authoritative text may be perceived as containing the morally good command, however. Indeed, the authoritarian may have a strong moral attachment to the authority of the text and its rightness or goodness.¹⁹⁴

In a piece on what she terms liberal legal theory, West explores the belief that the Rule of Law, as embodied in the Constitution, is moral.¹⁹⁵ She argues that liberal legalism posits obedience to the totems of the Rule of Law and the Constitution as necessary brakes on human aggression. For liberal legal scholars as diverse as Laurence Tribe and Charles Fried, then, the only solution to state power is obedience to true law; true law is the moral solution to human aggression and therefore deserves unquestioning acceptance and obedience.¹⁹⁶ Thus, for "American legal liberalism the only moral solution to the problem of power is obedience to law . . . [T]he law that does and should command our obedience is both autonomous from the political process and rich in moral content."¹⁹⁷ True law is a rich blend of rights and principles that protects individuals from state power and the evil desires of others. Judges, accordingly, must be obedient to the disembodied law. "Judges *can* obey the command of the totem because morally they *must* obey," for otherwise "the community [would] face the unrestrained,

190. West, *Authoritarian Impulse*, *supra* note 8; see also Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CALIF. L. REV. 521 (1989) (similar point about bracketing of moral discourse in *Roe v. Wade*, 410 U.S. 113 (1973), and *Bowers v. Hardwick*, 478 U.S. 186 (1986), but does not reach conclusion that authoritarian).

191. West, *Authoritarian Impulse*, *supra* note 8, at 538; cf. Michelman, *Law's Republic*, *supra* note 8, at 1502-15 (describing republican tradition of self-governance versus pluralism).

192. West, *Authoritarian Impulse*, *supra* note 8, at 539.

193. *Id.* at 541.

194. See *supra* notes 70-71 and accompanying text.

195. West, *Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law*, 134 U. PA. L. REV. 817 (1986).

196. *Id.* at 838-40.

197. *Id.* at 838.

liberated power of individuals, which is something to fear, not something to celebrate."¹⁹⁸

Like Cover, West observes that the interpretivist turn celebrates literary methods, interpretive communities and internal examination of legal texts at the expense of recognizing that law, unlike literature, inflicts violence and pain on real people.¹⁹⁹ Rather than being merely the use of reason to interpret a pre-existing legal text, "adjudication, including constitutional adjudication, is the creation of law backed by force . . . Adjudication is an act of power, not of cognition."²⁰⁰ Objectivists such as Stanley Fish and Ronald Dworkin, who argue that disciplining rules of interpretation or the community's moral codes supplement the legal text, make a mistake similar to that of conservative natural law theorists. Both create the condition that the law that *is* becomes the law that *ought to be*, possibly creating the conditions for authoritarianism.²⁰¹ West uses the novel *Pudd'nhead Wilson* to illustrate why objective interpretation—obedience to an objective, authoritative legal text—does not lead to moral results. That is, use of the community's conventional morality, as embodied in legal texts, as a reference in interpreting those texts can lead to oppressive results.²⁰² West uses *The Floating Opera* to argue that subjective interpretation—the denial that there is any real basis for moral criticism of law or of adjudication—creates the nihilism of power and no way in which to combat it.²⁰³

West also criticizes some of the law and literature work of James Boyd White by emphasizing the repressive or punitive result of reducing communities and law to text. If texts are central "to the form and substance of a community's moral and social life," and "[w]e ought to think and read legal texts, not as political or positive commands, but as texts which both constitute and constrain the community's moral commitments,"²⁰⁴ we lose the ability to criticize legal or "shared constitutive texts" independent of the texts themselves. The shared text, by nature, leads to exclusion and dehumanization of those not included in the textual community as readers, writers or critics.²⁰⁵ The discourse of power excludes those it injures, or makes it impossible to communicate that injury to the members of the relevant textual community. If this is so, then constitutive texts can both

198. *Id.* at 877.

199. West, *Adjudication is Not Interpretation: Some Reservations About the Law-As-Literature Movement*, 54 TENN. L. REV. 203 (1987) [hereinafter West, *Adjudication*].

200. *Id.* at 205.

201. "Historically, the consequence of the blending of the law and the moral basis from which we criticize law has almost always been a politically regressive insistence upon the morality of existing power . . . " *Id.* at 208-09.

202. *Id.* at 219-44.

203. *Id.* at 258-76.

204. West, *Communities, Texts, and Law: Reflections on the Law and Literature Movement*, 1 YALE J. L. & HUMANITIES 129, 131 (1988).

205. *Id.* at 140-41.

justify oppression of those who are different and blind members of the community to that oppression. And because the punitive, repressive side of authoritarianism flourishes in an atmosphere of objectification of persons and prejudice, it would seem that the argument from constitutive texts also creates a ground for authoritarianism.

From the work of Cover and West, together with the scholarly work on authoritarianism generally, it is possible to devise a tentative description of the substantively authoritarian problem in law. Descriptively, the authoritarian orientation to law stresses obedience to positive law and rules and takes a punitive or moralistic stance against deviance. It is suspicious both of human nature and of the power of legal actors. The authoritarian emphasizes the need for positive law as a guarantor of predictability, stability and order, regardless of the oppressive consequences. This orientation fears change and frequently insists that law is grounded in traditions and the past—oppressive uses of law are justified because the possibility of alternatives is frightening.²⁰⁶ The intolerance of ambiguity that characterizes authoritarians is part of this orientation to law. This is not a jurisprudence of formal authoritarianism, that is, of deferential or even blind obedience to accepted traditional authority alone. Instead, it is a jurisprudence of dominance and punishment towards those who are different or deviant.

II. AUTHORITARIAN LEGAL THOUGHT AND DECISIONMAKING

This section discusses legal scholarship about judging and law that creates the conditions for formal authoritarianism, which in turn facilitates substantively authoritarian legal and judicial practices. It then examines some recent Supreme Court decisions that appear to demonstrate the linkage of these ways of thinking about law and judging to substantive authoritarianism. While this section makes no claim that there is a direct, causal connection between the work discussed and the Court's jurisprudence, a claim that would be impossible to prove, this section does emphasize the striking similarities in the reasoning and justifications used by both groups.

Nowhere is an authoritarian orientation more striking than in the theories about proper judicial decisionmaking currently propounded by many scholars and in the actual practice of these theories and arguments by the current Supreme Court. The scholarly approaches to constitutional law and judicial decisionmaking that are authoritarian reflect preoccupations with judicial power, the legitimacy of judicial review and the status of the federal judiciary as unelected and unaccountable to the people. These arguments are hardly original or new; however, this scholarship *also* projects onto judges particular negative traits, and when its other concerns are examined, appears to

206. See Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 24-33 (1986) [hereinafter Michelman, *Traces*].

be distinguishable from other American constitutional scholarship. This scholarship emphasizes law as a mechanism of social control through its privileging of predictability, stability and control. There is a portrayal of the judiciary as tyrannical and powerful, unresponsive and always willing to thwart "the people's" will. Another earmark of this scholarship is its emphasis on obedience to positive law narrowly conceived: there is usually one law or legal authority, one formative intent or text to be obeyed, rather than alternative sources of law, authority and meaning.

The arguments of authoritarian jurisprudence do not break neatly into categories, although they can be separated to some extent. The model of authoritarian jurisprudence as applied to judges proceeds in several dimensions, or perhaps follows a continuum of time from the decisionmaking process to the enforcement of the decision. Authoritarian process arguments oppose judicial discretion of any type and insist on judicial obedience to rules and power. These arguments deny that the judge should ever reach an independent moral judgment. More significant to the issue of authoritarianism is the steadfast refusal of those making obedience arguments to acknowledge that judges frequently can refer to and choose among multiple legal authorities or doctrines rather than having only one narrowly defined positive law rule to obey. Arguments for authoritarian results emphasize the notion that law is an instrument of power and control, and appear to be grounded in a bleak and distrustful vision of human nature.

A weak, formal legal authoritarianism may be endemic to legality, but authoritarianism in a substantive sense not only emphasizes obedience to law but also manifests distrust of judges, insistence on an absolute severance between concern for positive law and justice, and a singular lack of concern with the continuing oppression of individuals. In examining the authoritarian dynamic and effects of representative scholars, this section uses the work of particular authors and their articles as illustrations.²⁰⁷ This section focuses on the particular visions of law and judging portrayed in the writings and demonstrates how these writings manifest an endorsement of what is, ultimately, substantively authoritarian judging. This section first examines formally authoritarian arguments and their link to substantive authoritarianism. It then examines more explicit substantively authoritarian arguments.

A. Formally Authoritarian Legal Scholarship

The works of Raoul Berger and Robert Bork have often been criticized for their constitutional fundamentalism, their insistence on adherence to the

207. While the arguments of these scholars are not great departures from the norms of legal scholarship, they are distinguishable from the work of other legal scholars who have been labelled authoritarian by commentators. See, e.g., West, *Adjudication*, *supra* note 199, at 210-19 (Robin West's characterization of Owen Fiss' invocation of an interpretive community as authoritarian); Michelman, *Law's Republic*, *supra* note 8, at 1519-24 (Frank Michelman's characterization of Bruce Ackerman's work as authoritarian).

original intent of the framers, and their similar insistence on obedience to the words and text of the Constitution.²⁰⁸ Although their scholarship is undoubtedly the best known and most influential, there has been a burgeoning number of articles making similar claims since the end of the 1970s.

Richard Kay, for example, is another representative of this line of scholarship, and his arguments, while extreme, reveal its dynamic. Against scholarly objections to the rigidity and antiquity of originalism, Kay posits affirmation of "the values inherent in 'inflexibility'—the values of stability and clarity."²⁰⁹ The moral content of the authoritative command and the moral nature of the authority are of less concern than preservation of the authority itself. Because the Constitution and the framers provided "an answer to the validity of every new thing" and omitted nothing,²¹⁰ the federal government and the judiciary cannot legitimately do more than the Constitution, so defined, permits. The source of all state authority is the Constitution and the framers, and anything the government does that is not "traceable to the enumerated institutions and powers is an exercise of power . . . contrary to the Constitution."²¹¹ The framers meant to bind future generations,²¹² and the framers' fear of judicial independence and power means that they intended that judges not have "any role as formulators of some values apart from positive law."²¹³ Obedience to positive law is more important than concern with justice or with freedom from law that oppresses. In a statement that reveals how closely linked formally and substantively authoritarian thinking are, Kay argues that "stability and assurance may be more important than the actual *content* of the substantive rules applied."²¹⁴ And predictability, control and certainty justify demanding that judges obey the positive law of the formative moment, in spite of the goodness or badness of those laws.²¹⁵ It is ironic that Kay has argued that judicial deviation from the original intent of the framers would threaten us with totalitarianism,²¹⁶ given that much of the perceived deviation from originalism in the Warren and Burger eras *limited* government and private power.

Kay's argument is not particularly subtle. The most subtle of the formally authoritarian constitutional scholars may be Henry Monaghan, who has

208. See Michelman, *Law's Republic*, *supra* note 8, at 1496 n.11; Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990).

209. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW U.L. REV. 226, 289 (1988).

210. *Id.* at 257. This is a truly God-like vision of the constitutional moment.

211. *Id.* at 256.

212. *Id.* at 281.

213. *Id.* at 283.

214. *Id.* at 290 (emphasis added).

215. *Id.* at 291-92.

216. *Id.* at 290.

shifted ground over time from insisting on originalism, to insisting on obedience, to arguing that, while courts may have to obey precedents that deviate from the original intent, such deviant precedent should never be the ground for future decisions. Rather, future decisions should refer to the original intent or plain textual meaning whenever possible.²¹⁷ Monaghan's apparent objective has been to discredit, under the guise of formal authoritarianism, any liberal/progressive arguments for constitutional interpretation directed at ending oppression, ensuring substantive equality or developing constitutional rights for the historically disempowered. For example, Monaghan explicitly attacks as "perfectionist,"²¹⁸ and hopelessly at odds with the original intent, the constitutional visions of a number of liberal/progressive constitutional scholars, including Paul Brest, Ronald Dworkin, Kenneth Karst, Frank Michelman, Michael Perry, and Laurence Tribe.²¹⁹ According to Monaghan, such advocates of judicial activism²²⁰ would allow nullification of the political process by illegitimate means, that is, the use of substantive judicial review.²²¹

Monaghan, relying heavily on the works of John Hart Ely and Raoul Berger, argues that the *sole* source of legitimacy for judicial review of the outcomes of the political processes—in other words, much of law—is judicial inquiry "into the openness and fairness of the political processes."²²² According to Monaghan, because the other branches of government are the ones with the "authority to *make* law," raising "legitimacy questions for judicial lawmaking,"²²³ the Court has *no* authority to "make" law "when the political organs have spoken."²²⁴ While the Court could interpret statutes with reference to visions of political morality, Monaghan argues that the Constitution prohibits the use of such "indeterminate" criteria as "a strong

217. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 772-73 (1988) [hereinafter Monaghan, *Stare Decisis*]. Monaghan argues that any doctrinal inconsistency between *Bowers v. Hardwick* and *Roe v. Wade* can be explained in terms of original understanding: "Accordingly, even if *Roe's* rule is preserved, the question whether its reasoning should be extended or is rightly halted in the name of the original understanding presents a quite different issue." *Id.* at 759.

218. Perfectionists, according to Monaghan, consider the Constitution to be perfect in one central respect: *properly construed, the constitution guarantees against the political order most equality and autonomy values which the commentators think a twentieth century Western liberal democratic government ought to guarantee to its citizens.* [A] necessary link is asserted between the constitution and currently "valid" notions of rights, equality and distributive justice.

Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 358 (1981) (emphasis in original) [hereinafter Monaghan, *Perfect*].

219. *Id.* at 353-60.

220. *Id.* at 396.

221. *Id.* at 353-55.

222. *Id.* at 356.

223. *Id.* at 370 (emphasis added).

224. *Id.*

set of judicially enforceable autonomy . . . claims" to invalidate legislation or "to control the contrary determinations of the political process."²²⁵ Arguments for judicial reference to non-textual sources of rights and principles based on common law models of decisionmaking, in order to promote humane values,²²⁶ fail to treat the Constitution as binding authority or as a positive command. Rejecting what he terms a "common law" approach to constitutional adjudication because it smuggles in "nontextually-grounded principles of political morality,"²²⁷ Monaghan states that, because the Constitution is the master rule of recognition, constitutional legal reasoning should not concern itself with principles, justice, fairness, equality, or political morality. The policy choices of the framers must not be overridden by the Supreme Court.²²⁸ For Monaghan, the "authoritative status" of the written Constitution is *the* foundation for *law*. The Constitution should be treated as a "super statute," a compact "whose contents could not be altered by any organ of government."²²⁹ The framers' choices may only be altered by the amendment process and never through adjudication.²³⁰ The authoritative status of the Constitution "is a legitimate matter of debate for political theorists interested in the nature of political obligation," but the authoritative status of the Constitution's commands cannot be questioned or tampered with by *legal* actors.²³¹ With regard to *legal* reasoning, which by his definition is neither political nor moral reasoning, the text is binding.²³²

Thus far, this summary of Monaghan's argument has focused on the formally authoritarian component. On the one hand, the argument emphasizes obedience to revered, long-dead authorities and the founding moment, in the ancient Roman authoritarian sense identified by Arendt.²³³ On the other hand, judges must obey the commands of those branches of government that the Constitution made sovereign and cannot take it upon themselves to make law. Judges have no authority independent of positive law, dictated by other sources. This is positivism with a vengeance: The "is" and the "ought" are not only separated by definition, but the ought as a reference, interpretive device, or tool of critique and improvement would disappear entirely from constitutional law.

A substantively authoritarian spin manifests itself in Monaghan's particular examples of illegitimate Court decisions and illegitimate constitutional theories. The equal protection clause stands only for the extension of "the

225. *Id.*

226. *Id.* at 391.

227. *Id.*

228. *Id.* at 374.

229. *Id.* at 392.

230. *Id.* at 376.

231. *Id.* at 383.

232. *Id.* at 84.

233. See *supra* notes 59-66, 69 and accompanying text.

principle of *political* equality to blacks."²³⁴ This political equality is a "thin" one, having nothing to do with the liberal/progressive concern with access to the political process and substantive equality or even the Warren Court's decision in *Brown v. Board of Education*.²³⁵ Indeed, under Monaghan's theory, *Brown* is an illegitimate decision, because it was out of line with the original intent of the drafters of the fourteenth amendment.²³⁶ Although the Constitution permits, but does not require, the "political branches" to enact laws expanding individual rights, substantive equality and autonomy, courts are absolutely forbidden to do so.²³⁷ The ninth and fourteenth amendment privileges and immunities clauses are meaningless, and therefore do not permit judges to create nontextual rights of social equality, privacy and autonomy under the Constitution. Even if the clauses were not superfluous, Monaghan argues that "*a showing is necessary that this was not . . . to be a list [of rights] closed as of 1791 or 1868.*"²³⁸ Not only are courts prohibited from expanding rights, they also must obey laws promulgated by the other branches that restrict or abolish rights and liberties that are not absolutely traceable to the Constitution. Monaghan's absolute lack of concern with the contemporary goodness or rightness of the framers' commands, or with principled ways judges could combat violence and oppression in the name of law, forces judges to inflict the violence the sovereign demands. In fact, the theory would require the reversal of a number of progressive and liberatory Supreme Court decisions which combatted oppression and domination, including the incorporation of portions of the Bill of Rights.²³⁹

Monaghan has abandoned originalism to some extent; history presented him and other originalists with the reality of the radical deviation from the original intent by the other branches of government. The tremendous growth of and change in presidential and executive branch power cannot be reconciled with the framers' intent. For example, the President has laid claim over the years to plenary power over national security,²⁴⁰ foreign relations

234. Monaghan, *Perfect*, *supra* note 218, at 364 (emphasis added).

235. 347 U.S. 483 (1954); see Monaghan, *Perfect*, *supra* note 218, at 372-73 (criticizing Michelman's argument for providing means of effective political participation to those historically and presently disenfranchised by protecting these groups from systematic bias).

236. Monaghan, *Perfect*, *supra* note 218, at 364-66, 373, 376; see also Monaghan, *Stare Decisus*, *supra* note 217, at 728.

237. Monaghan, *Perfect*, *supra* note 218, at 396.

238. *Id.* at 367 (emphasis in original).

239. See Monaghan, *Stare Decisus*, *supra* note 217, at 732, for an admission of this.

240. Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1259-61 (1988); see also Kellman, *Judicial Abduction of Military Tort Accountability: But Who is to Guard the Guards Themselves?*, 1989 DUKE L.J. 1597.

and war powers,²⁴¹ and cabinet, administrative and judicial appointments.²⁴² When the Senate has challenged the presidential appointment power pursuant to its constitutional obligation to approve certain presidential appointments, as in the case of the nominations of John Tower and Robert Bork, it encounters shocked criticism.²⁴³ Congressional authority to investigate the Iran-Contra affair was sharply called into question as an illegitimate challenge to presidential authority.²⁴⁴ The popularity of a president that gives him the political strength to contravene the opinion of a majority on various substantive issues, as was true in the Reagan years,²⁴⁵ does not legitimate such plenary authority if one is making an argument of deference to majority will as the ground for criticizing the Court. Yet Monaghan is sanguine about the growth of the "Imperial Presidency."²⁴⁶ Continuing his attack on judicial deviation from the command of the text and framers, Monaghan simply assumes that presidential power is almost plenary, legitimate, and so concentrated and effective that even the theoretically offsetting power of Congress is "no longer descriptively accurate."²⁴⁷ In fact, he once argued *against* originalism and plain textual meaning in interpreting presidential power with regard to war powers,²⁴⁸ indicating an authoritarian agenda aimed specifically at courts. Rather than being troubled by the question of the constitutional legitimacy of the growth in presidential power, Monaghan appears to be concerned only to attack the legitimacy of an ostensible increase in *judicial* power.

Monaghan's recent work continues to argue that judicial review is illegitimate and that the Court has repeatedly exceeded its authority.²⁴⁹ Using *Roe v. Wade*²⁵⁰ as his stalking horse, he deplores judicial activism.²⁵¹

241. Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379 (1988); see Koh, *supra* note 240; Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672 (1972).

242. For an article referring to Bork's failed appointment as "a tragedy," and criticizing the Senate for violating the President's "right" to make judicial appointments, see Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988); see also Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185 (1988). See generally, *Symposium: The Bork Nomination*, 9 CARDOZO L. REV. (1987).

243. See Ackerman, *supra* note 242.

244. See W. COHEN & G. MITCHELL, *supra* note 118, at 289-94.

245. Reagan's popularity remained extremely high although many took issue with his substantive policies. See Roberts, *Reagan's Final Rating is Best of Any President Since 40's*, N.Y. Times, Jan. 8, 1989, at A1, col. 4.

246. The term originated with Arthur Schlesinger's book of the same name. A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* (1973).

247. Monaghan, *Stare Decisis*, *supra* note 217, at 739.

248. Monaghan, *Presidential War-Making*, 50 B.U.L. REV. 19, 19-22 (1970).

249. See Monaghan, *Stare Decisis*, *supra* note 217.

250. 410 U.S. 113 (1973).

251. The article is full of suggestions on how the Court might overrule *Roe*. See Monaghan, *Stare Decisis*, *supra* note 217, at 746-48, 751, 754, 759; see also Monaghan, *Perfect*, *supra* note 218, at 381.

Monaghan argues for confining the Supreme Court within a "conservative" scheme of law.²⁵² Conceding that *Brown* should not be overruled even if it violated original intent,²⁵³ he still wishes to "freeze" henceforth the Court's constitutional decisionmaking powers. Some decisions, such as *Brown* and the reapportionment cases, might not be reversible,²⁵⁴ because although they violate original intent, the values of "consistency, coherence, fairness, equality, predictability and efficiency" may require their retention.²⁵⁵ As to decisions that he claims have gone beyond constitutional text or authority, however, stare decisis can be justified "only to prevent disruption of practices and expectations so settled, or to avoid the revitalization of a public debate so divisive, that departure from the precedent would contribute in some perceptible way to a failure of confidence in the lawfulness of fundamental features of the political order."²⁵⁶ He leaves unexplained how the Court is to determine whether such conditions exist in a given case. Monaghan simply asserts that stare decisis must "operate to keep issues off the constitutional, if not the political agenda, thereby leaving open for debate only less threatening issues."²⁵⁷ This appears to contradict his argument that it is illegitimate for the Court to decide issues of public value or general welfare, but it also suggests a substantively authoritarian vision. As Robert Cover demonstrated, the manipulation of jurisdiction by courts—a method of keeping issues off the constitutional agenda—has been used to perpetuate government oppression. Arguing, as Monaghan does, that the Court is *required* to keep decisive issues off its agenda would make it impossible for the Court to consider cases involving oppression, because it is by definition divisive and disruptive to tell oppressors that they can no longer oppress.

Monaghan justifies authoritarian decisionmaking in yet another way, and this justification appears to lead even more directly to substantively authoritarian uses of law. The principle of stare decisis, for Monaghan, embodies a Rule of Law virtue by requiring the Court to be bound by

252. Although Monaghan states in a footnote that he means "Burkean" conservatism, Monaghan, *Stare Decisis*, *supra* note 217, at 752 n.165, he never explains what he means by that term. For an analysis of Burke and constitutional adjudication, see Wilson, *supra* note 5.

253. His argument in support of upholding *Brown* seems to be historically inaccurate; he writes that the decision was "probably the Supreme Court's only legitimate response to the nation's escalating moral and social turmoil." Monaghan, *Stare Decisis*, *supra* note 217, at 772. But at the time *Brown* was argued and decided, there was no more turmoil than usual: *Brown* itself triggered turmoil, and actions like the Montgomery Bus Boycott arose at the same time as *Brown*, not before. See T. BRANCH, *PARTING THE WATERS* (1988); R. KLUGER, *SIMPLE JUSTICE* (1976); Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

254. Monaghan, *Stare Decisis*, *supra* note 217, at 745.

255. *Id.* at 748.

256. *Id.* at 750.

257. *Id.*

law,²⁵⁸ by which he means pre-existing law.²⁵⁹ The main function of stare decisis appears to legitimate Court decisions in the eyes of the "reasoning classes" and "elites."²⁶⁰ The agenda-limiting function of stare decisis is the means to avoid "radical and even revolutionary attacks on the legal status quo,"²⁶¹ apparently necessary to preserve the interests of the reasoning classes and elites. For the Court to take it upon itself to remove from constitutional debate fundamental constitutional conflicts in the interests of the reasoning classes and perceived stability, however, seems as arrogant and undemocratic as the Court's interpreting the Constitution expansively or progressively.

Combined with an endorsement of plenary presidential power and an argument that the Court's legitimacy is determined by elites, Monaghan's argument would support a substantively authoritarian government in the United States. If the Court need only justify itself and respond to (power) elites, then the Rule of Law embodied in the Constitution need not concern itself with anything other than the concerns of an existing power elite and its interests in stability and predictability. Such thinking would support the capture of the judiciary by ruling elites as a legitimate mechanism of government. And capture of such institutions as the judiciary is a characteristic of authoritarian governments.²⁶²

Another common argument in legal scholarship centers more generally on judicial obedience to rules and texts. While the "ruleness of rules" argument may mask authoritarian tendencies, or even be useful to anti-authoritarian causes,²⁶³ the substantively authoritarian danger lurking within the formally authoritarian nature of rule-boundedness becomes clear in the work of Frederick Schauer. Although Schauer does not consider the framers' intent relevant, he, like Monaghan, would require absolute judicial obedience to the constitutional text. Schauer has similarly argued that a common law method of elaborating constitutional meaning is inapplicable when "the rule is . . . set forth in a fixed canonical form in an authoritative text,"²⁶⁴ such as the Constitution. "In many respects the Constitution acts as a rule, rigidly demanding of decisionmakers that they exclude from consideration

258. *Id.* at 752.

259. *Id.* at 750. Ironically, the argument that divisive issues should be kept off the constitutional agenda by means of stare decisis principles could support a Court refusing to overrule *Roe v. Wade*. See Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105 (1989).

260. Monaghan, *Stare Decisis*, *supra* note 217, at 749.

261. *Id.* at 750 (quoting Powell, *Parchment Matters: A Meditation on the Constitution as Text*, 71 IOWA L. REV. 1427, 1433 (1986)).

262. See A. PERLMUTTER, *supra* note 18, at 179-84.

263. See, e.g., Wilson, *The Morality of Formalism*, 33 UCLA L. REV. 31 (1985).

264. Schauer, *The Constitution as Text and Rule*, 29 WM. & MARY L. REV. 41, 48 (1987) [hereinafter Schauer, *Text and Rule*].

certain potentially morally and politically relevant features of the case before them."²⁶⁵

Schauer's vision of the world appears to be a Hobbesian "war of all against all" that must be controlled through obedience to legal commands. He has recently explicitly relied on the Hobbesian vision to justify his argument that the "rule" of the first amendment is

a principle of distrust, an embodiment of a Hobbesian view of the world. Why would the "slippery slope" and its associated metaphors figure so prominently in free speech discourse were there not some specially close relationship between a theory of free speech and a theory of governmental and judicial distrust?²⁶⁶

For Schauer, rules are good because they provide an almost absolute mechanism of predictability and control, as well as control over untrustworthy judges and other legal actors. Predictability is more important than flexibility; obedience to rules is more important than justice. Rules, and the words and texts that describe them, are usually absolutely determinate in meaning and can and must be obeyed. Reference to normative reasons for rules is not rule-following, and rule-following is what judges must do, because judges must be controlled.

Suspicion of judges runs throughout Schauer's work as a justification for rules as trumps. He has frequently written that while rules may interfere with justice, they may "restrict misguided, incompetent, wicked, power-hungry, or simply mistaken decisionmakers whose own sense of the good might diverge from that of the system they serve,"²⁶⁷ and that although "[i]n attempting to disable wicked, misguided, or simply incompetent decisionmakers from doing wrong, rules also disable wise, well-intentioned, and capable decisionmakers from reaching the optimal results in individual instances,"²⁶⁸ rules are essential as "barriers to the . . . evil and dangerous."²⁶⁹ His arguments for obedience to rules employ scare tactics in a number of places. Do we want Oliver North deciding the meaning of separation of powers? Do we want a recurrence of the *Lochner* Court?²⁷⁰ But as J.M. Balkin has observed, "[i]f we are ruled by law, we are ruled

265. *Id.* at 49.

266. Schauer, *Henry Kalven and the Perils of Particularism*, 56 U. CHI. L. REV. 397, 414 (1989) [hereinafter Schauer, *Kalven*].

267. Schauer, *Formalism*, 97 YALE L.J. 509, 543 (1988) [hereinafter Schauer, *Formalism*].

268. Schauer, *Rules, the Rule of Law and the Constitution*, 6 CONST. COMMENTARY 69, 69 (1989) [hereinafter Schauer, *Rules*].

269. Schauer, *Text and Rule*, *supra* note 264, at 50.

270. To those who question the bindingness of constitutional rules, Schauer asks if we are willing to have the cop on the beat interpret *Miranda* (which she does frequently, whether Schauer thinks we like it or not) or Oliver North interpret separation of powers. Schauer, *Rules*, *supra* note 268, at 79. This scare tactic argument isn't persuasive, and it is extremely rigid and authoritarian in its own right. That is, it denies *anyone* the capacity to interpret a democratic document.

by texts, and if we are ruled by texts, we are ruled by readings of texts."²⁷¹ Those texts can be "misread" or read in such a way as to embody authoritarian precepts if the interpreter is herself authoritarian, or if she has an authoritarian view of law. Thus rules are less of a restraint on the wicked judge than Schauer would have us believe.

The abuse of power through demanding slavish adherence to rules is of little moment to Schauer. Instead, what he terms "particularism"—which variously means unrestrained passion, common-law methods, balancing and reference to different doctrines and rules—is the source of all danger.²⁷² For Schauer, the overriding threat to stability is created by permitting judges "flexibility, adaptability to changing circumstances, empathy, and the other benefits of particularistic adjudication."²⁷³ Much of his argument for formalism and obedience to rules appears to be an authoritarian response to the writings of feminist and humanist scholars who have urged consideration of the contextual, human and painful aspects of a decision.²⁷⁴ Schauer frequently has rhetorical recourse to the parade of horrors to support his claim that we must have rigid rules and avoid particularism.²⁷⁵ "Context" and "sympathy" mean the abandonment of rationality and principled decisionmaking. Particularism would mean that the Nazis would have been denied their first amendment right to march in Skokie, because emotion would have overridden thought. The guilt of the accused would affect the outcome of criminal procedure decisions, which it has in any case, despite Professor Schauer's belief in rules.²⁷⁶ Unprincipled, biased, arbitrary or tyrannical decisionmaking is obviously a concern for all legal scholars, but there is no basis for Schauer's conflation of particularism with morally horrible, repressive results or for his confusion of particularism with out-of-control emotionalism or hysteria. The basis for such conflation appears to be a negative view of human nature, a belief that all emotion is bad and irrational, and an authoritarian rejection of the imaginative and compassionate.²⁷⁷ Empathic and responsible decisions do *not* require abandonment

271. Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911, 938 (1988). Radin makes a related argument about rules: rules and their meanings are mutable, changeable and "embedded" in social practice. See Radin, *supra* note 116, at 807-10, 819.

272. Schauer, *Kalven*, *supra* note 266, at 412-14.

273. See Schauer, *Text and Rule*, *supra* note 264, at 48.

274. He has specifically cited Michelman, *Traces*, *supra* note 206 and Henderson, *Legality*, *supra* note 33, as representatives. *Id.* at 48 n.21; see also Minow, *supra* note 33; K. KARST, *supra* note 33.

275. Schauer, *Kalven*, *supra* note 266, at 397, 407-08, 413-14.

276. See Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 968-74 (1985).

277. Schauer is not alone in his irrationality about emotion and empathy in legal decision-making. See Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989); Yudof, "Tea at the Palaz of Hoon": *The Human Voice in Legal Rules*, 66 TEXAS L. REV. 589 (1988).

of principle, balance or arbitrariness.²⁷⁸

Control is the other authoritarian theme in Schauer's work. Law and rules exist for control of otherwise unrestrained—and dangerous—passion and the terrible uncertainties of existence. Legal institutions should exist as “stabilizers and breaks,” and they are necessary “institutions of restraint.”²⁷⁹ Only absolute obedience to rules and the denial of affectivity in deciding cases protects us from uncertainty and abuse. Schauer argues that categorical thinking, constraint and rule-following are all preferable to responsiveness. Predictability is in itself “desirable,”²⁸⁰ and “suboptimal results” are tolerable in order to provide standardization and maintenance of what he terms the “principle” of stability.²⁸¹ To illustrate the need for certainty, Schauer employs the hypothetical example of a faculty considering the case of a student seeking an excused absence from an examination to attend the funeral of his sister. Because it may be impossible to find a principled rule-category covering requests for excuses in the case of deaths arising in the future, as it is difficult to “distinguish” significant deaths and losses, a rule prohibiting excuses to attend *any* funerals may be justified, even if it is suboptimal.²⁸² Resigned acceptance of suboptimality and the human pain it entails is necessary to preserve the value he places on precedent and rules.

In a recent article, Schauer again argues for emphasizing “predictability, stability, and constraint of decisionmakers commonly associated with decision according to rule” in legal thought.²⁸³ His vision of decision according to rule always assumes that only one rule governs a case. The only alternative is reference to something that is not a rule. His denial of *multiple* applicable rules reflects a simplistically authoritarian view of law and rule-bound decisionmaking. Schauer prefers judicial obedience to narrowly interpreted

278. Unrestrained emotionalism is *not* inevitable and to characterize the scholarship in this way reflects a bias of considerable proportions. See Brennan, *Reason, Passion, and “The Progress of the Law”*, 10 CARDOZO L. REV. 3 (1988); Henderson, *The Dialogue of Heart and Head*, 10 CARDOZO L. REV. 123 (1988); Henderson, *Legality*, *supra* note 33; Minow, *supra* note 33; Minow & Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37 (1988); see also *infra* notes 504-17 and accompanying text.

279. Schauer, *Precedent*, 39 STAN. L. REV. 571, 604-05 (1987).

280. *Id.* at 597.

281. *Id.* at 601.

282. *Id.* at 590. In another bizarre passage, Schauer says that the burden of showing a compelling interest in race-classification cases was inapplicable in *Korematsu v. United States*, 323 U.S. 214 (1944): “But once that obligation [to show a compelling state interest] is created, it may be possible, as in *Korematsu*, for the state to provide such a special justification, such as the exigencies of war, *based on reasons that themselves cannot be described in terms of a classification based on race.*” *Id.* at 593 (emphasis in original). This is an incredible use of a tragic case; history has demonstrated that there was no threat and that the internment of Japanese Americans was racist. See JUSTICE DELAYED (P. Irons ed. 1988); Matsuda, *Reparations*, *supra* note 34.

283. Schauer, *Formalism*, *supra* note 267, at 547.

commands, and the potential for repressive, oppressive or evil outcomes to the alternative of capitulation to tyrannical judges. "To be formalistic is to say something is not my concern, no matter how compelling it may seem."²⁸⁴ This is "modesty" rather than moral irresponsibility or moral obtuseness. To avoid the obvious objection that his vision would render judges mere conduits for oppression, he suggests that we think of judging in terms of "presumptive formalism," but his attachment to rule-bound obedience remains strong. He posits only one "escape route that allowed some results to be avoided when their consequences would be especially outrageous."²⁸⁵ It is unclear *what* would be "especially outrageous" under Schauer's theory, and in any event, he goes on to write that even the "especially outrageous" standard might be bad because "it would diminish the amount of ruleness by placing more final authority in the decisionmaker than in the rule."²⁸⁶

The authoritarian currents of mistrust of people generally and judges in particular, the demand for absolute obedience to absolute rules, and the concern for predictability and control at the expense of concern for oppression and violence all render Schauer's scholarship formally authoritarian with substantively authoritarian elements.

B. Substantive Authoritarianism in Legal Thought

Some forms of legal scholarship are more overtly authoritarian, containing substantively authoritarian elements as part of their foundation. The work of Judge Richard Posner and the work of "civic republican" scholars contains substantively authoritarian elements. Across a number of dimensions, Posner's work is the most explicitly authoritarian in current American legal thought. Accordingly, this section first seeks to explicate Posner's authoritarianism and then examines the substantively authoritarian danger presented by the civic republicans.

Posner's work has been prodigious and influential. It has ranged from economic interpretations of law, to law and literature, to jurisprudence. His willingness to explore other fields of thought and legal scholarship has left him strangely untouched, however.²⁸⁷ Ultimately, he returns to the same themes of suspicion of human nature, law as an instrument of social control, the necessity of obedience to authority, and dismissal of human suffering. Posner has bemoaned what he perceives to be a loss of respect for authority

284. *Id.* at 543.

285. *Id.* at 547.

286. *Id.* at 543.

287. See Weisberg, *Entering With a Vengeance: Posner on Law and Literature*, 41 STAN. L. REV. 1597 (1989); White, *What Can a Lawyer Learn from Literature?*, 102 HARV. L. REV. 2014 (1989).

(including legal authority), has defined authority and law as power and nothing more, and has repeatedly indicated an indifference to, if not a punitive attitude toward, human suffering. The tone of Posner's writings and the scholarship he relies on to support his arguments often suggest that his views of human nature and law reflect a substantively authoritarian bent. As a result, several scholars have noted that some of his work is authoritarian.²⁸⁸ In the introduction to his latest work, *The Problems of Jurisprudence*, he writes that the book "will provoke . . . the political activists who want to move the law sharply to the left or to the right. It will be criticized by the Left as authoritarian and complacent, and by the Right as cynical and amoral."²⁸⁹ Despite his effort to discredit his critics, however, the book more clearly reveals the very authoritarianism he seeks to deny. Posner relies heavily on sociobiological and "vulgar" Darwinist theories of human nature to justify his arguments against a wide range of jurisprudential positions and for a Chicago-school economic approach to law. Social Darwinism combined with laissez-faire economics has characterized a number of American right-wing authoritarian movements,²⁹⁰ thus, at a minimum, linking Posner's thought to the political history of authoritarianism.

For Posner, the state of nature, "red in tooth and claw," would actually exist without law. Life would indeed be the Hobbesian nightmare as people, driven by impulse, would play life out on a number of revenge themes,²⁹¹ making real the portrayal of life as nasty, brutish and short. Without law, the social chaos of the war of all against all is inevitable. Law is civilization's answer to never-ending revenge; it is revenge constrained.²⁹² Law is the answer to the Hobbesian threat because it demands obedience and compliance; any other alternative is sentimental, deluded "romanticism."²⁹³ According to Posner, justice, the virtue of law, is itself rooted in a Hobbesian-Darwinian world of revenge and survival:

Stressing the primitive character of corrective and retributive justice—the roots of these concepts in behavior having plausible sociobiological interpretations—is a necessary corrective to the common belief that Aristotelian and Kantian ideas of justice are more "moral" than pragmatic and instrumental views. Although Aristotle and Kant obviously had no opportunity to read *The Origin of Species*, their ideas about

288. See, e.g., Weisberg, *supra* note 287; West, *Authority*, *supra* note 180; West, *Law, Literature, and the Celebration of Authority*, 83 NW U.L. REV. 977 (1989); West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV L. REV. 1499 (1986).

289. R. POSNER, *JURISPRUDENCE*, *supra* note 129, at 32.

290. See R. HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* (1955); S. LIPSET, *supra* note 20, at 169-72; S. LIPSET & E. RAAB, *supra* note 75, at 432-33, 451.

291. R. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 26-32 (1988) [hereinafter, R. POSNER, *LAW AND LITERATURE*].

292. *Id.* at 25-33.

293. *Id.*

remedial justice—the justice of sanctions for transgression—are rooted in a view of human nature, as quintessentially vengeful, that is highly compatible with a Darwinian view.²⁹⁴

Even “rights,” in Dworkin’s strong sense of having a right such that it would be wrong to interfere with its exercise, are based in selfish, competitive human nature:

“[R]ights” is a primitive rather than a sophisticated concept. The sense we all have of having certain rights it would be wrong to deprive us of is a primitive feature of our psychological make up—one as well developed in children and in the inhabitants of primitive societies as it is in modern American adults, and found in animals as well. Survival in a competitive environment requires some minimum sense of the essential things that are one’s own to keep or dispose of as one will, and of a readiness to fight for this control. The creature that does not feel a sense of moralistic indignation when another creature seeks to take from it the things that are essential to its survival is not likely to survive and reproduce, so there will be a selection in favor of creatures genetically endowed with such a sense.²⁹⁵

Posner conflates rights with survival and is apparently concerned only with property rights and rights against physical aggression. But it is easy to demonstrate that the strong rights such as freedom of expression, which are considered important by Dworkin and other rights theorists, have little to do with species survival, historically or at present; people survive physically in tyrannical cultures without freedom of speech. Posner’s statement is not only a gross oversimplification of the meaning of rights, but also empirically suspect in terms of our knowledge of developmental psychology, anthropology, history, and biology.

Posner’s view of human nature, while consistently negative, is supported by inconsistent claims. At times, Posner seems to believe that human beings are driven by impulse and genetics—he appears to have adopted his own version of Freud’s Helmholtzian drive theory, without the ego. For example, he has asserted, without citing authority, that “most human choices are determined by preferences that have their roots in instinct—the instinct to survive, the instinct to reproduce.”²⁹⁶ At other times, he appears to endorse sociobiology wholeheartedly as a science of human behavior “attested by sober philosophers of science.”²⁹⁷ As a result of his interest—and faith—in

294. R. POSNER, JURISPRUDENCE, *supra* note 129, at 331.

295. *Id.* (footnote omitted).

296. Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431, 1442 (1986) [hereinafter Posner, *A Reply*]; see I. YALOM, *supra* note 188, at 288-89.

297. R. POSNER, JURISPRUDENCE, *supra* note 129, at 332. Posner fails to cite any of the scientific criticisms of sociobiology’s claims, preferring to suggest that objections to the field are political. For works Posner could have cited, see P. KITCHER, *VAULTING AMBITION* (1985) (philosophical critique); Gould, *Cardboard Darwinism*, N.Y. Review of Books 33 (Sept. 25, 1986); Gould, *Biological Potential vs. Biological Determinism*, in THE SOCIOBIOLOGY DEBATE 344 (A. Caplan ed. 1978); Hubbard, *The Political Nature of “Human Nature”*, in THEORETICAL PERSPECTIVES ON SEX DIFFERENCE 63 (D. Rhode ed. 1990).

sociobiological claims, Posner almost casually asserts a number of startling propositions about humans. He states, for example, that a belief in free will or freedom of choice is an illusion with "survival value" that "may be hard-wired into our brains."²⁹⁸ Yet, the notion of free will or freedom of choice is a Western one; apparently non-Western humans—and Western humans for most of their history—have survived and flourished without this genetic illusion.

At still other times Posner appears to be a reductionistic behaviorist. He asserts that concepts such as mind, intent and presumably, self are the products of our ignorance about phenomena rather than real entities.²⁹⁹ This assertion, of course, is nothing new in thought; rather, it is the conclusion that Posner draws from this observation that is authoritarian. He opines, "'Economic' man, [sic] . . . is a person whose behavior is completely *determined* by incentives; his rationality is no different from that of a pigeon or a rat. The economic task from the perspective of wealth maximization is to influence his incentives so as to maximize his output."³⁰⁰ At yet other times, his view of human nature is that of selfish individualism. In his book on jurisprudence, he uses John Mackie to critique communitarian and feminist theories of morality. According to Posner's summary of Mackie, such theories "cut . . . against the genetic grain; we are selfish, individualistic animals"³⁰¹ This easy declaration should make one shudder; it ignores the fact that individualism as we understand it did not even arise until the Enlightenment. People in numerous cultures and contexts would not even understand the concept of atomistic individualism.³⁰² And, finally, there is his view of humans as driven to retaliation and revenge against one another, in what would, without law, be a never-ending blood feud.

In addition to his reduction of philosophical systems to the probable outcome of sociobiological species survival, Posner has appropriated philosophical notions of "practical reason" and "pragmatism" and redefined or exaggerated their aspects to support his arguments for wealth maximization and scientific law and judicial decisionmaking. He observes that judicial choice is always a result of practical reason and pragmatic choice, which certainly seems reasonable, although it is difficult, given his view of human nature, to know who or what is exercising the choice. Posner correctly observes that rules are not absolute in the way that Schauer views

298. R. POSNER, JURISPRUDENCE, *supra* note 129, at 178.

299. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 868 (1988) [hereinafter Posner, *Skepticism*].

300. R. POSNER, JURISPRUDENCE, *supra* note 129, at 382 (emphasis added).

301. *Id.* at 417.

302. See J. RANDALL, THE MAKING OF THE MODERN MIND (1940); R. ROSALDO, *supra* note 51, at 25-27, 74-87.

them and that judges do make—and have to make—their own policy decisions. But the pragmatic Posnerian judge will have recourse to science—read microeconomic theory—in interpreting rules and deciding cases, as opposed to hopelessly muddled political or moral considerations. Moreover, because law is a mechanism of social control, the more the judge knows about cause and effect, the more rigorously she can use law to control human behavior.³⁰³ Behaviorism is the referent: Posner asserts that predicting human behavior is usually accurately and easily accomplished, but does not acknowledge the vast literature contradicting his claim.³⁰⁴

Certainly Posner's view of human nature is negative and reflects an ideology compatible with right-wing authoritarian thought. But one could argue, as Posner himself does, that because of his absolute dedication to free markets and choice, he is far from being an authoritarian. Economic theory and libertarianism of the Posnerian variety is what guarantees us all freedom from oppression. Although this argument is inconsistent with his arguments about manipulation of behavior and about law as social control and constrained revenge, Posner does not address the inconsistency. Rather, he is a self-proclaimed "classic liberal," one of the least likely authoritarian figures.³⁰⁵ Government is the power to fear; it must be minimal, and should regulate no more than absolutely necessary.³⁰⁶ Further, as a "libertarian," Posner consistently raises the spectre of direct government oppression, overlooking the possibility of authoritarian oppression due to government omission or the government's active or passive support of the dominance

303. Posner, *Skepticism*, *supra* note 299, at 868-71.

304. *Id.* at 871. Posner blithely asserts that "[p]arents, economists, psychologists, marriage counselors, and probation officers all have the experience of being able to predict correctly what another person will do even when the person himself is genuinely undecided" and cites Hume as support for the proposition. *Id.* Although it is true that we all might have the experience of accurately predicting what someone will do, there are countless times when we predict inaccurately.

305. His response to Robin West's critical review of *LAW AND LITERATURE*, *supra* note 291, is telling. In some of the great run-on sentences in law review history, Posner uses selective quotes and irony to argue that he is a libertarian, not an authoritarian. Posner, *Gregor Samsa Replies*, 83 Nw U.L. Rev 1022, 1024 (1989). His response is both humorous and angry:

[I]f only we realized that the "rule of law," and the market, and prisons and police, and convention, and differences among persons in aptitude and character, and the bourgeois values, and prudence, and asking students questions in class, and the monuments of Western civilization (including that reactionary sexist work, the *Nicomachean Ethics*), and maturity and professionalism and expertise and respect and tradition, and, in just two words, institutions and constraints, or, in a single word, "liberalism," were all just so much authoritarian *bullshit*—then we could get on with the task (and it's a lot easier than you think) of building a warm, loving, caring, open, hopeful, hugging, unmediated, hierarchy-free, prelinguistic, empathic, affective (but not sentimental—liberals are sentimental), happy, herbivorous, weaponless, whole-grain, solar-powered, polymorphously perverse, classless, Utopian society for the Whole Human Family.

Id. at 1025 (footnote omitted) (emphasis in original).

306. Posner, *A Reply*, *supra* note 296, at 1431-42, 1447.

by powerful elites over others. Posner's interpretation of libertarianism, with its obsessive focus on government power, seems to destroy his ability to acknowledge state-permitted infliction of human pain and oppression. He would not see a problem with the perpetuation of racism in the private sphere or with the private violence against women and children that are the result of government inaction or complicity.³⁰⁷ Because the authoritarian state has to rely on others to help it maintain control, Posner's avowed dedication to libertarianism is suspect.

The more substantively authoritarian attitudes supporting Posner's arguments are clear in his tone and characterization of problems. Posner has written that rape is the result of an inefficient market for sex.³⁰⁸ He has stated that battered wives stay in the battering relationship, because staying married is value-maximizing: if there is no better alternative in the marketplace to being beaten, the choice is rational.³⁰⁹ There are, of course, alternatives, including enforcing criminal statutes, taking the crime as seriously as we do other assaults, providing support and counselling for battered women and battering men and so forth.³¹⁰ But this might involve government action and expenditure, which leads Posner to prefer the injustice of omission³¹¹ and the resulting perpetuation of violence against women in the United States to the alternative of government assistance. Posner states, "We ought to be wary about embracing a system in which *government breaks up families to protect wives against themselves*."³¹² Taking seriously the crimes of battery and assault with serious bodily injury does not logically entail "breaking up families," and blaming the victim of abuse manifests a complete failure of human understanding, empathy or compassion on Posner's part.³¹³

Posner's opinion in the *DeShaney v. Winnebago County Department of Social Services*,³¹⁴ a child abuse case, also demonstrates his authoritarian

307. Posner, of course, is not alone here. See K. KARST, *supra* note 33, at 75 (discussing Alexander Bickel's criticism of the Warren Court as "planting the seed of tyranny"). As Karst observes, however, the private violence and discrimination of the KKK and Jim Crow practices "acquired the influence of a pseudogovernment." *Id.* Thus, oppression is maintained with government complicity.

308. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1198-99 (1985); see also Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1879 & n.109 (1987) (developing theory based on human flourishing to help determine what ought not to be bought and sold).

309. Posner, *A Reply*, *supra* note 296, at 1444 ("If she stays, it may be because, all things considered, the feasible alternatives are even worse.").

310. See Littleton, *supra* note 23, at 52-56.

311. For a general discussion of injustice, see Shklar, *supra* note 15.

312. Posner, *A Reply*, *supra* note 296, at 1445 (emphasis added).

313. Perhaps one could demonstrate that the lost work time, the neglect of children, and the ultimate homicides that result in many battering cases are so costly that they are not wealth-maximizing to society, however.

314. 812 F.2d 298 (7th Cir. 1987), *aff'd*, 489 U.S. 189 (1989).

attitude and illustrates his beliefs. In *DeShaney*, a mother sued the State of Wisconsin for damages under section 1983 for reckless failure to take action to protect a child whom state social workers knew was being beaten by his father. In an opinion holding that there was no cause of action, Posner wrote that "the state's failure to protect people from private violence . . . is not a deprivation of constitutionally protected property or liberty."³¹⁵ Consistent with his libertarian position, Posner asserted that the minimal state was commanded by the framers of the Constitution, yet the state becomes *so* minimal for Posner as to be virtually nonexistent: "The Constitution is a charter of negative rather than positive liberties"³¹⁶ with few exceptions, and "[t]he state does not have a duty enforceable by the federal courts to maintain a police force or a fire department, or to protect children from their parents."³¹⁷ This leaves Posner's vision of the purpose of the state—or law—unclear, to say the least; even Nozick's minimal state recognizes the need for a police force.³¹⁸ If law and the state exist to prevent private vengeance, the state should have a duty to protect against private vengeance and violence. This contradiction may be more understandable in light of Posner's expressed attitudes to human suffering. In *DeShaney*, Posner cited an 1898 case on causation,³¹⁹ reasoning that because Joshua DeShaney would have sustained the injuries if the state department of social services had never existed, the state's involvement did not increase the probability of injury to him in any non-trivial sense; the state did not cause the risk to Joshua; and no special relationship between the state and Joshua was created by awareness that the child was in danger. In what appears to be a terribly callous way of stating a point, Posner wrote, "The men who framed the original Constitution and the fourteenth amendment were worried about government's oppressing the citizenry rather than about its failing to provide adequate social services."³²⁰

Posner's punitive attitude to society's "losers," his breezy dismissals of human suffering, and his obsessive preoccupation with "the government" as the sole source of abuses of power and oppression, rather than an agent that can either oppress or liberate, seems to reflect a substantively authoritarian outlook. Moreover, an amoral jurisprudence focused on economic science and power can easily become authoritarian; when combined both with a fundamentally suspicious and unsympathetic view of human nature and a view of law as a mechanism of control, it *is* substantively authoritarian. Holmes, to

315. *Id.* at 301.

316. *Id.*

317. *Id.* (emphasis added).

318. R. NOZICK, ANARCHY, STATE, AND UTOPIA 57-87 (1974).

319. *DeShaney*, 812 F.2d at 302 (citing *Weeks v. McNulty*, 101 Tenn. 495, 48 S.W. 809 (1898)).

320. *Id.* at 301.

Posner the most pragmatic of judges and one worthy of emulation,³²¹ deferred to power and science because he felt no moral engagement.³²² Posner's world is very similar to Holmes' world at its worst.

In contrast to the extreme individualism present in Posner's work, a relatively recent strand of constitutional scholarship emphasizes the primacy of the community and argues for restoring civic virtue and participatory democracy in constitutional law. The civic republican scholarship may be, in part, a reaction to the atomism in certain liberal theories, to the Posnerian view of the world as populated by non-altruistic, self-interested individuals, or to a perceived breakdown of social solidarity and dissatisfaction with late twentieth-century liberalism in the United States.³²³ Scholars also have responded to the connection thesis and ethic of care developed in feminist thought³²⁴ and to a renewed concern with conceptions of the good, or virtues, in political life.³²⁵ Community, belonging, caring for, and responsibility to others are important to anti-authoritarianism and human fulfillment and *had* been overlooked by many legal and moral scholars. Unfortunately, the history of the republican tradition in the United States is one of intolerance and xenophobia; if historically oppressed people are skeptical of the argument for the republican tradition, it is for a reason.³²⁶

321. See, e.g., Posner, *Skepticism*, *supra* note 299, at 865-71; R. POSNER, *JURISPRUDENCE*, *supra* note 129, at 15-26; R. POSNER, *LAW AND LITERATURE*, *supra* note 291, at 281-89. In his dissent to a decision denying a challenge to a company's fetal protection policy, Posner waxes eloquent about Justice Holmes, although Holmes' relevance to Posner's decision in the actual case is hard to discern. *UAW v. Johnson Controls*, 886 F.2d 871, 903 (1989), *cert. granted*, 110 S. Ct. 1522 (1990).

322. See generally Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989).

323. Fallon, *What is Republicanism, and is it Worth Reviving?*, 102 HARV. L. REV. 1695, 1695-97 (1989). For a sociological work making the argument against atomism in the context of the white, upper middle-class, see R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, *HABITS OF THE HEART* (1985); and Harding, *Toward a Darkly Radiant Vision of America's Truth*, *CROSS CURRENTS* (Spring 1987) (criticism for omission of people of color from study). For the argument from political philosophy, see M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); and Sandel, *supra* note 190. For the argument in political theory, see B. BARBER, *STRONG DEMOCRACY* (1984). Another influential work has been MacIntyre's argument for restoration of Aristotelean virtues in moral thinking, with appropriate historical updates, in A. MACINTYRE, *AFTER VIRTUE* (2d ed. 1984). The emphasis this scholarship places on "community" may stand for our wistful desire to return to a past Golden Age of certainty, belonging, civility and care—an age that never has existed for everyone; a desire for an ideal nurturing family that never was; or a desire to overcome the social isolation, groundlessness and uncertainty of life in the United States in the post-modern (and post-hegemonic?) era. Certainty, belonging, civility and care are all important to human beings, but so are change, conflict and growth. To the extent that the desire to have certainty and belonging can lead to authoritarian conformity, the civic republicanism scholarship creates a real risk of substantive authoritarianism.

324. The connection thesis is West's term used to identify feminist thought emphasizing women's connection to other persons. West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988). The interrelationship of individuals as a criteria for moral thought emerged from C. GILLIGAN, *IN A DIFFERENT VOICE* (1982).

325. See A. MACINTYRE, *supra* note 323.

326. See Abrams, *Law's Republicanism*, 97 YALE L.J. 1591 (1988).

In rushing to rescue notions of community and cooperation from the jaws of selfish individualism, civic republican scholarship often argues for conditions that would facilitate substantive authoritarianism. The substantively authoritarian danger can arise in communitarianism either by abandoning individuals or by failing to perceive the need for empathy with those who differ from ourselves.³²⁷

Phillip Selznick has noted that "a communitarian morality . . . is not at its core a philosophy of liberation. The central value is not freedom or independence but *belonging*."³²⁸ As Kenneth Karst has so eloquently argued, belonging to communities is important to us all,³²⁹ but the "community" will not incorporate new people without conflict and struggle.³³⁰ Indeed, the "civic conception" of law and the "participatory ideal" can quickly justify a lack of compassion toward, or the continued oppression of, those *not* belonging.³³¹ To the extent the community's values trump the liberal concerns for individual dignity and rights, the threat of substantive authoritarianism increases.

The civic republican scholarship raises this danger in several ways. First, there have been arguments that the community's good supersedes the individual's good. Second, the notion of encouraging virtue based on a teleological view of human progress has historically justified conventionalist, conformist tendencies that can produce substantive authoritarianism. Third, and related to encouraging virtue, the notion of a public life in which all engage in discussing political issues assumes a shared discourse and values that can be exclusionary.

Suzanna Sherry has written that the civic republican ideal "exalts the good of the whole over the good of its individual members."³³² Professor Sunstein has written that the republican ideal includes a "willingness of citizens to subordinate their private interests to the general good."³³³ Yet, the question of the public good as opposed to private interests or pressures³³⁴ is left tantalizingly unanswered. This omission is unfortunate, for quite obviously the definition of public good historically has been determined by powerful and dominant elites, and it can easily be corrupted into conformism, intolerance and moralism.³³⁵ It is not madly libertarian—or original—to note that without some narrowing definition of the community good,

327. See K. KARST, *supra* note 33; *infra* text accompanying notes 513-15.

328. Selznick, *The Idea of a Communitarian Morality*, 75 CALIF. L. REV. 445, 454 (1987) (emphasis in original).

329. K. KARST, *supra* note 33, at 189-96.

330. *Id.* at 215.

331. Selznick, *supra* note 328, at 456-57.

332. Sherry, *supra* note 31, at 551.

333. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31 (1985).

334. *Id.* at 52.

335. See, e.g., Abrams, *supra* note 326.

exalting the good of the whole over individuals can easily justify repression and substantive authoritarianism.³³⁶

Perhaps Sherry's writings most clearly demonstrate the dangers of emphasizing the community good in civic republicanism. In her effort to equate civic republican ideals with a "feminine vision," Sherry sought to explain the early jurisprudence of Justice O'Connor as embodying proper "communitarian" ideals. Justice O'Connor's "conservative" willingness to agree with cases limiting the fourth and fifth amendment rights of criminal defendants is explicable for Sherry because the community trumps the individual defendant in such cases: "If the community is more important than individual rights, it is quite predictable that Justice O'Connor would be a strong law and order proponent: she will protect the community from crime even at the expense of the individual rights of criminal defendants."³³⁷ Of course, "protecting the community from crime" can be a justification for a number of substantively authoritarian, coercive practices, including police detention and "rousting" of African-Americans in white suburbs and the government internment of members of "suspect" groups. To rebut that suggestion, perhaps, Sherry has argued that Justice O'Connor's communitarian view encompasses "[d]ismantling the barriers erected by race discrimination or religious favoritism," because those barriers prevent individuals from exercising their "right" to full community membership.³³⁸ But this "right" does not connect directly to civic virtue notions of politics that require shared values and discourse.³³⁹

Sherry has also argued that the feminine vision is concerned with ensuring public morality at the expense of pluralism and tolerance. Thus, the feminine point of view is that "[p]ornography conveys a view of women that is simply immoral."³⁴⁰ The reason *why* this view of women is immoral, however, could rest on a number of conventionalist or oppressive assumptions about sexuality and women, not upon the radical feminist proposition that pornography is immoral because it harms women. At another point, Sherry conflates a "caring" society with a "virtuous" one and then resorts to "tolerance" as a virtue that will constrain the state from coercively

336. See, e.g., Herzog, *Some Questions for Republicans*, 14 POL. THEORY 473 (1986); Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 67 (1987).

337. Sherry, *supra* note 31, at 604. For a discussion of the perspective offered by female judges, see Sherry, *The Gender of Judges*, 4 LAW & INEQUALITY 159 (1986). Sherry's vision also overlooks the fact that the community itself may have an interest in protection from unmonitored coercive force, and thus it is *not* inevitable that a person with communitarian concerns would become less concerned with protections against government force.

338. Sherry, *supra* note 337, at 166.

339. See *infra* text accompanying notes 343-49.

340. Sherry, *supra* note 337, at 166.

enforcing a vision of the good life.³⁴¹ Caring, responsiveness and connection are important to anti-authoritarianism, but Sherry's portrayal of these characteristics often raises the specter of oppression instead.

To counteract an immediate aversive response by liberal-progressive scholars to a concept of "communitarian" jurisprudence, many scholars, including Sunstein and Michelman, have reframed republicanism to stand for strong participatory democracy, self-determination and dispersion of decisionmaking authority.³⁴² The notion of law as self-constituted authority, as something other than a top-down command, is a break from authoritarianism, as is diffusion of authority. But a difficulty exists in a model featuring articulation of community values through virtue and dialogue.³⁴³ According to Sherry, accomplishing dialogue requires shared values and a shared discourse that in turn requires internalization of those values and discourses.³⁴⁴ Alisdair MacIntyre, who has sought to restore the virtues to human moral experience, has opined that the Aristotelean polis depended upon agreement on virtues.³⁴⁵ If "civic virtue" is essential to participation in political decisionmaking, and virtues must be agreed upon, the potential for authoritarian domination of those who are different increases. That is, the requirement of shared values will not prevent what Sherry has termed "aggressive majoritarianism" and may have the opposite effect. For those whose value discourses are different, communication may be impossible as well: They may seem incoherent, unintelligible or repulsive. Pluralism, which has been criticized by civic republicans, is a vision of a community of diversity—not the best, perhaps, but it is one that does not require obedience to shared values, discourses and experiences; it is one embodiment of tolerance that is crucial to the anti-authoritarian project.

Another problem arises from the civic republicans' arguments for dialogue. Individuals must have the ability to participate in the relevant discursive community. One immediate authoritarian problem is raised by the fact that the argument for "English only" laws has often been phrased in terms of the ability to participate in American politics, for example, when the real reason for enacting English only laws is nativist and xenophobic. But even without the xenophobic streak of "English only," for those whose experience, language, or both is not encompassed by the dominant discourse, participation in the dialogue will be difficult if not

341. *Id.* at 169. For a critique of Sherry's version of "tolerance" in the context of an argument that tolerance is a liberal value, see Smith, *The Restoration of Tolerance*, 78 CALIF. L. REV. 305, 338-42 (1990).

342. See Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1989); Michelman, *Traces*, *supra* note 206; Michelman, *Law's Republic*, *supra* note 8.

343. See Sherry, *supra* note 31, at 552-55; Michelman, *Law's Republic*, *supra* note 8, at 1526-32.

344. Sherry, *supra* note 31, at 555-56.

345. A. MACINTYRE, *supra* note 323, at 155.

impossible. Although Michelman's vision of legal practice rests on "bringing to legal-doctrinal presence the hitherto absent voices of emergently self-conscious social groups[,]""³⁴⁶ those voices must be able to communicate. While Michelman correctly suggests that the civil rights movement managed to "penetrate the dominant consciousness" and have some influence in altering the discourse of equal protection, the effectiveness of the civil rights struggle did not rest on language and discussion alone.³⁴⁷ Further, much of African-American experience and meaning is still, over thirty years later, outside the dominant frameworks of discourse and law.³⁴⁸ To be understood by the dominant discursive community might involve the translation of experience into terms the dominant discourse apprehends—for example, the translation into rights of the oppression of African-Americans during the 1950s and 1960s. Putting aside the risks of co-optation such translation may entail, translating from one discourse to another in order to participate in dialogue is not always possible or believed: consider the historical absence of women's and others' voices from dominant discourses such as law, legal scholarship, and philosophy and the frustration and feeling-craziness of those scholars brave enough to try to convey these meanings and experiences.³⁴⁹

To circumvent the very real authoritarian implications of civil republicanism, Sherry, Michelman and Sunstein all have had recourse to tolerance and rights. Blending community-based and individually-based concerns has promise: Michelman has argued that for a proper, non-authoritarian understanding of republicanism, one must promote citizenship for every member of the community by providing each member "admission to full and effective participation in the various arenas of public life."³⁵⁰ Participation in the dialogue must take place on conditions of freedom; changes in one's understanding as a result of dialogue must take place in circumstances "not . . . experienced as coercive, or invasive, or [as] a violation of one's identity or freedom."³⁵¹ Laws chosen under these conditions would more likely be liberating than oppressing.

A single vision of what is good and right imposed in the name of the public good is both frightening and promising: It is frightening for the

346. Michelman, *Law's Republic*, *supra* note 8, at 1529.

347. See Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1381-82 (1988).

348. See *id.* at 1349.

349. For a particularly powerful example of this, written with the author's voice counterpointed by doubt, see West, *The Difference in Women's Hedonic Lives*, 3 WIS. WOMEN'S L.J. 81 (1987); see also Coombe, *Room for Manoeuvre: Toward a Theory of Practice in Critical Legal Studies*, 14 LAW & SOC. INQUIRY 69, 100-08 (1989) (discussing symbolic practices and power).

350. Michelman, *Law's Republic*, *supra* note 8, at 1533.

351. *Id.* at 1527.

reasons already stated and promising because it rejects the libertarian Posner-like vision of completely privatizing the good and disabling the state from seeking to better people's lives. Currently, however, the difficulties presented by a tyranny of the majority or of the "general will" have not been addressed adequately by pure communitarians; the emphasis on community values can justify a great deal of repression and intolerance. Progressive participatory democracy, or "dialogic," scholars have had difficulty within their models when community values lead to banning books and punishing homosexuals³⁵² without recourse to arguments based on notions of liberal principles and grounded on individual rights and dignity.³⁵³ Civic republican scholars, in recognizing this problem, have found that they have to modify, modernize, or meld the tradition with that of rights and principles to avoid the majoritarian difficulty.

C. Authoritarianism and the Court

Michelman and West have both identified authoritarian elements in the Court's current constitutional decisionmaking that are consistent with the description of formal authoritarianism, and both have demonstrated the formally authoritarian orientation of various scholars.³⁵⁴ For example, Michelman has argued that a "constitutional jurisprudence"³⁵⁵ based on "positivism"³⁵⁶ in the most reductionist sense is authoritarian in the formal sense. Michelman has observed that courts can be authoritarian by taking a stance of complete deference to "the prior normative utterance, express or implied, of extra-judicial authority."³⁵⁷ Although Michelman uses the notion of "popular authoritarianism" in his critique of Bruce Ackerman's argument that the Supreme Court may break with the past only when "the People" decide to make a break with past constitutional understandings,³⁵⁸ he does not note that Ackerman's process argument could require that courts obey the dictates of legally embodied popular majoritarian hatred, dislike or prejudice against a group. This link between formal and substantive authoritarianism in scholarship and decisionmaking is the subject of this section. By examining cases and the Court's reasoning therein, this section suggests that the Court is following an authoritarian path.

352. See, e.g., Minow, *supra* note 33; Michelman, *Traces*, *supra* note 206.

353. Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Minow, *supra* note 33; Michelman, *Traces*, *supra* note 206.

354. See Michelman, *Law's Republic*, *supra* note 8; West, *Constitutionalism*, *supra* note 3.

355. Michelman, *Law's Republic*, *supra* note 8, at 1496, 1520-21.

356. *Id.* at 1514 n.86.

357. *Id.* at 1496.

358. *Id.* at 1519-24.

The opinions of Justice White and Chief Justice Burger in *Bowers v. Hardwick*³⁵⁹ foreshadowed the rise in the Court's authoritarianism, not only in terms of results clearly lacking in empathy for human suffering, acknowledgement of human dignity and an indifference to punishment, but in terms of a *tone* and a form of reasoning that is substantively authoritarian.³⁶⁰ Justice Powell's opinion in *McCleskey v. Kemp*³⁶¹ crystalized the Court's growing support for capital punishment and its indifference to racism in the United States by rejecting strong evidence that the Georgia capital sentencing structure discriminated against defendants on the basis of their victim's race, devalued African-American lives, and perpetuated government-approved racism.³⁶² In its ruling in *McCleskey*, the Court stated that there was no "logical" reason to distinguish racism or sexism from other biases in sentencing, including capital sentencing, and further suggested that there actually wasn't any problem of racism in sentencing at all, despite the evidence presented. This indicates at best an attitude of indifference to racism.³⁶³ It appears that by the 1988-89 term, the Supreme Court had adopted the jurisprudence of *Bowers* and *McCleskey* taking not only a conservative turn but also a substantively authoritarian one.³⁶⁴ Rather than being conservative in the sense of caution and respect for tradition,³⁶⁵ much of the Court's language and many of its decisions³⁶⁶ provide evidence of a substantively authoritarian attitude on the part of many members of the Court. The Court has variously justified its decisions as deference to state authorities, obedience to legal commands and support of majoritarianism.³⁶⁷ The Court has also engaged in nativist, suspicious and stereotypical reasoning.

359. 478 U.S. 186 (1986). I omit discussion of Justice Powell's opinion, because his concurrence expressed concern with the punishment for homosexual sodomy. The Georgia statute made sodomy a felony punishable by up to twenty years in prison; quite obviously, there are other punitive results from a felony conviction, including loss of the right to vote.

360. See Henderson, *Legality*, *supra* note 33, at 1638-49 (discussing the opinions in *Bowers*).

361. 481 U.S. 279 (1987).

362. See Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988).

363. *Id.* at 1409-10, 1416.

364. See West, *Constitutionalism*, *supra* note 3; Greenhouse, *The Year the Court Turned to the Right*, N.Y. Times, July 7, 1989, at A1, col. 2; see also Brisbin, *supra* note 4 (arguing Reagan appointees are concerned with coercive application of state power to maintain social order; jurisprudence is one of statism and politics of management, not conservatism); cf. Chemerinsky, *supra* note 1, at 61 ("It is tempting to view the Rehnquist Court's decisions simply as a product of the conservative views of a majority of the current Justices [but] to view the Rehnquist Court entirely in ideological terms is to ignore" other forces shaping constitutional law.).

365. As Mark Tushnet has observed, "In its most admirable form, Burkean conservatism leads to a resigned acceptance of the change that it knows is inevitable. The Burkean will not battle to the death." Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 694 (1985).

366. See *infra* notes 368-85 and accompanying text.

367. See Chemerinsky, *supra* note 1, at 46.

Prejudice and punitiveness are frequently' subtextual, if not immediately obvious, in the Court's opinions. Along the way, the Court has enhanced the power of government to command, to punish, to control, and to *ignore* social wrongs. It has also diminished the power of individuals and governments—state and federal—to attempt to *correct* the evils of subordination and oppression.

Thus, in the 1988-89 term, the Court decided that the government could execute young people sixteen years of age³⁶⁸ and mentally retarded people.³⁶⁹ It held that the government owes no duty to protect children, its most vulnerable citizens, from "private violence."³⁷⁰ The Court also sharply curtailed the ability of governments and citizens to battle racial or gender discrimination. The Court struck down a minority business set-aside program meant to rectify past discrimination,³⁷¹ and in other cases held that white males who were not parties to Title VII litigation could challenge affirmative action consent decrees,³⁷² although women were barred from litigating the discriminatory result of a discriminatory contract through a narrow reading of the limitations period.³⁷³ The Court also held that section 1981 of the Civil Rights Act did not allow suits for racially discriminatory breaches of contract.³⁷⁴ A majority held that drug testing of customs employees without probable cause or even reasonable suspicion of drug use was constitutionally permissible.³⁷⁵ Further, the Court created limitations in federal habeas cases³⁷⁶ that became the grounds for the virtual end of federal habeas relief in 1990.³⁷⁷ The Court also came close to overruling *Roe v. Wade* in a decision that virtually ignored women's concerns.³⁷⁸

The shift continued in the 1989-90 term.³⁷⁹ A majority of the Court rejected almost fifty years of constitutional doctrine in holding that the free

368. *Stanford v. Kentucky*, 109 S. Ct. 2969 (1989).

369. *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989).

370. *DeShaney v. Winnebago County Dep't Soc. Servs.*, 109 S. Ct. 998 (1989).

371. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989).

372. *Martin v. Wilks*, 109 S. Ct. 2180 (1989).

373. *Lorance v. AT&T Technologies, Inc.*, 109 S. Ct. 2261 (1989).

374. *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989).

375. *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989).

376. *Teague v. Lane*, 109 S. Ct. 1060 (1989). For a criticism of *Teague*, see Hoffmann, *The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners*, 1989 SUP CT. REV. 165; see also Note, *Resolving Retroactivity After Teague v. Lane*, 65 IND. L.J. 651 (1990) (proposing a new exception to the *Teague* retroactivity test based on an individual rather than a categorical approach).

377. *Teague* held that any "new" rules of constitutional criminal procedure or rules announced after the defendant's conviction which became "final" under state law would no longer be grounds for federal habeas relief. *Teague*, 109 S. Ct. at 1068. In *Butler v. McKellar*, 110 S. Ct. 1212 (1990), "new" rules were defined as anything not commanded by prior case law. *Id.* at 1216.

378. *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989); see Olsen, *supra* note 259.

379. For a similar observation characterizing the decisions of the 1989-90 term as "illiberal," see West, *Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 41 (1990) [hereinafter West, *Freedom*].

exercise clause did not protect Native American church members from legal disadvantages resulting from their sacramental use of peyote.³⁸⁰ Police may establish sobriety checkpoints, stopping and detaining motorists without probable cause.³⁸¹ Police can enter premises without a warrant if they reasonably, although mistakenly, believe a person has the authority to consent to their entry and search;³⁸² the government is not bound at all by the fourth amendment if it acts beyond the territorial boundaries of the United States.³⁸³ A bare majority did uphold the F.C.C.'s minority preference in granting broadcasting licenses and privileges against an equal protection challenge, but not without vigorous dissents.³⁸⁴ The Court also continued to approve almost every death penalty scheme it considered.³⁸⁵

At times, the Court has arguably reached substantively authoritarian *results* through formally authoritarian means. This seems evident in the Court's opinion in *Patterson v. McLean Credit Union*,³⁸⁶ as well as in the decisions on federal habeas. In *Patterson*, Justice Kennedy took a formally authoritarian stance toward contract damages for racial discrimination and harassment under section 1981. *Patterson* had been set for reargument on whether the Court should overrule *Runyon v. McCrary*,³⁸⁷ a 1976 case that held that section 1981 permitted private damage actions for racially discriminatory breaches of contract. Faced with resounding evidence that Congress intended section 1981 to apply to private actions, the Court would have had great difficulty overruling *Runyon*. Unable to overrule the decision completely, Kennedy and the majority proceeded to redefine the elements of section 1981 suits to accomplish much the same result in contract actions.

Justice Kennedy's opinion speaks of deference to the doctrine of *stare decisis*, while it simultaneously eliminates most of the contract issues that can be litigated under section 1981. Justice Kennedy wrote:

[T]he right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, *including breach of the terms of the contract or imposition of discriminatory working conditions*. Such postformation conduct does not involve the right to make a contract ³⁸⁸

Although it is standard contract doctrine that enforcing contracts means the right to performance or damages,³⁸⁹ for Kennedy, the enforcement

380. *Employment Div., Dep't of Human Resources v. Smith*, 110 S. Ct. 1595 (1990).

381. *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481 (1990).

382. *Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990).

383. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056 (1990).

384. *Metro Broadcasting Inc. v. F.C.C.*, 110 S. Ct. 2997 (1990).

385. The exception is *McKoy v. North Carolina*, 110 S. Ct. 1227 (1990).

386. 109 S. Ct. 2363 (1989).

387. 427 U.S. 160, 179 (1976). Section 1981 states that "all persons shall have the right to make and enforce contracts" 42 U.S.C. § 1981 (1988).

388. *Patterson*, 109 S. Ct. at 2373 (emphasis added).

389. See Burton, *Racial Discrimination in Contract Performance: Patterson and a State Law Alternative*, 25 HARV C.R.-C.L. L. REV 433, 450-58 (1990).

language of section 1981 applied only to "conduct by an employer which impairs an employee's ability to enforce through [the] legal process his or her established contract rights."³⁹⁰ The metaphysical moment of contract "formation," the moment that has given so many law students, law professors and courts headaches, becomes the only point at which discrimination is relevant. Harassment violating the terms and conditions of employment, freedom from which is arguably a term of the contract, was neither an issue of contract formation *nor* an impediment to using the legal process to enforce contract rights. "[R]acial harassment amounting to breach of contract, like racial harassment alone, impairs neither the right to make nor the right to enforce a contract."³⁹¹ Allowing suits under section 1981 for breach of contract would "federalize all state-law claims for breach of contract where racial animus is alleged," which presumably raises a threat of chaos and loss of states' rights. Finally, to litigate discrimination at the formation stage under section 1981, individuals must prove discrimination according to the Title VII framework for burdens and standard of proof, thus, an effective legal remedy for individuals suffering from "private" racial discrimination has been sharply limited. Employers and other "private" actors not covered by Title VII (as well as those who are) who do not discriminate at the metaphysical formation stage are immune from suits alleging racist discrimination in the contractual relationship.

Another example of a formally authoritarian approach with substantively authoritarian overtones appears in the cases denying federal habeas relief to persons sentenced to death. In *Teague*, a plurality of the Court held that state defendants could not use federal habeas proceedings to attack their convictions if their claims were based on a "new rule" of constitutional criminal procedure.³⁹² A majority of the Court in 1990, in *Butler v. McKellar*,³⁹³ interpreted the "new rule/new law" language of *Teague* to mean that "a decision announces a new rule 'if the result was not *dictated* by precedent'"³⁹⁴ Defendants may not rely on reasonable doctrinal development to avoid being barred from seeking habeas relief. Rather, the Court defined "rule" to mean specific, uninterpreted commands. A court's determination that its decision was within the logic of a prior decision or even "'controlled'" by a prior decision does not exempt such decisions from being "new rules."³⁹⁵ Differences among courts which are eventually resolved by the Supreme Court also produce new rules. Further, the majority

390. *Patterson*, 109 S. Ct. at 2373.

391. *Id.* at 2376.

392. *Teague*, 109 S. Ct. at 1068.

393. 110 S. Ct. 1212 (1990).

394. *Id.* at 1216 (emphasis in original) (citation omitted) (quoting *Teague*, 109 S. Ct. at 1070).

395. *Id.* at 1217

opinion quoted approvingly from *Teague*'s suggestion that habeas corpus serves only the *punitive* function of deterring state courts from committing constitutional violations; a new rule could not possibly deter the state courts, and therefore defendants cannot rely on such rules.³⁹⁶ An alternative interpretation of federal habeas corpus, that all individuals in the United States should enjoy the same constitutional rights and protections regardless of what state they live in, was ignored.

In what can be characterized as vindictive language,³⁹⁷ the *Butler* Court held that a death row inmate could not invoke either of *Teague*'s exceptions to the new rule barrier. Police interrogation of an already-represented murder defendant, a violation of the fifth amendment according to precedent,³⁹⁸ was neither the kind of conduct beyond the lawmaking authority to proscribe nor a procedure "implicit in the concept of ordered liberty."³⁹⁹ The pure command notion, together with the punitive tone of the opinion, is startlingly authoritarian; as Joseph Hoffmann observed in the context of the earlier *Teague* decision, the result is that the state courts will be the *primary* interpreters of federal constitutional rights in criminal cases.⁴⁰⁰

Those who would argue for formal authoritarianism in the guise of obedience to absolute rules, because such formality produces better results than allowing judges to impose their own values and curbs wicked decisionmakers, could point to the flag-burning case, *Texas v Johnson*,⁴⁰¹ as a victory for rule-boundedness. Unlike the sometimes-on, sometimes-off right to an abortion, which was created by an activist Court, the first amendment is a textual command that must be obeyed. Perhaps authoritarian obedience to command is the reason that a bare majority could hold that the Texas flag desecration statute was unconstitutional in *Johnson*. Justices Brennan, Marshall, Scalia and Kennedy filed an opinion that was consistent with existing first amendment precedent and that "obeyed" the command against restricting freedom of speech.

Apparently defending against the dissent's implied criticism that he was unpatriotic, however, Justice Kennedy wrote an agonized concurrence that more clearly illustrates an authoritarian obedience that curbed a substantively authoritarian, repressive urge. Only Kennedy's duty to obey "a pure command of the Constitution" could cause Kennedy to rule against the "lonely place of honor" the flag holds "in an age when absolutes are distrusted

396. *Id.*

397. I am indebted to Robert Weisberg for this characterization.

398. *Butler*, 110 S. Ct. at 1216.

399. *Id.* at 1218 (quoting *Teague*, 109 S. Ct. at 1064).

400. Hoffmann, *supra* note 376; see also Weisberg, *A Great Writ While It Lasted*, 81 J. CRIM. L. & CRIMINOLOGY 9 (1990).

401. 109 S. Ct. 2533 (1989).

and simple truths are burdened by unneeded apologetics.”⁴⁰² His concurrence hastens to sympathize with the dissenters, and he extols the flag as a symbol “constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit.”⁴⁰³ Perhaps, then, the case means only that authoritarian obedience to commands will have good results if the command is a good one.⁴⁰⁴ Further, although Kennedy saw a clear command to obey the Constitution’s demand for a liberal result, four justices saw the command differently, thus undermining the assertion that obedience to “clear” commands constrains judges.

The Chief Justice’s dissent stressed the meaning of the flag in militaristic and nationalistic terms, chronicling its use in wars and its value to the military. Rehnquist dismissively referred to the powerful communication of burning a flag as an “inarticulate grunt.”⁴⁰⁵ Because it was only an inarticulate grunt, flag burning was tantamount to antagonizing others and was unprotected under the fighting words exception for freedom of speech.⁴⁰⁶ This analogy in itself is unremarkable, because there was reason to think that burning the flag would cause emotional distress to many. But the dissent didn’t stop there. Rehnquist accused the majority of “anti-democratic” meddling and disparaged them for having engaged in a “regrettably patronizing civics lecture” instead of having upheld an important counter-majoritarian textual right.⁴⁰⁷ Invoking democracy and majoritarianism, Rehnquist asserted: “Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people—whether it be murder, embezzlement, pollution, or flag burning.”⁴⁰⁸ Declaring that flag burning is tantamount to the human harms brought about by murder, theft or toxic chemicals seems unjustifiable; it does not entail a physical intrusion or tangible loss. Although some may experience psychological pain, the psychological pain caused by flag burning certainly cannot be greater than the pain caused by racist hate speech and pornography, which currently enjoy first amendment protection. Further, if the state has no duty to prevent severe physical harms according to the Court’s opinion in *DeShaney*,⁴⁰⁹ it is odd that it has a duty to protect

402. *Id.* at 2548 (Kennedy, J., concurring).

403. *Id.*

404. See *infra* note 487; see also THE AUTHORITARIAN PERSONALITY, *supra* note 78, at 373.

405. *Johnson*, 109 S. Ct. at 2553 (Rehnquist, C.J., dissenting).

406. *Id.* at 2553-54. The decision in *Johnson* met with angry calls from the President and Congress for a constitutional amendment prohibiting the burning of flags and to the passage of a federal statute prohibiting flag burning. See also Michelman, *Saving Old Glory: On Constitutional Iconography*, 42 STAN. L. REV. 1337 (1990). This, together with an accompanying outburst of patriotic fervor, indicates a growing recourse to authoritarianism in the United States.

407. *Johnson*, 109 S. Ct. at 2555 (Rehnquist, C.J., dissenting).

408. *Id.*

409. *DeShaney*, 109 S. Ct. at 1003.

people from seeing an important symbol destroyed. Having declared in *Webster*⁴¹⁰ that the Court decides what the Constitution requires, Rehnquist wrote in *Johnson*: "Our Constitution wisely places limits on powers of legislative majorities to act, *but the declaration of such limits by this Court* 'is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case.'"⁴¹¹ The inconsistency in these cases indicates that Rehnquist may be untroubled by manipulating principles to serve ends.

An examination of the Court's reasoning and language in specific cases reinforces the argument that the Court recently has taken a more direct substantively authoritarian approach to constitutional cases. Racism, nationalism and indifference to oppression characterize these opinions. Affirmative action, originally meant to assure substantive equality for members of groups that have been victims of stereotypy and subordination, has been controversial in a society dedicated to individualism and an "equal opportunity mythology,"⁴¹² but it was also anathema to authoritarian prejudice. Absent stereotypy, misogyny and racism, it is difficult to believe that the phrase could have been transformed from a positive meaning to a code word for "less qualified," "reverse racism," "quotas," and worse. A majority of the Supreme Court now appears to have adopted the negative view, however. In *City of Richmond v. J.A. Croson Co.*,⁴¹³ a majority of the Justices struck down a mandatory local government set-aside program for minority-owned construction businesses as a violation of the equal protection clause. Such plans deny equal protection to whites and discriminate *against* whites. The opinions make clear that state and local governments are now violating equal protection if they have minority set-aside plans aimed at remedying past discrimination, absent a fairly demanding standard of proof of causation: they must admit that they themselves intentionally discriminated or aided in discrimination. State and congressional power to pass remedial legislation under section five of the fourteenth amendment also seems dubious.⁴¹⁴

410. *Webster*, 109 S. Ct. at 3040.

411. *Johnson*, 109 S. Ct. at 2555 (Rehnquist, C.J., dissenting) (emphasis added) (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810)).

412. Crenshaw, *supra* note 347, at 1380.

413. 109 S. Ct. 706 (1989).

414. Immediately after *Croson*, the Georgia Supreme Court and a federal district court in Wisconsin struck down a city and a state set-aside program, respectively. See *American Subcontractor's Ass'n v. City of Atlanta*, 259 Ga. 14, 376 S.E.2d 662 (1989); *Milwaukee County Pavers Ass'n v. Fiedler*, 707 F. Supp. 1016 (1989); see also *The Supreme Court—Leading Cases*, 103 HARV. L. REV. 137, 228 (1989); Fried, *Affirmative Action After City of Richmond v. J.A. Croson Co.*, A Response to the Scholars' Statement, 99 YALE L.J. 155 (1989); Taylor, *The Equal Protection Dilemma of Voluntary State and Local Set-Aside Programs for Minorities and Women*, 27 Hous. L. Rev. 45 (1990).

In the *Croson* case, Justice O'Connor, writing for a plurality, used a formally authoritarian mode in stating that granting victims of societal discrimination preference "would be contrary to both the letter and spirit of a constitutional provision whose central *command* is equality,"⁴¹⁵ her equality is a formal, neutral equality rather than a richer, more substantive equality. Absent a showing of intentional discrimination, no race-conscious affirmative action is constitutional. O'Connor found no difference in cultural meaning between African-American and white, stating that *all* "[c]lassifications based on race carry a danger of stigmatic harm."⁴¹⁶ Try as one might, it is difficult to see that whites are disadvantaged or stigmatized by their race in the United States, or even in Richmond, Virginia, nor does Justice O'Connor's opinion cite any evidence to support this particular interpretation. With almost willful blindness, O'Connor wrote that "[a]bsent searching judicial inquiry there is simply no way of determining what [racial] classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics,"⁴¹⁷ accordingly, all racial classifications, for whatever purpose, are suspect. Further, her opinion emphasizes the African-American "dominance" of the Richmond city council and implies that whites might be a *disadvantaged* minority in Richmond. The racist overtones of the opinion are hard to overlook, as is the substantively authoritarian agenda of a majority of the Justices.

Rhetorically, Justice O'Connor's opinion also contains a substantively authoritarian tone of hostility: pejorative language and sarcasm appear in her dismissal of the city's efforts to remedy the effects of past discrimination in the construction industry. The affirmative action medical school admissions plan in *Regents of the University of California v Bakke*⁴¹⁸ was a "racially segregated" one, even though what it sought was integration.⁴¹⁹ The city's assertion of discrimination against minorities was "sheer speculation." The Richmond program defined "Minority Business Enterprise" to include Latino, Asian, Native American, Eskimo and Aleut businesses; O'Connor wrote somewhat sarcastically:

The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in Richmond, suggests that perhaps the city's purpose was not in fact to remedy past discrimination.

If a 30% set aside was "narrowly tailored" to compensate black contractors for past discrimination, one may legitimately ask why they

415. *Croson*, 109 S. Ct. at 727 (emphasis added).

416. *Id.* at 721; see Crenshaw, *supra* note 347, at 1373-86; Lawrence, *supra* note 34 (on the meaning of being African-American in the United States).

417. *Croson*, 109 S. Ct. at 721.

418. 438 U.S. 265 (1978).

419. *Croson*, 109 S. Ct. at 722.

are forced to share this "remedial relief" with an Aleut citizen who moves to Richmond tomorrow?⁴²⁰

Much as Justice Powell had done in rejecting the claim of discrimination in *McCleskey*, O'Connor employed the argument of social chaos as a trope against affirmative action to ameliorate societal discrimination, unsympathetically dismissing the possible claims of those so oppressed. O'Connor wrote that "[t]o accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group."⁴²¹ As Patricia Williams commented, this argument "sets up a 'slippery slope' at the bottom of which lie hordes-in-waiting of warring barbarians . . . It problematizes by conjuring mythic dangers."⁴²² As Williams noted in her criticism of the *Richmond* decision:

What strikes me most about this holding are the rhetorical devices the court employs to justify its outcome: . . . societal discrimination is "too amorphous"; racial goals are labelled "unyielding"; goals are labelled "quotas"; testimony becomes mere "recitation"; legislative purpose and action become "simple legislative assurances of good intention"; lower court opinion is disregarded as just "blind judicial deference"; and statistics are rendered "generalizations."⁴²³

In 1990, Chief Justice Rehnquist wrote an opinion with strong nationalistic and militaristic overtones. In *United States v. Verdugo-Urquidez*,⁴²⁴ Rehnquist invoked the plain meaning of the text of the Constitution, the intent of the framers, and militaristic justifications to hold that the fourth amendment did not bind the United States government in searching and seizing the property of foreign nationals in their own countries. Even those foreign nationals arrested and brought to the United States and imprisoned by this country have no grounds to invoke our Constitution or its procedural protections. The words "the people" in the fourth amendment referred only to "the People of the United States."⁴²⁵ According to Rehnquist, the intent of the framers "never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory."⁴²⁶ Brushing aside the cases which hold that the equal protection clause applies to aliens, Rehnquist wrote that such protections only applied to aliens with "substantial connections" to the United States,

420. *Id.* at 728.

421. *Id.* at 727.

422. Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2129 (1989).

423. *Id.* at 2129 (footnotes omitted).

424. 110 S. Ct. 1056 (1990).

425. *Id.* at 1060-61.

426. *Id.* at 1061.

not to foreign nationals in their own countries.⁴²⁷ Relying on cases decided before the Court's development of constitutional procedural protections and even before the incorporation of the Bill of Rights, Rehnquist asserted that "not every constitutional provision applies to governmental activity even where the United States has sovereign power."⁴²⁸ Honoring the Rule of Law for foreign nationals would cripple national security, national interests, and the option of resorting to armed force. Once again, the notion of hordes waiting to litigate claims became a justification for dismissing the petitioner's claim that the government had to follow its own Constitution.⁴²⁹ As Justices Brennan and Marshall pointed out in dissent, "we cannot forget that the behavior of our law enforcement agents abroad sends a powerful message about the Rule of Law to individuals everywhere. . . . If we seek respect for law and order, we must observe these principles ourselves."⁴³⁰ A militaristic, authoritarian government will ignore the rules and use its power as it sees fit;⁴³¹ the majority opinion approves of the use of such power.

Members of the Court have engaged in various strategies to arrive at arguably substantively authoritarian results, as in the death penalty cases, while abandoning the same strategies when they fail to support the Justice's predilections or prejudices. Two opinions by Justice Scalia provide an example of this willingness to use strategies selectively. In his opinion upholding the constitutionality of the death penalty for minors aged sixteen or older in *Stanford v Kentucky*,⁴³² Justice Scalia asserted that state legislatures provided the best evidence of contemporary values regarding execution of juvenile offenders.⁴³³ Because a "majority of the States that permit capital punishment authorize it for crimes committed at age 16 or above,"⁴³⁴ the execution of minors who committed their offenses at the age of sixteen or seventeen was constitutionally permissible. But in *Michael H. v Gerald D.*,⁴³⁵ a due process challenge by a biological father to a California statute allowing only the husband or wife to challenge the presumption of biological parentage of children born during a marriage, Justice Scalia wrote:

[I]t is ultimately irrelevant, even for purposes of determining *current* social attitudes towards the alleged substantive right Michael asserts, that the present law in a number of States appears to allow the natural father the theoretical power to rebut the marital presumption

427. *Id.* at 1064.

428. *Id.* at 1062.

429. *Id.* at 1065.

430. *Id.* at 1071 (Brennan, J., dissenting).

431. A. PERLMUTTER, *supra* note 18, at 51.

432. 109 S. Ct. 2969 (1989).

433. *Stanford*, 109 S. Ct. at 2975 (1989).

434. *Id.* at 2976.

435. 109 S. Ct. 2333 (1989).

What counts is whether the States in fact award substantive parental rights to the natural father of a child ⁴³⁶

In *Webster v. Reproductive Health Services*,⁴³⁷ although the Court did not abolish the right to abortion, the majority opinions indicated little sympathy or concern for women. The majority opinion by Chief Justice Rehnquist relied on the Court's decision in the *DeShaney* case for the proposition that there is no "affirmative right to governmental aid"⁴³⁸ in reaching a holding that a state prohibition on the use of public hospitals by public employees for performing abortions simply "leaves a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all."⁴³⁹ Rejecting the trimester divisions of *Roe*,⁴⁴⁰ Rehnquist, writing for four justices, stated that there was no reason "why the State's interest in protecting potential human life should come into existence only at the point of viability."⁴⁴¹ Rehnquist heavily implied that the state's interest in "protecting potential human life [exists] throughout pregnancy."⁴⁴² His opinion makes the textualist argument that nothing in the Constitution's text could supply a principled basis for the trimester division.⁴⁴³ But while ostensibly obeying the command of the text, Rehnquist declared that there was no reason to obey precedent;⁴⁴⁴ the Court itself is the only entity that can determine the meaning of the Constitution, it alone determines the command of the Constitution. The doctrine of *stare decisis* "has less power in constitutional cases, where, save for constitutional amendments, this Court is the *only* body able to make needed changes."⁴⁴⁵ And, although only the Court could decide constitutional issues, Rehnquist appealed to democracy and the legislative process as justifications for deferring to the command of the Missouri legislature in *Webster*.⁴⁴⁶ He noted that "[t]he goal of constitutional adjudication is to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not. We think we have done that today."⁴⁴⁷

436. *Id.* at 2344 (emphasis in original). In the beginning of the opinion, Justice Scalia wrote somewhat sarcastically that "[a]t the outset, it is necessary to clarify what [Michael H.] sought and what he was denied. California law, like nature itself, makes no provision for dual fatherhood," denigrating the humanity of the biological father and simultaneously indicating a bias against violation of conventional norms. *Id.* at 2339.

437. 109 S. Ct. 3040 (1989).

438. *Id.* at 3051 (quoting *DeShaney*, 109 S. Ct. at 1003).

439. *Id.* at 3052.

440. *Id.* at 3056.

441. *Id.* at 3057.

442. *Id.*

443. *Id.* at 3056-57.

444. *Id.* at 3056.

445. *Id.* at 3056 (emphasis added).

446. *E.g., id.* at 3053, 3055, 3058.

447. *Id.* at 3058.

Striking the balance between what the Constitution places beyond the political process and what it leaves to the political process is defensible in the case of abortion, because there is no explicit textual reference to privacy or to equal protection for women. But the Court has not stopped there. In a 1990 opinion by Justice Scalia, the Court suggested that the government could control even rights enumerated in the Bill of Rights. In *Employment Division, Department of Human Resources v. Smith*,⁴⁴⁸ the Court held that the free exercise clause of the first amendment did not protect sacramental use of peyote by members of the Native American Church from state regulation. In an opinion that quoted Frankfurter's opinion in *Minersville School District v. Gobitis*⁴⁴⁹—a case that had been overruled by the Court—and that distinguished every free exercise decision upholding the right to practice religion against state interference, Justice Scalia also suggested that *nothing* in the Constitution protects basic rights and freedoms from government control.⁴⁵⁰ As long as the state does not "intentionally" discriminate against a religious group, it can forbid members of the faith to practice their sacraments and beliefs by majority vote for any arguably rational reason.⁴⁵¹ Scalia wrote: "Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process."⁴⁵²

Scalia refers to the threat of social chaos or anarchy in vaguely disguised form several times in his opinion; fear of social chaos and emphasis on order and control are hallmarks of substantive authoritarianism. At one point, he quoted *Reynolds v. United States*,⁴⁵³ the Mormon polygamy case, to argue that citizens must not be a law unto themselves⁴⁵⁴ and again raised the spectre of anarchistic law-unto-themselves later in the opinion in order to justify denying any special privilege for the free exercise of religion.⁴⁵⁵ Perhaps even more chilling is Scalia's dismissal of the value in free exercise, which Justice O'Connor's concurrence noted was "our Nation's fundamental commitment to individual religious liberty,"⁴⁵⁶ especially for those who are discriminated against or are victims of prejudice. According to Scalia and four other Justices:

[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally

448. 110 S. Ct. 1595 (1990).

449. 310 U.S. 586 (1940) (flag salute case overruled by *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

450. See *Smith*, 110 S. Ct. at 1602-06.

451. *Id.*

452. *Id.* at 1606.

453. 98 U.S. 145 (1879).

454. *Smith*, 110 S. Ct. at 1600.

455. *Id.* at 1603, 1606.

456. *Id.* at 1606 (O'Connor, J., concurring).

required, and that the appropriate occasions for its creation can be discerned by the courts. *It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in*; but that unavoidable consequence of democratic government must be preferred to a system *in which each conscience is a law unto itself* or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.⁴⁵⁷

Native Americans, historically the targets of discrimination, not to mention near genocide, are likely to suffer further discrimination because of their religious beliefs, or at a minimum, "a relative disadvantage" in the "political process."

The retirement of Justice Brennan, whose presence on the Court accounted for the majorities in the flag-burning and F.C.C. minority-preference cases,⁴⁵⁸ leaves no reason to believe that the Court will change its authoritarian direction in the near future, and much reason to worry about the authoritarian jurisprudence that has justified this direction. Given the general cultural assumption that citizens are to obey the Court's pronouncements, and the reality that the Court's judgments influence legal understanding, the current direction is troubling for liberal/progressive and anti-authoritarian hopes. Although, at this point, the efforts of liberal/progressive scholars might be better directed toward the legislative and executive branches, courts will still be playing a role in shaping law and the language of legal rhetoric. Ceding the control of legal discourse in the courts to the current majority of the Supreme Court would be a mistake; at a minimum, an alternative discourse must always be available. Further, while the immediate future appears bleak, change can and does occur, and a developed anti-authoritarian approach should be available when there is a change. In order to avoid giving up on the courts, liberal/progressives must understand what the anti-authoritarian stance is and use it to the best of their ability in framing constitutional theory and practice, both before courts and in legislatures.

III. AGAINST LEGAL AUTHORITARIANISM

To combat authoritarianism in law, we need to develop a different understanding of law and authority. It may be useful to this end to understand which attitudes and beliefs appear to have anti-authoritarian

457. *Id.* (emphasis added).

458. Brennan wrote the majority opinions in *Eichman* and *Johnson*, the two flag desecration cases, and in *Metro Broadcasting*, the case upholding minority preferences for new broadcasting licenses. *United States v. Eichman*, 110 S. Ct. 2404 (1990); *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997 (1990); *Texas v. Johnson*, 109 S. Ct. 2533 (1989).

tendencies. This section briefly discusses approaches that seem to be useful in restraining the impulse toward authoritarianism. Drawing on studies by social scientists, the section then suggests that particular legal theories would support a non-authoritarian vision of the Rule of Law. Studies by social scientists and psychological theorists suggest that certain orientations to authority enable people to resist and combat authoritarianism. Although the anti-authoritarian attitude can rest on several different grounds, and holding the attitude does not always lead to goodness or altruism just as holding an authoritarian attitude does not preclude some goodness or altruistic acts, the attitude does resist oppression and domination of others. Such an attitude toward law, emerging in some feminist, critical race and humanist jurisprudence, and never absent entirely from a jurisprudence resting on a strong belief in human rights, may hold the most promise for combatting authoritarianism in legal thinking.

In *The Authoritarian Personality* study,⁴⁵⁹ the authors indicated that non-authoritarians were low on ethnocentricity and high on tolerance of difference.⁴⁶⁰ Although acknowledging that it was more difficult to generalize from the data about the anti-authoritarian personality, the authors divided individuals with low scores on authoritarianism into various "syndromes" that they then evaluated in psychoanalytic terms. Two of the "syndromes"—the "Easy-Going Low Scorer" and the "Genuine Liberal"—are of particular interest.⁴⁶¹ Together with the "protesting," or reactive, low scorer, the "easy-going" low scorer accounted for the most frequent type of low scorer.⁴⁶² The authors described the easy-going person as non-violent, compassionate, imaginative and non-judgmental.⁴⁶³ Far from being patriarchal or sexist, easy-going people "may best be characterized as those who know no fear of women."⁴⁶⁴ The authors criticize the easy-going person as too passive to be likely to resist oppression, although "one may count on them as on persons who, under no circumstances, ever will adjust themselves to political or psychological fascism."⁴⁶⁵ The "genuine liberal," like the easy-going person, is "compassionate," but the authors concluded that she is more likely to take action against oppression.⁴⁶⁶ From the somewhat sketchy description of the genuine liberal given by the authors (and from references in a later study to the Kantian morality⁴⁶⁷ preferred by the authors of *The*

459. *THE AUTHORITARIAN PERSONALITY*, *supra* note 78.

460. *Id.* at 191-208.

461. *Id.* at 380-85.

462. *Id.* at 373. The authors emphasized that "low scorers are as a whole less 'typed' than high scorers," however. *Id.*

463. *Id.* at 380-81.

464. *Id.* at 381.

465. *Id.*

466. *Id.* at 383.

467. S. OLINER & P. OLINER, *supra* note 38, at 255-57.

Authoritarian Personality), it appears that the "genuine liberal" personality is a rights-focused one. The authors seem to have found anti-authoritarian tendencies in people who resembled either Kohlberg's rights-based higher stages of moral development⁴⁶⁸ or Gilligan's higher stages of an ethic of care and morality of non-violence.⁴⁶⁹

In *The Altruistic Personality*,⁴⁷⁰ a study of individuals who helped Jewish people during the Nazi reign of terror in Europe, two researchers found that rescuers differed from nonrescuers in several important respects. First, they reported different upbringing: The parents of rescuers tended to emphasize the values of care—"the need to be helpful, hospitable, concerned, and loving"⁴⁷¹—and were "significantly less likely to emphasize obedience"⁴⁷² or to use physical force in disciplining their children.⁴⁷³ The parents of rescuers taught them that "[c]are was not a spectator sport, it compelled action. It meant assuming personal responsibility . . ."⁴⁷⁴ Thus, the rescuers were more likely to have been raised in non-authoritarian homes and less likely to have developed either a fear of or an absolute identity with authority. Second, although rescuers and nonrescuers did not significantly differ overall in their ability to empathize with others, at least in terms of emotional contagion (taking on the mood or emotion of another), rescuers were more responsive to others' pain, sadness and helplessness.⁴⁷⁵ Third, the rescuers resembled the anti-authoritarian "genuine liberal"⁴⁷⁶ in several ways. They tended to have had parents who rarely used physical punishment to discipline their children and who were approving of their children, a factor that seems to correlate with low ethnocentrism and high democratic potential.⁴⁷⁷ The rescuers, "like Adorno's antifascists, were more characterized by close relationships with others, empathy for and identification with the underdog, and perceptions of others as individuals rather than as representatives of a [stereo]type . . ."⁴⁷⁸ Finally, the authors of *The Altruistic Personality* found a difference as well; *The Authoritarian Personality* depended too much upon identifying the "true" anti-authoritarian as an independent, ego-integrated individual who embodied a Kantian vision of the moral development at the expense of other forms of moral development,

468. See Blum, *supra* note 34.

469. C. GILLIGAN, *supra* note 324; see also Gilligan & Attanucci, *Two Moral Orientations*, in *MAPPING THE MORAL DOMAIN* 73 (1988).

470. S. OLINER & P. OLINER, *supra* note 38.

471. *Id.* at 164.

472. *Id.* at 162.

473. *Id.* at 179-80, 249.

474. *Id.* at 168.

475. *Id.* at 174.

476. See *THE AUTHORITARIAN PERSONALITY*, *supra* note 78 (containing a description of the "genuine liberal").

477. S. OLINER & P. OLINER, *supra* note 38, at 256.

478. *Id.*

such as Carol Gilligan's ethic of care.⁴⁷⁹ Rescuers fell in both categories, but many followed the ethic of care. Thus, the fear of Adorno and his co-authors—that those whom they termed the “easy-goer” would not take action against fascism—seems to have been misplaced.

The characteristics of rescuers, by and large, were inconsistent both with the economic model of rational self-interested behavior and with the argument that human beings “need” authority in order to curb their violent tendencies. The authors identified four rough categories of rescuers, depending on their reported reason for helping Jews, although care for others was a common thread among the groups. In one group, this care appeared to stem from exposure to parental values “emphasiz[ing] caring for others, dependability, and independence.”⁴⁸⁰ Caring more concretely influenced another group of rescuers, who acted because of their friendship and contact with Jewish people.⁴⁸¹ A third group felt personal responsibility for society as a whole and felt connected to, and responsible for, everyone in their society.⁴⁸² A fourth group was “egalitarian,” feeling a general similarity with all people; “[w]hat moved them most was others’ pain, and they felt a strong responsibility to relieve it.”⁴⁸³ But, “rescuers [were] not saints.”⁴⁸⁴ They had difficulties with and resentments of some of the individuals they rescued; nonetheless, they persisted. Overall, “[w]hat distinguished rescuers was not their lack of concern with self, external approval, or achievement, but rather their capacity for extensive relationships—their stronger sense of attachment to others and their feeling of responsibility for the welfare of others, *including those outside their immediate familial or communal circles*.”⁴⁸⁵

Although “[i]nvolvement, commitment, care, and responsibility” characterized those willing to defy authority and sheer force in order to take affirmative actions to help Jews, the “catalysts” for altruistic action varied. The authors found that individuals gave three general reasons for helping: many individuals acted from an empathic response to their direct or indirect knowledge of the pain inflicted upon Jewish people;⁴⁸⁶ others responded to, or obeyed, the normative demand of “a highly valued social group” such as these relatively few churches that opposed the Nazi efforts to exterminate the Jews;⁴⁸⁷ and others saw outside events as violating their principles of

479. *Id.* at 257-58.

480. *Id.* at 184.

481. *Id.*

482. *Id.* at 185.

483. *Id.*

484. *Id.* at 239.

485. *Id.* at 249 (emphasis added).

486. *Id.* at 185.

487. *Id.* at 199-203.

justice or of care and acted out of principle.⁴⁸⁸ Only in the instance of the "normocentric" rescuers, those who obeyed the commands of authorities to help Jewish people, does an authoritarian orientation perhaps occur, lending support to the argument made in this Article that it is the goodness of the authority, rather than obedience *per se*, that determines good outcomes. Abstract principles, empathy, or following the normative rules of an authoritative group did not, of course, guarantee virtue, but empathy and principles of care or fairness were common and inspired acts of moral courage in the group studied.

In another study, two researchers used surveys of Americans to explore why people do horrible things to others at the behest of authority, and why others might approve those actions. This sociological study was particularly concerned with obedience to "legitimate" political authority that led to "crimes of obedience," or the commission of hurtful or atrocious acts in the name of superior orders or authorities.⁴⁸⁹ "Crimes of obedience," defined as the commission of acts that are illegal or that the person should have known were illegal while obeying "superior orders,"⁴⁹⁰ entail individual moral responsibility as well as authoritarian punitiveness and rigidity. To determine whether orientation to authority affected perceptions of individual moral responsibility, the researchers conducted surveys on attitudes about the conviction of Lieutenant Calley in the My Lai massacre case together with measures of attitudes about authority, obedience, and attitudes about particular hypothetical and real cases. While the authors recognized that the responses from individuals about what they would do in similar circumstances does not prove what they actually *would* do if they were in the situation of being ordered to obey immoral or illegal commands,⁴⁹¹ their study confirmed the relation of authoritarian submissiveness and identification with authority to a willingness to approve authoritarian oppression.

The authors were unable to develop a statistically significant measure for the anti-authoritarian orientation, which they termed "value orientation," but the group they identified as value oriented did test low on measures of authoritarianism, traditional moralism and conservatism.⁴⁹² Because both

488. *Id.* at 188, 209.

489. "Crimes of obedience are a consequence of authority run amok," as in the My Lai massacre. H. KELMAN & V. HAMILTON, *supra* note 74, at 20.

490. *Id.* at 46-51.

491. *Id.* at 262; see also S. MILGRAM, *supra* note 71.

492. H. KELMAN & V. HAMILTON, *supra* note 74, at 304. Part of the difficulty may have come from the questions used to measure "value orientation." The authors observed that the scale used to measure the value set contained many items that most people in American culture would agree with no matter what their ultimate orientation to authority. *Id.* at 304-05. The "value oriented" individual descriptively and empirically appears to be upper-middle-class in education and status; rather than subscribe to the hypothesis of "working class authoritarianism," the authors note that upper classes would experience more personal efficacy and ability to resist authority. *Id.* at 316.

the traditional moralism and the conservatism scales correlated with the measure of authoritarianism developed by Adorno and his co-authors, one might tentatively conclude that the non-authoritarians in the crimes of obedience study would meet the characteristics described as anti-authoritarian by the Adorno study. Descriptively, the non-authoritarian individuals were likely to assert individual responsibility for crimes of obedience and to measure authority's commands by their personal moral standards.⁴⁹³ They supported the government, but the support was conditioned on whether the government upheld the values and principles for which they understood it to stand.⁴⁹⁴ Overall, the study concluded that

[v]alue orientation was related to a tendency to assert individual responsibility for crimes of obedience and to a disposition to disobey commands that violate the individual's own principles. In contrast, the rule and role scales were both associated with a tendency to deny individual responsibility and a disposition to obey authoritative orders.⁴⁹⁵

The anti-authoritarian orientation can be care-based or rights-based, but in either instance, it grows out of a sense of personal moral responsibility, sympathy towards, and recognition of, the individual dignity and humanity of others. The orientation includes a sense of responsibility for others, an ethic of care, a capacity for compassion and empathy—particularly for the pain of others—together with a sense of independence from conventional morality. Tolerance of difference and of ambiguity also characterizes the anti-authoritarian attitude, but this by no means entails passive inaction. Rather, such tolerance is a refusal to engage in stereotyping and categorization of persons, a resistance to us/them thinking, and an ability to place commonality rather than difference at the base of relationship to others. Just as authoritarians are capable of good, anti-authoritarians are capable of evil, but their tendency toward inclusion, relationship and care for others mitigates the tendency to exclusion, punishment and oppression of those who are different.

Individual moral responsibility, respect and care for others, empathy for the pain of others, tolerance for diversity, concern for the rights of individuals—each of these elements seems robustly related to anti-authoritarianism. These elements are not foreign to legal thought. Thus it is important to consider, briefly, what ways of thinking about law can help us in opposing authoritarian oppression and subordination, and how we might think of law as something other than a formal and substantive instrument of authoritarianism. There are a number of scholarly legal arguments available that embody these anti-authoritarian traits. For example, Cover's work

493. *Id.* at 305.

494. *Id.* at 269.

495. *Id.* at 305.

consistently emphasized the personal, individual moral responsibility of judges in interpreting and applying the law. West's work frequently emphasizes personal moral responsibility and moral choice.⁴⁹⁶ Moreover, the arguments of humanist and progressive liberal scholars for positive and negative rights generally fit a description of the anti-authoritarian. The works of the "perfectionists" whom Monaghan criticized⁴⁹⁷ are anti-authoritarian in their arguments for the constitutional embodiment of those "substantive goods" of individual dignity, freedom, universal justice, and benevolence.⁴⁹⁸

Karst's work, exemplified in his book *Belonging to America*,⁴⁹⁹ rejects the notion of the Constitution as fixed command and argues for expansive and inclusionary interpretation, particularly of the fourteenth amendment. Observing that part of the character and history of the United States is nativist, racist, sexist and intolerant—in short, authoritarian—Karst also points to the elements of tolerance, understanding and inclusion in that character and history. Against intolerance, subordination and exclusion of the different, he argues for the use of our competing traditions of tolerance, responsiveness and inclusion in interpreting and applying the Constitution. For example, criticizing the Court's turn to "discriminatory intent" as the necessary element of equal protection violations as an effort "to contain" the promise of the clause, Karst argues for empathic and responsive constitutional adjudication consistent with anti-authoritarian principles.

In reaction to the Court's authoritarian decision in *Bowers v. Hardwick*,⁵⁰⁰ Michelman has argued for an understanding of strong personal rights, grounded in respect for individuals, as necessary to full participation and consideration in the formulation of non-authoritarian law.⁵⁰¹ According to Michelman, society can enforce its norms through law in a non-authoritarian manner only when "law-rule" is the *same* as "self-rule."⁵⁰² And "self-rule" is possible only in a process that is non-authoritarian itself.⁵⁰³

Neither Karst nor Michelman, nor indeed most liberal humanist scholars, is outside the range of "normal" discourse about law or legal understanding. Their arguments are always already available to those seeking to combat

496. West, *Authority*, *supra* note 180; West, *Freedom*, *supra* note 379.

497. See *supra* notes 218-21 and accompanying text.

498. See C. TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 396 (1989); see, e.g., Brest, *supra* note 353; Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

499. K. KARST, *supra* note 33.

500. 478 U.S. 186 (1986).

501. Michelman, *Law's Republic*, *supra* note 8, at 1528-36.

502. *Id.* at 1499-1503.

503. *Id.* at 1499-1501. He states that "self-given law" can only be created through a process "not considered or experienced as coercive, or invasive, or otherwise an invasion of one's identity and freedom." *Id.* at 1526-27.

authoritarian uses of law. The arguments of other legal scholars against the relationship of law to authoritarian oppression, however, differ in their emphasis on awareness of pain and suffering and their requirement of a caring response. These other developing lines of scholarship are even more markedly embodiments of anti-authoritarianism, in that they emphasize responsiveness and opposition to oppression and inclusion of diverse views and visions in law. These lines of scholarship argue for the use of an anti-subordination principle to combat the public *and* private oppression of groups and individuals in society, for the hearing and taking account of the voices of the oppressed in legal decisions and for the use of response to human suffering and pain in legal decisionmaking. Ruth Colker, for example, has argued that equal protection doctrine should center on an anti-subordination principle that identifies and remedies the evils of "racial patriarchy"⁵⁰⁴ in the United States. The evils the anti-subordination principle combats are the evils of authoritarianism: the dominance and oppression of some by others and the denial of full human status to some human beings by others. In deciding equal protection issues under the anti-subordination principle, the effect of a practice on the subordinated is always relevant. West has urged a reawakened personal sense of moral responsibility for our actions as a way to make rights and freedoms meaningful against oppressive, illiberal power.⁵⁰⁵

The scholarship of many minority and feminist scholars urges consideration of the voices of the oppressed in transforming law. By demonstrating how the voices of the oppressed and the "different" have not been heard in legal decisionmaking, and by demonstrating the oppressive effects of that exclusion, they suggest how legal doctrine and rules might be used to liberate, rather than subordinate, human beings. By communicating the experience of subordination, oppression and difference, these scholars also appeal to our common humanity. For example, Mari Matsuda has argued from the experience of Japanese Americans to show that reparations to those interned by a racist government during World War II are not problematic under law, but consistent with it.⁵⁰⁶ Patricia Williams has argued against inflexibility and absolutes in eloquently appealing to a celebrating and nurturing of difference.⁵⁰⁷ Charles Lawrence and Matsuda have challenged the legal mind to address the harm of racist hate speech, using both accounts of the effects of racist hate speech and legal doctrine.⁵⁰⁸ Chris

504. Colker, *The Anti-Subordination Principle: Applications*, 3 WIS. WOMEN'S L.J. 59, 64 (1987).

505. West, *Freedom*, *supra* note 379, at 79-106.

506. Matsuda, *Reparations*, *supra* note 34.

507. Williams, *supra* note 422, at 2143.

508. Matsuda, *Racist Speech*, *supra* note 34; Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431.

Littleton and Martha Mahoney have used stories and the law to depict the situation of battered women and to suggest legal reform.⁵⁰⁹ Robin West has argued that Congress' power under section five of the fourteenth amendment could be used to abolish the marital rape exemption in rape laws.⁵¹⁰ Martha Minow has argued that judges should be aware of their own assumptions and biases so that they may be open to considering the message of those who are different.⁵¹¹ Each of these and other scholars have messages that challenge substantively authoritarian assumptions in the law of the United States.

Scholars concerned that legal decisionmakers invoke a caring response believe that the stories of those who are victims of authoritarian law can increase understanding of their victimization or even bring about change in law. These scholars agree that law is indeterminate in the sense that law is always open to different interpretations, different resolutions and different futures,⁵¹² and that legal doctrine can respond to caring for the pain of others. As Karst and I have argued,⁵¹³ efforts to convey the pain caused by particular laws or legal practices are important to morally good legal decisionmaking. And morally good decisions require empathizing with those historically and presently seen as Other and accordingly oppressed.⁵¹⁴ Empathy for the pain of others can be an essential element of resistance to the persecution of others in an authoritarian system, as *The Altruistic Personality* study suggests. As West has argued, knowing the pain of others is possible and important for responsive, caring and, accordingly, anti-authoritarian law: "The knowledge we learn this way—knowledge of the subjectivity of others, gained and pursued through metaphor, allegory, narrative, literature, and culture—is a peculiar sort of knowledge, but it is absolutely essential to any meaningful quest for justice, legal or otherwise."⁵¹⁵ Such empathy and understanding alert the moral sensors of the responsible decisionmaker, who in turn may take action to end authoritarian oppression.

CONCLUSION

This Article has argued that there is much in law and legal thinking that is conducive to authoritarianism, and that particular arguments about law

509. Littleton, *supra* note 23; Mahoney, *supra* note 23.

510. West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 U. FLA. L. REV. 45 (1990).

511. Minow, *supra* note 33.

512. Delgado, *Storytelling for Oppositionists and Others*, 87 MICH. L. REV. 2411 (1989); Luban, *supra* note 8; Matsuda, *Racist Speech*, *supra* note 34; Michelman, *Law's Republic*, *supra* note 8, at 1528-29; Singer, *Persuasion*, 87 MICH. L. REV. 2442 (1989); Williams, *supra* note 422.

513. K. KARST, *supra* note 33; Henderson, *Legality*, *supra* note 33.

514. Henderson, *Legality*, *supra* note 33.

515. West, *One Contrast*, *supra* note 33, at 876-77.

reinforce authoritarian applications of law. Authoritarian understandings of law and legal decisionmaking rely on the paradigms of rule-following, obedience to authority narrowly understood and suspicion of human nature. While the present United States Supreme Court (and perhaps many federal courts) appears to be taking both a formally and substantively authoritarian approach to constitutional decisionmaking, it should not be permitted to define the universe of legal discourse and constitutional understanding for other courts or legislatures.⁵¹⁶ Nor should scholars and lawyers give up on articulating humanitarian visions of law and the Constitution. The anti-authoritarian, humanitarian vision of law and the Constitution is available, and the vision of broader, more responsive, and liberating uses of law should be the concern of all legal thinkers. Substantive authoritarianism flourishes when we cease to take personal responsibility for the suffering and oppression of others in the name of obedience to authority, including legal authority. It is incumbent upon us to take responsibility.

Nothing in law is so fixed that we don't have responsibility for acting creatively in making things just. When we go to sleep at night, we must reflect that we have done something political that very day: that in a society of powerful and powerless, our decisions and non-decisions have sided with one or the other.⁵¹⁷

516. For an argument that progressives should turn to Congress, see West, *Constitutionalism*, *supra* note 3, at 713-21.

517. Stanford Law School Students, *Beyond the Casebook: A Supplementary Reader for First Semester Law Students* (1st draft, Aug. 1990) (quoting Frank Michelman's concluding lecture, first-year property class at Stanford Law School, spring 1990) (copy on file with author).