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Radically Subversive Speech and the Authority of Law

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ESSAYS

RADICALLY SUBVERSIVE SPEECH AND THE AUTHORITY OF LAW

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This essay attempts to use a familiar, relatively concrete *constitutional* question to think about a familiar, relatively abstract *jurisprudential* question — and *vice versa.* The constitutional question asks why we should give legal protection to what I will call "radically subversive speech." The jurisprudential question concerns the ancient problem of the legitimacy or authority of law in general. "What is law," as Philip Soper puts the question, "that I should obey it?"[1] I will try in this essay to show that the abstract question sheds light on the more concrete one — and vice versa.

I emphasize that my object is not to provide a thorough review of either the problem of subversive speech in relation to free speech theories or the large literature concerned with legal authority.[2] My interest, rather, is in exploring one aspect of the intersection of these problems. Because the discussion considers two problems at once, it does not proceed in linear fashion to a unitary conclusion that can usefully be stated in advance. Instead, its method is to start by looking at — but not attempting to resolve — one problem, then to consider the other problem, and finally to circle back on itself in the end.

I. THE SPECIAL PROBLEM OF RADICALLY SUBVERSIVE SPEECH

Start with the narrower question. "Radically subversive speech," in this discussion, will refer to speech that challenges government at the core by denying the very legitimacy of the existing legal order. This kind of speech does not argue that the government has erred in adopting this or another particular policy or that some discrete feature of the existing political regime is unjust or ill-

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1. PHILIP SOPER, A THEORY OF LAW 7 (1984).

2. For a valuable overview and assessment of free speech theories, see FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982). For helpful general treatments of the problem of legal authority, see KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY (1987), and SOPER, *supra* note 1.

advised. It argues, rather, that the government itself is fundamentally illegitimate and should be repudiated or overthrown.

It is not easy to cite unadulterated examples of radically subversive speech. In part, that is because most speech is complicated, containing various and perhaps conflicting layers and dimensions of meaning. In part, the difficulty is also due to the fact that speakers typically do not craft their messages to fit legal or theoretical categories; indeed, insofar as the categories define exceptions to constitutional protection, prudent speakers might craft their messages so as *not* to fit those categories.[3] What one can say with confidence, though, is that there is a discernible range of political discourse that government regulators operating in tense or troubled times may sincerely regard as radically subversive speech, and they may classify the speech as such in decisions about whether it should be legally protected.

Indeed, our free speech tradition has been shaped in a series of encounters with speakers — anarchists, radical labor agitators, war resisters, and communists — who were understood, fairly or not, as advocating just this kind of subversive message.[4] Those historical encounters tended to produce two things: decisions upholding restrictions on speech and dissents containing eloquent and passionate free speech rhetoric.[5] In the long run, it seems that the dissents have proven more powerful than the decisions,[6] as the Supreme Court's recent flag desecration rulings reflect.[7] For the moment,

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3. For example, when members of the Nazi party applied for a permit to march and carry placards in Skokie, Illinois, they indicated that their message would be "White Free Speech," "Free Speech for the White Man," and "Free Speech for White America." Collin v. Smith, 578 F.2d 1197, 1200 (7th Cir.), *cert. denied,* 439 U.S. 916 (1978). This message, in contrast with other aspects of the Nazis' philosophy that they might have emphasized, reduced the possibility that their message would fit into categories of potentially unprotected speech such as "group libel" or "fighting words."

4. *See, e.g.,* Schenck v. United States, 249 U.S. 47 (1919) (anticonscription, antiwar, and anticapitalist literature); Debs v. United States, 249 U.S. 211 (1919) (antiwar speech by leading Socialist); Abrams v. United States, 250 U.S. 616 (1919) (pro-Russian Revolution leaflet opposing U.S. military action); Gitlow v. New York, 268 U.S. 652 (1925) ("Left Wing Manifesto" advocating "Communist Revolution" and "revolutionary Socialism"); Whitney v. California, 274 U.S. 357 (1927) (Communist organizing activity); Dennis v. United States, 341 U.S. 494 (1951) (conspiracy to promote communism and to advocate overthrow of the government).

5. All of the decisions listed in the previous footnote upheld speech regulations. Holmes's dissents in *Abrams,* 250 U.S. at 624, and *Gitlow,* 268 U.S. at 672, and Brandeis's opinion, though technically a concurrence but in substance a dissent, in *Whitney,* 274 U.S. at 372, have proven especially memorable.

6. Brandenburg v. Ohio, 395 U.S. 444 (1969), is usually regarded as a turning point in the movement toward broader protection of radical speech.

7. *See* United States v. Eichman, 496 U.S. 310 (1990) (holding the Flag Protection Act of 1989 unconstitutional because it suppresses expressive conduct protected by the First Amendment); Texas v. Johnson, 491 U.S. 397 (1989) (holding a Texas statute criminalizing the desecration of the flag unconstitutional as applied to a defendant who burned the flag as a means of political protest).

though, I intend not to side with either the decisions or the dissents but merely to frame the far from novel claim that radically subversive speech presents special obstacles, both practical and conceptual, for free speech theories.

The problem with such speech arises partially because the objective it ostensibly aims to achieve — the subversion of the existing government — may seem an especially catastrophic evil. Speech that attacks or threatens things the existing political order holds dear may be troublesome enough, but speech that threatens the political order itself raises the stakes to another level of magnitude. Hence, early decisions reasoned that, under a balancing test, the Constitution should permit speech regulations designed to prevent such a political overthrow even if the actual prospect of an overthrow was remote.[8]

Standing alone, however, this "balancing" argument does not identify the central problem radically subversive speech poses. It is possible, after all, that the existing legal order *is* or may become oppressive and illegitimate. If that is so, then speech exposing the illegitimacy of government would be *true,* and if such speech succeeded in bringing the illegitimate regime to an end, it seemingly would have achieved an especially valuable political good. In this vein, Holmes conceded, "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[9]

Nor is this concession purely artificial. We can identify historical examples of oppressive political regimes — the Third Reich, for instance — whose fall we regard as desirable and just. It is conceivable that our own government might be or become such a regime. So if radically subversive speech threatens to produce a catastrophic evil, that risk arguably must be balanced against the possibility that it could produce a singularly important political good — if, that is, the subversive message declaring the illegitimacy of government is true.

But the qualifier points to the more basic problem: radically subversive speech is *not* true. Rather, it is demonstrably "false" — in a special sense. To be sure, free speech theorists tend to be wary of "true" and "false"; indeed, they may insist that we can never be finally sure what is true and what is false and that this is precisely the reason that we must always keep the free "marketplace of ideas" inviolate.[10] But in contrast to the broad array of statements uttered in public and private discourse, the truth or falsity of which

8. *See, e.g., Dennis,* 341 U.S. at 509-11; *Gitlow,* 268 U.S. at 667-70.

9. *Gitlow,* 268 U.S. at 673 (Holmes, J., dissenting).

10. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

is independent of any theory of free speech, there will be a few notions that any given theory must itself presuppose and thus *necessarily* accept as true. Ideas incompatible with these necessary premises or presuppositions are, by implication, false.

This incompatibility is most obvious in the case of radically subversive speech that denies the value of free speech. This sort of denial will necessarily be in conflict with *any* theory *affirming* the value of free speech — which is to say that relative to the premises of any theory of free speech, this sort of radical claim will be false. In this vein, Larry Alexander notes that "freedom of speech cannot rely on the search for truth as its basis for tolerating advocacy of the repeal of freedom of speech."[11]

But the necessary falsity of radically subversive speech is not limited to radical claims that may deny the value of free speech. In various ways, even radical claims that attack the legitimacy of the government without explicitly denying the value of free speech will run afoul of necessary premises of free speech theories. Consider, for example, the "democracy" rationale, which in one version or another informs much free speech thinking. The core idea of this rationale is that our political community is founded on a commitment to democratic government, and democratic government is possible only when citizens are free to speak their minds on political issues. Within this theory, "truth" comes to have a special meaning. Robert Bork explained his version of the theory:

> Truth is what the majority thinks it is at any given moment precisely because the majority is permitted to govern and to redefine its values constantly. "Political truth" . . . has no unchanging content but refers to the temporary outcomes of the democratic process. Political truth is what the majority decides it wants today. It may be something entirely different tomorrow . . . .[12]

Under this view, most ideas are, at least as far as free speech theory is concerned, at least potentially "true"; they *might* at some point gain the support of a democratic majority. Hence, "there is no such thing as a false idea."[13] But this pronouncement is too broad. By the logic of the democracy rationale itself, there is *one* kind of idea that is demonstrably false — that is, an idea that contradicts the very logic of the democracy rationale by asserting that democratic government is illegitimate and hence that democracy is

11. Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763, 766 (1993).

12. Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 30-31 (1971). Bork's position, and the democracy rationale in general, create a number of conundrums that need not be considered here. For a discussion, see Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 649, 669-75 (1987).

13. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

not the test of "political truth." Bork drew the natural inference: "Speech advocating forcible overthrow of the government" should not be protected, he reasoned, because "[v]iolent overthrow of government breaks the premises of our system concerning the ways in which truth is defined, and yet those premises are the only reasons for protecting political speech."[14]

Similar problems may exist, though in more veiled fashion, with respect to other rationales for free speech, such as the "marketplace of ideas" rationale or the "self-realization" rationale.[15] A premise implicit in any free speech rationale is that speech is for some reason entitled to a degree of legal protection; a theory of free speech *must* affirm at least that much in order to be a constitutional theory of free speech. Another necessary notion of free speech, it seems, is that there is a regime or legal order with at least enough authority to grant legal protection to speech. It is hard to see how any constitutional defense of free speech could decline to accept *these* premises and still be a theory of free speech. Radically subversive speech, however, contradicts these essential premises. Consequently, one might argue that a theory of free speech is logically committed to the conclusion that radically subversive speech is false — "false," that is, not "objectively" or in the abstract, but as measured by the premises or necessary presuppositions of the theory of free speech.[16]

Confronted with the claim that radically subversive speech is "false," proponents of the prevailing view might respond, following Mill, that even false speech is valuable because of "the clearer perception and livelier impression of truth produced by its collision with error."[17] Ultimately, I will argue for an unorthodox variant of this view. For now, it is enough to note that although the contention that false ideas have value is not implausible, neither is it especially compelling. One may concede that even falsehoods have *some* positive value and yet doubt that this benefit will always, or even usually, outweigh the harm and error caused by false expression.

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14. Bork, *supra* note 12, at 31; *see also* Carl A. Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech,* 23 U. CHI. L. REV. 173, 188-89 (1956).

15. The "marketplace of ideas" rationale justifies free speech by asserting that truth will emerge when all ideas are spoken and exchanged. The "self-realization" rationale justifies free speech by insisting that it is necessary for individual freedom and self-understanding. For a full discussion of these and other familiar rationales, see SCHAUER, *supra* note 2.

16. *Cf.* SCHAUER, *supra* note 2, at 194 ("[I]f freedom of speech is justified by its relationship to the legal system, and especially if it is justified by its ability to ensure the functioning of a system of laws, then speech directed at weakening or destroying that legal system would appear to have little claim to protection.").

17. JOHN STUART MILL, ON LIBERTY 21 (Currin V. Shields ed., 1956) (1859).

Changing the context slightly to make the question less abstract, imagine that you are the victim of vicious slander and that the ugly lies spread about you are ultimately shown to be baseless. How much comfort will you derive from the observation that the truth — the truth, that is, of your virtue or integrity — shines out even more brightly now that it can be contrasted with the obnoxious falsehoods perpetrated by your defamer? The logic suggests that you should be grateful to your defamer for a benefit conferred or perhaps that the defamer has at least a moral claim upon you for services rendered. The improbable quality of these implications underscores the obvious conclusion: the positive value of falsehood is a value that we would often prefer to do without.[18] That conclusion seems to hold for radically subversive speech, as the case law and history noted earlier amply attest.

Even if this analysis is sound, of course, conventional free speech wisdom is apt to counter that although radically subversive speech might "in theory" or "in principle" be undeserving of the legal protection afforded other kinds of speech, it should nonetheless be given that protection on more prudential grounds. These prudential grounds would likely include the difficulty of identifying radically subversive speech and extracting it from other, more valuable speech, or "slippery slope" concerns, or fears of governmental error and overreaching if a category of speech is left unprotected.[19] The present discussion is not calculated to foreclose this conclusion; indeed, I will later suggest that there is a good theoretical rationale for resisting the temptation to suppress subversive speech. So the present point is, I repeat, a modest one. I suggest only that the case for protecting radically subversive speech encounters special, weighty objections that go beyond those that trouble free speech theory in general because such speech challenges the very premises of free speech or the regime that protects it.

I will return to the problem of radically subversive speech. At this point, with apologies, I must abruptly change the subject by raising a different and broader question: How can law have authority?

II. The Problem of Legal Authority

Many legal philosophers have held that "authority" and "obligation" are qualities essential to law — that a "law" that can claim no authority is not really law at all. Joseph Vining asserts that "[t]hat

18. *Cf.* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976) ("Untruthful speech . . . has never been protected for its own sake.").

19. For an argument to this effect, see Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 Stan. L. Rev. 299, 322-31 (1978).

which evokes no sense of obligation is not law. It is only an appearance of law . . . ."[20] Even legal positivists may acknowledge the centrality of "authority" to law. H.L.A. Hart, an avowed positivist, criticized John Austin's jurisprudence on just these grounds. Austin had defined positive law as a "command of a monarch or sovereign number to a person or persons in a state of subjection to its author."[21] But if law is no more than this, Hart objected, then there is no difference, except in scale, between "the law" and a mugger's command of "give me your money or I'll kill you." Austin's positivism, in other words, could not account for our sense that though the mugger's order "obliges" us to obey, "the law" does more than that: it "obligates."[22]

But what is the nature or basis of law's "authority," if it has any? This perennial question can be viewed as having both conceptual and factual aspects. The conceptual problem concerns the conditions that must be met in order for law to have authority. This problem invites a theoretical response detailing what law would need to have or be in order to impose obligations on citizens. The factual question asks whether these theory-based conditions obtain in reality. This question seemingly calls for a more empirical response. But of course the theorist or legal philosopher cannot just ignore the factual question because he is probably interested in considering not only whether some imaginary legal order *could* have authority but whether the existing legal order *does* have authority. So although the conceptual and factual issues are distinguishable, they must be considered in conjunction with each other.

Over the centuries, the question of law's authority has elicited a variety of answers — sometimes, as in the cases of Socrates and Daniel, from people who had more than an academic interest in the question. For present purposes, though, it should be sufficient to consider the orthodox account that legal authority must be based on the consent of the governed and two noteworthy alternatives to that account. Then this essay will point to an account of legal authority that is a sort of composite, though in one important respect essentially different from those previously considered.

A. *Consent*

The orthodox democratic view maintains that political and legal authority must somehow be grounded in "consent." It is "self-evident," the Declaration of Independence asserts, that "[g]overnments are instituted among Men, deriving their just pow-

20. JOSEPH VINING, FROM NEWTON'S SLEEP 34 (1995).

21. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE 134 (3d ed. 1954).

22. H.L.A. HART, THE CONCEPT OF LAW 6-7, 18-20 (1961).

ers from the consent of the governed."[23] A similar view is regarded as almost axiomatic in much modern constitutional discourse.[24] So a law has authority only if it or the government that enacted it was somehow consented to by those subject to the law.

This general answer to the conceptual question immediately provokes an obvious and troubling factual question: Have we as citizens consented to the prevailing legal order, and if so, how? The challenge raised by this question can to some extent be parried by tinkering with the concept of "consent." The standard moves are familiar. Consent, for example, may be extended to include "tacit consent" and "implied consent."[25] At some point, however, this conceptual tinkering becomes exhausted: the ostensible consent becomes so remote or so "constructive" that it seems purely pretextual. Perhaps it is implausible or simply false to say that the unwilling conscriptee drafted to serve in a foreign war has "consented" to the draft law in any even minimally meaningful sense.[26]

This conclusion is unsettling because it throws in doubt the authority of the whole legal order. Few of us consent in any explicit and specific way to *any* particular statute or regulation, and few of us consent consciously, deliberately, or formally to "law" or the legal order in general. If we consent at all, we normally do so very indirectly — by voting in elections, perhaps, or by accepting some of the benefits of citizenship, or by staying in the country rather than renouncing our citizenship and leaving. We consent, in other words, in the same loose and less than fully voluntary way that the conscriptee "consented" to the draft law. If the conscriptee's actions were not truly consent and hence not a basis for saying that he was "obligated" to obey the draft law, then few of us have any consensual obligation, it may seem, to obey any specific laws that we happen not to like. Ronald Dworkin explains: "Consent cannot be binding on people . . . unless it is given more freely, and with more genuine alternate choice, than just by declining to build a life from nothing under a foreign flag."[27]

If this conclusion seems unacceptable, we may simply choose to insist, through clenched teeth, that we — including the conscriptee

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

24. *See, e.g.*, ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 9 (1960) ("Governments, we insist, derive their just powers from the consent of the governed. If that consent be lacking, governments have no just powers."). Rogers Smith maintains that one element of "the course of America's constitutional development" has been an "expanding legal emphasis on consent as the sole source of political legitimacy." ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 4 (1990).

25. For a careful analysis of these issues, see GREENAWALT, *supra* note 2, at 62-93.

26. For a critical analysis rejecting arguments that base legal authority on consent or promise, see SOPER, *supra* note 1, at 65-67.

27. RONALD DWORKIN, LAW'S EMPIRE 192-93 (1986).

— *do* consent in the necessary sense to all duly enacted laws, including the draft law. Or, in the alternative, we might seek some basis other than "consent" for law's authority. It will thus be helpful to consider two leading contemporary legal theorists who have followed this alternate path.

B. *The Need for Coordination*

According to John Finnis, authority arises from the necessity of social coordination combined with the power of an individual or institution to provide that coordination.[28] A community requires some sort of coordinating authority in order to function and to promote the common good; it needs some person or institution to say when to set the clocks forward, which side of the road to drive on, how long insiders must hold shares before selling them, and when to arm and assemble for war — in short, how to behave in the whole host of matters, trivial or momentous, in which the absence of central direction would prevent citizens from working together efficaciously in the pursuit of their common interests. The need for coordination is not merely an unfortunate consequence of human ineptitude and wickedness; on the contrary, "the greater the intelligence and skill of a group's members, and the greater their commitment and dedication to common purposes and common good . . . the *more* authority and regulation may be required, to enable that group to achieve its common purpose, common good."[29] The necessity of coordinating direction can justify legal authority, Finnis maintains, without any appeal to "[c]onsent, transmission, contract, [or] custom."[30]

Finnis is surely correct in pointing to the social value — indeed, the social necessity — of a coordinating authority, and the point is one that we will return to more than once. But the fact that we *need* something does not normally ensure that we *have* it or even that the thing exists at all. I may need a meal, or a job, or a loyal friend, but it does not follow that I have any of these things. Similarly, need alone seems impotent to generate legal authority. Bosnia and Beirut need legal authority, desperately. Any destructive civil war underscores the social necessity of legal authority — and the insufficiency of necessity alone to create such authority.

In order to give rise to authority, therefore, Finnis explains that *effective power* must supplement *social need.* Authority, in other words, is the product of a need for social coordination *plus* the power or ability of a person, group, or institution to provide such

28. The following discussion is distilled from JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 231-59 (1980).

29. *Id.* at 231.

30. *Id.* at 248.

coordination.[31] So the threat or the reality of social chaos resulting from, say, the French Revolution does not by itself confer authority on Napoleon. What confers that authority is the combination of the threat of social chaos *and* Napoleon's ability to provide relief from that chaos. Authority is lodged in Napoleon by virtue of "the sheer fact of [his] effectiveness."[32]

Finnis's account avoids the need to hypothesize any fictional contract or consent, and in its recognition of the role of power, it displays a sense of realism sometimes missing in academic discussions of authority.[33] Despite these virtues, Finnis's formulation — social necessity *plus* effective power — provokes a serious objection. The problem now is not that the formulation is wrong but rather that in the typical situation, it begs the central question.

What, after all, is the source of Napoleon's, or Lenin's, or Congress's *power?* Why is it that "the say-so of [these people] . . . will in fact be, by and large, complied with"[34] thus enabling them to provide social coordination? It is surely implausible to suppose that these or most other governors could, through unaided physical force or personal charisma or moral suasion, exact compliance with their decrees. Indeed, the typical ruler or government official may not be especially well endowed with any of these qualities, and it would not be either incoherent or unusual for citizens of a community to ascribe legal authority to one individual or group while at the same time maintaining that other individuals and groups have greater physical strength, wisdom, virtue, rhetorical skill, or charisma.

So what is the source of the ruler's power? Typically, a ruler's *power,* to a large extent, lies precisely in the fact that his subjects believe he possesses legal *authority.* But this acknowledgment would seem to render Finnis's requirement of effectiveness or power circular and useless. A person has authority, we are told, if she has power to provide social coordination, but a person has power to provide social coordination if and because she has authority. So the central question remains unanswered. What is it that confers authority on particular people in the first place, thus giving them power to provide social coordination?

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31. *See id.* at 246-47.

32. *Id.* at 247.

33. *Cf.* GREENAWALT, *supra* note 2, at 161-62 (observing that one feature of a natural law theory of authority such as Finnis's is "its 'realism' about the origins and survival of actual political authorities").

34. FINNIS, *supra* note 28, at 246.

C. *The Community of Principle*

At this point, it will be helpful to leave Finnis's account temporarily and turn to another legal theory that, like Finnis's, does not rely on "consent" as the basis of legal authority. Whereas Finnis tries to squeeze authority out of social necessity, Ronald Dworkin seeks to ground it in a particular kind of political community. Legal authority, he explains, is not based on the "consent" of the governed[35] but rather on a collective commitment to "principle": legal obligations can arise only from and within a "community of principle."[36] In order to merit that designation, a community must meet stringent requirements. In particular, its citizenry must "accept that their fates are linked in the following strong way: they accept that they are governed by common principles, not just by rules hammered out in political compromise."[37] Thus, political and legal decisions cannot merely reflect public choice bargains or compromises among competing interest groups. *Those* kinds of decisions would carry no authority; they would not be fully "law." Instead, government must act on "a single, coherent set of principles."[38] Only if it does so can its law impose obligations on citizens.

Whether Dworkin's account satisfies the conceptual requirements for a plausible theory of authority is debatable. Imagine that you are Henry David Thoreau.[39] The tax collector answers your objections by explaining that contrary to your initial supposition, the war in Texas and the taxes required to support that war are not the product of political compromise. On the contrary, there is a coherent set of principles that can consistently account for the war, the tax, and the constitutional order generally. Is your answer, "In that case, here's my money," or, "So what—with all due respect for your ingenuity, the war's still wrong"?[40]

Suppose, though, that Dworkin's account is *conceptually* satisfying. Those inspired by his vision of community still must consider an unpleasant consequence: it seems that our own community fails as a matter of hard fact to qualify as a "community of principle." Most laws and political decisions in this country are quite clearly products of political compromise. For those who find political

35. DWORKIN, *supra* note 27, at 192-93.

36. *Id.* at 195-216.

37. *Id.* at 211.

38. *Id.* at 166.

39. *See* Henry David Thoreau, *On the Duty of Civil Disobedience, reprinted in* LEGAL AND POLITICAL OBLIGATION 25 (R. George Wright ed., 1992).

40. Of course, if Thoreau *accepts* the principles that justify the war, one might expect that he would support it. But it would be plainly unrealistic to suppose — and Dworkin does not assume — that all actual citizens will agree with the governing "single, coherent set of principles."

horse trading and compromise unseemly, the taint goes all the way down — to the Constitution and the Philadelphia Convention.[41]

Consequently, our own law would seem to lack authority. Moreover, a similar diagnosis seems likely for any large and heterogeneous democratic community subsisting anywhere outside our imaginations. So it may seem that in seeking to shore up the authority of law, Dworkin has effectively destroyed it.

D. *The Construction of Fictional Authority*

But this conclusion would be premature. No doubt Dworkin knows perfectly well that the quarrelsome, pluralistic citizenries that make up the United States, or the United Kingdom, or any other modern state do not constitute "communities of principle" as he has described them. He suggests, however, that this deficiency can be remedied by thinking "*as if* a political community really were some special kind of entity distinct from the actual people who are its citizens."[42] And this "as if" community might always act on a single, coherent set of principles, even though the flesh-and-blood citizens who make up the actual communities from which the "as if" community is abstracted plainly do not.

Dworkin is explicit in pointing out that this way of thinking about a community, which he calls "personification," involves an imaginative or constructive effort on our part. The "as if" community is not in reality a person; nonetheless, we can choose to think of it as if it were one. "[I]t is still a personification not a discovery, because we recognize that *the community has no independent metaphysical existence,* that it is itself *a creature of the practices of thought and language* in which it figures."[43] In short, the authority of law is wholly dependent on what plainly is, and what Dworkin quietly acknowledges to be, a fiction.

It is tempting — but it would also be unwise — to reject Dworkin's account of authority out of hand on the ground that the "community of principle" is nothing but a transparent academic fabrication. We should recall, however, that "legal fictions" are a perfectly familiar, if somewhat controversial, feature of legal thinking.[44] Some of our most venerated political philosophers — Locke, Hobbes, and Rousseau — have grounded political authority in a

41. *See* JOHN P. ROCHE, SHADOW AND SUBSTANCE: ESSAYS ON THE THEORY AND STRUCTURE OF POLITICS 91-126 (1964).

42. DWORKIN, *supra* note 27, at 168 (emphasis added).

43. *Id.* at 171 (emphasis added).

44. For a thoughtful discussion of the value and limits of legal fictions, see LON L. FULLER, LEGAL FICTIONS (1967). For a more skeptical analysis objecting to the common use of fictions, see Peter Birks, *Fictions Ancient and Modern, in* THE LEGAL MIND 83 (Neil MacCormick & Peter Birks eds., 1986).

"social contract" whereby individuals agree to confer upon the state all or some powers and rights that they had previously held while in a "state of nature." This "contract" is surely neither a historical fact nor a present reality, and it must therefore be regarded as a useful fiction.

Indeed, many centuries earlier, Socrates explained his obligation to obey the laws of Athens, including the unjust decree requiring his own execution, by personifying the polity in a way that at least resembles the kind of thinking Dworkin recommends.[45] In Plato's account, "the laws" actually appear as a person and engage Socrates in conversation.[46] This personification is not a superfluous literary device; rather, it enables Socrates, or Plato, to separate "the laws" from the Athenian multitude that Socrates argues, in the very same dialogue, is *not* entitled to respect or obedience.[47] In employing a fiction at the foundation of his theory, therefore, Dworkin arguably is carrying on a long and honorable tradition in political and legal philosophizing.

Nor is Dworkin the only contemporary legal thinker to tie legitimate authority to a fiction. John Rawls's "original position"[48] is not and could not be presented as a historical condition or occurrence. Bruce Ackerman locates constitutional authority in "We the People,"[49] but Ackerman's "the People" seems abstract and idealized, unnaturally integrated and abnormally self-conscious — manifestly distinct from the temporally and cognitively limited, flesh-and-blood mortals who fought about and then supported the Revolution, the Constitution, the Reconstruction Amendments, and the New Deal.

"We the People," in short, is a fictional construction.[50] Nor is Ackerman the original author of that fiction; John Marshall, for one, has a prior claim.[51] James Boyd White observes that we "think

45. Plato, *Crito, reprinted in* LEGAL AND POLITICAL OBLIGATION: CLASSIC AND CONTEMPORARY TEXTS AND COMMENTARY 1, 7-11 (R. George Wright ed., 1992).

46. *Id.* at 7-11.

47. *Id.* at 2, 4-5.

48. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971).

49. *See generally* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

50. Ackerman sometimes suggests as much. For example, in discussing "the Bicentennial Myth," Ackerman observes that "the narrative we tell ourselves about our Constitution's roots is a deeply significant act of collective self-definition; its continual re-telling plays a critical role in the ongoing construction of national identity." 1 *Id.* at 36. He views his own version of "We the People" as making constitutional history a "revisionary narrative." 1 *Id.* at 44.

51. *See* Lawrence Douglas, *Constitutional Discourse and Its Discontents: An Essay on the Rhetoric of Judicial Review, in* THE RHETORIC OF LAW 225, 234-50 (Austin Sarat & Thomas R. Kearns eds., 1994).

of 'the People' . . . as a kind of fictive entity constituted over time, in the life of the nation as a whole and in our institutions."[52]

More generally, White discusses Supreme Court opinions as literary works that rhetorically "construct" or "create" authority. The process by which judges create authority, it seems, is not essentially different from the process by which novelists or poets accomplish the same end. With respect to Justices like Frankfurter, Brandeis, and Harlan, White comments that "[t]he heart of their achievement lies in the recognition that their authority must be created rhetorically, in the opinion itself."[53] White's work is largely devoted to exploring the complex ways by which this rhetorical creation of authority operates.

E. *Authority as Self-Fulfilling Fiction*

Despite the pedigree of the philosophers and scholars who in different ways trace political authority back to rhetoric or fiction, one may still harbor doubts. What is the point of constructing authority on a fictional level? Isn't labeling this authority "fictional" tantamount to admitting that it is "not real" — and therefore not helpful for addressing real-world legal and political issues?

These questions may suggest that our quest for legal authority has again come to a dead end. At this point, though, the invocation of fictions can be combined with Finnis's emphasis on social necessity plus effective power to suggest a more promising account of legal authority. The problem with Finnis's position, once again, was not that the position was implausible but rather that it left the central question unanswered. Perhaps necessity plus power can create authority, but if power depends, as it typically does, on a widespread belief that government has authority, we are still left wondering how that belief arises.

Here the use of fictions may be illuminating. "Power" in the relevant sense consists, we might say, not in *having* actual *a priori* legal authority — whatever that might be — but in *persuading* a sufficient number of citizens that one has legal authority. If Napoleon can persuade the French that he has legal authority, then

52. JAMES BOYD WHITE, ACTS OF HOPE: CREATING AUTHORITY IN LITERATURE, LAW, AND POLITICS 84 (1994). White adds that "the idea that the framers of the Constitution, and the Constitution itself, are fictive is no argument against them. All thought about collective life requires simplification; all such thought is constitutive; and this 'fiction' . . . has been at times a source of enormous good." *Id.* at 84 n.2.

53. JAMES BOYD WHITE, JUSTICE AS TRANSLATION 217 (1990). More generally, White explains: "There is no ground in nature, in the facts, or in uninterpreted texts, upon which the law and its authority can rest. Both law and authority are made, and largely made in the process of writing the opinions by which the decisions reached by courts are given their meaning." *Id.*

they will obey him, and he will thereby acquire power to satisfy the social need for coordination.

In short, it is not fatal to legal authority to acknowledge that such authority is ultimately grounded in fiction.[54] If an authority story is believed, then it becomes in an important sense "true." If the people believe Napoleon has authority, he does; if they don't, he doesn't. The content of the authority story may vary — it may be a story about "divine right," or about a "social contract," or about a "community of principle" — but what matters is not the content of the story *per se* but rather that the story be believable and believed by those to whom it is addressed.[55]

III. The Nature of Fictional Authority

Recognizing the fictional element in legal authority may deflect some traditional and troublesome jurisprudential inquiries. In particular, this view suggests that the persistent quest to go beneath or beyond mere fictions such as "consent" or "social contract" in order to discover the "real" basis of legal obligation is, in one sense, unnecessary and misguided. More generally, it seems that *sociological* questions of authority addressed by social theorists and *philosophical* questions of authority addressed by legal and political theorists are more intimately connected than some jurisprudential discussions in an analytical philosophy mode seem to suppose.

This view of legal authority as self-fulfilling fiction also suggests a different perspective, I will argue, on the problem of radically subversive speech. Before returning to the free speech problem, however, it is necessary to reflect briefly on the nature of "fiction" and on the political "fictions" that may support authority. What does it mean to say of a story or a statement that it is a "fiction"? How are "fictions" different from simple "lies," on the one hand, and from simple "truths," on the other? And how do the fictions that lie at

54. Finnis concedes, although grudgingly, that legal authority might be grounded in a fiction: "The tendency of political thinkers to utter legalistic fictions about the original location of authority has its excuse, and perhaps its occasion (but not a justification), in the urgent need to legalize the devolution of undevolved authority." Finnis, *supra* note 28, at 250.

55. There may be a small flaw, or at least an unanswered question, in this account. Perhaps the account is subtly parasitic. How could we have believable fictions about authority, a skeptic might ask, unless there were somewhere, perhaps in the backwaters of our memories, a "true" or "real" authority? We can have believable stories about fictional spies or fictional detectives, after all, because we know there are real spies and real detectives. But we treat stories about mermaids or dragons or genies differently — though of course we may still tell and enjoy them — because we are confident that mermaids and dragons and genies do not "really" exist. Perhaps the same is true for authority, and without "real" authority, we could not have even believable fictions about authority. Indeed, one might wonder how we could have even developed the concept of authority if authority were always and inherently fictional. This doubt need not detain us, though, because, even if it is cogent, the important practical and jurisprudential question is still whether a particular account of authority is believable, not whether it is "true" in any more ultimate sense.

the foundation of legal authority work? This is not the place to explore these questions in detail, but it is necessary to say something about the kind of attitude or mindset that fictions seek to elicit and the conditions necessary to sustain this attitude.

A. *The Fictional Mindset*

Consider first the sorts of fictions with which we are all familiar and that we associate with the term "fiction": novels, movies, and television dramas. These fictions typically attempt to generate in the reader or viewer a complex, divided state of mind delicately poised between belief and disbelief.[56] We may doubt that a novel or a television drama is "really true" — indeed, we may know that it is not historically accurate — but in order to enjoy or appreciate it, we need to be able to set aside that doubt and to take the story "as if" it were true.[57] Suppose you go to a horror movie. If the film is well-made and if you maintain the appropriate attitude toward it, you will actually feel the terror the film is trying to evoke. For this to happen, you need to "believe" the story at least to the extent of imaginatively treating it "as if" it were true. A friend might mock you with the observation, "None of this really happened, you know; it's all made up." But your friend has missed the point and the experience by failing to muster up the requisite level of belief or by failing sufficiently to suspend his disbelief. His observation is superfluous because, of course, even as you imaginatively take the story as true, you also remain cognizant at some level that it didn't "really happen." Indeed, if you believed it "really happened" in the way you might, for example, if the story appeared in a documentary or on the evening news, your reaction might be entirely different — not the feeling of delicious terror that you have actually chosen and even paid to experience but perhaps a feeling of numbing fear, or shock, or outrage.

If either of these conflicting attitudes — the belief or the disbelief — is missing, then you will not have the experience of responding to the fiction in the appropriate or intended way. The story may

56. For a helpful discussion of this complex mixture of belief and disbelief, see JAMES BOYD WHITE, "THIS BOOK OF STARRES": LEARNING TO READ GEORGE HERBERT 42-44 (1994). *Cf.* JEROME FRANK, LAW AND THE MODERN MIND 317 (1930) ("In the case of a fiction the mind is obliged to regard a subjective idea 'as if' it were objective but, at the same time, to remain aware that the idea is actually subjective.").

57. Compare VINING, *supra* note 20, at 71:

> But then the individual who speaks in metaphor . . . does perhaps want his listener actually to believe, if only part way, as a child may be both skeptical and believing at the same time, *seeing* Mole and Rat sitting in overstuffed armchairs inside a hollow tree in a forest, *knowing* they are not to be found there. The deceit is benign, it is play, it is fantasy in which everyone is to join with good to come of it in the end, a residue of understanding left behind as if understanding were precipitated out of good drink and then washed down with it.

be so implausible, or you may be so incorrigibly skeptical, that you simply cannot call up the requisite belief needed to engage with the story at all, and then you will not feel the horror — or the sadness, or the exhilaration — that the story attempts to evoke. Conversely, an inability to apply the proper measure of *disbelief* may reflect some cognitive or psychological deficiency. We may think it touching or endearing when someone cries quietly in a sad movie; if they wail inconsolably, we will think there is something a little wrong with them. *That* is not the reaction the story is supposed to produce. To be sure, in our academic mode, we may with a show of insight challenge the distinction between fact and fiction.[58] But if in everyday life, we encounter someone who persistently fails to distinguish between fiction and reality, we say they are "delusional" or that they live in "a fantasy world."

Achieving and maintaining the complex attitude called for by a work of fiction requires effort both by the maker of the fiction and by the reader or viewer. The maker must present a story that is "plausible" in a complex sense. The story can deviate from actual history or from "the facts" in detectable ways, but if it seeks to be realistic fiction as opposed to, say, outright fantasy or theater of the absurd, it must not depart significantly from what "could have happened." In order to treat a story "as if" it were true, a reader or viewer should think that events of the kind narrated could have happened — even while acknowledging that they didn't — or that characters of the kind depicted could have existed and could have acted and talked in the way the story portrays.

If the maker of the fiction must present something that is "plausible," the viewer or reader must cooperate by trying to enter into the story and imaginatively take it as true, instead of warily watching for any sign of factual inaccuracy. It is merely obtuse or boorish to point out certain kinds of factual discrepancies in a work of fiction: "That's not really blood; it's ketchup!" or "Look! This is supposed to be happening during the Truman administration, but notice that parked car. It's a 1954 Ford!" This kind of observation would be highly relevant in other contexts. In a murder trial, for example, it would be crucial to note that what had been described as blood was really ketchup or that what purported to be an authentic photograph contained an object that did not exist at the time the photo was supposedly taken. With a fiction, however, this sort of trivial discrepancy is beside the point: the viewer's deficiency lies in noticing the discrepancy, not in failing to notice it.

58. *See, e.g.*, TERRY EAGLETON, LITERARY THEORY 1-2 (1983) (arguing that the distinction between fact and fiction is often "questionable").

B. *The Payoff of Fiction*

Upon reflection about the nature of fictions, it becomes apparent that the making and maintenance of fictions is a complex undertaking on the part of both the maker and the reader or viewer. It is an undertaking that demands effort and imagination, and it can — and, judging from movie reviews, usually *does* — go wrong in a variety of ways. What is it that justifies this effort and this risk? Substantially the same question is sometimes put by those who have no taste for novels or movies or television to those who do. Why waste time reading novels when you could read history and learn something true? Why watch television dramas when you could watch documentaries and thus become better informed? More generally, why should we make the effort to treat stories "as if" they were true when we know that in fact they aren't and when we could instead limit our attention to reports that at least purport to be factual?

The answer is that fictions promise — and, when they are successful, deliver — their own special kinds of payoff.[59] In some cases, the payoff might be simply escape from the pain or drabness of everyday life. Or it might be entertainment. The payoff might be vicarious experience or mental, moral, or spiritual illumination. Rewards differ, but people make the effort that the production and appreciation of fictions requires because we hope to obtain some benefit or reward for our effort.

So far we have been talking about the familiar kinds of fictions — novels, movies, and television shows. This discussion must now be extended to the political and legal fictions that lie at the foundation of law's authority.

C. *Political Fictions*

Fictions about legal authority — about "social contracts" or "communities of principle" — demand at least as much imaginative effort and suspension of disbelief as novels or movies do. Moreover, legal fictions cannot promise payoffs in the form of entertainment or enlightenment; people in need of either spiritual sustenance or comic relief typically do not turn to Hobbes or Locke or Dworkin or Rawls (although some readers may in fact find these authors spiritually sustaining — or comical).

But fictions about legal authority offer an even more indispensable payoff, which is the one discussed by Finnis.[60] In order to live together with a degree of harmony and cooperation, human beings need a coordinating authority. Political fictions seek to satisfy this

59. *See supra* notes 52, 57.

60. *See supra* section II.B.

need. Hence, powerful incentives support the effort to create and maintain viable fictions of authority. The compelling quality of these incentives may compensate, in the matter of political fictions, for even quite serious "factual" discrepancies. As a result, just as we may regard as obtuse the person who calls attention to the 1954 Ford — and we will be especially inclined to do this if the film is a very entertaining or moving one — we may also regard as boorish the radical critic who insists on pointing out that no one has really signed a contract to support the government, and we will be especially inclined to do this if the government is functioning well in satisfying the need for social order. In each case, we may think, the critic has a point — but those who treat the critic with contempt have a more cogent point.[61]

Despite the strength of the will to believe in political legitimacy, however, an authority story, like a novel or movie, still must satisfy some requirement of minimal plausibility. Three centuries ago, a claim of political authority based on "divine right" may have been sufficiently plausible; today, in this country, it just wouldn't sell. Even though voting in elections and exercising the right to speak about public issues may not add up to genuine and voluntary consent to be subject to government, the fiction of consent is more believable where citizens can vote and speak their minds than where they cannot. In short, authority stories need not be exactly true, but they must be close enough to what is accepted as factual to sustain the sort of belief that fictions seek to elicit.

This observation points to the real flaw in Dworkin's theory of legal authority.[62] The problem is not that his account depends upon a fiction but that Dworkin's fiction is not a very good one. Offered as an ostensible description of the polity of the United States or the United Kingdom or any other large and pluralistic democracy, Dworkin's rigorous "community of principle" partakes too much of fantasy to be accepted even as a plausible fiction. Indeed, it seems that in criticizing and seeking to replace the "consent" account of legal authority, Dworkin has misdiagnosed the situation and has offered a nostrum that will only aggravate the malady. The problem with the "consent" account is not that it is *conceptually* inadequate. On the contrary, the notion that legitimate government may and must be based upon the consent of the governed still appears to

61. Some of the reaction against the Critical Legal Studies movement and other critical movements in legal scholarship can be understood in this way — that is, as the protest of persons who believe that the legal order is functioning admirably or at least tolerably well and that it is therefore inappropriate for critics to upset the enterprise by emphasizing its defects and necessary illusions. *See, e.g.*, Paul D. Carrington, *Law and Chivalry: An Exhortation from the Spirit of the Hon. Hugh Henry Brackenridge of Pittsburgh (1748-1816)*, 53 U. PITT. L. REV. 705, 741-42 (1992).

62. *See supra* notes 35-43 and accompanying text.

command widespread support. The problem, if there is one, occurs on the *factual* level: it appears that citizens in reality have not meaningfully consented to government. As noted, Dworkin criticizes the consent account on just this ground.[63] But it is hardly a cure for *this* problem to offer an even more exotic fiction that on a factual level is as implausible as the consent account and that is conceptually alien as well.

Indeed, once we recognize the fictional quality of legal authority, it becomes quite unclear that any new *theory* of authority is needed. To the extent that there is any "legitimacy crisis," it seems that crisis arises not so much from conceptual deficiencies in the consent account as it does from practical problems that undermine its plausibility. When government undertakes to regulate more and more areas of life, for example, or when unelected judges assume a more pervasive supervisory role in the political and social order,[64] even citizens who are normally good-spirited or docile might naturally be pressed to wonder when and how they have "consented" to these intrusions. In addition, if government increasingly comes to be seen as bloated or bumbling or wicked, the payoff that drives the effort to sustain the fiction of consent will diminish, thus threatening the viability of the fiction. But these difficulties do not demonstrate any flaw in or erosion of support for the conceptual proposition that legitimate authority must be based on "consent."

IV. The Free Speech Problem Revisited

The immediately preceding discussion has considered the possibility that conspicuous implausibilities in an authority-founding fiction might threaten the legitimacy of government by undermining the belief needed to sustain the fiction. We must recall, though, that the state of mind that a fiction seeks to elicit is a complex one, involving not only belief but also a measure of *disbelief,* and that a failure to maintain the proper disbelief can also prevent the fiction from having the appropriate effect.[65] On the individual level, a per-

63. *See supra* note 27 and accompanying text.

64. Certainly it was the expanded role assumed by the judiciary beginning in the Warren Court era that prompted constitutional scholars to agonize over problems of "authority" and "legitimacy." The various constitutional writings of Alexander Bickel, Robert Bork, Ronald Dworkin, and Michael Perry, among many others, are centrally concerned with this issue.

65. Thus, a number of scholars have argued that although legal fictions can serve valuable functions, "[a] fiction becomes wholly safe only when it is used with a complete consciousness of its falsity." Fuller, *supra* note 44, at 10. Conversely, if we forget that the fiction *is* a fiction, Lon Fuller warned, "the inevitable result is intellectual disaster." *Id.* at 119. In a similar vein, Jerome Frank argued that the "correct and effective use of a fiction involves a constant recognition of its character." Otherwise, the result is "confusion and befuddlement of thought," and the fiction is likely to become a dogma. Frank, *supra* note 56, at 37-38, 317; *see also* Alf Ross, *Legal Fictions, in* Law, Reason, and Justice 217, 219 (Graham Hughes ed., 1969) (discussing the dangers of ignoring the difference between what is fiction and what is real).

son who lacks the proper measure of disbelief in a fiction is "delusional," and this kind of delusion is understood as a kind of psychological defect or mental illness. The malady that results from an analogous delusion on a societal level can have various names and take various forms. From a religious perspective, such a condition might be regarded as a form of political "idolatry."[66] Speaking from a secular perspective, one might describe a political culture that believes too unreservedly in the authority of its law as "authoritarian" or "oppressive."[67]

If one reflects upon political history in this century or, more narrowly, upon the views and assumptions of bureaucrats, judges, or "mainstream" legal scholars in this country at present, one might plausibly conclude that the authoritarian tendency to accept unreservedly the basic legitimacy of the existing legal order is as strong and potentially pernicious as the subversive temptation to deny the authority of law and government. Noticing that possibility brings this essay full circle to a second assessment of the issue of radically subversive speech.

The fundamental objection to protecting radically subversive speech, once again, was that this kind of speech is necessarily "false" in a special sense.[68] Though other statements might happen to be false, their truth or falsity raises a question independent of the truth or falsity of a theory or account of free speech. In contrast, insofar as radically subversive speech rejects assumptions on which a given theory of free speech rests, that theory seems logically committed to holding that the central message of such speech is false. Its necessary falsity, as opposed to the debatable and merely contingent falsity of other kinds of speech, makes radically subversive speech a special problem for free speech theory.

But the ensuing discussion of legal authority suggests that this earlier argument, although perhaps correct as far as it goes, is at best a partial truth. The legitimacy of the existing legal order, I have argued, is likely to be grounded in fiction, and an authority-founding fiction, like others, calls upon citizens to exercise both belief and disbelief. If the fiction works in the appropriate way, in other words, citizens should believe that government has legitimate authority — but also that it lacks such authority. More accurately, perhaps, the fiction should permit citizens to believe "as if" the necessary conditions for legal authority had been satisfied, even

66. I have argued elsewhere that a good deal of modern constitutional interpretation can be understood as a form of idolatry. *See* Steven D. Smith, *Idolatry in Constitutional Interpretation,* 79 VA. L. REV. 583 (1993).

67. For quite different efforts by legal scholars to explore the problem of authoritarianism in law, see JOSEPH VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN (1986), and Lynne Henderson, *Authoritarianism and the Rule of Law,* 66 IND. L.J. 379 (1991).

68. *See supra* notes 10-16 and accompanying text.

though at another level they know that this belief is not "really true."

Within the complex mindset required by the fiction of authority, radically subversive speech has an elusive, paradoxical status. Insofar as it denies something that the fiction calls upon citizens to believe, such speech is, to be sure, "false." But insofar as the authority story is a fiction, radically subversive speech is also true. Indeed, insofar as authority is grounded in a fiction, statements denying the actual *a priori* legitimacy of government are, in an important sense, *necessarily* true — unlike other kinds of statements that might be contingently true. So if a central purpose of legal protection for speech is to promote the pursuit of truth or to foster in citizens the appropriate orientation toward the legal order, then in one sense, radically subversive speech has a uniquely powerful claim on the law's protection.[69]

For similar reasons, the earlier observation that radical critics of law's legitimacy are obtuse and boorish now needs to be amended. To be sure, radical critics can be simple-minded nay-sayers — scorning a complex reality that they fail to grasp. But this is at best only half of the story. In another sense, radical critics are uncommonly perceptive; they tell a truth that most of us habitually overlook and that we need to be reminded of, lest we become "delusional" or "idolatrous." The radicals' message is "false" as measured by the fiction that we need to believe, but it is true in pointing out what we also need to recognize: the fictional quality of our beliefs.[70]

V. A Concluding Doubt — and Affirmation

I have suggested in this essay that the key to understanding both radically subversive speech and legal authority lies in the capacity of a class of statements or stories — "fictions" — to be both "true" and "false" and hence to call upon us to exercise both belief and disbelief. Insofar as we accept the claims of legal authority as "true," radically subversive speech is "false." But insofar as legal authority is grounded in fiction, the central claim of radically subversive speech is true.

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69. Whether such speech should be protected in every circumstance and in all of its manifestations is a question that I think cannot be answered on the basis of these reflections alone. That should not be surprising. Particular legal decisions and doctrines can almost never simply be deduced from abstract theory. Earlier in the essay, I suggested that prudential reasons might counsel *protection* for radically subversive speech even if in theory that speech is undeserving of protection. Conversely, prudence may sometimes require *regulation* of radically subversive speech even though there is a good theoretical objection to such regulation.

70. For a related argument suggesting that art should receive full constitutional protection because it is a valuable source of subversion, see Marci A. Hamilton, *Art Speech,* Vand. L. Rev. (forthcoming 1996) (manuscript at 18-20, on file with author).

Still, one may wonder whether fictional claims of legal authority can meaningfully be compared to more familiar fictions like television dramas and novels. With ordinary fictions we can mediate belief and disbelief in temporal fashion: *during* the movie or *while reading* the novel, we can treat it as true, and *afterward,* we can call it a fiction. But our experience of legal and political authority is not structured in this way. Typically there is no relevant *afterward* in which we look back upon legal authority and call it a fiction. Conversely, once we *do* assert that legal authority is founded in fiction, how can we thereafter continue to treat that authority as if it were "real"? To call a statement or story "fiction," after all, is normally to call attention to the statement's or the story's lack of truth.

I will not try to solve this problem but only to deflect it with a further observation. In this essay, I have discussed two kinds of claims — those of radically subversive speech and of legal authority — while proceeding as if my own discussion were detached, somehow independent of and different than the kinds of claims it is studying. But of course this essay is not unlike the subjects of its discussion. Insofar as it calls attention to the fictional quality of authority, it is itself a kind of subversive speech; insofar as it claims that authority *can* be based on fiction, it offers a version of and provides support for legal authority. So the essay, it seems, shares the ambiguous quality of the claims it discusses, and it accordingly calls for the same mixture of belief and disbelief. Authority exists insofar as we treat the kind of claims made in this essay as "false." As with other subversive speech, though, it would be a mistake to forget that its claims are also true.