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The Death

produced by Bruce Mau

of Discourse

Third Edition

Ronald K.L. Collins & David M. Skover

CAROLINA ACADEMIC PRESS
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To Life
&
Those We Love

CONTENTS

Text of 1791 First Amendment

XV

Dramatis Personae

XVII

How to Read This Book

XVIII

Foreword

XIX

Prologue

XLIII

Book I
The Paratroopers' Paradox

The Huxleyan Crossing

3

The Soma Medium:
Its Mechanics & Messages

9

A Rearview Mirror Look at the First Amendment

25

Wrestling with the Paradox

35

The First Amendment in Bold Relief
– A “Dialogue”

47

Book II
Commerce & Communication

Commerce & Its Handmaiden:
Then & Now
69

Commercial Communication
& Its Consequences
83

Commerce, Communication
& the Constitution
99

Communication &
the Capitalist Culture
107

Absolut® Protection? — A “Dialogue”
121

Book III
Discourse & Intercourse

The Rise of the Pornographic State
139

The Logic of the Erotic
149

Body Politics & the Ambivalent Citizenry
159

War & Pleasure in Pornutopia
165

Rubber, Reason & Religion
in Pornutopia
171

Respectable Stories
for an Unrespectable State
179

How Worthy a Tradition?
— A “Dialogue”
185

Epilogue

201

Deliberate Lies & Deliberative Democracy

205

The Discourse of Death

211

Afterword

217

Credits

251

Endnotes

253

Bibliography

295

Discography

321

About the Book & Its Design

323

About the Authors

325

Index

327

Text of 1791
First Amendment

Amendment I

Congress shall make no law respecting
an establishment of religion,
or prohibiting the free exercise thereof;
or abridging the freedom of speech,
or of the press; or the right
of the people peaceably to assemble,
and to petition the Government for a
redress of grievances.



Dramatis Personae*

Stuart Banner	lawyer
Leo Bogart	sociologist & advertising expert
Shadia B. Drury	political scientist
Elizabeth Fox-Genovese	historian
Robert Hariman	communications professor
Sut Jhally	communications professor
Alex Kozinski	federal appellate judge
Max Lerner	syndicated columnist
David Nyberg	philosophy professor
David M. O'Brien	political scientist
Martin Redish	law professor
Edward Rubin	law professor
Loyal Rue	philosophy & religion professor
Herbert I. Schiller	communications professor
Suzanne Singer	rabbi & former public television producer
Rodney A. Smolla	law professor
Richard Stivers	sociologist
Nadine Strossen	law professor & ACLU national president
Cass R. Sunstein	law professor & political scientist
Mark V. Tushnet	law professor

* Books I, II, and III and the Afterword contain “dialogues”
in which the people listed above participate.

HOW TO READ THIS BOOK

Writings are naturally accessible to all who can read.

— Leo Strauss

Social Research (1941), p. 488.

You do not have to be a jurist, a lawyer, or a scholar to enjoy this book. Of course, familiarity with philosophy helps, knowledge of sociology and psychology cannot hurt, some comprehension of law and government is useful, and an understanding of modern advertising and theories of communication (from Plato to McLuhan and beyond) is indeed helpful. But these are not prerequisites.

Anyone can read any portion of this book (in any order) and walk away with some new view of the First Amendment. At least, that is our hope. In what follows, we occasionally mix media — i.e., print and electronic. Sometimes discounting the traditional print mindset, we invite you, our audience, to read and listen to music, or to read and view videos, or to read and consider advertisements, or even to read while “turned on” to an eroticized imagination.

So relax. Do not be intimidated by the high-sounding law-talk of those few who quarantine the First Amendment in the lifeless wards of lawyers. Rather, visualize this little book in your own way, at your own pace, and for your own particular purpose. And remember: The First Amendment is, above all, what We the People make of it.

Foreword

If one lives long enough, sometimes the obvious remains so even in the face of denial. After all, yesterday's insights occasionally shed enough light through the corridors of time to reveal a momentous fallacy in constitutional and cultural thinking. That fallacy, which we exposed in this book's first edition, still plagues free speech jurisprudence. And so we return to the scene, a quarter century since we first associated the word "death" with "discourse." Today, as we will point out, that death sentence seems more warranted than ever.

There is a cautionary adage in Proverbs: "He who repeats a matter alienates even his friends."¹ Once written, a book is not to be reworked. That, at any rate, may be the Hebrew Scripture's admonition to authors. If so, there is some wisdom in the warning. For what is a text without closure? Its authority depends, in no small part, on its finality; its artistry on its originality; and its authenticity on its timeliness.² Moreover, to reopen the four corners of the printed page for revision potentially exposes it to all forms of novel attack, even by its earlier defenders. Challenges to its analysis may be dressed up in today's fashionable theories; critiques of its style may be fed by current aesthetic tastes; and conclusions about its relevancy may be inspired by the ideologies *du jour*. In short, writers who revisit their works risk severe judgments of obsolescence.

Is that not even more the case for authors who have predicted a death? As the Welsh poet Dylan Thomas reminds us, "After the first death, there is no other."³ It could be an injudicious act to return to the scene of a battle, if only to declare that the mortally wounded are still dying and the recently deceased are still dead. What might we be thinking, then, in writing a third edition of *The Death of Discourse*? Are we, like the war-weary partisans of the Greek hero Ulysses in Alfred Lord Tennyson's famous ode, enchanted by the belief that "Death closes all: but something ere the end, some work of noble note, may yet be done"?⁴

In the face of censure (even by our friends), we revisit yet again the state of American discourse for three important reasons. First, governmental responses to the geopolitical realities of 9/11 appeared to contradict central tenets of our book; accordingly, a resolution of

such seeming contradictions reinforces our thesis. Second, post-2016 political events, combined with ever-emerging communications technologies, validates our arguments to a disturbing degree. Third, new facts and figures further support our previous depictions of the nation's popular culture of electronic entertainment, commercial advertising, and pornographic eroticism. Although our earlier portrait remains surprisingly representative of our times, and retains much of its explanatory force, we relish this opportunity to retrace its lines and retouch its colors.

Think about it: More than any other provision of the United States Constitution, the First Amendment brought the idea of the pursuit of truth into the constitutional arena. Of course, it also brought other pursuits into that realm, some ignoble, others farcical. On the one hand, the Framers were the heirs of the Enlightenment; many of them shared the Kantian aspiration that it signaled “the emancipation of the human consciousness from an immature state of ignorance.”⁵ On the other hand, as the author of *The Age of Reason* (1794) well knew, the Enlightenment had its share of enemies determined to dismiss or subvert it.

If the Enlightenment promised a new self-confidence rooted in reason, the “no law” command of the First Amendment enabled a future in which that confidence might be eclipsed by folly of the most unsettling kinds. The ideal faith of the Founders notwithstanding, from the beginning the First Amendment was situated at the crossroad of reason and unreason, that place where the philosophical signposts proclaimed conflicting messages.

We are not unmindful that such a seemingly bipolar account wars with the idea of the Madisonian First Amendment cast in a quixotic light. Then again, we are all creatures of a post-modern world, the mere specter of which would horrify Enlightenment heroes such as Immanuel Kant, Denis Diderot, and Jean-Baptiste le Rond d’Alembert. That said, do not mistake our philosophic and pragmatic pause for any animus toward elevated notions of the First Amendment. Our admiration for the Madisonian ideal first prompted us to expose the hypocrisy justifying vacuous forms of free speech mouthed in its name. There should be no shame in debunking a culture in which truth has no real value and falsity masquerades as reality. Just such a social order—lionized in America’s political and popular cultures and justified in its legal theory—became manifest in the past several years,

and in most surreal ways. Thus, what we wrote back in 1996 strikes us as more relevant today than then, if only because free speech continues to thrive while enlightened discwourse continues to die.

The Death of Discourse reveals a “Huxleyan dilemma” operating in America’s popular entertainment culture. That is, much of our public talk resembles, in character and form, the distracting pleasures of Aldous Huxley’s anti-utopian *Brave New World*. Book I (pp. 1–65) establishes that we are inundated with the fact-free and amusing sound- and eye-bite spectacles of electronic technologies, even for our most important news and information. Book II (pp. 67–135) demonstrates that we are enticed by the fantasy-fulfilling words and images of commercial advertising, even for lifestyle choices beyond our means. And Book III (pp. 137–200) contends that we are tantalized by the lusty lures of pornography, even as our primary source of sexual fulfillment. In all of this, everyday experiences in mass communication dramatically deviate from the more traditional and lofty notions of rational discourse in the service of the civic good. Moreover, as the Epilogue (pp. 201–216) and the Afterword (pp. 217–249) argue, when we consider America’s public speech as it is rather than as it should be, our cultural approach to the First Amendment proves that the exalted reasons given for constitutional freedoms of speech and deliberative democracy are little more than noble lies. The modern First Amendment mixes the high and the low, protecting private indulgences in our carnival culture in the name of the political community’s constitutive values. Now our free speech system equates electronic self-amusement with enlightened civic education, the marketplace of items with the marketplace of ideas, and passionate self-gratification with political self-realization. In short, eighteenth-century Madisonian principles of discourse seem ill-suited, if not functionally irrelevant, for our practices in twenty-first-century mass communication.

When you read what follows, remember this: Our cultural approach to the First Amendment was crafted at a time and in circumstances that would be unrecognizable by some and perhaps only faintly remembered by others. In significant respects, it was a very different world. Ground-breaking communicative innovations such as Facebook, Instagram, Snapchat, Twitter, and YouTube did not exist; Fox News had just debuted on cable television; the I-Phone was yet on Steve Jobs’s

drawing board; and you could not read this book on mobile devices. In the political sphere, Bill Clinton was still President; William Rehnquist was still Chief Justice; centrist Republicans still retained seats in the Congress; and legalized gay marriage was still wishful thinking. On the entertainment front, the sit-coms *Seinfeld* and *Cosby* ruled the TV ratings; the first *Mission Impossible* movie was a top box-office seller; and the first volume of J.K. Rowling's *Harry Potter* series had yet to be published. As for the erotic domain, Pornhub and xHampster, two of today's leading porn sites, were a decade away from erogenous zones.

Running from this past to our present, however, a cultural constant remains. Admittedly, and as we note below, the facts and figures have changed. What has not changed is the Huxleyan dilemma: the unending modern assault on the edifice of the Madisonian First Amendment by entertainment pastimes, commercial pursuits, and erotic pleasures—all made possible by technological proliferation. It may be the same story, but its retelling takes on monumental proportions. In the process, Madisonian values struggle to survive in a popular culture largely indifferent to their demise.

Our Huxleyan warning could appear out of sync with the specter of Orwellian threats to our civil liberties in post-9/11 America. The war on terrorism that the United States waged on both foreign and domestic soil since the fateful morning of September 11, 2001, triggered troubling threats to our cherished freedoms of speech, association, press, religion, and privacy, among other civil rights. To mention only a few examples, the Homeland Security Act, passed in 2002 and still operative, seriously curbed press and public access to governmental information through Freedom of Information Act requests, and the ill-named USA Patriot Act of 2001 (that expired in part in 2015) significantly broadened the Executive's criminal inves-

EYEBITES: READER SUPPORT BOX

Orwell v. Huxley: Two Types of Tyranny

Orwellian tyranny = Ruling with an iron fist to create a system of fear and repression. Government squelches political dissent, bans books, invades privacy, censors electronic information, and conceals truth. The governing maxim is: "Big Brother Is Watching."

Source: George Orwell, 1984 (1949)

Huxleyan tyranny = Providing narcotic "soma tablets" and non-stop entertainment to create a system of pleasure and passivity. Government and the corporate sector offer a surfeit of amusement to distract the public from socio-political realities. The governing maxim is: "Everybody's Happy Now."

Sources: Aldous Huxley, *Brave New World* (1946) & *Brave New World Revisited* (1958)

tigatory authority. Exceptional governmental powers originally used for foreign counter-intelligence—including covert searches of homes and offices, seizure of personal belongings, and “roving wiretaps” to capture private e-mail exchanges, telephone calls, and credit card purchases, all without notice until the targets were actually prosecuted—became available for domestic criminal surveillance, as well. Ironically, at the same time that the Bush Administration secured an unprecedented amount of governmental secrecy, it weakened an unprecedented number of individual privacy and speech freedoms.⁶

For vehement critics of these national security policies, George Orwell’s ears would be burning. The English novelist who penned 1984, his famous tract on totalitarian tyranny, no doubt would have been alarmed by such dangers to our speech freedoms. And many a First Amendment advocate lifted the veil of government propaganda and exposed “Big Brother” behind our government’s promises of more security for less liberty. To them, the suggestion that the more profound threat to traditional First Amendment ideals may be Huxleyan rather than Orwellian ignored the realities of the time.

Of course, we must always be mindful of Orwell’s dark specter, and *The Death of Discourse* is unambiguous on this point: “Let us be clear: The potential for Orwellian governmental censorship should *never* be dismissed, and we do not dismiss it.”⁷ Indeed, if American free speech history teaches us anything, it is that our expressive liberties are most endangered precisely when they should be most engaged—that is, in periods of war or anticipated war. Tellingly, the first federal Sedition Act was passed by the Congress in 1798, when war with France seemed imminent; galvanized by concerns about German-American sympathizers, Congress passed the second Sedition Act in 1918, shortly after the United States entered World War I; America witnessed the West Coast relocation and internment of Japanese-Americans during World War II; and between 1951 and 1956, during the Cold War, Congressional McCarthyism supported the exaggerated fears of Communist governmental infiltration. In all of those instances, real spies or traitors were rarely discovered, but many political dissenters, pacifists, labor radicals, and innocent bystanders were jailed or silenced.

What do these lessons of history teach us? First, the American government—one ostensibly committed to the First Amendment and other fundamental liberties—is capable of exploiting national hyste-

ria to expand its powers and to equate dissent with disloyalty. To that point, President George W. Bush's then-press secretary, Ari Fleischer, highlighted the "un-American" character in criticizing the administration's war on terrorism, as he cautioned that "Americans . . . need to watch what they say."⁸ Second, our fellow citizens—including many who believe themselves to be free speech advocates—often will yield to the government's repressive agenda, ready to trade a full measure of freedom for the illusion of greater security. The ultimate lesson here: fear is the first enemy of freedom.

Though we must take this Orwellian lesson to heart, *The Death of Discourse* encourages us to confront another clear and present danger to traditional First Amendment values. In America, the dissenter is effectively silenced, and a citizenry that should jealously safeguard its constitutional liberties is lulled into passivity, by a commercial entertainment culture too often oblivious to truth. This is the enemy of free speech identified in the Huxleyan dilemma. And it was just as ubiquitous and treacherous in the aftermath of 9/11 as it had been previously. Indeed, to a large extent, the attributes and spirit of public discourse during the war on terrorism resonated noticeably with Huxleyan overtones.

For example, well-informed professors and pundits frequently decried the government's unprecedented power grab, and at the same time bemoaned the public's apparent ignorance of or indifference to the loss of its civil liberties. Typical were the observations of rhetoric professor Sandra Silberstein and civic activist Jeff Milchen: "In post-9/11 America, 'red, white, and blue' was everywhere. . . . Stores were unable to keep flags in stock. . . . [But] while millions of citizens were waving the Stars and Stripes, our constitutional rights were being whittled away by. . . . legislation that erodes three core protections: freedom of speech, freedom from unreasonable search and seizure, and freedom from deprivation of liberty without due process. And the flag wavers overwhelmingly were silent."⁹ Similarly, journalist professor Jane Kirtley explained the citizenry's abdication of its rights as the result of its insouciance: "[I]n this climate of escalating secrecy, the public appears content not to know, at least if enthusiastic support of Congress' [new security measures] is any indication." The general public attitude seemed to be: "Information is dangerous. I don't want to take any responsibility for my own security. Keep me safe. And don't tell me how you do it."¹⁰

In effect, these commentators depicted the Huxleyan dilemma, without explicitly labeling it as such. The public that they described were the millions of amusement-hungry prime-timers who proved that “Friends” were more popular than enemies, as the ratings for repeat episodes of the NBC sitcom topped those for ABC’s live-war coverage.¹¹ They were the star-struck media reporters who stumbled over themselves to publicize body-builder/actor Arnold Schwarzenegger’s California gubernatorial campaign, while virtually ignoring former Vice-President Al Gore’s challenges to President Bush’s distorted rationalizations for the Iraqi war.¹² And they were the evening TV audience, apparently “burned out” on serious news, who sated themselves with pseudo-“reality shows” and other entertainment fare rather than stress out over “real-reality” programs on such crucial issues as the ever-rising “post-war” military casualties in Iraq, the ever-declining national economy, or the ever-present struggle over affirmative action or environmental protection.¹³ Should it be any surprise, then, that the American mindset—occupied as it was with Huxleyan pursuits of triviality and pleasure—appeared markedly complacent about withering constitutional liberties, particularly First Amendment rights for the press and political dissenters?

Moreover, the Huxleyan tactics of our imagistic mass media immeasurably assisted the federal government in winning popular consent for its war against terrorism. From the moment that apocalyptic scenes of the imploding New York World Trade Towers were broadcast to a shocked and distressed nation, television programming exploited a form of “terror-tainment.” “Out came the graphics and stirring music as coverage became packaged with titles like ‘America Under Attack,’ ‘America Rising,’ and ‘America Fights Back,’” observed civil libertarian Danny Schechter. “The effects were soon noticeable as patriotism-influenced punditry and jingoism-informed journalism.”¹⁴ Prominent TV and cable news media personalities quickly revealed an uncritical penchant for military boosterism. No less a figure than the CBS Evening News anchor Dan Rather supported anti-terrorist war efforts by observing: “George Bush is president, he makes the decisions, and you know, as just one American, if he wants me to line up, just tell me where.” Similarly, ABC News anchor Cokie Roberts admitted, “Look, I am, I’ll just confess to you, a total sucker for the guys who stand up with all the ribbons on and stuff, and they say it’s true and I’m ready to believe

it.”¹⁵ Rallying round the flag, most television and press reporters gave little serious attention or depth of coverage to worrisome and well-documented abuses of governmental power, running the gamut from illegal detentions to racial profiling to harassment of dissenters. Instead, they manifested “patriochialism,” a “dicktat holding that supporting your country means supporting the current administration.”¹⁶ The media’s emotion-laden, angst-filled, and chauvinistic agenda delivered the popular verdict that enabled the President and the Pentagon to raise appropriations, to wage war, to broaden investigatory authority, and ultimately to undermine constitutional rights.

Consider also the explicitly Huxleyan terms in which the national government popularized its policies against war-time economic recession. A contracting American economy, further crippled by the September 11th terrorist attacks, presented troubling dilemmas for an administration elected in 2000 on a promise to cut federal income taxes. The solution: define consumerism as patriotism, and justify tax cuts as a tonic to stimulate economic growth. Though our citizens already had accumulated the historically highest level of consumer debt, President Bush called on them all to go shopping.¹⁷ And former Treasury Chief Paul O’Neil urged speedy passage of the President’s \$1.6 trillion tax cut plan to fill the pockets of avid buyers.¹⁸ “Maxing out your credit cards in the mall,” *NYT* reviewer Allan Sloan explained, “wasn’t self-indulgence, it was a way to get back at Osama bin Laden.”¹⁹ Comically reflecting on the hype to stoke the fires of Christmas-time consumption, *Colorado Business Magazine* editor Jeff Rundles wrote: “I am a patriot, not a debtor. Not exactly a fire-fighter or anything, but a hero of sorts. An American patriot. I went out this Christmas and spent like there was no tomorrow so that I might be responsible for the recession ending earlier than predicted, or the Taliban being defeated, or something else really important to the country.”²⁰

To the discerning eye, then, We the People expected hassle-free national security without the bother of governmental accountability; we preferred news-lite puff-pieces without the boredom of in-depth study; and we bought into a patriotic duty to consume without the sacrifice of genuine civic participation. In sum, we seemed to exchange the demands of informed judgment and social responsibility for the delights of illusory spectacle and individual self-gratification. As such, Americans were not the cowering citizens of

Orwell's Oceania, suffering under the totalitarian tortures of the Thought Police. They were, rather, the pain-free and pleasure-seeking denizens of Huxley's *Brave New World*.

Book I of this work focused primarily on the relationship between free speech ideals and America's entertainment culture, particularly as expressed through the medium of broadcast television. The conceptual link there demonstrated how amusement and the distractions of the "carnival culture" infect every aspect of modern existence, including political life. By that measure, celebrity figures—be they the governors of California or Wisconsin or the President of the United States—would qualify as model candidates for high office. In the process, the medium guaranteed that their messages, however bizarre, would become pervasive.

When *The Death of Discourse* was first published in 1996, broadcast and cable television were the dominant electronic communications media, although Internet use was becoming more prevalent in the 1990s. Since then, however, other Internet-based media have challenged television's dominance and surpassed its audience size. Nonetheless, the core tenet of our critique of discourse in America remains: "Entertainment is the supra-ideology of all discourse," is how our late colleague Neil Postman put it in his seminal book *Amusing Ourselves to Death: Public Discourse in the Age of Show Business* (1985).²¹ We greatly amplified on that argument and applied it to our thinking on free speech freedoms, always emphasizing how the various channels of communication succumb, in one way or another, to the entertainment mandate. Today, those channels include a large variety of new communications technologies. While our original examples are now offered as historical illustrations, the conceptual thread running through them extends both into the present and the future.

One man, more than all the rest, realized that he could exploit the boundless potential of the new technologies to replicate in the political world the success that he had achieved in the entertainment world. That man became the 45th President of the United States. In his pursuit of power, he changed public discourse in America in ways that would have appalled the great Enlightenment figures and shocked James Madison, the father of the First Amendment. Worse

still, the media cashed in on the outlandish spectacle and millions of Americans came along for the ride with fanatical fervor. And yet, exalted free speech principles continued to be bandied about by jurists and legal scholars as if the recent past had never happened, as if truth in the marketplace still had currency.

His name was his brand: Donald J. Trump. Literally speaking, his credentials were not those of a carnival barker, but they were akin to it. For some fourteen years, the former real-estate developer reigned as a TV celebrity, starring as the host of the widely popular reality show *The Apprentice*. Each episode concluded with the elimination of one contestant as the domineering Trump bellowed, “You’re fired!” According to Nielson ratings, the beguiling program at its seasonal peak drew in 20-plus million viewers. With such name recognition and natural braggadocio, he was ideally fit for presidential politics in our carnival culture.

The TV-savvy artist knew the workings of the media business better than journalists. He had mastered the skills of being a spectacle, the kind that attracts base instincts while constantly captivating audience eyeballs—and all this to ramp up ratings. By linking his carnival to the media’s commerce, he guaranteed that the captains of communication would pay homage to him with 24/7 “breaking news” coverage. No one (pope or politician), no group (religious or civic), and no truth (scientific or economic) could eclipse him. He had a lock on that. And the lock remained secure because his eccentricity was consistent with their commerce—that is, the *business* of the mass media.

The SPECTACLE[†] was on mesmerizing display during the 2015–2016 Republican primary debates. Time and again, and to the great amusement of the television viewing audiences, trite answers, false denunciations, colorful comments, personal insults, and posturing of all preposterous sorts triumphed over sense and substance in the twelve televised debates. Better than a game show and more enjoy-

[†] We need not fully endorse the philosophical underpinnings of Guy Debord to appreciate the importance of the insight that he offered in *Society of the Spectacle* (1967): The spectacle “is the heart of unrealism of the real society. In all its specific forms, as information or propaganda, as advertisement or direct entertainment consumption, the spectacle is the present *model* of socially dominant life.” (emphasis in original) Equally important: “The spectacle subjugates living men to itself.”

able than a sitcom, the main play was to the camera. The ratings for the SPECTACLE — between 12 and 24 million viewers—revealed that entertainment politics made for lucrative business.

That was the formula, or a main part of it. Keep the media lights on the candidate even in the face of repeated falsehoods and shocking distortions. It is all part of the SPECTACLE and how it works to the candidate’s political advantage and to the media’s pecuniary gain. The fact is that cable TV has “built an audience on outrage—people go there to get their anger on,” Tom Rosenstiel (executive director of the American Press Institute) told the *Post*’s media columnist Margaret Sullivan.²² The cable-news networks, he added, are “birthing centers for polarizing rhetoric.” Translated: polarity produces profits . . . the wellbeing of the Republic be damned.

The result was a paradox: On the one hand, journalists must remain faithful to their highest calling; that is, they must be objective and venture to discover and explain the truth as best as they can discern it. On the other hand, they must be beholden to the market forces that maximize their company’s revenues. In other words, they must serve two often warring masters, one that favors a Madisonian ideal and the other that favors a Madison Avenue deal. Though truth sells, it does not always sell as well as its counterpart, especially when the latter masquerades as the former.

Objectivity may be the aspiration but profit is the motivation. Journalism operates somewhere between those two goalposts. How closely it leans towards objectivity depends on its proximity to profit. True, the two may sometimes coexist, but given a test between them, profit is a hard master to disobey. The journalistic problem is seriously compounded when news is cast as entertainment and when politics becomes a circus chock full of outlandish acts designed to capture attention. Yet, this is where we are in our post-2016 world.

Retired journalist Ted Koppel highlighted the paradox, though he seemed to be at a loss as how best (if at all) to resolve it. In a 2019 *Washington Post* op-ed,²³ Koppel portrayed the problem in rather Sisyphean terms: “Let the record show that [the current occupant of the White House] has launched the careers of numerous media stars and that expressions of indignant outrage on the left and breathless admiration on the right have resulted in large, entirely nonpartisan profits for the industry of journalism. Why anyone should assume that [the President] and those who cherish or

loathe him in the news business will easily surrender such a hugely symbiotic relationship is hard to understand.” In another *Washington Post* op-ed,²⁴ Koppel was equally critical of America’s modern commercial media: “Beginning, perhaps, from the reasonable perspective that absolute objectivity is unattainable, Fox News and MSNBC no longer even attempt it. They show us the world not as it is, but as partisans (and loyal viewers) at either end of the political spectrum would like it to be. Audience share determines profits, which means that profits determine truth.” And so, Mr. Koppel sadly proclaimed, “that’s the way it is.”

What was paradoxical for journalists was propitious for Donald Trump. He garnered astounding media attention without having to pay for much of it. Victorious in one primary after another, he needed a relatively meager campaign budget. As of March 2016, the *New York Times* reported: “[Trump] still doesn’t have a super PAC. He skimmed on ground organization and field offices. Most important, he spent less on television advertising—typically the single biggest expenditure for a campaign—than any other major candidate. . . . But Mr. Trump is hardly absent from the airwaves.”²⁵

Trump’s *modus operandi*? He “earned” media attention by free news and commentary in newspapers and magazines and on television and social media that reported on his bold and boisterous campaign antics. Although he bought only \$10 million of political advertising in the primaries, he benefitted by a whopping \$1.898 billion of free media attention. By comparison, the next highest Republican “earner” was Jeb Bush, who came in for only \$214 million of free media while paying \$82 million for advertising. Notably, Trump’s earnings were twice the estimated \$746 million that Hillary Clinton took in during the same period. “The big difference between Mr. Trump and other candidates,” the *New York Times* story concluded, “is that he is far better than any other candidate—maybe than any candidate ever—at earning media.”

During his two election campaign bids and his presidency, Donald Trump sustained the unending barrage of message trafficking by his favorite weapons of mass distraction—Internet-based platforms such as YouTube, Facebook, and Twitter. Although he had attained notoriety through the medium of television, he understood all too well that the nation he governed had moved increasingly to online technologies for their news and entertainment.

Why, for example, would YouTube be so vital to Trump's mission? Answer: YouTube had an algorithm-fed audience of "2 billion regular viewers a month [as of January of 2021]—who watch over 1 billion hours of video per day, mostly via mobile apps on their phone."²⁶ Given YouTube's sensational popularity, Trump maintained a channel that included an extensive collection of campaign advertising, news bits, and original web shows that he and his associates produced. For a long time, YouTube allowed him to glorify and falsify his messages unregulated by pesky media gatekeepers. In this way, his YouTube channel enabled him to compete with the likes of CNN, MSNBC, and broadcast stations for 24 hours a day, 7 days a week.

From April to September of 2016, his YouTube following grew from 320,000 subscribers to more than 1 million. According to *NBC News*, "the Trump campaign was trying to flood YouTube with content and leverage the site as a secret weapon."²⁷ During his 2020 reelection effort, his campaign pulled back on television advertising and focused on Google's video platform. "The campaign and its joint fund with the Republican National Committee have spent over \$65 million on YouTube and Google—about \$30 million of it since July."²⁸

Even more important to his brand of communication and style of governance, Twitter was the electronic megaphone that best suited his instinctual nature of executive rule. Given their 280-character limit, his tweets—often peppered with grammatical errors and misspellings—were far less important for their substantive content than for the constancy of their frenzied onslaught. Since Trump first joined Twitter in May of 2009 with the handle @realDonaldTrump, he tweeted approximately 57,000 times, with more than 25,000 of these posted during his presidency. Trump tweeted 5.7 times per day on average during his first half-year in the White House, but the frequency grew to 34.8 times a day on average by the second half of 2020. His most active day was June 5, 2020, when he sent 200 tweets or retweets, as he angrily rebuked General Mattis for denouncing him as a threat to the U.S. Constitution. By 2021, Trump enjoyed over 88.9 million subscribers of @realDonaldTrump. When Twitter permanently locked him out of his account after the U.S. Capitol insurrection of January 6, 2021, he lost the primary vehicle for his constant feed of distraction. The same, of course, held true when YouTube and Facebook banned him. Gone were many of the oppor-

tunities for incendiary provocations, implausible claims, defamatory statements, outlandish boasts, and startling charges that energized his base, excited his party, enticed media outlets, and dismayed his political adversaries.²⁹

The realities of climate change, responses to the coronavirus scourge, reactions to police brutality of minorities, and relations with China, Russia, and North Korea were all essential topics for the White House and the press corps to hash out in press briefings, or daily White House briefings as they were called. But like the fate of the phone booth, such briefings became a thing of the past for the Trump Administration. As press briefings proved contentious and unproductive, the President turned more and more to “Twitter storms” and impromptu news conferences in front of Marine One, the presidential helicopter. Above the raucous clatter of the helicopter’s blades, Trump would hold court in some of his 30-minute exchanges with the press. He shouted, they shouted—“chopper talk.” They asked tough questions, he ignored them. And then he’d go off on some tangent in whatever direction the passions of the moment took him. In the process, the value of the Press Secretary and the White House briefings diminished to the point that by September of 2019 they were functionally obsolete. The fate of daily briefings was sealed, since its fare—rational discourse—had no place in a SPECTACLE dominated by his impulses.

There was another way that the President punished the press. He attacked its most treasured asset—its integrity. In this regard he was enormously successful in maligning the credibility of any reporter, newspaper, or media outlet. He did so with the use of two words, which became embedded in the American mind: “fake news.” In an interview with the *New York Times*,³⁰ he prided himself on his vernacular triumph: “I do notice that people are declaring more and more fake news. . . . I even see it in other countries. I don’t necessarily attribute that to me. I think I can attribute the term to me. I think I was the one that started using it.” He then combined those words with five others to further attack his media critics: “enemy of the American people.” As NPR’s Scott Simon observed, it’s “an incendiary phrase . . . [that’s] been uttered by some of history’s most vicious thugs—Robespierre, Goebbels, Lenin, Stalin, Mao—to vilify their opponents.”³¹ What is noteworthy here is how the Orwellian threat came to be aligned with its Huxleyan counterpart.

As we proceed, one thing will come into sharper focus: One cannot reason with a person who does not believe in reason. Facts, logic, and the very idea of reason governing our affairs no longer carried much weight in the toss-and-tumble of Trump politics. More and more people tended to situate reality into the frames of their own partisan beliefs—a case of a verdict preceding a trial. When this occurred, the line between facts and falsity blurred to a mind-numbing degree, as if there were no touchstone for truth. Americans seemed indifferent (or largely so) to a meaningless world, one bereft of reason. Perhaps by dint of fatigue they came to accept it, to acknowledge a political world in which the logic of $2+2=4$ succumbs to the lie that $2+2=5$. As Max Boot put it: If the President says that “ $2+2=5$, he expects his acolytes to nod in zombified acquiescence.”³² Incredibly, Trump’s expectations were often honored.

As he ended a tumultuous week in early March of 2019, the President clutched the American flag and then rambled on for more than two hours in his speech at the Conservative Political Action Conference:³³ “You know, I don’t know, maybe you know. You know, I’m totally off script right?” he said at the outset of his remarks. “This is how I got elected, by being off script” he told an indulgent crowd at the annual CPAC event. He dismissed investigations of him as “bullshit”; he mocked his former attorney general with a contrived Southern accent; he complained that the media did not accurately report the size of the crowd at his 2017 inauguration; and he tagged the House Intelligence Committee Chairman, Adam B. Schiff (D-Calif.), as “Little Shifty Schiff.” His criticism of special counsel Robert S. Mueller III was laced with profanities; and with capricious speed he crisscrossed from the success of his presidential campaign to immigration to free trade to the midterm elections without ever giving his audience a moment to think. Like a raving tent preacher railing against sin, he lashed out at his opponents: “We have people in Congress right now—we have people in Congress that hate our country. And you know that, and we can name every one of them if you want. They hate our country.” He took comic delight in deriding the validity of climate change: “When the wind stops blowing, that’s the end of your electric,” he said as if speaking to his wife. “Darling, is the wind blowing today? I’d like to watch television, darling.” He spoke of the government shutdown and the hardships it imposed on him: “I spent my New Year’s all by myself. . . . It was me and about

500 men and women outside with machine guns. I never saw so many beautiful-looking machine guns. I'd look at that equipment and I'd say, 'Man'. . . They sit in the trees. They sit on the lawn." Throughout, he veered time and again from talk of "criminal immigrants," to "crooked Hillary," to "socialist Democrats." Despite it all, the crowd expressed its approval with wild applause.

Because it was so bizarre, it made for great spectacle, great TV, and great fare for the evening's talking heads. Yet beyond the amusement appeal there lay a troubling truth: this was madness; it owed no debt to facts or reality or anything verifiable by the human mind. It was government by impulse: His measure was instinct, that unrestrained urge to say anything in any way, however incoherent. Nothing was vulgar; nothing was sacred; nothing was over-the-top; and nothing needed to make sense. It was all a show, the triumph of instinct over intelligence. Stimulated by the crowd, he upped his verbal ante as his admirers lowered their rational expectations. It was as strange as it was true, the President's own admission: "I'm going to regret this speech." But it was no more than a joke, a wink-wink for the audience, his way of saying that it really didn't matter what he said as long as *he* said it. Meanwhile, the statue of James Madison located on Independence Avenue was sullied by this ignominious display of ignorance, deceit, malice, and fury. In the face of Trumpism, Madisonian ideals had no purchase because the American culture no longer appeared to value them.

Much of the same instinct-driven mindset was on perilous display when Trump rambled on during his January 6, 2021, inflammatory remarks before a mob-ready crowd. Alarming as the storming of the Capitol was, equally astounding was the revisionist characterization given to the insurrection and the events related to it. In early February of 2022, the Republican National Committee officially declared that this episode merely involved "ordinary citizens engaged in legitimate political discourse." How astonishing that the very idea of discourse had become so unanchored that even violent property destruction and physical injury could be functionally labeled and legitimated as "political discourse." Notably, the RNC attempted to walk its statement back by claiming that it was not condoning violence; in this respect, it took its "wink-wink" cue from the Master of Deception.

On the one hand, if one were to articulate a First Amendment theory *critical* of all such exploits, what would that theory be? What-

ever it is, it would have to denounce all of the components—advanced capitalism, run-away commercialism, unchecked technology, and the public spectacle of amusement—that made Trump-talk triumphant. On the other hand, if a theory were to *defend* such talk, it must be oblivious to Huxleyan tyranny. We ask: Are any of the defenders of the modern First Amendment, in the courts or in the academy, willing to openly concede and embrace the civic cost of unbridled Trumpism? We ask again: Do any First Amendment reformers actually believe that, short of dramatic governmental and societal restructuring, the flood of toxic Trumpism could be abated?

Thus did life in America turn between 2016 and 2022. Uncertainty was widespread. Demagoguery was unbridled. Hyperbole ubiquitous. Objectivity impossible. Facts suspect. And willful ignorance normal. Snap-judgments replaced deliberate decision-making. Science took a back seat to propaganda. Social media spread misinformation with wild abandon. The media, both liberal and conservative, were often too preoccupied with ratings to ferret out a fuller measure of the truth. Many denied responsibility, deceived themselves, and took refuge in a collective lie in order to defend the indefensible. And all of this transpired while a terrifying plague threatened the very lifeblood of a nation. It was the age of the Un-Enlightenment, the death of reasoned discourse in the public realm.

Book II of *The Death of Discourse* explores our nation's inextricable link between private commerce and public communication. America's mass and social media cater to the demands of producers and the desires of consumers, who thrive in a co-dependent and synergistic relationship. Delivering a banquet of commercial advertising, our channels of public expression promote goods to buy; more abstractly, however, they offer lifestyle fantasies to consume. That is the greater meaning of our study of modern commercial advertising. In other words, speech in the service of selling develops the codes of our culture, and we stand to become the sum of what we buy. Moreover, as the values of communication are fused to the market, the law's notions of commercial speech alter even our understanding of First Amendment freedoms.

As we now cast our thoughts into words, we do so against the backdrop of the Supreme Court's First Amendment decision in *Reed v.*

*Town of Gilbert*³⁴ and its largely inflexible ruling on the invalidity of content-based discriminatory speech regulations. If *Reed*'s ruling were methodically applied to commercial speech contexts, constitutional protection for commercial expression would be vastly invigorated. In practical effect, commercial speech could be elevated functionally to the same level of constitutional value as political speech.

In a jurisprudential realm in which legal doctrine is unanchored to some overriding free speech principle, the possibility of equating political dissent with commercial puffery is real. As we noted in Book II (pp. 111–115), just such an anchor was provided in the first case in which the Court extended protection to commercial speech. That anchor was the *right to know*: that is, the right of consumers to receive truthful and accurate information in order to make *informed* decisions in the commercial marketplace. That elevated precept has come to offer constitutional protection to every sort of irrational and even non-sensical advertising of the sort exemplified by imagistic commercials. In other words, *rational* advertising has ever-declining currency in the modern American commercial culture.

If *Reed* portends the doctrinal future of commercial speech, that fate is endorsed today by Professor Martin Redish, the intellectual godfather of an expansive constitutional theory safeguarding commercial speech. In his book *Commercial Speech as Free Expression: The Case for First Amendment Protection* (2021), Redish offers bold arguments for “extending full First Amendment protection to commercial speech. . . .” Whatever one may make of such an alliance between judicial doctrine and academic theory, one thing is undeniable: both positions are consistent with communication in a highly capitalist culture. Indeed, it would be most odd if commercial speech actually were devalued in such a culture.

In a technological world of data collection and terms of service contracts, the specter of consumer information being marshalled by algorithms for marketing purposes is real—it is already happening. Consistent with that phenomenon, the tenacles of commercialism reaches all sorts of communication devices and platforms. A new generation of advertising has evolved through insights informed by data collection. Not surprisingly, in 2021 Facebook launched “a new series of expert interviews to help provide more guidance for advertisers on how to respond to key industry shifts. . . . As explained by

Facebook: “[W]e will explore how the marriage of data and creativity is helping to drive the best [results] in class advertising and powering better returns on investment for brands.”³⁵ The way James Greaney, the Chief Data Officer at CHE Proximity (a “full service advertising agency”), sizes things up: “By using the tools and technologies we have at our disposal, the advertising industry can create great entertainment and experiences that are genuinely valuable. And since we have the ability to measure its effectiveness, we need to lean in and make sure that we’re understanding it properly.”³⁶ Data harvesting, combined with data configuration, combined with personalized consumer-oriented entertainment—it all points to commodity identities in a consumer democracy . . . protected, of course, by the First Amendment. And if Facebook and other communicative platforms can use political ads to spread misinformation, should they not claim a similar right to do so with commercial ads? Would this not be yet further evidence of the foreseeable move to unite the principles of political speech with the practices of commercial speech? Keep that in mind as you read the commercial marketing examples of yesterday as set out in Book II, since they set the stage for what has come to pass today and what will likely occur tomorrow.

Book III of *The Death of Discourse* introduces an allegorical place named “Pornutopia” (pp. 165–177)—not America as we now know it, but a state to which America often appears to aspire. Our society both celebrates and condemns the carnal; but we cannot deny the ever-increasing prominence of sexualized speech in our public arenas and popular amusements, and the ever-powerful influence of eroticized expression over our notions of First Amendment freedoms. This is entirely predictable: since sex appeals and sex sells, our commercial marketplace imagistically transforms and packages it, and sends it out for sale. The capitalist regime of profit wed to pleasure points the way to Pornutopia—a republic erupting with sensual images, a domain where uninhibited, robust and wide-open fantasies dominate. And the capitalist free speech system protects the rise of Pornutopia, as our First Amendment law equates pornographic images with political ideas, self-gratification with self-realization, and the pursuit of private pleasure with the search for the public good.

The story of Pornutopia, however, is not to be told here. Only in the full context of Book III will you come to appreciate the properties and peculiarities of Pornutopia, the hormone-happy state, a no-man's land of sensual indulgence. At this point, we aim only to present the current data that mark the steep ascent of the pornographic state. In this regard, welcome back to Erotic America as it is currently constituted.

It is a sign of our times: literary classes on pornography. Yes, students are learning how to be literate in pornography; they study how to process the erotic. According to a July 2021 *New York Times* article: “Multiple sex educators . . . said there was nothing inappropriate about [such] classes. . . . All of it was in line with current National Sex Education Standards and the World Health Organization’s International Technical Guidance on Sexuality Education.” The article went on to note that a recent national survey, published in the *Journal of Sexual Medicine*, “found that the average age of first exposure to pornography was just under 14 for males and just under 18 for females.”³⁷

In keeping with the need for such education, “[p]ornography literacy classes teach students how to critically assess what they see on the screen—for example, how to recognize what is realistic and what is not, how to deconstruct implicit gender roles, and how to identify what types of behavior could be a health or safety risk.”³⁸ Consistent with such public education, the pornographic website Pornhub has produced a “Classic Nudes” guide for “finding eroticism in dozens of major nude works of art exhibited at prestigious museums.”³⁹ Thus, from K-12 schools to art museums to YouTube to cybersex technology and beyond, behold the Renaissance of Pornography!

Of course, when it comes to such sexual mastery, many viewers, including longtime ones, are illiterate. But that does not prevent them from savoring pornography’s sexual delights. Though *Playboy* and *Hustler* magazines no longer rule the erotic roost, their more seductive Internet successors (XVideos and Pornhub) alone claim 6.7 billion monthly visits.⁴⁰ According to pornography industry sources:

- American children begin consuming hardcore pornography at an average age of 11.
- Four out of five 16-year-olds regularly access pornography online.

- The pornography industry is a \$97 billion business worldwide.
- The pornography industry is a \$13 billion business in the United States.
- Internet pornography in the United States is a \$3 billion industry.”⁴¹

And “every second, \$3,075.64 is being spent on pornography, 28,258 Internet viewers are ogling pornography, 372 Internet users are typing adult search terms into search engines, and every 39 minutes a new pornographic video is made in the United States.”⁴² In Covid times there was a 43% increase in pornographic consumption.⁴³ In the near future, virtual reality and cybersex porn will be multi-billion-dollar profit-makers. Thanks to landmark First Amendment cases such as *Reno v. ACLU* (1997)⁴⁴ and *Ashcroft v. Free Speech Coalition* (2002),⁴⁵ such erotic pursuits have become a common feature of American culture. The Internet is, save for child pornography, a bacchanalian paradise of porn.

The ascendancy of Pornutopia represents a key component of free expression in our modern world. To ignore it, to act as if it stood apart from what we consider free speech liberty, is to turn a blind eye to how electronic eroticism shapes our discourse and our lives. By way of a single example, consider the isolating nature of pornographic use. That may well be understood as a preference for the virtual over the real. In that world, freedom of real association is recast as freedom of virtual association. Erotic companions in Pornutopia are always and everywhere ready to associate with the minds and imaginations of those who value the stimulating *virtual* life.

We trade in taboos, and in Pornutopia there are almost no taboos that are beyond the virtual pale. Moral crusaders such as Anthony Comstock (1844–1915) and his Society for the Suppression of Vice no longer have the clout they once enjoyed when they prosecuted and persecuted the “depraved.” Moreover, as a result of the Internet and emerging technologies, obscenity laws have functionally gone the way of Victorian values. That past has lost its currency; ours is the age of the uninhibited First Amendment. No less a man than Harvard Law School’s Cass Sunstein long ago realized this cultural truth as he explained pornography’s vital role in our society and defended it as valuable under a lofty First Amendment theory of autonomy: “Sexually explicit works can be highly relevant to the development of

individual capacities. For many, it is an important vehicle for self-discovery and self-definition.”⁴⁶ In other words, pornographic self-gratification is tantamount to self-realization.

While we certainly do not wish to embrace the Comstockian mindset and thereby endorse any kind of Orwellian tyranny, we wonder if Sunstein and his conceptual fellow travelers have ever paused to ponder exactly where their “vehicle for self-discovery” will take them on the path to Pornutopia. Precisely such concerns informed us when we wrote the section of our book titled “Deliberate Lies and Deliberative Democracy” (pp. 205–210). Deceit, after all, seems to be a strange attribute to champion in any democracy, especially one rooted in Madisonian soil.

I'm probably the most aggressive defender of the First Amendment. Most people might think that doesn't quite fit with my jurisprudence in other areas. . . . People need to know that we're not doing politics. We're doing something different. We're applying the law.

That's how Chief Justice Roberts described his First Amendment voting record when he engaged Belmont Law School Dean Alberto Gonzales in a conversation about his jurisprudence in February of 2019.⁴⁷ But apart from a numerical account of free speech claims sustained by the Court, what does it mean to be a defender of the First Amendment? What exactly is being defended? Throughout our book we examine that question time and again. For example, some of the standard answers given are the following: we value speech because it promotes *self-realization* or *self-fulfillment*; we prize speech because it enables *self-governance*; we protect speech because it provides *information*; or we safeguard speech because it *checks the government*. All of these are elevated reasons for securing free speech. But are those the justifications that are advanced today when the Roberts Court renders its decisions in animal abuse video cases, or violent video game cases, or cases involving lying, or campaign finance cases, or commercial speech cases, and so on? We raised such questions decades ago and found that both the Court and legal scholars either proffered elevated purposes for speech that could not easily be defended when applied in the cases under consideration, or they protected speech for its own sake regardless of the values that they could not claim. Then as now,

we were less concerned with whether speech should be protected than we were as to *why* it should be protected. When we explored the “why” question in the Epilogue (pp. 205–210), we concluded that hypocrisy best explained their rationalizations—that deliberate lies were being tendered in the name of deliberative democracy.

Have things changed since we first wrote those words? In response, we ask: what does it mean to be the “most aggressive defender of the First Amendment”? For the Chief Justice, who assigns the lead opinions in 96% of the free speech cases decided by his Court, it means upholding the constitutional right to lie. For example, in *United States v. Alvarez* Roberts signed onto Justice Anthony Kennedy’s majority opinion that declared: “Our constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth. See G. Orwell, *Nineteen Eighty-Four* (1949).”⁴⁸ In *Brown v. Entertainment Merchants Association* the Chief Justice voted to affirm the First Amendment right to sell violent video games to minors. He joined Justice Antonin Scalia’s majority opinion that proclaimed: “The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try.”⁴⁹ Roberts’s “aggressive” defense of the First Amendment also meant safeguarding the free expression rights of those who trade in images of “horrific acts of animal cruelty—in particular, the creation and commercial exploitation of ‘crush videos,’ a form of depraved [sexual] entertainment that has no social value.” That, at least, is how Justice Samuel Alito depicted it in his dissent in *United States v. Stevens*.⁵⁰ The Chief Justice viewed the matter differently. “The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs,” he wrote in his majority opinion. “Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.”⁵¹

False speech, violent commercial expression, and erotized visual fare all claimed and received constitutional protection under Madison’s First Amendment. Enlightenment principles were bum-rushed out the constitutional door. By the same measure, the Roberts Court has extended considerable protection to monied interests in both campaign contribution and commercial speech cases. In these regards, liberals—both on the Court and in the legal academy—came to view more and more of the Roberts Court’s jurisprudence as being moti-

vated by laissez-faire economic considerations. “Adam Smith’s First Amendment”⁵² is how Professors Amanda Shanor and Robert Post tagged it. By Justice Elena Kagan’s measure, the Court was “weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.”⁵³

In the culture we describe in Books I through III ahead, all such forms would certainly merit First Amendment protection, not because they further lofty free speech ideas, but rather because they resonate with our entertainment, commercial, and pornographic cultures. That, then, is what it actually means to be an “aggressive defender of the First Amendment” for a world that abandons the Age of Reason.

All of the foregoing, of course, is but an overture to our work. So, sit back, ladies and gentlemen, and prepare yourselves for the performance that follows.‡ Welcome to the opening act of *The Death of Discourse*, ushered in with a little night music, if you will.

*Ev’ry day a little death
On the lips and in the eyes,
In the murmurs, in the pauses,
In the gestures, in the sighs.
Ev’ry day a little dies.*

— Stephen Sondheim,
A Little Night Music (1973)

‡ *Trigger Warning*: In the spirit of the day, we think it advisable to caution our readers about what follows. Some of this may offend you in a variety of ways—political, legal, sociological, moral, or philosophical. Nonetheless, we implore you to hold judgment until the very end of our concededly satirical foray into America in Modern Times.

Prologue

*Per voi s'ora**

Scene opens with the Adagietto from Gustav Mahler's Fifth Symphony. Daybreak at the ruins of the Acropolis. The music continues past its first delicate measures to the key change at its passionate bridge. The focus slowly zooms away from the ancient pillars and into the halls of the National Archives in Washington, D.C. Collins and Skover enter, proceed directly to the display of the 1791 Bill of Rights, and reflect silently. With the diminuendo at the end of the musical score, the text below comes boldly into view.

Discourse is dying in America, yet everywhere free speech thrives.

This is difficult to grasp, much less grant. After all, how can something be dying and thriving at once? Grapple with this and you will be prepared for what follows. Believe us, we “speak” to you in the tongue of our times, even in the face of our more rationalist bents.

DISCOURSE. It is a weighty word of classical origin, the sort of utterance that runs to and fro in erudite circles. Something beyond mere talk is implied. Unlike trivial talk, discourse resonates with reason, with method, with purpose. Whether its loftier values were ever entirely realized is, in one sense, of no moment. Discourse is an ancient aspiration. As idealized in the Western culture's vision of classical Greece, expression was valued as a means to some *telos*, some greater end. For Aristotle, expression was not simply for its own sake but, rather, was discourse in the service of the civic good, or *agathon*. Expression, properly understood, was essential to *paideia*, the shaping of character.

This, of course, is all Greek to us as young Americans. Ours is a system of free speech — free from old notions of discourse. For us,

* “For you we are praying.” Recited by medieval monks for the souls of those condemned to death.¹

expression is no more or less than the speech of our daily experiences. The sight, the sound, indeed the feel, of robust expression is a thing of joy in the carnival of life we call modern mass culture. To communicate with uninhibited liberty, to talk in the vernacular of the popular culture, to express that culture's tastes, is the way of free speech in America. It is often speech for its own sake, speech in the service of self-gratification, and speech that is essential to the *raison d'être* of a commercial entertainment culture.

These two cultures of expression — the old discourse and the new free speech — turn to the FIRST AMENDMENT for constitutional recognition. Ever since 1791, the judicial and scholarly keepers of the Amendment have invoked the high ideals of discourse to define the boundaries of protected expression. They continue to do so even now as they summon the traditional values of enlightened reason, self-government, and self-realization to protect communication in contemporary popular culture. We wonder, however, why they ignore the wide gulf between yesterday's reasons and today's realities. And we question whether the First Amendment is actually what judges and scholars say it is, or rather what the popular culture makes of it.

Know this: The First Amendment is more than law. It is a way of life. Only in a technical, although important, sense is the First Amendment solely the province of law. Its symbolic and functional meanings extend well beyond what pinstripe-suited lawyers proclaim in courtrooms, beyond what black-robed judges pen in case reports, and certainly beyond what cardigan-sweatered professors pronounce in scholarly journals. James Madison's genius cannot be restricted to the cramped quarters of legal doctrine or to the tidy categories of legal theory. To know the Amendment's vital meaning, one need do no more than breathe its air. In sum, the high values of yesterday's First Amendment must be squared with the realities of free speech in today's America. With law as with physics, "a theory must first and foremost reflect the way the world is."²

Unfortunately, what the elite few say about the First Amendment does not mirror what the many do with it. Hence, the truer reference point of the free speech guaranty is the unremarkable talk of popular culture rather than the remarkable discourse envisioned by constitutional doctrine and theory. For this reason, the keepers of the First Amendment need to reflect upon the culture of free expression in order to realize the Amendment's practical meaning.

In law, understanding the First Amendment typically proceeds deductively, from the *top down*. Jurists and legal commentators impose the world of theory onto the world of practice. With this aim, they proudly drag out the dead: the likes of Plato, Aristotle, Milton, Locke, Spinoza, Mill, Hume, Jefferson, Madison, Emerson, Whitman, Holmes, and Alexander Meiklejohn, among others. Similarly, they parade a variety of elevated notions ranging from the attainment of truth to moral responsibility in order to justify speech's special status in our democratic regime. Who would not applaud this worthy tradition of aligning the noble purposes of the First Amendment with their noble counterparts in public expression? Who indeed?

It is said that for love of country Niccolò Machiavelli “pissed in many a snow.”³ The great Florentine political philosopher expressed his love of country by calling for a *realpolitik*. His point: It is “more fitting to go directly to the effectual truth of the thing than to the imagination of it.”⁴ The First Amendment is in need of a similar love — a willingness to stain the white snow of pure principles in the name of our common reality. To do this we need to develop a *bottom-up* approach to the First Amendment, an approach going directly to our communicative experiences rather than to imaginative theories. Such an approach might represent a real awakening in First Amendment law, a new sort of Machiavellian moment.

If we look at America's free speech as it is, rather than as it should be, what would we find? Having made such a discovery, what then would our notions of the First Amendment be were they premised on that experience? Tellingly, this culture-centered method — what we call a *cultural approach* to the First Amendment — is still a strange concept to those content with never looking too closely at unsullied snows.

Our popular culture is defined by *mass* communication — communication that permeates almost all exchanges in the American culture, including one-on-one and small group conversations. Even the character of private talk cannot be entirely sequestered from the merging forces of mass talk. These forces, which are necessarily related, are identified by *wide* (even global) dissemination, broad (typically entertaining) *appeal*, dynamic (and disconnected) *images*, *ever-changing* (yet often repetitive) themes, commercial (more precisely, capitalistic) *marketability*, and by the *appropriation* (and redefinition) of our most cherished symbols and values. All of this is made possible by

electronic technology. In fact, the forces of mass communication are so great as to influence the very *logic* of much thought and expression. (Indeed, in our culture this paragraph is turgid to the point of virtual unintelligibility. But do not worry, for we'll bring things down a bit and be more reader-friendly.)

We cannot honestly think about the First Amendment as a way of life without considering the impact of entertainment and commerce on communication. TV talk, for example, is the talk of our times. There is no escaping the fact: ELECTRONIC VISUAL ENTERTAINMENT is an essential part of our modern culture of communication. “[I]t has oozed everywhere.”⁵ So much of who we are, what we think, how we express ourselves, and how we perceive and react to our world is tied to the entertainment media. Above all, the electronic media frame our world with a surfeit of amusement. This phenomenon is communication in the service of pleasure. Perhaps more than anything else, these media are our cables to consciousness.

Furthermore, virtually every type of expression is dwarfed by another form of popular communication — ADVERTISING. It represents a multi-billion-dollar investment that links commerce with communication. Various types of mass advertising (e.g., product-image and lifestyle advertising, among others) reveal the character and direction of much contemporary expression. In the service of selling, mass advertising frequently seizes on our politics, values, and even identities

Commercial TV is the Rosetta Stone of our times.

and translates them into commercial talk. This is the marriage of the marketplace of items to the marketplace of ideas.

Where entertainment and commerce are the paradigms of communication, “discourse” inevitably combines with intercourse. Clearly, sex appeals and sex sells. PORNOGRAPHY (whether the soft porn of television or the hard porn of explicit videos) represents the commodification of sex. Like advertising generally, it trades the essence of the person for a money-making image. It is a form of communication that promises to make the unattainable attainable. The popularity of pornography is an index of the free speech valued in today’s culture.

Of course, mass communication in modern America exists in still other arenas. And as we discuss later, it is the general objective of our cultural approach to the First Amendment to identify and evaluate all

other such major environments. In the three main arenas we have identified thus far, the operative logic abounds in *contradictions*. For example, a proposition can be at one with its opposite; something can assume the attributes of something else merely by visual association; a point can simultaneously be understood and misunderstood; and a fact can be real and unreal at the same time. Incredible, yet true. In what follows, we wrestle with this logic of contradictions as we develop our cultural approach to the First Amendment.

Reader beware! We are not entirely what some will paint us to be. Before leaving this prologue, we think it prudent to sketch our own portrait in bold strokes. Without the benefit of elaboration, we thus declare the following:

Warning

1. The obvious import of our enterprise is more descriptive than normative. Thus understood, our work is more concerned with depicting and discussing certain forms of expression in contemporary America than it is with promoting any conventional view of the First Amendment. (Bear this in mind as you think about our cultural approach to the First Amendment.)
2. Although our analysis often focuses on the values of the traditional First Amendment, our enterprise does not depend on affirming or denying those values. (Many will forget this admonition.)
3. To the degree that we dwell on the values of the traditional First Amendment, we do so in order to examine the apparent tension between theory and practice. Again, we ask: Can the high values of free expression be squared with the dominant character of mass communication in our popular culture? (Beware of false prophets!)
4. To say that traditional free-speech values cannot always be squared with popular mass expression is *not* to say that such expression automatically should be denied First Amendment protection. It is only to say that the reason(s) for protecting such expression must be other than the traditional norms. (Assuredly, this point will elude many ideological diehards.)
5. We ask, and we invite you to ask: What notion of the First Amendment would be most compatible with popular mass expression as we have come to know it? What candid and honest view of the

First Amendment might countenance a generous measure of protection for such speech? (Once again, our cultural approach has a role to play here.)

6. Having asked the question, we suggest a possible “answer”: Constitutional protection of speech linked to pleasure and to commerce is entirely consistent with the values of a highly consumerist and capitalistic culture. Here too, our endeavor does not depend on approving or disapproving this “answer.” (Consider the importance of the quotation marks.)
7. This “answer” raises yet another question: What would be the social and legal consequences of signing on to such a view of the First Amendment? (In answering this, think about the relationship between discourse and democracy.)

If today’s First Amendment represents a way of life, what kind of life? If it represents freedom, what kind of freedom? And if it represents the triumph of democracy, what kind of democracy? Perhaps some will reply that the First Amendment’s way of life is unbridled, its freedom unbound, and its democracy unlimited. If so, its *logos* (speech with direction) tends toward the Absolute in ways heretofore unimagined or unspoken. In this work, we chart various aspects of this tendency toward the Absolute in life and law. Along the way, we invite you to explore the First Amend-

MONTESQUIEU

I beg one favor of my readers, which I fear will not be granted me; this is, that they will not judge by a few hours’ reading, of the labor of [several] years. . . . If they would search into the design of the author, they can do it no other way so completely as by searching into the design of the work.

Preface to *The Spirit of the Laws*, trans. Thomas Nugent (1750), ed. David W. Carrithers (Berkeley: University of California Press, 1977), p. 91.

ment’s meaning as it intersects our popular culture.

Our pestering probes may trigger hypersensitive reactions. This is likely to be true because our analysis plays different ideological stances off against each other. Throughout, “[t]he reader is constantly invited to take two opposite views simultaneously,” to consider and reconsider a “complexity of conflicting elements.”⁶ In all of this, some may surmise a hostile First Amendment posture and consequently fear that we will snatch the First Amendment shield away from the most favored forms of mass expression. (No amount of Valium or Xanax can cure such anxiety.) Quite the contrary, we aim

Prologue

to push the First Amendment closer to the contemporary culture, even at the risk of disowning old notions that cannot be easily reconciled with new realities.

This book represents our first take on a novel, culture-centered approach to the First Amendment. Of course, the first take ought not to be the last. So we invite you, our readers, to look at popular culture as you may and join us in this effort. Indeed, our collective efforts may lead some to ask: Does all of this point to the death of discourse? You be the judge.

TO LISTEN

(fragment of poem by C. K. Williams)

*In the dream of death where I listen, the voices of the dream keep
diminishing, fading away.*

The dead are speaking, my dead are speaking, what they say seems urgent . . .

A Dream of Mind (New York: Farrar,
Straus & Giroux, 1992), p. 85

