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ACT III

AFTERWORD: NEW "TRUTHS" AND THE OLD FIRST AMENDMENT

*Collins & Skover**

If [our values] are lies, they are . . . true lies;
if illusions, then indispensable ones.
To abandon them is to commit moral suicide.

—Alexander M. Bickel[1]

We begin with Bickel.

Back in 1973, he spoke those words at Yale Law School. Bickel had free speech theory in mind. The renowned constitutional scholar posed a paradox: lies may be vital to the life of the First Amendment.[2]

To some, perhaps most, this complex passage sounds odd, especially coming from the lips of the counselor recruited by the New York Times in the *Pentagon Papers* case.[3] For it was in that controversy between government and press that the foreign-born Bickel vindicated a basic tenet of American democracy—deception is antithetical to the First Amendment.

As far as we can say, Bickel never resolved the tension between lies and First Amendment values that he so poignantly identified. Regrettably, his reflections on free speech theory ended with his untimely death one year after his Yale lecture. He never told us how lies could be true, or exactly why illusions are indispensable. No, he left those questions unanswered and slipped gently into the night.

This Symposium invites us to pick up where Professor Bickel left off. It presents an opportunity to return to the "*sketch*"[4] of the topic explored in the Epilogue of *The Death of Discourse*. That sketch in-

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* © 1996 Collins & Skover. We are indebted to David J. Willbrand, Editor-in-Chief of the *University of Cincinnati Law Review*, for his creative and insightful efforts in making this Symposium possible.

1. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 77, 78 (1975) (commenting on Holmes's marketplace-of-ideas theory); *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 92-98 (1962) (discussing "benevolent illusions"). To the best of our computer-assisted knowledge, the epigraph has never been quoted in the American law review literature.

2. Bickel's larger point, of course, transcended First Amendment theory to encompass constitutional jurisprudence and political philosophy.

3. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

4. RONALD K.L. COLLINS & DAVID M. SKOVER, THE DEATH OF DISCOURSE 252 n.2 (1996).

troduced perplexing connections among lying, free speech theory, and political philosophy. We had hoped that others would subsequently draw more detailed portraits. Happily, our colleagues in this Symposium have done just that, and colorfully so.

If for no other reason, this Symposium is important because it features the ideas of scholars, outside the law, on values within the law of the First Amendment. As we emphasize in our book, discourse on free speech stands to benefit considerably from the contributions of those who think beyond the letter of the law. This is entirely consistent with the notion in *The Death of Discourse* that the First Amendment is more than law—it is a way of life.

A few more prefatory comments. *The Death of Discourse* is far less categorical and far more provisional than is apparent at first glance. Indeed, we encourage our readers throughout to engage in a dialogue with us.[5] Among other things, we pose questions, shift perspectives, fashion bold and seductive claims,[6] and move the discourse in and out of exchanges with our Dramatis Personae—much in the interest of a "collective process of conversation and judgment."[7] We feel compelled to make this disclosure because depictions of our work as closed, static, or dogmatic summon us to defend a book that we did not write.

Several of our colleagues in this Symposium address the role and rule of "narrative" in the First Amendment context. Judging from their statements, they dwell on the *substance* of narrative to the virtual exclusion of narrative *style*. Yet, one might discern a good deal about narrative plot from narrative *form*. After all, "no text worth reading wears its meaning on its sleeve."[8] For whatever reasons, our colleagues generally decline to address such methods of argument in *The Death of Discourse*. Hence, it would be premature for us to proceed too far with these telling matters. For now, our cerebral flirt should suffice to catch the mind's eye of the attentive reader.[9]

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5. *See, e.g., id.* at xxiii-xxv, 216 n.(d), 252 n.2, 278.

6. Consider generally ALEXANDER NEHAMAS, NIETZSCHE: LIFE AS LITERATURE 22-41 (1985) (discussing rhetorical tropes in Nietzsche's writing).

7. JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING 264 (1984).

8. STANLEY ROSEN, HERMENEUTICS AS POLITICS 142 (1987).

9. Consider generally NEHAMAS, *supra* note 6, at 13, 22, 28, 31 (noting relationship between Nietzsche's thinking and his writing style); NICCOLÒ MACHIAVELLI, THE PRINCE 5, 8, 10, 22 (Martin Coyle ed., Manchester Univ. Press 1996) (Machiavelli's style).

The sun is lost, and th'earth, and no mans wit
Can well direct him, where to looke for it.

—John Donne[10]

Considering how several of our colleagues characterize our passion for truth, we are reminded of a fetching quip: "Tell your boss what you think of her, and the truth will set you free." Not only may we be unable to afford the truth, but, in our postmodern world, truth is a *virtual* reality. Either way, truth is troublesome.

Predictably, our colleagues are troubled by the image attributed to us as truth-tellers:

- Shadia Drury: The authors exhibit a "valiant devotion to truth."[11] . . . "Collins and Skover's devotion to truth is so grandiose that it leaves no room for ideals or for the inevitable discrepancy between the ideal and the actual."[12]
- David Nyberg: "[T]hey themselves insist on truth-telling no matter what the consequences. *Fiat veritas, et pereat mundas* [Let there be truth, though the world may perish]."[13]
- Robert Hariman: "I can't help but wonder whether *The Death of Discourse* carries a yearning for a heroic world [replete with heroic truths]."[14]

True to their convictions, these colleagues seem to devalue the pursuit of truth. Some of them can be understood as urging us to move away from the Enlightenment's notion of truth-seeking--a paradigm in which truths are both real and discernible. By the same token, they can be read as inviting us to move toward a view of "narrative truth"—a paradigm in which "truths" have currency as satisfying stories.

To all appearances, Professor Nyberg appeals to narrative truths as epistemological criteria for First Amendment theory. Nyberg argues that "Madisonian First Amendment conservatorship can be better described in many if not most instances as based upon narrative truth (granted its fictional and deceptive qualities) . . . ."[15] Does not something of this mindset likewise inform Professor Hariman's suggestion that Madisonian rationality is the "wrong standard"? Thus, we " 'feel'

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10. John Donne, *An Anatomy of the World*, *in* THE COMPLETE POETRY OF JOHN DONNE lines 207-08 (John T. Shawcross ed., New York Univ. Press 1968).

11. Shadia Drury, *Lying and Politics*, 64 U. CIN. L. REV. 1227, 1228 (1996).

12. *Id.* at 1230.

13. David Nyberg, *Noble Lies, Narrative Truths, and The Art of Voice: Thoughts on Pragmatic Language and the First Amendment*, 64 U. CIN. L. REV. 1203, 1206 (1996).

14. Robert Hariman, *Machiavelli at the Fair*, 64 U. CIN. L. REV. 1237, 1242 (1996).

15. Nyberg, *supra* note 13, at 1207.

the irrelevance of the model of Madisonian speech" given the "radical relativism within modern society . . . ."[16] And it is precisely *this* philosophical position that prompts Professor Drury to protest that "the postmodern world has dispensed with truth . . . . In a world where reality and truth are a void, the creative art rules supreme."[17]

The Enlightenment and narrative concepts of truth, however similar they may appear, are as different as Aristotle and Madison on the one hand, and Rorty[18] and Fish[19] on the other. Essentially, the move from Enlightenment truth to narrative truth parallels the transition from the modern to the postmodern. This transition substitutes aesthetics for foundationalism; "that art is worth more than truth is the dominant principle of our time."[20]

Too much talk of narrative can be dizzying. In order better to target the discussion, we offer the following defining points in rapid-fire:

- Madisonian ideals are anchored in Enlightenment truths. By contrast, narrative truths afford no safe harbor for Enlightenment truths.
- In principle and practice, traditional Madisonian values war with pluralistic narrative truths and varying aesthetic judgments.
- One defender of Madisonian ideals—whom we call the classicist[21]—is intolerant of those corruptive influences of the popular commercial culture that invite Huxleyan tyranny.[22] By contrast, the defender of narrative truths—somewhat like the free speech advocate we call the modernist[23]—tolerates a great measure of the popular commercial culture in order to avoid Orwellian tyranny.
- Another defender of Madisonian ideals—whom we call the reformist[24]—compromises Enlightenment values as a pragmatic measure while firmly believing in them. By contrast, the defender of narrative truths does not ultimately believe in the Enlightenment, but is willing to advance "salutary" Madisonian myths.

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16. Hariman, *supra* note 14, at 1254.

17. Drury, *supra* note 11, at 1233.

18. *See generally* RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY (1989). When asked to comment on the excesses of Western culture, Professor Rorty once replied, "I think it's the best little culture anybody ever thought of. It will appear to our remote descendants pretty crude, primitive and nasty, but as cultures go these days it's terrific." Martyn Oliver, *Towards a Liberal Utopia: An Interview with Richard Rorty*, TIMES LITERARY SUPPLEMENT, June 24, 1994, at 14.

19. *See generally* STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO (1994).

20. ROSEN, *supra* note 8, at 138.

21. *See* COLLINS & SKOVER, *supra* note 4, at 27-29, 36-39.

22. *See id.* at 6-7, 25-27, 44-45.

23. *See id.* at 30-31, 39-42.

24. *See id.* at 31-33, 42-43.

- The defender of Madisonian ideals withholds constitutional protection from the excesses of "junk" and pornographic speech. By contrast, when narrative truths are elevated, their defender protects such speech, but in the name of moderating values.
- For the defender of Madisonian ideals, there can be "noble lies" in furtherance of discernible truths. By contrast, for the defender of narrative truths, it is far more difficult to call the fabrication of reality a lie, because there are no ultimate truths.[25]

These bulleted points indicate that the old First Amendment is radically different from the new "truths" told about it. To defend the former is to attack the latter, and vice-versa. Therefore, it is critical to remain clear-minded about the ramifications of moving from the Madisonian to the postmodern. Let us examine further some of those ramifications.

> *An epoch approaches its end when its fundamental conviction begins to weaken and no longer inspires enthusiasm among its advocates.*
>
> —Albert Borgmann[26]

The Death of Discourse recognizes a phenomenon akin to the free speech narratives discussed by some of our colleagues. It points to this phenomenon, not so much as a philosophical matter, but more so as a socio-economic cultural matter. Hence, in the mass commercial entertainment culture, "truth is irrelevant," " '[t]ruth is what sells,' " "[t]here is no test of truth," and "[t]ruth is what you want people to believe."[27] In fact, commercial narratives draw much of their bloodflow from postmodern attitudes toward truth and lying. Men wear shirts and feel like daisies; liberation comes to women who puff cigarettes; chemical and gas companies console us with promotional visions of snow-capped mountains and green fields. These are the narratives of We the People, not those heroic narratives told by the elitist conservators of the First Amendment.

None of our colleagues is willing to champion these narratives of the capitalist marketplace. They agree, explicitly or *sub silentio*, that there is an immense gap between Madisonian First Amendment "ideals" and many modern free speech practices.[28] But that gap is obfuscated

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25. *See, e.g.*, Drury, *supra* note 11, at 1232-33.

26. ALBERT BORGMANN, CROSSING THE POSTMODERN DIVIDE 48 (1992).

27. COLLINS & SKOVER, *supra* note 4, at 109, 110 (quoting, in part, Jules Henry).

28. To be fair, there are passages in which Professors Nyberg and Hariman suggest that the theory-practice gap may not be as wide as we depict it. *See, e.g.*, Nyberg, *supra* note 13, at 1217; Hariman, *supra* note 14, at 1247-48. Such arguments presume, however, that there are

when several of our colleagues engage in motivational analysis. That is, they are less concerned with the dissonance between First Amendment "ideals" and cultural practices than they are with the intentions of those who rationalize that dissonance. For us, the focus turns 180 degrees--this notwithstanding our bold claims about "deliberate lies" and our tentative speculations about those who advance such "lies."[29] However informative a discussion of the spectrum of volitional untruths, is it not more fruitful to examine the high against the low, rather than to fix on perplexities akin to criminal culpability under the *Model Penal Code*?

Let us offer one preliminary answer to our question. The greater the divide between Madisonian ideals and commercial entertainment realities, the more muted is the voice of those ideals. Though ideals by definition presuppose some discrepancy between the aspirational and the actual, no First Amendment narrative can tolerate a span so wide as to erode belief in its ideals. A culture's noble free speech theory loses its staying power if it is no longer likely to be believed. Ultimately, to remain functional, a Madisonian myth (or any ennobling narrative) must be a *likely* object of trust.

The viability of any Madisonian myth, of course, is fundamentally what we question in the Epilogue of *The Death of Discourse*. We ask whether the First Amendment ideals espoused by courts and commentators—the stuff of which "noble lies" or "cultural myths and narratives" are made—are or could really be shared societal values. To that end, our "cultural approach" abandons (though at no little cost) the old ideals in the name of new realities. But why? Our reply has everything to do with what Professor Nyberg appropriately calls "*pragmatic* language."[30] That is, what *real* chance do Madisonian principles or elevated narratives stand in a carnival culture? In the end, however, Professor Nyberg's own "pragmatic" argument proves unresponsive. It is one that sounds "too ideal,"[31] and extends little beyond Echoing narratives "over and over"[32] and over and over and over . . . .

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pockets of private and public expression that are largely immune from the ubiquitous influences of our mass commercial entertainment culture. In this regard, *see* COLLINS & SKOVER, *supra* note 4, at 22-23, 77, 153, 201-03.

29. Consider *supra* notes 6 & 9 and accompanying text.

30. Nyberg, *supra* note 13, at 1213 (emphasis added).

31. *Id.* at 1223.

32. *Id.* at 1225.

The unkept promises of the Enlightenment require apologists of Liberalism to cover up. . . . Hypocrisy [thus] becomes an integral feature of mature Liberalism.

—Sue Curry Jansen[33]

Putting lies aside (if only for a moment), let us consider instead the role of hypocrisy in First Amendment thinking. That is, what are we to make of a liberal democracy that encourages base practices to masquerade as noble principles? Does modern constitutional liberalism depend on hypocrisy to survive? And just how candid can any free speech narrative be?

Eminent philosophers and social scientists have argued that hypocrisy is endemic to life and law. Much in the character of the modern democratic state, they contend, not only allows hypocrisy in governance, but demands it. Correlatively, stringent insistence on truth-telling imperils the health of liberal democracy.[34] The late Professor Judith Shklar, for example, maintained that "[h]ypocrisy is one of the few vices that bolsters liberal democracy."[35] Such hypocrisy stems from the disparity between a polity's creed and its conduct. "This disparity often develops over time as an institution comes to serve purposes other than those for which it was established."[36] As we suggest above, the move from Madisonian truths to narrative ones carries with it the baggage of hypocrisy.

Some of our colleagues acknowledge this underbelly of liberal democracy as revealed in the body of First Amendment theory.[37] For example, Professor Hariman declares: "[T]he lesson to be learned is that any society depends on systematic (although not absolute) inatten-

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33. SUE CURRY JANSEN, CENSORSHIP: THE KNOT THAT BINDS POWER AND KNOWLEDGE 203 (1991). Remarkably, this most thoughtful work on censorship has yet to receive the attention it richly deserves in the legal literature.

34. *See* JUDITH N. SHKLAR, ORDINARY VICES 67-78, 248-49 (1984).

35. *Id.* at 248; *cf.* Dennis F. Thompson, *Hypocrisy and Democracy*, *in* LIBERALISM WITHOUT ILLUSIONS: ESSAYS ON LIBERAL THEORY & THE POLITICAL VISION OF JUDITH N. SHKLAR 173-90 (Bernard Yack ed., 1996) (offering one explanatory interpretation of the passage quoted in the text).

36. Thompson, *supra* note 35, at 176.

37. Virtually all of our colleagues in this Symposium confine their comments on lying or hypocrisy to a *defense* of modern liberalism, *i.e.*, "narratives" that accord First Amendment protection in the name of high ideals. What is overlooked, however, is our discussion of respectable stories employed by radical feminists to *withdraw* First Amendment protection from pornography. *See* COLLINS & SKOVER, *supra* note 4, at 179-84, 196-99. What are we to make of our colleagues's silence here? Only Professor Drury addresses, albeit obliquely, the matter by noting, "Radical feminists are particularly notorious for their creative lies." Drury, *supra* note 11, at 1234. On this score, what are we to make of the fact that the radical feminists alone are tagged as deliberate liars?

tion to its contradictions, an inattention that is directed mythically . . . ."[38] "Likewise," he adds, "the test of the First Amendment is not so much that it provides an accurate representation of American discursive habits, but that it can provide the rhetorical norms for renewing specific discursive practices."[39] A far less sympathetic Professor Drury observes: "There is no doubt a certain hypocrisy on the part of those who use First Amendment arguments in order to defend [low] speech [practices] . . . ."[40]

Granting *arguendo* the importance of First Amendment narratives, must one also grant the necessity of a hypocritical narrative or myth? Hypocrisy typically enters into these narratives whenever elevated stories are heralded. By contrast, narratives that reflect the popular commercial culture do not depend on such hypocrisy, if only because they more closely align low realism with low idealism. When the ceiling crashes through the floor, hypocrisy is no longer foundational. Liberal democracy of the postmodern variety must suffer a significant degree of narrative hypocrisy because it is unable to free itself altogether of traditional Madisonian values. Sociologist Todd Gitlin—an astute defender of Madisonian liberalism—puts it forcefully: "[T]he immense gravitational field of the Enlightenment is not so casually escaped, even by its critics."[41]

Ponder this: "Man has to choose between peace of mind deriving from a pleasing delusion and peace of mind deriving from the unpleasing truth."[42]

Without shrugging off the Enlightenment's values, our postmodern free speech narrators have chosen the uneasy position of owning mythic hypocrisy that cannot be revealed—at least not too often or too openly. Political pragmatism would appear to dictate that our narrators hide behind a curtain as opaque as the one that concealed the pitiful wizard in the Land of Oz.[43] In more familiar free speech terri-

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38. Hariman, *supra* note 14, at 1240.

39. *Id.* at 1241.

40. Drury, *supra* note 11, at 1230.

41. TODD GITLIN, THE TWILIGHT OF COMMON DREAMS: WHY AMERICA IS WRACKED BY CULTURE WARS 214 (1995).

42. LEO STRAUSS, LIBERALISM: ANCIENT AND MODERN 85 (1968). However understandable in these times, it is not axiomatic that because one invokes the thought of the late Professor Strauss one is thereby a "Straussian" or views the world through a "Straussian lens," whatever those charges may mean. In this regard, consider, for example, STANLEY ROSEN, PLATO'S SYMPOSIUM xiv-xv (2d ed. 1987).

43. Somewhat puzzled, we ask our colleagues: Was the wizard a wonderful story teller?

tory, exactly how candid can our narrative conservators of the First Amendment be when it comes to the tales they tell? Consider, for example, an imaginary opinion of the United States Supreme Court. A portion of that opinion follows:

> Justice ANONYMOUS announced the judgment of the Court, and delivered an opinion with respects to Parts II, III-A, IV-D, and V-C(1), which is for the Court:
>
> I
>
> We are called upon to determine the constitutionality of a Kansas law that restricts specified kinds of imagistic cigarette advertising on World-Wide Web sites and other computer on-line services located within the state. Among other arguments, Petitioners maintain that such commercial expression is protected under the Free Speech Clause of the First Amendment as made applicable to the states by the Fourteenth Amendment. For the reasons set forth below, we agree and reverse the judgment of the state supreme court.
>
> This case comes to us against the backdrop of our profound national commitment to the narrative of truth, however understood or defined, as one of the central purposes behind the First Amendment. Moreover, this narrative serves other important First Amendment values, such as the myth of the marketplace of ideas and the respectable tales of deliberative discourse, broad and fluid as those narratives must necessarily be. Those who won our independence were not openly nihilistic; they realized the importance, nay the necessity, of high-minded stories to rationalize the protection of almost any form of expression, communicative or otherwise. The civilizing force of such myths may serve to make us what we say we aspire to be. These narratives, then, inform the "analysis" that follows. . . .

We suspect that any proponent of narrative truths would hesitate to sign onto this opinion.[44] Perhaps we are wrong. If not, what does this

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An imaginative myth maker? A confused narrator? A profound philosopher? A deliberate liar? Or all of the above?

44. On a more general level, Professor Drury does not seem to be entirely troubled by hypocrisy in the First Amendment context because she believes that such hypocrisy is readily detectable. For example, "Restrictions on advertising and pornography are quite compatible with the intentions of Madisonian discourse . . . . When cigarette companies complain that the restrictions imposed on their advertising rob them of their freedom of speech, no one takes their argument seriously; their lie is so blatant that it fools no one." Drury, *supra* note 11, at 1230. Argued as a worthy classicist.

Conceptually, withholding First Amendment protection from advertising and pornography in today's mass commercial entertainment culture is not as uncomplicated as Professor Drury might have us believe. Advertising and pornography are no longer, if they ever were, insular categories that can be surgically removed from the body of our culture. The commingling of the commercial and non-commercial is so extensive that what was once "blatant" is now "blatant"

sample opinion suggest about the character of hypocritical myth-making? Duly mindful of motivational analysis, we wonder at what point a narrative of hypocrisy unravels into something less grandiose: a deliberate lie, perhaps? One revealing point of demarcation, it seems, would be the unwillingness of a narrator to be forthright with his or her audience. The greater this unwillingness, the greater the likelihood that hypocrisy deconstructs into lying.

> *There is a curious custom in the British Navy: all the cordage of the Royal Fleet, whether heavy or light, is twisted so that a red thread runs through whole ropes, by which even the smallest piece can be recognized as Crown property.*
>
> —Johann W. von Goethe[45]

Can we untangle hypocrisy from Madisonian values by educating ourselves? Several of our colleagues hope so. They attempt to avoid free speech critiques of the popular culture by relying on education, by raising public consciousness, and by refining the tastes of Americans. With the fighting spirit of the late Robert Maynard Hutchins,[46] they tie the fate of America to an Enlightenment-like faith in education.

Mind their rallying cries:

• Robert Hariman: "[T]he direction that I would recommend for resolving the problem of maintaining citizenship . . . in the spirit of civic-republican reform ought to be developing rhetorical competencies rather than restricting competing forms of expression."[47] . . . "[T]he focal point for reorienting the First Amendment should be protecting and nurturing particular communities that allow the development of the rhetorical competencies required for achieving deliberative judgment in an open society. These communities will range from high schools to electronic networks to . . . talk shows and beyond."[48]

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and "mainstream" at the same time. This blending is so significant that Americans now define their very lifestyles and identities in terms of commodities. *See* COLLINS & SKOVER, *supra* note 4, at 88-89, 114-15. To be unmindful of these points is to allow a form of censorship in modern America tantamount to tyranny. Of course, the specter of censorship prompts some "Enlightenment" liberals to tolerate hypocrisy.

45. JOHANN WOLFGANG VON GOETHE, THE SUFFERINGS OF YOUNG WERTHER & ELECTIVE AFFINITIES 238 (Victor Lange ed. & Elizabeth Mayer & Louise Bogan trans., 1990) (from *Elective Affinities*).

46. *See generally* MARY ANN DZUBACK, ROBERT M. HUTCHINS: PORTRAIT OF AN EDUCATOR (1991).

47. Hariman, *supra* note 14, at 1248.

48. *Id.* at 1255.

• David Nyberg: "The institutional failure that deserves more attention here . . . is an educational one; it is the failure to instill . . . a sense of self-discipline, a disposition to seek and appreciate *excellence*, and a belief in the long-term benefits of moderation, or balance in the ways that we live."[49] . . . "The kind of education that we need to combat passive, mindless consumerism and fascination with pornography is—exposure to greatness, to excellence."[50]
• Loyal Rue: "What about the schools? . . . [W]e should not underestimate the possibility that the tastes of American consumers of culture might be elevated by means of education. The educational establishment is still largely independent of the media culture, and increasingly hostile toward it."[51]

Our colleagues's appeal on behalf of education is valiant. Narrative heroicism notwithstanding, is theirs a battle that can be won? We wonder whether the education envisioned by our colleagues does not war with a culture ever increasingly steeped in the excesses of the marketplace. To what extent is it likely that the mission of education can stand significantly free of the commercial entertainment culture? Even Professors Nyberg and Rue, as they endorse this campaign, are sober enough to admit that the odds of victory are slim. Nyberg concedes, despite his aspirations, that we are starting from the point of "*institutional failure*."[52] And Rue's optimism is heavily qualified: "The whole story is *likely* to be *bleak* enough, but it just *might* leave room for a *slightly* happier ending."[53]

Skepticism is amply warranted. If education is to combat rampant commercialism and the like, educators must be mindful of how commercialism pervades education on various fronts. On the *operational* front, public elementary and secondary school districts are trading more and more with marketers to overcome the constraints of tightening instructional budgets:

• More than eight million of our nation's students are tuned in daily to Channel One—the station that pumps ads into classrooms—this despite protests by the National Education Association and the National PTA.[54] Over 12,000 American high schools (accounting for forty per-

49. Nyberg, *supra* note 13, at 1217.
50. *Id.* at 1223.
51. Loyal Rue, *After the Death of Discourse*, 64 U. CIN. L. REV. 1277, 1289-90 (1996).
52. Nyberg, *supra* note 13, at 1217 (emphasis added).
53. Rue, *supra* note 51, at 1290 (emphases added).
54. MICHAEL F. JACOBSON & LAURIE ANN MAZUR, MARKETING MADNESS: A SURVIVAL GUIDE FOR A CONSUMER SOCIETY 29, 30 (1995).

cent of high school students) are a captive audience for that channel.[55] A 1993 demographic study of Channel One schools revealed that "schools with the greatest concentration of low-income students are more than twice as likely as the schools with the wealthiest students to have Channel One."[56]

• American corporations by the thousands supply curricular and extracurricular materials, from teacher's forestry guides prepared by Weyerhaeuser with self-serving "instructional" questions, to ad-laden book covers, to corporate logos on athletic uniforms and in athletic facilities.[57]

• In response to its shrinking sources of funding, America's nonprofit educational television, the Public Broadcasting Service, is quickly becoming a marketplace player—peddling its greatest hits through home-shopping catalogues, joining arms with MCI Communications Corporation to hawk CD-ROMs and with the Turner Home Entertainment division to market videotapes, and licensing the PBS logo to manufacturers of "educational" products.[58]

• Anecdotal evidence tells the story even more strikingly. Palmer High School in Colorado Springs, for example, supplements its revenue by leasing school property to corporate advertisers. Hanging a six-foot-long banner inside the school costs a marketer $700 per year; for $2,500, corporate logos can be painted on the side of a yellow school bus. With "plenty of blank wall space left to fill," Superintendent of Schools Kenneth Burnley boasts that the district is "just scratching the surface of potential revenue."[59] Banners and buses today, walls, lockers, bulletin boards, desks, chalk boards, book pages, and computer screens tomorrow.

Lest we be misunderstood, our larger point is that commerce's many threads are interwoven more and more into the fabric of American education. While our classrooms are not yet overtaken by commercialism, there are discernible trends in that direction. Such trends are antithetical to instilling the ethical values of republican simplicity, those of Adams, Jefferson, Emerson, Thoreau, and the like. Hence, on the *ideological* front, the commercialization of our schools is likely to redefine

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55. *Id.* at 29.

56. *Id.* at 30 (quoting UNPLUG, *A National Youth Organization for Commercial-Free Equitable Education*, press release, Oct. 19, 1993) (emphasis deleted).

57. *Id.* at 31, 33, 34, 35.

58. Paul Farhi, *Public TV's Private Ordeal: As Funding Growth Slows, PBS Casts Its Eye on Commercial Ties*, WASH. POST, Mar. 17, 1996, at H1. For a more extensive account, see generally WILLIAMS HOYNES, PUBLIC TELEVISION FOR SALE: MEDIA, THE MARKET, AND THE PUBLIC SPHERE (1994).

59. *Where Madison Avenue Meets the Schoolhouse*, N.Y. TIMES, Feb. 28, 1996, at B8.

the aspirational goals of the "good life." When students are educated less about civics and more about commerce, less about self-restraint and more about unbridled liberty, and less about public virtue and more about private gain, the lessons of the marketplace become the lessons of the schoolhouse. Whatever else, this is not education in *sophrosynē* (sobriety, moderation).

If education is to rescue us, then to what end? Is it first and foremost *paideia*, the shaping of character to develop well-informed and socially responsible citizens? Or is it rather job training in the service of economic self-interest and pleasure? In this regard, psychology professor Barry Schwartz reminds us that "the moral character of a culture is bound up with our judgment of the set of practices that the culture encourages and supports."[60] In a society that teaches its future citizens to be entrepreneurs and consumers, "the good person becomes the good pursuer of wealth."[61] It is nearly tautological: a culture that highly values commerce will teach, above all, the values of commerce.

Even if our colleagues's campaign were to succeed and education were to be essentially purged of all of commercialism's contaminations, it is puzzling to imagine what that education would be like. To reinvigorate Madisonian values, would education return civic republicanism to the public mind? But then what? Would we defend the fundamental right of all to all forms of expression, and teach the need to tolerate the base? Seemingly, this education would never move the commercial entertainment culture beyond the point where it is now, or ward off the Huxleyan dilemma[62] to which it is tending. Or would we emphasize the need to combat the base, and thus withhold constitutional protection from expression inimical to our high ideals?[63] Seemingly, this education flirts with the censorship associated with Orwellian regimes. In the end, have our colleagues not reintroduced in the guise of educational reform their own version of what we labeled the "Paratroopers' Paradox?"[64]

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60. BARRY SCHWARTZ, THE COSTS OF LIVING: HOW MARKET FREEDOM ERODES THE BEST THINGS IN LIFE 184 (1994).

61. *Id.* at 185.

62. *See* COLLINS & SKOVER, *supra* note 4, at 6-7.

63. This, at least, is what one great liberal educator, Dr. Alexander Meiklejohn, urged. For it was this president of Amherst College, later chairman of the Experimental College at Wisconsin, who declared adamantly that the First Amendment ought not safeguard commercial speech. *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE xv-xvi, 86-88 (reprint, 1979).

64. *See* COLLINS & SKOVER, *supra* note 4, at 4, 35-45, 134, 202.

[F]earless thinking has fearless consequences . . . .

—Stanley Rosen[65]

We now leave the valleys of narrative truths, hypocrisy, and deliberate lies, and take flight toward the heights where Professors Loyal Rue and Richard Stivers would have us soar. For this mission no Piper Cubs will do; bring out the F-14A Tomcats. We are, after all, entering the realm of fearless thinking.

Professors Rue and Stivers maneuver around the topic of First Amendment deliberate lies for two basic reasons. First, they believe that Madisonian principles are virtually irrelevant in our highly technological and entertainment-driven society. Second, they understand *The Death of Discourse* to be about more, far more, than America's free speech system. Ultimately, they admonish us: we must never forget that it is a *civilization* we are examining.

"We have now reached the turning point," Professor Stivers asserts.[66] "[T]he probability of a return to Madisonian ideals is small indeed and will take more than a shocking discourse, even if this is the necessary first step."[67] In ways unimaginable to Madison's generation, modern technology has seized an immense power over our laws, discourse, and culture. So great is that power that "[n]othing short of a nonviolent cultural revolution, no matter how unlikely it may be, will allow us to escape the modern tyranny of technology."[68] Essentially, Stivers's technological critique moves us from talk about First Amendment reforms to talk about the transformation of America as a civilization.

Similarly, Professor Rue calls on us to think beyond that "relatively minor document"[69] known as the First Amendment so that "we are brought to the heart of the matter: is it too late to save the American experiment of self-governance?"[70] For Rue, not only is the American experiment not sacred, but ultimately, it is not worth saving. In a society so ecologically imbalanced and so self-indulgent, even modest reforms are improbable, if only because they stand to be judged as tyrannical.[71] Thus, Professor Rue bids " 'good-riddance' to the American

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65. ROSEN, *supra* note 8, at 138. Professor Rosen concludes the observation quoted in the text with the following: "and never more so than in times of extreme decadence." *Id.*

66. Richard Stivers, *Technology, Discourse, and Truth*, 64 U. CIN. L. REV. 1259, 1267 (1996).

67. *Id.* at 1275.

68. *Id.* at 1276.

69. Rue, *supra* note 51, at 1280.

70. *Id.* at 1289.

71. Professor Rue does offer a modest variation of his bio-cultural approach, one calling for local regulation of pornography and federal luxury taxes. *Id.* at 1280-88. But ultimately, he

Dream," a social experiment that has "miserably failed."[72] With deliberative irreverence, he quips: "The patch of land between Mexico and Canada might become the *former* United States of America. Okay, so what's all the fuss about? It's bound to happen sooner or later, so why not sooner?"[73]

Consider this: "[D]isdain of that which belongs to the present moment is an integral part of philosophical contemplation."[74]

Bold statements, gentlemen. "Hyperbolic" or not, such reflections engage *The Death of Discourse* in two important dialogic ways. First, they begin (explicitly or otherwise) to play out the consequences of our "cultural approach" to the First Amendment.[75] The cultural approach, as we sketch it, may extend to Stivers's sociological claims about technology and to Rue's ecological claims about civilization. Our approach need not validate these claims in order to recognize the value in seriously considering them. Such thinking is made possible, of course, precisely because our colleagues' discourse about the First Amendment covers the terrain from Orwellian tyranny to Huxleyan tyranny, and beyond—a journey never ventured by "dunderheads."[76]

Second, both Professors Rue and Stivers escape the paradox of the traditional First Amendment as formulated in *The Death of Discourse.* They do so, however, by denying the relevancy of Madisonian ideals and challenging the viability of Madisonian government. Fundamentally, our colleagues appreciate our hypothesis that the traditional First Amendment cannot save itself without destroying itself. In the spirit of Albert Camus, they engage us in a "discourse of death."[77]

We leave it to you, the readers of this Symposium, to decide whether our colleagues have brought their terrifying Tomcats in for a safe landing, or whether they have parachuted. You be the judge.

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concedes that such an approach may be "well beyond the realm of possibility, for how could such proposals gather support in a culture where the target of legislation gets to ration the bullets and determine who shoots?" *Id.* at 1288-89.

72. *Id.* at 1291.

73. *Id.* at 1290.

74. FRIEDRICH NIETZSCHE, *On the Pathos of Truth* (1872), *in* PHILOSOPHICAL WRITINGS 85 (Reinhold Grimm and Caroline Molina y Vedia eds. & Bruce Armstrong trans., 1995). Of course, we are not accusing our colleagues of being "Nietzschean," whatever that may mean.

75. *See* COLLINS & SKOVER, *supra* note 4, at xxi-xxv, 199-202, 211-15.

76. Rue, *supra* note 51, at 1279.

77. COLLINS & SKOVER, *supra* note 4, at 211-16.

> *Pointless stories are met with the withering rejoinder, "So what?" Every good narrator is continually warding off this question; when his narrative is over it should be unthinkable for a by-stander to say, "So what?"*
>
> —William Labov[78]

Over three decades ago, Justice William Brennan proclaimed the "central meaning of the First Amendment."[79] It was an affirmation of Madisonian principles.[80] However glorious, that moment was short-lived; for never once has the Court again invoked Brennan's famous declaration. Nor has the Court since paid much but idle lip-service to traditional Madisonian ideals. Apparently, the Court has no coherent theory, only case-by-case "balancing" and ever-changing legal doctrines. This is predictable. The postmodern First Amendment has no central meaning. It defies meaning to the point that it means nearly all things to all people. Broadly understood, expression is heralded as an end in itself. Free speech values, like a faith in reason, have become passé.

This is the regime of First Amendment myths and narrative truths. In this realm, there are no Madisonian truths, no Enlightenment realities, and no noble lies. There are mainly stories about contingent truths, virtual realities, and aesthetic tastes. Thus, Alexander Bickel's protest that "total relativism . . . cannot be the theory of our Constitution"[81] is likely to be met with the rejoinder, "So what?"

By contrast, when the narrators of liberal democracy paint a patina of respectability on the excesses of an unrespectable state, they cannot reasonably hope to redirect our commercial entertainment culture. The divide between ennobling First Amendment narratives and ignoble free speech practices may already be too wide to cross. Thus, the pragmatically-minded Bickel would likely counter such romantic stories with the rejoinder, "So what?"

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78. William Labov, *Narrative Analysis: Oral Versions of Personal Experience*, *in* AMERICAN ETHNOLOGICAL SOCIETY, ESSAYS ON THE VERBAL AND VISUAL ARTS: PROCEEDINGS OF THE AMERICAN ETHNOLOGICAL SOCIETY 37-38 (June Helm ed., 1967).

79. New York Times Co. v. Sullivan, 376 U.S. 254, 273 (1964).

80. *See* ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 140-52 (Random House, Inc. 1991); *id.* at 153 (noting that *New York Times v. Sullivan* was the "first full statement by the Supreme Court as a whole of an American theory of free speech: the Madisonian theory").

81. BICKEL, *supra* note 1, at 77.

We now take leave, very grateful to our colleagues in this Symposium for engaging us after *The Death of Discourse*. If we meet again, may our discourse be as lively.[82]

82. As to where we may meet next, see (if you will) the website for *The Death of Discourse* at http://www.researchpro.com.