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# Reply

## The Psychology of First Amendment Scholarship: A Reply

Ronald K.L. Collins\* & David M. Skover\*\*

*How you, men of Athens, have been affected by my accusers, I do not know. For my part, I nearly forgot myself because of them, so persuasively did they speak. And yet they have said, so to speak, nothing true.*

—Socrates<sup>1</sup>

*Perhaps nobody yet has been truthful enough about what "truthfulness" is.*

—Nietzsche<sup>2</sup>

Truth + Advertising = Insanity.

That, at least, is the formula of the comedy film *Crazy People*.<sup>3</sup> It is the story of an advertising copy man who works at a respectable New York firm run by a CEO who insists: "You have to drill, drill, drill that target audience until they are consuming your product, not because they love it, but because they can't escape it."<sup>4</sup> Skeptical of this philosophy, our leading man one day decides to mend his ways and tell the truth. "Let's not fool the public anymore. . . . Let's level with America," he implores a co-worker.<sup>5</sup> The reponse is predictable: "We can't level, you

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1. PLATO'S APOLOGY OF SOCRATES 21 (Thomas G. West trans., 1979).

2. FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL 93 (Walter Kaufmann trans., Random House 1966) (1886).

3. CRAZY PEOPLE (Paramount Pictures 1990).

4. *Id.*

5. *Id.*

crazy bastard. We're in advertising!"<sup>6</sup>

Ignoring this sane advice, our truth-in-advertising crusader writes ads such as these:

- Buy [Car X]. They're boxy. But they're good. We know they're not sexy. This is not a smart time to be sexy anyway with so many new diseases around. Be safe instead of sexy.<sup>7</sup>
- [Ad for national phone company]. We're tired of taking your crap. If we fold, you'll have no damn phones.<sup>8</sup>

Not surprisingly, our noble friend is chauffeured off to a sanitarium.

Exaggerated as it may be, this modern-day morality play is comic precisely because it is absurd. In a commercial culture where image is all, truth is irrelevant, and there is no right to know,<sup>9</sup> the notion that mass advertising might be rational, honest, and fully informative seems preposterous. In fact, both on and off the screen, the ad man's novel idea was viewed not only as ludicrous but as dangerous. Thus, in the real world, ABC and CBS refused to air promotional commercials for the film, fearing that they might offend the networks' major advertisers.<sup>10</sup> In light of this, how would a call for truth in commercial-speech jurisprudence be received? What would happen if the "hype" about rational decisionmaking and self-realization were stripped from the commercial-speech doctrine? Would the exponent of such views be treated similarly as senseless and threatening? If so, what would this say about the psychology of contemporary First Amendment scholarship?

\* \* \* \*

We are grateful to our colleagues Alex Kozinski, Stuart Banner, Rodney Smolla, Leo Bogart, and Sut Jhally for their serious treatment of our Essay and their thoughtful responses to it. We had hoped that *Commerce & Communication* would prompt new debate and discussion about certain First Amendment issues. Judging from our colleagues' reactions, there may well be more of the former than the latter. But in the scheme of things, who's to complain about "fighting words" and friendly knocks where the First Amendment is concerned?

Happily, Rodney Smolla thinks enough of our work to label it "fresh

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6. *Id.*

7. *Id.*

8. *Id.*

9. See Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697, 738-39 (1993).

10. Laura Landro, *Film Satirizing Ad Industry Plays to a Touchy Audience*, WALL ST. J., Apr. 3, 1990, at B1.

and provocative,"<sup>11</sup> "excellent,"<sup>12</sup> and even "ingenious."<sup>13</sup> Equally flattering, Alex Kozinski and Stuart Banner believe that we have raised "questions that deserve serious thought,"<sup>14</sup> including "many points upon which we agree."<sup>15</sup> Having "convincingly demonstrated"<sup>16</sup> certain points, we are said to be "no slouches in this arena."<sup>17</sup> In fact, Kozinski and Banner all too liberally label us as "among the most intelligent members" of an entire school of thought dating back to Cicero and perhaps "many millennia before that."<sup>18</sup>

*Fortuna* being what it always is (or what Machiavelli tells us it is), one may see an author "flourishing today and ruined tomorrow, without his having changed at all in character or qualities."<sup>19</sup> True to fate, our three colleagues ran out of kind words. Indeed, they argued so persuasively against us that when they were through with us, we barely recognized ourselves.

### I. Some Daring Declarations<sup>20</sup>

Reader beware! We are not entirely what some of our colleagues portray us to be in their responses. Before turning to those portrayals, we think it prudent to sketch our own portrait in bolder strokes. Without the benefit of the elaboration contained in *Commerce & Communication* and our related works, we dare to declare the following:

- The obvious import of our entire scholarly enterprise is more descriptive than normative. Thus understood, our work is more concerned with depicting certain forms of discourse in contemporary America than it is with promoting any particular theory of First Amendment jurisprudence.
- Although our analysis often focuses on the values of the traditional First Amendment, our enterprise does not depend on espousing or denying these values.

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11. Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 801 (1993).

12. *Id.*

13. *Id.* at 797.

14. Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 748 (1993).

15. *Id.*

16. *Id.* at 747.

17. *Id.* at 751.

18. *Id.* at 749 n.6.

19. See NICCOLÓ MACHIAVELLI, *THE PRINCE* 85 (Quentin Skinner & Russell Price eds., 1988).

20. What follows is a bold and unqualified restatement of some of the key points in *Commerce & Communication*. For a similar series of declarations prompted by earlier commentaries on our First Amendment views, see Ronald K.L. Collins & David M. Skover, *The First Amendment in Bold Relief: A Reply*, 68 TEX. L. REV. 1185 (1990).

- To the degree that we dwell on the values of the traditional First Amendment, we do so in order to examine the apparent dissonance between theory and praxis. Simply stated, can the high values of free expression be squared with the operation of commercial speech as it exists in the modern mass advertising culture?
- To say that traditional free speech values cannot be squared in the above manner is *not* to say that commercial speech automatically should be denied First Amendment protection. It is only to say that the reason(s) for protecting commercial communication must be other than the espoused traditional norms.
- We ask, and we invite our readers to ask: What conception of the First Amendment would be most compatible with commercial discourse as we have come to know it? What candid and honest view of the First Amendment might countenance a generous measure of protection for commercial speech?
- Having asked the above question, we suggest one possible answer: Constitutional protection of speech in the service of selling is entirely consistent with the values of a highly capitalistic and consumerist culture. Here again, our endeavor does not depend on approving or disapproving this answer.
- 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 our other writings, we pose still more questions and tender still more answers. Whether the topic is commercial discourse in a consumerist culture,<sup>21</sup> political discourse in a television culture,<sup>22</sup> or pornographic discourse in an entertainment culture,<sup>23</sup> our methodology remains largely the same.

## II. Reading Between the Lines

We appreciate the caution with which Rodney Smolla sometimes approaches our arguments. When addressing us *directly*, he never accuses us of withdrawing commercial speech from the orbit of the First Amendment.

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21. Collins & Skover, *supra* note 7.

22. Ronald K.L. Collins & David M. Skover, *The First Amendment in an Age of Paratroopers*, 68 TEX. L. REV. 1087 (1990).

23. RONALD K.L. COLLINS & DAVID M. SKOVER, *Discourse & Intercourse*, in THE DEATH OF DISCOURSE (forthcoming).

ment. Thus, we only "intimate"<sup>24</sup> governmental regulation, or "apparently"<sup>25</sup> contemplate it, or "appear"<sup>26</sup> to be of such a mind. Yet, he cannot resist doing *indirectly* what he refrained from doing directly. For, by Smolla's account, we are evidently in favor of "disqualifying most modern mass advertising from constitutional protection" or alternatively "reducing the level" of that protection.<sup>27</sup> And as the alleged "proponents of regulation,"<sup>28</sup> we simply have not made a case for "enact[ing our preferences] into law."<sup>29</sup>

Mindful of what we actually stated in *Commerce & Communication*, we ask our readers to judge for themselves:

- Nowhere do we state what Smolla implies we do. In fact, we offer much to the contrary; we dedicate some four pages of argument to critiquing the progressive broadside against commercial speech in the American culture.<sup>30</sup>
- Our question: "How can a free speech theory with strong socialist or even neo-Marxist overtones be adopted by a capitalistic culture? Part of being the American capitalistic culture is having the American mass advertising system."<sup>31</sup>
- Our conclusion: "Advertising has become an essential thread in the American cloth. Ultimately, the progressives' radical critique is likely to fail because consumerist America would inevitably recognize that one cannot remove the thread without unraveling the cloth."<sup>32</sup>
- Discussing the futility of true-false distinctions in much commercial speech, we note "the pointlessness of legal regulation of pecuniary truth."<sup>33</sup>
- To repeat: "Speaking from a First Amendment definitional standpoint, it is increasingly difficult to demarcate the realms of the commercial from those of the political and cultural, to distinguish commercial expression from the most preferred forms of democratic speech."<sup>34</sup>

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24. Smolla, *supra* note 11, at 786.

25. *Id.* at 781 n.21.

26. *Id.* at 791.

27. *Id.* at 780 (emphasis omitted).

28. *Id.* at 802.

29. *Id.* at 784 n.31.

30. Collins & Skover, *supra* note 9, at 741-44.

31. *Id.* at 744.

32. *Id.*

33. *Id.* at 739.

34. *Id.* at 743.

- In the clash between press freedom and the public's so-called right to know, we're rather forthright: "[T]he right to know cannot co-exist easily with commercial mass advertising."<sup>35</sup>
- We take some issue with Justice Hugo Black's implication that the First Amendment endorses affirmative governmental regulation of private commercial communication: "To restructure the First Amendment so as to permit some governmental regulation of corporate advertising messages is to set the legal guarantee against the commercial culture."<sup>36</sup>

Certainly, Smolla (and the Kozinski-Banner team) should understand that *we* are not purposively bent on killing the sacred cow<sup>37</sup> of commercial-speech protection. As long as they and their like address the apparent dissonance between traditional First Amendment theory and praxis, the cow might be milked for all it's worth.

In addition to his apparent claim that we are the harbingers of First Amendment commercial-speech regulation, Smolla (and the Kozinski-Banner duo<sup>38</sup>) implicitly cast us as elitist and undemocratic—those Allan Bloom<sup>39</sup> types. Ostensibly, Smolla situates us among the intellectuals who claim "a mandate to push government to regulate mass culture in the service of elevating it . . . ."<sup>40</sup> After all, we are the ones "presuming to regulate mass advertising in order to defend high culture or to elevate public discourse . . . ."<sup>41</sup>

Once again, we find such claims puzzling. Ironically, we are the very ones who point out that "the progressive view . . . is likely to be seen as manipulative, elitist, and undemocratic."<sup>42</sup> (In an earlier work, we argued that intrusive governmental regulation of commercial television "would be viewed as the segue to an aristocratic (and, therefore, un-American) displacement of egalitarian and mass tastes."<sup>43</sup>) Furthermore, we baldly assert that "America's self-identity is bound up with commer-

35. *Id.* at 740.

36. *Id.* at 727.

37. See JOHN CIARDI, A BROWSER'S DICTIONARY AND NATIVE GUIDE TO THE UNKNOWN AMERICAN LANGUAGE 342 (1980).

38. See generally Kozinski & Banner, *supra* note 14, at 753 (discussing the highbrowed preferences of those in the academy who "read more books than average").

39. See Benjamin Barber, *The Philosopher Despot: Allan Bloom's Elitist Agenda*; H.D. Forbes, *Opening the Open Mind*, and Richard Rorty, *Straussianism, Democracy, and Allan Bloom I: That Old Time Philosophy*, in *ESSAYS ON THE CLOSING OF THE AMERICAN MIND* 79-124 (Robert L. Stone ed., 1989) (commenting on the question: "Bloom on Democracy: Is He an Elitist?").

40. Smolla, *supra* note 11, at 784.

41. *Id.* at 786.

42. Collins & Skover, *supra* note 9, at 742.

43. Collins & Skover, *supra* note 22, at 1118.

cialism"<sup>44</sup> and that "it is impossible to disentangle commerce from communication and preserve America as we know it."<sup>45</sup> Such concessions, of course, ought not to imply that we go to the other extreme and embrace the excesses of contemporary commercial communication. Our express purpose, it must be remembered, is more descriptive than normative.

More importantly, Smolla challenges our depiction of the culture of commercial communication. He contends that "the threats to public discourse posed by contemporary mass advertising are largely exaggerated."<sup>46</sup> Although our portrait of the mass advertising culture is "an arresting caricature,"<sup>47</sup> Smolla finds the notion that advertising's messages "really do influence us, indeed actually *transform* us, in deep and significant ways"<sup>48</sup> to be "ingenious but not convincing."<sup>49</sup> He explains that advertisements "rarely penetrate or connect"<sup>50</sup> because "[w]e often do not stop to even read or watch the ads,"<sup>51</sup> and when we do, "certainly no one must pay attention."<sup>52</sup>

To pursue the inquiry, Smolla asked colleagues and friends: "Does advertising cause them to think of themselves differently? To make irrational purchases? To speak and write in ways that lose any grounding in reality or logic?"<sup>53</sup> The conclusion of his "nonscientific polling": "Most people . . . profess to have relatively strong advertising immune systems and do not feel that they are being *transformed* in any alarming sense."<sup>54</sup> Furthermore, in the style of a personal confession, he admits to fantasizing now and then that he might "be like Mike"<sup>55</sup> when wearing his basketball shoes, but asks us: "What harm *to the consumer* does this fantasizing do? Who is hurt? Who is 'created' or 'reconstituted' or 'debased' or 'commodified?'. . . So what if I enjoy a little dreaming now and then, even when prompted by my athletic shoes?"<sup>56</sup>

Notably, Smolla's contentions are made largely from an intellectual perspective *outside* of much of our commercial-speech culture, a perspective that assumes (or privileges) rationality and individual self-determination. But, as emphasized in *Commerce & Communication*, product-image,

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44. Collins & Skover, *supra* note 9, at 743.

45. *Id.* at 742.

46. Smolla, *supra* note 11, at 777.

47. *Id.* at 778.

48. *Id.* at 796 (emphasis added).

49. *Id.* at 797.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 802 n.95.

54. *Id.* (emphasis added).

55. *Id.* at 802 (discussing the advertising lines used "in commercials featuring the Chicago Bulls' basketball superstar, Michael Jordan").

56. *Id.* at 803 (emphasis added).



product-personality, and lifestyle advertising make no serious effort to address audiences in a rational manner as individual economic decision-makers.<sup>57</sup> These forms of advertising often work best when they invite us to set aside precisely the questions Smolla asked of his friends and colleagues. Having largely buried those questions, can consumers really be expected to resurrect them so as to indict themselves?

Predictably, the subjects of Smolla's polling experiment would not regard themselves as irrationally influenced and profoundly transformed by modern advertising. Even if consumers distanced themselves from their own consumption habits so as to evaluate their behavior more honestly and critically, it would be impossible for them to imagine who they would be in a culture in which consumption is *not* a governing ideology. Simply consider America's most favored public forum—the shopping mall. Commenting on the more than seven-acre Mall of America in Minneapolis, Alan Durning of the Worldwatch Institute demonstrates the extent to which consumption has become an American institution:

We visit [shopping malls] more often than we go to church, and our teenagers spend more time there than anywhere but home or school. (Ninety-three percent of teenage girls rank shopping their favorite activity.) Malls have become the town squares of our public life, and the brand names and chain stores they host have become the icons of our popular culture.<sup>58</sup>

Hence, what must be asked is not whether one is injured personally in any physical or psychic way by fleeting and momentary dreams of being "like Mike," but rather whether such dreams generally influence the extravagance of consumption.

Moreover, our overall portrayal of the commercial culture does not turn on assessments of the seductive power of particular advertisements to dictate particular buyer behaviors. As Leo Bogart forcefully puts it: "[Advertising's] importance lies not in having elicited a specific purchase response to a specific ad. The real significance of advertising is its total cumulative weight as part of the culture—in the way in which it contributes to the popular lore of ideas and attitudes toward consumer products."<sup>59</sup> It is the essential role of advertising in developing the consumer culture's pervasive ideology—that we regularly identify ourselves by our habits, patterns, and communities of consumption—which is the focal point of a perspective more complex and dynamic than Smolla indicates.<sup>60</sup> In part,

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57. Collins & Skover, *supra* note 9, at 700-07.

58. Alan Durning, . . . *And Too Many Shoppers: What Malls and Materialism Are Doing to the Planet*, WASH. POST, Aug. 23, 1992, at C3.

59. LEO BOGART, STRATEGY IN ADVERTISING 107 (2d ed. 1984), *quoted in* Collins & Skover, *supra* note 9, at 728 n.169.

60. In his response, Leo Bogart both asserts this point and warns us not to "minimize its

this perspective informs Sut Jhally's account of consumption as "an inherently *social* activity, not an individual one."<sup>61</sup> So in his unrestrained reply, Jhally admonishes us "to put aside such ideologically inspired idiocy" as "the prevailing nonsense about the marketplace of ideas and advertising as a form of information."<sup>62</sup>

### III. Crossing Over the Line

There is much in Alex Kozinski and Stuart Banner's informative treatment of the doctrinal history of commercial speech with which we take no exception. For example, the result in *Valentine v. Chrestensen*<sup>63</sup> might be attributed to reasons like those ably set out by Kozinski and Banner.<sup>64</sup> A court sitting in 1942, rather than 1993, would not have understood mass advertising as speech entitled to First Amendment protection because the merger so obvious today between commercial discourse and the American culture had not yet sufficiently developed. Accordingly, we are very much intrigued by our colleagues' historical and doctrinal findings. But, sometimes, in toeing their line they cross over our line. The result of this trespass is misrepresentation.

Kozinski and Banner are blunt: Collins and Skover "say [that commercial speech] deserves no protection . . . ."<sup>65</sup> In light of our reply to Rodney Smolla, we need not say more on this point. We do, however, invite Leo Bogart to take the stand as a witness for the defense:

The authors take us right up to the brink of the conclusion that advertising should not enjoy the protection of the First Amendment, but they never make it over the edge. While they set up a vigorously phrased brief against advertising, they distance themselves from it in the concluding section of their paper . . . .<sup>66</sup>

The greater force of the Kozinski-Banner critique turns on two other arguments. They describe our work first as "*ahistorical*,"<sup>67</sup> weakened by

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complexity." Leo Bogart, *Freedom to Know or Freedom to Say?*, 71 TEX. L. REV. 815, 816 (1993). This warning is well-taken. But how we are to investigate the ways in which various life "relationships influence our consumption habits, and . . . consumption influences them in turn" is another question for another forum. *Id.* What is telling, however, is that it is difficult, if not impossible, to separate out these interactive forces. Clearly, commerce is in our veins, befriending red corpuscles and warring with the white ones.

61. Sut Jhally, *Commercial Culture, Collective Values, and the Future*, 71 TEX. L. REV. 805, 808 (1993).

62. *Id.* at 814.

63. 316 U.S. 52 (1942).

64. See Kozinski & Banner, *supra* note 12, at 754-74.

65. *Id.* at 752. Later, they reiterate that we hold that commercial speech "isn't protected by the First Amendment." *Id.* at 753.

66. Bogart, *supra* note 60, at 816.

67. Kozinski & Banner, *supra* note 14, at 748 (emphasis in original).

"a romanticized vision of the past."<sup>68</sup> "We have no reason to believe," Kozinski and Banner counsel our readers, "that reasoned discourse represented any greater fraction of total communication 200 or 100 years ago than it does now."<sup>69</sup>

That discourse may have been more enlightened a century or two ago is a claim that we neither do nor need make. What we do opine, however, is that functionalist "reason-why" advertising represented a greater proportion of mass commercial discourse one hundred years ago. And, more importantly, even if Kozinski and Banner can show otherwise, the task of reconciling the traditional First Amendment to today's commercial expression is thereby made no easier.

Romanticizing the past is one thing; romanticizing the present is yet another. Who among us is the out-of-touch-with-reality romanticist? Is it the one who recognizes dissonance between modern mass advertising and the First Amendment's touted norms of rationality and individuality? Or, is it rather the one who continues to justify First Amendment protection for commercial speech along those traditional lines? Kozinski and Banner exhibit a sophisticated understanding of the workings of commercial advertising. Why, then, do they appear to toe the old First Amendment line that romanticizes the present? (Gentlemen, if you hold otherwise, just speak the words and the truth will set you free.)

Not only is our work described as ahistorical, but Kozinski and Banner consider it "*antihistorical*" as well.<sup>70</sup> Dividing the universe of First Amendment interpretations into two categories—"the history-based and the theory-based"<sup>71</sup>—Kozinski and Banner label ours "as close to a pure theory-based [approach to the First Amendment] as one is ever likely to find."<sup>72</sup> They charge: "The essay contains no mention of the actual words of the First Amendment, no discussion of any cases interpreting the First Amendment . . . , and no attempt to discern what the real-life First Amendment might mean."<sup>73</sup>

We plead no contest to the charge that we have not added to the voluminous and often hackneyed debate drowsing on the subject of historical intent and its relationship to constitutional interpretation. It is enough for our limited purposes to remind folks that James Madison, the Father of the First Amendment, was not mad about this method.<sup>74</sup> And we leave it to

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68. *Id.*

69. *Id.*

70. *Id.* at 749 (emphasis in original).

71. *Id.*

72. *Id.* at 750.

73. *Id.*; see also *infra* note 76.

74. See Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 228 (William C. Rives & Phillip R. Fendall eds., R. Worthington 1884)

our colleagues to engage in the more esoteric debate as to whether even mechanical historicism is not in some way theory-based. Since we ultimately take no stand on whether commercial speech should or should not be constitutionally protected, we trust that history and decisional law will support us in some respect.

If Kozinski and Banner must divide the universe of First Amendment thinking, why must it be restricted to history-based or theory-based approaches alone? Why can't the "*real-life* First Amendment" (their words, our emphasis)<sup>75</sup> be understood from the vantage point of the real-life experience of commercial discourse? To do that would require yet an additional approach—what in another essay<sup>76</sup> we call a "cultural approach" to the First Amendment. This approach asks several significant questions: If we look at American discourse 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? Nothing here should be unfamiliar to the careful reader of *Commerce & Communication* who is invited to consider an approach to the First Amendment consistent with the realities of the marketplace of commercial discourse.

Our colleagues close their challenging response by calling on Holmes.<sup>77</sup> We, too, find it convenient to invoke the old master, for he appears to have been of two minds on the role of history. In a speech delivered in 1895 at a Harvard Law School Association dinner honoring Christopher Columbus Langdell, Holmes cautioned: "[T]he present has a right to govern itself so far as it can . . . ."<sup>78</sup> Even more striking are Holmes's observations made in his 1897 article, *The Path of the Law*.<sup>79</sup> "We must beware of the pitfall of antiquarianism,"<sup>80</sup> admonished Holmes. "I look forward," he added, "to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be

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("As a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character.").

75. Kozinski & Banner, *supra* note 14, at 750.

76. Ronald K.L. Collins & David M. Skover, *Pissing in the Snow: A Cultural Approach to the First Amendment*, 45 STAN. L. REV. 783 (1993). Apropos of their comment, Kozinski and Banner might be interested to know that this other essay reproduces the full text of the First Amendment, but we suspect that they will not appreciate our effort.

77. See Kozinski & Banner, *supra* note 14, at 775.

78. THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 184 (Richard A. Posner ed., 1992) [hereinafter THE ESSENTIAL HOLMES].

79. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897), reprinted in THE ESSENTIAL HOLMES, *supra* note 78, at 160-77.

80. *Id.* at 474, reprinted in THE ESSENTIAL HOLMES, *supra* note 78, at 174.

attained and the reasons for desiring them."<sup>81</sup> Insofar as the Kozinski and Banner line moves beyond these admonitions, it borders on dead-letter law.

Finally, our colleagues depict us as prominent members of the "we're-going-to-hell-in-a-handbasket"<sup>82</sup> crowd of curmudgeons.<sup>83</sup> We appreciate this depiction nearly as much as the Devil loves holy water. Remember, the commercial culture appears low only from the lofty place of traditional First Amendment values. In one important sense, low or lofty is of no moment to us. Unless free speech law is squared with modern commercial communication, we need not sit in judgment over this matter. Till then, we are content to give the Devil his due and are willing to echo the words of the pimp in the musical theater production of *Miss Saigon*:

What's that I smell in the air,  
the American dream.  
Sweet as a new millionaire,  
the American dream.  
Pre-packed, ready to wear,  
the American dream.  
Fat, like a choc'late eclair,  
when you suck out the cream.  
Luck by the tail.  
How can you fail?  
And best of all it's for sale,  
the American dream.  
.  
.  
.  
Schlitz down the drain.  
Pop the champagne.  
It's time we all entertain  
My American dream.<sup>84</sup>

#### IV. Armchair Psychology and First Amendment Ideology

Why do Smolla, Kozinski, Banner, and others before them<sup>85</sup>—all good-natured and knowledgeable thinkers—portray us to be something

81. *Id.*

82. Kozinski & Banner, *supra* note 14, at 749 n.6.

83. Properly understood, we don't mind being labeled as curmudgeons. See THE PORTABLE CURMUDGEON 1-6 (Jon Winoker ed., 1987) ("A curmudgeon's reputation for malevolence is undeserved. They're neither warped nor evil at heart. . . . They hurl polemical thunderbolts at middle-class values and pop culture in order to preserve their sanity.").

84. *The American Dream*, from MISS SAIGON (Original London Cast Recording, Geffen Co. 1990). See generally EDWARD BEHR & MARK STEYN, THE STORY OF MISS SAIGON 148-55 (1991) (describing the Vietnam of *Miss Saigon* as a dark mirror-image of the American dream).

85. See generally Collins & Skover, *supra* note 20, at 1186-87, 1189-92 (responding to criticisms of Martin H. Redish, *Killing the First Amendment with Kindness: A Troubled Reaction to Collins and Skover*, 68 TEX. L. REV. 1147 (1990) and Mark V. Tushnet, *Decoding Television (and Law Reviews)*, 68 TEX. L. REV. 1179 (1990)).

other than what we say we are? What drives them to brand us (expressly or implicitly) as enemies of First Amendment freedoms? More generally, is there a pathology in much contemporary scholarship on the First Amendment?

In the liberal community and the legal academy, few things are more sacrosanct than the First Amendment. On this point, Frederick Schauer, a noted free speech scholar, hammers away: "[A] broadly protective understanding of the First Amendment is taken as an orthodoxy—or ideology . . . —in a large number of academic and professional environments . . . ." <sup>86</sup> In other words, "there seems to be, within these domains, little free thought about free thought, little free inquiry about free inquiry, and little free speech about free speech."<sup>87</sup> Thus, where the First Amendment is the measure, more is always better.

Against this backdrop, it is not surprising that any far-reaching and probing analysis of free speech jurisprudence will trigger hypersensitive reactions. This is especially true with unorthodox inquiries that play different ideological stances against each other. After all, who knows where the pursuits of such "crazy people" will lead? Consistent with this, what our critics gather to be a less than edifying account of the commercial speech culture is likely to be a source of anxiety. From our account they presumably surmise a hostile First Amendment posture and consequently fear that we will pull the First Amendment away from the enterprise of commercial speech. No amount of Valium<sup>88</sup> or Xanax<sup>89</sup> can cure this anxiety. Yet, if truth be known, our design is to push the First Amendment closer to the commercial-speech culture, albeit at the risk of disowning old theory that cannot be easily, if at all, reconciled with praxis.

For our critics and their like, the First Amendment must remain a totem not associated with any taboo. But it is hard to retain that mindset when core free speech concepts such as rational decisionmaking and self-realization are held up to the realities of our modern mass advertising culture. For that reason alone, Justice Harry Blackmun<sup>90</sup> and others may feel some compunction to perpetuate an ignoble lie, namely, that this culture and these concepts can co-exist free of cognitive dissonance. Or they may prefer to be silent, cherishing commercial speech in a way not dependent on any noble values. But they cannot bring themselves to

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86. Frederick Schauer, *The First Amendment as Ideology*, 33 WM. & MARY L. REV. 853, 854 (1992).

87. *Id.* at 856.

88. THE PILL BOOK 240-43 (5th rev. ed., 1992) (an anti-anxiety drug of the Diazepam family).

89. *Id.* at 35-38 (an anti-anxiety drug of the Alprazolam family). But cf. *High Anxiety*, CONSUMER REPORTS, Jan. 1993, at 19-24 (warning that Xanax is highly addictive and possibly ineffective in treating anxiety).

90. See Collins & Skover, *supra* note 4, at 728-31.

profess a glaring point: If commercial speech is to be protected for what it is, basically it must be valued as speech in the service of selling.

Just how long can contemporary First Amendment discourse repress this point? What is the future of an illusion that yesterday's marketplace of ideas and today's marketing of items can be valued for the same reason? If the ardent defenders of commercial speech could only bring themselves to confront these questions, then the arduous process of a much-needed therapy could begin. We wish them well.