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BOOK REVIEW

THIS COULD BE YOUR CULTURE — JUNK SPEECH IN A TIME OF DECADENCE

THE DEATH OF DISCOURSE. By Ronald K.L. Collins¹ and David M. Skover.² Boulder, Colorado: Westview Press. 1996. Pp. xxv, 294. \$49.95 (cloth), \$16.95 (paper).

*Reviewed by Pierre Schlag*³

The Death of Discourse closes with a quote from Albert Camus: "I do not give the human race more than one chance in a thousand. But I should not be a man if I did not operate on that one chance" (p. 216).⁴ After finishing *The Death of Discourse*, however, the reader might well wonder whether Camus has not overstated the odds for the human race. Indeed, *The Death of Discourse* is relentless in exploring the depths of our predicament.

Stated most broadly, the predicament is this: with the perfection of communications technology, the refinement of capitalist rationality, and the intensification of market-created desire, the resulting culture is one that renders its own ostensible steering mechanism — namely, reasoned discourse — impossible. This broad scale rendition of the predicament is quite bleak, for there is no exit; everyone is included. We are all living in a culture that is, quite literally, doing itself in, mindlessly devoting itself to frivolous self-amusement: the unbridled pursuit of thrills, chills, titillations, fun, and ultimately, death.

At various times, the authors' arguments tend toward this broad scale rendition of the predicament. But most often, Collins and Skover focus on the smaller scale. There, the variables of our impending catastrophe crystallize into more concrete and possibly more manageable identities. Communications technology is represented by electronic media; commercialism, by advertising; the marketing of human desire, by pornography; and the realm of reasoned discourse, by First Amendment freedom of speech.

The predicament becomes more familiar: as Collins and Skover put it, the unholy troika of electronic media, advertising, and pornography has produced a discursive universe and a citizenry incompatible with

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⁴ Collins and Skover are quoting an interview of Camus from 1945.

lofty First Amendment free speech values. The First Amendment, as they render it, is supported by a belief in the importance of meaningful dissent, political self-government, and deliberative democracy. In short, the First Amendment is grounded in a Madisonian model that places its faith in the possibility of reasoned discourse (pp. 201-03). For Collins and Skover, neither the Madisonian faith nor its ideals can be squared with the actual mass communication of our popular culture (pp. 201-03).

How so? The thrust of their argument focuses overwhelmingly on one side of this tension — on a sustained examination of the character and the effects of electronic media, advertising, and pornography. Interestingly, they leave the concept of reasoned discourse (the thing that will die in the end) relatively untheorized. Rather, their argument relies implicitly on the reader's presumed understanding of what reasoned discourse might be. They presume (and probably, in most cases, rightfully so) that whatever that understanding is, it will be incompatible with their description of electronic media, advertising, and pornography.

The recurring gesture in Collins and Skover's argument is thus to remind the reader of the brute realities of electronic media, advertising, and pornography. The gesture is not so much an exercise in ratiocination as an exercise in disclosure — a sustained attempt to shatter panglossian First Amendment fantasies and to reveal the actual realm of speech. It is a jolt into awareness — channel surfing in print:

ZAP

"Zip it, puke breath," admonishes the host. "Mort! Mort! Mort!" exclaims the horde.

ZAP

TV Guide looks back on the 1980s and ranks its "Top 20." Oprah Winfrey trumps Ronald Reagan, Vanna White tops Sam Donaldson, and Hulk Hogan trounces Dan Rather, who narrowly beats out Pee-Wee Herman.

ZAP

. . . NBC and Geraldo Rivera team up to produce an exposé on devil worship. The result: "the highest Nielsens ever for a two-hour documentary."

ZAP

In a more serious vein, Diane Sawyer, an ABC News journalist on *PrimeTime*, asks the former mistress of entrepreneur Donald Trump: "Tell me, Marla, was it really the best sex you ever had?"

ZAP

A future president, Bill Clinton, decked out in dark hipster glasses, does a mean sax gig on the *Arsenio Hall* show.

ZAP

Race-and-riot-torn Los Angeles fires up while the *Cosby Show* winds down (pp. 10–11 (footnotes omitted)).

Next come the commercials as Collins and Skover offer unforgiving descriptions of the conceptual content of commercial advertising. As they put it:

There is no place for the mind in the marketplace.

. . . .

. . . [How would you] determine the truth or falsity of the following commercial messages?

- Soft-drink commercial depicting a rock singer performing in front of, and mingling with, a teenage audience at a drive-in movie theater: "Don't care about movie stars who live in Hollywood. Don't like their attitude; don't think I ever could. Don't want the good taste, I know what tastes good. Why is the best thing always misunderstood? Just give me what the doctor ordered. Just what the doctor ordered. Hey, give me a [brand named soda]."
- Cigarette ad with a man and two women frolicking in a swimming pool: "Alive with pleasure!"
- Designer-jeans ad with a woman unzipping a man's trousers; opposite page photograph of man raising third finger of right hand in obscene gesture: [Brand name of product].
- Cologne ad supposedly picturing a father holding his young son: "[Brand name] for Men" (pp. 109–10 (some alterations in original)).

After the commercial, Collins and Skover move on to the pornographic. To a large extent, the pornographic is represented by Collins and Skover's virtual character, Anthony. Anthony is always on the lookout for autoerotic possibility, which is to say, First Amendment material: "Anthony enters a sex shop on New Orleans's Bourbon Street, walks directly to the erotic clothes rack, and gawks at shiny black rubber skirts and stockings. The rubber *speaks* to him and he *knows* it" (p. 171 (emphasis added)).

Collins and Skover's work is a compilation of such intrusions. Their text is punctuated with boxed quotes from the famous (Ronald Reagan), the infamous (Marquis de Sade), the heroic (Václav Havel), the informed (Carl Bernstein), the reckless (Camille Paglia), the confused (Cass Sunstein), the bilious (Jesse Helms), the Sixties (Bob Dylan), and the dead (James Madison). Following each of the book's three main sections, Collins and Skover engage in dialogue with their critics: a crew of academics, legal officials, journalists, and communications experts (who have responded to Collins and Skover's prior works).

Death of Discourse is an anti-book — an attempt at multimedia in print form. Hence, the section on electronic media not only mimics channel surfing, but also marshals evidence in the clipped speech patterns of T.V. news shows. The section on advertising is continually

interrupted by box messages from whomever Collins and Skover take to be their sponsor: "Information Advertising — an idea that's gone the way of the Remington typewriter" (p. 74). And then, of course, there is the ubiquitous Anthony.

Amidst these shards of American culture, Collins and Skover weave a narrative in which reason, discourse, and the old First Amendment verities are systematically overwhelmed by the realities of the unholy troika.

A SINISTER SYNERGY

At various points, Collins and Skover's description reveals a sinister synergy among electronic media, commercialism, and pornography (pp. 76, 147-48, 160). Their argument very much echoes Herbert Marcuse's critical assessment of the congruence of technology, commercial culture, and repressive desublimation.⁵ The difference is that Marcuse's writing was largely prophetic, whereas Collins and Skover write about something that has already largely happened. What emerges from their description of the unholy troika is an intricate web of symbiotic interconnections; each of the practices appropriates and intensifies the others.

Consider first the development of the electronic media. There was radio, then T.V., then cable T.V., then pay-per-view, then virtual reality. With each new technological advance, there has been a further intensification of the pornographic. Electronic media appropriate pornography to expand their markets, in turn opening up new venues of pornographic possibility. The electronic media likewise appropriate and intensify the commercial. Thus, with advances in such media, there are new opportunities and, more importantly, new market-driven requirements that commercial enterprises make use of the new media to promote their goods. Hence, commercial enterprises are not only allowed, but forced by competitive pressures, to advertise via radio, T.V., rental videos, movies, and now even the Internet.

Commercial advertising appropriates the pornographic imagination to sell products and services. A tremendous number of products are marketed as sexual accoutrements — everything from cars to breakfast cereals to jeans. This practice becomes ever more obvious as advertising becomes increasingly steeped in the pornographic aesthetic of the transgressive and the exhibitionist. The message is to "break the rules" (that is, buy and consume). The result is a sexualization of commodity consumption and, ultimately, experience. The pornographic mind-set is intensified as it breaks out of its traditional fora (pictures, books, magazines, and movies) into a form of consciousness — a generalized approach to life and world. The pornographic is thus tran-

⁵ See HERBERT MARCUSE, *ONE DIMENSIONAL MAN* 56-143 (1964).

substantiated from substance into form, creating what Collins and Skover call, in a deliberate play on words, "the pornographic state" (p. 139): something that is at once a type of political organization, an orientation, and a form of life.

Pornography appropriates the electronic media by transforming entertainment into a series of sensory experiences. Electronic entertainment is aimed at producing ever more frightening, shocking, thrilling, disgusting, or revolting images. Thus, electronic media come to resemble pornography — weak on narrative, strong on the repeated evocation, deferral, and fulfillment of desire. Similarly, the pornographic appropriates the commercial by transforming the logic of the commodity (consume!) into that of the image (fantasize!). The value of products is no longer limited simply to fulfilling a need or a function (real or imagined). Products — much like pornography — must do much more: they must create a mood, a desire, an attitude, a lifestyle. What the public consumes, then, is an image of itself consuming an image.⁶

Indeed, one of the dizzying effects of reading Collins and Skover's book is that, by the end, an uncanny resemblance has developed among the logics of electronic media, commercial advertising, and pornography. Although it remains possible, of course, to advance definitions that distinguish each of them, such distinctions will seem somewhat artificial; their conflation turns out to be more important.

Of course, this conflation occurs in part because a great many instances of the one are also instances of the other two. But there is far more to it than that: there is also a transposition of the aesthetic of each into those of the others. As the boundaries blur, the aesthetics of electronic media, commercialism, and pornography become isomorphic.

THE EFFECTS

For Collins and Skover, the unholy troika produces significant deleterious effects that obstruct reasoned discourse. This obstruction takes various forms.

Impoverished Substance

The most obvious deleterious effect stems from the content (or lack of content) of junk speech. Collins and Skover argue that a steady diet of degrading, trivial, vulgar, demeaning, ugly, stupid, and vile speech tends to inscribe the very same qualities in viewers and listeners (pp. 23, 152). The understandings, visions, and connections represented in this junk speech lack any cognitive virtue: no truth, no beauty, no goodness, no enlightenment. To the extent that these char-

⁶ "What if all advertising were an apologia not for a product but for advertising itself?" JEAN BAUDRILLARD, *THE TRANSPARENCY OF EVIL — ESSAYS ON EXTREME PHENOMENA* 50 (James Benedict trans., 1993).

acteristics of junk speech are internalized by viewers and listeners, it is mediocrity (not reason) and stupefaction (not truth) that rule.

One response to Collins and Skover is to argue that junk speech is not as vile, stupid, or trivial as they contend. Cass Sunstein comes close to taking this position when he asserts that "Mapplethorpe's work is part of democratic deliberation" (p. 188). The question, of course, is: why? Or, as Collins and Skover put it, "One person urinating into another's mouth has out-and-out deliberative democratic meaning?" (p. 188). Apparently unfazed, Sunstein responds: "Okay. All I want to say is that Mapplethorpe, in my view, is a sexually explicit [artist] whose work has self-conscious democratic implications. . . . Now I might be wrong on Mapplethorpe. I'm perfectly prepared to judge that" (p. 188 (omission in original)). I'm perfectly prepared to judge it too. And if Mapplethorpe's photographic memorialization of urination into mouth has "self-conscious democratic implications," then so does any act of symbolic representation — which, given an appropriate context, could be *any* human action.⁷

Now, of course, for anyone who has seen Mapplethorpe's work (as opposed to just reading or hearing about it), it is possible — indeed, even easy — to argue that it is art (a generously capacious designation). But what about the value of certain T.V. shows: *Ren and Stimpy*, *My Mother the Car*, *Beavis and Butt-head*, *The Partridge Family*, *Wheel of Fortune*, *Ricki Lake*, *A Current Affair*, and *Cops*? These programs may, of course, have artistic value or "self-conscious democratic implications," but if so, then what does *not* and why not?⁸ The problem is not that arguments to vindicate the value of such speech-acts necessarily fail. On the contrary, the dilemma is that they can succeed all too well. And that very success demonstrates quite graphically that we no longer have the linguistic or cultural means to distinguish between what has value and what does not.

Perhaps a better response to Collins and Skover is offered by Rod Smolla, who claims that their bleak assessment of junk speech stems from their elitist, intellectualist perspective (p. 129). Indeed, although Collins and Skover effectively distance themselves from the elitist idealizations of First Amendment Panglossians like Sunstein (pp. 149–51), they cannot disassociate themselves from the different flavor of intellectualist elitism inherent in their scathing evaluation of junk speech. But, then again, neither can anyone else who arrives at the determination that this stuff is junk. Indeed, once that determination is made, it

⁷ Sunstein's heroic rhetoric concerning Mapplethorpe is typical First Amendment hyperbole. Indeed, the champions of freedom of speech often wildly exaggerate the value of the speech they seek to bring within the ambit of the First Amendment.

⁸ It is important to recognize that the point here is not: should these instances of speech be protected by the First Amendment? Instead, it is: do we really believe what we are saying when we assert that such shows have "self-conscious democratic implications" or "artistic" value?

becomes somewhat difficult to argue, *sans élitisme*, that the junk remains good enough for the masses. Precisely what would one say? "Sure, it's grade B T.V. But remember that, on average, it's a grade C citizenry. We're still ahead of the curve." Not likely.

Nevertheless, perhaps Collins and Skover are too quick and too harsh in their condemnations. The relativist perspective might, after all, be right, and perhaps it can even be rendered in nonelitist terms. True, *Beavis and Butt-head* is not inspiring. True, *Married With Children* is filled with (self-conscious) self-loathing. True, *A Current Affair* has an instinct for the gutter. And, true, Jenny Jones's white trash on T.V. can furnish only so much insight. But, perhaps, these encounters with the rude and crude bespeak a truth of our national culture. For instance, the acid simplicity of the "that's cool"/"that sucks" dichotomy on *Beavis and Butt-head* might be a lucid insight into the vacant character of contemporary popular culture. (As an insight into the normative structure of the vast bulk of American legal thought, the contribution is, of course, unimpeachable — but that's neither here nor there.) One problem with this line of argument is that, although *Beavis and Butt-head* prompts a certain caustic awareness of our culture's vacancy, it also helps to reproduce the vacancy that is the object of its ridicule. *Beavis and Butt-head* thus emerges as a kind of exercise in self-abasement — one is entertained by literally watching as one's culture and one's self are abased: "We're really dumb, and we know it." This state, of course, is not exactly exhilarating — either intellectually or ethically. It is, instead, rather desperate. It is a state one small step away from being abased and not knowing it — that is, the state associated with much of the rest of T.V. programming.

A more convincing response to Collins and Skover is anticipated by Jack Balkin.⁹ He acknowledges the mindlessness of the electronic media but intimates that it is precisely what it should be: the medium of mindless relaxation that (like sleep) makes tolerable the exigent cognitive demands of contemporary waking life.¹⁰ Collins and Skover champion the logic of *inscription*: for them, the mindlessness of the medium inscribes itself on the viewers. Balkin, by contrast, champions the logic of *decompression*: for him, the mindlessness of the medium enables the viewers to decompress in relatively harmless ways. Both of these logics are plausible. And it is even plausible that they are both correct: both inscription and decompression may take place to some degree.

⁹ See J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935 (1995) (reviewing CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEMS OF FREE SPEECH* (1993)).

¹⁰ See *id.* at 1939-42.

Too Much Trash

One of the deleterious effects of all this junk speech lies in its very prevalence. Junk speech captures large portions of the nation's available airwaves, occupying time otherwise available for "reasoned discourse" (or, indeed, any other activity).

One response to this claim is offered by Martin Redish, who states, "Admittedly, much of television's programming is not designed to appeal to the viewer's higher intellectual interests. But for almost every *My Mother the Car* there has been a *Masterpiece Theatre*" (p. 48). This response strains credulity. Even apart from considerations of actual ratings (one suspects that even *My Mother the Car* was a much bigger draw than *Masterpiece Theatre*), it is absurd to suppose that T.V. achieves some sort of parity between the highbrow and the lowbrow.

Cultural Vandalism

Another way in which junk speech produces harmful effects lies in its appropriation and transformation of cultural markers and ideals. For instance, advertising works by appropriating cultural ideals and markers to sell products. In one T.V. commercial from 1991, the fall of the Berlin wall becomes an occasion to celebrate freedom and, by association, Pepsi-Cola (which we have come to know as "the choice of a new generation"). The syllogism is as follows:

- (1) Fall of Berlin Wall = Freedom;
- (2) Freedom = Pepsi; and therefore,
- (3) Pepsi = Fall of Berlin Wall.

The cultural impoverishment inherent in these equations has two aspects. First, a cultural ideal (freedom) and a complex cultural marker (the fall of the Berlin Wall) are trivialized. Second, the metonymic logic continues as both the ideal of freedom and the cultural marker of the Berlin Wall are reduced to a commercial product. This degradation of ideals and cultural markers is typical of advertising. Hence it is that:

The 1960s African-American political declaration "Black is Beautiful" became a promotional anthem for hair products. Marketers later capitalized on the "X" in Malcolm X to sell baseball caps that since have become fashion statements. John Lennon's "Revolution" became a commercial cause célèbre for peddling sneakers, even as the songwriter warned listeners to "free your mind instead." Women's equality became synonymous with the liberty to smoke: "You've come a long way, baby!" (p. 84 (footnotes omitted)).

There is, in short, nothing that cannot and will not ultimately be demoted to the order of the profane and the superficial.

This abasement of the discursive world — even if it has not yet affected the reasoning capacities of the public — is bound, according to Collins and Skover, to impoverish our shared discursive universe (pp. 9–10). It is T.V. that provides many of the shared narratives and experiences that shape national culture and, thus, a common citizenship. Ed Rubin emphasizes this point when he affirms, in effect, that T.V. is politics:

Throughout the country, people are watching the same shows at the same time. They are listening to the same sports event. . . . [Television] provides us with a common set of direct experiences, a shared body of images, situations, and events. Its meaning for us lies in this interconnection; we perceive its programs not simply as news or entertainment, but as *national* news or entertainment. Thus, television is intimately linked to our concept of citizenship. . . . Indeed, this activity may be the average person's most important political act (p. 60).

Contamination

If the effects of the unholy troika could be contained within discrete jurisdictional bounds, the threat would be limited. But we have, according to Collins and Skover, already passed that point. The political sphere, for instance, is already suffused with the aesthetics of the unholy troika (pp. 16–19). Hence, political candidates are marketed like fast food ("Where's the beef?") or breakfast cereals ("It's morning in America."). During the general election of 1992, the length of the average sound bite dropped to 8.4 seconds (p. 19). Collins and Skover quote Aldous Huxley's prophetic words:

[The consummate political figure] must be glamorous. He must also be an entertainer who never bores his audience. Inured to television . . . , that audience is accustomed to being distracted and does not like to be asked to concentrate or make a prolonged intellectual effort. All speeches by the entertainer candidate must therefore be short and snappy. The great issues of the day must be dealt with in five minutes at the most — and preferably . . . in sixty seconds flat (p. 14 (omissions in original)).¹¹

Accordingly, candidates for political office — indeed, even sitting Presidents — organize political events for placement on the evening news. Image experts package and construct political action like commercial advertising, fashioning press interaction with an eye toward televisual transmission: sound-bites, eye-bites, photo-ops — all scheduled to "occur" in time for the evening news and too late for timely response by the competition.

Even the pornographic makes its entry into the political arena through stories calculated to sustain interest and defer satiation, stories

¹¹ This passage comes from ALDOUS HUXLEY, *BRAVE NEW WORLD & BRAVE NEW WORLD REVISITED* 46 (Torchbook ed. 1965) (quoting *BRAVE NEW WORLD REVISITED*).

of: who did what to whom how many times where? Adultery and sexual antics are traditional political fare. What is new, however, is the *mass exploitation* of such topics for entertainment value. Hence, the "serious" media have turned from their "gentlemanly" agreement not to disclose the sex lives of politicians and officials to a leave-no-stone-unturned investigation of their sexual misadventures. The result is not necessarily pornographic (pubic hairs on Coke cans); it can also be soap opera (the Packwood diaries) and even burlesque (*Monkey Business*).¹² But it is almost always tawdry.

Then, too, there is the feedback effect. Official government institutions, such as the Senate Judiciary Committee, are conscripted to aid in the nation's entertainment. To the extent citizens pay attention, these proceedings become vehicles of voyeurism. And all this "news" is reported with the conspiratorial promise of giving the viewer "the inside scoop, the real story" — in other words, some really hot gossip.

Bad Form

The very form of junk speech is deleterious to reasoned discourse. The imagistic, nonsequential character of electronic, commercial, and pornographic speech creates viewers and listeners who are receptive to sensation and imagery, but not to conceptual argument. The faculty of reason is neither evoked nor challenged. More than that, the audience is trained to become comfortable with incoherence and irrationality. Indeed, as the beer commercial suggests, "Why ask why?"

Although Collins and Skover do not say so explicitly, the intimation is that, even if one wanted to be wise, thoughtful, and insightful, the unholy troika has so degraded the available linguistic material and narrative tools that the likelihood of achieving these goals has been dramatically reduced. Words lose their meanings as they become flat, metaphorically bankrupt, exhausted.

It is difficult to see what the answer to this problem might be. If the potential meanings of words are primarily a question of permissible (and forbidden) associations, then the deeply repetitive and crudely stereotyped mass culture contributions of T.V., advertising, and pornography can hardly be benign.

WHAT IS TO BE DONE?

For academic legal thinkers — people who generally pattern their professional identities on the model of idealized judges — the key question is almost always the normative one: what should be done about this predicament? More specifically, what should be done about

¹² The references here are to the public discussions of the sexual conduct of Justice Clarence Thomas, Senator Robert Packwood, and Senator Gary Hart, respectively.

this disjunction between the lofty values of the First Amendment and the ugly actualities of the speech world?

Collins and Skover frame the problem in a classic legal realist device — a perceived disjunction between the actual and the ideal, the descriptive and the normative, the social and the legal (p. xxiii). To this classic disjunction, they add a classic legal irony: the disjunction has emerged not because of a failure to honor the ideal, the normative, or the legal, but rather because they have been honored all too well.

Indeed, as Collins and Skover are quick to point out, the irony is that it is the corpus of First Amendment law, values, and ideals that has brought about this state of affairs (pp. 4–6). It is the fear of an increasingly powerful state dictating what one can say (and think) that has led to a permissive attitude toward electronic media, advertising, and pornography. In turn, it is this permissive attitude that has allowed the stupefying mindlessness of T.V., advertising, and pornography to flourish. It is the fear of the Orwellian tyranny that has in effect prompted our crossing into the Huxleyan dystopia — a brave new world of triviality in which reasoned discourse is impossible (pp. 6–7).

What should be done? Once one focuses on this normative question, the problem and the irony mature into a paradox. In the legal community, the question “What should be done?” is not asked as a general open-ended ethical inquiry. On the contrary, for judges, lawyers, legal academics, and law students, the question almost always means “What should the law do?” The presumption, in other words, is that whatever should be done should be done by courts, legislatures, or agencies — in short, the state.

But therein lies the paradox. For as soon as one contemplates state action to avoid the deleterious effects of the unholy troika, the risk of Orwellian tyranny emerges (p. 37). Collins and Skover call this denouement the *classical scenario* (p. 27). As an example, they consider Anostopolo’s extreme solution of abolishing T.V. (p. 29). Whether or not this approach paves the road to Orwellian tyranny (an issue more arguable than Collins and Skover let on), it is utterly utopian (in the pejorative sense). It is as if one were to answer the problem of crime in America with the suggestion that, in the future, people should try to be nice. The problem with the classical scenario is that it grossly underestimates the extent to which the people really do want their MTV. As Neil Postman tersely puts it, “Americans will not shut down any part of their technological apparatus, and to suggest that they do so is to make no suggestion at all” (p. 37).¹³

One could adopt a laissez-faire approach and refuse to use the legal machinery to curb the numbing effects of electronic, commercial,

¹³ Collins and Skover are quoting NEIL POSTMAN, *AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS* 158 (1985).

and pornographic speech. Collins and Skover call this approach the *modern scenario* (and it doesn't work either) (p. 30). The domination of the speech realm by cheap entertainment and trivial amusement means that words of political deliberation, meaningful public discussion, and effective dissent will not be uttered; if uttered, not distributed; and if distributed, not heard.

As for any attempt to avoid these two extreme scenarios by merely reforming the realm of electronic, commercial, and pornographic speech, Collins and Skover argue that such an effort is likely to prove ineffective. They suggest that, even with government subsidy and intervention, worthwhile speech remains at a disadvantage if it must compete with the amusing, the titillating, or the captivating (pp. 42-43). In addition, it seems unlikely that this *reformist scenario* would succeed at harnessing only the virtues of the extreme positions without also, to some extent, reenacting their vices.

All this, of course, presupposes that one accepts Collins and Skover's depiction of the paradox. There are other options. One possibility is simply to deny that there is any disjunction between the lofty Madisonian ideals and junk speech. There are several ways to effect such a denial.

One approach is to reject (as, indeed, Redish, Smolla, Sunstein, Strossen, and Tushnet variously do) the bleak characterizations of junk speech. One can, for instance, provide more favorable descriptions of the speech (Redish (pp. 47-48), Smolla (p. 133), Sunstein (p. 190), Strossen (pp. 191-92)) or deny that junk speech, bad as it may be, has any serious causal or constitutive implications (Tushnet (p. 54)).

Another approach is simply to affirm that the normative thrust of the First Amendment precludes taking into account the (possibly) awful character of junk speech. One can do this by suggesting that the First Amendment forbids considering the offensiveness of speech as a reason for withholding protection (Banner & Kozinski (p. 102)). In the alternative, one could say that, inasmuch as Collins and Skover argue that the unholy troika manipulates consciousness, they are adopting a metaphysics of human agency that is at odds with First Amendment principles. Their presumption that speech media can manipulate listeners is fundamentally at odds with core First Amendment commitments about the autonomy of the self and the relatively noncoercive character of speech.

These are all very traditional arguments that can be answered with very traditional counterarguments (which will not be rehearsed here). Collins and Skover themselves raise a more interesting possibility. They argue that contemporary belief about the First Amendment may well be organized around a contemporary version of Plato's "noble lie." According to Collins and Skover, a small legal elite might be deliberately romanticizing and elevating the value of junk speech in or-

der to maintain the Madisonian ideals. The noble liar thus deliberately misdescribes junk speech in lofty Madisonian terms. The noble liar believes that, by invoking the Madisonian aspirations, some Madisonian hopes might rub off: we must pretend that we are better than we are in order to become so. In addition, the liar believes that, by ascribing lofty Madisonian value to most junk speech, the liar might ensure that Madisonian norms can still be used to withhold First Amendment protection from the most egregious and threatening instances of junk speech.

What is interesting about Collins and Skover's version of the noble lie is that it accounts plausibly not only for a great deal of First Amendment rhetoric, but also for the contemporary state of belief in law among legal actors generally.¹⁴

WHAT ABOUT LAW?

The dissonant conditions that render the noble lie plausible in the First Amendment context are present throughout the law. Those who understand themselves to be "doing law" must act as if they believe in the law, in its self-representations, and in its promises to effectuate its claimed ends. But, of course, to any person who is not busy "doing law," the claims of law often seem quite preposterous — simply not to be believed. Consider the kinds of things that American law asks judges, lawyers, law teachers, and law students to believe:

that law is open and generally known to the public;

that human action generally comports with Newtonian conceptions of causation;

that the legislative or bureaucratic actions of collective bodies, like legislatures, can be analyzed in terms of the human attribute of intention;

that there are determinative methods for deciding whether a case is "correctly decided";

that human states of mind comport with a schema that conveniently breaks down into the cognitive states known as "intent," "recklessness," and "negligence."

Then, too, we are asked to believe that there exists some technique or faculty that enables us to balance incommensurable goods (for example, the flag against the First Amendment) in order to reach correct outcomes. We are asked to believe that such balancing decisions are intersubjectively valid among a sufficiently large community (namely

¹⁴ See Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 850-52 (1991).

citizens) or a sufficiently enlightened community (namely the legal profession) that the decisions are legitimate.

Among the intellectual elites, it takes a special mind to believe such things.¹⁵ It takes a legal mind — one that can be perfected through years of arduous training. Acquiring a legal mind, however, is not without its psychic costs. Imagine, for a moment, a person who believed all of the above not only in his capacity as a law student or an appellate advocate or a sitting judge or a professing academic, but as a whole person. Imagine someone, in other words, who took the empirical, aesthetic, and metaphysical representations of Supreme Court opinions as valid descriptions of social life. We would be dealing, I think, with someone on the brink of madness.

To varying degrees, first-year law students are invited to participate in this madness. They are led to believe, for instance, that the doctrine of proximate cause is valid social theory. In the realm of the First Amendment, they are prompted to believe that speech is very often weightless — noncoercive, nonmanipulative, and nonperformative. They are invited to believe these things not simply as “law,” but as valid descriptions of the social reality to which the law will be applied.

Although this kind of true belief endures in some law students, most, no doubt, eventually shed this untroubled faith. Students come to understand that these beliefs are germane to the enterprise of law. They are views one must hold or pretend to hold to “do law.” The law student realizes that it would be error to suppose that these views are valid descriptions of social reality. Instead, the law student comes to believe that these views are valid descriptions of reality for the limited purpose of “doing law.” This mind-set is the beginning of a well-known and recursive disjunction:

SPEECH ACT	FORMAL PRECINCT	INFORMAL PRECINCT
what the law student says	in class	outside of class
what the law professor says	in class	in the faculty lounge
what the judge says to counsel	in open court	in chambers
what the conference panelist says	at the podium during the panel	in the hall after the panel

This disjunction embraces both belief and disbelief. Hence, to “do law,” the legal actor must not only profess that the beliefs he or she

¹⁵ These points, and the ones that follow, are further elaborated in CAMPOS, SCHLAG & SMITH, *AGAINST THE LAW* (forthcoming 1996), and PIERRE SCHLAG, *LAYING DOWN THE LAW — MYSTICISM, FETISHISM AND THE AMERICAN LEGAL MIND* (forthcoming 1996).

holds are valid descriptions of the relevant social reality, but also that they are his or her own.¹⁶ An appellate or trial court advocate cannot reveal to the judge or the jury what may well be the informal truth of the matter. He or she cannot argue in court: "Look, I'm just a lawyer, and I think the argument I am making is a pretty good one, but of course, I don't believe it for one second." On the contrary, the advocate must profess belief (even if it is not there).

To describe things this way foregrounds the sense of disjunction. This disjunction can appear in different guises — more or less acute, more or less problematic. Hence, at times it assumes a material form: for instance, it emerges as a discordance between the law-talk of formal precincts (the classroom, the podium, the courtroom) and the law-talk of the informal precincts (the hallway, the faculty lounge, the judge's chambers). At other times, it appears as a dissonance between "law in action" and "law in the books." At still other times, the disjunction is expressed as a formalized distinction between the so-called "internal" and "external" perspectives.¹⁷

The disjunction can emerge in many other forms. But the important point is that, however manifested or expressed, this disjunction remains a crucial aspect of the ontology of American law: it does not go away. This disjunction is one that a person "doing law" must at the same time recognize and yet deny. This condition is tragic because the stratagems for dealing with it are not terribly satisfactory.

One can, of course, recognize the disjunction and deny its force. This path leads either to formalism or opportunism (neither term is pejorative here). On the formalist side, one simply denies any social referent that fails to conform to law. One understands law to be fully effective in describing and constituting the objects that it purports to regulate. When one is "doing law," there is nothing else. What seems objectiona-

¹⁶ For a discussion of this dual character of the authenticity (or inauthenticity) of belief, see JOSEPH VINING, *FROM NEWTON'S SLEEP 11-12* (1995).

¹⁷ The distinction between the internal and external perspective has been a mainstay of much of American legal thought. Here it is rendered by Professor Ronald Dworkin:

People who have law make and debate claims about what law permits or forbids This crucial argumentative aspect of legal practice can be studied *in two ways or from two points of view*. One is the *external* point of view of the sociologist or historian The other is the *internal* point of view of those who make the claims. . . .

This book takes up the internal, participants' point of view; it tries to grasp the argumentative character of our legal practice by joining that practice and struggling with the issues of soundness and truth participants face. We will study formal legal argument from the judge's viewpoint . . . because judicial argument about claims of law is a useful paradigm for exploring the central, propositional aspect of legal practice.

RONALD DWORKIN, *LAW'S EMPIRE* 13-14 (1986) (emphases added); see also H.L.A. HART, *THE CONCEPT OF LAW* 88-91 (1961) ("[I]t is possible to be concerned with the rules, either merely as an observer who does not accept them, or as a member of the group which accepts and uses them as guides to conduct. We may call these respectively the 'external' and 'internal points of view.'"). For a sustained criticism of the distinction and its deployment, see Schlag, cited above in note 14, at 916-29.

ble about this approach (from an external standpoint) is its imperialism, its mechanistic self-confidence, its violent and arrogant disregard of other forms of life. On the opportunist side, by contrast, one simply gives up on any transcendental role for law — understanding implicitly that law is a rhetoric, a lie, a useful way to get things done. What seems objectionable about this approach (from an external standpoint) is its amorality, or even immorality.

One can also recognize the disjunction and fail to deny it. This path leads to legal nihilism (not a pejorative term here). This option is a plausible orientation for someone who studies rather than “does” law or someone who is talking about law in an informal precinct. It is not plausible, however, for someone who is “doing law” in a formal precinct. What seems objectionable about this approach (from an external standpoint) is that, for those who are “doing law,” this approach cannot be lived — at least not authentically.

Most American legal thinkers reject the extremes of formalism, opportunism, and nihilism. Instead, their main stratagem lies in a redemptive view. The disjunction is expressed in a time line formatted in the great image of progress: the present is inadequate, but the future shows great promise. The redemptive view admits the disjunction between the legal and the social, the ideal and the real, and the normative and the descriptive, but holds that, in time, the former can still be perfected and used to regulate, organize, and constitute the latter. The redemptive view thus recognizes and denies the disjunction. The recognition lies in an admission of a disjunction in the present. The denial operates through a presumption that normative prescription can eventually bridge the gap.

This view is expressed, at times, in such various perfectionist jurisprudences as realist policy analysis, critical legal studies, neo-pragmatism, and law and economics. All these schools of thought acknowledge that law is not what it represents itself to be. But in each case, there is also a redemptive promise that the law can be made to conform to its ideal self-representations.

All of this perfectionist jurisprudence presupposes, of course, that the ideal representations of the law — all these normative arguments consisting of lofty hopes, noble values, sound policies, appealing principles, and well-crafted doctrines — somehow regulate the actual uses made of law by litigants, lawyers, and judges. It is not easy to believe such things — at least not for those legal thinkers who are acquainted with the coercion, wheedling, needling, harassment, and other rude and crude practices of lawyers.¹⁸ How then can legal thinkers maintain the faith that law is regulative of its actual social uses? This is a difficult question.

¹⁸ See Edward A. Dauer & Arthur A. Leff, *Correspondence: The Lawyer as Friend*, 86 YALE L.J. 573, 581 (1977).

Certainly, it is not an inconceivable notion that the ideal representations of law are regulative of law's uses. On the contrary, some such notion has been conceived over and over again throughout the history of American legal thought. It has been, and still is, a tacit background presumption of analytical jurisprudence, normative legal theory, and doctrinal analysis.¹⁹ Yet, once one begins to question whether the ideal representations of law are regulative of its uses, the faithful affirmation of the presumption is a complete nonstarter. What is needed instead is an argument to buttress the view that the ideal representations of law are regulative of law's ruder and cruder uses.

Here, one should note that the philosophical argument that it is *necessary* to make such a presumption is of no moment whatsoever. This argument typically goes something as follows: to have law at all, one must presuppose that law is indeed regulative of its own deployment. It may be true that this presupposition is a precondition for "law" properly so-called. And it may be true that, unless the precondition holds, we do not have "law" properly so-called. But even if this is true, it cannot establish that in any given social context, the law invoked by various social actors is indeed "law" properly so-called. Nor does the point change, however much those social actors may desire that their law be "law" properly so-called. This philosophical argument about the necessary internal conceptual structure of "law" as regulative is neither here nor there when the question is precisely whether, in any given social practice, the invocation of law is regulative of its uses or not. In this context, the presumption quite simply begs the question.

It is not easy to believe that the ideal representations of law are regulative of its uses. Not only must one believe that the crucial relation is that of regulation, but one must believe as well that the ideal representations of law are distinct from their uses. This last presumption is made routinely by all manner of academic legal thinkers in the pursuit of their own jurisprudential projects. Collins and Skover invoke this presumption as well in setting up their legal realist tension between the legal and the social, the ideal and the real, the normative and the descriptive. Although they do not explicitly endorse the lofty Madisonian values, they do accept these values as normatively authentic and thus as worthy of respect.²⁰

Yet one wonders to what extent such presumptions about the regulative role of authentic ideals or values are plausible. One wonders to what extent the academy that trades in such ideals or values is not itself already under the influence of the commercial, electronic, and pornographic logic of the new state. Indeed, one can easily wonder to what

¹⁹ See Schlag, *supra* note 14, at 870-79.

²⁰ For an inquiry into the potentially counterfeit ontology of "values," see Pierre Schlag, *Values*, 6 YALE J.L. & HUMAN. 219, 224-27 (1994).

extent law review articles are anything more than advertisements for the professional self.

Like commercial advertising, law review articles trade in pleasing images. Legal thought has become a vehicle for the delivery of those signifiers crucial to the target audience: law as craft, law as order, law as transformative action, law as morality, and so on. The fascination of legal academics with this year's "in" terms displays the same kind of feverish attention that Madison Avenue devotes to this year's ad formulas in *Advertising Age*.

Much of normative legal thought might well be considered as a kind of trashy feel-good literature for legal thinkers. Relative to the tastes, hopes, and fantasies of the target audiences, is there really that much difference in the end between *Law's Empire* and a Danielle Steel novel? Danielle Steel's heroine wants to swoon, to feel the earth tremble, to be taken from this world in a love so deep that . . . It will happen. But, it will only happen after overcoming sustained and highly dramatic adversity. The legal academic, similarly, wants to be supremely just, to experience a law that is the best it could ever be, to submit to a jurisprudence so majestic, so encompassing, that it will take him out of this world to a realm of a "[l]aw [that] works itself [so] pure" that . . .²¹ It will happen. But, it will only happen as a result of achieving Herculean power and vanquishing countless jurisprudential enemies.

The extraordinary grandiosity common to both works (and their respective genres), the unbelievably flattering portrayal of the characters with which the reader is meant to identify, and the fantastic structure of the narratives when compared to their earthly social referents, bespeak a common aesthetic. It is the aesthetic of the romance. In both cases, the works (and their respective genres) deliver the goods as broadly and as efficiently as possible. In both cases, we have mass-market romance — which means that the story line must remain highly schematized, leaving the reader to fill in the details at his or her option.²²

Not all legal thought, however, is romance. A great deal of it is gaming, on the order of Trivial Pursuit. Whether in the genre of legal process, analytical jurisprudence, moral philosophy, deconstruction, or law and economics, there is a great deal of legal thought that does very little except trace out, in acutely self-referential detail, the mazes of its particular conceptual universe. It is difficult to find a cogent explanation for the production or consumption of this sort of work. One might

²¹ Ronald Dworkin, *The 1984 McCorkle Lecture: Law's Ambitions for Itself*, 71 VA. L. REV. 173, 173 (1985) (internal quotation marks omitted).

²² I do not mean to suggest, of course, that the two kinds of works are equal in their intellectual or ethical content. My point is that relative to the identities of their target audiences, the two kinds of works play largely the same roles, institute the same aesthetic, and instill the same dreams of hope.

thus be led to the otherwise counterintuitive conclusion that, like Trivial Pursuit itself, this sort of thing is actually entertaining to some people.²³

Whether we are talking about tracing out the minute legal process implications of this or that case or about a grand and captivating display of normative signifiers, legal academia, like the commercial entertainment culture, is taking a holiday from the serious and the troublesome. Like the prototypical Hollywood blockbuster, the true *pièce de résistance* in legal thought must end on a high note. In days past (pre-1970), this requirement meant writing an article that would definitively resolve a legal problem — so definitively that no one would dare to write about it again. As this task has become recently impossible, the *pièce de résistance* must now simply end on a note of cheery normativity (no matter how bad things get along the way). Hence it is:

that legal formalism may be intellectually exhausted, but sound policy analysis can infuse it with new life;²⁴

that the professionalism of the American lawyer is lost, but he or she can still find rewarding work in a small law firm environment;²⁵

that Supreme Court opinions are written by clerks and read like C.F.R., but that somehow law is still a kind of literature worthy of comparison to the works of Plato or Aristotle;²⁶

that there was a golden age of law (tentatively identified as 1958) to which we can return despite the fact that the doctrinal dreck produced by this jurisprudence is precisely what we are complaining about now;²⁷

that the practice of law is fraught with commercialism, greed, and predation, but that teaching “skills” and “values” to law students will help repair the profession.²⁸

There is a lack of seriousness to much of contemporary American legal thought.²⁹ In some sense, this lack of seriousness may always have been there. What is different now is that American legal thought is sub-

²³ And this is not a wholly implausible supposition. See Arthur Leff, *Law and*, 87 YALE L.J. 989 *passim* (1978).

²⁴ See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1483–84, 1506–11 (1987).

²⁵ See ANTHONY T. KRONMAN, *THE LOST LAWYER* 311–12 (1993).

²⁶ See JAMES B. WHITE, *ACTS OF HOPE: CREATING AUTHORITY IN LITERATURE, LAW, AND POLITICS* 178 (1994).

²⁷ See MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 197–98 (1994).

²⁸ See AMERICAN BAR ASS'N, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM* 235–36 (1992).

²⁹ See RICHARD A. POSNER, *OVERCOMING LAW* *passim* (1995) (criticizing many schools of American legal thought); Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. (forthcoming 1997) (manuscript at 23–37, on file with the *Harvard Law Review*).

ject to increased pressures from the commercial culture of entertainment, amusement, and triviality. What legal thinkers have offered, by and large, are law review parades of pleasing normative imagery and detailed games of acute legalism. Sometimes, we even get both at once: traditional legal process obsessionism combined with unrestrained normative messianism.

Either way, it is hard to escape the thought that we are in a period of flourishing decadence — one in which many legal thinkers, having abandoned all hopes of serious intellectual or political work, have devoted themselves to increasingly crimped wanderings through the doctrinal maze or to ever more effusive self-congratulations of their chosen profession (or both).

DECADENCE

Decadence, if taken seriously, is not an insult, but rather a diagnosis. And it is not one that can be thrown about lightly, for its grammar is generally inclusive of all those who are within the culture. This will usually include the author as well, and keep him or her from issuing such a reckless diagnosis. But perhaps legal thinkers should face up to this possibility forthrightly. There is more than enough evidence of decadence all around to make it a plausible theme.

Collins and Skover's book, *The Death of Discourse*, may well be evidence of this decadence. What they describe is a culture in decay — one that can no longer believe its ideals, one that can advance these ideals coherently only as a lie, one that is almost completely given over to mediocre forms of distraction. Then too, Collins and Skover's idiosyncratic form, their jurisprudential slumming, their sometimes lowbrow delivery, and their occasional wallowing in commercial sloganeering and pornographic imagery are symptomatic of decadence.

So are Collins and Skover decadent? Perhaps. But if one were to look around the legal academy for the jurisprudential equivalent of Nero, whom would one pick? Who is busy savoring the elixir of nostalgic jurisprudential reminiscence? Who is indulging in pleasant normative fantasies? Who is averting the gaze and closing the mind?