"Finishing the Hat": Reflections on David Skover's Life in the Law

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The art of making art is putting it together.
Bit by bit . . . .

—Stephen Sondheim[1]

INTRODUCTION

David Skover: what is the measure of the man who began teaching at the Law School in August of 1982? To answer that question requires turning back many personal and professional pages. As one who has been David's coauthor for a good portion of that journey that began forty years ago,[2] I am happy to enter my memories into the historical record. It is a record of enormous achievement combined with heart-breaking affliction; it is also a chronicle of a man with an unflinching determination to achieve excellence in all things ranging from mastering his operatic voice[3] to realizing his scholarly objectives. Beneath the folds of his tailored clothes beats the heart of a man with a genuine sense of social justice and a personal devotion to improve the plight of those sometimes left on life's sidelines. Polite in manner yet bold in method, there is also his paradoxical side—with uninhibited brio he has bent many a straight line.

It may be true: David Skover is an acquired taste. But for those who have acquired that taste there is no leaving; believe me, I know! Students

1. STEPHEN SONDHEIM, LOOK, I MADE A HAT: COLLECTED LYRICS (1981–2011) WITH ATTENDANT COMMENTS, AMPLIFICATIONS, DOGMAS, HARANGUES, DIGRESSIONS, ANECDOTES AND MISCELLANY 39 (2011).

2. David left the University of Puget Sound Law School (as it was then known) for a year to teach as a visiting professor at Indiana University School of Law, Bloomington (1988–89). *See* Erin Shea, *Getting to Know Professor Skover,* 24 PROLIFIC REP. 1, 7 (Jan. 31, 2005, Seattle U. Law School publication) ("To all appearances, the most important consequence of my one year at Indiana University School of Law was to meet Kellye Testy *as my student*, to lure her to the University of Puget Sound as my colleague, and now enjoy having her as my soon-to-be Dean") (emphasis in original).

3. "Considering David Skover's many accomplishments, as a legal scholar and professor, it almost strains credulity that law was his backup career plan. As a young man his first love was singing and performing in operatic productions and musical theater." *Singing Scholar: David Skover Retires from Teaching, Legal Scholarship*, SEATTLE U. MAG. (May 18, 2022).

and scholars alike understand that sentiment—those who value merit in its traditional forms and in its unpredictable applications appreciate that.[4] In what follows I sketch a portrait of my longtime friend, David Michael Skover. Of necessity, it must be an unfinished portrait since his life canvas is still very much a work in progress.

I. THE ARC OF HIS MIND

A. A Musical Mind

To understand how he teaches the way he does or how he writes as he does, one must first have some sense of the arc of his mind. To cast it broadly, David's mind operates on two fronts, one rigorous and analytical, the other creative and musical. Think of it as a combination of Ludwig Wittgenstein and Stephen Sondheim. Or to put it more personally, he is a perfectionist in matters big and small, and demands nothing less of himself. But he is also the one who sings boldly and operatically on stage[5] and in the shower.[6] By the same token, he is very Socratic and loves a good back-and-forth tumbling of ideas. Then again, he is someone who can get totally lost in the splendor of a melody.[7] Beyond the sound of music, he is a talented bridge player who thinks strategically and responds quickly and with discipline to changing situations.[8]

4. Unknown to most, a long time ago several of David's former students organized a social group ("Skoverites") that meets from time to time to talk about life, law and other things that matter. Over the years, the group grew as did everyone's affection for their mentor and friend. And so, the tradition continues to this day.

5. Before moving to Seattle, David performed lead roles on both the east and west coasts. Among his favorites are Ravenal in *Showboat*, Tony in *West Side Story*, and *Henry Higgins* in My Fair Lady. In Seattle, he played Mr. Lundquist in the Light Opera's production of Stephen Sondheim's *A Little Night Music* and was the tenor among five talents in the Crepe De Paris' summer cabaret production of *By Sondheim*. In Tacoma, he played the Minstrel in Little Theater's production of *Once Upon a Mattress*. For four years, he performed in Scott Warrender's *Washingtonians*. More recently, he performed musical theater songs, American Songbook standards, and jazz tunes in various Seattle venues. He also performed in cabaret shows at the former French restaurant, Crepe de Paris in Rainier Square.

6. My wife and I know this from the many times David has stayed at our home; on many occasions we have heard him singing Broadway or operatic songs from behind closed doors.

7. David was very active in his school choirs—in his secondary school days in the music and drama departments of Aquinas High School in La Crosse, Wisconsin, and later during his college years with the Princeton Glee Club and the Princeton close-harmony group, the Footnotes.

8. In more recent years, David took a number of Seattle middle-school children under his wing to teach them how to play bridge. One of his teams achieved no small success, winning first place in the local and regional youth competitions.

B. A Socratic Mind

Though he can be razor-sharp when it comes to reciting the holding of a case (be it in constitutional law, federal courts, or civil procedure), he is no "case cruncher." By that I mean he does not follow the example of many professors who "teach to the case"[9] and not beyond it to test its analytical merit. Thus, those who wanted a "black-letter" "case-cruncher" type of professor steered wide and clear of his classes. David's teaching style and the way he assigned student papers or conducted exams were atypical. Class participation was an essential component of his teaching method, and a portion of each student's final grade hinged on that.

The idea in all of this was not simply to have students robotically recite case names and black-letter rules. Rather, the pedagogical purpose was to *engage* their minds, to get them thinking about the logic behind a

9. That said, when called upon he could do so as well as any. For a good number of years, David taught bar review courses and was quite good at it. When he teaches, he will often begin the discussion by highlighting the most relevant facts, stating the applicable rule of a case, and then turning to an evaluation of its logic, albeit with Socratic rigor.

rule or holding and then test that logic, duly mindful of the various interpretative tools of the law. The way he conducted his classes was on par with how such classes are taught at the finest of ivy league law schools. (To enhance the dialogic spirit, some of his smaller classes or seminars were held in a designated area of an off-campus coffee shop).[10]

If David expected more of his students, it was because he gave them more in how he tutored them. For example, and as I recall, for his federal courts class he assigned students to argue a particular side of a hypothetical fact pattern, this for their oral final in his office. This was based on a hypothetical memo assigned to a young law firm associate by a senior partner. David played the latter and asked the associate a number of questions; those answers determined a significant portion of a student's final grade. When he assigned papers (several short essays) in seminars, the feedback he gave was substantial, sometimes running two or more single-spaced typed pages.

C. Ways of Thinking About the Law

Again: The Skover method was far from the conventional black-letter memorization approach commonplace in so many law schools. This is not to say he held back in preparing his students for the bar; quite the contrary, they were *more* than prepared after taking one of his classes.[11] That is because those classes had a value-added component, a way of *thinking* about the law.[12] In that regard, the frame of his mind is well on display in a book he wrote with Professor Pierre Schlag titled *Tactics of Legal Reasoning* (1986). To provide some sense of that book, here is how it was described in a review essay published in the *Michigan Law Review*:

> This very brief and lucid book offers an outline of the most common flaws in legal arguments and how such flawed arguments may be effectively attacked. Usually the student will encounter these forms of bad reasoning during ordinary law school work. The special contribution of Professors Schlag and Skover is to assemble and

10. When the Law School was located in Tacoma, there were times when a small class or seminar was conducted in a local coffee shop.

11. For example, in his con-law discussion of the dormant commerce clause he would begin with identifying and explaining the four relevant doctrinal rules followed by a discussion of the related exceptions. All of these would be essential to bar preparation. He would then proceed with a critical discussion of the relevant cases.

12. For example, in his examination of *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), he would lead the class to ponder such questions such as the following one: "Consider the potential consequences of the Court's invalidation of state commercial regulations under the classical theory of exclusive federal power in the arena of interstate commerce. Might there be troubling practical difficulties with a categorical denial of state power to achieve commercial ends or objectives?" I know of this question since we shared class notes with one another.

> organize all of these reasoning errors so they can be studied, and the skill of answering them practiced, independently of substantive courses.
>
> The authors hope to encourage students to think of attacking weaknesses in reasoning as being similar to learning 'moves' in sports. The lawyer's craft of argumentation is broken down into its component units so that these can be mastered by drill, just as the basketball player's flowing play of a game has previously been practiced in units such as dribbling or blocking. Can this approach accomplish any educational purpose that is not already served by the many debates and discussions that take place in classrooms, in the hallways, over meals, or wherever two or more law students are found?
>
> Clear thinking will always be in short supply, in the law and elsewhere. Professors Schlag and Skover offer a valuable tool toward a commendable end.[13]

D. From Mahler to Madison and More

To turn the conceptual tables yet again, *The Death of Discourse* (1996) is a good example of the marriage of David's rigorous analytical side with his creative side. The book opens with a vivid daybreak account set at the ruins of the Acropolis while the mind's-ear is directed to the Adagietto from Gustav Mahler's Fifth Symphony.[14] Soon enough, however, the focus turns to more cerebral matters, such as the free speech perspectives of the likes of Milton, Mill, Madison, and Meiklejohn.[15] Then again, if you would consider the drift of a work such as *When Money Speaks* (2014),[16] David's ability to cut through the thickets of campaign finance laws and accompanying case law is on proud display.

All of this reveals the workings of a mind that operates comfortably and confidently in two profoundly different domains, one analytical, the other creative. Then there his rare talent in working in sync with certain

13. Reviewed in Charles A. Reich, *All the Right Moves*, 85 MICH. L. REV. 1201, 1203 (1987).

14. RONALD COLLINS & DAVID SKOVER, THE DEATH OF DISCOURSE XLIX (2d ed., 2005).

15. *Id*. at LI.

16. RONALD COLLINS & DAVID SKOVER, WHEN MONEY SPEAKS: THE MCCUTCHEON DECISION, CAMPAIGN FINANCE LAWS AND THE FIRST AMENDMENT (2014). On July 9, 2014, Skover moderated a debate between Erin Murphy, who successfully argued the *McCutcheon* case, and Paul Smith, a noted Supreme Court litigator, on campaign finance regulation and the Supreme Court's recent decision in *McCutcheon v. FEC*, 572 US 185 (2014). David was one of the co-founders of The First Amendment Salons. *The First Amendment Salons*, FIRE, https://www.thefire.org/first-amendment-library/special-collections/the-first-amendment-salons/ [https://perma.cc/8NR2-WW6P].

others, much as James Lapine did when he worked with Stephen Sondheim.[17]

II. IN THE BEGINNING

It all began in late 1984 with a request to write the foreword to a *University of Puget Sound Law Review* (*Review*) symposium on the Washington Constitution.[18] The *Review* had already lined up an impressive list of authors including Washington Supreme Court Justice Robert F. Utter.[19] At that time I was writing a lot on state constitutional law,[20] having been a law clerk to the leading jurist and scholar in that area, Oregon Supreme Court Justice Hans Linde.[21] Hence, I was honored to be invited to write the foreword. Even so, I asked: "I'm curious: How is it that you came to me?" The editor replied: "Professor Skover urged us to invite you." There was more, but that is the gist of it. They then photocopied all the articles and mailed them to me by postal service, this in the days before the Internet. When I read all the articles, two stuck out as quite thoughtful: an article by David Skover[22] and another by Pierre Schlag.[23] Sometime after I wrote my foreword, David called to thank me . . . and it turned into a rather long phone conversation. To my great surprise, in the days that followed, he had orchestrated an arrangement with Dean Fredric C. Tausend[24] to invite me to teach at the Law School as a visiting professor. Thus did things begin—soon enough, we engaged in long dialogues in one another's offices and even did some spot and impulse "team teaching." It was attraction at first thought . . . and many more.

Strange, this attraction. I was California, he was Wisconsin; I was U.C. Santa Barbara, he was Princeton; he donned penny loafers, I preferred sandals; he loved Sondheim, I fancied Bob Dylan; he clerked for

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17. *See* James Lapine, PUTTING IT TOGETHER: HOW STEPHEN SONDHEIM AND I CREATED SUNDAY IN THE PARK WITH GEORGE (2021).

18. *Symposium: The Washington Constitution*, 8 U. PUGET SOUND L. REV. 221 (1985).

19. Robert F. Utter, *The Right to Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgment*, 8 U. PUGET SOUND L. REV. 157 (1985).

20. *See, e.g.*, Ronald Collins, *Reliance on State Constitutions: Away from a Reactionary Approach*, 9 HAST. CON. L. Q. 1 (1981); Ronald Collins & Peter Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 16 PUBLIUS 111 (1986); Ronald Colins, *Reliance on State Constitutions: Some Random Thoughts, in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE 1 (1985).

21. Adam Liptak, *Hans A. Linde, Iconoclastic Legal Scholar, Dies at 96,* N. Y. TIMES (Sept. 2, 2020), https://www.nytimes.com/2020/09/02/us/hans-a-linde-dead-96.html.

22. *See* David M. Skover, *The Washington Constitutional "State Action" Doctrine: A Fundamental Right* to *State Action*, 8 U. PUGET SOUND L. REV. 221 (1985).

23. *See* Pierre Schlag, *Framers Intent: The Illegitimate Uses of History,* 8 U. PUGET SOUND L. REV. 283 (1985).

24. The professorship that David long held was sponsored by and named after Dean Tausend.

a federal judge,[25] I for a state one. After graduation he worked as a summer associate at White and Case and for the Federal Election Commission (FEC),[26] while I worked at the Legal Aid Foundation in Venice, California. In teaching, he took class attendance and graded on participation, while I did neither. Odd couple, no? For whatever reasons, the stars aligned once again when we wrote our first law review article together.[27]

III. THE SENATOR WHO NEVER BECAME A SUPREME COURT JUSTICE

"[H]e is Mr. Constitution in the Senate."[28]

Back in 1986, Senator Orrin Hatch's (R-UT) standing as a stalwart conservative constitutionalist was such that his name surfaced on President Ronald Reagan's short list of possible Supreme Court nominees.[29] Against that backdrop, we were fortunate to secure an interview with Senator Hatch on December 19, 1986, in his office in Washington, D.C. Without any advanced notice of our questions, the Senator proved to be learned, candid, and very conservative—the kind of Supreme Court nominee President Reagan wanted. The interview was tape-recorded and transcribed. Minor stylistic changes were made to conform the oral exchange to a written format. Moreover, we heavily annotated the Senator's responses to explain, expand, or qualify his articulated positions. The footnotes were drawn from the Senator's published and unpublished statements made prior and subsequent to the interview.

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25. He clerked for Judge Jon O. Newman, both as a federal district judge and as appellate judge on the second circuit.

26. He worked in the General Counsel's Office of the FEC from May 1975 to September 1976. This was *before* he graduated from law school. Jack Murphy (then a Georgetown Law professor on leave at the FEC) was the one who hired him. It was originally to be a summer job, but the staff became so reliant on Skover's assistance that they convinced him to stay for an entire year. His *Yale Law Journal* student note was titled *The Constitutionality of Limitations upon Donations to Political Committees in the 1976 Federal Election Campaign Act Amendments*, 86 YALE L.J. 953 (1977), which was cited in Justice Blackmun's concurring opinion in *California Medical Associates v. Federal Election Commission*, 453 U.S. 182, 202 (1981).

27. Prior to that, David was still writing scholarly works with others and on his own. *See, e.g.*, PIERRE SCHLAG & DAVID SKOVER, TACTICS OF LEGAL REASONING (1986); David Skover, *"Phoenix Rising" and Federalism Analysis*, 13 HAST. CON. L. Q. 271 (1986)*; see also* David Skover, *Constitution Should Tell It Like It Is,* NAT'L L.J., Jan. 18, 1999, at 25.

28. Eric Effron, *Hatch Soars After Rehnquist Victory*, LEGAL TIMES, Sept. 22, 1986, at 1, col. 1 (quoting federal judge Howard Markey).

29. *See* Bob Brandt*, Reagan May Turn to Sen. Hatch as Next Supreme Court Nominee*, WASH. POST, Nov. 20, 1986, F4, col. 5; *Justice Hatch?*, NEWSWEEK, Sept. 22, 1986, at 10. *See also* Thomas Burr, *Sen. Orrin Hatch's Impact on the Supreme Court: How a One-Time Lawyer From Pittsburgh Shaped the Highest Court in the Land,* SALT LAKE TRIB. (July 29, 2018) ("After Associate Justice Lewis Powell announced his retirement in 1987, President Ronald Reagan considered naming Hatch to the high court. Reagan's short list for the spot was so small it included only Hatch and D.C. Court of Appeals Judge Robert Bork.").

As fate would have it, the Senator was never nominated. This was due to a most peculiar turn of events. Apparently, he had an Emoluments Clause problem (Art. I, § 6, cl. 2).[30] Were it not for the *Washington Post*'s story on the Emoluments issue,[31] the Senate may have assessed the qualifications of one of its own for the post left open in 1987 by the retirement of Justice Lewis Powell. But that never happened. Since we had conducted a considerable amount of research, including much legislative history research, we were reluctant to allow the project to die. Instead, we crafted the article as a constitutional profile of a noted American lawmaker.[32] And what a profile it was!

During his tenure as Chairman of the Constitution Subcommittee, for example, Senator Hatch was "exposed to more proposals . . . to amend the United States Constitution than any other member of Congress since James Madison was successful in securing ten amendments to that document."[33] Indeed, a number of these proposed amendments were launched by the Senator himself. For example, he introduced at least three controversial resolutions: the Human Life Federalism Amendment,[34] the Voluntary Silent Prayer Constitutional Amendment,[35] and the Equal Protection Amendment,[36] which would have outlawed affirmative action measures.

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30. In effect, this clause prohibits a Senator from serving as a judicial officer if the salary for that position had been increased during the Senator's term. Since Senator Hatch had recently voted for a pay raise for the Supreme Court Justices, he would have benefitted in contravention of the clause were he to be nominated and confirmed.

31. Al Kamen, *Could Judges Pay Raise Keep Hatch Off Court?,* WASH. POST, June 5, 1987, at A25, col. 1. *See also* Scott Matheson, Jr., *Hatch Downed*, NAT'L L.J., July 13, 1987, at 13.

32. Ronald Collins & David Skover, *The Senator and the Constitution: An Interview with Orrin G. Hatch*, 16 HAST. CON. L. Q. 141 (1989).

33. The Second Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 104 F.R.D. 207, 233 (1985) (statement by Hatch).

34. As early as 1977 and as late as 1981, Senator Hatch introduced and supported constitutional amendments consistent with the view that fetuses should be recognized as persons within the protection of the supreme law. *See, e.g.*, 123 CONG. REC. 31,438 (1977) (introduction of S.J. Res. 84, human life amendment); 127 CONG. REC. 848–84 (1981) (supporting S.J. Res. 17, Senator Garn's human life amendment). The Senator's critique of *Roe v. Wade,* 410 U.S. 113 (1973), was part of a statement he made in support of the proposed Human Life Federalism Amendment. *See* S.J. Res. 110, 97th Cong., 1st Sess., 127 CONG. REC. 1381 (1981), which "would overturn *Roe*" and "establish concurrent authority to legislate in the State and Federal Governments on the subject of abortion." 128 CONG. REC. 23,533 (1982).

35. First introduced in 1982 (as S.J. Res. 199), 128 CONG. REC. 10, 371–72 (1982), the proposed amendment was reintroduced in 1985. *See Constitutional Amendment Relating to School Prayer*: *Hearings on S.J. Res. 2 Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 3–4 (1985).

36. 126 CONG. REC. 23,772-84 (1980). In 1981, Senator Hatch argued that the Supreme Court's interpretations of the Civil Rights Act of 1964 amounted to "government-mandated discrimination . . . causing disruptions all over America in favor of the 'preferred' classes. Where in the Constitution do

IV. EARL WARREN LIVES?

"Earl Warren is dead. A generation of legal scholars continues, nevertheless, to act as if the man and his Court preside over the present. While this romanticism is understandable, it exacts a high price in a world transformed."[37] We began writing together with those opening words to our law review article. The article was written in Downey, California, around a circular fireplace overlooking a swimming pool. Unlike all the times thereafter, we wrote sections separately and then went over the manuscript line-by-line together. Our first coauthored work landed in the *Michigan Law Review*—not too shabby for beginners![38]

The central theme of that article is one that manifested itself time and again in our future collaborations: the demand for legal realism. Legal theory was fine so long as it was duly mindful of the real workings of the world. Formulating a theory and then claiming to cabin reality within it was nothing short of fantasy and hypocrisy.[39] Moreover, there was this question: Once progressive scholarship was no longer valued by a majority of Justices of the Supreme Court, what should such scholars do? How should they formulate their arguments and to whom should they direct them? That was one of the key takeaways of *The Future of Liberal Legal Scholarship*. More than three decades after that article was written, such questions remain more timely than ever in the era of cases such as *Dobbs v. Jackson Women's Health Organization,*[40] *Kennedy v. Bremerton School District*,[41] *West Virginia v. Environmental Protection Agency*,[42] and *New York State Rifle & Pistol Association v. Bruen*[43]—all decided in a single Court Term.

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we find preferred classes?" AMERICAN ENTERPRISE INSTITUTE, WHOM DO JUDGES REPRESENT? 8 (June 1, 1981 conference); *see also* Orrin Hatch, *Bork and Equal Protection*, WASH. TIMES, Oct. 2, 1987, at Fl, col. 1 (describing affirmative action as "difficult to reconcile with the Constitution's language guaranteeing equal protection to every person").

37. Ronald Collins & David Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189 (1988). A year or so thereafter, we spoke on this article at Temple University. After we presented our remarks, a professor of political science rose up to voice his strong objection: "Earl Warren is *not* dead!" he proclaimed with passion—*res ipsa loquitur.* In a playful moment, I turned to David and asked, "I wonder whether he thinks Elvis is dead?"

38. Of course, David may have paved the way. *See* David Skover, *Reconstituting "Original Intent:" A Constitutional Law Encyclopedia for the Next Century*, 86 MICH. L. REV. 1257 (1988).

39. The article was excerpted in MICHAEL J. GERHARDT, CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES (1993).

40. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992)).

41. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (functionally overruling *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

42. West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587 (2022) (substantially curbing federal regulatory powers).

43. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022) (further expanding gun rights).

V. WRITING METHOD

After the Hatch article our writing and conceptualizing method took on a new and ever more unorthodox character. For one thing, there was more thinking outside the proverbial "box," more originality, and more exploration into new ways of conceptualizing ideas, especially in the context of free speech jurisprudence. In the process, our writing style became less cumbersome and more creative, even *avant-garde*. Hence, both the method and content of much of our subsequent writings were unorthodox.

As with the Earl Warren and Orrin Hatch articles, enormous amounts of research continued to be the norm. Literally, weeks and even months of research were done to assure we had covered all of the informational bases. We would start with identifying the pertinent articles or books (quite often *outside* the boundaries of legal literature) and then discuss them with one another. David would prepare a binder (in later years an e-folder) of "nuggets" with summaries and quotes from the relevant literature we had previously discussed. Thereafter, we would draft a very detailed outline, replete with references to the applicable "nuggets." We would then sit on the outline for a day or so before we turned to writing.

When the day for writing came—and it could be anywhere from eight to fifteen hours per day for a week or more—we would chart out the general direction of our thought; this as a sort of "warm up" exercise. Ready to write, David manned the computer as I paced back and forth, until one of us began a sentence or two. Sometimes I would start, and David would type and edit as he did, or he would start, and I would edit. We went back-and-forth with this method until, soon enough, a draft text appeared on page after page. On a good day, we might compose some twenty single-spaced pages, in pretty good shape with relatively little major editing required later. When we wrote in two week-or-so blocks, we would finish a respectable draft of a law review article, with polishing to be done here and there in the days thereafter.

Several of those articles were so original that they prompted editorial invitations for a symposium with several responses followed by our rejoinder. We always welcomed the robust exchange of ideas, some of which inspired us to refine our opinions or even take them to a new conceptual level. What was a conceptual constant in many of these writings was a philosophical, cultural, and economic emphasis on the importance of the *medium.* That is, the *meaning* of the *message* could not be divorced from the *method* of its communication, especially when operating in a modern highly *capitalistic* culture. This emphasis on the importance of the method of communication was not confined to the free speech realm of the law. Hardly. As the discussion of the next article

illustrates, that focus was germane to how law, *qua* law, is conceptualized—the method of communication actually *framed* the boundaries of law.

VI. PARATEXTS

Of all the scholarly articles we wrote, the one David was most proud of was titled *Paratexts*. In 1990–91, that article had been sent to the top fifteen law reviews; it was rejected by all of them save the *Cornell Law Review*. While I was willing to publish in *Cornell*, David felt the article deserved better placement. We went back-and-forth about the matter. I argued that if we waited to resubmit the article the following year our publication luck might not be anywhere as good as the *Cornell* offer. David was firm; the article deserved better. So, I went along . . . with great trepidation. After a year passed, we sent the same article to the same fifteen reviews. This time the editors of the *Stanford Law Review* were excited about the piece and ran it as the lead article in the issue.[44] Here is how that article about the relationship between law's form and its substance began:

> Law is bound by its form.
>
> In important ways, law is the product of its methods of creation, transmission, and execution. While commentators dwell on the evolution and enforcement of law, little attention is given to the significance of the law's dissemination, the media by which legal messages are communicated. This omission ignores the lessons of the law's past and the directions of its future. Any understanding of legal culture is necessarily incomplete without some real appreciation of the role played by its modes of communication, whether oral, scribal, print, or electronic.
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> Approximately a century after the invention of moveable type, Western legal tradition began to be characterized by print. Today, our legal consciousness is still demarcated and mediated by printed texts. Whether, for example, in the formation and interpretation of wills or contracts, or in the review of court trials and legislative proceedings, the law's primary instrument remains the printed document. Wherever we turn, legal reality is shaped largely by the printed word.
>
> But that reality is changing. We live in an era of "paratexts," in which words and images, as captured by electronic recording, compete with print to represent legally significant events. In using the term "paratexts," we intend to convey two essential ideas. First, we imply a meaning of "text" that extends beyond ("para") its conventional understanding, which is typically limited to written or printed

44. *See* Ronald Collins & David Skover, *Paratexts*, 44 STAN. L. REV. 509 (1992).

> documents. Second, although the term could apply to any electronic form of transmission—such as telephone, radio, film, television, photocopying machine, facsimile ("fax"), computer, laserdisk, compact disk-read only memory ("CD-ROM"), or audio-visual equipment—we intend, for our purposes, to refer only to those technologies that record the images and sounds of persons, places, and events. Among such technologies existing today, the audio-visual camera and playback equipment ("video") have been used more widely by the American legal community than any other technology. Accordingly, in the context we have adopted, "paratext" means the electronic recording produced by currently known video technology in American law and unknown technological inventions that will be the functional analogues of video in the future.[45]

Paratexts took a deep and long view of the law and how we come to think of it—a view both largely original and certainly rife with jurisprudential implications.[46]

VII. FROM PARATROOPERS TO PORNUTOPIA AND BEYOND

When it came to law review publications, the years between 1990 and 1996 were quite productive ones.[47] The Collins and Skover[48] spate of articles (replete with three symposia)[49] consisted of seven publications in

45. *Id*. at 509–10 (footnotes omitted).

46. That mindset informed a subsequent article with a yet broader scope. *See* Ronald Collins & David Skover, *Paratexts as Praxis*, 37 NEOHELICON 33 (2010) (Charting out the pedagogical, technological, operational, institutional, commercial, and theoretical implications of moving from a print-based casebook paradigm to an electronic course book model. Central to this venture is what we call the Conceptions Course Book, the law school course book of the future.).

47. Our writings also appeared in other publications. *See, e.g.*, Ronald Collins & David Skover, *Video & the Nation-Jury*, CHRISTIAN SCI. MONITOR, May 11, 1992, p. 19, col. 1; and Ronald Collins & David Skover, *Art v. Obscenity—Drawing Distinctions*, CHRISTIAN SCI. MONITOR, April 6, 1992, p. 13, col. 4. Our articles on the emerging communication technologies gave rise to an October 1996 conference held at Seattle University Law School; it was titled "Internet Law in 1996."

48. In later years, our "brand" became "Collins and Skover" on the covers of our books. *See, e.g.*, COLLINS & SKOVER, ON DISSENT: ITS MEANING IN AMERICA (2015).

49. Colloquy*, The First Amendment and the Paratroopers Paradox*, 68 TEX. L. REV. 1087–1193 (1990); Colloquy*, The First Amendment in a Commercial Culture*, 71 TEX. L. REV. 697–832 (1991); Symposium, *Noble Lies and the First Amendment: A Symposium on THE DEATH OF DISCOURSE*, 64 U. CIN. L. REV. 1191–1321 (1996).

journals such as the *Texas Law Review*,[50] *Stanford Law Review*,[51] *Harvard Law Review*,[52] and the *University of Cincinnati Law Review*.[53]

Speaking generally, what these articles had in common was a critique of free speech theory as commonly articulated in scholarly tracts and judicial opinions. Such theories—e.g., the marketplace of ideas, self-realization, the pursuit of truth, or democratic self-government—all, in one way or another, employed a normative value by which to justify certain kinds of speech in the world. Speech was categorized (e.g., high or low value speech) and then assigned a high value by which it was legitimated. This is what we understood to be a *top-down* approach to free speech theory. In other words, when it came to evaluating speech, this approach looked at the world from on high in order to validate speech as practiced "down below." Sometimes employing Swiftian-like satire,[54] we critiqued such theories as being unmindful of speech as actually practiced in the real world. Our "cultural" or *down-up* approach reversed the perspective. By looking at speech as practiced in our everyday lives, it became apparent that the values of expression in that culture of advanced capitalism were largely centered around entertainment,[55] commerce,[56] and sexual gratification.[57] And all of this was very much influenced by the technologies of modern communication.[58] In such ways and others, the aim was to bring an element of legal realism into the free speech world, much as Karl Llewellyn had brough it into the world of commercial law.[59] By that measure, our approach was a radical one; it set out to reorient legal scholarship and redefine the way it found expression in judicial opinions. Our *cultural approach* thus explained real speech values as those prized in modern America as it is. Understood that way, such values actually warred with those championed by *top-down* theorists and jurists. That

50. Ronald Collins & David Skover, *The First Amendment in an Age of Paratroopers,* 68 TEX. L. REV. 1087 (1990); Ronald Collins & David Skover, *The First Amendment in Bold Relief: A Reply,* 68 TEX. L. REV.1185 (1990); Ronald Collins & David Skover, *Commerce & Communication*, 71 TEX. L. REV. 697 (1993); and Ronald Collins & David Skover, *The Psychology of Contemporary First Amendment Scholarship: A Reply,* 71 TEX. L. REV. 819 (1993).

51. *Paratexts*, *supra* note 44; Ronald Collins & David Skover, *Pissing in the Snow: A Cultural Approach to the First Amendment*, 45 STAN. L. REV. 783 (1993).

52. Ronald Collins & David Skover, *The Pornographic State*, 107 HARV. L. REV. 1374 (1994).

53. Ronald Collins & David Skover, *New "Truths" and the Old First Amendment,* 64 U. CIN. L. REV. 1295 (1996).

54. *See Pissing in the Snow, supra* note 51.

55. *See The First Amendment and the Paratroopers Paradox*, *supra* note 49.

56. *See Commerce & Communication, supra* note 50.

57. *See The Pornographic State, supra* note 52.

58. *See* RONALD COLLINS & DAVID SKOVER, ROBOTICA: SPEECH RIGHTS AND ARTIFICIAL INTELLIGENCE (2018).

59. *See* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (2d ed. 2012).

being the case, *top-down* theorists turned to lying ("noble lies")[60] in an attempt to give credence to their theories.

* * * *

"The Pornographic State," which appeared in the *Harvard Law Review* in 1994, presented us with yet another opportunity to explore the relationship between speech values and speech practices, this time in the context of sexual expression. Though it was a great honor to be invited to speak at the Harvard Law School's symposium on "Images of the State," and subsequently to be published in the law review, we were mindful that the style and substance of our views were anything but conventional and would likely provoke a measure of blowback.

In essence, the article took issue with the exaggerated theories employed by free speech scholars to promote constitutional protection for sexual expression. In our opinion, such expression might well be protected, but *not* for the elevated reasons typically given as justifications. This was especially apparent when Professor Cass Sunstein spoke in high-minded defense[61] of some controversial photographs taken by the late Robert Mapplethorpe, including graphic depictions of the gay male BDSM subculture in New York City. Again, our position was not whether these photographs (or other such erotic expression) should or should not be protected, but whether they should be protected for the highbrow (and arguably duplicitous) reasons Sunstein tendered. When we publicly called him out in response to his oral remarks at Harvard, he took spirited exception, seemingly shocked that anyone would challenge his views as we had.

Then there was the editorial gauntlet that we had to go through in the *Harvard Law Review*'s publication of *The Pornographic State*. The piece was shepherded through the process by the commendable direction of our editor, David Barron (now a First Circuit judge). Our problems began when the article was submitted to the President of the *Harvard Law Review*. He made significant edits and omissions–the manuscript was heavily redlined. We were appalled when we saw it. What to do? For David, the answer was an emphatic *no!* We would not countenance such a major reworking of our words and ideas. David was that categorical. Though I certainly agreed with him on the merits, I did pause nonetheless—this, after all, was the *Harvard Law Review*. Were we really prepared to walk away if our demands were denied? I would have been insecure enough to yield. But then David (the *bold* soul) came up with a "solution" to our problem.

60. *See New "Truths" and the Old First Amendment*, *supra* note 53.

61. *See* THE DEATH OF DISCOURSE, *supra* note 14, at 149–150, 188–190.

David's plan was to send off the unmarked galleys of our article to the editors of the *Yale Law Journal*, the periodical at which he once worked as an editor. In a written communiqué (sent by express mail), David explained the editorial conundrum at Harvard and said to the Yale editors that the article was theirs if they acted promptly. Shortly thereafter, I received a phone call from our Harvard editor, Dave Barron. "What have you and David done?" he asked. I pleaded ignorance. He then informed me that they had received a call from the *Yale Law Journal* editors informing them of our scheme. "Do you guys want to publish in the *Harvard Law Review* or not?" He spoke rather emphatically. "If so," he added, "I think I can work things out with the President in a conference call. I can get you much of what you want but I need you two to be on board with me. Can you do that?" Such was the drift of his remarks. We agreed. The call took place, we made a few rather insignificant concessions, and the text returned in large part to its original shape and substance. When it was over, David chuckled with pride—he had done it again.

IX. THE DEATH OF DISCOURSE (1996, 2005, 2022)

Beyond doubt, this is David's favorite of our books together. The book will soon resurface in its third edition and it is as timely now as it was more than a quarter-century ago. *The Death of Discourse* is in some respects an anti-book; in other respects, it is pure cultural satire; while still other respects it is perhaps the boldest defense of free speech ever written. Then again, it is also a bleak dystopian critique of free speech in modern capitalist America. It is likewise a book crafted from a critical perspective; it thus trades in contradictions and delights in mocking the hypocrisy that is so often summoned to defend real-world, low-value expression as if it were high-value discourse in the service of elevated normative principles. Yes, it can be dizzying, but if one reads it carefully and with reflective pause, she can begin to appreciate its moves from the confines of law to the constructs of sociology and then to the probes of philosophy.

Where to begin in explaining the origin, research, writing style, and overall discursive mindset of a work that looks at the First Amendment from a radically unorthodox perspective? Afterall, this book (the interior pages of which were "produced by Bruce Mau")[62] opened with a bold

62. "Produced by Bruce Mau" appears on the first page of the two-page title format. Bruce Mau was, and remains, a world-noted Canadian graphic artist and educator who works with film, eco-environmental design, education, and conceptual philosophy—he is very engaging and highly creative.

quote from Albert Camus,[63] followed by a list of twenty "Dramatis Personae" and a Straussian[64] warning as to "How to Read This Book." The work has music,[65] commercial ads,[66] pornographic depictions,[67] and a good dollop of TV-type lines of mindless entertainment.[68] It is also replete with "dialogues" with the dead, famous, and infamous.[69] Apropos to its content, the second edition of *The Death of Discourse* portrayed Socrates in his last moments surrounded by his disciples, this against a neon backdrop of pornographic "private fantasy video books." The cover for the third edition (see below) was tailored to capture free expression as it plays out in more modern times.

The reviewer for *The New York Times* portrayed the book as a "decidedly odd but sporadically engaging collection of ruminations,"[70] while the reviewer for the *Harvard Law Review* took a more existential view:

> *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" . . . 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.[71]

Enter Leonard W. Levy, the Pulitzer-Prize winning historian. He judged the book from the point of its scholarly candor: "*The Death of Discourse* is literary dynamite ready to demolish the pomp and hypocrisy obstructing the proud edifice of the First Amendment. This book poses a clear and present danger in the most deserving sense."[72] Over at the *American Bar Association Journal*, the book left the reviewer with a dark

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63. "If our speech has no meaning, nothing has meaning." Albert Camus, NOTEBOOKS: 1942–1951 23 (Justin O'Brien trans., 1965).

64. Leo Strauss (1889–1973) was a famous German-American political philosopher and author of several books, including PERSECUTION AND THE ART OF WRITING (1952). *See also* LUDWIG WITTGENSTEIN, CULTURE AND VALUE 7 (G.H. von Wright, ed., Peter Winch, trans. 1980) ("[I]f a book is written for just a few readers that will be clear just from the fact that only a few people understand it. The book must automatically separate those who understand it from those who do not.").

65. *See, e.g.*, THE DEATH OF DISCOURSE, *supra* note 14, at XLIV, XLIX, 69, 87, 148, 160, 173, 201.

66. *Id*. at 67–135.

67. *Id*. at 137–200.

68. *Id*. at 1–45.

69. *See, e.g.*, *id.* at 47–65, 121–135, 185–200, 213–215, 217–249.

70. Neil A. Lewis, *Tongues Untied*, N. Y. TIMES, Apr. 14, 1996, at 23.

71. Pierre Schlag, *This Could Be Your Culture—Junk Speech in a Time of Decadence*, 109 HARV. L. REV. 1801 (1996).

72. Blurb on back of second edition of THE DEATH OF DISCOURSE, *supra* note 14.

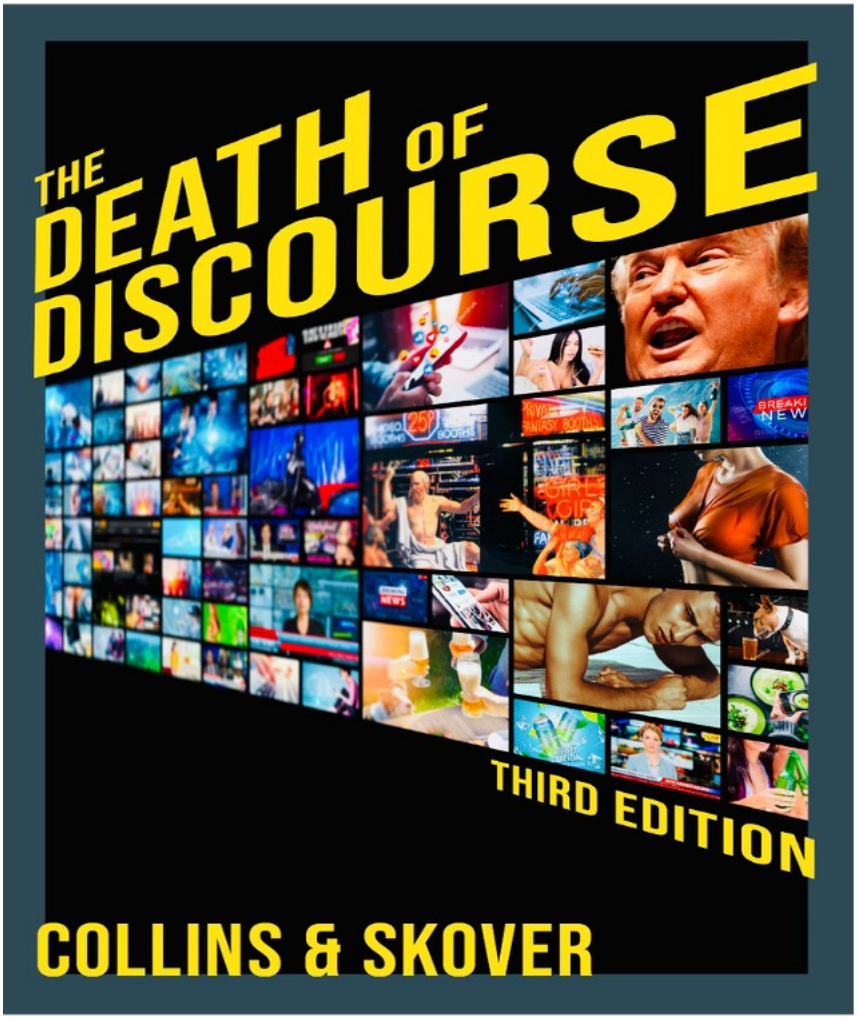
view of America's future: "It is hard to read this book without becoming concerned about American democracy."[73]

Turning to the third edition (circa 2022), here is sample of how we sketched our thinking decades after the original edition of *The Death of Discourse* was first published:

> If one lives long enough, sometimes the obvious remains so even in the face of denial. After all, yesterday's insights occasionally shed enough light through the corridors of time to reveal a momentous fallacy in constitutional and cultural thinking. That fallacy, which we exposed in this book's first edition, still plagues free speech jurisprudence. And so we return to the scene, a quarter century since we first associated the word "death" with "discourse." Today, as we will point out, that death sentence seems more warranted than ever . . . .
>
> In the face of censure (even by our friends), we revisit yet again the state of American discourse for three important reasons. First, governmental responses to the geopolitical realities of 9/11 appeared to contradict central tenets of our book; accordingly, a resolution of such seeming contradictions reinforces our thesis. Second, post-2016 political events, combined with ever-emerging communication technologies, validate our arguments to a disturbing degree. Third, new facts and figures further support our previous depictions of the nation's popular culture of electronic entertainment, commercial advertising, and pornographic eroticism. Although our earlier portrait remains surprisingly representative of our times, and retains much of its explanatory force, we relish this opportunity to retrace its lines and retouch its colors.[74]

73. Paul Reidinger, *Weighting Cost of Free Speech: Do Invective and Talk Shows Signal the Failure of the Marketplace of Ideas?*, *in* AM. BAR ASS'N J. 88 (Jan. 1996).

74. THE DEATH OF DISCOURSE, *supra* note 14, at XIX–XX.



A quarter-century after its initial publication, *The Death of Discourse* continued to be seen, at least in some more objective quarters, as a sort of bellwether of where free expression is tending, with ever more perilous trends:

> Professors Collins and Skover have written a provocative and important book, that was prescient in earlier editions and very timely now, about the meaning of freedom of expression when false speech is prevalent, when commercial interests dominate, and when pornography is easily accessible. Some might think of the internet and social media as creating a golden age for free speech. But Collins and Skover powerfully suggest that instead we might be seeing the end of the discourse that the First Amendment exists to create and

> that is essential for a democracy. Their unique, thought-provoking writing style invites readers to ponder our cultural dilemma against the backdrop of the high principles of Madisonian democracy to which we claim allegiance in word, though not in practice."—**Erwin Chemerinsky**
>
> This is a disturbing yet mind-opening tour through the deep chasm that separates our free speech ideals from our cultural reality. The new edition, which by all rights could be titled 'We Warned You,' brilliantly invokes up-to-date examples to show that modern American discourse is indeed suffocating under the spectacle of an entertainment and commercial culture obsessed with self-gratification. With their unique and prophetic talents, Collins and Skover have issued a sagacious warning that we ignore at our peril.—**Jane Bambauer**[75]

Such perspectives ring true to David's mindset, but a measure of nuance is warranted here. Though he is decidedly progressive,[76] he is also very much a realist (thus our "cultural approach"[77] to the First Amendment). While he surely appreciates the inspirational value of works such as Charles Reich's *The Greening of America* (1970) (the Bible of the counterculture), he also realizes the value of conservative critiques such as that of Allan Bloom's *The Closing of the American Mind* (1987). The analytical rigor that David brought to his classroom lectures is the same as what he displays in his academic writings. In short, there is a strong Socratic streak in him.

X. LOUIS BRANDEIS' ONCE LOST DISSENT

In 2005 the *Supreme Court Review* published our article titled, *A Curious Concurrence: Justice Brandeis' Vote in Whitney v. California*.[78] The article probed the history behind Brandeis' opinion in his famous 1927 concurrence.[79] In doing so, we discovered and published Brandeis' long lost dissent in *Ruthenberg v. Michigan*, a 1927 unpublished First

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75. Jane Bambauer, *Editorial Review* to THE DEATH OF DISCOURSE, *supra* note 14.

76. In 2004, for example, he was one of the ACLU of Washington's Bill of Rights Award Recipients. *See Bill of Rights Award Recipients*, ACLU WASH., https://www.aclu-wa.org/pages/bill-rights-award-recipients [https://perma.cc/6SEH-Q5KK].

77. THE DEATH OF DISCOURSE, *supra* note 14, at LI–LV, 127, 199–202, 211–15, 243–49.

78. Ronald K. L. Collins & David Skover, *Curious Concurrence: Justice Brandeis' Vote in* Whitney v. California, SUP. CT. REV. 333 (2005) [hereinafter *Curious Concurrence*].

79. Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., concurring), *overruled by* Brandenburg v. Ohio, 395 U.S. 44 (1969). *See* Mary L. Dudziak, *Collins and Skover: Explaining Brandeis in Whitney v. California,* LEGAL HIST. BLOG (Feb. 23, 2007), http://legalhistoryblog.blogspot.com/2007/02/collins-and-skover-explaining-brandies.html [https://perma.cc/2WVL-GFBH].

Amendment case[80] that would have been decided by the Court save for Charles Ruthenberg's untimely death on March 1, 1927.[81] When that occurred, the companion case (*Whitney*) became the lone one.

Thus, the First Amendment story of Anita Whitney proved to be inextricably linked to that of Charles Ruthenberg. And a fascinating story it was, both in law and history. It involved, in various ways, an array of characters ranging from a U.S. Supreme Court Justice (James McReynolds) to a lawyer for the Hearst newspapers (John Francis Neylan); to two civil liberties appellate lawyers (Walter Pollak and Walter Nelles); to a Brandeis law clerk (Walter Landis); to an Alameda County prosecutor (Earl Warren), and finally, to a California Governor (Clement Calhoun Young).

More significantly, the article established that generations of lawyers and scholars remained oblivious to the obvious and let Brandeis' rhetoric (albeit enlightened) divert them from what they might otherwise have noted about the law. Finally, the article revealed how, even as Brandeis sought to justify his concurrence on procedural grounds, he could not help but conclude that Ms. Whitney's conviction had to be sustained *on the merits*.[82]

XI. TRAGEDY STRIKES

A. 22 July 2009

It was a Wednesday in Seattle, the weather hung unusually heavy in the 90s. Apart from the heat, it was just another day in a life. Sean O'Reilly (age fifty) was off to Starbucks and then to his office; he was a psychotherapist.[83] David and Sean had been loving partners for years—were it then legally possible, they surely would have wed. But *Obergefell*

80. Brandeis' dissent was reprinted, for the first time, in our article, *Curious Concurrence*, *supra* note 78, at 388–95. *See also* Margaret Peachy, *Digitization of Supreme Court Justice Louis Brandeis' Unpublished Dissent in Ruthenberg v. Michigan*, ET SEQ: HARV. L. SCH. LIBR. BLOG, https://etseq.law.harvard.edu/2010/04/digitization_of_supreme_court_justice_louis_brandeis_unpublished_dissent_in/ [https://perma.cc/PGB3-9MY3] (introduction by Collins and Skover).

81. *See C.E. Ruthernberg*, WIKEPEDIA, https://en.wikipedia.org/wiki/C._E._Ruthenberg [https://perma.cc/6H6P-QYWG].

82. Other First Amendment topics in which David was involved included David M. Skover, *First Amendment on Trial-The Libel Lawyer's Perspective*, 23 SEATTLE U. L. REV. 849 (2000).

83. Sean Patrick O'Reilly (born May 10, 1959) wore many hats: Air Force and hospital chaplain, psychotherapist, Celtic and interfaith minister, public speaker, poet, and budding author, among other things. He was renowned for his work as a celebrant of all occasions for life's transitions—the welcoming of children, weddings and commitments, anniversaries, the rituals of aging, and funerals and memorials. He graduated from Fordham University with a B.S. in psychology. He had two master's degrees: one in divinity (St. Patrick's Seminary) and another in psychology (Seattle University).

v. Hodges was still a distant dream.[84] That was for tomorrow; for today, it was life as usual with the day to be capped off with chilled drinks with David in their backyard garden. Those moments, however, were never to be shared, for Sean never returned home. Time passed, and then more time, until worry set in. By the next morning that worry turned to agonizing fear—David called the police.

At Sean's office, the worst revealed itself: he was head down on his desk, dead. A brain aneurysm had stolen his life. Stop the frame there: picture David's terrifying shock and intense agony. That pain was compounded when the officer in charge refused to allow David into the room or to claim any control or rights over Sean's body and belongings. After all, gay couples had no such rights then. It was their world; it was their time—an unjust time in life, a cruel one in death.

The fall semester began, and David was, as always, well prepared for his classes.[85] Yet, the sword of Damocles hung over him; he still had to deal with the memorial service for Sean, which had been postponed to allow for time to prepare. And prepare and prepare he did. True to David's method and Sean's spirit, everything had to be planned and perfected down to each practical and inspirational detail—the people, place, time, words, and the music to assure the loving ethos of the ceremony. "We live by symbols,"[86] said Holmes. David understood that and Sean appreciated that. Hence, for that pinpoint in time, that time when all would gather in loving memory, a touch of the transcendent would have to grace this spiritual ceremony. To that end, David assigned each of us, Sean's friends, our ritualistic parts.

B. 3 October 2009

That was the date of the memorial service for Sean. That Saturday ceremony began with a 10:30 a.m. musical prelude followed by the service that began at 11:00. The ceremony, held at the Manor (13032 Admiralty Way, Everett, WA) began with Ellen Bice reading "Celtic Prayer for Good Passage," a prayer Sean had written for his father's memorial service. Fourteen choreographed rituals—replete with candles, music, and poetry—reincarnated Sean's spirt. David had gone to great lengths to prepare the ceremony as Sean would have done, and so it was. In the middle of it all, there was "The Ten Reasons Ritual;" ten of Sean's friends each selected a special word they associated with Sean and spoke briefly

84. Obergefell v. Hodges, 576 U.S. 644 (2015).

85. In the course of his teaching career, David taught constitutional law, federal courts, conflicts, civil procedure, and First Amendment law. In 1988–89, he served as secretary for the Section on Federal Jurisdiction of the American Association of Law Schools.

86. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 596 (1940).

about why they chose to remember him that way. The circle of readers spoke into a microphone:

Engagement: Kellye Testy

Generosity: Susie Wood

Compassion: Ron Collins

Mischievousness: John Mitchell

Spirituality: Wendy Eaglewolf

Intelligence: Ken Masters

Humor: Kathryn Skover-Visk

Creativity: Mark Travis

Joie de Vivre: Victoria Kill

Integrity: Kevin Krycka

It ended in true Irish form, with music that surely would have captured Sean's Irish heart; John Dally did a highland bagpipe performance of "Anam Cara."[87] Finally, devotion's work was done . . . though it left David with a hole in his heart.[88]

XII. ON COMEDY AND FREE SPEECH: THE LENNY BRUCE STORY

Hoity-toity opera types are not likely to savor the ill-mannered humor that Lenny Bruce (1925–1966) traded in as a standup comedian. They are even less likely to co-author a 550-page book about a man whose life was as strange as it was illicit. So, what in his Princeton/ Yale/ operatic mindset prompted David to coauthor *The Trials of Lenny Bruce: The Fall and Rise of an American Icon*?[89] Though the book was of an entirely different order than *The Death of Discourse*, what captured David's imagination was a remarkable free speech story that had never been told in any meaningful way. Though the Bruce story had been recounted many times before, and though there was a Broadway play[90] and a Hollywood

87. Anam Cara is a phrase referring to the Celtic concept of "soul friend" in religion and spirituality. The term inspired John O'Donohue's book, ANAM ĊARA: A BOOK OF CELTIC WISDOM (1997).

88. Each of those who attended the ceremony later received a CD and DVD of the service—memory is the ultimate tribute.

89. RONALD K. L. COLLINS & DAVID M. SKOVER, THE TRIALS OF LENNY BRUCE: THE FALL AND RISE OF AN AMERICAN ICON (2002). The book came with a CD narrated by the famed columnist, music critic, and First Amendment advocate Nat Hentoff.

90. *See* Julian Barry, *Lenny* (Brooks Atkinson Theater 1971), https://www.playbill.com/production/lenny-brooks-atkinson-theatre-vault-0000008040 [https://perma.cc/TN5E-28BD].

movie (titled *Lenny*),[91] no one had ever before told the story through the lens of Bruce's encounters with the law when it came to free speech "crimes." To that end, we tracked down each of the transcripts for Bruce's trials in Beverly Hills, San Francisco, Chicago, and New York,[92] and spent several years doing research and interviewing a variety of people who knew Bruce or knew about him.

The book's 100 pages of resources was typical of the kind of research work that went into books or articles to which David lent his name. What was atypical about *The Trials of Lenny Bruce* was its writing style. Its prologue, eleven chapters, and an epilogue were written in colorful narrative style coupled with sixteen pages of revealing photographs. This was a first for us, this popular audience offering of free speech law and history by way of a captivating narrative. Its style paved the way for two similar kinds of books about free speech and the Beats.

Kirkus Reviews hailed *The Trials*: "The authors set the record straight . . . . Detailed, objective and valuable."[93] *Publishers Weekly* likewise praised the work:

> Skover and Collins (coauthors of *The Death of Discourse*) meticulously document both litigation and the literary scene of the 1960s, crosscutting between clubs and courtrooms to show how Bruce's career crumbled in a nightmarish fashion as he broke taboos and struggled for free speech in the years before his death from a morphine overdose. . . . Generating a gamut of emotions, the entire package is an important documentation of a revolution in American culture.[94]

Others, ranging from the Floyd Abrams (the noted First Amendment lawyer) to George Carlin (the famed comedian) offered their own unique praise for the book.[95]

Following the book's publication, we organized a campaign to posthumously pardon Bruce, who in 1964 had been convicted of obscenity

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91. *See* LENNY (United Artists 1974).

92. We donated the transcripts to the Foundation for Individual Rights in Education (FIRE). They can be found, along with our introduction, at *The Trials of Lenny Bruce*, FIRE, https://www.thefire.org/first-amendment-library/special-collections/lenny-bruce-cases/ [https://perma.cc/S73S-7LK2].

93. KIRKUS REV. (May 20, 2010), https://www.kirkusreviews.com/book-reviews/ronald-kl-collins/the-trials-of-lenny-bruce/ [https://perma.cc/XKW5-F9MW] (book review).

94. PUBLISHERS WEEKLY, https://www.publishersweekly.com/9781570719868 [https://perma.cc/X5U6-4GH8] (book review).

95. *See Advance Praise & Reviews*, SKOVER ONLINE, http://www.skoveronline.net/trialsoflennybruce/reviews.htm [https://perma.cc/69QD-WKZD]. The book also won a Hugh Hefner First Amendment award. *Trial of Lenny Bruce Wins First Amendment Award, Excerpts from Collins & Skover's Reception Speech at the Award Ceremony*, SKOVER ONLINE, http://www.skoveronline.net/trialsoflennybruce/hefner.htm [https://perma.cc/7FLD-RTKN].

for a late-evening routine he performed to adults in a famed New York club known as the Café au Go Go. The campaign involved a petition to New York Governor George E. Pataki, which was prepared by Robert Corn-Revere, a seasoned First Amendment lawyer.[96] On Tuesday, May 20, 2003, a press conference was held in New York city to announce the posthumous-pardon petition. Accompanying the petition were two letters of support, one signed by noted celebrities and comedians and the other endorsed by noted First Amendment lawyers and scholars. Among others, those who signed letters of support for the posthumous-pardon petition included the following celebrities and writers: Margaret Cho, Phyllis Diller, Nat Hentoff, Penn Jillette, Lisa Lampanelli, Tom Smothers, Dick Smothers, Teller, and Robin Williams. The following lawyers who once represented Lenny Bruce in his obscenity trials, both in and outside of New York, did likewise: Al Bendich, Edward de Grazia, William Hellerstein, and Maurice Rosenfield. Professors Norman Dorsen of New York University Law School; Nadine Strossen of New York Law School; Laurence Tribe of Harvard Law School; and Eugene Volokh of UCLA Law School also signed letters of support, among others. First Amendment lawyers, including Floyd Abrams, Sandra Baron, Marjorie Heins, Lee Levine, and Burton Joseph did likewise. The letter of support was signed as well by Donna Lieberman, executive director of the New York Civil Liberties Union.[97]

"No Joke! 37 Years After Death Lenny Bruce Receives Pardon." That was the headline of a front-page *New York Times* article that ran on Christmas Eve of 2003, which read:

> Lenny Bruce, the potty-mouthed wit who turned stand-up comedy into social commentary, was posthumously pardoned yesterday by Gov. George E. Pataki, 39 years after being convicted of obscenity for using bad words in a Greenwich Village nightclub act.
>
> The governor said the posthumous pardon—the first in the state's history—was "a declaration of New York's commitment to upholding the First Amendment."
>
> "Freedom of speech is one of the greatest American liberties, and I hope this pardon serves as a reminder of the precious freedoms we are fighting to preserve as we continue to wage the war on terror," Mr. Pataki said in a statement. . . .

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96. See his book, ROBERT CORN-REVERE, THE MIND OF THE CENSOR AND THE EYE OF THE BEHOLDER: THE FIRST AMENDMENT AND THE CENSOR'S DILEMMA (2021).

97. *See* Press Release, Pardon Lenny Bruce Celebrities & Noted Lawyers Support Campaign, (May 20, 2003), http://www.skoveronline.net/trialsoflennybruce/release.htm [https://perma.cc/G42B-BH43].

> "Obviously, we are very pleased with this development," said Robert Corn-Revere, a Washington lawyer who wrote the main legal brief arguing for the pardon. "There is only one reason for Governor Pataki to do this: for the principle of the thing."[98]

The Trials of Lenny Bruce was subsequently released as a ten-year anniversary issue in a Kindle format with hyperlinks.[99]

XIII. THE UNINHIBITED STORY OF THE BEATS: THE BOOK THAT SEEMED DOOMED

The evolution of *Mania: The Story of the Outrageous and Outraged Lives That Launched a Cultural Revolution* is a tortured one, mixed with disappointment and accomplishment.[100] The book was originally to be published with Sourcebooks, the publisher of our Lenny Bruce book. The editor assigned to us was Hillel Black (1930–1986), the distinguished former publisher of Macmillan and former editor-in-chief at William Morrow. With our advance in hand, we set out to write the story of Allen Ginsberg and his famous poem *Howl*.[101] It was to be a slim and spirited book, around 250 pages in print. Once we got into the history of things, however, we realized that the story was a much more complicated and longer one than we had originally imagined and involved a wider cast of characters. So, we wrote that book and sent the manuscript off to Mr. Black and his colleagues at Sourcebooks.

Then came the bad news: they wanted us to cut the length of the manuscript (then about the equivalent of 500-plus pages in print) by 50%. We refused. Since there was no meeting of the minds, we returned our advance and walked away. True, we kept our literary dignity but at a high cost, since it proved difficult to find a publisher in the years following that. There were two problems: There was, at the time, something of a glut of "Beat" books and, worse still, the mainstream Beat scholars had little interest in our work since it revealed too much of the dark sides of the

98. John Kifner, *No Joke! 37 Years After Death Lenny Bruce Receives Pardon*, N.Y. TIMES (Dec. 24, 2003), https://www.nytimes.com/2003/12/24/nyregion/no-joke-37-years-after-death-lenny-bruce-receives-pardon.html.

99. RONALD COLLINS & DAVID SKOVER, THE TRIALS OF LENNY BRUCE: THE FALL AND RISE OF AN AMERICAN ICON (Amazon Kindle 2012) (ebook), https://www.amazon.com/Trials-Lenny-Bruce-David-Skover-ebook/dp/B009JFKWG4/ref=sr_1_2?crid=HNAM3B01P26Z&keywords=The+Trials+of+Lenny+Bruce&qid=1650644624&s=books&sprefix=the+trials+of+lenny+bruce+,stripbooks,126&sr=1-2.

100. *See* DAVID SKOVER & RONALD K. L. COLLINS, MANIA: THE STORY OF THE OUTRAGEOUS AND OUTRAGED LIVES THAT LAUNCHED A CULTURAL REVOLUTION (2013) [hereinafter MANIA].

101. Allen Ginsberg, *Howl*, *in* ALLEN GINSBERG, HOWL AND OTHER POEMS 9 (1959).

"Beat Boys" (Allen Ginsberg, Carl Solomon, Jack Kerouac,[102] William Burroughs, Lucien Carr, and Neal Cassady). Finally, years later in 2013, Top-Five Books published the nearly 500-page work.

PBS, Los Angeles, April 2, 2013.

Mania's fast-paced narrative mimicked the life and literature of the Beats. For example, there is the following passage depicting Lucien Carr showing up at William S. Burroughs' New York City apartment after murdering Dave Kammerer (a gay man) just before dawn:

> "I just killed the old man."
> Burroughs was shocked. "What?" Could it be true? Had Lucien snapped?
> Before Bill could say more, Lucien told his story and handed him the blood-stained pack of Lucky Strikes that had been in Kammerer's pocket.
> "Have the last cigarette."
> Strange. Burroughs paused. Then, with his trademark nasal sneer, he spoke. "So this is how Dave Kammerer ends."[103]

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102. *See* Ronald Collins & David Skover, *Kerouac's Creed*, WASH. INDEP. REV. OF BOOKS (Mar. 12, 2013), https://www.washingtonindependentreviewofbooks.com/index.php/features/kerouacs-creed [https://perma.cc/4U96-QD3R].

103. MANIA, *supra* note 100, at 9. David discussed MANIA on the TV program, Connie Martinson, *David M. Skover—Mania—Part 1*, YOUTUBE (Apr. 2, 2013), https://www.youtube.com/watch?app=desktop&v=L7MIdvfJ33Q [https://perma.cc/PB7K-K5ZM]; Connie Martinson, *David M. Skover—Mania—Part 2*, YOUTUBE (Apr. 2, 2013), https://www.youtube.com/watch?v=mtzqlhD6dQs [https://perma.cc/3DDZ-PTTW].

And then there is this passage about Ginsberg writing *Howl*:[104]

> Allen typed typed typed typed typed. He filled seven pages of single-spaced strophes, rejecting inapt words or inferior phrases . . . . "I saw the best minds of my generation destroyed by madness starving hysterical naked" . . . . Winding down to the end, he knew he had done it. He had breached the dam that obstructed his poetic imagination. And with the fury of a Hebraic prophet, he had railed on behalf of the madmen and madwomen in his life . . . a gesture of wild solidarity . . . a sort of heart's trumpet call.[105]

Odd as the lifestyle of this cast of outlaw literary characters was to David's more rational and highbrow mindset, he took great pleasure in first researching the *full* story and then retelling it with uninhibited stylistic flair. "A balanced history—sometimes admiring, sometimes blistering—of the writers who fractured the glass capsule of literary conformity" is how the *Kirkus* review[106] portrayed it. James L. Swanson, a *New York Times* best-selling author, captured the book's style and substance:

> *MANIA* is a stunning and chilling portrait of rebellious youth gone mad. The story descends into a netherworld of heroes and antiheroes, killers and creators, junkies and geniuses. Collins and Skover, through a thrilling narrative and unprecedented research, reveal how a misfit band of brothers, dreamers, and vagabonds broke old ties, abandoned families, and lived by their own rules to concoct an ecstatic and uninhibited vision of literary modernism. From the macabre killing that opens the book to the grand free speech victory at its climax, *MANIA* is both a celebratory and cautionary tale of American revolt. A remarkable achievement.[107]

Though it took much doing and many years of uncertainty, MANIA finally made its mark, one that David valued—it represented a significant achievement in storytelling.

XIV. DEFINING DISSENT

On Dissent is a pure Skover kind of project if ever there were one. It is the kind of book that electrifies his frontal lobe.[108] And why? Well, for starters, dissent is a word wrapped in many meanings, a paradox hiding

104. GINSBERG, *supra* note 101, at 9.

105. *Id*. at 196.

106. Book Review, KIRKUS REV. (Nov. 26, 2012), https://www.kirkusreviews.com/book-reviews/ronald-kl-collins/mania/ [https://perma.cc/5TQE-23UY].

107. James L. Swanson, *Editorial Review* to MANIA, *supra* note 100 (found in back cover of the print edition).

108. *See* RONALD COLLINS & DAVID SKOVER, ON DISSENT: ITS MEANING IN AMERICA (2013).

beneath the covers of certainty. Its paradoxical side only reveals itself when one pricks the tissue of its meanings, its usages, and its legal and philosophical import. It is a word as central to the meaning of the First Amendment as it is ambiguous when it comes to that meaning. It is a word in need of definition, a word in search of some linguistic (dare I say Wittgensteinian?) work.

Dissent. It is a word we all know, and yet do not know.[109]

That was the opening line of our book on dissent. It is as good a window as any into the mind of David Skover. Wrestling with a paradox, unraveling the mystery of how language is used and interpreted, exploring the context and culture of an idea, studying the law's meanings of that idea, and then venturing to bring a spectrum of clarity to it all–such are the moves that exercise and excite his mind. The more we discussed the idea, the more we realized that there was a need to develop some clarity about this phenomenon we call dissent, for not every difference of opinion, symbolic gesture, public activity in opposition to government policy, incitement to direct action, revolutionary effort, or political assassination need be tagged dissent. Unlike tracks on the meanings of liberty, equality, and property, there were no real books or articles on the meaning of dissent; its meaning was taken as a given. Again, that was only so as long as that "meaning" was never questioned or studied or held up to the scrutiny of the mind's methods.

Given all of that, how does begin to spade the ground of an idea lurking under its surface? Here, as in *The Death of Discourse*, one approach was to engage others in the process, in order to scrub off the muck on the mind. Those others were:

- *Randy E. Barnett* (constitutional law professor)
- *Noam Chomsky* (linguistics & philosophy professor)
- *Todd Gitlin* (journalism & sociology professor)
- *Steven K. Green* (religion & the law professor)
- *Kent Greenawalt* (law & legal philosophy professor)
- *Sue Curry Jansen* (communications professor)
- *Sut Jhally* (communications professor)
- *Anita K. Krug* (commercial law professor)
- *Hans A. Linde* (state supreme court judge)
- *Catharine A. MacKinnon* (feminist law professor)
- *Ralph Nader* (public interest activist)

109. *See id.* at xi.

- *Jon O. Newman* (federal circuit judge)
- *Martha C. Nussbaum* (law & philosophy professor)
- *Dennis M. Patterson* (law & philosophy professor)
- *Frederick Schauer* (law & jurisprudence professor)
- *Steven H. Shiffrin* (First Amendment & constitutional law professor)
- *Faith Stevelman* (corporate law professor)
- *Geoffrey R. Stone* (First Amendment & constitutional law professor)
- *Nadine Strossen* (First Amendment & constitutional law professor)
- *Michael Walzer* (philosopher)
- *Cornel West* (professor of African-American studies religious philosophy)
- *Howard Zinn* (professor of American history)

We interviewed those twenty-two scholars with a set of questions designed to probe their ideas about the meaning of dissent. Suffice it to say that their perspectives were wide-ranging and often inconsistent with one another. Along with our own research and ideas, we wove portions of those interview materials into the text of the book's prologue, five chapters and epilogue. By the book's close, we managed to craft the first extensive work to sketch out the philosophical, linguistic, legal, and cultural meanings or usages of the notion of dissent in the American culture.

One more thing: *On Dissent* closes with a paragraph that always moved David, from the time we first wrote it to the last time he taught the book at the Law School. Here is that paragraph:

> There is a man who has stood outside the Vatican Embassy (or The Apostolic Nunciature, as it is officially known) for nearly every day for the past 15 years. Passersby see him at his post, in snow or sun, armed with this or that sign of protest. Some banners scream out in bold black and red letters: "VATICAN AIDS PEDOPHILES" and "POPE SODOMIZES JUSTICE." Other banners are cast in white and yellow: "CATHOLIC COWARDS." The anti-pedophile activist on the Washington, D.C., sidewalk, the dissident behind the signs, is John Wojnowski. This white-haired 70 year-old man has proclaimed his dissent for 5,000-plus days. His persistent outspokenness is, to say the least, unwelcomed by those behind the forbidding doors in front of which he preaches his gospel of protest. Are his rants true? Are his criticisms fair? Are his accusations over the top? Perhaps. Perhaps not. Either way, there is something magnificent in beholding

> such a sight in our nation's Capital. It is a sign of dissent—which is a good sign in a democracy.[110]

XV. 2017–2019: THREE BOOKS IN THREE YEARS

It must have pleased Dean Annette Clark: Even towards the end of his teaching career, David's scholarly output was as prolific and exceptional as it had ever been. Whereas many professors "coast" in their final years and get fat on tenure, it was not so for the professor with his Calvinist work ethic. His last three books while at the Law School covered everything from political philosophy and jurisprudence, to free speech law and the emerging communications technologies, and then to the 1957 criminal trial of the poet Lawrence Ferlinghetti. It was as broad in scope as it was deep in thought—vintage Skover. The creative process of it all spawned hearty dialogue both at the Law School[111] and outside of it.[112] Much of the same energy, if not more, found creative expression in some of the classes David taught in his final years at the Law School.

A. A Machiavellian View of Judging

The idea for a book on Machiavelli and judging traced back to 1985 when I was visiting at the University of Puget Sound Law School (Seattle University's predecessor). David and I had organized a small faculty reading group in which we discussed Machiavelli's famous 16th-century political tract, *The Prince*. It made for several stimulating evenings as we worked through its twenty-six chapters. What animated much of the discussion was the question of whether the acquisition and retention of power as championed in *The Prince* might likewise apply to the art of judging, especially at the Supreme Court level. Here yet again, a sense of legal realism informed the discussion, as if to say: "*Others will tell you what the law should be, but we will tell you what it is*." It is against that backdrop that the book, *The Judge: 26 Machiavellian Lessons*,[113] was conceived.

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110. Ariel Sabar, *The Passion of John Wojnowski*, WASHINGTONIAN (June 25, 2012), https://www.washingtonian.com/2012/06/25/one-mans-crusade-against-pedophiles-in-the-catholic-church/ [https://perma.cc/2NNF-PGM8].

111. *See, e.g.*, Symposium, *Artificial Intelligence and the Law,* 41 SEATTLE U. L. REV. 1073 (2018) (panelists included: David Skover, Bruce Johnson (noted media lawyer), and Helen Norton (First Amendment scholar)).

112. David Skover, *Words, Writers, and the West Seattle*, Presentation at the Seattle Historical Society (Nov. 8, 2018); *see also* Lisa Mansfield, *Do Robots Dream of First Amendment Speech?*, N.W. LAW., Nov. 2019 at 22; Nico Perrino, *So To Speak Podcast: The Fight to Publish Allen Ginsberg's 'Howl'*, FIRE (May 2, 2019), https://www.thefire.org/so-to-speak-podcast-the-fight-to-publish-allen-ginsbergs-howl/ [https://perma.cc/X76A-5FE7].

113. RONALD COLLINS & DAVID SKOVER, THE JUDGE: 26 MACHIAVELLIAN LESSONS (2017) [hereinafter THE JUDGE].

The book's chapters were as diabolical as they were truthful—here, as in *Death of Discourse*, revealing how law often works rather than parroting its exalted claims. Or as Niccolò Machiavelli put it: "Since my intent is to write something useful to whoever understands it, it has appeared to be more fitting to go directly to the effectual truth of the thing than to the imagination of it."[114] Thus, the opening lines of *The Judge* were:

> HYPOCRISY. Few defend it, though many practice it. No one admits to it, not even when vowing to tell the whole truth and nothing but the truth. The word has a special place in the law owing to its Greek origins. On the one hand, it signifies a kind of pretending or hiding. On the other hand, it refers to a kind of judging. Consider the sense of the word from the Attic Greek—*hypo* ("under" or "beneath;" as in "false") and *krinein* (to "decide" or "judge;" as in "acting," "pretending," "dissembling"). The hypocrite extols objectivity; he feigns detachment. In the process, something is concealed, but it must appear otherwise. If one is to master the art of hypocrisy, one must categorically repudiate it. The greatest hypocrite in the law, then, is the judge who values the appearance of virtue more than its actuality. He thus pretends to be true to the law. By that measure, hypocrisy is a word well suited to the calling of a judge . . . or we should say, a special kind of Judge.[115]

In that spirit, some of THE JUDGE's twenty-six chapters were titled:

- "Recusal and the Vices of Impartiality"
- "Tactical Tools: Using Procedure to One's Advantage"
- "When to Lose a Case and Win a Cause"
- "How to Manipulate the Rule of Law"
- "How to Play to the Media"
- "The Threat of Impeachment and How Best to Avoid It"

"This all may sound sinister, or even evil," is how we put it in the Prologue to the book. "Hypocrisy," we added, "seems especially immoral when associated with judging, which should be aligned with justice. Our aim, however, is not to praise the deeds of demons, but rather to highlight the virtues of realism—a new and vibrant realism, a modern-day legal realism fit for our times."[116] That said, the book could, nonetheless, be understood as a sort of cautionary tale of how law can be perverted when it is captured to advance the power principle. Think of the book's ethical

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114. NICCOLÒ MACHIAVELLI, THE PRINCE 61 (2d ed., Harvey Mansfield trans., 1988) (ch. 15) (1532).

115. THE JUDGE, *supra* note 113, at xi (endnotes omitted).

116. *Id.*

mission as a sort of corrective measure, a kind of philosophical cynicism pointing to utopian idealism. Then again, "[t]his raises an important question: What would it mean to remove the necessity of deception from the art of appellate judging? Think about it; think hard."[117] That, at least, was how the matter was presented to the readers of *The Judge*.

B. The First Amendment in the Age of Artificial Intelligence

The 2018 book was titled *Robotica: Speech Rights and Artificial Intelligence*.[118] It was yet another work that examined the conceptual and practical relationships between speech rights and the methods of communications. Thus, the opening of *Robotica*:

> *And the word was made functional*. As you will soon discover, that statement is rich with historical, philosophical, technological, legal, and constitutional meaning. Yet that meaning escapes us. Just as fish take water as a given, we take much for granted regarding the technologies that enable our communication. It is precisely that awareness of the technological underpinnings of communication that informs our discussion of robotics and free speech. And it is that eye-opening awareness—at once historical and futuristic—that points to new ways of thinking about free expression in an advanced technological world.[119]

To that end, we explored what the advent of robotics and artificial intelligence portend for both how we communicate and how such communications will be treated by lawmakers and judges when harms of various kinds are alleged in the name of some form of censorship.

At the jurisprudential outset, there is the question of First Amendment *coverage*; that is, if and when such exchanges of digital data amount to speech within the meaning of the First Amendment. Such questions, we noted, are antecedent to whether a particular form of speech is entitled to constitutional protection. To answer the coverage question, we explored the question of "where is meaning to be found?"[120] Finally, in sketching out a few ideas of when such "speech" should be protected, we developed a spectrum of harm related to "the new norm of utility"[121] and how that norm plays out in an advanced technological world.

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117. *Id.* at xx.

118. RONALD COLLINS & DAVID SKOVER, ROBOTICA: SPEECH RIGHTS AND ARTIFICIAL Intelligence (2018) [hereinafter ROBOTICA].

119. *Id.* at 3.

120. *Id*. at 37–40, 42–47.

121. *Id*. at 48–64.

Here as in previous works, we invited critical responses (this time in the form of short essays)[122] to our main thesis. We in turn tendered a rejoinder[123]—this being yet another example of our dialogic approach to scholarship.

C. On Poets and Cultural Outlaws: The Ginsburg and Ferlinghetti Stories

The People v. Ferlinghetti: The Fight to Publish Allen Ginsberg's Howl[124] is an outgrowth of our earlier book *Mania*. Insofar as it tells its story largely through the lens of an obscenity prosecution and trial, it resembled our Lenny Bruce book. Here, too, the book was biographical and presented in narrative style to tell the remarkable story of a poet bookseller who dared to challenge the law in the name of free speech liberty.

The People v. Ferlinghetti is the story of a rebellious poet, a revolutionary poem, an intrepid book publisher, and a bookseller unintimidated by federal or local officials.[125] There is much color in that story: the bizarre twists of the trial, the swagger of the lead lawyer, the savvy of the young American Civil Liberties Union (ACLU) lawyer, and the surprise verdict of the Sunday school teacher who presided as judge. It was a book waiting to be written and so we did. By this time, we had fine-tuned our skills in writing together—the work was written within four or so months after we signed a contract.

Lawrence Ferlinghetti's name does not appear in any First Amendment treatise or casebook. And yet when the best-selling poet and proprietor of City Lights Books was indicted under California law for publishing and selling Allen Ginsberg's poem, *Howl*, Ferlinghetti's case was one of the first to be decided under the new First Amendment standard developed in *Roth v. United States*.[126] The heretofore unpublished opinion[127] by a municipal judge broke new ground and effectively prevented any subsequent obscenity prosecutions for poetry, even in other

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122. *Id*. at 71–108. The respondents were law professors Ryan Calo (University of Washington), Jane Bambauer (University of Arizona), Helen Norton (University of Colorado), James Grimmelmann (Cornell University), and noted First Amendment lawyer Bruce E.H. Johnson (Davis Wright Tremaine).

123. *Id*. at 111–22.

124. RONALD K.L. COLLINS & DAVID SKOVER, THE PEOPLE V. FERLINGHETTI: THE FIGHT TO PUBLISH ALLEN GINSBERG'S *HOWL* (2019) [hereinafter THE PEOPLE V. FERLINGHETTI].

125. *See* Ronald K.L. Collins & David M. Skover, *Trial of 'Angelheaded Hipsters*,' LEGAL TIMES (Nov. 27, 2006), https://www.bloomberglaw.com/document/XAI7DML4000000?jcsearch=900005467706#jcite (archived on Bloomberg Law).

126. Roth v. United States, 354 U.S. 476 (1957).

127. The full opinion, which appears nowhere else, is reproduced as an appendix to THE PEOPLE V. FERLINGHETTI*, supra* note 124, at 107–19.

jurisdictions and states. Thus, in the end Ferlinghetti buttressed the tradition of dissident expression—ending an era when minds were still closed, candid literature still taboo, and selling banned books was considered a crime.

Celebratory days of tributes were held in honor of Ferlinghetti on the occasion of his 100th birthday, this at City Lights bookstore in San Francisco.[128] We were thrilled to be invited there (March 26, 2019), in order to speak about our new book and the amazing story behind it.[129]

XVI. DISCREET DISSENT[130]

Players only love you when you're playing
[for their team].
— Stevie Nicks[131]

Think of the First Amendment as an antidote to groupthink. That idea very much informs what David and I have written from one of our first law review articles[132] to an article we wrote for *The Nation*[133] to our 2019 book on Lawrence Ferlinghetti, the dissident poet.[134] Breaking from orthodoxy likewise informed *what*[135] we wrote, *who*[136] we wrote about, *how*[137] we wrote, and also the *perspective*[138] from which we wrote. Time and again, that has been the perch from which we viewed the law and the culture in which it took root. Thus, it should be no surprise that when

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128. *See City Lights Hosting 100th Birthday Celebration for Lawrence Ferlinghetti*, SHELF AWARENESS (Feb. 14, 2019), https://www.shelf-awareness.com/issue.html?issue=3432#m43398 [https://perma.cc/57EZ-WZ27].

129. Prior to that, we organized a campaign to persuade Pacifica Radio to air *Howl*, this mindful of new First Amendment norms. The lawyers for Pacifica, however, felt that airing a reading of *Howl* could result in substantial fines and might jeopardize their broadcasting license. Thus, the event was aired on Internet radio (not subject to Federal Communications Commission (FCC) regulations), involving a reading of the poem and an interview with Ferlinghetti. Janet Coleman, WBAI Pacifica Radio Interview (Mar. 17, 2019).

130. Consider "Do not go gentle into that good night." This is the title of a poem written by Dylan Thomas in 1947, though it was not published until 1951. *See* PAUL FERRIS, DYLAN THOMAS, A BIOGRAPHY 283 (1989). A moving rendition of the poem as recited by Thomas can also be found. Blogaboutpoetry, *Dylan Thomas Reads "Do Not Go Gentle Into That Good Night"*, YOUTUBE (July 7, 2011), https://www.youtube.com/watch?v=1mRec3VbH3w [https://perma.cc/X7DQ-794N].

131. FLEETWOOD MAC, DREAMS, RUMORS (Warner Bros. 1977).

132. *The Future of Liberal Legal Scholarship*, *supra* note 37.

133. Ronald Collins & David Skover, *Speech & Power: Is First Amendment Absolutism Obsolete?,* THE NATION, July 21, 1998, at 12.

134. THE PEOPLE V. FERLINGHETTI, *supra* note 124; Ronald Collins & David Skover, *Lawrence Ferlinghetti, American Maverick*, PUBLISHERS WEEKLY (Mar. 8, 2019).

135. *See, e.g.*, THE JUDGE, *supra* note 113.

136. *See, e.g.*, MANIA, *supra* note 103; THE TRIALS OF LENNY BRUCE, *supra* note 99.

137. *See, e.g.*, *Pissing in the Snow*, *supra* note 51.

138. *See, e.g.*, Ronald Collins & David Skover, *The Guardians of Knowledge in the Modern State: Post's Republic & the First Amendment*, 87 WASH. L. REV. 1 (2012).

groupthink found its way to the halls of law schools, the lure of (discrete) dissent was irresistible.

David taught his last First Amendment seminar on Wednesday, April 6, and his last Constitutional Law II class on Thursday, April 21, 2022. Per his request, there were to be no celebrations or ceremonies of the kind at which one's colleagues hail (often disingenuously) their retiring colleague. There was, however, a profile of him published in the Seattle University magazine.[139] Though the reasons for David's desire to draw the curtain as he did are complex and of a sensitive nature, I will, nonetheless, venture to sketch out a few speculative thoughts I have on the matter.

If you would know David Skover, there are at least two things you should understand: he is genuinely committed to excellence (broadly understood) and likewise devoted to a robust exchange of ideas, albeit civilly expressed and in ways tolerant of diverse perspectives. In that regard, my sense is that he may have felt that his beloved Law School had fallen short in its devotion to the former and in its dedication to the latter. Thus, *perhaps*, his silent departure might be understood as an act of respectful dissent, a way of saying *take heed* of where you are tending. For when an institution of higher learning trades excellence for the popularity of the day, it first fails it educational mission, then its students, and ultimately impairs their future career potential. Excellence need not be the enemy of equality, but that can only be so where there is a concerted and concentrated effort to promote both in tandem.[140] Such a commitment, openly expressed and honestly pursued, is not synonymous with duplicitous promises and practices that defeat the very idea of education. By the same token, any institution of higher learning that is intolerant of

139. *See Singing Scholar*, *supra* note 3.

140. An excerpt from an April 27, 2022, e-mail from Joan Duffy Watt to David (shared with me and others) brings this point home in some respects. Ms. Watt was the former Dean of Admissions at the Law School:

> While I know you richly deserve—and have doubtless earned—this moment of transition, I honestly (and truly) can't imagine the School of Law without Professor Skover. From the moment you arrived on campus . . . , you brought to our halls, our committee meetings, and our classrooms a keen intellect, a vibrancy, an energy, a sense of purpose and of humor—in sum, an effectiveness matched by few of our colleagues on any floor of the Norton Clapp Law Center. I will never forget, nor be able to repay you, for the enormous contributions you made to our student recruitment efforts. As the faculty chair of our Admission Committee, you helped us craft a program that was the envy of peer institutions up and down the West Coast. From Spring Visit Days to a comprehensive and effective scholarship program, from individual faculty cultivation of "special factor" student admittees to production of award-winning admission publications—you were there for it all: always participating, always inspiring us to do ever-better . . . .

the free exchange of ideas[141] betrays its mission even if it gains the tawdry prizes of herd approval. In that realm, hypocrisy masquerades as verity. Of course, and for the record, the above is just my opinion.

One more thing: The last assignment for his last Constitutional Law class were readings from *On Dissent*. Thus did his teaching sun set, bathed in the light of a career committed to the value of discourse and the worth of the outsider's voice—the one that speaks out against groupthink.

POETIC CODA

As the life-flow rushes through our veins / and then starts its eternal journey / we step back and behold the world anew. From that perch / a distant sun turns its cycles / then does our time bow in obedient reverence. Still, as Holmes averred, the race is not yet over.[142] There remains time enough for some spirited bursts / time to love life and those in it / time to push a few more Sisyphean stones.[143] So in that journey / my adventurous friend / may the joy that has escaped you find its way past the demon's door and grace your heart.

* * * *

Pause there / with his portrait cast triumphant yet defiant / bold yet quiet – all paradoxical as a life can be. Even so, there remains those Skoverite seeds stirring in the soil.[144] And then there are his fertile ideas, preserved in print and perpetuated in digital form.

But why remain in reverse? / in that tense past ? / for the spirit of tomorrow tingles within him. A mighty Mississippi flows in Western Wisconsin / with riverboats chockfull with messages yet unopened / pushing forward into unknown waters / where the past empties out into the future.

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141. *See, e.g.*, *Commentary—Cancel Culture at Seattle University Law School? Point-Counterpoints*, FIRE (May 19, 2021), https://www.thefire.org/first-amendment-news-298-commentary-cancel-culture-at-seattle-university-law-school-point-counterpoints/ [https://perma.cc/Q6HC-KSVP]; Sabrina Conza, *Seattle Law School Mum on Whether Student Government Can Oust Student Groups over Views*, FIRE (May 11, 2021), https://www.thefire.org/seattle-law-school-mum-on-whether-student-government-can-oust-student-groups-over-views/ [https://perma.cc/8V7J-TR34]; *Letter to Seattle University School of Law, April 2, 2021*, FIRE (Apr. 2, 2021): https://www.thefire.org/fire-letter-to-seattle-university-school-of-law-april-2-2021/ [https://perma.cc/FC9H-556A].

142. *See* RONALD K.L. COLLINS, THE FUNDAMENTAL HOLMES: A FREE SPEECH CHRONICLE AND READER—SELECTIONS FROM THE OPINIONS, BOOKS, ARTICLES, SPEECHES, LETTERS AND OTHER WRITINGS BY AND ABOUT OLIVER WENDELL HOLMES, JR. 342 (Ronald Collins ed., 2010).

143. *See* ALBERT CAMUS, THE MYTH OF SISYPHUS (1955).

144. *See* Percy Shelley, *The Revolt of Islam, in* THE POETICAL WORKS OF SHELLEY 115 (1817) (1974) (introduction by Newell F. Ford).

From his lofty study in West Seattle, he is busy "finishing the hat" on a magnificent canvas. And as he sketches away / let us peer out into his mysterious night / where roman candles explode / "like spiders across the stars" / and in the middle of it all / we can "see the blue center-light pop" / and as it does let us all sigh . . . "Awww!"[145]

145. JACK KEROUAC, ON THE ROAD 6 (2003) (1957).