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REPLY

A REPLY TO PROFESSOR KROTOSZYNSKI

Steven H. Shiffrin†

In his review[1] of my book, *Dissent, Injustice, and the Meanings of America*,[2] Ronald J. Krotoszynski, Jr. recognizes that I would afford special protection for dissent, and that my definition of dissent would include "disempowered cultural minorities who are victimized by the hierarchy and racism of the contemporary United States."[3] He insists, however, that "right-wing" or corporate speech would be excluded from my understanding of dissent.[4] At one point, he goes so far as to claim that my approach "has more in common with contemporary free speech jurisprudence in the People's Republic of China than in the United States."[5]

I would like to set the record straight. In the book I argue that dissent should be given a pride of place in First Amendment theory and special weight in a balancing process.[6] But I do not believe the existence of dissent should be a necessary[7] or a sufficient[8] condition

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1 Ronald J. Krotoszynski, Jr., *Dissent, Free Speech, and the Continuing Search for the "Central Meaning" of the First Amendment*, 98 MICH. L. REV. 1613 (2000) (book review). Professor Krotoszynski also reviews STEPHEN L. CARTER, THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY (1998).

2 STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA (1999).

3 Krotoszynski, *supra* note 1, at 1619.

4 *Id.* at 1632.

5 *Id.* at 1621 (footnote omitted).

6 *See, e.g.*, SHIFFRIN, *supra* note 2, at xi, 10, 91, 97, 117.

7 Krotoszynski blurs this position at various points in his review. He claims (often wrongly) my position is that certain groups cannot engage in dissent or do not get the full protection of the First Amendment. For example, he attributes to me the view that "corporate entities, such as tobacco companies, cannot engage in dissent even if they oppose the views of either the government or the general community." Krotoszynski, *supra* note 1, at 1619. He claims I maintain that "no matter what the issue, commercial enterprises cannot engage in dissent," *id.* at 1624, or that anti-abortion protestors do not meet my dissent model, *id.* at 1628. In fact, I believe that some speech of corporations is dissenting; some is not. Some corporate speech should be protected (most commercial speech and most noncommercial speech); some not (corporate campaign finance regulations should generally be constitutional as should prohibitions of tobacco and alcoholic beverage advertising). Anti-abortion protestors are clearly dissenters and should be protected whether or not their speech is dissenting, in the absence of otherwise unprotected conduct. Krotoszynski also imagines that I would not regard speakers who oppose affirmative action as dissenters, *id.* at 1630, and he might be right about that, but I regard it as obvious that such speech should be protected under the First Amendment. As I read his review, Krotoszynski glosses over the point that to get protection speech need not be dissenting in ways that would mislead even a careful reader.

8 Krotoszynski misses this point in parts of his review. *See id.* at 1616-17, 1633, 1635.

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for free speech protection.[9] Thus, most religious, political, and commercial speech should be protected whether or not dissenting.[10] Defamatory lies about public figures are dissenting, but they should not be protected.[11]

I define dissent, not in terms of who speaks, but as "speech that criticizes existing customs, habits, traditions, institutions, or authorities."[12] I do not now and never have believed that right-wing speech or corporate speech are excluded from the definition of dissent. As I say in the book

> The overwhelming majority of right-wing dissent is fully protected under my theory. The political bias of a dissent-centered conception of the First Amendment is for those who wish to challenge the status quo and for those who believe that society stagnates and furthers injustice when it is not open to challenge. People with these beliefs sit at many points on the political spectrum. Those who wish to preserve the status quo, of course, should oppose a dissent-centered theory (though their own speech remains protected in the overwhelming majority of circumstances).[13]

In addition, I specifically observe that my approach "goes beyond the protection of outsiders" and "also has . . . special regard for the speech of the powerful when it dissents from our existing customs, habits, institutions, and authorities."[14]

To take a specific example, if a person or a powerful corporation makes a defamatory statement about a public figure, the statement would be protected unless it were a knowing falsehood. It would never occur to me to permit a court to make ad hoc judgments within the category as to whether the speech is or is not dissenting, is or is not right-wing, is or is not the speech of a corporation. Similarly, it would never occur to me to permit a court to examine the content of a protestor's speech in applying rules regarding the time, place, or the manner of speech. Those rules should be crafted to protect dissent and enforced whether or not a judge would determine that particular speech falling under the rules is or is not dissent. Indeed, I specifically reject the idea that courts should be able to make ad hoc judgments within categories when I discuss commercial advertising.[15]

Although there are hard cases for my approach, I am comforted that almost all of the traditional areas of First Amendment discussion

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9 SHIFFRIN, *supra* note 2, at xi-xii.

10 *Id.* at xi-xiii.

11 *Id.* at xi.

12 *Id.*

13 *Id.* at 129 (footnote omitted).

14 *Id.* at 76.

15 *Id.* at 41. If I were to permit ad hoc judgments, it would to be to allow determinations that dissent exists, not the other way around.

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do not present hard cases concerning the existence of dissent or not. Advocacy of illegal action, defamation of public figures, criticism of employers in the workplace, access to public places and the media, and the like are easy cases. Most such speech is dissenting, and rules should be framed accordingly to encourage and protect dissent. On the other hand, most commercial advertising and most speech exposing embarassing details of a private person's sex life are not dissenting, and rules should be crafted without the kind of special weight afforded to dissenting speech.

Tobacco advertising and hate speech are hard cases however, and that is why I devote two chapters to them. Although I do not explicitly argue this in the book, a court might well resolve such issues without exploring the presence of dissent if its presence would make no difference to the outcome. Whether or not tobacco advertising is assigned full dissenting value, in my view, it should not be protected because of the harm it causes. Conversely, in my view, general racist speech should be protected whether or not it is dissenting in character because enforcement of a hate speech statute would aggravate the problem of racism. Nonetheless, I do argue that neither tobacco advertising nor hate speech should be assigned full dissenting value. It would be one thing if Professor Krotoszynski merely argued that I could not consistently take these positions and protect right-wing speech or corporate speech. In fact, I think he has quite a good argument about an aspect of the position I took on tobacco advertising,[16] and the arguments he makes about my position on racist speech[17] are well within the grounds of fair debate. But, to claim that I would exclude corporate or right-wing speech from the category of dissent grossly misrepresents my position.

I think it would be a good thing for academic life if a scholar argued for the free speech positions taken by the People's Republic of

16 *See* Krotoszynski, *supra* note 1, at 1620-21. Although I make clear that I do not believe that ad hoc judgments should be made within the category of commercial advertising, SHIFFRIN, *supra* note 2, at 41, I go on to observe that tobacco advertising should not be considered worthy of full dissenting value even if ad hoc judgments were made. *Id.* In the course of that discussion I maintain that such advertising "is no part of a social practice that challenges unjust hierarchies with the prospect of promoting progressive change." *Id.* at 42. I believe this to be true. Moreover, I believe that a major advantage of protecting dissent is that such protection offers the best hope of combating injustice. I do not believe, however, that reactionary dissent should be unprotected in the absence of countervailing harm, nor do I believe that judges should make ad hoc decisions about the progressive or nonprogressive character of dissent. In my discussion of commercial advertising, I did not mean to suggest otherwise—though I understand how readers might be misled. On the other hand, to suppose that I intended such general ad hoc judgments when I had rejected the possibility of any ad hoc determinations even within the category of commercial advertising overlooks too much.

17 *See* Krotoszynski, *supra* note 1, at 1623-25, 1640-31, 1633-35.

China. But, if Professor Krotoszynski is on the lookout for such a scholar, he needs to look elsewhere.

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