

C. EDWIN BAKER, 1947–2009

The University of Pennsylvania Law School community was shocked and saddened to learn of the passing of C. Edwin Baker, the Nicholas F. Gallicchio Professor of Law and Communication, on December 8, 2009. Professor Baker was a leading scholar of constitutional law, free speech, and communications law, and he mentored and inspired many members of the *Journal's* Board of Editors.

The Board of Editors wishes to dedicate the twelfth volume of the *Journal of Constitutional Law* to the memory of Professor Baker. We hope that the following Essays, written by his colleagues, help illustrate Professor Baker's impact as a scholar, teacher, advocate, and colleague.

—The Board of Editors

University of Pennsylvania Journal of Constitutional Law

ED BAKER, COLLEAGUE

*Regina Austin**

As I reflect on my relationship with Ed Baker, I am amazed how much overlap there was in our time as Penn Law faculty members. Ed came to Penn in 1981, a mere four years after I returned to Penn as an assistant professor. Ed, of course, was well ahead of me in terms of productivity and status in the profession.

In the beginning, we read each other's work. He offered substantive comments on mine while I proofread his. Over time, I understood less and less of what he was doing and he understood less and less of what I was doing. Our minds simply did not work the same way. He was methodically rigorous. He was excited about talking theory. I like reality and popular culture; I was excited by ethnographies and documentaries. His avocations were my vocations. His fascination with print media and his reluctance to subscribe to cable television left me totally dumbfounded.

But he remained my good colleague. We would ride the rails together, down to Philadelphia, back up to New York. Back and forth and back and forth. He would often join me and my husband for Sunday brunches, sometimes with the likes of Walter Mosley and Danny Glover. Ed hung with them and seemed to accept his role as the token white guy. I will be eternally grateful for the protection he provided me from so much macho humanism. At some point, I could take it no more, gave up, and moved back to Philadelphia to produce student videos. Throughout it all, whether in NYC or Philadelphia, Ed and I talked about life at the Law School.

We talked about teaching and the difficulties we encountered. Over time the students had become less politically liberal and more intellectually blasé. Ed never blamed his teaching evaluations on that. He was very concerned that he was not effective at getting his message across. Ed's commitment to the values of democracy was best reflected in and confirmed by his dealings with his students. I do not recall his having groupies the way some professors do, but he touched many of his students in a most profound way. Jo-Ann Verrier, Vice Dean of Administration and Penn Law Class of 1983, shared

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with me the story of one of her classmates, Martha Manning, who had Ed Baker as a teacher when she was a first-year student at the University of Oregon Law School. Jo-Ann writes: When Ed Baker arrived at Penn Law, “he convinced the Admissions Office to accept Marty as a transfer student. Well, she excelled here. She did excellent work as a student while delivering twins her 3rd year. She went to Morgan, Lewis & Bockius, then was general counsel at the Wistar Institute and now she’s Vice President and General Counsel at the international biopharma firm Sandoz. . . . Along the way, she’s had four more children.” Martha Manning acknowledges her debt to Ed Baker. “He really made a difference in my life not only by opening the door to Penn Law School for me, but by his teaching. When I was a 1L in his class at Oregon, he used the Socratic Method to teach me to think for myself—to come up with not only my own answers to his tough questions, but to come up with my own questions. That is the most important skill I learned in law school and rely on every day in practice. He was truly instrumental in my legal education and [in] really teaching me to think for myself.”

Far more than teaching, though, we talked about the obstacles that stood in the way of our being members of a progressive and diversified faculty. James Gimmelman, whom I do not know, offered the following comment on Ed’s Facebook page; there is truth in what he says: “I only met Ed twice, but I’ll remember him vividly. The first time was a talk on his theory of ‘complex democracy’ and I remember thinking that this was a man who truly loved democracy. Not in a distant, abstracted, idealized way, but with a calm, contented, knowing, sad, and complex depth. He gave it a lifetime of scholarly attention, and notwithstanding all the trends he decried, I like to think that his care was repaid.” I am not so sure about that.

For many academics who came of age in the 1960s and 1970s (like me and Ed and many of others here), our commitment to democratic rule is both expressed and practiced in the context of the university, particularly in areas of faculty governance.

We fought many battles over the past thirty years. We won some, and lost some, most notably the right to elect the appointments committee and the decision to grant tenure to Drucilla Cornell.

Ed believed that balanced, cogent, tightly reasoned, disciplined analysis of the scholarship of candidates for appointment and tenure would be listened to and responded to in kind, even if his views did not ultimately prevail. He poured his best efforts into the statements he put in files or read aloud at faculty meetings because his commitment to collegial decision making demanded it. After the meetings were over, he would ask me and others our opinions of his perform-

ance. He wanted confirmation of his views and feedback about areas where the analysis needed improvement. As the number of people who placed a high priority on our having a progressive and diverse faculty dwindled, Ed's words had less persuasive impact. Ed was deeply disappointed and angry. Yes, Ed got mad, but he was able to get on a train and travel to a more nurturing environment.

I believe that Ed took our colleagues' responses to his evaluations of the work of candidates for appointment and tenure and opinions about other issues of faculty governance personally. I think he would have liked to have had more of an impact on our collective decisions because it would have represented recognition of his standing as a scholar and a thinker. Despite his record of publications, his engaged mind, his temperate disposition, his expansive network of academic friends and acquaintances, it appears that he served on the appointments committee only once and on the tenure and promotions committee only twice. Being able to influence the future course of the institution, to have colleagues who respect your intelligence and your contribution to the overall reputation of school, to have fellow scholars with whom one can really have deeply substantive discussions is important to any true academic. I think they were important to Ed. Ed would have taken it as acknowledgment of his value to the Penn community if he had been asked to serve, if he had had more influence in a democratically governed community of scholars.

But Ed was changing. He seemed to have less need for external validation and vindication. As Dean Robert Post of Yale has written of Ed: "I believe his need for recognition and for acknowledgement diminished as [he] grew older and as the quality of his work became so indisputably foundational that even he could relax about the security of its reception."

I hope that the outpouring of testimonials about Ed the scholar and theorist will cause some of my colleagues to reflect upon him and his scholarship anew. It still matters.

Ed was not the only one of my colleagues who died suddenly during my tenure at Penn Law School. There was another Ed, Ed Sparer, who had a fatal heart attack at his home in Woodstock. He was a brilliant legal thinker too and a creative and caring activist/lawyer of welfare law and health law. He too was not fully appreciated. Shortly before he died our new dean told him that he had been underpaid for years. In the time since his death, he has become better regarded. Now there is an annual symposium held in his honor. But the faculty did not do the one thing that would have indicated that it recognized the truly superlative quality of his intellect: that is, appoint someone to the faculty who was committed to carry-

ing on his work. Rather, the response might be characterized as cynical.

I have found these words very hard to write. If Ed were still alive I would have given him a draft and gotten his thoughts on whether the tone is right or whether I am merely speaking truth to petty power and should save my breath. Worst yet, he might know if I was foreclosing a window of hope and goodwill, no matter how small, that might lead to the result I want. So many of our best efforts to seek a more progressive and diverse community have been met with the kind of response that makes one careful what one asks for. I cannot guarantee that a fate like Ed Sparer's will not befall my colleague Ed Baker. The votes are not there. I have moved on too. The best I can do is go on record with my hope that Ed Baker's scholarly commitments to a diverse, progressive democratic order protected by a vibrant First Amendment will be reflected in future appointments to the Penn Law faculty and that if questioned you will attest to what I have said here.

A DEAN'S PERSPECTIVE ON ED BAKER

Dean Michael Fitts

Ed Baker was a unique scholar and individual—and will be deeply missed by his many intellectual colleagues and friends.

As an academic he was widely recognized as one of the country's preeminent scholars in the areas of First Amendment and communications law. His four books were full of insights and genuinely original thinking. Two of them, in particular, were extremely influential and often cited: *Human Liberty and Freedom of Speech* and *Media, Markets, and Democracy*. In the first, Ed propounded a liberal theory of the First Amendment that promoted free speech as a vehicle for progressive change; in the second, he offered a sharp critique of deregulation, calling it antithetical to a free press. Both books received critical acclaim, and both will stand the test of time—the ultimate measure of academic depth and importance.

The intellect that produced these works was as deep and playful in person as he was on the page. Everyone recognized his boundless intellect. He was completely at home with the play of ideas. We marveled at his ability to draw on so many disciplines and weave them together so effortlessly in the service of incisive work that left people wondering why they hadn't thought of that themselves.

At the same time, Ed also used his extraordinary gifts to bend the world toward social justice. For him, the personal was political. That pursuit of justice led Ed to make common cause with the ACLU. He was not afraid to call himself a card-carrying member. He relished the role of championing the little guy and preserving people's rights.

All of these things—Ed's prodigious intelligence, his love for the underdog and feisty defense of liberalism—are well-known to anyone who had the pleasure of knowing Ed. Perhaps less well-known was his lack of pretension and genuine concern for those around him, whatever their station in life. I worked with Ed when I was an aspiring academic and later as dean of this great law school. And I can say without reservation that Ed never changed his demeanor toward me. This kind, gentle, shy man remained friendly and personally supportive no matter our roles.

I first met Ed when I was a young candidate for the faculty and I only knew of him through his publications. He could have made me feel even more uncomfortable than I already was, but he did not.

Rather, he went out of his way to welcome me and to smooth my transition from government to academia.

If anything, he was protective—championing me like he did the people who needed his help through the ACLU. And I will never forget his kindness, at a time when I needed it.

When I became dean, Ed and I continued to enjoy a warm relationship. Academic life provides the best of all worlds, but, like politics, strains can develop over institutional policy. And although Ed vigorously disagreed with some of the institution's decisions, he never made it personal. I thank him for this as well.

I also remember Ed as the consummate scholar devoted to teaching. Ed did not put on airs in the classroom. Neither showy nor dynamic, Ed nonetheless took his teaching responsibilities very seriously. He wanted his teaching to spark lively discussion. At length he explained to me his teaching method. His preparation was meticulous and the results speak for themselves. To many students he was an icon. Upon hearing of his passing, a number of students visibly mourned. They reminisced about the discussions that spilled out into the hallways, lasting well beyond class.

Like these students, I feel a deep sense of loss for a renowned scholar, a wonderful colleague and a true friend. I know I speak for Penn Law School when I say that Ed Baker will be sorely missed.

**ED BAKER: INSPIRATION BY A FRIENDLY SCHOLAR AND A
SCHOLARLY FRIEND**

*Friedrich Kübler**

Ed Baker joined the Penn Law Faculty in 1981. During the fall of 1983 I served as a visiting professor. Ed and I quickly found out that we had a common interest in free speech and mass media issues, and we started to exchange our views and ideas. Since 1985 I taught permanently, although not full time, at Penn. Whenever he and I were there we would meet regularly, about once a week, to discuss our work and our projects.

From the very beginning it was obvious that Ed was an extremely sophisticated and rigorous scholar, an excellent lawyer, and at the same time deeply familiar with economics, political science, media sociology, and philosophy. In the late eighties or early nineties Jürgen Habermas, my colleague at the University of Frankfurt, visited Penn; I was in Germany at that time. When I asked about the visit after his return he answered that it had been very interesting and pleasant and that he had been particularly impressed by a young philosopher whose name was Ed Baker.

Ed and I always agreed as to methodology and mostly on policy. In the analysis of speech and media issues he was nearly always one or more steps ahead of me, in spite of the fact that I am considerably older. My main advantage had been that I am familiar with the German mass media system and its European implications. It contains elements, e.g., a strong public service segment in broadcasting, which he thought interesting. The same was true for the British system which he knew better than I do. He had a certain affinity to the values and virtues of “Old Europe.”

In the late eighties he was finishing his seminal book, *Human Liberty and Freedom of Speech*.¹ Its central argument formed the basis for his future writings (and for mine). He rejects the prevailing idea that freedom of speech is ultimately a functional right, serving the “marketplace of ideas.” The First Amendment primarily protects the au-

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1 C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989).

tonomy and equality of individual speakers, their right of self-determination by communicating with others.

Speech is protected because, without disrespecting the autonomy of other persons, it promotes both the speaker's self-fulfillment and the speaker's ability to participate in change. This leads to the conclusion that, as long as speech represents the freely chosen expression of the speaker, depends for its power on the free acceptance of the listener, and is not used in the context of a violent or coercive activity,² freedom of speech represents a charter of liberty for noncoercive action.

This does not completely exclude the functional justification, which remains valid where speech is not individual expression but the advertising or lobbying activity of (mostly huge) entities like corporations. This corporate and/or commercial speech, which serves a specific communicative purpose, is therefore constitutionally protected, and can be regulated to ensure the democratic process and to protect individuals who are members of the organization and disagree with its propaganda. This aspect is enormously important: it justifies efforts to regulate mass media in ways which would be intolerable when applied to individual speakers.

In the nineties Ed shifted his interest to the particular issues of media regulation. His next book, *Advertising and a Democratic Press*,³ contains a convincing description and explanation of how and why the dependence upon advertising revenues affects and distorts the content of mass media. Then three major articles⁴ served as the basis for a third book, on *Media, Markets, and Democracy*.⁵ Its first part presents a brilliant analysis of the specific features of the economics of mass media. Their products are "public goods" which allow nonrivalrous use and make it difficult to exclude third parties (or free riders). In addition there are—positive and negative—externalities. And the media operate on two markets: they distribute news, editorials and entertainment to their recipients; and those form the audiences which are sold to the advertising industries. There is strong evidence that this form of financing promotes concentration of newspaper and broadcasting business. And finally, the media not only satisfy but also generate and modify the preferences of their recipients. For all of these reasons a purely commercial media system is plagued by significant market failures which are likely to degrade the communicative

² *Id.* at 69.

³ C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* (1994).

⁴ C. Edwin Baker, *An Economic Critique of Free Trade in Media Products*, 78 N.C. L. REV. 1357 (2000); C. Edwin Baker, *The Media That Citizens Need*, 147 U. PA. L. REV. 317 (1998); C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311 (1997).

⁵ C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* (2002).

services rendered to individuals and to the public. The second part of the book discusses a broad spectrum of potential relief through content-neutral regulation. The book concludes with very timely chapters on international trade in media products and on the impact of the internet and of digital technologies.

In the beginning of 2000 I was asked by the German Association of Comparative Law to assist in the preparation of a program on media concentration and to present the comparative analysis of the national reports. I suggested inviting Ed Baker to contribute a report on the ownership rules in U.S. broadcasting regulation. He accepted, and a year later he sent me a text which was at the same time a comprehensive description and a brilliant evaluation of the American development.⁶ The comparative law conference took place in Hamburg, in September 2001, only few days after the terrorist attack killing thousands of people and destroying the World Trade Center in New York. Ed was visiting with NYU and felt that he should not leave his students at that moment. But even in his absence it was his text which dominated the debate: he had provided the conceptual framework for the discussion of policies. In particular, he argued that for compelling reasons ownership rules cannot be substituted. In the Hamburg discussion his view prevailed against the strong opposition of the German Cartel Office, which viewed media specific ownership rules as an undesirable interference with its own powers. For Ed, his contribution to the conference became the starting point for his latest and last book, *Media Concentration and Democracy: Why Ownership Matters*.⁷ This is another classic text—an enormously careful and nearly exhaustive explication of the relevant policy arguments, making it very clear that a democratic system will face unacceptable risks once media power is no longer constrained by ownership rules. In between Ed and I had co-authored a short article in German explaining and criticizing the new ownership policy the FCC wanted to adopt in the early years of the century.⁸

6 C. Edwin Baker, *The Law and Policy of Media Ownership in the United States*, in MEDIENKONZENTRATION UND ANGEBOVSIELEFALT ZWISCHEN KARTELL- UND RUNDfunkRECHT 9 (Uwe Blaurock ed., 2002).

7 C. EDWIN BAKER, MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS (2007). A summary of his argument had been presented at the Penn Law School Faculty Retreat 2005; I had been invited to comment on his paper.

8 C. Edwin Baker & Friedrich Kübler, *Sicherung der Meinungsvielfalt durch mehr Markt?*, 2004 MEDIA PERSPEKTIVEN 81.

Two years ago I finally finished and published my book on the German system of mass communication law.⁹ In the preface I could and I did write without any exaggeration that nobody had exercised as much influence on the content of this book, and on my way of thinking about freedom of speech and mass media regulation, than Ed Baker. Today I have difficulty disentangling which insights I derived from reading his books and articles, and what I gained from our continuing conversations and discussions. But I have no doubt that for his and for my generation Ed has elaborated the most comprehensive and the most persuasive theories how to understand constitutional guarantees of free speech and how to transform this interpretation into policies which will serve the public on the long run; if there is anything better, I have not seen it. So I am very sorry that I lost a vital source of information and education. But there is more. Ed had been the model of an academic, fully dedicated to his students and to his scholarship, unpretentious and kind, but unconditionally committed to principles of intellectual integrity and social justice. And he was a wonderful friend. I am deeply saddened by the loss, but I am happy whenever I remember our relationship.

9 FRIEDRICH KÜBLER, *MEDIEN, MENSCHENRECHTE UND DEMOKRATIE: DAS RECHT DER MASSENKOMMUNIKATION* (2008).

**“THE FULL PERSON AS REASON-GIVER”:
THE LIBERAL CONSTITUTIONAL CONCEPTION
OF C. EDWIN BAKER**

*Frank I. Michelman**

My theme is Ed Baker’s scholarly involvements with large questions of political equality, democracy, liberty, and justice. I envision my friend as having been engaged in the construction of a full-fledged liberal constitutional conception, on the scale of those advanced by writers like John Rawls, Ronald Dworkin, and Jürgen Habermas. I cannot, with certainty, say when (or, indeed, whether) a project of such a scope may have taken conscious shape in Professor Baker’s mind. One might, if so inclined, see portents in Ed’s earliest published articles, from 1974 and 1975.¹

I pick up the trail in the middle, with a 1989 paper on *Republican Liberalism*.² This may not be one of Ed’s most widely noted works. It has, however, a special resonance for me, because Ed chose to write it in the form of a rather stern (and may I also say a richly deserved!) rebuke to some then-current work of mine. In that paper, we find Ed in search of foundations for a defense of liberal constitutionalism. He does not buy into the contract tradition that we associate with John Rawls.³ But then neither does he tie liberal rights—as Ronald Dworkin has done—to an abstract ethical theory positing the special responsibility of each person for the conception and pursuit of value in the life that is hers.⁴ Rather, Ed proposes, in that paper, to draw his foundations for a liberal constitutional order from a kind of Ha-

* Robert Walmsley University Professor, Harvard University. The following tribute is drawn from my remarks at a memorial service for Professor Baker held in New York on January 30, 2010.

1 C. Edwin Baker, *Utility and Rights: Two Justifications for State Action Increasing Equality*, 84 YALE L.J. 39 (1974); C. Edwin Baker, *The Ideology of Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3 (1975).

2 C. Edwin Baker, *Republican Liberalism: Liberal Rights and Republican Politics*, 41 FLA. L. REV. 491 (1989) [hereinafter Baker, *Liberal Rights*].

3 See JOHN RAWLS, A THEORY OF JUSTICE 11–17 (1971).

4 See RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE: PRINCIPLES FOR A NEW POLITICAL DEBATE 9–21 (2006); RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 242–84 (2000).

bermasian philosophic anthropology, a conception of persons as, essentially, participants in communicative action.⁵

The “key move” in *his* case for liberal constitutionalism, Professor Baker wrote in that 1989 paper, would be a claim that “communicative action is [a constitutive] part . . . of our present, historical nature as persons.”⁶ The case for treating liberal rights as foundational in a practice of democratic politics should be drawn, Ed wrote, from what he called “our experiential commitment to communicative action.”⁷ If we are going to concede obligatory force to the lawmaking outcomes of democratic political debate, then (as Ed maintained) we need to “redeem” the “validity claims” implicit in each person’s contribution to the lawmaking debate.⁸ And that is where liberal rights would come in: as supports for validity in the debate—or call it support for the debate’s commandingness of respect. Collective commitment to regard for the equality and autonomy of individuals, Ed argued, is presupposed by the conduct of a joint practice of lawmaking among persons inevitably, essentially bound to what Habermas came to call the “ethics” of “discourse.”⁹

That may sound to you a lot like Jürgen Habermas writing on constitutional theory, in his great book on that topic, *Between Facts and Norms*.¹⁰ *Facts and Norms* appeared in print (in English) in 1996.¹¹ Ed was writing in 1989—anticipating, it seems, the directions that a liberal constitutional theory inspired by Habermasian discourse ethics might take.

I will push the comparison further. There is, in Ed’s paper of 1989, a clear premonition of an idea that Habermas would come to label “the co-originality of public and private autonomy.”¹² Not only is it true (Ed wrote) that a practice of deliberative politics presup-

5 See generally 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: LEIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON* (Thomas McCarthy trans., 1981); 1 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY* (Thomas McCarthy trans., 1981).

6 Baker, *Liberal Rights*, *supra* note 2, at 514.

7 *Id.* at 515.

8 *Id.* at 514.

9 See, e.g., JÜRGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* 43–115 (Thomas McCarthy trans., 1990) (a chapter entitled *Discourse Ethics: Notes on a Program of Philosophical Justification*).

10 JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 104 (William Rehg trans., 1996) [hereinafter *HABERMAS, NORMS*].

11 The German language original is JÜRGEN HABERMAS, *FAKTIZITÄT UND GELTUNG; BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS* (1992).

12 E.g., *HABERMAS, NORMS*, *supra* note 10, at 104.

poses individual rights of self-determination; it is also true that there are presuppositions embedded in the very idea of an individual's self-determination, and those include "a realm of deliberative politics in which a person determines her social environment and situation [and thus herself] through deliberative participation in collective creation."¹³ In Ed's writings on the First Amendment, that thought takes shape as a constitutionally preferred, individual right to "participation in change."¹⁴ In Ed's more broadly political-theoretic work, that thought becomes a ground for rejecting demands—supported, in different ways, by both Rawls¹⁵ and Dworkin¹⁶—for the sort of liberal neutrality that would exclude socially contested ethical convictions, regarding the substance of the good for humankind, from collective determinations of coercive law.

The argument that Ed sketched out in 1989 would, in later years, evolve. It would thicken. Ed developed it in scholarly interrogations of Rawls,¹⁷ of Dworkin,¹⁸ and of Habermas,¹⁹ taking issue with all of them. And, yes, that does include Habermas, too, on the point of tying political legitimacy to each person's supposedly being able to see herself as an autonomous author of all the laws in force. Ed was leery of that idea.²⁰ He thought it tended dangerously toward the evacuation of ethical contestation from democratic debate. Professor Baker, as we see, was tilting with giants in his field. (In my mind's eye, I see on Ed's face, as he tilted, that characteristic, slightly wry, self-deprecating smile. Well, maybe not so self-deprecating; let us, rather,

13 The interpolation is mine, but necessary to convey the full, dialectical flavor of Ed's thought, as shown by other passages and writings. See, e.g., C. Edwin Baker, *In Hedgehog Solidarity*, 90 B.U. L. REV. (forthcoming 2010) (manuscript at 35–36, on file with author) [hereinafter Baker, *Solidarity*]; C. Edwin Baker, *Two Interpretations of Liberalism: Neutrality Versus Toleration* 23–24, 28 (unpublished manuscript, on file with the author) [hereinafter Baker, *Two Interpretations*].

14 C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 47, 48, 81 (1989).

15 See John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997).

16 See Frank I. Michelman, *Foxy Freedom?*, 90 B.U. L. REV. (forthcoming) (describing and analyzing Dworkin's view as developed in a draft of RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (forthcoming 2010)).

17 See C. Edwin Baker, *Rawls, Equality, and Democracy*, 34 PHIL. & SOC. CRITICISM 203 (2008) [hereinafter Baker, *Rawls*]; C. Edwin Baker, *Sandel on Rawls*, 133 U. PA. L. REV. 895 (1985).

18 See Baker, *Solidarity*, *supra* note 13.

19 See Baker, *Two Interpretations*, *supra* note 13.

20 See *id.* at 5, 13–15. Self-authorship of the laws became a bit of a bone of contention between the two of us. See *id.* at 5 n.7; Frank I. Michelman, *A Reply to Baker and Balkin*, 39 TULSA L. REV. 649, 651 (2004) (conceding a point to C. Edwin Baker, *Michelman on Constitutional Democracy*, 39 TULSA L. REV. 511, 521 (2004)).

say that smile of quiet, unassuming confidence and joy in his own powers to contribute.)

It seems to me that Ed's evolving, communicative-ethics inspired, liberal constitutional conception was coming to a boil in what I must now, sadly, refer to as his "late" work. It looks as though pieces are being set in place for a sort of summative statement. I have in mind Ed's article, *Rawls, Equality, and Democracy*, published in 2008;²¹ his large essay on Dworkin's not-yet-published *Justice for Hedgehogs*, left by Ed at his death for publication in a forthcoming law review symposium;²² also, an unpublished manuscript on *Two Interpretations of Liberalism: Neutrality Versus Toleration*, that I was lucky to receive from Ed just a few months ago.²³

In the Dworkin essay, Ed takes up Dworkin's idea of each person's special responsibility for living well his own life, viewed as a key aspect of human dignity. From that idea, Dworkin infers a moral prohibition against legislation meant to impose a collective view of ethical value on individuals responsible to work out such matters for themselves.²⁴ Ed draws a different lesson. "People's special responsibility for their own lives," he insisted, requires that "people be able to pursue their visions [of what makes for value in human lives] in all their roles, including collective governance."²⁵ His difference with Dworkin on this point, Ed suggests, turns on a question about the best conception "of the person and her dignity."²⁶ Much as he had done in his paper of 1989, Ed asks us to "imagine a person" as essentially a communicative agent, "an interactive giver" of reasons in exchange with others—any and all "reasons she finds best," including reasons of the good for human lives—in any and all social venues, including venues of lawmaking.²⁷ Respect for "the full person as reason-giver" entails, Ed argued, acceptance of "a political realm where people pursue, as communicative agents, their inevitably conflicting values," and not everyone can come out a winner every time.²⁸

Ed Baker himself modeled the debate from which everyone wins. He did so—it is just an example—as a devoted participant, over the past ten or so years, in an annual, cross-disciplinary colloquium, now held in Prague, where people discuss work connected in some way to

21 See Baker, *Rawls*, *supra* note 17.

22 See Baker, *Solidarity*, *supra* note 13.

23 See Baker, *Two Interpretations*, *supra* note 13.

24 See *supra* notes 4, 16, and accompanying text.

25 Baker, *Solidarity*, *supra* note 13.

26 *Id.*

27 *Id.*

28 *Id.*

the critical-theoretic tradition that gave rise to the theories of communicative action and discourse ethics. The colloquium is, in fact, a direct descendant of a series of meetings first organized, decades ago, by Jürgen Habermas. Over these recent years, “Prague” has been a group in which Ed’s voice was deeply respected, highly valued, and much loved. It was I who first brought Ed to Prague, and I am very proud of that; I did a good thing there. Much of Ed’s later work got airings in Prague. We had the blessing, there, of Ed’s presence—of Ed giving reasons, Ed getting reasons, Ed giving respect, Ed getting respect, Ed giving and getting the affection—the love—that flowed from and flowed to the full person that he was: the giver of reasons, yes, but so much more; that full-to-the-brim person that was Ed Baker.

REMEMBERING ED BAKER

*Monroe E. Price**

Ed Baker had the intense purpose of biblical prophecy.

He was against the grain; he foresaw deep and terrible decline; and he railed against it (in his own quiet way). Like many prophets of yore, he saw his understandings rejected by those he thought had a more limited moral compass, a more limited grasp of the world, or a more limited sense of the promise of American society. And like many prophets, he was at heart an idealist. We shall wonder how Ed became who he so gracefully was: this combination—in one of those astounding tricks of American social life—multi-generational Madisonville, Kentucky, Italian immigrant, Wyoming ranch grit, and Emersonian Yale Law School graduate.

Ed was a prophet with influence. When I was scurrying about the Internet, trying to see his influence, I found an article, published in 1992, with a title that captured what he accomplished: *First Amendment Theories and Press Responsibility: The Work of Zechariah Chafee, Thomas Emerson, Vincent Blasi and Edwin Baker*.¹

This is where Ed belongs: in the Valhalla of heroes of free expression jurisprudence.

I looked up how many professors and students, writers of law review articles, expressed their thanks to Ed. It is in the hundreds. By the way, twice as many thanked “Ed Baker” as thanked C. Edwin Baker, and I thought that was a sign of who Ed was.

But even in this academic ritual, Ed could show the railing part of his prophetic side.

For example, a future colleague of Ed’s at Penn sent a nice bouquet to Ed in his acknowledgements in an article on media policy:

I would like to offer special thanks to my friend, Ed Baker, for his willingness to engage in the lively and constructive intellectual exchange about my ideas appearing in this Article. I can offer no higher praise

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¹ Elizabeth Blanks Hindman, *First Amendment Theories and Press Responsibility: The Work of Zechariah Chafee, Thomas Emerson, Vincent Blasi and Edwin Baker*, 6 JOURNALISM Q. 48 (1992).

than to say that I have spent much of my career inspired by and responding to his work.²

This graceful comment triggered Ed the prophet. Even to a brilliant scholar who had complimented him, Ed could be churlish, even raging. He saw this interlocutor as representative of a group of media law scholars who were what Ed called “free market acolytes.” Here’s his reply in prophetic mode: “This short Comment on his article . . . is written not because I consider it uniquely objectionable, but rather because its fundamental errors and characteristic distortions are representative of this influential group of scholars.”³

Or to two other colleagues: “After a generally entertaining and informative narrative of the Nike litigation, [the authors] conclude with a disturbingly bad attempt at constitutional analysis—a point I will illustrate only briefly here before turning to their equally bad mischaracterization of my Essay.”⁴ And these were to friends!

In his pretty much lonely prophecy, Ed saw the role of the press in society as fundamentally constitutive—as a necessary element in creating an informed public and in empowering individuals to perform their civic roles. For him media companies and media institutions had to be subject to social adjustment to make sure their functions could be adequately performed.

He found meaning in the strange yet uncharted formula of the First Amendment, which protects, serially, freedom of speech and of the press. And these last four words “or of the press” have been a mystery to scholars and judges.⁵ Ed had a philosophy of why there were these two clauses—and why each was separately and differently important for the adventure of American constitutionalism.

His prophetic sirens rang out the tyranny of concentrated ownership and the tyranny as well of pervasive, overwhelming advertising on editorial decisions. These as much as government could corrupt the true role of the media. It is ironic or tragic that just at the time of his death, his voice on this question becomes more and more vital. Some months ago, he traveled to Washington to testify on the role government should play in making certain there’s a vital press in the

2 Christopher S. Yoo, *Architectural Censorship and the FCC*, 78 S. CAL. L. REV. 669, 669 n.* (2005).

3 C. Edwin Baker, *Media Structure, Ownership Policy, and the First Amendment*, 78 S. CAL. L. REV. 733, 733 (2005).

4 C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in Nike*, 54 CASE W. RES. L. REV. 1161, 1184 (2004).

5 Potter Stewart, “*Or of the Press*”, 26 HASTINGS L.J. 631 (1975) (excerpted from Potter Stewart, Assoc. Justice, U.S. Supreme Court, Address at the Yale Law School Sesquicentennial Convocation (Nov. 2, 1994)).

United States. He testified before a Congressional Committee—to provide them with a short history lesson on speech and society as he saw the subject in U.S. history—and how to react to whatever crisis journalism faces. His approach was typically Ed: claiming that the “market cannot be expected to adequately support professional quality journalism. . . . [and that t]his inadequacy of the market was recognized at the country’s founding and through most of the country’s first 200 years.”⁶ He wanted to open a space for some creative approaches with a public initiative. Here as elsewhere, his was an unusual voice, using the scholarly mantle to help be an architect of a more democratic world. And last year, as well, he met with a committee of the House of Lords.

Ed was a prophet with humor and here’s Ed’s idea of a First Amendment joke (in an article on the First Amendment in cyberspace):

I have argued that the channeling approved in *Pacifica* [a famous Supreme Court case] may make sense. Channeling that would, however, keep indecency off the broadcast system from six o’clock in the morning till ten or twelve o’clock at night should be unconstitutional. Such regulation would reduce the availability of indecency to people like me, who go to bed early in order to take the train from New York to Philadelphia. It would mean that I could not watch indecency on broadcast at 8 or 9 in the evening, when I am still somewhat awake.⁷

What Norman Dorsen wrote about Ed’s mentor, Tommy Emerson applies to Ed: “There is no way to do justice to a man so deep and humane. He is as addicted to concepts of fairness and equality [His writings] are more than merely authoritative: they are works which reordered the line of inquiry for those who have come after.”

Ed danced to his own drummer, but what a drummer that was.

Ed had that quiet modest quality in which he claimed not to be “lecturing” in the sense of telling people what they should do; but all the while he was demonstrating an allegiance to basic legal and moral principles that were so inspiring that they transcended national borders and cultural differences.

We had a regular effort to meet on the train going to or from Philadelphia. He always sat in the Café Car—the open tables appealed to him, and he used the time to read the papers that might be

6 *A New Age for Newspapers, Diversity of Voices, Competition and the Internet: Hearing Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 62 (2009) (statement of C. Edwin Baker, Professor, Univ. of Pa.).

7 Norman Dorsen, *Thomas Irwin Emerson*, 85 YALE L.J. 463, 464–66 (1976) (quoting Louis H. Pollak, *Thomas I. Emerson, Lawyer and Scholar: Ipse Custodiet Custodes*, 84 YALE L.J. 638, 638 (1975)).

given by a faculty member at lunch, or take a last look at the assignments he had made, but he always made time to talk about his view of some freedom of expression related matter. Several were the times when I rued the punctuality of Amtrak at arriving in New York, depriving me of yet another of Ed's thoughts, which were always there in great supply.

He was an invaluable colleague for me. When, as part of Annenberg's center for global communication studies, I wanted a voice to represent the best of American (or beyond) thinking on speech and society, Ed would be the first person I turned to. In the summer of 2009, for example, he went to Beijing to lecture in a series of seminars for graduate students in China. A year or two earlier, he gave of his time to go to Jordan and talk with young Jordanians, to lawyers, law professors, and journalists about his conception of the role of speech in society. I was most fortunate to know Ed and see his generosity with young people around the world. In Jordan, in Hungary, in China just this last summer, Ed was the perfect exponent of a culture of discussion, understanding, exploring basic concepts. He met with young Jordanian women in headscarves and blue jeans, with Chinese scholars eager to be respected but also be informed, worlds of people who were specially able to benefit from Ed's special brand of listening, telling, being open but having a firm set of ideas.

I was touched by their uniform reaction to Ed's death, testimony about how much Ed had meant to them, and how distressed they are that they cannot engage him in yet another conversation, have yet another discussion. In all of these instances, he wanted to make it clear that he was not preaching; he wanted his audiences to have a better understanding of the complexities of the U.S. perspectives on speech, press and society so that they could bring a more discriminating view to their own dilemmas. He was a quiet and persistent missionary for his own very exacting and compelling view of the First Amendment and international norms of free speech.

In Amman, among the students Ed talked to, formally and informally, a group of young women were charmed by this intense, sincere, curious American, who was willing to listen to them and who seemed to appreciate their intriguing way of adjusting to a globalised modernity. I remember, for example, his puzzled look when one or two young women asked him for his opinion on honor killing, apparently a problem that wasn't merely speculative for them.

Here's a note from Zhan Li, a young professor in Xiamen, in China, when I told her Ed Baker would come: "Of course I know how wonderful Prof. Baker is—his *Media, Markets, and Democracy* was a big part of the theoretical framework of my dissertation, but I didn't have

a chance to meet him in person on Penn campus. Thanks so much for giving me the opportunity!” Just recently, another acolyte from his China trip, Sixin Wang, a rising professor at the Communications University of China in Beijing, arranged for a scholarship to come to Penn for a year primarily to learn from Ed.

I remember, too the period in which Ed was one of the few American voices that took seriously French, Canadian and other efforts to maintain cultural identity by regulating trade in television programs or songs or magazines. Ed wanted to master this area and set forth a comprehensive approach to it. And he did it in his usual painstaking fashion, but then put, pretty much, full stop to that issue and turned to something else.

Just before his death, I heard him intervene in a colloquium on hate speech and, as usual, he sought to move the speaker (in this case Columbia’s Jeremy Waldron) off what might have otherwise been a pedestal of self-confidence about a position—in this case the role of speech regulation as a way of affording dignity to scorned minorities. And in our last conversation, he was trying to instruct me in the difference between a “tolerant” society and a “neutral” society with respect to speech practices. My wife and I had lunch with Ed the day before he died. He was full of hope and anticipation and enthusiastic love (an important quality). His tone that day came back to me as I read a sentence he wrote (in an essay about Catherine McKinnon:

Anyone with an ultimate faith in people—and in humanity—is likely to share the inevitably unprovable belief that legal regimes premised on respect for people’s agency will ultimately lead to the best results, the best society. At least they are likely to share the belief that because life is a continual process of becoming without final outcomes, this approach is the wisest way to live as we proceed.⁸

⁸ C. Edwin Baker, *Of Course, More Than Words*, 61 U. CHI. L. REV. 1181, 1211 (1994) (reviewing Catherine A. MacKinnon, *Only Words* (1993)).

REMEMBERING ED BAKER

*David Rudovsky**

Ed Baker died suddenly and all too early in his engaging and productive life at the age of sixty-two. Ed was a prodigious scholar, a committed civil libertarian, a revered teacher at Penn Law School, and an individual whose passion for justice and fairness animated all parts of his life. His work on First Amendment issues of free speech and association were ground-breaking in legal and philosophic circles; in particular, his theories of free speech with respect to the relationship of the media to the citizenry and to the political system were both illuminating and comprehensive. His discussions of the proper functions of the First Amendment reflected insightful research, a strong sense of history, and a broad understanding of the role of free speech in the culture of the United States. No wonder that his four major books on freedom of expression were translated into several foreign languages and that he was a frequent lecturer here in the United States and around the world. He had a passion for life, for personal liberties, and for integrity in scholarship and teaching.

For years, as a colleague at Penn, I admired Ed's academic work and his understanding of constitutional doctrines. I also valued the times we had together talking about politics, law, and teaching. His comments were always wise and his modesty genuine. He was quiet and reserved, and often absorbed by his projects, but he always had the time to connect on a personal level.

The theories and philosophies that have been generated by First Amendment scholars are sometimes daunting in their complexity and nuances. But Ed had a way of both developing complex theories and applying them in a way that made eminent good sense. Even so, I did not have much occasion to use Ed's work in actual litigation until a number of the Penn Law Faculty decided to file suit against the Solomon Amendment (which terminated federal funding to any university that did not provide the military with equal recruitment services). I was part of a team of lawyers that represented the faculty members on their claim that the federal law impermissibly prevented the Law School from enforcing its anti-discrimination policies as the

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military discriminated against gays and lesbians. Who knew that Ed's perceptions and thoughtfulness would be so critical to our agenda.

We had to sort through an array of possible arguments and doctrines that would support the legal claims, and several of these arguments involved free speech and association issues. Early on, Ed wrote a memorandum setting forth the core First and Fourteenth Amendment arguments in support of the Law School's right to enforce its anti-discrimination policies. The challenge for me was to translate Ed's academic understandings of First and Fourteenth Amendment doctrine into functional arguments for a district court judge. At first, some of what Ed wrote seemed too abstract, but as I worked through his thought process, and applied his thinking to the issues at hand, I soon found myself with a well-integrated approach to the issues that would be presented by our case. Ed was persistent in his views, but also fully understood the realities of litigation against the military so soon after 9/11. Our legal briefs were very much the product of his thinking and advice, and fully supported our statutory construction theory. Unfortunately, Congress eventually mooted our winning arguments by a statutory amendment and, in a separate case, the Supreme Court found no constitutional problems with the federal law.

But Ed was far more than an academic when it came to this kind of issue. With legal challenges swept aside, he and others at Penn and other law schools re-engaged with student activists to directly protest the military's policies, including demonstrations and other activities surrounding visits by military recruiters. These protest activities have helped to broaden the campaign against "Don't Ask; Don't Tell." And some day soon, Ed's vision of fairness and equality will prevail, not because a court agreed, but because the country will finally reject policies built on bigotry and discrimination. That development will be a true testament to Ed's legacy.

ED BAKER: FRIEND AND FIRST AMENDMENT SCHOLAR

*Steven Shiffrin**

I want to discuss what Ed Baker meant to me, but my primary responsibility is to present his vision of the First Amendment: to tell you what Ed believed, what Ed wrote, what Ed fought for, fiercely fought for in public and in private even when presented in a quiet, considerate Kentucky drawl.

It all begins in the fourth grade. Ed's parents, to whom he dedicated his first book, wanted to take him to the Episcopalian church. Ed told them he had a First Amendment right not to go. In the tenth grade he wrote a paper on the First Amendment inspired by John Stuart Mill. In law school, Ed studied under the greatest First Amendment scholar of his generation, Thomas Emerson. There Ed wrote a paper that became the basis for his first great book on the First Amendment: *Human Liberty and Freedom of Speech*.

In that book he broke with Mill and with Emerson, but he held fast to what he knew in the fourth grade.

The building block for his theory was that human beings are equally entitled to be respected by government as autonomous agents. He believed that people had a right to make their own commitments and live out those commitments without state interference except in extraordinary circumstances. He called this the liberty theory of the First Amendment.

Ed's approach had no room for the marketplace of ideas theory. Ed thought among other things that we know too much about the sociology of knowledge to accept that sunny view. Ed recognized that what emerges in the marketplace may tell us more about upbringing, bias, and power than it tells us about truth.

Ed also rejected Mill's idea that liberty could be restricted when it harmed the interests of others. Harm was too slippery a concept for Ed, and he recognized that the harm idea led to judicial balancing, which he opposed for many reasons including its subjectivity and its tendency to ratify the status quo. Ed also rejected Emerson's theory that speech should be protected but action should not. Ed argued that freely chosen speech should be protected unless it physically in-

* Charles Frank Reavis Sr. Professor of Law, Cornell University Law School.

jured or coerced another, and he rigorously defined coercion in a way that would leave little wiggle room for judges. Similarly, he argued that action that was substantively valued should receive equivalent protection.

In so doing, Ed improved on the work of First Amendment giants like Hugo Black, William O. Douglas, and Thomas Emerson. He was the premier defender of the core of the ACLU position on free speech. And Ed's theory is not just abstract. It is backed by a passion he shared with John Stuart Mill, the part that emphasized the importance of diversity, of experimentation, of independence, of resistance to authority, and the value those qualities play in individual self-realization and building the culture.

But Ed's free speech theory protected human beings. It did not protect business corporations. He would have been appalled by the recent Supreme Court decision protecting corporations. Ed argued for more than thirty years that the speech of business corporations was not an exercise of liberty. Ed maintained that corporate speech was not the speech of the shareholders, and it was not the speech of officers and directors. Corporate speech was dictated by the competitive business needs of the corporation wholly apart from the personal beliefs of shareholders, officers, and directors. In short, inhuman corporate speech, for Ed, was not an exercise of human liberty.

In looking at Ed's work, some scholars have been better at packaging. Perhaps some scholars have been as smart. But no one has been as deep; no one as broad; no one as creative; no one as original. And when you put his forty articles and four books together, I do not believe that anyone has made as important an intellectual contribution to the First Amendment as Ed Baker, whether in this century or the last.

I, of course, will miss his continuing scholarship, but I also miss more. I miss those long pauses when I made an argument and Ed mulled over his response. I will miss his total lack of defensiveness. He always wanted to get the right answer even if it meant changing a past position. I miss his thoroughgoing integrity. Nietzsche once said that to have a system—as Ed did—was to lack integrity. He thought that anyone with a system would fudge it to get desirable results. Well Nietzsche never met Ed Baker.

Most of all I miss his kindness, his self-deprecating humor, and I miss that he did not wear his brilliance on his sleeve, though you would have to been a moron to miss it.

Finally, I smile at the fact that Ed wrote much of his last two books in Claude's, that great French bakery on 4th Street in New York. I can just see him sipping coffee at that little table and, despite people

pushing into the cramped store, I see him working with enormous concentration and discipline—though I can see him looking up when a friend came through the door as I once did. Ed had a wonderful capacity to nourish and maintain friendships with many people, friendships that sometimes have gone for thirty to forty years. Ed's ability to connect with people is a major source of the misery that accompanies his passing. Certainly, Ed's death has made me miserable. But I am consoled and I think we all can be consoled by the fact that Ed not only lived an accomplished life, but a wonderful life, that we had the gift of sharing a part of that life with him, that his work lives on, that his role modeling of what it means to be a human being is still available to us, that his memory is so much a part of us, and that the pain we are experiencing will be mitigated with time. For some, that pain will fade, but never completely go away. I'm not sure that's a bad thing.

REMEMBERING ED BAKER

*Tobias Barrington Wolff**

Sitting at the top of my e-mail Inbox on my home computer are two messages from Ed Baker. He sent them to me last spring, in response to a paper that I had presented in workshop to the Penn faculty—a draft of a First Amendment article on which I have been working in one form or another for over ten years. The article attempts to say something about the proper analysis of free speech claims under the First Amendment when those claims are asserted by corporations and other artificial entities. It pursues a set of instincts about the distinction between safeguarding individual autonomy and promoting robust public debate, along with the arguments for and against permitting artificial entities to invoke each species of claim in different speech situations. I started work on the article about a year before I became a law professor, and I have come to think of it as the measure of my own learning curve in the field of free speech. I have ripped it up and rewritten it several times; spun off another article from one part of the paper's analysis; and, nonetheless, I am still painfully aware that I do not yet know enough to write this paper in the way it should be written.

Ed's e-mail comments came in response to the paper's current incarnation—a stripped down version of what it has been at various points in the past, since it lacks both the sections that were spun off into another article and the sections that I excised upon returning to it this most recent time and concluding that substantial portions were not yet right. The Penn faculty, as always, were excellent in workshop, engaging with the elements of the project in which they saw genuine value and pushing me to improve my thinking in the parts that were still rough. But Ed had been unable to attend my workshop presentation. If memory serves, he was in New York that day. Instead, he read the draft and offered me his reactions in written form.

I have not been ready to give Ed's e-mails the attention they deserve, hence their presence atop my Inbox these many months. My head has been filled with Civil Procedure, Federal Jurisdiction, and Conflict of Laws since last summer, and I have promised myself that

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in my next engagement with this First Amendment article I will spend as much time educating myself and refining my thoughts as is necessary to do the project justice. Ed spoke to me in that mode in his e-mails—as a colleague and equal capable of engaging with free speech doctrine and theory at the highest level. A scholar with proper respect for his avocation does not approach such a conversation unprepared. And so Ed's e-mails have sat conspicuously atop my Inbox as a reminder of the major endeavor that I have waiting for me, and of the great mind that will be there to help guide me, with characteristic generosity, to a deeper understanding of my own instincts about this indispensable provision of our Constitution.

It will perhaps not be difficult to understand, therefore, that Ed's e-mails have now taken on an elegiac quality. I will not enjoy the benefit of that great mind in my further efforts to understand the First Amendment. Ed Baker made perhaps the most earnest, passionate, and thorough attempt to use the autonomy of the individual as a basis for justifying free speech theory and structuring First Amendment doctrine that any scholar has contributed to the modern canon. When I joined the Penn faculty three years ago, Ed Baker's collegueship was like a vein of ore to me—a source of wealth that I would mine, just as soon as I was ready. But now that treasure has receded beyond reach.

I did not know Ed well. We had several rich conversations about the law after I arrived at Penn in 2007. On two immensely gratifying occasions—once in response to a presentation that I made of another First Amendment article, and once when he agreed to sign an amicus brief that I had written to a federal appeals court—Ed praised me for having provided insights that were new to him and had changed his way of thinking about a pair of free speech issues. But I don't believe that we ever shared a meal together outside the halls of the law school, and I knew little about him beyond his work. It is one of the passages that marks the transition from young scholar to mature academic, I think, when one begins approaching senior colleagues not merely as intellectual mentors but also as friends. Though I have found some of my closest friendships in the academy in these last ten years, that transition came more slowly for me in approaching Ed. He was notoriously private and inscrutable, which perhaps accounts for a part of that lost opportunity, but he was so palpably tenderhearted and compassionate that any colleague must assume equal responsibility for not finding a space to share with him.

The work that Ed Baker leaves behind will be a legacy of which any scholar would be proud, and I will turn to that work frequently as I continue trying to form myself into a respectable First Amendment

scholar. But Ed's e-mails will always serve as a more personal reminder to me of what I have lost: a great mind; a generous colleague; and a close friend and co-venturer that could have been.