

2-2010

Remembering Ed Baker

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Recommended Citation

Kreimer, Seth F., "Remembering Ed Baker" (2010). *Faculty Scholarship*. Paper 1165.
http://scholarship.law.upenn.edu/faculty_scholarship/1165

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University of Pennsylvania Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 158

FEBRUARY 2010

No. 3

IN MEMORIAM

REMEMBERING ED BAKER

Ed Baker collapsed at his gym on December 8, 2009; he was sixty-two years old. With his death, the legal academy lost a penetrating scholar at the height of his powers. Penn Law lost a teacher of commitment and insight. Ed's wide network of friends and comrades lost—in the words of his former student Anne Bartow, who now teaches at the University of South Carolina Law School—a soul who was “brilliant, funny, kind and fiercely invested in building a more just world.”¹

Let me briefly address Ed as scholar, Ed as teacher, and Ed as friend.

Ed was a scholar to his core. When he graduated from Yale Law School in 1972, Ed was deeply engaged in the effort to complete a project recasting the foundations of First Amendment doctrine in light of the challenges of modern psychology and contemporary media structure. To allow him to continue that work, Ed procured a teaching position at the University of Toledo Law. During the next nine years, he pursued a path through a Law and Humanities fellowship at Harvard and a professorship at the University of Oregon Law

¹ The quotations of Professor Bartow and other scholars come from personal correspondence in the aftermath of Ed's death.

School. He staked out a well-deserved reputation for creativity, rigor, breadth, and incisiveness. Ed wrote careful and trenchant critiques of the emerging law and economics scholarship. He brought broad philosophical learning to issues of constitutional law—to my knowledge, his was the first law review article that used Habermas to illuminate equal protection doctrine. He elaborated his “liberty theory” as a major alternative to the “marketplace of ideas” in justifying protection of free expression. For a generation afterward, no serious discussion of First Amendment theory could fail to grapple with Ed’s work.

Scholarship was not an abstract exercise for Ed. “Constitutional interpretation,” Ed observed, “is a constant struggle and, properly understood, is part of the struggle for justice.”² His work was fueled by profound concern for the way real people live their lives, for autonomy, equality, and democracy on the ground.

Ed liked to tell the story of invoking the First Amendment as a fourth grader in defense of his right to remain a Southern Baptist when his parents suggested that he join them in moving to the Episcopal Church. That sensibility matured into a bedrock conviction that no legal order can have a legitimate claim to authority unless it respects the autonomy of those from whom it seeks obedience.

Ed grew up outraged by segregation and racial hierarchy in his native Kentucky. He never lost his conviction that a society is illegitimate when it denies any citizen respect for her equal dignity. He formed his political identity as a student activist at Stanford in 1965, reaching across the racial divide to struggle for civic redemption. He believed that respect for autonomy and equality entails government and media institutions that provide real and meaningful opportunities for democratic participation.

Ed brought his scholarship to Penn Law in 1981, at the same time I entered the profession here. As a newly fledged academic, I was hungry for role models, and I was lucky to have one near at hand. Some of my colleagues are outstanding lawyers, some are insightful social scientists. Ed’s signature strength was that he was so flamboyantly both at once. Rather than deploying a single social science paradigm to a legal problem, his work applied two or three seriatim, together with philosophical analysis, to reinforcing effect. Ed then showed that the result brilliantly illuminated the discourse of practicing lawyers, judges, and policymakers.

² C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 283 (1989).

By the time of his death, Ed had written four deeply informed books on free expression and media policy,³ books which were translated into Chinese, Romanian, and Korean. Over fifty scholarly articles and book chapters bore his authorship, regularly reprinted in English and reaching audiences in German, Hungarian, French, and Chinese.⁴ He had served for a year as a scholar in residence at the national offices of the ACLU, and had testified before the House of Representatives, the FCC, and the British House of Lords. Ed had spoken to hundreds of gatherings of academics, policymakers, and media activists across the United States; he had shared his insight with eager audiences in Paris and Prague, in Amman and Budapest, in Cholula and Quebec, in Zurich and Beijing.

And what insight it was. Robert Post, a longtime scholar of the First Amendment, the current Dean of Yale Law School, and Ed's sometime intellectual antagonist, observes,

I guess what I would want said about Ed is that he was a man of enormous integrity—personal and intellectual. I've never met anyone with such a passion for getting it right. He lived his politics like he lived his intellectual life, with rigor and endless determination, with superlative intelligence and ruthless, uncompromising purity. He was of a rare breed who combine deeply libertarian sentiments with a strong grasp of structural injustice. It made his work unique and generative.

Frank Michelman of Harvard Law School offers tribute to Ed's "distinctive brew of modesty and confidence, seriousness and gusto, the intellectual comradeship with which Ed approached the work of recognized giants of our age in constitutional and democratic theory—Hart, Rawls, Habermas, Dworkin, and Posner." Monroe Price, international media scholar at Penn's Annenberg School, can recall "no American scholar so committed, so disciplined, so wise in his understandings of the relationship between the media and the political system."

As a teacher, Ed was hardworking and committed; he mentored and challenged a generation of law students. But Ed's standards would not allow him the benefit of cheap theatrics or simplification. In discussing media policy, Ed observed, "For me, . . . paternalism (sometimes) seems fine for children but very questionable for

³ See C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* (1994); BAKER, *supra* note 2; C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS* (2007); C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* (2002) [hereinafter BAKER, *MEDIA, MARKETS, AND DEMOCRACY*].

⁴ Ed's bibliography is currently available at <http://www.law.upenn.edu/cf/faculty/ebaker/cv.pdf>.

adults.”⁵ He felt the same way about teaching. Ed viewed his students as adults, equals, and partners. He held them to the high intellectual standards he set for himself; he treated them with profound respect. Students who took up the partnership learned deeply and remembered for life. Sylvia Brown, who went on to teach international human rights law and U.S. constitutional law at Kwansai Gakuin University Law School in Japan, recalls,

My class arrived at Penn at the same time as Ed—August 1981. My fondest memory is an occasion when one of my classmates responded to one of Ed’s questions and confounded him: Ed ruffled his hair (a regular gesture) stared at the ceiling (another usual move) and then, beaming at us with genuine joy said, “I can’t answer that. I’ll have to think about it.” There was laughter, of course, but there was also a palpable warmth and delight in the room. He was truly proud of his students for stumping him and we loved him for it.

Ed was generous intellectually and personally with friends and colleagues. Penn Law Dean Mike Fitts lauds Ed’s “penetrating intellectual insights, his high expectations and his quiet but caring approach to people around him.” Comments from Ed’s colleagues reverberate with gratitude for the intellectual curiosity, rigor, and clear-eyed balance he contributed to their work, as well as for the depth of his friendship. Peggy Radin, who began teaching with Ed at Oregon and now teaches at the University of Michigan Law School, recalls, “Ed was my best (or worst) critic. Ed would never let anything go at the surface of a facile statement. He would dig and dig. He was a fantastic commentator. That’s also what kind of friend he was.” Gerry Neuman, who taught with Ed at Penn Law and now teaches at Harvard Law School, concurs:

Ed was generous and incisive in commenting on the work of colleagues who engaged in other forms of scholarship, and this made him an important mentor for me. He equally welcomed fair criticisms of his own writing, in matters large or small. Ed’s extreme fair-mindedness could, however, make him an ineffective ally in debates at faculty meetings. You could never tell when he would suddenly perceive and admit the merit of a point made on the other side.

Susan Sturm, who went on from teaching with Ed at Penn Law to a post at Columbia Law School, remembers best Ed’s silences, a remembrance that strikes her “as ironic given his lifelong commitment to communication.” She elaborates,

⁵ BAKER, MEDIA, MARKETS, AND DEMOCRACY, *supra* note 3, at xiii.

He was comfortable with the long pause, the space between the comment, and the raised eyebrow or crooked smile. I remember leaning in to our conversations, both literally and figuratively, so as to hear, to connect, to engage. His gentleness of spirit was a wonderful complement to his toughness of mind.

Ed's warmth, his passion, and his insight are now memory and legacy. In his most widely reprinted book, Ed observed of the Internet, "Tools can make doing some things easier But the Internet is not ideas, not knowledge; it is not passion or values; nor is it wisdom or meaning. It may increase the creation, occurrence, or distribution of these things But that depends on its use."⁶

The same can be said of legacies. The task is now for those of us who knew and admired Ed Baker to use his legacy to nourish the passion and values, the wisdom and meaning, the liberty and justice that he cherished during his life.⁷

Seth Kreimer

January 7, 2010

⁶ BAKER, MEDIA, MARKETS, AND DEMOCRACY, *supra* note 3, at 285.

⁷ Ed is survived by his sister Nancy. She can be contacted at nbaker@fielding.edu or by mail at Fielding Graduate University, 2112 Santa Barbara Street, Santa Barbara, California 93105.