

## BAKER TRIBUTE

*Anne Marie Lofaso\**

This is my first public reflection on Ed Baker (1947-2009),<sup>1</sup> whom I ultimately thought of as my older brother. I have waited almost two years to write or talk about him, primarily because thinking about him since his death has been too painful. To paraphrase C.S. Lewis, I hope these remarks might shed some light on “the joy then” that is the cause of the “sorrow now.”<sup>2</sup>

I met Ed in January 1989 at the University of Pennsylvania. Ed was my first-year Constitutional Law professor. My first memory of Ed was that dreaded day in January when first-semester, first-year grades are released. Ed started class by telling us not to worry about the grades we received. He said that grades do not necessarily reflect knowledge or command of the first-semester curriculum. He also took issue with those who might tell us that first-semester grades determine career success. Revealing that he was a “mediocre” student at Yale, he told us to keep trying to do what it took to be who we wanted to be. At that time, I did not know my grades, but I felt much less nervous about what was to come. Ed commuted from the Village in New York City to Philadelphia four days a week. At least once a week—typically on the Thursday or Friday that he would return to New York for a long weekend—Ed would announce in class that he would be eating lunch at the White Dog Café, which was a kind of “groovy” restaurant across the street from the Law School. He expressly invited any students to join him. The restaurant is self-described as “a local favorite known for its unusual blend of award-winning contemporary American cuisine, civic engagement, and environmental

---

\* A.B. Harvard University, J.D. University of Pennsylvania, D.Phil., University of Oxford, Professor of Law and Associate Dean for Faculty Research and Development, West Virginia University College of Law.

<sup>1</sup> Ed Baker died on December 8, 2009. The Inaugural C. Edwin Baker Lecture on Liberty, Equality, and Democracy was held at West Virginia University College of Law on October 10, 2011. For further information, see *To Honor his Legacy C. Edwin Baker: Lecture for Liberty, Equality, and Democracy*, W. VA. C. L., <http://law.wvu.edu/bakerlecture> (last visited Sept. 18, 2012).

<sup>2</sup> See generally C.S. LEWIS, *A GRIEF OBSERVED* (1961). In the movie *Shadowlands*, Joy tells C.S. Lewis, “[w]e can’t have the happiness of yesterday without the pain of today. That’s the deal.” *SHADOWLANDS* (Price Entertainment 1993). These words also have biblical roots: “And ye now therefore have sorrow: but I will see you again, and your heart shall rejoice, and your joy no man taketh from you.” *John* 16:22 (King James).

sustainability.”<sup>3</sup> To give you a more vivid idea of the type of café that the White Dog was, let me give you a few examples of some of the lunch entrees: free-range Amish chicken cobb salad with organic bibb lettuce and sherry vinaigrette; spicy lamb Bolognese with whipped basil ricotta and organic baby spinach; and crab cakes with saffron orzo shaved fennel salad.<sup>4</sup>

I was often the only person to show up to lunch, so I would have Ed all to myself for an hour or so before he needed to walk to the 30th Street Station to catch the train back to New York. Ed’s soft-spoken, Kentucky drawl characterized him: He was a self-declared “Southern gentleman” who came “not from a confederate state.” I only once heard him raise his voice in the twenty years that I knew him—and I probably deserved it. I only once heard him curse. We were in the White Dog talking about *Cohen v. California*,<sup>5</sup> the case in which the Supreme Court of the United States overturned the conviction of Paul Cohen who had been arrested for wearing a jacket bearing the words “Fuck the Draft.” We talked about so many things during those conversations. Was there was an unresolvable conflict between the Equal Protection Clause<sup>6</sup> and the Free Speech Clause?<sup>7</sup> Ed thought not, mostly because in his view the Free Speech Clause almost always won. To what extent should the First Amendment protect commercial speech? Ed thought that such protection should be limited to the extent that the speech was profit-motivated.<sup>8</sup> Who has the best free speech theory—was it the marketplace of ideas?<sup>9</sup> Was it

---

<sup>3</sup> *White Dog Newsletter*, WHITE DOG CAFÉ, [http://www.whitedog.com/uploads/newsletter\\_final%20web.pdf](http://www.whitedog.com/uploads/newsletter_final%20web.pdf) (last visited Sept. 18, 2012).

<sup>4</sup> *White Dog Lunch Menu*, WHITE DOG CAFÉ, [http://www.whitedog.com/uploads/ucity\\_lunch.pdf](http://www.whitedog.com/uploads/ucity_lunch.pdf) (last visited Sept. 18, 2012).

<sup>5</sup> 403 U.S. 15 (1971).

<sup>6</sup> U.S. CONST. amend. XIV.

<sup>7</sup> U.S. CONST. amend. I.

<sup>8</sup> See, e.g., C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3 (1976) (arguing that “given the existing form of social and economic relationship in the United States, a complete denial of first amendment protection for commercial speech is not only consistent with, but is required by, first amendment theory” because “unlike the broad categories of protected speech, commercial speech does not represent an attempt to create or affect the world in a way which can be expected to represent anyone’s private or personal wishes. Therefore, profit-motivated or commercial speech lacks the crucial connections with individual liberty and self-realization which exist for speech generally, and which are central to justifications for the constitutional protection of speech, justifications which in turn define the proper scope of protection under the first amendment.”).

<sup>9</sup> See, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.”).

Meiklejohn's democracy theory?<sup>10</sup> Balancing?<sup>11</sup> Protecting dissent?<sup>12</sup> Or Baker's liberty theory?<sup>13</sup> Ed explained over and over again why Baker's theory was superior. We also discussed who we thought was the greatest thinker of the twentieth century. My pick was John Rawls.<sup>14</sup> I think Ed agreed, at least at the time.

The more I spoke to Ed, the more enthralled I became with him as a person, as a teacher, as a thinker, and as a man. My classmates at Penn had one of two opinions of Ed—either he was the most brilliant thinker they had ever encountered (a pretty amazing claim considering that Penn Law's faculty included Elizabeth Warren and Lani Guinier at that time) or that he was completely incomprehensible (a claim made by those who thought that thinking should be easy). The latter group called him “quick-to-bed Ed”—an epithet that, according to those students, meant that Ed was putting them to sleep, but that, according to Ed, meant that the students thought that he was promiscuous. Another group of students thought that he was gay simply because he defended the right of gay and lesbian people to love one another freely. Ed asked me what I thought. I said, “Ed, you're *definitely* not gay.” When he asked how I knew that, I responded, “No self-respecting gay man would ever wear that belt buckle with those jeans or with those boots.”

Over the next two years, I took two more courses with Ed: Mass Media Law and Mass Media Policy Seminar. And we continued to talk at the White Dog and during his office hours. Our conversations grew deeper. We would talk about whether pornography should be suppressed because it is degrading to women. Ed said no. That is, pornography should not be suppressed; he made no claims to me as to whether pornography was degrading to women—at least not

---

<sup>10</sup> See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

<sup>11</sup> Balancing is clearly witnessed in cases where the Court has created a category of low-value speech, such as indecency or obscenity, and has required less justification from the government to uphold the speech regulation. See, e.g., *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 744–51 (1978) (Stevens, J.) (explaining that a radio broadcast of George Carlin's filthy words monologue was not entitled to absolute constitutional protection, that the speech, although not obscene, was offensive, and that the F.C.C. has power to regulate those words); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 66–67, 71–72 (1976) (Stevens, J.) (explaining, in the context of upholding a zoning ordinance for adult movie theaters, that the question whether the government may regulate speech often depends on the setting in which the speech occurs, and noting that the availability of alternative venues created only a “slight” “burden on First Amendment rights”).

<sup>12</sup> See, e.g., STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* (1999); STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* (1990).

<sup>13</sup> See, e.g., C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 *UCLA L. REV.* 964 (1978).

<sup>14</sup> See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

while I was using a knife to eat my lunch.<sup>15</sup> Additionally, we discussed whether advertisers and commercial interests have harmed a free press. Ed thought so and used empirical data and historical evidence to support that claim.<sup>16</sup> We also debated over whether advertisements reflected, reinforced, or created social norms.<sup>17</sup>

Graduation came upon us and I grew concerned that I would not see Ed anymore. But I had a plan. I mentioned to Ed that I would be moving to New York to practice law. We exchanged phone numbers on graduation day, and our relationship began to transition from student-teacher to friends.

Ed and I met quite often over the next few years between 1991 and 1997. Although I favored pizza, Ed typically took me out to dinner at some restaurant in the Village, such as Pó, where I was forced to eat what I called “Yuppie Food”—think White Dog Café. We met frequently during the year I spent working on Wall Street as a bankruptcy attorney. And we continued our conversations. Ed visited me in Vermont when I was clerking for Judge Oakes on the Second Circuit; I visited him when I was in New York for oral argument. And we continued our conversations. Ed also visited me at Oxford—three times in three years. Each time, I got him a speaking gig. Each time he stayed with me. I visited him when I returned to New York during the holidays or the summers. And we continued our conversations. During my time at Oxford, our relationship began to transition again from friends to mentor-mentee. So those conversations, in particular, grew deeper and more jurisprudential. We talked about whether corporations, as mere creations of the state, should be granted fewer free speech rights than human beings. Ed suggested that I read him for that answer.<sup>18</sup> We discussed whether there is a

---

<sup>15</sup> See generally C. Edwin Baker, *Of Course, More Than Words*, 61 U. CHI. L. REV. 1181 (1994) (reviewing Catharine MacKinnon’s book, *ONLY WORDS* (1993), and criticizing her view that the law should suppress pornography, rather than punish rapists and other perpetrators of sexual crimes, because the pornography, not the person, is responsible for the crime).

<sup>16</sup> See generally C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* (1995).

<sup>17</sup> See generally *id.*

<sup>18</sup> According to Ed,

Business enterprises in general—commercial corporations even more obviously—are legal entities created for essentially instrumental reasons. These entities allow the economy to operate effectively in the modern world. Despite being vitally important, their merely instrumental rationale leaves them with a morally different status than living, flesh-and-blood people—the people who Kant argues must be valued as ends and whose ultimate value a legitimate state must respect. This difference certainly explains why, under any theory centered on the moral importance of individual liberty (the formal right to make, stupidly or wisely, choices about oneself), individuals’ right to make speech choices has constitutional status while these entities’ rights do not.

C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981, 987–88 (2009) (citing IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* (Thomas Kingsmill Abbott trans.,

difference between those who use their rights instrumentally and those whose rights are inherent. Ed suggested that I read him for that answer.<sup>19</sup> We deliberated over which is a better theory for grounding workplace law—autonomy and dignity or pluralism?<sup>20</sup> Ed suggested that I also review theories grounded in participatory democracy.<sup>21</sup> We also debated over who was the better legal philosopher—Ronald Dworkin or H.L.A. Hart?<sup>22</sup> I told him that I favored Dworkin (I think he did, too) but that I seemed to be in the minority at Oxford on that one.

At Oxford, Ed also met my other friends—the other doctoral candidates. We would all gather around a table at the old canteen and drink tea, eat cheese sandwiches, and talk about free speech. One day, we showed him the free speech syllabus. His writings were required reading. Ed gave us his famous wry smile and said nothing.

A funny side story—when Ed stayed with me, I would put him on a futon or mattress on my floor. One night, I got food poisoning from the chicken curry I had eaten earlier in the day. I called the doctor, who made house calls. The doctor came over in the middle of the night; he looked at Ed—with a disapproving stare—as Ed pretended to be asleep. I noticed what was happening so I said: “Don’t worry about him, he’s just my professor.”

I got it wrong that evening. Ed was not just my professor. Nor was he just my mentor—the person who guided my research, taught me how to think, and supported me in all that I was doing. Ed was my friend, and as my friend he encouraged me to think freely.

After graduate school, I moved to Washington, D.C., and Ed and I remained in touch. He visited me several times in D.C. We frequently spoke by phone, and although he encouraged me to communicate also by e-mail, I rarely did. I preferred to listen to him speak. His logic was impeccable; his pauses were frightening—the calm before the stormy attack that destroyed months of thinking. But my thinking was always better for it.

When I went on the market, Ed encouraged me to come to West Virginia. In advising me on whether to take WVU’s early offer, he told me that

---

Dover Publ’ns 2004) (1788)). Although this is a later-published article, this article represents the views he held during the time of our talks.

<sup>19</sup> Ed’s views on this matter can be found in many of his writings. *See, e.g.*, C. Edwin Baker, *Republican Liberalism: Liberal Rights and Republican Politics*, 41 FLA. L. REV. 491 (1989).

<sup>20</sup> *See generally* Anne Marie Lofaso, *Toward a Foundational Theory of Workers’ Rights: The Autonomous Dignified Worker*, 76 UMKC L. REV. 1 (2007) (arguing that workers’ rights are grounded in two foundational values: autonomy and dignity).

<sup>21</sup> *See* BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (20th anniversary ed. 2004); CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* (1970).

<sup>22</sup> *Compare* RONALD DWORIN, *A MATTER OF PRINCIPLE* (1986); RONALD DWORIN, *LAW’S EMPIRE* (1988), *and* RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* (1978), *with* H.L.A. HART, *THE CONCEPT OF LAW* (2d. ed. 1994).

I “could get an offer from a top-10 school, no offer at all, or anything in between.” He added that he had heard great things about the WVU Law faculty and that it was the faculty that makes your life happy or miserable as an academic. So with Ed’s blessing, I took this job.

The year Ed died, we were planning another visit—this time, he was to visit me. I could not wait to show him Morgantown and to introduce him to my colleagues, especially to my dean and to Bob Bastress, who has many traits in common with Ed. Our last conversation was just a few days, perhaps a week, before he died. I had just finished a tribute to another mentor, Clyde Summers.<sup>23</sup> I called Ed just to update him on what was going on and to get advice on a few challenges that I was facing. Ed said in reaction to my own actions, “I don’t know what it is about academia that makes junior faculty weak, but I know that you are brave.” Then in a very uncharacteristic way, Ed said, “I am proud of you.”

I deeply regret—in the way that one might regret the death of her father before he has had the chance to give her away at the altar—that Ed did not live to see me granted tenure. I deeply regret not visiting him the year that he died because I was too busy trying to get tenure. I deeply regret spending my last few phone calls asking for his advice on getting tenure rather than listening to him speak about his latest book. And finally, I deeply regret never having told him how much he meant to me. But here’s what I don’t regret. I don’t regret finding the courage to ask Ed’s sister, Nancy Baker, whom I met for the first time at Ed’s memorial service at Cardozo, to consider giving Ed’s archives to WVU. Nor do I regret asking my dean, Joyce McConnell, to somehow make it happen. I wanted Ed’s archives here so that I could ensure that the very special types of conversations I shared with Ed might be available to future scholars who care deeply about liberty, equality, democracy, and social justice.

Today’s conversation with Vince Blasi and Jim Weinstein, moderated by Bob Bastress, is designed to honor Ed by people who loved his mind and who loved him. I hope today that you will get a glimpse into the kind of person Ed was—yesterday’s joy that has provoked today’s sorrow.

---

<sup>23</sup> Anne Marie Lofaso, *Talking Is Worthwhile: The Role of Employee Voice in Protecting, Enhancing, and Encouraging Individual Rights to Job Security in a Collective System*, 14 EMP. RTS. & EMP. POL’Y J. 55 (2010). The tribute was written in November and December 2009 as part of a special issue in honor of Clyde W. Summers, who had recently taken ill. Professor Summers died on October 30, 2010, shortly after publication of this symposium issue in his honor.