FORMAL EQUALITY, FORMAL AUTONOMY, AND POLITICAL LEGITIMACY: A RESPONSE TO ED BAKER

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I. INTRODUCTION

I first met Ed Baker thirty years ago at the home of one of his Penn colleagues. I didn't really get to know Ed, however, until about eight years ago when we were together at several free speech conferences. I then encountered firsthand not only Ed's well-known brilliance and creativity but also his wry sense of humor and his way of expressing affection through gentle teasing. I also discovered that Ed and I had considerably different views about free speech. Ed thought that the basis of American free speech is a commitment to formal autonomy, while I believed that its core principle is a commitment to participatory democracy founded on formal equality. So, after many hours of interesting and productive discussion between ourselves, we decided to form a theory group to address this question in writing. Other members of this group include Vince Blasi, Robert Post, Tim Scanlon, Seana Shriffrin, Steve Shiffrin, Eugene Volokh, and Susan Williams.

Earlier this year, the *Virginia Law Review* published a symposium with target articles by Robert Post and me defending participatory democracy as the

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basis of the American free speech principle,[1] with critical responses from the rest of the group,[2] including Ed.[3] Later this month, as Anne mentioned, *Constitutional Commentary* will publish a symposium with target articles by Ed and Seana Shriffrin defending their quite different visions of individual autonomy as the basis of the American free speech principle,[4] with other members of the group filing responses.[5] It's Ed's target article that Anne has just summarized and to which I will respond in a moment.

Before we formed this free speech theory group, Ed and I were friendly acquaintances. Through working closely with him on this project, we became friends. I would like to think good friends. And so it was one of the saddest days of my life on December 9, 2009, when Seana called to tell me that Ed had died suddenly the previous evening. I am very grateful to Nancy Baker and to the faculty of the West Virginia University College of Law, especially Anne Lofaso, for this opportunity to once again engage in discussion with my friend Ed Baker.

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[1] Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477 (2011); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491 (2011).

[2] C. Edwin Baker, *Is Democracy a Sound Basis for a Free Speech Principle?* 97 VA. L. REV. 515 (2011); Vincent Blasi, *Democratic Participation and the Freedom of Speech: A Response to Post and Weinstein*, 97 VA. L. REV. 531 (2011); T.M. Scanlon, *Why Not Base Free Speech on Autonomy or Democracy?*, 97 VA. L. REV. 541 (2011); Seana Valentine Shiffrin, *Methodology in Free Speech Theory*, 97 VA. L. REV. 549 (2011); Steven Shiffrin, *Dissent, Democratic Participation, and First Amendment Methodology*, 97 VA. L. REV. 559 (2011); Eugene Volokh, *In Defense of the Marketplace of Ideas/Search for Truth as a Theory of Free Speech Protection*, 97 VA. L. REV. 595 (2011); Eugene Volokh, *The Trouble with "Public Disclosure" as a Limitation on Free Speech Rights*, 97 VA. L. REV. 567 (2011); Susan H. Williams, *Democracy, Freedom of Speech, and Feminist Theory: A Response to Post and Weinstein*, 97 VA. L. REV. 603 (2011).

[3] Baker, *supra* note 2.

[4] C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251 (2011); Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283 (2011).

[5] Vincent Blasi, *Seana Shiffrin's Thinker-Based Freedom of Speech: A Response*, 27 CONST. COMMENT. 309 (2011); T.M. Scanlon, *Comment on Baker's Autonomy and Free Speech*, 27 CONST. COMMENT. 319 (2011); T.M. Scanlon, *Comment on Shiffrin's Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 327 (2011); Shiffrin, *supra* note 4; Seana Valentine Shiffrin, *Reply to Critics*, 27 CONST. COMMENT. 417 (2011); Steven H. Shiffrin, *Freedom of Speech and Two Types of Autonomy*, 27 CONST. COMMENT. 337 (2011); Eugene Volokh, *Speech Restrictions that Don't Much Affect the Autonomy of Speakers*, 27 CONST. COMMENT. 347 (2011); James Weinstein, *Free Speech and Political Legitimacy: A Response to Ed Baker*, 27 CONST. COMMENT. 361 (2011); James Weinstein, *Seana Shiffrin's Thinker-Based Theory of Free Speech: Elegant and Insightful, But Will It Work in Practice?*, 27 CONST. COMMENT. 385 (2011); Susan H. Williams, *Free Speech and Autonomy: Thinkers, Storytellers, and a Systemic Approach to Speech*, 27 CONST. COMMENT. 399 (2011).

II. WHY FIT MATTERS

My disagreement with Ed about free speech is not just theoretical, it is also meta-theoretical. In my view, free speech theory should be judged both by its normative appeal as well as by its fit with current doctrine. A theory with reasonably good doctrinal fit brings coherence to what might otherwise seem an inexplicable jumble of random decisions. Such coherence will, in turn, promote doctrinal clarity, stability, and administrability, features which provide, among other benefits, notice to speakers and law enforcement officials as to what speech is protected and what may be forbidden.[6] For Ed, in contrast, doctrinal fit is largely irrelevant to judging the merits of a free speech theory, leaving normative appeal as the only important criterion.[7]

In addition, purely normative free speech theories are often problematic because, like purely normative debate more generally, there is rarely agreement on the criteria by which to judge the merits of contending theories. Bereft of any such common ground, purely normative debate often has the deep subjectivity—and hence the productivity of—schoolyard boasts about whose dog is best. So, I was delighted to discover that the normative essence of Ed's autonomy theory is political legitimacy, the same basic norm that underlies the vision of participatory democracy that I endorse. The burden of my remarks here today, therefore, will be to show that there is a much stronger connection between participatory democracy and political legitimacy than there is between formal autonomy and political legitimacy. If I can carry this burden, then by Ed's own standards, participatory democracy is the better theory of free speech.

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[6] For a more detailed discussion of the importance of doctrinal fit, see James Weinstein, *Participatory Democracy as the Basis of American Free Speech Doctrine: A Reply*, 97 VA. L. REV. 633, 634–35 (2011).

[7] According to Ed, from the "critical rather than the apologetic perspective, the significance of 'fit' between theory and doctrine becomes murky. Instead, theory could be measured by how well it casts light on what is good about portions of doctrine that are good and what is bad about portions that are bad." Baker, *supra* note 2, at 524–25*; see also*, Baker, supra note 4, at 270 ("The measure of appeal of a First Amendment theory should not be the extent that it conforms to existing doctrine . . . ."). I disagree with Ed's suggestion that emphasis on doctrinal fit necessarily tends to make one "an apologist for the status quo" (Baker, *supra* note 2, at 524) or requires one to defend the "legal correctness" of morally repugnant decisions (Baker, *supra* note 4, at 270). To the contrary, considering fit as well as normative appeal leaves plenty of room to criticize not only individual cases but also more general features of the Court's free speech jurisprudence. *See, e.g.*, Weinstein, *supra* note 1, at 501 n.53, 510 n.85 (criticizing Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010), as wrongly decided); Weinstein, *supra* note 6, at 647 (criticizing extension of the N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964), malice rule to defamation actions brought by public figures).

III. DEFINITION OF LEGITIMACY

Before discussing why I think participatory democracy in service of a commitment to formal equality more robustly promotes political legitimacy than does formal autonomy, I will first define the term "legitimacy." And to maintain the common ground I just mentioned, I will try to hew closely to what I understand Ed means by the term. As Ed explains in his paper that Anne summarized,[8] political legitimacy is at least a partial solution to the age-old problem of justifying the use of force or coercion to enforce the law, or relatedly, a partial answer to H.L.A. Hart's question of what conditions are necessary to obligate, not merely to oblige, people to obey the law.[9] In this sense, legitimacy has both a descriptive and a normative dimension: Descriptively, a legal system is invested with legitimacy to the extent that citizens obey the laws, not just out of fear of punishment, but also out of the sense of duty or, to use Hart's term, obligation. Or, even if the decision to obey the laws is not out of a commitment as strong or as grand as a duty, the legitimacy of the legal system is promoted when citizens chose to obey the law because they think that doing so is generally the right thing to do. Normatively, a legal system is legitimate if it warrants, on moral grounds, the allegiance of its citizens.

Consistent with his preference for normative critique over descriptive analysis, Ed seems to be concerned primarily with the normative rather than the descriptive aspect of legitimacy. Here Ed and I may diverge somewhat in what we mean by legitimacy. For consistent with my view of the proper criteria for judging the merits of a free speech theory, I think that both a descriptive and a normative inquiry is relevant to measuring the legitimacy of a legal system. Indeed, it seems to me that these two dimensions converge at least at the following point: One reason that citizens might feel obligated rather than merely obliged to obey the laws, or at least might possess the belief that obeying the laws is generally the right thing to do, is their warranted convictions that the legal system is, on the whole, moral. Nevertheless, to maintain common ground with Ed, I will primarily emphasize the normative dimension of legitimacy.[10]

So the question becomes, do restrictions on speech that interfere with democratic participation undermine warranted allegiance to the legal system to

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[8] Baker, *supra* note 4, at 262; *see generally* Anne Marie Lofaso, *A Bakerian Response to Weinstein's Free Speech Theory*, 115 W. VA. L. REV. 39 (2012).

[9] *See* H.L.A. HART, THE CONCEPT OF LAW 82–91 (2d ed. 1994).

[10] Though not particularly relevant to this discussion, I should at least note that in common usage there is a highly positivistic conception of legal legitimacy that focuses on whether government assumes power in accordance with the system's rule of recognition for the transfer of power and, while in power, acts in general accord with the constitutional rules that define the scope of the powers given to it.

a greater extent than do laws that infringe formal autonomy? I will attempt to show that this question should be answered in the affirmative by first considering the relationship among free speech, democratic participation, and political legitimacy. I will then do the same for free speech, formal autonomy, and political legitimacy.

IV. LEGITIMACY, PARTICIPATORY DEMOCRACY, AND FREE SPEECH

Measures that selectively restrict the ability of individuals to participate in the political process violate the fundamental precept of equal citizenship underlying contemporary visions of democracy. As the preeminent democratic theorist Robert Dahl has explained, "[t]he democratic process is generally believed to be justified on the ground that people are entitled to participate as political equals in making binding decisions, enforced by the state on matters that have important consequences for their individual and collective interests."[11] Whatever may have been thought in times past, it is now a basic precept of modern democracy that every competent adult member of society has a fundamental right to participate in the process by which a nation's collective decisions are made, and as a formal matter at least, has the right to do so on an equal basis with all other citizens. Indeed, this norm of equal formal participation has become so deeply entrenched in both American and European political culture that its violation is seen as a denial of the equal moral worth of any individual excluded from this process.

So while Ed and I agree that the normative essence of free speech is the legitimacy it confers on the legal system, I see the concern for political legitimacy as based on a commitment to formal equality, whereas Ed ties legitimacy to a commitment to formal autonomy.

In addition to the profound commitment to formal equality, there is, in my view, another essential normative commitment underlying the concern for political legitimacy. Selective exclusion from voting or from expressing one's views on matters of public concern—be it about the war in Afghanistan, health care reform, same-sex marriage, or a proposed tax hike—is fundamentally unfair, and is likely to be perceived as such by those so excluded. And laws that are, and are perceived to be, fundamentally unfair will be especially corrosive to the moral foundation warranting citizens' allegiance to the legal system. For this reason, fundamental fairness stands together with formal equality as twin pillars supporting the legitimacy of the legal system.

I want to also suggest that it is this concern for legitimacy—or more precisely, the dual commitments to formal equality and fundamental fairness that underlie this concern—that explains the American free speech doctrine's

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[11] ROBERT A. DAHL, CONTROLLING NUCLEAR WEAPONS: DEMOCRACY VERSUS GUARDIANSHIP 5 (1985).

rule against laws that restrict public discourse[12] on the basis of content, especially viewpoint.[13] Viewpoint-based restrictions on public discourse are, and are likely to be perceived by those selectively silenced as, both a denial of the equal moral worth of those excluded from participating in the political process and fundamentally unfair. This profound commitment to formal equality and fundamental fairness is in my view why American free speech doctrine so robustly protects speech by which public opinion is formed. This protection extends even to palpably harmful speech, as was involved, for instance, in *Snyder v. Phelps*,[14] in which a preacher and his family held up signs bearing despicable messages such as "Thank God for Dead Soldiers" and "Thank God for IEDs" adjacent to a public street near the church where the funeral of a soldier killed in Iraq was being held. This profound commitment is also why the expression of racist ideas in public discourse is protected despite the harm it can cause, as is anti-war speech that can dispirit our troops and encourage our enemies.

To appreciate the connection to public discourse and political legitimacy, consider the following scenario: Suppose a state legislature puts out for a referendum the question of whether there should be a tax increase. Suppose further that the legislature also passes a law forbidding anyone from publicly speaking in opposition the proposed tax increase. If under these conditions, the tax increase passed, as to those excluded from the public discussion on the measure, imposition of the tax increase would lack legitimacy even though they had a right to vote against the increase. So the right to vote for or against a measure does not, as I have occasionally heard asserted, cure the legitimacy problem created by the imposition of viewpoint-based restriction on public discourse. This is because the formation of public opinion resulting from public discourse is the primary way that citizens control their elected officials between elections.

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[12] Following the lead of the Supreme Court and Robert Post, I use the term "public discourse" to refer to speech essential to democratic self-governance, which I have described as "speech on matters of public concern, or largely without respect to its subject matter . . . expression in settings dedicated or essential to democratic self-governance, such as books, magazines, films, the internet, or in public forums such as the speaker's corner of a park." Weinstein, *supra* note 1, at 493. For a more refined description of the term, as well as for a discussion on the methodology by which the Court determines the boundaries of public discourse, see Weinstein, *supra* note 6, at 637–39. Consistent with my view that the core value of free speech is the legitimacy that political participation confers on the legal system, government has far more leeway to regulate the content of speech other than public discourse. *See* Weinstein, *supra* note 1, at 493–94.

[13] *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 ("When the government targets not subject matter, but particular views taken by speakers on the subject, the violation of the First Amendment is all the more blatant.").

[14] 131 S. Ct. 1207 (2011) (holding that because the speech involved was a matter of public concern, it could not form the basis of a claim for intentional infliction of emotional distress or related tort actions by the father of the dead soldier).

Significantly, substantial legitimacy problems are created by *any* viewpoint-based restriction on the debate on matters of public concern, be it about something as momentous as whether our nation goes to war, or abortion, or immigration policies, or as mundane as where to build a road or place a traffic light. This is, as I have emphasized, because excluding people from discussion of public issues denies their basic equality as citizens and violates fundamental fairness.

I want to draw an important distinction here. So far I have focused on how excluding someone from participating in public discourse can make a particular imposition of a law illegitimate as to that person. But as I have also alluded to, denials of the right to participate in the political process, including restrictions on the ability to participate in public discourse, can in addition undermine the legitimacy of the entire legal system. Now let me be clear: I'm not arguing, as I have sometimes been misunderstood as suggesting, that a single viewpoint restriction on public discourse would itself significantly undermine the legitimacy of a state's legal system. (Though such a restriction, as I have emphasized, would make the application of a law illegitimate as to those prevented from expressing opposition to it.) Rather, to use Robert Dahl's useful metaphor, each such restriction would to some extent lower the level of the legitimacy "reservoir."[15]

V. LEGITIMACY, FORMAL AUTONOMY, AND FREE SPEECH

Having shown why there's a keen connection between democratic participation and legitimacy, I'll now examine the relationship between formal autonomy and political legitimacy. As Anne said, the autonomy that Ed is concerned with is formal autonomy, which he defines as "a person's authority (or right) to make decisions about herself—her own meaningful actions and usually her own resources—as long as her actions do not block others' similar authority or rights."[16] Although such autonomy includes a lot more than speech, it does, as Ed notes, readily "encompass self-expressive rights that include . . . a right to seek to persuade or unite or associate with others—to offend, to expose, condemn, or disassociate with them."[17] Ed attempts to tie this vision of autonomy to legitimacy by arguing that "the majority, those prepared to back their law with force," must propose "only laws or projects for which they can in good faith give reasons to the dissenter why she could and, the majority argues,

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15 ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 148–49 (1971).

16 Baker, *supra* note 4, at 254. In contrast, Ed refers to an individual's "capacity to pursue successfully the life she endorses—self-authored in the sense that, no matter how her image of a meaningful life originates, she can now endorse that life for reasons she accepts" as "substantive autonomy." *Id.* at 253.

17 *Id.* at 254.

should accept these laws."[18] This requirement is, in Ed's words, "an implicit premise of discourse, that is, of communicative action . . . ."[19]

Significantly, to the extent that the focus of Ed's theory is with "discourse" or "communicative action" by which "the majority . . . in good faith give[s] reasons"[20] to the dissenters why they should accept laws, Ed's theory overlaps considerably with my (and Robert Post's[21]) democracy-based theories. To this extent, Ed's autonomy theory, like a theory grounded in participatory democracy, focuses on the *process* necessary to make a particular law or an entire legal system legitimate. Crucially, however, Ed's theory, unlike a theory based in democratic participation, also embraces communicative action that has nothing to do with the process by which laws or social policy is adopted. Rather, the "communicative action" central to Ed's theory concerns "a process by which people seek agreement,"[22] not just about matters of public concern such as the morality of abortion or the desirability of same-sex marriage, but also about personal matters, such as trying to persuade a friend to leave a worthless or philandering spouse[23] or even about discussions about where a group of friends should go to dinner.[24] However, the inclusion of speech that has no bearing on decisions about public matters creates a large problem for Ed's theory. The difficulty arises because the connection between agreement-seeking communicative action on purely private matters and political legitimacy is obscure.

I agree with Ed that government should respect the presupposition of autonomy inherent in communicative action, whether such expression concerns public or private matters. I will even grant for the sake of argument (though since this is an extremely difficult question, only for the sake of argument) that laws that fail to respect formal autonomy are not just morally deficient and unconstitutional but illegitimate as well. I will further grant for the sake of argument that restrictions on autonomy imposed for insufficient reason do not respect this autonomy. But here's the rub: When government has good and substantial reasons for restricting formal autonomy, which it often will given the capacious scope of formal autonomy identified by Ed, it does not disrespect this autonomy and therefore is not acting illegitimately.

A defamation action by private citizens on matters of private concerns provides a good example of this point. Let's assume that Andy tells Bob that he should shun Charlie, a new member of their social club, because Charlie beats

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18 *Id.* at 267.

19 *Id*.

20 *Id.*

21 *See generally*, Post, *supra* note 1.

22 Baker, *supra* note 4, at 267.

23 *Id.* at 254–55.

24 *Id.* at 267.

his wife, an accusation that turns out to be false. Let's also assume that Charlie is not a public official or public figure but rather a private individual. Finally, let's assume that although he acted negligently in making this false accusation, Andy did not know that what he said was false, nor did he act with reckless disregard of the truth. Now Andy's condemnation of Charlie fits squarely within Ed's definition of communicative action. And contrary to current doctrine, which would allow Charlie to recover damages for Andy's negligent comments, Ed believes that because Andy neither knew that his accusation was false, nor spoke with reckless disregard for the truth, the First Amendment should bar recovery.[25]

There can, of course, be reasonable disagreement as to what level of protection, if any, the First Amendment should provide defamatory speech of private concern about a private individual such as in this example. Subject to the "malice" exception just mentioned, Ed would protect such speech; I (and the Supreme Court) wouldn't.[26] But in light of Charlie's important substantive autonomy interests that would likely be compromised by the spreading of this false information about him, including the likelihood that he would be shunned, it is difficult to comprehend how allowing Charlie to recover damages from Andy is illegitimate in itself, let alone would diminish the legitimacy of the entire legal system. Indeed, I think it's more plausible that *not* allowing Charlie to recover for Andy's culpable and harmful conduct would tend to corrode the moral underpinnings of the legal system.

This example is not just cherry picking but rather exposes a problem with a large swath of "communicative action" that Ed's autonomy theory would protect. Here's another example: Suppose that in an exercise of his formal autonomy, a white man walks up to a black man waiting for the bus and calls him a "dirty nigger." Ed's view of formal autonomy, it will be recalled, includes "a right to . . . offend, or condemn," not just in the expression of ideas in public discourse but in private conversations as well. So Ed's theory, contrary to Supreme Court "fighting words" doctrine,[27] and in contrast to the democracy-based theory that I embrace, includes the right to engage in such face-to-face insults.[28] As with defamation on matters of private concern,

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25 *Id.* at 282 n.62.

26 *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

27 *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

28 Ed, to his credit, unlike some other brilliant theorist, never tried to concoct some conveniently gerrymandered hate speech exception to the protection provided by his theory. *Cf.* OWEN FISS, THE IRONY OF FREE SPEECH (1996) (arguing for a hate speech exception from an otherwise broad and robust view of speech protection). For a criticism of Fiss's position, see James Weinstein, *Taking Liberties with the First Amendment*, 17 LAW & PHIL. 159 (1998) (book review). Though passionately committed to civil rights, Ed defended the right of individuals to express racist views. *See* C. Edwin Baker, *Autonomy and Hate Speech*, *in* EXTREME SPEECH AND DEMOCRACY 139 (Ivan Hare & James Weinstein eds., 2009). This is a prime example of Vince Blasi's observation that Ed had the intellectual integrity and courage to take the implications of

however, both the utterer and the target of face-to-face insults such as this have moral claims sounding in autonomy (though once again I think the stronger claim lies with the target of the speech). It is therefore difficult to see how prohibiting the speaker from verbally attacking a fellow citizen in this way is illegitimate in itself, let alone undercuts the moral basis warranting allegiance to our legal system.

VI. CONCLUSION

So, even if Ed is right that "[t]he legitimacy of the legal order depends . . . in part, on it respecting the autonomy that it must attribute to the people whom it asks to obey the laws," government, in my view, does not fail to respect this autonomy when it has good reasons, often sounding in substantive autonomy, for infringing formal autonomy. In contrast, as I have attempted to show, even when there's good reason for the restriction, any viewpoint discriminatory restriction on public discourse will deprive a law of legitimacy as applied to those forbidden from expressing dissenting viewpoints about the measure. In addition, such restriction will tend to diminish the legitimacy of the entire legal system. There are indeed good reasons to stop racist speech, to prohibit anti-war speech, or to allow recovery for inflammatory public protests that inflict emotional distress on a father mourning his dead son. But unlike many exercises of formal autonomy, the right to express one's view in public discourse is so weighty and so intimately connected to the legitimacy of the legal order that justifications far more compelling than "good reasons" are required to justify denying an individual the right to participate in democratic self-governance.

So, with respect to the task of guarding political legitimacy, my dog Demo *is* better than Ed's dog Auto.

his theory where logic leads, even when it conflicts with his deep social and political commitments. *See* Vincent Blasi, *The Intellectual Integrity of Ed Baker*, 115 W. VA. L. REV. 7 (2012).