

## THE INTELLECTUAL INTEGRITY OF ED BAKER

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John Stuart Mill was not one of Ed Baker's favorite authors, although Ed knew his Mill well and drew on him for some of his important work. But I know Ed Baker would have been a particular favorite of John Stuart Mill. I say that not generically, but specifically. Mill said that what an adaptive, improving society needs most of all—even more than technological expertise—is the hardest thing to achieve: independent thinkers who have the courage to follow their thought wherever it leads, even when that journey risks unsettling their cherished beliefs or damaging their credibility.<sup>1</sup> Ed Baker was that rare specimen, a truly independent thinker.

Courage is hard to come by, not least in academia. It is not easy when a scholar discovers that where his thought leads him will disappoint his intellectual compatriots or cause his ideas to be profiled unfairly. It is not easy when he learns that where he needs to go entails additional research or self-training that will require much more time and effort than he had planned to devote to a project. Genuine curiosity can lead a scholar out of his comfort zone, into domains where he lacks intellectual capital and/or credentials. In that circumstance, he may need months or years to get up to speed, all the while not knowing whether the effort will yield anything of value. But if he is going to explore a subject or problem or idea in the right way, sometimes that kind of risky, arduous, patient undertaking is requisite. Most of us, when we confront that hurdle, find ways to redefine our project. Ed Baker did not do that. He put in the time and took the risk.

Another form of faint-hearted backing off relates to conclusions and types of argumentation. No scholar really prefers to take positions that most people think are impractical, too theoretical, or too idealistic. No scholar really prefers to advance a thesis that depends on arguments that do not summarize easily and that ask a lot of the reader. Most of us find ways to schematize. We compromise in the service of respectability, accessibility, or eloquence. Most of us, but not Ed Baker. I have known no more uncompromising scholar. He followed his thought where it led, in all sorts of directions he could not have

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<sup>1</sup> See, e.g., John Stuart Mill, *On Liberty*, in *THE PHILOSOPHY OF JOHN STUART MILL* 185, 250–71 (Marshall Cohen ed., 1961).

predicted and may not have welcomed. In that sense, he truly was the Millian independent thinker with genuine, rare, scholarly courage.

Examples of the fearlessness that was such an important dimension of Ed's intellectual integrity are many and various. He wrote a review of one of Catharine MacKinnon's most widely read books, *Only Words*.<sup>2</sup> The title is sarcastic. The book advances the thesis that words (and images) always have consequences in that they constitute power relations. The title of Ed's review is *Of Course, More Than Words*.<sup>3</sup> He then goes on to show that Professor MacKinnon's foundational observation does not begin to make her case for the constitutional legitimacy of regulating such consequential behavior. His review begins with a comprehensive summary of the various ways in which pornography does harm, then demonstrates how that harm still does not justify the regulations that MacKinnon endorses. Particularly courageous about that review is what Ed says about what might be called the democratic politics of misogyny. He criticizes Professor MacKinnon for not trusting democratic politics as much as she needs to. If we are to counter the harm that pornography does, Baker maintains, it is going to have to come through improved public understanding, not resented legal coercion. More people must come to appreciate how much injury is caused by degrading, servile, inauthentic portrayals of female sexuality.

Now, persons who share Ed's general political disposition might be troubled, I imagine, by the degree to which he makes room for a grassroots politics expressing certain misogynistic attitudes and premises. Can that possibly be what democratic politics is about? Ed courageously advances an argument that indeed we have to allow people to develop their ideas, however harmful and benighted. He had a true Brandeisian commitment to fighting bad ideas with good ideas through the medium of grassroots democratic politics. He believed that such distasteful and draining combat is the only effective way to contain the harms that speech can do. Ed maintained that government cannot ever regulate speech on the ground that people will be persuaded by it. That is a familiar bromide of the First Amendment lexicon, but most sophisticated analysts embrace it only to a degree. Ed was an absolutist on this point, an intellectually courageous position to take. And unlike most "absolutists," he did not treat the position as self-evident, or compelled by constitutional text or history. He developed and defended his absolutism regarding pornography with sophistication and candor.

Probably the most controversial as well as consequential free speech issue of our day is campaign finance regulation. Ed's view, developed with considerable ingenuity, was that elections are not a true measure of the

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<sup>2</sup> CATHARINE A. MACKINNON, *ONLY WORDS* (1993).

<sup>3</sup> C. Edwin Baker, *Of Course, More Than Words*, 61 U. CHI. L. REV. 1181 (1994).

democratic will.<sup>4</sup> You can imagine how vulnerable this view made him look. He believed that it is very important for a free society to develop a true democratic will. That is what the First Amendment is all about. But the way a society develops a true democratic will, and measures and nurtures and energizes it, is through all sorts of institutional commitments and human interactions other than elections. In this view, elections have a crucial role to play, but it is an instrumental role, that of distributing power so as to implement a democratic will that is developed not in the electoral process itself but rather in a never-ending, ongoing, grassroots process, a less calculating and focused procedure than an election. A society needs decisions pertaining to operational governance. Ed was no defender of anarchy or of the law of the jungle. But he believed that the integrity of the democratic will is the foundation of just governance. The problem with elections as a site for determining the democratic will, as he saw it, is that they are dominated by strategy.

My own behavior during the presidential election of 2008 makes his point. As an observer of that election, my mind was working overtime to calculate which are the real swing states and what sound bites would work with which constituencies. Whatever else I was doing, I was not participating in the ongoing formation of a genuine democratic will. On that occasion, I wanted my candidate to win so badly that all other considerations took a back seat. When he did, I indulged in a heartfelt victory lap, so to speak. But that kind of competitive quest and triumph, Ed asserted and I must concede, has very little to do with the forming of a democratic will. It entails a whole different set of judgments, understandings, and priorities.

You can appreciate what a gutsy guy Ed was to challenge the democratic bona fides of elections and then argue that speech in that context can be regulated consistent with a commitment to respect the integrity of the democratic will. Characteristically, Ed formulated this bold argument only after making many appropriate concessions and paying scrupulous attention to the counter-arguments that could be mounted against it. His position was provocative, but his analysis was methodical and thorough.

It is a sign of his thoroughness, as well as his intellectual courage, that he held his ground even to the point of advocating the regulation of independent expenditures surrounding elections.<sup>5</sup> One might think that even if the strategic speech of an office-seeker and her campaign apparatus has little to do with expressing or generating any kind of authentic democratic will, the speech of independent citizens about political candidates should not be considered to be so unremittingly strategic. Isn't such speech better classified as grassroots democracy speaking out on the most important concerns of the day? Ed, undaunted, developed the argument that it depends on who is the

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<sup>4</sup> See C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1 (1998).

<sup>5</sup> See *id.*

purportedly “independent” speaker. An independent speaker, in his view, is not just any person or entity that is trying to influence an election. To qualify as an independent speaker possessed of robust First Amendment rights in the election setting by virtue of helping to constitute the democratic will, an organization must have an existence throughout the year that entails speaking to a variety of issues and communicating with its intended audience on a regular basis. In contrast, if a speaker is an entity that is cranked up just to win an election, it should be seen as engaging in strategic speech, the type of communication that has little to do with the formation of a genuine democratic will. Such speech, Ed believed, can be regulated in the same way that society can regulate campaigning too close to a voting booth or decide who is entitled to appear on the ballot.

In his ambitious, deeply informed and informative book *Media Concentration and Democracy*,<sup>6</sup> Ed addressed the dangers that stem from media concentration. Before reading the book, potential critics might suppose that this topic is a little dated. After all, don't we have an Internet? One can imagine a scholar who is interested in the subject of media concentration treating this objection grudgingly. Not Ed. The book takes that bull by the horns. It is largely about why the advent of the Internet does *not* diminish the problem of media concentration. One of the many reasons why I think Ed would have been a favorite of John Stuart Mill is that he approached objections to his arguments the way Mill insisted they must be treated: with respect, even gratitude. Mill wanted the counter-arguments to his ideas stated fairly, powerfully, with lucid articulation and imaginative development. He viewed counter-arguments as opportunities to clarify and refine one's understanding.<sup>7</sup> That attitude is on display in *Media Concentration and Democracy*. Most of us, when we grudgingly attend to counter-arguments, find it hard to resist the temptation to present them in a slightly cartoonish form. We inflate the claims of the critics (real or hypothesized) who make the counter-arguments, and we present their evidence selectively and schematically. When Ed addressed counter-arguments, he not only showed that he had done his homework, he helped readers to navigate the bibliographic landscape so as to be able to form their own judgments regarding which side of the dispute has the stronger case. And he was scrupulously honest and thorough in presenting the claims and evidence he was at pains to refute.

This pattern in his scholarship relates to what I was speaking of earlier regarding the tendency of most of us to define the scope of our endeavors in a way that permits us to avoid being drawn into time-consuming research projects. Ed decided that if he was going to address the Internet counter-argument, he was going to have to study in some detail how the Internet is used

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<sup>6</sup> C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS* (2007).

<sup>7</sup> Mill, *supra* note 1, at 227–28, 238.

and how this relates to problems of media concentration. That led him to plunge into a vast new literature. He canvassed numerous studies of who reads blogs and whose blogs are read. He concluded that it is simplistic to imagine that anybody can just set up a blog and begin to communicate to a mass audience. He maintained that it still matters a great deal what ideas and facts are transmitted by media giants. And he discovered that by some measures there is surprisingly a greater phenomenon of concentration in the blogosphere than in the newspaper industry. The ten most-read blogs attract a higher percentage of the blogosphere audience than the ten most-read newspapers do of the newspaper audience. If we broaden the inquiry to the eighty most-read blogs and eighty most-read newspapers, the pattern of concentration holds: “The data indicate . . . that even though there are apparently millions of self-publishing bloggers, concentration of audience attention is extreme. . . . Of these millions of bloggers, most could probably reach larger audiences if they spent a couple of hours in the old-fashion activity distributing hand-bills in the town center . . . .”<sup>8</sup>

Ed also developed an argument about the economic logic of why media concentration replicates itself in the blogosphere. As reduced distribution costs make it feasible technically to reach a larger audience, the potential efficiency of successful audience acquisition techniques makes it economically logical to put more effort into that endeavor. And that brings into play the dynamics of concentration regarding branding and leveraging and tie-ins and the like. So it is not surprising that we have this kind of concentration in the blogosphere.

One of the features of Ed Baker’s scholarship that impresses me is his versatility. His study of media concentration is rich in empirical findings and economic logic. But philosophical and conceptual matters were equally important to him. The First Amendment states in part: “Congress shall make no law abridging the freedom of speech or of the press . . . .” One question presented by this formulation is whether it refers to two discrete freedoms, with distinctive histories and implications, or one cognate freedom to communicate. Some scholars have argued that the freedom of the press is not distinct from the freedom of speech. Ed, on the other hand, took on this question in a most interesting way.<sup>9</sup> He showed how the case law treats the press differently from individual speakers. Not in libel where it would not make sense to do so, but in disclosure requirements, for example, and also in imposing certain must-carry obligations. In fact, there are many ways in which the case law that we have treats the press differently from other kinds of speakers, and such differential treatment has not been controversial. This feature of the case law has implications, Ed argued, for the foundational question of whether we have a

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<sup>8</sup> BAKER, *supra* note 6, at 107.

<sup>9</sup> See C. Edwin Baker, *The Independent Significance of the Press Clause*, 35 HOFSTRA L. REV. 955 (2007).

distinctive constitutional principle of freedom of the press that is separate from the freedom of speech.

If so, it becomes imperative to define who counts as “the press,” not an easy matter in the age of the Internet. Never one to shy away from the hard questions, Ed produced a detailed analysis of the various ways in which one can decide who is “the press.” Characteristically taking a bold position, certain to attract criticism of a practical as well as a theoretical nature, he maintained that the purpose of the speaker is what matters most in determining who is “the press.”<sup>10</sup> He addressed both practical problems of proof and why theoretically the purpose of the speaker is the key to qualifying for the status of “press” as the First Amendment employs that concept. I believe that Ed attributed more significance to the phenomenon of speaker purpose than does any other leading First Amendment thinker. That is where his thought led him—his disciplined, rigorous, fearless thought. And even though many critics would never get past the considerable practical problems of proving what purpose a speaker may have had, Ed did not eschew reliance on that variable because he found it to be so central to the constitutional commitment.

Ed Baker first came to my attention as an important scholar with two articles he wrote in the mid-1970s addressing the question of what is the proper scope of the First Amendment.<sup>11</sup> Currently, that is a dominant, much-disputed question, but in 1976 there was not much systematic writing about it. The whole matter was somewhat taken for granted or bracketed in the literature. Ed said: let’s wait, the most important question really is what is the domain that is covered by this phrase “the freedom of speech or of the press.” Does it really cover commercial advertising?<sup>12</sup> Does it really cover symbolic speech? Why? What are our criteria for determining the scope of coverage? His early work was at the forefront of what became a seismic shift in debate about the meaning of the freedoms of speech and press. Now we focus not only on how deep is the protection granted by the First Amendment but also on what counts as a First Amendment activity.

There is one final observation I want to make about Ed Baker in the effort to mark his scholarly achievement and the example he set for all of us. Perhaps I can make my point best by starting with a confession. Anytime I come across a newly published article or book about the First Amendment, the first thing I do is to check the footnotes to see if I am cited. When I do that, almost always I am disappointed. Not so much because I am not cited enough: sometimes I feel that way, sometimes I don’t. What is maddening is that too often I feel that I am cited not by an author who is really trying to understand

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<sup>10</sup> See C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979 (1996).

<sup>11</sup> C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1977).

<sup>12</sup> C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981 (2009).

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what I was saying and either build on that or demonstrate in a careful why it might be wrong. Usually I am cited because, as luck would have it, some fragment of my work fits nicely into the argument the author is trying to advance. My scholarship is used instrumentally, strategically, and sometimes without strict accuracy or attention to context. The author is cherry picking. Few of us can resist the temptation to use the work of others in such a selective, typically mildly distorting fashion. But this is yet another way in which Ed Baker was different. He used the work of others in an unusually honest, discerning, faithful, careful way. For this reason, his books and articles serve wonderfully well as bibliographic resources, even for scholars who do not share his premises or for other reasons are not persuaded by his arguments. When I encounter his writings that draw upon the work of others, I feel that I have a pretty good idea what I want to read next about the subject. This is because Ed has presented the work of others in a way that does it justice.

Ed Baker was unpredictable but not erratic. He managed to be a fresh and friendly voice even as he brought to his work unusual levels of intellectual intensity and moral indignation, doggedness, and concern for consistency. One can be unpredictable by being a professional gadfly or a dilettante with few real commitments. Ed was a scholar with the deepest of commitments who nevertheless managed to turn a different corner and find a new way of looking at a problem, to take an unexpected position, to use an example one would never have thought of, not just to be creative but because that is where his thought led him. His originality, his courage, and his thoroughness were of a piece. They were expressions of his integrity.