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## Book Review: Human Liberty and Freedom of Speech. by C. Edwin Baker.

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**HUMAN LIBERTY AND FREEDOM OF SPEECH.** By C. Edwin Baker.<sup>1</sup> New York, N.Y.: Oxford University Press. 1989. Pp. viii, 385. Cloth, \$39.95.

*John Stick*<sup>2</sup>

Professor C. Edwin Baker has for the last dozen years been one of our most intelligent and interesting commentators on the first amendment. This book contains previously-published writings on free speech, plus much that is new or revised. The first half of the book presents a liberty theory of the first amendment, and a critique of other competing theories, particularly those derived from the metaphor of the marketplace of ideas. Baker's theory can be seen in greater depth and complexity here than in his isolated articles; the cohesive presentation in the first five chapters will become the primary source for scholars seeking to evaluate his theoretical work. The last six chapters apply his theory to selected doctrinal topics such as time, place, and manner regulations, parade permits, commercial speech, and press rights.

Although Professor Baker champions a liberty theory of the first amendment, he does not begin with a justification of liberty of speech. Instead, Baker begins with a rebuttal of what he describes as the prevailing orthodoxy: marketplace theories of the first amendment. Marketplace theories posit a goal of discovering truth and assert that a regime of unregulated speech is more likely to recognize truth and expose error than a regime of governmentally regulated speech. Baker explicitly identifies marketplace theories with utilitarian or general welfare theories about speech; he presents his theory by contrast as an anti-utilitarian theory, much as Dworkin introduces his theory as an anti-utilitarian theory of rights. After describing the marketplace theory and then his liberty theory, Baker walks them through a range of first amendment problems such as blackmail and whistle blowing, and the speech/action distinction. Finally, in the one part of the theoretical analysis that explicitly expresses his progressive political agenda, Baker states that "a central function of rights protected by the first amendment analysis is to contribute to a legitimate, democratic process for achieving needed change." He then proceeds to compare the liberty and marketplace theories, and concludes that marketplace theories reinforce the status quo, while the liberty theory protects rights and promotes progressive social change.

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*Human Liberty and Freedom of Speech* is more a work of theory than of case commentary. It lacks the sustained exploration of factual situations, or the systematic exploration of areas of doctrine, of works such as Emerson's *The System of Freedom of Expression* or Kalven's *A Worthy Tradition*. Yet neither does *Human Liberty* attempt a sustained and coherent exploration of first amendment theory comparable to Frederick Schauer's *Free Speech: A Philosophical Enquiry*. Baker seems to be attempting a middle course that presents theory and selected doctrinal problems together, using each to illuminate the other without presenting a complete account of either by itself. The integration of theory and context is a commendable aim, but much depends on how it is carried out.

## I

Baker begins his argument by distinguishing between two types of theories of the first amendment: marketplace theories and liberty theories. He gives the impression that marketplace theories are much more numerous; his sole example of a liberty theory is his own. He situates these competing theories in the broader context of political philosophy: marketplace theories are utilitarian, instrumentalist, objectivist. His own liberty theory hews close to the old-fashioned ACLU verities in substance, but the theoretical roots to which he alludes range from Dworkinian natural rights theory, to the account of dialogic reciprocity of European theorists such as Jurgen Habermas, to a postmodernist rejection of the notion of objective truth.

Baker uses general theory less to elaborate his own position than to criticize other theories; the content of his own theory is developed more in the contextual discussion of particular issues. From one point of view, this was a wise choice: to have overlain his distinction between noncommercial and commercial speech with the Habermasian distinctions between system and lifeworld, for example, or between communicative and strategic action,<sup>3</sup> would have only exacerbated his problems of persuasion while making the whole theoretical edifice too unwieldy to manage. Moreover, Baker's contextual discussions are invariably illuminating. On the other hand, it is always suspicious to treat one's own theory differently from its competitors by subjecting them to tests from which one's own theory is exempted. Baker develops the marketplace theory by means of general theoretical assumptions that he submits to

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3. For an application of these aspects of Habermas's theory to the first amendment, see Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54 (1989).

analysis; he develops his own theory in context. The suspicions raised by this differential treatment are borne out in the details of Baker's criticisms. He contends that the marketplace theory assumes that truth is objective, that individuals seek the truth by rationally processing the data applied by the marketplace of ideas, and that people's goals are unitary, stable, and undisturbed by the products of the marketplace of ideas. Baker criticizes all three assumptions. His criticisms are meant to perform two functions—to distinguish the marketplace theory from his own view, and to explain why the marketplace theory is unsatisfactory—but they fail on both counts.

With the second and third assumptions, Baker interprets marketplace theories as being precursors to law and economics and interest group pluralism. Surely this is an accurate portrait only of some marketplace theorists. Holmes was a much more subtle and social thinker than these assumptions imply. The most ironic twist occurs when critics of the complacent invocation of the marketplace metaphor, such as Jerome Barron who proposed a right of access for citizens to the mass media, are labelled by Baker as market failure theorists.<sup>4</sup> For Baker, the market failure theorist is just a subspecies of the marketplace theorist. The use of "market failure" here is a compelling rhetorical move. It not only suggests that Barron accepts the assumptions underlying the marketplace theory; it makes his access theory sound vaguely economic. Barron, however, does not rely on economic analysis to argue for his theory. He developed his call for a citizen's right of access to speak in established newspapers and broadcast stations in response to the failure of the protest movements of the mid-60s to gain a "full and effective hearing" in the marketplace of ideas.<sup>5</sup> The general problem here, which recurs elsewhere in the book, is a failure to fully engage the theories of particular authors rather than abstract generic positions. This failure, which seems to be due to politeness rather than egotism, naturally leads to oversimplification of opponents' views.

Baker's criticism of the theory of the individual presupposed by the marketplace theory is also ironic because Baker himself is vulnerable to the same type of charge. To oversimplify, radical communitarians criticize many liberals for excessive individualism. Part of the substance of this criticism is the same as Baker's criticism of marketplace theory: liberalism assumes that people have unitary and stable identities, preferences and goals, so that the lib-

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4. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

5. *Id.* at 1647.

eral process of political adjustment can be seen as the fair compromise and adjustment of existing claims rather than the social molding of personality to prefer some outcomes to others. In law, this line of criticism is most prominently pursued by some members of critical legal studies as part of their critique of rights.<sup>6</sup> These writers would find Baker's theory individualistic because it focuses exclusively on protecting the expressive and associational liberties of individual speakers from government interference. Baker does not pay much attention to those nongovernmental social influences that both make self-realization through expression possible and threaten to distort it. He does not discuss, for example, the hard first amendment issues rising from community control over education. He dismisses many of the free speech problems raised by inequalities of wealth by stating that redistribution of wealth is a separate issue. He does not fully discuss issues where some progressives advocate restraining the liberty of individuals such as the new critique of pornography and the call to create criminal and tort liability for racist speech. Baker's criticism of marketplace theories implicitly promises that his own theory will display a more well-rounded account of the individual, but he does not fulfill that promise.

Indeed Baker, even more than the marketplace theorists, is an individualist on first amendment issues because in neither his theory nor his contextual discussions does he identify any constitutional role for government in helping to create an environment where self-realization will flourish, or to protect one individual from other private individuals or groups that attempt to influence or stifle choice of expression. For Baker's theory, the individual is complete and competent to exercise liberty of expression so long as government does not interfere; the purpose of the first amendment is to prevent government censorship, and detecting subtle forms of censorship in, say, parade permit requirements is the task his theory sets for itself.

To be fair, Baker is in favor of statutory, not constitutional, initiatives to provide citizens with educational and other resources to facilitate self-expression. He favors redistribution of wealth, though not wealth-related restrictions on campaign speech. The words of the first amendment prohibit the government from restricting speech and so a first amendment theorist like Baker naturally focuses on government censorship. My point is not that Baker's positions are obviously mistaken; only that they are as individualistic as those of a marketplace liberal.

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6. See Gabel, *The Phenomenology of Rights Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984).

Baker's claim that the marketplace theory is distinguished by the assumption that the truth is objective is also a distortion. As Holmes said in his *Abrams* dissent, anyone who firmly believes in an objective truth that is readily ascertained does not need the marketplace theory: the government can act directly to protect the truth and regulate false speech. Theories that protect the process by which truth is determined, rather than substantive truths themselves, are only necessary if the process is more certain than the substance. Holmes's lack of faith in objective truth is notorious. Marketplace theories float in the mainstream of liberal political theory: they appeal most to those who believe that "truths" about politics and morality cannot be determined independently of pluralistic, democratic processes. This is precisely Baker's own position.<sup>7</sup>

It has become almost commonplace to criticize theorists for assuming that truth is objective, but such criticisms are never illuminating when stated at such a high level of abstraction. All such critics, most emphatically including Baker, continually make use of precisely the same epistemology that they criticize in others. The problem stems in part from the complexities of the concept of objectivity—which such critics are rarely willing to sort out. Instead, they use the ambiguities of the concept to attribute it to others while refusing to see it in themselves. For example, Baker finds a belief in objective truth in Mill, Holmes, and Brandeis in part because they at times used the locution "discover the truth"—as if subjective feelings and intersubjective agreements were not also at times discovered. Luckily for the reader Baker does not take the pledge concerning discoveries; he discovers illuminating arguments about first amendment problems on almost every page.

The real shame about overgeneralized critiques of objectivity is that they conceal a very important, more specific intellectual problem. Feminists and critical race scholars often demonstrate that doctrines, theories, and narratives that purport to describe universal human experience have actually excluded the experience of women and minorities. This wrongful claim of universality is often discussed as a false claim of objectivity—in part because white male defenders of the old theory dismiss criticism of it as subjective. But the language of objectivity and subjectivity here is too abstract to capture the real dispute. Grand overgeneralizations that "the truth is objective" or "the truth is subjective" are meaningless in them-

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7. Oliver Wendell Holmes, Jr., for example, was strongly influenced by the pragmatist theories of truth of C.S. Peirce, who defined truth as that which emerged as the end of a public process of rational, scientific inquiry. Baker aligns his epistemology with Jürgen Habermas, whose ideal speech situation is an explicit descendant of Peirce's theory.

selves, and obscure important problems. In first amendment theory, both marketplace theories and the quasi-absolutist tradition of which Baker is a part have been insufficiently sensitive to the problem of excluded voices.

Baker also attempts to keep his theory separate from traditional liberal theory by claiming that liberal marketplace theories are theories of process. What about Baker's own theory? Baker does not believe in objective truth, although he does believe that a liberty theory of the first amendment is the best theory. Some liberty theorists justify a strong interpretation of the first amendment on the ground that such an interpretation is necessary to establish a strong democracy. Thus free speech is instrumental to obtaining the substantive good of democracy. Baker, however, believes that democracy is an instrumental, and not an ultimate value; relationships of dialogic reciprocity are the ultimate value and democracy is conducive to them. But for Baker, dialogic reciprocity seems to be synonymous with the continuous exercise of first amendment freedoms. In other words, rather than the first amendment being a valuable means to a functioning democracy, democracy is a means to the good society, which is defined by—an absolutist theory of the first amendment. This is more than a little bizarre. Baker criticizes other theories of the first amendment which treat it as a means, not an end, as a process, rather than as substance. But his theory is the ultimate deification of process: process becomes substance because nothing else is left.

This transubstantiation of process into substance is the more glaring because it is the only substance Baker provides. He does not give even an abbreviated account of the good life other than the self-realizing virtues of open conversation. He does not acknowledge the full status of any liberty except self-expression. It might seem that in a book about the first amendment, such material is superfluous. Hard first amendment cases, however, usually involve a conflict between free speech and some other right or liberty, often a right of private property. Baker assures us early on that he does not mean to trample on rights to private property, and that homeowners can still use the law of trespass to get protesters off the front lawn, but in later examples he almost always expresses anti-speech interests as governmental interests and ignores private concerns. More generally, once he criticizes others for failing to have an account of the substance of the good life protected by the first amendment, he invites speculation about the justification of his own account. The failure to embed his discussion of the value of free speech in a more general theory of the human good, however

sketchily drawn, makes his own theory seem ad hoc and his criticisms opportunistic.

Baker's relationship to liberal marketplace theories is really quite similar to the relationship to liberalism of Cass Sunstein and Roberto Unger, each of whom takes one aspect of procedural liberalism and attempts to build a consistent and substantial political theory around it. All three begin with the (admittedly fair and widely held) account of liberalism as a *modus vivendi* among individuals who have widely differing conceptions of the good life. Liberalism, on this account, is a theory of politics that by design forsakes the attempt to describe, let alone enforce, a vision of the good life, in order to present a set of fair ground rules for the common life of diverse individuals. Sunstein's neo-republicanism criticizes current liberal theory (and particularly interest group pluralism) for a narrowly self-interested loss of concern with the public good. It claims to be republican by providing a theory of virtue. But the only concrete virtues praised by the neo-republicans are the virtues of a political process working in the public interest. These are process virtues, virtues of an appropriate means to a good political end. Unlike Aristotle, the neo-republicans do not give an account of the virtues, or of any other aspect of the good life, apart from the political process. They also fail to suggest how politics, now a minor aspect of the life of the average citizen, can be restored to the central role it purportedly played in the life of a citizen of a Greek polis in the time of Aristotle. Sunstein's republicanism provides a worthy supplement to interest group pluralism, but it is manifestly a liberal theory rather than an Aristotelean one. (And is the better for it.) It is a theory about a fair and well-functioning political process and not a theory of the good life, or of the substance of ethical theory, apart from the minimum necessary to uphold that process. Sunstein takes process so seriously he makes it substance, but that is so liberal it is, to borrow a term, super-liberal.

Unger's relationship to liberalism in his later works is similar, except that he turns to substance the liberal concern for the individual tyrannized by the power of her context. Unger's political vision is a super-individualism, where the state always stands by to help the individual transcend the restraints posed by any social structure, including the state itself. Baker's vision can be seen as a limited version of Unger's: the good is self-expressive activity (rather than all individual activity). Baker's vision is not itself a full and rich vision of the good life. Baker is in favor of self-realization—who isn't?—but he does not tell us one word about what a realized self looks like. (Indeed, any theorist with a blueprint for what a



realized self, or a realized life, looked like, would frighten almost everyone away.) But this indicates that his vision is super-liberal, which is to say, after all, liberal. His "substantive" vision of the good life is a vision of the means by which individuals with different sets of values can live harmoniously together. And so his criticisms of proceduralism, instrumentalism and liberalism are overdone. He may be taking these things seriously, he may be perfecting them, but he is not offering an essentially different theory.

## II

Can one construct a first amendment theory solely from the concepts of liberty, autonomy, and self-realization? Baker gives a brief general overview of his own theory, but his discussion does not attempt to fully describe or justify it. He identifies the fundamental purposes of the first amendment as self-fulfillment and participation in change. Self-fulfillment is glossed as autonomy or self-realization; participation in change—a strikingly individualistic right—is left unelaborated until a later chapter.

In defining speech, Baker objects to views that identify speech with acts of communication—such as those advanced by Thomas Scanlon.<sup>8</sup> Baker points out that speech is often used in solitude (diaries, outlines) and in ceremonial or institutional settings where communication is secondary to participating in some form of activity. He therefore proposes that the definition of speech be broadened to "emphasize the speech's *source* in the self," rather than the element of communication. Baker wants to change the emphasis from communication to self-expression because he wants to privilege speakers' rights over listeners' rights and so deny part of the foundation of marketplace theories. The difficulty raised by his move is that many activities that express the self are not traditionally considered to be protected by the first amendment. Any activity done by a self can be considered as expressive of that self: selling surfboards, playing kickball in your neighbor's rose garden, building a second story garret on a house in a neighborhood zoned for one-story dwellings. The speech/action distinction causes a great deal of confusion in first amendment doctrine because communications are also actions, and sometimes seem properly to be regulated as such. Baker's theoretical comments exacerbate the problem by potentially protecting all actions as self-expression. As elsewhere, Baker fails to give sufficient attention to the need to explain why the

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8. Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972).

first amendment specifically protects speech, and not autonomy, self-realization, self-expression, or liberty in general.

Widening the definition of speech makes it even more important to delineate categories of speech that will remain unprotected. Speech that causes certain types of harms is not protected: consider libel, blackmail, violations of rule 10b-5, solicitation of murder, and more controversially, pornography, fighting words, and incitement to riot. Yet much harmful speech is protected. Baker suggests that the line between the two categories can be drawn using the concept of coercion: coercive speech is unprotected. (As elsewhere in presenting his own theory, Baker is a bit vague about whether his remarks are intended to be rigorous and exhaustive, or merely illustrative.) This emphasis on coercion harmonizes with Baker's view that the first amendment is intended to protect autonomy, because coercion involves an attempt to overpower the will of another.

Unfortunately, the concept of coercion cannot bear the weight placed upon it, and Baker's use of it becomes confused.<sup>9</sup> He starts over by positing, without explaining their origins, three categories of unprotected speech: 1) "speech involved in an actual or attempted taking of, or physical injury to, another's person or property," 2) "speech not chosen by the speaker" (such as commercial speech), and 3) "speech designed to disrespect and distort the integrity of another's mental process or autonomy." Baker writes as if the derivation of these categories from the values of personal autonomy and self-expression is straight forward. It is not. The general problem Baker confronts is that the self-expressive activity and autonomy of citizens will at times conflict with each other. How is a sadist to express his inner self without violating the autonomy of another? (Masochists may not fully satisfy him—they are too easy.)

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9. In an attempt to apply his analysis of coercion too widely, Baker greatly confuses the analysis. He begins correctly: "The coerciveness of Theo's statement to Vickie, I will cut and sell the flowers unless you plant a tree, should depend on whether the law has assigned Theo the relevant rights in respect to flowers." Baker then falters: "[a] person's speech could be coercive of, or an improper interference with, or an injury to others if society could and did give others authority over the speaker's speech—that is, if society could provide that a particular expression by a speaker violates someone else's right to have that expression not spoken." Baker has transformed the locus of inquiry from the wrongfulness of the threatened activity (does Theo have the right to eat the flowers?) to the wrongfulness of the talk (does Theo have the right to threaten to cut the flowers?). The first excerpt exhibits the traditional analysis of coercion; it grounded the moral analysis of Theo's speech on a pre-existing moral evaluation of his rights over the flowers.

For an instructive and exhaustive presentation and analysis of the main philosophical theories of coercion, see J. FEINBERG, *HARM TO SELF* (1986).

The second analysis is not about coercion specifically, but about wrongful speech in general. And in the context of Baker's theory, it is circular: he gives us a theory of which speech violates autonomy that amounts to "it depends on whether the speech violates autonomy."

There are two general, opposing methods for governing such conflicts. Following Hohfeld, we may call them the methods of rights and liberties. Under Hohfeld's analysis, one has a liberty when one is assured that the government will not intervene to stop one's activity; one has a right if the government will intervene to stop any citizen from interrupting your activity. An overall scheme of rights is provided, by, among others, John Stuart Mill: one's rights are circumscribed by similar rights for all; your freedom to swing your fist ends at your dean's nose; and both fist and nose are protected by the state from assault by the other. A scheme of liberties is exemplified by Hobbes's account of the state of nature: each person is at liberty to do whatever he or she wants: you and your neighbor are at liberty to appropriate each other's cattle, and all fists are safe from government interference, although no nose is safe from bashing. In short, the method of rights utilizes spheres of individual activity protected by the government and designed not to conflict; the method of liberties allows conflicts to be resolved privately without government interference.<sup>10</sup>

Baker's core idea, that the first amendment establishes a circle of liberty within which citizens may speak free of governmental interference, coheres well with the distinctions made above. Freedom of speech is about liberty, not rights, freedom from government, not protection by government from other citizens. Consider the contrast with private property, which is primarily a regime of rights, not liberties.<sup>11</sup> Yet the liberties of speech must be effectively integrated into the larger legal framework dominated by rights. Where speech liberties conflict with each other, and when they conflict with property rights, Baker follows the scheme of Mill, not Hobbes. He circumscribes and limits his liberties. Self-expression is not allowed to war upon self-autonomy or even upon property rights.

This choice might seem unexceptional, but it is no coincidence that it is the method of John Stuart Mill, who after all is also a prominent exponent of the marketplace theory of the first amendment. In order to circumscribe liberties and prevent conflict, one must draw a line between liberties. Absent revelation from a higher authority, to draw the lines between liberties, or between liberties and rights, one must balance. To be a true absolutist first amendment libertarian, Baker would be forced to reinstitute Hobbes's state of nature regarding speech: no libel laws, no protection of pri-

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10. Notice that it is possible to use what I call the *method* of rights to resolve conflicts among liberties and *vice-versa*.

11. Clearly in the real world, most institutions partake of both methods in varying amounts. Competition among businesses for customers follows the method of liberty, for example.

vate property against speech, no exceptions for coercive speech. If he wishes to fix limits by discussion rather than by fiat he must balance. And so once again the distinction Baker attempts to draw between marketplace theories and his own is undone.

Baker can of course disagree with particular marketplace theorists about how to balance. One can balance degrees of autonomy and psychological health rather than utility. One can attempt principled balancing rather than ad hoc balancing. One can make a single balance for each category rather than balancing case-by-case. But one must balance.

Another problematic aspect of Baker's discussion is his attempt to appropriate the mantle of human liberty. Claiming that one's own constitutional theory is a liberty or rights-based theory, while opponents' theories are utilitarian or market theories, is a common rhetorical move. One of the larger achievements of critical legal studies is to have exploded this type of liberal claim. Claims of liberty or right can be made on both sides of all constitutional issues. I do not say that all of these claims of liberty or right are equally convincing, but they exist. One must give an account of the content of our rights and liberties to advance the discussion. Merely claiming to be on the side of liberty is not enough.

After all, utilitarians believe in liberties and rights, too. For every Jeremy Bentham, who thought that rights were "nonsense on stilts", there is a John Stuart Mill who uses utilitarianism to argue for particular accounts of rights and liberties. Moreover, Bentham believed in legal rules defining the justiciable rights of an individual; he reserved his scorn for general moral and political rights. Utilitarian legal theorists are overwhelmingly rule utilitarians: they do not oppose utilitarianism to a rights-based analysis, but instead use utilitarianism to define the content of particular legal rights. (That is, rather than telling a judge to seek to maximize utility according to the facts of the case, most utilitarians tell the judge in a case of first impression to choose the doctrinal rule that maximizes utility.)

In first amendment cases, the liberties in conflict may both be free speech claims; at other times the conflict is between speech and some other protected liberty, such as property. Baker attempts to finesse such conflicts by privileging some liberties over others: speakers over listeners, individuals over organizations, private roles over public roles, speech over property. But because any of these choices becomes nonsensical when enforced absolutely, Baker also admits, *sotto voce*, many exceptions. For example, although first amendment liberties are more important than rights to private property, the law of trespass is still to be enforced to keep speakers

off your lawn. But because he does not want to admit he is choosing between liberties, let alone balancing, Baker only rarely explains—even when discussing cases—why he draws the line that he does between conflicting liberties. Usually he magnifies the liberty on one side and minimizes any claim of liberty on the other.

A more helpful approach to formulating a liberty theory of the first amendment would give a particular justification of the content of the liberty to be protected. Baker to some extent does present such a theory—which he calls an autonomy or self-realization theory of the first amendment. Unfortunately, he does not work very hard to define or explain the autonomy or self-realization on which he bases his theory, perhaps because he thinks he has already distinguished his theory from others in his general assertion that his is a liberty and not a marketplace theory.

The point of constructing a theory of an area of doctrine like the first amendment, however, is to tell us which facts are crucial to the proper resolution of cases. A self-realization theory of the first amendment is helpful if it explains which facts trigger the protection of the amendment. To perform this function, the theory must elaborate in some detail a conception of self-realization. Baker unfortunately does not go far enough.

One first might ask which aspects of the use of language are most important in exercising autonomy or realizing the self. For example, I would argue, contrary to Baker, that the listener's ability to receive the widest possible range of information is at least as important as the speaker's right to speak.<sup>12</sup> But the key point is not that some aspects of Baker's account of self-realization are controversial, but that he does not adequately justify his assertion that speech is more important than listening. In general, as Fred Schauer points out, a theory of the first amendment that states that the amendment seeks to preserve a single value, such as autonomy, must explain why speech rights are singled-out for protection. This is a very difficult task, but it is crucial for a useful application of the theory. All tough first amendment cases will involve a conflict of interests, with free speech interests on one side and other interests on the other. If the theory cannot explain why speech is more essential to preserving self-realization than all other interests, it does not help resolve the tough case.

For example, Baker argues that people should be allowed to

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12. An originalist could object that the language of the first amendment protects speech, not listening, but that is an objection which hurts rather than helps Baker: it is unlikely that the first amendment was drafted to promote self-realization if speech itself is not the primary means of realizing the self.

stage a protest march in a public street without a permit even when they obstruct traffic. In describing the contending interests Baker gives a full and subtle account of the interests of the demonstrators and how a permit system harms those interests. He describes in great detail the pressures confronting city government and why courts should be skeptical about the balances local governments strike. He pays relatively little attention to the interests of other citizens. By disrupting traffic the protestors prevent drivers and passengers from going on with their ordinary lives. They disrupt not just "traffic", but classes, jobs, time with children and lovers, time to speak and listen in other forums. Baker gives no argument that the increase in self-realization for the protestors outweighs the loss in self-realization to others; he fails even to consider the question. This makes a hard case easy, and it also misses a frequent point of such a protest. When I took part in street demonstrations during the Vietnam War, we purposefully shut down the major road for commuting to the state capital for a week because we thought business as usual should not be able to continue while Vietnamese society was being destroyed and young men were being drafted. If the disruption to others' lives we caused was justifiable, it was not because of the self-realization we achieved. From the standpoint of self-realization, we might as well have been nudists, fascists, or simply irresponsible children. A more pointed political account is required.<sup>13</sup>

Baker also at times labels his theory an autonomy theory—which might seem to promise a grounding in Kantian moral theory—as well as a self-realization theory—which would seem to call for a grounding in a psychological theory of the development of the self. Baker makes greatest use of the notion of autonomy in his discussion of commercial speech. He takes the unusual position, for a first amendment quasi-absolutist, that commercial speech that is "profit-motivated" should not be protected. Baker argues that the "forced profit orientation" of commercial enterprises "is not a manifestation of individual freedom or choice." Neither does commercial speech have "any logical or intrinsic connection to anyone's

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13. Another example: Baker could more effectively argue for lesser protection for commercial speech if he elaborated his theory of self-realization. Margaret Jane Radin has presented a two-tier theory of property law that advocates stronger protection for personal property that is essential to the development of the self than for property held only for commercial purposes. Thus the family home would be protected more strongly than a half-interest in a gas station. Baker could develop a similar two-tier theory of speech if he gave a more nuanced account of the psychological development of the self and explained which speech is not essential to it.

substantive values or personal wishes." Commercial speech does not *express* a person's values, it only instrumentally advances them.

The commercial speech discussion illustrates the dangers of waiting to develop an account of autonomy in context. His argument is unsatisfactory because his description of autonomy is never made rich enough to explain why some autonomy claims are preferred to others. The result Baker reaches denigrates the autonomy interests of consumers interested in alternative products: consider the ways in which regulation of attorneys' advertising was used to attempt to restrict the growth of low-cost legal clinics. Baker when discussing theory says that he will ignore the interests of listeners and assume that there will be a speaker whose liberty is at stake to advance the claim, but that claim is highly implausible here because Baker has disqualified from first amendment protection the speakers with the greatest incentive to provide the information. This argument also ignores those theorists who argue that the market enhances autonomy. I do not find their claims any more persuasive than Baker's, but he should at least explain how his notion of autonomy differs from theirs, or how they are mistaken about the effects of the market.<sup>14</sup>

Another problem with Baker's approach is that he cannot effectively distinguish commercial speech from non-commercial speech in the way he would like. Baker attempts to distinguish the two both by means of causation and by means of the extent to which the speech expresses the self. At first he seems to claim that the content of commercial speech is caused by market forces, but under the scientific understanding of causation, it is assumed that *all* speech is caused. The distinctions between voluntary and involuntary action in criminal and tort law do not suggest a distinction between commercial and noncommercial speech, nor do the doctrines of duress and coercion in contract law. Under psychological theory, much political and artistic speech is driven by passions equally as compelling as the fear of bankruptcy. Baker might con-

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14. Baker also seeks to identify his autonomy theory with first amendment theories that celebrate democracy, although he explicitly maintains that democracy is for him a means to the end of autonomy and not vice versa. This identification of democracy and autonomy is troubling in a constitutional theory of rights and liberties. As Robert Paul Wolff convincingly demonstrated in *In Defense of Anarchism*, there is a serious tension between autonomy (which Wolff defined in the Kantian sense as the self-rule of a rational moral agent) and democracy. Why should an autonomous agent feel bound by the results of an election if the agent voted for the losing side? To follow the rule set by the majority is to follow the rule of others and not one's own best moral and rational self; it is heteronomy and not autonomy. The constitutional analogue to this philosophical tension is the paradox of judicial review: how does a democracy justify allowing unelected judges to invalidate laws passed by properly elected legislatures? Individual autonomy can conflict with democracy, or what is the first amendment for?

tend that the passions underlying politics and art belong to the self, while the passions driving commercial success do not, but a rereading of Dreiser and Dickens, if not personal observation, should convince him that many of the same fears and desires underlie both. Newspapers are run for profit, and Shakespeare may have been trying to get rich.

Baker's argument is also dangerous to his own political values. The same argument against protection of a category of speech which was externally imposed and not reflective of an autonomous self was made in the fifties to explain why communists could be appropriately discharged from academic positions. If party discipline is not causally distinguishable from market discipline, Baker must present a theory of what speech is truly expressive of the self, or alternatively, what speech helps realize the autonomous self. Such a theory, however, would seem to cut against the underlying motivation for Baker's theory. Libertarian theorists ordinarily seek the widest possible sphere for individuals to pursue their own vision of the good life consistent with a like liberty for all. A psychological theory that distinguishes sharply between authentic self-expression and inauthentic self-expression would thereby distinguish between authentic and inauthentic uses of liberty. This would constrict the range of visions of the good life that citizens would be allowed to pursue. Various radical and communitarian theorists are willing to accept such a result, but Baker's rhetoric is greatly to the contrary.

Even if Baker were to adopt a radical critique of capitalism, the distinction between commercial and non-commercial speech would not survive. Social theorists in the Marxist tradition use the concepts of alienation, hegemony, and the fetishism of commodities to explain how a capitalist economic system distorts public speech and makes it inauthentic. However, these radical theories all apply equally to commercial and noncommercial speech; novels and political slogans are just as subject to the distortions of commodity fetishism as are advertisements.<sup>15</sup> Thus Baker cannot rely on such theories to support his analysis of commercial speech.

Baker could strengthen his position by disentangling the commercial/noncommercial speech distinction from the individual/corporate speech distinction. Some of his examples draw their intuitive power from the sense that a corporate spokesperson is speaking for

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15. For two differing explanations of commodity fetishism that agree on this point, see Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. L. REV. 939 (1985); G.A. COHEN, *KARL MARX'S THEORY OF HISTORY: A DEFENSE* (1979).



the organization and not for herself. From a libertarian perspective, a plausible argument could be made that freedom of corporate speech is only of instrumental value, while freedom of individual speech is intrinsically valuable. (There will still be problems in disaggregating the two in particular situations.) But not all commercial speech is corporate speech—consider advertising by a sole practitioner, who specializes in the plaintiff's side of personal injury suits, or the local mom-and-pop drugstore. Baker's writings stand out from other progressive commentators precisely because he would deny protection to commercial speech and not merely give corporations fewer speech rights than individuals. Baker may be right, but he has yet to find the most persuasive form for his arguments. If he wants to keep his individualist focus, he needs a more compelling psychological description of autonomy that convincingly distinguishes commercial speech from other speech. Alternatively, he could argue that an adequately functioning marketplace of ideas is a prerequisite to full personal autonomy, and use market failure arguments to justify a lesser protection for commercial speech.

### III

To his credit, Professor Baker discusses at length many of the first amendment issues that pose the most difficult challenges for his theory. Baker's theory is designed for cases with a sharp conflict between individuals and government: parade permits, speech in the park, and so on. The difficult cases for his simple model are those where opposing individuals make conflicting claims on the government, and government is implicated in constructing the arena of speech: notably, regulation of broadcasting and cable television, special rights for the press, or access claims to the press by individuals. Baker devotes several chapters to such problems. His basic approach is to create a large ad hoc exception to his liberty theory for the press, hung on the textual peg of the press clause. Baker is willing to give special first amendment protections to the press, beyond the sphere of protected individual speech, on the instrumentalist grounds of Vincent Blasi's "checking function." Baker's discussion of detailed issues is always informed and interesting. He reaches numerous controversial conclusions: for instance, that cable television should be structured, at least in part, as a common carrier; and that the first (enforced coverage) prong of the fairness doctrine was constitutional but the second (balance) prong was not. The discussion of each issue, however, is sketchy, in part because he takes on so many of the press and mass media issues that he is unable to

devote much space to the complexities of any one of them. (Parade permits, a simpler issue, is discussed at considerably greater length.) But the thinness of the discussion is also a symptom of the ad hoc nature of the analysis. The theory developed in the first two thirds of the book, whatever its strengths and faults, is treated as irrelevant and Baker develops a second theoretical framework to which he devotes less attention.

I do not mean to suggest that all analysis of first amendment problems must be tied to one overarching theory to be valuable. The attacks by Fred Schauer and Steve Shiffrin on unitary theories of the amendment present a strong case. But Baker in the first two thirds of the book purports to be offering a unitary theory of the amendment, and he specifically attacks and rejects theories ("market failure" theories) whose analysis he in some measure appropriates as his own when discussing the mass media. And since he incorporates the arguments of the market failure theorists only implicitly, and only relates them to one specific press issue at a time, his discussion seems quite ad hoc and strongly tied to his own political and moral intuitions.

I think my disagreements with Baker over his use of theory and his criticisms of other theorists arise in large part from a disagreement over what constitutes the core of contemporary first amendment theory. Baker seems to consider parade permit and time, place and manner cases as the core of the first amendment. His theory is designed to achieve the correct results in such cases, and opposing theories are criticized predominantly for failing to do so. Mass media cases are treated as the periphery, and so ad hoc exceptions to his theory made to cover such cases can be treated as details rather than the creation of a hybrid theory. For many of the market failure theorists, on the other hand, and for me, mass media cases, corporate speech cases and campaign financing cases are the key first amendment issues of our time, while parade permit and speaker in the park cases are only moderately important, and are intellectually much less complex and difficult to resolve.

This difference should not be overstated. We both begin with the standard story of the development of free speech. From the dawn of the invigoration of the first amendment to the end of the 1950s, the central free speech issue was limiting government reaction to subversion. In the 1960s, the focus of attention widened to speech arising from protest movements or general political activism: the public forum doctrine and time, place and manner restrictions began to receive more analysis than the clear and present danger test. (Even seemingly unrelated doctrinal areas, such as libel,

evolved under the pressure of protest and reaction, as embodied in *New York Times v. Sullivan*.)

Subversion is no longer at the center of the first amendment agenda for Baker, or any other current theorist, because we all assume the practical battle has been (tenuously) won, that no new major controversies are imminent, and that our theory adequately addresses the problem. Baker, and many other first amendment theorists, still treat public forum cases as the paradigmatic first amendment cases, presumably because they are still a source of major controversy with important political ramifications and they are thought to present the central puzzle a first amendment theory must explain. My partial disagreement with such a judgment may be in large part an unreflective, resigned acceptance of the current public forum cases, just as we all may turn out to have been too complacent about issues of subversion if "terrorism" in the future provokes the same governmental reactions that communism provoked in the past.

I would argue, however, that for supporters of the system of freedom of expression, and especially for those like Baker and me who believe that this country still requires substantial changes to achieve social justice, the most important current free speech issues concern the mass media and campaign financing. Credible arguments can and are being made that the entire current scheme of regulation of both broadcasting and cable television are unconstitutional; these arguments have been accepted, in part, by various courts and agencies. Concurrently, citizens and public interest groups argue that the first amendment requires access to the mass media, or at least permits Congress to implement an access scheme, as it has done for cable television. This position too is credible and has been adopted in part by various courts and agencies. The practical effect of organizing broadcast and cable television as unregulated private entities, regulated quasi-public entities, or as common carriers, are immense both for our everyday lives and for our political system. Moreover, first amendment doctrine and theory does not handle such issues well. I am not so concerned here with results, although those are important, but with bringing out the most important contextual factors in a way that expresses the full appeal of each side of the dispute. Current doctrine fails miserably. The current formula for resolution of cable television problems is the *O'Brien* test: a general balancing test designed for incidental restrictions on arguably expressive actions such as draft card burnings. In the context of cable television it provides almost no guidance as to what facts are important or how they are to be balanced; as a result

the cable television regulation cases taken as a group are wildly inconsistent and taken separately often seem to miss the point of what is at stake in each case.

I believe that we should rethink general first amendment theory starting with what are currently the most important practical and most puzzling theoretical problems. This may be too complacent in considering past achievements as irrevocably established, but it seems much easier to design a theory to help decide the mass media cases and then modify it to retain our understanding of speaker in the park cases than the reverse. Baker's book is practically proof of the point; if this able first amendment scholar can only deal with mass media cases by developing a second, subsidiary theory, I do not expect anyone else to do much better. These cases deserve their own spotlight, not the reflected glow from old battlefields.

I am not sure how one finally identifies the central first amendment issues and so decides between Baker's intuitions and my own. Many first amendment teachers will find Baker's account congenial because it meshes well with certain arbitrary features of casebooks and the law school curriculum. The first amendment course in many law schools does not cover all free speech cases. Mass media cases, particularly involving the details of regulation of broadcasting and cable television, are often taught in a separate, more specialized course. The leading constitutional law casebooks devote hundreds of pages to the clear and present danger test and the public forum doctrine, but leave discussion of mass media issues to a small section on special problems at the end of the first amendment material.<sup>16</sup> There are good historical reasons for this, but for training first amendment lawyers and for directing new scholarship, our casebooks are out-of-date.

If I have been critical of Baker's first amendment theory, let me finish with an appreciation of his strengths. On every problem he discusses, Baker illuminates facets previously undisclosed. He so frequently and energetically explores the arguments against his own position that he might contend that I have borrowed many of my criticisms *from* him, and that my disagreements are merely matters of placement of emphasis between foreground and background, principle and exception. The reader will find in this book an endless number of cogent, well-considered arguments on a wide array of

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16. See, e.g., G. GUNTHER, CONSTITUTIONAL LAW 1416-61 (11th ed. 1985). Slightly more material can be found in W. LOCKHART, Y. KAMISER, J. CHOPER, and S. SHIFFRIN, CONSTITUTIONAL LAW 561-634 (6th ed. 1981).

first amendment topics, presented with greater clarity than one expects in an academic work.

**CRIMINAL JUSTICE AND THE SUPREME COURT.** Edited by Leonard W. Levy,<sup>1</sup> Kenneth L. Karst,<sup>2</sup> and Dennis J. Mahoney.<sup>3</sup> New York, N.Y.: MacMillan Publishing Company. 1990. Pp. xix, 375. Paper, \$12.95.

*Gerald Caplan*<sup>4</sup>

This paperback book is a collection of essays (96 in all) on constitutional criminal procedure, culled from the *Encyclopedia of the American Constitution* (1986). It is intended, the publishers say, as an "overview of the development of criminal justice in the United States, from the framing of the Bill of Rights up to and including the Burger Court."<sup>5</sup> Although written and edited by leading constitutional scholars, and containing some first rate contributions, the collection, surprisingly, disappoints. Many of the contributions are out of date; others are too short to be useful, even as an introduction.

In general, the essays avoid polemics, seeking to inform rather than persuade. Although occasionally an author argues for or against a decision or theory, such evaluations are ordinarily brief. For the most part, the authors proceed descriptively, seeking to compress decades of precedent into a few sentences or paragraphs. At their best, the essays are creative syntheses, showing the stretch, the zigs and zags of constitutional development; but they are rarely at their best.

Many are just too short. At a page or two, some read like a long *Black's Law Dictionary* entry or an excerpt from a nutshell. Professor Leonard Levy's explanation of entrapment in two pages, for example, is of limited value. It may provide some assistance to a lay reader struggling to understand recent highly-publicized trials where the defense was raised, but the subject is too complex for such an abbreviated treatment. Similarly, the page and a half treat-

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5. Publisher's Note, p. xix. I have drawn upon the publisher to characterize the volume and its intended audience because the otherwise excellent introduction by Professor Wayne LaFave oddly makes no reference to the essays themselves.