

**ED BAKER: INSPIRATION BY A FRIENDLY SCHOLAR AND A
SCHOLARLY FRIEND**

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Ed Baker joined the Penn Law Faculty in 1981. During the fall of 1983 I served as a visiting professor. Ed and I quickly found out that we had a common interest in free speech and mass media issues, and we started to exchange our views and ideas. Since 1985 I taught permanently, although not full time, at Penn. Whenever he and I were there we would meet regularly, about once a week, to discuss our work and our projects.

From the very beginning it was obvious that Ed was an extremely sophisticated and rigorous scholar, an excellent lawyer, and at the same time deeply familiar with economics, political science, media sociology, and philosophy. In the late eighties or early nineties Jürgen Habermas, my colleague at the University of Frankfurt, visited Penn; I was in Germany at that time. When I asked about the visit after his return he answered that it had been very interesting and pleasant and that he had been particularly impressed by a young philosopher whose name was Ed Baker.

Ed and I always agreed as to methodology and mostly on policy. In the analysis of speech and media issues he was nearly always one or more steps ahead of me, in spite of the fact that I am considerably older. My main advantage had been that I am familiar with the German mass media system and its European implications. It contains elements, e.g., a strong public service segment in broadcasting, which he thought interesting. The same was true for the British system which he knew better than I do. He had a certain affinity to the values and virtues of “Old Europe.”

In the late eighties he was finishing his seminal book, *Human Liberty and Freedom of Speech*.¹ Its central argument formed the basis for his future writings (and for mine). He rejects the prevailing idea that freedom of speech is ultimately a functional right, serving the “marketplace of ideas.” The First Amendment primarily protects the au-

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1 C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989).

tonomy and equality of individual speakers, their right of self-determination by communicating with others.

Speech is protected because, without disrespecting the autonomy of other persons, it promotes both the speaker's self-fulfillment and the speaker's ability to participate in change. This leads to the conclusion that, as long as speech represents the freely chosen expression of the speaker, depends for its power on the free acceptance of the listener, and is not used in the context of a violent or coercive activity,² freedom of speech represents a charter of liberty for noncoercive action.

This does not completely exclude the functional justification, which remains valid where speech is not individual expression but the advertising or lobbying activity of (mostly huge) entities like corporations. This corporate and/or commercial speech, which serves a specific communicative purpose, is therefore constitutionally protected, and can be regulated to ensure the democratic process and to protect individuals who are members of the organization and disagree with its propaganda. This aspect is enormously important: it justifies efforts to regulate mass media in ways which would be intolerable when applied to individual speakers.

In the nineties Ed shifted his interest to the particular issues of media regulation. His next book, *Advertising and a Democratic Press*,³ contains a convincing description and explanation of how and why the dependence upon advertising revenues affects and distorts the content of mass media. Then three major articles⁴ served as the basis for a third book, on *Media, Markets, and Democracy*.⁵ Its first part presents a brilliant analysis of the specific features of the economics of mass media. Their products are "public goods" which allow nonrivalrous use and make it difficult to exclude third parties (or free riders). In addition there are—positive and negative—externalities. And the media operate on two markets: they distribute news, editorials and entertainment to their recipients; and those form the audiences which are sold to the advertising industries. There is strong evidence that this form of financing promotes concentration of newspaper and broadcasting business. And finally, the media not only satisfy but also generate and modify the preferences of their recipients. For all of these reasons a purely commercial media system is plagued by significant market failures which are likely to degrade the communicative

² *Id.* at 69.

³ C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* (1994).

⁴ C. Edwin Baker, *An Economic Critique of Free Trade in Media Products*, 78 N.C. L. REV. 1357 (2000); C. Edwin Baker, *The Media That Citizens Need*, 147 U. PA. L. REV. 317 (1998); C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311 (1997).

⁵ C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* (2002).

services rendered to individuals and to the public. The second part of the book discusses a broad spectrum of potential relief through content-neutral regulation. The book concludes with very timely chapters on international trade in media products and on the impact of the internet and of digital technologies.

In the beginning of 2000 I was asked by the German Association of Comparative Law to assist in the preparation of a program on media concentration and to present the comparative analysis of the national reports. I suggested inviting Ed Baker to contribute a report on the ownership rules in U.S. broadcasting regulation. He accepted, and a year later he sent me a text which was at the same time a comprehensive description and a brilliant evaluation of the American development.⁶ The comparative law conference took place in Hamburg, in September 2001, only few days after the terrorist attack killing thousands of people and destroying the World Trade Center in New York. Ed was visiting with NYU and felt that he should not leave his students at that moment. But even in his absence it was his text which dominated the debate: he had provided the conceptual framework for the discussion of policies. In particular, he argued that for compelling reasons ownership rules cannot be substituted. In the Hamburg discussion his view prevailed against the strong opposition of the German Cartel Office, which viewed media specific ownership rules as an undesirable interference with its own powers. For Ed, his contribution to the conference became the starting point for his latest and last book, *Media Concentration and Democracy: Why Ownership Matters*.⁷ This is another classic text—an enormously careful and nearly exhaustive explication of the relevant policy arguments, making it very clear that a democratic system will face unacceptable risks once media power is no longer constrained by ownership rules. In between Ed and I had co-authored a short article in German explaining and criticizing the new ownership policy the FCC wanted to adopt in the early years of the century.⁸

6 C. Edwin Baker, *The Law and Policy of Media Ownership in the United States*, in MEDIENKONZENTRATION UND ANGEBOVSIELEFALT ZWISCHEN KARTELL- UND RUNDfunkRECHT 9 (Uwe Blaurock ed., 2002).

7 C. EDWIN BAKER, MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS (2007). A summary of his argument had been presented at the Penn Law School Faculty Retreat 2005; I had been invited to comment on his paper.

8 C. Edwin Baker & Friedrich Kübler, *Sicherung der Meinungsvielfalt durch mehr Markt?*, 2004 MEDIA PERSPEKTIVEN 81.

Two years ago I finally finished and published my book on the German system of mass communication law.⁹ In the preface I could and I did write without any exaggeration that nobody had exercised as much influence on the content of this book, and on my way of thinking about freedom of speech and mass media regulation, than Ed Baker. Today I have difficulty disentangling which insights I derived from reading his books and articles, and what I gained from our continuing conversations and discussions. But I have no doubt that for his and for my generation Ed has elaborated the most comprehensive and the most persuasive theories how to understand constitutional guarantees of free speech and how to transform this interpretation into policies which will serve the public on the long run; if there is anything better, I have not seen it. So I am very sorry that I lost a vital source of information and education. But there is more. Ed had been the model of an academic, fully dedicated to his students and to his scholarship, unpretentious and kind, but unconditionally committed to principles of intellectual integrity and social justice. And he was a wonderful friend. I am deeply saddened by the loss, but I am happy whenever I remember our relationship.

9 FRIEDRICH KÜBLER, *MEDIEN, MENSCHENRECHTE UND DEMOKRATIE: DAS RECHT DER MASSENKOMMUNIKATION* (2008).