

REMEMBERING ED BAKER

*David Rudovsky**

Ed Baker died suddenly and all too early in his engaging and productive life at the age of sixty-two. Ed was a prodigious scholar, a committed civil libertarian, a revered teacher at Penn Law School, and an individual whose passion for justice and fairness animated all parts of his life. His work on First Amendment issues of free speech and association were ground-breaking in legal and philosophic circles; in particular, his theories of free speech with respect to the relationship of the media to the citizenry and to the political system were both illuminating and comprehensive. His discussions of the proper functions of the First Amendment reflected insightful research, a strong sense of history, and a broad understanding of the role of free speech in the culture of the United States. No wonder that his four major books on freedom of expression were translated into several foreign languages and that he was a frequent lecturer here in the United States and around the world. He had a passion for life, for personal liberties, and for integrity in scholarship and teaching.

For years, as a colleague at Penn, I admired Ed's academic work and his understanding of constitutional doctrines. I also valued the times we had together talking about politics, law, and teaching. His comments were always wise and his modesty genuine. He was quiet and reserved, and often absorbed by his projects, but he always had the time to connect on a personal level.

The theories and philosophies that have been generated by First Amendment scholars are sometimes daunting in their complexity and nuances. But Ed had a way of both developing complex theories and applying them in a way that made eminent good sense. Even so, I did not have much occasion to use Ed's work in actual litigation until a number of the Penn Law Faculty decided to file suit against the Solomon Amendment (which terminated federal funding to any university that did not provide the military with equal recruitment services). I was part of a team of lawyers that represented the faculty members on their claim that the federal law impermissibly prevented the Law School from enforcing its anti-discrimination policies as the

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military discriminated against gays and lesbians. Who knew that Ed's perceptions and thoughtfulness would be so critical to our agenda.

We had to sort through an array of possible arguments and doctrines that would support the legal claims, and several of these arguments involved free speech and association issues. Early on, Ed wrote a memorandum setting forth the core First and Fourteenth Amendment arguments in support of the Law School's right to enforce its anti-discrimination policies. The challenge for me was to translate Ed's academic understandings of First and Fourteenth Amendment doctrine into functional arguments for a district court judge. At first, some of what Ed wrote seemed too abstract, but as I worked through his thought process, and applied his thinking to the issues at hand, I soon found myself with a well-integrated approach to the issues that would be presented by our case. Ed was persistent in his views, but also fully understood the realities of litigation against the military so soon after 9/11. Our legal briefs were very much the product of his thinking and advice, and fully supported our statutory construction theory. Unfortunately, Congress eventually mooted our winning arguments by a statutory amendment and, in a separate case, the Supreme Court found no constitutional problems with the federal law.

But Ed was far more than an academic when it came to this kind of issue. With legal challenges swept aside, he and others at Penn and other law schools re-engaged with student activists to directly protest the military's policies, including demonstrations and other activities surrounding visits by military recruiters. These protest activities have helped to broaden the campaign against "Don't Ask; Don't Tell." And some day soon, Ed's vision of fairness and equality will prevail, not because a court agreed, but because the country will finally reject policies built on bigotry and discrimination. That development will be a true testament to Ed's legacy.