SPEECH RESTRICTIONS THAT DON'T MUCH AFFECT THE AUTONOMY OF SPEAKERS

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I. SPEECH RESTRICTIONS WITH LITTLE IMPACT ON SPEAKERS

The sad occasion of Ed Baker's untimely death is perhaps a fitting reason to reflect on the speech of those who are no longer living. Most of what is worth reading was written by authors who have died. All of what is now worth reading will one day fall in the same category.

I take it none of us thinks such material is or should be less constitutionally protected than the writings of the living. I know of no court that has suggested any such thing. Yet the speech of authors who are now dead poses a difficulty for speaker-based free speech theories (or speaker-based components of broader theories).

Say the government were to ban a book written by a now-dead author: Aristotle, Machiavelli, Marx, Hitler, Orwell. Such a ban would have no effect on the author's autonomy.

It would not deny him an opportunity to "fully develop a complex mental world, identify its contents, evaluate them, and distinguish between those that are merely given and those one endorses."[1] It would not interfere with "the appropriate development and regulation of the [author's] self, and of [the author's] relation to others,"[2] at least if "relation to others" means the relation of actual living human beings. It would not interfere

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1. Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 292 (2011).

2. *Id.* at 294.

with the author's "authority (or right) to make decisions about" himself.[3] Those authors are beyond the writ of governments.

What is wrong with such bans, it seems to me, is that they burden the rights of the living, not of the dead—of readers, not of authors. Some might identify, I suppose, some symbolic interference with the author's "self-expression," but in the absence of a living self such interference is metaphor, not reality.

Some might suggest that a few authors could be deterred from speaking during their lives by the fear that their influence will be legally blocked after their death, but that seems unlikely. Even those who think they write for the ages are unlikely to be much affected by the possibility that some government some time after their death might restrict their works.

Some might point to the rights of future "speakers," such as publishers or booksellers. But while the law rightly protects such rights to convey the speech of others, surely the real tragedy of a ban on Ed Baker's works—or on Aristotle's works—would not be that it will interfere with the speech of a future bookseller. And of course many works are made public through largely automated mechanisms such as Google Books or HeinOnline, whose operators may not even make any conscious choice about what to publish. It can't really be booksellers' rights that are chiefly at stake here.

Rather, once time removes the author from the realm of those who possess rights, what is left is the reader. Life, and the law, are for the living. And the reader's rights are entirely sufficient to provide the works of now-dead authors with full First Amendment protection.

Consider likewise the republication of a leaked document: an internal government report, a business's memo describing its plan to close plants, a business's investigation of whether its products make people sick, or a political advocacy group's long-term strategy for accomplishing its political goals. Let's call this the "pure leak republication" scenario. And consider alongside it the republication of a leaked document together with careful analysis and criticism of the document by the republisher, which we'll call the "speaker-supplemented leak republication" scenario.

3. Ed Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 254 (2011).

Pure leak republication does not do much to advance speakers' autonomy, or their development as thinkers. In many cases, the original authors did not wish the documents to be released.[4] Whatever the value of the publication to listeners, it doesn't seem to be respectful of the authors' mental autonomy. Moreover, if the report was an internal corporate document, then under Ed's and Seana's own framework, the development of the report would not have involved sufficient "thinking" to justify full protection. After all, Ed's and Seana's conclusions that commercial advertising and nonmedia corporate speech aren't fully constitutionally protected rest largely on the view that business employees' speech is generally not sufficiently self-expressive, or not sufficiently connected to their status as "thinkers."[5]

The leaker must have thought about whether to leak the documents, but I doubt this thinking would suffice to qualify the leak for full constitutional protection under Ed's or Seana's framework. After all, advertising agency employees and corporate press release writers do some thinking about what to write for their bosses, as well as about the morality of whether to write it—but that isn't enough, under Ed's and Seana's models, to qualify such employees for full speaker-as-thinker protection. Plus one can imagine situations where the document wasn't even deliberately leaked, but just accidentally released.

Likewise, though the recipient of the leak (say, a newspaper editor or a Web site operator) must have thought about whether to publish the leaked document, that thinking is also likely not sufficient for full protection under Ed's and Seana's framework. And of course such thinking might well have been largely motivated by market pressures, focusing more on whether the document will draw paying readers and advertisers than on any deeper moral questions. If so, then it would be hard to distinguish the speech from the economically shaped speech of advertisers or non-media business corporations—speech that, under Ed's and Seana's approach, lacks sufficient value as self-expression.

4. I say "in many cases" because sometimes the author of a report might be pleased to see it published, and it is only the author's superiors who are keeping it secret. But in many cases the author would not want it published, and might in fact be badly embarrassed and professionally harmed by its publication.

5. *See infra* Part III.

Yet I take it that the case for protecting such pure leak publications remains strong, because of the interests of readers (including the possibility that the readers' own future speech will be affected by what they learn from the published leaks). Perhaps in some situations such speech may nonetheless be restricted, for various reasons.[6] But that possibility applies equally to the pure leak publications and to the speaker-supplemented leak publications. And the arguments for protection also apply equally to both kinds of leak publications, even though the speaker adds nearly no intellectual content to the pure leak publication, but a great deal of such content to the speaker-supplemented leak publication.[7]

Or consider the accidental recording. Say a convenience store owner finds that one of his security cameras has captured something noteworthy (say, a police beating of a citizen). He then posts it on his Web site, thinking solely of the traffic and advertising revenue that it would bring.[8]

There was no thinking-as-human-development involved in the original creation of the videotape—none of the creativity of a professional videographer staging the shot, or the thinking needed to track down the person or thing that a reporter might want to videorecord. The decision to post the tape is, by our hypothesis, motivated by a desire for money, not by a desire to make a political statement. Yet I take it that the posted accidental recording should nonetheless be fully protected, because of the value of the video to viewers.

6. Maybe some narrow restrictions are permissible if the information would help people commit serious physical harm (consider the classic "sailing dates of troopships" hypothetical). Or maybe the speech could be restricted if the speaker actively conspired with the leaker—and is thus responsible for the leaker's breach of his confidentiality obligations—rather than just passively receiving the document from an unknown source. Or, as some argue, maybe all or most such publications should be restricted, because of a compelling interest in removing leakers' incentive to break their confidentially promises.

7. The one area in which the law distinguishes republication with no extra commentary from republication with a great deal of extra commentary is copyright law's fair use doctrine. But this distinction stems from special factors related to copyright law and the value it places on "transformative" works. *See generally* Harper & Row Publishers, Inc. v. Nation Enters., 471 U. S. 539, 550 (1985) (explaining the difference between fair use and piracy); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576–77 (1994) (listing the factors to consider when determining whether a use is fair). The distinction does not justify any more general difference in treatment between pure leak republication and speaker-supplemented leak republication.

8. For a similar such incident, consider the Zapruder film that inadvertently captured the assassination of President Kennedy.

II. LISTENER INTERESTS IN COMMERCIAL AND CORPORATE SPEECH

So I hope that I've demonstrated that speech should be protected even if its chief value is to listeners, not to speakers. And of course both Ed's autonomy-based theory and Seana's thinker-based theory have room for the listeners' interests in autonomy, and in their development as thinkers. But once we recognize the force of these listener interests, then it's hard for me to see how those theories can sustain the argument that (to quote Seana) "non-press, business corporate and commercial speech may be different and that their protection may assume a weaker form and may rest upon separate, more context-dependent and instrumental, foundations."[9]

For now let's assume, though I'm not sure this assumption is valid, that those forms of speech involve lesser autonomy or thinker interests of speakers than do other forms of speech.[10] Yet such speech can be of use to listeners as thinkers, and as autonomous citizens. If the value to listeners of the work of the dead, of the leaked documents, and of the accidentally captured video suffices to fully protect such material, why shouldn't it equally suffice to fully protect corporate and commercial speech?

Again, let us assume that information or argument contained in commercial speech and non-media corporate speech "does not involve in any direct or straightforward fashion the revelation of [authors'] mental contents." And reading a dead writer's works does generally reveal the writer's mental contents as of the time he was writing. But why should that matter, when—as with the works of dead authors—the only continuing mental development at stake is not the author's, but the reader's?

Seana's response seems to be that,

9. Shiffrin, *supra* note 1, at 295.

10. Among other things, many professionals and small businesspeople may sincerely believe in the quality and social value of their products or services, and their advertising may accurately reflect their thinking. Yet many of the Court's commercial speech cases involve speech by individuals; consider, for instance, the long line of lawyer advertising cases. *See, e.g.*, Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995); Shapero v. Ky. Bar Ass'n, 486 U.S. 466 (1988); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

> Of course, thinkers may have an interest in [having] access to corporate speech because corporate and commercial speech may serve as a source of information about one's environment, but, in other circumstances, the point of corporate speech, as well as other commercial speech, is to *alter* the environment, e.g. to manufacture desire, not to report it.[11]

But, as the very next sentences in Seana's article acknowledge, "altering the environment is also the aim of advocacy speech by individuals as well. That aim in no way diminishes the protection that should be afforded to it."[12] So we still haven't come to an explanation for why commercial and non-media corporate speech is different from advocacy speech for purposes of the *listeners'* role as thinkers.

Nor does the explanation that follows those quoted sentences work, in my view, when limited to the effect on the listeners' role. The article argues,

> Advocacy speech represents a form of exercise of thinkers' interests in developing their moral agency and in treating one another well by attempting to discern and to persuade others of what each of us or what we together should think and do. By contrast, non-press, business corporate and commercial speech, by design, issue from an environment whose structure does not facilitate and, indeed, tends to discourage the authentic expression of individuals' judgment.[13]

Yet again, though the environment in which the speech is *created* may affect the development of *speakers* as thinkers, that environment will have little effect on the development of listeners as thinkers.[14]

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11. Shiffrin, *supra* note 1, at 296.

12. *Id.*

13. *Id*. Likewise, Ed writes that "The structural compulsion of the market means that neither liberty nor autonomy is at stake [as to commercial speech], at least to the extent this sphere works according to its ideal." Baker, *supra* note 3, at 273.

14. Ed similarly says that his "essential claim" is—quoting the *First Nat'l Bank of Boston v. Bellotti* dissent—"[W]hat some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech. It is clear that the communications of profitmaking corporations . . . do not represent a manifestation of individual freedom or choice." Baker, *supra* note 3, at 274 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 804–05 (1978) (White, J., dissenting)). This sounds like a

Listeners' development as thinkers might be affected by the particular content of the work—for instance, by whether it contains elaborate reasoned argument and factual information or just vapid sloganeering and unreliable puffing. But there are intellectually useful and intellectually useless or harmful examples in all genres, whether advertising, corporate-funded advocacy, or non-corporate-funded advocacy.

Ed seems to dismiss the value of commercial speech to listeners' autonomy by arguing that commercial speech "only seeks behavior that the listener now instrumentally values because of how the speaker has changed [the listener's] options," rather than "seek[ing] to persuade the listener on agreement in values."[15] But that seems like an oddly truncated analysis of commercial speech: Much commercial speech both appeals to the listener's values and seeks to subtly influence the listener's values (albeit for the speaker's economic purposes, the same purposes that animate much speech that does not fall within the "commercial speech" category). Consider, for instance, ads that seek to persuade listeners that buying a certain product is good for the environment, for American labor, or for some charity to which the seller donates part of the profits.

And Ed's analysis also seems like an oddly truncated approach to autonomy. Why shouldn't our autonomy as listeners include access to information that helps us better accomplish our instrumental goals, even if those goals are simply to get the most that we can for our family and ourselves?

Perhaps the right to *buy* certain products that one wants might be an aspect of autonomy that is properly regulable as a "mutual exercise of [market] power" that should "be subject to collective (legislative) control." But we're not talking here about a right to buy free of government regulation, but rather a right to listen free of government regulation. And government attempts to stop listeners from hearing arguments affect listener autonomy whether the arguments are "you should buy this supposedly environmentally friendly product," "you should buy this product that will help your pocketbook," "you should vote

focus on the supposed absence of *speakers'* autonomy interests in corporate speech, without attention being paid to *listeners'* autonomy interests.

15. Baker, *supra* note 3, at 274.

for this supposedly environmentally friendly policy," or "you should vote for this policy that will help your pocketbook."

I suppose one answer might go like this: We should care both about speakers as thinkers and about listeners as thinkers. When a restriction interferes with the thinking of both groups, the presumption of its invalidity is strongest. When it interferes only with the thinking of one group—such as with commercial and non-media corporate speech—the presumption is weaker.

But the dead author example suggests that this isn't so. As I mentioned, I know of no cases that have treated the works of dead authors as less constitutionally protected than the works of live authors, or of any arguments that have been made for such lesser protection. Listeners' interests (or perhaps the very modest speaker interests of the living redistributors of the dead authors' works) have apparently been seen as justifying full constitutional protection for dead authors' works. And this judgment seems to me to be right.

What's more, note that some of the examples given in Part I were themselves originally corporate speech. The leaked internal corporate report (later published verbatim by a journalistic Web site), like the published corporate advocacy, was originally created by corporate employees; under Seana's and Ed's analyses, both the report and the advocacy are thus of equally little value to speakers-as-thinkers or to speaker autonomy.[16] But both may be read by readers who aren't just reading them on the corporate dollar; the two kinds of corporate-created speech are thus of equally great value to listeners-as-thinkers.

So the thinker- and autonomy-based theories, it seems to me, do not explain why commercial speech and non-media corporate speech should be less protected than other speech. There might be other explanations for this difference in protec-

16. The difference can't just be that the leaked document was published by some intermediate recipient: As I noted above, such a simple decision is likely to do much less for the publisher's development as thinker than writing ad copy or corporate advocacy does for the employee's development as thinker. And the publisher may be no less motivated by economic gain than is the corporate employee.

tion—but they would have to come from other theories of free speech.[17]

III. SPEECH CREATED BY EMPLOYEES

This leads me to one more category of speech: speech written by people employed to speak by the media and by advocacy groups. Unsurprisingly, much such speech is deeply affected by financial incentives and by managerial commands. Some writers might be given a comparatively free hand by their employers, but many reporters and many employees of political advocacy groups are indeed greatly constrained in what they can write.

Such speech strikes me as hard to distinguish from speech written by the employees of other organizations, including the employees of business corporations. For instance, Seana argues that "non-press, business corporate and commercial speech, by design, issue from an environment whose structure does not facilitate and, indeed, tends to discourage the authentic expression of individuals' judgment."[18] But reporters are also substantially constrained in their "authentic expression of [their] judgment," whether by their editors' commands or by the desire to entertain or please readers.

People who write the Sierra Club's press releases are likewise constrained in authentically expressing their judgment. For them as for people who write business corporations' press releases, "external . . . pressures render more tenuous any charitable presupposition that such speech is sincere, authentic, or the product of autonomous processes."[19]

To be sure, many people who work for the Sierra Club do so because they believe in the Club's goals. Some reporters go to work for particular magazines or newspapers because they respect the editors, and want to be guided by the editors' orders—or expect their editors to give them a good deal of flexibility.

But many people likewise go to work for particular businesses because they like the business's products, and thus ge-

17. In particular, I'm not sure whether and to what extent the commercial speech doctrine might be justified by some other First Amendment theory.

18. Shiffrin, *supra* note 1, at 296.

19. *Id.* at 297.

nuinely feel the enthusiasm with which they are asked to infuse the business's press releases or advertising. In any case, I don't see why the precise degree of likely agreement between the writer and his superiors, should affect the constitutional status of the organization's speech.

Top managers of media enterprises or advocacy groups are less constrained, but even they may be considerably constrained—and sometimes entirely motivated—by a desire to make money, or to raise money. Indeed, "the competitive structure of the economic market and the narrowly defined aims of the corporate or commercial entity place substantial pressures on the content of corporate and commercial speech." But these factors also place substantial pressures on the content of media speech, and similar factors place considerable pressures on the content of advocacy group speech.

Of course, one could focus just on whether the speech reflects the "authentic expression of [the] judgment" of top managers who control the speaking employees, rather than of the speaking employees themselves. But corporate press releases and advertising would still remain hard to distinguish from speech in a newspaper editorial or an advocacy group press release. After all, I suspect that top managers of businesses authentically believe much (even if not all) of the self-praising and self-serving statements that their businesses put out. There's little reason to doubt the authenticity of a former GM chairman's beliefs that "what [is] good for our country [is] good for General Motors and vice versa"—it's human nature for people who run organizations to believe in the value of their organizations and the organizations' products.[20]

Now of course the work of even the most just-the-facts reporters—or of satisfy-the-customers magazine writers, or of keep-donors-donating press release writers—involves a great deal of thinking and creativity. All writing, even constrained writing, involves this. Consider the paid lawyer, whose arguments are dramatically constrained by the "narrowly defined aims" of serving his clients, aims that "place substantial pressures on the content" of the lawyer's speech and "tend[] to discourage the authentic expression of [the lawyer's judgment]";

20. Testimony of Charles E. Wilson before the Senate Committee on Armed Services (1953), *cited in* Charter Twp. of Ypsilanti v. General Motors Corp., No. 92-43075-CK, 1993 WL 132385, at *10 n.38 (Mich. Cir. Ct. Feb. 9, 1993), *rev'd*, 506 N.W.2d. 556 (Mich. Ct. App. 1993).

despite this constraint, writing a brief surely helps develop the lawyer as thinker. Yet writing advertising copy, corporate publicity, or corporate advocacy aimed at persuading legislators or voters, is an intellectual task as well. It both requires thinking and helps develop the author's thinking.

So again it's hard to distinguish the paid, constrained, non-autonomous journalist, advocacy group publicist, lawyer, corporate publicist, and advertising professional. All are constrained. All may be saying things that don't authentically express their judgment. All are thinking. All say things that can influence listeners and thinkers. The thinker-based theory, it seems to me, does not persuasively explain why they should be treated differently.

Ed's response to this, I take it, would have been that the institutional press is protected by the freedom of the *press*, for reasons that are indeed related to democratic self-government rather than autonomy.[21] (I'm not sure how he would have responded as to the speech of people who work for advocacy groups.)

But why should the institutional media—including the business corporations in the institutional media—have greater constitutional rights than others who want to use "press" technology (which is to say the technology of mass communication) to express their views?[22] Voters, autonomous citizens, and thinkers can find much that informs their judgment in publications by non-media business corporations, media business corporations, labor unions, other advocacy groups, and so on.

Of course, listeners can also find much that is false, misleading, or self-interested in all those groups' publications. Falsehoods and shadings of the truth, deliberate or inadvertent, are not uncommon in the speech of professional advocates, opinion journalists, newspaper editorial writers, and even reporters. And even if some media organizations and nonprofit organizations especially value their reputations for accuracy, and take pains to protect them, that is hardly true of all such organizations (whether the opinionated ones or the supposedly

21. *See* Baker, *supra* note 3, at 274–76.

22. *See* Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology?—From the Framing to Today*, 160 U. PA. L. REV. (forthcoming 2012) (gathering evidence that the Free Press Clause has long been seen by American courts as treating all users of mass communications technology equally, whether or not they are members of the institutional press).

objective ones). Again, the source of the speech does not seem relevant to listeners' democratic self-government any more than to listeners' autonomy.

I've heard some argue that media and advocacy group speech should nonetheless be more protected than speech by nonmedia business groups, because media and advocacy groups are especially major contributors to public debates. And media organizations and advocacy groups do play an extremely important role in such debates, which gives them disproportionate power both for good and for ill.

Yet while listeners as thinkers of course benefit from media and advocacy group speech, constitutionally protecting non-media business speakers (whether as commercial advertisers or political commentators) adds still more voices to the mix, and still more potential value to listeners. To the extent that these non-media business voices prove to be relatively peripheral to most public discussions, this means that listeners get less value from them, but also that there is less possibility for ill stemming from free speech emanating from these voices. And to the extent that we might fear that speech by non-media business corporations will be so influential that it may cause great ill, that would suggest that such speech has indeed become central to the media diets of listeners-as-thinkers—which is all the more reason to protect it.

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There is much that is persuasive in Ed Baker's and Seana Shiffrin's arguments. They make a strong case that the contribution of speech to self-expression, the contribution of speech to speakers' and listeners' lives as thinkers, and the interference of speech restrictions with speakers' and listeners' autonomy are important reasons to protect speech.

But it seems to me that their analysis cannot justify their conclusion that commercial speech and corporate-produced speech should be less constitutionally protected. To the extent this conclusion rests on the supposed lack of value of such speech to speakers, it shortchanges the interests of listeners. And to the extent this conclusion tries to show that the commercial and corporate-produced speech lacks autonomy or

thinker-development value to listeners, it strikes me as unpersuasive.