FREEDOM OF SPEECH AND TWO TYPES OF AUTONOMY

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For several decades, I have maintained that social reality is too complex to hope or expect that First Amendment theory could be reduced to a single value or a small set of values.[1] Nonetheless, extraordinarily fruitful scholarship can be produced by those who try. Such scholarship can show just how far we can get by resort to monistic approaches (as well as their limits). C. Edwin Baker and Seana Valentine Shiffrin offer two approaches to autonomy. Baker's approach rests on a speaker liberty theory that he put forward over a period of decades. It is, for my money, the best that has been put forward in the field, eclipsing those of Rawls and Dworkin, for example. It represents in my view the most thoughtful defense of the ACLU position on freedom of speech.[2]

Shiffrin puts forward a substantial and original contribution to the literature. She—wisely in my view—does not seek to offer a comprehensive theory. But she maintains that if we focus on humans as thinkers instead of as speakers or audience members,

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1. See, e.g., STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE ch. 1 (1990); Steven H. Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983); Steven H. Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915 (1978). Similarly, in Steven Shiffrin, *Dissent, Political Participation, and First Amendment Methodology*, 97 VA. L. REV. 559 (2011), I argue that political participation will not serve as an organizing principle for First Amendment doctrine or as a primary normative basis for First Amendment theory.

I have argued that if the First Amendment is to have a center it should be protecting and encouraging the practice of dissent. In addition to the *Democracy and Romance* book *supra*, see STEVEN H. SHIFFRIN, DISSENT, INJUSTICE AND THE MEANINGS OF AMERICA (1999). Although I think protecting and encouraging the practice of dissent is vital (primarily because of its role in combating unjust power relations), I do not think dissent is valuable *per se* (its value depends on the First Amendment values it implicates in particular contexts and the harm the government seeks to mitigate caused by dissent). Indeed, I think that the presence of dissent is neither a necessary, nor a sufficient basis for protection.

2. I expand on this in a memorial essay on Ed's life and work. Steven Shiffrin, *Ed Baker: Friend and First Amendment Scholar*, 12 U. PA. J. CONST. L. 963 (2010).

we can provide surprising insights across a range of First Amendment issues. One might have thought that the First Amendment literature would have explored in detail the implications of freedom of thought, but it has not, and Shiffrin systematically forges a new path.

Baker argues that the legitimacy of government demands respect for formal autonomy. He apparently maintains that instrumental reasons need play no role in speech clause analysis (though they do in press clause analysis).[3] The crucial question for Baker is whether a speaker has coerced or manipulated another. If so, the speech is not protected. If not, the speech is protected. [4] Thus, he says that obscenity is an easy case for his system. Obscenity does not coerce or manipulate, and, therefore, it is protected.[5] Note that Baker's system dictates this conclusion wholly apart from the consequences of obscene speech. The same would be true of intentional infliction of emotional distress, fighting words, the revealing of intimate facts about a person's private life, negligent defamation of private persons (at least in the non-media context), and racist speech including the advocacy of genocide (so long as it did not amount to an attempt). It may be that there are good grounds to protect all the speech in these categories (I doubt it), but resolving these problems via moral geometry without attention to the consequences does not seem right to me. Blanket protection for formal autonomy seems insufficiently respectful of the dignity of human beings as witnessed by its protection of the intentional infliction of emotional distress, fighting words, the revealing of private facts about a person's private life, and some negligent (indeed, even grossly negligent) defamation of character. In

3. Although his liberty theory made instrumental arguments unnecessary to ground freedom of speech, he also thought that instrumental arguments supported his conclusions as well.

4. I leave to the side Baker's distinction between substantively valued and instrumentally valued speech because it is not important for my criticisms.

5. Actually, since obscenity is ordinarily accomplished by means of what Baker would classify as the press, he has imported some of his free speech conclusions into the press clause. In the balance of my analysis, I will assume he does the same in other areas including the revealing of private facts about a person's private life and defamation. In prior work, for example, he says that defamation law should arrive at the same answers whether the defendant is a private individual or the press. C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 242 (1989). Particularly because attention to consequences is required in the press context under his analysis, I do not think he was bound to arrive at the same results in speech and press cases. The only area, however, where I know that he arrived at somewhat different results between speech and press was in the copyright arena.

addition, suppose that pornography[6] and racist speech create unjust conditions for women and people of color. In the absence of good consequentialist arguments against such prohibitions,[7] it is a little odd to be told that injustice must be maintained in order to protect the legitimacy of the government. In the case of racist speech and pornography, the effect of Baker's system is automatically to privilege negative liberty over the positive liberty that might be created by governmental egalitarian measures. To put it another way, using Baker's terminology, I believe that it is sometimes appropriate to privilege substantive autonomy over formal autonomy even when the exercise of formal autonomy has not interfered with the equal formal autonomy of another. Doing so, in my view, can make the government more legitimate.[8]

The exercise of the formal autonomy of speech can fit into the problematic categories of speech mentioned above or it can produce uncontroversially protected political, religious, artistic, scientific, or private communications. As I understand him, Baker maintains that interfering with racist speech is no better or worse than interfering with religious or political speech (at least from a formal perspective—obviously Baker was no fan of racist speech). Nonetheless, there are grounds to be suspicious of a theory that equates these categories of speech without need of further investigation. From Baker's perspective, to interfere with formal autonomy (when the person has not interfered with the autonomy of another) is to disrespect the speaker. To deny such autonomy is to give up on any legitimate basis for justifying the use of force against an individual.

I deny that interference with formal autonomy in the circumstances I mentioned earlier disrespects the speaker. The government can have great respect for the speaker as a citizen, but it can disrespect the choices made by the speaker precisely because the speech causes *harm* that outweighs the value of the

6. Following MacKinnon, I would distinguish pornography from obscenity, but the distinction is not important in this context.

7. In the past, I have argued that there are good consequentialist arguments against prohibiting racist speech in the United States, but not against prohibiting some forms of pornography. I doubt I was right about racist speech and suspect that the case for pornography regulations was not as strong as I thought. I continue, however, to think the case for the latter is strong enough to justify regulation.

8. For reasons I have developed elsewhere, I actually do not think it is possible to have a government in a large-scale society that is legitimated for all citizens. It is always possible, however, to move toward a better and more legitimate government. *See* SHIFFRIN, DISSENT, INJUSTICE AND THE MEANINGS OF AMERICA, *supra* note 1, at 91–93.

speech.[9] There is another way to put this: I am in Mill's family; Baker is in Kant's family by way of Habermas. Baker complained that the harm principle is fuzzy, undefined, and capable of manipulation. It is. Indeed, Baker argued that the harm principle inherently requires difficult substantive judgments about the character of harm, the extent of harm required for abridgment, the particular types of autonomy that need to be respected and those that do not, and ultimately assessments of what it takes for human beings to flourish. Baker argued that his commitment to formal autonomy leaves many fewer grey areas and offers a defining path in a difficult area. It does. I do not think his path leads us off a cliff, but I do think it leads to many unfortunate results and could potentially lead to injustice.

Finally, I deny that interference with formal autonomy in the circumstances I have outlined makes a government illegitimate. If the facts warranted intervention in the context of racist speech, I would rather explain to the racist why his moral theory is defective and why the state need not respect it than try to explain to people of color that they must live in unjust conditions. Similarly, if a person intentionally inflicts emotional distress upon another, I would rather explain to the tortfeasor why her conduct was reprehensible than explain to the victim that we are obligated not to violate the formal autonomy of the tortfeasor.[10]

I think the position I have taken applies to all those who try to develop a comprehensive theory of free speech autonomy within a Kantian or neo-Kantian framework. Kant thought that "freedom" (a term of art) could not be restricted unless it interfered with the *freedom* of another; with limited exceptions, Dworkin argued that the right of freedom of speech could be interfered with only if it interfered with another's *right*; Rawls argued that the basic liberty of freedom of speech could be abridged only if it interfered with another *basic liberty*; and Baker argues that the autonomy of freedom of speech can be

9. Applying a harm test requires a contestable conception of human anthropology or of what it means for human beings to flourish. Baker was not opposed for government to act on such conceptions, but he did not think such conceptions should play a role in restricting liberty.

10. I do not think it is possible to have a legitimate government in any large-scale "democracy" (let alone in our corpocracy) because of the inevitable corruption present in large-scale bureaucracies and hierarchies, but governments can improve their claims to legitimacy (they can be less injust), so I am not bothered by the large role that legitimacy played in grounding Baker's system.

interfered with only if it coerces (or manipulates) and thus interferes with the autonomy of another. Although the formal structure of the argument is the same, their results differ. Kant said that freedom included reputation (conceived as a property right) and was in favor of imposing liability for defaming the dead. Rawls did not list reputation in his scheme of basic liberties. Out of thin air, Dworkin discovered a "right" not to be negligently defamed. To the extent Baker supports an action for defamation, it arises from manipulative speech. But the defamed's autonomy is not interfered with by that speech. The defamed is a third party. To my mind stretching the system to arrive at sensible results is appropriate. But I think some stretching is necessary even to deal with defamatory lies.[11]

I would conclude this aspect of the analysis to note that Baker rarely stretches. He applies his system with integrity. He shows that the autonomy justification will not apply to business corporations or to media corporations. He rightly argues that those who argue from speaker autonomy must employ different principles to have a theory of the press. As I mentioned earlier, I think he does the best job of showing where formal speaker autonomy leads, but I believe it inherently leads us away from satisfactory results in too many contexts to serve as a comprehensive theory of freedom of speech. Imperfect as it is, I believe that balancing can lead us to more satisfactory results.

Although I do not think that "the individual agent's interest in the protection of the free development and operation of her mind"[12] is central to the First Amendment, I do think that Seana Shiffrin is right to argue that such an interest is of special importance and leads us to significant insights. I think that her exploration of the interests that every individual, rational, human agent *qua* thinker possesses is genuinely illuminating; that her claim of the special importance of speech to human beings as thinkers is original and unassailable, and I agree with her conclusion (well tied to freedom of thought) that dissent, religious speech, fiction, art, music, diaries, personal

11. Baker's theory would seem to authorize non-protection for all lies. But I doubt he would have allowed juries, judge, or administrative agencies to impose sanctions for any and all utterances that they deemed to be lies. The alternative would be to authorize the imposition of sanctions only if there is some further harm. But this opens Baker to the kind of subjectivity he has sought to avoid and for which he has criticized Mill. In fairness, however, this problem is limited to a narrow category of already problematic speech.

12. Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*¸ 27 CONST. COMMENT. 283, 298 (2011).

conversations and letters deserve strong protection under the First Amendment. I also think that her perspective yields important light on the much discussed subject of compelled speech in *West Virginia v. Barnette*[13] and on the muddled doctrine of freedom of association.

I would like to sketch, however, a few areas where I think or know that we differ or wonder if we do. Although I share the view that many types of speech must be protected to safeguard the role of thinkers, and I understand the conclusion that from thinkers' perspectives, no hierarchy among these forms of speech appears to be appropriate, I believe, as I think she does, that the thinker's perspective should not be the exclusive perspective. If that perspective is not exclusive, then there is room to argue for various hierarchies. I have argued, for example, that the role of speech in combating injustice in public and private contexts is especially important. From this perspective, it is particularly important to protect dissent. Of course, she could agree with this and think no hierarchy is necessary, but that conclusion would flow from something more than a thinker's perspective.

Second, I think that the thinker's perspective could potentially protect too much speech. I have in mind commercial speech or the speech of non-press business corporations. For Baker the issue was relatively easy. Commercial and corporate speech are dictated by the market[14] and, therefore is not an exercise of speaker liberty. For Baker, listeners have no "affirmative constitutional right to override a restriction" on commercial or corporate speech. Shiffrin argues that commercial and corporate speech should receive lesser protection, but the thinker's perspective may not provide a sturdy enough explanation for this conclusion. I can see how a thinker's perspective can provide an argument with respect to corporate political speech. To the extent corporate political speech is

13. 319 U.S. 624 (1943)

14. Shiffrin rightly argues that Baker's claim that commercial and corporate speech are dictated by the market is overbroad in cases of market failure or in cases where organic farmers, for example, revolt against the reigning commercial values in the market. The problem of market failure was acute for Baker's theory in its early years when oligopolies were relatively free from market pressure (*see* Shiffrin, *The First Amendment and Economic Regulation*, *supra* note 1), but the market has significantly changed since in a more competitive direction. ROBERT B. REICH, SUPERCAPITALISM (2007). On the other hand, Baker acknowledged the force of Shiffrin's criticism regarding dissenting advertisers such as organic farmers and agreed that they should be afforded protection. C. Edwin Baker, *The First Amendment and Commercial Speech,* 84 IND. L.J. 981, 995–97 (2009).

unrelated to the authentically held views of the speaker, it can reasonably be argued that the listener loses little by having the cluttered marketplace[15] cleared of such speech.[16] Purely from a thinker's perspective, however, I would think at least informational advertising should be protected. Informational advertising may be dictated by the market, but the market itself reflects preferences of people who may well want information about travel, electronic devices, and drug prices. To be sure, many of those preferences are created by advertising, but many are not, and those that are so created are still the product of thought.

I am also interested in Shiffrin's views about image advertising. On the one hand, as I read her, she places importance on the presence of rational agents, but she does not believe that "emotional" speech should be beneath First Amendment protection. Some believe that many of our greatest artists are employed by corporations and that advertisements are well designed to provoke aesthetic reactions. I, however, would be sympathetic to an argument that image advertising in our culture is a special form of manipulation that should not be protected. I think a thinker perspective could underwrite that argument though it would need to distinguish imagistic political advertising. In the end, despite having claimed many years ago that commercial advertising should receive a degree of free speech protection, I now regret it given the sweeping protection provided for such advertising made by the Court (upholding tobacco advertising for me was the last straw). A thinker perspective and a liberty perspective (the two overlap) can provide part of the justification for putting commercial and corporate speech outside the protection of the First Amendment, but the addition of other perspectives (*e.g.,* democracy and dissent perspectives) can strengthen the case.

Third, Shiffrin thinks that her mentioned categories of speech should be foundational and subject to strong and principled protection. As she puts it, she has only offered a sketch of her views (which was quite enough work), but I am left

15. Although Shiffrin focuses on the thinker (including speakers and listeners), she need not accept the marketplace arguments put forth by Holmes.

16. This is particularly true when the speech promotes corruption of the democratic process. On the other hand, constitutional considerations should not be considered absent. For example, it would be deeply problematic if corporations were authorized to sponsor Republicans, but not Democrats or vice versa. On this analysis, corporations should get some form of political equality protection, but not liberty protection.

wondering about the meaning of foundational and principled, especially the latter. Leaving aside the focus on different kinds of autonomy, I am wondering how much the commitment to principle might put her in the Kant/Rawls/Dworkin/Baker camp.

Fourth, I think Shiffrin is entirely correct in arguing that a thinker perspective lays bare a major problem with the compelled speech regulation at issue in *Barnette*. She maintains that it is simply illicit for the government to use manipulative methods bypassing deliberative faculties in order to influence the child.[17] I agree with this, but I would add that I think compelled speech should be unconstitutional even if it were not calculated to influence the speaker. As Laurence Tribe maintains, there is something deeply wrong with forcing someone like the school child in *Barnette* or the driver in *Wooley*[18] to be a forced courier of,[19] or megaphone for, a government message.[20] In my view, it is not just (as Baker might have it) that formal autonomy is breached, compelled speech simply does not appropriately respect the speaker's human dignity whether the speaker or audience is influenced or not.

Finally, I think Shiffrin is entirely right to observe that associations are not just sites for amplifying voices, but that they are also sites for forming values and thus particularly important from the thinker's perspective. Exposing the narrowness of prior law on association is a substantial contribution of the thinker's perspective. I think it is worth observing, however, that these instrumental perspectives on associations do not exhaust associational values. I have in mind intimate associations, particularly friendships. Friendship involves substantial concern for the good of the friend and a readiness to act in ways that further that good.[21] As Lawrence Blum argues, "Friendship is an altruistic phenomenon . . . ; a relationship based on mutual advantage (even if it involved mutual liking) would not in this

17. Image advertising also seeks to bypass deliberative faculties, but so does much political advertising. The compelled speech in *Barnette* is distinguishable. Nonetheless, even if I were inclined to protect commercial advertising and the speech of non-press business corporations, I would cast the regulatory net broadly enough to permit government to regulate imagistic commercial advertising, but not imagistic political advertising. That, however, would require a long discussion.

18. Wooley v. Maynard, 430 U.S. 705 (1977). It is possible, but less likely that New Hampshire was trying to influence the mind of the driver by putting the motto on his car than West Virginia was trying to influence the mind of the child.

19. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 901 n.15 (1978).

20. Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 PEPPERDINE L. REV. 641, 645 (2001).

21. LAWRENCE A. BLUM, FRIENDSHIP, ALTRUISM, AND MORALITY 43 (1980).

sense be a friendship."[22] Blum maintains that without the presence of altruism, trust, reliance, and substantial personal involvement would not be possible.[23] If Blum is right, an important aspect of intimate association is captured neither by the speech amplification perspective nor by the thinker's perspective. This would be a criticism only if these perspectives purported to be comprehensive, but I do not understand them to do so. I am not sure whether Blum's understanding of friendship has practical or theoretical value for freedom of speech, though I would tend to believe that freedom of association is best supported by support of all of its underlying values. I suspect that one could develop fruitful insights about freedom of speech by concentrating on the full range of values that underlie associations. This dialogue itself has shown that insights abound if one starts from democratic participation, speaker autonomy, or the autonomy of the thinker. Because I believe free speech is supported by a multiplicity of values, I do not believe we have exhausted the theoretical richness of the free speech terrain, but we have covered a lot of ground and opened some new territory in the process.

22. *Id.*
23. *Id.* at 44.