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A BAKERIAN RESPONSE TO WEINSTEIN'S FREE SPEECH THEORY

*Anne Marie Lofaso**

As Professor Jim Weinstein correctly notes, his and Baker's views about the core value underlying free speech form the main focus of disagreement between his and Baker's free speech theories.¹ Whereas Professor Weinstein thinks that American free speech is committed to participatory democracy, the basis of Baker's theory is formal autonomy.²

But there is another area of difference between Weinstein and Baker that is very important—one that Weinstein implicitly recognizes. Whereas Weinstein appears to be searching for the core value underlying the American free speech principle, Baker is searching for the core value underlying the best or the correct free speech principle.³ In this way, Weinstein is a positivist, and Baker is a natural law theorist. Baker may very well have agreed that Weinstein's theory better describes American free speech jurisprudence—though, knowing Ed, I'm quite certain that he would never concede that point. Baker's project, however, was not only to find a theory that demonstrated some doctrinal fit. After all, he was a great fan of the Free Speech Clause and believed that United States jurisprudence had developed a "robust" free speech doctrine. Baker was also preoccupied with getting it right, which meant finding a theory that persuasively explains when and how the courts are getting it wrong.

Along these lines, I agree with Weinstein that Baker places a high emphasis on normative appeal.⁴ I just do not think that, for Baker, doctrinal fit is "irrelevant." Indeed, Baker uses doctrinal fit to help him in the reflective equilibrium process. Accordingly, where Baker's theory generates a different

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¹ See James Weinstein, *Formal Equality, Formal Autonomy and Political Legitimacy: A Response to Ed Baker*, 115 W. VA. L. REV. 29, 29 (2012).

² *Id.*

³ *See id.*

⁴ *See id.* at 31.

result from doctrine, such as is the case with obscenity, Baker would use that misfit to test or reflect on, and possibly refine, his theory. But perhaps that is just another way of saying that doctrinal fit is “irrelevant,” at least in drawing a substantive conclusion about the underlying core value of the Free Speech Clause and the kind of society we wish to reside.

As Weinstein further points out, Baker and he agree to some extent on the normative underpinnings of the Free Speech Clause.⁵ Both believe that political legitimacy helps to resolve an age-old jurisprudential question: Under what conditions can a government obligate its citizens to obey the law?⁶ Both seem to use political legitimacy as a check on policies generated by their theories.⁷

As Weinstein points out, and Baker would agree with this point, a legitimate legal system must reflect citizen obedience out of a sense of duty, not merely out of a sense of fear.⁸ In this way, both Weinstein and Baker are very Hartian in their approach to legal legitimacy.

I have some dispute, however, with the question that Weinstein poses: Do restrictions on speech that interfere with democratic participation undermine warranted allegiance to the legal system’s legitimacy to a greater extent than do laws that infringe formal autonomy?⁹ Weinstein’s question assumes that democratic participation is a fundamental value. I think that Baker would argue that a society built on formal autonomy would necessarily generate some form of constitutional democracy, which in turn would value citizen participation in political decision-making; after all, participatory democracy is the sum of each citizen’s actualized formal autonomy. For Baker, formal autonomy then is prior to participatory democracy, and participatory democracy depends on formal autonomy.

Moreover, constitutional restraint is built into Baker’s definition of formal autonomy as “a person’s authority (or right) to make decisions about herself—her own meaningful actions and usually her use of her resources—as long as her actions do not block others’ similar authority or rights.”¹⁰ Baker’s conception of formal autonomy grants citizens a right, which necessarily means that governments are under an obligation to uphold that right.

Baker’s theory and Weinstein’s theory tend to converge in many places because Baker’s theory necessarily generates a constitutionally constrained democracy and Weinstein’s theory is grounded in participatory democracy.¹¹

⁵ *Id.* at 33.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 31.

⁹ *Id.* at 32.

¹⁰ C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 254 (2011).

¹¹ See Weinstein, *supra* note 1, at 29.

Where Weinstein and Baker might disagree is on the fringes of what that form of government might or must look like. For Baker, the building blocks for a just political society must include both formal equality and formal autonomy—”both [are] basic but do different, non-conflicting work in relation to a legitimate legal order.”¹² As Steven Shiffrin, interpreting Baker, has put it: “The building block for [Baker’s] theory was that human beings are equally entitled to be respected by government as autonomous agents. He believed that people had a right to make their own commitments and live out those commitments without state interference.”¹³

There are, therefore, two components of Baker’s theory: 1) formal autonomy,¹⁴ which we have devoted the better part of this conference to discussing, and 2) formal equality.¹⁵ Baker valued equality of respect,¹⁶ or what Ronald Dworkin and Immanuel Kant have called dignity: each human being must be respected equally on the basis of her inherent worth as a human being.¹⁷ My guess is that Weinstein would agree with this constraint. After all, participatory democracy does seem to entail Kantian dignity. Baker therefore allowed for a sufficient baseline distribution of resources (material conditions, which would include “sustenance and shelter and maybe education and medical care”) to allow for meaningful opportunities to lead a self-authored life.¹⁸ This is not really substantive equality, although some may differ with me on this point.

Finally, Weinstein uses the doctrine of defamation to show why his theory is superior to Baker’s.¹⁹ There are several responses that Baker could give to this argument. First, Baker might claim that certain untrue defamation is simply not protected. Recall that Baker’s autonomy theory does not protect violence, coercion, or manipulation as practices that society must respect.²⁰ In Baker’s view, regulating these practices does not violate the speaker’s autonomy because the speaker’s speech or conduct does “not aim to communicate the speaker’s own views or values, . . . but rather attempt[s] to undermine the integrity of the other person’s decisionmaking authority.”²¹

¹² Baker, *supra* note 10, at 255.

¹³ Steven Shiffrin, Eulogy at the Memorial Service Honoring the Life of C. Edwin Baker at the Cardozo School of Law (Jan. 31, 2010), *available at* http://www.nclrights.org/site/DocServer/Steve_Shiffrin_-_Ed_Baker_Eulogy.pdf?docID=7983.

¹⁴ Baker, *supra* note 10, at 254.

¹⁵ *Id.* at 255.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Weinstein, *supra* note 1, at 36–37.

²⁰ Baker, *supra* note 10, at 255–56.

²¹ *Id.* at 256.

To be fair, this “caveat” will not capture all defamation, which is perhaps why Baker recognized that defamation is a problem for his theory.²² It does, however, capture the worst types of defamation, which should be good enough to demonstrate that even though formal autonomy allows some harms, it does not permit the worst kind of harms and therefore generates the type of society to which any of us in the original position might agree.

These observations leave open one question: Who wins this dog fight—Weinstein’s Demo or Baker’s Auto? I think it depends on how foundational you want to get.

²² See *id.* at 282.