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Freedom of Speech

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FREEDOM OF SPEECH. By *Eric Barendt.* New York: Oxford University Press. 1985. Pp. xxii, 314. $64.

Eric Barendt's[1] *Freedom of Speech* begins by noting the paucity of books exploring "comparative civil liberties law," despite the topic's "growing interest in Britain" (p. v). Barendt attempts to "fill part of this gap" (p. v) in his comparative treatment of free speech law in England, the United States, West Germany, and under the European Convention on Human Rights.[2] The book categorizes a vast body of material, uncovers common doctrine, and, from a British scholar's perspective, suggests areas in which English common law should consider adopting features of other systems.

The introductory chapter, *Why Protect Free Speech?,* structures the book. Barendt gives "a short and inevitably oversimplified" analysis of "three prominent free speech theories" (p. 7). The theories are slight variations of the policy rationales recognized as the theoretical underpinnings of American first amendment doctrine.[3] Barendt calls them (i) "Mill's argument from truth," (ii) "Free speech as an aspect of self-fulfillment," and (iii) "The argument from citizen participation in a democracy."[4] He then describes the freedom of expression[5] law in

1. Fellow and Tutor in Law, St. Catherine's College, Oxford. Barendt is co-author, with A.I. Ogus, of the British treatise THE LAW OF SOCIAL SECURITY (2d ed. 1982).

2. The European Convention on Human Rights and Fundamental Freedoms has been lauded as the "most important product" of the multi-national organization, the Council of Europe. M.A. GLENDON, M. GORDON & C. OSAKWE, COMPARATIVE LEGAL TRADITIONS 120 (1985). Created and signed by the Council's twenty-one member nations in 1950, the European Convention is a document which explicitly sets out the fundamental rights of individual citizens of its member states. Its provisions are "enforced" (admittedly more through publicity than direct sanctions) by the Council's European Court of Human Rights at Strasbourg. The European Convention has, nevertheless, played an important role in safeguarding human rights through its impact on individual nation's laws, especially nations whose constitutions did not already include a bill of rights. *Id. See also* T. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW: AN INTRODUCTION TO THE CONSTITUTIONAL AND ADMINISTRATIVE LAW OF THE EUROPEAN COMMUNITY (1981).

3. *See, e.g.,* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1 (1978); G. GUNTHER, CONSTITUTIONAL LAW 974-79 (11th ed. 1985).

4. The "argument from truth" reflects John Stuart Mill's idea that truth is a fundamental good that can be ascertained over time, but not without open discussion of facts and judgments, regardless of their veracity. P. 8. Society can only identify ultimate truth through the argument and challenges to potential truths resulting from unrestricted expression of ideas and information. Citing F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY ch. 2 (1982), Barendt distinguishes this "argument from truth" from Justice Holmes' variation of this theory, con-

the surveyed systems, noting that all four systems derive their free speech principles from some combination of these rationales. The author uses these three theories to unify the book, by exploring the manifestations of each system's differing degrees of reliance on each theory.

Barendt applies these theories to seven broad categories of modern-day free speech problems, each of which makes up a chapter of the book: prior restraints, political speech, libel/invasion of privacy, public order, judicial process, obscenity, and freedom of association. The categories represent murky legal areas in which "free speech" cannot be absolute because an individual's freedom of expression right impinges on another's, or the state's, interests in limiting expression. The limiting interests can range from society's peace and safety (p. 192) to an individual's right to privacy (p. 173).

Barendt shows that all four legal systems employ each theory in different contexts, with varying degrees of success. Obviously, no one theory can resolve every free speech controversy, and Barendt marks the points at which each theory is inadequate to deal with a problem. Among other difficulties, the author highlights problems each theory has in enumerating which types of ideas and modes of conveyance are protected, and in resolving conflicts between the rights of the speaker, the listener, and the state. Unfortunately, however, when the theories become insufficient, Barendt's analysis also seems unsatisfying.

Chapter Six, *Libel and Invasion of Privacy,* is illustrative of this problem. Barendt first delineates the private rights in conflict, in this case, the speaker's freedom to speak against her subject's right to reputation (p. 173). Libel and invasion of privacy are corollary causes of action arising out of this conflict (p. 174); invasion of privacy is an alternative to libel for "public figures," who are vulnerable to unique intrusions (pp. 189-90). Barendt first addresses libel, detailing the

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ceived in Abrams v. United States, 250 U.S. 616, 630 (1919) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."). P. 9. Some commentators do not call attention to the differences between Mill's and Holmes' theories, but to the similarities. *See, e.g.,* G. GUNTHER, *supra* note 3, at 979.

The "aspect of self-fulfillment" theory sees free speech as an "integral aspect of each individual's right to self-development and fulfillment." P. 14. This theory accentuates the value to individuals served by free speech (self-determination, autonomy), rather than the good to society as a whole, protected by the arguments from truth or democracy.

The "argument from citizen participation in a democracy" is the most popular rationale used "in modern Western democracies." P. 20. This rationale sets the ultimate goal of free speech as preservation of democracy by sustaining individual access to uninhibited public debate on political issues: without discussion, public opinion cannot form in a meaningful way.

5. Following Barendt's practice, this Notice uses the terms "freedom of speech" and "freedom of expression" interchangeably. As the author points out in his second chapter, " 'Speech' is really a term of art when used in constitutions, and courts should ask whether, in the light of the reasons for protecting expression from legal regulation and so adopting a free speech principle, the type of communication in issue should be covered by the principle." P. 38.

While this second chapter, entitled *The Meaning of Speech,* is devoted to the question of precisely what modes of communication are covered by free speech protections, this Notice focuses on the analysis that follows this initial discussion.

English, American, and German[6] approaches to when and whether libel is protected speech. He finds the German position

> midway between those taken by English and United States law. Like the former, it draws a distinction between assertions of [f]act and of opinion, conferring a higher degree of protection on the latter. . . . On the other hand, in its willingness to grant some immunity for libels committed during the course of political and public debate, and in its recognition that the publication of some exaggerations and inaccuracies should be tolerated, the [German] Constitutional Court's approach is similar to that of the Supreme Court in Washington. [p. 187]

Barendt has more difficulty categorizing the invasion of privacy aspect of the conflict. Because the right an individual must assert in protecting her privacy mandates shielding some information from public exposure, a "conflict" is generated "between the conclusions suggested by the arguments from democracy and Mill's truth rationale" (p. 190). This conflict is one with which all three systems continually struggle: the free speech theories often collide during the critical determination of the reach of an individual's rights. Yet Barendt's handling of this important quandary is disappointing. Where he could have used this opportunity to make just about any point he wished — a preference or dislike for a theory, or a legal system's approach — he merely remarks on the need for flexible rules.

This lack of directional signals is confusing. As the book develops, the reader can see patterns in Barendt's analysis, and generate her own theses about his purpose. Yet not until the concluding chapter is Barendt's message apparent: Britain would benefit by adopting a constitutional free speech clause (pp. 304-07). Even then, it is not completely clear why he arrives at this conclusion. Although in preceding chapters he often notes the limited arsenal available to British judges for protecting free expression, this is counterbalanced by equally frequent warnings against absolutist protection of expression. The overall impression is ambiguous.

The book is most valuable in its self-described function as a "detailed account of the law of the various jurisdictions" (p. vi). Barendt clearly explains the nuances of an intricate and often subtly differentiated mass of transnational rules. However, vague design leaves the reader adrift, to make her own guesses about what to do with so much information.

For example, the four legal systems are facially very different. The United States' first amendment is extremely vague, inducing much controversy (pp. 31-33). The United States also consistently applies the most "liberal" standards in the sense that it is the most protective of even "extremist" free speech (p. 157). Barendt seems to suggest a

6. There are no relevant European Convention decisions for some topics. Thus, Barendt often either omits them, or treats them very briefly, as he does in this chapter.

relationship between this vague constitutional language, and the more "liberal" formulas the United States Supreme Court uses to implement the document (pp. 31-32). Meanwhile, England has no written Bill of Rights; it relies on common law free speech doctrine (pp. 29-30). The English law represents the other end of a limited spectrum, generally providing the least protection to free speech. Its courts are somewhat more comfortable finding that competing interests outweigh — or, carve out exceptions to — common law free speech interests (pp. 30-31, 304). Finally, compared to the United States or England, West Germany's Article 5 of the Basic Law, and the European Convention's Article 10, both written in the middle of the twentieth century, are extremely explicit in their language.[7] Detailed language requires minimal judicial elaboration. Thus, the German and the European Convention approaches fall somewhere between those of the American and the English.

Perhaps the most interesting element of Barendt's presentation of these facial differences is how much it brings out their similarities. The differences do not seem fundamental: variations seem to be only of degree. However, Barendt never directly states this idea. He treats it only by inference. Parallels between the four judicial interpretations remain with the reader only because of the book's organization, not because of any explicit consideration given them by the author. The discussed focus on shared doctrinal underpinnings advances this end. Beyond this, Barendt's juxtapositional method naturally calls attention to underlying similarities, because the differences are relatively obvious ones inherent in the systems' structures. Barendt's description of the elements of each system (pp. 28-36) also reinforces likenesses between plans.

It is surprising that Barendt does not direct his audience's attention to this idea more vigorously, because the modest nature of the differences between the systems is key to another of Barendt's themes. He designed the work, at least in part, to counter England's apprehensions about adoption of a written free speech clause (pp. 304-07). His

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7. Article 5 (1) of the German Basic Law provides,

> Everyone shall have the right freely to express and disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorship.

GRUNDGESETZ [GG] art. 5 (1) (W. Ger.), *quoted at* p. 33.

Article 10 (1) of the European Convention provides,

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television, or cinema enterprises.

EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS art. 10 (1), *quoted at* p. 35.

Notably, the European provisions specifically address the rights of both the speaker and recipient of information, and illustrate what may qualify as protected speech.

comparison ultimately achieves this on two levels. First, he shows that written documents produce a range of responses, both within and across legal systems. This fact belies the assertion that writings are intrinsically inflexible. More importantly, he shows that, even factoring in the potential for extremist interpretation of vague language, all of the systems restrain free expression, considerably in some areas. The entire range of judicial responses across systems falls within a limited spectrum. Barendt concludes that "constitutional courts are generally relatively cautious in their interpretation of a free speech clause," (p. 300), due to a number of factors, such as deference to the legislature (p. 149) and protection of the court's own integrity (p. 222-23). Thus, adoption of a free speech clause does not require becoming as "liberal" as the United States Supreme Court. Even if the British Parliament enacted constitutional language as vague as that of the United States, its interpretation would not necessarily be very far from the procedure already employed in England — and in a number of other Western jurisdictions as well.

Finally, as an American, this reader cannot appreciate some of Barendt's argument regarding the English constitutional dilemma as intimately as, no doubt, his British audience can. His purpose is as foreign as, perhaps, the American debate over national health insurance proposals might be to an uninitiated British legal reader. Unfortunately, comprehension is limited by respective socializations.

Having said this, there remains one criticism particularly germane to comparative legal inquiry. *Freedom of Speech* is somewhat disappointing, not because of any lack of thoroughness, but, as mentioned, due to the lack of a persuasive picture of the whole. Professor Inga Markovits makes this point about the shortcomings of comparative analysis especially well in a recent review of a another comparative work.[8] Criticizing comparative legal academics as limiting their roles to that of "gatherers" of information, she tries to answer "[w]hy is so much of comparative law work so unsatisfying in general?"[9] She suggests that the "comparative method" is "good at placing information into proper doctrinal slots, at comparing the technicalities of different legal regulations, and . . . even at exploring the functional differences and similarities between . . . systems. But [comparativists] are not very good at asking questions going beyond that."[10] Markovits aptly summarizes what turns out to be the disappointment with *Freedom of Speech* as,

[N]ever experienc[ing] a developing argument, advancing step-by-step

8. Markovits, *Hedgehogs or Foxes?: A Review of Westen's and Schleider's* Zivilrecht im Systemvergleich, 34 AM. J. COMP. LAW 113 (1986). *Hedgehogs or Foxes?* is a fresh, thoughtful critique of comparative legal work in general.

9. *Id.* at 114-15.

10. *Id.* at 115.

> from hypothesis to result. Rather, we get an explanation or an enlightening aside whenever our progress through the material provides a suitable occasion.[11]

Barendt does not fall into this trap entirely, for he uses his introductory chapter as a theoretical launching point. His framework clearly seeks to identify the transnational common denominator in free speech law, what Professor Markovits dubbed "looking for the one thing rather than the many, for the one thing *in* the many."[12] Furthermore, Barendt has a point to make; the problem is that he never brings it home. There remains a vacuum where analysis begs for a statement summarizing what Barendt thought readers should have gleaned from each fresh example. Not until the final chapter can the reader piece together his purpose, beyond that of an exhaustive accumulation and organization of four not-all-that-dissimilar approaches to an admittedly complex legal area. Perhaps the breadth of his coverage itself forces the sacrifice of analytical acuity. Barendt would make his point more powerfully, especially to an unenlightened foreigner, if he pulled together his numerous strands for his audience earlier and more often.[13]

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11. *Id.* at 117.

12. *Id.* at 114 (emphasis in original).

13. This points to yet another question about comparative inquiry. Given the limitations cultural backgrounds impose, the question becomes: Is it inherently futile for an American to attempt to comprehend (and, for that matter, review) on a meaningful level a work uniquely designed to persuade the British mind?