FREEDOM OF SPEECH. By Eric Barendt.[1] Oxford: Clarendon Press. 1987. Pp. 366. Paper, $19.95.

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The principal achievement of Professor Eric Barendt's *Freedom of Speech* is one which the author did not intend. Asserting "[t]he closeness of the relationship between legal and philosophical reasoning," Professor Barendt argues that "the more difficult free speech questions can only be answered after reflection on the reasons of principle why free speech is valued so highly." He attempts to connect these contentions to an argument for constitutionalism—and for a particular approach to constitutional interpretation. In treating a wide array of specific free speech problems, however, Barendt's philosophical analysis rarely generates convincing solutions. Hence, the book's ultimate effect—albeit an unintended one—is to undermine the case for philosophical analysis as a method of constitutional interpretation.

The book's flaws are doubly significant because its philosophical approach typifies an influential mode of constitutional interpretation that has been elaborated in its most self-conscious form, perhaps, by Professor Ronald Dworkin. Barendt, of course, is not Hercules. But he is a thoughtful scholar who would compare very favorably with the typical judge in his philosophical aptitude and international knowledge of free speech law. Hence, the gaps and shortcomings of Barendt's analysis can serve as useful illustrations of the pitfalls in a common approach to constitutional interpretation.

I

Barendt discusses not only case law under the United States Constitution's speech and press clauses but also English and West German (and occasionally New Zealand, French, Canadian, Australian, Irish, and South African) law, as well as decisions of the European Court of Human Rights. Barendt's preface properly cautions, however, that the book is not intended to be a comparative law treatise, but rather an analysis of "legal questions in the context of fundamental free speech principles." Accordingly, in his first chapter, Barendt presents the most common philosophical ratio-

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nales for free expression.[3] He also describes some of the major objections to such rationales.

The remainder of the book discusses nearly all of the major free speech issues with which courts have had to grapple, ranging from traditional controversies about seditious speech, libel, and obscenity to more recent issues raised by the regulation of campaign financing and cable television. Barendt describes and often evaluates the judicial treatment of these issues, emphasizing American and then English case law. In most instances, he concludes that speech receives greater legal protection in the United States than in England—a fact which Barendt attributes to the lack of constitutional protection for speech in England.

Along the way, the book provides readers with assorted incidental benefits. For instance, the first chapter might serve as a brief introduction to free speech theory. The book also reveals alternative approaches or solutions to speech issues which American jurists and lawyers might profitably consider. It is instructive to learn, for example, that other nations normally regarded as democracies may take very different positions than ours on matters such as group libel, film censorship, and regulation of extremist political groups such as Nazis—without sliding down that ever-menacing (and, for rhetorical purposes, ever-useful) slippery slope to authoritarianism.[4]

These benefits, however, reflect secondary concerns of the book, and thus do not provide appropriate bases for evaluating it. Barendt's discussion of philosophical rationales for free speech is by his own admission a "short and inevitably oversimplified account." And although American lawyers might gain valuable ideas from European and English law, Barendt's intention seems just the opposite: accusing English courts of "myopia" in matters of expression, he hopes that English lawyers will see the superior virtues of American law and, hence, the need for constitutional protection of speech. This perspective is not calculated to make American lawyers sensi-

3. These include Mill's argument that freedom of expression is a prerequisite for the discovery of truth, Meiklejohn's argument that free speech is essential to democratic government, and the argument (associated in this country with scholars such as Martin Redish and C. Edwin Baker) that free expression is necessary for self-realization or self-fulfillment.

4. Barendt himself sometimes makes use of "slippery slope" arguments. But his discussion does not confirm, and occasionally undermines, the assumption that governments have some natural proclivity towards suppression which can be controlled only by rigid legal restraints. For instance, he notes that in Britain, the still extant offense of seditious libel is literally inclusive enough to permit the prosecution of "much political argument and oratory," and could theoretically "have the effect of stifling any serious criticism of government." In reality, however, "prosecutions for sedition have become virtually unknown."

tive to the limitations of their own modes of analysis, or to attractive alternatives from foreign jurisdictions.

Although its various virtues and uses should be noted, Barendt's book must in the end be evaluated in relation to its central theses. Those theses are that free speech problems should be resolved in the light of philosophical reasoning, and that the proper function of philosophy is to guide the interpretation of a constitutional free speech clause.

II

Perhaps the most critical step in Barendt's analysis occurs so quickly that it might easily pass unnoticed: philosophical principles are presented as *a guide to interpretation* of the free speech clause. That clause, after all, must mean *something.* But the "literal approach to textual interpretation is of little assistance," and "[f]or rather obvious reasons [the] technique [of relying upon the framers' intent] cannot really be sustained." So what is left? Plainly, the argument runs, we must turn to philosophical principles in order to figure out what the free speech clause means. Philosophy qualifies to be our guide, in this instance, by default.[5]

Though familiar enough, such reasoning is, upon closer inspection, odd. The oddity may be made more conspicuous by contrasting Barendt's argument for employing philosophical principles with related arguments that might be made by what have historically been the most influential conceptions of law: naturalism and positivism. A naturalist approach to law would argue that philosophical principles for protecting speech should govern if they are valid or correct. Thus, a natural lawyer presumably would defend the use of such principles by trying to demonstrate that they are correct *on their merits,* and thus able to withstand objections. Conversely, a positivist approach to law would argue that such principles should govern if they have been adopted by the relevant political authority or sovereign—meaning, in a constitutional democracy, the people or their representatives.

Barendt pursues neither of these alternatives. He notes that the free speech principles are subject to serious objections, and he

5. Barendt qualifies this conclusion by observing that "[j]udicial consideration of the [purely philosophical arguments] must be tempered by the constraints imposed by the text, and must further be substantially molded by the concepts adopted by the framers of the constitution as revealed in its general structure." This concession does not square comfortably with the earlier assertion that "[e]ven when it is possible to infer a particular intent, it should not necessarily be decisive for litigation arising some decades or centuries after the framing of the constitution." In fact Barendt's analysis of United States law rarely if ever finds guidance in the constitutional text or the historical framers' intent.

does not pretend to have refuted those objections; such a refutation, if it could be made at all, would require vastly more space and analysis than Barendt devotes to the problem. Nor does Barendt make any attempt to demonstrate that those who wrote, proposed, and ratified the first amendment consciously intended to embrace such principles. Thus, his discussion leaves free speech principles without a secure footing either in philosophy or in popular sovereignty. Nonetheless, such principles are said to be contained in the supreme law of the land because in some mysterious sense they tell us what the first amendment means. Rather than earning its way, philosophy gets piggy-backed into law through a theory of "interpretation."[6]

This argument for philosophical interpretation is, to be sure, devilishly difficult to refute. Trying to deflate the argument is a lot like trying to pop a soggy balloon by squeezing it; you can crush it wherever you like, but the balloon just bubbles forth somewhere else. Why, one may ask, should we interpret the first amendment to contain or express philosophical principles that the text does not, and the framers apparently did not, expressly or consciously adopt? Because, Barendt suggests, such principles give needed meaning to the amendment; they make it, to borrow a phrase from Dworkin (or is it from an ad promoting military enlistment?), "the best it can be." Well, then, why should we choose to be ruled by such principles when they are vulnerable to serious logical and empirical objections that have not been convincingly rebutted? Because, Barendt suggests, the choice is already made; the favored principles are already implicit in the first amendment. Which brings us back around to the first question. And so on. The philosophical approach to constitutional interpretation gives a whole new meaning to the notion of a "hermeneutical circle."

III

This method of elevating and conferring legal status upon free speech principles inevitably leads to artificiality in the analysis of actual controversies. It is one thing to conclude, in the abstract, that speech deserves constitutional protection; but the application of the conclusion to concrete cases often places free speech principles in conflict with other public interests and needs. In such situations, courts in this country, and elsewhere, resort to balancing.

6. This interpretive tactic obviously does not work as well where, as in Britain, there is no constitutional provision for the free speech principles to attach themselves to—hence Barendt's call for a British Bill of Rights to protect speech.

The critical question in this process is how much weight free speech principles should be given when they clash with other interests.

One would like to be able to answer that the reasons for protecting speech should be given just as much weight as they in fact carry—that free speech principles should be respected only to the extent that they are actually persuasive. But the philosophical approach to constitutional interpretation cannot be comfortable with this answer. After all, the principles for protecting speech were not adopted purely on their merits in the first place. If given only as much weight as they actually carry, they might not be entitled to constitutional status at all, much less to a "preferred position" that allows them to trump other interests, such as national security, or other constitutional rights, such as the right to a fair trial.[7]

Thus, the very method by which philosophical principles are imported into the law implies that when balancing occurs, the weight given such principles cannot be limited to that which their intrinsic persuasiveness would justify. Neither, however, can such principles be regarded as absolute; as Barendt remarks, in some situations, at least, it is "rather obvious . . . that limits may be placed on speech to protect the public interest or a private right." Consequently, whatever value is actually assigned to the speech interest in a balancing case will inevitably seem somewhat arbitrary.

Indeed, while maintaining the appearance of rationality, free speech jurisprudence often seems more like a kind of hallowed etiquette in which, irrespective of their truth, some statements are immune to challenge ("We had *such* an enjoyable evening") while other things ("You certainly have been putting on weight") are simply not said. In such an artificial world, acculturation replaces reasoned justification—even when conversation assumes the *style* of reasoning. Barendt's book faithfully reflects this world. His analysis may seem perfectly plausible—even, at some points, obvious—to insiders who already know what the right answers are. But readers who are waiting to be persuaded will often find the analysis contrived.

The unprincipled use of principle. One manifestation of artificiality is the apparently arbitrary, ad hoc manner in which principles are invoked, or forgotten, in the justification of particular conclusions. Early in the book, for instance, Barendt finds "perfectly reasonable" the Supreme Court's decision upholding the conviction of David Paul O'Brien, who had expressed opposition to the Vietnam

7. This observation finds support in Barendt's argument that in England, where the free speech principles cannot be disguised as constitutional interpretation and must therefore stand on their own merits, speech receives less protection.

War by burning his draft card. "It is immaterial that more conventional forms of protest would be less effective," Barendt observes, "for there is no general right under a free speech principle to put over an opinion in the most newsworthy or dramatic way." Barendt may be right that free speech rationales do not cover *effectiveness* of communication, although the point seems far from clear. But then how far does this limitation on speech protection extend? It seemingly might justify upholding convictions of persons who, like O'Brien, wanted to protest the war in colorful ways by, for instance, burning the American flag, or by walking through a courthouse wearing a jacket which bore an obscene anti-draft slogan. Yet Barendt describes with apparent equanimity the Court's contrary decisions—without offering any explanation of why his analysis of *O'Brien* would not apply in those cases.

The seemingly arbitrary operation of Barendt's philosophical method is further evident in his treatment of obscenity. He begins by explaining that the rationales for protecting speech may not warrant treating obscenity as speech at all.[8] Thus, the pornography purveyor's "claim to be exercising freedom of expression is . . . transparently bogus." A few pages later, however, Barendt criticizes measures designed to regulate but not prohibit obscenity—through zoning schemes, for instance—by insisting that if indecent materials are protected at all, then they must receive just as much protection as any other kind of expression. These alternatives seem suspiciously stark. Is it likely that a class of materials, if judged by its real value, would deserve either full first amendment protection or, failing that, none at all? Barendt's all-or-nothing position reflects the chasm that separates his philosophical maneuvers from real world interests and concerns.

The diminution of practical concerns. Perhaps the most striking evidence of the artificiality of the philosophical free speech principles appears when Barendt candidly acknowledges the cogency of pragmatic reasons for restricting particular forms of expression but nevertheless advocates adherence to principle. For instance, Barendt takes note of the argument that the restrictions on defamation suits instituted in *New York Times v. Sullivan* actually damage democracy by deterring capable people from seeking public office, and by eroding public confidence in government. Barendt rejects

8. The truth rationale appears to be inapplicable because obscene materials generally do not communicate ideas or appeal to the intellect, and obscenity seems far removed from the political speech which the democracy rationale would protect. Although the self-fulfillment rationale might justify protection, the status of this rationale is dubious because it fails to explain why speech deserves more legal protection than other kinds of self-fulfilling behavior.

this argument, but not because its claims are factually false; although calling them "conjectural," he seems to believe that they may be true. Nor does Barendt attempt even a rough or impressionistic empirical demonstration that the benefits to democracy of the *Sullivan* rule exceed its costs. Instead, he simply observes that "[t]he First Amendment is based on the assumption that everyone should be free to contribute to political debate." Because the first amendment is in some sense "based on" such a principle, the actual consequences of the *Sullivan* rule for democratic government can be brushed aside without even a factual assessment.

In a similar vein, Barendt evaluates the recommendation of Britain's Williams Committee that film censorship be continued in that country. "Some of [the Committee's] *practical* points," he concedes, "can hardly be denied: whatever its *theoretical* weaknesses, the system has worked satisfactorily in Britain, and most cinema distributors appreciated its advantages of certainty, speed of decision, and cheapness. Moreover, it is hard to quarrel with the experience of Committee members that some films are exceptionally nasty and sadistic." (Emphasis added). If the system has "worked satisfactorily," is appreciated by those directly subject to it, and restricts films that are "exceptionally nasty and sadistic," then Barendt surely must approve of it, right? Wrong—he opposes the system, apparently because of its "theoretical weaknesses." But such analysis suggests that the theory in which such weaknesses are grounded must be far removed from practical realities.

The pro-speech presumption. Barendt believes that close or doubtful questions ought to be resolved in favor of protecting speech and sacrificing other concerns. In presenting his general conclusions, he insists that "[t]he danger of suppression of speech which ought to be covered and protected by the free speech clause is *a worse evil by far* than the toleration on occasion of publications that could legitimately be proscribed." (Emphasis added). Though Barendt speaks here with the tone of one who is pronouncing a self-evident truth, his assertion actually seems, upon reflection, almost reckless. In a world in which absolutes are scarce, is Barendt's generalization likely to be a member of that rare species? Isn't it more probable that the relative dangers of suppression versus nonsuppression vary with the context?

For example, how can Barendt be so confident, in the face of the contrary judgment of jurists in France, Britain, and the other Commonwealth countries, that forcing readers to wait several weeks to learn of an alleged but inadmissible confession is a worse evil than the risk that a man charged with murder will be denied a

fair trial?[9] In another controversy that Barendt discusses, the "danger of suppression of speech" refers to the possibility that residents of a New Jersey town might have to drive twenty miles to a neighboring town in order to partake of the pleasure of watching nude dancing. Even if one agrees that imposing such a burden on the devotees of dance is unwarranted—or "surely illegitimate," as Barendt pronounces—is it clear that such a course would be "a worse evil by far" than the alternative? One suspects that aggressive generalizations such as Barendt's reflect a lurking concern that if the reasons for protecting speech were candidly assessed for what they are worth, the author's preferred conclusions in such cases might be difficult to defend.

Such a concern is well founded. The stylized argumentation that occurs in the artificial world of the first amendment may be comforting to those who have already absorbed that world's conventions. It may be perfectly clear in that sheltered realm that a community has a negligible interest at best in preserving its moral character, but that to inconvenience people who enjoy nude dancing should be counted as a grave evil. When first amendment insiders attempt to address outsiders, however, there is a noticeable plausibility gap. Barendt's book does little to close that gap.

IV

The general unpersuasiveness of Barendt's book might lead some readers to conclude that philosophy has little value for legal analysis. It is not foreordained, after all, that judges must impersonate philosophers. Justice Black's effort to find an objective meaning in the text is an alternative that, in refined forms, seems to be experiencing a revival of interest.[10] Advocates of a more textual approach might use Barendt's book to stand his "default" argument on its head: The first amendment must mean *something*; and since philosophical analysis plainly does not produce persuasive answers, we may have no choice except to look to the text. Or, if the objections to textual or framers' intent approaches seem insuperable, one might conclude that courts should simply get out of the business of protecting speech.[11]

Such conclusions, however, are hardly irresistible.[12] The

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9. Barendt pronounces the British position "hard to reconcile with any serious commitment to freedom of speech."

10. *See generally* sources cited in Powell, *Constitutional Law as Though the Constitution Mattered*, 1986 DUKE L.J. 915, 927 n.53.

11. *See* Nagel, *How Useful is Judicial Review In Free Speech Cases?*, 69 CORN. L. REV. 302 (1984).

12. At least I hope that the irrelevance of philosophy to the first amendment is not the

problems in Barendt's analysis originate not so much in his assumption that philosophical reasoning may be valuable, as in his method of importing philosophy into constitutional interpretation. By asserting that philosophical principles tell us *what the first amendment means,* Barendt not only transforms the amendment but also elevates particular philosophical principles to a status that they have not earned and may not merit. Such an approach reduces the incentive to evaluate philosophical arguments seriously and realistically. When scholars forego the temptation to pass off their philosophy as interpretation of what the Constitution means, they will likely find themselves forced to do better philosophy.

THE DOUGLAS LETTERS: SELECTIONS FROM THE PRIVATE PAPERS OF JUSTICE WILLIAM O. DOUGLAS. Edited with an introduction by Melvin L. Urofsky.[1] Bethesda, Md.: Adler & Adler. 1987. Pp. xxiii, 448. $24.95.

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In a recent assessment of the Justice who served longer than any other on the Supreme Court of the United States, a distinguished legal historian described William Orville Douglas as "the anti-judge," a man whose fierce individualism and idiosyncratic style challenged two of the dominant assumptions of modern American jurisprudence: that appellate jurists should remain aloof from most forms of political engagement and that their opinions ought to display a decent regard for precedent and the trappings of legal scholarship.[3] Bill Douglas seldom paid obeisance to the judicial, political, or social conventions of the time, because in his conception of human nature they remained the principal enemies of the authentic self. He looked upon life as a series of obstacles to be overcome and battles to be won by the heroic self against the oppressive institutional arrangements of society. A loner and a narcis-

proper moral to draw, since I have made a meager attempt of my own to develop a "philosophical" rationale for protecting speech. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 649 (1987).

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3. White, *The Anti-Judge: William O. Douglas and the Ambiguities of Individuality*, 74 VA. L. REV. 17 (1988).