

Review of Eric Barendt, *Anonymous Speech: Literature, Law and Politics*, Oxford: Hart (2016) xvii + 176 pp.

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Published in *The Modern Law Review*, (2018) 81(2) MLR 361–393.

Should rights of free expression include anonymous speech? In our age of post-truth and internet trolls Eric Barendt's brisk and engaging book raises timely questions.

Disputes about free speech command a wide literature, with Barendt's *Freedom of Speech*, first published in 2005, now a standard reference. *Anonymous Speech* shifts our focus from the message to the manner in which it is spoken. As Barendt notes, however, disputes about anonymity inevitably bring the message back into the picture. After all, we worry about fake news and hate mongering, not anonymous postings of kittens and cupcakes. English law distinguishes between higher- and lower-valued speech. Whistle-blowers, for example, enjoy greater anonymity than racists (96); an approach Barendt in principle endorses.

The etymology of 'anonymous' traces to 'without a name'. Literal namelessness certainly arises, as in the one-in-a-million case where some amnesiac or 'forest child' is discovered bearing no discernible civil status. But those are not problems of anonymity as ordinarily understood in law, which entail precisely the opposite, namely, persons who *do* maintain a registered civil status that they choose to conceal. The legal concept of anonymity presupposes some formally assigned identity, typically recorded on a birth certificate, identity card, or passport.

Anonymous Speech asks to what extent an assumption of anonymity counts among our freedoms of speech. The distinction between speaker and speech becomes crucial. On the English approach, anonymity *per se* falls outside the legal protection of free speech *per se*. (81) A speaker's choice to communicate anonymously commands no greater protection

than can be justified under a consequentialist balancing test. When some demonstrable cost outweighs any purported benefit, the law may legitimately mandate disclosure of the speaker's identity.

Several factors guide that test. One element is motive. In the eighteenth century, *Cato's Letters* and the *Letters of Junius* were published pseudonymously to avoid charges of seditious libel (37), a crime subsequently abolished in most Western democracies. The Brontë sisters adopted pseudonyms because female authorship jeopardised a novel's success. (17) Jane Austen's writings were attributed to 'A Lady' to preserve 'her character as a kindly aunt who seldom voiced serious opinions of her own'. (16) Such motives for anonymity carry less weight today, but others remain. Doris Lessing and JK Rowling, like Anthony Trollope over a century earlier, sent anonymous manuscripts to literary agents after they had achieved fame under their ordinary names. They sought to be judged on merit rather than reputation (19-22). Anonymity may also be chosen out of sheer preference. George Orwell simply disliked his birth name, Eric Blair. (21)

Forms and degrees of anonymity diverge as widely as the motives for it. At one extreme, the identities of fully anonymous speakers are known only to themselves. At the opposite pole lies the more usual case, namely, no choice at all for anonymity, hence full disclosure of one's officially registered name. Between those two poles we find, for example, authors known only to close confidantes, who in turn act as agents between authors and publishers. Alternatively, many individuals are known to more arms-length intermediaries, as unnamed sources are known to journalists, or whistle-blowers to regulators. Here, anonymity merges with confidentiality. (95) Barendt sees a stronger case for anonymity when a third party can be held responsible. Authors, whistle-blowers, journalists' sources, and even internet trolls can more credibly claim legal protection once publishers, human resources officials, journalists, or website managers assume vicarious liability.

We can also discern a spectrum of regulation. At one extreme, we can imagine a near-absolute right of anonymity. At the opposite extreme, it could be altogether banned. Neither extreme characterises contemporary democracies in practice, though a question for comparativists would be to ask where one jurisdiction lies in relation to another.

For Barendt, rejecting any universal rule, different situations warrant different responses. Despite the variety of scenarios, however, the interests to be balanced are relatively few (creating occasional repetitiveness across chapters). Barendt endorses protections of journalists' sources and whistle-blowers, but would withhold them for antisocial expression, such as libel and hate speech. Barendt doubts that speakers have any substantial interest in anonymity *per se* (62-3), and suggests that the interests of audiences are more compelling. Whistle-blowing merits a strong presumption in favour of anonymity because the public maintains an interest in information claims about professional misconduct that might not otherwise surface (68-70). That same public interest militates against anonymity insofar as disclosure may assist audiences in assessing a speaker's credibility. (66-68)

These principles depend, in turn, on context. Media sources, for example, enjoy a qualified right to anonymity under English law. Journalists are charged to act as 'responsible intermediaries', vouching for their sources' credibility. (115-9) Journalists are ordinarily presumed to perform the task of assessing their source's reliability. The law's background assumption is that professions reliant upon good reputation will self-regulate. For Barendt, that approach secures a pragmatic balance. It does not dissuade honest sources from communicating through journalists; but assuming professional journalists' overall competence, any risk that dishonest or malicious sources might exploit a cloak of anonymity is mitigated. In contexts where no responsibly trained intermediary can be assumed, the justification for protecting anonymity diminishes. Barendt accepts compulsory disclosure

when, for example, libels are published on websites that assume no responsibility for their content. (147-8)

Barendt draws illuminating comparisons, notably to the United States, Canada, and Germany. Probing the ‘near absolute’ end of the spectrum, he discusses the US Supreme Court case of *McIntyre v Ohio Elections Commission* (1995), concerning an anonymous leaflet circulated prior to a state referendum. Justice Stevens, writing for the majority, identified two grounds for protecting the author’s anonymity. (56) First, anonymity protects persons seeking to express controversial views, thereby promoting robust political speech. Second, authorial identity may form part of a message’s expressive content: the leaflets in that case had been signed ‘Concerned Parents and Taxpayers’. Requiring authors to state their names equates to forcing them to adopt a substantive viewpoint whilst serving no civic value.

Justice Scalia retorted in dissent that disclosure plays the overriding civic role of promoting accountability. Barendt agrees. As to Stevens’s first, instrumentalist argument, the risk of a ‘chilling effect’ on political speech does not automatically outweigh countervailing considerations of accountability. Nor does any right of anonymity derive perforce from our interests in autonomy (62-3), public participation (66-8), or the audience’s interest in hearing views that might not otherwise be expressed. (68-70) Conceding that an author’s name may peripherally form part of the content, Barendt nevertheless distinguishes it from the content as such. The latter comprises the ‘information and ideas contained in the work’. (59) By contrast, ‘[t]he use by an author of “Anon” or a pseudonym does not give readers valuable information or provide them with ideas [...] arguably these devices often deprive them of information they value’. (60) For Barendt, content-based restrictions may impede the expression of ideas and information; bans on anonymity do not.

But is Stevens’s majority opinion so easily answered? Barendt’s reference to ‘information’ begs some questions. Political fiction or satire, for example, may certainly

convey political or social messages without containing ‘information’ in the sense of empirical truth-claims. Central political themes in *King Lear* concern not literal truth, not ‘information’ about dividing up a kingdom, but rather metaphors about the risks of centrally concentrated political power. Had Shakespeare published as a ‘Concerned Citizen’ – which one had every reason to be under James I – that identity would surely be bound to the author’s core message. Scalia and Barendt do not altogether disagree, but maintain that any such legal intrusion is too minimal to impact on the speaker’s core ideas. Yet how minimal *is* minimal in the sphere of political controversy?

In *Cohen v California* (1971), the Court held that the US Constitution generally bars government from imposing its preferred word choices on open, political speech, even if the legal intrusion is negligible. Paul Cohen, protesting the Vietnam war, wore a jacket bearing the words ‘Fuck the Draft’ in a local courthouse. By no means challenging Cohen’s rights of open dissent, the state would merely have changed a single word. In *Wooley v Maynard* (1977), the Court found that the right of free speech bars government from coercing speakers to associate even tangentially with particular messages. Enforced disclosure imposes Hobson’s Choice: either state your identity or remain silent. It conjures that spectre of self-censorship which the Court’s vigilance about government ‘chilling’ of speech has long sought to dispel.

Contemporary literary theorists have probed the porous boundaries between ‘text’ and ‘para-text’. ‘Text’ signifies the communication as such – a novel, an internet posting, a painting, a symphony. ‘Para-text’ denotes elements such as the cover design or advertising. Nothing better illustrates the fluidity of that boundary than authorial identity. Anonymity is not simply a withholding, not merely a self-effacement: in choosing identities like ‘Concerned Citizen’ or ‘Anon’, authors affirmatively *advertise* their choice to conceal their identity. Far from being a purely marginal, *de minimis* adjustment, that choice can frame and

pervade the entirety of a message.

Admittedly, authors commonly adopt ordinary-sounding pseudonyms to conceal their identities. But even then, consequential choices are made. Female authorship might well have diminished the Brontë sisters' successes, but why did they not then choose, say, 'Charles', 'Edward', and 'Andrew'? The androgynous 'Curren', 'Ellis', and 'Acton' communicate a message of their own, hinting at resistance, if not resentment. Para-text blends with text as authorial ambiguity fuels textual ambiguity. It cannot be irrelevant to the 'message itself' that the American Paulette Williams publishes under the African name Ntozake Shange; or that the Lithuanian Jew Roman Kacew first became the characteristically French 'Romain Gary', then published as the more ethnically ambiguous Émile Ajar. From Rosalind in *As You Like It* and Viola in *Twelfth Night* to Proust and Joyce; from Merleau-Ponty's *Phenomenology of Perception* to Judith Butler's *Gender Trouble*, shifting and fragmented identities (nowadays further splintered through the proliferation of constructed, cyberspace selves) challenge notions of a 'real', ontologically fixed identity lurking behind legally registered identities. The assumption of 'genuine' identity all too readily resembles a Platonic Form, an essential truth hovering behind the sheer spectacle of transient, deceptive appearances. 'How', WB Yeats famously wondered, 'can we know the dancer from the dance?'

We can certainly undertake civil proceedings to change our names and other aspects of civil status, including gender. But does formal civil status 'accurately' convey an identity by reproducing one's name, birthdate, sex, or other data inscribed on a birth certificate or passport? Is 'Blair' the lie concealing the truth of 'Orwell'? Or precisely the opposite? There is no clean divide between author and authored, between text and para-text. To state, to withhold, or to change one's name are communicative acts. Barendt occasionally recognises as much himself. Risk of arrest originally spurred the anonymity of the street artist Banksy. With his fame later secure, however, his cultivated mystique *became* an identity bound up

with the art itself. (49-50) Of course, as Barendt (echoing Scalia) insists, governments maintain plausible policy reasons supporting authorial disclosure. The sticking point is whether their weighing and balancing of rival interests can so easily proceed on the assumption – too often tilting the ‘balance’ to a foregone conclusion – that authorial identity remains inherently subordinate to the message ‘itself’.

Admittedly, we can only push these deconstructions of the concept of personal identity so far. Legal systems governing mass societies must, as a practical matter, assume stable individual identities. Enforcing contracts, property transactions, or the criminal law would turn to farce if breaching parties could claim that it was some ‘other self’ who had, say, underwritten a loan or robbed a bank. If the boundaries of individual identity were so utterly to collapse, the legal system would collapse with it. To avoid that fate, law preserves itself by suspending the presumption of mental capacity: individuals pervasively doubtful about their civilly recognised identities, traditionally classified as (something like) ‘schizophrenics’ or ‘hysterics’, come to serve not as the heightened exemplars of human experience portrayed in literary texts, but rather as marginalised deviations from the norm of stable, traceable identity.

Yet why even bother sparring with Stevens when English law is moving in no such direction? Jousting matches with the First Amendment lanced by non-Americans whose nations face no spectre of ‘free speech Americanisation’ are always intriguing. The tilt is heartily pursued, as if one’s national legal system preserves its honour only after taking up the First Amendment gauntlet. Could it be that the majority opinion in *McIntyre* – perhaps not absolutist but far more protective of anonymity as germane to expression itself – haunts the traditional balancing approaches more than Barendt would wish? Does Stevens’s opinion rightly highlight the thin line between, on the one hand, weighing up rival interests, and on the other, capitulating to legislators’ and judges’ political preferences, a risk always latent

within balancing tests? To be fair, Barendt does chastise writers who accept judicial balancing uncritically. (109) And yes, risks of bad balancing pervade many areas of law. Surely, however, balancing approaches demand exceptional scrutiny when applied to the ultimate democratic safeguard, namely, citizens' core prerogatives of expression within public discourse.

A longstanding aim of limitations on government intrusions into speech has been to promote legal clarity so that citizens may confidently enter the public sphere without feeling intimidated into self-censoring even legally permissible speech through uncertainty about the law. The more our freedoms of expression come to resemble a baroque statutory code understood only by a coterie of specialists, the greater the risk of chilled expression. Serious democrats may grudgingly accept the need for seeking expert legal advice on complex tax or commercial codes, but must shrink at the prospect of ordinary citizens needing to phone their lawyers before expressing themselves in public discourse, or, more likely, staying silent for fear of legal consequences. The prospect of chilling *legitimately* anonymous speech may raise greater concerns for democratic legitimacy than Barendt acknowledges – surprisingly, since elsewhere Barendt rightly doubts the wisdom of entrusting legislatures and judges with discretionary powers over the public conversation.

A perennial infirmity of balancing tests is that they muddy any criteria for judging whether the balance in any particular case has been well struck. Even assuming studious case-by-case adjudication, an argument could be made for at least marginally stronger presumptions in favour of anonymous speech, particularly on patently political issues. Barendt joins Scalia in emphasising the public interest in knowing the identity of speakers in order to assess their credibility; but can an audience not factor in anonymity when assessing speakers' credibility?

Such line-drawing problems are the stuff of predictable disagreement, but Barendt

does take seriously the views at odds with his own. As new electronic media continue to confront legislatures and courts with difficult problems of anonymity, this thought-provoking book illuminates the diversity and complexity of issues that will require attention into the foreseeable future.