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Comparing Free Speech: United States v. United Kingdom

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by Professor Stephen J. Shapiro

One of the major differences between the political and legal systems in the United States and the United Kingdom is the existence in America of a written Constitution. In Britain, Parliament is supreme; any Act passed by it is interpreted and enforced by the courts. In the United States, any statute passed by Congress or by any state legislature must comply with the Constitution. Any statute that violates the Constitution will not be enforced by the courts.[1]

This distinction is readily apparent when one studies freedom of speech in the two countries. Studying freedom of speech in the United Kingdom involves examining the ways in which parliamentary acts, and to a certain extent the common law, restrict free speech in such areas as obscenity, libel, government secrets, and press reporting of trials. While American free speech is not absolute, and governmental restrictions certainly exist in all of these areas, the study of freedom of speech in America proceeds from an importantly different angle. Rather than studying the actual restrictions placed on free speech, one looks at the limits placed on such restrictions by the first amendment to the Constitution.[2]

Although there is no equivalent to the first amendment in the United Kingdom, the British, through a long history recognizing the importance of freedom of speech, enjoy some of the greatest freedom of any people in the world to write and speak their mind. Yet, in a number of areas, methods of controlling speech used in the United Kingdom would violate the first amendment in the United States. This article will first examine some areas of difference in the control of speech in the United States and the United Kingdom. Then it will examine the extent of those differences to determine whether they indicate a significantly different treatment of free speech rights or whether they are merely minor disagreements on the fringe of those rights.

I. PRIOR RESTRAINTS

One of the major differences is the way the two countries handle attempts to restrain, before publication, material which could be punished after publication. In both countries certain kinds of speech, for example libelous statements or release of government secrets, may be actionable. In a libel suit, the common law of Britain and all American states holds that if a person makes untrue, derogatory statements about another, he or she may be forced to compensate the victim for any harm done to their reputation. In Britain, however, unlike the United States, if the victim discovered that a libelous statement was about to be published, he or she might have the publication enjoined.[3] Courts in the United Kindgom do not necessarily make a distinction between prior restraint and post-hoc punishment of improper or illegal speech. Any impermissible speech which is subject to punishment might also be subject to injunction. In the United States, however, even speech which may be punished may not normally be subjected to prior restraint.

In the 1931 case of *Near v. Minnesota*,[4] the United States Supreme Court struck down an injunction which prohibited a newspaper from publishing any "malicious, scandalous or defamatory"[5] material. The only remedy for a libel victim in the United States is to sue for damages after the publication. In the United States, the public's right to know is held paramount over the danger of irreparable harm that might be done to an individual.

The British system, on the other hand, is more concerned with the right of the individual, since a person's reputation might be irreparably harmed by a libelous publication which he was powerless to prevent because of the restrictions on prior restraint. In Britain, a hearing could be required before publication in order to determine if the article were libelous. If a hearing did find the article libelous, the article could be enjoined, and it could be argued that no harm is done in suppressing an article clearly found to be defamatory and untrue. If the article were found not defamatory or were found to be true, publication would be allowed. Thus, an article deserving of publication might be delayed, but could be published eventually. Under the British system, therefore, an individual's right to an undamaged reputation is viewed as more important than the immediate right to publish the article.

The difference between the two countries as to the difficulty in obtaining injunctions against publication has also shown itself in the area of national security. In 1971, the United States Supreme Court held that the government had not met its "heavy burden of showing justification" for enjoining publication of the Pentagon Papers, a classified study of United States' decisionmaking on Viet Nam policy.[6] The Court has, in dicta, indicated that in very limited circumstances, such as "publication of the sailing dates of transports or the number and location of troops"[7] in time of war, an injunction might be issued. The Court has shown, however, that it will be very difficult for the government to prove that publication "will surely result in direct, immediate, and irreparable damage to our nation or its people."[8]

In the United Kingdom, the courts have been more willing to grant injunctions against publications containing confidential governmental information when it is "in the national interest" to do so.[9] In a recent high-profile case, British courts enjoined newspaper publication of the book, *Spycatcher*, the memoirs of a former British intelligence officer.[10] The injunction was only dissolved after the publication of the book in the United States had destroyed the secrecy of its contents. The British Official Secrets Act is a very stringent law which makes it a criminal offense for any government employee to divulge any information which was "entrusted to

him in confidence"[11] even if that information is not in any way sensitive or its release would not in any way harm the government.

The American government has taken a different approach to halting release of confidential information by its agents. All CIA agents must sign an agreement promising not to publish any information gained during the course of their employment, without permission of the agency. In *Snepp v. United States*,[12] the government obtained a constructive trust on all income earned by a former CIA agent from a book he had written about the agency without its prior approval. This holding and judgment will prove to be a great deterrent to such books in the future.

In another aspect involving national security, the Thatcher government quite recently has announced significant and controversial press restrictions in connection with the Northern Ireland dispute. Using its general power to control broadcasting, the government has banned the radio and television broadcast of the direct statements of members of eleven named "terrorist" organizations, including Sinn Fein and the Ulster Defense Association. Such a restriction would clearly be unconstitutional in the United States and, in fact, is currently being challenged in the British courts by the National Union of Journalists and Sinn Fein.

II. LIBEL

A second major difference between the two countries in free speech rights is in the area of libel law. In both the United States and Great Britain, libel developed as a common law tort. Although the law has been codified by Parliamentary Act in Britain,[13] both have virtually identical elements and defenses. Until the 1960's, libelous statements were not given any constitutional protection by the United States Supreme Court. Libel was considered, along with obscenity and fighting words, among "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem."[14] This doctrine regarding libel was changed in the decision of *New York Times v. Sullivan*.[15]

The *Sullivan* decision imposed, for the first time, constitutional restrictions on the way states applied their libel law to the media. The Court held that public officials could not recover damages for defamatory falsehoods relating to their official conduct unless they could prove that the statements were made with "actual malice" — that is, with actual knowledge that it was false or with reckless disregard of whether it was false or not. The Court reasoned that libel law, even with the defense of truth, deterred not only false, but also true speech. Critics might be deterred from voicing even true criticism "because of doubt whether it can be proved in court or fear of the expense of having to do so."[16]

The Court also held that public officials could not recover presumed damages for injuries to their reputations but must prove actual damages before recovering. Subsequent cases have extended the *Sullivan* defense to cases involving public figures[17] and, to a somewhat lesser degree, private persons involved in matters of public interest.[18]

The news media in the United Kingdom do not enjoy nearly so broad a privilege as in the United States. For the most part, libel plaintiffs may recover regardless of whether the media defendant was at fault for printing the false statement.[19] Also, if the defamatory statement is "calculated to disparage the plaintiff in any office, profession, calling, trade or business," it is not necessary for the plaintiff to prove actual damages in order to recover.[20] Newspapers are only granted a privilege for non-malicious libel if the defamatory statements are contained in a "fair and accurate report" of various governmental proceedings, such as court trials or proceedings in Parliament.[21]

Group libel laws present another interesting comparison. Such laws prohibit dissemination of derogatory information about groups or classes of people (i.e., races or religions) which might incite hatred against such groups. The United States Supreme Court upheld a prosecution under such a law in *Beauharnais v. Illinois*.[22] There, the Court refused to require a defense that the words must constitute "a clear and present danger" of inciting violence because libelous utterances were "not within the area of constitutionally protected speech."[23]

The *Beauharnais* case has not been explicitly overruled. Based on *New York Times v. Sullivan* and other more recent cases which have given a measure of constitutional protection to libelous statements, however, some commentators believe that *Beauharnais* is no longer good law and, therefore, that group libel laws are unconstitutional.[24] Since only a few states have such laws and they are rarely, if ever, invoked, no definitive answer is available as to their constitutionality.

The United Kingdom does have a group libel law. The Race Relations Act of 1976 prohibits any person from using "threatening, abusive or insulting" words, where "having regard to all the circumstances, hatred is likely to be stirred up against any racial group in Great Britain."[25] Although a few successful prosecutions have been brought under the statute, the government has made little use of it.[26]

One area of the law closely related to group libel is blasphemous libel. In England it is a crime to insult, offend, or vilify Christ or the Christian religion.[27] In 1979, the *Gay News* was found guilty of blasphemous libel for publishing a poem and a drawing portraying Christ as a homosexual. The jury was instructed that any writing which in an offensive manner tended to vilify Christ could be a blasphemous libel, and that the publication need not amount to an attack on Christianity, nor need it be proved that there was a subjective intent on the part of the accused to attack the Christian religion.[28]

The crime of blasphemous libel would be unconstitutional in the United States. Not only would it violate the free speech clause of the first amendment, but it would also violate the first amendment religious establishment clause.[29] Because the poem in the British *Gay News* case was described as obscene, however, it might not have received first amendment free speech protection because of its obscenity if the case was brought in the United States. But since the poem was subject to prosecution not because it was obscene, but because it was blasphemous, the prosecution would still have violated the religious establishment clause by giving special protection to the Christian religion.

An interesting comparison can be drawn on the treatment accorded Martin Scorcese's recent film, *The Last Temptation of Christ*. Although no prosecution in Great Britain has yet been brought against the film, that is a possibility. In the United States, however, no prosecution for blasphemous libel could be brought to stop distribution of the film. Yet, widespread picketing against the showing of the film has caused it not to be shown by large movie chains in many cities, including Baltimore.[31] The same first amendment rights which protect the film from prosecution here also grant picketers the right to protest against and perhaps hinder its distribution.

III. OBSCENITY

It is in the area of obscenity that the law of the United States and the United Kingdom are probably the closest. This is because "obscene material is unprotected by the first amendment."[32] Obscenity has been defined by the United States Supreme Court as material which, taken as a whole, would be viewed by the average person, applying contemporary community standards, as appealing to the prurient interest;

which describes sexual conduct in a patently offensive way; and which lacks serious literary, artistic, political, or scientific value.[33] Unlike libelous publications, which may be punished but not enjoined,[34] obscene publications may be enjoined.[35] In fact, the United States Supreme Court has upheld a system requiring all films to be submitted for examination to determine whether they are obscene before receiving the necessary license to be shown.[36] Such "censorship" would clearly not be allowed in other areas of speech, but it is closer to the general British approach to regulation of speech.

In England obscenity is basically controlled by the Obscene Publications Act of 1959.[37] The test for obscenity contained in the Obscene Publications Act is somewhat different than the American definition. The Act defines material as obscene if its effect, taken as a whole, is "to tend to deprave and corrupt" persons who are likely to read, see or hear it.[38] There is a defense if the publication is "justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other interests of general concern."[39] Obscenity is regulated differently in Scotland because the Obscene Publications Act does not apply there. Since this act does not apply to Scotland, other laws, including the recently developed common law offense of shamelessly indecent conduct, apply there.[40]

Where the United States and England differ is their treatment of pornography, as opposed to obscenity. Ordinances recently passed in several American cities have tried to control pornography, which is generally defined as "the graphic sexually explicit subordination of women, whether in pictures or words."[41] Such an ordinance has been held unconstitutional by the Court of Appeals for the Seventh Circuit because it regulates the content of speech, by mandating a preferred viewpoint of women.[42] Although the court accepted the proposition that pornography has the effect of encouraging those who see it to commit acts of violence against women, the court rejected the idea of trying to control the behavior of persons by controlling the ideas which they read and see. In England, however, the Obscene Publications Act, with its "tend to deprave and corrupt" language, seems to be directed at the effects the pornography has on the observer. Therefore, without the first amendment protection of the content of speech, the English Act seems broad enough to accomplish the regulation of pornography which was denied the City of Indianapolis. It has, in fact, been used against material portraying violence and other material which would not be held obscene in the United States.[43]

IV. RESTRICTIONS ON TRIAL PUBLICITY

One final area where British restrictions on the press would probably violate the United States Constitution is the control of pretrial publicity. In the United Kingdom, any publication about active court proceedings which "creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced" is prohibited and may be punished as a criminal violation.[44] General discussions of matters of public interest are not prohibited, however, merely because a trial is going on involving the same subject matter.[45] For example, an anti-abortion article appearing during the trial of a doctor for an illegal abortion was held not to be a violation, since the doctor's specific case was not mentioned and any threat of prejudice was deemed "merely incidental."[46] Fair and accurate reports of public legal proceedings are also protected. The prohibition applies to published facts about a specific case between the time of arrest and the time of sentencing (the Act applies to civil as well as criminal cases). The rationale is to avoid prejudice to the defendant which would occur if the jury were to read or hear facts concerning the case, other than those presented in court. The Act does not actually prohibit publication of all facts about a case, but only those which would seriously prejudice the trial. Most newspapers, however, in order to be on the safe side, publish virtually nothing except the actual testimony presented in court until a criminal trial is concluded.

This procedure is contrary to the American practice, especially in sensational trials, of publishing every bit of information obtained about the case. Although there is concern in the United States about the effect of such pretrial publicity, no blanket prohibition such as the British Contempt of Court Act is permitted. Instead, any prohibition on pretrial publicity must be issued by the judge on a case by case basis. Although the United States Supreme Court has recognized the dangers to a fair trial because of too much publicity,[47] it has also severely restricted a judge's right to issue "gag orders" prohibiting dissemination of information about a case. The Court has not completely eliminated the use of such orders, but has required that a very heavy burden be met before they can be imposed and that they be as narrowly tailored as possible.[48] Other steps to avoid prejudice, such as jury sequestration or change of venue, must be attempted before the judge may consider issuing even a narrow gag order.

V. CONCLUSION

Any comparative law study necessarily concentrates on the differences between the law of two countries, rather than the similarities. This may exaggerate any differences that may exist. By giving examples of British laws which violate the American first amendment, it may seem that there is significantly less freedom of speech in the United Kingdom. It is easy to lose sight of the fact that Britons historically have, and still do, exercise some of the broadest free speech rights of any people on earth, especially in their ability to criticize the government, a most important bellwether of free speech rights. Our American concept of free speech developed directly from the British, and in many important respects, the free speech rights exercised in both countries are quite similar.

It is important to note that in each of the areas studied in this article, it is not the case that the United Kingdom allows controls over a particular kind of speech whereas that same speech is given absolute protection in the United States. In spite of the absolute-sounding language of the first amendment, it has never been so interpreted. In the United States, some controls are allowed in the areas of libel, government secrets, obscenity, and trial reporting. In all these areas, a balance must be struck between allowing free discussion and preventing harm to individuals or the public. The balance has been struck in some cases at a different point in Great Britain than in the United States. Most of those choices, however, seem to be a legitimate, albeit different, balancing of rights, rather than merely an illegitimate attempt to stifle debate or to protect the government from criticism.

It is the author's viewpoint that British law seems to have gone astray in the area of blasphemous libel because it controls speech for reasons other than protecting against actual harm. Unlike ordinary libel, which protects an individual from the harmful effects of untrue statements, the courts have stated that the purpose of blasphemous libel is to protect "a Christian's feelings" from insult.[49] This does not seem to be a valid reason to control speech. It must be remembered, however, that historically in the United States, obscenity has not been subject to control because of proof of actual harm to persons, but because it was "without redeeming social importance."[50]

The most important difference between the two countries is the much greater difficulty there is in the United States to restrain, rather than punish, publication, regardless of the grounds. If one is willing

to take the risk of punishment, an individual will always be able to communicate his or her ideas. The public will have the benefit of the information even if the speaker is eventually punished. It is also important to note that any punishment (either criminal or in the form of civil damages) will be meted out by a jury, whereas injunctions are granted by judges. One should not lose sight of the fact, however, that there is some cost to the system used in the United States. If an individual is punished for speech that could not be restrained, this means that someone's rights may have been violated by the speaker. Unlike the British, America is willing to take this risk in order to maximize the free exchange of ideas.

Given that Britain does not have a protection for free speech akin to a first amendment, it is noteworthy that Parliament has chosen not to impose more controls than it has in the area of free speech. The first amendment is still important, however, even though the United Kingdom, without one, does not suffer significantly less rights of free speech than the United States. It is important to remember that just because Parliament has chosen to exercise self-restraint in this area, there is no guarantee that it will continue forever to do so. It is conceivable that it could succomb to political pressure to stifle debate and, in that circumstance, there would be no document binding on them that would prohibit it. One can only imagine what American society would be like without the restrictions of the first amendment. It is possible that American legislatures, in that instance, would not show as much self-restraint as Parliament and, therefore, significantly greater controls on speech could exist in this country than presently exist in Britain.

NOTES

[1] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

[2] The first amendment prohibits Congress from "abridging...the freedom of speech, or of the press. ..." U.S. Const. amend. I.

[3] *Waddell v. B.B.C.*, 1973 S.L.T. 246. The Court eventually removed the injunction because it found that the plaintiff had consented to the publication and because the balance of convenience did not favor the plaintiff.

[4] 283 U.S. 697 (1931).

[5] *Id.* at 706.

[6] *New York Times v. United States*, 403 U.S. 713 (1971).

[7] *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

[8] *New York Times*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring).

[9] *Attorney General v. Guardian Newspapers*, 2 W.L.R. 805 (1988).

[10] *See Attorney General v. Guardian Newspapers*, 1 W.L.R. 1248 (1987).

[11] Official Secrets Act of 1911 (c. 28).

[12] 444 U.S. 507 (1980).

[13] Defamation Act of 1952.

[14] *Beauharnais v. Illinois*, 343 U.S. 250, 255-56 (1952).

[15] 376 U.S. 255 (1964).

[16] *Id.* at 279.

[17] *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

[18] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

[19] Defamation Act of 1952.

[20] *Id.* at Section 2.

[21] *Id.* at Section 7.1.

[22] 343 U.S. 250 (1952).

[23] *Id.* at 266.

[24] *See* J. Nowak, R. Rotunda & J. Young, *Constitutional Law*, 925-26 (3rd Ed. 1986). *But see* Lasson, *Racial Defamation as Free Speech: Abusing the First Amendment*, 17 Colum. Hum. Rts. L. Rev. (1985).

[25] Race Relations Act of 1976, Ch. 74.

[26] Lasson, *Racism in Great Britain: Drawing the Line on Free Speech*, 2 B.C. Third World L. J. 161, 171 (1987).

[27] *R. v. Lemon*, 3 W.L.R. 404 (1978), *aff'd*, 2 W.L.R. 281 (1979).

[28] *Id.*

[29] "Congress shall make no law respecting an establishment of religion...." U.S. Const., amend. I.

[30] *See* text at *infra* note 32.

[31] *Baltimore Sun*, Sept. 29, 1988, at C1.

[32] *Miller v. California*, 413 U.S. 15 (1973).

[33] *Id.* at 24.

[34] *See* text accompanying *supra* notes 3-5.

[35] *Kingsley Books v. Brown*, 354 U.S. 436 (1957).

[36] *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961).

[37] Obscene Publications Act of 1959 (c. 66).

[38] Obscene Publications Act of 1959 (c. 66) § 1.

[39] Obscene Publications Act of 1959 (c. 66) § 4.

[40] *See Watt v. Annan*, 1978 S.L.T. 198, 1978 J.C. 84.

[41] Indianapolis Code § 16-3(q).

[42] *American Booksellers Assoc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

[43] *Director of Public Prosecutions v. A. & B.C. Chewing Gum*, (1968) 1 Q.B. 159, (1967) 2 All E.R. 504, (1967) 3 W.L.R. 493 (chewing gum cards portraying violent battle scenes); *John Calder Publications v. Powell*, (1965) 1 Q.B. 509, (1965) 1 All E.R. 159, (1965) 2 W.L.R. 138 (book glorifying drug use).

[44] Contempt of Court Act of 1981 (c. 49) § 2(2).

[45] *Id.* at § 5.

[46] *Attorney General v. English*, (1982) 2 All E.R. 903.

[47] *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

[48] *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

[49] *R. v. Lemon*, (1979) A.C. 617, 1 All E.R. 898, 2 W.L.R. 281.

[50] *Roth v. United States*, 354 U.S. 476, 484 (1957). The *Roth* Court specifically rejected the argument that obscenity could only be outlawed if shown to cause antisocial conduct of some kind.

SUMMER LAW PROGRAM IN ABERDEEN, SCOTLAND

Professor Shapiro taught in the Summer Law Program in Aberdeen, Scotland, this past summer. The Summer Law Program is sponsored jointly by the University of Baltimore and the University of Maryland. It provides American law students the opportuity to study comparative law for six weeks at the University of Aberdeen, one of the oldest and most beautiful universities in Great Britain.

Courses are team-taught by members of the University of Baltimore and Maryland faculty, along with faculty members of the University of Aberdeen. This article grew out of material presented in a course entitled Comparative Civil Rights and Civil Liberties taught by Professor Shapiro and three members of the University of Aberdeen faculty. The course compared freedom of speech, freedom of religion, and employment discrimination laws in the United States and the United Kingdom. The author wishes to thank Professor Colin Reid of the University of Aberdeen for his assistance in preparing the article.

The Summer Law Program will be held this year from June 27 through August 4, 1989. The courses for this summer's program will include Comparative Criminal Justice and Professional Responsibility: Comparative Legal Professions. Cost of the program is approximately two thousand dollars for tuition, program fees, and room and board. Students interested in participating should contact Dean Laurence Katz, at the University of Baltimore.