Censorship and freedom of speech

Chapter 1: Freedom of Speech

Censorship and Free Speech is Volume 207 in the Issues in Society series of educational resource books. The aim of this series is to offer current, diverse information about important issues in our world.

Censorship and Free Speech explores the key issues involved in censorship and freedom of speech, with a particular focus on the extent and impacts of sex and violence in mass media and online; and provides an overview of Australia’s system of media classification and regulation. The information comes from a wide variety of sources and includes:

- Newspaper reports and features
- Magazine articles and surveys
- Internet website material
- Government reports, statistics and media releases
- Literature from lobby groups and charitable organisations.

It is hoped that, as you read about the many aspects of the issues explored in this book, you will critically evaluate the information presented. In some cases, it is important that you decide whether you are being presented with facts or opinions. Does the writer give a biased or an unbiased report? If an opinion is being expressed, do you agree with the writer?

Censorship and Free Speech offers a useful starting point for those who need convenient access to information about the many issues involved. However, it is only a starting point.

The Further Links and Resources section of this book contains a list of useful websites which you can access for more reading on the topic, or you may wish to visit The Spinney Press website at www.spinneypress.com.au for additional links to organisations which offer a range of information on particular issues.

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Chapter 1: Freedom of Speech

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Why is censorship controversial?

The first objection that people usually make to the suggestion that some views should be censored is to say "But who is to decide what should be censored?"

Why this is a problem? Governments make difficult decisions all the time – that’s what they’re there for.

The question of “who is to decide” seems especially important in regard to freedom of speech because of the connection between freedom of speech and freedom of thought.

- Unless we can express ourselves freely, and are free to hear the opinions of those we desire to hear, then it will be impossible for us to develop and revise our opinions.
- Various forms of social and communal life will also be impossible.

If someone (or some group or body) is deciding what sorts of opinions can be expressed or published in the public sphere, then all those who feel strongly about the matter will want to be on it and will contest its decisions. If they feel strongly enough about the matter, this may even lead to social conflict.

What if the government refused to allow the expression of particular religious viewpoints?

Defence of a right to freedom of speech is a key doctrine in liberal political thought. Liberal thought developed in the context of wars of religion.

The liberal hope is that a realm of free speech can be marked out without relying on controversial (religious or secular) premises – in order to avoid destructive social conflict. Liberals believe that everyone can agree that speech within this realm should be protected from government interference and that speech outside it may be regulated.

A philosophy lecture on ethics, media and the law, by Dr Robert Sparrow of the University of Wollongong

Censorship is especially problematic in a democratic society as a fully informed public is necessary for democratic decision making. Control of public opinion would allow political domination. In general, and in a liberal society there is a presumption against censorship.

Freedom of speech versus "freedom of expression"

Debates about freedom of speech often slide between speaking of "freedom of speech" and speaking of "freedom of expression"...

"Speech" seems like too narrow a description of what should be free from government (or other?) interference.

Censorship is almost never about preventing people from (literally) speaking. Indeed short of cutting out their tongues this is impossible. Instead it is about banning books or films or computer games, or preventing people from having access to the media, or closing down radio stations, or preventing newspapers from publishing certain information.

Which of the following are acts of "speech"?

- publishing a pamphlet; speaking at a demonstration; writing in a newspaper; publishing a newspaper; teaching a class; talking in a classroom; a painting; a slogan on a t-shirt; burning a flag; putting on a play; a photo; art; a pornographic film; chanting a footpath; spray painting a wall; displaying a swastika; burning a cross; playing music; a political demonstration; posting a music file to the internet; the description of a product on a packaging;

Yet if speech is too narrow a definition, "expression" seems too wide. Any action in the public sphere expresses "something. Often this expressive function is the reason why people engage in an activity.

Think here of terrorist bombings. The primary purpose of such bombings is to "send a message" rather than to achieve the deaths of particular people.

So, freedom of expression cannot possibly mean that people should be free to express themselves however they like.

The question of just what should be protected is a central part of the debate about freedom of speech/ expression.

What counts as censorship?

As well as disagreement about just what should be protected, there is also disagreement about what counts as censorship. What should speech/ expression be protected from?

If your speech were silenced in one of the ways mentioned on the list below, would you complain that you had been censored, or that freedom of speech was at issue? If not, why not?
Censorship and classification of films and computer games in Australia

The material in this section refers to the Office of Film and Literature Classification's Guidelines for the Classification of Films and Computer Games (2003), available via www.oflc.gov.au. Page numbers in brackets refer to this work.

A couple of points to note:

The different treatment of sex and violence especially at the lower classification levels

The restrictions on explicit depictions of consensual sexual activity still exist except the ACT and the Northern Territory. 13,14

- Why is it that we are so quick to Strike a balance on representations of sex and sexual activity yet we allow full nudity of a non-consensual and unhealthy part of a human life? Almost all of us will have sex at some point in our lives.

- Why are we less concerned with children seeing representations of violence and murder, given that this isn’t a normal and healthy part of human life? Most of us will enjoy being involved in the course of violence.

The ban on "relentless" or "other fantasies which are offensive or aberrant"15,16 is this ban justified by liberalism?

Or does it reflect a cultural management of notions of normality and abnormal sexual desire?

The ban on detailed instructions on how to commit crimes? 17

 Might this be seen as political censorship?

Is it possible to provide a "non-political" or non-controversial account of what is a crime?

The different treatment of film and computer games

Computer games are refused classification beyond MA

What does this say about computer games as a medium compared to film? What is the relation posited between the viewer/player and the classification system?

Is it true that computer games are more likely to change the behaviour of those who view/play them? Is killing a zombie in a computer game worse than cheering when one gets killed in a film?

such a way that certain views cannot be heard (or perhaps even expressed).

- Think here of asking someone whether they are "pro-life" in relation to the abortion debate. Is it possible to answer this question "no"?

- See also Catherine MacKinnon's arguments (in Catherine MacKinnon, Only Words, London: Harper Collins, 1995) that pornography is the silencing of women because it promulgates of rape myths ensures that when women try to say "no" to a sexual advance they will not be heard.

- Homophobic, or sexist, or racist or ethnic violence.

- These are often targeted at those who are openly gay or feminists or proud of their racial/ethnic identity.

Which of these are "censorship"?

What? Why is it stoke here?

Notice that we’re all usually comlicit with some of these in our daily life, for instance by not listening to (or mocking) the views of those who we think have “crazy” or “out there” views.

"Censorship" debates usually concern decisions made by the State.

- Yet most of our news and information comes to us from privately owned media. Most of the decisions that determine what is and is not published by that media are not made by government figures or censors. Why aren’t commercial decisions "censorship"? Why aren’t they questioned more?

- There may be reasons why state censorship is particularly dangerous (for instance, the state has unrestricted power. There is only one state [per nation], while there are many private media organisations).

Accepted (or hidden) forms of censorship

Despite near universal lip service to the value of "free speech" everyone agrees that some censorship is legitimate:

- for reasons of "national security";

- Restrictions on advertising (e.g. cigarettes, alcohol, pharmaceuticals);

- Regulations governing product labelling.

- Broadcast regulations (think here about the fate of "pirate" radio and television stations);

- Copyright law (Think here of the debate over the use of music "samples" in hip-hop);

- Noise regulations.

- Incitement to crime/riot.

- Where speech establishes an immediate threat to public safety (for instance, shouting "fire" in a crowded cinema).

- Insults that are sufficiently powerful as to constitute "fighting words".

- In the workplace (You can’t tell the boss to F*ck off—or customers that the product is not worth buying).

- Libel/slander/denigration.

- Privacy related (should someone be allowed to publish pictures of you having sex taken through your bedroom window on the Internet or in the newspapers?).

- Restrictions on the publication of information that is "commercial in confidence".

- Laws against threats/blackmail/ orders of various sorts ("kill them").

Not everyone will agree with every justification for censorship on this list. The important point is that hardly anyone will object to them all.

More controversial (yet still popular grounds) for censorship are:

- Obscenity.

- Racial vilification.

- Advocacy of "terrorism".

Note that some of the prohibitions on certain sorts of expression described above are not usually understood as censorship. Why not?

The question of how the limits of freedom of speech/censorship are decided is a central concern of the writings of Stanley Fish.

Stanley Fish’s argument

The material in this section refers to the notes shared above, and in particular, the argument made in Stanley Fish, There’s No Such Thing as Free Speech, And It’s a Good Thing Too: New York and Oxford: Oxford University Press, 1994, Chapter 3, pp 100-119. Page numbers in parentheses refer to this work.

Fish argues that "there is such thing as free speech".

By this he means that the category of free speech does not mark out a space delineated by a set of independent principles. Instead it is a label that is appropriated as the fruit of victory in a political struggle.18,19 i.e. if we win a political struggle in debates about censorship then we get to call those views we like free speech and argue that those we do not should be censored.

Or, to put it another way, we cannot determine whether a particular utterance or type of speech should be protected from censorship independently of assumptions about truth and value judgments that are themselves being contested in the debates in which the speech appears.20,21

Fish begins with the observation, made above, that everyone agrees that some sorts of speech should be censored. He extends this to argue that censorship, or at least the possibility of censorship, is actually necessary for speech to occur at all.

Two ways of understanding this claim:

(1) Silencing is essential to meaning (2.1,26)

Think of the definition/meaning of words. A word which can be used to mean anything is meaningless.

The policing of meaning ("You can’t say that") is therefore essential to meaning.

(2) Speech is always for something (2.2,27)

The shared goals of the community to which speech is addressed give sense to the practice of speaking and also set limits on what may be said.

Notice how in any context in which we are speaking we have an intuitive sense that there are some things that is is inappropriate to say and that we would therefore not say.27,28,29 Think of the implicit restriction on topics and forms of communication in tutorials.

But as soon as we realize that speech is always "for" something it also becomes apparent that some types of speech may hinder or prevent the realization of that goal.29,30

As Fish argues, the only circumstances in which it might make sense for speech to be entirely free are those where no person has a stake in the speech, which is expected to benefit all or towards which no particular viewpoint.31

The more vital the purpose of the institution or context in which a speech is occurring the more significant these limits are. (Think here of the ways in which what may and may not be said in a court room during a trial is tightly delineated)

Examples: "span" on the internet

There is currently lots of interest in regulating/preventing "span" (unsolicited commercial email).

Yet this is hardly ever seen as a free speech issue. (Why aren’t spammers like a person standing in the middle
The university is an institution devoted to the pursuit of knowledge it cannot tolerate the promotion of falsehoods in its official functions. Fish’s argument is controversial. If he is correct then there is no escape from the politics of disputes about what the proper goals of communities and institutions are and about what action of government will help or hinder us in reaching them. It problematizes liberalism.

Another example makes this clear: Should a biology teacher at the university be allowed to lecture on creationism in their lectures? Presumably not. Or at least this judgment cannot be made independently of an assessment of the truth and worth of the claims of creationism.

Freedom of speech and the Constitution

The Australian Constitution does not have any express provision relating to freedom of speech. In theory, therefore, the Commonwealth Parliament may restrict or censor speech through censorship legislation or other laws, as long as they are otherwise constitutional. The Constitution consists mainly of provisions relating to the structure of the Commonwealth Parliament, executive government, and the federal judicial system. There is no list of personal rights or freedoms which may be enforced in the courts. There are however some provisions relating to personal rights such as the right to trial by jury (section 80), and the right to freedom of religion (section 116). Since 1992 decisions of the High Court have indicated that there are implied rights to free speech and communication on matters concerning politics and government, e.g. permitting political advertising during election campaigns. This is known as the ‘implied freedom of political communication’. Issues arising from these decisions include defining when communication is political and when the freedom allows people to overcome public interests.

In 1942 a Constitutional Convention held in Canberra recommended that the Constitution be amended to include a provision 116A preventing the Commonwealth or a State passing laws which curtailed freedom of speech or of the press. The government did not accept this proposal and it was not included in the referendum on 19 August 1944, when other constitutional amendments were proposed.

The advantage of having such rights written into the Constitution is that they are entrenched and cannot be removed or amended by any government without the overwhelming approval of the people voting at a referendum to amend the Constitution. Rights contained in other legislation, such as the Racial Discrimination Act 1975, are not entrenched. They may be amended or repealed by any government with the consent of Parliament.

Freedom of speech and a Bill of Rights

Proposals for legislating for freedom of speech have been made mainly in the context of legislating for a Bill of Rights. Since 1973 at the Commonwealth level there have been attempts to legislate for a Bill of Rights which would incorporate provisions of the ICCPR, including Article 19, into Australian law.

Various governments, parliamentary parties and individual members of parliament have introduced legislation to establish a Bill of Rights, which would include the right to freedom of speech. While lacking constitutional force, such an Act of Parliament would list various rights which could be enforced in the courts in many circumstances. The less complicated option of legislation, rather than amending the Constitution, has been preferred by proponents of a Bill of Rights.

More recently at the State level Parliamentary Committees in Queensland and New South Wales have considered a Bill of Rights but neither has recommended such a proposal. In 2002 the Australian Capital Territory government established a non-parliamentary committee to inquire into a Bill of Rights for the ACT. Professor George Williams has summarised the arguments for and against the introduction of a Bill of Rights in Australia.

It is interesting to note that not only is there no legislation providing for freedom of speech either in the Constitution or in other legislation, but Governments have passed legislation to prevent freedom of speech in certain circumstances. Examples include the various State and Territory defamation laws and racial vilification laws. Confidential laws may also be used to prevent freedom of speech by restricting distribution of certain films and publications, although these laws now severely restrict the publication media according to the age groups to which they may be seen, rather than preventing their publication.

Overseas Comparisons

The United States incorporated a Bill of Rights into its Constitution in 1789. Other countries have legislated more recently for freedom of speech, mainly in legislation which is separate from their constitutions: Ireland in 1937, Canada in 1982, New Zealand in 1990, South Africa in 1996, and the United Kingdom in 1998. The European Union has included freedom of expression information in its Draft Charter of Fundamental Rights for possible adoption by member states. This makes Australia alone among like-minded countries not to provide for freedom of speech in their constitutions or legislation or the national constitution.