Chapter 1: Freedom of Speech

Censorship and freedom of speech

Introduction
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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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 is this 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 within 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 then, 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 slogan; 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 the package; the list of ingredients on a product?

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?
Different ways of "silencing" expression

- jailing those who write controversial articles.
- jailing those who publish controversial articles.
- Denying those with controversial views access to the media.
- Removing public funding from organisations that promote views that the government dislikes.
- Note the current controversy about the ABC’s funding — and coverage of the recent war in Iraq.
- Refusing to publish particular views in a privately owned newspaper.
- Editorial licence.
- Not choosing to interview those with controversial views for a media story.
- Sacking those who express controversial views from their job in the media.
- Not providing those with controversial views with a permit to hold a demonstration at which they would present their views.
- Refusing to allow someone to hire a meeting space/hold a meeting on university grounds.
- Shooting someone down.
- Drowning their views out with opposing views.
- Think here of the conservative attack on a term called "political correctness" in Australia over recent years — that argued that the domination of left-wing or elite views in the media meant that "ordinary Australians" were being prevented from having their views heard. Think of John Howard’s refusal to clearly condemn Pauline Hanson’s controversial statements on immigration and Australian race relations on the grounds of "freedom of speech".
- Pathological lie.
- The possibility of being laughed at/publicly humiliated is a powerful deterrent to expressing controversial views. In a public forum, in a meeting, in a seminar. It stops the conversation, it stops the argument. It stops the discussion. It stops the debate.

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 in all states except the ACT and the Northern Territory.
Why is it that we are so quick to penalize other forms of sex and sexual activity which are legally valid and normal and healthy part of 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 is not a normal and healthy part of human life? Most of us will not have been involved in someone of the course of violence.
The ban on "relentless" & "other fantasies which are offensive or aberrant".
Is this ban justified by liberalism?
Or is it reflective of political/legal arguments about normality Vs. abnormality, sexuality?
The ban on detailed inscriptions on how to commit crimes.

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 16.
What does this say about computer games as a medium compared to film? What is the difference between the two activity levels where the sex or violence is represented?
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 shooting when one gets killed in 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 its promoting 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? What is at stake here?
Notice that we’re all usually pretty comfortable 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], whereas there are many private media organisations).

Accepted (or hidden) forms of censorship
Despite near universal lip service to the value of "free speech".

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 work place (You can’t tell the boss to fire off — or customers that the product is not worth buying).
- Libel/slander/defamation.
- Privacy related (should someone be allowed to publish pictures of you without your permission that is appropriate as the fruit of victory in a political struggle, 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.
- Of, 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.

Fish argues that "there is no 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, 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.

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.

As Fish argues, the only circumstances in which it might make sense for speech to be entirely free are those which were an absurdity of a shared goal which is expected to be met by another way, when we do not care what is being said.

The more virulent 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 courtroom during a trial is tightly delineated)

Some examples: "spam" on the internet.
- There is currently lots of interest in regulating/preventing "spam" (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...
Free speech and the constitution

**International background**

In 1948 the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR). Article 19 affirms the right to free speech:

*Article 19. Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*

Members of the Commonwealth Parliament reaffirmed the principles of the Declaration during a sitting on 10 December 1998 to mark the 50th anniversary of the UDHR and pledged to give wholehearted support to the principles enshrined in the Declaration.

Article 19 of the 1966 United Nations International Covenant on Civil and Political Rights (ICCPR) states:

*Everyone shall have the right to freedom of expression. No State party shall put into effect any law or practice of censorship or any other measure intended to curb freedom of expression.*

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 judiciary. 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 the High Court has 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 has not prevailed over competing public interests.

In 1942 a Constitutional Convention held in Canberra recommended that the Constitution be amended to include section 116A preventing the Commonwealth or a State passing laws which curtail 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 suspended 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.

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**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 and in both states considered 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 his book *The Right to speak: A Bill of Rights in Australia*. It is important 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. The laws may also be used to prevent freedom of speech by restricting distribution of certain films and publications, although these laws are mainly to classify publications according to the age groups which can see them, 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 and 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 its Constitution or legislation or the national constitution.

**Further reading**