

Introductory framework

Margot Kaminski Pranesh Prakash

2015-05-01

Global censorship: shifting modes, persisting paradigms

In 2006, during the Access to Knowledge conference organized by the Yale Information Society Project, Jack Balkin gave a speech in which he identified three broad points about the theory of access to knowledge:

- First, Access to Knowledge is a demand of justice.
- Second, Access to Knowledge is both an issue of economic development and an issue of individual participation and human liberty.
- Third, Access to Knowledge is about intellectual property, but it is also about far more than that.¹

In his 2007 address at the second Access to Knowledge conference, Balkin provided some ideas about what that “far more than that” consisted of. He situated access to knowledge as the goal of a broader ‘knowledge and information policy’, of which freedom of speech is a part. Freedom of speech and access to knowledge depend on what Balkin identifies as an ‘infrastructure of free expression’,² which enable ‘democratic access to and participation in cultures’.

This book seeks to address that larger view of access to knowledge by bringing together a series of case studies that provide a broader picture of what censorship is today. One of the most difficult problems faced by individuals working in this area is definitional.³ Given the broad range of speech-related tactics that different countries use, what do we mean when we use the word “censorship?”

¹ Jack Balkin, *What is Access to Knowledge?*, BALKINIZATION (Apr. 21, 2006), <http://balkin.blogspot.com/2006/04/what-is-access-to-knowledge.html>.

² Jack Balkin, *Two Ideas for Access to Knowledge — The Infrastructure of Free Expression and Margins of Appreciation*, BALKINIZATION (Apr. 30, 2007), <http://balkin.blogspot.in/2007/04/two-ideas-for-access-to-knowledge.html>. In this, Balkin elaborates on what he means by ‘infrastructure of free expression’:

What is in that infrastructure? It includes government policies that promote the creation and delivery of information and knowledge. It concerns government policies that promote transparency and sharing of government created knowledge and data. It involves government and private sector investments in information provision and technology, including telephones, telegraphs, libraries, and Internet access. It includes policies like subsidies for postal delivery, education, and even the building of schools.

³ See Derek Bambauer, *Cybersieves*, 59 DUKE L.J. 377, 384–386 (2009). Also, see generally Helen Freshwater, *Towards a Redefinition of Censorship*, in CENSORSHIP & CULTURAL REGULATION IN THE MODERN AGE 225 (Beate Müller, ed. 2004).

At the Global Censorship conference held at Yale Law School in March 2010, which laid the foundation for this book, Balkin, once again, presented a useful framework for beginning to answer this question.⁴ Censorship — which Balkin calls ‘speech regulation’, to avoid the pejorative connotations that word carries — can be divided into two rough types: “old school” and “new school”. Old-school censorship has characteristics of direct and salient use by the state of its power to detain, block, or destroy. For instance, the police could show up at a journalist’s home, confiscate all written materials, and throw the journalist in jail. This is the type of censorship that is instantly recognizable as censorship. Likewise, using a state agent to black out objectionable passages in all copies of a book, or to use the court system to prevent distribution of the book altogether, is old-school censorship. Even when the state co-opts private parties — as happened during the McCarthy witch-hunts against communists in the United States — the censorship that takes place is still quite visible, and easily identifiable as censorship.

New-school censorship is markedly different in several ways. It is often not performed by the state itself, but is either outsourced through third-parties — such as internet service providers, web services, or financial intermediaries — or is performed by private actors without the active direction or involvement of the state. It is often indirect, and communication is blocked through less obvious means. It also tends to rely on digital surveillance, and in many cases on state access to infrastructure and authority over digital infrastructure providers.

Old-school censorship is a dying breed in many democracies where freedom of expression is guaranteed by a constitution or a bill of rights. New-school censorship, on the other hand, occurs regularly, but is often not readily identified as ‘censorship’ — hence, the definitional problem. In more repressive regimes, new school censorship interacts with the old in deeply problematic ways. A state may pursue both forms of censorship at the same time: outsource certain kinds of censorship to private parties, and still arrest journalists on false charges and throw them in jail. The two types of censorship also share common features; surveillance has played a role in both types, and it is arguably more ubiquitous today than ever before.

Despite these notable differences, this book does not claim that there is a bright-line division between old- and new-school censorship, nor between digital and non-digital censorship, nor does it claim that all experiences of censorship are equivalent in harm or scope. Rather, it seeks to illustrate the range of tactics used by states — and corporations — today and recently, that control and restrict the present knowledge environment, and the infrastructure of free expression, both online and offline, and through them to illuminate some of the changes we are seeing in the nature of censorship itself.

The chapters of this book address a wide variety of censorship activities taking place around the world, across nine countries in four continents. Some of the country chapters focus exclusively on digital case studies, while others look at both digital and offline censorship as inseparable. In these chapters, two impor-

⁴ Jack Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296 (2014), available at http://cdn.harvardlawreview.org/wp-content/uploads/2014/06/vol127_balkin.pdf.

tant questions are repeatedly addressed, implicitly or explicitly. First, what is meant by censorship, and what shapes and forms does it take in actual practice? Second, how do organs of the state and civil society engage with the practice and contours of that censorship, and create possibilities for accountability and for change?

Defining censorship

The first question of “what is meant by censorship” can be answered along three observable axes: the justifications provided, the actors involved, and the methods used. Censors regularly offer justifications for censorship, ranging from preventing criticisms of the government, to protecting national security, to balancing speech against other rights such as privacy, or intellectual property, or personal dignity. Each case in this book addresses one or more of the justifications states give for creating censorship regimes. Some of these directly target expression, while for others restrictions on free expression is a collateral cost. Sometimes a technical regime that is built with one justification in mind — say, curbing online distribution of child pornography — may end up serving another — enforcement of maximalist interpretations of copyright law.

In identifying what is meant by censorship in each case study, the authors have paid close attention to which actors are involved. States increasingly do not regulate speech directly. They employ intermediaries, encourage private contracting, or permit private censorship. Censorship can involve multiple actors in different capacities. An actor-oriented categorization of censorship could divide it up as: direct state censorship, state-directed censorship, state-enabled censorship, state-independent private censorship, societal censorship, and self-censorship. In each of these categories — with the exception of societal and self-censorship — the act of censorship can be seen as being lawful, unlawful, or even extra-legal. Most laws protect against state censorship, but in mature democracies like the United States of America or India there is little naked state censorship, with state-directed, state-enabled, state-independent private, societal and self-censorship being the more important conceptual categories.

States also employ vastly different methods for censoring. Some go after communications infrastructure by employing broad ‘kill switches’, as in Egypt. Others engage in surveillance, thereby on occasion chilling the speech of journalists or activists or minorities, as in the USA and Myanmar. Some establish liability regimes, whether criminal or civil, directed at users or communication intermediaries, as in South Africa, India, and China. Others revise right to information laws to prevent journalists from accessing government information. Some continue to perpetuate old school censorship by employing the enforcement powers of the state, as has been done in Brazil through the judiciary. Each case study in this book addresses one or more censorship method chosen by the state, or in some cases private entities, to stop or shape some kind of speech, or that is chosen for other reasons, but structurally achieves the result of interfering with free expression. Importantly, by using the word ‘censorship’ we do not necessarily impute malicious motivations to the actor that is censoring. In some cases, it is a lack of understanding of the implications of their actions that leads to censorship, as we see in some of the case studies, for example, from South Africa and India.

Overview of Chapters

While there is no way of succinctly capturing all the different ideas contained in the various chapters of this book, we will briefly walk through the themes that they touch upon. Dr. Laura DeNardis's chapter titled "The Privatization of Free Expression", kicks off the book, and in it she explores the role of Internet governance, especially its technical governance and what she terms "private public policy", in determining whether the "technical characteristics providing infrastructures of free expression" are preserved and promoted on the Internet.

In her chapter on the United States of America, Anjali Dalal looks at the evolution of the chilling effects doctrine in American free speech law, and some of the adverse consequences of domestic mass surveillance, especially on minority populations. In the second chapter to look at the USA, Prof. Christina Mulligan writes of the use of copyright law to remove non-copyright-infringing material, including political speech and cultural speech, through intermediary liability-linked content removal requests, and through "seizures" of domain names: a step unprecedented in other countries. She notes how our inherent sense that censorship ostensibly for copyright reasons bring forth lesser vigilance: "the public would likely have been up in arms", she notes, if in the scenario she describes, "a magazine printing press" had been seized "instead of a domain name".

In their joint chapter on Zimbabwe and South Africa, Prof. Caroline Ncube and Dr. Eve Gray paint a broad-brush overview of the law relating to access to information, official secrets, intermediary liability, and insult of the state by going through a wide assortment of instances of censorship. They examine different kinds of instances of censorship, ranging from direct ("old-school") state censorship through arrest of journalists to self-censorship due to the atmosphere created by a political party.

Expanding on one of the threads that Dr. Gray touches upon in that chapter, Andrew Rens presents detailed analysis of the intermediary liability regime and its constitutionality. By doing so, he answers the question of whether "interdiction of the means of speech be characterized as censorship, when it is carried out by one non-state actor at the behest of another?"

In a markedly different take on the theme, the chapter by Rebecca Wexler looks not at direct state censorship, but at the environment required for informed political debate in a free society by focussing on standards when it comes to video forensic evidence, and its role in truth-making. They examine in depth the forensic examination of a set of videos that purportedly show the cold-blooded shooting of Tamil Tigers by the Sri Lankan armed forces during the civil war, and how opaque technical procedures go on to determine "truth" in political discourse.

The next chapter is that on India by Pranesh Prakash. In that chapter he presents an overview of online censorship in India since the mid-1990s, from direct state censorship to state-directed and private state-independent censorship, and then focusses on the new intermediary liability regime that brings about what he terms "invisible censorship".

Prof. Hong Xue continues with the theme of intermediary liability in China, focussing on the hugely successful e-commerce 'third-party platforms'. In it

she traces the evolution of the Chinese law in this regard, thus explaining the difficulty that courts have faced of striking a fair balance between consumer protection, protection of trademark, and encouraging innovation in these online shopping malls.

Myanmar’s censorship and surveillance regimes form the basis of Erin Biel’s chapter, and she examines these regimes through the lens of the ethno-religious conflicts there. Her chapter shows the faultlines and the similarities between the regimes that regulate the traditional press and the digital public sphere — telecom surveillance is even easier to conduct than physical surveillance, hate speech is as readily disseminated online — using platforms like Facebook — as offline, and reporters can be arrested for challenging state corruption. It also shows that the existence of the digital sphere doesn’t accomplish much in countries where the Internet penetration is low and where “government that is accustomed to maintaining state control over the media and telecommunications industries may have difficulty embracing all that freedom of the press and freedom of speech encompass.”

Profs. Mônica Steffen Guise Rosina and Alexandre Pacheco da Silva study the decidedly ‘old-school’ means employed in Brazil by corporations and state officials to prevent their critics from challenging them. In both the cases they examine, the defendants were critics who were ordered by the judiciary to refrain from using particular online social networks to communicate their message, leading the authors to look at the importance of the infrastructure of free expression.

Rounding off the book, Dr. Nagla Rizk explores a period of approximately a week in great detail: the period in January–February 2012 when access to the Internet and various telecom services were shut down in Egypt by the authorities. She presents one of the most detailed accounts of the actual mechanism through which the blocks took place, and then examines a part of the economic impact of this outage of communication channels.

Dangers of New School Censorship

A common theme that emerges out of this book as a whole is that in new school censorship, restrictions imposed on speech and expression, or on the infrastructures of speech and expression, do not constitute the entirety of the problem. Censorship never results in restrictions alone; it simultaneously results in the production of new discourses around the object of censorship, as well as its discursive limits.⁵ As film studies scholar Annette Kuhn notes, “Censorship is not reducible to a circumscribed and predefined set of institutions and institutional activities, but is produced within an array of constantly shifting discourses, practices and apparatuses . . . [it] is an ongoing process embodying complex and often contradictory relations of power.”⁶ The productive nature of censorship is seen in the fact that we often create satire with which to mock censorship,⁷ as

⁵ MICHEL FOUCAULT, 1 THE HISTORY OF SEXUALITY 15–18

⁶ ANNETTE KUHN, CINEMA, CENSORSHIP, AND SEXUALITY 127.

⁷ Foucault dismisses this “illicit discourse” as less important. See FOUCAULT, *supra* note 5, at 18.

well as the increased attention that which is sought to be censored gets, which on the Internet is often referred to as the “Streisand Effect”.⁸

Society will never be free of censorship, nor of resistance to censorship. Indeed, the very technologies that seem to liberate our communications and form the means of our modern self-expression are the selfsame technologies that enable states and corporations greater powers of censorship and surveillance.⁹ Old-school censorship, it would seem, is simultaneously both non-productive — since it often does not work well at being a restriction — as well as productive, since it often results in counter-speech, both directly critical and subversive. Citizens may not always have been able to legally challenge old-school censorship in non-democratic regimes, but they could very often see it and galvanize against it, and in many cases, subvert it in myriad ways.

There are indications that in many circumstances new-school censorship may be more effective than old-school censorship by making invisible the fact that speech regulation is happening, and thus depriving speakers and the audience of the ability to engage with the fact of censorship and to indulge in counter-speech. Even where new-school censorship is visible, it has not always received the same treatment with respect to principles of process and court access, due to it happening mostly through private parties, and not readily being seen as ‘censorship’. Thus, the constitutional safeguards that citizens in a democracy use to protect themselves against the state, are not as readily available against private entities such as internet service providers, domain name hosting services, web hosting services, and social media platforms. Given this, civic engagement with processes of censorship assumes the highest importance. However, such engagement with censorship must be studied not merely at the social and cultural levels, but must be accounted for in legal and procedural terms as well.¹⁰

This shift in relative importance of the actor that controls expression is also a shift that signifies the changes in state ownership of media and communications infrastructure — from the time when many governments exercised monopolies over telecommunications networks and radio stations and television channels, and some of which are still controlled by licensing regimes in many parts of the world. The advent of the Internet as a network of largely privately-owned networks, with a large part of people’s daily interactions being on servers owned by private corporations, without licensing requirements in most parts of the world, further reduces the opportunities for direct state censorship. States desirous of censoring material must, for it to be effective, seek the cooperation of these private entities, as police action is far less likely to be effective. Equally, the spectre

⁸ T.C., *The Economist Explains: What is the Streisand Effect?*, THE ECONOMIST (Apr. 15 2013), <http://www.economist.com/blogs/economist-explains/2013/04/economist-explains-what-streisand-effect>.

⁹ See generally EVGENY MOROZON, THE NET DELUSION (2011) (detailing the usage of digital technologies by authoritarian regimes). See also Jack Balkin, *supra* note 4, at 2304–05 (“Many of the same features of the digital infrastructure that democratize speech also make the digital infrastructure the most powerful and most tempting target for speech regulation and surveillance. Although the digital infrastructure frees speakers from dependence on older media gatekeepers, it does so through the creation of new intermediaries that offer both states and private parties new opportunities for control and surveillance.”).

¹⁰ See generally Bambauer, *supra* note 3, at 390–410.

of private censorship becomes omnipresent online since private corporations — especially the ones with millions of users — now often have the regulatory reach of state, but very often do not have restrictions placed upon them in the form of the freedom of expression or privacy rights that we often enjoy against the state.

The case studies that are contained in the rest of this book bring to the forefront the legal hurdles we currently encounter and must cross if we are to ever effectively safeguard ourselves against the harms of censorship.