The Rabelais Case

> ***"It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error."***
>
> - Robert H. Jackson (1892-1954), U.S. Judge

During the five years prior to June 1997, the censorship debate in Australia had focussed on issues of morality and the portrayal of violence. Whilst some had expressed fears that censorship policy was headed backwards, to the extreme moral conservatism and hypocrisy of decades past, few anticipated that political censorship would rear its ugly head.

On 6 June 1997, a Federal Court judge dismissed an appeal by four student editors of *Rabelais*, the La Trobe University student newspaper, against the decision of the censors to ban an article published in July 1995. The decision was appealed to the full bench of the Federal Court and again dismissed on 24 March 1998. On 11 December 1998, the High Court of Australia refused to grant special leave to appeal. The former editors each faced jail terms of up to six years and/or fines to a maximum of AUD$72,000.

The case looks decidedly like political censorship; convenient grounds for which came into effect quietly, with minimal - if any - public awareness in 1992.

Eventually, on 24 March 1999, the charges against the former editors of Rabelais were dropped by the Director of Public Prosecutions (DPP), without explanation.

This document provides historical information about the case; the potential effects of the Court decision on freedom of expression in Australia; and, the unaccountable censorship regime which enables such an absurd and appalling situation to occur.

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- Other historical information available on the Rabelais Defence Campaign Page.

The Background

In July 1995, an edition of *Rabelais*, the newspaper published regularly by the Students Representative Council of La Trobe University in Melbourne, included an article titled "The Art of Shoplifting". The editors at the time, Melita Berndt, Michael Brown, Ben Ross and Valentina Srpcanska, were students who had been elected at the most recent annual student elections.

Following publication, there was a substantial level of media interest. Representatives of major retail chains and of the local police condemned the publication. The editors have defended and explained the article in terms of raising issues about the pattern of wealth distribution in Australian society, questioning the sanctity of private property, and highlighting the inadequacy of financial support for students.

Background to the publication of the article and the political issues affecting university students, eg. the "Voluntary Student Unionism (VSU)" legislation, is available on the following pages:

- [BROKEN LINK] Political Censorship - Could it happen here? You bet, NoName, VUT Student Newspaper, September 1995.
  "...The 'VSU' legislation was put in by the state government in order to quash anti-state government sentiment on campuses. As a leaked Liberal Party policy document put it: 'we do not want compulsory student monies flowing out to anti-Kennett and anti-Coalition campaigns and other fringe activities of the hard student left.'..."
- [BROKEN LINK] A Guide to Successfully Shutting Down a Student Paper NOT! Catalyst, RMIT Student Newspaper, Issue #10, 1995
  "...For many of the uninitiated, the goings on at La Trobe may seem a little bit confusing. Can an article about shoplifting close down a student union ? Well. the issues are varied and complex but one thing seems pretty clear: VSU fears materialise! ..."

According to a report [BROKEN LINK] in The Melbourne Age, broadcaster Neil Mitchell drew the article to the attention of the chief of the Victorian Retail Traders Association (VRTA). NoName [BROKEN LINK] reports that VRTA issued a media statement condemning the article whereupon "[t]he papers echoed the Kennett agenda regarding student papers and the 'need for control'".

On 8 August 1995, the then Federal Government Minister for Education, Simon Crean, was 'grilled' on a nationally syndicated radio program by John Laws (commonly known as "the king of talk back radio"). An undertaking was extracted from the Minister to pursue the student editors to determine if

Federal Government funding to their paper could be cut, and to determine if the individuals could be prosecuted in the criminal courts. The exchange took place against a background of widespread speculation that an early federal election may have been imminent.

The Minister subsequently wrote to the Victorian Attorney-General, Jan Wade, urging her to prosecute the editors of both Catalyst and Rabelais for printing the article. (Sunday Age, 30 Aug 95). For further information about the involvement of politicians and public servants, see Interview with Marcus Clayton, Solicitor for the Rabelais Editors on The Law Report, ABC Radio National, 30 July 1996 (Note: The interview is in the last third of the file).

There is little doubt that the views being expressed in student newspapers were causing great anguish to politicians. The publication of an article about shoplifting seems to have been particularly convenient to them.

One wonders, however, whether these politicians gave any responsible thought to what they were doing. They should know that attempting to ban speech is a very effective means of increasing demand and distribution, at least when it is already inside Australia and thus outside the reach of Customs Department officials. Unsurprisingly, the article was reprinted in Catalyst (RMIT), Honi Soit (University of Sydney), Metior (Murdoch University - locked up before distribution), Vertigo (UTS), Arena (Macquarie University), Semper (University of Queensland), NoName (Victorian University of Technology) and excerpts were printed in The Bulletin magazine, in an article titled "Censorship" (Ref: NoName). It also became available on the Internet at around the same time.

No-one, apart from the Rabelais editors, has been prosecuted.

For further information on the background and political issues, see:

- [BROKEN LINK] Political Censorship - Could it happen here? You bet, NoName, VUT Student Newspaper, September 1995.
- [BROKEN LINK] A Guide to Successfully Shutting Down a Student Paper NOT! Catalyst, RMIT Student Newspaper, Issue #10, 1995
- [BROKEN LINK] Political Censorship, VSU, and the Art of Shoplifting
- [BROKEN LINK] Rabelais, John Laws and the Art of Student Poverty
- [BROKEN LINK] The Art of Shoplifting - Jumping on the Bandwagon without Getting Sued, Tharunka, UNSW Student Newsletter
- [BROKEN LINK] Nicotine (Links to relevant information)
- [BROKEN LINK] Kennett's Still Clowning Around (Note: Item is half way down the page.)

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The Burnt Article

Justice Merkel states in the Rabelais case decision of June 1997:

> *"As was said by Lord Simon of Glaisdale in Attorney-General v. Times Newspapers Ltd [1974] AC 273 at 320:*
> *'The public interest in freedom of discussion...stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves.' "*

Undoubtedly, the Rabelais case decision affects every Australian's freedom of expression. However, obviously Australians cannot "influence intelligently" such decisions, nor advocate for change in censorship laws which result in undesirable decisions, unless they know exactly what it is that the Government has banned. It is clearly impossible for persons who are not familiar with the content of the article to intelligently discuss the merits or

otherwise of the decision and associated laws.

Adults in a democratic society cannot be expected to blindly believe that "the government knows best". Frequently they do not, and members of the Australian government have been known to ignore the views the majority of citizens.

Fortunately in this case, at least for citizens able to access the Internet, that issue is academic. Banning the publication of information in Australia is totally ineffective when the same information is legal to publish in other countries and is available on overseas Internet sites which can be found via search engines. Despite history, governments refuse to accept the fact that banning information is the most effective means of increasing curiosity and demand for it and thus ensuring its rapid spread.

However, it is possible that in *some* Australian States it is illegal to even possess articles which have been "refused classification". Any person considering reading the article is strongly advised to familiarise themselves with laws applicable to them and abide by those laws.

Since "The Art of Shoplifting" article was published by the Federal Court in its decision of March 1998, members of the public have been able to legally obtain a copy of the article from the Court. The article is available from the following sources:

Offline:

- From the offices of the Federal Court:
  The article is included in a Schedule to the Federal Court decision in *Michael Brown & Ors v Members of the Classification Review Board of the Office of Film and Literature [1998] - VG 314/97* of 24 March 1998 (i.e. The Federal Court is distributing copies of the banned article.)

Online:

- The Federal Court decision in *Michael Brown & Ors v Members of the Classification Review Board of the Office of Film and Literature [1998] 319 FCA* includes the article in a Schedule to Justice Heerey's opinion.
- http://samsara.law.cwru.edu/comp_law/10-shoplifting.html [BROKEN LINK]
- http://www.nihidyll.com/mirror/10-shoplifting.html [BROKEN LINK]
- http://thingy.apana.org.au/~fun/rabelais/ [BROKEN LINK]
- http://joc.mit.edu/latrobe/10-shoplifting.txt [BROKEN LINK]
- http://www.c2.org/~offshore/10-shoplifting.html [BROKEN LINK]
- http://bureau42.base.org/mirrors/shoplift.html [BROKEN LINK]
- http://www.inch.com/~jellicle/shoplift/ [BROKEN LINK]
- http://www.slip.net/~petemc/nocensor.html [BROKEN LINK]
- http://www.stanford.edu/~llurch/Not_By_Me_Not_My_Views/10-shoplifting.html [BROKEN LINK]
- http://inet.uni-c.dk/~pethern/10-shoplifting.html [BROKEN LINK]
- http://icewall.vianet.on.ca/pages/dwyerj/shoplifting.html [BROKEN LINK]
- http://www.webweavers.com.au/Jonathon/html/rabelais.html [BROKEN LINK]
- http://dingo.vu.edu.au/~src/noname/95-05/10-shoplifting.html [BROKEN LINK]
- http://login.datashopper.dk/~pethern/not_by_me_not_my_views/10-shoplifting.html [BROKEN LINK]

Some views and comments on the article and/or publication of same are also available on-line.

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The Prosecution Process

The Victorian Retail Traders Association applied to the Chief Censor to refuse classification of (ban) the Rabelais publication under the Victorian Classification of Films and Publications Act 1990.

These "classification" Acts are the means by which the Australian Commonwealth and State Governments (who each have similar legislation) oppress citizens' freedom of expression, restrict access to information and attempt to implement thought control. These "classification" Acts also enable the goverment to imprison people who have had the misfortune to speak in a manner that the Censor/s subsequently deem illegal. It is unfortunate that these Acts are not called Censorship Acts so that it is more clear to members of the public that a censorship regime is operative in Australia.

On 18 September 1995, the publication was refused classification by the then Chief Censor, Mr John Dickie, on the ground that the article "instructs in methods of shoplifting and associated fraud." Under the Act, publications to be refused classification (banned) include those which "*promote, incite or instruct in matters of crime or violence*".

The Chief Censor's decision enabled the student editors to be prosecuted for publishing an "objectionable" article.

The students sought a review, out of time, of that decision by the Classification Review Board. On 3 May 1996, the Board granted the requisite leave for the review to proceed.

In July 1996, Counsel for the student editors, Mr Stuart Littlemore QC, argued the case before the Classification Review Board on constitutional and human rights grounds. The [BROKEN LINK] Free Speech Committee (Vic) also made a submission to the Review Board. Nevertheless, on 26 July 1996 the Classification Review Board, in a split decision upholding the ban, explicitly declined to comment on the merits of the Theophanous argument (a High Court ruling which had found a constitutionally implied right to freedom of political expression).

Decisions of the Classification Review Board are **not** required to be unanimous although the liberty of citizens can be subject to same.

If the Review Board had changed the article's classification from 'RC (Refused Classification)' to 'Unrestricted' the students would have had a complete defence to the criminal charges.

On 31 July 1996, proceedings against the students in the Magistrate Court were adjourned indefinitely to allow the Federal Court to review the Classification Review Board's decision under the Administrative Decisions (Judicial Review) Act 1977 (Cth).

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Federal Court Decision - June 1997

On 6 June 1997, almost 12 months after the Classification Review Board decision and 2 years after the publication, the Federal Court's Justice Ron Merkel dismissed the students' appeal against the banning of the article. The students each face up to six years' jail *and/or* fines of maximum AUD$72,000.

Very briefly, the decision was based on the fact that the censorship laws require the banning of any articles that "promote, incite or instruct in matters of crime or violence" and shoplifting is a crime throughout Australia. With regard to implied or other rights to freedom of expression, the judge

stated that no "instances in the free speech jurisprudence of the United States or other jurisdictions where constitutional protection is given for speech which might be likely to cause or induce the commission of a crime" had been presented. The judge's comments on free speech issues were extensive and no attempt is being made to summarise them here. The judgment is available on-line.

The Court Decision - 6 June 1997:

- Michael Brown, Melita Berndt, Ben Ross, Valentina Srpcanska v the members of the Classification Review Board of the Office of Film and Literature Classification [1997] 474 FCA

Media reports and other commentaries:

- Senator Bob Brown's Senate motion urging the Government to review the National Classification Code, 2 October 1997
- Senator Natasha Stott Despoja's speech in the Senate pointing out the need to re-evaluate and re-examine the relevant laws, 30 September 1997
- Interview with Marcus Clayton, Solicitor for the Rabelais Editors, The Media Report, ABC Radio National Transcript, 12 June 1997
- [BROKEN LINK] The Theology of Theft, Terry Lane, Sunday Age, 8 June 1997
- [BROKEN LINK] Death Knell for Provocative, Ratbag Writing, Virginia Trioli, The Melbourne Age, 11 June 97
- Publish and be banned, Editorial Opinion, The Age, 10 June 1997
- [BROKEN LINK] Newspaper article becomes test case for freedom of expression, Paul Conroy, The Melbourne Age, 7 June 1997
- [BROKEN LINK] Students behind shoplift guide could face jail, Paul Conroy, The Melbourne Age, 7 June 97
- [BROKEN LINK] Student editors face jail, Benjamin Haslem, The Australian, 7 June 97
- Interview with Marcus Clayton, Solicitor for the Rabelais Editors, The Law Report, ABC Radio National Transcript, 30 July 1996 (Note: Interview is in the last third of the page).
- [BROKEN LINK] The Free Speech Committee (Vic)'s Comments, including information about their submission to the Classification Review Board.

On 27 June 1997, the former editors filed a Notice of Appeal.

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The Rabelais Case (Cont'd)

> ***"It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error."***
>
> - Robert H. Jackson (1892-1954), U.S. Judge

The Appeal

Rabelais Editors Appeal Federal Court Decision, Media Release, 26 June 1997

> "My clients will argue Justice Merkel's interpretation of the national censorship code was wrong and could open the way to the banning of a wide range of material which ostensibly 'promotes, incites or instructs in matters of crime or violence,' such as a union leaflet calling on workers to picket, a newspaper article in favour of euthanasia or even a boxing manual," Mr Clayton said. "We say a much narrower interpretation is required."

Liberty intervenes in Rabelais editors' free speech appeal, Media Release, 2 October 1997

> "Liberty, the Victorian Council of Civil Liberties, announced today it is seeking leave of the court to appear at the hearing because of the important issues it raises about freedom of speech and censorship. Liberty has briefed Hartog Berkeley QC, former Victorian Solicitor General, to appear on its behalf."

[BROKEN LINK] Shoplifting article appeal back in court, ABC News, 7 October 1997

> "...The Council for Civil Liberties this morning made an application to appear in the case based on its concerns about the principles of freedom of expression and concerns about the legislation under which the students have been charged. But the application was refused on the grounds the council could not be of any assistance to the court. "

The appeal was heard by the Full Court of the Federal Court of Australia on 7 October 1997. The Court reserved its decision.

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Full Federal Court Decision - March 1998

On 24 March 1998, almost 6 months after the appeal was heard, the full Federal Court issued a judgment upholding the ban on the article.

At the time of handing down the judgment, Justice Heerey said the Court had decided to issue a media statement but it did not form part of the judgment. It is unusual for the Court to issue such a media statement and a clear admission by the Court that the matter was of considerable public interest. Despite this, considerable delay occurred in the judgment being made publicly available. This apparently occurred because the Australian

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Other Resources

Government Solicitor wrote to Justice Heerey advising that he might have breached the law by publishing the banned article in the judgment which upheld its banning.

The judgment became available for purchase from Federal Court registries late on 3 April. Court representatives advised that no decision had been made as to whether it would be made available on the Internet. However, it was finally issued for on-line publication on 9 April and is available at:

- *Michael Brown & Ors v Members of the Classification Review Board of the Office of Film and Literature [1998] 319 FCA (24 March 1998)*

The Appellants' Submissions to the Federal Court is also available on-line. This document explains the grounds and reasons for the Appeal in detail.

In summary, the Court said that the evaluation of the article (for example, whether or not it "instructs" in crime) is a matter for the Classification Board in the discharge of its duties under the Act. It said that the function of the Court, in this case, was to decide whether the Board had acted in accordance with the law, not to substitute its own assessment of the article for that of the Board.

On the matter of interpretation of the phrase "instructs in matters of crime", the Court was of the view that provision of information on matters of crime will constitute instruction if it appears from the content and context of the article, objectively assessed, as having the purpose of encouraging and equipping people with the information to commit crimes.

Justice Sundberg said: "*The mere furnishing of information about how to commit crime is not sufficient. If it were, a newspaper report about how a bank was broken into and robbed might instruct in matters of crime. That could not have been Parliament's intention. The reader must as well be encouraged to use the information. To determine whether the second element is present, one does not look into the mind of the author. The test is an objective one. Conformably with the view I favour, an article which merely states the obvious, or conveys information in such a general way that no learning is imparted, is not instructional. Nor do I think that an article that is clearly satirical or tongue-in-cheek is instructional. It will lack the educational quality that inheres in the word "instruct", and readers will understand that it is not to be taken seriously.* "

Justice Heerey said: "*The purposive construction of "instructs in matters of crime" is consistent with the principle that free speech, while not an absolute, should be restricted only to the minimum extent necessary to protect other important values in a civilized society - in the present case the security of personal property. Such a construction would clearly place beyond the reach of the statute newspaper reports of crime, crime fiction and criminology material as well as publications which are satirical or ironic.* "

Justice French said: "*In considering whether a publication instructs in matters of crime in the purposive sense, the assessment is objective. The existence of words in the publication which, literally read, constitute such instruction, will not necessarily bring the publication within the Code. It must be read as a whole and in context. So a writing which is satirical or ironic or is offered as parody may not be instructional in the sense required by the Code. Its satirical or ironic character may be such as to negate instruction by conveying the message that it is not to be taken seriously. In other words it is not the purpose of the writing to encourage or equip the reader with information for the commission of a crime. There may be other indicators from tone and content including the nature of the publication and the market to which, on the face of it, it is directed that indicate a different characterisation. In student publications in particular it may be open to treat*

outrageous or offensive or shocking statements as statements whose purpose is to do little more than outrage, offend or shock even if presented in a form susceptible of a literal characterisation as instructional. "

The Court said that it was open to the Board to have found that the article instructed in matters of crime and that neither the Board nor the single judge in the prior Federal Court appeal had erred in their approach to construction and the application of the law to the publication in question.

On the matter of implied (Australian) constitutional freedom for discussion on political and government matters, the Court rejected argument that the article was protected by this Constitutional freedom.

Justice French said: "*The freedom of communication in relation to public affairs and political discussion protected by constitutional implication does not confer private rights. It confines legislative power - Lange. It will not, however, invalidate a law enacted to satisfy some legitimate end if that law is compatible with the maintenance of representative and responsible government under the Constitution and is reasonably appropriate and adapted to achieving the legitimate end - Lange at 108.*"

The Court found that the article did not fall within the scope of political discussion as identified by High Court decisions to date. However, Justice French said:
"*The various cases and the terms in which they describe the implied constitutional freedom leave open the possibility of further development of the law as to what will constitute "political discussion". The adoption of the observation taken from Barendt would support a view that the category of such discussion is open.*

There is much to be said for the conclusion that "The Art of Shoplifting" falls outside the scope of political discussion. But, inelegant, awkward and unconvincing as is its attempt to justify its practical message about shoplifting by reference to the evils of capitalism, it is arguable that in some aspects it would fall within a broad understanding of political discussion. That characterisation, however, will not invalidate the effective operation upon it of a law which is enacted for a legitimate end, is compatible with representative and responsible government and is reasonably appropriate and adapted to achieving that end. "

The Court expressed opinions to the effect that the relevant provisions of the Classifications Code and the supporting provisions of the Act are enacted for a legitimate end (the prevention of crime), and are compatible with representative and responsible government and are reasonably appropriate and adapted to achieving that end.

It appears that an article which contained precisely the same information about shoplifting, but which did not use phrases such as "suss out", "don't be put off", etc, would not, under the above interpretation, be banned. It seems there is an assumption that Australian citizens are incapable of "learning" anything, or will not use any "learned" information, unless they are "encouraged" to do so. If this is true, one might wonder why the word "instruct" was used in the legislation in the first place, rather than the word "encourage". If it is not true, it is questionable whether the legislative restriction on freedom of expression, as interpreted by the Court in this case, is either effective, appropriate or adapted to the claimed purpose of preventing crime allegedly resulting from the mere reading of information.

Media reports and other commentaries:

- **More Censorship Silliness**, Terry Lane, The Sunday Age, 19 Apr 98
  "...As if that were not enough silliness for one organisation in one month, the censorship board has gone one better. It has sent a menacing letter to a judge concerning his written judgement in the

infamous case of the editors of the Latrobe student newspaper, Rabelais..."

- [BROKEN LINK] **The Children of Oz**, Shane Green, The Age, 28 March 1998
  "...when his jacket falls open and his T-shirt is revealed, Ross is acknowledged as someone who may be different. In red letters, the word "censored" is emblazoned.
  This isn't simply another message on another T-shirt. The red brand tells of a remarkable and significant story for Benjamin Ross is someone who has felt the full and crushing force of Australia's censorship laws...
  The battle has gone way beyond the desire by the four to escape a criminal conviction which could stain the rest of their lives, although that remains a primary concern. It is also now a much bigger issue about freedom of expression in Australia, with echoes to some of the most significant freedom of expression legal cases in recent times..."
- [BROKEN LINK] **Shoplifting case goes to High Court**, Rachel Hawes, The Australian, 25 March 1998
  "...The full Federal Court yesterday upheld a Classification Review Board decision prohibiting publication of the article, prompting warnings from civil libertarians and lawyers that the ruling set a dangerous precedent for restricting political expression..."
- [BROKEN LINK] **Court upholds ban on shoplifting article**, Peter Gregory, The Age, 25 March 1998
- [BROKEN LINK] **Greens motion to Senate over classification laws**, ABC News, 25 March 1998
  "The Greens Party is calling on the Federal Government to review Australia's classification laws, following a Federal Court decision banning a student newspaper article on shoplifting...Greens Senator Bob Brown says they limit legitimate freedom of expression and political dissent, and need to be reviewed."
- **Notice of Senate motion calling on the Government to urgently review classification laws**, Senator Bob Brown, 24 March 1998

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Application to the High Court

An application to the High Court of Australia for special leave to appeal was lodged.

However, on the day after the 50th Anniversary of the Universal Declaration of Human Rights, which states:

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.

Australians were firmly reminded that "everyone" does not include every one of the people of Australia, notwithstanding that Australia participated in the drafting and is a signatory to the Declaration.

On 11 December 1998, the High Court refused to grant special leave to appeal to the former student editors. According to a brief ABC news report "the High Court rejected the group's argument that banning the article was censoring political discussion.".

Freedom of speech in Australia is apparently not subject to the content of

the speech, it is subject to who the speaker is. The judges of the Federal Court are free to publish the same speech. Film makers, news media, book publishers, magazines, etc, are demonstrably free to publish information promoting and instructing in matters of crime. However, combine such information with political commentary and satire, outrage talkback radioshow hosts, big business and most importantly politicians, and ordinary Australian citizens can expect to feel the full force of Australia's censorship laws to come crushing down on them.

A report in The Age of 12 December 1998 states that lawyers representing the four former editors asked authorities to halt prosecutions against them. For further information see:
Student editors vow to fight on, Peter Gregory, The Age, 12 December 98

Eventually, on 24 March 1999, the charges against the former editors of Rabelais were dropped by the Director of Public Prosecutions (DPP), without explanation.

- [BROKEN LINK] A triumph for commonsense, Richard Ackland, Sydney Morning Herald, 26 Mar 99
  "The system finally comes to its senses in a ludicrous case against four student editors."
  "There was a golden moment for free speech in the Heidelberg Magistrate's Court in Melbourne on Wednesday. Counsel for the Victorian Director of Public Prosecutions (DPP) stood up and said that he proposed to drop criminal charges against four former editors of the La Trobe University student newspaper, Rabelais. The charges related to the distribution of an "objectionable publication", a July 1995 edition of the paper which contained an article headed "The art of shoplifting". The article was really a deeply earnest political tract about redistributing wealth from the ruling-class capitalists to low-income strugglers."

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The Issues and Potential Effects on Free Speech

The case and the decision show that freedom of expression in Australia is on very insecure ground and raise some concerning issues relative to the nature and operation of the censorship regime.

The following brief comments may suffice to provide an indication of some of the issues:

- What is a crime?
- When was "crime" added to censorship laws?
- Discriminatory Laws: all publishers are not equal
- Federal Court publishes banned shoplifting article
- Censorship laws threaten freedom to access case law - OFLC uncertain of its censorship powers
- Do all other countries have similar restrictions on free speech?
- Are the severe penalties the students faced morally justifiable?

What is a Crime?

As Marcus Clayton, the defendants' solicitor said, the decision is disturbing because it has for the first time clarified what is meant by "crime" under the Act and "[b]ecause there are many activities which are theoretically illegal. For example, striking in most circumstances is illegal in Australia, picketing a factory in most circumstances is illegal, blocking a roadway as part of a demonstration, euthanasia is illegal now throughout Australia." (7.30 Report, 6 June, 1997)

In the Federal Court on 21 May 97, Mr Stuart Littlemore QC pointed out that 'Oliver Twist would amount to instruction in the techniques of pickpocketing.' But Mr Peter Hanks, representing the Censorship Review Board, said the board was only obliged to classify the material brought before it. (Ref: The Australian, 22 May 1997).

When was "crime" added to censorship laws?

Previous censorship codes referred to information which "promotes, instructs or encourages terrorism...". Information available to the writer to date indicates that a change was made in 1992 to the current clause which is "promote, incite or instruct in matters of crime or violence".

It is concerning that such a broad and ill-defined clause was approved. As the judge pointed out in his decision "instruct in matters of crime" would ban information instructing in the **prevention** of crime. Little, if any, publicity was given to this change in the law. It is, to say the least, difficult for members of the public to comply with changes to laws unless they are made aware of them.

Discriminatory Laws: All Publishers Are Not Equal

The book "Final Exit: The Practicalities of Self-Deliverance and Assisted Suicide for the Dying", which is advertised as a step by step guide, was banned by the Chief Censor in 1992 on the ground of incitement to crime. That classification was overruled on appeal to the Classification Review Board and the book is sold legally in Australia. The extremely violent misogynist fantasy, "American Psycho", which is claimed to have been a contributing factor to the murders committed by Wade Frankum in 1991, is also sold legally in Australia.

Furthermore, as Virginia Trioli highlights in an article [BROKEN LINK] in The Melbourne Age, 11 June 97: there are a number of films which, inexplicably, have not been refused classification although, given the court's ruling, it would appear they should have been. Ms Trioli commented that:

> "By my reckoning that description takes in the film Resevoir Dogs, after which you could conduct your own methodical torture of someone, and would also take in Pulp Fiction, with its detailed, explicit depiction of how to shoot up heroin: the scene I am thinking of not only promotes and instructs in heroin use, it incites such use by an extremely seductive, almost luscious visual portrayal of the act."

Senator Natasha Stott Despoja spoke in the Senate on 30 September 1997 about the case and the need to re-evaluate and re-examine the relevant laws and, amongst other things, pointed out that:

> "...for example, if someone wanted to pursue the matter of shoplifting and be instructed in how to commit that crime, perhaps on a larger scale, they could rent the video of an English movie called Shopping, which was released a few years ago. It was not actually banned in this country but it did detail--and, you could argue, potentially instructed people in--ram raids. Clearly, that would fall foul of this particular piece of legislation. "

The Aug-Sept 98 edition of "Colors", the magazine of United Colors of Bennetton, includes a six page article titled "Breaking and Entering". This article contains interviews with "Technical Advisors", i.e. house breakers, and provides detailed instructions on how to break into houses. One of the *milder* pieces of advice is, for example:

> "What to Wear:
> USA [housebreaker's advice]: Gloves and dark clothes are mandatory (figure 1). Wear rubber-soled gym shoes that won't leave prints. Nothing

should rustle. Don't wear windbreakers. Wear a cap, but not before entering. That keeps follicles with DNA from falling out. Don't cover your face, it distorts vision and makes you sweat. Only wear the clothes once and then burn them when you're done."

That edition of "Colors" was on sale, to both adults and children, in Australian newsagents in October 1998.

See also other examples of material which "instruct in matters of crime" but are not banned in Australia.

Obviously, there are either two versions of Australian censorship laws - one for major publishers and another for everyone else, or the relevant clause in the censorship laws is available for selective use. The word vindictiveness comes to mind.

Federal Court publishes banned shoplifting article

In perhaps the most incredible development in this case to date, The Melbourne Age reported on 28 March 1998 that it has been suggested that publication of Court judgments could be subject to Australia's draconian censorship laws. The report "'Legal twist on banned article" by Peter Gregory, Chief Court Reporter, states:

'Australia's censorship authority has told a Federal Court judge he might have breached the law by publishing a banned article on shoplifting in a judgment that upheld its banning.

In a letter to Justice Peter Heerey, a lawyer from the Australian Government Solicitor's office said the Office of Film and Literature Classification thought the Federal Court might not have been aware of laws about objectionable publications.

[...]

"Whether or not the legislation applies to publication or distribution of the article by the court as part of the court's judgment, there would appear to be an issue whether the legislation applies to consequential publication, and distribution by other persons/bodies," the solicitor said. "Leaving aside the question of whether any illegality would be involved, it does seem inappropriate...that the article be published as a result of a court judgment upholding a decision that the article be refused classification."

Justice Heerey's associate, Ms Christine Petrov, wrote in reply "Their honors see no reason why the judgments should not be published in the usual way."

[...]

Ms Andree Wright, acting director at the Office of Film and Literature Classification...said it "may be a possibility" the legislation applied to publication of court judgments.'

It is of serious concern that we have the OFLC censors attempting to instruct Federal Court judges on the law and how to carry out their responsibilities, not to mention that publication of case law may be subject to censorship laws.

Nevertheless, the judgment became available for purchase from Federal Court registries late on 3 April. Court representatives advised that no decision had been made as to whether it would be made available on the Internet. However, it was finally made available online on 9 April.

While there is obviously considerable merit in enabling citizens to know what they are not permitted to say, and why they are not permitted to say it, in order to avoid imprisonment, quite clearly the censorship situation in Australia is ludicrous. We have four young people facing charges with maximum penalties of six year's jail and fines up to AUD$72,000 for publication of an article deemed so dangerous to society that it must be

banned. Despite this, the Federal Court publishes it in a publicly available Court judgment.

Censorship laws threaten freedom to access case law: OFLC uncertain of its censorship powers

On 23 April 1998, Electronic Frontiers Australia (EFA) sent an application to the OFLC for classification of a Full Federal Court's publication containing the judgment in Michael Brown and Others v Classification Review Board (the Rabelais case) under Section 13 of the Classification (Publications, Films and Computer Games) Act 1995 ("the Act").

EFA lodged the application following the Acting Chief Censor's observation that censorship legislation may apply to the publication of Court judgments, indicating that the rights and freedom of Australians to access case law are under threat.

In July 1998, the Acting Chief Censor informed EFA that the Classification Board of the Office of Film and Literature Classification (OFLC) does not know what its powers are and does not intend to find out. This attitude threatens the rights and freedom of Australians to access case law, either by application of censorship law, or by uncertainty and intimidation. For further details including copies of correspondence, see EFA's page.

Media reports and other commentaries:

- Time the censors got their Act together, Terry Lane, The Sunday Age, 9 Aug 98
- Courts may shoplift free speech, Richard Ackland, Sydney Morning Herald, 14 Aug 98

Do all other countries have similar restrictions on freedom of speech?

In the June 1997 decision, the judge referred to several USA cases leading up to Brandenberg v. Ohio apparently in support of a view that even the US First Amendment would not protect speech instructing in crime and, presumably, that therefore Australians should not expect such freedom of expression. However, the Brandenberg v. Ohio case shows that the article would be protected speech in the USA:

> "...the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."
> Per Curiam Opinion, Brandenburg v. Ohio, 395 U.S. 444 (1969)
>
> "Finally, in 1969, in Brandenberg v. Ohio, the Supreme Court struck down the conviction of a Ku Klux Klan member, and established a new standard: Speech can be suppressed only if it is intended, and likely to produce, "imminent lawless action." Otherwise, even speech that advocates violence is protected. The Brandenberg standard prevails today."
> ACLU Briefing Paper on the history of freedom of expression rights in the USA

The shoplifting article clearly would not cause "imminent lawless action". People have time to think and reflect on material they read and decide whether they wish to act on it of their own volition.

It is also notable that many books published by Paladin Press are able to be sold legally in the USA although they are banned in Australia. In Rice v. Paladin Enterprises, Inc., 940 F. Supp. 836 (D. Md., 1966), a Federal District

Court for the District of Maryland held that the Paladin book, Hit Man: A Technical Manual for Independent Contractors is protected speech under the US First Amendment. Further information is available in a [BROKEN LINK] Paladin press release. Similarly "Steal This Book" by Abbie Hoffman is able to be sold legally in the USA.

Are the severe penalties the students faced morally justifiable?

The wide range of material which "promotes, incites or instructs in matters of crime or violence" which is not banned in Australia, together with the background and unprecedented level of interest by State and Federal politicians, suggests the prosecution of the Rabelais editors has far more to do with suppressing political dissent than anything else. That, and the fact that people can be imprisoned and/or fined as a result of the non-unanimous opinion of a few government appointees to the OFLC is far more concerning than the irresponsible publication of an article in a news journal which has extremely limited distribution.

It is high time the censorship laws be reviewed and the prosecution process be brought into line with other criminal law. If Australians must be subject to restrictions on freedom of expression, opinions on whether or not certain speech warrants banning, and authors and publishers imprisoned, should be made by jury, not government appointees to a statutory body.

[BROKEN LINK] "The Theology of Theft" by Terry Lane (Sunday Age, 8 June 1997) places some of the issues in perspective. Reasonable people are likely to share the views of Mr Lane in his closing paragraph:

> "Crean and Wade could now redeem themselves by publicly saying: "Enough!" This case has gone far enough. It has already cost the students enough in money and stress to be adequate penalty for the crime that they may have unwittingly committed. If Mr Crean and Mrs Wade cannot find this measure of mercy in them then words cannot express what I feel about them."

Furthermore on 19 July 1998 on Radio National, Mr Neil Comrie, the Victorian Police Commissioner, stated that since 1985 people who have actually stolen something from a shop are let off with a stern warning. Obviously, in Victoria mere speech on the topic of theft is considered a more serious crime than actual theft. The former editors of Rabelais, and all student editors, were sternly warned long before the charges were finally dropped by the Director of Public Prosecutions four years later.