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Are the concepts of cancel culture and lawful freedom of expression irreconcilable?

Debate around ‘cancel culture’ often relies on an implicit assumption that social sanctions chill speech in an equivalent way to that of formal legal restrictions. If we oppose legal restrictions on free speech because of that harmful chilling effect then, so the argument goes, we ought to oppose cancel culture, even when the state is not directly involved. This assumption - that all chilling effects are equivalent and are inimical to freedom of expression - is flawed. Properly understood in two distinct forms, cancel culture is not, simpliciter, irreconcilable with free speech. Mill’s statement that we may act on our unfavourable opinions of others ‘not to the oppression of his individuality, but in the exercise of ours’ captures the distinction proposed in this essay.

‘Coercive’ Cancellation

‘Cancel culture’ is not a unitary phenomenon; it consists of two distinct forms. Consider the following two examples. Firstly, a controversial academic is invited to speak at a university. In response to her gender-critical views, students protest her visit and attempt to have her talk cancelled. The talk takes place, but with reduced attendance, protests, and enhanced security.¹ Secondly, a researcher at a think-tank expresses gender-critical views on social media. After her colleagues raise concerns, her employment contract is not renewed and she loses her job.² While both examples involve organised social sanctions in response to controversial speech, *coercive cancel culture*, as in the second example, involves sanctions aimed at interfering with the target’s existing legal rights, such as their employment or equality protections. Coercive cancel culture is

¹ Morris, S. (2015). Germaine Greer gives university lecture despite campaign to silence her. [online] the Guardian. Available at: <https://www.theguardian.com/books/2015/nov/18/transgender-activists-protest-germaine-greer-lecture-cardiff-university>.

² As in *Forstater v CGD Europe & Ors* [2021]

irreconcilable with freedom of expression because it restricts speakers' existing legal rights in an impermissible way.

How can we judge this distinction? Healy's suggestion that we ought to balance a sanction's expressive value against its coerciveness offers a place to start. Under this view, a strongly expressive sanction with only minimal coercion – such as public shaming or criticism – would be permissible, while a strongly coercive sanction with minimal expressive value – such as threats of violence – would not be³. Healy's approach leaves us, however, with a considerable grey area in which the most controversial elements of cancel culture seem to fall. The underlying problem with his framework is that Healy treats all forms of coercion as comparable. The law, however, is not concerned with responding to all forms of coercion; what matters is interference with specific existing legal rights. This is what distinguishes ordinary coercion found in any form of expression from a type that is genuinely harmful and which the state has reason to prevent.

Coercive cancellation – the type which is irreconcilable with free expression – is, therefore, more than merely coercive speech. Examples include cancellation resulting in dismissal from employment or discriminatory treatment based on protected beliefs. The justification for prohibiting such conduct is not merely that it creates a chilling effect, but that the chilling effect is premised on interference with the target's rights. The law's response to these sanctions lies outside of the ECHR. Rather, employment law and the Equality Act recognise that adverse rights-interference based on protected beliefs is unlawful. In Forstater's case, outlined in the example above, the Employment Appeal Tribunal ruled her dismissal unlawful on the grounds that her gender-critical views were a 'genuine and important philosophical belief' and, accordingly, were protected by the Equality Act 2010⁴. The nature of the law's response here is

³ Healy, Thomas, Social Sanctions on Speech (December 2022). 2 J. Free Speech L. 21 (2022), Seton Hall Law School Legal Studies Research No. Forthcoming, Available at SSRN: <https://ssrn.com/abstract=4319955>

⁴ Fenwick, H. (2022). Exploring narratives about 'cancel culture' in UK educational/employment settings under the ECHR. In P. Czech, L. Heschl, K. Lukas, M. Nowak, & G. Oberleitner (Eds.), *European Yearbook on Human Rights 2022* (pp. 309-344). Cambridge University Press.

crucial; we do not legislate against the act of cancellation itself. Rather, legislation protects against the rights-interfering consequences of coercive cancellation. The state should, and does, act when cancellation results in unlawful discrimination or interference with rights.

‘Responsive’ Cancellation

In contrast, responsive cancel culture is not only compatible with freedom of expression but is itself an exercise of it. Responsive cancel culture consists of protest, criticism, public shaming or the withdrawal of voluntary invitations to speak. Responsive cancellation does not meet the criterion for prohibition because, while it may discourage speech, it does not interfere with the target’s existing rights. There is no general right to speak at a particular venue, or to a particular audience. Nor is there a right to be insulated from opposing views. Counter-speech is itself constitutive of free expression in allowing people to express their disapproval of views they find intolerable.

Yet critics still point to the chilling effect caused by this milder form of cancellation. If we regulate coercive cancellation based on its chilling effect, why not do the same for all speech which has similar consequences? Such a comparison is mistaken. All forms of speech can create some level of coercion or chilling effect. If the mere presence of a chilling effect were sufficient to restrict speech, then freedom of speech would be entirely self-defeating. What matters is not the existence or scale of a chilling effect, but the mechanisms through which speech is chilled. If it chills speech by violating targets’ rights, it is illegitimate. If not, it is a legitimate form of counter-speech. This is where legislative responses risk overreach. The Higher Education (Freedom of Speech) Act 2023, for example, risks treating protest and the withdrawal of platforms as legally problematic, even where no rights are interfered with⁵. For cancel culture to remain compatible with free expression, the law’s focus should not be on acts of cancellation

⁵ Higher Education (Freedom of Speech) Act 2023

themselves, but on policing the social sanctions resulting from that cancellation, based on the criterion of rights-interference.

Conclusion

Cancel culture need not be irreconcilable with lawful freedom of expression. Legal protections ought to track not merely the existence of a chilling effect, but whether acts of cancellation infringe on existing rights. This approach allows the law to restrict harmful sanctions, while avoiding stifling acts of legitimate counter-speech. However, not all harms associated with cancel culture lie within the law's domain. Its lack of precision and the reluctance for rehabilitation, for example, reflect *cultural* failures rather than legal ones. While this framework offers a path for cancel culture to be reconciled with free expression, its full realisation depends on the further development of these social attitudes.

[998 words]