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Laws that Punish for Hypothetical Harm Must be Abolished

by Denis Rancourt / September 26th, 2019

Given the state of laws in Canada, it has become necessary to state the obvious:

An individual legitimately can be punished solely for proven actual harm that is also proven to have been caused by the individual.

In a free and democratic society, laws that punish an individual for harm that is hypothesized to have occurred, or hypothesized to have been caused by the individual, or hypothesized to have both occurred and been caused by the individual, are pathological in that such laws attack democracy itself in its foundation, as explained below.

Canada and institutions and corporations sanctioned by the State enforce many laws and rules that punish individuals for hypothesized harm, in which the State or State-sanctioned actor does not have to prove actual harm or actual cause. With these laws, proving actual harm is not relevant in the prosecution, and is considered inadmissible and unacceptably wasteful of court and tribunal resources.

Instead, the prosecutor merely needs to argue that there is “likelihood” that unspecified harm has occurred to unspecified “victims”, which is caused via an unspecified mechanism by the accused. Here, the prosecutor can rely entirely on the “judgement” of the court or tribunal, or can bring an “expert” witness to give opinion evidence about the said “likelihood” of harm.

No victim will testify or be cross-examined. No evidence of actual harm, physical or psychological, will be entered. No victim will even be named or identified to the court. There is a total absence of evidence of actual harm caused by the accused person.

The proceedings are separate and distinct from any criminal proceedings of responsibility for actual physical or psychological harm against an actual and identified victim.

What are these laws, you ask? These are the so-called “hate speech” laws, the codes of conduct, and also the common law of defamation.^{1, 2, 3} These laws include:

- “hate speech” provisions of the Criminal Code
- censorship codes, rules or “guidelines” enforced by social-media corporations
- censorship rules and practices of employers regarding the personal actions of employees
- professional-ethics codes or rules regarding personal expression on public media
- codes of conduct on campuses

- common law of defamation

In all of these laws — in a total absence of proven actual harm, from mere expression of comment, opinion, thought or belief, excluding criminal harassment, intimidation or threat against any actual and specific person, often made through the filter of a public social-media platform rather than any face-to-face interaction — the punishments range from fines, to unlimited “damage” awards, to workplace or professional-association discipline, to loss of access to education, to loss of employment, to loss of professional certification, to lengthy jail terms or house arrests, and include gag orders or compelled speech enforced by imprisonment.

Such is the status of Canadian law, despite the fact that Canada has ratified the *International Covenant on Civil and Political Rights*, which expressly prohibits all such written or unwritten censorship laws.^{1, 2}

As a result, Canada has spawned a legal landscape not unlike that of past eras having blasphemy laws to prevent the alleged deleterious effects of the most offensive and subversive utterances of the day. This legal landscape vitiates the fundamental right of freedom of expression and incapacitates democracy itself.

The fundamental right of freedom of expression is the right that allows the individual free expression, and the personal agency that derives from free expression, even though the individual is confined by society’s changing and democratically agreed-upon rules. Free expression is the right to express. It is essential for personal development and emancipation. It does not, in itself, confine others, and it is up to the individual to seek and secure receptive listeners. This is the essence of both personal growth and society.

Beyond person growth within the fabric of society, freedom of expression plays a second role that is equally important. Democracy is susceptible to capture by a self-interested elite, and politics must not be solely a contest between dominant-elite special interests. The balancing force against runaway capture, in a democracy, is freedom of expression, together with freedom of association, which permit effective democratic participation, and are the true sources of the often touted “transparency” (whistle blowing) and “accountability” (popular opinion making).

Censorship, including censorship actuated with the pretext of preventing hypothetical harm, does not protect the individual. It is a lockdown designed to frustrate the essential democratic process of expression, discussion, debate and argument, in an increasingly illegitimate and intolerant system. Its use by politicians in exploiting the oppression Olympiad in their partisan manipulations is unconscionable, as is its use in special-interest propaganda by litigation.

For these reasons, the State must not provide laws that enable an influential elite in-effect to neuter vehement individual expression that has transformative potential. The State must not be allowed to thus erode and suppress individual agency. Instead, it is the duty of the State to protect individual freedom of expression. If democracy cannot be trusted, then there is no democracy.

Relation to recent work

In her 2018 book,³ Nadine Strossen brilliantly reviews the research showing that “hate speech” laws are harmful to society. While this scholarship brings current empirical support for abolishing “hate speech” laws, I don’t find it to be satisfying. We should not be reduced to making policy arguments regarding harm reduction in order to justify preventing the State from suppressing fundamental human freedom, or preventing the State from enabling elite interests and corporations from suppressing the said freedom. If history itself and the study of sociology⁴ cannot

inform us about the necessity to safeguard the fundamental human right of freedom of expression, then we are lost.⁵

Opposing “hate speech” law is not “free-speech absolutism”

Unfortunately, in the present climate of clamouring to ask the State to limit fundamental personal freedoms “for our own safety”, the arguments become polarized, and many have used the sophistry that the position of opposing the aberrant inherent features of “hate speech” law is equivalent to advocating for “free-speech absolutism.” This is a false equivalency.

If the State were to strike down all “hate speech” laws, limit the codes of conduct to exclude “hate speech”, and strike down the common law of defamation (which presumes falsity, damages and malice), then there would still independently exist: the civil tort of malicious falsehood, the Criminal Code provisions against threats, coercion, intimidation, harassment, and so on; and all the laws against discrimination. The individual would not lose any of these common law, statutory and constitutional protections.

Limiting the State’s power to prosecute victimless speech crimes (presuming harm at large, and presuming causation) does not limit the State’s power to enforce crimes that have proven victims and cause, irrespective of the role of expression in these offences, and does not limit the individual’s means to obtain redress.

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1. [“Canadian defamation law is noncompliant with international law”](#), by Denis Rancourt, Ontario Civil Liberties Association report, 1 February 2016. [🔗] [🔗]
 2. [“Towards a Rational Legal Philosophy of Individual Rights”](#), by Denis Rancourt, *Dissident Voice*, 15 November 2016. [🔗] [🔗]
 3. [“HATE: Why We Should Resist It with Free Speech, Not Censorship”](#), by Nadine Strossen, Oxford University Press, 2018, ISBN 978-0-19-085912-1. [🔗] [🔗]
 4. [“Self-organization and time-stability of social hierarchies”](#), by Joseph Hickey and Jörn Davidsen, 29 January 2019, *PLoS ONE* 14(1): e0211403. [🔗]
 5. [“Cause of USA Meltdown and Collapse of Civil Rights”](#), by Denis Rancourt, *Dissident Voice*, 7 September 2017. [🔗]
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