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Freedom III: Free Speech

Panel Discussion

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Is the Crisis of Liberalism Self-Correcting?

* Why isn’t liberalism winning the argument?
  + “Shouldn’t liberal democracy promote a full airing of all possibilities, even false and bizarre ones, **because the truth will eventually prevail**?”
  + “**These criticisms do not arise in a vacuum**. They stem from real-world crises, most notably the 2008 Great Recession and the rise of far-right populists like Donald Trump to power. These shocks to the system show, in the eyes of liberalism’s contemporary critics, that **something is profoundly wrong with the fundamental ideas that define our politics**. It is a belief that “**the liberal idea has become obsolete**,” as Russian President Vladimir Putin recently declared.”

The Social Practice of Reasoning

* Mill argues that human beings are capable of rectifying their mistakes of judgement and wrong opinions and practices through discussion and experience. Experience must be interpreted and validated intersubjectively through rational discussion.
* “**Wrong opinions and practices gradually yield to fact and argument: but facts and arguments, to produce any effect on the mind, must be brought before it**.” - *On Liberty,* II, 37.
* Mill’s **epistemic virtue of open-mindedness** to criticism of opinions and practices, and the **intellectual habit** of seeking out different perspectives and oppositional voices.
* Mill’s conception of deliberation is overly idealised: a civilised mutual exchange of reasons (empirical and normative) between proponents and opponents of an idea plays out until a stable consensus approximating the truth is achieved.
  + There are imperfections or structural flaws in the “marketplace of ideas”.
  + Human beings are not ideal-typical rational agents.
  + Most people are too busy with social reproduction to perform this labour.
  + The best magazines, newspapers, and education are prohibitively expensive.
* Truth and falsehood coexist for long periods of time. In the meantime, the world keeps moving, and important decisions get made with imperfect information and without stable consensus.
* Actual practices of public reasoning and political communication are not at all like imagined “rational”, “orderly”, “polite”, “civil” debates:
* Speech is used to marginalise and exclude bodies, voices, and perspectives from the public sphere; intimidate or threaten opponents; stoke insecurities; create controversy; construct friends, enemies, and threats; and heighten prejudice toward the “other”.
* Stories, creative expression, art, song, performance, demonstrations, rallies, memes, humor, satire, impersonation, decontextualisation, deep fakes.
* Coded language, dog whistle politics, political correctness, fake authenticity.
* The cultural politics of emotion: **disgust**, **shame**, **fear**, **grief**… (Ahmed, 2004).
* State and non-state actors interfere with the democratic process using money and power to advance their strategic interests.
* Reasoning is mediated by technology: from the printing press to social media.

Defective Reasoning

* Rationality is bounded because there are **limits** to our **thinking capacity**, **available information**, and **time**.
* Generally, human beings aim to **satisfice**, not **optimise**.
* We fall back on heuristics and prejudices (normatively neutral).
* The concept of bounded rationality emerges from the behaviouralist critique of neoclassical economics ideal-typical homoeconomicus.
  + “Broadly stated, the task is to replace the global rationality of economic man with the kind of rational behavior that is compatible with the access to information and the computational capacities that are actually possessed by organisms, including man, in the kinds of environments in which such organisms exist.” (Simon 1955a: 99)
* The concept of bounded rationality has since become **generalised**.
* Bounded rationality refers to a wide range of **descriptive**, **normative**, and **prescriptive** accounts of human behaviour which depart from the theoretical assumptions of perfect rationality.
  + A *descriptive theory* aims to explain or predict what judgments or decisions people in fact make and how they form them.
  + A *prescriptive theory* aims to explain or recommend what judgments or decisions people ought to make and how people ought to form them.
  + A *normative theory* aims to specify a normative standard to use in evaluating a judgment or decision and the process by which it was formed.

Fake News

* If human rationality is bounded, in particular due to constraints on our cognitive abilities, access to information, and the time costs of practices of reasoning, then **misinformation** and **disinformation**, which toxify the information **ecosystem**, further damage the prospects of reasoning and communication.
  + Recall that bounded rationality approaches to the study of human behaviour situate reasoning and communication “in the kinds of environments in which such organisms exist”.
* **The challenge of misinformation and disinformation to democracy becomes especially pronounced when it is dressed up as real news or expert opinion**, more so when the producers and suppliers of fake news are state and non-state actors engaged in **information warfare**.
  + “In a market made inefficient by inadequate information, consumers end up unintentionally consuming undesirable or low-quality products – essentially buying lemons. When individuals consume fake news, they are essentially buying lemons from the **marketpace of ideas**, from sellers who are often operating with substantial troves of behavioural, demographic, and geographic information about news consumers.” (Napoli, 2019)

Regulating the Marketplace of Ideas

* Monopolistic and oligopolistic information market structures.
* When there is market failure, we reasonably expect the government to intervene.
* Competition is not the natural state for most markets, and has to be enforced by government through regulation in the public interest.
  + Sometimes the public interest is identified with policy support for “national champions” through government market interventions to sustain an oligopolistic market structure.
* Liberal democratic governments typically break up monopolies, and enforce regulations to protect consumers and new entrants to market from the market dominance of oligopolistic firms. **This is preferred to *ex post* redistribution**.
* In the grocery sector in Aotearoa/New Zealand, two national supermarket chains dominate the market. In petrol, the “big four” dominant retailers realise uncompetitive profit margins, and may **act** more like an oligopoly than genuinely vigorous competitors. **A big reason for inequality in NZ is market failure**.
  + See also: banking, electricity, technology companies  
    <https://www.noted.co.nz/money/money-business/commerce-commission-petrol-companies-shouldnt-stop-why>
* Liberal governments typically provide for **consumer protection**.
* A consumer protection framework comprises laws and organisations designed to ensure the **rights of consumers** as well as **fair trade**, **competitive pricing**, and **accurate information** in the marketplace.
* Weights and measures, product safety, advertising standards, *etc*.
* Consumer protection laws are designed to prevent fraudulent and unethical businesses from gaining unfair market advantages over their honest competitors – a lot like anti-doping regulation in sports.
* A consumer protection framework may also provide additional protective measures for the most vulnerable in society.
  + Elder abuse is a paradigm example (scams, fraud, exploitation, *etc*.)

The Limits on Government Intervention in the Marketplace of Ideas

* **Mill argues that free speech can be justifiably limited**.
* However, the conditions under which limits on free speech can be justified are narrow. Mill gives the example of **incitement** (III, p.104).
* Other examples include false advertising, defamation of character, blackmail, fraud, harassment, *etc*. where there is the clear likelihood or actuality of harms to others (violation of rights and interests) and benefits to potential victims and society as a whole in regulation.
  + Terrorist manifestos? Extremist content?
* **Mill argues that government censorship of ideas cannot be justified**.
* “But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, **the clearer perception and livelier impression of truth, produced by its collision with error**.”   
  – *On Liberty*, II, p.31.
* Errors may contain half-truths, or at least sharpen good arguments.
* Mill constructs an argument against government censorship based on the proposition that censorship implies infallibility.

Free Speech and Hate Speech

* **Topic of tomorrow’s panel discussion**
* Recall Mill’s harm principle. Government intervention is justified if an **action infringes on the legitimate rights of others**, and if **the benefits of intervention outweigh the costs**.
  + Excludes offence.
* We have to consider the harms to the agents whose free speech is limited by regulation, and to society as a whole.
* We have to consider the harms to the agents whose legitimate rights are infringed upon.
* Is this **utilitarian calculus** the normatively correct way to **resolve tensions** between rights and freedoms? Or are there other ways of thinking about and codifying the **balance** and **prioritisation** of rights and freedoms?
* Most positions held by ordinary people (“common sense”) and by academics, judges, and politicians tend to be **moderate** and **synthetic**.
* **Extremism** and **absolutism** about free speech, outside of the United States, is generally seen as **immature** and **pragmatically frustrating** for the real challenge of working through the normative issues involved in regulation.
* Even within a liberal perspective, there is nothing inherent in free speech to prioritise it absolutely when free speech comes into competition with other fundamental rights and freedoms.
* We need to decide how much value we place on free speech in relation to other important ideals in democratic state-societies, such as the protection of the **liberty and security of the person**, **privacy**, **democratic equality**, **maintaining social order and national security**, and **preventing harm**.

Speaking Truth to Power

* “**Mankind can hardly be too often reminded that there was once a man named Socrates**, between whom and the legal authorities and public opinion of his time, there took place a memorable collision. **Born in an age and country abounding in individual greatness, this man has been handed down to us by those who best knew both him and the age, as the most virtuous man in it; while *we* know him as the head and prototype of all subsequent teachers of virtue**, the source equally of the lofty inspiration of Plato and the judicious utilitarianism of Aristotle, "*i maëstri di color che sanno*," the two headsprings of ethical as of all other philosophy. **This acknowledged master of all the eminent thinkers who have since lived** – whose fame, still growing after more than two thousand years, all but outweighs the whole remainder of the names which make his native city illustrious – **was put to death by his countrymen, after a judicial conviction, for impiety and immorality**.”  
  – *On Liberty*, II, pp.44-45.