

Individual Militant Democracy

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One could have arrested a few of us in 1925, and everything would have been finished and over.

Joseph Goebbels, 1940

The ballot is the democratic system's coin of the realm. To condition its exercise on support of the established order is to debase that currency beyond recognition.

Thurgood Marshall, 1974

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Militant democracy has traditionally been treated as a matter of institutions: states take militant measures against political parties or associations in order to protect democracy from actors who might subvert or outright destroy democracy (but who do not engage in conduct punishable under criminal law). To be sure, restrictions on free speech – usually part of the repertoire of techniques for defending democracy – mostly apply to individuals, rather than institutions²; but, broadly speaking, the fact remains that organizations of some sort have been both the agents and the objects of militant democracy.

This essay asks about militant democracy targeting individuals – and also about individuals adopting militant measures against threats to democracy. This is clearly a highly fraught subject, and there are good reasons why theorists of democratic self-defense have generally shied away from considering what, for shorthand, I shall be calling *individual militant democracy* (for the purposes of this paper I shall use ‘militant democracy’ and ‘democratic self-defense’ interchangeably, setting aside the standard distinction between the former as repressive and the latter as also including softer elements such as civic education). When individuals have their rights restricted, it not only gets much more *personal*, so to speak (with particular persons being stigmatized); the main problem is that citizens’ legitimate interests in political participation might be permanently harmed: being excluded from the political process would appear to be an obvious instance of being dominated, that is to say, being at the will of others without any means of controlling their action or, for that matter, inaction (Pettit 2012).³ Put more bluntly: it’s one thing if my favorite quasi-fascist party has been banned; it’s another thing if *I* personally have

² I say ‘mostly’ because of the attribution of free speech rights to corporations in the US, and because there have been militant measures to shut down entire newspapers and websites.

³ The counter-position here is that those who refuse basic elements of liberal democracy are no longer owed justifications by liberal democratic governments (Quong 2004).

been banned from ever giving political speeches, demonstrating, standing for office or, for that matter, voting – in short, if I can feel for good reasons that I have been entirely removed from the realm of politics, and that my standing as a citizen has been permanently diminished.

As Alexander S. Kirshner has pointed out, even anti-democrats have a range of political interests (they are not all single-mindedly, ascetically focused on abolishing democracy); hence banning individuals, so to speak, would *prima facie* appear a highly problematic move within militant democracy (Kirshner 2014). This is one reason why theorists, as well as public lawyers, have been inclined to say that *actions* ought to be subject to militant democracy, and never *actors* (Invernizzi Accetti and Zuckerman 2017); states should, if anything, ensure *orthopraxy*, and not *orthodoxy*, as Julian Rivers has put it recently (Rivers 2018). And, furthermore, militant democracy ought to limit itself wherever possible: it should not aim at somehow creating a perfect democracy (whatever that might mean), let alone somehow purifying the polity so as to leave only fully certified pro-democratic citizens; it's enough if democracy is protected from empirically verifiable threats (Kirshner 2014). Otherwise we might well end up with Chinese-style 'citizen scores' or, even worse, are thrown back into a Lockean universe where those consistently unwilling to follow what Locke called 'the Rule of Reason' are eventually cast out amongst the beasts.

Practitioners tend to concur with this line of reasoning: in its 'Code of Good Practice in Electoral Matters', the Council of Europe's Commission of Democracy Through Law (generally known as the Venice Commission) proposes a clear principle when it comes to individuals being excluded from the political process: one's right to vote should only be removed on the basis of a

criminal law (or mental incapacity), and the decision has to be made by a court of law.⁴ Since militant democracy, by definition, is about expressions and conduct *not* already covered by the criminal law, measures such as disenfranchisement or other deprivations of basic political rights on the basis of some kind of anti-democratic attitude would appear to be plainly illegitimate.

Yet the legal possibility of banning actors, and not just actions, actually exists in a number of countries. It does so not least in the one polity that is often considered the paradigmatic example of a country with a successful track record of militant democracy: the Federal Republic of Germany, where Article 18 of the Basic Law provides for the forfeiture of basic political rights if such rights are being used to fight against liberal democracy. Moreover, individual rights restrictions for political reasons which amounted to banning actors and not just actions have come before the Council of Europe's Court, the European Court of Human Rights -- and the judges have sometimes found it justifiable to declare them compatible with Europe's human rights regime. For good measure, adopting a historical perspective, one can also find plenty of examples of such individual militant democracy, from ostracism in ancient Athens to present-day mechanisms of impeachment (on the understanding that officials can be impeached, even if they have *not* engaged in criminal conduct) (Whittington 2017).

These not always very well-known facts make it less fanciful to examine the question under which conditions (if any), such militant democracy with individuals as targets could ever

⁴ In this specific regard, then, the differences between the US and Europe, as understood by the Council, are not as great as often suggested; after all, in both there is no margin between criminal law and state-imposed restrictions (Issacharoff 2015). At the same time, it is worth emphasizing that militant democracy in general is not as alien to the US as frequently claimed: think of restrictions on Southern politicians during Reconstruction, of FDR's plan to have Congress investigate whether Louisiana still enjoyed a republican form of government, or, for that matter, the Voting Rights Act. None of these amount to militant democracy in the form of party bans, of course, but all are about protecting democracy through state-imposed restrictions.

really be legitimate. There is also the particular concern that we might live in an era where individual (quasi-Ceasarist) leaders appear as perhaps the greatest threats of all to democracy. Models focused on ideologically committed, somehow ‘extremist’ mass parties, as they were prevalent in the twentieth century, might be more misleading than helpful – as might be the pervasive tendency to draw an analogy between defending democracy and criminal prosecution, a tendency which certainly remains dominant in American discussions (Issacharoff 2015: 23).

Individuals as the actors *implementing* militant democracy would also appear normatively very fraught indeed. As both defenders and critics of militant democracy would concede, militant democracy is serious business: it is always in danger of damaging the very thing it seeks to protect. A democracy overzealous to defend itself, or so a long-standing worry suggests, might well go too far in restricting rights and, at the limit, bring about the very authoritarianism it seeks to avoid.⁵ A typical precaution to prevent this outcome is to build checks and balances into the very process of deciding on, and implementing, militant measures.⁶ Moreover, the institutions ultimately making the decision to ‘go militant’, usually a constitutional court, are

⁵ This is too crude, of course: few democracies will commit outright suicide in order to prevent death; much more likely are scenarios where parts of the population, usually vulnerable minorities, no longer enjoy the benefits of a proper democratic life – somewhat analogous to the ways in which anti-terror measures usually only hit some hard (leaving majorities with the illusion that deeply illiberal policies actually change little and can be justified) (Waldron 2003). But this concern also applies when it comes to the question how much of a threat a party or even an individual poses: a party might be insignificant at the national level, and yet have local strongholds – to the point where citizens feel completely intimidated. Under such conditions, a ban might well be justified, as a state speaking against the party nationally is experienced by the relevant citizens as effectively powerless (Brettschneider 2012). But in federal systems, where *only* federal institutions can initiate a ban (as in Germany), this situation might also create particular political and legal difficulties.

⁶ It might seem that the practice of giving a monopoly of militancy to one institution – usually a constitutional court – contradicts this point. The fact is, though, that the procedures leading up to a decision for militancy involve checks and balances. Moreover, the targets of militancy have extensive opportunities to defend themselves against the charges; *audi alteram partem* is ensured.

supposed to be insulated both from popular and party-political pressures, mostly to avoid a situation where majorities target unpopular, vulnerable minorities or where parties start to outlaw their competitors. It is hard to see how individuals could ever be in a similarly constrained (and also a similarly accountable) position. Hence all the long-standing worries about militant democracy being arbitrary would appear to be compounded, if it seems like individuals can simply take democracy-defense into their own hands.⁷ In short: if one has concerns about militant democracy, one should be especially anxious about anything smacking of what we might call *vigilante militant democracy*.

As with militant democracy directed *against* individuals, it turns out there actually exist plenty of practices of democracy-defense *by* individuals, even if they are not always presented, let alone generally understood, that way. I am thinking in particular of civil disobedience and, as an ultimate measure, resistance in contexts where parts or even most of the state has already been taken over by anti-democratic forces. As outlandish as the latter might sound in particular, it is

⁷ The common charge of arbitrariness against militant democracy is more complex than is usually suggested. Contrary to what Invernizzi and Zuckerman argue, it is not subject to the same paradoxes as the demos problem (Invernizzi Accetti and Zuckerman 2017), since militancy does not aim to fix the boundaries of the people per se (with the possible exception of denationalization, discussed in this essay). One possible form of arbitrariness has to do with the definition of the constitutional core that is to be defended: powerful actors might include elements in such a core about which there is perfectly reasonable disagreement. A second is the conflation of ‘protection of the state’ with ‘protection of democratic core institutions and practices’ – which is more or less what happened in the early years of militant democracy in West Germany (Rigoll 2017); the lie identified by Nietzsche ‘Ich, der Staat, bin das Volk’ becomes a different lie: ‘Ich, der Staat, bin die Demokratie’. And a third one has to do with application: unless one assumes a duty of militancy (i.e., all possibly anti-democratic actors *must* always be banned), it becomes a matter of expediency, or just day-to-day politics, as to who in the end is made subject to militancy (since there is no duty to ban, there also is no possibility of individuals taking state institutions to court because they failed to initiate a ban). Having said that: the Venice Commission explicitly calls for a ‘political filter’ or space for discretion as a part of a legitimate form of militant democracy – so as to avoid overly restrictive practices such as in Turkey, where bans have basically been automatic and, in the eyes of the Venice Commission, far, far too frequent (Venice Commission 2009).

worth emphasizing that, yet again, the paradigmatic example of militant democracy, contains precisely resistance as part of a repertoire of techniques to save democracy: the Basic Law of the Federal Republic of Germany also features an article explicitly legitimating resistance for the sake of defending the so-called free-democratic political order. In an era when talk about ‘popular resistance’ has become inflationary even in long-established democracies, it is, I suggest, urgent to assess the legitimacy of disobedience and resistance as militant measures.

In this essay, I shall argue that there is a space for militant democracy both against and by individuals – but that such a space has to be very, very constrained, and also clearly be limited to exceptional circumstances.⁸ In particular, militant democracy aimed at individuals has to be constrained by three considerations: first, beliefs and their expression, no matter how radically anti-democratic, cannot plausibly be subjected to militancy (for incitement to violence or to hatred, there are already criminal statutes in many democracies). Rather, there has to be a pattern of behavior that makes it plausible that an individual is intentionally subverting, or at least is just about to subvert democratic institutions – and that such efforts are possibly having an effect.⁹ That charge is *prima facie* much more plausible in case of prominent or in some other manner powerful individuals. So militancy applies to what we might call in the widest sense *resourceful* individuals (we might be talking about financial resources, about personal charisma,

⁸ To be sure, that’s easier said than done. Arguably, militant democracy has a way of expanding on its own: just think of the *Radikalenerlass* in 1970s West Germany, which eventually made it possible to fire train drivers because they were suspected of communist sympathies, or the UK’s current ‘Counter-Extremism Strategy’ which appears more about protecting ‘British values’ than actually countering threats to democracy (Rivers 2018).

⁹ Even in *Brandenburg*, there is a hint of what kind of pattern of conduct might be thought of this way: while ‘mere abstract teaching’ cannot be restricted, ‘preparing a group for violent action and steeling it to such action’ is another matter. It is the ‘steeling’-part that is particularly interesting: presumably, ‘steeling’ is a matter of repeated instruction by an ideologically committed (and possibly charismatic) leader; it aims at anti-democratic action, but that action is clearly not imminent.

celebrity status, or, for that matter, links to powerful organizations – in that sense, individual and institutional militant democracy cannot and should not always be completely separated).¹⁰ The worry that sanctioning such individuals might make them martyrs in the eyes of their supporters is justified – but then again, a democracy cannot have its actions dictated by how a group of citizens with anti-democratic citizens view such sanctions.

Second: if democracy is a political system dedicated to the advancement of freedom and equality, then individual militant measures have to be as respectful of individual autonomy as possible; they cannot fundamentally deny the standing of an individual as holding democratic citizenship (and as a democratic co-author of the laws, if they wish to participate in democracy).¹¹ If single persons really plausibly pose a threat to democracy because of the pattern of their expressions and conduct, then *prima facie* militancy might be justified. But it should only affect as small a set of political rights as possible, and leave as much autonomy as possible (for instance by prohibiting an individual from standing for office, but not disenfranchising, let alone denationalizing them). It should also be strictly limited in time. Democracy, after all, is built on the idea that citizens can and do change their minds; hence it is plausibly understood as a form of institutionalized uncertainty (Przeworski 1991). Any militant measures that assume that citizens are just not capable of changing their political beliefs, that they are ‘irredeemable’ (in Hillary Clinton’s infamous words), contradict one of the core elements of democracy.¹²

¹⁰ For an excellent account of what it can mean to prevent or not prevent the rise of an anti-democratic resourceful individual, see Elster 2018.

¹¹ I am indebted to Corey Brettschneider for discussions on this point.

¹² This certainty about individuals’ supposedly unchanging character determining electoral choices is often invoked to justify felon disenfranchisement: it is alleged, for instance, that felons will vote to change the criminal law in such

Third, while Kirshner is absolutely right that even those presently holding anti-democratic convictions have an interest in political participation, it is important to see that such a basic interest generates not just a general right to participate, but a multiplicity of rights with a multiplicity of duties placed on others (including, but not limited to, the state) (Waldron 1989). Anything like a blanket removal of an individual from the political process is to be rejected in favor of a nuanced approach that involves at most the temporary forfeiture of specific rights (and the attendant lifting of some duties). Such measures should be tailored as closely as possible to the individual case; restrictions should ideally match the pattern of behavior. And, as already argued, the individual in question has to be enabled to regain any rights temporarily lost.

Such an approach mitigates the worry that a democratic state ultimately responds to anti-democratic actors in a *symmetrical* fashion, mirroring the very anti-democratic conduct of its declared enemies. This concern is particularly acute in our historical moment: after all, those threatening democracy today hardly ever officially reject democratic ideals; rather, they will suggest that some groups (be they ‘corrupt elites’ or certain minorities) do not properly belong to the demos at all (the very move that I think is best called populist, which is to say: a claim to a monopoly of representing the supposedly ‘real people’, while holding that all those who do not support the populists’ ultimately symbolic construction of the ‘real people’ are outside the people tout court).¹³ It is not the case that populists in general do not believe in democracy or freedom, so that, as Rawls had hoped, the ‘liberties of the intolerant may persuade them to a belief in freedom’ (Rawls 1971: 219). Rather, they believe that only some are the proper people who

a way that a society’s order as a whole is undermined. Many variations of this argument are rehearsed in *Richardson v. Ramirez et al.*

¹³ This is a telegraphic version of my argument about populism in Müller 2016.

should enjoy freedom and equality.¹⁴ Here a militant response is in danger of sounding like ‘because you exclude, we exclude you’ – a morally untenable position and one that gives credence to the concern that militancy will end up undermining democracy itself. By contrast, an approach that disaggregates the interest in participation and then selectively restricts rights (and lifts duties) in the face of plausible threats is less likely to end up with such a fateful symmetry.¹⁵

Let me also preview the arguments about militant democracy *by* individuals. Such militancy should ideally be confined to exerting pressure on states actually to become more militant; there should generally be no shortcuts by civilian, i.e. non-state actors, to restrict the rights of other citizens in anything like democracy-saving ‘self-help measures’ (especially if these other citizens have not yet themselves infringed any rights). Where individuals believe that a majority, and, more particularly, the institutions charged with militancy, have genuinely failed to comprehend and act against a threat, highly constrained acts of civil disobedience might be justified – with a publicly articulated account under what conditions civil disobedients would rest their case. Finally, resistance is an outlier in matters of militant democracy: it assumes that a state has already at least partially been taken over by anti-democratic forces; hence, this

¹⁴ This form of moralized anti-pluralism also has important implications for the legitimacy of a democratic regime. Ronald Dworkin famously argued that restricting participation ‘upstream’ would deprive such a regime of legitimacy for its policies ‘downstream’ (Dworkin 2006). The problem with populists is that, at least according to the logic of their anti-pluralist stance, they essentially refuse the authority of any democratic decision, as long as the collective body that made the decision includes individuals who they do not consider part of the demos at all – hence even if they can fully participate at all levels, they would deny the legitimacy of the outcomes (what they often do in practice is another matter). See also Weinstein 2017.

¹⁵ One might object that populists in power also do not go all the way with their anti-pluralism and practical exclusions: it is enough that they systematically deny the legitimacy of an opposition, treat some citizens as *de facto* second class, and, at most, selectively withdraw citizenship to strike fear into potential dissenters.

approach is unlikely to count as preemptive, as understandings of militant democracy would hold. But in theory a situation is also imaginable where a state has simply been weakened in many of its defenses; it could be completely taken over by anti-democratic forces next, but resisters might still be in a position to prevent such an outcome.

As has been said many times, the problem with all such scenarios is that one assumes the best about the actors engaging in militancy: they will restrain themselves; militancy will involve both government and opposition members; executives will not take militancy as an occasion to score partisan points etc. If all these conditions hold, one is led to think that such a democracy is probably secure enough not to need militancy in the first place. Hence the real paradox of militant democracy: democracies that need militant democracy probably won't have it, because the actors cannot agree on such a model (or, where it does exist, militancy does damage to the democracy); whereas polities that would do fine even without militant democracy can agree on having it, but probably will never truly need it.¹⁶

This essay does not dispute this basic insight, but still holds that militancy is important to think about, because the line between political systems (or cultures) that really need it and those that don't just isn't always as clear as the neat paradox just explained makes it out to be. It hardly needs mentioning that in recent years, complacent assumptions about what makes for 'consolidated democracies' have been profoundly shaken. We are not in Weimar any more, but we are also not quite where we thought we were (in terms of secure liberal democracies).

¹⁶ I am indebted to Christoph Möllers on this point.

Should Individuals be targeted by Militant Democracy? Forfeiture of Rights, Denationalization, Political Trials

Most accounts of militant democracy include not just criteria as to what kind of political content might be taken to indicate threats to democracy; they also emphasize that actual expression and conduct have to be exhibited – and, crucially, that the likelihood of that threat materializing needs to be taken into consideration when deciding whether militant measures can at all be justified.¹⁷ Prima facie, single individuals would appear to pose much less of a danger than individuals acting in concert, let alone ones forming stable organizations.¹⁸ Jonathan Quong, in an important article on the rights of ‘the unreasonable’ (broadly speaking: those who deny their fellow citizen’s freedom and equality), has emphasized that only the systematic reproduction of unreasonable beliefs, which could then endanger what he calls the ‘normative stability’ of a liberal polity, should be prevented by restricting the rights of the unreasonable (Quong 2004). In the same vein, the ‘concentric circles’ model of containing anti-democratic extremism which has been proposed by Stefan Rummens and Koen Abts emphasizes that the justification for restrictive measures kicks in when anti-democratic actors get closer to power (Rummens and Abts 2010); by contrast, individuals should enjoy extensive free speech rights in order to voice

¹⁷ Not always. In the KPD judgement, the German constitutional court held that the likelihood of a party gaining power was actually irrelevant for a decision on banning – a view that today would clearly be out of line with the approach of the European Court of Human Rights.

¹⁸ To examine one’s intuition about this, one might think about the attempt by a White Supremacist to buy plots of land in a tiny city in North Dakota, evidently with a view to creating something like a white nationalist utopian community (in response, some residents called for a referendum legally to dissolve the city altogether). Did it make any difference that White Supremacy became organized and potentially self-reproducing in the form of a cohesive, possibly self-sustaining community, in contrast to single individuals espousing racist views?

‘grievances’ which could then be addressed by non-extremist parties. Again, it is hard to see how individuals *qua* individuals, disconnected from political parties or mass civil society organizations, could really get close to power in most contemporary representative democracies. When prominent individuals have been fined for inciting hatred or for Holocaust denial – think of Jean-Marie Le Pen or Geert Wilders -- what mattered was surely the fact that these were leaders of politically significant parties.¹⁹

Here I want to say more about the empirical example mentioned at the beginning of this essay. The German Basic Law envisages in Article 18 the possibility of forfeiting a range of basic rights – the right to free expression (freedom of the press in particular), the freedom to teach, freedom of assembly, freedom of association, protection of privacy for mail and telephony, the right to property, and also the right to asylum.²⁰ Only three institutions have the right to apply for such a forfeiture of rights: the Federal Parliament (Bundestag), the Federal Government, and the executives of the individual states comprising the German federation. Once an application reaches the Constitutional Court, the authorities may search a defendant’s house, seize property, and or in other ways investigate whether the allegations concerning an

¹⁹ This logic can also work the other way around, though: if one of the major normative concerns about militant democracy is that it arbitrarily cuts short, or at least distorts, a collective democratic learning process or forms of democratic experimentalism (Frankenberg 2003), then it is clear that banning parties is particularly egregious, while taking individuals out, so to speak, might be less of a concern, given the small influence that individuals ultimately have over these processes (not counting genius democratic theorists who change the course of history with their innovative theorizing).

²⁰ Note that the list does not include the possibility of forfeiting one’s right to religious liberty – a fact particularly salient in light of suggestions by German politicians in recent years that Article 18 should be applied to individual militant Islamists. On the other hand, note the inclusion of a right to property, which implies not only that property by anti-democrats can be seized; it also hints at the not-so-obvious thought that somehow the right to property can be abused in such a way that it destroys democracy. One might think of situations in which shortages are artificially created in order to undermine the legitimacy of a democratic regime.

abuse of fundamental rights are warranted. If the Court agrees, the minimum period during which a right or multiple rights are forfeited is one year. Not surprisingly, Article 18 is usually presented as a direct reaction to the fate of the Weimar Republic, with the implicit assumption that militant measures, had they been available at the time, might have saved the republic (Deutscher Bundestag 2012; Möllers 2010).

Four attempts have been made so far to deprive individuals of basic political rights; all concerned right-wing extremists (or, put more bluntly: neo-Nazis). All have all failed. Tellingly, the Constitutional Court – the only institution that can decide on a forfeiture of rights – has generally emphasized that the danger of an individual overthrowing the basic democratic order is small, or simply non-existent.²¹ In one case, the neo-Nazi in question appeared to have retired from political life already; in another, the right-wing extremist publisher of a newspaper was deemed no actual danger for West German democracy; and with two neo-Nazis, the Court argued that, after their criminal convictions and time in prison, one could expect that they would no longer engage in anti-democratic political expression and conduct.

These cases in the end yield little guidance as to how one should think about the forfeiture of rights. The Court has emphasized the importance of individuals actually posing a threat to the democratic order, but there is little indication of what the criteria for judging single citizens a plausible danger actually are. Moreover, there is not much of a sense which rights exactly would be forfeited and whether there needs to be an internal connection between the conduct of

²¹ There has long been a legal debate as to whether it is really the likelihood of actors destroying democracy that justifies militant measures or whether an intense ‘fighting’ attitude – *Kampf* – is crucial. At the least in the second case under discussion here – concerning the right-wing extremist publisher of the *Deutsche National-Zeitung* – there could be little doubt that he exhibited such a fighting attitude and was determined to continue the *Kampf* into the indefinite future. On abuse of rights see also Sajó (ed.) 2006.

individuals and the rights lost; more particularly, it is unclear where a line should be drawn between doing something morally wrong on the basis of a right and doing something politically dangerous with a right (after all, as Jeremy Waldron famously argued, must be understood as rights to do wrong [Waldron 1993]). Clearly, rights can be used to engage in criminal activity, but the proper response to such activity would appear to be specific forms of punishment, not a permanent forfeiture of a whole range of rights. Put less abstractly: yes, I can use freedom of speech to incite hatred of a particular minority, but then proper punishment awaits me (possibly including a temporary forfeiture of my right to liberty, at least in some jurisdictions), not a permanent ban on voicing opinions.²² Moreover, I am not necessarily judged as posing a permanent danger. It seems that the German Constitutional Court also does not want to adopt a view according to which individuals could somehow conclusively be seen as politically bad (and threatening) characters.

By contrast with these failed cases against individuals, two political parties were banned in the 1950s: the Socialist Reich Party, de facto a neo-Nazi organization, and the Communist Party of Germany. In January 2017, a party, the extreme right-wing NPD, was declared hostile to the constitution, but not dissolved (while the parliament was encouraged by the judges to draft legislation allowing special measures being applied to the NPD, in particular through restrictions on party financing through the state). Less well known is the fact that almost routinely extremist associations (*Vereine*) are banned in Germany (by contrast, parties are privileged by the constitution and afforded special protections on account of their crucial role in democratic will-

²² It has been argued that a plausible interpretation of Article 18 can actually not justify an extended forfeiture of rights; all that really happens is that in the case of an abuse of a right, the duty on the state to refrain from interfering with the individual is lifted on just this particular occasion (Schnelle 2014).

formation); since the Basic Law came into force, more than 500 associations have been dissolved by the executive.

All these findings would seem to support the general thought that, if one is willing to have militant democracy at all, militant measures should be aimed at organizations, not at individuals.²³ Most accounts of democratic self-defense include a call for proportionality: militant measures must be proportional to the threats posed, and individuals on their own would hardly ever seem to pose an existential threat to a democracy. Furthermore, the ban of an organization automatically affects a number of individuals anyway; practically, it would simply be too burdensome to go after every member of an anti-democratic organization individually (especially if the organization were not banned and thus could keep giving individuals ideas about adopting anti-democratic attitudes, so to speak, and generally attract them to the cause).²⁴

And yet: there are actually instances when the state passes a more comprehensive judgment on a citizen's character – and even decides on what one might call a civic or political death penalty as a consequence. And there seems reasonable disagreement about the legitimacy of states taking such a stance. Think, most obviously, of prisoners' voting rights.²⁵ Democracies

²³ When a party is dissolved, members and voters of that party obviously lose representation in the political process, but what Kirshner has called a right to participate is not per se forfeited: these citizens can form a more moderate party; they can vote for an existing party whose program at least partly covers what they might see as their core political preferences; they can also keep up the advocacy of the party's positions individually. It is also imaginable that the citizens in question themselves modify their anti-democratic attitudes (or that they don't -- and simply retreat from political life, while of course retaining all other benefits of citizenship).

²⁴ In Germany, it is a criminal offense to be a member of a prohibited party or a party that obviously serves as a substitute for the prohibited party.

²⁵ Another example would be the preventive restriction of some of the basic rights of individuals deemed close to Islamist extremists: even though they may never have engaged in criminal activity, such individuals can, for

take a range of very different approaches to this question, from no disenfranchisement to disenfranchisement for the entire prison term or even beyond. Different justifications for such disenfranchisement have been advanced, including the notion that prisoners have forfeited the ‘moral authority’ to vote (an argument invoked by a court in the UK defending the state’s restriction of prisoner’s voting rights), as well as the state’s legitimate aim of promoting ‘civic responsibility’ and ‘respect for the rule of law’.²⁶

Note that these justifications are rather different: with the former, disenfranchisement is not primarily a form of punishment; rather, a legislature holds that a society wants particular individuals to have absolutely no say whatsoever in the way it is governed – on account of their moral character. However little difference one vote makes, the thought is that the process is somehow tainted if it included citizens who have forfeited their moral authority to affect the manner in which we live together as a political community; democratic authority is only assured if that particular individual is not part of the demos, at least as far the latter’s role in the political process is concerned. Loss of moral standing thus translates into forfeiture of the right to influence our collective fate (see also Morris 1991).

In the second case, the forfeiture of rights seems more straightforwardly a matter of punishment with a view to deter and to educate citizens about the fact that crime will incur a whole range of disadvantages (even if there are no reasons to believe that the prospect of

instance, have their right to free movement restricted (electronic surveillance, confiscation of passport, duty to report to state agencies, etc.).

²⁶ Hirst vs. UK, Sauvé vs Canada.

disenfranchisement will act as an incentive not to commit a crime in the first place).²⁷ The approach is pedagogical; it is not about assuring the purity of democratic authority, so to speak.

The European Court of Human Rights has accorded states a wide margin of appreciation in what in recent years has turned out to be a highly controversial, symbolically fraught issue (Dzehtsiarou 2017). In what is probably the most well-known case dealt with by Strasbourg, a British prisoner convicted for manslaughter was denied the vote, according to the 1983 Representation of the People Act; the latter holds that ‘a convicted person during the time that he is detained in a penal institution in pursuance of his sentence ... is legally incapable of voting at any parliamentary or local election’. The ECHR decided against the UK government, but not because disenfranchisement constituted a violation of the Convention’s right to free elections per se. Rather, it found fault specifically with the ‘automatic and blanket restriction on convicted prisoners’ franchise’ adopted by the British Parliament.²⁸

Strasbourg also emphasized that in previous rulings ‘uncitizen-like conduct’ and ‘dishonorable’ behavior had been accepted as reasons for denying a citizen the right to vote.²⁹ Such a connection between politically dishonorable behavior and a public downgrading of one’s civic status (short of loss of citizenship altogether) goes back to democratic Athens, which featured the institution of declaring a citizen *atimos* – without honor – justifying a loss of rights.

²⁷ An unusual argument for denying prisoners the right to vote was advanced before the ECHR by the Latvian government: it argued that prisoners connected with criminal structures – presumably a polite way of saying ‘mafia’ – could use their votes to bring to power individuals also connected to said criminal structures. See *Hirst v UK 2*. Of course, one can also turn this reasoning around: by disenfranchising prisoners/felons, it is much less likely that anything will ever be done to put an end to the shameful prison-industrial complex in the US.

²⁸ In the eyes of the UK’s critics, the relevant provisions could be traced back to the 1870 Forfeiture Act, which in turn was derived from earlier notions of ‘civic death’.

²⁹ *H. v. Netherlands, X. v. the Netherlands* (sic!).

And, after the Liberation, the French Republic introduced the crime of *indignité nationale* for those who had collaborated with the Germans under the Occupation. Those convicted incurred the penalty of *dégradation nationale*: a citizen was declared ‘unworthy’ and stripped of basic political rights (Simonin 2008), a measure which leading French politicians sought to re-introduce in the wake of the attack on *Charlie Hebdo* in January 2015.³⁰

The problem at the point of the Liberation was clearly not pre-emption, or, put more bluntly, power – there existed no realistic possibility that collaborators would somehow enter government and re-establish Vichy-style authoritarianism. Rather, it also served as a kind of political pedagogy mixed with concerns about historical justice; the law that attributed ‘infamy’ to a citizen had primarily an expressive function (as would a re-introduction of *indignité nationale* for convicted terrorists today).

Now, once ‘un-citizenly’ conduct has been admitted as a possible justification for forfeiting rights, one might be led to wonder (warning sign: slippery slope!) why a complete loss of citizenship should not also be an option. De-nationalization has in fact been debated (and practiced) extensively in recent years. One French president sought to include it in the Republic’s constitution³¹; one British Home Secretary quietly kept proceeding with it for years, on grounds that have not exactly been transparent.³² To the extent that there have been explicit

³⁰ The crime consisted of having « postérieurement au 16 juin 1940, soit sciemment apporté en France ou à l'étranger une aide directe ou indirecte à l'Allemagne ou à ses alliés, soit porté atteinte à l'unité de la Nation ou à la liberté des Français, ou à l'égalité entre ceux-ci ». This measure was criticized not least because of its retroactive character.

³¹ The effort failed. François Hollande eventually said he very much regretted the initiative, since it ended up dividing, rather than uniting the French people.

³² According to Patrick Weil, between 2006 and 2015 the British Home Secretary stripped at least 53 Brits of their nationality (Weil 2016). At least two were subsequently killed through American drone strikes. By now, the UK

justifications of this practice (which, in theory, is severely limited by the Convention on Statelessness)³³, the main one has been about security: known terrorists are supposed to be removed from the country. Another motivation has been punishment. And, finally, less obviously, there has been the notion that denationalization can serve as a symbolic distancing of a democratic state from anti-democratic, or outright terrorist, actors: one effectively disowns the national and their conduct (Macklin and Bauböck 2015). Closer to the concerns in this essay, there has been the thought that citizens who commit acts of violence or even just *intend* to commit them for political reasons have themselves effectively severed any kind of civic bond. This thought is rarely spelt out, but it appears to rely on some underlying notion of reciprocity; someone committing crimes on the basis of ideas fundamentally incompatible with the polity is said to have taken themselves out of the political community altogether, even if they have not formally renounced citizenship (arguably, a move reminiscent of what Locke was getting at in the *Second Treatise*) (see also Miller 2012).

Normatively, such measures make no sense within a militant democracy framework (and, in most cases, are indefensible *tout court*). Not because losing or, for that matter, giving up citizenship is always wrong: of course, citizens can hand back their passport voluntarily (not least if they actually object to the political direction their home country is taking); moreover, there are circumstances in which de-nationalization might be justified, because individuals

has extremely low standards for citizenship deprivation; it is sufficient for the Home Secretary to be ‘satisfied that such deprivation is conducive to the public good’. Since 2014, it is possible to take away British nationality from a naturalized citizen, even if they are immediately rendered stateless – as long as the Home Secretary has ‘reasonable grounds’ for believing that the person in question could acquire the citizenship of another country. Theresa May, during her time as Home Secretary, usually stripped British subjects of their citizenship when they were outside the UK, making it impossible for the latter to initiate any review of the decision.

³³ As long as governments respect the international conventions against statelessness, they can only apply the particular punishment of citizenship deprivation to dual nationals – an obvious form of discrimination

effectively have no ties to a country (think of descendants of emigrants inheriting passports down the generations, so to speak, without having any connections to the emigrants' homeland [López-Guerra 2005]). But these scenarios have nothing to do with militant democracy. If a citizen engages in politically motivated violence, there are criminal punishments (and militant democracy does not enter the picture at all); if a person advocates the violent overthrow of democracy, there might be criminal sanctions, depending on the free speech legislation of the country in question (and militant democracy does not enter the picture at all). But if someone propounds anti-democratic principles, or perhaps also starts organizing others on the basis of such principles, it is hard to see how such actions could possibly justify anything as drastic as loss of *all* rights by virtue of loss of nationality (not to mention the fact that only those with dual nationality could be subject to such measures). Such measures would clearly fail to respect the autonomy of the citizen in question; they would not take the necessary nuanced approach that disaggregates the interest in political participation and might legitimate the restriction of some rights, but not the temporally unlimited forfeiture of *all* rights. Depriving an individual of citizenship leaves no possibilities of showing moderation, not least because the person in question has no real access to the state anymore – which is the very intention of de-nationalization on the basis of security concerns.

Also, if one conceives of democracy as an open-ended learning process (Frankenberg 2003), as leaving space for collective experiments in how people live together, or, more simply, recognizes it as a form of institutionalized uncertainty (Przeworski 1991), it is hard to see how the final and permanent removal of members of that collective can be justified. The extreme case of de-nationalization thus also underlines that militant democracy on the basis of immutable

judgments of individual characters really has to be ruled out altogether – this really is a case of democracy defense undermining core elements of democracy itself.

So does all this not push us in the direction of rejecting militant democracy targeting individuals who have not committed any criminal acts altogether? Not so fast. Thinking back to ostracism in ancient Athens, one is reminded that the basic idea then was that a particularly powerful individual might pose a threat to democracy – even if that individual had not committed any acts yet that could be construed as political crimes. Moreover, there are plenty of examples of prominent politicians, and sometimes even ordinary citizens, who have been banned from standing for office, without losing their other basic political rights. Are these so obviously illegitimate measures?

We need to make two shifts in our discussion. First, as has already been suggested a number of times, we need to unbundle what Kirshner has called the right to participate (López-Guerra 2017). There might be valid reasons to restrict particular individual rights and yet not have a citizen end up in a situation that could plausibly be described as domination (let alone among the beasts, in the Lockean sense). Second, we need to move away from the typical images of democratic self-defense familiar from the twentieth-century: ideologically driven mass movements that appear easily classified as ‘extremist’.³⁴ We should give at least some thought

³⁴ One obvious way to find one’s bearings in the present is to say ‘this reminds me of something’. Once we have our historical analogies in place, we can comfortably distil and distribute seemingly fail-safe ‘lessons of history’. There are numerous problems with this search for analogies and the resulting political self-help manuals. One is not specific to our age: as James Bryce famously quipped, the chief practical use of history is to liberate us from plausible historical analogies, as analogical reasoning is likely to mislead. What is specific to our age, however, as Tony Judt once observed, is that we have become extremely skillful at teaching the lessons of history – but very bad at actually teaching history; fascism is not being revived in our era; there are no mass mobilizations or a systematic

to the possibility that seemingly ‘mainstream’ individuals might do as much, if not more, damage to democracy – especially if they are well-resourced, or can call on a strong personal following

cult of violence which glorifies mortal combat as the good life as such; nor are states thoroughly remade on the basis of racism (which is not to deny that racism is encouraged from the very top in states like Hungary and the US).

Less obviously, one of the reasons we are so clearly not witnessing anything like a second coming of the anti-democratic past is that today’s anti-democrats are also trying to learn from history. They know full well that massive human rights violations which are bound to remind international audiences of twentieth-century dictatorships cannot form part of a repertoire of techniques to establish non-democratic rule (in that sense, the recent open brutalities of an Erdoğan are a sign of weakness, not of strength). Precisely because we would recognize it, it isn’t happening.

Analogical reasoning is not the only trap. It is a fateful legacy of the twentieth century, the Cold War in particular, that we assume political argument to be structured around the ideas of prominent thinkers. The first imperative for many observers is: *cherchez le maître-penseur!* Hence the prominence of what we might call ‘instant intellectual history’ in our day. Want to understand Putin? Look for the intellectual power behind the throne of the new Czar and you find Alexander Dugin. The best way to make sense of Trumpism? Even now, the man to watch and listen to is Bannon, and the more particular task is to figure out his secret reading list, which includes figures like the Italian traditionalist Julius Evola, a major inspiration for the European New Right. Such instant intellectual history takes it for granted that we are dealing with political actors inspired by comprehensive world-views; it also often assumes implicitly that citizens are eager for such world-views and elect leaders because they espouse them. To be sure, more or less prestigious names are being dropped here or there and can serve as signals about political orientations – in that sense, the name-dropping is not meaningless, even if the point is not the imminent translation of some *Weltanschauung* into practice. But the question is also: a signal directed at which audiences and why? In Russia, a prime contender today for a great power with philosophical pretensions, the name-dropping is less an indication of the actual sources of policy than evidence for the imperative that important, but not necessarily crucial, constituencies of committed nationalists have to be kept happy.

It is not hard to see why liberal intellectuals have inadvertently been building up what they take to be their opponents into the kind of serious thinkers that in fact they’re not; after all, it gives them something to work with as political theorists. It is even easier to see why they have also almost casually adopted the view that ordinary men and women are ready to be seduced by illiberal ideologies; after all, since the early nineteenth century, suspecting the masses of being up to no good is the default position of liberalism. The rather clichéd invocation of the democratic double disaster of ‘Brexit and Trump’ gives liberals license not to hold back when it comes to reviving the prejudices of nineteenth-century mass psychology: people are just irrational or at least horrendously ill-informed; this allegedly explains why, as one liberal German newspaper put it in horror, ‘the wrong ones are winning’ elections.

(or the possibility that ‘mainstream’ parties come under the control of actors who end up taking party and perhaps even an entire polity in an undemocratic direction). We should also consider impeachment an example of individual militant democracy, as those subject to it do not necessarily have to have committed criminal offenses; they just have to have engaged, for instance, in an abuse of public office, which may well include de facto attempts to subvert a democratic system as a whole (Whittington 2017) – though, to be sure, most provisions for impeachment do include a requirement of the office-holder having violated actual laws, as opposed to vaguer language such as ‘betrayal of public trust’ or ‘bringing the office into disrepute’.

It is hard to see how in modern representative democracies one could replicate something like the Athenian ostracism, where sometimes the wealthy were banned simply for being wealthy, as they posed a potential threat to the democracy – but sometimes also powerful rivals of leaders who were somewhat less popular and who could be removed from the scene without bloodshed (Malkopoulou 2017). It is not hard to see, however, that particular citizens, if they exhibit a pattern of behavior which suggests that they will use their wealth in ways to subvert democracy or seek financially to profit from public office (or avoid criminal sentences by using the immunity granted by the office), could be barred from standing in elections, or be held accountable through impeachment or impeachment-like procedures.³⁵ Such an approach would

³⁵ The new authoritarian states, I would submit, are not fascist; rather, an important pattern of Nazi rule is precisely inverted. As the exile political scientist Ernst Fraenkel demonstrated, the Nazi state was not characterized by complete chaos and lawlessness, as traditional accounts of tyranny would suggest; there were plenty of areas of life where “arbitrary domination” would have seemed an absurd description, given that so much proceeded in normal, predictable ways: marriages were concluded and annulled, business contracts were written and enforced. Alongside these large areas of legal normality, however, there was always the threat of the “prerogative state” which could act

not be quite comparable to ancient ostracism, where the character of the person to be ostracized was not necessarily impugned and where political ideas were not judged illegitimate and in any way ‘punished’ (Forsdyke 2005, Malkopoulou 2017). By contrast, such militant measures today would be based on a holistic (and cumulative) judgment of character on the basis of past conduct (Whittington 2018). While drastic, such measures, I submit, would not debase the currency of democracy (to cite Marshall), in a way that denying political rights to non-resourceful individuals on the basis of character judgements indeed does.

Now, a critic might say that such an approach does not truly fall into the category of militant democracy, where the realization of an anti-democratic ideological agenda is to be thwarted. Based on recent experiences – Berlusconi, Trump – I would argue that this focus on ideology is too narrow. It also tends to forget that during the twentieth century (and, for that matter, today) many actors threatening democracy actually went out of their way to profess allegiance to democratic values; they did not always do us the favor of openly advocating authoritarianism. Especially if we take militant democracy to be concerned with *action*, we

in completely unpredictable, and of course unaccountable, ways. Fraenkel coined the term “dual state” to capture this particular configuration of legal normality alongside naked exercises of power.

What if today we are again faced with double states – except that the realm of politics, broadly speaking, in many respects remains one of normality (plus some legal-looking manipulations), whereas one’s fate in the economy is subject to arbitrary decisions? Or perhaps not so arbitrary – for if it is correct that loyalty to the adopted political family becomes crucial for economic success, then punishments are in fact foreseeable. Instead of sending muscle to collect the cash, the government alerts the tax authorities – and they’ll always find something; powerful businesspeople not favorable to the regime receive offers they cannot refuse.

As my colleague, the sociologist Kim Lane Scheppele, has pointed out, these patterns are not easily detectable by outside critics, for essentially political decisions can always be disguised as having been dictated by economic or financial necessity. The politicization of the economy is the best hypothesis to explain how such regimes remain quite stable in the absence of direct political repression.

might want to say that what matters are *patterns of action* over time – and if these patterns suggest that an actor appears to be intent on undermining democracy, then prohibiting the relevant *actor* from exercising a circumscribed set of rights (ideally, just the right to stand for office) may well be justified. Unlike with the issue of voting for prisoners, there is a clear link here to patterns of action in the past, and there is ideally an internal connection between such patterns and the specific rights being temporarily forfeited.³⁶

If ‘political trials’ did not have such a bad name, one might describe the approach here as one advocating political, but not partisan trials (Posner 2004).³⁷ Some actual institutional practices fit this characterization: impeachment in the US involves a judgement by political peers, as does the procedure whereby the European Council decides to suspend the membership rights of an EU Member State in breach of fundamental values of the Union (primarily democracy, the rule of law, and human rights).³⁸ But one could envisage institutions that give greater weight to jurists and experts: election commissions or even special tribunals which judge the fitness of particular individuals for office or, even more broadly, a prominent role in democratic life.³⁹

³⁶ But notice how the approach suggested here differs from that of the Venice Commission, for whom the relevant conduct must also have been subject to criminal law.

³⁷ This approach is compatible, but not identical, with what Peter Niesen has called ‘negative republicanism’: here restrictions are justified only in cases where the ideology and the actors in question have already yielded disastrous consequences in the past (Niesen 2003). There is no cost to a collective learning process, if a country has already learnt thoroughly that a particular set of ideas will lead to political catastrophes.

³⁸ See Article 7 TEU.

³⁹ Or even a greater role for lay people: Article 90 of the Italian Constitution envisages a complicated impeachment procedure for the President, one which at one of its multiple stages empowers not only the 15 judges of the Constitutional Court, but also 16 citizens from outside parliament to make a decisive judgment.

Obviously, the potential for abuse would be large here – capturing that particular election commission might be tantamount to controlling the political process and effectively destroy democracy itself. In less dramatic cases, it might be a problem that a self-declared ‘outsider’ could be kept out by such a commission – and hence have his or her story confirmed that corrupt elites are preventing the real champion of the people from gaining office.

This is a difficult question of institutional design. What we might call the *enemy-test* (would we ever want such an institution in the hands of our political enemies?) on one level yields an obvious result. Still, a well-designed institution would make for a balance of political forces or at least pluralism in such a way that abuses become at least very unlikely. Then again: if actors in a democracy are so reasonable that they can craft such a pluralist institution, the likelihood of militant democracy being necessary is probably very small anyway. But it’s not zero: democracies change over time, polarization is not a constant.⁴⁰ It can happen that the powerful start acting against democracy from within – that, broadly speaking, is the kind of scenario for which this kind of individual militant democracy appears appropriate.

This leaves one obvious difficulty: if the approach is supposed to respect autonomy, if militant measures have to be nuanced and focus on particular rights restrictions that do not ride roughshod over the general interest in participation (and, ultimately, not being dominated) – then how could that ambition be realized in practice so that citizens can have clear expectations under what conditions they might regain all their rights? Here the danger of loyalty oaths, McCarthyite hearings that amount to political persecution and the effective outlawing of dissent, etc., looms

⁴⁰ From the point of view of democratic theory, polarization is not the problem as such: democracies are always divided; the whole point of the exercise is that we can deal with our divisions. Polarization turns into a potentially existential threat to democracy when one side systematically starts denying the legitimacy of the other (a process that started years before Trump in the case of the US).

large. By definition, if the basis for specific rights restrictions is a pattern of action in the past, that pattern will have ceased once the restrictions are in place. Must an individual then (more or less abjectly) profess belief in democratic values in front of a political tribunal or even explicitly repent – a distinctly unattractive, deeply illiberal vision?

I can think of two answers: one is that it's actually not so obvious that the pattern will have ceased even after rights restrictions: those fanatically devoted to anti-democratic ideas (or fanatically devoted to using the political process for personal gain, for that matter) might well try to use surrogates or otherwise continue their scheming in ways that are devious, but ultimately can be detected. Admittedly, such an expectation appears to rely on the cartoonish image of the single-minded, ascetic anti-democratic which Kirshner has rightly criticized; I share the criticism, but it would also be problematic to exclude the possibility of such actors appearing altogether a priori.⁴¹

Secondly, there is nothing illiberal, let alone completely illegitimate, about the idea of a hearing (and resulting judgment of political character) as such. After all, it's a routine procedure in confirmations of judges and all kinds of federal officers. While rights restrictions are not to be thought of as a form of punishment, the expectation that a panel of experts, judges, political peers, or, for that matter, ordinary citizens comes to a judgment as to whether a particular individual still poses a threat to democracy could well be likened to a parole hearing (without thereby accepting the analogy between militant democracy and criminal prosecution).

⁴¹ Detecting the pattern again and again does not have to be equivalent to making an immutable character judgment; nothing prevents a state from giving yet another chance after the expiry of specific rights restrictions.

Should Individuals Execute Militant Measures? Civil Society, Civil Disobedience, Civil or Uncivil Resistance

Should individuals, as opposed to institutions, play an important role in defending democracy?

Traditional models of militant democracy have often been criticized as elitist, since they are supposedly suffused with a deep distrust of ‘popular participation’ (Malkopoulou and Norman 2018). This is not an unreasonable worry: Karl Loewenstein, the original theorist of militant democracy in the mid-1930s, harbored deep reservations about the fitness of the masses for modern politics. In line with the clichés of nineteenth and twentieth century mass psychology, he charged them with being overly emotional, a fact which had allegedly made them particularly susceptible to fascism (which Loewenstein judged to have no real ideological content; it was simply a political technique to gain power on the basis of – emotional – mass mobilizations). Less obviously, militant democracy has sometimes been pursued in what could seem like a rather technocratic vein: take the right militant instruments out of the tool-kit of militant democracy, apply them correctly -- problem solved. In other words, citizens should just leave the challenge of some people having a problem with democracy to the institutional machinery of militant democracy; no need to get very much involved (or, for that matter, concerned, if the machine is well-oiled and produces the right result in terms of keeping democracy safe).

In response, both theorists and practitioners of democracy defense have long argued that repressive legal measures ought to be complemented with education as well as broader attempts to address what is sometimes perhaps too glibly described as the ‘underlying causes’ of some

citizens turning against democracy (Capoccia 2005, Rummens and Abts 2010). What has been stressed less is the possible role of civil society: individuals – civilians, if you like -- can mobilize to show their opposition to parties and movements which they think pursue anti-democratic agendas.⁴² Government and civil society activity obviously do not exclude each other: for instance, in October 2000, German Chancellor Gerhard Schröder launched an appeal for an ‘uprising of the decent’ (*Aufstand der Anständigen*), after a synagogue had been attacked.⁴³

Now, civil society action undoubtedly can aim at defending democracy -- but it is not strictly speaking an instance of militant democracy, if we take the latter to involve the restrictions of rights. One possible course of action that individuals can undertake and that can result in restricting the rights of others – one that has played no real part in discussions of militant democracy traditionally – is civil disobedience. According to Rawls’ classic definition, civil disobedience must be based on conscience and aim at publicly breaking the law to bring an injustice to the attention of a majority which as yet has failed to see that injustice (Rawls 1973;

⁴² One might object that when it comes to civil society – and concrete measures such as counter-demonstrations – we are not really talking about individuals, but about collectives and, in many cases, organizations that initiate concrete measures. True. What was often referred to as ‘the sheer significance of our numbers’ during the civil rights movement in the 1960s matters a great deal. But in theory it’s still possible for one individual to take action against undemocratic forces. As a dramatic example, think of the self-immolation of a Polish citizen in front of Warsaw’s Palace of Culture in October 2016. He had handed out leaflets accusing the ruling Law and Justice Party of violating the constitution, effectively destroying the constitutional court, and restricting the rights of individual citizens. It’s arguable whether this example fits better into the category of resistance discussed at the end of this essay.

⁴³ Militant democracy has often been charged with being elitist because the ultimate judgement on rights restrictions is delegated to a court. As we know from many empirical studies, courts can be very sensitive to what jurists take to be public opinion. So what they decide might not be out of line with majority concerns – but the worry is then also that the trouble with militant democracy is not that it’s insufficiently participatory, but that it is exercised mainly against unpopular and vulnerable minorities.

see also Habermas 1985).⁴⁴ In that classic model, disobedients are supposed to display ‘fidelity to the law’, while at the same time their actions must presumably be sufficiently drastic to make a public pay attention. Now, what if civil disobedience effectively becomes a way of drawing the majority’s attention to a threat to democracy that has not been properly appreciated? What if it becomes a way to put pressure on governments to initiate measures of militant democracy?

The obvious question in response is: why aren’t legal means enough to accomplish such goals? Citizens concerned about actors who, in their view, pose a threat to democracy can be out on the streets, they can blog, they can write to parliamentarians, etc. etc. The question of course applies to all acts of civil disobedience: why not just legal protest? One possible answer is that engaging in unlawful acts and then taking the punishment increases the credibility of the claims being made by civil disobedients. That argument can go only so far, though: presumably the claims about injustice (or threats) themselves still need to be plausible and bear the weight of a conscientious decision to break the law; some kind of existential investment in politics cannot substitute for what may be lacking in the moral arguments being addressed to a majority.

A second, more promising, thought is that acts of civil disobedience can directly respond to the injustice – and, if done well, make the injustice more visible than would ordinarily be the case, even with well-crafted protests. Both Gandhi and the leaders of the American civil rights movement carefully staged their law-breaking in such a manner that the authorities’ responses

⁴⁴ I leave aside here the question whether practitioners of civil disobedience necessarily have to be ready to be punished. For counterarguments see de Lagasnerie 2015.

made the public (in some cases a global public) perceive the injustices, as well as the pernicious political ideas behind the injustices, much more clearly.⁴⁵

Blocking or even breaking up a demonstration by anti-democratic actors – assuming that the demonstrators have a permit – might be an example of this approach. The anti-democrats' rights would be restricted, and, possibly, the injustice inherent in their ideas might become more visible in clashes with counter-demonstrators: it is revealed, for instance, that they really are full of hatred against particular minorities and prepared to engage in horrific violence. Of course, a state that has not initiated militant measures against the presumed anti-democrats will be compelled to guarantee the latter's right to demonstrate. And, presumably, governments will not want to feel they are being blackmailed into militant action by civil disobedients, or, put differently, self-empowered vigilantes for democracy-preservation.

Nevertheless, in particular cases, if civil disobedience is well-crafted and executed, it might sway public opinion more generally to put pressure on a government to restrict the possibilities of presumed anti-democratic actors more generally. This might especially be the case if the latter are locally concentrated (and had thus far not been so clearly visible to a general, national audience).

Having said that: one of the assumptions of classic accounts of civil disobedience clearly can no longer be taken for granted in many democracies: Rawls, Habermas and others did not yet live in an age of highly fragmented public spheres, where a notion of appealing to *the* public has become highly implausible (see also Smith 2011). Both what civil disobedients and what, in this case, presumed anti-democrats do and say seems always already framed normatively in and for

⁴⁵ It is important to insist that civil disobedience be non-violent – or else the logic of provoking the authorities to over-react, reveal the ugly truth about the system, etc. becomes indistinguishable from terrorist strategies.

their separate publics. This does not pose a particular challenge to the use of civil disobedience in a militant democracy context, but it certainly makes it less likely that such efforts can succeed in polarized political cultures – bringing us back to the basic point that in less polarized societies, militant democracy might be more easily practiced, but is probably not really needed, whereas in much more conflictual settings militant democracy is much more difficult to establish as legitimate.⁴⁶

There is a further concern here that applies to practices of civil disobedience generally, but that might be particularly acute for civil disobedience in the name of defending democracy: under what conditions, if any, are those engaging in civil disobedience willing to accept a majority's decision not to adopt the view of civil disobedients that an injustice needs to be righted? If the quality of the public sphere is low, it is easier to make the case that the majority has not really had the opportunity yet to understand that case. But what if it is in reasonably good working order? Will civil disobedients just keep going to jail? And what about the situation we are particularly interested in here: will they persist with attempts to restrict the rights of what they take to be actors posing public threats to democracy, even if a majority (and, let's say, the institutions officially tasked to undertake militant measures) reject their view about the dangers involved in leaving the rights of these actors unrestricted? Presumably, it strengthens the case of civil disobedients if they specify some conditions for ceasing their law-breaking (after all, lawful protest still remains a possibility then); moreover, it makes it less likely that they can be accused of actually undermining democracy in the process of supposedly defending democracy.

⁴⁶ This paradox was noted as early as the 1960s, when Otto Kirchheimer wrote about political justice (Kirchheimer 1993, 629).

One might also ask: should the constraints on state institutions specified earlier in this essay also apply to individuals implementing militant measures on their own? While civil disobedients might peacefully infringe the rights of others, there is every reason for them to signal at the same time that they retain faith not just in the law, but also in a basic capacity for autonomy, as far as their fellow citizens with seemingly anti-democratic attitudes are concerned. In short: they should not treat such citizens as ‘irredeemable’. They should thus also not fall into the trap of symmetry I mentioned earlier: ‘because you exclude some, we will also try completely to exclude you’.

Having said that: civil disobedients – as civilians – do have more leeway in how they treat other citizens, as long as what they do can plausibly be said to bring out particular injustices or the threats posed to democracy. A state cannot really provoke or, let’s say, ridicule particular citizens, let’s say Saul Alinsky-style. For civil disobedients, by contrast, these might be fair tactics. Or, put differently: civil disobedients might go very far in actively denying some citizens appraisal respect; what they cannot do is somehow communicate a message that recognition respect is also to be withheld in a democratic polity (Darwall 1977)⁴⁷

One last instance of individual militant democracy that I wish to discuss is resistance in moments when the state itself might have been partially captured by anti-democratic forces. As mentioned above, language justifying such resistance for the sake of preserving democracy can be found in the German Basic Law. The relevant clause was only included in 1968, alongside highly controversial provisions for emergency powers, which gave the impression that, politically, the introduction of potentially authoritarian elements into the constitution had to be

⁴⁷ I am grateful to Ulrich Wagrandl for suggesting the use of this distinction in the context of militant democracy (see Wagrandl 2018).

balanced with an explicit empowerment of individuals willing to face up to authoritarianism (Johst 2016).⁴⁸ The constitution makes it clear that all other means of countering anti-democratic forces must have been exhausted before one is entitled to engage in acts of resistance. It also implies that, unlike in the case of civil disobedience, violence might be used.

Critics have long held that a ‘right to resistance’ has no place in positive law; it is at best a (redundant) remnant of pre-modern times. Once the liberal rule of law is established, such a ‘right’ is actually no right at all (Raz 1979).⁴⁹ Language invoking it might have at best a pedagogical function to make citizens think about what should, in any case, be a very, very remote scenario: the codification of the right is supposed to give a moral boost to individuals who see their democratic world being destroyed, but who can take heart that, if they were to succeed in reversing that destruction, re-established liberal democratic institutions would thoroughly vindicate their conduct.

Again, the obvious danger here is a scenario of individuals empowering themselves to violate the rights of others when in fact there is no threat to democracy, or the destruction of democracy is not nearly as advanced as the resister claims. By definition, anyone invoking the right in the face of functioning liberal democratic institutions is likely to be judged as having committed a politically motivated crime by such institutions.

⁴⁸ The federal states of Hesse and Bremen contained such a right from the beginning.

⁴⁹ Both the Virginia Bill of Rights and the 1789 Declaration of Human Rights nevertheless contained such rights.

Conclusion

Militant democracy is always curiously suspended between politics and law. Ultimately, its only justification is the prevention of major harm – be it the harm done to individuals in the course of massive human rights violations after a take-over of a democracy by authoritarian forces, or be it the harm caused by the systematic denigration of vulnerable minorities in a polity that remains officially committed to democratic principles. Militant democracy claims that there is a space beyond criminal law where such harm needs to be prevented through rights restrictions. Of course, if one rejects the proposition that such a space can exist, one necessarily will be against the very idea of militant democracy. Those who see such a space have, for the most part, thought of organizations as the proper targets of militant measures. The most obvious reason is that organizations are much more likely to cause harm. But banning organizations is also much more clearly compatible with respect for individual citizens' autonomy (whose character is generally not judged by such bans).

Nevertheless, I have argued that individuals may, under certain conditions, also be subject to such measures – but that such an approach must be handled with utmost caution. Something like a permanent banishment of an individual from the polity – literally or figuratively, in the case of a complete forfeiture of political rights – cannot be justified under any circumstances. However, not all participation rights are equally important. There is a space for temporarily restricting some rights as a result of a pattern of action that suggest a particularly resourceful individual is intent on undermining or outright destroying democracy. Some forms of impeachment – when impeachment is also forward-looking, taking into account the damage

that an irresponsible office-holder abusing their powers might do in the future – can be included in this category.

Such militancy also needs to remain as respectful of autonomy as possible, leaving open the possibility of anti-democratic actors changing their minds (or at least changing their conduct). Moreover, attempts at exclusion of minorities by such actors should not be met with seemingly symmetrical measures to exclude these anti-democratic citizens completely; again, the most plausible approach is to disaggregate the general interest in political participation and restrict rights selectively and temporarily only.

I have also argued that sometimes militant democracy might be undertaken by individuals. Again, the perhaps pedantic point needs to be made immediately: handle with extreme caution. By definition, all actions by individuals opposing presumed anti-democrats within the confines of the law are welcome and normatively unproblematic. De facto restricting the rights of others through civil disobedience for the sake of bringing a threat to democracy to the attention of democratic majorities might be justifiable – but it is a state's liberal democratic institutions that will ultimately judge. Civil disobedients should also remain respectful of the autonomy of those they judge a threat to democracy; and they should resist the temptation of responding to moral exclusions in a symmetrical fashion. A very special case is individual resistance in situations where democracy is already partially destroyed. In theory, it is conceivable that individual resisters restrict the rights of others in what might well already look like a civil war situation, with a view to defending, or perhaps rather: re-establishing democracy. One can debate whether this is still militant democracy in a narrow sense: after all, the enemies of democracy have taken action and openly engaged in activity presumably punishable under criminal law (and partially, perhaps completely abolished a democratic constitution). At least in

theory, though, it is imaginable that the institutions of democracy are simply so weakened that they cannot offer resistance, but the enemies of democracy have not yet acted – it is then that the individual resistance as a form of last-ditch militant democracy would make sense and come into its own.

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