The Self-limiting Theory of Militant Democracy

Alexander Kirshner, *A Theory of Militant Democracy: The Ethics of Combatting Political Extremism.* New Haven/London: Yale University Press. 2014. 208 pages. ISBN 9780300189858.

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As we know, democracy requires the readiness to accept decisions we do not agree with if a majority endorses them. Should this unconditional acceptance extend to decisions that fundamentally challenge the core of democratic practice? Most proponents of democratic disobedience and judicial review would answer in the negative: neither are we obliged to obey decisions that contradict democratic principles, nor do we have to follow those that were made undemocratically. It is less clear however what if anything we ought to do against antidemocrats when they are not yet in a position to make decisions that affect us. Should we act in advance and prevent them from taking power or wait and see until it is perhaps too late for the democratic game altogether?

The question of how we can legitimately respond to parties that harbor antidemocratic agendas has been in the spotlight of democratic theory lately. One popular method of democratic self-defense is to raise barriers for antidemocratic parties. Formal bans, restrictions of free speech and judicial reviews are common ingredients of *militant democracy*, a recipe first theorized by the German opponent to the Nazis Karl Loewenstein and used time and again to contain democracies' internal threats. Yet, militant democracy has also been criticized for failing normative democratic commitments, such as universal participation and basic political liberties. Critics emphatically claim that it impregnates democracies with the very logic of exclusion that antidemocrats try to promote. This so-called "paradox of militant democracy" (p.2), i.e. the fact that by confronting antidemocratic threats democrats may undermine the foundations of a democratic system, is the focus of Alexander Kirshner's book.

Can democrats successfully contain their enemies without contradicting their own values? And if so, which normative rules can guide institutional design to this direction? Kirshner has formulated a masterful response to these questions. Militant democracy á la Loewenstein, he says, is both illegitimate and insufficient as a strategy of democratic self-defense. To successfully defend democracies in a manner consistent with democratic values, we need to found our counter-anti-democratic endeavors on three principles: (1) the right to participate (of democrats and antidemocrats alike), (2) the obligation to intervene when one group is about to violate the participation rights of another group (but in no other case!), and (3) the obligation to pay the normative costs

of intervention. This is the gist of Kirshner's self-limiting reconfiguration of militant democracy, neatly outlined in Chapter 2.

The book proceeds by adding nuance to these three principles, as well as to the variety of internal threats democracies can face. These are illustrated by way of real-world examples as well as imagined cases. Central in Kirshner's alternative to militant democracy is the human right to participate. Based on active and passive interests, the right to self-government is described as too important to withhold from any individual merely because s/he holds antidemocratic views. Antidemocrats retain their right to participate, since they "possess a broad portfolio of concerns and preferences" (p. 41). These include interests other than toppling the regime – for example interests linked to their occupation – that deserve representation. Therefore, any defense against antidemocrats ought to consider their participation rights, and restrict them only in case they clash with the participation rights of others.

To put this in context, Chapter 3 examines the problem that arises when small parties such as the British National Party feature racist rules in their statutes. In this case, a party is neither involved in crafting antidemocratic legislation – which could be counter-acted with judicial review – nor in perpetrating acts of physical violence – which could be dealt with via criminal law. In addition, the party in this case is only marginal in terms of political influence and does not substantially threaten democracy. Still, democrats need to be concerned about such actors, Kirshner believes. Racist exclusion from party membership as in the case of BNP violates the right of political participation, and therefore democrats are justified to block such attempts. This is possible to do *a priori*, by using the right to participate as an organizing principle of democratic institutions, such as party regulations, electoral rules and similar constitutive arrangements that shape "the democratic playing field" (p. 19). By democratizing the rules of the game, the risk that antidemocratic actors will establish themselves is contained before a need to intervene arises.

Still, Kirshner grants that there can be cases calling for an *a posteriori* intervention. However, he disagrees as to the criterion by which such cases should be singled out. Chapter 4 is thus dedicated to discussing competing justifications of militant intervention. First, the author finds fault with theorists defending the exclusion of *parties that oppose democracy*: merely advocating antidemocratic ideas cannot harm "democratic stability" (p. 93) and does not justify exclusion. Further, excluding parties from participation – *pace* Peter Singer – because they do not honestly value or agree with the principles that animate that process is unfair, since antidemocrats do not have the option of participating in any other process. Secondly, Kirshner calls undemocratic to exclude *parties that threaten an important feature of a state's identity*, the most obvious example being secularism in Turkey. An issue that is constitutionally protected and cannot be democratically contended, he says, is unlikely to

represent those who did not participate in its formulation. Hence, excluding antidemocrats because they challenge gag rules is as unjustified, as excluding them because they supposedly threaten democratic stability or do not share our democratic morality. To be sure, Kirshner's objection is not against preventive intervention as such, but about preventive intervention against these particular types of cases.

For the author, military sanctions should target only parties violating universal participation rights; these sanctions should then be both repressive and preventive. Chapter 5 makes a distinct 'democratic' case for preventive intervention that is based on principles of democratic rebellion. Assuming that "transitions to democracy are never realistically complete" (p. 128), he draws an equivalence between the dilemmas faced by democratic rebels trying to topple an authoritarian regime and those faced by democratic governments dealing with antidemocratic parties. Their decision will neither be representative nor legitimate, but democratic nonetheless: if democratic procedures are not available, democratic ends will suffice. Hence, a democrat is justified to intervene if a "comprehensive threat" (p. 130) arises. Yet, recognizing that prevention will inevitably be illegitimate, Kirshner considers that it should always be governed by self-limiting criteria, such as fairness, transparency, accountability and a "duty to bring the excluded back in" (p. 138). These criteria will ensure democrats are not carried away in the application of militant sanctions.

Having walked us through the reasons why militant intervention is warranted, in which cases it is needed and how it should be applied, the book ends in Chapter 6 with a positive real-world example. It is borrowed from American history and specifically the debate over Reconstruction (1865–66) in the immediate aftermath of the Civil War. Northern states were then faced with institutional intransigence by the defeated Southerners who were trying to bring slavery back in from the backdoor. The chapter analyzes the debate in the Reconstruction Congress, where both full inclusion and full exclusion of Southern representatives were rejected by Northerners in favor of a golden mean: the defeated were offered *conditional access* to Congress provided they effectively accepted the rights of African American men. This type of exclusion conditioned by the acceptance of democratic practices was successful in the short run, but also democratic in accordance to the self-limiting theory of militant democracy. The example of this compromise between democrats and antidemocrats can be used nowadays positively to guide democratizing efforts in new, transitioning and established democracies faced with antidemocratic challenges.

Kirshner has given us a first full research monograph on the ethics of counter-extremist action that befit the democratic age. His normative critique of militant democracy responds both to a prevalent gap in literature and a pressing need in constitutional policy-making. The book is eloquent, well argued,

balanced and rich with examples, both imagined and real ones (e.g. court decisions). Although the main thrust of his theory is normative, Kirshner goes at great length to put it in context and make it intelligible in practice. His approach is further sensitive to reality, taking into account for example that people are imperfect, democratic transitions never complete and militant action hard and costly.

Two further points deserve praise. Firstly, putting participation rights at the center of a theory of militant action reconciles in a single move liberal commitments with democratic intervention. Since the main risk of militant action going awry is precisely the violation of individual rights (free speech, right to associate etc.), putting a liberal right in the conceptual frontline and indeed one that sets the foundations for democratic self-government seems to square the puzzle of how militant democracy will not take a Jacobinistic turn. In addition to the rights-based approach, another originality in this book is that it examines democratic defense on the same basis as democratic rebellion. Comparing the challenge of containing antidemocratic parties to the challenge of toppling an authoritarian regime offers a valid source of legitimation for militant measures. To be sure, the democratic rebel operates outside formal structures, whereas militant actions are always directed by political or other authorities. Nevertheless, the heuristic value of paralleling the two instances is significant in that it brings to the surface the normative lacunas and real risks involved in making pro-democratic choices under dire circumstances.

A few issues however could benefit from further discussion and analysis. One is the actual definition of what constitutes an anti-democrat for the purposes of militant action, a question underdeveloped and not explicitly addressed in the book. First of all, it is not clear if this label applies only to political parties, or other associations or groups of individuals. In any case, by deduction we understand that anti-democratic is *not* the entity that poses a threat either to democracy or to a central element of a regime's identity; antidemocrat is whoever has the capacity and intent of violating the right to participate of a certain group. Through a number of examples, it is assumed that this category basically incorporates the likes of Nazis, fascists, elitists, monarchists, slavery advocates, racists and religious fundamentalists. These real-world movements indeed shared the intent and capacity to exclude. But if opposing a group's right to participate is enough to qualify someone as antidemocrat, this list would also include groups that do not sit easily with the examples mentioned. It would encompass for example those who oppose the voting rights of 17-year olds or those who argue against the enfranchisement of immigrants or the right of EU citizens to vote in other EU countries. Many parties are able and willing to block these groups' access to self-government, but their policies can hardly invite the use of militant action. In sum, to sharpen his view of the antidemocrat, Kirshner cannot escape from the need to address the boundary problem.

Secondly, the author seems to take for granted that democracy is identical to a representative regime or a polyarchy (p. 4–5). For example, he writes that "a democrat may preventively intervene when she judges there to be a comprehensive threat to *representative institutions*" (my emphasis, p. 135). This assumption is maintained throughout the book; it is both explicit and consistent. Clarity, however, comes here at the cost of neglecting many a democrat who favors direct participation and non-electoral modules of self-government. To be sure, radical democrats and post-democrats, but also advocates of sortition and all those who charge electoral government with elitism could very well object to the centrality of representative institutions for democracy. Do they qualify as democrats or as antidemocrats in Kirshner's model? Can we for example say that advocates of the ineligibility of media tycoons or the exclusion of the super-rich from office-holding are antidemocrats and warrant militant action? To be sure, the place of radical democrats within the self-limiting theory of militant democracy deserves special attention, lest they will fall within the cracks of democracy's relation to electoral representation.

Last but not least, one would expect a more detailed engagement with the self-limiting theory of democratic rebellion. Even though the Polish Solidarity movement inspired the central principle of this book, only a few works by the activist Adam Michnik are cited. Critically absent is Jadwiga Staniszkis' *Poland's Self-Limiting Revolution* (Princeton University Press, 1984) published by a Polish sociologist and Solidarity advisor who explicated in greater detail the self-limiting principle of the Polish rebellion. Engaging with this classic source would have enriched Kirshner's arguments with historical and theoretical detail. To be precise, Staniszkis shows that the self-limiting pragmatism of Polish strikers was a strategy of adaptation to the risk of being crashed by the Russia-supported all-mighty Communist Party. It also argues that without help from their more fundamentalist comrades, Polish pragmatists would have achieved less and perhaps risked becoming radically compromised. How these insights add historical nuance and weight on the value of the self-limiting paradigm would have merited detailed discussion.

By making these suggestions, I do not want to point at flaws or assume that the book written by Kirshner is incomplete. This is by all means an outstanding contribution to the theory of democracy in distress. It suffices to remind that it is the first single-authored monograph dedicated entirely to outlining the conceptual limits of militant democracy. In that it is a crucial milestone in the literature, one that is brilliantly performed and has already inspired further scholarship in this area. It goes without saying that were it not for Kirshner's masterful exploration of the normative issues involved in theorizing militant democracy, we would not be able to understand the complexity of the puzzle and much less to see the horizon for future development in this field.