

Doubts about ‘Democratic Legitimacy’*

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Many words are value-laden. Some are value-laden in their very semantics. ‘Just’ and ‘loyal’ are examples. Someone who says ‘That policy is just, but it has nothing going for it’ does not exhibit a full command of the concept of justice. Someone who says ‘Yes, he was loyal, but he had no virtues of character’ similarly errs in relation to the concept of loyalty. Justice and loyalty are analytically good. If some action or decision or policy or person has nothing going for it, it is neither just nor loyal.

Other value-laden words, however, are different. They are only value-laden at the level of pragmatics. They are typically used with a particular evaluative valence – approving or disapproving as the case may be. But those who dissent from the evaluative valence are not failing to exhibit mastery of the concept. ‘Free’ and ‘illegal’ are good examples. Calling a country a ‘free country’ is typically a way of approving of it. Calling an action ‘illegal’ is very often a way of disapproving of it. But free countries (free people or free choices etc.) are not analytically good in any respect, and illegal actions (illegal policies or illegal wars) are not analytically bad in any respect. It is open to me to say, without falling into any conceptual error, that the illegality of an action is no bad reflection on it, or that the freedom of a country is entirely regrettable. Most anarchists say the former and

* As presented at the workshop ‘Democracy, Legitimacy, and Hate Speech’ in London in June 2017. The main topic was Eric Heinze’s book *Hate Speech and Democratic Citizenship* (Oxford 2016).

most Marxists say the latter. They may be wrong in their evaluations but they do not show any lack of conceptual mastery.

'Democratic' falls into the second group of value-laden terms. Typically it is used to convey approval. But not analytically. There is no contradiction in terms, and more generally no sign of conceptual confusion, in saying that a certain regime or decision is amply democratic yet lacks any redeeming feature. Many people, me included, were driven to say such harsh things by the election of Donald Trump and/or by the outcome of the BREXIT referendum. Our judgments were probably too hasty, but not because Trump is doing a better job than we expected, or because BREXIT is a better idea than we thought. We were right about both of those things. So what was our error? I will try to say more about that later. However I can say now that whatever error I and others may have made about Trump and BREXIT, it was an ordinary evaluative error, not a conceptual one. The democratic route by which these options rose to victory may lend some silver lining to the cloud that each represents, but that is in no way an analytic truth. The positive value of democracy is not built into the criteria for correct use of the concept or the word. 'Democracy stinks' may be hyperbolic, but it is not oxymoronic.

While reading Eric Heinze's wide-ranging and fast-moving book *Hate Speech and Democratic Citizenship* I sometimes thought that he was taking the opposite view. He was holding democracy out as analytically good. Consider this remark, for example, on p90:

Criteria of democratic legitimacy ... demand attention not to those traits, needs, desires, and aspirations necessary to constitute the human, but only to those elements necessary to constitute democracy.

Does this sentence not say, boiled down, that whatever counts as democratic thereby, without further ado, satisfies the conditions for being legitimate? And is legitimacy not analytically good? If the answer to both questions is 'yes', then Heinze is standing up

for the analytic goodness of democracy. Not, of course, claiming that it is perfect, ideal, wonderful, the best. Just that it is good enough to pass whatever threshold of goodness is imported by the concept of legitimacy.

Heinze is not consistent, however, in asserting the analytical goodness of democracy. Here is one of several passages in which he appears to go the other way (p52):

The very specific task of identifying democracy's legitimating features ... must seek the necessary attributes only of humans as citizens. That enterprise does not require that we posit democracy as superior to other forms of government or society. It asks only which norms must obtain if a society is to be democratic. (It requires not, to phrase the point in Kantian terms, that democratization be construed as a categorical imperative, but only as a hypothetical one.)

How does this passage distance Heinze from the 'analytic goodness' reading? Well, after reading that Heinze's enterprise 'does not require that we posit democracy as superior to other forms of government or society,' what one expects to read is that it requires only that we credit democracy with having some value, with being to some extent good. Instead what one reads contains no explicit reference to goodness at all. Rather, it changes the subject to the constitutive norms of democracy. One might think that the sentence contains an implicit reference to goodness. Does it not perhaps presuppose the analytic goodness of democracy? On this reading Heinze asks only which norms must obtain if a society is to be good in the way that democracy is analytically good. One might think that this is what Heinze means, until one reads the words in parentheses. They seem to say something quite different. They seem to say, roughly, that Heinze is not presupposing the goodness of 'democratization' (and hence of democracy) at all. He has no horse in that race. He is merely imagining what one might be committed to if, rightly or wrongly, one regarded democratization as a good thing. It is an open question whether one should so regard it.

That is what he seems to be saying in the parenthetical words, but his way of saying it is weighed down with the technical Kantian lingo of 'hypothetical imperatives'. The lingo reappears at several points in the book. For example, here we are back at p90:

[T]he purely hypothetical conception being assumed here ... enquires only into politically legitimating conditions if democracy is assumed. For present purposes ... we need assume no view about the ultimate existential status of democracy's legitimating expressive conditions.

Again the line of thought here is a little hard to distil. I can imagine three possible readings. One is the sociological reading. On this reading, Heinze is eschewing any interest in the actual legitimacy of a government or a system of government. Instead his interest lies in the socially perceived legitimacy of governments and systems of government. Habermas famously wrote about a 'legitimation crisis' in late modern liberal societies.¹ At that stage in his career he was not interested in the actual legitimacy of late-modern liberal governments. He was interested in the extent to which they were regarded as legitimate by the populations that lived under them. Could it be that 'politically legitimating conditions' in Heinze's book means something similar: It means the conditions under which a democracy avoids a Habermas-style legitimation crisis?

Although it would enable him to resile from any personal commitment to the value of democracy, this strikes me as the least likely reading of Heinze's words. The book as a whole does not seem to be sociological in its ambitions. It does not seem to be arguing, for example, that official toleration of 'hate speech' will help to rescue the popular reputation of the authorities.

A second reading strikes me as more plausible. It takes more notice of the specifically Kantian lingo of 'hypothetical

¹ Habermas, *Legitimation Crisis* (Boston 1975)

imperatives' and (as Heinze transposes it: p120) 'hypothetical goods'. For Kant, a hypothetical imperative is a requirement that applies to me if and only if I have certain personal aims or goals. It is absolutely central to the Kantian idea that, once I have those aims or goals, the requirement really does apply to me. If Heinze's idea of a 'hypothetical good' works by the same logic, then a hypothetical good really is a good. It is, however, a good to be pursued only by those with certain aims or goals. Democracy really is a good thing, then, but not good for everyone: only for those who have certain aims or goals, whether individually or collectively. Perhaps, indeed, only for those who have democratic aims and goals.

This rivals a third reading according to which democracy is a good only from a certain point of view, which we might call 'the democratic point of view'. This is not what Kant means by 'hypothetical' but there is textual support for the view that it is what Heinze means. Sometimes he identifies propositions about value as holding true '[f]rom the democratic standpoint' (p57) or '[f]rom the standpoint of democratic legitimacy' (p89). This suggests the Kierkegaardian-Kelsenian metaphysics that we all know well from the philosophy of religion and of law. Is a legal duty a duty? Yes and no. It is a duty in roughly the same way in which an attempted murder is a murder, or a would-be millionaire is a millionaire, or a self-styled guru is a guru. It is a duty only in a derivative and extended sense. More specifically, a legal duty is a purported duty; it is what the law claims to be a duty; it is a duty from the legal point of view or the legal standpoint. But of course the legal point of view may be profoundly mistaken. Those who say democracy is good from the democratic point of view leave open, in the same way, that the democratic point of view may be profoundly mistaken.

This last reading, which I think is the most faithful to his text, leaves Heinze with various specific difficulties. The most important is that 'democratic legitimacy' is now a mode of legitimacy only in the way in which a legal duty is a duty.

Legitimacy, let's continue to assume, is analytically good. But that doesn't mean that democratic legitimacy is analytically good in any straightforward way. For, according to the third reading, the word 'democratic' relativizes the goodness of democracy to a specialized point of view, viz. the democratic point of view. Democracy is legitimate, hence good, only from within the democratic point of view, just as law is legitimate, hence good, only from within the legal point of view. That means that, once we exit that specialized point of view, it is possible that democracy, like law, is not legitimate at all, and indeed has nothing at all to be said for it. This undermines the first impression given by remarks such as the following (p55), of which there are many in the book:

I am challenging human rights not as legitimating elements of states, but as legitimating elements of democracy.

One naturally reads this to hold the evaluative point of view constant, while narrowing down the specific aspect of the state that is being evaluated. One reads it to contrast 'legitimating elements of states' with 'legitimating elements of states inasmuch as they are democratic.' But once we stir in the Kierkegaard-Kelsen metaphysics, that turns out to be a misinterpretation. What is actually being contrasted is a judgment of actual legitimacy and a judgment of what a democrat would take to be or claim to be legitimacy, allowing always that a democrat may be totally wrong. At this point, to get any further, we need to discuss whether the democrat is right, or at least has something to be said for her position. Until we do we have no reason to think that so-called 'democratic legitimacy' has any bearing at all on actual legitimacy, and hence - to put it crudely - no reason to care about the claimed incompatibility of hate speech bans with democracy.

I have focused here on the third reading of Heinze's position which, to repeat, I think is the most faithful to his text. But

versions of the same problem remain even if I am wrong. The second reading, more faithful to Kant's explanation of hypothetical imperatives, also leaves us with the question of why we should care about the claimed incompatibility of hate speech bans with democracy. For it leaves us with the question of why we should adopt those aims or goals, whatever they are, which make the imperatives of democracy applicable to us, and which would make democratic ideals suitable ideals for us to pursue?

What does Heinze say about this question - the question, roughly, of why we should want to be democrats and/or see things from the democratic point of view? He says rather less than I was expecting, and rather less, in my view, than is needed to motivate his book. For the paucity of attention to the question he does offer, at one point, an explanation. He writes (p120):

[R]easoning about democracy as only a hypothetical, and not a categorical good would have remained question-begging at any time in history until the fall of the Berlin Wall. After all, why bother reasoning about a system's legitimating conditions without first asking whether it is the system we want? Today, the necessity of that first step, establishing whether democracy is even our objective, may seem less pressing. Yet humanity's long history of non- and indeed anti-democratic government, and the ongoing vitality of anti-democratic movements into the twenty-first century, cannot leave us complacent. By the second half of the twentieth century, the Cold War was still teaching us how readily many intellectuals would deem non-democratic regimes as being at least equal in legitimacy to democratic ones if they appear to promise certain elements of substantive justice that are deficient or uncertain in democracies. We must not forget that famines were still occurring well into the twentieth century (leaving aside controversies as to the boundaries between their political, economic, and agricultural causes), making concern about immediate livelihood more urgent. That concern remains crucial, given the broader preoccupations with equality underlying disputes about the seemingly narrow problem of hate speech. ... But that is an altogether different enquiry. For present purposes, then, we can continue to assume democracy solely as a hypothetical imperative.

From the vantage point of 2017, this passage seems lacking in prescience. The question of why we would want have a democratic system has now become pressing again. It is Heinze's greatest misfortune to have sent his book to press (I calculate) only weeks before the BREXIT referendum and only months before the victory of Mr Trump in the US presidential election. For these voter insurgencies have lent the lie to his ... what shall we call it? ... his 'end of history' thesis about the Berlin Wall. These voter insurgencies have reminded us that even what Heinze calls 'LSPDs' - Longstanding, Stable, and Prosperous Democracies - are only ever a frighteningly short step away from the kind of demagogic dictatorship that has now taken hold in, for example, Turkey - with Hungary and Poland, it seems, teetering on the brink. Heinze says that 'it is not merely happenstance that [in LSPDs] hate speech within public discourse has shown nothing like the snowballing effects witnessed in Weimar Germany, Rwanda, the former Yugoslavia, and other non-LSPDs.' I think his view about the trajectory of public discourse has been overtaken by events. Snowballing is everywhere. Just look at Twitter, Reddit, or dailymail.com.

But even if you agree with Heinze that our public discourse has not yet hurtled over the edge of reason, you should now be much more doubtful of his relaxed explanatory posture. Even if it is not *mere* happenstance that we are not yet joining Hungary and Poland on the cliff-top, it is still happenstance. I mean that we'll have to continue being lucky to stay stably and prosperously democratic. The Daily Mail reaction to judicial intervention in the BREXIT debate² shows that the very concept of democracy is widely misunderstood, and in particular that many people hear only the 'demos' (people) part without any grasp of the implications of having a '-cracy' (set of rules)

² 'Daily Mail's "Enemies of the People" front page receives more than 1,000 complaints to IPSO', *The Independent*, 10 November 2016.

that governs the political role of that demos. I think we can fairly say that true democracies, even of the longstanding, stable, and prosperous kind, have a serious vulnerability in this neighbourhood, always threatening their stability and prosperity. From the Representation of the People Act to the Enemies of the People Act - well, as Kirsty MacColl says, 'it's not that far'.³

I am not blaming Heinze for his lack of prescience. At the time when he was writing his book, I was similarly blasé about the scale of the threat we are facing from demagogic manipulators on the extreme right and their unwitting accomplices on the disorientated left. But would he still be inclined to say, in 2017, that the question of 'whether [democracy] is the system we want ... may seem less pressing' than it once did? Sufficiently unpressing, indeed, to be almost invisible in a book called 'Hate Speech and Democratic Citizenship'?

Even if he would still deny that the question is politically or socially pressing, I think Heinze still faces the different challenge that the question cannot but be intellectually pressing in the context of his project. Without knowing why we should want democracy, what value it has, can we get very far in investigating democracy's incompatibility with hate speech bans (or with any other particular policy)? I doubt it. I should say right away that I am not assuming what might be called rational reductivism about norms. A rational reductivist regards norms as what Rawls once called 'summaries'.⁴ The norm does not strictly speaking give one a reason to do anything. In principle it could drop out without altering what one should do. One's actions are justified directly by the underlying reasons, which are merely summarised by the norm. But even without assuming normative reductivism, the underlying reasons for having a norm clearly play some part

³ MacColl, 'Walking Down Madison' on her album *Electric Landlady* (1991).

⁴ Rawls, 'Two Concepts of Rules', *Philosophical Review* 64 (1955), 3.

in determining what the norm requires or permits or empowers one to do. The content of any sound norm, in other words, to some greater or lesser extent reflects its rationale.

How does this matter for Heinze's project? Here is just one example, among many, of a point at which it matters. Heinze regards it as a constitutive norm of democracy that popular elections must be held (p49):

The problem for a democracy that lacked any form of [citizen] voting would not be that it is bad, but that it would not exist at all. A 'non-voting democracy' would be, like a 'non-quadrilateral square', words to which nothing material can correspond.

I strongly dissent from this view. In some of the great democracies of history, including the ur-example of ancient Athens, representatives were selected from among the citizenry at large by lottery rather than, or as well as, by popular election. The Athenian tradition remains alive in Britain today in the selection of juries for criminal trials. Random selection of jurors from the widest possible pool of candidates is an important aspect of our democracy, even though nobody ever gets to vote for or against any of the candidates. Heinze seemingly disagrees: his view, so far as I can see, denies that there is anything distinctively democratic about jury trial, unless we switch to popular election of jurors.

One disagreement between us here is conceptual. What is democracy? But if Heinze and I can agree for the sake of argument that there is value in democracy, then our conceptual disagreement may turn out to run parallel to an evaluative one. Heinze finds citizen voting irreplaceably good in achieving whatever it is that democracy is there to achieve, and that therefore shapes its constitutive norms. Whereas I find it replaceably good. On my view, but not it seems on Heinze's, other mechanisms might in principle substitute for citizen voting in serving whatever good it is that citizen voting serves. To make

progress with this disagreement we would need to get talking about what that good is (or, more likely, what those goods are).

It is fair to say that Heinze is not totally silent on this point. He says that voting gives citizens a political voice, and he suggests that this voice is what we are really trying to protect with our democratic ways, citizen voting being one essential component of a system for doing so. I am not unsympathetic. But I am eager to hear more. What is so important about citizen voices that all of them should be heard, however ignorant, however incoherent, however deranged, however vile, through votes or otherwise? The question is especially pressing for Heinze because – recall – in the book as a whole he is arguing from democracy to a principle of free speech that doesn't discriminate on the basis of speaker viewpoint. He can hardly be satisfied with an argument to democracy from a principle of free speech that doesn't discriminate on the basis of speaker viewpoint. He can't rely on his own conclusion as a premise. He can't say: every voice to be heard, therefore democracy, therefore every voice to be heard. He needs independent premises to make his case for democracy, so that he can use democracy so defended to make his case for free speech. It is not totally clear, to me at least, what those independent premises are.

We do learn, however, what they are not. Heinze says this much (p89):

When a democracy assumes solely rights-based criteria of legitimacy, then rights, far from proving their functions as the limits on democracy that 'really' strengthen democracy, wholly defeat that aim. Democracy then exists only instrumentally, as a means to the greater end of achieving rights, which, themselves, have never been manifestly conceived as requiring democracy. From the standpoint of democratic legitimacy, by contrast, rights and freedoms exist as tools, along with democracy's distinct legitimating criteria, to safeguard and to continue to improve a society as a democracy.

What is the problem here? Is it a problem with defending the legitimacy of democracy only as an instrument for protecting rights? Or is it a problem with defending the legitimacy of democracy as an instrument of anything? It sounds from the final sentence as if an instrumental defence of democracy is fine, so long as what democracy is an instrument of is more and better democracy. But that's not much help. The question of why we should want to live in a democracy can be restated as the question of why we should want more and better democracy. So the suggestion at the end takes us right back to our original question. Why democracy?

We can find out more about the scope and the ground of Heinze's resistance to instrumental defences of democracy by returning to his thoughts, already sampled above, about 'substantive justice' and the ways in which democracy may fail to address it. Here is another, more detailed, remark on the same subject (p52):

Substantive injustice may indeed emerge out of democratic failure, but the straightforward inference of democratic failure solely from an actual or presumed injustice misconstrues the mandate of democracy as a constitutional form. We can call that inference the legitimacy fallacy. Every failure of democracy may entail injustice. That does not mean that every injustice within a democracy amounts to a failure of democracy. Substantive injustice may diminish the legitimacy of the state as a state, i.e., as guarantor of certain legal interests; but it does not diminish the legitimacy of the state as a democracy. Or, again, it does so only insofar as harm is caused to essential attributes of citizenship, or to rules governing the state's democratic institutions, such as election rigging.

There are various interesting features of this remark. For example, in 'every failure of democracy may entail injustice' we see once again the temptations of the 'analytic good' view of democracy. For present purposes, however, the key idea is what Heinze calls the 'legitimacy fallacy'. He frames it in terms of injustice, but I take it that the same fallacy could extend to other

deficiencies in public policy that are not strictly speaking injustices. The fallacy is to think that the case for democracy is that it yields better governments, meaning governments with better policies and practices. Of course it does yield government with better policies and practices in one narrow respect, namely in respect of democracy itself, i.e. in respect of the government's answerability and hence sensitivity to the voices of citizens. But the case for that very answerability and sensitivity is not that it yields better government policy in other respects. The very best democracy may turn out to make really dumb decisions on all matters other than those relating to the representation of the people. The case for democracy does not rest on the wider quality of the government it provides.

One can see the worry. If democracy stands on the wider quality of government that it yields, it also falls on the wider quality of government that it yields. If democracy can put an imbecile in White House (Trump) or yield a ridiculous King Canute game that is played with people's lives and livelihoods (BREXIT) then so much the worse for democracy. Stupid voters get stupid results. Thinking about such cases - substituting your own examples if you don't agree with mine - it probably won't be long before you are tempted to follow Jason Brennan away from the precepts of democracy and towards those of 'epistocracy', as he calls it - the rule of the well-informed. Brennan writes:

[S]ince voters are generally uninformed, we get worse policies that we would with a better-informed electorate ... We cannot 'fix' this problem because it's a built-in feature of democracy. So maybe it's time to consider an alternative to democracy called epistocracy. In a democracy, every citizen gets an equal right to vote. In an epistocracy,

voting power is widespread, but votes are weighted: More knowledgeable citizens' votes count more.⁵

And that, indeed, was the kind of radical solution that sprang to many people's minds after the BREXIT vote and, perhaps a fortiori, after the Trump victory. I already mentioned this near the start of my talk. Many people were tempted to say, in the light of these decisions, that a regime or decision that is amply democratic may nevertheless lack any redeeming feature. In saying this, however, they were falling into the trap of what I already called 'rational reductivism' about the norms of democracy. A norm, on this view, does not strictly speaking give one a reason to do anything. In principle it could drop out without altering what one should do. One's actions are justified directly by the underlying reasons, which are merely summarised by the norm. Thus when conformity with the norms of democracy yields a decision that should not have been arrived at apart from the norms of democracy, the fact that the decision was arrived at in conformity with the norms of democracy is no kind of redeeming feature. It cannot be. The norms should not make any difference to what anybody ends up doing. One should care, to put it in Heinze's terms, about the 'substance' of the policies that prevail, and not about the process (of election, deliberation, adjudication, or whatever) by which they were arrived at.

But rational reductivism is a trap. Where norms are justified they give one a reason to conform to them, and the reason may hold even where there would be no reason to act that way were it not for the norm. How can that be? The trick is to think about how life would be were it not for the norm, rather than thinking how life would be were it not for the action. In the case of the norms of democracy we should think about alternatives to

⁵ Brennan, 'Can epistocracy, or knowledge-based voting, fix democracy?', *Los Angeles Times*, 28 August 2016.

democracy, not alternatives (within democracy) to Trump or BREXIT. We should think about the other good decisions we sacrifice if we react to individually terrible decisions by overthrowing, or even modifying, the system. And when think about 'other good decisions' for this purpose we should think about their goodness, not in comparison with the ideal decisions we imagine to be possible, but in comparison with the different run or pattern of decisions that might have been thrown up by alternative political systems at our disposal such as epistocracy, plutocracy, meritocracy, or aristocracy. Notice that perfectocracy, the counsel of perfection in public policy, is not on the list. For that is not an alternative at our disposal.

The thought that I have just sketched is as old as the hills. Heinze mentions it at one point under the brand-name 'rule utilitarian'. But a departure from rational reductivism about norms is by no means distinctively utilitarian. It is central to Aristotle's fierce critique of democracy (for its demagogic potential), which nevertheless juxtaposes, unexpectedly, with his endorsement of popular elections. It is a constant refrain in *The Federalist Papers*, as Madison and his colleagues debate the best model for democratic checks on executive power. It is captured in the title of E.M Forster's *Two Cheers for Democracy*, and better still in the aphorism quoted (or coined) by Churchill: 'democracy is the worst form of Government except for all those other forms that have been tried from time to time.' In political philosophy it is also a principal theme of what is known, following Joseph Raz, as the 'Service Conception' of authority.⁶ Authority is there to help people to do what they ought to do anyway. Since people will make errors come what may, the service conception favours systems for minimizing the extent of their errors. Under the 'Service Conception', the principal case for a democratic political system is that, across time and across

⁶ Raz, 'Authority and Justification', *Philosophy & Public Affairs* 14 (1985), 3.

issues and across institutions, it tends towards a better error-rate than its competitors. People, both authorities and their subjects, go less astray *in the round* when they are subject to the kinds of controls that are built into democratic institutions. Or rather, they do for as long as they do. When democratic institutions no longer provide the best protections against misrule, the case for them collapses. But obviously that doesn't happen just as soon as we see some bad decisions, or even some very bad ones. The Service-Conception case for democracy can survive some terrible democratic mistakes, mistakes at least as terrible as BREXIT or Trump, even epoch-defining mistakes such as that of the German public voting in the 1932 general election.

The case for democracy survives such catastrophes depending on, first, whether the catastrophes can be put down to particular curable design flaws in particular democratic arrangements; second, the extent to which the catastrophes overwhelm the generally decent record of democratic rule as a whole, balancing evil against good; and third, perhaps most importantly, how the record of democratic rule as a whole compares with the (actual or likely) record of other (actual or possible) political systems.

You may say that we face insuperable epistemic obstacles in conducting the latter comparison. How are we to know how much better or worse things might be under, say, epistocracy or plutocracy? Well we can certainly work through the risks. And we can look on aspects of our current arrangements as testbeds for alternatives. We are in a strong position to judge, for example, how democracy might compare with plutocracy, for we live in an age in which democratic arrangements for making public policy are rather ineffective in changing the conditions of many people's lives, as compared with the plutocratic arrangements that largely determine economic and technological change. It is not even much of a counterfactual any more to ask how much worse things would be under plutocracy. The epistemic hurdle to make that comparison is not very high.

In a way, however, the epistemological question is beside the point. The question of whether democracy is defensible is not the question of how confident we can be that democracy is defensible. There are of course some feedback loops from our confidence levels. If people start to lose faith in democracy then that is a bit like their losing faith in the value of money. Democracy's ability to thrive depends partly on people's trust in it, for only with trust in it can they be brought to participate in democratic life, and only with widespread participation in democratic life can the virtues of democracy - which are primarily the extra checks that it places on overmighty and overzealous authorities - be maintained. That is a big problem today. Many people have lost confidence and that already makes democracy harder to defend. The catastrophes don't help but nor, these days, would their avoidance: the BREXIT vote has damaged many people's faith in democracy, but a vote going the other way would have damaged the faith of at least as many. In a way that impasse illustrates my main point. We care about people's confidence in democracy in a derivative way. Even deeply misguided people need to have confidence in democracy for democracy to be defensible. A legitimation crisis in the Habermas sense eventually becomes an actual legitimacy crisis. For we need to do our democratic work in large numbers, all sorts of people with diverse concerns, to keep overmighty and overzealous authority in check in the democratic way. And that *keeping in check* is what makes democracy defensible.

What makes democracy defensible, then, is not that it tracks people's political preferences or anything like that. That tracking feature is, in a way, a downside of democracy. Since many people have awful political preferences, the tracking feature is allows electoral catastrophes to unfold. However we need people in the wider population to *believe* that democracy has the tracking feature (i.e. that their vote can make a difference) to keep democracy doing its important work in keeping officials on their toes. So we are in a double-bind. It goes like this:

1. As the Service Conception tells us, it is wise public policy, helping us all to do what we should do anyway, that justifies political authority, makes it legitimate.

2. Under most familiar conditions, it is an officialdom subject to many checks and balances that gives us the wisest public policy, in the round, that we can expect.

3. And, under most familiar conditions, it is democracy that gives us the most effective checks on officialdom.

4. Now, it is popular faith in democracy that makes these effective checks on officialdom possible, by encouraging wide political participation.

5. Wise public policy, therefore, includes policy that gives people faith in democracy.

6. But at certain times it is, sadly, only public policy that is extremely unwise in most other respects that gives people faith in democracy.

7. Thus democracy always contains the seeds of its own potential illegitimacy.

The problem we face, in short, is how to build public faith in democracy under conditions in which we should not do it by giving the population the public policies they want.

You can see here that, according to the Service Conception, there is no really fundamental divide between 'substance' and 'process' in politics. Everything is about what Heinze calls 'substance', i.e. about getting the best public policy we can. The defence of the political process answers entirely to the quality of the public policy that it produces. The catch is that there must, therefore, also be public policy governing that process. Policy on political process is itself part of the policy substance. And the challenge is to make that particular part of public policy such that, in its success, it does not undermine the rest and thereby eliminate the legitimacy of the political process.

In these remarks you can see why I think it was too hasty to say, after the BREXIT and Trump debacles, that the decisions were amply democratic yet lacked any redeeming feature. That

they were amply democratic was, I believe, itself a redeeming feature. But not analytically. And indeed only precariously. It was a redeeming feature only on the assumption that, in the round, democracy is still doing its job of keeping power in check. If these votes turn out to herald a bigger change, in which democratic institutions are subverted by demagogic forces, in which the worst passions rule and strongman governments take hold, in which we face social disaster after social disaster – famine after famine, or war after war – then it will no longer be a redeeming feature of these decisions that at least they were democratic. For democracy's legitimacy will surely by then have gone up in smoke. It will then have become a minus rather than a plus that these decisions were democratic ones.

I have made no bones, today, about my instrumentalism in thinking about politics. I have made it clear that I am not just outlining the Service Conception. I am endorsing it. But our concern today is less what I endorse than what Heinze endorses. And as I have explained at some length, the burning question in my mind, as I read his gripping book and even after I finished it, was: Why democracy? In particular, if not on instrumental grounds, then on what grounds? Maybe in framing the last question, I have exaggerated the importance of the hostile remarks that Heinze made about the instrumentalization of democracy. Maybe his hostility was limited to those arguments that make democracy instrumentally answerable only to liberalism's institutionalized individual rights, such as those appearing in the ECHR and the US Bill of Rights. If that is the target of his hostility, he has nothing to fear from me. For I think of those institutionalized rights mainly as instrumental devices for placing checks on governments. I think of them much the way I think of democracy. So the real question, I suppose, is whether Heinze has anything to fear from taking the same line.

I found only one clue in the book. It was when he characterized a hate speech bans as 'epistemically dictatorial' (p104). I found the word 'dictatorial' somewhat tendentious in

the circumstances. It suggested that Heinze's resistance to instrumentalism is bound up with a deep scepticism about the role of value in politics. Maybe he simply can't bring himself to talk in the way that I talk, with what Neil MacCormick once called 'in-your-face moral realism',⁷ about the knaves and cretins who elected Trump and the stooges and suckers who voted for BREXIT. Officially Heinze is no moral sceptic. But unofficially? There are occasional signs of moral scepticism on his part, of trying earnestly to place the judgments of the foolish on a par with the judgments of the wise – not just pretending to do so for the sake of encouraging the political participation of all, but actually aiming for parity, so to speak, in his heart.

I would find that a very alarming stance for a writer on democratic theory. It is a truism that people who are moral sceptics cannot be defenders of democracy. That is because they cannot be defenders of anything. I would not wish it upon Eric Heinze that, in spite of all of his admirable hard work on some of the most difficult political and social problems of our age, he did not produce a defence of anything. Nor do I think that to be the case. But to make absolutely sure, we need to hear a more forthright explanation from him of the value of democracy.

⁷ MacCormick, 'Access to the Goods', *Times Literary Supplement*, 5 June 1987.