

Peter Berkowitz

THE DEMAGOGUERY OF
DEMOCRATIC THEORY

ABSTRACT: For all of its blessings, democracy in America displays weaknesses. Democratic theorists both disguise and exacerbate these weaknesses by urging us, as imperatives of democratic justice, to extend the claims of equality to all practices and throughout all spheres of life; and to discount what people actually want in favor of what democratic theorists think that reason tells us people ought to want. Such theorizing encourages the evisceration of virtue, the trivialization of truth, the subjugation of chance, the fear of freedom, and the routinization of romantic love. To combat the dogmatism and despotism to which democracy is prone, it is necessary to preserve the distinction between democracy and justice.

To understand democracy in America—a form of government grounded in the democratic principle of the sovereignty of the people, and limited by the liberal principle of individual rights—requires more than grasping the principles that undergird it and the virtues that sustain it. It is also necessary to take account of the unwise tendencies that threaten democracy's well-being. Unfortunately, this task has been sorely neglected by democratic theory. Indeed, spurred on by the common democratic faith that causally equates democracy with justice—and equates justice with equality in an ever expanding array

of respects and with freedom from a constantly increasing range of external authorities—scholars have unwisely encouraged the neglect of democracy's weaknesses and unwise tendencies. Particularly disadvantageous in this regard have been efforts, sophisticated as well as routine and thoughtless, to collapse the distinction between democracy and justice.

In the 1990s, political theorists published a spate of treatises on democratic theory. These works included Michael Sandel's *Democracy's Discontent* (1996), Amy Gutmann and Dennis Thompson's *Democracy and Disagreement* (1996), Seyla Benhabib's *Democracy and Difference* (1996), and Ian Shapiro's *Democratic Justice* (1999). The similarity of the book titles should make one suspicious. To be sure, the professors laid claim to various inspirations and flew under different flags: Sandel championed classical republicanism; Gutmann and Thompson developed an applied form of Rawlsian liberalism; Benhabib wrote from the perspective of Habermasian discourse ethics; and Shapiro sought to apply Deweyan pragmatism to contemporary moral and political life. In classrooms, professional journals, and conferences around the globe, they, their acolytes, and their critics parsed the fine points that divided them.

Yet when it came to the relationship between democracy and justice, the democratic theorists speak as with one voice in defense of a common position. In the last analysis, each wants to argue that democracy and justice are one and the same thing. Alas, each faces the problem of being more democratic than the last—the authoritative voice of popular sovereignty; but each also favors policies and programs—concerning affirmative action, welfare, marriage—at odds with the preferences of the majority of his or her fellow citizens. How to present as democratic a minority position? How to defend the demonstrably unpopular, or at least less popular, as a true expression of the popular will? How to square the circle? That is the dilemma.

The solution, seized upon in one way or another by

each theorist, is ingenious. It is also as old as the hills, certainly at least as old as Rousseau, or Rousseau's doctrine of the general will, and it was later manifested in the Marxist notion of false consciousness. The great allure and abiding danger of the solution was brilliantly exposed by Isaiah Berlin at the height of the Cold War in his famous 1958 lecture, "Two Concepts of Liberty." The solution consists in distinguishing, on the one hand, between citizens' apparent, or professed, or expressed desires; and, on the other hand, their unstated or imperfectly expressed but real, or authentic, or genuine desires. True democracy cannot be governed by the former, because people's apparent or professed or expressed desires are typically unenlightened and distorted. Instead, the real meaning of democracy consists in what people really and truly desire or prefer—that is, what people would say and do and will if their hearts and minds had not been twisted and degraded by oppressive social hierarchies, unjust economic arrangements, or false and contingent ideas masquerading as universal and commanding truths.

Now the distinction between apparent interests and true interests is not in itself ridiculous, or even objectionable. To the contrary, some such distinction is the presupposition of philosophical speculation and lies at the heart of critical thinking. We may desire a piece of candy, a life as a rogue and a scoundrel, or a political realignment; but then, and with the benefit of experience and upon reflection, taking all the relevant factors into account and giving each its due, we may think again, reach different conclusions about what is desirable, and reorient our aspirations accordingly. What is peculiar in the approach championed by contemporary political theorists is the compulsion they betray to equate what they contend are our true or rational interests with the imperatives of democracy. Similarly peculiar is their tendency to deny the name of democratic politics to political institutions and partisan positions that do not issue in, or fail to assure, laws and policies that reflect

their vision of our true interests—or, what amounts to the same thing, laws and policies that correspond to their vision of what is right and just and good.

To be sure, today's democratic theorists balk at using the words right and just and good. Such terms suggest judgments, but today's democratic theorists are loath to appear judgmental, because that smacks of superiority, which is undemocratic. Inconveniently, however, they are champing at the bit to make judgments, to condemn existing arrangements, and to demand substantial reforms. So they use democracy or democratic to express moral approval and disapproval, as a synonym for right and just and good. The purpose of this illicit maneuver, which is a hallmark of recent democratic theory, is to pass a moral judgment or express a political preference without seeming to do so. For while what is right or just or good is open to debate, especially in a democracy, the goodness of democracy is not. Unfortunately, this conflation of democracy and justice obscures the claims of both. In the process, it also obscures the just cause of democracy.

A Case Study in the Misuse of "Democracy"

An illustration of the reckless use of the term "democratic" to legitimate, or as it happens delegitimate, was provided by the barrage of criticism directed by leading professors of Constitutional law against the Supreme Court's December 2000 decision in *Bush v. Gore* (121 S. Ct. 525), the decision holding that the recount ordered by the Florida Supreme Court was inconsistent with the demands of the Equal Protection Clause of the 14th Amendment. In early January of 2001, University of Chicago law professor Cass Sunstein (2001) opined in *The Chronicle of Higher Education* that 50 years from now, fair-minded historians would conclude that the court had "discredited itself" by rendering an "illegitimate, undemocratic, and unprincipled decision" (emph. added). Shortly thereafter, New York University law professor Ronald Dworkin (2001), writing in *The New*

York Review of Books, declared *Bush v. Gore* "one of the least persuasive Supreme Court opinions" that he had ever read, and charged that by means of it, "the conservatives [on the Court] stopped the democratic process in its tracks" (emph. added). Then Bruce Ackerman (2001a), Sterling Professor of Law and Political Science at Yale University, argued in *The American Prospect* that the court's opinion was "a blatantly partisan act, without any legal basis whatsoever," and added in an article published almost simultaneously in *The London Review of Books* (2001b) that "the more democratic solution would have been not to stop the Florida courts from counting the votes, but to stop the Bush brothers from creating Constitutional chaos by submitting a second slate of legislatively selected electors. The court could have taken care of all the serious difficulties by enjoining [Florida Governor] Jeb Bush not to send this slate to Congress" (emph. added).

In criticizing the U.S. Supreme Court on the grounds that its intervention was undemocratic, the professors embraced the Florida Supreme Court's contention that its interventions were democratic. But whatever one thinks of the legality of the Florida Supreme Court's decisions, it is absurd to see them as essentially democratic, or somehow as more democratic than the Supreme Court decisions invalidating them. The Florida Supreme Court twice overruled lower Florida courts. In its first decision, on November 21, 2000, the Florida Supreme Court ruled on the rather expansive grounds that "the will of the people, not a hyper-technical reliance on statutory provisions, should be our guiding principle in election cases" (*Palm Beach County Canvassing Board v. Harris*, 772 So. 2d 1220 [Fla. 2000] at 1227). What the Florida court did not explain was why it is reasonable to suppose that judges are competent, or why courts have the institutional responsibility, to discern the will of the people—as opposed, say, to declaring what the law is. Or why it was an expression of the people's will for the Florida Supreme Court in its November 21 decision to extinguish the dis-

cretion invested in the Secretary of State (as the chief election official) by the Florida election code. Or why, in its second intervention, on December 8—again citing the doctrine of popular sovereignty—it was an expression of the people’s will for the Florida Supreme Court to extinguish the authority vested in local canvassing boards by the Florida election code (*Gore v. Harris*, 772 So. 2d 1243 [Fla. 2000] at 1253–125).¹

In fact, the Florida court’s repudiation of “hypertech-nical reliance on statutory provisions” also entailed grossly misapplying its own case law in the name of the will of the people. The decisions the Florida court cited actually cut against its determination to override the decisions of local and elected officials (*Beckstrom v. Volusia County Canvassing Board*, 707 So. 2d 720 [Fla. 1998], and *Boardman v. Esteva*, 323 So. 2d 259 [Fla. 1975]). According to the plain meaning of these precedents, in election disputes Florida courts should, except in the case of fraud or gross negligence or substantial violations of law, refrain from second-guessing the decisions of the officials to whom the Florida election code had assigned responsibility for administering elections. (No case for fraud, etc., was made as part of the legal challenges Vice President Gore and his team brought to overturn the decisions of Florida’s elected officials.)

Despite the fact that the questions before the Florida Supreme Court and the United States Supreme Court revolved around the interpretation of statutes and cases, our most influential academic commentators advanced the notion that somehow the Florida Court’s judgments (which involved second-guessing and overruling local and elected officials) upheld the democratic process, while those of the U.S. Supreme Court (which involved overruling the judgments of a lower court) subverted it. The alacrity with which the professors did so suggests how democracy has become for academic theorists an all-purpose term for conveying moral judgment and partisan preferences. The episode also illustrates how collapsing the distinction between “democracy” and “justice” abuses both terms

and obscures the moral and political challenges we confront.²

Democratic Justice

Among the most sustained attempts in recent years to vindicate the equation of democracy with justice is Yale University political scientist Ian Shapiro's *Democratic Justice* (New Haven: Yale University Press, 1999). Although he begins his book by suggesting that unglimped tensions roil the relation between our commitments to democracy and our convictions about social justice, Shapiro aims to vindicate "the popular identification" (18) according to which democracy and justice go hand in hand. Following in the footsteps of John Dewey (quotations from whom, in the form of sage offerings, are scattered throughout the book), Shapiro embraces the core Deweyan idea that the answer to the problems of democracy is more democracy. In response to the common charge that Dewey made the mistake of treating democracy as the comprehensive human good, an end in itself—indeed, the highest end in itself—Shapiro emphasizes that in his view democracy is not the whole good or the highest good, but is rather a "subordinate foundational good" (21).

Shapiro calls his new approach "democratic justice" and advances it as "a third way between liberal and communitarian views" (16). Presupposing with liberals that disagreement over morals and matters of faith is fundamental, and agreeing with communitarian critics of liberalism that the struggle over power permeates human relations, the theory of democratic justice claims that the chief concern of politics should be "democratizing the multiple domains that structure social life while retaining democracy in a subordinate or conditioning role" (24). Yet for Shapiro democracy turns out to be more foundational than subordinate. To be sure, individual rights must be protected and shared values must be cultivated, but both the protection of rights and the cultivation of shared values, Shapiro argues, must be placed in the

service of the progressive democratization of all spheres of public and private existence.

In what does such democratization consist? Oddly, in a book marked by sharp conceptual analysis, Shapiro nowhere provides a succinct working definition of democracy, whose primary meaning is usually taken to be, in the words of the Florida Supreme Court, rule according to "the will of the people." Nevertheless, Shapiro's definition of democracy can be constructed from various theses and themes to which he repeatedly returns. As Shapiro understands it, democracy is not only a formal principle specifying that the people rule, but is also a substantive ideal loaded with moral and political content.

The basic institutional expression of democratic rule is representative government based on the universal franchise. To promote universal inclusion in a collective decision-making process, however, democratic justice seeks to eliminate domination in public and private life. It depends on the presence of a loyal opposition whose determined but respectful challenge to the persons or party in power keeps government and the majority honest and on their toes. And it imposes constraints that prohibit the enactment of laws that foster inequality and reduce opportunities for individuals to develop their powers and capacities as they think best.

Shapiro believes that these elements, which may have a familiar ring to them, constitute a view of democracy that is, in a phrase he borrows from the liberalism of John Rawls, "political, not metaphysical" (21). Shapiro's comparison is apt, though not for the reason he supposes. For what Shapiro has done is import into democratic theory a confusion in Rawls's liberal theory. Just like Rawls's theory of liberalism, so too Shapiro's theory of democratic justice, contrary to its boasts, is grounded in moral principles and metaphysical notions. Misleadingly, Shapiro suggests that his embrace of democracy is premised on a skepticism that is merely political, one that only rejects grounding politics in any comprehensive moral view because it would not be "wise to let any of

them achieve hegemony in a world populated by a plurality of contending views of the good life" (22). There is a world of evasion, though, in Shapiro's use of the word "wise." For surely what makes it wise, in Shapiro's view, to refrain from imposing a single comprehensive conception is not that it would be unfeasible—tanks and troops and systematic terror have proven effective—but that it would be cruel, vicious, a violation of something essential in our nature as human beings. In fact democracy, as Shapiro expounds it, is premised on the natural freedom and equality of all human beings. It is this premise, at once metaphysical and moral, that suggests to Shapiro, as it does to Rawls, that respecting persons requires respect (within limits) for their competing views about morals and faith—one major political expression of which is refusal to condition citizenship on shared beliefs about the human good or ultimate salvation.

Shapiro might demur, arguing that in his theory the demand for universal inclusion, the imperative to eliminate oppressive hierarchy, the need for voices that oppose the majority, and the importance of placing constraints on the range of permissible decisions people can make about how to govern themselves, all alike flow from the democratic principle that "people should always be free to decide for themselves, within an evolving framework of democratic constraints, on the conduct of their activities" (14). Put aside that this principle represents a version of the liberal interpretation of freedom as autonomy, or living under laws one has given to oneself. The question is why democracy grants or require a universal privilege of self-government. Is it not because most democrats assume, as Shapiro himself acknowledges casually and quickly, "the basic moral equality of persons" (13)? But in that case, for democrats the moral principle is more fundamental than—and is the foundation for—the commitment to various political institutions reflecting the popular will, including the practice of majority rule itself, which actually reflects an effort to give institutional expression to uni-

versal human equality. Indeed, for democrats such as Shapiro—contrary to his official position—“democracy” is more accurately described as an effort to determine the political consequences of the moral and metaphysical claim that all human beings are, by nature, free and equal.

The natural freedom and equality of all human beings is indeed one of the assumptions on which constitutional democracy is and should be grounded, but it is only because the assumption is widely shared and largely uncontested today that one could doubt, or get away with denying, that it implicates puzzling metaphysical issues. Recognizing this does not undermine Shapiro’s theory of democratic justice. However, it does suggest that the theory is both more conventional—belonging to the family of academic liberalisms to which Shapiro sees himself as offering an alternative—and more philosophically ambitious than Shapiro lets on: bound up, like many other members of the clan, with vulnerable first principles. An appreciation of the metaphysics involved also helps one to discern the real relationship between democracy and justice in Shapiro’s argument, which differs significantly from the account he provides. Far from mediating the conflicting claims of democracy and social justice, as the opening lines of his book suggest is his aim, Shapiro builds a robust egalitarian conception of justice into his theory of democracy. In practice democracy and justice cannot really clash, because Shapiro’s definition makes them one and the same thing.

Eliding by definitional fiat the disjunction between democracy and justice disguises many difficulties, but it does not dissolve them. It does not, for instance, erase the clash between the ideals that inform “democratic justice” and the stubborn realities of political life. Here Shapiro’s practice is better than his theory, for his examination of concrete cases brings into view obstacles both predictable and surprising that the real world places in the way of efforts to bring life in a free society into line with egalitarian ideals. Shapiro is at his most

instructive when he shows that when it comes to controversies in which we are likely to have a big stake—Who should control the education of children? What counts as a marriage? What is government's role in regulating the relationships between employers and employees? Is there a right to take one's own life?—concerning such problems, the theory of democratic justice can define limits, highlight relevant factors, and identify presumptions about preferred courses, although it cannot generate solutions themselves, for that requires immersion in the messy details of political life.

Shapiro's democratic theory also recognizes the gap between theory and practice through its acknowledgment of a "Burkean dimension" to politics (36), through its embrace of the principle of "subsidiarity" (35), and through the deference it gives to "insider's wisdom" (12, 80, 92). His theory is Burkean in that it presumes that practices of long standing are bound to embody a coherence and wisdom that escapes the cold categories of abstract reason; but its Burkeanism is qualified (so was Burke's, as Shapiro seems not to realize) because it holds that tradition is never the last word, that the presumption in its favor is always rebuttable, and that it must give way, wherever feasible, before the imperative to democratization. The principle of subsidiarity declares that, when other things are equal, the local is to be preferred to the large, because people tend to know their interests and their good better than others—especially others who are at a distance. But the theory of democratic justice cautions that often other things are not equal, so a larger collectivity must frequently be called upon to correct the local. And deference to "insider's wisdom," though never the last word, is warranted on the supposition that members of a community, participants in a practice, and masters of a craft will, as they pursue their purposes, tend to acquire a grasp of their undertaking, of their associates, and of themselves that is unobtainable by detached observation

(however sophisticated) and by logical inference (however rigorous).

These pragmatic considerations concerning the relationship between political theory and political life are points well taken, though Shapiro's qualifications make clear that when it comes to a showdown between the claims of tradition and those of democracy, democracy wins. And Shapiro's insistence on ascribing a democratic lineage to wise maxims of politics betrays within the theory of democratic justice a certain imperial tendency, a partisan predilection to give democracy more than its due.

The analysis of concrete issues that occupies the bulk of Shapiro's book is supple and informative, though the policy prescriptions that flow from the theory of democratic justice do not depart often or interestingly from conventional left-liberal positions, and Shapiro's sniping at conservatives is tedious and a tad vulgar, especially from one who declares the expression of disagreement vital to the well-being of democracy. In regard to education, for example, Shapiro argues that the state must ultimately assume responsibility for ensuring that children receive the basic goods that enable them to develop into normal adults, while parents have primary responsibility for developing the human potential of their children to the maximum. The state should therefore direct substantial funds to children, including high-quality day care for the children of working mothers. And public schools should be protected from private-sector competition because they have an urgent and probably indispensable role in forming good democratic citizens. Concerning marriage, Shapiro defends a universal right to unilateral divorce; maintains that divorce laws should be reformed to take account of the precarious economic position in which the ending of marriage places women; and argues that benefits enjoyed by married couples should be extended to cohabiting couples, gay and lesbian as well as heterosexual. And as to work, Shapiro favors mechanisms that strengthen the position of employees against unjust discharge and civil-rights violations; schemes that increase employee

control over firms; and redistributive taxation to fund effective government worker-retraining programs, and public-works projects to refurbish decaying urban infrastructure. And he supports universal health insurance, as well as the right of people to take their own lives qualified by the individual's right to be protected from coercion to do so.

Democratic Despotism

Notwithstanding the conventionality of the political agenda it sustains, the theory of democratic justice embodies a tyrannical tendency. This tendency is thrown into sharp relief by Shapiro's discussion of education, which revolves around the distribution of responsibility between parents and the state for equipping children to live in a democracy and care for themselves.

To sort out the responsibilities, Shapiro distinguishes between children's "basic interests" and their "best interests." Basic interests "concern the security, nutrition, health, and education required for children to develop into normal adults" (85). To avoid controversial assumptions and metaphysical entanglements, the theory of democratic justice, Shapiro emphasizes, defines these basics in a manner that is "comparatively minimal" (86). In contrast, best interests are maxima that "have to do with the full development of one's human potential" (90-91). They entail conceptions of happiness or human flourishing, and so directly implicate controversial assumptions and give rise to metaphysical entanglements.

The theory of democratic justice teaches that the state should shoulder ultimate responsibility for the protection of children's basic interests, since it has a considerable stake in forming citizens capable of sustaining democratic political orders, and since it possesses the means and institutional competence needed to provide the relatively uncontroversial minimums. But parents should have primary responsibility for promoting the best interests of their own children because parents have the strongest at-

tachment to their children and the most intimate knowledge of their special gifts and unique personalities.

This account of basic interests and best interests is reminiscent of the distinction, central to academic liberalism, between rights that are fundamental and prior to conceptions of the good, and which are therefore enforceable by the state; and conceptions of the good life, which differ fundamentally among each other, and are therefore ineligible for state enforcement or support. This distinction may seem unexceptional. But officially, at least, Shapiro does not want to be a liberal. He wants to be a democrat. So he must get the invaluable protections that liberalism offers on the sly. Conversely, because he is anxious that parents may fail to imbue their children with properly democratic sensibilities, he must also find a way to get around the invaluable protections—including the protection of personal choices parents make about how to educate their children—that liberalism confers.

This is where Shapiro's Rousseauianism, the hallmark of the contemporary democratic theorist, comes into play. Just as he surreptitiously frontloads a large part of justice into his definition of democracy, so too Shapiro (86, *emph. added*), as if it were a slight and insignificant matter, packs a great deal of the same into his "relatively minimal" definition of basic interests:

Children's basic interests are not limited, on this account, to the realm of their physiological needs. In addition to meeting these, children may also be said to have a basic interest in developing the capacities required to function adequately and responsibly in the prevailing economic, technological and institutional system, governed as a democracy, over the course of their lives. Adequately here refers to a person's ability to comprehend, shape, and pursue his or her individual interests. Adequate pursuit of interests depends on being able to evaluate different lifetime aspirations critically, and being able to understand—at least as well as others generally do—the costs and benefits of different courses of action. By contrast, the idea of responsible pursuit of interest is other-regarding; it has to do with the expectations that

people may reasonably entertain about the ways in which others pursue their interests.

Not merely "adequately" but "responsibly" is the kind of individual functioning—in all spheres of public life!—that Shapiro wants to invest the state, under the guise of "basic interests," with the authority to underwrite and enforce. And this at a time in which the public schools are stumbling badly even in the attempt to teach reading, writing, and arithmetic.

With the doctrine of responsible functioning, Shapiro seems to have left behind his professed concern with actual democracy: his commitment to the principles and policies to which people, in their collective capacity, actually agree. Instead he seems to have embraced, or at least created a large opening for, idealized democracy, or the subordination of the people's choices to those laws and practices that democratic theorists determine are prescribed by rational standards

For Shapiro defines responsible functioning in terms of "the expectations that people may reasonably entertain about the ways in which others pursue their interests" (emphasis added). This standard, in effect, transforms the notion of basic interests into a regulative ideal for politics, an ideal to which the state is obliged to compel majorities and parents to submit—and a relatively non-minimal one at that. For instance, parental or popular preferences about curriculum must be subordinated to the dictates of satisfying children's "basic interests." So it is hard to see how even the qualified Burkeanism, the principle of subsidiarity, and the deference to insider's wisdom that democratic justice affirm retain any force, in the face of the abstract rationalism—of the sort Shapiro finds disagreeable in academic liberalism—that he embeds in the notion of basic interests.

Although the distinction between basic interests and best interests is, in principle, defensible and even necessary, Shapiro draws the line between them in a dubious manner and applies the resulting concepts in a suspect way. Armed with a notion of basic interests that is

defined in such far-reaching terms, democratic justice, as Shapiro interprets it, vests the state with the power to disarm parents, the people as a whole, tradition, and local authorities and associations. Their authority is transferred by the theory of democratic justice to judges authorized to look beyond the expectations people actually entertain and, in the people's name, deduce and enforce as a mandatory part of the public-school curriculum the conception of responsible democratic citizenship that people "may reasonably entertain."

Notwithstanding his anxieties about the limits of theory and his protests of the modesty of his own theory's aims, Shapiro's theory of democratic justice is extremely ambitious. Although the theory seems to grant existing beliefs, practices, and institutions a legitimacy that many of Shapiro's fellow democratic theorists are reluctant to recognize, in practice that grant serves as an important step toward bringing the given world of custom and convention under the authority of the state for the purpose of effectively democratizing it. Shapiro is candid about his transformative wish: democratic justice aims to "refashion aspirations" (232-33). Furthermore, because the theory of democratic justice focuses on reforming "power relations" (233), which are everywhere, rather than on protecting rights, which set limits on when and where the state may enter, all spheres of life are in principle fair game for the re-fashioning and reforming that democratic justice commands.

Shapiro formally registers the menace of such an aspiration, but he sees little cause for alarm. He wishes to "resist every suggestion that just because democracy is a foundational good, it is the only good for human beings, it is the highest human good, or it should dominate the activities we engage in" (21). And he repeatedly assures the reader that democratic justice teaches that the ambition to democratize beliefs and actions must be tempered both by the claims of efficiency and by appreciation of the threat of tyrannical intrusion into citizens' lives posed by

government and society. But these salutary wishes and reassurances receive scant expression in the development and application of his principles.

Overlooking Democratic Virtues

Had Shapiro taken his own warnings with greater seriousness, he would have been moved to give more thought to the kinds of individuals capable of keeping government and society and themselves in bounds as they pursue their in-principle-sweeping project of democratization. Like so many contemporary theorists, Shapiro views democratic theory as primarily concerned with issues of process and the logic of justification. True, he wants to form character; but only to make individuals more egalitarian and participatory. His commanding theoretical concern is how this transformation can be justified, not what its effect might be on the passions and the interests of those who are to be transformed. Accordingly, the questions that Shapiro addresses deal for the most part with what the principles of democratic justice require, permit, and forbid. But there are issues fundamental to democracy and justice that lie beyond the justification of the progressive democratization of private and public life.

Democracy has not only material but also moral preconditions. And the function of some of these preconditions is to contain or correct democracy's desultory and destructive tendencies. Without them, the deeds a democracy requires of its citizens it may be unable to summon; the actions it permits of them may prove incapable of being controlled; and the conduct it forbids on their part, it may lack the means or will to enforce. Democracy is an ethos or way of life. Notwithstanding its justice, it encourages a variety of forms of behavior, some of which are inimical to its well being. And it discourages other species of behavior, some of which are vital to its preservation.

Shapiro sometimes acknowledges these complexities, but he shows scarcely more interest in allowing them to intrude on his theorizing than his rivals in the democ-

matic theory business. Understanding the spirit of democracy, however, involves attending to the sentiments that democracy fosters, as well as to those to which it gives a bad name. It requires a recognition of the passions that democracy excites and nourishes and flatters, as well as to those it frustrates and stigmatizes and enfeebles. And it means considering the dubious ideas that democracy makes look more solid than they actually are, as well as the solid ideas that democracy has an interest in portraying as optional and insubstantial.

Shapiro's lack of interest in such factors is unpragmatic, because it gives little thought—and suggests that little thought is worth giving—to the impact, for good and bad, of the spirit of democracy on its citizens' character. Yet democracies cannot afford to overlook the question of character—or to truncate it by assuming that the only interesting question to be asked is how to justify the fostering of ever-more-egalitarian sentiments and participatory practices. This is in part because democracies require citizens who can not only justify the law, but who can abide by it, make it, implement it, and adjudicate the controversies that arise under it. Contrary to an important but often misleading distinction, the rule of law is only as strong and sure as the men and women who live under it and uphold it.

Perhaps it is because of concerns about his neglect of issues such as these that Shapiro concludes by both paying tribute, and registering an objection, to Tocqueville, who is still the seminal student of how modern democracy shapes citizens' souls. "Part of what has been attempted here," Shapiro (240) writes on the last page of his book,

has been an enterprise of educating democracy in Tocqueville's sense. The goal has been to find ways for democracy to coexist with other values, to structure

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Robert B. Talisse, Department of Philosophy, Vanderbilt University, Furman Hall 111, Nashville, TN 37240, e-mail robert.talisse@vanderbilt.edu, telephone (615) 343-8671, author of the forthcoming book, *Democracy*

them without stifling them. But there is an additional piece to our enterprise, overlooked in the Tocquevillian worry about democracy's potential to undermine good things. That is its potential to undermine bad things. Important as it is to control democracy's wild instincts by insisting that it operate as a subordinate good, we should not forget that it is a good. Its value derives from the hope it holds out of making the world a more just place.

The sentiment is stirring, but both the tribute and the critique mislead.

For starters, it is mistaken to charge Tocqueville with overlooking democracy's "potential to undermine bad things." In fact, Tocqueville explains at length in volume 1, part 2, chapter 6 of *Democracy in America*, entitled "The Real Advantages Derived by American Society from Democratic Government," that democracy is a blessing because it promotes "the well-being of the greatest number" (2000, vol. 1, 220-34). And in the conclusion of his masterwork, Tocqueville summarizes a judgment that pervades his book: modern democracy is a genuine good that makes the world more just; "in its justice lies its greatness and beauty" (*ibid.*, vol. 2, part 4, ch. 8, 673-77).

More troubling than the unfair jab at Tocqueville for failing to take account of democracy's advantages is the unwarranted credit Shapiro gives to his own theory for incorporating Tocqueville's lessons about democracy's disadvantages. In reality, prior to his concluding paragraph, Shapiro's theory says scarcely anything of note about democracy's disadvantages (or about Tocqueville). In this too Shapiro follows in the footsteps of both academic liberals and his fellow democratic theorists—certainly those he most respects and finds worth engaging in his book. This silence is disadvantageous, particularly for those who wish to take democracy's well-being to heart, since understanding the disadvantages or partiality of democratic justice is critical to democracy's defense.

The Unanticipated Effects of Democratic Justice

Democracy's injustice grows out of the nature of democratic justice. Democratic justice is a part of justice. But it is only a part. And in practice democratic justice betrays a tendency to subsume the whole of justice, to be embraced as justice pure and simple. To see its partiality, and the danger in mistaking it for the whole of justice, it is useful to reconsider the ordinary experiences and enduring claims out of which democratic justice arises.

The justice of democratic justice is grounded in the conviction of the demos that what we share deserves respect and should receive political expression. What we share begins with the realities of our bodies, which are vulnerable to extremes of heat and cold, which require food and drink for their maintenance, which bleed when they are pricked, and which sometimes delight in the touch of each other. But we also share a range of desires not limited to the satisfaction of bodily need and physical pleasure. We want to be recognized by others as fellow human beings. We wish to be honored for our achievements and comforted for our shortcomings and misfortunes. We seek friendship. We yearn for love. In addition, a portion of reason seems to be universally distributed, for part of what it is to be a functioning human being is to speak and listen, to voice satisfaction and discontent, to calculate the most effective means for the satisfaction of desires, to hesitate and puzzle over the matter of which desires will best satisfy us. These common features of our humanity lend substance to the idea that democracy, which demands equality among citizens, is just.

But our equalities are not the final and full truth about us. Some of us are weaker and needier, some are stronger and sturdier. Some are meaner, some are gentler. Some are more beautiful, braver, wiser. Each of us moves through the world in a particular body that is a unique site of pleasures and pains that others can infer or imagine but never feel. Each of us has memories, fears, and

longings all his own. Given such differences, how can happiness not be a function, in part, of the gifts, the experiences, and the accidents of fortune that set us apart? Why shouldn't more than our commonalities count in the determination of how wealth, honor, political power, and satisfaction are distributed? Equality may be fundamental, but so too is inequality. Just as we want the most skilled surgeons operating on our bodies, and the most suitable mates for ourselves and our children, isn't it reasonable to hope that the best rulers will govern? Yet doesn't that reasonable hope flagrantly contradict the relentlessly egalitarian aspirations of democratic justice?

Because he grasps the outlines of these tensions, Shapiro emphasizes repeatedly that democracy, though foundational, is not the whole good, that differential excellences and merit should be admired, that the contingent should be respected, and distinctions should be honored. But here exhortation is not enough. Overlooking the diverse effects that democratic aspirations have on sentiments, passions, and hopes, Shapiro does not reckon with the propensity of democratic justice, severed from the rest of justice, to set individuals against the very ideas of human distinction and human excellence. Yet these ideas are necessary to the defense of democracy. And they have their just claims.

Shapiro's inattention to democracy's propensity to promote the resentment of distinction and excellence can be seen in his approving observation that "democratic ideals are forged out of reactive struggles" (2). He makes this observation without apparent irony or awareness that in so doing, he is affirming an ancient critique of democracy, subsequently restated in distinctive registers in the nineteenth century by Tocqueville, Mill, and Nietzsche. Of course Shapiro is right, and right to emphasize, that democracy, in the last 250 years, has arisen—in America, in France, most recently in Eastern Europe—as a rallying cry to combat arbitrary privilege and oppressive hierarchy. Yet the grand and just achievements of democracy are not inconsistent with the warning elaborated in

the writings of Plato and Aristotle and later developed in the pages of the Catholic French aristocrat, the Victorian English progressive, and the free-spirited German immoralist: democracy bears within itself an animus against not merely arbitrary privilege and oppressive hierarchy, but against privilege and hierarchy as such. That is, it is the tendency of the democratic spirit to regard privilege as by definition arbitrary, and hierarchy as in essence oppressive. When left to its own devices, the democratic spirit wages a foolish and destructive war against claims to distinction that deserve to have a hearing, and against features of our condition that are inseparable from our humanity. The logic of Shapiro's theory, which calls for the democratization of all it touches and which aspires to touch all aspects of public and private life, bears out this insight.

This is not for a moment to deny or disparage the goods that democracy nourishes. They are many, and they are cause for wonder and celebration. Under democracy's rule, gentler virtues such as benevolence come to life; curiosity and an experimental attitude toward the truth take root; individuals acquire unprecedented opportunities to take chances and defy the accidents of birth and fortune; the love of freedom topples pompous old authorities; and romantic love bursts forth as a source of this-worldly redemption available to all.

Yet democracy does have its dark side. Indeed, its dark side is the other side of its happy one. For democratic egalitarianism also tends to eviscerate virtue, trivialize truth, subjugate chance, foment a fear of freedom, and routinize romantic love. In the process, democracy's despotic tendencies damage democracy itself. The virtues of mind and character whose exercise is essential to flourishing as a citizen and a human being offend democratic egalitarianism, because they confer privilege and imply a hierarchy of human goods. So democratic egalitarianism issues the imperative to democratize virtue, making it equally available to all. One way to do this is by turning virtues into values. While virtues must be

achieved, values need only be affirmed. While virtue sets a standard for the individual, each individual can, through his choice of values, set his own standard.

When virtue is democratized into value, striving for excellence comes to be seen as suspect because it implies that the striver after excellence is guilty of the impertinence of believing that one's values reflect standards binding on others. So democratic egalitarianism—and Shapiro's democratic justice—have the effect of eviscerating virtue by excising the aspiration to excellence that lies at virtue's heart. This is bad for democracy, because democracy is always in need of individuals who wish, and who have the wherewithal, to stand out, excel, and prevail.

Truth rankles the spirit of democratic justice because it looms as a touchstone against which personal opinions and collective decisions can be evaluated and found wanting. Chafing at all forms of authority, democratic egalitarianism—and Shapiro's theory—have the effect of neutralizing the authority of truth by reducing it to personal preference or the consensus of the community. But the underlying purpose of that reduction, whether to personal or collective will, is the same: to transform truth into a good that is always present, evenly distributed, and in abundant supply. The most vehement proponents of the egalitarian transformation of truth believe that their efforts will bring about an expansion of personal freedom for everybody. In order to insure each an equal share, however, they must trivialize truth, for a truth that is always present, evenly distributed, and in abundant supply cannot serve as a touchstone against which to measure one's opinions or one's collective decisions. It also cannot function as a spur to further inquiry and exploration and self-examination. Ironically, those who rebel against what they regard as the repressive character of truth sell themselves and their credulous followers into slavery to accident, ignorance, and illusion.

Chance is an affront to democratic justice because it appears to distribute talents and gifts, good fortune and bad,

arbitrarily and unequally. In response, democratic justice aims to tame chance by democratizing it, compensating for its failure to fall on each with equal bounty or equal severity. This aim has a progressive thrust that is greatly aided by science and modern technology, but it does not know when or where to stop. The democratization of chance underwrites the just claims of the welfare state, which seeks to ensure that citizens do not lack a certain minimum level of basic goods. It can also be seen in the more extreme socialist commitment to state control of the economy for the purpose of guaranteeing every citizen's economic interests. It inspired Marx to imagine the prospect of a central (and democratic) authority of such refined sensibility and exquisite judgment that it would be capable of taking from each individual according to his abilities and giving to each in accordance with his needs. The nightmare lurking within the ambition to overcome chance through the imposition of absolute equality is brilliantly exposed in Harrison Bergeron, Kurt Vonnegut's gem of a short story. In eight chilling pages Vonnegut dramatizes the destruction of our humanity that results from the project, made possible by the totalitarian union of radical egalitarian hopes and modern technology, to distribute handicaps in such a manner as to make us each absolutely equal in every way.

Freedom frightens the democratic spirit because of the diversity of achievement that it unleashes. On the one hand, democracy serves freedom, leveling every authority in sight in order that no individual must bend the knee or bow the head. On the other hand, democracy recoils from freedom, because it provides a fertile ground on which certain forms of inequality can flourish, as differences in individual talent and initiative, gumption and charm, rude animal spirit and refined intelligence, bring about differences in prosperity and honor and happiness. Locked in a love-hate relationship with freedom, the democratic spirit lurches this way and that, subverting authority in the name of freedom and subverting freedom in the name of equality.

Romantic love, liberated by democracy, remains the most undemocratic of passions, flouting the spirit of democratic justice by putting a single one before all others and seeking in the accidental and passing a taste of permanence and perfection. Bridling at love's arrogance, democratic justice seeks to break it down into its supposed component parts: commitment, sex, and partnership. But unlike devotion—the offspring of passion and duty—commitment, which is subjective and voluntary, reflects the cold spirit of legalism. Under the auspices of democratization, sex is stripped of its status as a mysterious part of the soul's quest for wholeness and increasingly comes to be thought of as the satisfaction of a particularly pronounced physical need. And the idea of partnership, borrowed from the realm of commerce, denotes a bond defined in terms of mutual advantage, a bond that is dissolvable at will by either party to the bargain. Thus does democratic justice, in the process of routinizing romantic love, insinuate a lesson of impermanence just where secular democrats might hope to preserve a sense of splendor and an intimation of commanding goods.

Democracy and Justice

An insinuation is not an imperative. Tendencies are not necessities. Democracy does not require the evisceration of virtue, the trivialization of truth, the subjugation of chance, the fomenting of the fear of freedom, and the routinization of romantic love. But it unleashes a logic within the soul and nourishes sentiments and passions that incline democrats in these dismal directions. There is a large and abiding good in democratic egalitarianism and thus in Shapiro's justice: by dissolving arbitrary privilege and by dismantling oppressive hierarchy, both of which like to wear the soothing mask of necessity, democratic justice makes the world we know other and better than it is. But democratic justice also encourages resentment of the world as we know it. Wanting equality and absence of constraint in all spheres, it fights to eradicate

inequality and the claims of authority in every shape and form.

The total victory that the democratic drive for equality craves would leave the world a dreary, less-than-human place. For virtue or excellence is an advantage, an attraction, that is its own reward. Truth, though many-sided and elusive, emancipates us from ignorance and gives eyes and intelligence to our striving. Chance, which often seems to reward and punish without rhyme or reason, cannot be subjugated without in the process condemning humanity to bondage. While it threatens democratic stability by inspiring envy at high fliers and solitary walkers, freedom gives us dignity and lets us reach for the peaks and discover the extent of our powers. And romantic love, sought by many, found by the fortunate, bestows inestimable privilege and engenders inviolable hierarchy.

Democracy is the last, best hope of man. It is rooted in and reflects the claims of our common humanity. It is a raucous carnival pulsating with beautiful possibilities and cheap thrills; bright paths and dark alleys; clowns and cops and crowds of kings and queens for a night; and everywhere scheming and striving, hustling and bustling, shirking and time-serving, and the appalling, awe-inspiring mingling of high and low. Democracy is, when all is said and done, most emphatically in accordance with justice. In many ways democracy and justice are mutually reinforcing. But not in all ways. And they are not the same. Democracy is also an imperfect regime whose imperfections must be considered by those who wish to defend its good name.

The cause of democracy can be better advanced and the imperatives of justice can be more fully heeded by remaining mindful of democracy's multifarious nature. Contrary to the dogmatism and despotism to which democracy is prone, not every tendency of democracy is just, and what is just is not in every respect democratic.

NOTES

1. "We are dealing with the essence of the structure of our democratic society; with the interrelationship, within that framework, between the United States Constitution and the statutory scheme established pursuant to that authority by the Florida Legislature. Pursuant to the authority extended by the United States Constitution, in section 103.011, Florida Statutes (2000), the Legislature has expressly vested in the citizens of the State of Florida the right to select the electors for President and Vice President of the United States:

Electors of President and Vice President, known as presidential electors, shall be elected on the first Tuesday after the first Monday in November of each year the number of which is a multiple of 4. Votes cast for the actual candidates for President and Vice President shall be counted as votes cast for the presidential electors supporting such candidates. The Department of State shall certify as elected the presidential electors of the candidates for President and Vice President who receive the highest number of votes.

"In so doing, the Legislature has placed the election of presidential electors squarely in the hands of Florida's voters under the general election laws of Florida. Hence, the Legislature has expressly recognized the will of the people of Florida as the guiding principle for the selection of all elected officials in the State of Florida, whether they be county commissioners or presidential electors. When an election contest is filed under section 102.168, Florida Statutes (2000), the contest statute charges trial courts to:

fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances.

"Id. (emphasis added). Through this statute, the Legislature has granted trial courts broad authority to resolve election disputes and fashion appropriate relief. In turn, this Court, consistent with legislative policy, has pointed to 'the will of the voters' as the primary guiding principle to be utilized by trial courts in resolving election contests:

The real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed

of the ultimate interest and it is they whom we must give primary consideration. The contestants have direct interests certainly, but the office they seek is one of high public service and of utmost importance to the people, thus subordinating their interests to that of the people. Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard. *Boardman v. Esteve*, 323 So. 2d 259, 263 (Fla. 1975) (emphasis added)."

2. For a more detailed discussion of the flaws in the scholarly condemnation of *Bush v. Gore*, and of the importance to democracy of scholars who put truth before politics, see Berkowitz and Wittes 2001.

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