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# ENNOBLING DIRECT DEMOCRACY

SHERMAN J. CLARK\*

*In this essay, Professor Clark argues that we should be attentive to the effect that direct democracy might have on our public character. Building upon earlier work, Clark suggests that the initiative in particular threatens to debase us by undercutting a crucial character trait which might best be called "responsibility-taking." The bulk of this essay is devoted to explaining what this means, and why it matters. Why should we care about the effect of political processes on public character? Why is this particular trait important and worth preserving? How is it threatened by direct democracy? In conclusion, and by way of illustration, Clark suggests that this effect might be countered—that direct democracy might be "ennobled"—through a simple but dramatic change in the way initiative voting is conducted. It should not be anonymous. If we want to tell our gay and lesbian neighbors that they may not marry, for example, we should at least be willing to look them in the eye when we do so.*

## INTRODUCTION

What kind of people might direct democracy reveal us to be or help us to become? That perhaps unusual question is the focus of this essay. I suggest that the initiative, at least as currently practiced, threatens to debase us—to make us less than we might be. I argue, however, that direct democracy, if practiced and viewed differently, might be ennobled, even ennobling. For example, simply by voting openly rather than in secret, we could perhaps find in the plebiscite a tool for the development, rather than the diminishment, of our public character.

I recognize that this is not the way people usually think or talk about direct democracy, or about law and politics in general. It is in fact part of my purpose here to try to change that.

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I hope to broaden the way we think about this and other high profile legal and political institutions. Research on direct democracy tends to focus, as one would expect, on whether the initiative and the referendum are in various ways effective or legitimate political decision-making procedures. For example, some scholarship considers the role money plays in the initiative process.<sup>1</sup> Other scholarship focuses on how well voters understand ballot issues.<sup>2</sup> Other more theoretical work asks whether the plebiscite is consistent with democratic ideals such as deliberation and fair representation.<sup>3</sup> In addition, a substantial body of research focuses on the substantive consequences of the plebiscite in various contexts.<sup>4</sup> While I certainly

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1. See, e.g., THOMAS E. CRONIN, *DIRECT DEMOCRACY, THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 90–125 (1989); PHILIP L. DUBOIS & FLOYD FEENEY, *LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS* 182–98 (1998); M. DANE WATERS, *INITIATIVE AND REFERENDUM HANDBOOK* 456–57 (2003); JOSEPH F. ZIMMERMAN, *THE INITIATIVE: CITIZEN LAW-MAKING* 144–146 (1999); John M. de Figueiredo, *How Much Does Money Matter in a Direct Democracy?*, 78 S. CAL. L. REV. 1065 (2005); Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. 1845 (1999).

2. See, e.g., CRONIN, *supra* note 1, at 60–90; DUBOIS & FEENEY, *supra* note 1, at 164–78; WATERS, *supra* note 1, at 456; Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. COLO. L. REV. 47, 91–92 (1995).

3. See, e.g., *DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA* (Larry J. Sabato et al. eds., 2001); RICHARD J. ELLIS, *DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA* (2002); JOHN HASKELL, *DIRECT DEMOCRACY OR REPRESENTATIVE GOVERNMENT?; DISPELLING THE POPULIST MYTH* (2001); Lynn A. Baker, *Preferences, Priorities, and Plebiscites*, 13 J. CONTEMP. LEGAL ISSUES 317 (2004); Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998) [hereinafter Clark, *A Populist Critique*]; Richard B. Collins, *How Democratic are Initiatives?*, 72 U. COLO. L. REV. 983 (2001); James A. Gardner, *Devolution and the Paradox of Democratic Unresponsiveness*, 40 S. TEX. L. REV. 759 (1999); Clayton Gillette, *Is Direct Democracy Anti-Democratic?*, 34 WILLAMETTE L. REV. 609 (1998); Ethan J. Leib, *Can Direct Democracy Be Made Deliberative?*, 54 BUFF. L. REV. 903 (2006); Richard Parker, *Power to the Voters*, 24 HARV. J.L. & PUB. POL'Y 179 (2000); Steven Marlowe, *Direct Democracy Is Not Republican Government*, 24 SEATTLE U. L. REV. 1035 (2001); Frank Michelman, *"Protecting the People from Themselves," or How Direct Can Democracy Be?*, 45 UCLA L. REV. 1717 (1998).

4. See, e.g., PETER SCHRAG, *PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE* (1998); Susan A. Banducci, *When Is It Used and When Does It Pass?*, in *CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES* 109–31 (Shaun Bowler et al. eds., 1998); Bruno S. Frey, *Does the Popular Vote Destroy Civil Rights?*, 42 AMER. J. POL. SCI. 1343 (October 1998); Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AMER. J. POL. SCI. 245 (January 1997); Mildred Wigfall Robinson, *Difficulties in Achieving Coherent State and Local Fiscal Policy at the Intersection of Direct Democracy and Republicanism: The Property Tax as a Case in Point*, 35 U. MICH. J. L. REFORM 511 (2002); Daniel P.

concede that these are important and worthwhile questions, my hope here is to illustrate and highlight the potential significance of a different sort of inquiry—one focused on character.

The argument can be framed by a series of questions about public character and its potential relationship to a political institution such as direct democracy.

*Why focus on public character, rather than political legitimacy or pragmatic consequences?*

As described in Part I of this essay, my focus on public character bears the same relationship to consequentialist and normative legal scholarship as does classical virtue ethics to utilitarian and deontological ethical theory. Virtue ethics asks us as individuals to think not just about what we hope to accomplish or whether our conduct is consistent with some set of first principles. It suggests that we each also think about character—about what sort of a person we each aspire to be. I attempt to apply a similar sort of broadened inquiry to community and political life.

I cannot in this essay rehearse an entire defense of this general approach, which I have described at some length elsewhere, and which I have burdened with the awkward label “communitarian virtue ethics.”<sup>5</sup> The essential claim or assumption, however, is the same as that which implicitly but unmistakably grounded so much of classical philosophy. Real and lasting human thriving—the legitimate and praiseworthy happiness we arguably each seek, both for ourselves and our communities—as hard as that elusive goal is to describe, let alone obtain—is arguably best pursued through a focus on character, rather than through an exclusive emphasis on external consequences and/or theoretical moral precepts.

*What aspect of public character arguably is threatened by direct democracy?*

I argue that direct democracy threatens to diminish us as a people by undercutting an important character trait which, for

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Selmi, *Reconsidering the Use of Direct Democracy in Making Land Use Decisions*, 19 UCLA J. ENVTL. L. & POL'Y 293 (2001).

5. See Sherman J. Clark, *Law as Communitarian Virtue Ethics*, 53 BUFF. L. REV. 757 (2005) [hereinafter Clark, *Law as Communitarian Virtue Ethics*].

want of a better name, might be referred to as responsibility-taking. I have made this suggestion, albeit without fleshing it out, in an earlier paper.<sup>6</sup> In Part II of this essay, I describe the virtue of responsibility-taking in general terms. Essentially, it is the willingness to stand behind and acknowledge agency in one's actions. Direct democracy, I suggest, potentially undercuts this virtue by encouraging citizens to exercise power over others without acknowledging or accepting responsibility for what they do.

*Why is responsibility-taking an important trait—one worth worrying about—particularly in a democracy?*

This is the heart of the matter, and the heart of this essay. Even if one grants that character matters, the question remains: Why is this particular trait—this form of responsibility-taking—a character trait worth cultivating? Specifically, even if one grants that direct democracy may not cultivate in citizens a sense of *ex poste* responsibility, one might still reasonably respond: So what? Crucially, my argument does not depend on a claim that responsibility-taking will lead to substantively better political decisions. It may have that effect; but I am neither making nor relying on any such claim. In that light it is central to my purpose here that I respond to the question of why responsibility-taking matters—what makes this virtue a “virtue?”

In Part III, therefore, I argue that this virtue—this character trait of responsibility taking—not only has deep roots in Western culture but is important and worth preserving, particularly in a democracy. I argue that responsibility-taking is not merely an admirable trait, but is in a sense a fundamental—and fundamentally human—aspect of character. It is, I suggest, an essential component of honest self-examination, which, coupled with action, can help us develop a fuller range of desirable or admirable traits of character. Seeing ourselves in what we would do is a crucial first step in becoming who we would aspire to be.

As will be evident, aspects of this argument may strike readers of legal scholarship as odd or unusual. Behind this re-

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6. Sherman J. Clark, *The Character of Direct Democracy*, 13 J. CONTEMP. LEGAL ISSUES 341 (2004) [hereinafter Clark, *Character of Direct Democracy*].

sponse, I think, is a justifiable skepticism about the value of character-focused theorizing. Can it really be illuminating to talk about what might “ennoble” or “debase?” Does that sort of talk not simply beg the “real” questions of normative status and pragmatic outcomes? No. A focus on character does not simply beg the real and vital questions of how we should live, what we should do, and who we should be. It frames those questions—and it does so more helpfully, I think, than do the reassuringly reductionist approaches with which we have grown so familiar. That said, I readily acknowledge that it is difficult to talk about public character in ways that do not merely beg the question or reduce to assertions of idiosyncratic preference. This sort of conversation requires if not a different language then at least a different stance and different ways of talking. This essay is part of my ongoing effort to find those ways.

*As a practical matter, what should be done differently in light of my arguments?*

In Part IV, I offer a concrete example of how direct democracy might be reformed in light of the concerns I have highlighted—how it might be ennobled. I suggest that voting in plebiscites, unlike voting on candidate elections, should not be anonymous. Open voting would offer a way to mitigate the potentially corrupting force of this institution, and might in fact allow direct democracy to help develop in us the very trait it now undercuts and retards—the important individual, public, and democratic virtue of responsibility-taking.

I do not address here at any length several of the questions which might appear to be central to the issue at hand. For example, what effect would open voting have on voter turnout? Or, perhaps more to the point, how likely is it that votes, if cast openly, would be influenced by threats, intimidation, or bribery? I do have something to say, of course, about how these issues might be considered or re-considered in light of the character-based concerns which are my focus. In particular, I will suggest that the potential risks attached to open voting ought perhaps to be welcomed, even embraced, as they are in a sense the ballast which gives weight to what otherwise be an empty gesture. I do not, however, purport to resolve the question of how ultimately to balance the pragmatic risks against the

character-based benefits of open voting. Rather, I suggest that this is the question citizens in states employing direct democracy ought to ask themselves.

Again, my purpose in this essay is to explore and highlight the potential importance of public character in law and politics, with this particular context of plebiscite voting intended as an example or illustration. It is the sort of thing toward which my argument points, rather than the motivating force behind the argument itself.

If, however, I were forced to identify a concrete upshot, it would be this. Citizens in states employing the initiative and/or the referenda should reconsider what so far seems to be taken for granted—that voting in these direct democratic processes should be anonymous. Perhaps instead they should be willing to do what they universally demand of their legislators. Perhaps they should stand behind their decisions. They would have to evaluate the risks, of course; but when they do so, they should think not just about consequences and rights but also about character. When thinking about voting anonymously, they should think not just about what they can get done by voting that way, and whether they can claim some sort of right to do so. They should think as well about what it says about them to want to exercise power over others while hiding behind a curtain. And they should think about whether that is the sort of people they want to be.

If, for example, we believe, that our gay and lesbian neighbors should not be permitted to marry, it is our prerogative to maintain that belief. Grant even, for present purposes, that we have the right to enact that view into law—that we are justified in exercising that power over our fellow citizens. We should, I argue, be willing to look them in the eye. We need not literally look any particular neighbor in the eye, of course, although a willingness to do so would be a noble thing. At the least, however, we ought not hide from what we do, but should stand behind our decisions. Moreover, as I hope to argue, we would ourselves benefit from being willing to do so.

## I. PUBLIC CHARACTER

It is possible, and I think useful, to describe in broad terms three sorts of ways to think about how to live and behave, whether as an individual or as a community. Two are familiar

and well represented in legal scholarship. First, we can identify principles by which we hope to guide our lives, and then judge and evaluate our conduct through and against those principles. Religious traditions often take this form, as does Kantian ethics. Conversation of this sort tends to focus on questions of right, or, in the legal and political arenas, questions of rights, whether understood as natural, constitutional, or otherwise derived. Second, we can focus on the consequences of our choices and actions, as in various forms of utilitarian ethics or economic analysis of law. We aim, for example, to protect public health and safety, promote economic prosperity, ensure national security. Law can of course serve these ends.

Both of these approaches make sense. We certainly should care about the consequences of our conduct, whether as individuals or communities. We want to know whether our legal rules are effective—whether or to what extent they accomplish their intended goals, have unintended consequences, and the like. I readily concede, therefore, that most legal scholarship will and should continue to address the pragmatic results of our legal rules and political institutions. I concede with equal readiness that what might be called normative or rights-based scholarship of various sorts is and should remain an essential component of legal scholarship—that we should remain attentive to the extent to which our rules and practices are or are not consistent with the principles for which we purport to stand. Obviously, what I have here described as two approaches to either individual or community life are in fact interrelated—facets of how we see and evaluate our world, rather than truly distinct ways of thinking. We evaluate the consequences of our conduct, for example, in light of principles of fairness and rights. But even taken together, the consequentialist and deontological approaches are incomplete. It seems to me that the third leg of the trivet is missing and, as a result, our thinking about law and politics is out of kilter.

The third leg is character. What is needed, I suggest, is a way of thinking and talking about law analogous to the way virtue ethics allows us to talk about individual life. Virtue ethics has ancient roots,<sup>7</sup> but is so old as to be almost new, and

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7. See generally PLATO, THE DIALOGUES OF PLATO (Edith Hamilton & Huntington Cairns eds., 1961) (see particularly *The Republic*, *Charmides* (on temperance), *Crito* (on justice), *Laches* (on courage), *Euthyphro* (on piety and justice),



has in fact experienced something of a revival.<sup>8</sup> This is not the place for a review of virtue ethics, ancient or modern, but the essential and crucial point is straightforward. Unlike deontological or consequentialist approaches, both of which emphasize ideas of duty and obligation—though specified in different and sometimes conflicting ways—virtue ethics focuses on human thriving. The aim is neither to describe or categorize various actions as right or wrong, nor to provide a set of rules against which actions can be so described or evaluated. Rather, the hope is to identify ways of being which will conduce to or even constitute human excellence and happiness. Described most broadly, and a broad description is more than sufficient for present purposes, virtue ethics asks us to think carefully about not just what we accomplish, and not just whether our actions are right or wrong, but also about what sort of people we are, and about what that can mean for the quality of our lives.

The word “virtue” in the term “virtue ethics” does not refer merely to general “goodness.” It refers instead to particular character traits thought worthy of respect or emulation. Virtues, on this account, are more specific traits like courage, wisdom, or temperance—particular ways of being to which we aspire, about which we dispute, and through which we define ourselves. Applied to an individual life, virtue ethics calls upon us each to ask ourselves a series of questions—questions like these: What traits do we find admirable? Why do we find particular traits worthy of respect or emulation? Is this merely a matter of individual preference, akin to one’s taste in music or fashion, or are there things we can say about why we might aspire to certain traits of character? If the latter, what traits do

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*Protagoras* (on virtue and how it is acquired), *Phaedo* (describing the execution of Socrates), and *Apology*); ARISTOTLE, *THE NICOMACHEAN ETHICS* (Sir David Ross trans., J.L. Ackrill & J.O. Urmson rev. eds., Oxford Univ. Press 1980) [hereinafter ARISTOTLE, *THE NICOMACHEAN ETHICS*]; ARISTOTLE, *POLITICS*, in *THE BASIC WORKS OF ARISTOTLE* 1131 (Richard McKeon ed., Random House 1941); ARISTOTLE, *EUDEMIAN ETHICS* (Michael Woods trans., Clarendon Press 1982); ARISTOTLE, *ON RHETORIC* (George A. Kennedy trans., Oxford Univ. Press 1991). For an excellent brief introduction to classical virtue ethics see RAYMOND J. DEVERETTE, *INTRODUCTION TO VIRTUE ETHICS*, (2002). In addition, an exploration of the thought of the Stoics, as described in various Greek and Roman sources, also would be useful reading.

8. See, e.g., *HOW SHOULD ONE LIVE?: ESSAYS ON THE VIRTUES* (Roger Crisp ed., 1998); *VIRTUE ETHICS* (Stephen L. Darwall ed., 2002); *VIRTUE ETHICS* (Roger Crisp & Michael Slote eds., 1997); *VIRTUE ETHICS: A CRITICAL READER* (Daniel Statman ed., 1997).

we want to find or construct in ourselves, and why? What ways of being and acting will allow us to lead the kind of lives that we will find both satisfying and worthy of respect? And, finally, what will it take to build or locate those traits in ourselves—to make ourselves the kind of people we can admire? I would encourage the law to provide a forum for us to ask the same sorts of questions of ourselves as a community. Put differently, I suggest that law can serve as a valuable and perhaps irreplaceable arena for the construction and articulation of community identity.

This essay thus relies upon the premise, central to any account of virtue ethics, that character matters and that talk of character does not merely beg the “real” consequentialist or normative questions. This is, I recognize, not self-evident. It is for that reason that I devoted an earlier essay to defending it. In *Law as Communitarian Virtue Ethics*, I argued that just as a reasonable individual ought to care about what sort of person he or she is, we as a community ought to care about what sort of people we are.<sup>9</sup> Again, I cannot repeat that entire argument here. All I can do is describe it, so as to make clear the form and nature of the argument made in this essay and, beyond that, direct still-skeptical readers to a fuller defense. With that caveat, I can say this much: the starting point—the basic assumption—is the same as that which grounded classical virtue ethics. Real human thriving, which I recognize to be an enormously rich and contestable concept, is best pursued by focusing not just on objective external circumstances or accomplishments, nor merely on fidelity to some set of moral precepts, but on one’s character as well.

It may seem as though one would need to define what I mean by “real human thriving” before proceeding with this application of the communitarian virtue ethics approach to the particular institution of direct democracy. That is not the case. I will of course have something to say about how this virtue of responsibility-taking might contribute to richer and fuller lives in those who cultivate it. For purposes of this essay, however, I need not rely on a strong claim about either the ultimate centrality of character for human thriving or the ultimate theoretical power of character-based thinking, either as applied to individuals or communities. All that needs to be granted for

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9. Clark, *Law as Communitarian Virtue Ethics*, *supra* note 5.

present purposes is this: if a particular legal or political practice were shown to lead us toward becoming a cruel or cowardly or ignorant people, we would want to be aware of that danger, perhaps even guard against it. We might still choose to continue the practice—if, for example, we were to decide that it is pragmatically necessary or normatively required. We might even decide we do not care if we are cruel or cowardly or ignorant, although I hope that would not be the case. At the very least, however, we should want to know what impact the practice might be having on who we are.

Consider an analogy. Suppose it were discovered that our voting booths were causing illness, perhaps because the booths had all been constructed of some carcinogenic material. We would in such a case want to think about whether there might be a better and safer way to allow people to vote. We would want to evaluate the risk, consider whether there are viable alternatives, and ask whether those alternatives might bring with them other, more severe risks. In the end, we might choose to continue with business as usual, but we would or should at least want to know if our current practices may be making us sick. That is the gist of my argument here. Plebiscite voting, I suggest, may be working an injury upon us—one arguably all the more severe because it is corrupting our character rather than merely our bodies—impacting not just how long we live, but how nobly.

## II. RESPONSIBILITY-TAKING

It is perhaps a good thing—albeit a rhetorical challenge—that the particular character trait I hope to address does not have a readily available name. This forces me to clarify substantively what I mean, rather than relying on a seeming understanding generated by a convenient label. I will use the term “responsibility-taking” as being perhaps as good as any other, but with the knowledge that the thing still very much needs to be defined. Only then can I get to the heart of the matter, which is an effort to defend the importance and even centrality of this particular trait of public character. I will argue that this is an essential and defining human trait, both in individuals and communities, and of particular importance and value in a democracy. But first, what is it? What in particular do I mean by responsibility-taking?

Begin with this tentative definition, or set of definitions. What I am describing and defending is the willingness, *ex poste*, to take responsibility for and acknowledge agency in what one has done. It is the willingness to face up to, stand behind, accept ownership in whatever it is that one finds necessary or prudent to do. It is primarily an internal virtue—one more of stance than action—though of course revealed through and influential on conduct.

It may be helpful to distinguish this use of the term “responsibility” from other ways in which the term is employed. Often we use the word “responsibility” to describe those things that one ought to do. This is what we mean when we say, for example, that a parent has a responsibility to care for his or her children. It is presumably a good thing to live up to one’s responsibilities in that sense. But that is not what I mean by responsibility-taking here. I mean rather one’s stance toward whatever it is that one does. Alternatively, we often use the word responsibility to refer to externally imposed consequences of or blame for an action. This is what we mean when we say that one is held responsible for a crime by being punished, or held responsible in tort by being found liable. This is obviously an important aspect of responsibility, and one of enduring philosophical and pragmatic interest. Moreover, the willingness to accept the externally-imposed consequences of one’s actions is presumably a good trait. But that is not the virtue I am describing here. I am talking about internal acknowledgment rather than externally imposed consequences.

Responsibility-taking, in this context, refers to the simple and in most cases unproblematic willingness to acknowledge—to oneself and to others—what one does, whatever one does. It is a sort of forthrightness akin to both courage and integrity, and opposed to evasion and buck-passing. I have suggested elsewhere that a deep if unspoken respect for this virtue pervades American culture and helps shed light on some aspects of high-profile American law, including the criminal jury trial and the Confrontation Clause of the Sixth Amendment.<sup>10</sup> Institu-

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10. See Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258 (2003) (arguing that the Confrontation Clause operates to require witnesses to stand behind and accept responsibility for accusations); Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381 (1999) (arguing that the criminal jury trial serves as a vehicle through which citizens not only assign criminal responsibility but also take turns shouldering a

tions of this sort allow and indeed require us to display and develop this virtue in particularly salient contexts when we act and exercise power on behalf of the community. If we are to accuse, as we do when acting as a witness against a criminal defendant, or judge, as we do when serving on a jury, the law in various ways requires or encourages us to confront, stand behind, and take responsibility for what we do. For example, the unanimity requirement, coupled with fact that criminal juries retain the ability (albeit arguably not the right) to nullify, create a situation where each juror feels, appropriately, that he or she has in fact been responsible for the conviction.<sup>11</sup>

Direct democracy, as I have argued elsewhere, threatens to undercut this virtue by facilitating and encouraging the exercise of power unaccompanied by this sense of felt responsibility.<sup>12</sup> In this essay I suggest that the plebiscites might be redeemed of this fault and ought perhaps to be structured in ways calculated similarly to fix a sense of responsibility.

### III. WHY A VIRTUE?

First, however, I ought to answer an essential and primary question—one which I have not adequately confronted in prior work on this theme: why? Why should we worry about redeeming or ennobling direct democracy in this way? Why, in particular, should we encourage those who exercise these forms of power to feel a sense of personal responsibility for what they do?

It is my main purpose in this essay to venture a tentative response to this question—the question of why we might want to encourage or cultivate this particular virtue. My suggestions on this point, however, will remain just that—tentative, and necessarily so. Virtue ethics, whether in the form of a Platonic dialogue or a law review essay, and whether addressed to individual or community life, does not conduce to conclusive proof. It is a way of framing, rather than resolving, questions of how one ought to live. It remains for each of us—individually and in community with others—to decide, having thought as well and fully as we can about the connections be-

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sense of felt responsibility for the imposition of criminal punishment) [hereinafter Clark, *Courage*].

11. Clark, *Courage*, *supra* note 10.

12. Clark, *Character of Direct Democracy*, *supra* note 6.

tween our character and the quality of our lives, what kind of people we want to be.

Moreover, this sort of conversation requires a language we have largely forgotten how to speak. What the ancient tradition of virtue ethics took as a central and essential way of talking about life—in terms of how various ways of being will help us thrive as people—is something we arguably no longer know how to talk about at all. If, therefore, we want to be able to see anew these old things, we may need to relearn how to talk in the old ways.

### A. *An Old Virtue*

Fortunately, even if our legal culture lacks ways of talking about character and human thriving, our larger culture does not. Our literature provides what our law has neglected, and while the virtue I am trying to describe may lack a convenient label, it does not lack deep roots. Once identified, the virtue of *ex poste* responsibility-taking appears as arguably central in many of the works through which we have striven to understand ourselves and our human condition, including the Old Testament, ancient Greek philosophy, and Shakespearian tragedy. Of course, this does not prove it to be a thing worth pursuing, let alone one which law should help us pursue. One looks to important and resonant literary works to limn rather than prove and, in this case, to suggest that this virtue is not merely an accidental artifact of American law or an idiosyncratic trait of American character, but seems rather to be deeply rooted in Western culture. The idea of responsibility-taking as an essential human virtue is as old as the underlying questions of who we are as people, and what kind of people we ought to be.

Begin with the Old Testament, Genesis in particular, here of course understood not primarily as a religious text, and not at all as an historical account, but rather as a foundational literary work—one of the central and abiding ways in which Western culture has attempted to define and describe the human condition. Adam and Eve were not cast from the Garden immediately upon eating the apple. First, there was the following exchange:

Hast thou eaten of the tree, whereof I commanded thee that thou shouldest not eat? / And the man said, The woman

whom thou gavest to be with me, she gave me of the tree, and I did eat. / And the Lord God said unto the woman, What is this that thou hast done? And the woman said, The serpent beguiled me, and I did eat.<sup>13</sup>

It was only then, after they had each pointed the finger elsewhere, that they were cast out. The final sin was the evasion—Adam pointing to Eve, Eve to the Serpent.

And recall what they were denying—eating the fruit of the Tree of Knowledge of good and evil. Whether or not that was the act that immediately gave rise to the banishment, it certainly was—or stands for—one of the things that makes us what we are. The story suggests that we as humans have above all asserted for ourselves the right to make moral judgments—to be our own gods, in that sense. I will leave it to theologians and philosophers to debate whether this ought to be understood as a lamentable separation from a brief but perfect grace, an inevitable consequence of our make-up, or even a fortunate Fall opening up the horizons of and for humanity. What we can say with some confidence is that the Genesis creation story can be read as saying something about how we see ourselves. We are the creatures who choose to know, and who above all choose to choose. We demand to be understood as not merely passive cogs in nature's wheel, but as creatures who choose and know, rather than merely feel and obey. It is arguably this, for better or worse, which makes us who we are—which makes us human.

And what does the Genesis account suggest comes with that? What is the cost of humanity? Responsibility-taking. If we claim for ourselves the right to choose and act, rather than merely obey and be acted upon, we must accept and acknowledge our agency in what we do. We want to be God-like in this way? We should bear the burden.

Shakespeare's Julius Caesar gives us a fully secular example in the person of Brutus. Contrast Brutus with, for example, Lady Macbeth. While she attempts to wash the blood from her hands,<sup>14</sup> Brutus parades with his bloody hands held high, acknowledging and accepting responsibility for what he has done. And how is he praised at the end of the play? According to

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13. *Genesis* 3:11–13 (King James Version).

14. WILLIAM SHAKESPEARE, *MACBETH*, act 5, sc. 1 ("Out, damned spot. Out, I say!").

Mark Antony: "Nature might stand up and say to all the world, 'This was a man!'"<sup>15</sup> And if that be thought faint praise, note that it is the very way Shakespeare has Hamlet praise the man he admired above all, his father, the elder Hamlet.<sup>16</sup> The question is what that means. What makes Brutus the very emblem of humanity?

The significance of this question is highlighted by the fact that Brutus is not portrayed as an altogether admirable character. In fact, his behavior does not stand up particularly well to scrutiny. He has bad judgment, for one, and in fact seems to have been wrong in every major decision he takes during the course of the play. Having decided to kill Caesar, it was probably a mistake not to follow Cassius' advice and kill Mark Antony as well.<sup>17</sup> Having failed to do that, it was probably a mistake to let Mark Antony address the citizens.<sup>18</sup> Brutus then again disregards Cassius' advice on when and where to fight Mark Antony.<sup>19</sup> And of course there is the murder itself, encompassing as it does both betrayal and brutality. Arguably, Brutus is in many ways both bad and foolish.

Yet he is in some inescapable way admirable. As the leading mid-century critic Harold Goddard observed, Brutus produces strong "antipodal opinions."<sup>20</sup> I suggest that the positive facet of this reaction may be explained in part by the fact that he stands so fully behind what he does—both publically and internally. He looks himself in the eye. Indeed, Brutus is Shakespeare's strongest pre-Hamlet exemplar of the self-reflection that comes to be seen as the heart of the human condition.<sup>21</sup> He sees himself, hears himself, and tries to speak honestly to and about himself.

In fact, Brutus can be heard to speak explicitly to the question at hand—that of how power ought to be accompanied by an acknowledgment of responsibility. In his soliloquy at the beginning of Act II, he considers the necessity of killing Caesar.<sup>22</sup>

15. WILLIAM SHAKESPEARE, *JULIUS CAESAR*, act 5, sc. 5.

16. WILLIAM SHAKESPEARE, *HAMLET*, act 1, sc. 2 ("[He] was a man, take him for all in all. . .").

17. WILLIAM SHAKESPEARE, *JULIUS CAESAR*, act 2, sc. 1.

18. *Id.*, act 3, sc. 1.

19. *Id.*, act 4, sc. 2.

20. HAROLD C. GODDARD, *THE MEANING OF SHAKESPEARE* 310 (1951).

21. See HAROLD BLOOM, *SHAKESPEARE: THE INVENTION OF THE HUMAN* (2nd ed. 1999).

22. WILLIAM SHAKESPEARE, *JULIUS CAESAR*, act 2, sc. 1.



As justification for the murder, the speech is only marginally persuasive at best. His central argument is that although Caesar has not yet abused his power, he might do so if crowned.<sup>23</sup> But Brutus says something else about power—something which is of uncertain application to Caesar and to the necessity of the killing, but which is arguably illuminating as to Brutus himself: “Th’ abuse of greatness is when it disjoins / Remorse from power . . . .”<sup>24</sup>

The primary meaning of the word “remorse” in Shakespeare’s time, and thus in Shakespeare, was “mercy,” or “compassion.”<sup>25</sup> Giving this meaning to the term, this passage is simply part of the larger argument that power corrupts, and that Caesar might act without compassion if permitted unlimited power. But “remorse” also has a backward-looking aspect.<sup>26</sup> It is what one feels—or ought to feel—after one has acted wrongly. Greatness—those who would hold themselves over others—ought, according to this view, not just do certain things. They ought also to feel the weight of what they have done. What if anything this adds to the justification for the killing is unclear, as we are not given evidence that Caesar lacks this trait. But it does tell us something about what Brutus thinks a truly great man—one who would not “abuse” greatness—should be and do. He should stand behind and acknowledge, to himself above all, what he has chosen to do—however well or poorly justified. He should, in this way at least, be like Brutus.

Indeed, the very weakness of the justification for the killing itself reinforces this reading. The soliloquy begins with an assertion that the killing is necessary: “It must be by his

23. *Id.*, act 2, sc. 1.

24. *Id.*

25. See, e.g., WILLIAM SHAKESPEARE, *THE FIRST PART OF HENRY THE SIXTH*, act 5, sc. 4; WILLIAM SHAKESPEARE, *THE SECOND PART OF HENRY THE SIXTH*, act 4, sc. 1; *id.* at act 4, sc. 7; *id.* at act 3, sc. 1; WILLIAM SHAKESPEARE, *KING JOHN*, act 2, sc. 1; *id.* at act IV, sc. 3; *id.* at act 4, sc. 3; WILLIAM SHAKESPEARE, *KING LEAR*, act 4, sc. 2; WILLIAM SHAKESPEARE, *MACBETH*, act I, sc. 5; WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 2, sc. 2; *id.* at act 5, sc. 1; WILLIAM SHAKESPEARE, *MERCHANT OF VENICE*, act 4, sc. 1; WILLIAM SHAKESPEARE, *OTHELLO*, act 3, sc. 3; WILLIAM SHAKESPEARE, *RICHARD III*, act 1, sc. 4; *id.* at act 3, sc. 7; *id.* at act 4, sc. 3; WILLIAM SHAKESPEARE, *TEMPEST*, act 5, sc. 1.

26. That this aspect was at least latent even in Shakespeare’s time is evidenced by the Middle English, French, and ultimately Latin roots of the word remorse. Origin: 1325–75; ME < MF *remors* < ML *remorsus*, equiv. to L *remord(ere)* to bite again, vex, nag (re- + *mordere* to bite). See *THE NEW OXFORD AMERICAN DICTIONARY* 1433 (Erin McKean ed., 2nd ed. 2005).

death.”<sup>27</sup> But the hedged and awkward nature of the actual argument belies that “must.” It is evidently a justification, rather than a claim of true necessity or inevitability; and Brutus knows it. He is denying himself, on this reading, the false and base comfort of claiming, even to himself, that he has no choice. If he does this thing, he will bear its weight.

He is in this sense, just as described by Mark Antony at the end of the play, truly a man.<sup>28</sup> Indeed, had the term not been co-opted, and were it not so inherently freighted with gendered meanings, I would almost adopt the term “manliness” to describe the virtue of responsibility-taking.<sup>29</sup> Perhaps “humanliness” would be a better label, albeit too clever by half. The point is that this is not just a good trait, but arguably a defining human one.

But is it desirable? Granted that responsibility-taking has been seen as somehow core to our humanity, why should we continue to see it that way? Perhaps what I have described as deep roots are more like archeological relics. Why, as a normative matter, should we care about whether people are inclined to this *ex post* awareness of responsibility or felt agency—as opposed to the forward-looking meaning of responsibility, which is understood as doing what one ought, or the externally imposed meaning of responsibility, which is understood as being held accountable by others? Why is this trait—the after-the-fact internal acknowledgment of agency and responsibility—a virtue?

### B. A Democratic Virtue

In *Hamlet*, when the players come to Elsinore, Hamlet instructs Polonius to attend to them. Polonius responds that he will “use them according to their desert.” Hamlet’s response is illuminating: “God’s bodykins, man, better: use every man after his desert and who should scape whipping? Use them after your own honour and dignity: the less they deserve, the more merit is in your bounty.”<sup>30</sup>

The way we treat others says much about us. And this is especially true where we have power over others. Each time

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27. WILLIAM SHAKESPEARE, *JULIUS CAESAR*, act 2, sc. 1.

28. *Id.*, act 5, sc. 5.

29. See, e.g., HARVEY MANSFIELD, *MANLINESS* (2006).

30. WILLIAM SHAKESPEARE, *HAMLET*, act 2, sc. 2.

we exercise power or authority over others, whether legitimately or otherwise, we are presented with the opportunity, indeed the necessity, to define ourselves. How so? How and why are exercises of power arguably constitutive of character?

First of all, if we aspire to virtues we must first practice them. This is one of the essential Aristotelean insights. Virtues—character traits—are in this sense moral habits. They are developed as well as revealed as much through repeated conduct as scholarly contemplation.<sup>31</sup> If we hope to be and understand ourselves as kind, or generous or fair, we need to find opportunities to behave in those ways. More to the point, we need to find and seize opportunities to choose to behave in those ways. Exercises of power present such opportunities because they are occasions on which we could, if we chose, behave otherwise. It would not demonstrate, and thus would not likely help constitute, kindness or generosity to avoid cruelty or selfishness only when forced to do so. We could, in dealing with those over whom we have power, choose to be cruel, or selfish. And that possibility gives weight to the actions we do take.

Second, the way we exercise power defines us because exercising power over others is or ought to be always troubling—not necessarily unjustified, but calling for justification, explanation, and reflection. This is a central and enduring question of political theory. By what right does one person impose his or her will on another? My aim here is not to canvas various political-theoretical accounts of how and why the exercise of power over others is potentially problematic, or how and to what extent power can or has been justified. Assume a given use of power is fully justified, correct, even necessary. It remains troubling, or it should. Exercising power over others is akin to judging others, in that sense. We need to do it, but we should not be too comfortable with it. And how we face a troubling albeit necessary task of that sort says a great deal about who we are. Those are the crucibles in which central aspects of our character are formed.

It might appear that the virtue thus described, particularly as highlighted and demonstrated through exercises of power, is one ill-suited to democratic times and democratic thinking. Is responsibility-taking merely a form of noblesse oblige, perhaps,

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31. ARISTOTLE, THE NICOMACHEAN ETHICS, *supra* note 7, at bk. I, lines 1103a30–35.

which should have little appeal to an egalitarian democratic community? It is not. In fact, I would suggest that this virtue is particularly salient, and particularly at risk, in a democracy.

Recall what it was that Brutus took responsibility for. He killed Caesar. And why? In an effort, albeit perhaps misguided and incompletely justified, to protect democracy. This link between responsibility-taking and democracy is a meaningful one, I think, because democracy is, at bottom, the exercise of power, directly or indirectly, by each over all. It might be claimed that direct democracy is the one form of decision-making that is not problematic in the ways adverted to above. Is not direct democracy the only form of political decision-making in which no one is exercising power over others? Is it not a system which resolves the political-theoretical legitimacy dilemma by having people make decisions for themselves? No. It is not.

Assume that direct democracy is the best possible form of government. Assume it is fully justified and does in fact represent the best possible answer to the problems posed by democratic political theory. I would and have contested both propositions,<sup>32</sup> but take them here as given. Assuming that direct democracy is theoretically and pragmatically unobjectionable, even ideal; it still represents exercises of power, albeit on this account wise and legitimate uses of power. In fact, far from being a system in which no one exercises power over others, they represent a system in which every voter tries to exercise power over others.

When you cast a plebiscite vote, you are not merely expressing your preference. You are asking that your preference be made law. You are asking that the coercive force of the state be put behind what you desire. Again, this may be the most legitimate and justified possible exercise of power. But it is an effort to exert power.

Now, ask yourself what you would ask or demand of someone who would exercise power over you. It may clarify the point to imagine you were governed by a king. What would you hope and ask of him as he made decisions affecting his people? Substantively, you would expect and hope for him to make decisions in the best interest of his people. But beyond that you would expect him to stand behind what he did. You would

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32. See, e.g., Clark, *A Populist Critique*, *supra* note 3.

hope and expect that a person who would claim to rule a people would be willing to stand behind his actions. If democracy is the kingship of the common man, then we ought to require the common man to behave to this extent royally.

Democracy does not eliminate the exercise of power, but it does diffuse power, which in and of itself may be a good thing. The difficulty is that democracy also tends to diffuse felt responsibility. I distinguish here internal responsibility-taking of the sort I am emphasizing, from external accountability as often discussed in legal and political theory. Democracy, and direct democracy in particular, does diffuse or render more difficult external political accountability. But my focus here is on the extent to which diffuse decision-making makes it less likely that individuals feel and reflect upon their own agency in the exercise of power.

If, therefore, we believe that those who would wield power and authority ought to stand behind what they do, the virtue of responsibility ought to be more strongly emphasized in a democracy than elsewhere. We do not in general allow people to accuse in court anonymously or from behind a screen, but rather we require them to confront those they would accuse. We do not allow people to serve on juries anonymously—to judge without opening themselves up to judgment. In both cases, exceptions can be made where the need is great, as in the case of child witnesses in court, or jurors who face threats of retaliation; but in general we do not permit citizens to hide their faces when they accuse or judge. Nor, perhaps, should we—without some compelling showing of necessity—allow people to hide behind a curtain when they attempt what is in some sense the fullest and boldest exercise of power—that of making law.

### *C. A Human Virtue*

So far I have argued that responsibility-taking can be conceived of as an obligation which follows and accompanies the exercise of power, and is thus particularly salient in a system where the exercise of power is widespread. But it is perhaps more helpful to think in terms of opportunities, rather than obligations. Virtues, in the classical conception, are not things imposed upon us—things we ought to do to conform to some set of norms or earn some reward in this life or the next. They are,

instead, things we ought to want to do—ways we ought to want to be—because they are the vehicles through which we can thrive as human beings.

Classical virtue ethics was avowedly naturalist in this way—so much so that the best analogy is to medicine, or physical health. If we eat well, exercise, and avoid smoking, we are likely to have healthier and more admirable bodies. Virtue ethics suggests that if we are courageous, wise, temperate, and the like, we can expect to have healthier and more admirable souls. On the classical account, this is not because some external force will reward us for doing the right thing, but because that is the way we are constructed. So, just as doctors argue about what sorts of conduct will lead to physical well-being, classical philosophy argued about what sorts of moral and ethical habits will lead to spiritual well-being, human thriving, and eudemonia.<sup>33</sup>

In this light, the key question about responsibility-taking is not whether or why it should be considered an obligation, but rather how and why developing that virtue might help us thrive.

The short answer is that the ability to act anonymously, invisibly, is ultimately and inevitably corrupting. I cannot prove this to be the case. This sort of argument—an inquiry into the nature and roots of human thriving—proceeds by illustration rather than demonstration, seeks resonance rather than proof, and culminates, when successful, with an “amen” rather than a QED. I cannot prove that exercising political power from behind a screen debases us. All we can do is suggest the ways in which that may be the case. From there, the inquiry is, or ought to be, ongoing. How do our political and legal processes influence the sort of a people we are? And, more fundamentally, what sort of a people do we want to be?

So, how might power without felt responsibility make us lesser people? First, those who can act without accountability may be tempted to act poorly or unjustly. This is an ancient

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33. Eudemonia is the Greek term which is sometimes translated as “happiness” but which encompassed much more than the good feeling or positive affect. A better translation might be “lasting and legitimate and praiseworthy well-being.” The crucial point is that virtue ethics neither assumes nor depends upon there being an agreed-upon or uncontroversial definition of well-being. One of the things medical professionals argue about is how we ought to measure and define physical health. Much more so does virtue ethics require, and encompass, a set of arguments about how we should define spiritual health.

insight. It is, for example, the point made by the parable of the Lydian Shepard related by Glaucon to Socrates at the beginning of Book Two of Plato's *Republic*.<sup>34</sup> The Shepard finds a ring which renders him invisible, and, realizing he can get away with nearly anything, soon gives in to the temptation to do just that. Glaucon, challenging Socrates' claims on behalf of justice, opines that most men, provided with such a ring, would end up behaving similarly.<sup>35</sup>

But the deeper potential corruption is internal. It is not simply that the ability to act invisibly may make you behave less well, but that it might lead you to become less of a person. This is the point of a more recent and perhaps more well-known literary ring of invisibility—that described by Tolkien in the popular *Lord of the Rings* Trilogy.<sup>36</sup> According to the story, the ring at the center of Tolkien's epic does not just make people invisible (and blur their vision), and thus open them up to temptation. It corrupts them internally. How it works this effect is never quite explained. Perhaps it is meant to be understood as a consequence of the ring's origin in evil. Or perhaps it requires no explanation. Perhaps the ability to act without being seen—and without seeing oneself—is itself the agent of internal corruption.

How so? How might exercising power anonymously produce not merely less admirable conduct but ultimately less admirable people? It is not merely that the former causes the latter—that a habit of acting poorly can entrench undesirable traits. That may be true, but would not provide grounds to object to the occasional opportunity to exercise anonymous power afforded by direct democracy. Rather, I think the deeper prob-

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34. PLATO, *THE REPUBLIC* lines 359c–360b (R.E. Allen trans., Yale Univ. Press 2006).

35. *Id.* at 41.

36. J.R.R. TOLKIEIN, *THE LORD OF THE RINGS* (HarperCollins Publishers 2002)(1954, 1955). It may seem strange to reference Tolkein in the same manner as Plato, Genesis, or Shakespeare; but it should not, and in fact helps highlight my purpose in looking to literary works. We are trying to think about the consequences of our legal and political practices for the character of our community. We find that our legal and political culture does not have much to tell us explicitly about the kind of people we are or might become. So we look to our literature. And the authority of what we find there—our reason for believing these works to contain insights rather than mere idiosyncratic opinions—is not primarily that we credit the authority or wisdom of the authors *per se*—although we may. The key is rather that we recognize and credit the deep resonance of the works. We believe they may have something to say to us about humanity because they have spoken so well to so many people.

lem is that it severs the connection—or at least reduces our awareness of the connection—between what we do and who we are. It encourages us to believe that the right to do a thing implies the right to be free from the consequences—both internal and external—of what we do.

According to Plato, Socrates, in his defense or “apology” against the charge of corrupting the youth, told the Athens Jury that “the unexamined life is not worth living.”<sup>37</sup> Aristotle made explicit why that is the case. What makes life worth living and fulfilling, what brings eudemonia, is character—becoming a certain kind of person.<sup>38</sup> And what builds and constitutes character is a complex and ongoing interaction between attitude and action, between the internal and the external. What we do reveals and in turn constructs who we are. Nor are these internal consequences mere secondary side effects of conduct, as if what really mattered were the normative status or costs and benefits of what we do. No. Character matters; and the relationship between conduct and character is one of the main reasons it matters so very much what we do. We examine ourselves and our lives not merely, or even primarily, by reflecting upon our abstract principles. What we must examine—what we must confront and learn from—is our conduct. But our actions cannot help us become who we might become if we do not acknowledge them as our own.

It is in this sense that the virtue of responsibility-taking is not just a good way to be, but an essential and essentially human way. This virtue is the link between conduct and self-examination, and thus the key to the whole range of virtues. Whatever sorts of people we hope to be—whatever traits of character we hope to find and develop in ourselves—the process begins with the ability to see ourselves. And if Aristotle is right that we both reveal and construct ourselves through our actions,<sup>39</sup> this means we must above all learn to see ourselves in what we do.

Secret exercises of power undercut this habit of mind, this ethical stance, of internal responsibility-taking. It might be compared to the way people violently act in a mob, when they can lose their sense of personal responsibility for what they

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37. PLATO, APOLOGY OF SOCRATES line 38a (Michael C. Stokes ed. & trans., 1997).

38. See ARISTOTLE, THE NICOMACHEAN ETHICS, *supra* note 7.

39. *Id.*



participate in doing. In fact, while the anonymous exercise of power through plebiscite voting is often less externally harmful than mob violence, it is in some sense more ignoble, because it lacks the mitigation of passion. It represents the cold decision to try, with the aid of the like-minded, to impose your will on others, backed by the force of the state, while you hide your face and refuse to acknowledge your role in what you do.

One problem with this way of exercising power is that it can encourage ignoble decision-making. As I have argued elsewhere, for example, in the particular context of direct democracy, outcomes often amount to the breaching of important political compromises.<sup>40</sup> Ballot issues address issues one at a time in isolation, which disguises the way in which electoral and representative processes may reflect the fact that some issues are more vital to some voters than others. Minority interests with particularly strong needs or desires have inevitably "traded away" other issues in order to secure at least a few of those outcomes about which they care the most. Those in the majority, having already secured much of what they want through the representative process, then proceed through an initiative to take back the few crumbs they had been forced to toss to the minority.<sup>41</sup>

Voters do not see it this way, of course. They do not see what they are doing because the process does not force them to look at or acknowledge what they do. As a result, even voters who by inclination would like to behave responsibly or altruistically are guided by the process to focus narrowly on their own immediate preferences. The interconnectedness of issues, the continuity of decision-making over time, and the mutual obligations between citizens (express or implied) are necessarily downplayed in a context where one is encouraged above all to tell us what he or she wants, on this issue, right now.

Again, however, my central claim is not that secret plebiscite voting leads necessarily to selfish voting or promise breaking. The narrow and selfish voting and the de facto betrayals of compromises are symptoms, rather than the problem itself. More essential is that they illuminate a forgone opportunity. Voting on important issues could be a chance to articulate and construct who we are as a community. Are we, for example,

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40. Sherman Clark, *A Populist Critique*, *supra* note 3, at 456-63.

41. *Id.*

people who do or do not stick by our deals and compromises? It is difficult to do this, however—to use our actions as ways of learning about and developing our character—unless we first develop and cultivate the habit, the virtue, of seeing ourselves in what we do. Direct democracy, by encouraging us to exercise power without acknowledging responsibility, encourages us as well to hide, in these potentially defining moments, from what we do.

And the irony is that we seem to consider it noble—we call it “political participation” and pat ourselves on the back for our “strong democracy” or our “civic maturation.”<sup>42</sup> So far are we from Brutus that we, unlike Lady Macbeth, do not even try to wash our hands of what we do. We simply avoid looking at it.

#### IV. OPEN VOTING IN PLEBISCITES

One way to remedy the potentially corrupting force of plebiscite voting—to ennoble direct democracy—would be to provide for some form of open voting. This could take any of several forms, but would basically entail the creation of some sort of list on which people’s ballot issue votes would be registered and available for public view. The New England town meeting so often seen as precedent for—or at least an honored ancestor of—modern direct democracy did not provide for anonymous voting. People knew each other, and knew each other’s votes. Perhaps it is time to consider a return to that tradition.

Twenty-seven states now permit the initiative and/or the popular referendum,<sup>43</sup> all through secret ballot. And any re-

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42. See, e.g., BENJAMIN BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (2nd ed. 2003); Alan Hirsch, *Direct Democracy and Civic Maturation*, 29 *HASTINGS CONST. L.Q.* 185 (2002).

43. Those states are: Alaska, Arizona, Arkansas, California, Colorado, Florida (initiative Constitutional amendments only), Idaho, Illinois (initiative only), Kentucky (referendum only), Maine, Maryland (referendum only), Massachusetts, Michigan, Mississippi (initiative Constitutional amendments only), Missouri, Montana, Nebraska, Nevada, New Mexico (referendum only), North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, Wyoming. See Initiative and Referendum Institute at The University of Southern California, [http://www.iandrinstitute.org/statewide\\_i&r.htm](http://www.iandrinstitute.org/statewide_i&r.htm) (last visited Oct. 10, 2007). Initiative provisions are those through which citizens can propose the legislation on which they will vote. The term “popular referendum” refers to provisions through which citizens can refer to themselves, as it were, by gathering signatures on a petition, legislation passed by their legislature and then approve or disapprove that legislation. This is to be distinguished from the legislative referendum, theo-

form providing open plebiscite voting in any of these states would need to come through state constitutional amendment.<sup>44</sup> This is certainly true in those states whose constitutions provide explicitly for anonymous voting.<sup>45</sup> Moreover, even if state constitutions were not interpreted to preclude the identification of voters, constitutional amendment would still be required in order to effect this change in the initiative and referendum processes, because those processes are themselves in all cases contained in state constitution. What this means is that any provision for non-anonymous popular voting would need to be approved by an anonymous popular vote, because in all states constitutional amendments require some form of popular approval.<sup>46</sup> So, my proposal in fact amounts more to a request—a request directed at the citizens of those states which employ and pride themselves on direct democracy. If you demand the right and claim ability to rule, demand and claim for yourself the courage to stand behind your rules.

Viva voce voting in the tradition of the town meeting would obviously be impracticable, but some analogous process could no doubt be generated. The technological details aside, the primary feature would be the availability, some time after the election, of an electronic list, on which names and votes were recorded and available for inspection. In this way each voter would be required not just to cast but to record his or her vote, and to that extent stand behind his or her attempt to exercise political power. Alternatively, voters might be given an option, whereby they could choose whether to acknowledge their vote. This would at least give each of us the opportunity to stand behind what we do.

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retically possible in all states, through which the legislature can choose to refer matters to a popular vote.

44. The United States Constitution nowhere mentions the secret ballot, and the Supreme Court has never held that it is constitutionally mandated.

45. *See, e.g.*, IDAHO CONST. art. VI, § 1 (“All elections by the people must be by ballot. An absolutely secret ballot is hereby guaranteed, and it shall be the duty of the legislature to enact such laws as shall carry this section into effect.”); WASH. CONST. art. VI, § 6 (“All elections shall be by ballot. The legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot.”)

46. *See, e.g.*, MICH. CONST. art. XII, §§ 1, 2 (state constitutional amendments may be proposed by either the legislature (2/3 of both houses) or through the initiative petition process, but in either case must be approved by a majority of the electorate); COLO. CONST. art 23, §3.

I ought again to distinguish my argument from one which has traditionally been made in favor of open voting in various contexts—that it will be conducive to better decision-making. John Stuart Mill, for example, famously argued that people are less likely to cast selfish votes if they must do so publicly.<sup>47</sup> Much more recently, it has been suggested that minorities might benefit from open voting, given people's apparent willingness to vent prejudices more freely behind the curtain than in public.<sup>48</sup> These may be valid points, but they are not essential to my argument.

Nor is it my claim that plebiscite voting should be open so that we can in some way hold voters externally accountable for their decisions. This lack of external accountability has been well-described by Daniel Rodriguez, who accurately diagnoses the "fundamental problem" as follows:

[I]nitiative lawmaking lacks a key mechanism that enables voters to monitor the individual decisions of their fellow citizens. The secret ballot is sacrosanct in the initiative, as it is in the elective process. . . . This anonymity limits completely the ability of interested individuals and groups to hold voters accountable for their particular choices. While we can scold the electorate writ large for their manifest aggregate preferences, we cannot discipline individual citizens for their votes. This breaks the accountability link that would otherwise function as a consideration in the voters' decision making. As described above, decisionmaking transparency and elections are mechanisms by which voters can hold their representatives accountable. With the anonymity intrinsic to initiative voting, we lack even the mechanism to hold voters accountable for their choices.<sup>49</sup>

My concern is similar, except that Rodriguez, like most who use the term "accountability," appears to argue that it matters primarily because it provides a vehicle through which votes might be influenced or policed by others. I have tried to suggest that telling others how one votes is important because

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47. JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT*, in JOHN STUART MILL, *ON LIBERTY AND OTHER ESSAYS* 353, 362 (Oxford Univ. Press 1998) ("[I]s there not some check to the unprincipled voter in the shame of looking an honest man in the face?").

48. Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT. L. REV. 707, 734 (1992).

49. Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 669 (2001) (citation omitted).

it provides a way of bringing home to oneself what one has done. The others who might criticize or object to our votes are mirrors through which we are forced to see ourselves and our actions.

There would be risks attached to open plebiscite voting. In particular, it might open up the possibility of vote buying or coercion. These were, after all, the very real problems that gave rise to the secret ballot a century ago. These risks would need to be evaluated and considered. Under present circumstances, are they greater than the risks of coercion in the context of juries, for example, where we, in general, do not permit anonymity? In thinking about these risks, moreover, it is important to distinguish pragmatic necessity from normative appeal. We may conclude that anonymous voting on ballot issues is necessary, but that alone does not mean we have to like it.

The secret ballot emerged in the United States at the same time as did direct democracy, at the dawn of the twentieth century, as part of the Progressive movement. Prior to the introduction of the secret ballot (then referred to as the "Australian Ballot" because it had been developed and used in Australia), intimidation and bribery of voters was widespread and difficult to control. Wigmore, a contemporary, observed that the purpose of a secret vote is to counteract a "great class of evils, including violence and intimidation, improper influence, dictation by employers or organizations, the fear of ridicule and dislike, or of social or commercial injury, coercive influence of every sort depending on a knowledge of the voter's political action," and to ensure that votes represent the "free and honest expression of the convictions of every citizen."<sup>50</sup> The modern system of official ballots combined with private voting booths proved remarkably effective in checking these abuses.<sup>51</sup>

This history should be kept in mind when we are tempted to elevate secret voting, *per se*, as normatively appealing. For example, one popular secondary source opines that "[p]rivacy in casting one's ballot is a sacred rule of law."<sup>52</sup> No, it is not—at least not if by that we are to understand that the rule itself has

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50. JOHN HENRY WIGMORE, *THE AUSTRALIAN BALLOT SYSTEM AS EMBODIED IN THE LEGISLATION OF VARIOUS COUNTRIES* 52 (2d ed. 1889).

51. The history of the secret ballot, and the abuses that gave rise to the need for it, were well described by the United States Supreme Court in *Burson v. Freeman*, 504 U.S. 191, 199–205 (1992) (upholding Tennessee statute protecting 100 foot "campaign free" zone around polling places).

52. 29 C.J.S. Elections § 322 (2006).

some normative force. It is a well-established and arguably important rule of law, but one which emerged as a pragmatic necessity, rather than due to anything “sacred” about having the ability to exercise political power without any form of accountability.

Consider the minor uproar which ensued a decade ago when Senator Grassley asked federal district court nominee Margaret Morrow how she had voted on California initiatives. The exchange and subsequent reaction was described in a contemporary article:

Senator Charles Grassley (R-Iowa) had asked Morrow whether there are “any initiatives in California in the last decade which you have supported? If so, why?” and “Are there any initiatives in California in the last decade you have opposed. If so, why?” There had been 160 initiatives in the previous decade, and the request was later reduced to the ten most publicized initiatives, but, as the San Francisco Chronicle editorialized: “Something is terribly amiss when Senators—under the pretense of protecting the Constitution—are demanding to know how would-be federal judges are voting beyond the curtain in a secret ballot.” When questioned on the propriety of this request, Senator Grassley said, “The people have a right to know whether we are going to confront another judge who may attempt to overturn another initiative that a majority of people voted for.”

In the floor debate on Ms. Morrow’s nomination, Senator Barbara Boxer (D-California) said: “I also want my colleagues to understand that the Senator from Iowa asked Ms. Morrow in an unprecedented request which, frankly, had Senators on both sides in an uproar, to answer the question how she personally voted on 10 years’ worth of California initiatives. It was astounding. I remember going over to my friend . . . and I said, “Senator, I can’t imagine how you would expect someone to remember how they voted on 160 ballot measures,” some of which had to do with parks, some of which had to do with building railroads, some of which had to do with school bond measures. And besides, I always thought . . . we had a secret ballot in this country; it is one of the things we pride ourselves on.”<sup>53</sup>

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53. Stephan O. Kline, *The Topsy-Turvy World of Judicial Confirmations*, 103 DICK. L. REV. 247, 336–37 (1999) (citing Confirmation Hearings of Federal Ap-

Part of the objection to the question was that it was unfair and onerous, given the large number of initiatives that had taken place in the relevant years. But the reaction of both the San Francisco Chronicle and Senator Boxer also reflect a sense that the question itself—even when amended to ask about just ten specific initiatives—was somehow improper. The suggestion is that the space “behind the curtain in a secret ballot” is somehow a private sphere which should not be subject to public scrutiny. The tone is the same one would expect to hear if a nominee or political candidate were asked about his or her sexual proclivities or personal religious convictions. Such inquiries into private life are only appropriate, many would argue, if there is reason to believe those matters will influence the way a judge or candidate will perform his or her public function—how he or she will exercise political power.

The underlying premise behind the objection to intrusive inquiries into the personal life of a judicial nominee or political candidate is that you should have a right to do and believe—and not be required to explain—whatever you like in your private life, so long as you are not harming others or imposing your views on others.

But plebiscite voting does not fit this model at all. It is not a private function akin to sexual habits or inner religious belief. It is, on the contrary, a paradigmatic public function. It is the exercise of political power—coercive public authority. We allow it to remain secret—if we choose to do so—because it we aim to protect against coercion or corruption, not because we lack the grounds for making you acknowledge your “private” vote. It is not a private act but a public one. And with all due respect to Senator Boxer, voting in secret should not be seen as something “we pride ourselves on.”<sup>54</sup> It may be something we need to allow ourselves to do, but, as I have tried to argue above, attempting to coerce others from behind a curtain is not something of which one should be at all proud.

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pointments: Hearings Before the Comm. on the Judiciary, Part 1, 105th Cong. 245 (1997) (written questions from Senator Grassley)); Editorial, *Judging the U.S. Judges*, S.F. CHRON., Oct. 5, 1997, at 18; Robert Shogan, *GOP, Clinton Now Fighting Over Federal-Judge 'Crisis'*, THE IDAHO STATESMAN, May 16, 1997, at A4; 144 Cong. Rec. S656–657 (daily ed. Feb. 11, 1998) (statement of Senator Boxer).

54. 144 Cong. Rec. S656–657 (daily ed. Feb. 11, 1998) (statement of Senator Boxer).