

# Vengeance and Virtue in Contemporary Criminal Justice

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This work analyzes changes to criminal procedure that express calls for revenge. It specifically addresses the role of the victims' rights movement in supporting changes to the rules of evidence, and especially the rules concerning character evidence. Recent changes have relaxed the prohibition on character evidence and have increased the importance of judicial discretion. Against recent calls to restrict discretion by reinstating a form of legalism, this work argues that reinstituting rules is unlikely in light of the strong influence of the victims' rights movement. As such, attention must be placed on improving the exercise of discretion by trial judges.

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## *List of Cases*

*People v. Ewoldt*, 867 P. 2d 757 (Cal. 1994).

*People v. Scott*, 39 Cal. Rptr. 58 (Cal. Ct. App. 1987).

*Taylor v. Louisiana*, 419 U.S. 522 (1975).

The victims' rights movement has played a transformative role in the development of the American legal system over the past two decades. As a result of victims' rights advocacy, the procedural rules surrounding the punishment phase of criminal trials – especially those where the death penalty is an option – have been transformed so that the families of crime victims currently enjoy a larger role in influencing sentencing outcomes through the use of victim impact statements. Moreover, the victims' rights movement has led to substantive changes to criminal law, including the adoption of victim restitution acts, the creation of new forms of self-defense claims for victims of domestic violence, and the development of new forms of punishment such as community notification of sexual offenders.<sup>1</sup> In light of these changes, a growing number of legal scholars have perceived an

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1. For an especially interesting treatment of the issue of restitution in criminal law, see Sara Managuh's, 'The Vengeful Logic of Modern Criminal Restitution', her contribution to this volume.

erosion of important legal restraints on state power precipitated by a growing validation of vengefulness in American criminal justice.

While much of the scholarly criticism of the victims' rights movement has understandably focused on substantive criminal law and sentencing, the concern for crime victims has also unsettled other areas of law. Specifically, it has deeply impacted the law of evidence in the guilt phase of the criminal trial. Over the last two decades, the guilt phase of the trial has seen a reduction in the evidentiary rules that protect defendants from being convicted on the basis of unfair and overly prejudicial evidence. This is especially so in the rules surrounding the jury's acquisition of information pertaining to a defendant's "character" as demonstrated in the defendant's past illegal activities. This kind of evidence was historically proscribed by a general rule: juries, for the most part, could not learn of a defendant's past bad acts. As a consequence in large measure of the victims' rights movement, however, these protections have been watered down from general rules of exclusion to protections that depend on the exercise of a vaguely structured judicial discretion to include or exclude evidence.<sup>2</sup>

In response to the risk that this development poses to the criminal justice system several scholars have sought to reassert a form of legalism. Given the potential abuses of judicial discretion, a return to legalism may appear warranted. However this article argues that legalism is not the appropriate way of responding to these changes ushered in by victims' rights advocates. Instead, given the strong development of the victims' rights movement and its menacing crystallization of vengeance in American law, reform should focus on improving the exercise of judicial discretion. What is necessary in light of this dangerous though less well known re-emergence of revenge in criminal law is a strong commitment to re-conceptualizing the tasks of judging.

Instead of a retreat to legalism, this article argues that we need to improve judges' exercise of discretion. In the first section I describe briefly how the victims' rights movement has been a force for subverting traditional principles of evidence law. In section two I indicate how this less thoroughly explored change has harmed the American legal system. In section three I argue that a return to legalism in light of this development is unlikely to bear appreciable fruit. In section four I then advance the outlines of a possible way out of this dilemma. I explore what I call the groundwork for an aretaic turn in contemporary criminal justice grounded on the writings on personal excellence and virtue advanced by Hannah Arendt, George Kateb, and Walt Whitman. Embracing the sense of self to be found in these thinkers and developing a fuller sense of judicial virtue in light of their thought can constitute a first step in developing an aretaic response to the changes

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2. Other examples of how the victims' rights movement has altered evidence law include changes to the rules of hearsay. See Eleanor Swift, 'One Hundred Years of Evidence Law Reform: Thayer's Triumph', *California Law Review* 88 (2000), arguing that judges have developed growing discretion in the application of hearsay principles, and that this has grown especially in terms of admitting statements from crime victims, and especially child victims.

wrought by the re-emergence of revenge in modern criminal justice. Finally, in section five, I show how several attempts to inculcate an ethic of judicial discretion offer hope that such a goal is practically achievable as well as theoretically desirable.

## I. The Victims' Rights Movement and the Transformation of the Modern Law of Evidence

The victims' rights movement has been a major force in bringing about a quiet revolution in the law of evidence. Roger Park, an expert in evidence law, argues that a concern for victims has been a "key substantive influence . . . on recent evidence law changes."<sup>3</sup> Indeed, the changes in evidence law traceable, at least in part, to the victims' rights movement are so extreme that the procedural core of the modern trial itself is being altered.

One especially important example of the victims' rights movement's influence on the law of evidence can be seen in the law surrounding the admissibility of "prior act evidence" in the guilt phase of criminal trials. Evidence of prior bad acts has traditionally been excluded from trials because it tends to show the defendant as a bad person and thus prone to bad acts. The concern is that a reputation for past wrongs could prejudice the jury, making it more likely to convict not on grounds of evidence relating to the specific offense named in the indictment as seen in a properly impartial light, but rather on grounds that the defendant is simply "no good." Thinking that the defendant is a bad person can lead a jury to think that the defendant must prove his own innocence, or it can lead the jury to construe evidence unfavorably against the defendant. Some jurors may even think that a defendant who has acted wrongly in the past deserves punishment now whether or not he is guilty of the specific offense. The practice of barring evidence of prior bad acts has been a deep-seated rule of American evidence law, and exceptions to this principle have traditionally only been made on the basis of clear rules that required that the proof be offered for a reason other than to show that the defendant is a bad person and thus has criminal propensities. This system of exclusionary rules, however, has recently been changed in many respects. The federal laws of evidence and the evidence laws in various states have been modified in ways that erode the strict and rulelike character of the proscription on prior misconduct evidence.<sup>4</sup> These

3. Roger C. Park, 'An Outsider's View of Common Law Evidence' (review of *Evidence Law Adrift* by Mirjian Dama), *Michigan Law Review* 96 (May 1998), p. 1494. Scholars who have also noted the connection between the victims' rights movement and evidence law changes include Eleanor Swift, 'Does It Matter Who Is in Charge of Evidence Law?', *Loyola Los Angeles Law Review* 25 (1992), pp. 657–660.

4. See William J. Robinson, 'Go West Florida! Adopt Recent Federal Exceptions to Inadmissible Character Evidence', *Stetson Law Review* 29 (spring 2000), pp. 1388–1389. See also Sherry L. Scott, 'Fairness to the Victim: Federal Rules of Evidence 413 and 414 Admit Propensity Evidence in Sexual Offender Trials', *Houston Law Review* 35 (1999).

rules prohibiting evidence of bad character are being replaced by a reliance on what can be called a reserve discretionary superintendence of the trial by trial court judges. In effect, the discretion of the court has become the predominant means of protecting defendants from the admission of prejudicial character evidence.

The move from clear rules of evidence to the fuzzier reliance on judicial discretion is evident in both federal and state jurisdictions. At the federal level, there has been a complete elimination of the rule against past acts character evidence in some important types of criminal cases, specifically, in the prosecution of crimes of sexual assault and sexual molestation. In 1994 Congress passed changes to the Federal Rules of Evidence creating rules 413 and 414 establishing new rules dealing with sex crimes. This legislation was to a great extent a creature of the victims' rights movement. The chief architect of the bill, Representative Susan Molinari of New York, advocated the rule changes in order "to benefit victims."<sup>5</sup> As a result of these legislative changes, the traditional rule against character evidence no longer applies. In federal sexual assault or molestation cases a defendant no longer has the general right to be shielded from a jury learning of his prior sex-related misconduct. The new rules state that evidence of sexual misconduct by the defendant can be admitted solely for the purpose of establishing an inference of guilt based on the prior bad acts.

However, as federal case law has developed it has become clear that defendants do enjoy some level of protection from the possible harm of admitting past misconduct evidence against them.<sup>6</sup> In essence, the rule against prior misconduct evidence has been replaced by a vaguely-structured supervision of the proceedings by the trial court.<sup>7</sup> In federal sexual assault cases the prosecutor can proffer evidence of the defendant's past bad acts in this area, for no other reason than to prove a tendency to commit these acts, and the defendant is to be protected only by the discretion of the judge to monitor the trial for overall fairness, which subsequent case law has construed as meaning that some measure of discretion resides in the courts to exclude character evidence on a discretionary basis. In what does this discretion consist? The judge is to gauge the probative weight likely to be assigned to the past act evidence by the jury, calculate the likely prejudicial effect on the jury of the evidence, and then balance these two by determining if the possible prejudice significantly outweighs the probative value. This is, to say the least, quite a daunting task.

At the state level similar changes in respect to sexual assault and molestation cases have taken place. In Arizona, Indiana, Missouri, and Alaska rules of evidence regarding a defendant's propensity to bad acts have

5. Robinson, 'Go West', p. 1376.

6. Robinson, 'Go West', pp. 1385–1388.

7. Representative Molinari and other supporters argued to House subcommittees during the legislative debates that they fully expected judicial discretion to attach to the new evidentiary changes as a way to safeguard the rights of criminal defendants. See Eric D. Green, Charles R. Nesson, Peter L. Murray, eds. *Federal Rules of Evidence* (New York, Aspen, 2001), p. 91.

been altered, in large measure as a result of victims' rights advocacy.<sup>8</sup> To take one example, in December of 1997 the Arizona legislature passed laws, styled "Victims' Assistance Acts," that changed Arizona rules of evidence in a way that was directly modeled after federal rules 413 and 414, thus making evidence of past acts of sexual misconduct potentially admissible against defendants accused of sex crimes.<sup>9</sup>

The state that has experienced the most sweeping changes in the rules governing prior act evidence is California. California passed by popular referendum broad-based constitutional amendments to protect victims' rights in 1982. Part of the detailed changes in these "Victims' Rights Amendments" included Proposition Eight, which allows *all* evidence of *any* criminal defendant's past bad acts to be admitted subject to the reserve balancing of the trial court.<sup>10</sup> This change became section 28(d) of the California Evidence Code. As Miguel Angel Mendez describes it, this was a "radical transformation," creating an "almost total abolition of common law rules of character and the replacement of those rules with a grant of broad judicial discretion to admit or exclude evidence."<sup>11</sup> As a result of California's victims-oriented evidentiary changes, "judicial balancing became the only rule of character evidence in the state."<sup>12</sup>

Courts in California, however, soon worked to limit the "Victims' Rights Acts." In *People v. Scott*<sup>13</sup> the Third Appellate Court of California held that due to a technicality in a subsequent initiative, Proposition Eight was invalid.<sup>14</sup> As Thomas Leach argues, this ruling was in fact a result of "the bench's inherent inclination against allowing other acts evidence, which [inclination] is attribut[able] to the long-enforced traditional rules against it."<sup>15</sup> In the case of *People v. Ewoldt*, the California Supreme Court upheld the ruling in *Scott*, thus also holding Proposition Eight to be invalid.<sup>16</sup> In

8. See Ind. Code Ann. sec. 25-37-4-15; Mo. Ann. St. sec. 566.02 5; and Drew D. Dropkin and James H. McComas, 'On a Collision Course: Pure Propensity Evidence and Due Process in Alaska', *Alaska Law Review* 18 (2001). Moreover there continue to be growing calls based on victims' advocacy for further liberalization of the rules of character evidence, as can be seen in the agitation of victims' groups in states as diverse as Florida, Utah, and Massachusetts. See Robinson, 'Go West'; Michelle Harper Lawson, 'Federal Rules of Evidence 413 and 414: A Guide for Massachusetts Evidentiary Law', *Suffolk University Law Review* 37 (2004); and Paul Cassell and Evan Strassberg, 'Evidence of Repeated Acts of Rape and Child Molestation: Reforming Utah Law to Permit the Propensity Inference', *Utah Law Review* 1988 (1988).

9. See Ariz. Rev. Stat. Ann. sec. 404 (West 1997), and Ariz. R. Evid. 404(c).

10. A similar enactment that at least as written removes all rulelike protections for defendants concerning prior act evidence was passed by the legislature in a victims-oriented initiative in Oregon. See Or. Rev. Stat. sec. 40.170(4) 1999.

11. Mendez, 'California's New Law on Character Evidence: Evidence Code 352 and the Impact of Recent Psychological Studies', *UCLA Law Review* 31 (1984), p. 1003.

12. Mendez, 'California's New Law', p. 1005.

13. *People v. Scott*, 39 Cal. Rptr. 588 (Cal. Ct. App. 1987).

14. See Thomas Leach, "'Propensity' Evidence and FRE 404: A Proposed Amendment Based on 'Plain English Jury Instruction'", *Tennessee Law Review* 68 (Summer 2001), pp. 832–843. Since then the California legislature has adopted several additional changes authorizing the admission of prior act evidence in distinct types of criminal cases. See Cal. Ev. C. 1107 and 1108.

15. Leach, 'Propensity Evidence and FRE 404', p. 837.

16. *People v. Ewoldt*, 867 P.2d 757 (Cal. 1994).

large measure in light of the continued strong popular support for the measure, however, the Court's invalidation of Proposition Eight was a "hollow victory for opponents of other-acts evidence."<sup>17</sup> For although *Ewoldt* did reinstate the older character evidence rules it dramatically increased the range of exceptions to the character rules. Most importantly, *Ewoldt* ruled that prior act evidence can be admissible if the prior acts and the acts named in the indictment constitute a "plan." While common law evidence rules allowed the admission of evidence of past bad acts if they constituted acts that were continuous with the alleged acts in the sense of coming from a clear and specific plan, this exception traditionally was defined narrowly. In *Ewoldt*, the California Supreme Court held that the mere existence of prior acts that are at all similar almost automatically establishes the existence of a "plan" to commit illegal acts. The court held that a plan can be inferred simply from the fact of the defendant's having engaged in prior acts, if the prior acts are at all relevant and vaguely similar to the charged acts. And then once the evidence is deemed nonpropensity evidence, that is, evidence not proffered to establish guilt on the basis of a tendency to commit illegal acts because of its having been recharacterized as an element of a "plan," the probative value and prejudicial impact of the evidence are to be balanced by the reserve authority of the trial court.

Since the court defines a plan so loosely, "the *Ewoldt* decision actually ratifies use of character evidence to prove action in conformity therewith."<sup>18</sup> "Plan," Leach rightly points out, "amounts to nothing more than a euphemism for [the use of] character [evidence]."<sup>19</sup> So the California courts, under color of common law, allow in almost every criminal case the potential admission of character evidence subject to a loose understanding of similarity, and the reserve balancing of the trial court, to be undertaken in the same way as described above: the judge is to calculate the likely probative force of the evidence as seen by the jury, and its likely prejudicial effect on the jury, and then is to balance these two in light of the actual reasonable weight of the particular piece of evidence in the development of the case.<sup>20</sup>

## II. The Dangers Inherent in these Consequences of the Victims' Rights Movement

The watering down of evidence and the turn to judicial discretion to regulate the admission of character evidence has been very damaging; in

17. Leach, 'Propensity Evidence and FRE 404', p. 838.

18. Leach, 'Propensity Evidence and FRE 404', p. 842.

19. Leach, 'Propensity Evidence and FRE 404', p. 842. See also Miguel A. Mendez and Edward J. Imwinkelried, 'People v. Ewoldt: The California Supreme Court's About-Face on the Plan Theory for Admitting Evidence of an Accused's Uncharged Misconduct', *Loyola Los Angeles Law Review* 28 (1995), pp. 501–503.

20. *People v. Ewoldt* (Cal. 1994). Moreover in all the areas we have addressed the trial level exercise of evidentiary balancing is subject to the extremely deferential abuse of discretion standard on appeal. Hence, judicial discretion, at both the state and the federal level, is subject to very little effective appellate oversight.

fact it is arguably more damaging than, for example, the admission of victim impact statements and other changes to the penalty phase of capital cases that have attracted much warranted attention.<sup>21</sup>

The danger inherent in the attack on evidentiary principles is, first and foremost, that it represents a return to vengeance in American law. Many scholars have argued that the victims' rights movement is based on the re-emergence of a spirit of revenge. Austin Sarat argues that part of the essence of the victims' rights movement is vengeance. "It partly represents, bubbling just beneath the surface, growing pressure for the return of revenge."<sup>22</sup> Sarat calls the victims' rights movement "vengeance uncloaked."<sup>23</sup> He looks directly at the death penalty and issues surrounding the procedures for sentencing one to death, but his point is a more general one. Based on a sophisticated treatment of the issue and the use of illustrative examples, Sarat establishes that the victims' rights movement initiated a train of actions that "provide[s] a vivid indication of the status of vengeance in modern law."<sup>24</sup> In the same vein, Professor Michael Risinger argues that the victims' rights movement has the goal of making the Eumenides – the Greek gods of blood retaliation and vengeance – the maestros of the modern legal process.<sup>25</sup> Given the vengeful roots of the victims' rights movement, it seems likely that the changes in evidence law, just by dint of provenance, represent a significant intrusion of the spirit of vengeance in American law.

We can also get a sense of the degree to which these evidentiary changes instantiate vengeance by exploring the vengeful attributes of the changes themselves. First, many commentators have noted that the victims' rights movement has been a force for creating harsher laws concerning criminal penalties.<sup>26</sup> This has been a vehicle for the expression of a spirit of vengeance. Yet criminal penalties and the revenge that they often give voice to can only be exacted on a defendant if the person is first found guilty; securing convictions is a necessary condition for the expression of revenge to be found in many aspects of contemporary punishment. Liberalizing the admissibility of prior act evidence is able to make the securing of convictions more likely given the tendency of this evidence to shape how juries view criminal cases. As we have noted, the admission of evidence of past wrongdoing can lead juries to be less solicitous in searching out and duly considering all the possibilities of reasonable doubt concerning the defendant's guilt. Hence, since convictions are essential for the expression of the vengefulness found in such things as mandatory minimum sentencing

21. See Austin Sarat, *When the State Kills: Capital Punishment and the American Condition* (Princeton, Princeton University Press, 2001), pp. 33–60.

22. Sarat, *When the State Kills*, p. 35.

23. Sarat, *When the State Kills*, p. 44.

24. Sarat, *When the State Kills*, p. 36.

25. Michael Risinger, John Henry Wigmore, Johnny Lynn Old Chief, and "Legitimate Moral Force": Keeping the Courtroom Safe for Heartstrings and Gore', *Hastings Law Review* 49 (1998), p. 446.

26. Franklin Zimring, Gordon Hawkins, Sam Kamin, *Democracy and Punishment: Three Strikes and You're Out In California* (New York, Oxford University Press, 2001), pp. 139, 223, 231.

laws, and given that convictions are easier to obtain in a system where prejudicial evidence is more readily admissible against the accused, we have further cause to expect the operation of a call for vengeance in the development of the law of evidence.

Second, the emotion of revenge seeks to personalize criminal punishment, and prior act evidence increases the personal and raw character of the proceedings in court. By reducing formal legal protections for defendants, protections which define the defendant as a "legal person" and one who can only be found "legally guilty" by a verdict that meets impersonal, formalized restrictions, the system is made more responsive to vengeance, which seeks to get at the person as person. Discussing the defendant's past personalizes the defendant: he is exposed as a flesh and blood individual, not a mere "legal agent." Revenge is sweeter when the target is personalized and seen as more than a merely legal or artificial entity. Since revenge is made more real, more effective and satisfactory if it can get at the defendant as a person, and since the new rules give the jury a fuller sense of the personhood of the defendant, this once again creates further cause to suspect the operation of vengeance in changes to the law of evidence.

Third, it is possible that the victim, and those who speak on his or her behalf, may wish to assure themselves that their vengefulness is appropriate. Knowing about the past bad acts of a defendant can help to enable a dive into revenge that is liberated from any remaining qualms or issues of bad conscience. Having a full knowledge of just how bad a person is can liberate the search for revenge from any tincture of guilt by justifying revenge in light of the person's simply being no good. As just no good, the defendant is presented as an object of revenge who is fully deserving the vengeance the victim seeks to mete out. So, once again, there is compelling reason to suspect the play of vengeance in contemporary evidence law.

The increased agitation for victim-friendly evidence laws suggests that the changes in the law of evidence do express a return to vengeance in American criminal justice. For this reason alone, they represent a serious erosion of the principle that law should be predicated on a commitment to reasoned restraint.

Beyond the rise of vengefulness itself, the *way* in which the relaxation of evidence law welcomes vengefulness into the criminal trial is especially important. These developments instantiating greater vengefulness strike at what is at least symbolically the very heart of the criminal justice system – the forum in which the guilt or innocence of individuals accused of crime is adjudicated. This movement, therefore, by the depth of the changes it brings forth, establishes an especially ominous precedent.

More directly, there are four ways to see the destructive nature of these changes to the traditional law of evidence. First, in a great number of criminal trials evidentiary discretion, and especially the decision to admit prior act evidence, plays an important role. Prior misconduct evidence is the

"prosecutor's delight" – a phrase coined to indicate just how often it is attempted to be admitted at trial.<sup>27</sup> Character evidence, as Edward Imwinkelried writes, can be seen as "the single most important element" in criminal law in light of how often it is proffered in criminal trials.<sup>28</sup> The issue of prior act evidence is not a peripheral aspect of criminal cases, but rather is a fundamental one.

Second, research indicates that propensity evidence, if admitted, can indeed have a prejudicial influence on juries. Various studies have confirmed that jurors are more likely to convict a person of a crime if they find out he was guilty of similar conduct or even of any prior illegal conduct at all.<sup>29</sup> Further, research indicates that, given some information about a defendant's behavior, jurors can conclude that the defendant's behavior must accord with the information provided.<sup>30</sup> However, it must be noted that the evidence concerning the prejudice to juries resulting from prior misconduct evidence is at least somewhat unclear. Research does indicate that some jurors are capable of remaining unprejudiced by access to prior act evidence.<sup>31</sup> Nevertheless it is clear that the defendant faces a risk. And indeed, it has been argued that it is precisely because of this risk that many prosecutors view the use of prior act evidence with such "delight." Hence the issue of the admissibility of prior act evidence is both central in quantitative terms as well as being central in qualitative terms: it has the potential to play an important role in the outcome of a criminal trial.

Third, trial judges are not likely to perform as ably as we would like the discretionary judgment in terms of this quantitatively and qualitatively important form of evidence; trial judges are not readily to be relied on to serve as effective gatekeepers protecting defendants from this often-proffered and potentially dangerous type of proof. One reason that judges are poor gatekeepers is that they cannot be relied on consistently to remain open to how a jury could respond to evidence. As we saw, it is a part of the judge's task to assess how the jury would respond to evidence of the defendant's prior misconduct. This is an essential part of the gatekeeping function. However, Professors Teitelbaum, Sutton-Barbere, and Johnson question judges' abilities in this area, arguing that judges do not remain adequately open to how a jury could construe a defense and other issues

27. Imwinkelried and Mendez, '*People v. Ewoldt*: The California Supreme Court's About Face', p. 473.

28. Imwinkelried, *Uncharged Misconduct Evidence*, sec. 1:04 (Wilmette, Ill., Callaghan, 1984, rev. ed. 1999). As to the incidence of this kind of proffer see also Miguel Manuel Delao, 'Admissibility of Prior Acquitted Crimes under Rule 404(b): Why the Majority Should Adopt the Minority View', *Florida State Law Review* 16 (spring 1989).

29. Mendez, 'California's New Law on Character Evidence', pp. 1044–1049.

30. Gustav Ichheiser, 'Misunderstandings in Human Relations – A Study in False Social Perception', *American Journal of Sociology* 55 (Supp. 1949), p. 34. See also Brooks and Doob, 'Justice and the Jury,' *Journal of Social Issues* 31 (summer 1975), pp. 171–177; and Mendez, 'California's New Law', pp. 1044–1049.

31. See Roger C. Park, 'Character at the Crossroads', *Hastings Law Journal* 49 (March 1998), pp. 740–745.

concerning possible prejudice to a defendant.<sup>32</sup> Moreover, Professor Park argues that given that judges are “relatively isolated and non-diverse” there is even more reason to be suspicious of judges’ abilities to protect defendants from prejudicial evidence by use of discretionary balancing that references the thoughts of jurors.<sup>33</sup> This is especially dangerous in that the legal system seeks juries that are cross sections of the community, and given that juries are in fact now drawn from a wide range of individuals.<sup>34</sup> In addition, it is important to keep in mind that since the new principles favor admission in the exercise of this discretionary balancing, the failure to imagine how evidence would affect a jury will usually resound to the disadvantage of the defendant.<sup>35</sup> So because judges are not always able consistently to remain sufficiently broad-minded as to approximate the way a jury would see information, and because of the inherent difficulty of the task, there is no reason to have easy confidence in the abilities of trial judges in this area, and *pro tanto*, there is reason to be concerned about the due process rights of criminal defendants.

A second set of arguments compounds this concern. Judges often are influenced by wider social developments and thus are susceptible to being influenced by the popular manifestation of a spirit of revenge.<sup>36</sup> Also, in hearing a large number of cases of human failing, judges can become casehardened.<sup>37</sup> These considerations give us all the more reason to be wary of any easy confidence in trial judges.

Fourth, all of these reasons for holding that the victims’ rights movement’s attack on evidence law furthers the law’s vengeful influence are compounded by its stealthy diffusion into the centrality of the trial’s basic guilt-determining function. The loosened laws of evidence, especially at the state level, operate against defendants in such a vast number of criminal trials that their transformation is essentially quotidian. Whereas the victims’ rights movement’s impact on, for example, penalty phases of capital trials has been visible and subject to resistance, the changes in evidence law at the guilt phase of more ordinary trials are largely anonymous and, as a result, more insidious.

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32. Teitelbaum, Sutton-Barbere, and Johnson, ‘Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?’, *Wisconsin Law Review* 1147 (1983), p. 1172.

33. Park, ‘Character at the Crossroads’, p. 745.

34. At the federal level, the venire must represent a fair cross section of the community in order to comply with the Federal Jury Selection and Service Act of 1968. For state law on the cross-sectional jury see *Taylor v. Louisiana*, 419 U.S. 522 (1975).

35. The prejudicial effect of the evidence must “substantially” outweigh its probative value.

36. Judges are citizens in our constitutional democracy and can be influenced by cultural trends. Sarat argues that the victims’ rights movement has sought and often succeeded in enlisting the “loyalties of judges.” Sarat, *When the State Kills*, p. 35. See also Frank Cross and Blake Nelson, ‘Strategic Institutional Effects on Supreme Court Decision Making’, *Northwestern University Law Review* 95 (summer 2001), pp. 1461–1471, noting the literature on how judges can be influenced by changes in public opinion and resulting political pressures.

37. See, among others, Marvin E. Frankel, ‘The Search for Truth: The Umpireal View’, *University of Pennsylvania Law Review* 123 (May 1975), pp. 1034, 1042.

### III. A False Step: Strengthening Legalism in Criminal Procedure

In response to these problems that attend the evidentiary developments at the federal and state level, several scholars – almost all evidence law professors – who have addressed this issue have argued that the rulelike nature of the criminal process must be strengthened. What is needed, they insist, is to resist the move towards judicial discretion and to deepen the law's commitment to legalism.<sup>38</sup> Yet this call to legalism is not likely to succeed under current circumstances. A major move in the law that would eliminate the gains of the victims' rights movement in this area is unlikely as a matter of current social and political realities. Simply put, it is not feasible politically to eliminate the erosion of the rulelike structure of the law of prior act evidence.

The entrenchment of the victims' rights movement is now widely recognized. Indeed, Professor Alice Koskela refers to it as "irresistible," and "apparently unstoppable,"<sup>39</sup> by which is meant that its success in securing victims-oriented legislation has been deeply impressive as witnessed by how victims' rights legislation, in some form or another, has been passed in almost every state. Moreover, those states that have adopted victims' rights amendments or similar referenda have seen them pass by overwhelming majorities – with passage rates averaging 78% of voters.<sup>40</sup> In light of the strength of the victims' rights movement, Professor Jonathan Simon refers to it as "one of the most important social movements of our time."<sup>41</sup>

Second, the victims' rights movement is not an isolated development, but rather is rooted in the very real decaying of trust in the legitimacy of political institutions. Professor Austin Sarat and others have argued that the victims' rights movement grows out of the cultural trends over the last thirty years indicating a decline in trust in government.<sup>42</sup> With a decline in trust in government has grown a

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38. Several evidence law professors have argued for more rules and less reliance on judicial discretion at the guilt phase of the criminal trial. Angel Mendez in 'California's New Evidence Law', p. 1060 argues that "exclusion [of character evidence] by specific rules should be seriously considered." David Leonard in his work 'In Defense of the Character Evidence Prohibition: Foundations of the Rule against Trial by Character', *Indiana Law Journal* 73 (fall 1998) argues that the long tradition of excluding character evidence should be reaffirmed by upholding a system of exclusionary rules. And Eleanor Swift in 'Law in the Twentieth Century' strongly suggests the need to re-establish a greater commitment to rules in contemporary evidence law.

39. Alice Koskela, 'Victim's Rights Amendments: An Irresistible Force Transforms the Criminal Justice System', *Idaho Law Review* 34 (1997), p. 158. See also Aya Gruber, 'Victim Wrongs: The Case for a General Defense Based on Wrongful Victim Behavior in an Era of Victims' Rights', *Temple Law Review* 76 (winter 2003).

40. See Koskela, 'Victim's Rights Amendments: An Irresistible Force', p. 159.

41. Jonathan Simon, 'Megan's Law: Crime and Democracy in Late Modern America', *Law and Social Inquiry* 25 (2000), p. 1136.

42. See Sarat, *When the State Kills*, p. 28. See also David Garland, *Culture of Control: Crime and Social Order in Contemporary Society* (Chicago, University of Chicago Press, 2001).

suspiciousness of the state's responsiveness to the wishes of the great majority of citizens, and as part of this, a suspicion that the state has placed an overemphasis on protecting the few (such as those accused of crime) as opposed to the many (the "silent majority"). Indeed, as Professor Ayers notes, part of the momentum propelling the victims' rights movement is an underlying discontent with the government, and a sense that government has breached its basic obligation of being responsive across the board to the majority of its citizens.<sup>43</sup> The victims' rights movement, with its direct initiative efforts and call for a more personal and less artificial or institutional form of trial, gives voice to this frustration. And many scholars such as Samuel Huntington argue that the divide between government officialdom and the majority of Americans appears to be firmly in place, and indeed to be continuing to grow.<sup>44</sup> So it seems likely then that the victims' rights movement will continue to draw support from a wide section of American society.

Third, the rise of movements designed to compensate past victims of social and political discrimination, and the resulting controversy surrounding these measures, have electrified the victims' rights movement. The resentment over claims of victimhood on grounds of race and gender and sexual orientation by many outside these communities has fed the victims' rights movement. In this light the following type of statement made by members of the majority community can take on a powerful force: "if you think you're a victim, and if you deserve special treatment, then I (the crime victim or the potential crime victim) am more concretely and truly a victim, and therefore deserve even more." Moreover, the backlash to claims of social victimization and the consequent Balkanization that can catalyze such a view of society appear to be firmly in place.<sup>45</sup>

Fourth, the victims' rights movement is partly driven by the pluralism of modern society in which disagreement extends more widely. We as a society do not share values as we used to, yet many of us still wish to express a form of social commonality and a sense of community. As Professor Sarat argues, one of the aspects of life that can knit us together is our response to clear acts of criminal, and especially bodily, violation. As Sarat notes, "[since] [l]egal norms . . . do not adequately express common moral commitments . . . we seem to be bound together by our shared recognition of, and aversion to, suffering

43. Ayers, 'Constitutional Considerations: Government Responsibility and the Right Not to Be a Victim', *Pepperdine Law Review*, volume 2 63 (1984), pp. 69–73.

44. See Samuel Huntington, *Who Are We: Challenges to America's National Identity* (New York, Simon and Schuster, 2004), p. 332.

45. See, among others, Susan Faludi, *Backlash: The Undeclared War against Women* (New York, Crown, 1991); and Charles Sykes, *A Nation of Victims: The Decay of American Culture* (New York, St. Martin's Press, 1993).

and grief.”<sup>46</sup> Many seek unity, yet society is fractured. In a time of disunion the body can easily become the locus of social agreements. We can become as a people united in our response to unjustifiable acts of bodily harm and so become one through our response to such clear examples of crime as rape, child abuse, and murder. And this more general fragmentation from which the victims’ rights movement appears to be emerging also appears to be deeply rooted, a point Professor Joseph Kennedy notes on the basis of a growing body of social research on contemporary America.<sup>47</sup> Hence given the prevalence of deep divisions in the current social environment, the victims’ rights movement will likely remain a potent force for unity in an age of disunion.

On the basis of these arguments we can conclude that the victims’ rights movement is firmly rooted in American public life. Since the evidence law changes represent extensions of the victims’ rights movement, these kinds of evidentiary principles must also be seen, presumptively, as deeply entrenched. As such, there does not seem to be much hope for a major initiative that would strike at the gains of the victims’ rights movement. Hence, there does not seem to be a realistic way to reintroduce *per se* rules of character evidence favorable to the legal rights of criminal defendants, at least, not anytime soon. A different response appears to be necessary.

#### IV. A Fresh Start: Groundwork for an Aretaic Response to the Problem of Revenge-Borne Judicial Discretion in the Procedures of the “Ordinary” Criminal Trial

Instead of a return to legalism, we need to respond to the re-emergence of a spirit of vengeance in contemporary American criminal justice by nurturing an elevated sense of judicial virtue. While inculcating virtue may seem hopelessly utopian, it need not be. In fact, there is a tradition of the virtues of judgment that offers a model for the kind of judicious discretion that I am advocating is both desirable and possible.<sup>48</sup>

46. Sarat, *When the State Kills*, p. 35.

47. Joseph Kennedy, ‘Monstrous Offenders and the Search for Solidarity through Modern Punishment’, *Hastings Law Journal* 51 (July, 2000). See also, among others, Todd Gitlin, *The Twilight of Common Dreams: Why America Is Wracked by Culture Wars* (New York, Henry Holt, 1995); and Robert Hughes, *Culture of Complaint: The Fraying of America* (New York, Oxford University Press, 1993).

48. Moreover in this light it is important to recall that, as mentioned, judges face the need to make difficult evidentiary judgments in other areas as a result of changes catalyzed by the victims’ rights movement, such as in the area of hearsay. Moreover, judges do face some requirements calling for detailed balancing and/or subtle forms of discretion in areas outside the law of evidence. In light of the reasons for not being complacent with judicial performance that we have discussed above, these other requirements for balancing and/or fact-detailed discretion serve to indicate how important it is to improve the exercise of judicial discretion.

Yet in order to justify this contention, we must first describe the traits that are needed for judges ably to perform the growing discretion that marks their office, and then the issue of judicial virtue must be addressed on a theoretical as well as a practical level.<sup>49</sup> The judge faces three requirements. First, she must understand the way jurors individually would likely respond to character evidence, and as part of this, she must then put these various viewpoints in dialogue with each other in order to approximate the likely impact of evidence on the jury as a whole, given that research indicates that jurors often do deliberate among themselves.<sup>50</sup> Doing this will enable the judge more clearly to see evidence as the jury would see it. Second, she must avoid becoming herself influenced by the popular calls for punitiveness and revenge so prevalent in contemporary society; and related to this, she must avoid becoming casehardened, that is, jaundiced or jaded as a result of hearing so many similar cases of crime and human failing. Third, she must determine, in light of the jury's likely response and based on a judgment that is not informed by vengeance, the correct decision as to admissibility; this must be done by a sound exercise of a highly context-specific judgment that balances the likely impact on the jury and the evidence's reasonable weight in terms of the development of the case.

Given these responsibilities, is there a way to improve the performance of judges? I think that there is. Specifically, we can learn from the thought of three theorists of politics and the human condition, Hannah Arendt, George Kateb, and Walt Whitman. In what follows I shall give an outline of how these thinkers offer both a mode of acting that could enable judges to act in the proper manner in light of the new burdens and a mode of response that could be given concrete effect and so could be realized to an appreciable degree through concerted focus on improving the quality of continuing judicial education. I do so by articulating how each thinker advances a sense of self that can respond to a different one of the three burdens facing trial judges, and how each thinker's sense of self can be operationalized in the judicial context. Of course, we must keep in

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49. An additional question might concern the possibility of reform in political terms. If the deep roots of the victims' rights movement preclude developing new rules, why would it be possible to develop new educational programs? Here we must emphasize the relatively greater immunity from direct political pressure of the trial courts. Just to take the federal and California cases, in the former trial judges, once on the bench, are to a considerable extent immune from direct political pressure, and in the latter, although trial judges face retention elections, as J. Clark Kelso notes, such elections rarely draw much public attention. This fact creates the greater political possibility of reform through education in comparison to rule-changing legislation or direct referendum or initiative. To be sure, this relative insulation from political pressure is not complete. [http://www.mcgeorge.edu/governmentLaw\\_and\\_policy/judicial\\_elections](http://www.mcgeorge.edu/governmentLaw_and_policy/judicial_elections): Kelso, Testimony for Senate Judiciary Committee Hearing on Judicial Independence, Capital Center for Government Policy, accessed March 12, 2005.

50. Jeffrey Abramson, *We the Jury: The Jury System and the Ideal of Democracy* (New York, Basic Books, 1994), p. 8. Some researchers have questioned the degree of deliberation engaged in by juries. See Kalven and Zeisel, *The American Jury* (Boston, Little, Brown, 1996), pp. 488–9. However, Randolph Jonakait has recently questioned the meaning of the Kalven and Zeisel findings and argued that deliberation does influence jury decision making. Randolph Jonakait, *The American Jury* (New Haven, Yale University Press, 2003), pp. 231–233.

mind that this is simply an outline, though given the importance of these changes to the justice system and their resistance to political solutions that would reinstate a system of rules, it is very important to begin to theorize about the nature of an aretaic response, if only in preliminary form.

Arendt's thought is relevant in terms of assisting judges to approximate the perspective of the jury, and, what is implied in this, in developing the ability of engaging in diverse inner dialogue. Arendt describes a mode of intellectual activity that she refers to as enlarged understanding. An enlarged understanding is based on the idea of a reflective judgment, a judgment that is not readily subsumed under a general concept. A reflective judgment is formed by "representative thinking." Ideally, representative thinking is thinking "from the position of all others," and rendering these views mutually communicable.<sup>51</sup> The practitioner of enlarged understanding desiderates a "universal communicability," or universal communicative exchange, where points of view, once understood, can be put into dialogue with each other.<sup>52</sup> Enlarged understanding therefore involves imaginatively communicating with a range of viewpoints.

Furthermore, the view held by Arendt concerning aggregative communicability is capable of being cultivated to a considerable extent. Here we should see that Arendt saw the capacity for enlarged understanding as related to political engagement. For political activity involves "the ability to see things from not only one's own point of view" but from the perspective of "everyone else."<sup>53</sup> The practice of judging and participation in politics share the quality that they can both be seen as "a being with others."<sup>54</sup> As such Arendt notes that enlarged judgment can be more closely approximated by means of participation in public life, "where people have the opportunity to exchange their opinions on particular matters and see whether they accord with the opinions of others."<sup>55</sup> Also to stimulate enlarged understanding there must be, as Professor D'Entreves notes, a genuine encounter with a variety of viewpoints, and so public engagements must be done on the basis of equality among the distinct participants.<sup>56</sup> Further, the interaction must be a direct form of political participation, and one that addresses issues that are not ones that mere survival or material necessity forces on the participants.<sup>57</sup> Cultivating an enlarged understanding requires, Arendt suggests, political engagement of a particular kind – one that is a direct

51. Maurizio D'Entreves, 'Arendt's Theory of Judgment' in Dana Villa, ed., *Cambridge Companion to Hannah Arendt* (Cambridge, Cambridge University Press, 2000), pp. 252–3.

52. D'Entreves, 'Arendt's Theory of Judgment', pp. 252–3.

53. D'Entreves, 'Arendt's Theory of Judgment', pp. 252–3.

54. D'Entreves, 'Arendt's Theory of Judgment', pp. 252–3. See also Hannah Arendt, *Between Past and Future* (New York, Penguin, 1968), p. 221.

55. D'Entreves, 'Arendt's Theory of Judgment', p. 254.

56. D'Entreves, 'Arendt's Theory of Judgment', p. 254; see also George Kateb, *Hannah Arendt: Politics, Conscience, Evil* (Totowa, N.J., Rowland and Allanheld, 1984), p. 14.

57. Kateb, *Hannah Arendt*, pp. 18, 25; Arendt, 'What is Freedom?' in *Between Past and Future*, p. 155.

form of decision making among roughly equal individuals and which is free from dire necessities for those involved.

In the judicial context, Arendt's thought would have to be applied to trial judges in a particular way.<sup>58</sup> Certain aspects of political life that she finds important – especially its equality among participants, its communicative give and take, and its deliberations free from personal concern over material necessity – can be found in a number of community activities. If a judge were to serve on a rotating basis as an advisor – but as no more than a first among equals – on a range of community organizations to which the judge has no personal connection, including perhaps school boards or municipal or community associations, the beneficial aspects of political life that Arendt emphasizes could be brought to the fore.

What is more, new research indicates that such forms of associational activity can indeed augment the ability to entertain a wide range of perspectives. Based on extensive empirical research, Professor Dietlind Stolle argues that participation in diverse groups increases robust levels of generalized trust, that is, trust in others outside one's established group and openness to a range of competing claims.<sup>59</sup> Her research finds that members who are active for a relatively short period of time in community groups are more open-minded than those who are not. Generalized trust and open-mindedness can grow as a result of relatively short-term participation in a range of community activities. Moreover, Stolle finds that if the groups in which one participates are themselves internally diverse, the beneficial results of participating in them in this way are even more pronounced. It should be emphasized that this is not the result of selection effects – levels of education and prior socialization are kept constant. Stolle's research therefore supports the conclusion that activity in a range of diverse groups can have beneficial consequences.<sup>60</sup> This conclusion then would further support the idea that virtues necessary for good reflective judgment can be inculcated to a considerable extent.

Next, the thought of George Kateb is relevant to the burdens facing district judges. As we have mentioned, judges must remain fresh, avoid casehardening, and avoid the broader social trends that support a call for increased vindictiveness. In this regard we can usefully extend to trial judges what Kateb refers to as democratic aestheticism. Kateb argues that if an individual cultivates this kind of aestheticism, he will be able to remain fresh, avoid becoming jaded or hardened, and avoid developing a spirit prone to excessive condemnation. To explore this idea I shall first describe

58. I do not advocate that judges be elected. The threats to the impartiality of the judiciary are in my opinion simply too great. Besides, Dietlind Stolle's research, which I discuss below, suggests that activity in one group (such as a political party) for a significant period of time actually reduces levels of interpersonal openness, flexibility, and other traits that can be considered important for trial judges. Dietlind Stolle, 'Bowling Together, Bowling Alone: The Development of Generalized Trust in Voluntary Associations', *Political Psychology* 19 (1998), p. 521.

59. Stolle, 'Bowling Together, Bowling Alone', p. 521.

60. Stolle, 'Bowling Together, Bowling Alone', p. 521.

what Kateb means by democratic aestheticism. I shall then discuss how this way of seeing helps to avoid the vices we have mentioned. I shall then discuss ways in which democratic aestheticism might be cultivated.

For Kateb, democratic aestheticism is the ability to see some measure of beauty in every individual. One who has developed this way of seeing is able to recognize every person, not as necessarily entirely beautiful – that may be impossible – but as at least “deserving” a fresh “gaze” and “patient attention.”<sup>61</sup> Such a person will see freshly (yet not naively), and in a way that is open to the possibility of something unexpected.

Cultivating democratic aestheticism can help judges to remain fresh, avoid casehardening, and avoid excessive condemnation. A judge who has developed this way of seeing can listen to every claim that defendants make and treat each defendant as possibly expressing a legitimate point of view. And she can do so despite the hard fact that so many defendants actually are guilty and may be advancing claims that have little genuine merit. A judge who has cultivated a robust form of democratic aestheticism will also not be worn down by having been exposed to so many (often similar) examples of human failing. Such a judge can avoid these vices because she can see in every defendant a person who elicits the patient gaze accorded an object of beauty. Lastly, a judge who can see individuals as possessing a kind of beauty is less likely to give in to calls to condemnation that are unwarranted or out of proportion to the crime. The attention born of aesthetic appreciation can slow down the drum-beats of condemnation and can allow one's thinking to remain measured.<sup>62</sup> In all, while a judge who has cultivated democratic aestheticism will, as a steward of institutional integrity, understand that condemnation must take place in criminal justice, she will be a participant in the law's condemnation in ways that always afford careful analysis to the distinguishing aspects of individuals' particular cases, and she will remain free of vindictiveness.

We can now address the question of how democratic aestheticism can be cultivated. According to Kateb's perceptive analysis, one of the best ways to acquire such a way of seeing is to develop a self-consciousness of one's own deep and often subconscious longing for the world to be an object of beauty, and how this aesthetic craving is often transported into the social realm, serving as a standard affecting one's relationships to others. One needs to appreciate one's potential to crave that social relationships instantiate beauty. One especially powerful form of aesthetic craving that affects social relationships is the craving for sameness.<sup>63</sup> Hence one needs to see how easy it is without fully realizing it to aestheticize group membership. One needs to bring to full self-consciousness how one can see as beautiful the sameness of values and the harmony of social practices often found in groups. When one reflects on one's own subconscious potential to crave the existence of

61. George Kateb, 'Aestheticism and Morality: Their Cooperation and Hostility', *Political Theory* 28 (Feb. 2000), p. 31.

62. Kateb, 'Aestheticism', p. 34.

63. Kateb, 'Aestheticism', pp. 8, 14, 16.

beauty in social life and to find this beauty in the sameness of social practices that can be found in one's own group, one is likely to become jarred by one's own tendency to or capacity for aestheticism.<sup>64</sup> In most people, a fully self-conscious recognition of an at least potentially deep proclivity to see aesthetics in the social realm is un-settling. It can mark one as an aesthete, and generate discomfort.

This sense of discomfort arising from a recognition of one's latent aestheticism can help one to grow in awareness of and receptivity to difference. For in light of the jarring recognition of the deep roots of the human tendency to aestheticize social phenomena, one can be spurred to engage in further self-reflection. As a result of this additional self-reflection one can begin to see how easy it is to be driven by subconscious aesthetic attachments to act in ways that fail to live up to ethical demands, such as the demand to treat people outside one's group morally. One can appreciate how a sense of aesthetic attachment to one's own way of life can generate an aesthetically-inspired dismissiveness of others – a dismissiveness that can result in a failure to live up to ethical requirements.

By the recognition of the latent hostility between subconscious aestheticism and morality one can become inspired to begin the project of upholding morality by harnessing one's subconscious aesthetic sentiments and self-consciously redirecting them so that one deliberately cultivates an appreciation of the at least partial beauty that can be found all around one. Following this critical self-reflection, one can have the moral energy consciously to reconfigure one's aesthetic cravings in a "democratic" direction. By doing this one can begin to see the outsider whom one must treat ethically as in some sense a seat of beauty. As a locus of beauty, the outsider can begin to benefit from the same aesthetically-inspired attentiveness previously accorded members of one's own group.

This process of critiquing one's subconscious cravings and deliberating redirecting them so that they uphold the demands of morality can take time. But once motion in this direction is made one can over time begin to see a measure of order and beauty in more and more of what initially appears disordered, remote, or perverse. Attention can progressively be given more readily to individuals and their ways of life despite their lack of a captivating sameness to oneself and one's own ideals. In all, then, the goal is to "reform individuals by reforming their aestheticism."<sup>65</sup>

What is more, both of these aspects – the critique of the human proclivity to aestheticize social life, and the self-conscious attempt to adjust one's actual or potential aesthetic tendencies in a way consistent with one's obligations – can further be developed by continually experiencing to some extent a closeness with those whom one may be most likely to condemn on aesthetic grounds. This relatively continual being with alterity can help to manifest the hidden order and unobvious beauty, at least at

64. Kateb, 'Aestheticism', p. 19.

65. Kateb, 'Aestheticism', p. 34.

some primitive level, to be found in others, which then can further move one to greater heights of solicitous attentiveness.

In addition, Kateb's work provides reasons for holding that democratic aestheticism can be further developed by engaging in another kind of critical self-reflection. Specifically, reflecting on the contingency of one's own existence can spur one to develop more fully this form of aestheticism.<sup>66</sup> By reflecting on how everything one has become could have been otherwise, and how one's own being may never have been – and how the same is true of every other individual – one can begin to be thankful for the simple being of the world.<sup>67</sup> This sentiment can produce a sense of wonder that can draw one to see alterity in an aesthetically-inspired way.

What is more, Kateb's thought supplies reasons for thinking that one can engage in additional practices that would help to bring one's attention to the contingency of one's being and the resulting sense of wonder that can aid the development of democratic aestheticism. Kateb argues that frequent transitions and changes can help to instill such a sense of wonder.<sup>68</sup> By becoming destabilized, the self that is frequently in transition can begin to see the changeableness of herself and the world around her. She is then likely to internalize a sense of the contingency of her own being and of the being of the world itself. Such a non-uniform self that is open to the contingency of the world is more likely to be thankful for life itself, and so is likely to have a kind of wonder for the world that can help to form democratic aestheticism.

Furthermore, this idea that frequency of self-change can produce beneficial psychological changes is supported by recent empirical work. Based on their own research and the research of W.A. Abbott, Professors French, Simpson, and Harvey establish conclusions that indicate that participation in a range of activities, and especially activities that are unusual for one, and that are low-status actions from one's perspective and that involve some measure of passivity – such as simply “being with diversity and listening” – can help stimulate a decentered and ultimately grateful and patient state of mind.<sup>69</sup> This line of research draws on a wide range of empirical data on leadership studies – and has a central focus on prison wardens, which suggests all the more its relevance for trial judges,

66. Kateb, 'Aestheticism', p. 33; see also George Kateb, 'Whitman and the Culture of Democracy' in *Inner Ocean: Individualism and Democratic Culture* (Ithaca, Cornell University Press, 1992) p. 244; and Kateb, 'Democratic Individuality and the Claims of Politics' in *Inner Ocean*, p. 83.

67. Kateb, 'Aestheticism', p. 33.

68. See Kateb, 'The Moral Distinctiveness of Representative Democracy', p. 40 in *Inner Ocean*. See also Kateb, 'Democratic Individuality and the Claims of Politics' in *Inner Ocean*, pp. 84–87; and Kateb, 'Whitman and the Culture of Democracy' in *Inner Ocean*, pp. 249–250.

69. <http://www.ispso.org/symposia/Paris/2001french.htm>: Robert French, Peter Simpson, Charles Harvey, 'Negative Capability: The Key to Creative Leadership', Proceedings of the International Society for the Psychoanalytic Study of Organizations, 2001; and W.A. Abbott, 'Prison Management', unpublished conference paper, Tavistock Institute Series, Program of Dialogues, Worlds of Leadership conference, July 6, 2000; quoted in French, Simpson, Harvey, 'Negative Capability'. It should be noted that French, Simpson, and Harvey focus on Keats's sense of Negative Capability, but this idea is deeply consistent with Kateb's sense of contingency, gratitude, and openness to alterity.

who, in dealing with a very large number of criminal cases every day, may often think of themselves as not much more than prison wardens.<sup>70</sup>

This analysis, then, also suggests that engaging in such things as rotating service on a diverse range of community associations, and other activities off the bench, including, as the government of France requires, visits to prisons, can assist trial judges in the exercise of their responsibilities.<sup>71</sup> Rotating service on a diverse range of associations for a relatively short period of time can help to generate a sense of contingency, and it can afford one greater experience with alterity. Both can help one to cultivate democratic aestheticism. On the basis of the foregoing analysis, it does then seem that the personal characteristics Kateb sees as important can fruitfully be applied to American district judges.

As to the third requirement facing judges, that of exercising a fact-specific form of judgment, the thought of Walt Whitman is relevant. He shares many of the traits we have investigated, and he is in fact the partial source of the thinking of George Kateb. We can focus on Whitman's emphasis on equitable judgment. Again, the trial judge in exercising evidentiary discretion must, after simulating the jury, and freeing herself from any measure of vengeance and/or casehardenedness, exercise a subtle form of highly-contextual judgment. For Whitman being able to judge in this way is especially important. As he expresses in his work *By Blue Ontario's Shore*, a truly democratic self is a person possessed of judgment and equity. In fact for Whitman the ideal judge "is judgment."<sup>72</sup> The Phantom – Whitman's literary expression of the perfect judge – "bestows on every object or quality its fit proportion."<sup>73</sup>

This capacity for judgment can be inculcated to a considerable extent. Here we can investigate the work on *phronesis* or sound practical judgment of Kyron Huigens. According to Huigens, it is possible to provide a minimalist account of how one can acquire sound practical judgment, or further fortify capacities one already possesses. To do so requires a commitment to a life of reason combined with the experience of conscientious decision making and the formulation of practical judgments in a range of contexts.<sup>74</sup>

On this understanding, enhancing the qualities of judgment can be developed by emphasizing a sense of calling or vocation – specifically the vocation to lead a life of reason, or what Huigens calls a life of "rationality in action."<sup>75</sup> Moreover this can be cultivated by developing experience in a variety of circumstances that call for rational reflection on specific practical issues. Experience with a wide range of practical decision making can fortify

70. French, Simpson, Harvey, 'Negative Capability'.

71. French judges traditionally have visited prisons upon being elevated to a judgeship. See David Stein, *Judging the Judges* (Hicksville, N.Y., Exposition Press, 1974), p. 131.

72. Walt Whitman, 'By Blue Ontario's Shore', in Louis Untermeyer, ed., *The Poetry and Prose of Walt Whitman* (New York, Simon and Schuster, 1949), p. 333.

73. Whitman, 'By Ontario's Blue Shore', p. 333.

74. Kyron Huigens, 'Virtue and Inculcation', *Harvard Law Review* 108 (1995), pp. 1467–1469. He is focusing primarily on Aristotle, but his thought applies to the more general idea of good judgment in a highly fact-specific sense.

75. Huigens, 'Virtue and Inculcation', p. 1469.

one's ability to render perceptive judgments. Hence, although not every person will become a full *phronimos* by these means, simply by expanding one's range of experiences and acting with a conscientious commitment to reason one can become *better* at making judgments. For as Aristotle long ago noted, those who are serious and have experienced much are to be "paid attention to" for they have "an eye with which to see correctly."<sup>76</sup>

Hence a program that calls for broadening the situations in which judges must make decisions and concomitantly widening judges' experiences off the bench, if coupled with the affirmation of the importance of reason to the life and role of the judge, can help to establish a close simulation to complete *phronesis* and so move the judge closer to the ideal described by Whitman's Phantom. Hence we have further reason, once again, for holding that a new form of judicial education could achieve important results.

## V. The Nurturing of Judicial Discretion in Practice: Recent Experiments

I have argued that the related traits described by Arendt, Kateb, and Whitman each appear to be relevant to trial judges and educable to an appreciable extent. At this point however one might still hold that this project is simply both too ambitious and too vague. In light of such a possible objection, is there anything further than can be said to make this project appear even more plausible to those who might still remain skeptical? In fact, there is. We can see this by looking at recent developments in judicial education.

At the state level, the Wisconsin bar has recently developed a plan calling for greater out-of-court activities for trial judges. The state bar established a pilot program encouraging trial judges to become more active in their communities. The state bar, in conjunction with the state Supreme Court, has drawn up a program known as the Wisconsin Initiative.<sup>77</sup> The Wisconsin Initiative argues that by creating a greater attachment, through concrete community service, between trial judges and the diverse communities they serve, judges can enhance the performance of their responsibilities.

At the federal level, the Seventh Circuit adopted in the mid-1990s a professionalism creed for federal judges – the first such creed in the nation. The creed grew out of a series of committee meetings that looked at the sense of self of judges and their personal commitments to reason, civility, and open-mindedness.<sup>78</sup> Since then the Federal Bar Association has developed programs that address the professional responsibilities and associated professional virtues of judges.<sup>79</sup> This commitment at the federal

76. Aristotle, *Nicomachean Ethics*, trans. Martin Ostwald (New York, MacMillan, 1962), 1143b13.

77. <http://www.wisbar.org/wisconsininitiative>, accessed June 12, 2003.

78. Marvin Aspen, 'The Search for Renewed Civility in Litigation', *Valparaiso University Law Review* 28 (winter 1994), pp. 519–520. See also Peter Joy, 'A Professionalism Creed for Judges: Leading by Example', *South Carolina Law Review* 52 (spring 2001), pp. 686–689.

79. Paul Friedman, 'Taking the High Road: Civility, Judicial Independence, and the Rule of Law', *New York University Annual Survey of American Law* 58 (2001).

level is consistent with the proposals that I have advocated, and further suggests the plausibility of a concerted effort to improve the exercise of judicial discretion.

In all, the development on the federal and state level of programs of this kind constitutes some additional measure of proof of the transformative potential of an Arendtian/Katebian/Whitmanian understanding of judicial virtue. Of course, once again, much more still needs to be said about these issues. However, this adumbration of a new sense of judicial virtue can serve as a first step in developing the theoretical and practical structure of an aretaic response to the problems facing American district judges in light of the mounting burdens that the victims' rights movement has exacted on the American criminal justice system.

## VI. Conclusion

The victims' rights movement and its foundation in revenge represents a serious problem for contemporary American law. The victims' rights movement has ushered in many changes that are important and highly problematic. Many of these have been explored in detail by social and cultural theorists. However, the victims' rights movement has also been a catalyst for other changes to the justice system that are arguably even more dangerous to the ideals of due process and that have not received nearly as much critical attention by socio-legal and cultural scholars. I have attempted to provide a commentary on these developments in this work. In doing so I have argued that the response that is most appropriate to these less salient changes is not agitation for a new legalism. Instead of a new legalism, if the right kind of trial judges – judges who are able to increase the degree of properly exercised discretion in the legal system – can arise, the system over time can witness a decrease in questionable or even unjustifiable acts of state power. The best response to this expansion of vengeance in American criminal justice, therefore, is to improve the quality of trial judges. The appropriate response to vengeance is virtue.