

JUDICIAL HUMILITY IN AN AGE OF CERTITUDE

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I. INTRODUCTION

It has not escaped notice that we live in an era of political and legal hyperpolarization.¹ One possible response to this circumstance would be to step back to reassess the grounds of our own political and legal beliefs, along with those of others.² This response would naturally be thought to involve a degree of intellectual humility.³ However, whether humility is more generally worth pursuing has long been contested.⁴ Often, humility is thought of in terms of something like an undignified, abject, self-effacing, deluded lack of sufficient self-respect.⁵

But humility,⁶ intellectual humility,⁷ and judicial intellectual humility in particular⁸ need not be thought of as unworthy qualities. Below, we argue that a proper judicial humility, under our circumstances, is distinctively valuable and, more generally, in an era of legal certitude and unusual contentiousness. Crucially, judicial humility, in particular, is not skewed toward deference to either past judges or to contemporary legal decision-makers.⁹ Judicial humility is an essential element of the ultimate value of broad practical wisdom in judging, but at the same time, judicial humility should be informed and steered by accumulated judicial practical wisdom.¹⁰ A proper judicial humility and judicial practical wisdom thus reciprocally inform and guide each other.

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¹ In this regard, consider the work of EZRA KLEIN, *WHY WE'RE POLARIZED* (2020); Joel Achenbach, *Science Is Revealing Why American Politics Are So Intensely Polarized*, THE WASH. POST (Jan. 20, 2024), www.washingtonpost.com/science/2024/01/20/polarization-science-evolution-psychology [<https://perma.cc/F95Q-QRZB>] (citing tribalism and mutual contempt in particular); Levi Bostell, Matthew Gentzkow & Jesse M. Shapiro, *Cross-Country Trends in Affective Polarization*, NAT'L BUREAU OF ECON. RSCH. (Jan. 2020), <https://www.nber.org/papers/w26669> [<https://perma.cc/GW2H-MPGG>] (explaining the United States as polarizing relatively rapidly); Richard Pildes, *The Age of Political Fragmentation*, 32 J. DEMOCRACY 146 (2021); Richard Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273 (2011).

² One might refer to this as a Dylanesque approach, as inspired by the lyrics: "People disagreeing everywhere you look . . . [m]akes you wanna stop and read a book." BOB DYLAN, *Watching the River Flow* on BOB DYLAN'S GREATEST HITS VOL. II (Columbia Records 1971).

³ For an overview, see THE ROUTLEDGE HANDBOOK OF PHILOSOPHY OF HUMILITY (Mark Alfano et al. eds., 2020).

⁴ See *infra* Part II.

⁵ See *id.*

⁶ See *id.*

⁷ See *infra* Part III.

⁸ See *infra* Parts IV-V.

⁹ See *id.*

¹⁰ See *id.*

II. HUMILITY IN GENERAL: ITS NATURE AND VALUE

The nature and value of humility have long been controversial.¹¹ Some such uncertainty is inevitable. But humility can be defined in terms that bypass much of what disturbs those who find humility to be objectionable. As one analysis has suggested, “some varieties of humility are morally problematic,”¹² but “there are other varieties of humility that are certainly worth wanting.”¹³

Thus, we shall not herein take humility to involve anything like a low opinion of oneself;¹⁴ a low opinion of one’s abilities;¹⁵ a “slave morality;”¹⁶ a “forgetting of the self;”¹⁷ seeing oneself “as nothing;”¹⁸ being insufficiently magnanimous;¹⁹ underestimating one’s good qualities;²⁰ a form of modesty;²¹ or “putting oneself last.”²² Humility, in our approach, does not involve any of these forms of self-abnegation.

As well, humility, in our view, also excludes what some consider the opposing extreme. Thus,

[h]umility is opposite to a number of vices, including arrogance, vanity, conceit, egotism, hyper-autonomy, grandiosity, pretentiousness, snobbishness, impertinence (presumption), haughtiness, self-righteousness, domination, selfish ambition, and self-complacency.²³

More positively, our approach takes humility to be instead a matter of insightful, undistorted accuracy and realism in assessing one’s own capacities

11. See, e.g., James Kellenberger, *Humility*, 47 AM. PHIL. Q. (2010); Thomas Nadelhoffer, et al., *Some Varieties of Humility Worth Wanting*, 14 J. MORAL PHIL. 168 (2017); Norvin Richards, *Is Humility a Virtue?*, 25 AM. PHIL. Q. 253 (1988).

12. Nadelhoffer, *supra* note 11, at 171.

13. *Id.*; see also, e.g., THE UDDHAVA GITA dialogue 14, at 143 (Swami Ambikananda Saraswati trans., 2002); Arthur C. Brooks, *The Red Pill of Humility*, THE ATLANTIC (Oct. 5, 2023), www.theatlantic.com/ideas/archive/2023/10/humility-happiness-matrix-acceptance/675543 [<https://perma.cc/7FGR-484B>] (elaborating on the rewards of humility).

14. See Richards, *supra* note 11, at 253.

15. See *id.* (citing HENRY SIDGWICK, *METHODS OF ETHICS* 334 (7th ed. 1907) (reprint ed. 1981)).

16. *Id.* at 258 (referring to Friedrich Nietzsche’s formulation). Spinoza holds that humility is neither a virtue, nor something that arises from a virtue. But Spinoza’s definition of humility is contrary to that which we employ herein. See BENEDICTUS DE SPINOZA, *ETHICS — PART 4* prop. LIII, at 223 (R. H. M. Elwes trans., 1883) (1955 ed.) (1677).

17. See June Price Tangney, *Humility: Theoretical Perspectives, Empirical Findings and Directions for Future Research*, 19 J. SOC. & CLINICAL PSYCH. 70, 70 (2000); Cathy Mason, *Humility and Ethical Development*, 17 J. ETHICS & SOC. PHIL. 48, 48 (2020).

18. Kellenberger, *supra* note 11, at 331 (referring to the writer Iris Murdoch).

19. See *id.* at 321 (Aristotle on humility as a deficiency of the virtue of magnanimity).

20. See *id.* at 323 (citing the contemporary philosopher Julia Driver).

21. See *id.* (citing Driver).

22. *Id.* at 332 (quoting John Cottingham).

23. ROBERT C. ROBERTS & W. JAY WOOD, *INTELLECTUAL VIRTUES: AN ESSAY IN REGULATIVE EPISTEMOLOGY* 236 (2009).

and those of other persons.²⁴ Humility in this crucial sense is partly a matter of acuity, astuteness, and insight bearing upon the self, on others, and on the relevant circumstances. But it is also a matter of moral character, including the virtue of fortitude, as well.²⁵ Professor Norvin Richards thus concludes that humility “involves having an accurate sense of oneself, sufficiently firm to resist pressures toward incorrect revisions.”²⁶

This view thus revises Aristotle’s basic methodology.²⁷ Humility, in our approach, is not the deficiency of the Aristotle virtue of magnanimity.²⁸ If humility is to be assessed on a loosely Aristotelian scheme, humility should occupy a virtuous mean between the vice of arrogance or the overestimation of self on the one hand and the opposed vice of self-effacement, diffidence, servility, self-subordination, or cringing inferiority on the other.²⁹

Thus, Professor Linda Zagzebski, setting aside any connection between humility and fortitude, recognizes that “humility is not an Aristotelian virtue.”³⁰ In Aristotelian terms, though, “if humility is the virtue whereby a person is disposed to make an accurate appraisal of her own competence,”³¹ then humility can be seen as a sort of Aristotelian mean between a deficiency and an excess.³² Humility in its intellectual dimension, in particular, “could reasonably be interpreted as a mean between the tendency to grandiosity and the tendency to a diminished sense of [one’s] own ability.”³³

It cannot be assumed, though, that humility precisely bisects the difference between its deficiency and its excess. Humility need not mark some important geometric halfway point. Thomas Aquinas, for example, takes humility to lie closer to “lack of confidence”³⁴ than to “excessive self-confidence”³⁵ at the other

24. See Kellenberger, *supra* note 11, at 332 (citing the psychologist Nancy Snow); *id.* at 332-33 (citing Bernard of Clairvaux).

25. See Richards, *supra* note 11, at 254.

26. *Id.*; see also *id.* at 258; Johannes Brunzel & Daniel Ebsen, *The Role of Humility in Chief Executive Officers*, 17 REV. MANAGERIAL SCI. 1487, 1487-88 (2023). In the judicial realm, consider, e.g., FRANK SIKORA, *THE JUDGE: THE LIFE & OPINIONS OF ALABAMA’S FRANK M. JOHNSON, JR.* (2007).

27. See Kellenberger, *supra* note 11, at 321.

28. See *id.*

29. See Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS L. REV. 127, 135-36 (1998). While Aristotle treats humility as a deficiency, it is possible to classify arrogance or self-effacement as constituting the deficiency or the excess of the virtuous mean of humility. A practical distinction between self-underevaluation and humility is relied upon in PHILIP E. TETLOCK & DAN GARDNER, *SUPERFORECASTING: THE ART AND SCIENCE OF PREDICTION* 228 (2015).

30. LINDA TRINKAUS ZAGZEBSKI, *VIRTUES OF THE MIND* 220 n.61 (1998).

31. *Id.*

32. See *id.*

33. *Id.*

34. ST. THOMAS AQUINAS, *SUMMA THEOLOGICÆ* II-II, q. 161, art. 2, at 1265-74 (London, Burns Oates & Washbourne 1920).

35. *Id.*

extreme.³⁶ But it is also said that “[h]umility is not a sickly virtue, timid and feeble . . . it is *strong, magnanimous*, generous and constant, because it is founded on truth and justice.”³⁷ For our purposes herein, we may remain agnostic on many such issues.

Humility is insight into reality when it is supported by character traits, including fortitude, and is commonly of value to individuals, groups, institutional actors, and entire societies. Living by illusions is often a risky evolutionary bet, even assuming the survival value of a sincere belief in the illusions in question. Bluster, obliviousness, and certitude carry the broader public interest only so far. Humility is, roughly, “the effort through which the self attempts to free itself of its illusions about itself”³⁸ more typically steers us away from risks we should not run and from challenges we should not take up.

Humility, though, admittedly imposes certain costs on the humble. Humility requires repressing the “highly agreeable”³⁹ feeling of “self-admiration.”⁴⁰ The humble, insofar as they avoid living by illusions about their own abilities, cannot unthinkingly “credit their successes to something about themselves, such as their ability or effort, and lay blame for failure elsewhere.”⁴¹

Importantly, though, humility is again not solely a matter of accurate self-perception and its sustaining virtues. One’s view of the broader world,⁴² and of “the ethical worth of others,”⁴³ are at stake as well.⁴⁴ Humility tends to limit our distortions of empirical as well as ethical reality.⁴⁵ Humility can thus be manifested by, for example, the social or natural scientist who is more interested in genuinely learning from rivals than in fending off all critiques and objections.

The typically valuable nature of humility can also be seen through that which humility opposes. Consider again the typical disvalue of the opposing qualities of “arrogance, vanity, conceit, egotism, hyper-autonomy, grandiosity,

36. *See id.*

37. CAJETAN MARY DA BERGAMO, HUMILITY OF HEART 38 (Herbert Cardinal Vaughan trans., 1908) (2006 ed.) (emphasis added); *see also* Christopher M. Bellitto, *The Medieval Notion That Shows Why Even Experts Should Be Humble*, PSYCHE (Mar. 21, 2024), <https://psyche.co/ideas/the-medieval-notion-that-shows-why-even-experts-should-be-humble> [<https://perma.cc/BF42-87PB>].

38. ANDRE COMTE-SPONVILLE, A SMALL TREATISE ON THE GREAT VIRTUES 147 (Catherine Temerson trans., 1996) (2001 ed.).

39. HENRY SIDGWICK, THE METHODS OF ETHICS 335 (7th ed. 1907) (reprint ed. 1981).

40. *Id.*

41. DAVID DUNNING, SELF-INSIGHT: ROADBLOCKS AND DETOURS ON THE PATH TO KNOWING THYSELF 70 (2005). The risk, though, is that misconceived ideas of humility may impair one’s own self-preservation or enhance the risk of being dominated or exploited. *See* Waclaw Bak et al., *Intellectual Humility: An Old Problem in a New Psychological Perspective*, 10 CURRENT ISSUES IN PERSONALITY PSYCH. 85, 92 (2022).

42. *See* Jen Cole Wright, *Experience Humility*, TIMES ARGUS (Sept. 14, 2023), https://www.timesargus.com/opinion/commentary/wright-experience-humility/article_95a176d6-d676-5170-bfda-ba9eaf7c1d0e.html [<https://perma.cc/934J-ZNS7>].

43. *Id.*

44. *See id.*

45. *See id.*

pretentiousness, snobbishness, impertinence (presumption), haughtiness, self-righteousness, domination, selfish ambition, and self-complacency.⁴⁶ Each of these qualities may indeed benefit its exhibitor, in the short run or even in the long run, particularly in a hierarchical or deeply class-divided society. However, the personal and social costs of these generally alienating and otherwise unattractive qualities should be obvious. Their manifestation ordinarily undermines broad, productive trust and cooperation among more or less free and equal persons and groups.

There arise distinctive and important problems when lack of humility manifests itself as, in particular, a lack more specifically of intellectual humility. The quality of intellectual humility is of special significance in the context of judicial, legislative, regulatory, and legal academic judgment and policy advocacy. We take up these considerations immediately below.

III. THE MORE SPECIFIC QUALITY OF INTELLECTUAL HUMILITY

Intellectual humility, in particular, is depicted in the literature in commonsensical terms. Thus, intellectual humility is thought to involve an accurate understanding of one's abilities and limitations;⁴⁷ an ability to recognize one's errors in judgment⁴⁸ and the gaps or deficiencies in one's knowledge and thinking abilities;⁴⁹ a genuine openness to new or currently disfavored ideas and information;⁵⁰ a tolerance of ambiguity and uncertainty;⁵¹ and a resistance to premature epistemic closure.⁵²

Otherwise put, intellectual humility involves appropriate, rather than excessive, recognition of one's frailties and vulnerabilities.⁵³ The intellectually humble person thus displays "appropriate attentiveness to the evidentiary basis of . . . beliefs,"⁵⁴ and to their own personal information processing limits.⁵⁵

46. ROBERT C. ROBERTS & W. JAY WOOD, *INTELLECTUAL VIRTUES: AN ESSAY IN REGULATIVE EPISTEMOLOGY* 236 (2007).

47. See Dennis Whitcomb et al., *Intellectual Humility: Owning Our Limitations*, 94 *PHIL. & PHENOMENOLOGICAL RSCH.* 509, 510 (2017) (citing J.P. Tangney, *Humility*, in *OXFORD HANDBOOK OF POSITIVE PSYCH.* (S.J. Lopez & C.R. Snyder eds., 2009)).

48. See *id.*

49. See *id.*

50. See *id.*

51. See *id.*

52. See *id.* It is not surprising that intellectual humility is positively correlated with intelligence. See Leor Zmigrod, et al., *The Psychological Roots of Intellectual Humility: The Role of Intelligence and Cognitive Flexibility*, 141 *PERSONALITY & INDIVIDUAL DIFFERENCES* 200 (2019). Of course, any given person may be intellectually humble in one or more of these respects, but not intellectually humble in one or more others. As well, particular persons, and people in general, may display more, or less, intellectual humility in one context or domain than another.

53. See Bak, *supra* note 41, at 88.

54. *Id.*

55. *Id.*; see also CHRISTOPHER PETERSON & MARTIN E. P. SELIGMAN, *CHARACTER STRENGTHS AND VIRTUES: A HANDBOOK AND CLASSIFICATION* 462-63 (2004).

Similarly, there is “appropriate attentiveness to limitations in obtaining and evaluating relevant information.”⁵⁶

Crucially, intellectual humility involves a typical “openness to revising one’s own viewpoints, lack of over-confidence about one’s knowledge, respect for the viewpoints of others,⁵⁷ and lack of threat in the face of intellectual disagreements.”⁵⁸ Pointedly, it is said that “[i]ntellectually humble people are those who are more concerned with getting at the truth than promoting themselves or protecting their own ideas.”⁵⁹ Intellectual humility thus requires more than respecting or deferring reasonably to colleagues, allies, and neutral parties. Seeking out the actual first-hand opinions of at least minimally thoughtful opponents may usefully inhibit the tendency toward self-defeating ‘groupthink.’⁶⁰

Intellectual humility can certainly have its costs under some circumstances, including various emergencies. Intellectual humility in a leader or a potential leader may be interpreted as weakness, indecisiveness, or irresolution. In a politically intensely polarized era, perceived intellectual humility may alienate potential supporters. Professional groups to which one belongs may require at least the appearance of one’s epistemic certainty as to the basic group beliefs. Reflective doubt may be widely deemed to amount to irresolution, dithering, or a way station to heresy.

In contrast, intellectual humility offers important benefits, including spillover benefits for groups and the broader society. Consider, for example, that the intellectually humble “are more likely to display tolerance of opposing political and religious views, exhibit less hostility toward members of those opposing groups, and are more likely to resist derogating outgroup members as

56. See Bak, *supra* note 41, at 88, quoting Mark R. Leary, *The Psychology of Intellectual Humility*, TEMPLETON FOUNDATION 4 (Sept. 2018), https://www.templeton.org/wp-content/uploads/2020/08/JTF_Intellectual_Humility_final.pdf [<https://perma.cc/PCS7-YDTQ>].

57. Crucially, the ‘others’ involved here would extend beyond one’s colleagues, allies, and those with whom one sympathizes to include non-supporters, skeptics, and implacable enemies of one’s relevant beliefs and values. The other side of this coin is the intellectually humble person’s tendency to avoid dogmatism; see Michael P. Lynch, et al., INTELLECTUAL HUMILITY IN PUBLIC DISCOURSE 5, IHPD LIT. REV. (2012), <https://humilityandconviction.uconn.edu/wp-content/uploads/sites/1877/2016/09/IHPD-Literature-Review-revised.pdf>.

58. Bak, *supra* note 41, at 88, quoting ELIZABETH J. KRUMREI-MANCUSO & STEVEN V. ROUSE, NAT’L LIBR. OF MED, THE DEVELOPMENT AND VALIDATION OF THE COMPREHENSIVE INTELLECTUAL HUMILITY SCALE 210 (Nov. 5, 2015). The Nobel Prize winner Daniel Kahneman is credited in this respect; see Cass R. Sunstein, *The Nobel Prize Winner Who Liked to Collaborate with His Adversaries*, THE NEW YORK TIMES (Apr. 1, 2024), www.nytimes.com/2024/04/01/opinion/nobel-daniel-kahneman-collaboration.html [<https://perma.cc/36RR-8AVN>].

59. Bak, *supra* note 41, at 1 (quoting Justin L. Barrett, *Intellectual Humility*, 12 J. Pos. Psych. 1 (2017)).

60. See Tenelle Porter & Karina Schumann, *Intellectual Humility and Openness to the Opposing View*, 17 SELF & IDENTITY 139 (2017) (referring to the classic IRVING JANIS, VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF POLICY DECISIONS AND FIASCOES (Houghton Mifflin Company, 1972).

intellectually and morally bankrupt.”⁶¹ Perhaps even more crucially, the intellectually humble “seem to be more curious and better liked as leaders, and tend to make more thorough, well informed decisions.”⁶²

More broadly, intellectual humility has been found to correlate with “measures of empathy, benevolence and altruism.”⁶³ Low levels of intellectual humility are associated not only with inadequately grounded opinions,⁶⁴ but with “interpersonal conflict”⁶⁵ and “an unwillingness to negotiate or compromise.”⁶⁶ No doubt many political actors—many with low intellectual humility—positively value interpersonal conflict and their own unwillingness to negotiate or compromise. This would seem to be especially characteristic of an intensely polarized age, where extremism is often rewarded.

Even those political actors would not typically approve of an unwillingness to negotiate or compromise with their opponents. Unwillingness to negotiate or compromise is commonly valued only on the assumption that, through that behavior, one’s own side, and not one’s opponent’s, will ultimately prevail. There is no reason, though, to identify the public interest with the uncompromised viewpoint of any single group of intransigents or fanatic extremists. The long-term public interest is, overall, better served by the intellectually humble person’s inclination toward reasonable “gratitude, forgiveness, altruism, and empathy.”⁶⁷

More concretely, the public interest is not typically best served by those who score low in intellectual humility and who

badger and bulldoze in place of persuading and discussing. They don’t care about your feelings but cry if you offend theirs . . . They fail to be open to the chance that they might be misinformed, mistaken, or—worst of all for their needy egos—not the center of everyone else’s universe.⁶⁸

What the contemporary physicist Carlo Rovelli says of science is true in the social and legal spheres as well: “The search for knowledge is not nourished by certainty: it is nourished by a radical absence of certainty. Thanks to the acute

61. Tenelle Porter, et al., *Predictors and Consequences of Intellectual Humility*, 1 NAT’L REV. PSYCH. 524, 530-31 (Jun. 27, 2022). This would seem especially important in societies with decreasing effective literacy, practical numeracy, interest in reading, national and global test scores, and student study effort at all levels.

62. *Id.* at 532.

63. Bak, *supra* note 41, at 91.

64. See Mark R. Leary, *Cognitive and Interpersonal Features of Intellectual Humility*, 43 J. PERSONALITY & SOCIAL PSYCH. BULL. 793 (2017).

65. *Id.*

66. *Id.* Which may be seen, however ultimately self-destructively, as a desirable quality.

67. Leary, *supra* note 56, at 13.

68. CHRISTOPHER M. BELLITTO, *HUMILITY: THE SECRET HISTORY OF A LOST VIRTUE* 141 (2023).

awareness of our ignorance, we are open to doubt and can continue to learn and to learn better.”⁶⁹

Intellectual humility, it should be emphasized, does not require anything like unlimited open-mindedness, undue credulity, or the active consideration of all new claims or all newly proffered evidence. Recognizing one’s fallibility in a given context does not mean that all new claims should be treated as plausible or worthy of costly examination. Nor need the appropriately intellectually humble decision maker to treat every speaker on a given subject as equally credible.⁷⁰ Intellectual humility is entirely compatible with recognizing that, in a given context, one may have epistemic superiors, epistemic peers, and epistemic inferiors.⁷¹ Other people, no less than oneself, may be vulnerable to the various adverse influences of psychological defense mechanisms,⁷² cognitive biases,⁷³ conflicts of interest,⁷⁴ and the inculcation of false consciousness⁷⁵ or adaptive preferences.⁷⁶

On the basis of these understandings, we can now address the proper scope and limits of humility, and of intellectual humility in particular, in specifically legal contexts.

IV. HUMILITY, AND INTELLECTUAL HUMILITY IN PARTICULAR, ACROSS THE LAW

It seems reasonable to assess the work of judges and other legal system actors as manifesting or not manifesting relevant virtues and vices.⁷⁷ But it has,

69. CARLO ROVELLI, *HELGOLAND* 156 (2021).

70. See Kasim Khorasane, *Being Open-Minded About Open-Mindedness*, 99 PHIL. 191 (Feb. 20, 2024).

71. See R. George Wright, *Epistemic Peerhood in the Law*, 91 ST. JOHN’S L. REV. 663 (2017); Heather Battaly, *Epistemic Self-Indulgence*, 41 METAPHILOSOPHY, 214 (2010); Juan Gomesana, *Conciliation and Peer-Demotion in Epistemology of Disagreement*, 49 AM. PHIL. Q. 237, 238 (2012); Bryan Frances, *Discovering Disagreeing Epistemic Peers and Superiors*, 20 INT’L J. PHIL. STUD. 1 (2012); Robert Mark Simpson, *Epistemic Peerhood and the Epistemology of Disagreement*, 164 PHIL. STUD. 561 (2013).

72. See, classically, ANNA FREUD, *THE EGO AND THE MECHANISMS OF DEFENSE* (1936).

73. Beyond the cognitive bias surveys themselves, see Nathan Ballantyne, *Debunking Biased Thinkers (Including Ourselves)*, 1 J. AM. PHIL. ASS’N 141 (2015); Emily Pronin & Lori Hazel, *Humans’ Blind Spot and Its Societal Significance*, 32 CURR. DIRECTIONS IN PSYCH. SCI. 402 (2023).

74. Presumably, one’s approach to many legal issues, including tax, schools, and crime, may reflect one’s sense of either insulation from, or vulnerability to, adverse policy consequences.

75. See, e.g., Nancy E. Snow, *Humility*, 29 J. VALUE INQUIRY 203, 213 (1995) (“calls to humility can be used by oppressors to inculcate false consciousness”).

76. See, e.g., SERENE J. KHADER, *ADAPTIVE PREFERENCES AND WOMEN’S EMPOWERMENT* (2011); Martha C. Nussbaum, *Symposium on Amartya Sen’s Philosophy: 5 Adaptive Preferences and Women’s Options*, 17 ECON. & PHIL. 67 (2001).

77. The leading such example is Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178 (2004); see also R. George Wright, *Constitutional Cases and the Four Cardinal Virtues*, 60 CLEV. ST. L. REV. 195 (2012). Professor

unfortunately, been suggested that lawyers in general “have lost sight of the necessity of humility as a core element”⁷⁸ of their discipline. What, though, might be gained by greater attention to, and by the practice of, appropriate judicial humility?

The answer to that question largely flows from the values and limits of the broader practice of humility illustrated above.⁷⁹ Thus, judicial humility can be associated with generally desirable qualities, including “modesty, gentleness, awareness of one’s fallibility, an openness to learning, curiosity about and engagement with the perspectives of others, [and] respect for and deference to other decision-makers and institutions.”⁸⁰ A judge who is not too sure that she is right may be neither indecisive nor underinformed. She may, to the broader benefit, be instead manifesting the spirit of liberty.⁸¹

In discussing the jurisprudence of Justice Holmes, Professor John Inazu suggests the value of judicial discourse that prioritizes charity over dismissal,⁸² or at least the value of a productive dialogue across time.⁸³ Judicial humility may play a role in limiting broad and severe societal conflict. Thus, “[a]t a time when we too often sacralize our views and condemn our opponents, epistemic humility could help our society avoid escalating from weaponized words to actual weapons.”⁸⁴ The psychological evidence suggests that persons with high intellectual humility in the sociopolitical realm tend toward reduced levels of political polarization⁸⁵ and of “motivated thinking.”⁸⁶

Still, we might wonder whether judicial humility would lead to an unduly conservative judicial system. The courts might unduly constrain the role and judicial influence of their own hard-won insights when confronted by legislative mandates or by popular excitement. Or perhaps courts would tend unduly to defer to what they take to be the presumed insights of the constitutional framers or to the presumed wisdom embodied in some particular version of history and tradition. Or, yet again, judicially humble courts might opt for narrow,

Solum focuses most extensively on the virtues of judicial practical wisdom, judicial impartiality or evenhandedness, and judicial integrity or respect for the law.

78. Bruce P. Frohnen, Augustine, *Lawyers & the Lost Virtue of Humility*, 60 CATH. U.L. REV. 1, 4 (2020).

79. *See supra* Parts II-III.

80. Benjamin Berger, *What Humility Isn't: Responsibility and the Judicial Role*, in CANADA'S CHIEF JUSTICE: BEVERLY McLACHLIN'S LEGACY OF LAW AND LEADERSHIP (Marcus Moore & Daniel Jutras eds., 2018) (forthcoming) (manuscript at 5-6) (on file with author).

81. *See generally* LEARNED HAND, THE SPIRIT OF LIBERTY, PAPERS AND OTHER ADDRESSES (1959).

82. *See* John Inazu, *Holmes, Humility and How Not to Kill Each Other*, 94 NOTRE DAME L. REV. 1631, 1631-33 (2019).

83. *See id.*

84. *Id.* at 1632 (referring to Justice Holmes).

85. *See* Elizabeth I. Krumrei-Mancuso & Brian Newman, *Intellectual Humility in the Sociopolitical Domain*, 19 SELF & IDENTITY 989, 1011 (2020).

86. *Id.* *See*, for background on motivated reasoning as distinguished from truth-tropic reasoning, Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCH. BULL. 480 (1990).

unambitious judicial incrementalism rather than acknowledge a need for more substantial legal change at the moment.

All of these possible outcomes of adopting judicial humility are real. But adopting such judicial attitudes need not reflect judicial humility. Judicial humility does not require these judicial attitudes any more distinctively than would any other defensible approach to judicial decision-making. Judicial humility itself does not, in general, tell us anything distinctive about the proper role of judicial deference, the passive virtues, the narrowness of statutory construction, the judicial avoidance canons, or judicial restraint.

The dominant current understanding of judicial humility might well lead us, admittedly, to suppose otherwise. Thus, it is said that “[t]he prevailing conception of judicial humility equates it with judicial restraint, deference, or comity.”⁸⁷ But in truth, judicial humility is more a matter of accurately assessing, in absolute or comparative terms, one’s competence along with that of others. Humility does not deny one’s absolute advantages or, even more interestingly, one’s comparative advantages.⁸⁸

More concretely, “the well-calibrated person can have real conviction, since being epistemically conscientious need not entail a loss of conviction.”⁸⁹ Appreciating one’s capacities, absolute and comparative, as well as one’s limitations, may enhance one’s grounds for conviction.⁹⁰ Believing that one’s convictions have been properly shown to be well-grounded may well lead to enhanced confidence and steadfastness. As one philosopher has rightly concluded, “humility is not inconsistent with social activism.”⁹¹

On this basis, we can think of judicial humility as sustaining the continuous threads of judicial institutional legitimacy and basic constitutional principles across time⁹² while reformulating those principles⁹³ to avoid the “unwarranted, destabilizing reinvention of the whole legal landscape.”⁹⁴ In itself, though, judicial humility does not allow others to predict how the judge in question will vote on some particular constitutional case.⁹⁵ Merely, for example, judicial

87. Amalia Amaya, *The Virtue of Judicial Humility*, 9 JURISPRUDENCE 97, 98 (2018); see, for an application, Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s Moral Reading of the Constitution*, 65 FORDHAM L. REV. 1269, 1290 (1997).

88. See, e.g., R. George Wright, *At What Is the Supreme Court Comparatively Advantaged?*, 116 W. VA. L. REV. 535 (2013).

89. Michael Hannon & Ian James Kidd, *Political Conviction, Intellectual Humility, and Quietism*, 18 J. POSITIVE PSYCH. 233, 234 (2023); see also Michael Hannon & Ian James Kidd, *Is Intellectual Humility Compatible with Political Conviction?*, 27 J. ETHICS & SOC. PHIL. 211 (2024).

90. See the sources cited *supra* note 89.

91. Jennifer Wargin, “We Must Speak:” *Humility and Social Activism*, 6 EIDOS 51, 59 (2022).

92. See Michael Gentithes, *Precedent, Humility, and Justice*, 18 TEX. WESLEYAN L. REV. 835, 858 (2012).

93. See *id.*

94. *Id.*

95. See Michael J. Gerhardt, *Constitutional Humility*, 76 U. CIN. L. REV. 23, 42 (2007).

humility need not impair that judge's ability to assess some case precedent as reflecting either the judicial humility of one's predecessor judges or humility's very opposite.⁹⁶ Judicial humility is thus entirely compatible with the ability to recognize a prior instance of judicial arrogance for what it is.

V. THE NATURE, VALUE, AND LIMITS OF PROPER JUDICIAL HUMILITY

It has been said that “judges are no less fallible about moral questions than the rest of us, and it's dangerous for them to imagine otherwise.”⁹⁷ More broadly, judicial humility may be indispensable to the functioning of courts,⁹⁸ and to their well-founded and sustained legitimacy.⁹⁹

Consider the position of judges seeking, during the COVID-19 pandemic, to accommodate constitutional rights with public health concerns and other public interests. At the time, Judge David Hamilton of the Seventh Circuit Court of Appeals richly appreciated that “the Constitution cannot be put away and forgotten.”¹⁰⁰ But Judge Hamilton recognized as well that most judges will, in science-based cases, unavoidably lack much relevant technical expertise.¹⁰¹

So, in many such cases, any judicial impulse to independently assess alleged constitutional rights violations should be tempered by a proper judicial humility. In the COVID-19 context, judicial humility would require a proper respect for the findings of others as to many emerging and complex technical and social facts.¹⁰² In such cases, the sense of judicial fallibility should be particularly acute.

The crucial complication, though, is that a judge's professional humility must also incorporate some sense of the capacities and limitations of other policymakers. Those judgments will often incorporate evidence of the degree of intellectual humility of those other policymakers. Judicial humility may well counsel less judicial deference to technical experts with unduly low intellectual

96. *See id.*

97. Susan Haack, *Pragmatism, Law, and Morality*, 3 EUR. J. PRAGMATISM & AM. PHIL. 79, 80 (2011).

98. See the discussion of Justices Frankfurter and Owen Roberts in AARON TANG, *SUPREME HUBRIS: HOW OVERCONFIDENCE IS DESTROYING THE COURT—AND HOW WE CAN FIX IT* 235-36 (2023).

99. *See id.* at 236.

100. *Cassell v. Snyders*, 990 F.3d 539, 549 (7th Cir. 2021).

101. *See id.*

102. *See id.* More broadly, judicial humility may “in the long run save time, energy, and resources.” *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974).

humility.¹⁰³ Judicial deference to policymakers in the evident grip of some cognitive bias can also be deeply harmful.¹⁰⁴

Consider that non-judicial policy experts may, quite systematically, overestimate their specific subject matter expertise.¹⁰⁵ They may be distinctively subject to systematic, non-random cognitive biases.¹⁰⁶ Their basic interests may evidently not align with those of the public, a fact that they may themselves clearly underappreciate.¹⁰⁷ Their basic methodological assumptions may be seriously flawed, contestable, or indeterminate in their proper application.¹⁰⁸ Experts may overrate the importance of considerations that are central to their own field of expertise and underrate the importance of considerations not within the scope of their expertise.¹⁰⁹ They may also tend, in a systematic way, to assume that important normative policy conclusions fall naturally and

103. As a hypothetical example, psychological studies might find less intellectual humility, and a greater degree of systematic cognitive bias, in some credentialed experts than among many judges.

104. Consider, for example, that pandemic response policies arguably impairing constitutional rights may also have adverse, unintended, long-term consequences in areas beyond the deaths and illnesses directly caused by the virus in question, and beyond the technical expertise of the key policy makers.

105. For a rigorous exposition of just such overestimation, see PHILIP E. TETLOCK, *EXPERT POLITICAL JUDGMENT: HOW GOOD IS IT? HOW CAN WE KNOW?* (Princeton University Press, 2006).

106. See JANIS, *supra* note 60; Michael Hallsworth, et al., *Behavioural Government*, BEHAVIOURAL INSIGHTS TEAM (July 11, 2018), www.bi.team/wp-content/uploads/2018/08/BIT-Behavioural-Government-Report-2018.pdf [<https://perma.cc/KS6Z-BFY5>]; see also BRIAN W. HOGWOOD & B. GUY PETERS, *THE PATHOLOGY OF PUBLIC POLICY* (1985); Sceheryar Banuri, et al., *Biased Policy Professionals*, 33 *WORLD BANK REV.* 310, 310 (2019) (on “confirmation bias driven by ideological predisposition”); Casper Dahlmann & Niels Bjorn Petersen, *Politicians Reject Evidence That Conflicts With Their Beliefs: And If You Give Them More Evidence, They Double Down*, *THE WASHINGTON POST* (Oct. 5, 2017, 10:00 AM) <https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/05/politicians-reject-evidence-that-conflicts-with-their-beliefs-and-if-you-give-them-more-evidence-they-double-down/> [<https://perma.cc/GA6U-RFXS>]; Timur Kuran & Cass R. Sunstein, *Availability Cascade and Risk Regulation*, 51 *STAN. L. REV.* 683 (1999); Slavisa Tasic, *The Illusion of Regulatory Competence*, 21 *CRITICAL REV.* 423 (2009); Michael David Thomas, *Reapplying Behavioral Symmetry: Public Choice and Choice Architecture*, 180 *PUB. CHOICE* 11 (2018) (on administrative agency cognitive capture).

107. See EAMOUN BUTLER, *PUBLIC CHOICE - A PRIMER* (Mar. 25, 2012); GORDON TULLOCK, ET AL., *GOVERNMENT FAILURE: A PRIMER IN PUBLIC CHOICE* (2002). For broader-based arguments, see PETER H. SCHUCK, *WHY GOVERNMENT FAILS SO OFTEN AND HOW IT CAN DO BETTER* (Princeton University Press, 2014); Clifford Winston, *GOVERNMENT FAILURE VERSUS MARKET FAILURE: MICROECONOMIC POLICY RESEARCH AND GOVERNMENT PERFORMANCE* (2006).

108. Policy makers seeking to apply some form of cost-benefit analysis, or perhaps a form of a precautionary principle, may overlook fundamental methodological problems that are evident to outsiders. For background, see e.g., Eric Posner & Matthew D. Adler, *Rethinking Cost-Benefit Analysis*, 109 *YALE L. J.* 165 (1999). On the logic of the precautionary principle, pre-COVID-19, see CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005). For an endorsement of a “least harm” decisional principle, see AARON TANG, *SUPREME HUBRIS: HOW OVERCONFIDENCE IS DESTROYING THE COURT—AND HOW WE CAN FIX IT* (2023).

109. Query whether teams of epidemiologists and separate teams of child and adolescent development and educational specialists would likely adopt the same COVID-19 response policies.

uncontroversially out of their findings of fact.¹¹⁰ And policy experts may tend to assume that the available evidence is clearly indicative of a much larger body of unavailable evidence.¹¹¹

More broadly, a properly exercised judicial humility does not invariably call for judicial minimalism or judicial restraint. What a proper judicial humility really calls for in any given case requires the exercise of the further, ultimate virtue of practical judicial wisdom. A proper degree of judicial humility is indispensable to a properly functioning judicial system. But in the end, judicial humility vitally contributes to the ultimate, overarching value of practical judicial wisdom while also relying on some elements of practical wisdom to guide judicial efforts to exercise humility. Judicial humility is thus essential to judicial practical wisdom and a properly functioning rule of law while being, at the same time, crucially informed by other dimensions of practical wisdom in the judicial context.

At first blush, judicial humility would seem to generally condemn attempts by courts to probe into the motives of legislators who have enacted a particular statute.¹¹² But the reasonably epistemically humble judge can recognize the difference between the attempted reading of a perhaps non-existent collective legislative mind and reasonably inferring legislative intent from the obvious point of a statute.¹¹³

A reasonable humility counsels against any judicial pretense to extreme or Herculean fact-finding abilities.¹¹⁴ Thus, when it comes to, say, a university's advanced student professionalism evaluations, the Court has recognized that such matters require "an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking."¹¹⁵ But when the typical outcome of an overly ambitious judicial test is widely approved of, any pretentiousness embodied in that test is

110. The tendency to slide casually from an 'is,' or a likely 'is,' to an all-things-considered 'ought' should be resisted judicially. See Rachel Cohon, *Hume's Moral Philosophy*, Stanford Encyclopedia of Philosophy (Aug. 20, 2018), <https://plato.stanford.edu/entries/hume-moral> [<https://perma.cc/M8CW-ZPJN>].

111. See Nathan Ballantyne, *The Significance of Unpossessed Evidence*, 65 PHIL. Q. 315, 315 (2015) ("[f]or many topics, evidence we don't have comprises most of the evidence there is"). On the other hand, there is the problem of the overuse, rather than the underuse, of judicial summary judgment. See Jeffrey W. Stempel, *Taking Cognitive Illiberalism Seriously: Judicial Humility, Aggregate Efficiency, and Acceptable Justice*, 43 LOY. U. CHI. L. J. 627, 637 (2012) (the proper response to the overuse of summary judgment as "a large dose of judicial humility or consciousness-raising").

112. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) (observing that "[i]nquiries into congressional motives or purposes are a hazardous matter").

113. For a more aggressive epistemic approach, see the hippie food stamp case of *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) ("a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest").

114. See, e.g., *Bd. of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 89-90 (1978).

115. *Id.* at 90.

commonly ignored.¹¹⁶ Judicial claims to mind-reading and the ability to assign probabilities to future events are widely approved of in some contexts, such as when the courts protect freedom of speech.¹¹⁷ Such speech-protective decisions may actually be defended on the grounds of judicial humility, though, if federal courts are thought to be less caught up than local officials in the political passions, frenzies, biases, and epistemic excesses of the day.¹¹⁸

Probably the most familiar argument for judicial humility as something like judicial restraint or judicial minimalism, though, relies upon Justice Brandeis's concurring opinion in the classic case of *Ashwander v. Tennessee Valley Authority*.¹¹⁹ Among Justice Brandeis's counsels of judicial humility in *Ashwander* is, centrally, the principle that "[t]he Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"¹²⁰ Presumably, the idea is that common law courts, especially, are by training and disposition better suited to modest tasks of narrow, concrete, fact-based, incremental scope rather than attempting to foresee the unintended consequences of needlessly broad judicial rules.¹²¹

The general approval of Justice Brandeis's *Ashwander* principles is not confined to any portion of the familiar political spectrum. Thus, it is thought by progressive judges that "[i]f it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more."¹²² The related general principle of

116. Note the Court's willingness to second-guess local administrative judgments on a range of largely empirical, or subjective, matters in the subversive advocacy free speech case of *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (per curiam).

117. *See id.*

118. *See generally* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985); Martin H. Redish, *The Role of Pathology in First Amendment Theory: A Skeptical Examination*, 38 CASE W. RES. L. REV. 618 (1988) (critiquing Professor Blasi's approach).

119. 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

120. *Id.* at 347 (internal citation omitted).

121. *See, e.g.*, the concern for the quality of judicial decision-making expressed in *State v. Rowan*, 416 P.3d 566, 579 (Utah 2017) (citing *Ashwander*, 297 U.S. at 346-47). More broadly, see the comparison between what is called disjoint incrementalism and broader, more synoptic approaches to decision-making in DAVID BRAYBROOKE & CHARLES E. LINDBLOM, *A STRATEGY OF DECISION: POLICY EVALUATION AS A SOCIAL PROCESS* (1970). For discussion in one particular constitutional context, see Brian C. Murchison, *Interpretation and Independence: How Judges Use the Avoidance Canon in Separation of Powers Cases*, 30 GA. L. REV. 85 (1995). For a skeptical critique of some aspects of judicial avoidance, *see generally* Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71 (1995).

122. *Trump v. Anderson*, 601 U.S. 100, 118 (2024) (Sotomayor, Kagan, and Jackson, JJ., concurring in the judgment) (quoting *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 348 (2022) (Roberts, C.J., concurring in the judgment)). The Sotomayor opinion goes on to declare this policy to be a "fundamental principle of judicial restraint." *Id.* For broader discussion, see CASS R. SUNSTEIN, *ONE CASE AT A TIME - JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

stare decisis is also thought to reflect judicial humility, modesty, and restraint, as opposed to judicial arrogance or hubris.¹²³

The deep problem here is not that judicial humility may be outweighed by other considerations. Certainly, *Ashwander* narrowness and respect for judicial precedent should, in some cases, be less than decisive. Professor Andrew Coan has recently observed that “[a]cross-the-board gradualism is subject to many weighty objections. It is hard to square with some of the Supreme Court’s most celebrated decisions. Think of *Obergefell v. Hodges* or *Brown v. Board of Education* or *Gideon v. Wainwright*.”¹²⁴ The controversy over the proper scope of judicial narrowness and stare decisis¹²⁵ is, however, not really about the role of judicial humility.

To see this, consider the position of the Court in *Brown*. Judicial humility certainly requires attention to one’s own real capacities, deficiencies, biases, limitations, and overall fallibility. However, thoughtful judicial humility does not automatically credit all other legal actors, including any judicial predecessors, with themselves invariably acting with proper humility. Such matters can be reflected upon by current judges with appropriate humility. One’s predecessor judges, prior and current legislators and administrators, and other legal actors were themselves fallible. They were situated persons, of and within their culture. They may not have always fully recognized their fallibilities. And their predictions as to the actual effects of their actions are typically less accurate than the observations of their successors, who have actually lived through those actual effects. All this may be humbly taken into account.

Judicial humility certainly requires a proper deference to those who contributed to the accumulated wisdom of tradition.¹²⁶ But merely being a predecessor of one’s successors hardly implies that one’s judgments reflect any degree of humility. Our predecessors may well have had even stronger grounds for exercising epistemic humility, given their comparatively more limited experiences.

This point is related to a conclusion classically expressed by Blaise Pascal. Pascal claimed that

123. *See, e.g.*, *Brown v. Davenport*, 596 U.S. 118, 141 (2022) (stare decisis is at best “a call for judicial humility” and “a reminder to afford careful consideration to the work of our forebearers, their experience, and their wisdom.”); *see also id.* (misuse of the doctrine “would turn stare decisis from a tool of judicial humility into one of judicial hubris”). For further thoughtful discussion, *see State v. Walker*, 267 P.3d 210 (Utah 2011).

124. Andrew Coan, *Too Much, Too Quickly?*, ARIZ. LEGAL STUD. at 26 (January 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4714188 [https://perma.cc/WAG5-4P5T]. One might think of the dubious value of cases like *Sweatt v. Painter*, 339 U.S. 629 (1950) in merely limiting *Plessy v. Ferguson*, 163 U.S. 537 (1896) rather than broadly overruling *Plessy* in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

125. For a recent authoritative discussion of the scope and limits of stare decisis, *see Dobbs*, 597 U.S. at 231-32; *id.* at 263-64 (Breyer, J., dissenting).

126. *See, e.g.*, Edmund Burke, *Reflections on the Revolution in France*, in *The Portable Edmund Burke* 415-451 (Isaac Kramnick eds., 1999).

[t]hose whom we call ancient were really new in all things, and properly constituted the infancy of humankind, and as we have joined to their knowledge the experience of the centuries which have followed them, it is in ourselves that we should find this antiquity that we revere in others.¹²⁷

The problem here, though, is that it cannot be simply assumed that nearly all of the knowledge attained by our predecessors has been preserved and absorbed by us in a largely undistorted fashion. Insights can be grossly distorted or lost, at least for some period of time.¹²⁸

But Pascal's broader point is clearly important. Earlier courts may have lacked sufficient humility, along with much grasp of the actual effects of their decisions, let alone the accumulated experience of later decades. The proper judicial humility of contemporary judges should thus take earlier insufficiencies in judicial humility into realistic account, along with the inevitable inability to anticipate the ill consequences of one's decisions over time.

Consider, then, the question of judicial humility in deciding whether to overrule the racial separate but equal case of *Plessy v. Ferguson*.¹²⁹ An important defect in the *Plessy* majority opinion is one of a distinct lack of judicial humility in a matter of logic and judgment, rather than of ability to forecast the future. The *Plessy* majority had declared that "[l]aws permitting, or even requiring, [racial] separation, in places where [races] are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other."¹³⁰

This is doubtless true, but only as a matter of the most arid, abstract, contextless, ahistorical, unrealistic legal formalism. Justice Harlan's dissenting opinion at the time pointed clearly enough at the problem of sightless formalism versus realism,¹³¹ though. The *Plessy* majority lacked the epistemic humility to hold their intuitions and biases up to any meaningful scrutiny. And the *Brown* Court could, with due humility, have taken the *Plessy* Court's now evidently insufficient judicial humility into proper account.

Such a judgment by the *Brown* Court need not have been a matter of hindsight bias or even of experience accumulated after *Plessy*. Perhaps the most decisive claim in *Plessy* runs as follows:

We consider the underlying fallacy of the plaintiff's argument to consist of the assumption that the enforced separation of the two races stamps

127. BLAISE PASCAL, A PREFACE TO THE TREATISE ON VACUUM, IN MODERN PHILOSOPHY: ESSENTIAL SELECTIONS 6, (Oct. 18, 2016), https://en.wikisource.org/wiki/Blaise_Pascal/Preface_to_the_Treatise_on_Vacuum [<https://perma.cc/7B2S-BUHE>].

128. As noted in JOHN STUART MILL, ON LIBERTY 63 (Gertrude Himmelfarb ed., 1974) (1859).

129. 163 U.S. 537 (1896), overruled by *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

130. *Id.* at 544.

131. *See id.* at 552, 556-57 (Harlan, J., dissenting).

the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction on it.¹³²

These are measured, but objectively and plainly embarrassing, words. They amount, in all relevant times and places, to an obvious instance of the fallacy of the excluded middle,¹³³ as most generously constructed. On the *Plessy* majority's logic, if there is any badge of inferiority in the case, it must be sourced either in the particular regulation at issue itself, or else in the supposedly readily alterable subjective perceptions of African Americans.

Giving the *Plessy* majority every benefit of the doubt, it should have been evident even then that the Court had somehow managed to exclude the most obvious possible account. We may choose to assume that the particular racial separation regulation, in itself, at least facially,¹³⁴ was not racially invidious in its express terms.¹³⁵ But this does not leave the readily alterable perceptual subjectivities of African Americans as the sole, or even most likely, alternative. Justice Harlan recognizes this and finds the majority's excluded middle alternative to be entirely obvious. Justice Harlan, in dissent, points to the commonsense recognition ignored by the majority:

Everyone knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied or assigned to white persons. . . . The thing to accomplish was to compel [blacks] to keep to themselves while traveling in railroad passenger cars. No one would be so wanting in candor as to assert the contrary.¹³⁶

As Justice Harlan evidently recognizes, there was likely some sentiment, as in racial intermarriage cases,¹³⁷ that the behavior of white persons should also be constrained to some degree by law. But this sort of Orwellian evenhandedness is no less racially invidious and in a racially non-symmetrical way. Fear of some sort of racial taint has historically run asymmetrically.

All of this should have been, if it was somehow not in fact, evident to all of the Justices in *Plessy*. And this is a matter of what was then widely known and

132. *Id.* at 551.

133. *See, e.g.*, the discussion *False Dilemma* Fallacy, THOUGHTCO (Ma. 8, 2017), www.thoughtco.com/false-dilemma-fallacy-250338 [https://perma.cc/W85X-WHYG] (last visited Mar. 1, 2024).

134. Of course, it has long been understood that an invidious intent can be carried out through language that is not invidious in its express terms, as in the case of Mark Anthony's funeral oration, and as recognized jurisprudentially in *Washington v. Davis*, 426 U.S. 229, 241 (1976).

135. *See id.*

136. *Plessy*, 136 U.S. at 557.

137. *See, e.g.*, the underlying cultural considerations in *Loving v. Virginia*, 388 U.S. 1 (1967).

understood rather than of our own hindsight. At the very least, by the time of *Brown v. Board. of Education*,¹³⁸ the Court was in a position, in all epistemic humility, to appreciate the failure of the Plessy majority to recognize its own biases and fallibility. Anything like judicial deference to the *Plessy* Court's reasoning would have been entirely inappropriate.

A proper judicial humility is thus both broadly realistic and broadly comparative. In some cases, as in *Brown* relative to *Plessy*, assessing proper judicial humility may call for dramatic, if not socially revolutionary, change. This can be so even where the long-term results in *Brown* itself were indeed partly unpredictable.¹³⁹ Again, the idea of humility is more closely associated with truth, and the pursuit thereof, than with deference to others, or to self-effacement.¹⁴⁰

Of course, most cases involving the proper scope of judicial humility will not be clustered either at the *Brown-Plessy* end of the spectrum, or at the end of the spectrum at which humility requires almost reflexive deference to other judicial, legislative, or administrative decision-makers. Among the most important kinds of cases in which the implications of a proper judicial humility are contested are those involving the question of judicial deference to various sorts of administrative agency regulatory determinations.

In some administrative agency case contexts, the Court treats the concrete application of a statutory term as less a matter of administrative expertise or of largely unbridled administrative discretion than of judicial inquiry into legislative intent.¹⁴¹ In other cases, the ambivalence of the Court toward the non-adversarially-based interpretive judgments of administrative agencies is almost palpable.¹⁴²

Often, but not always,¹⁴³ judicial humility will, in the administrative agency case context, depend upon the administrative agency's own apparent epistemic humility in seeking to upgrade its own base of knowledge and experience. The implications of a proper judicial humility in the context of one degree or another

138. 347 U.S. 483 (1954).

139. Consider the partially disappointing results discussed in GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008).

140. *See supra* Parts II-IV.

141. *See, e.g.*, *NLRB v. Hearst Pubs.*, 322 U.S. 111, 124 (1944) (“[w]hether . . . the term ‘employee’ includes . . . newsboys must be answered primarily from the history, terms, and purposes of the legislation”).

142. *See, e.g.*, *Skidmore v. Swift*, 323 U.S. 134, 140 (1944) (following up a deferential review formulation with a clearly less deferential set of considerations); *Chevron, U.S.A., Inc. v. NRDC Inc.*, 467 U.S. 837, 844-45 (1984) (pointing both to clear legislative intent and to an agency's “more than ordinary knowledge” of the matter at issue); *see also* the diverging approaches of the well-regarded opinions in *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976) (en banc).

143. *See, e.g.*, *Kisor v. Wilkie*, 588 U.S. 588, 571-72 (2019) (“[a]gencies (unlike courts) can conduct factual investigations, can consult with affected parties”); *United States v. Western Pac. R.R.*, 352 U.S. 59, 65 (1958) (decided in the context of the doctrine of agency primary jurisdiction).

of administrative agency expertise in interpreting congressional language are currently intensely contested.¹⁴⁴ Thinking about what a proper judicial humility requires in this area of the law thus seems especially important, and of current and future controversy.

VI. CONCLUSION

A proper judicial humility is an indispensable element of the ultimate value of practical wisdom in adjudication. Such humility need not imply and is, in fact, incompatible with judicial timidity, judicial institutional self-effacement, and unjustified deference to either prior judicial decisions or to the judgments of other legal actors. Reciprocally, though,¹⁴⁵ a proper judicial humility must, in its turn, be informed and steered by independent elements of all-things-considered practical wisdom in judging.¹⁴⁶ There may be no shortcuts to a proper judicial humility or to persuading judges of its indispensability.¹⁴⁷ But this does not make a proper judicial humility and the continuing pursuit thereof any less necessary.¹⁴⁸

144. See, e.g., *Skidmore*, 323 U.S. at 140 (not requiring administrative agency procedural outreach); *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 682 (D.C. Cir. 1973) (agencies as “not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice”) (citation omitted). For a broader discussion, see R. George Wright, *At What Is the Court Comparatively Advantaged?*, 116 W. VA. L. REV. 535 (2013).

145. Consider, for example, the contest over the nature and scope of the ‘major questions’ doctrine that is central to the various opinions in *West Virginia v. EPA*, 597 U.S. 697 (2022); see also Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023); Anita S. Krishnakumar, *What the Major Questions Doctrine Is Not*, 92 GEO. WASH. L. REV. 1 (2023); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022).

146. As in, for example, what is called Rawlsian wide or narrow reflective equilibrium. For background, see Carl Knight, *Reflective Equilibrium*, Stanford Encyclopedia of Philosophy, (Nov. 27, 2023), <https://plato.stanford.edu/entries/reflective-equilibrium> [<https://perma.cc/2HYB-QUEL>] (last visited Mar. 1, 2024).

147. While moving much past Aristotle’s classic understanding of phronesis, or practical wisdom, has been difficult, see the careful empirical work of Professor Philip Tetlock, as referenced at The Decision Lab. Phillip Tetlock, THE DECISION LAB, <https://thedecisionlab.com/thinkers/political-science/philip-tetlock> [<https://perma.cc/LUX4-JHH5>], (last visited Mar. 1, 2024); GOOD JUDGMENT, <https://goodjudgment.com> [<https://perma.cc/YU9B-77UL>], (last visited March 1, 2024).

148. For those who find the idea of wisdom to be meaningless, empty, unrecognizable, or entirely unattainable to any degree, we can define wisdom as the sum of whatever conduces to decisional outcomes that such a skeptic finds overall most appealing. For discussion, see Mario DeCaro et al., *Why Practical Wisdom Cannot Be Eliminated*, 43 TOPOI 895 (Mar. 16, 2024).