

## HOLMESIAN PERSONS AND THE ADMINISTRATIVE STATE

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### INTRODUCTION

Oliver Wendell Holmes's classic *The Path of the Law*<sup>1</sup> has elicited commentary on a number of fronts.<sup>2</sup> One strain of commentary has focused on Holmes's discussion of the so-called "bad man"<sup>3</sup> perspective on law and compliance therewith. Holmes's figure of the bad man has been discussed from many and varied perspectives.<sup>4</sup> Herein, our focus is not on the bad person in particular, but, as inspired by Holmes, on the broader public interest value of

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1. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897), reprinted in 110 HARV. L. REV. 991 (1997) and 78 B.U. L. REV. 699 (1997) [hereinafter *Path*]. Subsequent references will cite to the 1997 Harvard Law Review reprint page.

2. Including, prominently, Holmes's focus on "the prediction of the incidence of the public force through the instrumentality of the courts." *Path*, supra note 1, at 991. See also Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 42 (1918).

3. See *Path*, supra note 1, at 992–93. The "bad man" is presumably not especially gender specific.

4. See, e.g., H.L.A. HART, THE CONCEPT OF LAW 38–42 (3d ed. 2012); Albert W. Alschuler, *The Descending Trail: Holmes' Path of the Law One Hundred Years Later*, 49 FLA. L. REV. 353, 373–79 (1997); Jack M. Beermann, *Holmes's Good Man: A Comment on Levinson and Balkin*, 78 B.U. L. REV. 937, 937–38 (1998); David Dolinko, *Alschuler's "Path"*, 49 FLA. L. REV. 421, 428–30 (1997); Keith R. Fisher, *Repudiating the Holmesian "Bad Man" Through Contextual Ethical Reasoning: The Lawyer As Steward*, 2008 J. PROF. LAW. 13, 18–19 (2008); William W. Fisher III, *Interpreting Holmes*, 110 HARV. L. REV. 1010, 1010 (1997); Thomas C. Grey, *Plotting the Path of the Law*, 63 BROOK. L. REV. 19, 36–37 (1997); Tracy E. Higgins, *Straying from the Path*, 110 HARV. L. REV. 1019, 1019 (1997); Marco Jimenez, *Finding the Good in Holmes's Bad Man*, 79 FORD. L. REV. 2069 (2011); Sanford Levinson & J.M. Balkin, *The "Bad Man," The Good, and the Self-Reliant*, 78 B.U. L. REV. 885, 885–86 (1998); David Luban, *The Bad Man and the Good Lawyer: A Centennial Essay on Holmes's The Path of the Law*, 72 N.Y.U. L. REV. 1547, 1561–62 (1997); Richard D. Parker, *The Mind of Darkness*, 110 HARV. L. REV. 1033 (1997); Richard A. Posner, *The Path Away from the Law*, 110 HARV. L. REV. 1039 (1997); David Rosenberg, *The Path Not Taken*, 110 HARV. L. REV. 1044 (1997); Frederick Schauer, *Prediction and Particularity*, 78 B.U. L. REV. 773 (1998); David J. Seipp, *Holmes's Path*, 77 B.U. L. REV. 515, 554–58 (1997); Rebecca Stone, *Legal Design for the "Good Man"*, 102 VA. L. REV. 1767 (2016); William Twining, *Other People's Power: The Bad Man and English Positivism, 1897–1997*, 63 BROOK. L. REV. 189 (1997); William H. Wilcox, *Taking a Good Look at the Bad Man's Point of View*, 66 CORNELL L. REV. 1058 (1981). See also STEVEN J. BURTON, *THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR.* (Steven J. Burton ed. 2000).

consciously attending to a variety of significant general types of ‘persons’ in the context of the administrative regulatory decision making.

Holmes begins his discussion in this context with a simple binary distinction between “a bad man”<sup>5</sup> and “a good one,”<sup>6</sup> largely for the purpose of seeking to distinguish the law, in itself, from morality.<sup>7</sup> Holmes argues that “a bad man has as much reason as a good one for wishing to avoid an encounter with the public force . . . .”<sup>8</sup> Thus “[a] man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nonetheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.”<sup>9</sup>

Classically, then, Holmes invokes the persona of the ‘bad’ person to further his more abstract argument:

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.<sup>10</sup>

The labels of ‘good’ and ‘bad’ only imperfectly fit Holmes’s substantive descriptions of the persons themselves. A bad person with respect to the law could actually care about non-material consequences, including public stigmatization, as expressed by the legal system or by private actors. A conventionally-conceived bad person could also be moved by the promptings of his ill-formed conscience. Conventionally-conceived good persons, on the other hand, need not be motivated by considerations of conscience, let alone by the sanctions of conscience in particular.<sup>11</sup> And both conventionally good and bad persons with respect to the law may well care about the consequences of their acts, material or non-material, for other persons.

For Holmes, and for our own purposes, however, the mere descriptive labels matter less than arriving at a useful sense of the various sorts of persons involved, including their capacities and the limits thereof, as well as of their significant interests, perspectives, and priorities. Taking imaginatively into account the most significant distinct persons, or much better, distinct person-types, as they are implicated in and affected by administrative decision making, is a path toward better such administrative decision making. This Essay builds, below, toward this normative conclusion.

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5. *Path*, *supra* note 1, at 992.

6. *Id.*

7. *See id.*

8. *Id.*

9. *Id.*

10. *Id.* at 993.

11. For sundry critiques, see the sources cited *supra* note 4.

## I. HOLMES AND THE EMERGING ADMINISTRATIVE STATE

As of 1897 and the publication of *The Path of the Law*, administrative law in England and the United States was of limited practical significance. The distinctiveness of the administrative law field and its study was, according to Ernst Freund, still emerging.<sup>12</sup> Frank Goodnow's pioneering treatise,<sup>13</sup> as of 1905, acknowledged this developing status.<sup>14</sup> Even by the mid-1920s, the term 'administrative law' still had no standard definition,<sup>15</sup> and was perhaps assumed to focus primarily on "the protection of private rights . . ."<sup>16</sup>

More broadly, though, administrative agencies were often then conceived of by analogy to a 'transmission belt,' expressing the popular or legislative will in particular contexts.<sup>17</sup> But any such analogy was early recognized as understating the significance of administrative decision making. Administrative agencies exercised "powers . . . not intended to serve as instruments of a fully expressed legislative will, but which are to aid the legislature in defining requirements that on the statute book appear merely as general principles."<sup>18</sup>

Similarly emerging was an appreciation of the distinctive value of administrative agency expertise.<sup>19</sup> Even if administrators began their service with no better grasp of the relevant problems than that of the legislators, a sort of expertise would inevitably accrue through agency specialization, the recurrence of substantive issues, and the development of institutional memory.<sup>20</sup>

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12. See Ernst Freund, *The Law of the Administration in America*, 9 POL. SCI. Q. 403, 403–04 (1894).

13. FRANK J. GOODNOW, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* (1905) (reprint ed. 2012). The year 1905 also saw, perhaps not entirely coincidentally, the publication of UPTON SINCLAIR, *THE JUNGLE* (1905) (addressing working conditions in meat packing plants).

14. See GOODNOW, *supra* note 13, at 1–2 ("In England . . . as well as in the United States, administrative law has been generally ignored as a branch of legal study except by those authors who have been subjected directly to the influences of continental thought.").

15. See Edward A. Harriman, *The Development of Administrative Law in the United States*, 25 YALE L.J. 658, 658 (1916).

16. *Id.* But see Notes, *The Growth of Administrative Law in the United States*, 31 HARV. L. REV. 644, 644 (1918) (on the inevitability of a shift in focus from negative individual rights toward facilitating positive government functions).

17. See A. A. Berle, Jr., *The Expansion of American Administrative Law*, 30 HARV. L. REV. 430, 434–35 (1917). For discussion of this approach, see Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675–76 (1975).

18. Ernst Freund, *The Substitution of Rule for Discretion in Public Law*, 9 AM. POL. SCI. REV. 666, 666 (1915).

19. See, e.g., Berle, *supra* note 17, at 442.

20. See, e.g., Roscoe Pound, *Executive Justice*, 55 AM. L. REGISTER 137, 144, 146 (1907); Felix Frankfurter, Book Review, 37 HARV. L. REV. 638, 639 (1924) (noting the structural untidiness, along with the practical inevitability, of the recent rise of administrative agencies) (reviewing Ernst Freund et al., *The Growth of American Administrative Law*, 31 HARV. L. REV. 644 (1918)). In retrospect, see Edward L. Glaeser & Andrei Shleifer, *The Rise of the Regulatory State*, 41 J. ECON. LIT. 401, 402–07 (2003).

And this dynamic also contributed to a wider sense of the practical inevitability of a significant federal administrative apparatus.<sup>21</sup> On this sense of inevitability itself, both constitutional critics<sup>22</sup> and defenders<sup>23</sup> of the expanding administrative state have tended to concur. Perhaps the best short formulation of this perspective is that of Samuel Krislov:

Bureaucracies are the late bloomers of modern political structure. They grew silently, inexorably in the underbrush—seldom noticed, little analyzed. Convenience and necessity, not ideology and legitimacy, are their life-blood; they are not loved and respected, but rather tolerated and depended on.<sup>24</sup>

Describing, if not also endorsing, the rise of the administrative state on this basis involves a form of legal pragmatism. Legal pragmatism can, as it turns out, actually take a variety of forms.<sup>25</sup> The idea of pragmatism intended herein, however, refers merely to a home-spun sense of practicality, or of efficacy and efficiency in progressing toward goals. Herein, no ambitious epistemological claims, including of a critical variety, are implied.

Holmes himself is often thought of as a leading<sup>26</sup> American legal pragmatist in one sense or another. Holmes, merely for example, has thus been

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21. See Pound, *supra* note 20; Frankfurter, *supra* note 20; Glaeser & Shleifer, *supra* note 20. See also Freund, *supra* note 12, at 424 (referring to “the constant and inevitable expansion of the sphere of modern state activity” including not only legislation, but administration). The sense of the practical inevitability of an expanded administrative role, even at a state level, was given clear expression early on in the railroad ratemaking case of *State ex rel. R.R. & Warehouse Comm’n v. Chicago*, 37 N.W. 782, 788 (Minn. 1888).

22. See PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 18, 504 (2014); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1241 (1994) (“[T]he Court believes—possibly correctly—that the modern administrative state could not function if Congress were actually required to make a significant percentage of the fundamental policy decisions.”) (citing the Court’s discussion of the legislative non-delegation doctrine in *Mistretta v. United States*, 488 U.S. 361, 372 (1989)).

23. See, e.g., Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852 (2020); Gillian E. Metzger, *The Supreme Court 2016 Term Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7 (2017) (bureaucratic features as “essential for the accountable, constrained, and effective exercise of executive power[.]” with broad delegation to agencies as “necessary given the economic, social, scientific, and technological realities of our day”). For background, see the work of Professor Jerry Mashaw, including *JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT* (2018).

24. SAMUEL KRISLOV, *REPRESENTATIVE BUREAUCRACY* 40–41 (1974). Professor Krislov is favorably quoted on this point in B. GUY PETERS, *THE POLITICS OF BUREAUCRACY: AN INTRODUCTION TO COMPARATIVE PUBLIC ADMINISTRATION* 14 (7th ed. 2018).

25. See, e.g., Charles L. Barzun, *Three Forms of Legal Pragmatism*, 95 WASH. U. L. REV. 1003 (2018). For a discussion of the influential pragmatism of Richard Rorty, see R. George Wright, *Pragmatism and Freedom of Speech*, 80 N.D. L. REV. 103 (2004).

26. See, e.g., Barzun, *supra* note 25, at 1022 (describing Holmes as “perhaps the most famous legal pragmatist of all”); Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 413–14 (1990) (referring to “Holmes, whom current legal pragmatists commonly regard as a kind

judged a legal pragmatist in an instrumentalist sense,<sup>27</sup> according to which beliefs about means, but not beliefs about ends, can be empirically validated.<sup>28</sup> Holmesian legal pragmatism, at least under some descriptions, may be thought to be obsolete,<sup>29</sup> or at least controversial.<sup>30</sup> But we need not address herein any of these disputed characterizations. Holmes's thinking in *The Path of Law* and elsewhere, including in his judicial opinions,<sup>31</sup> recognizes and expresses legal pragmatism in the minimalist, home-spun sense specified above. This sort of pragmatism was thought to validate, in particular, "[t]he growth of bureaucracy in all phases of law,"<sup>32</sup> marking the gradual rise of the administrative state.

Thus, Holmes was able to view with equanimity the formally problematic combination of functions that is typical of many administrative agencies. Holmes recognized, as of 1908, the utility of a state administrative agency's being "clothed with legislative, judicial and executive powers."<sup>33</sup> Justice Holmes later referred non-critically to the Interstate Commerce Commission's powers, regardless of the doctrine of legislative non-delegation,<sup>34</sup> to engage in "legislative, judicial and executive acts."<sup>35</sup> More broadly, and in a similarly pragmatic vein, Holmes declared that "[t]he great ordinances of the Constitution do not establish and divide fields of black and white."<sup>36</sup> In the context of administrative agency operations and the separation of powers, Holmes thus concluded:

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of patron saint for the movement"); Albert W. Alschuler, *From Blackstone to Holmes: The Revolt Against Natural Law*, 36 PEPP. L. REV. 491 (2009).

27. See Barzun, *supra* note 25, at 1022.

28. See *id.*

29. See Susan Haack, *On Legal Pragmatism: Where Does "The Path of the Law" Lead Us?*, 50 AM. J. JURIS. 71, 71 (2005) ("What is called 'legal pragmatism' today is very different from the older style of legal pragmatism traditionally associated with Oliver Wendell Holmes."). Professor Haack goes on to attempt to sort through the "desperately confusing scholarly mare's nest" of contemporary forms of legal pragmatism. *Id.* at 74.

30. See, e.g., Paul L. Gregg, *The Pragmatism of Mr. Justice Holmes*, 31 Geo. L.J. 262, 286–87 (1943) (describing Holmesian pragmatism as seeking "the satisfaction of social needs, desires and wants[,] but not necessarily for the sake of some genuinely common or egalitarian good, as distinct from the perceived good of the particular "individuals and groups" who happen to have attained positions of dominance). For further takes on Holmesian pragmatism of one sort or another, see, e.g., Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 788 (1989); Seipp, *supra* note 4, at 554 (quoting biographer Max Lerner on Holmes's "bad man" in the context of "a pragmatic America in whose practical business life the realm of fact had elbowed out the norms of morality"); Catharine Wells Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541, 594 (1988) (Holmesian pragmatism as focusing on concrete particulars). See also Holmes, *Peirce and Legal Pragmatism*, 84 YALE L.J. 1123 (1975).

31. See *infra* notes 32–39 and accompanying text.

32. Posner, *supra* note 4, at 1042.

33. *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 224 (1908).

34. See *Springer v. Gov't of Phil. Islands*, 277 U.S. 189, 210 (1928) (Holmes, J., dissenting).

35. *Id.*

36. *Id.* at 209.

[H]owever we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires.<sup>37</sup>

The underlying home-spun pragmatism of this approach is also illustrated in the well-known dissenting opinion by Justice Brandeis, as joined by Justice Roberts and Justice Stone, in *Crowell v. Benson*.<sup>38</sup> Therein, Brandeis and Holmes refer to administrative bodies as adjudicating, subject to some form of judicial review,<sup>39</sup> “a class of controversies which experience has shown can be more effectively and expeditiously handled in the first instance by a special and expert tribunal.”<sup>40</sup>

This form of pragmatism, as expressed by Justice Holmes, was strengthened by the emerging experiences with the Great Depression;<sup>41</sup> with the mobilization and enhanced regulation under the Second World War;<sup>42</sup> with the Civil Rights statutory enforcement of the 1960s;<sup>43</sup> and with the perceived advantages of thoughtful administrative regulation over the standard tort and criminal law systems in addressing environmental harms.<sup>44</sup> The basic Holmesian pragmatist concern for effective achievement of adopted public goals remains today generally unabated.

## II. THE CONTEMPORARY ADMINISTRATIVE STATE AND SOME APPARENT

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37. *Id.* at 211. Holmes’s language was quoted in *Clinton v. City of New York*, 524 U.S. 417, 481 (1998) (Breyer, J., dissenting) and in *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981). See also Louis L. Jaffe, *The Judicial Enforcement of Administrative Orders*, 76 HARV. L. REV. 865 (1963).

38. 285 U.S. 22 (1932).

39. See *id.* at 89 (Brandeis & Holmes, JJ., dissenting).

40. *Id.* at 88 (Brandeis & Holmes, JJ., dissenting). See also the pragmatic concerns expressed in *id.* at 93–94, and for near contemporary defenses, see James M. Landis, *Administrative Policies and the Courts*, 47 YALE L.J. 519, 519, 525, 530, 531 (1938); Louis L. Jaffe, *The Reform of Federal Administrative Procedure*, 2 PUB. ADMIN. REV. 141 (1942). For a more recent defense, see ADRIAN VERMEULE, LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE 29–30 (2016).

41. See the classic JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 14 (1938).

42. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (discussing the farm price subsidy).

43. For a current overview, see the material at U.S. EQUAL EMP. OPPORTUNITY COMM’N, [www.eeoc.gov](http://www.eeoc.gov) (last visited Apr. 19, 2021) (providing background for the activities of the Equal Employment Opportunity Commission).

44. See, e.g., STEPHEN BREYER, *REGULATION AND ITS REFORM* 261–84 (1984); Richard B. Stewart, *A New Generation of Environmental Regulation*, 29 CAP. U. L. REV. 21 (2001). See also Peter L. Strauss, *How the Administrative State Got to This Challenging Place* (Columbia Public Law Research Paper, Working Paper No. 14-668, 2020), [https://scholarship.law.columbia.edu/faculty\\_scholarship/2669](https://scholarship.law.columbia.edu/faculty_scholarship/2669).

## PATHOLOGIES

The shift in emphasis from judicial toward administrative processes and remedies is often of practical value. But public administrative agencies, in practice, do not invariably manifest pragmatic efficacy or rationality itself in its most important forms.<sup>45</sup> At the heart of current efforts to upgrade administrative state policy-making and functioning has been increasing sophistication in cost-benefit analysis, broadly construed.<sup>46</sup>

Holmes had, in *The Path of the Law*, already sought to turn the attention of the legal profession toward economics,<sup>47</sup> toward careful consideration of legislative goals,<sup>48</sup> toward careful assessment of alternative means of promoting those selected goals,<sup>49</sup> and to considerations of costs in general,<sup>50</sup> including opportunity costs.<sup>51</sup>

Today's more richly elaborate cost-benefit analysis focuses more on ascertaining facts than on seeking to reconcile conflicting values,<sup>52</sup> and on actual policy consequences and effects.<sup>53</sup> This focus leads, understandably, to a crucial role for expert administrative technocrats. Technocrats are ultimately responsible to the people,<sup>54</sup> but they are granted substantial authority to assess policy risks, uncertainties, and tradeoffs.<sup>55</sup> In practice, technocrats should be aware of the inevitably limited character of the information that is actually

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45. For background, see MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196–244 (Hans Heinrich Gerth & C. Wright Mills eds. & trans., ed. 2011) (1946); MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 337–41 (A.M. Henderson & Talcott Parsons eds. & trans. 1964) (1947).

46. See, e.g., BREYER, *supra* note 44; CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION (2018); MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS (2006); ED DIENER ET AL., WELL-BEING FOR PUBLIC POLICY (2009). Among standard textbooks, see, e.g., E.J. MISHAN & EUSTON QUAH, COST-BENEFIT ANALYSIS (5th ed. 2007). Among the cases, see, e.g., Corrosion Proof Fittings v. EPA, 947 F.2d 1201 (5th Cir. 1991), as discussed in ADLER & POSNER, *supra* note 46, at 114. For alternatives to utility maximization, see, e.g., LARA BUCHAK, RISK AND RATIONALITY (2017); John Rawls, *Concept of Distributional Equity: Some Reasons for the Maximin Criterion*, 64 AM. ECON. REV. 141 (1974).

47. See *Path*, *supra* note 1, at 1005.

48. See *id.*

49. See *id.*

50. See *id.* See also *id.* at 1007 (foregrounding “the reasons why [the] ends are desired, what is given up to gain them, and whether they are worth the price”); JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW 70 (2002 ed.) (1976) (on Holmes’s proto-cost-benefit analysis inclinations).

51. See *Path*, *supra* note 1, at 1007.

52. See SUNSTEIN, *supra* note 46, at x.

53. See *id.*

54. See *id.* at xi.

55. See *id.*

available to them,<sup>56</sup> and of the need for continuing optimal revision of their own assumptions, beliefs, and techniques.<sup>57</sup>

Given the complications, though, of administrative bureaucratic policy-making, it is hardly surprising that administrative regulation today commonly falls short of Holmesian home-spun pragmatism. Often, the relevant information for agency decision making is, if not unavailable, then unprocessable in any systematic way, or is provided largely by groups with an obvious stake, pecuniary or ideological, in the relevant administrative policy issues.<sup>58</sup>

Notoriously, the unintended and unforeseen consequences of administrative policies may be neither insignificant nor desirable. The problem of unintended and unforeseen adverse consequences, short- and long-term, is nearly ubiquitous and resistant to eradication.<sup>59</sup> Unsurprisingly, the more significant the public policy choice, and the greater the accompanying risks and uncertainties, the greater the scope for unintended, underappreciated, or largely unforeseen broad-ranging adverse policy effects.<sup>60</sup>

56. See *id.* at xv.

57. See *id.* at xiv (noting that “[w]hen a regulation causes job losses, it produces significant adverse effects on people’s welfare. Cost-benefit analysis does not now consider those effects, and some people believe that it should not. If they are right, so much the worse for cost-benefit analysis. Those losses matter.”). The theory assumed here is that persons who lose their jobs can obtain an appropriate substitute within a reasonable time. Consider also the superficially appealing better-safe-than-sorry “precautionary principle,” as critiqued in Stephen M. Gardner, *A Core Precautionary Principle*, 14 J. POL. PHIL. 33 (2006); Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. PA. L. REV. 1003, 1054–55 (2003).

58. Consider, for example, the information requirements needed for a national-level COVID-19 policy, reasonably accommodating all plainly significant direct and indirect consequences, whether short- or long-term, and including impacts on other sorts of health outcomes, economic-related health effects, various effects on vulnerable Third World populations, and in particular on domestic and international economic and educational inequalities. See the sources cited *infra* note 60.

59. See, classically, Claude Frédéric Bastiat, *That Which Is Seen, and That Which Is Not Seen*, MISES INST. (Dec. 18, 2019), <https://mises.org/library/which-seen-and-which-not-seen>. The Bastiat essay in question dates from 1850. As of the time of the onset of New Deal-Era regulation, see Robert K. Merton, *The Unintended Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894, 894–95 (1936). See also Lane Wallace, *Unintended Consequences*, THE ATLANTIC (Oct. 9, 2009), <https://www.theatlantic.com/national/archive/2009/10/unintended-consequences/28169/>; Mark J. Perry, *Ten Examples of the Law of Unanticipated Consequences*, AEI (Nov. 19, 2013), [www.aei.org/carpe-diem/ten-examples](http://www.aei.org/carpe-diem/ten-examples); Holmes E. Miller & Kurt J. Engemann, *The Precautionary Principle and Unintended Consequences*, 48 KYBERNETES 265 (2019). In the adjudicative realm, see *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 216 (7th Cir. 1990) (Easterbrook, J., concurring).

60. Consider, for example, the ramifications of state, national, and international level COVID-19-related regulations. From among the burgeoning literature, see, e.g., Martin Kulldorff et al., GREAT BARRINGTON DECLARATION (Oct. 4, 2020), <https://gbdeclaration.org>; Will Wilkinson, *The Useful Libertarian Idiocy of The Great Barrington Declaration*, NISKANEN CTR. (Oct. 27, 2020), [www.niskanencenter.org/the-useful-libertarian-idiocy](http://www.niskanencenter.org/the-useful-libertarian-idiocy); Tyler Cowen, *A Dangerous Libertarian Strategy For Herd Immunity*, BLOOMBERG (OCT. 15, 2020), <https://www.bloomberg.com/opinion/articles/2020-10-15/great-barrington-declaration-is-wrong->



Some pragmatic ineffectiveness in agency decision making is due to effective monopoly rent seeking and other public choice processes, including administrative agency capture by regulated parties.<sup>61</sup> Agency decision making process and outcomes may thus be adversely affected by rent seeking, and perhaps increasingly so over time.<sup>62</sup> Any perceived agency vulnerability to rent seeking behavior may then attract increased investment by private actors in just such socially unproductive strategies, thereby intensifying any adverse effects on agency decision making.<sup>63</sup>

But even if we set aside all the adverse effects of rent seeking and related phenomena on the quality of agency decision making, a more fundamental problem remains. The pragmatic value of agency policy making reflects the often-systematic cognitive biases of agency decision makers. Agency cognitive biases partially overlap with, while not systematically counteracting or counterbalancing, private sector cognitive biases.<sup>64</sup> Even subject matter expertise often

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about-herd-immunity; Robert Rowthorn & Jan Maciejowski, *A Cost-Benefit Analysis of the Covid-19 Disease*, 36 OXFORD REV. ECON. POL'Y S38 (2020), <https://www.repository.cam.ac.uk/handle/1810/307272>; Brad Palumbo, *Four Unintended Consequences of the Lockdowns*, CATALYST (Aug. 25, 2020), <https://catalyst.independent.org/2020/08/25/4-unintended>; Michelle Fox, *Coronavirus has Upended School Plans. It Will Also Worsen Racial and Economic Inequalities, Experts Warn*, CNBC (Aug. 12, 2020, 12:28 PM), <https://www.cnbc.com/2020/08/12/impact-of-covid-19-on-schools-will-worsen-racial-inequity-experts-say.html>; Kerry Murakami, *Colleges: Financial Toll of Coronavirus Worse Than Anticipated*, INSIDE HIGHER ED (Sep. 29, 2020), <https://www.insidehighered.com/quicktakes/2020/09/29/colleges-financial-toll-coronavirus-worse-anticipated>. At the level of international poverty, hunger, education, and child malnutrition, see David Nabarro, *Reflections About the Middle Path*, 4SD (Sept. 25, 2020), <https://www.4sd.info/covid-19-narratives/reflections-about-the-middle-path/>. In such cases, the uncertainties and consequences of what one might call the disease in itself, and of the public policy responses thereto, are largely inseparable. Of course, all of the substantive issues involved above were and remain debatable. But that is, for our purposes, precisely the point.

61. See, e.g., EAMONN BUTLER, PUBLIC CHOICE: A PRIMER 76–77 (2012) (on rent-seeking behavior and its associated policy distortions and other costs); SUSAN E. DUDLEY & JERRY BRITO, REGULATION: A PRIMER 58–60 (2d ed. 2012); BRINK LINDSEY & STEVEN M. TELES, THE CAPTURED ECONOMY 8–30 (2017); MANCUR OLSON, THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES 47 (1982) (“On balance, special-interest organizations and collusions reduce efficiency and aggregate income in the societies in which they operate and make political life more divisive.”) (emphasis omitted); ANDREI SHLEIFER & ROBERT W. VISHNY, THE GRABBING HAND: GOVERNMENT PATHOLOGIES AND THEIR CURES 87 (1998); RANDY T. SIMMONS, BEYOND POLITICS: THE ROOTS OF GOVERNMENT FAILURE 62 (The Indep. Inst. rev. ed. 2011); GORDON TULLOCK ET AL., GOVERNMENT FAILURE: A PRIMER IN PUBLIC CHOICE 49 (2002).

62. See OLSON, *supra* note 61, at 47.

63. See LINDSEY & TELES, *supra* note 61, at 26.

64. For background, see JON ELSTER, EXPLAINING SOCIAL BEHAVIOR: MORE NUTS AND BOLTS FOR THE SOCIAL SCIENCES 480–81 (Cambridge Univ. Press rev. ed. 2015); MICHAEL HALLSWORTH & ELSPETH KIRKMAN, BEHAVIORAL INSIGHTS 126, 151 (2020) (on government policies attributable to agency cognitive biases); DAVID HARDMAN, JUDGMENT AND DECISION MAKING: PSYCHOLOGICAL PERSPECTIVES 24 (2009) (on the availability heuristic); BRIAN W. HOGWOOD & B. GUY PETERS, THE PATHOLOGY OF PUBLIC POLICY (1985) (broadly pursuing a

involves the epistemic vice of overconfidence in one's policy beliefs, confirmation bias, and a disinclination to appropriately adjust those policy beliefs in the light of new, or previously minimized, evidence.<sup>65</sup>

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health or medical and disease analogy with respect to bureaucratic behavior); IRVING L. JANIS, VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN-POLICY DECISIONS AND FIASCOES 138 (Houghton Mifflin Co. ed. 1972) (on Cuban Missile Crisis decision making); DANIEL KAHNEMAN, THINKING, FAST AND SLOW 138–45 (2011) (on the availability heuristic, the availability cascade phenomenon, and the role of so-called availability entrepreneurs); RICHARD E. NISBETT, MINDWARE: TOOLS FOR SMART THINKING 31–32 (2015) (on the availability and salience biases); Sheheryar Banuri et al., *Biased Policy Professionals*, 33 WORLD BANK ECON. REV. 310, 310 (2019) (referring to the effects of “confirmation bias driven by ideological predisposition”); John Cassidy, *The Saliency Bias and 9/11: Is America Recovering?*, NEW YORKER (Sept. 11, 2013), <https://www.newyorker.com/news/john-cassidy/the-saliency-bias-and-911-is-america-recovering> (linking saliency, or conspicuousness, to the availability bias); Edward Chancellor, *How to Think Straight During a Crisis*, REUTERS (Apr. 9, 2020), <https://www.reuters.com/article/us-health-coronavirus-society-breakingvi/breakingviews-chancellor-how-to-think-straight-during-a-crisis-idUSKCN21R1GD> (discussing groupthink and the saliency bias, along with Professor Philip Tetlock's long-term study conclusion that “experts are prone to poor judgment at critical moments”); James C. Cooper & William E. Kovacic, *Behavioral Economics: Implications for Regulatory Behavior*, 41 J. REG. ECON. 41 (2012) (discussing agency “myopia,” as well as agency insulation from the adverse consequences of questionable policies); Casper Dahmann & Niels Bjørn Petersen, *Politicians Reject Evidence That Conflicts With Their Beliefs. And If You Give Them More Evidence, They Double Down*, WASH. POST (Oct. 5, 2017, 6:00 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/> (“[T]he more evidence there was, the more [the Danish] politicians were influenced by their prior attitudes, rather than the conclusion that the evidence pointed to.”); MICHAEL HALLSWORTH ET AL., BEHAVIOURAL GOVERNMENT: USING BEHAVIOURAL SCIENCE TO IMPROVE HOW GOVERNMENTS MAKE DECISIONS (2018), <https://www.instituteforgovernment.org.uk/sites/default/files/publications/BIT%20Behavioural%20Government%20Report.pdf> (comprehensively surveying various agency cognitive biases, as well as the quality of collective group decision making); Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 761 (1999); Mario J. Rizzo & Douglas Glen Whitman, *The Knowledge Problem of New Paternalism*, 2009 BYU L. Rev. 905, 932–42 (2009); Paul Slovic & Ellen Peters, *Risk Perception and Affect*, 15 CURRENT DIRECTIONS IN PSYCH. SCI. 322, 322 (2006) (stating “fear amplifies risk estimates, and anger attenuates them”); 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 (2019) (discussing agency “cognitive capture”); W. Kip Viscusi & Ted Gayer, *Behavioral Public Choice: The Behavioral Paradox of Government Policy*, 38 HARV. J.L. & PUB. POL'Y 973 (2015), [https://www.harvard-jlpp.com/wp-content/uploads/sites/21/2010/01/ViscusiGayer\\_4.pdf](https://www.harvard-jlpp.com/wp-content/uploads/sites/21/2010/01/ViscusiGayer_4.pdf). On the availability or salience bias in judicial outcomes, see *Carroll*, 896 F.2d at 216 (Easterbrook, J., concurring) (“[T]he legal system prefers the interests of identified plaintiffs to invisible future victims . . .”).

65. See Susan E. Dudley & Zhouan Xie, *Nudging the Nudger: Toward a Choice Architecture for Regulators*, Regulation & Governance (June 14, 2020), <https://onlinelibrary.wiley.com/doi/full/10.1111/rego.12329>. More broadly, consider the invaluable PHILIP E. TETLOCK, EXPERT POLITICAL JUDGMENT: HOW GOOD IS IT? HOW CAN WE KNOW? (rev. ed. 2017). See also, e.g., Banuri, *supra* note 64, at 310; Cooper & Kovacic, *supra* note 64, at 41;

Whether through the pathologies of public choice processes, through systematic cognitive biases, or through other mechanisms, administrative decision making outcomes seem often to miss the mark, sometimes in rather costly ways.<sup>66</sup> We address this crucial problem below.

### III. EPISTEMIC HUMILITY, HOLMESIAN PERSONS, AND

#### A RESPONSE TO THE ADMINISTRATIVE PATHOLOGIES

The phenomenon of costly errors in administrative policymaking invites reflection on possible reform paths to reduce the incidence and gravity of such errors. Expertise, along with immersion in data, apparently do not, in this respect, suffice. Professor Philip Tetlock thus concludes that “[w]hen we pit experts against minimalist performance benchmarks—dilettantes, dart-throwing chimps, and assorted extrapolative algorithms—we find few signs that expertise translates into greater ability to make either ‘well-calibrated’ or ‘discriminating’ forecasts.”<sup>67</sup>

Among the alternative approaches to reducing the incidence and gravity of administrative policy errors are attempts to make more data available to the decision makers.<sup>68</sup> The federal administrative notice and comment process, including agency responses to the public’s comments, could, for example, be made more elaborate and more demanding.<sup>69</sup> Greater attention could be paid

Dahlmann & Petersen, *supra* note 64; Thomas, *supra* note 64; and Xinsheng Liu et al., *Bureaucratic Expertise, Overconfidence, and Policy Choice*, 30 GOVERNANCE 705 (2017).

66. See, e.g., sources cited *supra* notes 58–59, as well as the broader arguments in PETER H. SCHUCK, *WHY GOVERNMENT FAILS SO OFTEN: AND HOW IT CAN DO BETTER* 20–22 (2014) (citing the works of Peter Rossi, as in e.g., Peter H. Rossi, *The Iron Law of Evaluation and Other Metallic Rules*, 4 RSCH. IN SOC. PROBS. AND PUB. POL’Y 3, 3–20 (1987), gwern.net/docs/sociology/1987-rossi); CLIFFORD WINSTON, *GOVERNMENT FAILURE VERSUS MARKET FAILURE: MICROECONOMICS POLICY RESEARCH AND GOVERNMENT PERFORMANCE* (2006); MARIO J. RIZZO & GLEN WHITMAN, *ESCAPING PATERNALISM: RATIONALITY, BEHAVIORAL ECONOMICS, AND PUBLIC POLICY* 309–48 (2019).

67. TETLOCK, *supra* note 65, at 20 (going on to then distinguish among analytical thinking styles). See also Philip E. Tetlock, *Theory-Driven Reasoning About Plausible Pasts and Probable Futures in World Politics*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 749, 749 (Thomas Gilovich et al. eds., 2002); Dudley & Xie, *supra* note 65, at § 1. On the broader phenomenon of systematic and sustained overconfidence in one’s skills and capacities, see DAVID DUNNING, *SELF-INSIGHT: ROADBLOCKS AND DETOURS ON THE PATH TO KNOWING THYSELF* 6–9 (2012). Note also that along with the rest of us, experts may mistake random ‘noise’ for ‘signal,’ and ‘see’ patterns where none obtain. Perhaps even worse in the long run, though, experts may fail to see important patterns that really have been emerging, especially where acknowledging such patterns would create dissonance for the decision maker in question.

68. See, e.g., Nathan Ballantyne, *The Significance of Unpossessed Evidence*, 65 PHIL. Q. 315, 315 (2015) (“For many topics, evidence we don’t have comprises most of the evidence there is . . .”).

69. See the requirements for federal agency informal rulemaking under the Administrative Procedure Act, 5 U.S.C. § 553, including, for example, as resulting in the 700,000 public comments considered by the FDA in the cigarettes-as-drug-delivery-device case of *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126–29 (2000).

by agencies to advances in the theory and practice of cost-benefit analysis.<sup>70</sup> On the other hand, the more serious problem for agency decision making may not be a lack of data, but the agency's inability to optimally process large amounts of data. As well, there may well be important and inherent limits to what cost-benefit analysis, apart from essentially contested value judgments, can tell us.<sup>71</sup> And any increased value in revised notice and comment processes may depend less upon further agency procedural changes than upon the spirit and motivation, including attention to epistemic virtues, with which such procedures are conducted.

Thus, one further approach to the problem of administrative agency policy errors might begin with the arguably crucial<sup>72</sup> phenomenon of overconfidence in their decision making prowess among bureaucrats,<sup>73</sup> and especially among those bureaucrats with the greatest experience.<sup>74</sup> The real antithesis of overconfidence and related biases among decision makers is not reduced self-esteem, reduced self-respect, or self-deprecation on their part. Instead, the real antithesis of overconfidence is a healthy and realistic degree of awareness of both the abilities and the crucial vulnerabilities, defects, and limitations of individual administrative actors and institutions as policy makers.<sup>75</sup>

In this pragmatically useful sense, epistemic humility rejects epistemic arrogance,<sup>76</sup> in favor of "a disposition not to make unwarranted intellectual entitlement claims on the basis of one's (supposed) superiority or excellence . . . ."<sup>77</sup> This quality of epistemic humility "helps us overcome responses to evidence that are self-centered or that outstrip the strength of that evidence."<sup>78</sup>

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70. See sources cited *supra* note 46.

71. See, e.g., Howard Kunreuther & Paul Slovic, *Science, Values, and Risk*, 545 ANNALS OF AM. ACAD. OF POL. & SOC. SCI. 116, 121 (1996); Paul Slovic, *Public Perception of Risk*, 59 J. ENV'TL HEALTH 22, 23 (1997) ("Risk assessment is inherently subjective and represents a blending of science and judgment with important psychological, social, cultural, and political factors."). Cf. Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119 (2002) (reviewing PAUL SLOVIC, *THE PERCEPTION OF RISK* (2000)).

72. See Liu, *supra* note 65, at 718 (on the relative importance of the overconfidence bias).

73. See *id.* at 706, 717.

74. See *id.*

75. See Dennis Whitcomb et al., *Intellectual Humility: Owning Our Limitations*, 94 PHIL. & PHENOM. RES. 509, 510 (2017). Professor Philip Tetlock does refer favorably to "a self-deprecating style of thinking," but this usage evidently suggests realistic, rather than irrationally low, self-assessments. See TETLOCK, *supra* note 65 at xi. For a useful overview of the virtue of humility in general, see Thomas Nadelhoffer et al., *Some Varieties of Humility Worth Wanting*, 14 J. MORAL PHIL. 168 (2017).

76. See ROBERT C. ROBERTS & W. JAY WOOD, *INTELLECTUAL VIRTUES: AN ESSAY IN REGULATIVE EPISTEMOLOGY* 250 (2007).

77. *Id.* This sort of admonition would apply, of course, to any emphasis on epistemic humility as well.

78. *Intellectual Humility*, JOHN TEMPLETON FOUND. (2020), [https://www.templeton.org/discoveries/intellectual-humility#:~:text=In%20a%20nutshell%2C%20intellectual%20humility,the%20strength%20of%20that%20evidence](https://www.templeton.org/discoveries/intellectual-humility#:~:text=In%20a%20nutshell%2C%20intellectual%20humility,the%20strength%20of%20that%20evidence.). See also MICHAEL P. LYNCH ET AL., *INTELLECTUAL HUMILITY IN PUBLIC*

The available empirical evidence seems to suggest that persons who are relatively strong in epistemic humility tend also to be more curious than others, and to be able to “distinguish strong from weak arguments more clearly . . . .”<sup>79</sup> Such persons also tend to “take other people’s perspectives and knowledge more seriously, [to] acknowledge the merits of divergent opinions [and] are less inclined to derogate people with different viewpoints . . . .”<sup>80</sup>

The benefits of the exercise of appropriate epistemic humility among administrative policy makers would be limited, however, if no such virtue could be learned or enhanced, as opposed to being merely selected for from among the competing individual candidates for agency policy making personnel positions. But it may well be that epistemic humility can indeed be learned,<sup>81</sup> and gradually acquired and enhanced, as a kind of developed skill.<sup>82</sup>

The purpose of seeking to enhance epistemic and other virtues among agency decision makers tracks all of the above-cited problems of agency failure, including failure to anticipate adverse consequences of policy choices;<sup>83</sup> of agency susceptibility to, if not encouragement of, damaging rent seeking behaviors;<sup>84</sup> and of systematic agency cognitive biases in policy making.<sup>85</sup>

The question then becomes how administrators should develop, and then deploy in practice, the crucial epistemic virtues. And it is here, in particular, that Holmes shows us a useful path. Holmes famously refers to the “bad man,”<sup>86</sup> and thus explicitly, and by inevitable implication as well, the man who is not bad, and even “good.”<sup>87</sup> Holmes does not focus on specific individual persons,<sup>88</sup>

DISCOURSE: LITERATURE REVIEW (2016), <https://humilityandconviction.uconn.edu/wp-content/uploads/sites/1877/2016/09/IHPD-Literature-Review-revised.pdf>; Barbara Mellers et al., *Forecasting Tournaments, Epistemic Humility and Attitude Depolarization*, 188 COGNITION 19, 25 (2019) (emphasizing the need for proper belief-updating). For an elaboration of some legal consequences of avoiding epistemic arrogance, see R. George Wright, *Epistemic Peerhood in the Law*, 91 ST. JOHN’S L. REV. 663 (2017).

79. MARK R. LEARY, *THE PSYCHOLOGY OF INTELLECTUAL HUMILITY* 15 (2018), [https://www.templeton.org/wp-content/uploads/2020/08/JTF\\_Intellectual\\_Humility\\_final.pdf](https://www.templeton.org/wp-content/uploads/2020/08/JTF_Intellectual_Humility_final.pdf).

80. *Id.* at 11.

81. *See id.* at 14. *See also* NATHAN BALLANTYNE, *KNOWING OUR LIMITS* 290 (2019). There is, however, likely to be a gap between what we can reliably measure as ‘wisdom,’ and the most valuable forms of actual wisdom as typically understood.

82. *See the authorities cited supra* notes 78–80. More broadly, the idea of practical wisdom is often thought as akin to a skill, if not itself actually a skill. *See, e.g.,* Cheng-hung Tsai, *Phronesis and Techne: The Skill Model of Wisdom Defended*, 98 AUSTRALASIAN J. OF PHIL. 234, 234 (2020); Matt Stichter, *Practical Skills and Practical Wisdom in Virtue*, 94 AUSTRALASIAN J. OF PHIL. 435 (2016); Jason D. Swartwood, *Wisdom as an Expert Skill*, 16 ETHICAL THEORY & MORAL PRAC. 511 (2013). *See also* Matt Stichter, *Ethical Expertise: The Skill Model of Virtue*, 10 ETHICAL THEORY & MORAL PRAC. 183 (2007).

83. *See supra* notes 57–59 and accompanying text.

84. *See supra* notes 60–62 and accompanying text.

85. *See supra* notes 63–64 and accompanying text.

86. *See supra* notes 3–10 and accompanying text.

87. *See id.*

88. For a distinct focus on the actual, ideally non-reductivist individual person, as distinct from person-types or categories of persons, *see* JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE*

as distinct from what we might call broad person-types. Any attempt by administrative policy makers to focus on many specific persons, as distinct from person-types, would, after all, invite information overload.<sup>89</sup> In this sense, some degree of reductionism is both inevitable and justifiable.

The Holmesian focus on general ‘good’ and ‘bad’ person-types opens the door to a more inclusive and more useful mental inventory of circumstantially important person-types, resulting in a larger, but still manageable, mental taxonomy of such types for agency decision makers. The goal, for our purposes, would be for administrative policy makers to develop an enhanced yet manageable sense of the capacities; evident interests; perspectives; and priorities of the crucial types of persons substantially affecting and likely being affected by the regulatory process.

It is not difficult to begin to populate such a mental taxonomy with some commonly important person-types, beyond merely the good and the bad. This process begins with recognizing that the Holmesian categories of good and bad persons themselves require sub-categorical distinctions: Bad persons might encompass, in the extreme, a “Napoleon of crime,”<sup>90</sup> the primary opponent of (Sherlock) Holmes.<sup>91</sup> Some Holmesian ‘bad’ persons, however, are instead focused merely on obtaining legal advice as an aid in decision making.<sup>92</sup> The Holmesian ‘bad’ person may also amount to a largely ‘pre-moral,’ as opposed to ‘immoral,’ person,<sup>93</sup> or to an alienated outsider to the dominant legal structure.<sup>94</sup>

The Holmesian ‘bad’ person must, for typical purposes, thus be disaggregated into important sub-types. And a similar disaggregation is required as well of the category of the Holmesian ‘good’ person.<sup>95</sup> ‘Good’ persons may be simply those who fall outside the category of the various ‘bad persons.’ Some ‘good’ persons may be crucially ‘better,’ for practical purposes,

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LAW (Univ. of Calif. Press ed. 2002) (1976). *See also, e.g.*, Linda Wetzel, *Types and Tokens*, STAN. ENCYCLOPEDIA OF PHIL. (Apr. 28, 2006), <https://plato.stanford.edu/entries/types-tokens/> (discussing the more technical type-token distinction).

89. As would result from attempting to even minimally concretize the personal interests and concerns underlying any meaningful fraction of the enormous number of public comments received in, say, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126–29 (2000).

90. Keith R. Fisher, *supra* note 4, at 19. As perhaps contrasted not with the fictional Holmes’s Professor Moriarty, but with an agency official “of average capabilities.” *See* Louis L. Jaffe, *James Landis and the Administrative Process*, 76 HARV. L. REV. 319, 323, 324 (1964).

91. *See* Keith R. Fisher, *supra* note 4, at 19.

92. *See id.*; Luban, *supra* note 4, at 1561.

93. *See* Keith R. Fisher, *supra* note 4, at 195; Luban, *supra* note 4, at 1561. *See also* Stone, *supra* note 4, at 1769.

94. *See* Luban, *supra* note 4, at 156 (citing Professor Catharine Wells).

95. *See* Stone, *supra* note 4, at 1771–72.

than other ‘good’ persons,<sup>96</sup> including, for example, what have been called good and “humble and grateful parishioners”<sup>97</sup> of the administrative agency.<sup>98</sup>

Some important person-types, however fine- or coarse-grained the analysis, are not meaningfully categorizable as either ‘good’ or ‘bad’ in the Holmesian sense. Consider, to begin with, general types of administrative officials themselves, whether within or external to some single specified agency. There will, inevitably, be the “confident shaper of the system.”<sup>99</sup> There will also be “shrewd operator[s].”<sup>100</sup> Other administrative actors may be primarily careerists,<sup>101</sup> political actors,<sup>102</sup> or technical professionals.<sup>103</sup> Agency actors, including well-known whistle-blowers,<sup>104</sup> will also vary as to their degrees of self-interested and altruistic motivation.<sup>105</sup>

Moving outward from federal agency employee circles, there are important person-types in the form of federal contractors,<sup>106</sup> agency consultants,<sup>107</sup> and administrative and other officials at the state and local levels.<sup>108</sup> More broadly, and similarly outside the agency, the important person-types will normally include rent seekers;<sup>109</sup> variously motivated suppliers of information;<sup>110</sup> watch-dogs and muck-rakers;<sup>111</sup> academics;<sup>112</sup> and seekers of

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96. See Alschuler, *supra* note 4, at 373–78 (distinguishing a presumably rare Mother Teresa from those decent persons motivated by a sense of basic reciprocity, equality, and fairness).

97. William W. Fisher, *supra* note 4, at 1010.

98. *See id.*

99. *Id.* “Confident shapers of the system” may of course include external actors as well, and most particularly, persons who have engaged in, or who aspire to engage in, agency capture processes. *See, e.g.*, sources cited *supra* note 60.

100. William W. Fisher, *supra* note 4, at 1010.

101. See JAMES Q. WILSON, *THE POLITICS OF REGULATION* 357, 364 (James Q. Wilson ed., 1980).

102. *See id.*

103. *See id.* *See also* Dudley & Brito, *supra* note 61, at 58–61 (discussing Professor Wilson’s typology).

104. *See, e.g.*, EDWARD SNOWDEN, *PERMANENT RECORD* (Metropolitan Books ed. 2019).

105. See the classic discussion in ANTHONY DOWNS, *INSIDE BUREAUCRACY* 83–86 (Little, Brown and Co. 1967) (1964).

106. *See, e.g.*, SCHUCK, *supra* note 66, at 308.

107. *See id.*

108. *See id.*

109. *See supra* note 61 and accompanying text.

110. See, for example, the information supply dynamics in FDA device approval cases such as *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) (upholding a broad preemption of state law claims based in large measure on data provided by the device developers).

111. See, classically, UPTON SINCLAIR, *THE JUNGLE* (1906) (prompting federal regulatory reform).

112. See, for example, the careful examination of Social Security Administration adjudicative processes in JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983).

information for various purposes.<sup>113</sup> In circumstances involving significant administrative policy choices, agency decision makers would be well advised to seek to empathetically think themselves into the perspectives, interests, and priorities of at least some of the most relevant of these person-types, in pursuit, thereby, of a better substantive administrative policy outcome.<sup>114</sup>

Often more important than any of the above-specified person-types, though, will be categories of persons outside government circles who are somehow marginalized; less visible; less identifiable; less conspicuous, less psychologically 'available,'<sup>115</sup> less 'salient,'<sup>116</sup> and typically less organized<sup>117</sup> and less effectively represented than others.<sup>118</sup>

Some such less readily visible person-types may suffer grievous and irreparable injuries as a result of an administrative policy choice, where those injuries are unintended, but foreseeable. Such injuries may also be foreseen, but discounted unduly by the decision makers in question. But this unfortunate pattern of unintended but severely harmful consequences is not beyond mitigation.

In particular, what one might refer to as 'judicious sympathy,'<sup>119</sup> as a quality that could be exercised by administrative decision makers, is often underdeveloped and underexercised.<sup>120</sup> The point of judicious sympathy among agency decision makers should be more conscientious and less presumptuous empathetic decision maker identification, at reasonable cost, with an inclusive set of crucially affected person-types.<sup>121</sup> The agency decision maker can and

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113. For an introduction, see the Freedom of Information Act, 5 U.S.C. § 552 (1966) (amended 2016) (along with the official background at [www.foia.gov/about.html](http://www.foia.gov/about.html)). The motives of FOIA requesters range from public spiritedness, to narrow partisanship, to hostility, to idle curiosity, to the pursuit of competitive advantage, to free riding.

114. Compare the more specific person, or individual token, focus that is endorsed in NOONAN, *supra* note 50, at ch. 1. Determining which person-types will be most important in any given policy making case will normally reflect the relevant context and circumstances, and thus will require the exercise of a certain degree of practical wisdom. But agency decision makers can presumably learn, at least to some further degree, to not ignore or unduly downplay, for example, readily foreseeable and substantial policy effects on marginalized groups.

115. See *supra* notes 63–65 and accompanying text.

116. See *id.*

117. See, classically, the emphasis on the differential costs of group organization in MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

118. See Stewart, *supra* note 17, at 1765.

119. As suggested by DAVID HUME, *A TREATISE OF HUMAN NATURE* bk. III, pt. III, § 1, at 581 (L.A. Selby-Bigge ed., 1968) (1888) (1740).

120. See the more expansive claim in HENRY SIDGWICK, *THE METHODS OF ETHICS* 501 (7th ed. 1981) (1907). Of course, attempts to empathize with actual specific persons, beyond notice-and-comment responses, would quickly become overambitious and unrealistic. And even empathizing merely with more general person-types has its own costs and limits.

121. As loosely suggested in ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* pt. I, § 1, at 4 (Prometheus Books, 2000) (1759); R.M. HARE, *FREEDOM AND REASON* 94 (1965). For



should begin with the reasonably ascertainable, or reasonably predictable, subjective feelings and beliefs of the significantly affected person-types.<sup>122</sup> Crucial, though, as well, will be a better sense among agency policy makers of what it would be like to be in the position of the major person-types substantially affected by an agency policy choice.<sup>123</sup> This empathic process requires an enhanced understanding of how, factually, such person-types are likely to be affected by the policy in question.<sup>124</sup> There are no obvious reasons why it must be impossible for agency decision makers to better understand the relevant circumstances and basic interests of those who would likely be adversely affected by a policy choice, or the nature and gravity of likely adverse effects.

As David Hume classically recognized, decision makers do not normally appreciate the likely, or even the established, effects of their actions on all persons, proximate and remote, with equal sympathy, clarity, and vividness.<sup>125</sup> Doubtless the costs to agency decision makers of meaningfully empathizing with person-types at the cultural margins and beyond will sometimes be high, and beyond some point, arguably not worth paying. But many such failures of empathy and understanding will be merely arbitrary, invidious, and discriminatory, even if they are not legally redressable in practice.

More positively, though, the ability of agency decision makers to more fully appreciate the likely, or indeed the actual, important consequences of administrative policies for culturally or psychologically remote person-types may, in some respects, be at least a partially learnable skill.<sup>126</sup> Ultimately, we should all aspirationally wish administrative policy makers to display some broad form of practical wisdom. And even practical wisdom, as elusive as it may otherwise be, may involve realistically learnable skills.<sup>127</sup>

#### CONCLUSION

In his rough sketch of the ‘bad’ person, Holmes pragmatically aimed, rightly, at what we might call a heuristic ‘mean.’ The excess of the mean in this context would have erred in trying to somehow envision a person in all their complex particularity, nuance, and inconsistency. The deficiency of the mean in this context would have erred in abstracting away the person, and treating all affected persons as fungible, if not indistinguishable. Much of the value of the

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commentary on Hare in context, see W. George Lycan, *Hare, Singer and Gewirth on Universalizability*, 75 PHIL. Q. 135, 136 (1969).

122. See the reference to the importance of the feelings of affected parties in STEPHEN TOULMIN, *THE PLACE OF REASON IN ETHICS* 169–70 (1968).

123. See, more broadly, R.M. HARE, *MORAL THINKING: ITS LEVELS, METHOD, AND POINT* 92 (1981); HARE, *supra* note 121, at 94–95.

124. See the authorities cited *supra* note 123.

125. See HUME, *supra* note 119, at 581.

126. See *supra* notes 80–81 and accompanying text.

127. See, e.g., Rosalind Hursthouse, *Practical Wisdom: A Mundane Account*, 106 PROC. OF THE ARISTOTELIAN SOC. 285, 308 (2006); Jason D. Swartwood, *Wisdom as an Expert Skill*, 16 ETHICAL THEORY & MORAL PRAC. 511 (2013). For some complications, see Jason Swartwood, *Can We Measure Practical Wisdom?*, 49 J. MORAL EDUC. 71 (2020).

Holmesian ‘bad’ person construct, or ‘ideal type,’<sup>128</sup> reflects Holmes’s aiming instead at that heuristic mean.

Administrative agency policy makers are similarly well-advised to avoid the overly ambitious path of attempting, fruitlessly, to internalize and appropriately process the subjectivities of all affected parties. Agency policymakers should also resist the temptations of the far less demanding path of embracing the most abstract elements of cost-benefit analyses, with no serious confrontation with the decision maker’s own systematic informational, empathetic, and decision making biases and limitations.<sup>129</sup> Enhanced epistemic curiosity, responsibility, humility, and even-handedness in administrative policy making are obviously not costlessly acquirable. But on the other hand, enhancing such valuable virtues and other related qualities need not be prohibitively costly.

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128. See Max Weber, STAN. ENCYCLOPEDIA OF PHIL. § 5.2 (rev. ed. Nov. 27, 2017), <https://plato.stanford.edu/entries/weber/>.

129. See JASON BAEHR, THE INQUIRING MIND: ON INTELLECTUAL VIRTUES AND VIRTUE EPISTEMOLOGY (2011); Nathan Rotenstreich, *Prudence and Folly*, 22 AM. PHIL. Q. 93 (1985).