ESSAYS

HOLMESIAN PERSONS AND
THE ADMINISTRATIVE STATE

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INTRODUCTION

Oliver Wendell Holmes’s classic *The Path of the Law*1 has elicited commentary on a number of fronts.2 One strain of commentary has focused on Holmes’s discussion of the so-called “bad man”3 perspective on law and compliance therewith. Holmes’s figure of the bad man has been discussed from many and varied perspectives.4 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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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.

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” and “a good one,” largely for the purpose of seeking to distinguish the law, in itself, from morality. Holmes argues that “a bad man has as much reason as a good one for wishing to avoid an encounter with the public force . . . .” 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.”

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.

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. 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.

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.12 Frank Goodnow’s pioneering treatise,13 as of 1905, acknowledged this developing status.14 Even by the mid-1920s, the term ‘administrative law’ still had no standard definition,15 and was perhaps assumed to focus primarily on “the protection of private rights . . .”16

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.17 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.”18

Similarly emerging was an appreciation of the distinctive value of administrative agency expertise.19 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.20

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.”).
19. See, e.g., Berle, supra note 17, at 442.
And this dynamic also contributed to a wider sense of the practical inevitability of a significant federal administrative apparatus. On this sense of inevitability itself, both constitutional critics and defenders 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.

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. 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 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).


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, according to which beliefs about means, but not beliefs about ends, can be empirically validated. Holmesian legal pragmatism, at least under some descriptions, may be thought to be obsolete, or at least controversial. 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, 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,” 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.” Justice Holmes later referred non-critically to the Interstate Commerce Commission’s powers, regardless of the doctrine of legislative non-delegation, to engage in “legislative, judicial and executive acts.” 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.” In the context of administrative agency operations and the separation of powers, Holmes thus concluded:

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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.


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

35. Id.

36. Id. at 209.
However 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.\textsuperscript{37}

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 \textit{Crowell v. Benson}.\textsuperscript{38} Therein, Brandeis and Holmes refer to administrative bodies as adjudicating, subject to some form of judicial review,\textsuperscript{39} “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.”\textsuperscript{40}

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

\section{II. The Contemporary Administrative State and Some Apparent

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\textsuperscript{38} 285 U.S. 22 (1932).
\textsuperscript{39} \textit{See id}. at 89 (Brandeis & Holmes, JJ., dissenting).
\textsuperscript{40} \textit{Id} at 88 (Brandeis & Holmes, JJ., dissenting). \textit{See also} the pragmatic concerns expressed in \textit{id}. at 93–94, and for near contemporary defenses, see James M. Landis, \textit{Administrative Policies and the Courts}, 47 YALE L.J. 519, 519, 525, 530, 531 (1938); Louis L. Jaffe, \textit{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).
\textsuperscript{41} \textit{See the classic} JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 14 (1938).
\textsuperscript{42} \textit{See, e.g.}, Wickard v. Filburn, 317 U.S. 111 (1942) (discussing the farm price subsidy).
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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. At the heart of current efforts to upgrade administrative state policy-making and functioning has been increasing sophistication in cost-benefit analysis, broadly construed.

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

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


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,56 and of the need for continuing optimal revision of their own assumptions, beliefs, and techniques.57

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 un-processable in any systematic way, or is provided largely by groups with an obvious stake, pecuniary or ideological, in the relevant administrative policy issues.58

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.59 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.60

56. See id. at xv.

57. See id. at xiv (noting that “[w]henever 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. PHILO. 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.


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. Agency decision making process and outcomes may thus be adversely affected by rent seeking, and perhaps increasingly so over time. 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.

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.\textsuperscript{65}
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.66 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 chimpanzees, and assorted extrapolative algorithms—we find few signs that expertise translates into greater ability to make either ‘well-calibrated’ or ‘discriminating’ forecasts.”67

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.68 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.69 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).


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 Past 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 KNOWLEDGE 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.\(^{70}\) 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.\(^{71}\) 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\(^{72}\) phenomenon of overconfidence in their decision making prowess among bureaucrats,\(^{73}\) and especially among those bureaucrats with the greatest experience.\(^{74}\) 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.\(^{75}\)

In this pragmatically useful sense, epistemic humility rejects epistemic arrogance,\(^{76}\) in favor of “a disposition not to make unwarranted intellectual entitlement claims on the basis of one’s (supposed) superiority or excellence . . . .”\(^{77}\) This quality of epistemic humility “helps us overcome responses to evidence that are self-centered or that outstrip the strength of that evidence.”\(^{78}\)

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70. See sources cited supra note 46.


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.


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

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 . . . .” 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 . . . .”

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, and gradually acquired and enhanced, as a kind of developed skill.

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; of agency susceptibility to, if not encouragement of, damaging rent seeking behaviors; and of systematic agency cognitive biases in policy making.

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,” and thus explicitly, and by inevitable implication as well, the man who is not bad, and even “good.” Holmes does not focus on specific individual persons,

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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, Pragmatism 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. 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,” the primary opponent of (Sherlock) Holmes. Some Holmesian ‘bad’ persons, however, are instead focused merely on obtaining legal advice as an aid in decision making. The Holmesian ‘bad’ person may also amount to a largely ‘pre-moral,’ as opposed to ‘immoral,’ person, or to an alienated outsider to the dominant legal structure.

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. ‘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,
than other ‘good’ persons, including, for example, what have been called good and “humble and grateful parishioners” of the administrative agency.

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.” Other administrative actors may be primarily careerists, political actors, or technical professionals. Agency actors, including well-known whistle-blowers, will also vary as to their degrees of self-interested and altruistic motivation.

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

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.
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).
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.\textsuperscript{113} 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.\textsuperscript{114}

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,’\textsuperscript{115} less ‘salient,’\textsuperscript{116} and typically less organized\textsuperscript{117} and less effectively represented than others.\textsuperscript{118}

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,’\textsuperscript{119} as a quality that could be exercised by administrative decision makers, is often underdeveloped and underexercised.\textsuperscript{120} 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.\textsuperscript{121} The agency decision maker can and

\textsuperscript{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). 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.

\textsuperscript{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.

\textsuperscript{115} See supra notes 63–65 and accompanying text.

\textsuperscript{116} See id.

\textsuperscript{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).

\textsuperscript{118} See Stewart, supra note 17, at 1765.


\textsuperscript{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.

\textsuperscript{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.\(^{122}\) 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.\(^{123}\) This empathic process requires an enhanced understanding of how, factually, such person-types are likely to be affected by the policy in question.\(^{124}\) 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.\(^{125}\) 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.\(^{126}\) 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.\(^{127}\)

**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 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.


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

Holmesian ‘bad’ person construct, or ‘ideal type,’\textsuperscript{128} 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.\textsuperscript{129} 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.
