This is a draft version of the paper. The published version is: Stevens, K. (2023). Humility as a necessary virtue in common-law decision making. *Jurisprudence (Oxford, England), 14*(4), 443-461. doi:10.1080/20403313.2023.2214484

Humility as a Necessary Virtue in Common-Law Decision Making

Abstract: Humility holds a modest but important place among the judicial virtues. But in spite of its growing popularity, it does not yet have a place on the 'central judicial virtues' lists. This paper provides an argument that judicial humility, especially institutional judicial humility, should be considered a necessary judicial virtue at least in common-law jurisdictions. This is because it is a necessary ingredient in precedent-based decisions that are fully justified from the point of view of the law *and* of political morality. Further, while it is sufficient that individual judges make decisions that a humble judge *would have made*, the judicial community must in fact be humble in order to produce fully justified common-law decisions –humility is therefore necessary as a community-virtue.

Keywords: Virtue Jurisprudence, humility, precedent, common-law, community virtue

1 Introduction

Among the judicial virtues, humility holds a modest but important place. It may not get mentioned in lists of the central virtues like for example those that Solum has put together.[1] Nonetheless, it has been discussed often enough that its importance can be considered generally acknowledged.[2] My goal here is to argue that we should consider judicial humility to be a

[1] Solum's lists contain intelligence, integrity, wisdom (Lawrence Solum, "The virtues and vices of a judge: An Aristotelian guide to judicial selection' (1988) 61(6) Southern California Law Review 1735-1756.) temperance, courage, justice (Lawrence Solum, 'Virtue jurisprudence – A virtue-centered theory of judging' (2003) 34(1-2) Metaphilosophy 178-213) and lawfulness (Lawrence Solum, 'Natural justice: An areatic account of the virtue of lawfulness' in L. Solum and C. Farelly (eds.) Virtue Jurisprudence (Houndmills/Basingstoke/Hampshire, Palgrave McMillan, 2008).

[2] Amalia Amaya, 'The virtue of judicial humility' (2018) 9(1) *Jurisprudence* 97-107; Benjamin Berger, 'What humility isn't: Responsbility and the judicial role' (2018) *Osgoode Digital Commons*. Retrieved from https://digitalcommons.osgoode.yorku.ca/scholarly_works/2749; Bruce Frohnen, 'Augustine, lawyers and the lost virtue of humility' (2020) 69(1) *Catholic University Law Review* 1-22; Zachary German and Robert Burton, 'Constitutional humility: The contested meaning of a judicial virtue' (2021) 10(1) American Political Thought: A

necessary component of fully justified, precedent-based and/or precedent-setting judicial decisions in a common-law-context (from now on "common-law-decisions"). When I say a 'fully justified decision', I mean a decision that is justified both from the point of view of the law *and* from that of morality. Specifically, morality insofar it is concerned with the fittingness of that decision for the moral and political justification of the institution in which it is made, in this case the institution of the common-law (from now on "political morality"). Because humility is a necessary ingredient of fully justified common-law-decisions in this sense, it deserves a place on the 'central virtues' list, at least for common-law jurisdictions.[3]

I will argue for the necessity of humility on two different levels. Amaya distinguishes two ways in which one can claim that virtue is a necessary component of a justified decision:[4] First, one can make the counterfactual claim that a decision can only be justified if it is one that a virtuous person *would* have made. Second, one can make the causal claim that a decision can only be justified if it is the result of an exercise of virtue. Amaya argues that virtue is only necessary for justified decisions in the counterfactual sense. However, I believe that, while this is true when it comes to *individual* judges, humility is necessary in the causal sense as a community-virtue for the

Journal of Ideas, Institutions, and Culture 238-270; Thomas Griffith, 'Was Bork right about judges?' (2011) 34(1) *Harvard Journal of Law and Public Policy*, 157-169; Michael McConnell, 'The importance of humility in judicial review: A comment on Ronald Dworkin's "moral reading" of the constitution' (1997) 65(4) Fordham Law Review 1269-1293; Richard Myers, 'The virtue of judicial humility' (2015) 13(2) *Ave Maria Law Review* 207-218; Brett Scharffs, 'The role of humility in exercising practical wisdom' (1998) 32(1) *U.C. Davis Law Review* 127-199; Suzanna Sherry, 'Judges of character' (2003) 38(2) *Wake Forest Law Review* 793-812.

[3] By this, I do not mean to say that humility does not deserve such a place in the civil law, or outside of applications of precedent – merely that my argument will only show that it deserves a place there. I should note that my argument presupposes that the law is incomplete – that judges can be (and in the application of precedent often are) in situations where the law does not fully determine the correct decision for them, at least not in a way that is obvious or easy to discern, so that the correct outcome of the case could in any sense be considered "promulgated. Amalia Amaya pointed out to me in private conversation that, for example, in a Dworkinian interpretivist framework the virtue of humility might be replaced by the virtue of lawfulness.

[4] Amaya, 'The rule of virtue' (n.2).

judges of a certain jurisdiction. I claim that even a common-law decision made by a non-humble judge can be fully justified if it is a decision that a humble judge would have made. However, this is possible only if it is made in a jurisdiction whose judicial community is sufficiently humble *as a group*, and where the group's humility has the right kind of causal connection to the non-humble judge's decision-making. Further, I claim that there are good reasons to believe that even the decisions of a humble judge who has to work in a non-humble community cannot be fully justified.

This paper will proceed as follows: First, I will identify a tension that exists between the moral and political justification for adopting a common-law system and the kind of *de facto* power that such a system affords to judges in the form of discretion. This discretion goes far enough that it enables judges to undermine the common-law's justification without crossing the boundaries of their legal duties. As a result, the authoritative rules governing the creation and application of precedent (from now on: rules of precedent) are not enough to generate fully justified common-law decisions. I will argue that this problem cannot be solved through an adjustment of the rules of precedent, because no set of such rules can at the same time remove the *de facto* power and preserve the justification. I will then move on to introduce the virtue of humility, explaining the difference between epistemic and institutional judicial humility as described by German and Burton.[5] I will argue that epistemic humility and especially institutional humility together provide the necessary guidance to fully justified common-law decisions. I consider whether humility is only counterfactually necessary, so that fully justified common-law decisions can result from other circumstances and/or character-traits, as long as the resulting decisions are identical to those a

[5] German and Burton, 'Constitutional humility' (n.2).

humble judge would have made. I argue that this is possible for individual judges, but only if they operate within a judicial community sufficiently saturated with humility, and if the community's humility is causally connected to their decision-making. Finally, I argue that there are good reasons to believe that even an individual, humble judge may not be able to make fully justified common-law decisions in a non-humble community.

2 The Problem: A Tension Between the Justification of Common-law Systems and *De Facto* Common-Law Judicial Power

In jurisdictions that have adopted a common-law system, cases that were decided in the past are given the legal status of authoritative precedents. Usually, this means that when courts of lower or equal rank as the precedent court encounter a new case possessing the facts that the precedent court cited as the basis for their decision, then the new court must either follow the decision or distinguish. In order to distinguish, the new court must identify a factor of the new case that distinguishes it from the precedent case and that provides a reason against following. Precedents can also be extended. That is, courts can decide to "follow" a precedent even though their present case does not share *all* the facts cited as the basis for the precedent decision, thereby expanding the influence of the resulting line of precedents. Some courts have the ability to overrule precedents, i.e. to declare them legally invalid. However, unlike distinguishing, this is not a routine part of common-law decision-making. There is generally a high burden of justification attached to overruling, such as that the court can show that the precedent was not only wrongly decided, but catastrophically so, with very serious harmful consequences (or that, though correctly decided at the time, it has developed very serious harmful consequences in the current context).

This is a draft version of the paper. The published version is: Stevens, K. (2023). Humility as a necessary virtue in common-law decision making. *Jurisprudence (Oxford, England), 14*(4), 443-461. doi:10.1080/20403313.2023.2214484

Adopting a common-law system and establishing the set of norms I have laid out above as authoritative (from now on "rules of precedent") means establishing judicial decision-making as a source of law. Therefore, it also means giving judges as a group *de facto* law-making power. Just like other law-making mechanisms, this needs to be justified – especially if the idea of-judge-made law stands in tension with the relevant jurisdiction's accepted theory of how law-making power is legitimated, as for example in democracies (and as I will assume in this text).[6]

A number of such justifications have been offered in the literature, including that the good-faith application of past judges' practical reasoning should be treated with respect by later judges.[7] However, these arguments appear too weak; a justification for allocating law-making power seems to require reference to sufficiently weighty values relevant to the political community. Here, the justifications that seem most successful in the philosophical literature tend to refer to two things: First, they refer to rule-of-law considerations like predictability and the preservation of the political equality between judge and legal subject.[8] Second, they refer to the balance that the common-law can strike between such rule-of-law considerations and concerns of substantial justice, easing the famous tension that is sometimes expressed as the dichotomy of settled vs right, and sometimes as that between stability and flexibility.[9]

---

[6] Compare Sebastian Lewis, 'Precedent and the rule of law' ((2021) 41(4) Oxford Journal of Legal Studies 873-898) for a summary of the "democratic worry" against adopting a system of binding precedent. (I assume here that the judges are not somehow democratically accountable in a way that creates a democratic legitimation for their law-making power.) I take it that Austin's (John Austin, The Province of Jurisprudence Determined (Cambridge, Cambridge University Press, 1995) difficulty to account for the legitimacy of the common-law in his theory of law as the command of the sovereign is based on a non-democratic version of this worry.

[7] David Strauss, 'Common law constitutional interpretation' (1996) 63(3) The University of Chicago Law Review 877-935.

[8] Randy Kozel, 'Stare decisis as judicial doctrine' (2010) 67(2) Washington and Lee Law Review 411-466; Lewis, 'Precedent' (n.6); Katharina Stevens, 'Setting precedent without making norms?' (2020) 39 *Law and Philosophy* 577-616; Jeremy Waldron, 'Stare decisis and the rule of law: A layered approach' (2012) 111(1) *Michigan Law Review* 1-31.

[9] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting); Randy Kozel, 'Settled versus right: Constitutional method and the path of precedent' (2013) 91(7) *Texas Law Review* 1843-1896; David Strauss,

In this section, I will first use these two considerations from the literature to reconstruct a coherent, summarizing justification for adopting a common-law system and providing judges with the associated *de facto* law-making power. Then I will show that the *de facto* power that common-law systems afford judges allows them to make decisions in keeping with the rules of precedent that nonetheless undermine this justification - and thereby the justification for them having this power in the first place. I will show that no adjustment of common-law rules for applying precedent can relieve the resulting tension. In the next section, I will then go on to explain that the solution lies with the judicial character, specifically in the judicial virtue of humility.

1.1 The Rule of Law, Substantial Justice and the Justification for Adopting a Common-Law System

Whatever form the legislature that is accepted as legitimate takes in a certain jurisdiction, the following problem will arise: In making law, the legislature is constrained to the crude tool of language and has limited time and resources. This makes it impossible for any attainable set of legislature-made laws to provide obvious answers to all legal cases that may possibly arise without, at the same time, risking gross injustices.[10] The variety of potential human interactions and events is simply too large. First, the legislature has neither the time nor the manpower to formulate specific laws for how every potential situation should be handled. Second, the gross instrument of

The Living Constitution (New York/Oxford, Oxford University Press, 2010); Wilfrid Waluchow, *A Common Law Theory of Judicial Review* (New York, Cambridge Universtiy Press, 2007).

[10] Whether the law is gap-free in that a heroically competent interpreter with infinite time and resources could always find a correct answer to all questions of legal interpretation is a different question (compare Ronald Dworkin, *Law's Empire* (Cambridge (Mass.), Belknap Press, 1986).

language does not capture all the subtle distinctions that may prove relevant under some conceivable set of circumstances.[11]

The only way in which the legislature could therefore provide definite answers to all cases would be through some kind of gap-filling rule, like for example that whenever a statute is unclear with respect to a case, the defendant should win, or the meaning of the statute should be determined by referring to a specific dictionary. But this would cause injustice in an unacceptably large percentage of cases, because such gap-filling laws could not take the morally and potentially (non-binding) legally relevant characteristics of the cases themselves into account. They could therefore not ground substantially just decisions with any reliability.[12] Substantial justice is a foundational value that lawmakers (and the law) ought to pursue and at least approximate, so such gap-filling laws are unacceptable.

The result is that the whenever a case arises for which the legislated laws do not provide an obvious answer, its adjudication has to involve interpretation. Judges have to determine what the law means by taking into account such factors as for example the known intentions of legislators, the moral or political values that the involved laws pursue, the morally relevant facts of the case, the impact of relevant persuasive sources of law etc.

Unfortunately, this raises another problem, because another foundational value that legitimate law ought to pursue and at least approximate is the *rule of law*. It is difficult to say what the rule of law requires in each case (just as it is difficult to say what substantial justice requires), and there

[11] Compare, e.g. Herbert Hart,'Positivism and the separation of law and morals' (1958) 71(4) *Harvard Law Review* 593-629; Frederick Schauer, *Playing by the Rules : A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford, Oxford University Press, 1991).

[12] Compare, e.g. Hart's discussion of the evils of extreme legal formalism (in Hart 'Positivism' (n.11). In addition, the question whether a statute is unclear with respect to a certain case will also sometimes be hard to answer, creating a situation in which one would need gap-filling rules for the application of gap-filling rules.

are substantial disagreements about the range of values it encompasses.[13] However, one aspect of the rule of law that is generally acknowledged to sit at the core of the value is the requirement that people be ruled by *laws* and not by the direct, individualized will of other people. They should be able to form reliable expectations about how legal officials will treat them without having to first acquire detailed knowledge about the character, beliefs and idiosyncrasies of the relevant officials.[14]

This view of the rule of law is mirrored in Fuller's famous list of formal rule-of-law requirements. The law should take the form of prospective, general and reasonably intelligible rules that have been publicly announced, remain relatively stable and are consistent with each other without requiring more of people than can be accomplished, and these rules shall be enforced as they are promulgated.[15] Law that fulfills these conditions becomes predictable, allowing legal subjects to plan their lives around it in the knowledge of what is expected of them and what will happen if they come in conflict with the law. This does not only protect their autonomy.[16] It also safeguards the moral and politically equal status of legal subjects and legal officials, thereby protecting the legal subject's dignity. This is because legal officials who have to apply the law as it is already known to legal subjects are not exercising personal power over those whose cases they decide, but are rather bound by the same law that they are applying.[17]

---

[13] See Jeremy Waldron, 'Is the rule of law and essentially contested concept (in Florida)?' ((2002) 21(2) *Law and Philosophy* 137-164.) for a discussion of the rule of law as a contested concept and Jeremy Waldron, 'The rule of law' in E. Zalta and U. Nodelman (eds.) *The Stanford Enclyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University, 2016) for a discussion of the procedural and substantial interpretations of the rule of law.

[14] E.g. Lon Fuller, *The Morality of Law* (New Haven, Yale University Press, 1964); David Luban, 'The rule of law and human dignity: Re-examining Fuller's canons' (2010) 2(1) *Hague Journal on the Rule of Law* 29-47; Jeremy Waldron, 'How law protects dignity' (2012) 71(1) *The Cambridge Law Journal* 200-222.

[15] Fuller, *Morality of Law* (n.14); Frederick Schauer, 'Precedent' (1987) 39(3) *Stanford Law Review* 571-605.

[16] Friedrich Hayek, *The Constitution of Liberty* (Chicago, University of Chicago Press, 1978);

[17] Lewis, 'Precedent' (n.6); David Luban, 'The rule of law and human dignity: Re-examining Fuller's canons' (2010) 2(1) *Hague Journal on the Rule of Law* 29-47; Waldron, "Law protects dignity' (n.14); Waldron, 'Stare decisis' (n.8).

Now, as we have just seen (and as Fuller himself points out), the crudeness of language, as well as time and resource-constraints make it impossible to ever fully meet the rule-of-law demands identified in Fuller's list – unless of course through the unacceptable use of gap-filling rules.[18] So, because the rule-of-law value does not categorically take precedence over the value of substantial justice,[19] the law will have to remain unclear to some degree. And when the law is unclear, then legal subjects cannot know beforehand how judges tasked with adjudicating their cases will treat them. As a result, a space opens up in which legal subjects cannot plan with certainty, and cannot be assured that judges do not have direct, personal power over their lives. In this space, the *de facto* power of judges to make decisions that legal subjects cannot predict threatens their autonomy and dignity.

This space cannot be brought to zero (without committing to the considerable substantial injustice of gap-filling rules). However, it can be reduced: The common-law is often justified by pointing out that systems of authoritative precedent offer a balance between enhanced stability and predictability (which realizes rule of law values) and flexibility (which allows the pursuit of substantial justice).[20] Here is why.

First, by requiring judges to follow precedents unless they can distinguish, each decision made within a gap of clear, predictable law reduces the number or size of such gaps, making the law

[18] Fuller, *Morality of Law* (n.14).
[19] Compare, e.g. David Lyons, 'Derivability, defensibility, and the justification of judicial decisions'. (1985) 68(3) *The Monist* 325-346, who argues that a decision being required by the law is neither necessary nor sufficient for that decision to be justified. Though there is a connection between being required by the law and being justified, this connection is complicated by the importance of substantial justice.
[20] Larry Alexander and Emily Sherwin, *Demystifying Legal Reasoning* (Cambridge, Cambridge University Press, 2008); Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge (Mass.), Harvard University Press, 2012); Strauss, *The Living Constitution* (n.9); Waluchow, *Common Law Theory* (n.9).

more predictable.[21] In addition, as, e.g. Waldron argues, *stare decisis* forces judges to treat themselves as representatives of the court rather than as idiosyncratic and powerful individuals because it requires them to treat all decisions made by anyone on the court as decided correctly.[22] This reduces the occasions at which legal subjects have to fear that they are subject to the direct power of the judge presiding over their case rather than the law.

However, at the same time, the common-law avoids the systematic violation of substantive justice that would come with gap-filling rules. When judges have to decide cases for which the law is not obviously clear – i.e. in situations in which they have to interpret unguided by precedent or decide whether to distinguish, extend or overrule precedents – they can take the moral and non-binding legal reasons into account that are applicable to the case. This is also important because once a common-law system is adopted, judges as a group become *de facto* lawmakers, sharing in the responsibility for substantial justice. And in fact, one of the standard justifications for adopting common-law systems is the idea that grabbling with real cases in the gradual development of legal rules will lead to more substantial justice than abstract rule-making.[23]

As a result, adopting a common-law system with binding precedent can be justified as a compromise capable of realizing a balance of two fundamental values that the law is supposed to pursue and approximate – the rule-of-law (and its protection of autonomy and dignity) and substantial justice. The common-law, if it works as it should, provides legal subjects with sufficient predictability to plan their lives confidentially, and thereby also gives them reason to believe that

[21] Larry Alexander, 'Constrained by precedent' (1989) 63(1) *Southern California Law Review* 1-64; Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge, Cambridge University Press, 2008); Lewis, 'Precedent' (n.6).
[22] Waldron, 'Stare decisis' (n.8). See also Grant Lamond, 'Do precedents create rules?' (2005) 11(1) *Legal Theory* 1-26 on the requirement of precedent that later courts treat all precedent setting cases as treated correctly.
[23] Compare Oliver Wendell Holmes, 'Codes and the arrangement of the law' (1870) 5 *American Law Review, 5*, 1. Though this idea has been subject to some criticism, e.g. Frederick Schauer, 'Do cases make bad law?' (2006) 73(3) *The University of Chicago Law Review* 883-918.

judges decide according to law, not their own idiosyncratic ideas. At the same time, it also allows judges to decide against what they know legal subjects expect if they realize that the demands of substantial justice outweigh those of the rule of law. The answer that this provides to, e.g., the democratic worry is also one that refers to a compromise: It points out that democracy, just like substantial justice and the rule of law, is one value among several that a political and legal system is supposed to pursue and approximate.[24] By giving judges law-making power, the adoption of a common-law system makes a sacrifice when it comes to democracy in order to realize rule-of-law values better without violating fundamental justice too egregiously.[25]

Unfortunately, by allocating law-making power to judges as a group, law-making power is also allocated to individual judges. And the problem with that is that the rules of precedent allow judges to use that power in a way that undermines the justification I just summarized.

1.2 De Facto Common-law Judicial Power

Before I show how the *de facto* power of individual common-law judges works and is capable of threatening its own justification, I should admit that it does not directly translate into a power of individual judges to make fully formed laws in the same way that the legislature does. Every precedent-setting decision is just one step in the incremental development of the common-law, and so the precedent setting judge only gets one, not the last word on her precedent's impact and even meaning. Later judges will interpret the opinions in which judges document their reasoning, thereby authoritatively determining which factors of the case are the legal grounds for

[24] Obviously, whether this compromise is worth it can be and is subject to debate.

[25] This sacrifice may be offset by allowing the legislature to overrule any part of the common-law by making a statute, but it is not erased. This is because, as we have already discussed, the legislature operates under significant time and resource constraints. It is therefore not capable of determining, for each part of the common-law, whether it wants to let it stand, or overrule it. Therefore, it would be misleading to think that the common-law exists by the legislature's tacit decision, rather than that the common-law is the product of judges and subject to legislative correction.

their decision. In the process, later judges will determine at which level of generality these factors should be read, which of the mentioned factors will be treated as material, what will count as part of *orbiter dicta* and treated as non-binding etc. Even more importantly, later judges will also distinguish and/or extend the precedent, thereby reducing or expanding its sphere of influence. Finally, some judges will be able to overrule the precedent, deciding whether it should continue to exert any influence at all.[26]

However, this does not make the individual common-law judge's power negligible. The same aspects of common-law decision making that restrict their individual law-making power also make it so that every judge, with every decision, makes *some* contribution to the common-law, because they have *some* discretion that will translate into the creation of authoritative legal sources, however minimal it may often be. They have this discretion when they interpret precedent opinions, which are often considerably less clear than statutes simply because they document complex reasoning.[27] They have discretion when they decide whether to distinguish and when they decide whether to extend. They exercise discretion even if they just follow existing precedent. This is because, as Lamond points out, any two cases will be different in some ways.[28] Therefore, even following a precedent changes the law by authoritatively determining that the differences between the cases are *not* ones based on which distinguishing is appropriate.

The admittedly unsurprising corollaries for the *de facto* power that individual judges exert in a common-law system are as follows: First, adopting a common-law system with binding precedent means that individual judges can determine how they want to use the discretion that the

[26] See, e.g. Melvin Eisenberg, *The Nature of the Common Law*, (Cambridge (Mass.), Harvard University Press, 1988); Lamond, 'Precedent rules?' (n.22); Schauer, *Thinking Like a Lawyer* (n.20).
[27] Compare Duxbury, *Nature and Authority* (n.21), chapter 3.
[28] Lamond, 'Precedent rules?' (n.22).

rules of precedent provide them. They could decide to habitually use however much power they have to inch the law towards a realization of their own vision of how the law should develop, politically and morally.[29] Alternatively, they could devise their own gap-filling mechanisms, habitually refusing to consider reasons concerning substantial justice when exercising discretion.

In each case, however, their behavior would be inconsistent with the justification of adopting a common-law system. This is because they would abandon one or the other of the values the common-law is meant to balance. Thereby, they would also undermine the justification for their own power.

Second, despite the common-law's potential to safeguard autonomy and dignity, the ever-present smaller and larger amounts of discretion give common-law judges *de facto* power to continuously search for ways to realize their own ideas of what the legal subjects deserve. Now, it is certainly true that judges can prioritize their personal opinions more easily in *hard* cases. But legal subjects can never be *entirely* sure that their case is really as easy as it looks to them, that it is undistinguishable, or not re-interpretable.[30] So the rules of precedent are not enough to fully

[29] Arguably, this is what judge Kacsmaryk did in a recent preliminary ruling in which he suspended the approval of the drug mifepristone. The drug is part of a two-step procedure for abortion and had, before his ruling, been in use for over 20 years. The party who brought the case represented physicians who had never taken the drug, nor prescribed it, nor were required to prescribe it, and judge Kacsmaryk made use of an argument for the standing of this party that is broadly considered to be very surprising. He can therefore be seen (and has been seen) as using his power to interpret precedents dealing with who has standing to bring a case in a way that arguably served his wish to further his own moral point of view, which is strongly against abortion (Alliance for Hippocratic Medicine et al. v. United States Food and Drug Administration et al. No. 2:22-cv-00223-Z).

[30] For example, in Carter v. Canada (Attorney General), 2015 SCC 5, [2015] 1 S.C.R. 331, the Canadian Supreme Court ruled that a lower court who had decided in favor of a party challenging the Canadian law against physician assisted death in spite of a Supreme Court Precedent that, to almost all onlookers, was plainly a binding precedent for the case and that upheld the law, had *not* ignored precedent. The Supreme Court argued that the lower court had legitimately distinguished and that the basis for distinguishing was a new understanding of the factual situation surrounding physician assisted death. Arguably, this was an entirely new kind of ground for distinguishing, and the Canadian Supreme Court's decision shows the extend of the courts' *de facto* power to act in unpredictable ways (compare John Keown, 'Carter: A stain on Canadian jurisprudence?' in D. Ross (ed.) *Assisted Death: Legal, Social and Ethical Issues After Carter* (Toronto: LexisNexis 2018)).

reassure a legal subject that their case will *not* hinge on the judge's personal ideas, if the judge is determined to make those ideas count. So the rules of precedent leave common-law judges the *de facto* power to make their relationship with the legal subject a personal one.

However, if judges take this opportunity, they thereby undermine the justification for the common-law. A judge who uses their *de facto* power to decide cases in line with what they think the legal subjects deserve is guided by *neither* by rule-of-law values *nor* by the value of realizing substantial justice for the (common) law as a whole. For not only would they leave legal subjects (justifiably) feeling that they are at their personal mercy. They would also abandon the attempt to make substantially just law, which would require them to consider how precedent-setting decisions will impact later cases.

Now, what is important to see is that judges who behave in these ways can do so while staying within the limits of the discretion that the rules of precedent afford them. If they do so, their decisions are still unjustified from the point of view of political morality. After all, they undermine the common-law's justification and thereby destroy the justificatory foundation on which they have the power to make these decisions in the first place. But their decisions are not legally *invalid*; they are not unjustified *legally speaking*. They are in keeping with the rules of precedent. It is just that the rules of precedent leave space to undermine the justification for treating these same rules as authoritative (adopting a common-law system), making legally valid but ultimately unjustified decisions possible.

It is equally important to see that the solution cannot be to create a set of rules of precedent that *both* allow for the balancing of rule-of-law values and substantial justice *and* remove the *de facto* ability of individual judges to undermine the common-law's justification. This is because removing this ability would require removing the judicial discretion that comes with the authority

to interpret precedent opinions, to distinguish and to extend (and, sometimes, to overrule). But that would mean destroying the flexibility in the stability-flexibility balance that the common-law is meant to achieve, and with it the common-law's justification. Therefore, fully justified decisions cannot be generated through a better set of rules of precedent. Judges cannot be *constrained* into using their discretion in keeping with the balance between rule-of-law values and values of substantial justice. They just have to *do it*. But if outside rules cannot provide the necessary guidance towards fully justified common-law decisions, what can? In the next section, I will argue that the missing ingredient is judicial humility. However, the humility of individual judges is not enough (or even required), what is needed is humility as a community-virtue.

3 The Solution: Humility as a Judicial Community-Virtue

Humility, if it is understood as a virtue[31], is a virtue of character, an entrenched excellence of disposition when it comes to actions, feelings, desires, choices, etc.[32] More specifically, it is a virtue of self-estimation, because it is an excellence in how a person sees and evaluates herself. As such (and following the Aristotelian tradition)[33], it is situated as a mean between two vices; a vice of deficiency in the form of arrogance/hubris and a vice of excess in the form of self-

[31] Not everyone who writes about humility agrees that it is a virtue in the first place – usually by conceptually relating is to self-abasement (see, e.g. Paul Bloomfield, 'Humility is not a virtue' in M. Alfano, M. Lynch and A. Tanesini (eds.) The Routledge Handbook of Philosophy of Humility (London, Routledge, 2021).
[32] Rosalind Hursthouse and Glen Pettigrove, 'Virtue ethics' in E. Zalta and U. Nodelman (eds.) *The Stanford Enclyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University, 2022).
[33] Aristotle and Roger Crisp, *Nicomachean Ethics* (Cambridge, Cambridge University Press, 2000).

abasement/servility.[34] As several authors have pointed out, humility has an inwardly and an outwardly directed form.[35]

The inwardly directed form of humility is concerned with the way a person estimates their own abilities and properties – their beauty, strength and talent, for example. The dominant understanding of judicial humility in the literature is of this kind and usually concerns epistemic properties. Epistemic judicial humility is often described as a virtue of judicial restraint and deference to other decision-makers because the judge has a humble estimation of their own ability to decide correctly.[36] It contributes to justified decision-making because it protects judges from confusing "certitude" with "certainty"; from mistaking their own feeling of sureness with a guarantee that they are seeing a case correctly.[37] It allows them to take the judgement of their epistemic peers (other judges, lawmakers, lawyers, maybe even academic commentators and journalists etc.) appropriately into account and thereby avoid decisions that are bad because of some reasoning error.[38]

The outwardly directed form of humility is concerned with the way a person estimates their relationships to other people – their standing and role within the network of human relationships

[34] See, e.g. Berger, 'What humility isn't' (n.2); German and Burton, 'Constitutional humility' (n.2); Alessandra Tanesini, 'Humility and self-knowledge' in M. Alfano, M. Lynch and A. Tanesini (eds.), *The Routledge Handbook of the Philosophy of Humility* (Abingdon/Oxon/New York, Routledge, 2021). I should note that in understanding humility like this, I follow authors, such as Tanesini (ibid.) who treat humility as a virtue of appropriate or correct self-estimation instead of as a virtue that requires self-under-estimation, as in, for example Julia Driver, 'Modesty and ignorance' (1999) 109(4) *Ethics* 827-834., or as a virtue that requires disinterest in the self as in Nicolas Bommarito, 'Modesty as a virtue of attention' (2013) 122(1) *The Philosophical Review* 93-117.

[35] In the literature on judicial humility, see Amalia Amaya, 'The virtue of judicial humility' (2018) 9(1) *Jurisprudence* 97-107; German and Burton, 'Constitutional humility' (n.2).

[36] Griffith, 'Was Bork right?' (n.2); Aileen Kavanagh, 'Judicial restraint in the pursuit of justice' (2010) 60(1) *The University of Toronto Law Journal* 23-40; Frederick Schauer, 'Must virtue be particular?' in A. Amaya and H. H. Lai (eds.) *Law, Virtue and Justice* (Oxford/Portland, Hart Publishing, 2013); Sherry, 'Judges of character' (n.2).

[37] Oliver Wendell Holmes, 'Ideals and doubts' (1915) 10(1) *University of Illinois Law Review* 1-4.

[38] The justification of adopting a common-law system out of respect for earlier judges' good-faith application of practical reasoning appeals to the value of humility as an inwards directed virtue (compare Duxbury, *Nature and Authority* (n.21); Strauss, 'Common law' (n.7)).

and their associated powers, rights and responsibilities. It is the kind of humility we think of when we say that someone 'knows their place'. We then typically mean that they are a person who is motivated to use their power and abilities in a way that is appropriate for their role. This kind of humility guards against arrogance or hubris by allowing individuals to withstand the temptation to overreach in the use of their abilities or power given the position they occupy in the web of relationships with others. But, as e.g. Berger as well as German and Burton point out, it should also be contrasted with self-abasement or servility in that it moves individuals not to shirk the responsibilities of their role by refusing to use their abilities or powers when doing so would be challenging.[39] German and Burton, integrating insights from Amaya and Berger, call judicial outwardly directed humility "institutional humility" because it is concerned with the correct self-estimation of judges in their *institutional role* as judges.[40] A judge who is institutionally humble appropriately understands the place that their institutional role affords them within the legal and political setting that they find themselves in. They reliably complete the tasks, pursue the goals, and fulfill the responsibilities that their role ascribes to them even when those clash with their interests. They do this because they submit to the fact that the power or abilities provided by the role are afforded to them *for* performing these tasks, realizing these goals and fulfilling these responsibilities. As such, they are neither arrogant, as they would be if they used their role-associated power to further their personal goals, nor servile, as they would be if they avoided use of their power in ways that shrink the judicial role below its institutional design. [41]

[39] Berger, 'What humility isn't' (n.2); German and Burton, 'Constitutional humility' (n.2).
[40] Ibid. and Amaya, 'Virtue of humility' (n.35).
[41] German and Burton, 'Constitutional humility' (n.2). That institutional humility can be described as "knowing one's place" does not mean that it can be reduced to a specific kind of epistemic humility. It is true that an epistemically humble judge will take the way that her epistemic peers describe the judicial role into account when she develops an understanding of this role, and so epistemic humility aids in the development of institutional humility. But institutional

In what follows, I will argue that judicial humility of both kinds, but especially institutional judicial humility, is the missing ingredient that can complete the needed guidance for common-law judges to fully justified decisions. I will then consider an argument that while humility is useful in this regard, it is not *causally* but only *counterfactually* necessary, and that it can be substituted with other factors as long as the resulting decisions is the same as one a humble judge would have made. I concede that this argument is successful when it comes to non-humble individual judges; they can indeed make fully justified decisions if those decisions mirror those of humble judges. But I reject the idea that humility need not play any causal role in fully justified decisions, arguing that fully justified decisions must be made from within a sufficiently humble judicial community, whose humility is causally connected to the decision making of even non-humble judges.

3.1 Humility as the Missing Ingredient for Fully Justified Decisions

Imagine, first, a perfectly humble common-law judge. For them, the tension between the common-law's justification and the power afforded to them by the rules of precedent that I described above does not arise. When such an institutionally humble common-law judge decides a case and finds that they have discretion, then they are neither servile in that they deny or ignore the *de facto* power that goes along with it, nor arrogant in that they perceive this power as available for furthering their own agenda. Rather they recognize this power as intended for the realization of a balance between rule-of-law values and substantial justice that justifies the common-law. Institutional humility motivates them to make decisions that mirror this balance, even if it means

humility also includes the motivation to act according to the judicial role, and use the role-associated powers accordingly. This goes far beyond epistemic virtue. I thank my reviewer for bringing this consideration to my attention.

abstaining from using their power in ways that would be legally open to them and would serve their own interests better.[42] Here is how.

When our perfectly institutionally humble common-law judge reasons about a case, they give considerable weight to the expectations of (averagely reasonable) legal subjects. They do this because of the importance that the common-law justification attributes to the rule of law and its ability to safeguard autonomy and dignity through predictability. Suprising decisions are unpredictable and can create the impression that it really was the judge who decided, not the law, undermining both the legal subject's future ability to confidentially plan their life, and to understand themselves as the judge's political and moral equal. Therefore, the perfectly humble common-law judge aims to avoid surprising decisions, even if this goes against their own sense of justice, or of what the legal subjects deserve. In this way, institutional humility protects our common-law judge from making unjustified decisions out of arrogance by helping them to limit the influence of their own personal opinions on their decisions appropriately.

However, this does not mean that institutional humility leads our judge to dismiss their beliefs about what substantial justice requires altogether. The common-law justification also contains reference to the development of the common-law towards justice. Therefore, the perfectly institutionally humble common-law judge does not give the expectations of legal subjects absolute weight. Instead, they balance the weight of these expectations against the weight of what

[42] Consider, for example, Frederick Schauer's argument in 'Why Precedent in Law (And Elsewhere) Is Not Totally (Or Even Substantially) about Analogy' (2008) 3(6) *Perspectives on Psychological Science* 454-460, explaining why Justice Steward refrained from dissenting in *Roe v. Wade, 410 U.S. 113 (1973)*, even though he was in moral disagreement with the ruling: According to Schauer, the judge did not dissent because he thought that it was a correct extension of *Griswold v. Connecticut, 381 U.S. 479 (1965)*. The Judge thought that *Griswold* itself had been wrongly decided, but he acknowledge that it was a valid precedent and therefore bowed to what he perceived to be the requirements of his role.

substantial justice would require. [43] Now, as it is for all human beings, the only access that our judge has to the nature of substantial justice is their own reasoning. Epistemic humility enters the picture here, allowing our judge to correctly estimate the way they should balance their own perception of justice against the arguments and opinions of their epistemic peers. In the end, however, this balancing too must be of their own reasoning, resulting in their own judgement of what substantial justice requires. So institutional humility protects our judge from servility and self-abasement in that it does not allow them to shirk their duty to take their own view on substantial justice into consideration to the right degree.[44] At the same time, epistemic humility protects them from epistemic arrogance – the over-estimation of *their* idea of justice against that of their epistemic peers. Institutional and epistemic humility together protect our common-law judge from making unjustified decisions because they allow them to meet their responsibility as a participant (and *only* a participant) in the creation of the common-law.

In sum, humility allows our common-law judge to make their decisions in a way that is fully justified. It functions as a sister-virtue to lawfulness, extending the judge's faithfulness to the law and its values beyond the following of authoritative rules and to the moral-political justification of those rules. Therefore, the humble judge's decisions do not only follow the rules of precedent, making them justified from the point of view of the law. They also reflect an adequate balance between rule-of-law values and values of substantial justice and are therefore also justified from the point of view of political morality. The result are fully justified common-law decisions,

[43] See, e.g., Jeffrey Brand-Ballard, *Limits of Legality: The Ethics of Lawless Judging* (Oxford, Oxford University Press, 2010) on the need to balance rule of law values with values of substantial justice and for suggestions of how judges could handle tensions that may arise.

[44] Berger, in 'What humility isn't' (n.2) argues forcefully that several of the Canadian Supreme Court's most controversial decisions, incuding the Carter v. Canada decision (discussed in note 30) should be read as instances of appropriately giving weight to substantial justice, not as instances of judicial activism.

accomplished because humility can do from inside the judge's character what authoritative rules cannot do from outside it: Provide sufficient guidance for the use of judicial discretion.

Isn't this solution a little to easy? It might look like all I have said in response to the problem resulting from the tension between the common-law's justification and the power judges have under the rules of precedent is that we should select good (virtuous) people to be judges who will then make good (fully justified) decisions. But the problem arises precisely because the rules of precedent leave space for abuse by judges who are *not* virtuous. "Find good people to be judges" is hardly a useful answer to this problem – it is both too obvious and too hard to fulfill.

But in fact, I have said more than this. The requirement to develop *institutional* humility is considerably more specific, and therefore provides clearer guidance to someone trying to become humble, than a broad requirement to be a good or virtuous person, or even a humble person. This is because how institutional humility manifests for different people varies with the institutional roles these people occupy. The institutional humility of a teacher looks different than that of a judge because the set of functions and goals that the teacher-role is designed to accomplish is different than that for which the judge-role is designed, and therefore the set of moral reasons that justify the teacher-role design are different than those than justify the judge-role design. Admittedly, in both cases, acquiring institutional humility requires habituating deference to the requirements of one's role and therefore shares the same motivational component. However, this is not enough. In addition, the teacher and the judge who are aspiring to institutional humility have to engage in the respectively different intellectual exercise of learning about the social and/or political design of their roles and the moral reasons that justify these designs. Without this understanding, they cannot integrate these moral reasons into their role-specific decision-making adequately, no matter how motivated they are to submit to the requirements of their role. A judge

must *understand* the role that both rule-of-law values and values of substantial justice play in the justification of *stare decisis* in order to correctly use them as premises in their reasoning about cases. There is then an aspect to institutional humility that can be taught: Both teachers-colleges and law-schools can, for example, integrate courses during which students study and reflect on arguments about the institutional design and purpose of the roles they may later occupy.[45] This means that offering the cultivation of humility as a solution is more than simply suggesting that we should select good (virtuous) people to be judges. It has concrete implications for how we should educate those who may later become judges.

3.2 Causal or Counterfactual Necessity? An Objection.

Now, what I have shown so far is only that the rules of precedent alone do not provide enough guidance for fully justified common-law decisions, and that judicial humility *can* provide the missing ingredient. But this does not yet show that humility is *necessary* for fully justified common-law decisions. After all, many recipes allow for substitutions – sugar for honey, yoghurt for buttermilk – as long as the substituted ingredient results in a dish that is as it *would have been* if the original ingredient had been used. And indeed, we can easily conjure up circumstances that, for a non-humble judge, could seemingly substitute humility.

Let us imagine, for example, an extremely career- and reputation-driven judge. All they are interested in is to further their career and be well regarded by their peers. Their motivations during their decision making come solely from these two goals. I think it is safe to say that their

[45] I have tried to provide a summary of one such argument in section 1.1, but other arguments have been made and the development of judicial humility would require that students study the range of available arguments and reflect critically on them in order to develop a well-grounded understanding of their potential role. I realize that by saying this, I am advocating for the integration of a substantial portion of legal philosophy into the law-school curriculum – not as an elective, but as a requirement part of legal training.

character as a judge is not humble. However, let us imagine further that they are also extremely intelligent, socially apt and very good at reasoning counterfactually. They are great at imagining the point of view of their fellow, humble judges and can very reliably determine which common-law-decision these judges would have made, had they been sitting over the case. The judge then makes these decisions to further their career and win the recognition of their peers. In other words: Due to their motivations, they reliably issue common-law-decisions that a humble judge *would have made* in like circumstances. Their decisions are reliably the same as decisions that were based on a correct weighing of the values of rule-of-law and substantial justice. As a result, the law as they administer it is predictable. When bringing a case before them, legal subjects have reason to believe (though they might be misleading reasons) that they are subject to the law, and not to the individual will of the judge. And where humble judges would have ruled in keeping with their sense of substantial justice, so does our non-humble judge. [46]

This example illustrates the force of an argument made by Amaya, according to which virtue can only ever be *counterfactually* necessary for justified legal decisions.[47] For this argument,

[46] I thank Amalia Amaya for bringing the following complication to my attention: Some virtue theorists may resist the idea that a vicious agent could faithfully copy the decisions that a virtuous agent would make. This is because situations in which practical judgements need to be made are too complex to eliminate the need for virtue-guided special discernment – which is exactly the reason why virtue cannot be replaced by principle-based theories like utilitarianism. In other words: In order to consistently make the judgements a virtuous agent would make, one needs to be virtuous, because only virtue provides the necessary ability to reliably tell the practically relevant properties of a situation from the irrelevant ones (compare Bridget Clarke, 'Virtue and disagreement' (2010) 13(3) *Ethical Theory and Moral Practice, 13*(3), 273-291). It follows that my vicious judge *cannot* be intelligent, socially apt and good at counterfactual reasoning *enough* to become the perfect copy of a virtuous judge. I think I can deal with this worry in the following way: Experience allows us to say that vicious agents *can* copy virtuous ones at least well enough to fool both onlookers and virtuous agents. At least this is plausible if the standard is not perfect virtue and if we allow for the possibility that sufficiently humble agents may still make mistakes or be flawed in other respects. We might then assume that the vicious judge does not make more incorrect decisions because of her flawed ability to mirror virtuously humble judges than the virtuously humble judges make due to, e.g., flaws in their ability to reason from ends to means. The law as she administers it would then be as predictable as the law that is administered by humble judges and legal subject would have just as much reason to believe that they are being treated as equals as when they face humble judges.

[47] Amaya, 'The rule of virtue' (n.2).

Amaya distinguishes between a causal and a counterfactual version of the claim that virtue is necessary for fully justified decisions:

> *Counterfactual version.* A legal decision is justified if and only if it is a decision that a virtuous legal decision-maker would have taken in like circumstances.
> *Causal version.* A legal decision is justified if and only if it has been taken by a virtuous legal decision-maker.

She goes on to argue that the causal version of the claim is untenable: Whether a judge was motivated by virtue in their decision cannot influence whether the decision is the right one to make. Whether a judge declares a *de facto* murderer guilty because the judge has virtuously reasoned about the murderer's guilt or because the victim's family bribed them is unimportant. The murderer was guilty, should have been found guilty and was found guilty. The decision is the *justified one* – whether or not its justification motivated the judge to make it. Similarly, we might think, our non-humble judge makes *fully justified* decisions, decisions that mirror the balance of rule-of-law values and substantial justice. That the judge does not make them *because of* this balance does not make the decisions unjustified.

3.3 An Argument for the Causal Necessity of Individual Judicial Humility in the Common-Law

Or does it? I think it would not be surprising if someone was to argue as follows: In fact, the legal subjects whose cases come before this judge *are* subject to the power of an individual person, not to the law. And because of this, the judge's decisions are also not *really* predictable, they just seem that way as long as that suits the judge's career-aspirations. At least this is true in so far as the judge has discretion, and in the common-law, they *always* have some.[48] After all, if the judge were to suddenly realize that their community of judges is *not* humble and applauds

[48] By this I do not mean to exclude the possibility that she may also always have some outside of the common-law.

decisions that a humble judge would *not* have made, they would not hesitate. The non-humble judge is not internally bound to the rule of law and substantial justice like a humble judge is. And so, the legal subjects before this judge are in a humiliating and autonomy-threatening position, they just do not know it. But if one of them acquired knowledge about the non-humble judge's character, they would cease to feel at ease because they would know that a change in the judge's environment could easily change the outcome of their case. Therefore, our vicious judge's decisions do *not* realize the rule of law values and values of substantial justice that justify *stare decisis*. Their behavior undermines the legitimacy of those decisions. It follows that, at least from the point of view of political morality, the decisions the judge makes are not fully justified – they just appear that way to legal subjects who do not know enough about the judge's character. What is required for fully justified decisions is that they are truly the outcome of a balanced valuing of predictability and substantial justice, and for that, a true attachment to the values justifying the common-law is necessary. In other words: Only a judge who truly thinks of their power as intended for the realization of the values justifying the common-law can issue fully justified common-law decisions, and so the humility of the individual judge who is making the decision is causally necessary for fully justified common-law decisions after all.

3.4. First Correction: An Argument for the Necessity of Judicial Humility as a Community-Virtue in the Common-Law

I think this argument is useful, but I suspect that it goes too far.[49] It is useful in that it directs our attention to the loss of justification that occurs when humility does not play an adequate causal

[49] However, I must admit that reasonable disagreement about my claim that the argument goes too far is possible. I have encountered several critics who believe the argument is cogent as it stands. If the reader is one of them, I have to say that though I disagree, I could be persuaded. That would actually make my position easier – for if the argument is successful, then humility is definitely causally necessary for fully justified decisions.

role in common-law-decision making. Humility gives judges a correct understanding of and relationship to their role and motivates them to act accordingly. It is what binds judges to the values that justify the common-law. Humility is that part of a judge‘s character which makes their actions *not* exert personal power over the subject but instead realize the law. Thereby, humility is also the part of the judge’s character that generates real predictability, predictability through decisions that are causally connected to the law, instead of just the perceived predictability that results from decisions that are regularly *accidentally* in keeping with the law. The way that humble judges think of themselves, namely as servants of their institutional role rather than individuals with the power to realize their ambitions, changes both their relationship to the law and to legal subjects. This relationship is *part* of what fully justifies their decisions because it turns their predictability and non-humiliating character from an appearance into a reality. So humility itself is a *causally* necessary ingredient in fully justified common-law decisions.

However, the argument goes too far in that it demands that humility must be located in every individual judge. It underestimates the role that the judicial community plays and overestimates the role of the individual judge. I want to explain this by taking another look at our non-humble judge and the reasons *why* they make decisions that a humble judge would have made:

They make these decisions because the judges around them are virtuous and the non-humble judge’s career will suffer if they overtly deviate from the path of virtue. Now, as economic analysts of judicial behavior have pointed out, the constraints that affect judges in their decision making are mainly soft and social.[50] They include the way other judges will think of them and what that will mean for their career, the way they are taught in university etc. Even non-humble

[50] See, e.g. Richard Posner, ‘What do judges and justices maximize? (the same thing everybody else does)’ (1993) 3 *Supreme Court Economic Review*1-41.

judges whose characters differ from our example judge will feel the effect of these constraints. For example, a judge with a temperament disposing them to obviously and blatantly make decisions to suit their own idiosyncratic values may not as easily ascend to positions of power in a humble community of judges.[51] They may not even want to become a judge, given how law-schools in a humble legal community will portray the job. So, in a humble community of judges, a legal subject can feel at ease even in front of a vicious judge, because they can trust that the judge is subject to pressures that push them towards making decisions that a humble judge would make. This makes the vicious judge's decisions truly, not only apparently predictable, and it turns the appearance that they are determined by the law into a reality. This is because there *is* a causal connection between humility and the decisions rendered by the non-humble judge in such a community. The community of humble judges has enough control over the behavior of the non-humble judge that the legal subject is protected from the non-humble judge's personal power and personal untethered-ness from the law. The situation is like that of a passer-by who is protected from a vicious dog by the owner holding its leash. Constraints, created by the soft pressures of the surrounding virtuous judges, curb the non-humble judge's motivations to abuse their power and causally tie them to the decision a humble judge would have made.

Of course, this soft pressure can fail. As, e.g. Posner points out, there are jurisdictions in which judges enjoy positions largely insulated from inspection or feedback.[52] In such positions, vicious judges can get away with making decisions that a virtuous judge would not have made. And even in well-organized jurisdictions, vicious judges will find themselves in situations where

[51] Unless their values, by chance, happen to reliably produce decisions that a virtuous judge would have made, in which case their ascend would again be causally tied to the virtue of the humble community surrounding them.
[52] Ibid.

they can indulge their vices knowing that no repercussion is coming. Does this mean that legal subjects facing a vicious judge are in danger of unpredictably finding themselves in humiliating situations?

Fortunately, common-law jurisdictions are usually organized hierarchically, so that legal subjects can appeal. In many jurisdictions, as legal subjects move up the ranks of appeal courts, they are also more and more likely to encounter a multi-judge panel. Therefore, if a judicial community is sufficiently humble, legal subjects can refuse to accept the decisions of an individual, non-humble judge. Legal subjects whose case is decided in a jurisdiction sufficiently saturated in humility will be able to move into a position where they are subjects to the law, not to other people.[53]

However, this worry shows that when I say that community-humility is causally necessary for fully justified decisions, I mean more than that there have to numerically enough humble judges in the community. Philosophers who discuss collective virtue disagree about its nature. Those with summative views claim that collective virtues can be reduced to the virtues of the individual members of groups. By contrast, those with collectivist views argue that groups can possess virtues in ways that are not fully reducible to the virtues of their members, and that they can possess them even if some of their members are vicious.[54] My argument so far should have shown that I embrace a collectivist view, though certainly enough judges must be humble for the causal connection

[53] I should point out that access to justice may be a crippling problem: My argument fails in jurisdictions where appealing a judgement is prohibitively expensive, especially for members of disadvantaged groups. On the other hand, in jurisdictions like this, rule of law values are undermined to an extent that will threaten the legitimacy of legal decisions independently of the problem I am discussing here.

[54] Ryan Byerly and Meghan Byerly, 'Collective virtue' (2016) 50(1) *The Journal of Value Inquiry* 33-50; Sean Cordell, 'Group virtues: No great leap forward with collectivism' (2017) 23(1) *Res publica* 43-59; Miranda Fricker, 'Can there be institutional virtues' in T. Gendler and J. Hawthorne (eds.) *Oxford Studies in Epistemology 3* (Oxford, Oxford University Press, 2010); Reza Lahroodi, 'Collective epistemic virtues' (2007) 21(3) *Social Epistemology* 281-297.

between the group's virtue and the decision-making of individual judges to take hold. But a community which does not promote decisions that a humble judge would make from its vicious members is incapable of playing the role I assigned to humble judicial communities. This is because common-law decisions that are made by a vicious judge can only be fully justified if they have a causal connection to the humility of the other judges in the community. So, a judicial community can only be humble in the relevant sense if it is organized to causally connect the humility of its humble judges with the decisions of its vicious judges. In addition, it also must be organized so that legal subjects can move from the influence of vicious judges to that of humble judges, e.g., through an accessible appeal-system. This also means that a community of judges can be humble even if some of its members are not, though of course the percentage of non-humble members cannot be too large. Rather what is required is that enough members are humble enough to create and perpetuate a community with a culture of humility such that, e.g. law-schools encourage and select for humility and so on. This also means that even individual humble judges need not be perfectly humble (providing another answer to the objection I dealt with at the end of section 3.1). This is because the decisions of imperfectly humble judges would be bound to the community humility via other motivators (discussed above) even on occasions where their imperfect humility may falter.

In sum: My argument here is that where the community of judges is humble, this humility can provide full justification even for decisions made by a non-humble judge, as long as they are the decisions that a virtuous judge would have made. What is required for a fully justified common-law-decision is that it is a decision that a virtuous judge would have made, and that it is made in a humble community of judges while being causally connected to this humility.

3.5 Second Correction: Individual Judicial Humility is not Sufficient for Fully Justified Common-Law Decisions

In section 3.1, I suggested that the humility of an *individual* judge can provide the missing ingredient for fully justified decisions. I would like to re-examine that claim now, after the introduction of community-humility into the argument. This is because I actually believe that we have at least three good reasons to think that even a humble judge may not be able to make fully justified common-law decisions if they are stuck in a non-humble judicial community.

First, the common-law develops based on judicial decisions that build on top of one another. It is a product of the judicial community. A non-humble community of judges will develop the common-law based on decisions that do not integrate substantial justice and the expectations of legal subjects in the right way. This undermines the justification for the common-law and the associated judicial power continuously. Even a humble judge making a common-law decision in this context must fall back on this self-undermining common-law.

Second, where the judicial community is not humble, legal subjects have reason to suspect each individual judge of vice. They therefore always have reason to worry that the decisions about their cases are products of the individual judge's will, not the law. Given that individual subjects cannot be expected to know the character of each judge they will encounter, this is the case even if the judge before them happens to be humble. Therefore, individual subjects will find themselves in a situation where they have reason to worry about and try to adjust their behavior to the individuality of the judge, which is humiliating and makes them unable to predict outcomes based on the law.[55]

[55] This also illustrates the damage that can be done by high profile instances of non-humble behavior of judges. Take, e.g. Judge Kacsmaryk's behavior in *Alliance for Hippocratic Medicine v. U.S. Food and Drug Administration*. The

Third, and perhaps most importantly, the humility of the judicial community adds an element of non-arbitrariness to the causal connection between humility and common-law decisions. Above, I argued that humility is the ingredient that turns the relationship between judge and legal subject from one of individual power to one of equality before the law. However, if this effect fully depends on the individual judge and the development of her character, then the legal subject is again in the judge's hands. If the judge loses her humility, the relationship becomes one of personal power again. This itself is humiliating and reduces predictability. A good comparison might be being subject to a good tyrant who makes laws only according to the perceived best interests of their subjects because they think of themselves as a servant to their people. The mere fact that the tyrant *could* act differently undermines the equality between them and the legal subjects. However, in a humble community of judges, the causal connections between humility and common-law decisions are much more reliable. They hold individual humble and non-humble judges and their decisions in place.[56]

6. Conclusion

The common-law develops via the use of judicial discretion. Adopting a common-law system is justified through its ability to balance rule-of-law values with values of fundamental justice. If this justification is to be effective, decisions made with judicial discretion must be made

degree to which he seems to be abusing the flexibility of the common law, together with widespread allegations that the party who brought the case to him had engaged in "forum shopping", selecting to bring the case in this part of Texas precisely to come before this judge, arguably contributed to a general loss of trust in the US-American court system.

[56] Of course, now someone may argue that the character of the entire community could change. This is true, but it is a problem that all political structures face equally. No structure can survive a complete change in the character of the community. If most Canadians abandoned their appreciation for democracy, democracy would not stand for long. In the end, all systems, no matter how carefully they are built to protect dignity and equality, depend on the minimal virtue of the humans living in them.

in accordance with, and motivated by, an understanding of the judicial role that integrates these values. This means that on the individual level, judges must make decisions that humble judges would have made, while on the community level, humility must be causally connected to decisions. That is why humility is a necessary virtue in the common-law context, taking over where lawfulness leaves off. Therefore, at least in the common-law, judicial humility deserves a place in the list of central judicial virtues.