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# What Humility Isn't: Responsibility and the Judicial Role

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# What Humility Isn't: Responsibility and the Judicial Role

Benjamin L. Berger\*

## WHAT IS HUMILITY?

The Talmud relates a story explaining why the Second Temple was destroyed in 70 CE.<sup>1</sup> This story centres on a man named Bar Kamtza, who was mistakenly invited to a banquet, and a Rabbi, R'Zechariah ben Avkulas.

The host of the banquet had instructed his attendant to bring his friend, Kamtza, to the event. Instead, the attendant brought Bar Kamtza, who the Talmud describes as the host's enemy. When the host arrived at the banquet and found Bar Kamtza, rather than his friend Kamtza, he told Bar Kamtza to "get up and get out." Bar Kamtza, no doubt seeking to avoid embarrassment, offered to pay for his food and drink if only the host would let him stay. When the host refused, Bar Kamtza offered half the value of the banquet and, when rebuffed, ultimately offered to pay for the entire banquet. The host again refused, this time grabbing hold of Bar Kamtza and physically ejecting him from the event.

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<sup>1</sup> Babylonian Talmud, Tractate Gittin, 55b-56a.

Bar Kamtza was offended not only by the rough treatment at the hands of the host, but by the fact that the Rabbis looked on without intervening or objecting to the host's conduct: "Bar Kamtza said to himself: 'Since the Rabbis were seated at the banquet and did not rebuke him for the way he treated me, it is evident that what he did was acceptable to them.'"<sup>2</sup> Bar Kamtza resolved to get revenge against the Rabbis.

He went to the leader of the Romans and advised him that the Jews were rebelling. When asked for proof, Bar Kamtza suggested that the Romans send an animal as a sacrifice and to watch to see if the Jews would offer it up in the Temple. If they did not, it would be a sure sign of the Jews' resistance. The Romans sent a calf but, on the way to Jerusalem, Bar Kamtza inflicted a subtle blemish on the animal, one that he knew the Jews would nevertheless notice and that would render the calf unfit for sacrifice.

Sure enough, when the sacrifice offering arrived, the blemish was noticed and all understood the grave situation. The Rabbis considered offering the animal despite the ritual prohibition, "for the sake of peaceful relations with the Roman government." But, according to the Talmud, Rabbi Zechariah objected that people would then believe that blemished animals were fit offerings. So the Rabbis instead considered killing Bar Kamtza so that word of the Rabbis' refusal to sacrifice the animal would not reach the Romans. Again Rabbi Zechariah objected: people would then wrongly believe that the penalty for blemishing a sacrificial animal is death. And so the Rabbis took neither path. Consistent with Jewish law, the animal was not sacrificed. Bar Kamtza returned to inform the Roman authorities. His plan succeeded: the Romans interpreted the refusal of the sacrifice as evidence of the Jews' rebellion, besieged Jerusalem, and destroyed the Holy Temple, a cataclysmic event in the history of the Jewish people.

The Talmud records that Rabbi Yochanan interrupted his telling of these events, offering the following observation: "The humility of Rabbi Zechariah ben Avkulas destroyed our Temple, burned down our Sanctuary, and exiled us from our land."<sup>3</sup>

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<sup>2</sup> Tractate Gittin, 56a.

<sup>3</sup> *Id.*

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In recent years academic literature has given some attention to humility as an important adjudicative principle or virtue. In the hands of some, the concept is rather thin. It is merely a synonym for restraint, describing a principle of judicial deference to legislative or democratic choices or debates.<sup>4</sup> For these authors, a judge's humility is measured simply by asking whether and how often she or he is willing to overrule or strike down legislation,<sup>5</sup> or intervene to decide contentious social issues.<sup>6</sup> Here, the call for judicial humility is a response to a concern about "judicial activism," sometimes quite neatly folded into polemical interventions on particular legal controversies.<sup>7</sup>

The virtue of judicial humility is thickened up by others who regard the core of humility as a deep awareness of the fallibility of human judgment and the risk of error when met with the difficult, sometimes excruciating, choices that must be made by a judge. Humility is, here, about "tempering judicial arrogance"<sup>8</sup> and counsels an openness to hearing the views of others and listening to the wisdom of other authorities and sources. Simone Chambers builds on this sense of humility as an attunement to human fallibility, describing it not only as a question related to the imperfection of our knowledge and judgment, but as "an acknowledgment of shared human frailty and weakness in the face of

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<sup>4</sup> Michael J. Gerhardt, "Constitutional Humility" (2007) 76 *Cin. L. Rev.* 23.

<sup>5</sup> *Id.* Although Scharffs develops a richer conception of humility, he ultimately also regards deference, an allergy to significant change, and avoidance of "activism" as markers for judicial humility. Brett Scharffs, "The Role of Humility in Exercising Practical Wisdom" (1998) 32 *U.C. Davis L. Rev.* 127.

<sup>6</sup> Richard S. Myers, "The Virtue of Judicial Humility" (2015) 13:2 *Ave Maria Law Review* 207.

<sup>7</sup> See *Id.*, at 212–213. Myers writes his piece in anticipation of the US Supreme Court's consideration of same sex marriage, hoping to avoid "the distorting effect of the Supreme Court's intervention."

<sup>8</sup> Michael W. McConnell, "The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's Moral Reading of the Constitution" (1997) 65 *Fordham L. Rev.* 1269, at 1292.

contingency and constraint”<sup>9</sup> – an attitude that will lead a judge to close the imaginative gap between her and an unfortunate person who appears before her.<sup>10</sup>

Arguing for the virtue of humility in constitutional discourse, Mark Walters builds on this idea of humility as linked to human fallibility and frailties in our understanding, as a kind of salve for judicial arrogance. For Walters, “[i]f constitutional law is a moral discourse, and if moral discourse embraces moral insight and tragedy simultaneously, then constitutional humility is essential.”<sup>11</sup> He observes that “[h]umility is not often identified as a constitutional value, at least not in the non-aboriginal legal tradition. Law is supposed to be about authority, certainty, and order; humility, in contrast, suggests meekness and modesty.”<sup>12</sup> To embrace humility, in this sense, instills a desire to relate to and understand the perspectives of others and a willingness to reconsider one’s past decisions.

The view that humility is, at core, about care and concern for the perspectives of others inspires Lindsay Borrows’s reflections on the principle of humility.<sup>13</sup> In the richest conception available in the existing legal literature – enriched by deep engagement with Anishinaabe teachings about humility – she describes humility as “a state of being that can open hearts and minds to see a situation in different ways.”<sup>14</sup> Her

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<sup>9</sup> Simone Chambers, “Democratizing Humility” (2004) 7 *Buff. Crim. L. Rev.* 465, at 470–471.

<sup>10</sup> Chambers is writing of the criminal realm, and describes this effect of humility as follows: “we are asked to think about our law abidingness as possibly and partially a product of many arbitrary, accidental, and contingent factors. It gives us an impartial perspective on ourselves and our own sense of justice.” *Id.*, at 471–472.

<sup>11</sup> Mark D. Walters, “The Morality of Aboriginal Law” (2006) 31 *Queen’s L.J.* 470.

<sup>12</sup> *Id.*, at 474. In this lovely piece, Walters opposes his view, inspired by the work of John Whyte, to that of Ronald Dworkin (as evidenced in *Law’s Empire*), which shows tremendous confidence in the capacity for moral progress through law.

<sup>13</sup> Lindsay Borrows, “Dabaadendiziwin: Practices of Humility in a Multi-Juridical Legal Landscape” (2016) 33 *Windsor Y.B. Access Just.* 149. See also Lindsay Keegitah Borrows, *Otter’s Journey through Indigenous Language and Law* (Vancouver: U.B.C. Press, 2018), at 136.

<sup>14</sup> *Id.*, at 152.

understanding of humility elegantly weaves together many of the threads that I have identified:

Humility is a state of positioning oneself in a way that does not favour one's own importance over another's. Humility is a condition of being teachable. Humility allows us to recognize our dependence upon others and to consider their perspectives along with our own. A humble opinion may be given in a spirit of deference or submission. The antonym is expressed in terms such as arrogant, elevated, or prideful.<sup>15</sup>

This is the “legal principle” of humility that Borrows argues should be more actively cultivated in Canadian and Anishinaabe law.

I, too, have argued for the importance of humility as an adjudicative virtue, one that is particularly important in navigating the encounter of Canadian constitutionalism with other cultural forms, including religion.<sup>16</sup> The conception of humility that I advanced resonated with the sentiment that Robert Cover hoped would install itself in the judge who understood that the act of adjudication involves violence to other rich worlds of meaning.<sup>17</sup> As Judith Resnik explains, Cover “wanted the state’s actors (here, its judges and, derivatively, commentators on their work) to be uncomfortable in their knowledge of their own power, respectful of the legitimacy of competing legal systems, and aware of the possibility that multiple meanings and divergent practices ought sometimes to be tolerated, even if painfully so.”<sup>18</sup> This, too, is a conception of judicial humility.

Together, these richer views offer an appealing set of practices, attitudes, and sentiments that would be induced through the cultivation of this judicial virtue: modesty, gentleness, awareness of one’s fallibility, an openness to learning, curiosity about and engagement with the

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<sup>15</sup> *Id.*, at 153–154.

<sup>16</sup> Benjamin L. Berger, *Law’s Religion: Religious Difference and the Claims of Constitutionalism* (Toronto; Buffalo: University of Toronto Press, 2015), at 173–177.

<sup>17</sup> Robert M. Cover, “The Supreme Court 1982 Term — Foreword: Nomos and Narrative” (1983) 97 *Harv. L. Rev.* 4.

<sup>18</sup> Judith Resnik, “Living Their legal Commitments: Paideic Communities, Courts, and Robert Cover” (2005) 17 *Yale J.L. & Human.* 17, at 25.

perspectives of others, respect for and deference to other decision-makers and institutions. These are all, surely, features of humility, and all noble ones at that. And yet these understandings of humility have another common feature, shared by the thinnest and the thickest alike. In their various ways and despite their differences, all are urging the judge to be, in a word, “smaller” – to occupy less space. Whether merely a pallid encoding of a call for restraint in judicial review of legislation or a vibrant vision of all that is involved in not becoming enchanted with one’s own importance, all principally deploy humility to combat excesses: arrogance, self-elevation, and pridefulness.<sup>19</sup> This is understandable; those excesses are no doubt at work in a judiciary and in need of attention. There is good to be found in encouraging judges to be “smaller,” and framing this in the language of humility is effective and compelling. But I have become uncomfortable with the adequacy of this understanding of humility and this piece is an exploration of this discomfort.

The Talmud’s curious tale of Bar Kamtza and Rabbi Zechariah – and the arresting conclusion that Rabbi Yochanan draws from it – offers a different lesson about the nature of humility. It suggests that the picture of judicial humility painted in the legal commentary is not only incomplete, but even potentially dangerous in its incompleteness. Rabbi Yochanan’s statement is perplexing by the light of these conventional conceptions of humility. On these accounts, humility is a good to be pursued, particularly by those in authority. How could one of the defining tragedies of the history of the Jews be laid at the feet of humility? Yet Rabbi Yochanan seems to conclude both that Rabbi Zechariah acted with humility and that this exercise of humility was the cause of the destruction of the second temple and the exile of the Jewish people. Rabbi Zechariah did not assume authority beyond the letter of the law, nor did he arrogate to himself the task of deciding this crucial question facing the Jewish people. He simply explained what the law said and let events unfold. He was small. But this was precisely his error of humility.

The lesson of this puzzling episode in the Talmud is that humility is not merely the opposite of pride, arrogance, or self-importance. Though

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<sup>19</sup> Although this is the focus of Borrows’s treatment of humility, she alludes to the dimension of humility that is my focus in this piece when she notes that “[s]pace must be taken up as necessary, just as it must be given away at times as well.” Borrows, *supra* note 14, at 157.

these attitudes, and the habits that follow from them, are all inconsistent with humility, they all flow from a common and more fundamental source: a flawed sense of oneself and one's position in relation to others. This is the essential pathology that signals a failure of humility. Rabbi Zechariah acted modestly, but, as one commentator puts it, "[h]is sense of himself was flawed because he saw himself as less capable than he actually was of solving a real-life dilemma of great consequence."<sup>20</sup> The failure in Rabbi Zechariah's humility was that he resiled from the decision, with disastrous consequences. In this respect, both arrogance and diffidence can be understood as problems of ego because both flow from placing the self too much as the centre of things – one resulting in the elevation above others, the other in the negation of responsibility towards them. Humility is, thus, better understood as attunement to one's appropriate position and role in a web of relationships with others. Drawing from this story, it might be said that humility also involves an awareness of power, of the consequences of power for others, and assuming one's appropriate place in the exercise of that power. It is a virtue based in awareness of and responsibility to others, not merely the antithesis of arrogance or certainty. Or, if you prefer, it is not about being as small as you can be, it is about taking an appropriate amount of space.

It is this feature of humility – awareness of one's role and position in respect of power and willingness to accept the burdens of responsibility that flow from this – that I want to isolate and explore in this piece, seeking to complete the picture of what judicial humility might entail.

With prevailing understandings of judicial humility in hand – and at a time when case names like *Insite*,<sup>21</sup> *Carter*,<sup>22</sup> and *Bedford*<sup>23</sup> ring in our ears – it might seem counterintuitive to reflect on the way in which Chief Justice McLachlin and the McLachlin Court evidenced the virtue of

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<sup>20</sup> Alan Morinis, *Everyday Holiness: The Jewish Spiritual Path of Mussar* (Boston & London: Trumpeter, 2007), at 49.

<sup>21</sup> *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, [2011] 3 S.C.R. 134 (S.C.C.) [hereinafter "*Insite*"].

<sup>22</sup> *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, [2013] 3 S.C.R. 1101 (S.C.C.) [hereinafter "*Bedford*"].

<sup>23</sup> *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, [2015] 1 S.C.R. 331, (S.C.C.) [hereinafter "*Carter*"].

humility in currents of the criminal justice jurisprudence. But that is precisely what I hope to do, focussed instead on this particular feature or understanding of humility that I have drawn out in this first part of this paper. In the next section I will look at three somewhat less celebrated cases that show this facet of judicial humility at work. And yet my claim is most certainly not triumphal or apologetic, suggesting that this conception of humility was fully or evenly realized in Chief Justice McLachlin's work or that of the McLachlin court. I am drawing out an ethical resource in the jurisprudence, something I take to be a noble component of the judicial role, and one that I think should be more sharply noted and cultivated, alongside the important aspects of humility that Walters, Borrows, and other "rich theorists" of humility have identified. And so the penultimate section will identify an area in the criminal justice system in which there have been meaningful failures of the humility involved in mindful positioning and acceptance of the burdens of responsibility.

### THE SHAPE OF JUDICIAL HUMILITY

I turn now to consider how this understanding of humility as a complex virtue involving awareness of one's appropriate position and responsibilities in relationship with others can find expression in the judicial role. The cases below are drawn from decisions of the Supreme Court concerning the criminal justice system because it is an area of law that seems particularly, if not uniquely, adept at drawing the complex burdens of the judicial role into high relief. I offer each case study as a site for exposing and exploring the juridical expression of the facet of humility that is of interest to me in this piece: its relationship to responsibility. The salutary attitudes and practices that other writers have associated with humility are also variously at work in these cases. My point is that a satisfying conception of the virtue of judicial humility involves embedding these attitudes and practices of modesty within an awareness of role and relationships, with particular attentiveness to power and its consequences, along with a willingness to accept the associated burdens of judgment.

*Humility, Responsibility, and Vulnerability*

*Winko v. British Columbia (Forensic Psychiatric Institute)*<sup>24</sup> brought before the Court the constitutionality of Part XX.1 of the *Criminal Code*,<sup>25</sup> the part of *Code* that governs the treatment of accused persons found not criminally responsible by reason of mental disorder (“NCR accused”). Parliament enacted Part XX.1 in 1991 in response to the decision in *Swain*,<sup>26</sup> in which the Court ruled unconstitutional the prior scheme by which accused found “not guilty by reason of insanity” would be detained automatically and indefinitely at the “pleasure of the Lieutenant Governor.” Part XX.1 instituted sweeping revisions to the treatment of mentally disordered offenders, including the introduction of a new verdict that was neither “guilty” nor “not guilty” but, rather, “not criminally responsible.” But it was the new approach to treatment, detention, and restrictions on liberty that was at issue in *Winko*. Under Part XX.1, a court or, more commonly, a Review Board is required to make a determination as to whether the NCR accused should be discharged absolutely (thereby releasing him or her from the jurisdiction of the criminal justice system), discharged with conditions, or detained in custody in a hospital. In coming to this decision, a Review Board is required to take into consideration “the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused”. Mr. Winko objected that this scheme – as interpreted to that point – presumed the dangerousness of the NCR accused and placed on that accused the burden of proving the contrary, in contravention of his section 7 and 15(1) rights.

Although the case raised constitutional issues, it turned on a question of statutory interpretation: Did Part XX.1, indeed, create such a presumption of dangerousness?<sup>27</sup> The focal point of the case was section

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<sup>24</sup> [1999] S.C.J. No. 31, [1999] 2 S.C.R. 625 (S.C.C.) [hereinafter “*Winko*”].

<sup>25</sup> R.S.C., 1985, c. C-46.

<sup>26</sup> *R. v. Swain*, [1991] S.C.J. No. 32, [1991] 1 S.C.R. 933 (S.C.C.).

<sup>27</sup> Although this was the core issue, *Winko* is more generally, a touchstone case establishing the posture that the Canadian criminal justice system would take toward those who, by reason of mental disorder, cannot be held criminally responsible. Justice McLachlin explains, for example, that the sole basis for the justice system’s claim over the NCR accused is danger to the public

672.54(a), which states that “where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public,” the Review Board must, “by order, direct that the accused be discharged absolutely.” And to put a fine point on it, the central question was, What should a Review Board do in a *condition of uncertainty* about whether the accused is a significant threat to the safety of the public? If the evidence supports a positive finding that the accused is a significant threat to the safety of the public, the result was clear: the accused should not be discharged absolutely. Equally clear was that if a Review Board concluded that the NCR accused was not such a threat, he or she should be discharged absolutely. But what if the evidence couldn’t support a clear finding in one direction or another?

Justice Gonthier (with whom L’Heureux Dubé J. concurred) held that if a Review Board finds that if there is uncertainty as to whether an NCR accused who presents some danger to the public is a *significant threat*, that NCR accused should be subject to conditions or detained. Perhaps more time and future information would resolve the issue, but in the meantime the criminal justice system should retain its warrant over the mentally ill individual. Justice Gonthier defended this as the plain meaning of the text. By contrast, Justice McLachlin, as she then was and writing for the majority, effectively denied that there was space for such uncertainty or indecision. If the Review Board could not conclude that the NCR accused presented a significant threat to the safety of the public, the decision was made: the individual must be discharged unconditionally.

In arriving at this conclusion, Justice McLachlin’s reasons faithfully express the extraordinarily difficult nature of the choice facing a criminal justice system and, on an individual basis, each Review Board: “In every society there are those who commit criminal acts because of mental illness. The criminal law must find a way to deal with these people fairly, while protecting the public against further harms. The task is not an easy one.”<sup>28</sup> The gravest concerns lie in each direction. There would be considerable solace to be found in some room for indecision. One could perhaps

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and that the orientation of the Part XX.1 approach is towards assessment and treatment, not punishment.

<sup>28</sup> *Winko*, *supra* note 24, at para. 1.

imagine a review board member, taking her cue from Rabbi Zachariah, objecting alternatively, “but if we discharge this person, they might cause harm to someone!” and “but if we don’t discharge this person, we have deprived them of their basic liberty without justification!”. Justice McLachlin denies the decision-maker this comfort. She explains that “however difficult the task, the court or Review Board cannot avoid the responsibility of making that determination.”<sup>29</sup>

Humility understood solely in terms of awareness of fallibility and embrace of uncertainty would not dictate this approach. But I read Justice McLachlin’s conclusion in *Winko* as a fine instantiation of the more complete picture of humility that I have been urging. Consistent with prevailing accounts of humility, her reasons in *Winko* are rich with an attempt to understand the lives of others. She reflects on the circumstances that brought Mr. Winko before the courts and insists on moving past stereotypes about the dangerousness of the mentally ill and thinking realistically about their lives, noting that evidence does not support the proposition that NCR accused are more likely than others to commit future offences.<sup>30</sup> She is seeking to engage compassionately with the perspectives and experiences of others. But she also, and crucially, emphasizes the unique vulnerability of the mentally ill in our society and in relation to our justice system. Justice McLachlin notes the “socially marginalizing side-effects”<sup>31</sup> of mental illness. She observes the historical mistreatment of the mentally ill who “have long been subject to negative stereotyping and social prejudice in our society based on an assumption of dangerousness”.<sup>32</sup> And she refers explicitly to the fact that “the mentally ill are often vulnerable and victimized in the prison setting, as well as by changes in the health system that many suggest result in greater numbers of the mentally ill being caught up in the criminal process”.<sup>33</sup>

Justice McLachlin is, here, drawing herself and the court or Review Board facing this admittedly difficult choice into explicit awareness of the

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<sup>29</sup> *Id.*, at para. 51.

<sup>30</sup> *Id.*, at para. 37.

<sup>31</sup> *Id.*, at para. 37.

<sup>32</sup> *Id.*, at para. 35.

<sup>33</sup> *Id.*, at para. 41.

power dynamics and vulnerabilities that shape that moment, as well as the enormous consequences of the decision for the affected communities. With this she is inducing a keener appreciation of the role and responsibilities of the decision-maker, burdensome though they may be. The overriding duty of the decision-maker in this situation is to ensure that the NCR accused is “treated with the utmost dignity and afforded the utmost liberty compatible with his or her situation.”<sup>34</sup> Attunement to the vulnerability of the mentally ill, the consequences for them of the exercise of the criminal law’s power, and one’s unique position standing between that power and consequence, require the acceptance of this duty. This is so despite how much one might prefer not to make the decision, to protect oneself from the burden of that choice. And this, it seems to me, is a true counsel of humility.

*Winko* thus serves as an example that evidence of the virtue of judicial humility is not found merely in a refusal to invalidate legislation, though with her interpretation of Part XX.1 in hand, McLachlin J. found the legislation constitutionally valid. It is a much more complicated matter than that, one that involves a judge positioning herself within a web of relationships with others. And in pursuing the virtue of judicial humility, those salient relationships are much broader than solely those between the judiciary and the other branches of government. The judge is a responsible member of a more complex community than that, and with more complex duties. In *Winko*, Justice McLachlin was keenly aware that this community of regard included those suffering with mental illness and that the Court’s decision would have profound impacts on their lives, as well as the safety of the public. In this, she not only asked courts and Review Boards to accept the burdens of their responsibilities, she humbly did so herself.

### *Humility, Responsibility, and History*

A judge working with the common law is engaged in a relationship with history. When that judge confronts a legal rule or principle applicable to a given case before her, she is, in that moment, participating in the unfolding of a tradition. With this, she faces the formidable question:

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<sup>34</sup> *Id.*, at para. 42.

Receiving, through this rule or principle, the accumulated wisdom of past experience and judgment, what is my appropriate relationship to this history as I wrestle with contemporary circumstances and the case before me? Principles of *stare decisis* and adherence to precedent embody one stance with respect to this question – one posture towards this legal history – and shape the inherently conservative dimension of the common law. Here, the judge’s role is to receive the wisdom of past decisions and draw them forward to the present. But of course change is also a genetic aspect of the common law and the source of its dynamism. This facet of the common law reflects a fundamental understanding that, as Michael Oakeshott puts it, “[t]here is nothing to encourage us to believe that ... what is better survives more readily than what is worse”<sup>35</sup> and that, as society changes and new circumstances emerge, history cannot exhaust our insight about justice. And so to bring this question into the terms of this piece, one might ask, What does judicial humility mean or demand for this engagement with history?

This question frames my examination of Justice McLachlin’s (as she then was) decision in *R. v. Khan*,<sup>36</sup> a decision that, in terms of its effects on our legal system, must be considered one of the most important and consequential of her career. *Khan* concerned the admissibility of a young child’s unsworn statements, made to her mother, regarding a sexual assault. Although the Court’s decision, authored by McLachlin J., clarified certain points about the approach to the testimonial competence of children, the crucial intervention of the case was on the analysis of hearsay. The child, T., was three and a half years old at the time of the incident. She had gone to the doctor with her mother. The doctor, Dr. Khan, first examined T. with her mother in the room. While her mother changed for her own examination, T. was alone with Dr. Khan in his office. After the examination, when the mother rejoined T., she noticed that the child was picking at a wet spot on her sleeve. Approximately 15 minutes after leaving Dr. Khan, the mother asked T. what she and Dr. Khan talked about when they were alone. The young girl then conveyed that Dr. Khan asked her if she wanted a candy, then told her to open her mouth and “put his

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<sup>35</sup> Michael Oakeshott, “The Character of a University Education” in Luke O’Sullivan, ed, *What is History? and other essays* (Exeter: Imprint Academic, 2004) 373, at 377.

<sup>36</sup> [1990] S.C.J. No. 81, [1990] 2 S.C.R. 531 (S.C.C.) [hereinafter “*Khan*”].

birdie in my mouth, shook it and peed in my mouth.”<sup>37</sup> The mother testified that “birdie” was T.’s word for “penis”. The police were called, the spot on the sleeve was examined and found to be a deposit of semen, and Dr. Khan was charged with sexual assault.

The evidentiary difficulty that became the legal core of *Khan* was that the trial judge found that T., only approximately four and a half years old at the time of the trial, was not competent to testify. This meant that the key evidence – what T. said to her mother about what occurred – could only be presented to the court through the mother, making it hearsay and, therefore, presumptively inadmissible. Finding no applicable exceptions to the hearsay rule, the trial judge excluded this crucial evidence and acquitted the accused. The Crown appealed and the case found its way to the Supreme Court.

Justice McLachlin corrected certain errors in the trial judge’s competency analysis, but the central question of the hearsay remained. And the core difficulty was this: Justice McLachlin concluded that the trial judge was right that no traditional hearsay exceptions applied and was therefore correct that the statements were inadmissible on the basis of prevailing hearsay rules. The choice before the Court was, therefore, to stand by these hearsay rules, which reflect an historical set of judgments about the safety of relying on certain types of information, or to reshape the rule. The matter drew particular importance from the context in which it appeared, namely the prosecution of an alleged sexual offence against a young child, a category of vulnerable persons from whom direct evidence would often be difficult to obtain in court. Justice McLachlin framed the essential issue before the Court as follows:

The question then is the extent to which, if at all, the strictures of the hearsay rule should be relaxed in the case of children’s testimony. The issue is one of great importance in view of the increasing number of prosecutions for sexual offences against children and the hardships that often attend requiring children to retell and relive the frequently traumatic events surrounding the episode in a long series of

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<sup>37</sup> *Id.*, at para. 4.

encounters with parents, social workers, police and finally different levels of courts.<sup>38</sup>

Attuned to this practical context, McLachlin J. acknowledged that the “hearsay rule has traditionally been regarded as an absolute rule, subject to various categories of exceptions” and that this approach “provided a degree of certainty to the law on hearsay”.<sup>39</sup> However she concluded that the approach “has frequently proved unduly inflexible in dealing with new situations and new needs in the law.”<sup>40</sup> For the purposes of this piece, a moment in the flow of her reasoning stands out. In reviewing the case of *Ares v. Venner*,<sup>41</sup> which provided some support for the approach she would take, she paused to emphasize a line that the Court had accepted from a dissenting judgment penned by Lord Donovan in a 1965 English case, *Myers v. Director of Public Prosecutions*: “The common law is moulded by the judges and it is still their province to adapt it from time to time so as to make it serve the interests of those it binds.”<sup>42</sup>

So Justice McLachlin counselled a return to the “principle and the policy underlying the hearsay rule rather than the strictures of traditional exceptions.”<sup>43</sup> She excavated the historical decisions to expose the core concerns animating the hearsay prohibition, namely that hearsay evidence might not be necessary and might be unreliable, and concluded that hearsay statements made by children regarding crimes committed against the child should therefore be admitted if they are, indeed, necessary and reliable.<sup>44</sup> T.’s mother’s evidence should have been admitted: it was necessary, the child having been ruled incompetent to testify, and the circumstances surrounding the making of the statement, features of the statement, and the corroborative evidence gave her hearsay statement the

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<sup>38</sup> *Id.*, at para. 17.

<sup>39</sup> *Id.*, at para. 18.

<sup>40</sup> *Id.*

<sup>41</sup> [1970] S.C.R. 608, [1970] R.C.S. 608 (S.C.C.).

<sup>42</sup> *Myers v Director of Public Prosecutions*, [1964] 2 All E.R. 881, [1965] A.C. 1001, at 1047 (H.L.).

<sup>43</sup> *Khan*, *supra* note 36 at para. 18.

<sup>44</sup> And “subject to such safeguards as the judge may consider necessary and subject always to considerations affecting the weight that should be accorded to such evidence.” *Id.*, at para. 33.

stamp of reliability. Subsequent cases would recognize that the logic of McLachlin J.'s approach could not be contained to the case of child witnesses, and that the principled approach to hearsay – focussing on necessity and reliability – would define the whole of the Court's subsequent hearsay jurisprudence.<sup>45</sup>

But what informed Justice McLachlin's decision to reshape the approach to hearsay in *Khan*? The law of evidence occupies a special place in the landscape of our justice system: it is the law's practical epistemology, its way of knowing the social world that it is asked to judge. As such, there is no path to a just outcome that can bypass the gates of evidence law. Chief Justice McLachlin was keenly attuned to this structural significance of our rules of evidence and her formidable contributions to the field of evidence law should be counted amongst her most important. In *Khan* she was specifically attentive to the practical consequences of the law for those who it would affect, here vulnerable children. And as evidenced by her invocation of Lord Donovan's dissent in *Myers*, this awareness of the consequences of her decision was married with a keen appreciation of her role as a judge in relationship not only to inherited wisdom and rules, but the communities affected by her decision.

If not the starting point – a matter on which there is substantial (though inconsequential) academic debate – Justice McLachlin's conceptual move in *Khan* was the watershed for what is considered the "principled revolution" in the modern Canadian evidence law. It reshaped our approach to evidence. Far from modest in its effect, the decision nevertheless showed humility because it involved a judge's thoughtful reflection on her role and responsibilities in the web of relationships and lived experiences in which she discharges her duties. Those relationships importantly include a relationship with history and the wisdom generated through historical experience. Although adherence to inherited rules and principles in light of the weight of that history might be more consistent with the lack of arrogance and modesty often associated with humility, it is not a reflection of the more complex picture of the virtue that I have been urging in this piece. As a judge, it is not

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<sup>45</sup> The general applicability of her approach to hearsay was explicitly recognized in *R. v. Smith*, [1992] S.C.J. No. 74, [1992] 2 S.C.R. 915 (S.C.C.), and would carry through to our guiding jurisprudence today (see *R. v. Bradshaw*, [2017] S.C.J. No. 35, [2017] 1 S.C.R. 865 (S.C.C.)).

enough to receive and apply rules and laws, as Rabbi Zechariah did. Nor can they be callously disregarded as if the experience and wisdom that generated them has no claim on us. Both approaches lack humility because both fail to occupy appropriate space. *Khan* is an example that shows that we find judicial humility at the confluence of respectful engagement with history and awareness of the responsibilities of one's role in the moment. This is perhaps one of the defining burdens we ask a judge to accept: to wrestle with history, not just to receive it.

### *Humility, Responsibility, and the Role of Others*

The combined effect of *R. v. Nur*<sup>46</sup> and *R. v. Lloyd*,<sup>47</sup> both with majority decisions penned by Chief Justice McLachlin, has been to sound the death knell for most mandatory minimum sentences. In *Lloyd*, she explains that “the reality” is that mandatory minimum sentences applicable to a breadth of circumstances and possible offenders are constitutionally vulnerable “because such laws will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional.”<sup>48</sup> She goes on to suggest that if Parliament wishes to persist in the use of mandatory minimums, it must more narrowly circumscribe their applicability or offer a legislative “safety valve” to judges. The Supreme Court of Canada’s recent jurisprudence on the question of the constitutionality of mandatory minimum sentences thus hardly seems a promising archive for reflection on the judicial virtue of humility, as it is often understood. *Nur* and *Lloyd* are large, bold, confident – to some, institutionally arrogant – decisions. But the axial jurisprudential moment leading to these cases, *R. v. Ferguson*,<sup>49</sup> is a decision that indeed discloses dimensions of the more complex picture of humility that I am developing here.

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<sup>46</sup> [2015] S.C.J. No. 15, [2015] 1 S.C.R. 773 (S.C.C.) [hereinafter “*Nur*”].

<sup>47</sup> [2016] S.C.J. No. 13, [2016] 1 S.C.R. 130 (S.C.C.) [hereinafter “*Lloyd*”].

<sup>48</sup> *Id.*, at para. 35.

<sup>49</sup> [2008] S.C.J. No. 6, [2008] 1 S.C.R. 96 (S.C.C.) [hereinafter “*Ferguson*”].

The case came from Chief Justice McLachlin's home town, Pincher Creek, Alberta, and involved the fatal shooting of a police detainee by an RCMP constable. Constable Ferguson would later testify that while placing the detainee, Mr. Varley, in cells, Varley attacked him, pulling his vest over his head and grabbing Cst. Ferguson's firearm. In the ensuing struggle, one shot was discharged into the detainee's stomach, wounding him. The booking officer would testify that he heard the second, and fatal, headshot up to three seconds later.

At issue was the constitutionality of the four year mandatory minimum sentence for manslaughter with a firearm. Ferguson did not challenge the general constitutionality of the minimum but, rather, argued that, as applied to his circumstances, this four year minimum constituted cruel and unusual punishment contrary to section 12, and that the appropriate remedy would be a constitutional exemption granted pursuant to the wide remedial power conferred on courts by section 24(1) of the Charter. Chief Justice McLachlin found no basis for concluding that the four year mandatory minimum sentence offended section 12 on the (distinctly unsympathetic) facts of this case. Nevertheless, and though a decision on this point was not strictly required given her finding on the section 12 question, McLachlin C.J.C. turned to what would be the key question in the case: what is the appropriate remedy when a violation of section 12 is, indeed, found? Should that law "be permitted to stand subject to constitutional exemptions in particular cases", granted pursuant to section 24(1) of the Charter, as Ferguson had argued, or is "the only remedy ... a declaration that the law is inconsistent with the *Charter* and hence falls under s. 52 of the *Constitution Act, 1982*"?<sup>50</sup>

Chief Justice McLachlin held that courts should not grant constitutional exemptions pursuant to their section 24(1) remedial power. Section 24(1), she explained, is to be used in response to *government acts* that violate Charter rights.<sup>51</sup> If, by contrast, it is *a law* that offends the Charter, courts are limited to "striking down" the law as being of no force and effect under section 52.

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<sup>50</sup> *Id.*, at para. 34.

<sup>51</sup> *Id.*, at para. 61.

At the time, some viewed this conclusion in *Ferguson* as representing the Court's unfortunate withdrawal from its appropriate role in relieving particular instances of injustice arising from mandatory minimum sentences. Constitutional exemptions offered "a workable solution to the problem of the exceptional case"<sup>52</sup> and some worried that *Ferguson* marked a retreat from close scrutiny of minimum sentences. And yet in retrospect, Chief Justice McLachlin's reasons in *Ferguson* are better read as a muscular intervention in the politics and legality of mandatory minimum sentences,<sup>53</sup> setting the stage for *Nur* and *Lloyd*. She denied judges the easy way out – episodically releasing tensions while sustaining the law produced by the politics of mandatory minimums. Far from an abdication of the necessary role of the courts, the decision served as an encouragement to judges to take the step required of them given their constitutional role: to recognize that a law that would inflict cruel or unusual punishment lacks the political morality within the structure of our constitutional order to stand as law. The world announced in *Lloyd* – one in which mandatory minimum sentences are all constitutionally suspect – is a world that *Ferguson* made.

But what does this all have to do with humility? The answer lies in how Chief Justice McLachlin arrived at this conclusion in *Ferguson*. Acknowledging the appeal of constitutional exemptions as a more surgical and flexible response to the excesses of mandatory minimum sentences, her rejection of this approach was very much anchored in a concern about the potential for interference with the appropriate role of Parliament. She notes that constitutional exemptions, though they might initially appear less intrusive, "may in fact represent an inappropriate intrusion on the legislature's role"<sup>54</sup> inasmuch as their use would effectively amend the

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<sup>52</sup> Lisa Dufrainmont, "R. v. *Ferguson* and the Search for a Coherent Approach to Mandatory Minimum Sentences under Section 12" (2008) 42 S.C.L.R. (2d) 459 at 470. See also Peter W. Hogg, *Constitutional Law of Canada*, looseleaf ed., vol. 2 (Toronto: Thomson Carswell, 2007), at 40-21. Hogg approved of the use of constitutional exemptions in minimum sentence cases, saying that there was "much to be said for it" in that "[i]t would enable the courts to keep in force a minimum sentence that was not disproportionate in the great majority of its applications, while applying normal sentencing principles to the rare set of facts where the defendant's lack of moral culpability would make the minimum sentence cruel and unusual."

<sup>53</sup> I suggested this interpretation of *Ferguson* in "A More Lasting Comfort? The Politics of Minimum Sentences, the Rule of Law and R. v. *Ferguson*" (2009) 47 S.C.L.R. (2d) 101.

<sup>54</sup> *Ferguson*, *supra* note 49, at para. 50.

legislation by conferring a discretion on judges that Parliament did not intend. This concern sounds in a register consonant with familiar understandings of judicial humility – that it involves judicial withdrawal and restraint in order to allow free space for Parliament’s judgments. The problem with resting on this reading of the Chief Justice’s concerns is it fails to account for the transformative role that *Ferguson* would come to play in the field.

In fact, the spirit of Chief Justice’s concern about interference with Parliament’s role is not solely, or even primarily, animated by an attitude of deference. As she reflects on what the Constitution and the rule of law say about the responsibility of courts when faced with unconstitutional legislation, the picture becomes more complex and interesting. The Constitution, she says, gives a clear answer to what a court must do with an unconstitutional law: it must be declared of no force or effect. This is important to Chief Justice McLachlin because, the unconstitutional provision having been struck down, “the ball is thrown back into Parliament’s court, to revise the law, should it choose to do so, so that it no longer produces unconstitutional effects.”<sup>55</sup> And as she considers the responsibility of courts, she turns to their central role in guarding the rule of law, and observes that providing constitutional exemptions not only produces lack of clarity and predictability at the formal level but that “the divergence between the law on the books and the law as applied – and the uncertainty and unpredictability that result – exacts a price paid in the coin of injustice.”<sup>56</sup> This divergence impairs the right of citizens to know the law, risks the overapplication of unjust laws, and creates barriers to the realization of the rights of those subject to the authority of these laws.

Having canvassed these various role and mandates, Chief Justice McLachlin’s reasons culminate in a way that sheds light on her fundamental concern about the relationship between Parliament and the courts, and with it on what a humble acceptance of responsibility in relation to the role of others demands. It is not that the courts must withdraw and exercise restraint in order to allow Parliament open space in which to act. Rather, a court must do its own job boldly and effectively

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<sup>55</sup> *Id.*, at para. 65.

<sup>56</sup> *Id.*, at para. 72.

— it must strike down unconstitutional laws — in order to make the shape of Parliament’s role and responsibilities, in light of the real consequences of its decisions, clear to Parliament itself. This is the very note on which she concludes her analysis: “Bad law, fixed up on a case-by-case basis by the courts, does not accord with the role and responsibility of Parliament to enact constitutional laws for the people of Canada.”<sup>57</sup> In *Ferguson*, McLachlin C.J.C. was concerned with the courts’ relationship to Parliament, but the point is more broadly applicable. Responsibly occupying one’s appropriate space — the heart of humility — is, in fact, an exercise in calling for others to do the same.

This is precisely what Rabbi Zechariah failed to do. But the Talmud relates another curious reflection on the nature of humility that captures this dimension of the virtue, richly understood. Rabbi Chelbo recounts that Rav Huna once said, “Anyone who sets a particular place for himself to pray in the synagogue, the God of Abraham stands in his aid, and when he dies, people say of him, ‘This was a humble person.’”<sup>58</sup> How can it be that reliably occupying a spot in the synagogue is an expression of humility? Perhaps the answer is that it clarifies the shape of things for others as they seek to responsibly occupy their own space.

### POLICE POWERS AND FAILURES OF JUDICIAL HUMILITY

Thus far this piece has been concerned with exposing a different face of judicial humility. I have done so by looking to three judgments penned by Chief Justice McLachlin, together displaying a more complex picture of humility as the effort to assume one’s appropriate place in relationship with others, attuned to the workings of power and history, the vulnerabilities of those around us, and a particular form of attentiveness to the roles of others. The attitudes, sentiments, and practices associated with the more common picture of humility — such as awareness of fallibility, compassion, openness to learning, and modesty — are really just aspects of this more complete understanding of humility. And as these three cases drawn from aspects of the Court’s jurisprudence on the

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<sup>57</sup> *Id.*, at para. 73.

<sup>58</sup> Tractate B’rachot 6b, translation taken from Morinis, *supra* note 20, at 49.

criminal justice system show, sometimes that practice requires asserting oneself and confidently assuming one's proper space, not simply being as small as one can be.

But this is just an ethical resource to be found in the case law. The cases are examples from a complex and vast jurisprudence that is also filled with counter examples. The attitude and practice of humility I have developed here is at work and available in the Court's jurisprudence and in Chief Justice McLachlin's work, but it would be too much to say that it defines either. Indeed, having found this important ethical thread within McLachlin C.J.C.'s jurisprudence concerning the criminal justice system, it is also in this field that I find a body of law that displays the failing of this form of humility. Humility is a virtue to be worked towards, not an already-realized feature of the Supreme Court's work or that of any given judge of the Court. It is therefore important to point to where the dimensions of humility at play in cases like *Winko*, *Khan*, and *Ferguson* have been absent, and with pernicious consequences for our law and those it affects.

Over the last many years, the Court has benefitted from a developing narrative about its progressive, skeptical take on the expansions of crime and punishment. Cases like *Insite*, *Bedford*, and *Carter* have shown the Court's concern about the scope of the criminal law and the limits of criminalization. The Court's jurisprudence on mandatory minimum sentences that I have touched on in this piece, most notably *Nur* and *Lloyd*, and to some extent its attention to the insidious character of the overincarceration of Indigenous peoples,<sup>59</sup> has evidenced similar concern and an inclination toward restraint in respect of sentencing and punishment. All of these decisions have shown elements of the regard for the experience and vulnerability of those subject to the law, and sensitivity to the consequential responsibilities and burdens of the judiciary, that is sonorous with the dimensions of humility that I have drawn out in this piece. As a result of this jurisprudence in substantive criminal law and punishment, in recent years the court has sometimes been positioned as the counterweight to a government with a "tough on crime" agenda.

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<sup>59</sup> See, e.g. *R. v. Gladue*, [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.); *R. v. Ipeelee*, [2012] S.C.J. No. 13, [2012] 1 S.C.R. 433 (S.C.C.) [hereinafter "*Ipeelee*"].

Yet over that same timespan there has been a quiet but powerful countercurrent in the Court's work in criminal justice: the steady expansion of police powers and contraction of the pre-trial rights of the accused. Indeed, one might observe that the progress and gains in substantive criminal law and punishment, though hugely significant in their domain, are somewhat "boutique" in nature, touching chiefly on "grossly disproportionate" mandatory minimum sentences (which is a fragment of the day-to-day punishment imposed by our criminal justice system)<sup>60</sup> and on the limitation of a set of offences that represent a small component of the work done in our courts. When one turns to the vast world of low-level, daily interactions between individuals and the police – the world that fundamentally shapes communities' experience of the criminal justice system – the picture looks very different indeed. In a series of deeply split decisions, a majority of the Court has either expanded police powers or interpreted the scope of rights in a way that is highly solicitous of those powers.

One might point to a number of cases to identify this other face of the Court's criminal justice jurisprudence,<sup>61</sup> but consider just three: *R. v. Singh*,<sup>62</sup> *R. v. Sinclair*,<sup>63</sup> and *R. v. Clayton and Farmer*.<sup>64</sup> Chief Justice McLachlin was in the majority in each. In *Singh* the Court was asked to consider the scope of the right to silence in a circumstance in which the accused had repeatedly asserted his right and expressed his desire not to speak with the police. The police nevertheless persisted and obtained incriminating information as a result. With the forceful objection of four judges of the Court who were concerned that this evacuated the right for those under the "dominance or control"<sup>65</sup> of the police, the majority of the Court held that the right to silence protected a "meaningful choice whether

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<sup>60</sup> By definition, indeed, this jurisprudence leaves the "merely disproportionate" sentence wholly untouched, though such a sentence is unjust by the *Criminal Code*'s own standards.

<sup>61</sup> Other examples include *R. v. Spencer*, [2007] S.C.J. No. 11, [2007] 1 S.C.R. 500 (S.C.C.) [hereinafter "*Spencer*"]; *R. v. Saeed*, [2015] S.C.J. No. 24, [2016] 1 S.C.R. 518 (S.C.C.).

<sup>62</sup> [2007] S.C.J. No. 48, [2007] 3 S.C.R. 405 (S.C.C.) [hereinafter "*Singh*"].

<sup>63</sup> [2010] S.C.J. No. 35, [2010] 2 S.C.R. 310 (S.C.C.) [hereinafter "*Sinclair*"].

<sup>64</sup> [2007] S.C.J. No. 32, [2007] 2 S.C.R. 725 (S.C.C.) [hereinafter "*Clayton*"].

<sup>65</sup> *Singh*, *supra* note 62, at para. 66.

to speak or to remain silent”<sup>66</sup> and that, in the police interrogation setting, as long as the accused’s statement was not rendered “involuntary” in the meaning of the common law confessions rule,<sup>67</sup> that accused should be viewed as having made a real choice.

In *Sinclair*, the majority rejected the dissenting view that understood the section 10(b) right to counsel as designed to “restore a power-imbalance between the detainee and the police in the coercive atmosphere of the police investigation”,<sup>68</sup> instead seeing the right as chiefly informational in character, intended to give “the detainee the information he needs to make a meaningful choice as to whether to cooperate with the investigation or decline to do so.”<sup>69</sup> As a result, and confirming past police practice in Canada, McLachlin C.J.C. and Charron J. held that section 10(b) will normally only entitle a detainee to a single consultation with counsel, with further consultation permitted only when there has been a “material change in the detainee’s situation”.<sup>70</sup>

And in *Clayton*, the Court was asked to clarify the scope of the new power of investigative detention that, using the common law police powers doctrine (or “*Waterfield* test”<sup>71</sup>) it had created in *R. v. Mann*.<sup>72</sup> Whereas the power as articulated in *Mann* appeared narrowly circumscribed, subject to Parliament legislating to enlarge it, the majority in *Clayton* expanded the power to allow investigative detention whenever it is “reasonably necessary” in the “totality of the circumstances.”<sup>73</sup> In his dissenting reasons in the 1985 case of *Dedman v. The Queen*, Dickson C.J.C. had explained that “[s]hort of arrest, the police have never possessed legal authority at common law to detain any one against his or her will for

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<sup>66</sup> *Id.*, at para. 53.

<sup>67</sup> A rule that, it should be noted, the majority of the Court made significantly more difficult for the police to breach in *Spencer* earlier that year.

<sup>68</sup> *Sinclair*, *supra* note 63, at para. 30.

<sup>69</sup> *Id.*, at para. 47.

<sup>70</sup> *Id.*, at para. 43.

<sup>71</sup> *R. v. Waterfield*, [1963] 3 All E.R. 659, [1964] 1 Q.B. 164 (C.A.).

<sup>72</sup> [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59 (S.C.C.).

<sup>73</sup> *Clayton*, *supra* note 64, at para. 30.

questioning or to pursue an investigation.”<sup>74</sup> With *Clayton*, and despite deep and abiding societal concerns surrounding police practices of racial profiling, the world described by Dickson C.J.C. was firmly in the rear-view mirror.

The significance of these cases for present purposes is not that they participate in a substantive countercurrent, standing in contrast with the Court’s more skeptical posture towards criminalization and punishment. Rather, most notable is that these decisions seem to lack key elements of the virtue of judicial humility that I have argued were central to the criminal justice cases of *Winko*, *Khan*, and *Ferguson*. The keen attentiveness to the workings of power, and the particular vulnerabilities of those subject to it, that was so prominent in McLachlin C.J.C.’s reasoning in *Winko* and *Khan* is troublingly absent from these three police powers decisions. Indeed, thinking through power and vulnerability in the criminal justice system, and the Court’s responsibility in light of both, was central to the Court’s reasoning in *Bedford*, *Carter*, *Insite*, and *Ipeelee*. Yet in *Singh* and *Sinclair*, a formal approach to choice displaces careful attention to the ways in which the radical asymmetries of power in the interrogation room might structure an accused’s choices, and might do so especially for those who are themselves less powerful, less informed, or less resilient. By the light of these cases, the dominance enjoyed by police in the interrogation room is not especially important to the right to silence, and the right to counsel is not about correcting power imbalances. And in *Clayton*, the experience of over-policing and profiling that is so central to racialized communities’ experience of the criminal justice system does not feature in the majority’s analysis, counselling a more cautious approach to the expansion of police authority, as it should. Indeed, the expansion of police powers using the common law in *Clayton* sits in tension with Chief Justice McLachlin’s desire in *Ferguson* for the Court to occupy its distinctive space, thereby calling on Parliament to wrestle with its own role and choices, as well as the *Khan* Court’s critical engagement with history in light of present systemic realities. The effect of these three cases is to locate the Court in a deferential role in relationship with police power and need. In short, these cases seem to lack the attentiveness to power, vulnerability, and the role of others, as well as the consequences of one’s

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<sup>74</sup> [1985] S.C.J. No. 45, [1985] 2 S.C.R. 2, at 13 (S.C.C.).

choices in light of all of this, that is essential to understanding and accepting one's appropriate place in relationship with others: the defining feature of humility, richly understood.

Perhaps the most generous reading of these cases is that there is a brand of humility at work in them. The field of police powers is one in which the rights of the individual and the safety of the public are in overt tension. The choices facing the courts in such cases have enormous consequences for each side of this dynamic. And met with this, it is perhaps tempting to occupy less judicial space, resiling from bolder positions and leaving room for others to do their work without judicial interference and in response to perceived need. But this is the form of humility exercised by Rabbi Zechariah and to which the Talmud so strenuously objects. So what would a genuinely humble jurisprudence of police powers look like? One informed by the richer sense of humility that I have developed here? Its starting point would be attention to the power enjoyed by police and the vulnerability of those subject to that power. It would involve a judiciary respectfully but critically engaged with the common law and past police practice, but attuned to the courts' overwhelming responsibility to ensure that the law is adapted to serve the peculiar concerns and interests of the communities that it affects today. It would see a judiciary assuming positions on police powers that call on others – police and Parliament alike – to occupy their own space responsibly. And resources for this humble posture towards police powers are available in Chief Justice McLachlin's broader work.

#### CONCLUSION: DUTIES OF THE HEART

We can do so much better than seeking to understand the very complex role of a judge and of a court by examining matters through the lens of "judicial activism". Picking up that lens, we are apt to see the responsibilities and roles of the judge very thinly, indeed. Within this frame, our ethical antennae are tuned to the risk that a court will do too much, and as a result the principal counsel is one of restraint. This is a pallid image of what we ask of a judge. In search of a language that better captures our hopes for the judicial role, the virtue of humility is an appealing offer. But I have argued in this piece that our understanding of

the virtue of humility should not be one solely associated with being “smaller” or constructed as a counterpoint to arrogance. Understood only in that way, I’m not certain that we have made much of an advance on “activism” in respect of the complexity with which we see the judge’s role. Instead, I have urged a conception of humility as the effort to occupy one’s appropriate place in relationship with others. We will continue to disagree about whether this conception of humility was realized in a given case, and that is fine and good because it offers a richer language in which to discuss what qualities we wish to see in those who exercise the judicial role. And this understanding of humility indeed encodes much that I think we want from our judges: the enormous goods of compassion, willingness to learn, acceptance of fallibility, yes; but also responsibility, attentiveness to power and vulnerability, and courage. Understood in this way, humility seems a foundational virtue, a pathway to other ethical goods, other virtues we would ask of our judges.

Rabbi Bachya ibn Pakuda thought so. He was a rabbi and philosopher who lived in Al-Andalus in the 11<sup>th</sup> century. His project was to generate the first systematic vision of Jewish ethics and his masterwork was a volume entitled *The Duties of the Heart*.<sup>75</sup> In that book, Rabbi Bachya poses the question, “on what do the [other] virtues depend?” His answer? “All virtues and duties are dependent on humility.”<sup>76</sup> It seems to me that this is because humility is, at core, a question of one’s relationship with others. Aware of others — attuned to their needs, experiences, vulnerabilities, and our responsibilities in relation to each — we should seek to occupy no more but also no less space than is appropriate. And if humility, so understood, is indeed the foundational virtue, this brings us into conversation with another, more modern, tradition of Jewish thought: that ethics is generated out of the encounter with the other and from the experience of being awash in the richness of their specificity and the flooding complexity of their lived experience.<sup>77</sup>

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<sup>75</sup> R Bachya ben Joseph ibn Paquda, *Duties of the Heart*, translated by Moses Hyamson (Jerusalem and New York: Feldheim Publishers, 1978), at 111.

<sup>76</sup> Translation drawn from Morinis, *supra* note 20, at 46.

<sup>77</sup> See, e.g., Martin Buber, *I and Thou*, translated by Walter Kaufmann (New York: Scribner, 1970); Emmanuel Lévinas, *Ethics and infinity* (Pittsburgh: Duquesne University Press, 1985).

Beverley McLachlin's jurisprudence is marked by that awareness of others and sense of responsibility towards them. In her judgments, one finds a deep and abiding desire to understand the complex ways that people find themselves in the world and a genuine wrestling with what this means for the role of a judge. That interest in people's condition in our society, and concern with law's role in making that condition better — or at least not allowing it to make things worse — is an ethical instinct that has animated her contributions to Canadian law. *Winko, Khan, Ferguson*, and a host of other cases are evidence of this. And where I have critiqued her decisions, it has been out of respect for this instinct and my sense that it could have been better realized in a given case. We can ask for little more than a judge who has insistently asked the question of the appropriate space for a court to occupy in light of power, vulnerability, and the role of others, and in so doing to have offered us resources for thinking more deeply about the virtue of humility.