



Jurisprudence

An International Journal of Legal and Political Thought

ISSN: 2040-3313 (Print) 2040-3321 (Online) Journal homepage: <http://www.tandfonline.com/loi/rjpn20>

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To cite this article: Amalia Amaya (2017): The virtue of judicial humility, Jurisprudence, DOI: [10.1080/20403313.2017.1352315](https://doi.org/10.1080/20403313.2017.1352315)

To link to this article: <https://doi.org/10.1080/20403313.2017.1352315>



Published online: 07 Nov 2017.



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The virtue of judicial humility

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ABSTRACT

This paper articulates an egalitarian conception of judicial humility and justifies its value on the grounds that it importantly advances the legal and political ideal of fraternity. This account of the content and value of the virtue of humility stands in sharp contrast with the dominant view of judicial humility as deference or judicial restraint. The paper concludes by discussing some ways in which the account of humility and of its value provided in the paper furthers our understanding of the judicial virtues and of the political implications of giving virtue a role in adjudication.

KEYWORDS

Humility; fraternity; judicial deference; egalitarianism

1. Introduction

Humility does not typically figure in the lists of judicial virtues or scholarly discussions on which traits of character are necessary or, at least, desirable for judges to possess and display. Nonetheless, humility does have a privileged place in judges' own views on the kind of attitudes that are most needed in their profession. Calls for judicial humility also abound in public discussions of judicial decisions as well as in experts' commentaries on controversial cases. The perceived need of judicial humility among the legal community and the public at large might not be misplaced. Humility is probably a virtue that is more difficult to have for judges than for other professions given a) the very nature of the role, which implies the exercise of authority over the parties, b) the fact that there is a quasi-sacred aura surrounding the figure of the judge in both legal and popular culture, and c) that the judiciary is, for the most part and in most legal systems, composed of individuals who come from favored sectors of society.¹ Hence, what seems surprising is not so much that humility should be considered a very valuable trait for judges to have as that it should have received so little attention in the growing literature on the judicial virtues. The relative neglect of the virtue of humility in work on virtue jurisprudence contrasts not only with the professionals' and the public's views on the relevance of this virtue for the judiciary,

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¹U.S. District Judge Thomas A. Wiseman Jr. wrote that 'most lawyers I know would say that a humble federal judge is an oxymoron: and they are probably right'. See Thomas A. Wiseman Jr. 'What Doth the Lord Require of Thee?' 27 *Texas Tech Law Review* (1996) 1403, 1408, quoted in Brett Scharffs, 'The Role of Humility in Exercising Judgment', 32 *University of California Davis* (1998) 127, 164. The issue of the relationship between humility among the judiciary and judicial diversity is an interesting and contested one. See Scharffs, id. (stating that 'a judge is more likely to err on the side of having too little humility than too much, regardless of the judge's gender or race. The temptation to be prideful is based upon the judicial role, not upon the individual judge's status). Cf. Michael Nava, 'The Servant of All: Humility, Humanity and Judicial Diversity' 38 *Golden Gate University Law Review* (2008) 175, 188 (arguing that 'minority judges tend to bring the qualities of humanity and humility to the job of judging').

but also with other approaches in legal and constitutional theory, which take judicial humility to be an important trait for exercising the judicial function. In legal and constitutional theory, judicial humility is taken to be essential in keeping judges in their right place, preventing them from usurping functions that are constitutionally assigned to other branches of the government. Judicial humility or modesty, in this view, is at the core of judicial restraint.

This paper aims to contribute to the contemporary discussion on the judicial virtues by providing an analysis of judicial humility and explaining its value.² The structure of the paper is as follows. In section II, I subject to criticism the dominant view of judicial humility as deference or judicial restraint. The next two sections develop an account of the content and value of judicial humility that stands in sharp contrast with the deference conception of judicial humility. Section III articulates an egalitarian conception of judicial humility. Section IV provides a justification of the value of humility in the context of judicial decision-making on the grounds that it importantly advances the legal and political ideal of fraternity. I conclude by claiming (in section V) that the examination of humility and the reasons why we take this trait of character to be a virtue furthers the debate over virtue and law in that, first, it leads us to rethink the traditional conception of the traits of character that make for virtuous adjudication and, second, it brings to light some political implications of giving virtue a role in a theory of adjudication.

II. Judicial humility as judicial restraint: a critique

The prevailing conception of judicial humility equates it with judicial restraint, deference, or comity.³ Judicial restraint encompasses a wide range of doctrines including

‘deference to legislative and/or administrative decision-making, respect for precedent (and an aversion to over-ruling), a textualist or strict-constructionist approach to statutory interpretation, doctrines of standing and mootness, the floodgates argument, and even the supposed requirement that judges should avoid making moral or policy choices.’⁴

Judicial humility, on these approaches, is understood as a self-awareness of one’s intellectual limitations, which leads to the recognition that others are better positioned to take some decisions and, therefore, that an attitude of deference or restraint is the proper one to have. Judicial humility, so understood, is variously invoked to justify an attitude of restraint in constitutional review,⁵ rule-following,⁶ deference to widely held

²Through the paper, I will use modesty or humility interchangeably. Although there are some differences in the use of these two concepts, the same problems have been discussed in the literature under the title of humility or modesty. See Daniel Statman, ‘Modesty, Pride and Realistic Self-Assessment’ 42 *The Philosophical Quarterly* (1992) 420, at 420.

³Judicial humility, as is mostly understood in legal scholarship, is identifiable with comity in both a broad sense (i.e., an obedient attitude of an institution that is bound by the authority of another) as well as in a narrow sense (i.e., an attitude of respect by an authority to another when the latter is not bound by the decisions of the first). Humility in judging – according to views of judicial humility as judicial restraint, comity or deference- would require an attitude of deference towards past institutional history that is bounding upon the judge as well as an attitude of deference when determining the boundaries of judicial discretion and operating within them. On comity (broad and narrow), see Timothy Endicott, ‘Comity among Authorities’ 68 *Current Legal Problems* (2015) 1.

⁴See Aileen Kavanagh, ‘Judicial Restraint in the Pursuit of Justice’ 60 *University of Toronto Law Journal* (2010) 24, 25.

⁵See Paul Gewirts, ‘On I know it When I see it’ 105 *Yale Law Review* (1996) 1023, 1034-45 (speaking of a ‘judge’s feeling of humility, an internalized sense that he is not the sole repository of constitutional truth, an attitude of restraint that is an aspect of temperament’); Rafael Gely and Paul L. Caron, ‘Affirmative Refraction: Grutter v. Bollinger Through the Lens of the Case “The Case of the Speluncan Explorers”’ 21 *Constitutional Commentary* (2004) 63, 83 (‘humility manifests itself in several ways, including the recognition that not all dumb statutes are unconstitutional or need to be rewritten by judicial fiat’).

⁶Fred Schauer, ‘Must Virtue Be Particular?’ in Amalia Amaya and Ho Hock Lai, *Law, Virtue and Justice* (Hart Publishing, 2012) (defining the ‘virtuously humble and modest decision-maker’ as the ‘one who is self-aware about her own inabilities’ and describing rule-following as ‘a form of deference, humility, and modesty’).

opinion,⁷ restraint in granting summary judgment⁸ as well as to argue against constructivism about constitutional interpretation,⁹ and to support a theory of fidelity in constitutional interpretation.¹⁰ In short, according to this conception, ‘[a]ll of the various constraints on judicial discretion can be understood as means of tempering judicial arrogance’, and judicial humility is, consequently, a matter of restraint in the exercise of the judicial function.¹¹

Views of judicial humility as judicial restraint are, I would argue, very problematic. To begin with, these approaches to judicial humility are unduly reductive in that they equate humility with intellectual humility and ignore non-epistemic dimensions of the virtue of humility. Humility is a virtue that applies to both moral and intellectual character. There are, surely, important connections between humility as a moral virtue and its intellectual counterpart. An argument might even be made for the case that intellectual virtues are but a subset of the moral virtues and, consequently, that epistemic humility is a sub-species of humility as a virtue of moral character.¹² However, the identification of humility with its epistemic aspects assumes a reversed conception of the relationship between moral and epistemic virtues –in which the former are a sub-class of the latter, not the other way around- which is hardly plausible.

In addition, views of judicial humility as restraint rest on an understanding of what epistemic or intellectual humility requires that makes epistemic humility incompatible with intellectual autonomy. While, to be sure, there is always the possibility that virtues might come into conflict in particular cases, it is highly implausible that virtues should be, by definition, in conflict. The humble thinks that he might be mistaken and others might know better than he does but from this skeptical stance it does not follow that he *is* mistaken and others *know* better. Humility requires openness to the ideas of others and acknowledgement of one’s fallibility rather than straightforward deference to the ideas of others and assertion of one’s failure. The attitude of openness to the ideas of others as well as to the possibility that one might be mistaken may result either in abandonment or in acceptance of one’s views. In other words, epistemic humility imposes some constraints on the process of deliberation, but it does not dictate the result of such deliberation. That this is so might be easier to see if we reflect on what views of humility according to which humility demands that one defers one’s judgment would mean in contexts other than the judicial one. On this view, the humble person would be a person who takes himself to be unsuited to form one’s beliefs and act accordingly and who, consequently, always defers judgment to those who (in his view) are better positioned to decide. It would be difficult to see how this trait of character could be a virtue in the

⁷See Cass Sunstein, *A Constitution of Many Minds* (Princeton University Press 2009), 165–184 (discussing fictional Judge Condorcet, a humble judge who believes that judges are at an epistemic disadvantage and should pay attention to public opinion).

⁸See Jeffrey Stempel, ‘Taking Cognitive Illiberalism Seriously: Judicial Humility, Aggregate Efficiency, and Acceptable Justice’ 43 *Loyola University of Chicago Law Journal* 627 (2012).

⁹See Michael W. McConnell, ‘The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s Moral Reading of the Constitution’ 65 *Fordham Law Review* 1269 (1997).

¹⁰See Lawrence Lessig, ‘Fidelity and Constraint’ 65 *Fordham Law Review* 1365, 1371 (developing an analogy between judges and translators and arguing that translators should be humble, i.e. that they should ‘minimize the voice of the translator in the text being translated’). See also Lawrence Lessig, ‘Fidelity in Translation’ 71 *Texas Law Review* (1993) 1165, 1206–1211.

¹¹See McConell (n9) 1292.

¹²For a defense of the view that intellectual virtues are a subset of moral virtues, see Linda Zagzebski, *Virtues of the Mind* (1996) 139.

first place. Such deferential attitude would be analogous, in the epistemic domain, to the attitude characteristic of the self-abasing person, who, as will be argued later, lacks altogether the virtue of humility.

The unattractive picture of what humility as comity would require in contexts other than the judicial one brings to light the fact that whether judges, on a given case, should defer judgment is not a question that depends on their purported possession (or lack thereof) of epistemic or intellectual humility, but rather on the extent to which they are committed to carrying out their decision task within the limits imposed by the institutional constraints that define the proper role of judges within the legal system. It is, in this sense, a political matter, which has to do with the issue of how the role of judges should be conceived, not an epistemic one. Institutional reasons –rather than epistemic reasons- are, for the most part, the kind of reasons which support deference to the decisions of either the legislature or the executive as well as deference to the past (precedent and tradition). Views that tie judicial humility to judicial restraint make a rhetorical use of the former with a view to lending support to one particular interpretation –one which leads to the rejection of judicial activism- of the judicial function.

The problems besetting the conception of judicial humility in terms of judicial restraint or deference should not be interpreted as an indication that epistemic humility is not an important trait of character for judges to have. Indeed, epistemic humility manifests itself in behavior that is extremely valuable in the context of the judicial role. As argued, it disposes the judges who have this virtue to be aware of their own limitations and seriously consider the possibility that they might be mistaken. In connection with this, epistemic humility is also associated with the disposition to consider alternative ideas, to listen carefully to the views of others, and to strive to understand the positions of those with whom one might disagree. In addition, insofar as the humble judge recognizes his own fallibility, he is also disposed to seek help from other sources and respond appropriately to situations in which their limitations are called for, which would require, on occasion, deferring to others.¹³

Two other important benefits of intellectual humility should also be noted, as they are particularly apposite in the context of the judicial role. First, intellectual humility allows one to learn from others, thereby promoting the personal and professional development of judges. It disposes those who have humility to exhibit an attitude of respect towards others, acknowledging that –regardless of differences in knowledge, ability, and expertise- one might be able to learn even from those who are not one's epistemic peers.¹⁴ Second, humility equips judges with a number of dispositions that are extremely useful to handle cases of disagreement, which often arise in the exercise of the profession. Humble judges will reduce the initial confidence in their views in the face of peer disagreement, take seriously the possibility that the views of their peers might be correct, and be open to their peers' arguments, all of which are pivotal to enabling a genuine collective deliberation within the court.¹⁵

¹³On the diversity of dispositions, motivations, and feelings of the intellectually humble person, see Dennis Whitcomb, Heather Battaly, Jason Baehr, and Daniel Howard-Synder, 'Intellectual Humility: Owning Our Limitations', *94 Philosophy and Phenomenological Research* (2017) 509-539.

¹⁴On the issue that humility in judges enables learning, see Scharffs (n1) 164, Nava (n1) 179, and Gely and Caron (n5) 98.

¹⁵See J. Adam Carter and Duncan Pritchard, 'Intellectual Humility, Knowledge-How, and Disagreement' in Michael Slote, Ernest Sosa, and Chienkuo Mi (eds), *Moral and Intellectual Virtues in Western and Chinese Philosophy* (Routledge, 2016).

Thus, intellectual humility is a very valuable trait of character for judges to possess and display. The received conception of judicial humility, however, unduly reduces humility to its epistemic dimension. Furthermore, it rests on an understanding of intellectual humility as low self-estimation of one's epistemic powers that is fraught with problems. In this view, the reach of humility is limited to it being a (dubious) argument in support of judicial deference. The next two sections develop an alternative – egalitarian – conception of judicial humility that shows the rich political potentialities it harbors beyond debates over judicial restraint.

III. An egalitarian conception of judicial humility

During the last two decades, humility has experienced a dramatic change as a topic of philosophical interest. Once a neglected virtue, humility has been the object of an intense debate in contemporary philosophy. Different conceptions of humility have been defended in the literature. Although contemporary approaches dissociate humility from lowliness, self-denigration, or self-debasement, for the most part they still tie up humility to one's appraisal or attitude towards one's merits and demerits. On these accounts, humility is variously understood as involving ignorance of one's own good qualities,¹⁶ indifference towards how others evaluate one's achievements,¹⁷ being unimpressed with one's admired features¹⁸, not over-estimation of one's worth,¹⁹ the evaluation of one's self against more stringent standards that one evaluates others,²⁰ inattentiveness to one's qualities,²¹ a disposition to de-emphasize one's accomplishments,²² and equity as far as one's achievements is concerned.²³

Humility, however – I would argue – is less a matter of how one stands *vis a vis* one's merits than a question of how one positions oneself *vis a vis* other people. It is one's attitude towards one's place within the community rather than one's attitude towards one's accomplishments that is at the core of the virtue of humility. A few contemporary approaches focus correspondingly not on the epistemic aspects (the self-knowledge or lack thereof) of humility but rather on the social-relational aspects of this virtue. Humility is therefore reconceived as an 'active, other regarding civic virtue and public ethos, and not as an interior, self-referencing quality'.²⁴ This shift of focus is, as I will argue, what enables us to vindicate humility as an important legal and political virtue.

Social-relational conceptions of humility have a long ancestry. On the Confucian tradition, humility is understood as a fully relational disposition which has a distinctively critical and political force.²⁵ Although in Western religious thought, humility is largely

¹⁶For a defense of the view that modesty involves ignorance about one's true level of worth or accomplishment, see Julia Driver, 'The Virtues of Ignorance' 86 *The Journal of Philosophy* (1989) 373 and 'Modesty and Ignorance' (1999) 109 *Ethics* 827.

¹⁷See, G Schueler, 'Why Modesty Is a Virtue?' 107 *Ethics* 467.

¹⁸See L. L. A. Garcia, 'Being Unimpressed with Ourselves: Reconciling Humility', 34 *Philosophia* (2000) 417.

¹⁹For defenses of modesty as non-overestimation, see Owen Flanagan, 'Virtue and Ignorance' 87 *Journal of Philosophy* (1990) 420 and Norvin Richards, 'Is Humility a Virtue?' 25 *American Philosophical Quarterly* (1988) 253.

²⁰See Jason Brennan, 'Modesty without Illusion' (2007) 75 *Philosophy and Phenomenological Research* 111 and Hans Maes, 'Modesty, Asymmetry, and Hypocrisy' (2004) 38 *The Journal of Value Inquiry* 485.

²¹See Nicolas Bommarito 'Modesty as a Virtue of Attention' 122 *Philosophical Review* 93.

²²See Michael Ridge, 'Modesty as a Virtue', 37 *American Philosophical Quarterly* (2000).

²³See A. T. Nuyen, 'Just Modesty' 35 *American Philosophical Quarterly* (1998) 101.

²⁴See Mark Button, 'A Monkish Kind of Virtue? For and Against Humility' (2005) 33 *Political Theory* 841.

understood as ‘praiseworthy self-abasement’²⁶ that leads one to blind deference and submission to authority, there are also defenses of humility as a relational and interpersonal virtue.²⁷ Thus, contemporary relational approaches to humility do not (as charged) change the subject of humility but rather pick and develop a long-recognized approach to the meaning and value of this virtue.²⁸

A socio-relational approach best captures, I would argue, the core of the virtue of humility as well as its value as a judicial virtue. Humble people have a distinctive way of regarding and constructing their relationships with others. In particular, humility involves a profound appreciation of the equality of all human beings, in spite of any other kind of differences that there might be, and is distinctively valuable in that it fosters egalitarian social-relations.²⁹ Thus, humility is characterized by an other-directedness that requires a deep commitment to egalitarianism and that carries with it a firm disposition to engage socially and politically with others on this egalitarian basis.³⁰

More specifically, my egalitarian proposal is as follows.³¹ Humility or modesty is a virtue of character that demands that the person does not regard the fact that he excels (and is, therefore) better than others with regard to some features or qualities as evidence that he is unqualifiedly better or superior to others. It is not, therefore, a matter of underestimating one’s qualities, thereby ignoring the aspects in which one is better. The humble person has an accurate vision of his achievements and knows the ways in which his achievements are higher than those of others. But from this knowledge of betterness with respect to some standards he does not infer (unhumbly) that he is better or superior to others. Two reasons block the inference from being a better basketball player, more intelligent, wealthier, classier, more handsome, learned, or better person to being unqualifiedly better³²: a) the recognition that one’s assets are in important ways the result of the influence of others and, in that sense, an awareness of the role of luck in one’s life, personality, and station,³³ and b) the recognition that differences as of wealth, ability, class, etc.

²⁵See Sara Rushing, ‘Comparative Humilities: Christian, Contemporary, and Confucian Conceptions of a Political Virtue’ (2013) 45 *Polity* 201.

²⁶Thomas Aquinas, *Summa Theologiae*, Question 161, cited in Rushing (n25) 205.

²⁷A prominent one is St. Bernard of Clairvoux in ‘The Steps of Humility’. For discussion, see Button (n24).

²⁸See Irene McMullin, ‘A Modest Proposal: Accounting for the Virtuousness of Modesty’ 60 *The Philosophical Quarterly* (2010) 790 (raising this objection, specifically, against egalitarian approaches to humility).

²⁹I thank Valeria Trotti for helping me see the extent to which a commitment to the view that humility is a ‘mode of relation’ more than a matter of self-knowledge is at the core of my egalitarian approach.

³⁰The egalitarian commitment that is at the core of the virtue of humility may be grounded either on Kant’s universality of moral reason or, following Hobbes, in the basic common nature for all human beings. For Hobbes’ egalitarian concept of modesty, see Hobbes, *Leviathan*, Chapter XV (Cambridge, Cambridge University Press, pp. 107–110, 1991). On the Kantian view of humility, see Jeanine Grenberg, ‘Humility: Kantian Style’, *The Handbook of Virtue Ethics* (Stan Van Hoft, ed., Durham, Acumen, 2014).

³¹For other egalitarian accounts of modesty, see Statman (n2) and Aaron Ben-Ze’ew, ‘The Virtue of Modesty’ 30 *American Philosophical Quarterly* (1993) 235. Despite critical differences, their analyses of humility share important elements and a similar spirit with my own proposal. See also Valerie Tiberius and John D. Walker, ‘Arrogance’ 35 *American Philosophical Quarterly* (1998) 379, for an analysis of arrogance that is interestingly close to the analysis of humility being provided here.

³²Thus, the humble person does not take the worth of a person to be a function of merit –moral or otherwise. For a discussion of whether moral attainments may be coherently treated as other kind of attainments (intellectual, physical, etc.) when it comes to asserting –as the humble person does– the fundamental equality among persons, see Stephen Hare, ‘The Paradox of Moral Humility’, *American Philosophical Quarterly*, 22 (2), 1996.

³³On the relevance of recognizing luck to humility, see Bommarito (n21) 102–105; Hastings Rashdall, *The Theory of Good and Evil* (Oxford University Press, 1924), 206; Nicholas Smith, ‘Modesty: A Contextual Account’ 82 *Proceedings and Addresses of the American Philosophical Association* (2008) 28; Flanagan (n19) 425; and Nuyen (n23) 102–4. Cf. Julia Driver, *Uneasy Virtue* (Cambridge University Press, 2001) 22. Kupfer makes of ‘radical dependence’, which involves

are minor when compared to the many ways in which we are fundamentally equal. The egalitarian stance which is characteristic of the humble person signals a mean (in accordance with Aristotle's doctrine of the mean) between the extremes of excess (i.e., self-aggrandizement or arrogance, in which one asserts one's superiority) and defect (i.e., servility or self-abasement, in which one asserts one's inferiority).³⁴

Humility thus described is a momentous trait of character for judges to have. Humility among the judiciary demands that judges do not think of themselves as superior to those whose case is being disposed. The humble judge recognizes that he is fundamentally equal to the parties, despite the fact that he occupies a place of prestige and power and regardless of the differences that there might be in professional and social status between him and the parties. The humble judge also has an acute awareness of the role that luck plays in life and, consequently, that the roles of judge and party might well have been reversed.

Humility in judges –as much as humility in non-legal contexts- has important social benefits. The humble judge will treat the parties with kindness and respect and he will not humiliate the defendant or make him feel degraded or inferior.³⁵ A critical component of humility, as many have argued, is the exhibition of an attitude of proper care and respect for the well-being of others and a sensibility to avoid boastful behavior that might cause pain and despair. This attitude is the proper one to have if we are to put in place a system of justice that views the administration of justice as a collaborative enterprise among citizens and that rests on a view of authority that is fit for a democratic government.³⁶ Humility in the judiciary would also help us have a more humane system of justice that recognizes the worth of every human being and that is conducive to restoring the social fabric that was disrupted by the litigated facts instead of provoking hatred and resentment –which issues from arrogant behavior.³⁷ These beneficial effects of humility all point towards what is, I shall claim, a major reason for valuing humility in the context of judicial decision-making, namely, humility importantly fosters the realization of the ideal of fraternity. The connection that exists between judicial humility and fraternity provides us with a political justification for valuing judicial humility.

IV. The value of judicial humility

The main value of humility for judges lies, I would argue, in its serviceability to the legal and political ideal of fraternity. A fraternal community is a community in which members

acknowledging how much of our success depends on fortuitous influences in our lives, a central element of the analysis of humility. See Joseph Kupfer, 'The Moral Perspective of Humility' 84 *Pacific Philosophical Quarterly* (2003) 249.

³⁴See Smith (n33) 23 (arguing that modesty is a mean between the excess of overestimating one's achievements and the deficiency of underestimating them); McMullin (n28) 788 and 805 (claiming that modesty is a mean between arrogance and complete self-abnegation and a type of mean between emphasizing freedom or facticity too much or too little); and Kupfer (33) 266 (stating that 'humility is a mean between the unjustified low regard or self-denigration and the loftiness of arrogance or excessive pride'). Modesty or humility is thus a virtue amenable to the traditional Aristotelian analysis – even though it does not figure in Aristotle's list of virtues.

³⁵On the claim that humility fosters kind and gentle social relationships, see Bernard the Clairvaux 'The Steps of Humility' as discussed in Kupfer (33) 260 and Button (n24) 850. See also Alan Wilson 'Modesty as Kindness' *Ratio* (2014) (arguing that humility is best understood as closely related to the more fundamental virtue of kindness).

³⁶See Anthony Duff, 'Legal Reasoning, Good Citizens, and the Criminal Law', *Jurisprudence*.

³⁷On the harmful results of arrogance, see Statman (n2) 434; Smith (n33) 36; Driver (n16) 828, and Tiberius and Walker (n31).

regard each as equal, are bounded by affective ties, and have a disposition to mutually help each other.³⁸ The cultivation of the virtue of humility is essential to establishing the kind of social-relations –egalitarian relations marked by mutual care and affection as well as reciprocal aid and voluntary cooperation- that are characteristic of fraternal communities. A humble judiciary, I submit, has a singular role to play in the project of building a fraternal society.³⁹

A primary way in which the possession and display of judicial humility helps to foster the realization of fraternity is by promoting an egalitarian ethos. If, as argued, fraternity requires that social relations among citizens be such that citizens see each other as equal, humility in judges, insofar as it demands that social and professional status not be taken as evidence of one's superiority, will surely be critical in advancing the ideal of fraternity. Humble judges will contribute to weaving a social scheme in which, as Pettit puts it, citizens can 'look others in the eye'⁴⁰ and where there is an absence of manners of servility and deference, on the one hand, and snobbery and haughtiness, on the other.⁴¹ The humble person's focus on what brings us together rather than on what tears us apart is instrumental to implementing the horizontal conception of society put forward by the ideal of fraternity.⁴² Critically, humility enables the judge with this virtue to think and feel that he belongs to the same community as the rest of his fellow citizens –in contrast with the arrogant, who regards himself so much above the others that it is unthinkable that he might belong to the same community as they do- and it is therefore conducive to reinforcing the communal bonds which, as argued, are constitutive of the ideal of fraternity.

Humility is also instrumental to establishing a fraternal society insofar as it promotes some virtuous dispositions which are also highly valuable for the purposes of achieving fraternity. To begin with, humility fosters compassion.⁴³ The virtue of humility –as claimed above- involves, in addition to holding certain beliefs and attitudes, having some dispositions to perform or omit certain actions, such as avoiding bragging, declining credit for one's accomplishments, or presenting one's achievements in a way that is sensitive to the ways in which they might have a negative effect on others. These dispositions stem, ultimately, from a concern for the well-being of others, benevolence towards others, and care for their good. 'True humility –as Rashdall put it- is but an aspect of true love for one's neighbour'.⁴⁴ This relation between humility as a trait of character and a concern for the well-being of one's fellow beings is often brought to light in discussions on humility and modesty and it is a key component of what may be called affective models of

³⁸A thorough analysis of the concept of fraternity is provided in 'The Relevance of Fraternity', on file with author.

³⁹The possession and exercise of humility on the part of judges has effects that go beyond the way in which it shapes the relationships between the judges and other actors in the process. In order to establish a political community that lives up to the ideal of fraternity, the way in which the state treats persons is of fundamental importance. Judges -and other public servants- play an exemplary role and are thereby critical to the promotion of an ethos of equality, service and mutual care. On the value of the law as a moral example, see Richard Child and Kimberley Brownlee, 'Can the Law Help us Be Moral?', *Jurisprudence*. I thank Oren Bracha and Lawrence Blum for pressing me on this point.

⁴⁰See Philip Pettit, *On the People's Terms* (Cambridge University Press, 2012) 84.

⁴¹See John Rawls, *Theory of Justice* (Harvard University Press, 1999) 90, who writes: "... fraternity is held to represent a certain quality of social esteem manifest in various public conventions and in the absence of manners of deference and servility".

⁴²On humility as a virtue of attention, see Bommarito (n21).

⁴³See Ben-Ze'ew (n31) 237; Nancy Snow, 'Humility' *The Journal of Value Inquiry* 29 (1995) 211; and Kupfer (n31) 260.

⁴⁴Rashdall (n33) 207.

humility.⁴⁵ It is particularly through this orientation towards the other's well-being that humility leads to compassion. As claimed above, a key condition of fraternity is the establishment of social relationships of mutual care and affection. A compassionate attitude towards one's fellow beings – and, in the case of the judge, a compassionate attitude towards the parties and victims – would be an important way of translating the affectivity component of fraternity into practice.

Judges who are humble and compassionate will have a distinct attitude –one of service-towards the exercise of the judicial function. Judicial humility also helps the project of building a fraternal society insofar as it fosters the virtue of service.⁴⁶ There is, as argued, a practical dimension to the idea of fraternity. Fraternity requires that social relations be structured around a system of reciprocal cooperation and mutual aid. A fraternal society satisfies what Cohen has called the principle of 'communal reciprocity' according to which members of a community are motivated to productively contribute 'on the basis of a commitment to one's fellow beings and a desire to serve them while being served by them'.⁴⁷ Judges who have the virtue of service would thus contribute to put in place a network of serve-and-being-served relationships, which is a condition of fraternity. This is not, of course, to eliminate the coercive element that is inherent to the role of the judge but to situate it in a framework of legitimate exercise of power. The judge in a fraternal democracy ought to exert authority, but in a manner of service rather than in an dictatorial way.⁴⁸ Hence, the relevance of the virtue of service for the ideal of fraternity leads us to re-conceptualize the judge as the servant of people rather than as the servant of the law – as a 'servant-leader'⁴⁹ rather than a 'remote figure of authority'.⁵⁰

In short, the virtue of judicial humility insofar as it promotes a distinctively egalitarian legal and political culture and facilitates the development of other virtuous dispositions, most importantly, compassion and service, is critical to fostering a fraternal sort of community. Humility, far from being a 'virtue of inaction' or an 'action inhibitor'⁵¹ that leads one to quietly accept one's low worth and submit to the authority – and, in the case of judges, to submissively defer judgment- it is a virtue that endows its possessor with a commitment to energetically affirm equal worth of self and others and actively engage in the political project of construing a distinctive kind of community – which judges are particularly well-positioned to advance. Thus, humility and, more specifically, judicial humility, rather than a depoliticizing quality, may be vindicated as a forceful political virtue.

⁴⁵See, for instance, the humility as love model put forward Rashdall (n33), the altruistic account of humility defended by T. Ryan Byerly, 'The Values and Varieties of Humility' 42 *Philosophia* (2014) 889-910 and Alan Wilson's kindness model (n35). See also G. Alex Sinha, 'Modernizing the Virtue of Humility' 90 *Australasian Journal of Philosophy* (2012).

⁴⁶Humility, for instance, is claimed to be the essential backbone of the servant leader. See Milton Sousa and Dirk van Dierendonck, 'Servant Leadership and the Effect of the Interaction Between Humility, Action and Hierarchical Power on Follower Engagement', 141 *Journal of Business Ethics* (2017) 13. Compassion has also been claimed to be foundational for servant leadership – and a virtue that simultaneously encourages humble behavior. See Dirk van Dierendonck and Kathleen Patterson, 'Compassionate Love as a Cornerstone of Servant Leadership: An Integration of Previous Theorizing and Research', 128 *Journal of Business Ethics* (2015) 119.

⁴⁷See Gerald Cohen, *Why not Socialism?* (Princeton, 2009) 38.

⁴⁸Dworkin's thesis on the relevance of fraternity for the justification of political obligations is to the point here. See Ronald Dworkin, *Law's Empire* (Fontana Press, 1986) 206-216.

⁴⁹On servant leadership, see Robert K. Greenleaf, *Servant Leadership: A Journey into the Nature of Legitimate Power and Greatness* (Paulist Press, 2002).

⁵⁰The phrase is Nava's. Nava (n1) 193.

⁵¹See Rushing (n25) 208.

V. Conclusions

In this paper, I have argued for an egalitarian approach to judicial humility according to which the humble judge is one who does not take himself to be superior to others on the grounds of his superior knowledge, social or professional status or other respects in which he might excel (and be better than) others (most importantly, the parties and other actors involved in the process). I have also argued that judicial humility is valuable in that it is instrumental to advancing the ideal of fraternity. Humility in judging contributes to fraternity insofar as it helps establish the egalitarian social relations which are, as argued, a constitutive condition of fraternity. In addition, humble judges are likely to possess the virtues of compassion and service, which are also critical to bringing about a fraternal community.

This approach to the concept of humility and its value in the context of the judicial role, as argued, is quite different from the conception of judicial humility as judicial restraint. Views of judicial humility as judicial restraint rest on an understanding of the virtue of judicial humility as acknowledgment of one's cognitive limitations and awareness of one's poor epistemic standing compared to others and find humility valuable insofar as it favors an attitude of restraint and deference in the exercise of the judicial function. In contrast, the egalitarian conception of humility developed here does not assimilate humility with low self-esteem as far as one's epistemic capacities are concerned and it situates the value of humility in the terrain of fraternity.

The important link between the virtue of humility and the ideal of fraternity that the inquiry into the value of humility has revealed can plausibly be generalized. In this paper, I have only hinted at the possible connections that there might exist between the advancement of fraternity and the exhibition of compassion and service on the part of the judiciary as well. This connection between the possession and display of the judicial virtues and the ideal of fraternity has, I believe, some important implications for the study of the judicial virtues and the political consequences that giving a role to virtue in adjudication might have.

First, the realization that there is a connection between the judicial virtues and fraternity leads us to rethink the kind of virtues that ought to figure among the judicial virtues. More specifically, it vindicates the relevance of judicial humility as a valuable trait of character for judges. It might also provide a justification for other traits of character the status of which as a judicial virtue is contested, i.e. the virtue of compassion. The connection between fraternity and virtue suggests the need to include other virtues which are not typically associated with the role of the judge, such as the virtue of service, as well. The identification of these traits of character, among others, as judicial virtues leads us to conceptualize the figure of the judge in a way that is more akin to the figure needed in a democratic society and help us get rid of some of the remnants of the ancient régime which still (out of keeping with our liberal democracies) surround the figure of the judge.

Second, the link between the judicial virtues and the ideal of fraternity also points towards a political justification for the judicial virtues – in addition to the epistemic one, according to which the virtues endow the judge with the capacity to identify the right answer/answers, if there is one.⁵² Furthermore, this political justification helps us

⁵²See A. Amaya, 'The Role of Virtue in Legal Justification' in A. Amaya and Ho Hock Lai, *Law, Virtue and Justice* (Hart Publishing, 2012).

meet one of the main objections that have been raised against attempts to introduce virtue notions in legal analysis, namely, that a virtue approach to law and adjudication marks a return to pre-modern law and society. If, as argued, the judicial virtues are instrumental to advancing the ideal of fraternity, then a virtue approach to adjudication far from being a regression to a pre-modern state, help us deepen and achieve the Enlightenment aspirations at their fullest.

To conclude, the examination of the virtue of modesty does not only seem interesting in its own right and has important implications for a central question in legal and constitutional theory, i.e. the problem of judicial restraint, but it also helps further the debate over which traits of character are relevant to adjudication and the feasibility of developing a virtue-centered account of adjudication in a way that is compatible with core liberal values and commitments.

Acknowledgments

An earlier version of this paper was presented at the IX Seminar UNAM (IIFs)-University of Texas at Austin, the Conference ‘Virtue, Emotion and Imagination in Legal Reasoning’ at UNAM; the Wine Seminar at Córdoba (Argentina) and the University of Córdoba Law School. I thank the participants in these events for helpful criticism. Special thanks are due to Oren Bracha, who participated as commentator of this paper in the above-mentioned UNAM-UT seminar and provided penetrating critiques and useful suggestions. Maksymilian del Mar, Claudio Michelon, and Carlos Pereda commented on earlier drafts of this paper, for which I am extremely grateful.