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Epistemic Peerhood in the Law

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EPISTEMIC PEERHOOD IN THE LAW

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INTRODUCTION

The quality of discussion and decision making in various legal contexts often displays substantial departures from the ideal. This Article points to a useful framework with which to understand many such departures. The framework in question also points the way to healthier decision-making processes in the law and to more substantively defensible outcomes of such legal decision-making processes.

The framework in question is adopted, with some modifications, from what contemporary philosophers refer to as the idea of epistemic peer status, or epistemic peerhood. Very roughly, an epistemic peer is a person or group who deserves our recognition as a full contributing partner in group deliberation and decision making. After introducing some important decision-making pathologies in the law, in legal decision making, and in public policy making in general, the Article presents the crucial idea of epistemic peerhood.[1]

In light of the idea of epistemic peerhood, the Article proceeds to examine legal decision-making processes in various legal contexts. These contexts include jury deliberation; the role more specifically of purported religious authority, including appeal to Scripture, in jury deliberation; debate over the merits and effects of diversity and affirmative action on university campuses and elsewhere; and the division of decision-making authority and proper deference as between federal judges and administrative agencies. A concluding section then concisely packages some of the results derived therefrom. The basic

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[1] The term "epistemic" here refers merely to ideas such as evidence, reflection, deliberation, belief, and ultimate judgment on legal or other matters. More crucially, this Article endorses an exceptionally broad and inclusive theory and practice of who should count as one's epistemic peer.

theme, and the broad conclusion, is that we would collectively be better off if we adopted broader, more inclusive views as to who should count as our epistemic peer. As it turns out, greater equality and expansiveness in acknowledging others as our epistemic peers generally pays off for all.

The concept of epistemic peerhood would, of course, be of no interest if there were no substantial problems on which it might be usefully brought to bear. As it happens, though, the quality of our legal discussion and decision making in various contexts should strike us as distinctly imperfect.[2] Epistemic peerhood issues are intrinsic to this general problem. For example, merely increasing ideological polarization, along with ignorance of and disdain for various out groups, often affect our political and legal decision making.[3] Beyond some point, such enhanced polarization and out-group disdain begin to undermine fundamental values and institutions, including the rule of law.[4]

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[2] For one perspective on an idealized decision-making process, see JURGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 133–34 (Christian Lenhardt & Shierry Weber Nicholson trans., 1995) (1983) ("I speak of *communicative* action when actors are prepared to harmonize their plans of action through internal means.") (emphasis in original).

[3] For social and scientific attempts to account for at least some aspects of ideological polarization, see JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION 100 (2013); JOSHUA GREENE, MORAL TRIBES: EMOTION, REASON, AND THE GAP BETWEEN US AND THEM 9–11 (2014). For brief accounts of Professor Haidt's main theses, see Gareth Cook, *How Science Explains America's Great Moral Divide*, SCI. AM. (Oct. 2, 2012), https://www.scientificamerican.com/article/how-science-explains-americas-great-moral-divide; Samuel McNerney, *Jonathan Haidt and the Moral Matrix: Breaking Out of Our Righteous Minds*, SCI. AM.: GUEST BLOG (Dec. 8, 2011), https://blogs.scientificamerican.com/guest-blog/jonathan-haidt-the-moral-matrix-breaking-out-of-our-righteous-minds. On the phenomenon of increasing, if not cascading, partisan bias and animosity, see, e.g., Ilya Somin, *The Disturbing Growth of Partisan Bias*, WASH. POST (Dec. 9, 2015), www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/09/this-is-your-brain ("If you think most supporters of the opposing party are evil or stupid, it's easy to preemptively reject their proposals without giving them any serious consideration."). More broadly, "Parties who disagree about matters that are important to them inevitably feel that the disagreement is the result of the other party not seeing things objectively and reasonably." THOMAS GILOVICH & LEE ROSS, THE WISEST ONE IN THE ROOM: HOW YOU CAN BENEFIT FROM SOCIAL PSYCHOLOGY'S MOST POWERFUL INSIGHTS 199 (2016).

[4] For background, see generally R. George Wright, *The Magna Carta and the Contemporary Rule of Law Problem*, 54 U. LOUISVILLE L. REV. 243 (2016) [hereinafter Wright, *Magna Carta*]; R. George Wright, *The Rule of Law: A Currently Incoherent Idea That Can Be Redeemed Through Virtue*, 43 HOFSTRA L. REV. 1125 (2015) [hereinafter Wright, *The Rule of Law*].

The key problem in this regard is that the rule of law is largely a public good, the production or the undermining of which neither reaps appropriate rewards[5] nor pays appropriate penalties to discrete groups.[6] The basic rule of law cannot simply automatically preserve itself.

Worse, there is no guarantee that political groups will always adopt the same tradeoff rate between their own undermining of the rule of law and the further promotion of their own distinctive political goals. The latter goals, in an era of intensifying polarization, may take on greater priority over any incremental damage to the rule of law.[7] Our broad legal decision-making patterns in this regard may thus intensify the collective pathology of what is called a "Prisoner's Dilemma."[8] We may all depend upon a basic underlying rule of law, but still find ourselves disinclined to do what is necessary to preserve it over the long term.

Thus, a legal system with mutual group disdain and lack of mutual respect still crucially depends upon a sufficient rule of law, and on other "values for which no strong partisan contends, but which, nonetheless, are essential to a good society."[9] There is under such circumstances a sense on the part of many that their contributing to the maintenance of the rule of law may demand too much self-restraint in promoting their own sense of justice or sound public policy.[10] Such self-restraint, if it is not promptly, clearly, and equally matched by one's political and legal opponents, often seems to involve one's disadvantaging and exploitation by those opponents.[11]

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[5] *See* Wright, *Magna Carta*, *supra* note 4, at 256–60.

[6] *Id.*

[7] Even, presumably, if those substantive legal goals are of course ultimately dependent upon some sufficient rule of law.

[8] *See* Wright, *Magna Carta*, *supra* note 4, at 260 n.114. The basic logic of what is, in our culture, an apparently increasingly severe collective Prisoner's Dilemma is classically set forth in ANATOL RAPOPORT & ALBERT M. CHAMMAH, PRISONER'S DILEMMA: A STUDY IN CONFLICT AND COOPERATION 111 (1970).

[9] Edward Shils, *Ideology and Civility*, *in* THE VIRTUE OF CIVILITY: SELECTED ESSAYS ON LIBERALISM, TRADITION, AND CIVIL SOCIETY 25, 50 (Steven Grosby ed., 1997). Thus, the problem is not resolved merely by the continued existence of some groups that give higher priority to the rule of law and other increasingly jeopardized but essential public goods.

[10] *See* Wright, *Magna Carta*, *supra* note 4, at 265.

[11] Thus, once more, the increasingly severe Prisoner's Dilemma problem. *See id.* at 260 n.114.

One possible perspective on this particular decision-making pathology might be termed "moralistic."[12] Some groups may, on this perspective, follow their own policy agenda, but with an element of what an observer might moralistically call self-indulgence.[13] This individual and group self-indulgence validates the broader observation that "[o]ther things being equal, people in most cultures believe they are superior to most others in their group."[14]

In terms we elaborate below, this form of self-indulgence involves a refusal to acknowledge, as one's epistemic peers, persons and groups one genuinely ought to so acknowledge.[15] Our sense of who counts as our epistemic peer in various legal contexts commonly tends to be narrow, and insufficiently inclusive. In virtue terms, we would be better off with reasonable "intellectual humility."[16] Epistemic humility would involve "a disposition not to make unwarranted intellectual entitlement claims on the basis of one's (supposed) superiority or excellence. . . ."[17]

The effects of out-group epistemic disdain in legal contexts need not, however, be thought of in narrowly moralistic or virtuistic terms. Consider the basic problem of insufficient

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[12] *See* Wright, *The Rule of Law*, *supra* note 4, at 1126.

[13] *See generally* HEATHER BATTALY, VIRTUE 97 (2015) (crucially distinguishing epistemic self-indulgence from moral self-indulgence, at least in certain respects). For further detail on the concept of epistemic self-indulgence, see Heather Battaly, *Epistemic Self-Indulgence*, *in* VIRTUE AND VICE, MORAL AND EPISTEMIC 214, 214 (Heather Battaly, ed. 2010). More broadly, see Heather Horn, *Self-Indulgence: Defining Quality of Our Time?*, ATLANTIC (June 21, 2010), https://www.theatlantic.com/national/archive/2010/06/self-indulgence-defining-quality-of-our-time/340666.

[14] RICHARD E. NISBETT, MINDWARE: TOOLS FOR SMART THINKING 198 (2015). For evidence of related cultural shifts over time, see JEAN M. TWENGE & W. KEITH CAMPBELL, THE NARCISSISM EPIDEMIC: LIVING IN THE AGE OF ENTITLEMENT 13 (2009).

[15] *See infra* Part I.

[16] ROBERT C. ROBERTS & W. JAY WOOD, INTELLECTUAL VIRTUES: AN ESSAY IN REGULATIVE EPISTEMOLOGY 250 (2009).

[17] *Id.* Consider also the instances of mutual epistemic respect, and of what we refer to as acknowledged broad epistemic peerhood, among a number of Supreme Court Justices of opposing ideological beliefs, including, reputedly, the relationship between Justices Antonin Scalia and Ruth Bader Ginsburg. *See, e.g.*, Daniel Politi, *Read Justice Ruth Bader Ginsburg's Touching Statement on Scalia*, SLATE (Feb. 14, 2016, 4:04 PM), http://www.slate.com/blogs/the_slatest/2016/02/14/read_justice_ruth_bader_ginsburg_s_touching_statement_on_scalia.html.

acknowledgement of epistemic peerhood[18] in light of the more pragmatic approach of Thomas Hobbes.[19] Hobbes classically holds that:

> Nature hath made men so equal, in the faculties of . . . mind; as that though there be found one man sometimes manifestly . . . of quicker mind than another; yet when all is reckoned together, the difference between man, and man, is not so considerable, as that one man can thereupon claim to himself any benefit, to which another may not pretend, as well as he.[20]

To those who doubt such claims of overall mental equality, Hobbes snarkily responds:

> That which may perhaps make such equality incredible, is but a vain conceit of one's own wisdome, which almost all men think they have in a greater degree than the vulgar; that is, than all men but themselves, and a few others, whom by fame, or for concurring with themselves, they approve.[21]

Whether everyone concurs with Hobbes in this regard is not ultimately crucial. Something roughly like Hobbes's approach may, at a minimum, be required for the sustained viability of a legal system. Most groups, after all, can generally recognize, with some accuracy, whether they are being broadly epistemically disdained by others or not.[22] Permanent acceptance of broad epistemic disdain of one's group by others is not to be generally expected. Broad epistemic disdain between and among substantial groups in a largely knowledge-based society, or in a broadly representative democracy, does not promote any reasonably stable legal or social equilibrium.[23]

More positively, there is certainly much to be said for what we will call a broad and inclusive acknowledgement of epistemic peerhood throughout our legal system. To begin with, consider some of the biases and pathologies affecting public discussion and decision making that adversely affect the credentialed, the formally elite, the celebrated, and the powerful, and assuredly not merely those of lower status. The work of Professor Philip Tetlock, for example, establishes the tendency of high-status,

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[18] *See infra* Part I.

[19] *See* THOMAS HOBBES, LEVIATHAN 82–83 (J.C.A. Gaskin ed., Oxford Univ. Press 1996) (1651).

[20] *Id.* at 82.

[21] *Id.*

[22] *See generally* NISBETT, *supra* note 14.

[23] *Id.*

credentialed experts to overesteem their own judgments and predictions, in various important respects.[24] In particular, elites can be susceptible to various decision-making pathologies, including one form or another of "groupthink,"[25] confirmation bias,[26] and motivated reasoning,[27] as well as the full range of classic subconscious defense mechanisms, including denial,[28]

[24] *See, e.g.*, PHILIP E. TETLOCK, EXPERT POLITICAL JUDGMENT: HOW GOOD IS IT? HOW CAN WE KNOW? 231–33 (2005); PHILIP E. TETLOCK & DAN GARDNER, SUPERFORECASTING: THE ART AND SCIENCE OF PREDICTION (2015). Note also the tendency of some public intellectuals to produce what Judge Richard Posner has called "solidarity" goods along with "credence" goods. TETLOCK, EXPERT POLITICAL JUDGMENT: HOW GOOD IS IT? HOW CAN WE KNOW?, *supra*, at 232. For a more public institutionally-focused perspective, see PETER H. SCHUCK, WHY GOVERNMENT FAILS SO OFTEN: AND HOW IT CAN DO BETTER 158 (2014).

[25] *See, e.g.*, IRVING L. JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES 7 (2d ed. 2013); Robert S. Baron, *So Right It's Wrong: Groupthink and the Ubiquitous Nature of Polarized Group Decision Making*, 37 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 219, 219 (2005); *What Is Groupthink?*, PSYCHOL. FOR SOC. RESP., http://www.psysr.org/about/pubs_resources/groupthink%20overview.htm (last visited Feb. 13, 2018) (noting in particular that the groupthink symptoms of "[s]tereotyped views of out-groups—Negative views of 'enemy' make effective responses seem unnecessary"). More constructively, see generally Jane C. Hu, *Group Smarts*, AEON (Oct. 3, 2016), https://aeon.co/essays/how-collective-intelligence-overcomes-the-problem-of-groupthink. We need not rely herein on any relatively narrow or technical meaning of the term "groupthink." *See* DAVID HARDMAN, JUDGMENT AND DECISION MAKING: PSYCHOLOGICAL PERSPECTIVES 150 (2009) ("Given the relative paucity of strong evidence for groupthink, it is perhaps ironic that it has come to occupy such a prominent cultural position," which might itself thus be considered an example of groupthink).

[26] *See*, Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998); Ray Nickerson, *Confirmation Bias: A Psychological Phenomenon That Helps Explain Why Pundits Got It Wrong*, CONVERSATION (Nov. 21, 2016, 10:14 PM), https://theconversation.com/confirmation-bias-a-psychological-phenomenon-that-helps-explain-why-pundits-got-it-wrong-68781 (emphasizing the adverse role of experts' selectivity of attention); GILOVICH & ROSS, *supra* note 3, at 144.

[27] *See* Dan Kahan, *What Is Motivated Reasoning and How Does It Work?*, SCI. & RELIGION TODAY (May 4, 2011), www.scienceandreligiontoday.com/2011/05/04/what-is-motivated-reasoning (citing personal needs, ends, and goals as biasing the search for, evaluation, and other processing of potentially available information, in such a way as to steer judgments toward identity protection as distinct from genuine insight, learning, or truth and raising the ironic and further socially damaging possibility that we may tend to detect motivated reasoning "only in those who disagree with us"); Dan M. Kahan, *Ideology, Motivated Reasoning, and Cognitive Reflection*, 8 JUDGMENT & DECISION MAKING 407, 407–08 (2013) (focusing in particular on ideologically motivated reasoning); David P.. Redlawsk et al., *The Affective Tipping Point: Do Motivated Reasoners Ever "Get It"?*, 31 POL. PSYCHOL. 563, 563 (2010).

[28] For a useful discussion, see ANNA FREUD, 2 THE WRITINGS OF ANNA FREUD: THE EGO AND MECHANISMS OF DEFENSE 32 (rev. ed. 1966) (1936); GEORGE E.

psychological repression,[29] regression to less fully mature development stages,[30] displacement and redirection of emotion and affect,[31] projection,[32] identification,[33] reaction formation,[34] and rationalization.[35] And it may, importantly, be far easier to detect such decision-making pathologies in others than in ourselves and our allies.

Among the effects of these pathologies is a tendency to deny epistemic peerhood to individuals or groups where it would be actually appropriate and broadly beneficial in the long term to do so. A part of a remedy was classically suggested by John Stuart Mill. Mill argued that a genuine understanding of one's own controversial positions requires more than just an abstract encounter with opposing views.[36] For a genuine understanding of even one's own views, one must confront counterarguments as they are articulated not merely hypothetically, by designated foils, or by devil's advocates, but by persons—whether elite or nonelite—who actually hold the beliefs in question.[37]

There is a possible argument for erring on the side of overinclusiveness in acknowledging one's epistemic peers that is grounded partly in sheer politeness, social civility, amiability, and ambient pleasantness, even at elite levels.[38] But there are,

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VAILLANT, EGO MECHANISMS OF DEFENSE: A GUIDE FOR CLINICIANS AND RESEARCHERS 7 (1992); PHEBE CRAMER, PROTECTING THE SELF: DEFENSE MECHANISMS IN ACTION 4 (2006).

[29] *See* FREUD, *supra* note 28, at 51.

[30] *See id.* at 50.

[31] *See id.* at 32.

[32] *See* CRAMER, *supra* note 28, at 92 ("[W]e can see extensive use of projection as a means of ensuring group cohesiveness through the formation of adolescent cliques and in the functioning of 'in groups' and 'out groups.' ").

[33] *See* FREUD, *supra* note 28, at 43.

[34] *See id.* at 44.

[35] *See id.* at 21.

[36] *See* JOHN STUART MILL, ON LIBERTY 41 (John Gray ed., Oxford Univ. Press, 1991) (1859).

[37] *See id.* at 42–43. Remarkably, it is reported that the followers of the eventually widely discredited Soviet agricultural theorist Trofim Lysenko "had never studied the scientific arguments of their opponents." VALERY N. SOYFER, LYSENKO AND THE TRAGEDY OF SOVIET SCIENCE 302 (Leo Gruliow & Rebecca Gruliow trans., 1994).

[38] For specific guidelines for more or less formal academic discussions, see, e.g., *NYU Guidelines for Respectful Philosophical Discussion*, NYU ARTS & SCI., https://as.nyu.edu/content/nyu-as/as/departments/philosophy/climate/initiatives/nyu-guidelines-for-respectful-philosophical-discussion.html (last visited Feb. 13, 2018); David Chalmers, *Guidelines for Respectful, Constructive, and Inclusive Philosophical Discussion*, CONSC.NET, http://consc.net/norms.html (last visited Feb. 13, 2018);

crucially, also more substantive grounds for relatively expansive and inclusive understandings of who should count as one's epistemic peer. Better policy discussions; better decision-making processes; higher motivation to engage in occasionally painful learning; and better, or more justified, decision-making outcomes can result from a broadened acknowledgement of epistemic peer status in others. Generosity and breadth in recognizing and acknowledging one's epistemic peers can pay off for all.

For example, the important "constructive controversy" approach to group learning emphasizes confirming the value and competence of each group discussion participant,[39] among other considerations. Restricting decision-making group membership to those who are considered high-status individuals or to one's narrowly defined epistemic peers can impair the overall performance level of the group in question.[40] In general, group homogeneity can impair the quality of group discussion and decision making. This is partly due to the tendency of groups to dwell upon and overemphasize information and beliefs that are already shared, and perhaps known to be shared, by the group members prior to deliberation.[41]

Remarkably, decision-making outcomes in legal and other contexts can often be enhanced by emphasizing the inclusion of persons and groups with a range of backgrounds and conflicting

Sean Carroll, *Norms For Respectful Classroom/Seminar Discussion*, PREPOSTEROUS UNIVERSE (Sept. 9, 2014), www.preposterousuniverse.com/blog/2014/09/09/norms. However, many norms of politeness can be observed even under very narrow understandings of who qualifies as one's epistemic peer.

[39] *See, e.g.*, David W. Johnson & Roger T. Johnson, *Energizing Learning*: *The Instructional Power of Conflict*, 38 EDUC. RESEARCHER 37, 42–43 (2009). It seems fair to assume that a norm of avoiding unjustified or imprudent denials of epistemic peerhood status is related to, but distinct from, most dimensions of political civility. *See generally* Robin Stryker et al., *What Is Political Incivility?*, 83 COMM. MONOGRAPHS 535 (2016). For examples of incivility, see *id.* at 8 tbl.1 (listing various forms of incivility, including "[r]efusing to let those with whom one disagrees take part in a political discussion").

[40] Such cases could encompass instances in which some potential group members are excluded on grounds of their allegedly falling short of relevant epistemic peerhood. For general background, see Boris Groysberg et al., *Too Many Cooks Spoil the Broth: How High-Status Individuals Decrease Group Effectiveness*, 22 ORG. SCI. 722, 722 (2011); Roderick I. Swaab et al., *The Too-Much-Talent Effect: Team Interdependence Determines When More Talent Is Too Much or Not Enough*, 25 PSYCHOL. SCI. 1581, 1587 (2014).

[41] *See* HARDMAN, *supra* note 25, at 148 ("[D]iscussion tends to focus on information that was already known and shared by the group prior to any interaction.") (internal citation omitted); GILOVICH & ROSS, *supra* note 3, at 156.

and unshared experiences. We often reach better results not from the wisdom of narrow elites, but from the proverbial "wisdom of crowds."[42]

But this is just the beginning. Openness and inclusion, and most especially, valuing various forms of independence, contrarianism, dissent, and disparity in constituting a decision-making group are often crucial. James Surowiecki minimally concludes that, "in general, it's smarter to cast as wide a net as possible, rather than wasting time figuring out who should be in the group and who should not."[43] But we can often improve on the already helpful basic "wisdom of crowds" principle. Independent-minded, contrarian, and self-identified dissenters in particular can often make distinctly valuable further contributions to the quality of legal and other forms of group decision making.

None of this is to deny the importance of general, across-the-board upgrades in epistemic capabilities and education in general.[44] If we were all more broadly and deeply educated, in

[42] See JAMES SUROWIECKI, THE WISDOM OF CROWDS 31 (2005) ("[I]f you can assemble a diverse group of people who possess varying degrees of knowledge and insight, you're better off entrusting it with major decisions rather than leaving them in the hands of one or two people, no matter how smart those people are.").

[43] *Id.* at 276. The "wisdom of crowds" process tends to work only to the degree that the decision-making group members contribute independently from differing and uncorrelated backgrounds. *See id.* at 10; DANIEL KAHNEMAN, THINKING, FAST AND SLOW 84 (2011); *see also* Philip Ball, *'Wisdom of the Crowd': The Myths and Realities*, BBC: FUTURE (July 8, 2014), www.bbc.com/future/story/20140708-when-crowd-wisdom-goes-wrong ("[I]t's better still to add individuals who aren't simply independent thinkers but whose views are 'negatively correlated'—as different as possible—from the existing members. In order words, diversity trumps independence."); Clintin P. Davis-Stober et al., *When Is a Crowd Wise?*, 1 DECISION 79, 98 (2014) (endorsing a greater emphasis on the value of substantive differences in judgments than on the independence of those judgments); Dražen Prelec et al., *A Solution to the Single-Question Crowd Wisdom Problem*, 541 NATURE, Jan 2017, at 532, 532 (emphasizing further the special value of judgments that the holder believes to be distinctly minority judgments).

[44] For background, see, e.g., CHRISTOPHER LASCH, THE REVOLT OF THE ELITES AND THE BETRAYAL OF DEMOCRACY 161–175 (1995); *PIACC 2012/2014 Results*, NAT'L CTR. FOR EDUC. STATISTICS, https://nces.ed.gov/surveys/piaac/results/summary.aspx (last visited Feb. 15, 2018) (providing statistics on U.S. and international adult competency levels in literacy and numeracy); David Kastberg et al., NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., PERFORMANCE OF U.S. 15-YEAR-OLD STUDENTS IN SCIENCE, READING, AND MATHEMATICS LITERACY IN AN INTERNATIONAL CONTEXT, https://nces.ed.gov/pubs2017/2017048.pdf (2016); *2015 Mathematics & Reading Assessments*, NATION'S REPORT CARD, www.nationsreportcard.gov/reading_math_2015 (last visited Feb. 15, 2018) (providing large samples of U.S. fourth grade and eighth grade students).

meaningful ways, the quality of public discussion and decision making would doubtless tend to improve. A broadened and more inclusive acknowledgement of who counts as one's epistemic peer, as recommended here, does not by itself guarantee that the more inclusive epistemic peerhood exists at a distinctively high level of deliberative competence. The quality, breadth, depth, and intensity of education, broadly understood, matters as well. However, these separate concerns, for both broader epistemic peerhood, as emphasized in this Article, and for stronger education certainly need not conflict with one another. Either can inspire the other.

We thus have, at this point, a preliminary sense of the importance of some possible choices in deciding whose voices and participation should be taken seriously, as that of our epistemic peers, in deciding legal questions. This Article addresses these preliminary understandings in several legal contexts.[45] We can do so most profitably on the basis of a better, fuller, and more specific understanding of the crucial idea of epistemic peerhood. It is thus the idea of epistemic peerhood itself that this Article addresses immediately below.

I. AN UNDERSTANDING OF EPISTEMIC PEERHOOD SUITABLE FOR LEGAL CONTEXTS

Deliberation in the law and elsewhere involves a distinctive kind of thinking style. Deliberation has been described as "quiet, reflective, open to a wide range of evidence, [and] respectful of different views."[46] There is thus a deliberative method, involving "a rational process of weighing the available data, considering alternative possibilities, arguing about relevance and worthiness, and then choosing the best policy or person."[47]

But deliberation is not simply a way of thinking. There is also the crucial dimension of membership and status in the deliberating group. Openness to evidence and respect for differing views, along with a desire for the best deliberative

[45] *See infra* Parts II–V.

[46] Michael Walzer, *Deliberation, and What Else?*, *in* DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT 58, 58 (Stephen Macedo ed., 1999).

[47] *Id.*

outcome,[48] may ultimately be inseparable from appropriate openness to possible contributors, and appropriate respect for those persons as fellow deliberators.[49]

Legal deliberation thus involves questions not only of method, but of membership, or more precisely of who counts as a full and respected member of the deliberative community. The idea of epistemic peerhood is therefore central to any conception of legal deliberation.[50] The idea of epistemic peerhood, actual or perceived, takes a number of different forms.[51] The specialists themselves take different approaches. "Peerhood" may itself be variously defined in terms of either sameness,[52] equality,[53] rough

[48] *See id.*

[49] John Stuart Mill argued, in effect, that the best understanding of particular arguments and viewpoints may require the active participation of persons actually holding those views. *See supra* notes 36–37. In the pure literary realm, consider the widespread initial doubts as to Sancho Panza's epistemic peerhood in MIGUEL DE CERVANTES, DON QUIJOTE 593–98 (Diana De Armas Wilson ed., Burton Raffel trans., 1999) (1615). The acknowledged epistemic peerhood among distinct groups has expanded. *See* GOTTHOLD LESSING, NATHAN THE WISE, act 3, sc. "An Audience Room in the Sultan's Palace"; act 3, sc. "The Place of Palms, close to Nathan's House" (chronicling the story of a group of Muslims, Christians and Jews as they overcome initial prejudices, find a common bond, and unite as one unit despite their diverse religious backgrounds).

[50] For the moment, we set aside questions involving the status of persons who are, are recognized as, or are at least thought to be, our epistemic superiors or our epistemic inferiors.

[51] *See, e.g.*, JONATHAN MATHESON, DISAGREEMENT AND EPISTEMIC PEERS, OXFORD HANDBOOKS ONLINE 3 (2015), http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935314.001.0001/oxfordhb-9780199935314-e-13?print=pdf.

[52] *See, e.g.*, Stewart Cohen, *A Defense of the (Almost) Equal Weight View*, *in* THE EPISTEMOLOGY OF DISAGREEMENT: NEW ESSAYS 98, 98 (David Christensen & Jennifer Lackey eds., 2013) ("When parties to a disagreement have the same evidence and are equal in their reasoning abilities, they are epistemic peers."); Stefan Reining, *Peerhood in Deep Religious Disagreements*, 52 RELIGIOUS STUD. 403, 403 (2016) (referring to one person's having "the same or equally good evidence" as another person, and to being "equally competent . . . in making judgements on the basis of the kind of evidence in question"); *see also* Nathan L. King, *Disagreement: What's the Problem? or A Good Peer Is Hard To Find*, 85 PHIL. & PHENOMENOLOGICAL RES. 249, 252 (2012) (epistemic peer status requires having "the same relevant evidence"); Michael P. Lynch et al., *Intellectual Humility in Public Discourse*, UCONN HUMANITIES INST. § 2.2 (2012), http://humilityandconviction.uconn.edu/wp-content/uploads/sites/1877/2016/09/IHPD-Literature-Review-revised.pdf (referring briefly to "possessing the same evidence" as a characteristic of a peer disagreement).

[53] *See, e.g.*, MATHESON, *supra* note 51, at 2 ("[E]pistemic peers are a kind of epistemic equal. . . . [involving] equality in evidential possession and equality in evidential processing."); *see also* Graham Oppy, *Disagreement*, 68 INT'L J. FOR PHIL. & RELIGION 183, 187 (2010) (describing cognitive peers as "cognitive equals," and evidential peers as "evidential equals," in the sense of being "equally well informed"

equality,[54] or even incomparability or incommensurability[55] between persons, or between groups. In any version of epistemic peerhood, the focus is on both the possession of, and the broad ability to process, arguably relevant evidence. The term "epistemic," as in the idea of epistemic peerhood, is here again merely shorthand for the various elements involved in somehow obtaining, processing, and assessing the evidence at issue in a given controversy.[56] Issues of epistemic peerhood, or the absence thereof, can arise in any group decision-making context. Our focus below is of course on various contexts of legal discussion and decision making. The key point to bear in mind is that in such contexts, we are generally better off, overall, with both a theory and a practice of broad, expansive, and inclusive epistemic peerhood.

in that area); Benjamin Wald, *Dealing with Disagreement: Distinguishing Two Types of Epistemic Peers*, 3 SPONTANEOUS GENERATIONS: J. FOR HIST. & PHIL. SCI. 113, 113 (2009) (describing epistemic peers as "equally well informed and intelligent" investigators); Richard Rowland, *The Epistemology of Moral Disagreement*, 12 PHIL. COMPASS 1 (2017) (distinguishing between equality of epistemic virtues and equality in one's chances of correctness on the question at issue).

[54] *See, e.g.*, BRYAN FRANCES, DISAGREEMENT 43 (2014) (arguing that if persons "are roughly equal on all Disagreement Factors, then they are epistemic peers" on the question at issue) (emphasis omitted). Frances elsewhere lists the "Disagreement Factors" as involving data, evidence, time, ability, background knowledge, and the circumstances of investigation. *Id.* at 26; *see also* Juan Comesana, *Conciliation and Peer-Demotion in the Epistemology of Disagreement*, 49 AM. PHIL. Q. 237, 238 (2012) ("Some philosophers have thought that two subjects are epistemic peers just in case, roughly, they are approximately equal when it comes to general epistemic virtues such as intelligence, thoughtfulness, [and] freedom from bias . . . ."). Somewhat more broadly, see David Killoren, *Moral Intuitions, Reliability and Disagreement*, 4 J. ETHICS & SOC. PHIL. 15, 17 (2010) (referring to differing mixes of epistemic virtues and vices of one person as "just as good" as those of another person).

[55] *See* Lynch et al., *supra* note 52, § 2.1, at 10 (referring to "epistemic incommensurability"). In this context, however, the incommensurability or noncomparability in question is taken to involve, unfortunately, "a threat to meaningful public discourse." *Id.* Thus, "[i]f we can't agree on whose methods of inquiry are correct, then it is hard to see how we could agree whose view of the facts is correct." *Id.* In contrast, we should consider more benign, and indeed positive, implications of epistemic incommensurability. Difficulties in fully and accurately communicating our disparate experiences means we should hesitate to downgrade, let alone dismiss, the value of incomparable lived experiences of other persons and groups.

[56] The term "epistemic" in this area thus refers not so much to knowledge, but more broadly to matters of evidence, reflection, productive discussion, belief, and judgment. *See supra* note 1.

To begin the analysis, persons or groups can, for our purposes, clearly be epistemically equal, in the law and elsewhere, without being epistemically the same.[57] Equality in general need not involve sameness. There are plainly several dimensions to acquiring, processing, and judging experiences and evidence. Weaknesses, relative to another person or group, in any one such dimension may be offset by relative strengths in some other dimension,[58] resulting in net relevant epistemic equality without sameness.[59]

But in any typical case of epistemic peerhood, meaningful judgments of precise epistemic equality will normally be unavailable. Ordinarily, judgments that persons have either precisely the same or equal evidence, or that they process evidence precisely equally well, are unavoidably arbitrary, contestable, and entirely unnecessary.[60] All one needs on this approach is an idea of rough pragmatic equality, or of approximate epistemic equality.[61]

In fact, even the idea of rough or approximate epistemic equality is itself a bit misleading, however convenient and typically harmless the idea may be. We might instead more properly think in terms of what we could call epistemic incommensurability. Sometimes, two items cannot be put on any common measuring scale. Epistemic incommensurability, or incomparability, is clearly not the same thing as epistemic equality, precise or otherwise.[62] As we note below in the context of campus affirmative action, there may be cases in which the relevant background experiences of persons and groups cannot be put, nonarbitrarily, on any common scale, and thereby objectively

[57] *See, e.g.*, MATHESON, *supra* note 51, at 3.

[58] *See id.*

[59] *See id.* By analogy, two branches of government might have, overall, equal power, without having the same power in any particular respect. More familiarly, a baseball pitcher and a baseball position player may be of equal overall value even if one is clearly better than the other with respect to, say, batting.

[60] This seems realistically true even in the extreme case of the evidence presented to presumed epistemic peer jurors in a criminal or civil trial. *See infra* Part II.

[61] For the bare pragmatic argument outline, see HOBBES, *supra* notes 19–21 and accompanying text. More broadly, one can be a genuine and committed egalitarian without hopelessly chasing some unattainable concept of precise equality. *See* R. George Wright, *Equal Protection and the Idea of Equality*, 34 L. & INEQ. 1, 16 (2016) [hereinafter Wright, *Equal Protection and the Idea of Equality*].

[62] *See* R. George Wright, *Does Free Speech Jurisprudence Rest on a Mistake?: Implications of the Commensurability Debate*, 23 LOY. L.A. L. REV. 763, 772 (1990).

ranked.[63] In such cases of incommensurability of experiences, we may well be justified in regarding all such persons and groups as, at a much deeper and more fundamental underlying level, effectively equals, who bring sensibly-interpreted and valuable background experiences to the common discussion.[64] We might then rightly treat such incomparable persons or groups as effective, constructive, or presumptive equals for purposes of discussion and problem solving.

These assumptions jointly suggest a broad, expansive, and inclusive view of epistemic peerhood for our purposes. It is admittedly possible, on the contrary, to instead defend a decisive, deliberative, and judgment-making role for our presumed epistemic superiors, or for presumed epistemic elites.[65] But as we have seen, and as we further explore in context below,[66] broad, expansive, inclusive theories and practices of epistemic peerhood clearly have much, practically and morally, to recommend them.

Some philospohers, contrary to our recommended view, endorse the idea that epistemic peerhood should be treated as a rare phenomenon. Such a view actually has little to recommend it in the context of legal discussion and legal decision making.[67] We might be tempted to think of epistemic peerhood as rare, and

[63] *See infra* Part IV.

[64] *See* Wright, *Equal Protection and the Idea of Equality*, *supra* note 61, at 45–53 (listing representative theories or defenses, on various grounds, of the fundamental equality of persons).

[65] *See, e.g.*, Daniel A. Bell, *Democratic Deliberation: The Problem of Implementation*, *in* DELIBERATIVE POLITICS, supra note 46, at 70, 74 ("[D]eliberation is more likely to be effective if the political culture values decision-making by intellectual elites . . . [b]ecause talented elites with the motivation and the ability to understand and apply moral principles to complex political controversies . . . are more likely to engage in constructive deliberations."); Russell Hardin, *Deliberation: Method, Not Theory*, *in* DELIBERATIVE POLITICS, *supra* note 46, at 103, 112 (noting at least on some conceptions, "[i]t is hard to avoid the suspicion that deliberative democracy is the 'democracy' of elite intellectuals"). For contrasting statements of what we might call epistemic egalitarianism drawn from classic literature, see DESIDERIUS ERASMUS, THE PRAISE OF FOLLY 127–30 (Clarence H. Miller trans., 2d ed. 1979) (1511); *see also* CHARLES LOUIS DE SECONDAT MONTESQUIEU, THE PERSIAN LETTERS 256 (George R. Healy trans., 1964) (1721) (proffering intellect as supposedly inversely correlated with attention to details).

[66] *See infra* Parts II–V.

[67] *See, e.g.*, King, *supra* note 52, at 250 ("[P]eer disagreement is rare, and . . . we rarely have reason to think it obtains in a given case."); *id.* at 263 ("When it comes to issues we tend to care about, it is rare for subjects to find themselves involved in a genuine disagreement with someone who is, and who they have good reason to believe is, their epistemic peer."); *see also* MATHESON, *supra* note 51, at 15.

thus as merely a marginal phenomenon, if, among other considerations, we believed that given a common body of evidence, disputed legal and policy questions typically have some single, uniquely right, yet difficult to determine answer.[68] In such cases, we might think of those persons most frequently endorsing the apparently uniquely right answer as somehow epistemically superior to the rest of us.

But in most sustained legal and other public controversies, it can hardly be presumed that any such uniquely right and evidently ascertainable single answer is available.[69] Even if we dubiously assume, for example, that the jurors in a given case are all exposed to precisely the same evidence, their reasonable responses to that evidence, and to the relevant legal instructions, will quite defensibly vary. This will reflect differences in their group and individual background experiences, and in their varying but defensible priorities in addressing the complexities and unavoidable vagueness of the relevant law.[70]

We should also appreciate that some entirely legitimate perspectives may be inherently more difficult to clearly publicly articulate than other, no more valid, perspectives.[71] Persons may still qualify as epistemic peers, given their available evidence and their various evidence-processing skills, even if they are not for this reason equally successful in their ability to clearly articulate their particular perspective to the far broader public.[72]

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[68] *See* Matthew Kopec & Michael G. Titelbaum, *The Uniqueness Thesis*, 11 PHIL. COMPASS 189, 189 (2016) ("Uniqueness holds, very roughly speaking, that there is a unique rational response to a given body of evidence.").

[69] Professor Ronald Dworkin is often interpreted to argue that there will typically exist right answers to most legal disputes. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81 (1977) ("[R]easonable lawyers and judges will often disagree about legal rights, just as citizens and statesmen disagree about political rights."). *But see* A.D. Woozley, *No Right Answer*, 29 PHIL. Q. 25, 25–29 (1979).

[70] *See* Christine Swanton, *Virtue Ethics and the Problem of Moral Disagreement*, 38 PHIL. TOPICS 157, 157 (2010) ("Taking moral disagreement seriously is to appreciate that much disagreement is deep, reasonable, and intractable . . . .") Rather more narrowly, baseball managers of equal skill, given the same data, might reasonably change or not change pitchers at a given time, based on entirely reasonable differences in their priorities as among various short- and long-term goals. At the broadest level, "outside of mathematics it is rare that the data is so conclusive that there is just one conclusion we can draw." Lynch et al., *supra* note 52, at 14.

[71] *See* Lynch et al., *supra* note 52, at 12–13.

[72] For a sense of the limits of public articulability as an indicator of the soundness or wisdom of the perspective at issue, see EDMUND BURKE, *Reflections on the Revolution in France*, *in* 2 SELECT WORKS OF EDMUND BURKE 232 & 451 n.30,

All of the above considerations, in sum, should contribute to a sensible reluctance on everyone's part to deny epistemic peer status even to many of those persons or groups whose explicit arguments we may find unfamiliar or obscure, and thus unpersuasive.

Once we are more generally open to a broad, expansive, inclusive understanding of who should be considered our epistemic peer, we should then reassess, in one way or another, any relevant substantive views we hold that are challenged by persons to whom we have newly accorded peer epistemic status.[73] But even on a presumably discredited and abandoned narrower view of who counts as our epistemic peer, we should have been taking some minimal account of the views of those we had declined to accredit as our epistemic peers.[74]

The extent to which we should reassess our substantive law-related views, in light of the arguments of either new or long-acknowledged epistemic peers, is currently being debated by academic specialists.[75] We need not resolve such controversies

233 & 452 n.5 (Isaac Kramnick ed., 1999). *See generally* MICHAEL POLANYI, PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY (1958). In the explicit context of epistemic peerhood, see Jaakko Hirvelä, *Is It Safe To Disagree?*, 30 RATIO 305, 311 (2017) ("[T]he evidence that we have is often so subtle that we cannot cite it or bring it to focus, and thus we are often not able to fully disclose our relevant evidence.") (citation omitted); Lynch, *supra* note 52, at 13 ("The inability of people to be immediately articulate about their judgment does not show that the judgment is the outcome of non-rational process, or even that they lack reasons for their view."). These legitimate inarticulability problems could, to different degrees, affect both or all sides in a given legal policy debate.

[73] The more general problem, and one possible response, are recognized by the philosopher Henry Sidgwick. Sidgwick assumes, contrary to our suggestion above, that "if I find any of my judgments . . . in direct conflict with a judgment of some other mind, there must be error somewhere." HENRY SIDGWICK, THE METHODS OF ETHICS 342 (Dover Publications 7th ed. 1996) (1907). Sidgwick then concludes that "if I have no more reason to suspect error in the other mind than in my own, reflective comparison between the two judgments necessarily reduces me temporarily to a state of neutrality." *Id.*

[74] *See supra* notes 36–37 and accompanying text.

[75] *See, e.g.*, Comesana, *supra* note 54, at 237 (contrasting "conciliatory" with "nonconciliatory" approaches to newly discovered disagreements between epistemic peers); Bryan Frances, *Discovering Disagreeing Epistemic Peers and Superiors*, 20 INT'L J. PHIL. STUD. 1, 19–20 (2012) (discussing conciliationist approaches); Thomas Kelly, *Peer Disagreement and Higher-Order Evidence*, *in* DISAGREEMENT 111, 127 (Richard Feldman & Ted A. Warfield eds., 2010) ("[M]any of us persist in retaining views that are explicitly rejected by those over whom we possess no discernible epistemic advantage"). Of course, we may be overall epistemic peers with someone with an obviously relevant "blind spot," if we ourselves have an off-setting or equalizing blind spot evidently irrelevant to the particular question at issue. *See also*

here. But in preparation for the specific legal contextual discussions of epistemic peerhood below,[76] we should briefly consider several points.

First, while new, or newly discovered, instances of disagreement on basic legal issues are clearly worthy of our attention, we in fact rarely confront entirely unfamiliar basic legal positions, and corresponding basic arguments, opposed to our own.[77] In broad legal policy contexts, we rarely develop fully our own preferred positions, and only then, at that point, first discover that our main arguments and conclusions are not universally shared. More positively, and despite the comforts of confirmation bias, we tend to sculpt our own views of broad legal issues in conjunction with our rejection of opposing views. We typically define ourselves partly in terms of what we are not. This implies that a phenomenon of great interest to some contemporary philosophers—how to properly respond to completely new and unexpected opposition to our views—is actually of quite limited concern in most important legal policy contexts.[78]

Second, in the legal contexts discussed below, we should give appropriate weight to what we take to be the most damaging current excesses and deficiencies in the overall process of recognizing or denying epistemic peerhood.[79] If we actually believe, contrary to our argument herein, that the main relevant contemporary problem is one of excessive epistemic egalitarianism, we would presumably, all else equal, then endorse a relatively narrow understanding of epistemic

Oppy, *supra* note 53, at 189 (contrasting "conformist or conciliationist" approaches with "non-conformist or steadfast" approaches); Philip Pettit, *When To Defer to Majority Testimony—And When Not*, 66 ANALYSIS 179, 185 (2006) (noting occasions on which it may be "hazardous to espouse a policy of testimonial deference to a majority"); Robert Mark Simpson, *Epistemic Peerhood and the Epistemology of Disagreement*, 164 PHIL. STUD. 561, 576 (2013) ("In fields like politics, religion, ethics, and philosophy, most of us are party to disagreements in which we are unable to identify . . . decisive advantages that we hold over the people who disagree with us."). There will also be cases in which expanding the class of those we acknowledge as epistemic peers tends to reinforce our established substantive views. *See* Sanford C. Goldberg, *Can Asserting That 'P' Improve the Speaker's Epistemic Position (And Is That a Good Thing?)*, 95 AUSTRALASIAN J. PHIL. 157, 157 (2017).

[76] *See infra* Parts II–V.

[77] *See supra* note 75.

[78] For a sense of this philosophical focus on entirely new, or newly discovered, disagreements, see *supra* note 75.

[79] *See infra* Parts II–V.

peerhood.[80] If on the other hand, perhaps for the various reasons referred to above, we rightly sense that the greater problem is instead one of the undue denial of epistemic peerhood to one's legal and political opponents, we might then encourage persons to first seek out a broader, less politically selective media exposure, and then partly on that basis to adopt a broader and more inclusive understanding of epistemic peerhood.[81]

Third, and relatedly, our approach to the proper scope of epistemic peerhood should similarly consider what we take to be the most severe contemporary excesses and insufficiencies in what we might call the epistemic vices.[82] If we believe, implausibly, that our primary contemporary problem in these terms is one of excessive mutual deference, undue indulgence of our domestic legal and political foes, and excessive open-minded reflection on the views of others outside our own favored epistemic circle, then our beliefs as to the proper scope of epistemic peerhood should be accordingly narrowed. If in contrast, we would generally prefer wide adoption of a broader role for the virtue of epistemic humility, a relatively broad, inclusive, and encompassing understanding of genuine epistemic peerhood should be more congenial.[83]

On this basis, then, let us consider the role of acknowledging and denying epistemic peerhood, first to fellow jurors in civil and criminal trials generally, and then in the more specific context of jury cases in which religious authority is arguably invoked, before moving to consider other legal contexts.

[80] Or, perhaps more distastefully stated, an expansive understanding of one's epistemic superiority and the corresponding epistemic inferiority of others.

[81] Denial of epistemic peer status to one's perceived opponents could be both a cause and an effect of what is referred to as selective exposure to information, with any associated confirmation biases. For discussion, see, e.g., Silvia Knobloch-Westerwick, *Selective Exposure and Reinforcement of Attitudes and Partisanship Before a Presidential Election*, 62 J. COMM. 628, 628 (2012). More broadly, see NATALIE JOMINI STROUD, NICHE NEWS: THE POLITICS OF NEWS CHOICE 14–17, 19 (2011).

[82] *See supra* notes 13, 16. *See generally* Michael S. Brady & Duncan Pritchard, *Moral and Epistemic Virtues*, 34 METAPHILOSOPHY 1 (2003); Killoren, *supra* note 54.

[83] *See* Lynch et al., *supra* note 52, at 15 ("There is a deep connection between intellectual humility and meaningful public discourse.").

II. EPISTEMIC PEERHOOD IN THE CONTEXT OF JURY DELIBERATION AND DECISION MAKING

In some sense, the idea of "peerhood" has influenced adjudicative thinking at least since the Magna Carta of 1215.[84] A jury of one's peers might, as a matter of history and logic, involve jurors of the same formal legal status or rank as the defendant.[85] This understanding, by itself, would not carry us very far toward the idea of genuine epistemic peerhood among jurors. But the Oxford English Dictionary suggests that a "peer" can also be "[a] person who equals another in natural gifts, ability, or achievements; the equal in any respect of a person or thing."[86] In this and similar respects, criminal and civil trial juries can vary in the extent to which the jurors are, or regard themselves as, epistemic peers. And the degree of epistemic peerhood, actual and acknowledged, among jurors could make a difference to the quality of jury deliberation.

Classically, Harry Kalven and Hans Zeisel referred to the jury deliberation process as "an interesting combination of rational persuasion, sheer social pressure, and the psychological mechanism by which individual perceptions undergo change when exposed to group discussion."[87] These processes typically unfold, however, through one degree or another of a denial on the part of some jurors of anything like universal epistemic and other forms of equality.

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[84] Clause 39 of the Magna Carta requires that imprisonment take place only pursuant to "lawful [peer] judgment" or "the law of the land." MAGNA CARTA cl. 39. The Sixth Amendment refers explicitly not to a jury of one's peers, but to "an impartial jury." U.S. CONST. amend. VI. Impartiality itself seems to say little about relations among jury members. The idea of community representativeness at least begins to address juror relationships for deliberative and decision making purposes. For background, see Robert C. Walters et al., *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. REV. 319, 319–21, 355 (2005).

[85] For some basis for such an approach, see the first definition of "peer" offered by the Oxford English Dictionary. *Peer*, OXFORD ENGLISH DICTIONARY (2d ed. 1989). The Oxford English Dictionary then cites William Blackstone for the principle that all "[c]ommoners" are peers in the sense that they all lack the status of nobility. *See id.* at A.1.a.

[86] *See id.* at A.1.b. By comparison, see the equality-focused understandings of epistemic peerhood referred to *supra* notes 52–53 and accompanying text.

[87] HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 489 (1966).

Thus, for example, ratings as to a particular juror's relative influence tend to correlate with the level of formal education of the juror in question.[88] The more influential jurors tend also to be of relatively high socioeconomic status,[89] and, even today, to be male.[90] In particular, those jurors selected for the role of foreperson tend to be better educated,[91] Caucasian,[92] and male.[93] Disproportionate speaking time among jurors during deliberations tends also to be associated with education,[94] occupational status,[95] and gender.[96]

These disparities raise the question of equality of epistemic status, or the lack thereof, in the context of jury deliberation and judgment. A part of the problem of anyone's discounting some particular fellow juror's perspective, and of the denial in that respect of full epistemic peer status, is tied to juror reactions to what we have called the incomparability or incommensurability of relevant personal or group experiences.[97]

It is important in this context to note how jurors who hear what is nominally the "same" evidence in a given case can variously react to such evidence.[98] Evidently, jurors filter such trial evidence "through their own experiences, expectations, values, and beliefs."[99] Such experiences may be unshared, or even incommensurable, and only imperfectly articulable, but certainly no less relevant, legitimate, and potentially valuable under the circumstances.[100]

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[88] *See* DENNIS J. DEVINE, JURY DECISION MAKING: THE STATE OF THE SCIENCE 166 (2012).

[89] *See id.*

[90] *See id.*

[91] *See id.* at 155.

[92] *See id.*

[93] *See id.* (citing several separate studies).

[94] *See id.*; Phoebe C. Ellsworth, *Some Steps Between Attitudes and Verdicts*, *in* INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 42, 59 (Reid Hastie ed., 1993).

[95] *See* DEVINE, *supra* note 88, at 155.

[96] *See id.*

[97] *See supra* note 55 and accompanying text.

[98] *See* Brian H. Bornstein & Edie Greene, *Jury Decision Making: Implications for and from Psychology*, 20 CURRENT DIRECTIONS IN PSYCHOL. SCI. 63, 64 (2011).

[99] *Id.* at 64–65.

[100] As the normatively focused philosopher John Rawls broadly observes, "To some extent . . . the way we assess evidence and weigh moral and political values is shaped by our total experience, our whole course of life up to now; and our total experiences must always differ." JOHN RAWLS, POLITICAL LIBERALISM 56–57 (1993).

Inevitably, equally legitimate life experiences, and related group demographic considerations,[101] affect the legitimate inferences, perceptions, and beliefs of jurors.[102] No given individual juror, in all her distinctive and complex particularity, can simply mirror an entire broader community.[103] As we have seen, typical group decision making, beyond highly technical contexts, tends to flourish when a wide range of potential contributors are taken as epistemically worthy.[104]

In the jury context, it has thus sensibly been concluded that "the jury cannot perform its fact-finding, interpretative, or educational functions effectively if it fails to consider the views of all of its members."[105] Thoroughness in jury deliberations requires attention to more, rather than fewer, of the empaneled jurors and their distinct perspectives.[106] It is hardly surprising that thoroughness in such deliberations tends to produce what are judged to be "legally appropriate" decisions.[107]

This is not to suggest that the actual course and content of jury deliberations are entirely a matter of responding to what other jurors have said, or of filling in perceived conversational gaps.[108] Just knowing that one is serving on a racially diverse

[101] *See* Nancy S. Marder, *Juries, Justice & Multiculturalism*, 75 S. CAL. L. REV. 659, 663 (2002).

[102] *Id.* at 666.

[103] *See* Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 U. CHI. LEGAL F. 125, 125–26, 129 (noting the distinction between individual juror impartiality and something like an overall, collective jury impartiality obtained through cross-sectional community representation on juries).

[104] *See generally supra* Part I, and perhaps most famously, the "wisdom of crowds" studies referred to in *supra* notes 42–43 and accompanying text. One modest limitation, in the jury context, is that pressuring reluctant jurors to speak may be counterproductive to the degree that reluctant jurors express inaccurate accounts of the evidence, where those false memories might go uncorrected by other jurors. *See* Jessica M. Salerno & Shari Seidman Diamond, *The Promise of a Cognitive Perspective on Jury Deliberation*, 17 PSYCHONOMIC BULL. & REV. 174, 177 (2010).

[105] Nancy S. Marder, Note, *Gender Dynamics and Jury Deliberations*, 96 YALE L.J. 593, 593 (1987).

[106] DEVINE, *supra* note 88, at 165.

[107] *See id.*

[108] In particular, the racial composition of a jury can apparently influence juror perceptions of a case even before actual jury deliberations have begun. *See* Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1030 (2003); *see also* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597, 597–98 (2006) (noting both direct discussion-

jury, by itself, can apparently have some effects on juror beliefs. But these sorts of effects are partly separate from, for example, the tendency toward greater deliberative thoroughness of racially diverse juries.[109]

What we have called a willingness to acknowledge relevant epistemic peerhood on a broad, inclusive, expansive basis is thus at the heart of what a number of scholars recommend as the path to improved jury deliberations and outcomes. Among other sensible recommendations, jury deliberations should, crucially, be inclusive and comprehensive.[110] Such deliberations should involve the "active participation of most (if not all) members"[111] of the jury. And jury members collectively should "foster an environment where . . . belief change is a function of informational influence as opposed to peer pressure or factionalism."[112]

Below, we briefly consider a more specific context in which a fundamental threat to broad and meaningful epistemic peerhood puts the quality of jury deliberations and outcomes at risk.

III. EPISTEMIC PEERHOOD AMONG JURORS AND THE PROBLEM OF APPEAL TO DISTINCTIVELY RELIGIOUS AUTHORITY

Inevitably, jurors bring their deepest convictions on moral and other matters to jury deliberations. For some jurors, these convictions will in part be religious in nature. Nor are jurors always inclined to, or even capable of, translating their religious and other metaphysical beliefs into terms that count as sufficiently nonmetaphysical, or that are shared by all other jurors.[113]

related effects and other effects of racial diversity on the quality of jury decision making).

[109] *See supra* note 108.

[110] *See* Dennis J. Devine et al., *Deliberation Quality: A Preliminary Examination in Criminal Juries*, 4 J. EMPIRICAL LEGAL STUD. 273, 276 (2007).

[111] *Id.*

[112] *Id.*

[113] For background, see RAWLS, *supra* note 100, at 212–54 (defining the scope and limits of public reason). To some extent, extreme cases can be addressed through jury instructions, voir dire, and the use of peremptory and for cause challenges to prospective jurors. For a useful response to Rawls on religion and public reason, see LENN E. GOODMAN, RELIGIOUS PLURALISM AND VALUES IN THE PUBLIC SPHERE 54–84 (2014); *see also* CHRISTOPHER J. EBERLE, RELIGIOUS CONVICTIONS IN LIBERAL POLITICS 141–50 (2002); ROBERT AUDI, RELIGIOUS COMMITMENT AND SECULAR REASON 90 (2000); Jeremy Waldron, *Isolating Public*

The sheer impossibility of effectively requiring jurors to check their deepest convictions at the jury room door means that some distinction between appropriate and inappropriate recourse to religious beliefs by jurors should be drawn. Finding all juror speech that is somehow informed, at some level, by religious beliefs to be legally inappropriate is plainly unrealistic. But this leaves open a number questions such as the propriety of a juror's quoting, accurately or not, from religious texts, or paraphrases thereof.

If it is unrealistic to distinguish among all such knowing or perhaps unknowing oral references by jurors, a legal line might then be drawn at, say, the mere physical presence of a Bible or comparable religious text, at least in printed form,[114] in the jury room.[115] Or the courts might seek to draw the line of legal permissibility between the mere presence of a Bible, and the actual use of a Bible.[116]

As it turns out, though, there is some evidence that the mere physical presence of a Bible in the jury room may not itself be without some influence.[117] But for our purposes herein, we can

Reasons, *in* RAWLS'S POLITICAL LIBERALISM 113, 124–35 (Thom Brooks & Martha C. Nussbaum eds., 2015).

[114] Obviously, religious texts are also commonly accessible via any smartphone technology to which jurors retain access.

[115] Such a possible line is considered and rejected in e.g., United States v. Lara-Ramirez, 519 F.3d 76, 87–89 (1st Cir. 2008); Ackerman v. State, 737 So. 2d 1145, 1148 (Fla. Dist. Ct. App. 1999) (citing State v. Hamilton, 574 So. 2d 124 (Fla. 1991)) ("It is clear . . . that the mere presence of a Bible in the jury room during deliberations does not require reversal."), *appeal denied*, 751 So. 2d 50 (Fla. 1999). But courts often try to draw a line between all "external" influences on deliberations, and all "internal" such influences. Consider the jury instruction at issue in *People v. Mincey*, 827 P.2d 388, 425 (Cal. 1992) (barring from the jury room essentially any writing, but allowing "your background, your heritage, your training" to play a role).

[116] *See, e.g.*, Perkins v. State, 144 So. 3d 457, 496 (Ala. Crim. App. 2012) ("[T]he use of a Bible during deliberations constitutes an external [and therefore presumptively improper] influence on the jury."), *cert denied*, 144 So. 3d 457 (Ala. 2014). *But cf.* Robinson v. Polk, 438 F.3d 350, 363–64 (4th Cir. 2006) ("[T]he reading of Bible passages invites the listener to examine his or her own conscience from within, [and thus] is not an 'external' influence."), *reh'g denied*, 444 F.3d 225 (4th Cir. 2006), *cert denied*, 549 U.S. 1003 (2006). The decision also declined to distinguish between reading from the text of a Bible and quoting the Bible from memory.

[117] *See* Monica K. Miller et al., *Bibles in the Jury Room: Psychological Theories Question Judicial Assumptions*, 39 OHIO N.U. L. REV. 579, 604 (2013) ("[O]bjects in one's immediate environment can influence behavior."). More broadly, see NISBETT, *supra* note 14, at 34–49 (on the often unrecognized power of seemingly inconsequential elements of one's situation or circumstances).

profitably focus on more overt cases, in which possible effects on broad epistemic peerhood are more conspicuously implicated.

Thus it has been observed, for example, that "[s]ome jurors may view biblical texts like the Leviticus passage . . . as a factual representation of God's will. . . . [and] as a legal instruction, issuing from God, requiring a particular and mandatory punishment for murder."[118] Invoking, preemptively, a purportedly universally binding divine commandment clearly raises various questions of epistemic peerhood.

In particular, a juror's overt assertion of a divine revelation with regard to defendant guilt or innocence,[119] as distinct from, say, merely generally consulting her conscience, is problematic from the standpoint of epistemic peerhood. A particular juror's settled determination that divine law should override any conflicting civil law[120] only heightens the importance of the epistemic peerhood issues thereby raised. How is such a juror to react to the contrary views of other jurors? How could such a juror take conflicting views seriously? We might refer to these sorts of cases as involving a preemptive "religious override."

The problem is thus that a juror's invoking a supposed infallible, divinely ordained resolution to a case, civil law to the contrary, implies a preemptive denial of relevant epistemic peerhood to one's fellow jurors, and perhaps a denial of any meaningful epistemic status at all to distinctly skeptical jurors. The realistic possibility of relevant persuasion by skeptical fellow jurors is apparently already ruled out. The otherwise reasonable relevant reflections of such fellow jurors cannot, generally, matter.

It is assumed by some current philosophers that basic religious disputes in general only rarely involve genuine epistemic peerhood, let alone mutually acknowledged epistemic peerhood.[121] In part, this may be a matter of religious believers

[118] People v. Harlan, 109 P.3d 616, 632 (Colo. 2005).

[119] *See* Young v. State, 12 P.3d 20, 48–49 (Okla. Crim. App. 2000) (citing State v. DeMille, 756 P.2d 81 (Utah 1988)) (finding no "outside influence sufficient" to taint the jury verdict).

[120] *See* Oliver v. Quarterman, 541 F.3d 329, 333 (5th Cir. 2008) (finding an external and improper influence on the jury, but no cognizable prejudice to the defendant therefrom), *cert. denied*, 556 U.S. 1181 (2009).

[121] *See, e.g.*, Nathan L. King, *Religious Skepticism and Higher-Order Evidence*, *in* 7 OXFORD STUDIES IN THE PHILOSOPHY OF RELIGION 126, 130 (Jonathan Kvavig ed., 2016) (noting that typical cases of religious disagreement are not cases of peer

and nonbelievers fundamentally disagreeing as to what can properly count as meaningful evidence, or as sound and permissible reasoning, from one's premises to a conclusion.[122] We need not take a stand either way on such a broad dispute. It is still possible for us to argue that epistemic peerhood can exist and can be mutually acknowledged between religiously-minded and secularly-minded persons on important legal issues.[123]

There are important differences between broadly political and law-related discussions in the public square, and the much narrower context of the proper functioning of particular civil and criminal juries. For many religious and metaphysical believers, the most important broad goal is to obtain what we might call "epistemic accreditation," or meaningful access as widely acknowledged peers to the public square and the broad debates therein, without any need to crucially distort their message. The crucial goal is thus often the opportunity to make a dialogic contribution to ongoing general public discussion, rather than, even by implication, to impeach or deny the epistemic competence and peerhood of one's more secular or less metaphysically-oriented fellow speakers.

The jury cases noted above thus present crucially different concerns in an importantly different context.[124] If one believes, as a juror, in one's distinctive access to specific and binding instructions from a source one unshakeably takes to be infallible, such as to override any contrary perspective, then one simply cannot regard some or many of one's fellow jurors as epistemic peers.[125] One can wish them well, empathize with them, respect them as persons, or patiently listen with mere curiosity or for some other extrinsic reason. But the latter such jurors cannot, on one's own assumptions, be rightly recognized in this context as one's epistemic peers.

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disagreement); *see also* James Kraft, *How Common Are Epistemic Peers in Religious Disagreement? Nathan King's Talk at Recent Conference*, PHIL. RELIGIOUS KNOWLEDGE (May 30, 2012), www.philosophical-religious-knowledge.com/2012/05/30/epistemic-peers; Wald, supra note 53, at 115–16.

[122] *See supra* note 121.

[123] *See* Robert Audi, *Religious Reasons and the Liberty of Citizens: The Integration of the Religious and the Secular in Kent Greenawalt's* Religion and the Constitution, 25 CONST. COMMENT. 249, 255 (2008).

[124] *See supra* notes 115–120 and accompanying text.

[125] *See supra* notes 115–120 and accompanying text.

Crucially, the legal system in return cannot generally validate and accommodate such a denial of epistemic peerhood to some or most of one's fellow jurors. An individual juror may believe that a specific divine command—bearing overriding epistemic authority—requires that the otherwise applicable civil law be overridden.[126] But the civil law cannot, without paradox, ordain that the civil law itself be thus overridden within the jurisdiction it claims. Even the phenomenon of principled, perhaps equal protection-based, jury nullification is, in this sense, within the contemplation of the broad legal system.[127]

Whether the law chooses to regard juror reliance on purported divine revelation as "internal" or "external" to the jury deliberation,[128] the law can hardly choose to validate jury deliberative processes that explicitly set aside the civil law in all its breadth and scope. Legal decisions, including decisions as to defendant guilt or innocence and punishment, may inevitably incorporate moral, metaphysical, and even, in a loose sense, religious elements.[129] But legal decision making can hardly, as a matter of due process and logic, simply default, within its own sphere, to a fundamental rejection of civil law.

The value of broad, inclusive epistemic peerhood is, in the "religious override" cases, thus reinforced by the most elemental considerations of due process, fair trials, and the rule of law. As one court has concluded, "In pluralistic America, the jury room must remain a place of common ground firmly rooted in law."[130]

Beyond the jury context, we now turn to the importance and value of a similarly broad, encompassing, inclusive approach to acknowledging epistemic peerhood in the campus affirmative action and diversity cases referred to immediately below.

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[126] *See supra* note 120 and accompanying text.

[127] For background, see Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 705, 715 (1995).

[128] *See supra* notes 115–120.

[129] Consider the overlap, or the reinforcing effects, of civil and religious prohibitions of murder, theft, perjury, and other societal harms, as distinct from esoteric religious dogmas. For an extended defense of the incorporation of moral considerations into law, see RONALD DWORKIN, LAW'S EMPIRE 225–75 (1986).

[130] Robinson v. Polk, 444 F.3d 225, 227 (4th Cir. 2006) (Wilkinson, J., concurring). A proper epistemic regard for one's fellow jurors' insights is linked to the rule of law and to specific constitutional rights, including Fifth and Fourteenth Amendment procedural due process rights and Sixth Amendment fair trial rights.

IV. EPISTEMIC PEERHOOD IN THE CONTEXT OF CAMPUS AFFIRMATIVE ACTION AND DIVERSITY

The college campus environment presents distinctive possibilities for changes of one's perspective. Minds are, in general, more open to change "when individuals find themselves in a new environment, surrounded by peers of a different persuasion."[131] This possibility, among others, is recognized in the major United States Supreme Court judicial cases addressing issues of campus affirmative action and diversity.

Thus, in the well-known *Grutter v. Bollinger* law-school-admissions case, the Supreme Court recognized that "classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds."[132] More recently, the Court has endorsed a university admissions goal of seeking "to provide an academic environment that offers a robust exchange of ideas, exposure to differing cultures . . . and acquisition of competencies required of future leaders."[133]

In connection with these legal cases, scholars have suggested that campus discussions involving persons of different races and different experiential backgrounds, and thus often of different perspectives and judgments, can "produce the most careful thinking."[134] As well, "[s]tudents learn more and think in deeper, more complex ways in a diverse educational environment."[135]

These upgrades in the quality of class and campus discussion are neatly analyzable under the rubric of either acknowledging, or denying, epistemic peerhood to fellow students and to

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[131] HOWARD GARDNER, CHANGING MINDS: THE ART AND SCIENCE OF CHANGING OUR OWN AND OTHER PEOPLE'S MINDS 62 (2004). Professor Gardner refers specifically to the college campus environment. *See id.*

[132] Grutter v. Bollinger, 539 U.S. 306, 330 (2003) (internal quotations omitted).

[133] Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2211 (2016) (internal quotations omitted).

[134] *Expert Report of Kent D. Syverud*, U. MICH. ADMISSIONS LAWSUITS, http://diversity.umich.edu/admissions/legal/expert/syverud.html (last updated Sept. 5, 2012).

[135] *Expert Report of Patricia Gurin*, U. MICH. ADMISSIONS LAWSUITS, http://diversity.umich.edu/admissions/legal/expert/theor.html (last updated Sept. 5, 2012); *see also* Anthony T. Kronman, *Is Diversity a Value in American Higher Education?*, 52 FLA. L. REV. 861, 875–76 (2000) (describing a class of students with diverse background experiences and perspectives as "a more fertile ground to cultivate the liberal aptitudes" and as more likely to better develop the "student's imaginative powers").

prospective students. These processes of acknowledging or denying epistemic peerhood operate first at the university or institutional level, including through university admissions policies, and then at the level of teacher-student, inter-group, and student-to-student interactions.

Thus, typical forms of racism—whether institutional or personal, overt or subconscious, subtle or crude, malicious or paternalistic—amount to unjustifiable denials of epistemic peerhood in the relevant respects. Such denials are analyzable in terms of the various distinct approaches to epistemic peerhood briefly catalogued above.[136]

For example, a student from a middle-class background might rightly conclude that students from working-class or poverty-associated backgrounds will tend not to have literally the same sorts of experiences, encounters, observations, perspectives, and inferences as that middle-class student. So if we choose, improperly, to define epistemic peerhood in terms of as having the same experiences, and the same experience-processing capacities, as another person,[137] then an unjustified denial of epistemic peerhood, in the relevant respects, will follow.

But for our purposes, there is no reason to adopt such an arbitrarily and unrealistically narrow understanding of the requirements of epistemic peerhood. It would instead be an improvement, in our legal context, to focus not on sameness, but on some version of equality of background experiences and experience processing-capacity.[138]

The idea of precise equality of background evidence, experiences, and processing capacities may be, unavoidably, a remarkably complex inquiry, diminishing its realistic usefulness. Some of the complexity can be reduced by focusing, more usefully, not on any version of precise epistemic equality, but instead on something like rough equality,[139] or on practical epistemic equality for the similarly practical purposes at hand.[140]

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[136] See *supra* notes 51–55 and accompanying text.

[137] *See supra* note 52.

[138] *See supra* note 53.

[139] *See supra* note 54.

[140] For a crude, or at least an openly pragmatic, version of rough interpersonal equality as the basis for important political inferences, see HOBBES, *supra* notes 19–21 and accompanying text.

But in truth, even the idea of rough or approximate equality as the criterion for epistemic peerhood again may not quite capture our best sense of the relevant epistemic differences. Do we wish to say, precisely, that the relevant background experiences of persons who have grown up in material poverty and those who have not, or of those who have been subject to chronic discrimination and those who have not, are roughly equal, in some genuinely quantitatively measurable sense, even with some specified margin of error? Would we not thereby pretend to some degree of neutral and objective measurability that is really not available?

More appropriate, and with equal or better implications for the case for broad, encompassing, inclusive epistemic peerhood, would be a focus instead on what we have called the realistic noncomparability, or incommensurability, of relevant background experiences.[141] Such a partial incomparability of experiences is then set in a largely uncontroversial and more basic presumption, on one theory or another, of the underlying more fundamental equality of all persons.[142]

Consider, by way of loose analogy, that we might want to say that a certain kind of wisdom and a certain kind of benevolence are not quantitatively of equal value, or even of roughly equal value, but instead both of great, but incommensurable, value. Or, more concretely, we might not want to say that a particular sculpture and a particular musical composition are quantitatively equal, or even nearly equal, in artistic value, but instead that their individual great values cannot be put on some neutral, objective, common numerical scale.

In the case of the noncomparable virtues, and of the noncomparable works of art, our sense of noncomparability on any objective common scale need not and should not leave us in a position of epistemic skepticism. We need not be left with arbitrariness. The much better justified approach is instead to apply our admittedly limited human capacities for empathy, humility, sensible judgment, and imagination.[143] We may then be more open to the possibility that our own experiences and those of our neighbors with regard to, say, local police practices,

[141] *See supra* notes 55, 62–64 and accompanying text.

[142] See the substantial literature referred to in Wright, *Equal Protection and the Idea of Equality*, *supra* note 61, at 45–53.

[143] *See supra* notes 55, 62–64 and accompanying text.

public bureaucracies, court systems, credit agencies, lessors, employment opportunities, physical safety, sales practices, or health care access and treatment may not be the same, and, crucially, that our own experiences and perceptions may not be uniquely legitimate or valuable.

This inclusive approach to epistemic peerhood then specifically supports various forms of campus pluralism and diversity as contributing to better, and more informed, discussion, debate, and broad problem solving. We shall see that research suggests, for example, that enhanced quality of group decision making, in our various legal contexts, need not take the form of the providing of utterly new ideas by diverse group members. In many instances, a relatively subtle, ongoing, perhaps awkward, discussion process instead unfolds. In this process, diverse group members often inspire a greater degree of group deliberative openness, innovation, conscientiousness, greater information exchange, and thoroughness in examining the range of interpretations and perspectives, thoughtfulness, and generally more defensible deliberative outcomes.[144] Such a process requires the meaningful acknowledgement of and epistemic respect for persons of different experiential backgrounds and perspectives.[145]

To some degree, an open, inclusive, and expansive approach to recognizing those with different experiential backgrounds as epistemic peers tracks the basic idea of the "wisdom of crowds" and the more specifically developed literature on even more effective group decision making.[146] From that literature, we appreciate that in many problem-solving contexts, a group of

[144] *See* Katherine W. Phillips, *How Diversity Makes Us Smarter*, SCI. AM. (Oct. 1, 2014), www.scientificamerican.com/article/how-diversity-makes-us-smarter. These effects are not in the slightest confined to discussions of what one would think of as distinctly racial substantive issues. *See, e.g.*, *Better Decisions Through Diversity*, KELLOGG INSIGHT (Oct. 1, 2010), https://insight.kellogg.northwestern.edu/article/better_decisions_through_diversity; *see also* Anthony Lising Antonio et al., *Effects of Racial Diversity on Complex Thinking in College Students*, STAN. U. (2004), http://web.stanford.edu/~aantonio/psychsci.pdf (last visited Feb. 15, 2018). More broadly, see Michel Zaitouni & Amani Gaber, *Managing Workforce Diversity from the Perspective of Two Higher Education Institutions*, 18 INT'L J. OF BUS. MGMT. (2017). These effects can to one degree or another be affected by how the decision-making group is externally managed. *See* Fernando Martin-Alcazar et al., *Effects of Diversity on Group Decision-Making Processes: The Moderating Role of Human Resource Management*, 21 GROUP DECISION & NEGOT. 677 (2012).

[145] *See* Phillips, *supra* note 144.

[146] *See supra* notes 41–43 and accompanying text.

diverse, independent, conflicting, contrarian, and dissenting persons is often likely to outperform a small group of presumably epistemically elite experts.[147] Again, self-identified minority or dissenting contributors may be of even greater value than merely independent-minded persons in improving group decision making.[148]

In particular, in some cases, additional group decision-making accuracy can be gained not by considering anyone's degree of confidence in their own judgments, but by giving weight to a somewhat different consideration.[149] Additional accuracy can sometimes be had by giving some additional weight to the judgments of persons who believe that their own best judgments are not likely to correspond to the judgment of the group's numerical majority,[150] especially where such modest judgments turn out nonetheless to be more popular than their holders had expected.[151] This partly reflects the more basic fact that on many questions, some subgroups will have distinctive, legitimate insights that they reasonably do not expect to be widely shared, or held by a numerical majority.[152]

The example the study authors in question actually refer to involves naming the capital of Pennsylvania.[153] As it happens, typically, more people will answer "Philadelphia," incorrectly, than will answer, correctly, "Harrisburg."[154] The basic point is that people who answer "Philadelphia" will tend to assume that most other respondents will give the same answer. In contrast, the limited number of persons whose own answer is "Harrisburg" will tend, understandably, to anticipate that a substantial percentage of persons will make the mistake of choosing the much larger, more famous city of Philadelphia.[155] Thus, in part the contrast between one's own judgment based on one's own

[147] *See supra* notes 41–43 and accompanying text.

[148] *See supra* note 43.

[149] *See* Dražen Prelec et al., *supra* note 43, at 533.

[150] *See id.*; Peter Dizikes, *Better Wisdom from Crowds*, MIT NEWS (Jan. 25, 2017), http://news.mit.edu/2017/algorithm-better-wisdom-crowds-0125. Consider, for example, the case of a small group of people who believe, correctly, that Carson City, Nevada is west of Los Angeles, but who also believe that many people would not agree.

[151] *See supra* notes 149–150.

[152] *See supra* notes 149–150.

[153] *See* Dizikes, *supra* note 150.

[154] *See id.*

[155] *See id.*

special knowledge and experience, and one's sense that not many others, lacking that knowledge and experience, will concur in one's own judgment, adds especially distinctive weight and value to that judgment.

This further refinement, beyond the independence and especially the contrariness of one's perspective, has implications for the extension of epistemic peerhood in the campus affirmative action and diversity contexts.[156] In many important contexts, the lived experiences, inferences, memories, and judgments of many minority students will tend to be distinctive, in the sense of being not widely shared or vividly envisioned by many nonminority students. And in many such cases, the relevant minority group members will tend also to believe that their experiences will not be credited by large numbers of nonminorities.[157]

Crucially for our current purposes, such experiential minorities tend to amount as well to a distinct numerical minority on campus. A relevant campus issue discussion thus tends to place minority group, and numerical minority discussants, with distinctive, largely-unshared, experiences, in a distinctively valuable epistemic position.[158]

Doubtless the lived experiences of nonminority students in general are in themselves generally equally valid and legitimate. But a substantial number of such majority students will also tend to assume that their basic experiences and inferences therefrom will be mainstream, and relatively broadly shared, at least by a numerical majority.[159] Their own perspectives, however legitimate, may thus tend to contribute less to further enhancing the quality of the basic "wisdom of crowds" decision-making process.[160] This effect constitutes yet a further reason for a broad, expansive, inclusive sense of epistemic peerhood in the contexts of campus affirmative action and diversity.

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[156] *See supra* notes 41–43.

[157] *See, e.g.*, Richard Tapia & Cynthia Johnson, *Minority Students in Science and Math: What Universities Still Do Not Understand about Race in America*, *in* DOCTORAL EDUCATION AND THE FACULTY OF THE FUTURE 123 (Ronald G. Ehrenberg & Charlotte V. Kuh eds., 2009); EVE FINE & JO HANDELSMAN, WISELI, BENEFITS AND CHALLENGES OF DIVERSITY IN ACADEMIC SETTINGS, (2d ed., 2010) https://wiseli.engr.wisc.edu/docs/Benefits_Challenges.pdf.

[158] *See supra* notes 149–150 and accompanying text.

[159] *See* Dizikes, *supra* note 150.

[160] *See supra* notes 41–43, 149–150 and accompanying text.

The case for an expanded sense of epistemic peerhood in campus discussion contexts operates crucially at individual, group, and institutional levels.[161] A broad acknowledgement of epistemic peerhood at institutional levels may encourage individual reassessments of who should count as one's epistemic peer as well. But there is also a more direct responsibility for all individuals, based on the available evidence and on considerations of fairness, to take the initiative in reexamining and expanding, where appropriate, their sense of who should count as an epistemic peer.[162]

As our final illustrative legal context, we briefly consider below the appropriate scope of acknowledged epistemic peerhood in the distinctively different, but certainly important, context of decision making by administrative agencies and by courts reviewing agency decision making.

V. EPISTEMIC PEERHOOD IN THE CONTEXT OF JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY DECISION MAKING

Many issues associated with the relationships between administrative agency actors and reviewing courts cannot be reduced to questions of epistemic peerhood. But administrative law issues increasingly involve remarkable subtlety and complexity of either a legal or a technical policy-making nature.[163] Questions of epistemic peerhood, actual and acknowledged, between judges and administrative agency actors have therefore taken on correspondingly increased importance.

Assumptions as to judicial and agency epistemic peerhood pervade the various contexts, and the corresponding judicial tests, of administrative agency decision making. The substance, and the outcome, of any epistemic comparison between agency decision makers and reviewing courts will, of course, vary with the context and the judicial test applied. Epistemic comparisons of agency decision makers and judges arise within the scope of any particular judicial test, as well. Questions of the scope and

[161] *See supra* notes 132–135 and accompanying text.

[162] For a broad endorsement of active, reflective, critical self-awareness and a willingness to make corrective adjustments in attitudes that may in part reflect negative group prejudice, see MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 91–92 (2007).

[163] *See* Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 865 (1984) (stating that the complexity and scientific nature of often divisive policy issues as one of the reasons for the need to give great deference to the decisions of administrative agencies).

limits of epistemic peerhood thus recur within and between each of the familiar legal tests that affect the scope and weight of decision-making authority exercised by judges and administrative agency actors.[164] We see these questions of epistemic peerhood played out more concretely in the typical judicial review scenarios referred to below.

The best-known context in which such epistemic peerhood issues arise is probably *Chevron* deference cases.[165] In appropriate cases, *Chevron* calls for substantial judicial deference to agency decisions.[166] This deference is not simply a reflection of a congressional desire for such deference, but partly a judicial and even a congressional acknowledgement of the epistemic peerhood, if not the epistemic superiority in a given context, of agency decision makers, even in some cases of empirical uncertainty.

Chevron itself involved interpreting vague statutory language in an area of technical and policy-consequence complexity. The path toward optimal air pollution reduction was disputable, even with partisan politics and interest group maneuvering somehow set aside.[167] Reasonable policy disputes flourished, even among relevant experts of various sorts.[168] In such a case, we obviously cannot say that judges should acknowledge a nonexistent agency policy conclusion that is uncontroversial among all agency experts. But a reasonable epistemic humility[169] counsels, in such cases, an awareness on the part of reviewing judges that they may genuinely understand relatively little of a relevant technical nature.[170] Or, that they may know just enough to be unintentionally arbitrary themselves, if not dangerous, in failing to defer to those

[164] *See id.* at 865–66 (discussing the relative weights of authority to be given to decisions made by administrative agencies, Congress, and the Judiciary).

[165] *See id.* at 842–45.

[166] *See id.* at 844.

[167] *See id.* at 847.

[168] *See id.* at 863–65.

[169] *See supra* notes 16–17 and accompanying text.

[170] *See* Ethyl Corp. v. EPA, 541 F.2d 1, 66 (D.C. Cir. 1976) (en banc) (Bazelon, J., concurring) ("[I]n cases of great technological complexity, the best way for courts to guard against unreasonable or erroneous administrative decisions is not for the judges themselves to scrutinize the technical merits of each decision," as opposed to judicially requiring appropriately careful agency procedural steps in decision making), *cert denied*, 426 U.S. 941 (1976).

administrative agency actors.[171] It is those agency actors who are most likely to eventually develop a more securely justified policy in the future, if they are left with appropriate experimental discretion.[172]

Thus, *Chevron* deference is in some measure a matter of contextualized differences between courts and agency personnel in what is thought to be relevant accumulating experience and expertise,[173] if not in the actual current possession of likely right answers.[174] Thus, for example, even where a court has held an agency interpretation of a statutory phrase to be reasonable but not legally required, a later and quite different agency interpretation of that same statutory phrase will, understandably, generally control over the judicial determination of the reasonableness of the prior, now revised agency interpretation of the statute.[175]

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[171] *See id.* at 66–67 ("[S]ubstantive review of mathematical and scientific evidence by technically illiterate judges is dangerously unreliable . . . ."). *Cf. id.* at 68 (Leventhal, J., concurring) ("Our present system of review assumes judges will acquire whatever technical knowledge is necessary as background for decision of the legal questions."). Of course, this latter approach may in some cases involve a touch of epistemic arrogance. By contrast, see sources cited *supra* notes 16–17, 70.

[172] *See Ethyl*, 541 F.2d at 67 (Bazelon, J., concurring).

[173] For a clear example, see Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191, 2196–97 (2014) (involving a particularly complex statutory scheme involving foreign affairs). *See also* FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 232 n.30 (2009) (describing the justifications for *Chevron*'s holding based on agency technical expertise and "conservation of scarce, expensive judicial resources"); Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1075 (2016) (noting arguments bearing upon agency technical expertise as well as political accountability). Actually, though, the precise issue may often not be one of the "absolute" advantage of agencies over courts, but the more technical "comparative" advantage of either. *See* R. George Wright, *At What Is the Supreme Court Comparatively Advantaged?*, 116 W. VA. L. REV. 535, 538 (2013) [hereinafter Wright, *At What Is the Supreme Court Comparatively Advantaged?*].

[174] Where the issue is not so much the reasonableness of an agency's interpretation of an ambiguous statutory phrase, but of choosing among possible responses to a more free-floating perceived social problem, the courts may similarly defer to evolving agency experience, if not to demonstrable agency expertise. *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513, 515 (2009) (regarding an agency's policy change from a "fleeting expletive" safe harbor rule to a more contextualized approach, the agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one") (emphasis in original).

[175] *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005). This policy also serves the further value of an agency-controlled, centralized, national uniformity of interpretation of the particular statutory language, as distinct from different and conflicting interpretations in different federal circuits.

On the other hand, classic *Chevron* deference[176] may not be granted, or may be judged insufficient to validate an agency's judgment, when an agency's claim to epistemic superiority seems to the reviewing court to be dubious, as in cases of an agency's supposed failure to attempt to explain some policy change,[177] or in cases of unexplained apparent agency irrationality in interpretation,[178] or in cases involving policy questions of unusual breadth and importance that do not fall uniquely within the scope of the particular agency's expertise.[179] These considerations, too, reflect judicial, if not also congressional, judgments as to the agency's relative epistemic competence.[180]

The importance of perceived relative expertise of agencies and courts is not confined, though, to the *Chevron* deference cases. Whether a reviewing court should apply relatively high level *Chevron* deference or what is often thought of as a somewhat lower level of deference to agency judgments can also sometimes turn on questions of comparative agency expertise and the complexity of the regulatory process.[181]

The most typical form of less expansive judicial deference to agency judgments in these contexts is known as *Skidmore* deference.[182] *Skidmore* deference recognizes that some agency

[176] *Chevron*'s step one, as distinguished from *Chevron*'s step two, does not involve any reference to an agency's interpretation of the statute; the focus instead is on the court's attempt to determine whether Congress somehow indicated a specific, unequivocal, nonoverridable intent on the precise interpretive question at stake in the case. *See* Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842–43 (1984).

[177] *See, e.g.*, Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125–26 (2016) (stating that an unexplained agency interpretive inconsistency is undeserving of *Chevron* deference).

[178] *See, e.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2707 (2015) (declaring the agency's failure, in the particular statutory context, to consider cost factors to be unreasonable under *Chevron* step two and thus undeserving of *Chevron* deference).

[179] *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2488–89, 2483 (2015) (declining to apply *Chevron* deference due to a presumed lack of congressional intent to delegate authority to the IRS to determine the matter at issue, given both the "deep 'economic and political significance' that is central to this statutory scheme," and the presumed fact that "the IRS . . . has no expertise in crafting health insurance policy of this sort").

[180] But note the ambiguity between an agency's "absolute advantage" and the more technical idea of "comparative advantage" in working through a given problem, or type of problem. For background, see generally Wright, *At What Is the Supreme Court Comparatively Advantaged?*, *supra* note 173.

[181] *See* Barnhart v. Walton, 535 U.S. 212, 222 (2002); *see also* Fox v. Clinton, 684 F.3d 67, 78 (D.C. Cir. 2012).

[182] *See* Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

judgments may be "based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case."[183] Such cases starkly pose issues of epistemic peerhood—or of epistemic superiority and inferiority—between administrative officials and federal judges.

Skidmore, however, then crucially authorizes reviewing courts to consider, in appropriate cases, the apparent thoroughness of the agency's consideration of the matter, the apparent validity of the agency's reasoning, and the apparent consistency or inconsistency of the agency's judgment on the particular matter over time.[184] The court's judgment as to the validity or invalidity of the agency's reasoning crucially depends upon that court's assessment of the presence or absence of their relevant epistemic peerhood with respect to the agency in question,[185] on any judicial sense of appropriate judicial epistemic humility,[186] and finally on any sense of a lack of relevant agency competence or expertise.[187]

Similar epistemic considerations play as well into cases in which a court is reviewing an agency's interpretation not of a congressional statute, but of an agency's interpretation of the agency's own preexisting rule. This is commonly referred to as

[183] *Id.* at 139.

[184] *See id.*

[185] In his account of the relations under *Skidmore* between agencies and courts, Professor Vermeule has used the term "epistemic deference." ADRIAN VERMEULE, LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE 200 (2016).

[186] *See supra* notes 16–17, 70 and accompanying text. For a further sense of the institutional epistemic comparison often licensed by *Skidmore*, see United States v. Mead Corp., 533 U.S. 218, 234 (2001) (under *Skidmore*, "an agency's interpretation may merit some deference whatever its form, given the specialized experience and broader investigations and information available to the agency") (internal quotation omitted); *see also* Christensen v. Harris County, 529 U.S. 576, 587 (2000) (on the judicial obligation to respect agency interpretive judgments, "but only to the extent that those interpretations have the power to persuade") (internal quotation omitted). For a judicial acknowledgement of the value, in some contexts, of administrative day-to-day expertise, see NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 130 (1944). Note also *Hearst*'s distinction between broad legal questions on the one hand and more contextualized, specific questions of applying broad law to distinctive facts on the other, *see id.* at 130–31, as well as the Court's reference elsewhere to the significance of an agency's relying, or not relying, in a given case, on its "experience and peculiar competence," SEC v. Chenery Corp., 318 U.S. 80, 92 (1943).

[187] *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 269 (2006) (granting no judicial deference to the agency even under Skidmore, given the epistemic factors of the administrative actor's "lack of expertise in this area and the apparent absence of any consultation" outside the agency).

Auer deference.[188] Whether to judicially accord *Auer* deference to agency interpretations of their own rules may take into account whether the agency's underlying regulation involves "a complex and highly technical regulatory program, in which the classification of relevant criteria necessarily require significant expertise."[189] *Auer* deference, on the other hand, may not be accorded to an agency interpretation where the court disagrees with the agency on grounds of constitutional or jurisprudential principle,[190] or on some narrower grounds,[191] at least apparently impeaching the epistemic peerhood or the epistemic virtue of the agency in a given case.[192]

In general, and taking all the above contexts into account, courts and agencies generally would be well advised to broadly acknowledge each other's epistemic peerhood within the constraints of the division of labor envisioned by separation of powers principles, and by principles of comparative advantage. This general or presumptive epistemic peerhood of courts and agencies commonly will not take the form of their epistemic sameness,[193] or of their concrete, substantive epistemic equality[194]

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[188] *See* Auer v. Robbins, 519 U.S. 452, 461 (1997)*; see also* Decker v. Nw. Envtl. Def. Ctr. 568 U.S. 597, 613–14 (2013); Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 59 (2011); Chase Bank, USA, N.A. v. McCoy, 562 U.S. 195, 209–10 (2011).

[189] Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (internal quotation omitted).

[190] *See, e.g.*, United Student Aid Funds, Inc. v. Bible, 136 S. Ct. 1607, 1608–09 (2016) (Thomas, J., dissenting) (raising concerns as to possible agency usurpation, insufficient separation of powers, insufficient decisional predictability, and agency arbitrariness).

[191] *See, e.g.*, Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012) (citing, among other grounds for not according *Auer* deference, a judicial judgment that the agency's own judgment is "plainly erroneous" (quoting *Auer*, 461 U.S. at 461) and finding in *Christopher* an unrecognized "unfair surprise" to reasonably relying regulated parties).

[192] It should be noted that issues of judiciary or agency epistemic peerhood can arise as well, even in cases of constitutional procedural due process when the fairness, fact-finding adequacy, or even the comparative cost effectiveness of the agency decision-making process is called into question. *See* Adrian Vermeule, *Deference and Due Process*, Essay, 129 HARV. L. REV. 1890, 1893 (2016). For background, see Mathews v. Eldridge, 424 U.S. 319, 349 (1976). *But see* Forsyth County v. The Nationalist Movement, 505 U.S. 123 (1992) (according far less procedural due process deference to a local agency's parade-permitting practices). Finally, courts will often defer, largely from a sense of epistemic deference, or reasonable epistemic humility, to many agency choices as to whether to proceed by general rulemaking or by successive case adjudication. *See* SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).

[193] *See supra* note 52.

in a given case, or even of rough or approximate equality.[195] Instead, agencies and courts take broad epistemic peerhood in the most interesting form of offsetting realms of relative expertise, and of what we have called epistemic noncomparability or incommensurability.[196]

Thus, the broad epistemic respect owed by agencies and courts to one another is based largely on the noncomparability of their diverse perspectives and experiences and their only partially overlapping realms of relevant and developed expertise. As a first approximation, for example, we should realistically expect administrative agencies to focus more on their own distinct regulatory mission than on how that mission fits with, or is properly limited by, the broader legal and constitutional environment. Dedicated agency experts with a given mission may tend to undervalue broader, big picture considerations. Agency experts may not also be legal generalists. This is where reviewing courts should hold an absolute, and perhaps a comparative, epistemic advantage over even agency experts.[197]

But as we have also seen throughout this Part, agencies may bring evolving substantive expertise to a legal issue that cannot be matched by, or even fully explained to, a generalist reviewing court. Federal courts of appeal must devote most of their attention to matters other than administrative law and related policies. Even when the agency is itself uncertain, at least for the moment, as to some technical or empirical question, judicial epistemic humility, and a division of labor based on epistemic incommensurability, suggest that courts should not typically override even uncertain, but conscientiously derived, agency conclusions.

CONCLUSION

This Article has deployed the somewhat technical idea of epistemic peerhood in the sense, roughly, of persons or groups who deserve, in context, to be considered full members of a decision-making community. The idea of epistemic peerhood illuminates and constructively addresses decision-making pathologies and inefficiencies in many legal contexts. The

[194] *See supra* note 53.
[195] *See supra* note 54.
[196] *See supra* note 55 and accompanying text.
[197] *See supra* note 173.

primary focus herein has been on civil and criminal jury decision making in general and cases of juror recourse to purported divine revelation; campus affirmative action, diversity, and the campus educational process; and the division of authority between administrative agencies and courts that review agency decision making. Reflection on these legal contexts and on the available empirical evidence has suggested that we are typically best advised to adopt broad, encompassing, and inclusive approaches to questions of whom we should recognize, for legal decision-making purposes, as our epistemic peers.