HOLMES, HUMILITY, AND HOW NOT TO KILL EACH OTHER

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Introduction

Justice Oliver Wendell Holmes's dissent in *Abrams v. United States* is one of the intellectual anchors of modern First Amendment doctrine.[1] In that opinion, Holmes sets out two core aspects of his free speech jurisprudence: his pragmatic concern about majoritarian control and his quasi-libertarian preference for the "competition of the market."[2] In the century since *Abrams*, we have witnessed changes in society, technology, and politics that have shaped and reshaped the contours of our First Amendment landscape. But not everything has changed—some aspects of our human experience remain remarkably similar to the context in which Holmes wrote.

One unchanged aspect of the human condition is our inability to know with certainty.[3] Confronted with this reality in his own day, Holmes, at times, gestured toward a foundationless relativism.[4] But even if his larger corpus

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1 *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Holmes's *Abrams* dissent marked a significant shift from his opinion nine months earlier in *Schenck v. United States*, 249 U.S. 47 (1919). *See generally* Thomas Healy, The Great Dissent: How Oliver Wendell Holmes Changed His Mind—and Changed the History of Free Speech in America (2013).

2 *Abrams*, 250 U.S. at 630.

3 I am not suggesting that understandings of epistemology have remained unchanged, only that people generally recognized epistemic limits to certainty in both Holmes's day and our own.

4 For an account of Holmes's pragmatism and its relationship to key aspects of the broader philosophical strands of American pragmatism, see Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 Stan. L. Rev. 787 (1989). For a more critical account that places Holmes's thought closer to nihilism, see Albert W. Alschuler, Law Without Values: The Life, Work, and Legacy of Justice Holmes (2000).

hints toward that direction, his *Abrams* dissent can be read to sketch a less skeptical approach rooted in a kind of epistemic humility.[5] This interpretation enlists Holmes as an advocate for more charitable discourse across deep differences.[6] In today's pluralistic society, acknowledging our lack of certainty can help us move toward better dialogue with one another. At a time when we too often sacralize our own views and condemn our opponents, epistemic humility could help our society avoid escalating from weaponized words to actual weapons. This is no small matter. Holmes knew firsthand the reality of violence, having watched friends die in the Civil War and having himself been wounded three times in battle. We are nowhere close to that kind of violence, but we should not think it unimaginable. As philosopher Alasdair MacIntyre has quipped, "[m]odern politics is civil war carried on by other means."[7] The less we are able to maintain civil dialogue across deep disagreement, the more we may glimpse the possibility of actual violence.[8]

This Article suggests that the kind of epistemic humility we can find in Holmes's *Abrams* dissent provides an important resource for preserving a stable political order. Part I offers a reading of the famous dissent that focuses on the humility underlying Holmes's epistemic claims and explains the implications of this humility for discourse norms. Part II distinguishes epistemic humility from more skeptical views. Part III then applies a lens of epistemic humility to three kinds of truth claims in contemporary discourse: claims whose certainty is not provable (focusing on the example of religious claims), claims whose practical certainty is not yet proven (focusing on the example of medical treatments of transgender children), and claims that are certain to be false (focusing on the example of demonstrable lies).

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5 Like much of Holmes's writing, his *Abrams* dissent displays internal tensions and lends itself to multiple interpretations. JAMES BOYD WHITE, LIVING SPEECH: RESISTING THE EMPIRE OF FORCE 34 n.9 (2006) (describing Holmes's *Abrams* dissent as "marked by tensions—between skepticism and faith, brute power and idealization, tolerance and judgment, dominance and truth—that characterize his work as a whole, calling upon the reader to exercise independent and complex judgment of his or her own"); Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 649, 653 n.9 (1987) (characterizing the dissent as "a mixture of faith and doubt").

6 For my extended views on navigating dialogue across differences, see JOHN D. INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE (2016).

7 ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 253 (3d ed. 2007).

8 *See, e.g.*, JAMES DAVISON HUNTER, BEFORE THE SHOOTING BEGINS: SEARCHING FOR DEMOCRACY IN AMERICA'S CULTURE WAR 4–5 (1994) ("[C]ulture wars always precede shooting wars . . . ." (emphasis omitted)); Melissa Gomez, *Charlottesville Car Attack Suspect Pleads Not Guilty to Federal Hate Crimes*, N.Y. TIMES (July 5, 2018), https://www.nytimes.com/2018/07/05/us/charlottesville-plea-hate-crimes.html (describing white supremacist James Alex Fields Jr., charged with thirty federal charges for hate crimes, one of which involved murdering demonstrator Heather Heyer by ramming his car into her).

I. EPISTEMIC HUMILITY IN HOLMES'S *ABRAMS* DISSENT

Holmes's *Abrams* dissent culminates in a remarkable paragraph that appeals to the "free trade in ideas."[9] The much-discussed market metaphor stems from Holmes's belief that the "experiment" of the First Amendment requires a willingness to see the "ultimate good" in speech-protective norms.[10] In some cases, the commitment to such norms rises above our own substantive convictions, at least enough to constrain our desire to prevail at all costs. Of course, speech-protective norms will not by themselves lead to a healthy society.[11] But Holmes's intuition—at least as I have characterized it here—is that these norms will be a necessary, albeit insufficient, condition for establishing healthy dialogue and protecting dissent in a pluralistic society.

Holmes did not always hold this view. For much of his judicial career, he regarded tolerance as simply out of reach: the solution to political disagreement was to suppress the other side. As Thomas Healy has noted of Holmes: "As a believer in society's right to impose its will on the individual, he thought persecution of dissenters made perfect sense."[12] Healy suggests that Holmes arrived at a different view in his *Abrams* dissent only after a sustained lobbying effort from some of his closest friends, including Judge Learned Hand and Harold Laski.[13] Just months prior to *Abrams*, Holmes had written the majority opinion in *Schenck v. United States*, upholding criminal convictions against a First Amendment challenge under the "clear and present danger" standard.[14] After reading *Schenck*, Hand and Laski set out to convince Holmes he was wrong by pleading their case for tolerance.

Hand led the way, following a chance encounter with Holmes on a train. Writing to Holmes after their meeting, Hand argued for tolerance in light of uncertainty:

> Opinions are at best provisional hypotheses, incompletely tested. The more they are tested, after the tests are well scrutinized, the more assurance we may assume, but they are never absolutes. So we must be tolerant of oppo-

9 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

10 *Id.*

11 *See, e.g.*, RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS?: WHY THE FIRST AMENDMENT SHOULD NOT PROTECT HATE SPEECH AND WHITE SUPREMACY (2018); Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1635 (2015) (arguing that broader free speech protections might have negative consequences, including more deference to governmental decisionmaking and weaker standards for appellate review).

12 HEALY, *supra* note 1, at 21.

13 *See generally id.* at 16–44 (describing Judge Learned Hand's and Harold Laski's persuasive interactions with Holmes prior to his *Abrams* dissent). Patrick Kelley has argued that Holmes's change of mind may have been prompted in part by concern about his reputation among "the intelligent and the informed." *See* Patrick J. Kelley, *The Life of Oliver Wendell Holmes, Jr.*, 68 WASH. U. L.Q. 429, 472–73, 475 (1990) (book review).

14 Schenck v. United States, 249 U.S. 47, 52 (1919).

> site opinions or varying opinions by the very fact of our incredulity of our own.[15]

Healy observes that Hand's letter clarified that "[h]e didn't mean abandoning one's convictions or refusing to fight for one's beliefs."[16] But even with our firmly held convictions, "[w]e should be tolerant of those who disagree with us because there is a chance we are wrong and they are right."[17]

Holmes was not immediately persuaded. He wrote Hand the following week to point out that a lack of certainty is not just true of our beliefs but "is the condition of every act."[18] And yet he believed we all must act in a world without certainty and without "bother[ing] about absolute truth or even inquir[ing] whether there is such a thing."[19] This was the pinnacle of Holmes's pragmatism, which he punctuated with a harsh realism a few sentences later: "When I was young I used to define the truth as the majority vote of that nation that can lick all others."[20]

Holmes shared Hand's letters with Laski shortly thereafter.[21] In an initial conversation with Holmes, Laski expressed a more instrumental view that we protect speech, believing that false or dangerous ideas will be discredited over time.[22] Holmes responded to Laski in a letter following their conversation:

> My thesis would be (1) if you are cocksure, and (2) if you want it very much, and (3) if you have no doubt of your power—you will do what you believe efficient to bring about what you want—by legislation or otherwise.
>
> In most matters of belief we are not cocksure, we don't care very much, and we are not certain of our power. But in the opposite case we should deal with the act of speech as we deal with any other overt act that we don't like.[23]

Holmes's words to Laski forecasted his language in *Abrams*:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that

15 HEALY, *supra* note 1, at 22 (quoting Hand's letter of June 22, 1918).

16 *Id.* at 23.

17 *Id.* at 24 (summarizing Hand's position); *see also* INAZU, *supra* note 6, at 88–90 (exploring similar themes in a discussion of humility).

18 HEALY, *supra* note 1, at 24 (quoting Holmes's letter of June 24, 1918).

19 *Id.* at 25.

20 *Id.*

21 *Id.* at 36. By this time in his career, Laski was immersed in developing his theory of pluralism, which he would subsequently publish as *Authority in the Modern State*. *Id.* at 36, 120.

22 *Id.* at 37. *But see* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (framing free speech as important to social progress, because "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth"); HEALY, *supra* note 1, at 99 (noting John Stuart Mill's defense of free speech as essential because of the fallibility of human judgment).

23 HEALY, *supra* note 1, at 37–38 (quoting Holmes's letter of July 7, 1918).

> you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises.[24]

Taken together, these sentences from *Abrams* suggest that if you are certain of the correctness of your beliefs, it makes perfect sense to crush the other side when you have the power to do so. People will only opt for tolerance in lieu of suppression under one of three conditions: (1) when they think the other side poses no risk of persuading others, (2) when the contested issue is too small to matter, or (3) when they doubt the veracity of their own beliefs or their ability to force others to comply with them.[25]

The first two conditions are conceptually possible but highly unlikely when it comes to the most contentious issues of our day like abortion, LGBTQ rights, immigration, police violence, or gun control. Partisans on both sides of these issues are unlikely to see them as too small to matter. To the contrary, they increasingly claim a "sacred" status for their own perspective: they see a "right way" to view an issue, they refuse to permit even partial disagreement or dissent, and they cast their opponents as morally deficient.[26] Yet even in the face of such heated rhetoric, some people do change their minds, which means these same partisans recognize some risk that opposing speech will persuade others. In other words, neither of Holmes's first two conditions for tolerance seems very plausible: when it comes to the issues that most divide us, we are unlikely to conclude that our speech does not matter, and we are unlikely to decide that the issues are simply unimportant. That leaves only one option under Holmes's framework to lead us toward tolerance: doubt.

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24 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

25 *See id.* In *Abrams*, Holmes shifted from the conjunctive "and" in his letter to Laski to the disjunctive "or" in his list of certainties. The wording change clarifies that people may opt for tolerance when any one of Holmes's three conditions is unmet, as opposed to only when all three conditions are unmet. Note, too, that these three conditions are not the only possibilities. For example, a political theory that values political autonomy either intrinsically (as normatively good) or instrumentally (to facilitate control or stability) might allow citizens to engage in oppositional or false political speech. But when we move from political theory to human nature, Holmes's three conditions cover a good bit of the landscape.

26 *See, e.g.*, Jenna Johnson, *Trump Calls for 'Total and Complete Shutdown of Muslims Entering the United States*,' WASH. POST (Dec. 7, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/ (quoting then-candidate Donald Trump saying that many Muslims have "great hatred towards Americans" and "have no sense of reason or respect for human life" (internal quotation marks omitted)); Dan Merica, *On Women's Health, Clinton Compares Republicans to 'Terrorist Groups*,' CNN (Aug. 28, 2015), https://www.cnn.com/2015/08/27/politics/hillary-clinton-republicans-terrorist-groups/index.html (quoting a speech by candidate Hillary Clinton in which she asserted: "Now, extreme views about women, we expect that from some of the terrorist groups, we expect that from people who don't want to live in the modern world, but it's a little hard to take from Republicans who want to be the president of the United States" (internal quotation marks omitted)).

Holmes intimates two different kinds of doubt in his reference to "your power or your premises."[27] The first kind of doubt is theoretically open to resolution: we may not know whether we have enough power to conquer the opposition, but we could find out by attempting to exert that power. The second kind of doubt is more difficult to settle: we cannot empirically prove the rightness of our moral beliefs.[28]

There is a tendency in some circles to recoil at the latter kind of doubt on the mistaken assumption that it leads inexorably to relativism or nihilism. But not all forms of doubt are the same. For example, Professor Steven D. Smith has distinguished between "strong skepticism" and "weak skepticism" that underpin "an expression of doubt" in modern First Amendment jurisprudence.[29] Strong skepticism, which Smith attributed to scholars like Judge Robert Bork and Professor Martin Redish, questions all forms of knowledge and, in Smith's view, leads to relativism.[30] Weak skepticism is different and nonrelativistic. It acknowledges that "every decision and action, whether private or public, involves the possibility of error" but "does not drive us to despair of the possibility of knowledge."[31] Instead, "while conceding that absolute certainty may be unattainable," weak skepticism insists on "the possibility of knowing some things to a *practical* certainty."[32]

Smith's description of weak skepticism approximates an epistemic humility that warrants subjective confidence in nonrelativistic truth claims.[33] As he notes, it is possible to acknowledge doubt alongside confidence in the

27 *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

28 These two kinds of doubt roughly correlate to the definition of "doubt" at the time Holmes wrote his *Abrams* opinion. *See* 3 THE OXFORD ENGLISH DICTIONARY 616 (1933) (defining doubt as: "1. The (subjective) state of uncertainty with regard to the truth or reality of anything; undecidedness of belief or opinion . . . . b. The condition of being (objectively) uncertain; a state of affairs such as to give occasion for hesitation or uncertainty").

29 Smith, *supra* note 5, at 664 (internal quotation marks omitted).

30 *See id.* at 664.

31 *Id.* at 684–85 (emphasis omitted).

32 *Id.* at 684. Smith argued that both strong and weak skepticism fell short as justifications for First Amendment speech protections, and he offered an alternative rationale grounded in tolerance. *Id.* at 653 ("[M]odern first amendment theory has committed a strategic error by embracing skepticism as a principal rationale for freedom of expression, and . . . such freedom would rest more securely upon a foundation of tolerance which does not depend upon relativism, fallibilism, or skepticism."). Tolerance, for Smith, means "an attitude or policy whereby a person or government permits the expression of particular views, while at the same time believing, perhaps with complete confidence, that such views are false." *Id.* at 700. It rests not "on the fact of fallibility or on the possibility that the other person's opinion might be correct, but rather on the fact that the human good of true belief can be realized only if belief is voluntary." *Id.* at 707 (footnote omitted).

33 To be clear, Smith's article critiqued weak skepticism as a theory of First Amendment jurisprudence, whereas my focus is on the more general question of whether weak skepticism and tolerance can be held together in ordinary discourse.

rightness of one's beliefs.[34] That is, in fact, how most of us live our lives. As the theologian Lesslie Newbigin observes, "[w]e are continually required to act on beliefs that are not demonstrably certain and to commit our lives to propositions that can be doubted."[35]

Holmes's reflections on doubt and certainty in *Abrams* fit within this understanding of epistemic humility.[36] And while his own views were closer to relativism, he at least hints at the possibility of epistemic humility in some of his other writing. The year before his *Abrams* dissent, Holmes published an essay on natural law in the *Harvard Law Review*.[37] There, Holmes offered an oft-quoted but puzzling aphorism: "Certitude is not the test of certainty."[38] Although the words "certitude" and "certainty" are often used interchangeably in casual conversation, Holmes likely meant to signal some sort of contrast. Perhaps a clue to his intended meaning lies in the subtle difference in emphasis of the words. In Holmes's day, like ours, the primary meaning of "certainty" was the fact of what is true in an objective sense. In contrast, "certitude" meant a subjective state of being or an assured conviction of mind.[39] Following this distinction, we might translate Holmes's state-

34 This is what Smith calls "practical certainty." Smith, *supra* note 5, at 684 (emphasis omitted); *cf.* Michael Polanyi, *The Stability of Beliefs*, 3 BRIT. J. PHIL. SCI. 217, 219, 230 (1952) (describing his doubt-tempered belief in science as one which could "never be exhaustively justified by statements of fact," yet remained confident).

35 LESSLIE NEWBIGIN, PROPER CONFIDENCE: FAITH, DOUBT, AND CERTAINTY IN CHRISTIAN DISCIPLESHIP 102 (1995). New Testament scholar C. Kavin Rowe makes a similar observation: "The human condition is such that you have to choose how to live from among options that rule one another out." C. KAVIN ROWE, ONE TRUE LIFE: THE STOICS AND EARLY CHRISTIANS AS RIVAL TRADITIONS 1 (2016). And we make that choice trusting in things unseen: "[W]e wager our lives, one way or the other," because "[w]e cannot know ahead of the lives we live that the truth to which we devote ourselves is the truth worth devoting ourselves to." *Id.* at 258. Rowe elaborates:

> [N]o matter how many criteria we find for living in one way or another, we cannot make them add up to a judgment about a true life before we live it. "Come join!" is not the same as "Test and confirm!" . . . There is really no place on which to stand that could secure us against the need to live one way or another in faith. And so we leap—or don't.

Id. at 257–58.

36 *See generally* Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 14 (explaining that Holmes "displayed an instinctive aversion to assertions of 'absolute' truth"); Grey, *supra* note 4, at 799, 803–04 (describing the pragmatist views generally attributed to Holmes); Smith, *supra* note 5, at 661 (reporting that Holmes "is said to have doubted whether one can be sure that the sum of two plus two is four").

37 Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918).

38 *Id.* at 40. Holmes continued: "We have been cock-sure of many things that were not so." *Id.*

39 The online Oxford English Dictionary defines "certainty" as "[t]hat which is certain; the certain state of matters, the fact, the truth; a certain account." *Certainty*, OXFORD ENG. DICTIONARY, http://www.oed.com/view/Entry/29979?redirectedFrom-certainty& (last visited Jan. 24, 2019). It defines "certitude" as "[s]ubjective certainty; the state of being certain or sure of anything; assured conviction of the mind that the facts are so and so; absence of doubt or hesitation; assurance, confidence." *Certitude*, OXFORD ENG. DICTION-

ment to mean: "One's subjective belief in a truth claim is not the same as the objective truth of that claim." In other words, just because we think we are right—however intensely we believe in our rightness—we may, in fact, be wrong.[40] On the other hand, our subjective belief might also be objectively true.

Elsewhere in his natural law essay, Holmes elaborates on the nature of subjective belief by observing that we often arrive at our most deeply held beliefs through experience:

> What we most love and revere generally is determined by early associations. I love granite rocks and barberry bushes, no doubt because with them were my earliest joys that reach back through the past eternity of my life. But while one's experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else. And this again means scepticism.[41]

Here it is important to observe that Holmes is making an epistemic claim, not an ontological one. Whatever broader claims about transcendence or reality Holmes embraced or rejected elsewhere, they do not fully position his claim here. In context, the skepticism to which he refers (which makes us "able to see") comes closer to admitting a kind of epistemic humility than denying our ability to know truth with confidence or practical

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ARY, http://www.oed.com/view/Entry/30000?redirectedFrom=certitude#eid (last visited Jan. 24, 2019). The 1933 print edition had verbatim definitions. *See* 2 THE OXFORD ENGLISH DICTIONARY 235 (1933) (including the definition of "certainty" as "[t]hat which is certain; the certain state of matters, the fact, the truth; a certain account"); *id.* at 237 (including the definition of "certitude" as "[s]ubjective certainty; the state of being certain or sure of anything; assured conviction of the mind that the facts are so and so; absence of doubt or hesitation; assurance, confidence").

40 Professor Vincent Blasi suggests a similar interpretation when he argues that Holmes is cautioning us to "hold out at least the possibility that prior understandings will be displaced." Blasi, *supra* note 36, at 19. Or, more succinctly: "we might be wrong." *Id.* Other jurists have relied on Holmes's claim in similar fashion. In 1976, then-Justice William Rehnquist invoked Holmes's phrase in an argument against the emerging view of a "living" Constitution. He stated that the moral judgments of individual judges are ultimately uncertain, and because "[c]ertitude is not the test of certainty," those individual judgments cannot exceed "the Constitution and the laws in our society." William H. Rehnquist, Observation, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 704 (1976) (quoting Holmes, *supra* note 37, at 40). Judge Richard Posner has echoed a similar caution: a judge's "unshakable convictions" about the right result may in fact be wrong. Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 13 (1996). Elsewhere, Posner, quoting Holmes, cautions judges to recognize that "[o]ne can feel something very strongly without believing that one's feeling is an adequate basis for constraining other people's behavior." Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1067–68 (2006).

41 Holmes, *supra* note 37, at 41.

certainty.[42] It sets up an argument more social than solipsistic: people hold different views based on how they have been shaped.[43]

We see this socially oriented perspective play out in the passage that follows next in his essay:

> Not that one's belief or love does not remain. Not that we would not fight and die for it if important—we all, whether we know it or not, are fighting to make the kind of a world that we should like—but that we have learned to recognize that others will fight and die to make a different world, with equal sincerity or belief.[44]

In other words, our differences really do matter, and our beliefs and loves feel right to us. But recognizing that we are all in some sense "fighting to make the kind of a world that we should like" need not deepen our divisions; to the contrary, it might be the first step toward greater empathy arising from a shared humanity.

For Holmes, the possibility of empathy begins by recognizing that our deeply held moral beliefs share some affinities with far more mundane preferences:

> Deep-seated preferences can not be argued about—you can not argue a man into liking a glass of beer—and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way. But that is perfectly consistent with admitting that, so far as appears, his grounds are just as good as ours.[45]

A skeptical interpretation of this passage might see Holmes embracing a full-throated moral relativism: deeply held ethical claims are mere "preferences" and people with contrary views ground those views in premises "just as good as ours."[46] And, in fact, there is a way to move from such an interpretation to a pessimistic and brittle political theory, what Professor Robert Gordon has characterized as the "bleakly skeptical foundations of [Holmes's] general outlook, according to which law and rights were only the systems imposed by force by whatever social groups emerged as dominant in the struggle for existence."[47] On balance, Holmes's overall thought may indeed lead to these dark conclusions. But there is at least a hint of empathy—and

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42 At Holmes's writing, the word connoted both "the opinion that real knowledge of any kind is unattainable" and "doubt or incredulity as to the truth of some assertion or supposed fact." *Scepticism*, VIII A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES, pt. II, at 202 (Sir James A.H. Murray ed., 1914).

43 Paul Griffiths advances this kind of argument against more recent natural law formulations. Paul J. Griffiths, *The Nature of Desire*, FIRST THINGS (Dec. 2009), https://www.firstthings.com/article/2009/12/the-nature-of-desire.

44 Holmes, *supra* note 37, at 41.

45 *Id.*

46 *Id.*

47 *Introduction* to THE LEGACY OF OLIVER WENDELL HOLMES, JR. 1 (Robert W. Gordon ed., 1992); *see also* ALSCHULER, *supra* note 4.

epistemic humility—in his *Abrams* dissent that points in a different direction.[48]

II. Epistemic Humility Without Skepticism

Holmes famously quipped that "[t]he life of the law has not been logic; it has been experience."[49] He elaborated:

> The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.[50]

These perspectives do not suggest an open-ended pragmatism; in fact, they might be better analogized to a tradition-based understanding of meaning.[51] Of course, to claim Holmes as a traditionalist would surpass even his most hagiographic biographers.[52] But the contrast between pragmatism and traditionalism is nevertheless useful for situating the idea of epistemic humility in *Abrams*.[53]

Professor Alasdair MacIntyre has argued that all human knowledge should be understood through the lens of tradition, by which he means "an historically extended, socially embodied argument."[54] MacIntyre elaborates that "the history of a practice in our time is generally and characteristically

48 *See* Abrams v. United States, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting); *see also* Blasi, *supra* note 36, at 23 ("Holmes was indeed a skeptic by temperament and self-training. But he was not a cynic or nihilist or disengaged agnostic. The operational skepticism that is integral to the scientific method bears little resemblance to the skepticism of cynical withdrawal. That difference is of the essence in trying to understand Holmes's thought in general and his views about free speech in particular. He did not treat ideas, his own or those of others, as trivial playthings. To the contrary, he believed that forming and defending strong opinions—not just self-serving preferences—is the stuff of life." (footnote omitted)).

49 Oliver Wendell Holmes, Jr., The Common Law 1 (Boston, Little, Brown & Co. 1881).

50 *Id.*

51 *See* Grey, *supra* note 4, at 807 ("Law is 'a reaction between tradition on the one side and the changing desires and needs of a community on the other.' To identify law with experience is to treat it as 'policy coupled with tradition.'" (footnote omitted)).

52 *See* Alschuler, *supra* note 4, at 181–86 (tracing "The Beatification of Oliver Wendell Holmes").

53 My hunch is that Holmes's explicit attention to history within his pragmatism is why a traditionalist like Professor H. Jefferson Powell, *infra* notes 59–62 and accompanying text, can find some resonances with him.

54 MacIntyre, *supra* note 7, at 222. Neopragmatist understandings of knowledge come closer to MacIntyre's account than do earlier formulations of pragmatism. *See* Grey, *supra* note 4, at 798 ("Whereas older accounts of pragmatism emphasized its instrumentalism, the distinctive feature of recent reinterpretations of pragmatism is to give equal significance to its contextualist thesis—the idea that thought is essentially embedded in a context of social practice."). A key difference between MacIntyre's traditionalism and neopragmatism is that the former accommodates and perhaps depends upon a teleology while the latter does not require a telos that constrains action.

embedded in and made intelligible in terms of the larger and longer history of the tradition through which the practice in its present form was conveyed to us."[55] Traditions are the "context" into which we are all born.[56]

The problem that any pluralistic society confronts is that people living within the polity inhabit different traditions. A Muslim and an atheist may shop at the same Whole Foods, but they disagree about fundamental matters. When it comes to the issues that divide us, we have no "shared moral first principles."[57] And we come to understand the meaning of words and ideas from within our respective traditions.[58]

When these understandings produce conflicting moral assertions, we are left with the high-stakes challenge of arbitrating meaning across different traditions. And if we fail to meet that challenge, we will find ourselves in what Professor H. Jefferson Powell has called "a wasteland of incommensurable moral assertions."[59] Powell suggests that American constitutionalism offers a way to avoid the wasteland. Constitutional law will not overcome all of our translation challenges because its "central function is to provide a means of resolving political conflict that accepts the inevitability and persistence of such conflict rather than the possibility of consensus or even broad agreement on many issues."[60] But that imperfect solution is preferable to the alternative of censoring opposition.

Powell characterizes Holmes's *Abrams* dissent as "perhaps the most famous statement" of American constitutionalism's wager "that American society is not MacIntyre's wasteland."[61] In other words, different moral traditions can coexist within the same polity if we create and sustain the possibility of listening to one another across our disagreements. This kind of listening requires a shared commitment to an ongoing effort toward mutual understanding by "men and women of civility acting in good faith."[62] That commitment does not presume that all beliefs are equally valid or morally harmless, nor does it assume that truth is beyond our reach. But our mode of engagement with one another matters—our proceduralism must reflect the substantive values of trust and good faith. And it is here that we return to the importance of epistemic humility. Opening the space for tolerant listening to opposing viewpoints gives us the opportunity to live with our differences as we seek to resolve them. We will inevitably confront conflicting

55 MacIntyre, *supra* note 7, at 222.

56 *Id.* at 221–22.

57 *Id.* at 253.

58 To take one example, the English novelist George Orwell observed that words like "equality" take on "several different meanings which cannot be reconciled with one another." George Orwell, *Politics and the English Language*, 13 Horizon 252, 258 (1946).

59 H. Jefferson Powell, Constitutional Conscience: The Moral Dimension of Judicial Decision 114 (2008).

60 *Id.* at 7.

61 *Id.* at 114.

62 *Id.* at 116.

truth claims, but the manner in which we negotiate those conflicts matters a great deal.[63]

III. APPLICATIONS

Having set out the substance and significance of epistemic humility in the previous Parts, I turn now to three kinds of truth claims to illustrate its First Amendment applications: claims whose certainty is not provable, claims whose practical certainty is not yet proven, and claims that are certain to be false.

A. Religious Truth Claims

One of the most interesting and longstanding examples of the role of epistemic humility in the First Amendment context comes from judicial reluctance to evaluate religious truth claims under the Free Exercise Clause. Many religious truth claims are not falsifiable. This is characteristic of many claims about the substance of religious teachings as well as claims regarding the sincerity or centrality of a belief or practice, or the burden imposed by a restriction on that belief or practice. Courts generally take one of two distinct approaches to these kinds of claims: (1) deferring to the religious claimant with a kind of epistemic humility, and (2) resolving the legal issue while avoiding the truth or falsity of the underlying religious claim.

The difference between these two approaches is illustrated in the 1944 case *United States v. Ballard*.[64] Two members of a religious group known as the "I Am" movement were convicted of mail fraud after soliciting donations by describing their power to heal infirmities.[65] Even though the falsity of their representations was an element of the fraud charge, the Court determined that the First Amendment prohibited the jury from determining the truth or falsity of the religious claims.[66] Justice William Douglas's majority opinion reflected a posture of epistemic humility, asserting that religious experiences are "beyond the ken of mortals."[67] Douglas also flagged a slippery slope concern: if we allow the law to question more "preposterous" religious claims "then the same can be done with the religious beliefs of any sect."[68]

Justice Robert Jackson's dissent took a different approach. He called the defendants' "teachings nothing but humbug, untainted by any trace of

63 Jeffrey Stout has offered a neopragmatist account of epistemic humility that criticizes MacIntyre's tradition-based account. *See* JEFFREY STOUT, DEMOCRACY AND TRADITION (2004). Stout at one point refers to his position as "[c]ontextualist epistemology." *Id.* at 240.

64 322 U.S. 78 (1944).

65 *Id.* at 79–80.

66 *See id.* at 86.

67 *Id.* at 87.

68 *Id.* Thus, Justice Douglas was unwilling to preference broadly accepted religious perspectives over more obscure religious claims because proving the truth of such claims is beyond us.

truth."[69] But these kinds of religious claims are "precisely the thing the Constitution put beyond the reach of the prosecutor, for the price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish."[70]

More recently, we can see epistemic humility at play in Justice Samuel Alito's opinion in *Burwell v. Hobby Lobby Stores, Inc.*[71] The business owners in *Burwell* had objected to providing employee health insurance plans covering contraception that affected already-fertilized eggs, as required under threat of financial penalty by the Affordable Care Act's implementing regulations.[72] The owners grounded their objections to providing these forms of contraception in their religious belief that life begins at conception and that paying for such forms of contraception was "immoral."[73] Alito concluded that courts "ha[d] no business addressing" whether the religious beliefs of the religious claimants were "reasonable."[74] He refused to assess whether "the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for [the owners] to provide the coverage" because

> [t]his belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another.[75]

Sometimes the Court ignores epistemic humility under the guise of neutrality. In *Lyng v. Northwest Indian Cemetery Protective Ass'n*, the Court allowed the government to build a logging road on public lands even though the construction "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples."[76] The Court consented to the destruction of the holy sites without requiring a compelling government justification because the Justices concluded the government action had "no tendency to coerce individuals into acting contrary to their religious beliefs."[77] Justice Sandra Day O'Connor's majority opinion insisted that the Court was not evaluating the truth or falsity of the religious claims of the Native American litigants.[78] The Court's reasoning formally avoided the question of

69 *Id.* at 92 (Jackson, J., dissenting).

70 *Id.* at 95.

71 573 U.S. 682 (2014).

72 *Id.* at 698–704.

73 *Id.* at 701–04.

74 *Id.* at 724.

75 *Id.*

76 Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 442 (1988) (citation omitted) (internal quotation marks omitted).

77 *Id.* at 450.

78 *Id.* at 450–51; *see also* Bowen v. Roy, 476 U.S. 693 (1986) (concluding that a federal requirement that welfare agencies use a social security number did not violate the appellant's Native American religious beliefs because it promoted a legitimate public interest that would not ultimately harm appellant's religious practices).

whether the religious claims were true, but effectively concluded they were false by permitting the government to destroy the underlying religious practice without having to justify its interest.

Epistemic humility in cases involving religious truth claims does not mean that religious claimants should always prevail. Some religious truth claims pose a danger to our society, whether it is because they run too strongly against societal norms (like polygamy in the nineteenth century, or cannibalism today) or because they threaten the physical safety of adherents or the broader public.[79] Approaching these cases with a posture of epistemic humility would still weigh the social harm against the rights of the religious claimants. But it would be less dismissive of the religious truth claims than other approaches. Epistemic humility does not mean that religious claimants must always win; it does mean that we should not dismiss their claims without considering—and perhaps even showing respect for—the weight of their claims.

B. Surgical and Hormonal Treatments for Transgender Children

Religious truth claims provide an example of epistemic humility in the context of nonfalsifiable assertions. Epistemic humility is also warranted when assertions that may eventually be falsifiable are not yet fully understood. We can point to many such examples within the tradition of scientific inquiry. Take the now falsifiable claim that the earth is flat. At one point in history, prior to scientific and mathematical advances, the assertion that the earth is flat was not falsifiable. Today, setting aside a few outliers and NBA superstars, most people agree that the earth is indeed round.[80] There is no longer the need for epistemic humility when we engage with flat earthers. We might still choose civility, patience, and persuasion in lieu of hostility, outrage, and coercion, but we need not set out our beliefs about a round earth as tentative or loosely held. But not all scientific assertions are as clearly or overwhelmingly settled as our knowledge about the earth's curvature. We remain limited in our understanding of vast swaths of human inquiry. Oftentimes, highly emotional and politicized debates highlight

79 The Supreme Court's Mormon cases in the late nineteenth century provide a useful illustration. *See* Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 41 (1890); Davis v. Beason, 133 U.S. 333, 342 (1890) (finding that it "was never intended or supposed that the [First A]mendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society"); Reynolds v. United States, 98 U.S. 145, 161, 164–65 (1878) (refusing to consider the defendant's claim that polygamy was required to prevent "damnation in the life to come" by stating "it is impossible to believe that the constitutional guaranty of religious freedom was intended" to protect such an "odious" practice (internal quotation marks omitted)). Whether the Court was justified in reaching its normative conclusions in these cases is a different question.

80 Sopan Deb, *Kyrie Irving Doesn't Know if the Earth Is Round or Flat. He Does Want to Discuss It.*, N.Y. TIMES (June 8, 2018), https://www.nytimes.com/2018/06/08/movies/kyrie-irving-nba-celtics-earth.html. Kyrie has since clarified that he does in fact think the earth is round, but his initial statement generated some controversy in light of his fame.

these limits. In these instances, our partial understanding counsels for epistemic humility.

Consider the example of debates over the risks and benefits of gender reassignment surgery or hormonal therapy involving children. At the time of this Article, the use of these procedures on children is relatively new. We have not yet had the benefit of long-term scientific reflection, and we lack clear answers about their social and individual effects.[81] We might think these issues would therefore be well suited to a posture of epistemic humility that would encourage inquiry, exploration, and dialogue. In practice, this has not happened.

For example, in August 2018, Brown University pulled an academic article about gender dysphoria over concerns that it "might invalidate the perspectives of members of the transgender community."[82] Rather than engage in discussion about the results of the study and the ways in which it may impact the transgender community, progressive university administrators ultimately chose not to engage with the topic at all.[83] And Brown is not the first academic institution to squelch these kinds of studies. In October 2016, over 600 members of the Johns Hopkins Medicine community petitioned the university to disavow a paper cowritten by a Hopkins scholar in residence,

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81 In October 2018, the American Academy of Pediatrics issued a policy statement asserting that "[t]he available data reveal that pubertal suppression in children who identify as [Transgender and Gender-Diverse] generally leads to improved psychological functioning in adolescence and young adulthood" but noted "[p]ubertal suppression is not without risks." Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, 142 PEDIATRICS 1, 5 (2018) (footnotes omitted).

82 Jessica Finn, *Brown University Pulls an Article on Its Own 'Gender Dysphoria' Study About Teens Rapidly Identifying as Transgender Amid Complaints that the Research is 'Transphobic,'* DAILY MAIL (Aug. 30. 2018) (internal quotation marks omitted), https://www.dailymail.co.uk/news/article-6115103/Brown-University-pulls-gender-dysphoria-study-teens-identifying-transgender-amid-transphobic.html.

83 *See also* Jeffrey S. Flier, *As a Former Dean of Harvard Medical School, I Question Brown's Failure to Defend Lisa Littman*, QUILLETTE (Aug. 31, 2018), https://quillette.com/2018/08/31/as-a-former-dean-of-harvard-medical-school-i-question-browns-failure-to-defend-lisa-littman/. Flier's commentary centered around Brown University Assistant Professor Dr. Lisa Littman's academic paper on rapid-onset gender dysphoria among clusters of teenage girls. Her peer-reviewed descriptive research "suggested that this often occurs after heavy exposure to social-media content extoling the benefits of gender transition." *Id.* After widespread social media outrage, the journal and university deleted online promotional references and indicated Littman's work would be subjected to additional review. Flier expressed concern at the elimination of discourse:

> For centuries, universities struggled to protect the ability of their faculties to conduct research seen as offensive—whether by the church, the state, or other powerful influences. Their success in this regard represents one of the great intellectual triumphs of modern times, one that sits at the foundation of liberal societies. This is why the stakes are high at Brown University. Its leaders must not allow any single politically charged issue—including gender dysphoria—from becoming the thin edge of a wedge that gradually undermines our precious, hard-won academic freedoms.

Id.

Lawrence S. Mayer.[84] Mayer, a biostatistics professor at Arizona State University, cowrote a 143-page report that evaluated existing longitudinal studies on gender identity in minors and measured mental health outcomes in the transgender population.[85] Opponents argued that it "mischaracterizes the current state of the science on sexuality and gender" but did not engage in substantive discussion or debate.[86] And in Canada in December 2015, Toronto's Child Youth and Family Gender Identity Clinic ("GIC") fired Dr. Kenneth Zucker after he published *The Myth of Persistence*, an analysis of "desistance" among transgender children.[87] Zucker, a world-renowned scholar on transgender issues, helped write the World Professional Association for Transgender Health's standards of care guidelines.[88] Zucker's research on desistance triggered outrage, and the GIC ultimately paid a settlement for wrongful termination and defamation.[89]

The issue is even more heated in popular discourse. Take Jesse Singal's July 2018 *Atlantic* cover story that explored the growing gender-identity crisis among children and adolescents.[90] Singal called for caution in the debate surrounding surgical and hormonal treatments for children identifying as transgender. Noting that adolescence is a time of "fevered identity exploration," he argued that the lack of available data should trigger greater prudence on the part of parents, physicians, and society.[91]

Singal's story was met with widespread outrage from progressive commentators.[92] In *Slate*, Alex Barasch referred to Singal as "a man whose own

84 Amy Ellis Nutt, *Long Shadow Cast by Psychiatrist on Transgender Issues Finally Recedes at Johns Hopkins*, WASH. POST (Apr. 5, 2017), https://www.washingtonpost.com/national/health-science/long-shadow-cast-by-psychiatrist-on-transgender-issues-finally-recedes-at-johns-hopkins/2017/04/05/e851e56e-0d85-11e7-ab07-07d9f521f6b5_story.html?noredirect=on&utm_term=.580793937023.

85 *Id.*

86 *Id.* (internal quotation marks omitted).

87 Jesse Singal, *How the Fight over Transgender Kids Got a Leading Sex Researcher Fired*, CUT (Feb. 7, 2016), https://www.thecut.com/2016/02/fight-over-trans-kids-got-a-researcher-fired.html; *see also* Kenneth J. Zucker, Response, *The Myth of Persistence*, 19 INT'L J. TRANSGENDERISM 231 (2018).

88 Singal, *supra* note 87.

89 The Canadian Press, *CAMH Reaches Settlement with Former Head of Gender Identity Clinic*, CBC NEWS (Oct. 7, 2018), https://www.cbc.ca/news/canada/toronto/camh-settlement-former-head-gender-identity-clinic-1.4854015.

90 Jesse Singal, *When Children Say They're Trans*, ATLANTIC (July/Aug. 2018), https://www.theatlantic.com/magazine/archive/2018/07/when-a-child-says-shes-trans/561749/.

91 *Id.*

92 Not that progressive commentators have cornered the market on outrage and insult around these issues. *See, e.g.*, Streiff, *No, Guys, Dating a Transsexual Doesn't Mean You're Tolerant and Open-Minded*, RedState (Jan. 13, 2018), https://www.redstate.com/streiff/2018/01/13/no-guys-dating-transsexual-doesnt-mean-youre-tolerant-open-minded/ ("Ever since a bunch of perverts and nincompoops humored Bruce Jenner's delusions and declared him 'woman of the year,' there has been a concerted campaign to mainstream and normalize transsexualism as something natural and beautiful.").

neuroses leave him so unqualified to tell [the story]."[93] In *ThinkProgress*, Zack Ford called the article "a loud dog whistle for anti-transgender parents."[94] And in a commentary published in *Jezebel* with the title *What's Jesse Singal's Fucking Deal?*, Harron Walker described "Singal's bullshit" and asserted that Singal "writes about trans kids as a smokescreen for his anti-trans sentiment."[95] Some of these commentators also pushed back on Singal's methods, but their ad hominem attacks far outpaced their substantive critiques. Writing in *Advocate*, Amanda Kerri took a more measured approach.[96] Unlike much of the other commentary, Kerri grounded her critiques in Singal's understanding of the issue and questioned his subject matter expertise.[97] And, she urged that "[w]e need as much good information and insight as possible, because many of us are still wrestling with these issues ourselves."[98]

Kerri's response to Singal's article also flagged "a legitimate concern about the politicization of science and social justice."[99] This is an important observation: the close link between scientific inquiry and normative arguments complicates efforts toward epistemic humility. But unless and until we find greater scientific consensus, this issue—and others like it—warrants greater epistemic humility and better dialogue.

C. Falsely Claimed Facts

Sections III.A and III.B offered examples of nonfalsifiable and not-yet falsifiable claims that counsel a posture of epistemic humility. Even these examples encounter limits: epistemic humility need not extend to incitement of religious violence or fringe challenges to widely settled scientific views. But there are also categories of speech which, while formally protected under the First Amendment, do not warrant a presumption of epistemic humility. One such example comes from brazen denials of facts, as distinct from normatively framed descriptions. We can illustrate the difference with the exam-

93 Alex Barasch, *Sacred Bodies*, SLATE (June 20, 2018), https://slate.com/human-interest/2018/06/desistance-and-detransitioning-stories-value-cis-anxiety-over-trans-lives.html.

94 Zack Ford, *Atlantic Cover Story is a Loud Dog Whistle for Anti-Transgender Parents*, THINKPROGRESS (June 20, 2018), https://thinkprogress.org/atlantic-jesse-singal-transgender-kids-54123639b640/ (referring to Singal as a "concern troll" whose article featured "lopsided perspectives and [a] dearth of citations").

95 Harron Walker, *What's Jesse Singal's Fucking Deal?*, JEZEBEL (June 19, 2018), https://jezebel.com/whats-jesse-singals-fucking-deal-1826930495 ("I'd say that he so frequently writes about trans kids as a smokescreen for his anti-trans sentiment.").

96 Amanda Kerri, *Why the Trans Community Hates* The Atlantic*'s Cover Story*, ADVOCATE (June 26, 2018), https://www.advocate.com/commentary/2018/6/25/why-trans-community-hates-atlantics-cover-story.

97 *Id.*

98 *Id.*

99 *Id.*

ple of the 2014 death of Michael Brown in Ferguson, Missouri.[100] It is a fact that Darren Wilson shot and killed Michael Brown and therefore committed a homicide. Whether Wilson is legally or morally culpable for Brown's homicide is a more complicated question (and is in fact two distinct questions, one legal and one moral). Many people have offered normative characterizations such as "Wilson murdered Brown" or "Wilson acted in self-defense."[101] These kinds of claims have been made with varying degrees of responsibility and good faith. When and whether to extend epistemic humility to them is a complicated question that involves contested understandings of legal norms combined with partially known facts and evidence.

But consider a different kind of claim: "Wilson shot Brown on a Saturday." The claim is less interesting because it is fully verifiable and, somewhat for that reason, largely uncontested. If someone were to claim that Wilson shot Brown on a Monday, we would simply say that the person was wrong without extending any degree of epistemic humility. That Wilson shot Brown on a Saturday is a fact of the world different than the normatively contested assertion that Wilson murdered Brown.[102] As Professor Paul Horwitz has noted, "There is no equality in the world of facts: it would be absurd to talk of the equal dignity of claims that the moon is made of rock and that it is made of cheese."[103]

That some facts can be verified by almost anyone does not prevent people from asserting false facts.[104] For example, Donald Trump claimed during a 2016 campaign rally in Birmingham, Alabama, that he saw "thousands and thousands" of people cheering in Jersey City, New Jersey, after the World

100 Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), https://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html.

101 *See, e.g.*, Nicholas Mirzoeff, *The Murder of Michael Brown: Reading the Ferguson Grand Jury Transcript*, SOC. TEXT, Mar. 2016, at 49; Paul Cassell, *Officer Wilson Had a Powerful Case for Self-Defense Under Missouri Law*, WASH. POST: VOLOKH CONSPIRACY (Nov. 26, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/26/officer-wilson-had-a-powerful-case-for-self-defense-under-missouri-law/?utm_term=.885b85446ab9.

102 A more controversial example is the claim that Brown had his hands in the air when Wilson shot him. A Department of Justice investigation found no physical or forensic evidence supporting that claim. Whether Brown raised his hands is a fact of the world unlike the normative question of whether Brown was murdered. Its empirical validity is harder to ascertain than the day of the week Wilson shot Brown, but the weight of the evidence strongly suggests that Brown did not have his hands in the air. Wesley Lowery, *Justice Dept. Concludes That No, Michael Brown's Hands Probably Were Not Up*, WASH. POST (Mar. 4, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/03/04/justice-dept-concludes-that-no-michael-browns-hands-were-probably-not-up/?noredirect=on&utm_term=.f9d73169c4c7.

103 Paul Horwitz, Essay, *The First Amendment's Epistemological Problem*, 87 WASH. L. REV. 445, 471 (2012).

104 *See, e.g.*, Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 897–98 (2010) (providing examples of political claims proven false, which individuals nonetheless persist in believing).

Trade Center fell on September 11, 2001.[105] Even after being confronted with the complete lack of evidence for his claim, he maintained that New Jersey's "Arab population" was "cheering as the buildings came down."[106] On the other side of the ideological spectrum, Hillary Clinton insisted that then–Supreme Court nominee Brett Kavanaugh referred to birth control pills as "abortion-inducing drugs" during his televised testimony when in fact he did not make such a statement.[107] And in another judicial nomination hearing, Democratic senators asserted that now–Seventh Circuit Judge Amy Coney Barrett had written an article stating that her Catholic faith would affect her constitutional views when, in fact, her article made exactly the opposite claim.[108]

Even scientifically verifiable facts are not safe from challenge. In 2013, anti–genetically modified organism ("anti-GMO") advocates testified in support of a bill in Hawaii banning genetically engineered crops on the state's largest island in response to the proliferation of papaya plants engineered to be resistant to a virus that had destroyed papaya crops in the state. These advocates relied on studies shown to be unreliable by mainstream scientists, and they falsely claimed that "there were no independent studies of the safety of genetically modified organisms," when, in reality, there were more than 100 independent studies.[109] These same advocates claimed that 270,000 farmers in India had been driven to suicide due to the practices of the agriculture companies selling genetically modified seeds, when, in fact, suicide

105 Lauren Carroll, *Fact-Checking Trump's Claim That Thousands in New Jersey Cheered When World Trade Center Tumbled*, POLITIFACT (Nov. 22, 2015) (internal quotation marks omitted), https://www.politifact.com/truth-o-meter/statements/2015/nov/22/donald-trump/fact-checking-trumps-claim-thousands-new-jersey-ch/.

106 *Id.* (internal quotation marks omitted).

107 Hillary Clinton (@HillaryClinton), TWITTER (Sept. 12, 2018, 6:14 AM), https://twitter.com/HillaryClinton/status/1039864914486149121; *see also* Manuela Tobias, *Did Brett Kavanaugh Call Birth Control Abortion-Inducing Drugs? No*, POLITIFACT (Sept. 10, 2018), https://www.politifact.com/truth-o-meter/statements/2018/sep/10/kamala-harris/brett-kavanaugh-birth-control-abortion-inducing/. In a subsequent hearing, then-Judge Kavanaugh's testimony about his high school drinking habits and the meaning of words in his high school yearbook raised their own set of questions about truthfulness. *See* Briahna Gray & Camille Baker, *The Unbearable Dishonesty of Brett Kavanaugh*, INTERCEPT (Sept. 29, 2018), https://theintercept.com/2018/09/29/the-unbearable-dishonesty-of-brett-kavanaugh/ ("Kavanaugh claimed references to 'Renate Alumnius' in his yearbook were allusions to his friendship with classmate Renate Schroeder Dolphin, and not, as many understood, a sexist smear about her promiscuity.").

108 C.C. Pecknold, Opinion, *Democrats Find Another Religious Heretic*, WALL ST. J. (Sept. 13, 2017), https://www.wsj.com/articles/democrats-find-another-religious-heretic-1505323653.

109 Amy Harmon, *A Lonely Quest for Facts on Genetically Modified Crops*, N.Y. TIMES (Jan. 4, 2014), https://www.nytimes.com/2014/01/05/us/on-hawaii-a-lonely-quest-for-facts-about-gmos.html.

rates among Indian farmers did not rise after the introduction of commercial GMOs.[110]

Climate change deniers are also well known for broadly denying scientifically accepted facts. For example, former Environmental Protection Agency Administrator Scott Pruitt has said he does not believe carbon dioxide created by human activity is a "primary contributor" to global warming.[111] Pruitt's statement contradicts ninety-seven percent of climate scientists, who agree that "[c]limate-warming trends over the past century are extremely likely due to human activities."[112]

Some falsities and lies can be criminalized, as is the case with laws governing fraud and perjury.[113] But the Supreme Court has made clear that at least some lies are protected under the First Amendment.[114] In *United States v. Alvarez*, a plurality of the Court invalidated the Stolen Valor Act, which had criminalized false statements about military decorations. Justice Anthony Kennedy concluded that lies could be instrumentally valuable because "the outrage and contempt expressed for respondent's lies can serve to reawaken and reinforce the public's respect for the Medal, its recipients, and its high purpose."[115] Citing Holmes's *Abrams* dissent, Kennedy observed that "[t]he theory of our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market.'"[116]

Whatever instrumental value the Court may see in some lies, its decision to protect them is not rooted in epistemic humility. There is no sense in which Kennedy protects the lie in *Alvarez* because it might actually be true. To the contrary, he suggests that "[t]he response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth."[117] Moreover, even in the absence of legal enforceability, we

110 *Id.*; *see* Natasha Gilbert, *A Hard Look at GM Crops*, NATURE, May 2013, at 24, 25, https://www.nature.com/news/case-studies-a-hard-look-at-gm-crops-1.12907.

111 Tom DiChristopher, *EPA Chief Scott Pruitt Says Carbon Dioxide Is Not a Primary Contributor to Global Warming*, CNBC (Mar. 10, 2017), https://www.cnbc.com/2017/03/09/epa-chief-scott-pruitt.html.

112 *Scientific Consensus: Earth's Climate Is Warming*, NASA, https://climate.nasa.gov/scientific-consensus/ (last visited Sept. 6, 2016).

113 *See* Horwitz, *supra* note 103, at 453 ("Many laws, especially those concerning defamation and commercial speech, contain permissible 'restrictions on false, deceptive, and misleading communications.' The Court has treated other laws involving potential falsity, such as perjury, fraud, and speech-related crime, as falling outside the boundaries of the First Amendment altogether." (footnotes omitted)).

114 *See* United States v. Alvarez, 567 U.S. 709 (2012) (plurality opinion).

115 *Id.* at 727. The plurality's holding was in some tension with the Court's earlier jurisprudence. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974) ("[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))).

116 *Alvarez*, 567 U.S. at 728 (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

117 *Id.* at 727. As Professor Joseph Blocher observes, the fact that the law sometimes distinguishes truth from falsity suggests that the reason for protecting the latter cannot

might embrace a cultural norm that rejects epistemic humility in such circumstances.[118]

D. The Importance of Social Practice

The preceding examples illustrate the role of epistemic humility in three different kinds of truth claims: those whose certainty is not provable, those whose practical certainty is not yet proven, and those that are certain to be false. These kinds of distinctions might be helpful as a rough sorting, but do they really hold up under scrutiny? Consider two religious claims: (1) Jesus Christ rose from the dead, and (2) the earth is only several thousand years old. Millions of people in this country believe both of these claims to be true. But we might ask whether the same degree of epistemic humility is warranted in both cases simply because they are religious claims. Are they both entitled to epistemic humility because they are religious? Is one more falsifiable than the other? Do we have a social practice around scientific arguments that more strongly rules out one of these claims—and if so, which one?

Or what about the line between claims whose practical certainty is not yet proven and those that are certain to be false? At some point not too long ago, the scientific community would not have been able to say with practical certainty that climate change is real or that GMOs are safe. So when, precisely, is epistemic humility off the table with respect to these kinds of claims?

It may be that our showing of epistemic humility depends in part on the social context that justifies our beliefs about beliefs.[119] Today, we generally acknowledge claims about transcendence to be nonfalsifiable, we generally regard the effects of some medical procedures as not fully specified, and we generally view empirical claims that contradict the overwhelming weight of scientific evidence to be false. As Professor Jeffrey Stout has argued, the context that justifies these beliefs could change: "It is perfectly conceivable that we will someday be justified in deviating significantly from the beliefs we are currently justified in believing."[120] But in the meantime, the fact of our "underlying social agreement"[121] about these general categories gives us some ability to make judgments as to when certain claims warrant epistemic humility.

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depend entirely on our inability to distinguish it from the former. *See generally* Joseph Blocher, Knowledge and the First Amendment (Oct. 23, 2018) (unpublished manuscript) (on file with author).

118 Brian C. Murchison, *Speech and the Truth-Seeking Value*, 39 COLUM. J.L. & ARTS 55, 63 (2015) (arguing that the *Alvarez* plurality "intimated that assessing the truth or falsity of such claims belongs to citizens, not to single-issue tribunals set up by the government").

119 Blocher advances a similar argument in recent work. *See* Blocher, *supra* note 117.

120 STOUT, *supra* note 63, at 233. Because our justifications are warranted in our context, "it would be foolish to address our justifications to the audience of *all* rational agents, regardless of time or place." *Id.* at 236. Stout argues this is humility, not skepticism. *Id.* at 233.

121 *Id.* at 277.

CONCLUSION

I have titled this Article *Holmes, Humility, and How Not to Kill Each Other*. The last section of the title highlights what is at stake. Those of us with the gift of reflective time can and should debate historical figures like Holmes, opinions like *Abrams*, and theoretical concepts like epistemic humility. But every one of us has a civic responsibility to minimize the risk of political violence. The more we see others, and the beliefs they hold, as beyond the pale of epistemic humility, the greater the risk that our underlying social agreement will collapse. That does not mean we should stop arguing about what ought to warrant epistemic humility. The First Amendment allows us to say almost anything to anyone, but our shared civic project depends upon some meaningful constraints on our discourse. The significance of this task comes into even greater relief when we realize that *Abrams*—like the other cases that produced the great First Amendment opinions from Holmes and his colleague, Justice Louis Brandeis—did not involve individuals, but groups.[122] Groups increase our power, for good and for bad.[123] And most of us organize into groups.

Holmes was far more familiar with actual killing than most of us. When he warned that people who believe with too much certainty will kill each other, it was because he had seen it in the Civil War. Sometimes, perhaps, the willingness to kill and die for something you believe is warranted. But for most societies, especially pluralistic democratic societies, survival depends on keeping those moments exceedingly rare. And we ought not take our relative peace for granted.

122 The defendant in *Abrams v. United States* was charged with four counts of conspiracy. Abrams v. United States, 250 U.S. 616, 616 (1919). Similarly, the defendant in *Whitney v. California* was charged with violating the Criminal Syndicalism Act. Whitney v. California, 274 U.S. 357, 359 (1927).

123 *See, e.g.*, AMY CHUA, POLITICAL TRIBES: GROUP INSTINCT AND THE FATE OF NATIONS (2018); INAZU, *supra* note 6; NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA (1998).