


Winter 1998

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Clark Memorandum

J. Reuben Clark

Law School

Brigham Young

University

Winter | 1998

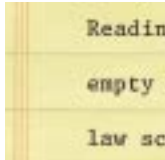
Centering on Humility



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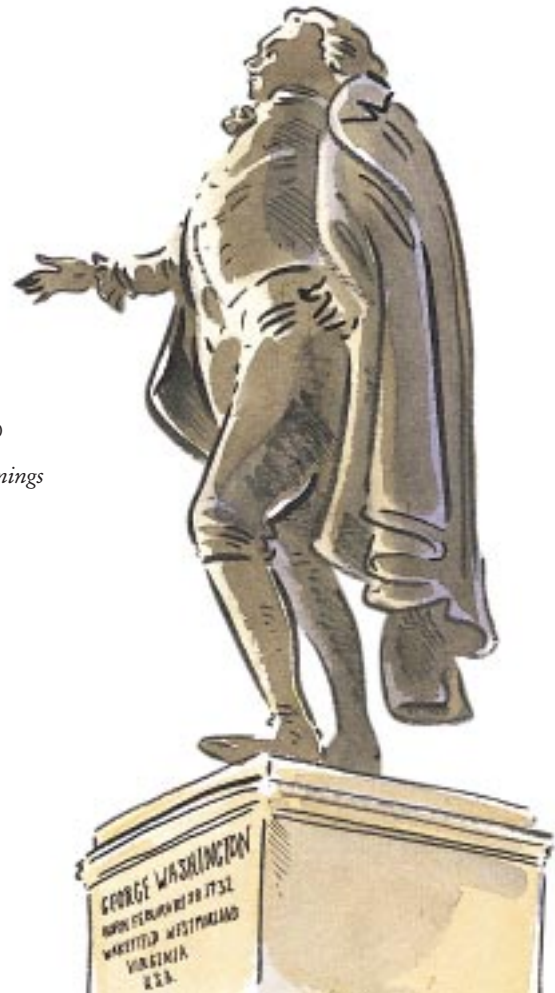
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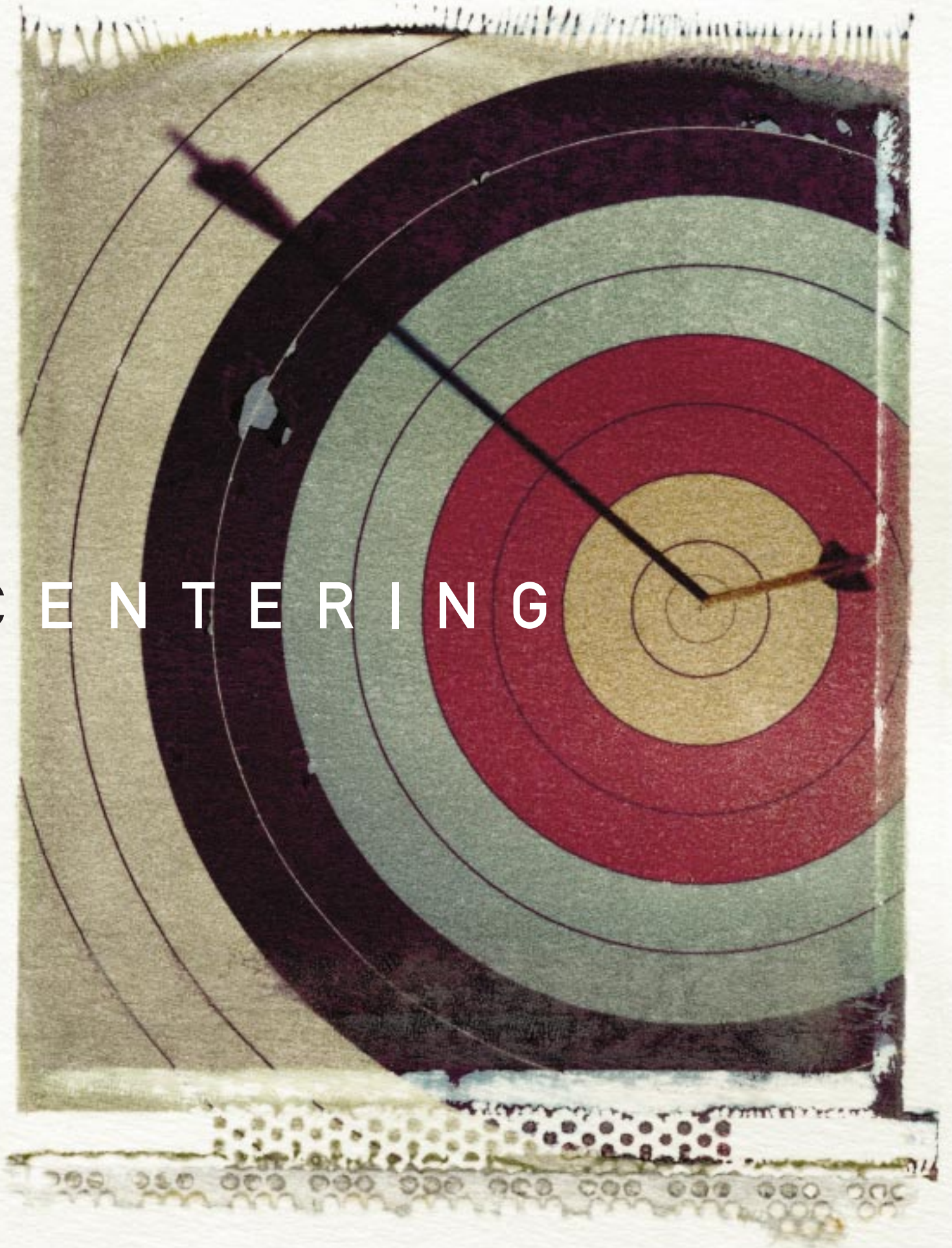


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CENTERING



[ BY BRETT SCHARFFS<sup>1</sup> ]



H U M I L I T Y

[ PHOTOGRAPHY BY JOHN SNYDER ]

N THE CLIMAX OF A DIVINE LAWSUIT RECORDED IN THE OLD TESTAMENT BOOK OF MICAH, CHAPTER SIX, INVOLVING GOD AS THE PLAINTIFF AND THE CHILDREN OF ISRAEL AS THE DEFENDANTS, THE PROPHET MICAH INSTRUCTS THE CHILDREN OF ISRAEL “TO DO JUSTLY, AND TO LOVE MERCY, AND TO WALK HUMBLLY WITH THY GOD.”<sup>2</sup> FOR YEARS I HAVE BEEN PERPLEXED BY MICAH’S CHARGE TO BE BOTH JUST AND MERCIFUL, SINCE JUSTICE AND MERCY OFTEN LIE IN OPPOSITION TO EACH OTHER.

Recently, I have become convinced that Micah’s injunction not only illustrates the conflicts that may occur between justice and mercy, but that by including humility, Micah also points the way to resolving, or at least meaningfully addressing, such conflicts. Micah invites us to recognize that humility is the key to synthesizing or mediating the demands of justice and the demands of mercy.

This should be particularly relevant to how we select and evaluate judges. While it is commonplace to note that we want judges who are just and merciful, it is less commonplace to recognize that the demands of justice and the demands of mercy may conflict. It is less commonplace still to ask how the demands of justice and the demands of mercy can be reconciled.

A judge who is humble, I believe, will be better able to give both justice and mercy their due. In addition, in contrast to a judge who is prideful, a humble judge will have a better understanding of his or her relationship to sources of authority. He will be less enamored of revolutionary change, be better able to avoid the seduction of judicial activism, be less inclined to abuse judicial power, be more likely to treat others with appropriate respect, and be more willing to reassess previous positions. For these reasons, humility is one of the most important habits of character that we should seek and value in judges.

## The Conflicts Between Justice and Mercy

Sometimes it is not possible to satisfy both the demands of justice and the demands of mercy. Often the principal reason for one course of action is that it would be just, while the principal reason for the opposite course of action is that it would be merciful. In the context of adjudication, a judge sentencing a criminal defendant may be faced with the competing demands of justice’s claim for *punishment* and mercy’s claim for *forgiveness*. Justice may direct the payment of a *penalty* in consequence of violating a law; mercy may advise the issuance of a *pardon*. Favoring justice might reflect the perceived need for *retribution*, whereas favoring mercy might reflect a belief in the possibility of *rehabilitation*. Justice may dictate doing one’s *duty*; mercy may require following one’s *conscience*. Many circumstances seem to present a choice between doing what is just and doing what is merciful; what is more, justice and mercy may be mutually exclusive—doing mercy may destroy the work of justice, and doing justice may destroy the work of mercy.<sup>3</sup> If laws are not executed and punishments not inflicted, justice cannot be done. If laws are implemented unflinchingly, mercy is not possible.<sup>4</sup> In exercising judgment, how is a judge to know whether she is erring on the side of being overly just or overly merciful?

## A Divine Lawsuit

In contemplating how we might integrate or reconcile the competing demands of justice and mercy, we can profitably turn to the book of Micah, which contains a beautiful exposition on the importance of justice and mercy and illuminates the possibility that humility may play an important role in addressing the conflicts that can arise between justice and mercy.<sup>5</sup> Because it is cast as a divine lawsuit, involving God as the plaintiff in a cosmic complaint against Israel (his chosen people, the defendants), this passage should be of particular interest to lawyers.

Micah, chapter six, begins with the prophet Micah issuing a summons to the children of Israel:



1. Hear ye now what the Lord saith; Arise, contend thou before the mountains, and let the hills hear thy voice.

In verse two, Micah identifies the mountains and foundations of the earth as the jury:

2. Hear ye, O mountains, the Lord's controversy, and ye strong foundations of the earth: for the Lord hath a controversy with his people, and he will plead with Israel.<sup>6</sup>

Note the double meaning of the word "plead"; the Lord will plead his case, as the plaintiff does in any lawsuit, but he will also plead with his people, the children of Israel, to change their hearts and actions. In verses three through five, Micah, speaking as the Lord's attorney, states God's claim against the children of Israel:

3. O my people, what have I done unto thee? and wherein have I wearied thee? testify against me.

4. For I brought thee up out of the land of Egypt, and redeemed thee out of the house of servants; and I sent before thee Moses, Aaron, and Miriam.

5. O my people, remember now what Balak king of Moab consulted, and what Balaam the son of Beor answered him from Shittim unto Gilgal; that ye may know the righteousness of the Lord.

Micah begins with an indictment of Israel's forgetfulness, reminding the children of Israel of their deliverance from bondage in Egypt. Micah's audience would have been acutely aware of the miraculous assistance identified in verse four—the plagues, the Passover, the pillars of fire and cloud, the parting of the Red Sea, the manna and quail, the water from the rock—that God provided the children of Israel in their exodus from Egypt.<sup>7</sup> The events alluded to in the following verse may not be as familiar to 20th-century readers, but they would have resonated strongly with Micah's listeners. Verse five refers to events recorded in Numbers, chapters 22–24, where Balak, the king of the Moabites, promised hon-

ors and riches to Balaam, a diviner from Northern Syria, if Balaam would curse Israel. Instead, upon explicit instructions from God and after a dramatic manifestation from an angel of God, Balaam blessed Israel three times and predicted that Israel would destroy Moab. The phrase "from Shittim unto Gilgal" refers to the critical period when the Israelites entered the promised land.<sup>8</sup>

The prophet Micah has presented a powerful case for the plaintiff. Micah's invocation of the Lord's miraculous assistance to the children of Israel in liberating them from bondage, leading them to the promised land, and preserving their freedom places them squarely on the defensive. In the following two verses, the defendants respond:

6. Wherewith shall I come before the LORD, and bow myself before the high God? shall I come before him with burnt offerings, with calves of a year old?

7. Will the Lord be pleased with thousands of rams, or with ten thousands of rivers of oil? shall I give my firstborn for my transgression, the fruit of my body for the sin of my soul?

In verse six, Israel demands to know just what it is that God wants. Does the Lord want them to bow low before him? Does he require burnt offerings? In verse seven, one detects an even sharper edge of self-justification, even sarcasm, on the part of the defendants. Would the Lord be satisfied with "thousands of rams" or with "ten thousands of rivers of oil?" The defendants' tone of self-justification finally "rises to a hysterical and ghastly crescendo,"<sup>9</sup> when they demand, "Shall I give my firstborn for my transgression, the fruit of my body for the sin of my soul?" From a Christian perspective, this last question is bitterly ironic, given the doctrine of the Atonement, which maintains that God the Father did send his Only Begotten Son, Jesus Christ, to take upon himself the sins—not of God, but—of the world.<sup>10</sup>

Given the defensive, self-justificatory, and strident tone of the defendants' response, we might expect God to answer with a voice of anger. Instead, through a rhetorical question, God issues a beautiful,

tender, and moving injunction. Micah states simply and majestically:

8. He hath shewed thee, O man, what is good; and what doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God?"

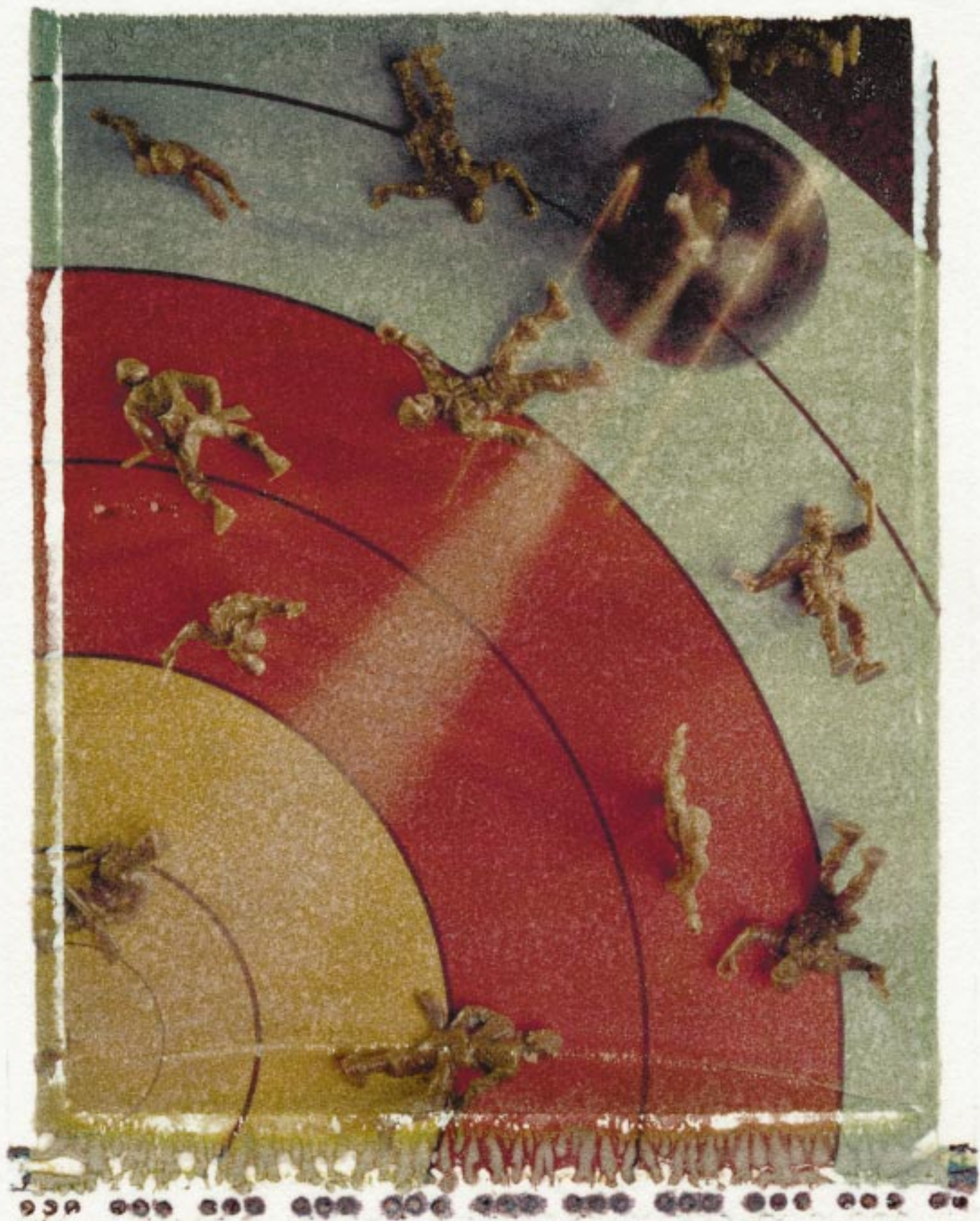
What does God require? With elegant clarity, God asks his people to be just,<sup>11</sup> merciful,<sup>12</sup> and humble.<sup>13</sup> More precisely, he employs a series of action verbs, asking them to do, love, and walk<sup>14</sup> with justice, mercy, and humility.<sup>15</sup>

While Micah's injunction is undoubtedly majestic, upon reflection its instruction is far from simple, for it illustrates the justice-mercy paradox: How can we be both just and merciful, when in so many circumstances the demands of justice and the demands of mercy pull in opposite directions?

### Conceptualizing Humility

Micah suggests the possibility that humility is the key to addressing the justice-mercy paradox. Perhaps justice, mercy, and humility are not just three good things on a list. Indeed, I have come to believe that humility is included by Micah precisely because it helps to synthesize or mediate the competing claims of justice and mercy. Humility helps to strike a balance both within and between the virtues of mercy and justice.

In order to defend this proposition, I should first explain what I understand humility to mean. Aristotle had the insight that virtue is a state of character that lies in a mean between two extremes. For example, generosity falls between parsimoniousness and prodigality; courage, between timidity and rashness. Humility also lies in a mean between undesirable extremes. One's commitment to humility can be either *underdone* or *overdone*. When humility is underdone the result is pride,





arrogance, or vanity; when humility is overdone the result is an attitude of insecurity, worthlessness, subjugation, or servility.

According to Aristotle, moral virtue is not simply a midway point between undesirable extremes, it is also a steady state of habit and character. This steady equilibrium of character that distinguishes moral virtue can be illustrated by imagining a heavy object suspended from the end of a rope, such as a wrecking ball. When the object is in motion, it swings from side to side, without stopping at the nadir. It also carries considerable destructive force. When the object is at rest, it is very difficult to move and its destructive capacity is under control. Similarly, humility is a steady state of character that is not easily moved, whereas when one is out of balance with respect to humility, he is likely to swing destructively between excessive and defective extremes.<sup>7</sup>

We could easily make the mistake of not realizing that one can have *too much* as well as *too little* of the feelings or attitudes underlying humility. While pride (too little humility) is often understood to lie in opposition to humility, it is less common to recognize that feelings of inferiority, worthlessness, subservience, or subordination (too much humility) also lie in opposition to humility. Indeed, one might even mistakenly think that humility *requires* one to be accepting of subjugation and subordination. But humility does not demand timidity, self-effacement, passiveness, or quietness, although it does urge circumspection, patience, respectfulness, and considered attention to others. The essence of humility is treating other things—and especially other people—as if they really matter. Humility does not imply weakness, although one who is humble will be mindful of the nature and hazards of his personal weaknesses.

*The Defective State.* Pride, the defective state with respect to humility, creates barriers between human beings, barriers based upon differences such as race, education, wealth, social status, or position. Pride demands the establishment and maintenance of vertical relationships, with oneself or one's group above, or in some way superior to, others. Pride creates enmity, hatred, or hostility toward others.

*The Excessive State.* At the other end of the spectrum from humility lies an excessive state, characterized by attitudes or feelings of inferiority, subjugation, or subordination. Being humble does not mean being a doormat. We may mistakenly view victims of subjugation as exemplars of humility, and in so doing we distort the meaning of humility. Such victims can be seriously misled by general exhortations to be humble or by praise of their humility. Such admonitions might be misinterpreted as an instruction to regard themselves as even more inferior or subservient than they already do, when in fact—and this is important—what humility may require is that they move toward the middle of the spectrum by asserting themselves, standing up for their rights, and fighting against the subjugation or subordination to which they are subject.

*The Mean State.* Humility does not denote weakness, but rather a proper understanding of the sources of one's strength. In the religious context, it is acknowledging one's relationship with and dependence upon God. In the context of relationships between people, it is acknowledging that one is a member of a family, a community, a nation, and the human race. These interrelationships form a primary source of one's strength and also constitute the source of one's obligations to others. Power wielded with humility becomes service; power wielded with pride becomes dominion. Pride is easy. Humility is difficult; it is no exaggeration to say that it takes a considerable amount of courage to be humble. It is unlikely that you will encounter someone who is humble and considers herself to be a "self-made" person, because humility will compel her to acknowledge the sustenance and assistance she has received from others. Humility will not countenance ingratitude or self-aggrandizement, but neither does it require self-mortification or denunciation. Humility enables one to be submissive to legitimate authority, but it

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Humility also denotes an attitude of open-mindedness and curiosity, a willingness to learn, reassess, and change. One who is humble can be persuaded that his conclusions are wrong; that his perspectives are limited and should be broadened; that his settled opinions merit reconsideration. One who is humble will possess a quiet confidence that is capable of learning and reassessment, because he is not defensive or insecure. What is more, one who is humble will *seek* the insights and viewpoints of others, because he will not have an unwarranted confidence in the power of his own intellect or the rightness of his every conclusion. One who is humble will have the capacity to

attributes of *being* both just and merciful will be better able to determine the appropriate course in the circumstances of that particular case.

#### Addressing the Justice-Mercy Paradox

Like humility, justice and mercy are virtues of character that lie in a mean, and one's commitment to justice or mercy can be both underdone and overdone. At first this suggestion may seem counterintuitive, for it may not immediately be apparent that someone can be too just or too merciful. But justice lies in a mean between injustice (a complete disregard for what is just) and vengefulness (an overwrought obsession with justice). To put it another way, someone who is unjust has too little commitment to being just, and someone who is retributive or vengeful has too much commitment to being just and may become consumed with

F O R O N E W H O I S H U M B L E , I T I S M O R E D I F F I C U L T T O D I F F E R E N T I A T E

be surprised by an argument or insight that causes him to rethink long-held opinions or favorite theories. Humility does not imply soft-headedness or intellectual weakness, although the learned and mentally acute are particularly susceptible to being prideful.

*Judges and Humility.* Judges are more likely to err on the side of having too little humility than too much.<sup>8</sup> This is likely to be the case regardless of the judge's gender, race, or other personal characteristics. The temptation to be prideful is based upon the judicial *role*, not upon the individual judge's *status*. A humble judge will be better able than a prideful judge to navigate the treacherous shoals that lie within and between the virtues of justice and mercy. A humble judge may not be able to *do* both justice and mercy on a particular occasion, but a judge with the

a perverse preoccupation with justice. Something similar is the case with respect to mercy. One who is insufficiently merciful will be unmerciful, hard-hearted, or cruel, and one who is overly merciful will be permissive, indulgent, or lenient. One can err in having an insufficient commitment to justice or mercy as well as an excessive and inappropriate commitment to justice or mercy.

But, if it is true that both mercy and justice are virtues that lie in a mean, how is one to know that she has struck the proper balance between the extremes within each virtue? And perhaps more problematic, how is one simultaneously to evaluate and do service to both the virtue of mercy and the virtue of justice? What looked like a difficulty of evaluating, reconciling, or balancing the demands of justice versus mercy is in reality an even more complicated problem because it involves additional conflicts between having too much or too little of a commitment to either justice or mercy.



*Humility and Justice.* Humility helps to resolve the tension within justice. As noted, justice is a virtue that lies in a mean between being unjust and being vengeful or retributive. One who is humble is less likely to be unjust. If one is humble, it is difficult to be unjust, because irrelevant differences between oneself and others are perceived to be small. One who is humble is able to recognize that roles could be easily reversed if fortuities of birth, opportunity, economic status, race, gender, or nationality, among other grounds for differentiation, were otherwise. Thus, for one who is humble, it is more difficult to differentiate between us versus them. And it is usually in the soil of perceived differences that the seeds of injustice are planted and cultivated.

One who is humble is also less likely to be vengeful or retributive. Feuds and ancient hatreds are built upon cycles of action and reaction, where each side is

## BETWEEN US VERSUS THEM.

constantly responding to the bad deeds perpetrated by the other side. Grievances are mutual and often run deep, but absent humility, the wrongs can easily be viewed as resting entirely with the other. Humility enables one to acknowledge that fault lies partially—perhaps even equally or predominantly—with oneself or one’s people.

*Humility and Mercy.* Humility plays a similar role in becoming merciful, in striking a balance between being merciless or hard-hearted at one extreme and permissive or indulgent at the other extreme. The relationship between humility and overcoming mercilessness is similar to the relationship between humility and injustice. If one is humble, one is less likely to differentiate inappropriately between persons. It is much easier to be merciful to someone who one perceives to be similar to oneself. Studies of the Jewish Holocaust have taught us that genocide became possible only when perpetrators ceased to view their victims as truly human—an extreme form of inappropriate

differentiation.<sup>9</sup> The importance of rejecting artificial or irrelevant differences between people is at the core of the Biblical doctrine that we are all children of God, created in his likeness. The importance of rejecting false differences between people may also partly explain the emphasis placed upon humility in the scriptures.

Humility is also a bulwark against overdoing mercy and becoming permissive or indulgent. Being overly merciful may be a result of identifying too thoroughly with only one of the points of view that needs to be considered. An indulgent parent (or more likely, grandparent) may identify too thoroughly with the child’s perception of his interests. Similarly, an indulgent judge may identify too thoroughly with a defendant in a criminal case, disregarding the interests of the victims or society at large. One who is humble is better able to avoid over-identification with a single point of view.

Pride exerts an almost irresistible force driving one from the middle ground where the virtues of justice and mercy are found. Pride fosters injustice by feeding one’s perceptions of the differences between oneself and others; it also nurtures vengefulness by inducing one to refuse to see fault in oneself or see things from the points of view of others. Similarly, pride breeds mercilessness, because it seduces one to view others as so different, inferior, or evil that they do not merit mercy; it also fosters permissiveness and leniency by encouraging one’s distaste or unwillingness to accept or be bound by external authority.

*Synthesizing or Mediating Justice and Mercy.* Not only is humility the key to striking the appropriate balance within the virtues of justice and mercy, it is the key to synthesizing or mediating between the competing claims of justice and mercy. As noted earlier, the demands of justice are often incompatible or cannot be reconciled with the demands of mercy. This conflict is illustrated by the controversy that, at least occasionally, arises between duty (which may represent the dictate of justice) and conscience (which

may represent the dictate of mercy). Humility helps to defend against erring on the side of being overly concerned with justice, or having an inappropriate devotion to duty. A judge who is prideful will be more likely to cling stubbornly to his notions of duty, even when doing so results in tremendous injustice. Humility also serves as a check against acting in a way that is inappropriately merciful. A humble judge will empathize with the parties before him, be they the plaintiff and the defendant in a civil suit, or the defendant and victim or society in a criminal case. More important, humility will give the judge a motive to empathize with each of these parties. The judge may have a predisposition to empathize with one side or the other, but a judge who is humble will not stop with that predisposition, but will empathize with each of the contending parties.

### Do We Want Humble Judges?

The answer to the question “Do we want humble judges?” should be a resounding yes, although it is unlikely that a survey of literature by and about judges concerning the judicial role would lead us to suspect that this is the case. Scholarly analyses of judges and judging do not contain much serious consideration of humility as an important character trait, although humility is occasionally included on laundry lists of judicial virtues. Acknowledgments of the value of humility in judges are found primarily in retirement tributes and judicial investiture speeches.

I have suggested that humility is an important attribute of character because it helps one become more merciful and just, and enables one to better strike an appropriate balance within and between these two virtues. This is the primary reason why we should want judges who are humble. While this alone, in my view, would justify our placing a much higher value on humility

than we currently seem to do, there are a number of additional reasons why we should value the virtue of humility in judges.

*Relationship to Sources of Authority.* A humble judge will have a better understanding than a prideful judge of her role within the legal system and will have an attitude (not of subservience, but) of respect for the sources of authority that constrain and guide the judge's behavior. The types of authority that should constrain judges are numerous and include constitutions, statutes, precedents, rules, and regulations. Text, history, and tradition should each constrain judges. Of course, none of these sources, singly or together, answers every question a judge will face; and the answers they suggest may conflict. Furthermore, judges who are humble will not necessarily agree on the proper application and implications of relevant sources of authority. But judges who are humble will understand that their authority and legitimacy is closely tied to their obligation to interpret and be guided by the relevant authoritative materials and institutions. When authoritative texts or precedents are on point, a humble judge will be more inclined to be attentive to those authorities, while a less humble judge will be more inclined to find some ground, strained or not, to distinguish the present case in order to implement her own vision of what is right. A prideful judge is more likely to act as if she is the source of her own authority, or that her position alone empowers her to make decisions, guided primarily by her own knowledge, erudition, learning, and reasoning. A prideful judge may mistakenly believe that, having survived the political battle to secure confirmation or election, she has a duty to serve the political ends of allies who helped her secure appointment.

*Attitude Toward Revolutionary Change.* A humble judge is also less likely than a prideful judge to be enamored of revolutionary change. Yale Law School

Dean Anthony T. Kronman has suggested that “[t]he law accords the past an authority that philosophy does not—an authority which indeed is incompatible with the independent spirit of all philosophical reflection.”<sup>20</sup> This deference to the past is explicitly manifest in the doctrine of precedent and makes the law in an important sense a fundamentally conservative institution. Recognizing the value of precedent and tradition is not so much an ideology as a propensity, what Michael Oakeshott has called “a disposition appropriate to a man who is acutely aware of having something to lose which he has learned to care for.”<sup>21</sup> A judge with such a disposition might be more inclined to employ what Alexander Bickel called the “passive virtues,” such as withholding judgment based upon doctrines such as ripeness, political question, and standing, or by dismissing an appeal for want of a substantial federal question, or, in the case of the Supreme Court, by denying certiorari.<sup>22</sup>

*Avoiding the Seduction of Judicial Activism.* Following the law places a judge in a role that is, in large part, clerical, where he labors largely as a functionary, applying and implementing the law.<sup>23</sup>

To be sure, the volume, variety, and complexity of the issues that a judge encounters makes his work difficult, but the judge's primary task is to find and follow the law. Analysts of the work and role of judges tend to focus their attention upon the Supreme Court, which obscures the primary role of judges of following and implementing existing law. Fidelity to role, following the law, is less exciting and sometimes less gratifying than creating new law, finding laws unconstitutional, or declaring new rights. Prideful judges are more likely to be seduced by the temptation of judicial activism, the invitation to go beyond the judicial role. Similarly, a prideful judge is less likely to have a skeptical disposition, never doubting that he knows best. To put it another way, some judges would rather be prophets than priests.<sup>24</sup> Prophets declare God's law, priests try to interpret and apply it. A prideful judge is much more likely to imagine himself as a judicial prophet,

whereas a humble judge is more likely to remain faithful to the priestly role of interpreting and following the law.<sup>25</sup> Ironically, while a prideful judge will feel inclined to elevate himself to being a prophet, humility is one of the cardinal virtues that God seeks in actual prophets. For this reason, prideful, self-anointed judicial prophets are a particular hazard.

*Proclivity to Abuse Power.* Judges wield enormous power and, as has often been observed, power tends to corrupt.<sup>26</sup> This is true for petty bureaucrats as well as for kings and presidents. The temptation for judges to abuse their authority is especially acute, given both the trappings and reality of their power, in court and in chambers. In court, judges wear robes, symbolic of a sort of secular priesthood, and are addressed as “your honor.” Everyone stands when a judge enters the courtroom, and advocates stand when addressing a judge. Judges wield a gavel, which is used to silence others. Judges are

## HUMILITY AIDS DELIBERATION AND CHOICE BY

also accustomed to people ceasing speech when they interrupt and to people laughing at their jokes. Juries assume that the judge is the smartest lawyer in the room, and they look to her for direction. Judges usually receive similar deference in chambers, where their primary interaction is with secretaries, who sit in a vertically subordinate professional role, and with law clerks, who are professional neophytes who have just finished law school and have little knowledge of or experience in the law. In this milieu, with the trappings of power and prestige, it is easy to understand how a judge might become prideful. And a prideful person is much more likely than a humble person to abuse whatever power, real or supposed, that she has. And judges wield real power. As Robert Cover once explained, “Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and, as a result, somebody loses



his freedom, his property, his children, even his life.”<sup>27</sup> Such violence may be justified, but its existence should not be obscured or ignored. Given the inseparability of thought and action—of the word and violence—inherent in a judge’s work, it should be easy to sense why we should care deeply about whether our judges are humble or prideful.

*Treatment of Parties.* Judges who are humble are more likely to adopt a respectful attitude toward the parties who appear before them. Some judges are bullies. As on the school playground, bullies are often insecure. Other bullies just dislike those who are weak, and many parties before judges by definition are in a position of weakness. Other judges are impatient. Observing the dynamic of appellate arguments, I have often been surprised by how rude some—but by no means all—judges are to the attorneys arguing cases before them. Questions are asked gruffly; lawyers are interrupted

prior positions or admit they were wrong. Needless to say, we do not want judges who are uncertain of their conclusions, feel a need for constant reassessment, or are racked with doubt about every ruling or decision. Nevertheless, we also do not want judges who are incapable or unwilling to reconsider prior conclusions, cannot admit they were wrong, or even acknowledge (at least to themselves) that someone else (including the advocates before them) might know more than they do about a question of law.

### Conclusion

Humility facilitates becoming more just and more merciful; it also aids deliberation and choice by one who is just and merciful, who is trying to determine the appropriate course of action in a particu-

ONE WHO IS JUST AND MERCIFUL, WHO IS TRYING TO DETERMINE [AN] APPROPRIATE COURSE OF ACTION.

before speaking the first sentence of their answer; different questions are posed with a tone of derision.

This is not to say that oral arguments should be tame affairs, nor is it to say that a humble judge will not ask difficult questions or vigorously pursue the implications of a line of thought. Pointed questions are not only warranted but essential. Time for oral arguments is limited, so lawyers occasionally have to be cut off. And some lawyers need to be reprimanded for using tactics that are misleading or disingenuous.

*Willingness to Reassess Previous Positions.* Judges must take definite positions on complex issues, often very quickly. Because those conclusions and the reasons supporting them are public, and often written down in formal judicial opinions that become a matter of record and form precedent that is binding upon that judge and other judges in the future, judges are in a position where it is difficult to reassess

lar situation. For these reasons, humility is a virtue of character that we should especially seek and value in judges.

I do not have tremendous confidence in my ability to convince the truly skeptical—certainly not the cynical—that humility is a virtue of character that we should value. When Micah identifies justice, mercy, and humility as the things God requires, he declares, “He hath *shewed* thee, O man, what is good.”<sup>28</sup> The injunction to do justly, to love mercy, and to walk humbly is not intended as new news; it comes after an indictment of the children of Israel’s forgetfulness, as a request to remember what they have already been shown, to put into action the teachings of prior prophets. For us, it is an invitation to open our eyes, to acknowledge and practice what we already know.

1. Assistant Professor of Law, J. Reuben Clark Law School. This is an abbreviated version of *The Role of Humility in Exercising Practical Wisdom*, — U.C. DAVIS L. REV. — (1998) (forthcoming).

2. Micah 6:8 (King James). All Biblical references are to the King James Version.

3. For a moving account of the conflict between justice and mercy experienced by a lawyer defending a criminal client whom one knows is guilty, see Frederick Mark Gedicks, *Justice or Mercy?—A Personal Note on Defending the Guilty*, 13 J. LEGAL PROF. 139, 148 (1988). (“Criminal defense lawyering . . . is an act of Christian charity. It is the setting aside of judgment to help one’s neighbor.”).

4. The Book of Mormon prophet Amulek explains that in the religious context, the conflicts of justice and mercy are resolved only through the Atonement of Jesus Christ. See Alma 34:8–16. Alma teaches his son Corianton the same principle in Alma 42:14–15 (“14. And thus we see that all mankind were fallen, and they were in the grasp of justice; yea, the justice of God, which consigned them forever to be cut off from his presence. 15. And now, the plan of mercy could not be brought about except an atonement should be made; therefore God himself atoneth for the sins of the world, to bring about the plan of mercy, to appease the demands of justice, that God might be a perfect, just God, and a merciful God also.”). See also Alma’s instruction to his son Corianton about the principle of restoration in Alma 41:14–15 (“14. Therefore, my son, see that you are merciful unto your brethren; deal justly, judge righteously, and do good continually; and if ye do all these things then shall ye receive your reward; yea, ye shall have mercy restored unto you again; ye shall have justice restored unto you again; ye shall have a righteous judgment restored unto you again; and ye shall have good rewarded unto you again.

15. For that which ye do send out shall return unto you again, and be restored; therefore, the word restoration more fully condemneth the sinner, and justifieth him not at all.”).

5. *The Jerome Biblical Commentary* characterizes “this classic passage [as] the epitome of the prophetic message; it is the Magna Carta of prophetic religion.” THE JEROME BIBLICAL COMMENTARY 288 (Raymond E. Brown, S.S. et al. eds., 1968) [hereinafter JEROME].

6. Micah 6:2. *The Abingdon Bible Commentary* notes that “[t]he mountains and the earth, older than man and witnesses of Israel’s history, so crowded with ingratitude, are summoned to listen to the indictment.” THE ABINGDON BIBLE COMMENTARY 796 (Frederick Carl Eiselen et al. eds. 1929) [hereinafter ABINGDON].

7. The reference to the Israelites’ deliverance from Egypt is noteworthy given the climactic admonition in Micah 6:8 to be humble. See Deuteronomy 8:2 (“And thou shalt remember all the way which the LORD thy God led thee these forty years in the wilderness, to humble thee, and to prove thee, to know what was in thine heart, whether thou wouldst keep his commandments, or no.”).

8. “Shittim was the last camping place of the Israelites in Moab prior to crossing the Jordan, and Gilgal was the first camping station west of the Jordan.” JEROME, *supra* note 5 at 288. See Joshua 3:1 (from Shittim) and Joshua 4:20 (unto Gilgal).

9. LESLIE C. ALLEN, THE BOOKS OF JOEL, OBADIAH, JONAH AND MICAH 370 (1976).

10. See John 3:16 (“For God so loved the world, that he gave his only begotten Son, that whosoever believeth in him should not perish, but have everlasting life.”).

11. Micah 6:8. *The Abingdon Bible Commentary* summarizes verse eight as instructing Israel that “[n]ot ritual but righteousness was what Jehovah required of men, not costly gifts of things but the surrender of themselves in the service of one another.” ABINGDON, *supra* note 6, at 796. This answer echoes the teachings of Micah’s three predecessors, Amos, Hosea, and Isaiah: “the divine demand was for justice (Amos 5:24), mercy or kindness (Hosea 6:6) and a humble walk with God who alone is exalted (Isaiah 2:11).” *Id.* As J. L. Mays has put it, “It’s you, not something, God wants.” JAMES LUTHER MAYS, MICAH: A COMMENTARY 136 (1976). Mays goes on to explain that “[t]he question is focused on ‘with what’, on external objects at the disposal of the questioner. The answer is focused on the questioner himself, on the quality of his life.” *Id.* at 137. The connection between humility, justice and righteous judgment is described in Doctrine and Covenants 11:12 (“And now, verily, verily, I say unto thee, put your trust in that Spirit which leadeth to do good—yea, to do justly, to walk humbly, to judge righteously; and this is my Spirit.”).

12. The Hebrew word *mišpāṭ* is translated as “do justly” (King James) or “practice justice” (Wolff) and carries adjudicative connotations of “deciding or settling.” See HANS WALTER WOLFF, MICAH THE PROPHET 193 (Ralph D. Gehrke trans., Fortress Press 1981) (1978). According to Wolff, “[w]hat is called for . . . is the exercise of justice: putting justice into practice.” *Id.* “To do justice,” according to Mays, “is to uphold what is right according to the tradition of [Jehovah’s] will, both in legal proceedings and in the conduct of life.” MAYS, *supra* note 11, at 141–42.

13. Of the three obligations cited by Micah, the Hebrew word *hesed*, which the King James version renders as “mercy,” presents the greatest difficulty for translators. Mays notes that “[t]he term ‘hesed’ is so plastic in usage that its exact definition is notoriously difficult.” MAYS, *supra* note 11, at 142, n.h. Entire books have been written about the meaning of *hesed*. See, e.g., NELSON GLUECK, HESED IN THE BIBLE 102 (Alfred Gottschalk trans., Elias L. Epstein ed., 1967) (1927) (concluding that “[t]he significance of *hesed* can be rendered by ‘loyalty,’ ‘mutual aid,’ or ‘reciprocal love,’”); GORDON R. CLARK, THE WORD HESED IN THE HEBREW BIBLE 18 (1993) (suggesting meaning of *hesed* in Micah 6:8 as “social beneficence which is an expression of loyalty to a religious ideal” or “Godly loving kindness”). In his authoritative study of *hesed*, Nelson Glueck notes that in Micah 6:8, “[*hesed*], which formerly existed only between those who stood in a fundamentally close relationship toward one another, undergoes considerable expansion in meaning. Every man becomes every other man’s brother, *hesed* becomes the mutual or reciprocal relationship of all men toward each other and toward God.” GLUECK, *supra* note 13, at 61.

14. The meaning of the Hebrew verb *hasnēā*, which is translated as “humbly” in the King James version, has been the object of considerable commentary and disagreement. The word *hasnēā* occurs nowhere else in the Old Testament, except as a passive participle in Proverbs 11:2, where it is opposed to pride, which means a swelling vanity that fills one with high notions of one’s self. See 3 JOHN CALVIN, COMMENTARIES ON THE TWELVE MINOR PROPHETS: JONAH AND MICAH 343 n.2 (Rev. John Owens trans., W. B. Eerdmans Publishing Co. 1976) (1950). John Calvin explains the requirement to “walk humbly with thy God” as follows: “He afterwards adds what, in order is first, and that is, to *humble thyself to walk with God*: it is thus literally, ‘And to be humble in walking with thy God.’” *Id.* Calvin goes on to explain, “[c]ondemned, then, is here all pride, and also all the confidence of the flesh: for whosoever arrogates to himself even the least thing, does, in a manner, contend with God as with an opposing party. The true way then of walking with God is, when we thoroughly humble ourselves, yea, when we bring ourselves down to nothing;

NOTES



for it is the very beginning of worshipping and glorifying God when men entertain humble and low opinion of themselves.” *Id.* at 344.

In contrast, according to Wolff, Martin Luther translated the last item that is good for humanity as “to be humble in the presence of your God.” WOLFF, *supra* note 12, at 196. Wolff states that “[i]nvestigations of the word *hasnēā* indicate that ‘humility’ is indeed an important part of the meaning of the word, but that basically it is not only a matter of an ethical stance or of being willing to take a subordinate position, but of attentiveness, thoughtfulness, wide-awakeness, awareness.” *Id.* Perhaps to avoid the connotation of “humility” only denoting a willingness to “take a subordinate position,” Wolff renders this passage as “attentively traveling with your God who is constructing your path for you.” *Id.* at 196–97. Mays adopts a similar interpretation, asserting that the passage “indicates something of a measured and careful conduct. It is a way of life that is humble, not so much by self-effacement, as by considered attention to another.” MAYS, *supra* note 11, at 142 (footnote omitted). The second century B.C. translators of the Septuagint rendered the passage *betoimon einai to poreuesthai meta Kuriou* (“to be ready to walk with God”), indicating an attitude of readiness and willingness.

A. Cohen suggests that the word translated as “humbly,” as elucidated by Rabbinic Hebrew, signifies “modesty, decency, chastity, personal purity.” REV. DR. A. COHEN, *THE TWELVE PROPHETS: HEBREW TEXT AND ENGLISH TRANSLATION AND COMMENTARY* 181–82 (1948). According to Max Margolis, “humbly” connotes “modestly, retiringly, unobtrusively, unostentatiously, not with the devotion which must express itself in costly and public sacrificial gifts (or acts of charity), but with inward devotion and noiseless acts of love.” MAX L. MARGOLIS, *MICAH 65* (1908). James Limburg makes a similar point, stating that “[t]he word translated ‘humbly’ has more the sense of ‘circumspectly, carefully,’ than humility.” JAMES LIMBURG, *HOSEA–MICAH INTERPRETATION: A BIBLE COMMENTARY FOR TEACHING AND PREACHING* 192 (1988).

15. Some commentators have emphasized the importance of the word *walk* in the injunction “to walk humbly with your God.” Mays notes that “[i]n Judaism the word for ethics is *halacha*, which means ‘walking’; the idea is that the task of ethics is to describe how one ought to walk one’s day-by-day life.” MAYS, *supra* note 11, at 193.

16. As the previous four footnotes suggest, the injunction to “do justly, and to love mercy, and to walk humbly with thy God” has been translated in a wide variety of ways. The translation utilized in *The Jerome Biblical Commentary* renders these phrases as “to do the right,” “to love goodness,” and “to walk humbly.” JEROME, *supra* note 5, at 288. *The Abingdon Bible Commentary* refers to “justice,” “mercy

or kindness,” and “a humble walk with God.” ABINGDON, *supra* note 6, at 796. John Calvin rendered these injunctions as “to do justice, to love mercy, or kindness, and to be humbled before God.” CALVIN, *supra* note 14, at 342.

In addition to its almost poetic majesty, one merit of the King James translation is that it places the important attributes of justice, mercy, and humility in stark contrast, in a way that helps us see the conflicts that can arise from trying to follow all three directives at once. But the possibility of such conflicts can also be seen in other translations. For example, *The Jerome Biblical Commentary* translation’s instruction to “do the right” and “to love goodness” raises the possible conflicts that can arise between duty and love. For an arresting and provocative account of such a tragic conflict, see Martha Nussbaum’s discussion of Agamemnon’s decision whether or not to kill his own daughter, Iphigenia, in response to a divine command and to save the lives of everyone else in an expedition. MARTHA CRAVEN NUSSBAUM, *FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* 32–38 (1986).

17. The metaphor of the wrecking ball, like the metaphor of the mean, while helpful, is not perfect or complete, and in some senses might even be misleading. Both the excessive state of pride or arrogance and the defective state of feeling inferior, subservient, or worthless will often be characterized by high levels of self-awareness or self-concern. In contrast, humility is characterized by the opposite tendency, being focused upon the needs, concerns, and viewpoints of others. Thus, it is odd to think of *selflessness* as a mean or middle state between two extremes that are characterized by being extremely *self-aware*. The metaphor of the wrecking ball might also be misleading if humility is understood to be a delicate equilibrium that can be thrown off at the slightest provocation or by the smallest mistake. I do not mean to suggest that we must all somehow continuously strike the “perfect” balance, and if we fail to do so, we will be walking around as human wrecking balls. Nevertheless, if we are seriously out of balance with respect to humility, there is a real danger that we will swing back and forth between defective and excessive states.

18. U.S. District Judge Thomas A. Wiseman, Jr., reflecting upon Micah’s injunction to do justly, love mercy, and walk humbly with thy God, notes that “[m]ost lawyers I know would say that a humble federal judge is an oxymoron; and they are probably right.” THOMAS A. WISEMAN, JR., *What Doth the Lord Require of Thee?*, 27 *TEXAS TECH L. REV.* 1403, 1408 (1996).

19. Livia Jackson, a Holocaust survivor, makes this point explicitly as she recalls the name-calling indulged in by the S.S. guards: “From *blode Lumpen*, ‘idiotic whores,’ we

became *blode Schweine*, ‘idiotic swine.’ Easier to despise. And the epithet changed only occasionally to *blode Hunde*, ‘idiotic dogs.’ Easier to handle.” LIVIA BITTON JACKSON, *ELLI: COMING OF AGE IN THE HOLOCAUST* 60 (1980), *reprinted in* MYRNA GOLDENBERG, *Different Horrors, Same Hell: Women Remembering the Holocaust*, *in* THINKING THE UNTHINKABLE: MEANINGS OF THE HOLOCAUST 150, 156 (Roger S. Gottlieb ed., 1990).

20. ANTHONY T. KRONMAN, *Precedent and Tradition*, 99 *YALE L. J.* 1029, 1034 (1990).

21. MICHAEL OAKESHOTT, *On Being Conservative*, *in* RATIONALISM IN POLITICS AND OTHER ESSAYS 169 (1962).

22. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* III–98 (1962).

23. H. L. A. Hart noted that legal theory “is apt either to ignore or to exaggerate the indeterminacies of legal rules.” H. L. A. HART, *THE CONCEPT OF LAW* 127 (1961).

24. In defense of judicial prophets, see ROBERT COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 128 (1985).

25. For a sitting Federal Court of Appeals judge’s defense of judicial restraint, see J. Clifford Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 *Geo. Wash. L. Rev.* 50, *reprinted in* JUDGES ON JUDGING: VIEWS FROM THE BENCH 163–74 (David M. O’Brien ed., 1997) (advocating judicial restraint “based upon concerns of legal predictability, uniformity, and judicial economy, and most importantly, upon values of liberty and democracy.”).

26. The classic citation in support of this proposition is Lord Action’s dictum “Power tends to corrupt and absolute power corrupts absolutely.” Letter from Lord Action to Bishop Creighton (Apr. 5, 1887), *in* ESSAYS ON FREEDOM AND POWER 329, 335 (Gertrude Himmelfarb ed., 1972). See also *Doctrine and Covenants* 121:39–44.

27. ROBERT M. COVER, *Violence and the Word*, 95 *YALE L.J.* 1601 (1986).

28. Micah 6:8 (emphasis added).







# The Real Generation Gap

BY MARIANNE M. JENNINGS

As Marianne M. Jennings attests, there are few experiences more terrifying than discovering what today's students know and what they don't know. At best, Generation X appears to be ill prepared for the responsibilities of adulthood and the challenges of modern life.

ILLUSTRATIONS BY PAUL COX | HAND LETTERING BY SHAYNE ELIASON



BORN IN 1980, TODAY'S COLLEGE FRESHMEN ARE PART OF "Generation X." They came into the world long after Vietnam, Richard Nixon, and Watergate. They never saw Senator Sam Ervin's eyebrows. Can you imagine? They were also born after *Saturday Night Fever*. They do not know John Travolta has had two movie careers.

Nor do they know what it is like to live in a society in which marriage is the predominant social institution. Unfortunately, they do know about broken homes and "single-parent families." And they know what it is like to be the children of child care, because 67 percent of them have mothers working outside their homes.

The members of Generation X know a lot about Madonna, Princess Diana, GI Jane, Michael Jackson, Michael Jordan, and Mike Tyson. They know nothing at all about Kate Smith, Mother Teresa, Rosie the Riveter, John Wayne, Babe Ruth, and Audie Murphy. Almost without exception, their favorite role models are the type of celebrities seen on MTV, ESPN, and the cover of *People*.

One disturbing poll reveals that nearly 100 percent of today's youth can name the "Three Stooges," but not even 1 percent can name three justices on the U.S. Supreme Court. Seventy-three percent want to start their own businesses, but 53 percent voted for small business foe Bill Clinton. Only 19 percent attend church regularly. Only 1 percent include a member of the clergy on their lists of most admired individuals.

What all these statistics tell us is that the gap between generations is wider than ever before. There are five areas in which the gap is most pronounced: skills, knowledge, critical thinking, work, and morality.

#### THE SKILLS GAP

Iowa test scores have been a standard measurement of academic achievement for many decades. And what they have been measuring lately is frightening. Students who should be scoring at the 90th percentile are barely scoring at the

70th; those who should be at the 70th are hovering between the 30th and the 40th. Between 70 and 90 percent of all students entering the California State University system have to take some form of remedial course work in basic subjects like English and math. Eighty-seven percent of students entering New York community colleges flunk the placement test—they can't even pass the test that would put them into remedial courses! As New York Mayor Rudolph Giuliani observed several years ago, if skills actually determined entrance into the New York system of higher education, three of every four students would probably be denied admission. (The state has recently begun to administer such tests, and it appears that Giuliani was right.) It is also a matter of public record that national ACT and SAT college entrance test scores are steadily declining despite "adjustments" designed to boost them artificially.

Yet one-third of many high schools' students maintain 4.0 (straight A) grade point averages. Why? Because grade inflation, which occurs at every level of education, is rampant. My daughter Sarah has been in the public school system since the third grade, and she is living proof. She has consistently received good grades without the benefit of a good education.

When she enrolled in an algebra class in the eighth grade, I offered to help her with her homework. She took me up on this offer one evening when we were sitting together at the kitchen table. The first problem was: "What is 10 percent of 470?" I was stunned to discover that Sarah couldn't solve it without the aid of a calculator. Another problem involved determining 25 percent of a given figure. She not only didn't know the answer, but she didn't know

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that this percentage could be expressed as “one-quarter” or “one-fourth.”

Here was my own flesh and blood—my straight-A student! I couldn’t help asking, “Are the other kids this dumb?” Without missing a beat, Sarah replied, “Oh, they’re much dumber.” She may be right. On the most recent International Math and Science Survey, which tests students from 42 countries, one-third of all American high school seniors could not compute the price of a \$1,250 stereo that was discounted by 20 percent.

#### THE KNOWLEDGE GAP

Algebra is not the only area where today’s students have trouble. Hillsdale College President George Roche writes, “Tens of thousands of students do not know when Columbus sailed to the New World, who wrote the Declaration of Independence, or why the Civil War was fought.” Part of the problem is that most parents don’t realize that what is being taught in modern public schools is actually widening the knowledge gap between them and their children.

One of the most popular history textbooks, produced as a result of the campaign for national education standards in the late 1980s, disparages the “Father of Our Country.” George Washington was not, the authors of *The United States: In the Course of Human Events* contend, really successful as a soldier, as a politician, or as a human being. Much is made of Thomas Jefferson’s subjective observation that Washington was possessed of “a heart that was not warm in its affections.”

How is Generation X ever going to find out that Washington the general did more than any individual to win the war that established our nation? Or that Washington the president risked his reputation and his career to ensure that we would have limited government, a sound economy, and a virtuous citizenry? Or that Washington the man constantly performed acts of kindness and charity for others, including Jefferson? It certainly isn’t going to learn such important lessons from a textbook that claims Washington was not much of a man because he did not, in modern lingo, “feel our pain.”

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Special sections in each chapter feature biographies of people who have made a difference in history. Almost all are politically correct minorities and/or females. One, for example, is a female astronaut. The authors allege that she was unfairly excluded from Project Mercury because she had no flight experience. This, of course, is characterized as an insufficient reason to deny her the “right” to participate.

The 17th-century English philosopher John Locke is not mentioned—there is no room, evidently, to discuss his significant role in bringing about the Enlightenment or the American Revolution. Famous religious leaders are also ignored, although the authors do bow to the ancient gods of primitive peoples. Pre-Columbian cultures like the Toltecs are praised for their lavishly decorated temples, their calendars, their games—so what if they practiced human sacrifice?

This best-selling textbook reveals a glimpse of the version of history—or rather, nonhistory—Generation X is being taught. I should know. Last summer I took Sarah, then 14 years old, on a tour of Boston, Massachusetts. I carefully explained the historic significance of each site to her. After several hours, she said, “Now, Mom, what war was this?” While I was still in a state of shock, we arrived at the Old North Church and listened to a tour guide tell the story of Paul Revere. Sarah’s question this time was, “What side was he on?” I asked incredulously, “What exactly did you do in the advanced placement U.S. history class you just completed?” Her response was, “I made a great many charts, and I did a lot of little projects with painting.”

I do not mean to pick on Sarah. She and her peers are victims of a pernicious system that has turned traditional liberal arts education on its head. The situation is no better in higher education. At some colleges and universities, professors deliver lectures on “The Apostle Paul as a Homosexual” and “Jesus Acted Up: A Gay and Lesbian Manifesto.” Stanford University achieved notoriety a decade ago for its course “Black Hair as Culture and History.” A current survey on American religion at another school fails to mention Catholicism. One new cutting-

edge psychology course is titled “Gender Discrepancies and Pizza Consumption.”

Before long, the loss of knowledge may even make simple conversation impossible. In my classroom, I cannot say, “Never look a gift horse in the mouth,” or my students will give me a blank stare. I cannot say, “Me thinks thou dost protest too much,” or at least one will inevitably respond, “Excuse me, Professor Jennings, shouldn’t that be, ‘I thinks?’” The literary shorthand of our culture is being lost. This is no small loss either, for words are symbols of important ideas.

#### THE CRITICAL THINKING GAP

Indoctrination is partly to blame for the knowledge gap. This is not a new trend in education. When I was in school, I was taught about “global cooling,” and my teachers predicted that the earth was going to be frozen over in a new ice age. Today, my children are told that global warming is going to bring on an ecological apocalypse. But the level of indoctrination has risen sharply. Environmentalism has become an obsession with the teachers of Generation X. They constantly bombard students with dire warnings about pollution, scarce resources, and weather-related disasters. A recent cartoon sums up the attitude the students typically develop. It shows a little girl declaring to her mother that her day in school was a bust: “We didn’t do anything to save mankind or the environment. We wasted the whole day on reading and math.”

Indoctrination makes students passive receivers of information. As such docile participants, most public school students are incapable of independent thought—of drawing logical inferences or exhibiting other critical thinking skills. They are also incapable of looking at a statement and determining its validity. I refer to this as the “frou-frou head” problem, because students are so lacking in skills and knowledge and are so indoctrinated by politically correct thinking that they are not able to think clearly or make sound, well-informed judgments.

High school freshman Nathan Zohmer of Idaho recently conducted an experiment in science class that reveals the serious

nature of this problem. He told classmates and teachers that they should sign his petition to ban a dangerous substance, “dihydrogen monoxide,” which causes excessive vomiting and sweating. He informed them that dihydrogen monoxide is a component in acid rain. In its gaseous state, it can cause serious burns. Accidental inhalation can kill. To make matters worse, it contributes to soil erosion, decreases the effectiveness of automobile brakes, and its presence has been detected in some terminal cancer tumors.

Forty-seven of the 50 students and teachers signed the petition with no questions asked. Not one thought to inquire, “Just what *is* dihydrogen monoxide?” If they had, they would have discovered they had signed a petition calling for a ban on H<sub>2</sub>O—water.

#### THE WORK ETHIC GAP

Then there is the work ethic gap. In a recent survey, 80 percent of Generation X respondents said they want an active social life, while only 37 percent admit success at work is important. More adult males are living at home with their parents than at any time in our country’s history. Why this staggering statistic? Moms and dads provide comfortable room and board while salaries can be used for fun. The desire for independence is missing along with the drive for achieving that independence.

There is no longer a stigma attached to joining the welfare rolls or renegeing on financial obligations. Personal bankruptcies are at an all-time high. What is unique about these bankruptcies is the fact that the majority are not the result of the loss of a job or health problems; they involve one or two wage earners who have simply overextended themselves. Credit card debt, which has skyrocketed in recent years, is mainly held by those whose annual income exceeds \$50,000. Evidently, the willingness to save and to delay gratification, the drive for success, and the concern for reputation are fast disappearing in a culture that condones irresponsible spending.

The average time for completion of a bachelor’s degree is 5.5 years, so most students are not on a fast track. And they

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Generation X



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# We have been silent as an entire generation has

have developed some bad habits by the time they get into college. One is whining. As long as there have been students there has been whining—about workload, about subjects, about grades. But now there is *preemptive whining*. Even before the semester begins, even before papers and tests are handed back, students come into my office at Arizona State University with a laundry list of complaints.

Last year, one-third of my students protested their grades. In my first 20 years of teaching, not a single student questioned my judgment, but I expect half of my students to do so in the next 10. They are infected with an entitlement mentality. Good grades are not earned by hard work and subject mastery but by signing up to take the class.

I once counseled a graduate student who was doing poorly by saying: “Look, the problem is that you have a lack of depth when it comes to your studies. You have no knowledge base on which you can draw. You are going to have to start reading.” He said with some surprise, “What do you mean? Books?”

A recent study analyzing the habits of elementary school children revealed that the average time spent on homework is 10 minutes. Worse yet, the same study found that schools are increasingly adopting a “no homework” policy. Perhaps the saddest aspect of this situation is the reason more assignments are not given: Parents complain about the work their children are given.

Following last spring’s final exams, a student came to my office and said, “You made us stretch to the maximum. It wasn’t a bad feeling.” Unfortunately, most students do not understand the pride that comes with conquering what seems to be impossible. Generation X is filled with self-esteem but bereft of knowledge.

In the math survey mentioned earlier, students from around the world were asked how they felt they had done upon completion of the exam. While the scores proved that the United States finished in

the bottom third of all countries participating, it did finish first in terms of students’ perception of personal performance. Americans exhibited the highest self-esteem while students from Japan and Singapore, who finished in the top two slots, were the least arrogant about their performance.

## THE MORALITY GAP

The most grievous problem is the morality gap. Sarah is a basketball player and a devoted fan of *Sports Illustrated*. Recently, she shared with me one of the magazine’s top stories, which summarized a poll of one thousand Olympic athletes. One of the questions posed was, “If we could give you a drug that would guarantee your victory at the Olympic Games but would also guarantee your death in five years, would you take it?” Fifty-four percent said yes.

Another survey conducted by the Lutheran Brotherhood asked, “Are there absolute standards for morals and ethics, or does everything depend on the situation?” Seventy-nine percent of the respondents in the 18–34 age group said that standards did not exist and that the situation should always dictate behavior. Three percent said they were not sure.

If this poll is correct, 82 percent of all students believe that right and wrong are relative terms and that morality is a ridiculous concept. This is the den of lions into which I walk every day. It is called the modern American classroom.

When I finish teaching a course, I ask my students to fill out a written evaluation form. Many of them comment, “This business ethics class was really fascinating. I had never heard these ideas before.” Mind you, I am not teaching quantum physics—I am presenting simple, basic ideas and principles that should be followed in the marketplace: Be honest. Treat other people the way that you want to be treated. Work hard. Live up to your obligations.

Comedian Jay Leno revealed during one of his street interviews on “The Tonight Show” that the same young people don’t seem to know the Ten Commandments. What they do know about morality is what they have picked up in scattered, disconnected bits from parents, friends, television, and magazines. And a good deal of this is immoral rather than moral. As a result, Generation X lacks a solid moral foundation for its views on school, work, marriage, family, and community.

## CLOSING THE GENERATION GAP

Are there ways to close the yawning generation gap, which is really the sum of all these smaller gaps? Of course there are. We live in a miraculous age. Great changes have revolutionized the way we live. I started law school with an electric typewriter—state-of-the-art back then. Now I have a computer, a fax machine, and electronic mail. The tools of high technology allow for improved education, wider access to knowledge, more work productivity, and greater freedom to make moral decisions. But these same tools also demand greater personal responsibility.

Is Generation X ready? I don’t know. Remember the 1986 disaster at the Chernobyl nuclear plant in Ukraine? The world’s worst nuclear accident did not happen because nuclear power is a flawed technology. It happened because a handful of young, cocky engineers chose to disregard established safety parameters while performing a routine test of equipment. Ironically, the test was designed to provide power to operate the reactor core cooling system in the event of an emergency. The engineers’ carelessness and arrogance, which caused the release of large quantities of radioactive substances into the atmosphere, has since caused the death, pain, and suffering of innocent victims in Belarus, Ukraine, and Russia.

Look at what happened to Barings Bank, the venerable institution that financed the

as seen truth repeatedly violated.

Napoleonic wars. It went bankrupt in 1995, because one trader, 28-year-old Nick Leeson, was able to sit in front of his computer and violate the prime ethical rule of banking: You don't take other people's money and recklessly gamble with it. He made a \$27 billion bet that the Japanese stock market would rally after the Kobe earthquake. The market dropped instead, and Barings' losses reached a staggering \$1.3 billion.

At the end of 1997, 29-year-old Marisa Baridis entered a guilty plea when she was charged with selling inside information. For \$2,000 to \$10,000 a tip, she and her friends made a dramatic impact on the stock market by using nonpublic information to take advantage of others. Ms. Baridis, who profited handsomely from such cheating, was the compliance officer for the investment bank and brokerage house of Morgan Stanley. She enjoyed a great deal of technological access to confidential information and a great deal of unilateral authority. In a tape-recorded conversation, she referred to insider trading as the "illegalist [sic] thing you can do," but, lacking the basic values of fairness and honesty, she easily dismissed the law she was responsible for enforcing. She also cost shareholders and companies millions of dollars.

High technology demands *more* individual judgment and *more* moral accountability. Generation X boasts thousands of technowise youth. But it is missing real wisdom, informed by a strong education and a strong spiritual ethic. When I point this out to some of my students and colleagues, they say, "Hey, don't shove that Judeo-Christian stuff down our throats! We don't want that." Then I remind them that this "stuff" exists everywhere, and that it has been considered vital to civil society for centuries. I challenge them to name one country in the world where bribery and cheating are legal and approved by the populace. I tell them to examine the most basic ethical principles of Moses and Jesus and compare them to those of Aristotle, Confucius, and Mohammed. The major religions of the

world are in agreement on certain universals that have stood the test of time.

One such standard of universal morality is what is referred to by Christians as the "Golden Rule": Do unto others as you would have them do unto you. The same notion of fairness can be found in the basic tenets of Buddhism, Judaism, Hinduism, and even in philosophy in the form of Kant's "categorical imperative." Throughout time, this simple test of ethics has been recognized in various cultures as a means of preserving civility, decency, and morality. Its beauty lies in its simplicity. Its profundity lies in its universal recognition and adherence.

#### PARENTS AS TEACHERS

As parents we have to stand up and be counted. When our children come home from school, as my daughter did one day, spinning yarns about Ethan Allen and the "Green Mountain Persons," we have to set the record straight. Truth matters. It was Ethan Allen and the "Green Mountain Boys," and this fact is not a slight to women. When preschoolers are exposed to storybooks on "alternative" lifestyles and early sex education (endorsed by the National Education Association, by the way), we must sound our objections loudly and clearly. We must exert pressure on superintendents, principals, and teachers. We must take the initiative and run for positions on school boards and city councils.

We must also seize moments of morality with our children to teach them the difference between right and wrong and impose punishments when they stray from moral principles. Most important, we must restore the twin notions that being judgmental is not the same as being narrow-minded and that expressing moral outrage is not a form of "hate speech." What a different world we would have if choosing right and rejecting wrong were not considered fanatical!

When I graduated from law school, a speaker offered nine words I have never forgotten: "Truth is violated by falsehood but outraged by silence." The past 25 years have been filled with falsehoods about our history and our culture. Generation X has never lived in a time of truth. Condemning immorality has become virtually the only sin, so it has not even witnessed the courage of conviction. We have been silent as an entire generation has seen truth repeatedly violated.

There is a difference between holding beliefs and being valiant in defending beliefs. As parents struggling to close the generation gap we must be valiant in defending our beliefs. Indeed, this is a call to action for all who guide our youth and offer them instruction. When immorality and adultery are described as "private" and therefore "irrelevant" in the public square, with no impact on character and leadership, we must shout from the rooftops, "Personal conduct *is* character! Character does matter!" When the lessons of history, literature, science, and religion are distorted, attacked, or lost in the shuffle, we must rescue them. It is time to break our silence and confront those who have perpetrated so many myths, so much fraud, and so little substance for so long.

It is still possible to reclaim Generation X from the hopelessly flawed indoctrination it has experienced. But reclaiming our children will require the type of introspection that results in moral courage and is followed by the expression of moral outrage. One of my students commented to me at the end of a semester, "You've dispelled so many myths. Now I know morality in business is not a crime." And I responded, "It's even better, son. Neither is the moral life a sin." Breaking our silence will allow truth to emerge, and its rare and illuminating quality will attract the attention and devotion of a generation trained and raised in amoral darkness.

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*at first you don't succeed, you're normal*

BY KENNETH R. WALLENTINE | *The following speech was given to the lawyering skills class at the J. Reuben Clark Law School on March 23, 1998.*

They didn't have this class when I was in law school. Or maybe they did, and I slept through it. I've been asked to talk with you about research and writing skills. I guess that I'm an example of what happens when hours of computer time produce nothing but glazed eyes, and endless page-turning results in near total blood loss through paper cuts.

[ Illustration by Vivienne Flesher ]

There is not much that I can tell you about how to research the law, other than to pay attention to Gary Hill. Then I'm supposed to tell you about writing and about life as a lawyer.

There are several ways to get a great clerkship or summer job. The best way is to bear the surname Rehnquist, Hinckley, or Zimmerman, or to be dating someone with such a name. Another way is to have a season ticket to law review. I also once heard of someone winning the Florida lottery and buying her own law firm just to get a summer clerkship. None of these methods worked for me. Let me tell you about landing my first summer clerkship.

A friend and I both discovered in February—coincidentally just after first-semester grades came out—that we would not be in the elite eight who would score prime clerkships. We discovered that the elite eight was selected by narrowing the sweet 16 of the top 10 percent down to the students who had palatable personalities and enviable golf handicaps. So we decided to create our own future.

I invested several dollars in a box of good linen bond paper. I toiled over my 8086 AT&T wonder computer and cranked out a very attractive résumé. I consulted with career services. They gently told me that the résumé looked nice, but it lacked any real substance. I could not understand why I should leave out the part about hanging out in a bar and public parks for the summer when I was assigned to buy drugs and hook up with prostitutes as part of my police job. Did not that uniquely qualify me for work in a big firm? I could be the token former cop. I had dreams of a television pilot and eventual series. Besides, I had a beard, and a beard license from the McDonald Health Center. Now show me one person in the top 10 percent who sported a beard, had arrested deviant panderers in parks, and could buy a quarter-gram of cocaine in the first hour of being in the local tavern!

After succumbing to threats of a compulsory chat with Dean Hafen, I trimmed the fat from my résumé and opened my own publishing house. I discovered a substantial savings in printing 5,000 copies of

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tive was torts and civil procedure.

a résumé at the same time. As I wallowed through draft after draft, I became quite friendly with the print shop staff.

Résumés in hand, and smiles worthy of missionaries serving in outer Mongolia, simultaneously afflicted with colitis and a migraine (years before, while on my mission, I knew I was practicing for some later life experience), my buddy and I plopped our \$1.25 fare on the UTA bus and headed for the big city. We had this crazy idea that we could visit the major law firms and bully our way into the office of each recruiting committee chairperson to personally deliver our fine linen bond résumés.

We picked a day during the worst storm of the winter of 1987. What the heck. The alternative was torts and civil procedure. I was relying solely on my silver tongue. Only a year before, I had faced a crazed immigrant waving a razor-sharp meat cleaver in my face while I pointed a gun at his forehead. I'd persuaded him that it would be in our mutual best interest for him to put the meat cleaver down. He did, and without me shooting him. I figured if I could do that, I could get past a law firm receptionist. (Actually, the truth is that some time later I discovered that this particular man spoke no English. He had surrendered because he had to visit the bathroom.)

I was buoyed up because my friend was much smarter than me, yet his grades weren't any better. We'd be together in this foolhardy endeavor. Or so I thought, until I discovered that his sister-in-law was a partner at Jones, Waldo, Holbrook and McDonough. Not to be outdone, I called on my father's high school debate partner at Jones-Waldo. He graciously invited me into his office and sat me in a chair that he'd had since knowing my dad in high school. The combination of the rickety chair and being placed by a window with a six-inch-high ledge 15 stories above State Street led to severe nausea and an abbreviated interview. I did not hear back from Jones-Waldo.

I moved on down the street to Watkiss and Campbell, where I had real hope. I had put my research skills to good use and discovered the name of the chair of the hiring committee. I'd then perused the

Salt Lake newspapers and discovered that the man kept bees for a hobby. My wife was interested in apiary science. A connection! I quickly digested several magazine articles about beekeeping. Arriving at the Watkiss and Campbell lobby, I boldly told the receptionist I was here to see Mr. So-and-so. (The names have been cleverly changed to protect the gullible.) It seems that my boldness worked. She assumed that I had an appointment and telephoned a confused Mr. So-and-so. Mr. So-and-so appeared in the lobby with a bewildered look. He ushered me into a palatial office, and we set about discussing bees. About three minutes into the conversation, he bluntly asked: "Did we have an appointment?" I confessed that we did not, produced a lovely résumé, and gracefully retreated.

Two weeks later, I received a call asking for a writing sample. I later learned that Mr. So-and-so had resigned from the hiring committee, but he told someone to interview me and to see if I could write. I interviewed. I wrote. I was hired. After I was hired, they asked if they could see my grades. Sure, no problem. After all, didn't we have an enforceable contract? No one ever really commented on the grades, other than to note, "That's not how they do it at the U."

The first summer did not lead to a guarantee of a second summer, somewhat to my dismay. In my second year, the better paying clerkships seemed just as scarce. With four kids to feed and a mortgage, money was a real issue. I wrote a paper to enter a natural resources writing contest sponsored by the American Bar Association. I made no great pretense about the reason. First prize was \$1,000 cash. To my amazement, I won the prize, besting a law review editor from Harvard Law School. That cemented a second-year clerkship and convinced me that legal writing could pay dividends.

I next turned my attention to writing a law review article about a hot topic in criminal law. The law review article later became a state statute through the plagiarism of one of my fellow students. The article also led to one of my most stimulating and engaging interviews ever and a clerkship at the Utah Court of Appeals.

Having a third article accepted for publication by graduation helped me get a clerkship with one of the nation's top federal appellate judges. In turn, that clerkship opened many more doors at fine firms. I returned to Utah to join the state's finest firm.

I'M NOT A PARTICULARLY BRIGHT guy, even today. I have passion for my work. I have passion for what I write. I follow a few very simple rules for writing. Maybe they will help you.

First, be prepared to stumble and fall. The best lesson I ever learned was in a bar fight. I got knocked down hard and I bled. Getting hit hurts, but not nearly as bad as lying on a smelly floor wallowing in the stench of failure. Failure is nauseating. Getting back up felt great; I was energized by my own blood loss. I hit back, got hit, hit back, and ultimately the other guy stayed on the floor. Writing requires the same willingness to stumble and get back up. Do not despair when a law review editor bleeds an entire red pen barrel on your "final" draft.

Here's my second suggestion. After that bar fight, I took a few fighting lessons from an amateur boxer. He taught me about wasted energy and useless motion. Wasted energy also clutters writing.

"Omit needless words! Omit needless words! Omit needless words!" E. B. White, author of the great book *Charlotte's Web*, said that to each new English class when he taught at Harvard. I have found that counsel invaluable. Yet I also recognize the truth spoken by my friend and legal mentor Rex E. Lee, when he noted: "There is nothing quite so painful as an undelivered speech." As I've seen editors bleed red ink all over my writing, I have learned that the same pain applies to a deleted paragraph.

There will always be a tug-of-war between the need for clarity and brevity and the wish to expound on the mysteries of the universe as developed in all the cases your research uncovered. Anyone who doubts that clarity and brevity deserve to win the war of the words ought to reread the Gettysburg Address or the Ten Commandments. Omit needless words!





The third suggestion that I offer for developing your writing skills is to write. Writing is easy. All you do is stare at a blank piece of paper until drops of blood form on your forehead. And then you tear up the paper and start over. Soon you create something important. Write, write, write. Edit, and write some more.

I have a friend that I have sent to prison twice. He did not become my friend until after he got out on parole for the second time. During his last term in prison, when he was pushing 50 years of age, he decided to become a painter. He is covered from ear to toe in tattoos, mostly

of his own design. He began painting. He painted and painted and painted some more. When he got out, he painted a picture for me. He gave several paintings to my office staff. He gave away more than 2,000 paintings, and many others ended up in the discard heap. Recently, he came to see me. He had just sold one of his watercolors for \$250 and had been given a commission to do several more. He became a painter by painting. One becomes a writer by writing, even if one writes only briefs and memoranda.

Finally, read great literature. I believe that a truly great lawyer will know

Shakespeare—or at least *Hamlet*—and certainly the Bible and perhaps even the *Autobiography of an Ex-Colored Man*. If you learn great stories and poems, they will return to you as metaphors, comforts, and even closing arguments.

Recently, a prosecutor was faced with the plausible argument that a particular piece of glassware could not legally constitute drug paraphernalia, since the drug residue from smoking was so thoroughly burned that the crime laboratory could not test the substance. In closing argument, the prosecutor recited the story of Elijah and the priests of Baal, recounted

# Read

GREAT LITERATURE

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in the 18th chapter of First Kings. He reminded the court that Elijah had built a large altar, topped with wood and a sacrificial bullock. Elijah then poured four barrels of water over the altar. He called down fire from heaven. The bullock, the wood, and even the stones of the altar were fully consumed in the fire. The story connected. The judge understood that the methamphetamine residue was fully consumed by the flame. The defendant was convicted. People are persuaded by what they understand. A good writer makes use of the familiar when exploring new territory.

THAT'S ENOUGH ABOUT WRITING. I have gathered a few ideas over the years about being a lawyer. Maybe a few of my observations will be useful to you. As you listen, remember this: Not long ago I spoke at a youth fireside. After my presentation, a woman approached me and gushed marvelous praises for my speech. I reminded her that I could preach more gospel in 45 minutes than I could live in 45 years.

Some may see a legal education as a ticket to a fine income. It is. But don't think that the only place to make money is in a large and prosperous firm. Of course, there is money in big-firm prac-

tice, and some may find satisfaction there. I certainly did, although I practiced in a uniquely wonderful large firm.

Money is where you want it to be. Money is what you get when you help another person solve a problem. Money is your time, your talent, and your commitment to your clients. Money is a tool to accomplish your needs and wants. It is not a treasure to accumulate. Money will come to you. Remember Paul's advice to the wealthy: "Charge them that are rich in this world, that they be not high-minded, nor trust in uncertain riches, but in the living God, who giveth richly all

things to enjoy” (1 Timothy 6:14). Paul also warned: “The *love* of money is the root of all evil” (1 Timothy 6:10; author’s italics). If money is your professional objective, you will discover that the “eyes of man are never satisfied.”

To build a prosperous practice, carefully study the New Testament. About one-fifth of Jesus’ words deal with money. The best financial advice that I’ve ever found is recorded in Luke, chapter 6: “Give, and it shall be given unto you; good measure, pressed down, and shaken together and running over, shall men give into your bosom. For with the same measure that ye mete withal it shall be measured to you again.” Read the first 11 verses of the fifth chapter of Luke, and you’ll learn that Jesus told people where and how to find all the money that they needed.

I’d also like to suggest that you regularly schedule time for fun. This past month and the next two months are incredibly busy for me. I have many days of speeches and lectures scheduled from Seattle, Washington, to Washington, D.C. This week I have an armed robbery jury trial, 3,000 miles of travel, two speeches, and a stake youth activity, and I am coordinating an election campaign in a couple of dozen neighborhood caucuses. I planned my week carefully, and I prepared for the week.

I prepared by spending Saturday afternoon, all of it, on a lake fishing for wide-mouthed bass. I caught a few fish. My friends and I talked up a storm, and we spent a fair time in silence with each other. Saturday night I spent with my wife. Last week was just as crazy, but I’d prepared by watching my son win all of his high school tennis matches and by going out to eat with the kids.

God worked six days and took a day to rest. After the apostles had been about preaching and healing, Jesus commanded them to retreat. “Come ye yourselves apart into a desert place, and rest a while” (Mark 6:31). Put the skids to your frantic rush toward success. Resting is rebuilding.

The greatest key to any success that I’ve ever achieved has been to surround myself with wise mentors, friends, and counselors. I well remember several of

my law school experiences because I shared my progress and achievement with wonderful men and women. Like John, I can do nothing of myself (see John 8:28; John 15:5).

You ought also to find a mentor or two. I do not mean just someone to show you how to be a lawyer. In fact, I think that your personal mentors should not be lawyers. Find some friends who are plumbers, teachers, or accountants. I’m talking about someone who will counsel with you, someone you trust implicitly. Show me your mentors, and I can tell you your future. Polonius told his son: “The friends thou hast, and their adoption tried, grapple them to thy soul with hoops of steel.” Solomon cautioned: “Where no counsel is, the people fall: but in the multitude of counsellors there is safety” (Proverbs 11:14). My life has been rich and full because of my friends.

If you want success, there is only one path: Serve. As a young associate in a large firm, I had the unusual opportunity of trying a major case with another lawyer. My client was at risk for \$6.25 million. We won the case. We received praise and a bonus. My classmates were ferociously jealous that I had actually been to trial. That happens infrequently for junior associates in big firms. That bonus was nothing compared to a bonus that I’ll receive in about a month.

A day after Christmas, I received an unexpected telephone call. A young mother with some mental and physical ailments was tired of her children—tired, truly tired. She had been considering giving away her children for some time. The father was nowhere to be found. Her family could not help her. So she had turned to her church. Her pastor had been on a jury panel before me on some old case. He remembered me and had asked for my help. I had spoken with his parishioner, counseled her on getting help with her children, and had helped her obtain some job skill training and some further health care. All of this had preceded the surprise phone call.

I took her two beautiful, but neglected children. I placed them with a wonderful couple, struggling financially, but eternally yoked together in a tremendous mar-

riage. They had spent a small fortune on medical care in an effort to have children. In a month or so, I’ll be before the court to finalize their adoption. I’m being paid in cookies. They have no idea of the legal fees for an adoption. They had to scrimp for the filing fee. I have no intention that they should ever know the usual fee. I’d have paid them to experience the joy I’ve received. No one but a lawyer could have accomplished this task. In a couple of years, you will be competent lawyers, and you will be able to serve in this fashion.

Always practice in a partnership, even if you choose to hang out your own shingle. In my office I handle a special category of crimes alone. I handle all sex crimes against children. But I have a partner. He’s the greatest researcher, investigator, and oral advocate. He knows all.

Let me tell you about a collaboration. A couple of years ago, a woman lost custody of her children to her ex-husband. The woman was a hard-core drug addict and criminal. The father was, and is, a drug dealer. He left his nine-year-old daughter with one of his drug clients for a few days while he went on a trip. He likely went away to purchase a quantity of drugs.

The babysitter, a man in his 20s, pinned the young girl down and sexually tormented her. After she could escape, she ran to a hospital a block away and reported what had happened. The trial approached. The father was nowhere to be found, having gone off again. There was minimal extended family support. They had tired of dealing with the law from their previous experiences.

The defendant was quite smooth and intelligent. His I.Q. measured off the charts. He told the jury about reading the *Wall Street Journal* front to back every day. He had a friend who gave a solid alibi. The jury was the ideal jury for a handsome, bright young man. It was composed of seven women, mostly young and single, and one single middle-aged man who’d never married.

I knew that I would not likely win this trial. It is always difficult when it is the word of a little child, especially one from a pretty dysfunctional family, against



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an adult with a good story. Then there was the alibi. The defense suggested that if the girl was abused, her father did it in a drug-induced haze. The defense also had been able to twist the state's expert witness into stating that kids often are mistaken about facts in these types of cases.

The second morning of the trial, I went into the courtroom early and consulted with my Senior Partner on my knees. I told him that I knew this little girl was his daughter, and it seemed that only he and I cared about her. I believed her, and I knew in my heart that the defendant had abused her in the most devious way. If I was to win this trial and protect this child, I needed some quick help.

The defendant took the stand. I wondered if my Senior Partner would come through. I knew that I would lose this trial and that this man would move on to another young girl. About five minutes before I was to cross-examine the defendant, one of my investigators came into the courtroom. He handed me a stack of documents showing that the defendant had three different identities. I'd never seen this material. I questioned the defendant about having other names. Naturally, he denied that he had any other identities. I cemented his denials with repeated questions.

Through all this, his attorney was confused and objected on the grounds of relevancy and surprise. Despite the defense attorney's protests, I was able to introduce the driver's licenses and applications with the defendant's photograph and different names. I accused him of molesting the victim in a single question and sat down. The jury was out for 11 minutes, from walking out to walking in. They had one vote to elect a foreperson and one vote to convict. I did not win that trial—my Senior Partner did. He did it for one of his children.

That's what being a lawyer is all about: service and being blessed.

*Kenneth R. Wallentine, '90, is currently the chief deputy Uintah County attorney in Vernal, Utah. He practiced with Parsons Behle & Latimer in Salt Lake City from 1992 to 1994.*

# The Heritage of the Country Lawyer

BY SCOTT W. CAMERON

Decades ago the writer Bellamy Partridge concluded that “the country lawyer, as he existed between the days of Abraham Lincoln and Calvin Coolidge, is no more.” In an attempt to keep this heritage of the country lawyer alive, the Hugh W. Colton Professorship was established at the J. Reuben Clark Law School in 1987. After a distinguished career as a young lawyer and businessman in Washington, D.C., Hugh Colton returned to Vernal, Utah, in 1929. He continued to practice law for more than 60 years, in a practice that included natural resources, livestock and public lands, water law, commercial law, and litigation. He was also involved in other aspects of private practice in Utah and Colorado.

The Colton Professorship provided the impetus needed for the Law School to continue the tradition of the country lawyer. This professorship made it possible for the school to hire Gayle F. McKeachnie, a distinguished practitioner, community leader, and former legislator, to teach a law practice management course. In 1972, when Gayle returned to his hometown of Vernal to open up a practice, Hugh Colton was one of six attorneys practicing in the area. Hugh and Gayle were born a generation apart on their respective farms in the Uintah Basin. Neither contemplated law practice in their early years, but as is often the case, lives have a way of taking their own course. Their service to citizens of the Uintah Basin overlapped for more than 20 years, and now—through the Colton Professorship, Gayle’s practice, and the students he is teaching—the influence of the

country lawyer will continue well into the next century.

Gayle McKeachnie grew up on a farm and always planned to stay on the farm, but a basketball scholarship to the College of Southern Utah intervened. It was there that he read the Book of Mormon for the first time and became converted to the gospel. Basketball led to college, and college led to a mission, and interestingly enough, his mission to Mexico led him to law. While serving in the mission home, Gayle met Agrico Lozano, the Church’s legal counsel in Mexico. He worked with Attorney Lozano to purchase property for the Church, and through this experience his interest in law began.

Following his mission, Gayle returned to the College of Southern Utah. During this time, he felt a force pushing him toward law school that was almost as strong as the desire he had to return to his family farm. After graduating in political science with a minor in Spanish, he decided to pursue a career in law and attended the University of Utah College of Law from 1967 to 1970. For two years following graduation from law school, Gayle stayed in Salt Lake City, where he practiced corporate law and natural resource law for the firm of Senior & Senior. While he loved his practice and enjoyed the Salt Lake area, his farm in the Uintah Basin began to pull him home once again.

Vernal was a boomtown in the early 1970s when the oil embargo created great interest in oil shale and tar sands. Gayle realized he could have the best of both worlds; he could return to the Uintah Basin to practice natural resource law and

once again have the chance to do a little farming. Most important, he would be home. He did make the move home, and even though his natural resource practice did not last as long as he had wished because of a decline in the Uintah Basin’s oil industry, Gayle has always thoroughly enjoyed the practice of law in Vernal. It provided him the opportunity to serve in the Utah Legislature for more than eight years. He notes that virtually all of the attorneys who serve in the state legislature have small practices. He indicates that few large law firms are willing to subsidize a partner for three or four months each year while the partner serves in the legislature. His small town practice has also allowed him to have a partnership arrangement with a Salt Lake City firm and to open a branch office in Roosevelt.

Among the virtues of practicing law in a small town is the opportunity to become part of the fabric of the community. Not only has Gayle’s firm represented virtually every organ of city and county government, but it has been involved with the Chamber of Commerce and has had myriad opportunities to assist the nonprofit sector of the community. The only drawback he sees in practicing law in a small town is that everyone “sees your warts.” Frequently, you are in adversarial situations with those who are neighbors or at least acquaintances. While serving as a stake president in Vernal, Gayle never represented anyone who opposed a member of his stake. This decision had adverse economic consequences, but he feels that even these problems were made up for in other ways. He indicates that while lawyers may

portrait



not take their role as adversaries personally, the clients feel the hurt and attribute it to opposing counsel.

Being in Vernal has also presented numerous opportunities for Gayle to teach. He has taught for the Utah State University Extension Division and, most recently, for the J. Reuben Clark Law School. In his law practice management course, Professor McKeachnie divides the students into law firms. He has them write a partnership agreement, where they decide if they will run as a full-fledged team, as a loosely bound confederacy, or merely as attorneys who have an office-sharing agreement. He indicates that the way partners get along with one another is one of the most important aspects of a small practice. The simulated experience of working in a law office where projects are handled together is one of the most valu-

able lessons future attorneys can learn. The “law firms” are graded as a partnership. The students create an organizational chart and divide the management responsibilities of the practice. They decide how to fund the creation of the law office, whether or not to have a library or use electronic databases, how to furnish their office, what billing system to use, how to hire support personnel, how to compensate personnel, and how to split the profits. One exercise that is particularly difficult for students is timekeeping. The students keep track of their time from 7:00 a.m. until they retire for bed. This exercise shows students how difficult it is to keep track of billable hours and how important it is to make better use of personal time. Students also learn “how to design a life.” They must sit down and determine how many hours they will work and how much time they will allow for

civic responsibilities, church responsibilities, and family commitments.

The students are pleased with the attempt to keep the tradition of the country lawyer alive. Isaac Paxman indicated: “The class could almost be called ‘Life Management for a Lawyer.’ We learn how to balance our lives so our practice doesn’t manage us. Professor McKeachnie is a great example of a gentleman lawyer.” Another student, Ben Lund, found that confronting the practical problems that students will face in the practice was helpful: “The diverse insight and knowledge he [McKeachnie] brings to the class will be helpful in whatever law firm setting we might work.” The Law School is indebted to the tradition of the country lawyer exemplified by Hugh W. Colton and reinforced by the teaching of Gayle McKeachnie.



# Last Laugh: A Mission for the Morgans

BY LOVISA LYMAN

"Man plans and God laughs" is a saying Kathryn Boe Morgan believes typifies many lives, including hers and her husband Thomas D. Morgan's. It's true that their lives have not turned out exactly as either of them planned. Both were born in the Midwest and intended to remain there. Both married in their 20s fully committed to stay in those relationships for the rest of their lives. Both would have laughed 10 years ago if anyone had suggested they would end up teaching at BYU law school. "And after we laughed," says Tom, "we would have dug out a map to see just where Provo, Utah, was." Yet in 1998 Tom Morgan was honored to become the first recipient of the Rex E. Lee Chair, a professorship funded by law school alumni and friends of Rex E. Lee, and the couple willingly left prestigious positions in Washington, D.C., to move to Utah.

## Enter Kathryn

Over the past 30 years, both Kathryn and Tom have made names for themselves in the legal field. But as a young girl, Kathryn, an accomplished pianist, did not even consider a legal career. Rather she decided she could best use her talents by serving God in the Catholic Church. At 18 she joined the Dominican Order. As a nun, she completed her teaching degree and taught music to kindergarten through 12th grades. ("When people call me 'Sister Morgan,' as they often do out here in Utah," she confides, "I still do a double-take.") After six years, at a juncture when further vows were to be taken, she elected to leave the order and serve the church as a layperson. She returned to her home in Nebraska, where she completed a master's

in music, married, and had two children, all the while continuing to teach music. Kathryn opted to attend law school to prepare to better support her children when, in her late 30s, she found herself a single mother. After graduation she discovered the area of law that has continued to fascinate her: franchising. As a new associate at a firm, she was handed a file on a franchising issue to research. She quickly learned that "when franchising works, it is the best of business possibilities. The franchisor profits when the franchisee does. Each learns from the other."

Soon Kathryn was the most experienced franchising attorney at the firm. But in 1980, after she had been in practice only a year, Creighton's dean of law called to ask if she would return to her alma mater as assistant dean. Her love of teaching and working with students was a determining factor in her acceptance. Back at Creighton, her interests in franchising and education fed into one another, because not only did she supervise recruiting, admissions, and financial aid, but she designed and taught one of the first franchise courses in the country. As her



expertise in franchising increased, she accepted other outside opportunities, including membership on a board of directors for a large franchising subsidiary, an of counsel position with a firm where she worked specifically on franchising cases, and retention as an expert witness by firms around the country in disputed matters involving franchising. In 1989 Kathryn was invited by the president of Creighton University to become his assistant. She accepted on condition that she could continue teaching at the law school. In her new position, she supervised all university legal work and worked on long-range planning, budget, personnel, corporate, and operational issues. She continued as assistant to the president until 1990.

#### Enter Tom

Tom's grandfather's and father's examples convinced him to become an attorney. Not only was his father a successful attorney, but he "took important time away from his practice to give of himself to community service at a time when [the] city desperately needed honest leadership" (Thomas D. Morgan, "Heroes for Our Time," *Clark Memorandum*, Fall 1992, p. 25). After graduating from the University of Chicago, Tom planned to join the long-established family firm in Peoria, Illinois, but before entering practice, he hoped to try teaching. At law school, he met someone who would become one of his personal heroes: Elder Dallin Oaks, then a professor of law. Oaks offered him his first job in teaching and "showed [him] that teaching could be a career with satisfaction and value" (*ibid.*). After teaching at the University of

Chicago for a year, Tom taught a year at the University of Illinois, then joined the Air Force. It was 1967 and the Vietnam War was still raging. Tom was stationed in Washington, D.C., where he worked on procurement contracts for the Office of Air Force General Counsel. During his final year in the service, he was named special assistant to the assistant secretary of defense for manpower. Once released from the Air Force, he would have returned to Peoria and joined the family firm, but his father had been made a federal court judge, and Tom's practice there would have created a conflict of interest for everyone in the firm. Instead he accepted an offer to teach again at the University of Illinois law school. In the subsequent 10 years there, he established himself as an undisputed legal scholar. In 1980 he was selected as dean of Emory law school in Atlanta, where he served for five years, then remained for another four as distinguished professor of law. In 1989 Tom accepted the position of Oppenheim Professor of Antitrust and Trade Regulation Law at George Washington University.

#### Re-Enter Kathryn

At about the time Tom moved to George Washington, his first marriage ended, and he was left to parent his two teenage daughters. It was then that he rediscovered a compassionate friend in the Midwest who was experiencing many of the same challenges. He and Kathryn had met 30 years before when both were living in Washington, D.C. Kathryn remembers distinctly the day the two families ran into one another in the basement of the National Gallery of Art. The husbands

had been law school acquaintances. The young couples became friends immediately, and over the years, as each made a number of career moves, they exchanged annual Christmas greetings. Once Tom and Kathryn had renewed their friendship, a long-distance relationship was quickly unsatisfactory. With the precise timing the government is not particularly known for, the Agency for International Development (AID) in Washington, D.C., approached Kathryn with a proposal that she relocate and help design a program in economic assistance for Eastern Europe. Since franchising is one of the best techniques for the transfer of business knowledge, the job was a good fit. She accepted, and soon the couple married. The following year, she was appointed director of policy for the agency. After the Clinton inauguration in 1993, she left government service and began consulting on international business and franchising and teaching in the MBA program at American University. Both Tom and Kathryn found Washington invigorating and professionally satisfying and fully intended to remain there until retirement.

#### Enter BYU

In 1992 Tom made his first visit to BYU as a commencement speaker for law school graduation. He had not visited the school before but accepted the invitation primarily on the basis of his friendship with Dean Reese Hansen. By that time Tom was one of the best-known legal educators in the country. He had been president of the American Association of Law Schools (AALS) in 1990 and had just finished six years of service on the AALS Executive Committee. He had authored three widely used and respected textbooks in the areas of professional responsibility, antitrust, and regulated industries as well as scores of scholarly articles and presentations. His text on professional responsibility is still the best-selling text on the subject, garnering about one-third of the market out of 30 competitors. So it was a great privilege for the graduates at BYU to be addressed by him.

The attraction was mutual. In 1994 he accepted a semester-long appointment as a visiting professor. Tom and Kathryn were

impressed with the students and faculty. Says Tom, "The students were outstanding. It was the best teaching experience I'd had in 30 years." When they returned to Washington, they felt they were leaving dear friends and a school important to them. "We were amazed," says Kathryn, "at how quickly we had put down roots."

So when Tom was invited to join the Law School board of visitors, he gladly accepted, and from 1996 to 1998, he returned annually to renew friendships and meet and counsel with students. Meanwhile the Rex E. Lee Chair was in the works, and Dean Hansen had already made some preliminary inquiries about Tom's interest in becoming the first occupant. Neither Tom nor the dean initially anticipated that the funding would move along as quickly as it did, however. Fortunately the Morgans' personal situations were such that an earlier move was possible. Their four children were established. Some of their long-term commitments were winding down. Kathryn's term as director of research for the International Franchise Association Educational Foundation was expected to end midfall 1998. Tom's obligation as reporter on ALI Restatement of Law Governing Lawyers would end spring 1998. Some ongoing work could be performed as well in Utah, such as Tom's updating his casebooks and serving as an expert witness in attorney malpractice cases. Both relished the prospect of a slower pace and, in anticipation, took a few golf lessons.

While Kathryn contemplated leisurely walks in the mountains around her new home and snuggling down with a favorite author, plots were afoot to relieve her of some of her free time. The BYU Law School's new lawyering skills program was midway through the first year when Tom's acceptance was officially announced, and the program lacked instructors for the second year. Kathryn was highly qualified to teach writing and analysis with her years of teaching and administration, editing journals, writing publications, and doing presentations. Lawyering skills program director, Associate Dean Constance Lundberg, approached Kathryn about accepting an adjunct position. After some

thought, Kathryn accepted. Since coming to Utah, Tom has also taken on an additional assignment: he accepted an invitation to serve for at least two years as a reporter for Ethics 2000, the new ABA effort to rewrite some of the ethical rules governing lawyers. As a result, they have not played golf and have taken only two hikes in the canyon since arriving in Utah, and neither has a free weekend for the rest of the semester. They are even fully booked for the Christmas holidays, when Kathryn, as a former Bush administration official, and Tom, as the Rex E. Lee Professor, will be featured speakers on a cruise to Australia and New Zealand. Come January they are hoping for more free time. But then Kathryn plans to start work on a book about franchising. All in all, it is not looking good for golf.

Nevertheless, both seem content with their decision to come west. They attribute the feeling of well-being to new friends, both at the Law School and in their neighborhood, and to their students. "For us," says Kathryn, "BYU is a sort of mission—not in the sense of proselytizing but in the sense of a calling, or vocation." Part of their mission is to help their students see how good they are and how good they can become. "They need to expect more of themselves," asserts Tom. Kathryn concurs: "BYU students have high ability and are open to being taught and willing to work. They are capable of more than they know." Tom clarifies, "Students here are less worldly than students at other schools. This is both positive and negative." In teaching regulated industries, he sees a lack of intuitive understanding of how government really works. Some students have a similar naiveté about the workings of law firms, he says. "They care about behavior and how law should be practiced. They hope to have an ethical practice. But law firm pressures and working conditions are alien to many." Tom doesn't mean to be cynical when he says that "students must face the fact that the world is complex and clients sometimes lie." He saw the opposite problem in Washington, where students were sophisticated about regulated industries issues and less concerned about ethics. He hopes to see increased realism at BYU as time goes on but at the same time

wants to nurture the strong ethical behavior already in evidence. Of the future, he says, "There is greater likelihood that more of the graduates from BYU's law school will have a positive impact on their communities and the world than will the graduates from any other school." The Morgans aren't certain what their role in that future will be. Says Tom, "People frequently ask why we came here. I answer, 'I'll be darned if I know.' None of us can know with clarity what our acts will lead to. Time will tell what impact, if any, we will have. We'll leave that in God's hands."

Though the Morgans cannot say exactly what their purpose is in coming to BYU, Tom's letter of resignation to George Washington University sums up their best approximation: "I have thought a lot about how I can most constructively spend the last years of my own career. Clearly, given the quality of life here, one good answer would be to count my blessings and continue teaching [in Washington] . . . as long as I can make it to the classroom.

"On the other hand, . . . three years ago I spent the fall semester teaching at Brigham Young University in Provo, Utah. It was an experience unmatched at any of the other outstanding schools with which I have been associated. . . .

". . . Neither Kathryn nor I are members of the LDS Church, but as embodied in its university and the warmth of its members' acceptance of us, we have found it to represent a remarkable testament of God's work on earth. Indeed, Brigham Young University is one of the rare remaining examples of what all religiously affiliated universities once aspired to be—an institution that sees its students as persons of infinite worth and believes that their education for faithful lives represents the world's best hope for a humane and productive future.

". . . I have been offered and have accepted a position as the first Rex E. Lee Professor of Law at Brigham Young University. I have, of course, been deeply honored to occupy the Oppenheim Chair here, but there was only one Rex Lee and there is only one BYU."

Kathryn and Tom Morgan have reached that enviable juncture when they can willingly laugh along with God.



# The Best Tell Stories

portrait

Paul Warner, Utah's new u.s. attorney, tells stories. He has the manner of a late-20th-century Mark Twain sans white suit, white hair, and mustache. While there may not be a physical likeness, there is definitely a likeness in style. Paul's ability as a storyteller predated his law school days, but its potential usefulness in the profession surfaced in Woody Deem's criminal trial practice class in 1975. Somewhere in the framing of opening statements, introducing exhibits, and closing arguments, a light went on. Paul discovered that there was a place in criminal trial practice for a person who could weave a story, tell a joke, and even crack courtroom tension with appropriate humor. This discovery affected his choosing the Navy JAG as his first job and has influenced his life ever since.

He says he preferred the Navy JAG over other military branches because he would receive a direct commission without ROTC and without three months of basic training. He wanted trial experience more than exercise. However, in thinking about getting trial experience "early and fast," he forgot to think about those he would be defending and prosecuting: drug dealers, rapists, and murderers—a group he affectionately calls the "cream of the crud." The training was excellent, and Paul enjoyed his five and a half years with the Navy. During these early years he faced one of the most difficult split-second decisions of his life, an experience that gave him yet another story to tell.

## The Story of the Young Sailor

Paul was assigned to represent a sailor from New Jersey accused of stealing a box of fragmentation grenades. The sailor's father had alleged Mafia connections. It seemed like a routine case until one morning Paul was visited by a rather nattily dressed attorney from New Jersey who worked for the sailor's father. The attorney wanted to review the progress of the defense and offered his assistance. Paul entertained the lawyer briefly and indicat-

BY SCOTT W. CAMERON

ed that while outside counsel was allowed, it would not be necessary in this case.

Two weeks before trial, the attorney called again and asked about the strength of the defense. Paul indicated that the defense was strong, except there was an alleged eyewitness to the theft. The attorney then posed a shocking question: "Well, what would happen to the case if this guy disappears?" Knowing that the young, alleged eyewitness had completed his service and was living in New York, and being fairly certain that "disappear" was just a euphemism, Paul's mind raced. He wondered if an innocent person would be harmed if he said it would help a great deal if the eyewitness disappeared. On the other hand, he worried that harm might come to himself or his fam-

ily if he said a disappearance would not help and he lost the case. Paul made his decision and said, "I don't think it would look right if the key witness were to disappear."

The trial came and Paul was concerned. The sailor's father—black suit, white hair combed back in a pompadour—sat at the rear of the courtroom with his attorney, another rather large, ominous-looking fellow who looked to have more brawn than brains. When it came time for the eyewitness to appear, he was not in the courtroom. A ticket had been forwarded by the Navy prosecutor to American Airlines in New York City, but when the young man went to get on the plane, the ticket had been canceled. A continuance was given and another ticket was ready the next day, but when the eyewitness appeared a second time at the airport, the ticket had been canceled again. Paul wondered who could can-



cel a ticket that had been issued by the Defense Department. The prosecutor asked Paul if he would stipulate to the alleged eyewitness' testimony. Paul indicated that he would, reserving the right to argue to the jury how difficult it was to cross-examine a stipulation. Eventually, the jury acquitted the young sailor. The sailor's father rushed to the counsel table. Saying nothing to his son, he embraced Paul and kissed him on both cheeks, telling Paul that he was in debt to him. As politely as possible, Paul assured him that he owed him nothing. He also turned down an offer of employment by the father's attorney.

### The Value of a Joke in the Real World

At the conclusion of his experience in the Navy, Paul was concerned that his professional life might be more boring. He was hired by the Utah Attorney General's Office in the Litigation Division. Within a short time, he became chief of the Litigation Division and then deputy attorney general. It was here that he had the sobering experience of representing the state of Utah in commutation hearings in two death penalty cases. Paul explains that all philosophical niceties of the debate over capital punishment are rendered moot when as an advocate you are personally involved in a decision being made whether to commute a death sentence.

After six and a half years with the Utah Attorney General's Office, Paul was hired in the Civil Division of the u.s. Attorney's Office by u.s. Attorney Brent Ward. For the past 10 years he has held virtually every position of responsibility in the u.s. Attorney's Office: first assistant under u.s. Attorney Dee Benson ('76); violent crimes coordinator under David Jordan; interim u.s. attorney; and criminal chief under Scott Matheson. Along with the foundation of legal skills that would serve him in each of these positions, Paul's sense of humor was tested and sharpened in law school. His classmates will long remember the day in contracts class when Professor Rooker flipped Paul a dime and said, "Mr. Warner, go call your parents and tell them you'll never be a lawyer." Catching the dime and immediately flipping it back, Paul drawled, "No, Mr. Rooker, you keep it and call all your friends."

Even after Paul graduated from law school, he understood the value of having a good sense of humor. In an interview with the *Deseret News*, he said, "Some issues we deal with here are ugly, unpleasant and troubling, but if we joke a little, it makes it easier to do what we do."

Sometimes this joking takes the form of "speaking the unspeakable." One time while in the Navy, Paul was in a meeting with several attorneys deciding how to proceed on a tough case. Differing opinions were expressed. Finally, a tough-talking senior officer announced a decision that no one seemed to like. He turned to Paul and said, "I can tell from the look on your face, Warner, that you think I am a hard-nosed SOB because of my decision." Paul paused a moment as the other officers present focused on him for a response. "No sir," he retorted. "I formed my opinion of you long before that decision."

### Ego Without Pretension

Another attribute of a successful trial lawyer, and particularly a prosecutor, is a healthy ego. According to Paul there are few other professions where your performance is judged on such clear terms as whether you have won or lost. The law school experience was invaluable in this regard as well, for as Paul notes, you have to have a healthy ego to survive law school. While Paul indicates that he and Linda, who were married immediately prior to Paul's commencing law school, cried most of the first semester, he survived by the use of his wit. That wit had a captive audience when Paul was elected editor of the newly created student newspaper, the *Clark Memorandum* (which he hastens to add has little resemblance to what he considers CM's present "slick image"). The original *Clark Memo* used a tabloid format, which Paul says was "yellow journalism at its best."

### Prosecutor as Gatekeeper

Paul claims that the prosecutor is the most important person in the criminal system. While a police officer may investigate, and even arrest, it is the prosecutor, as gatekeeper, who must exercise discretion to determine whether or not to

charge. Knowing that the mere act of charging a crime may ruin an individual's life, the prosecutor must be certain he has the evidence necessary to convict. Paul emphasizes that in his position as u.s. attorney, he must decide whether or not to prosecute an alleged crime, not a specific individual. Paul explains that while a person might be despicable, you cannot run that person through the system if there is not sufficient evidence to convict him of the specific offense. A u.s. attorney must have good legal judgment and knowledge of the law to come to the correct decision. An unwise decision by the prosecutor may undermine public confidence. In an article in the *Deseret News*, Paul pledged that fairness would be the hallmark of his administration. He indicated that he wants to show compassion and dignity and that he believes the statement "The United States wins its case whenever justice is done to one of its citizens."

### Sincerity Cloaked in Humor

For those who know Paul, his pledge of fairness is in keeping with the way he has conducted his life. While his manner is humorous, his humor is a cloak for sincerity, trusted because it makes sure he doesn't take himself too seriously. While the Law School cannot take credit for his sincerity, at least it can pride itself on not destroying it.

When asked why he attended law school, Paul explained that in the spring of 1971 he was sitting in the Wilkinson Center listening to President Harold B. Lee speak at a devotional. The prophet announced the formation of a law school at BYU, and as Paul ate a donut, he had the strong impression he should attend the new law school. This was quite a switch for a premed major, who took English classes to preserve his sanity. Paul explains that he never thought it was a risk to attend an unaccredited school. He knew that a school organized under the direction of the First Presidency would succeed.

While Mark Twain would have a heyday satirizing 20th-century lawyers, one of them would not be Utah's recently appointed u.s. attorney, Paul Warner, a man who mingles storytelling and a sense of humor with the demands of the legal profession.

# Past Imperfect

*Personal Statements Can Renew Motivation, Improve Learning*

Students submit as part of their law school application a personal statement that explores life-changing events, describes the influence of key people, and explains why the applicant wants to become a lawyer. With the admission decision hanging in the balance, applicants craft their words very carefully. Indeed, the essay represents many hours of self-study, subsequently revealing priorities and personal goals. Yet for all of its potential value toward sustaining academic discipline and improving legal pedagogy, it is used by the admissions committee principally to verify writing ability and to promote diversity in the entering class. Having served its purpose, it is filed away.

Revisited effectively by the law teacher, a student's personal statement can be an excellent motivational tool and a powerful

BY DAVID DOMINGUEZ

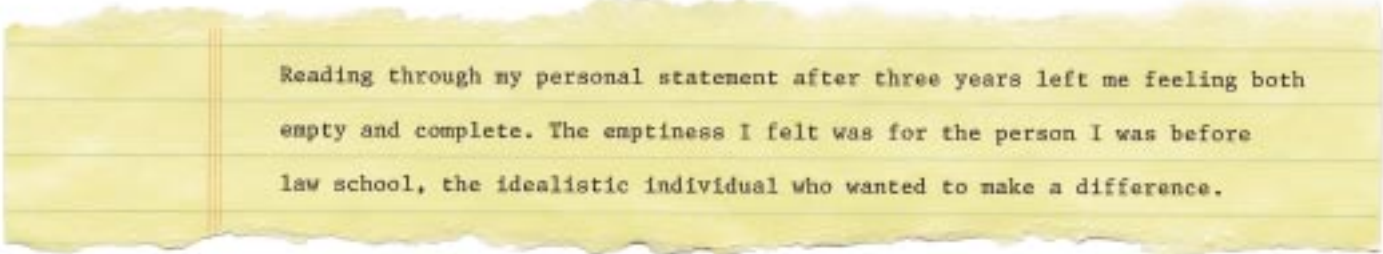
and- and third-year law students, often appearing jaded and cynical, to reclaim the initial excitement they felt for legal study. Where is a match to reignite "fire in the belly"?

On the first day of class, I ask students what factors contribute to the optimal learning experience. Students are quick to cite natural intelligence as a key factor, but they soon add that discipline and motivation are just as important. Being smart is a big plus, they say, but no more so than the will to excel and good study habits. Pressing on, I ask whether there was a time when they were convinced that becoming lawyers mattered so much that they were prepared to give unrelent-

race and gender relations, to stop the shaming of the poor and outcast, to lend an ear to the unpopular voice.

I then jolt them by announcing that I will distribute to them a copy of their personal statement and that the first paper assignment is to write an updated personal statement. They are to carefully examine the discrepancy between how they imagined law school would deal with their ideals and what, in fact, law school has done in that regard. As they critically reflect on written promises they made to themselves, will the person they once were recognize the person they have become? Why have they gone back on their word—and at what price?

*[T]he applicant I once was would recognize me because she was hopeful and good. Conversely, I no longer recognize the applicant's positive [outlook], idealism, and hope for change. Perhaps this is merely the result of maturation. . . . [T]he legal educational process does engender cynicism, disillusionment, the baseness of human nature, and intellectual and emotional exhaustion from constantly conforming to the status quo.*



Reading through my personal statement after three years left me feeling both empty and complete. The emptiness I felt was for the person I was before law school, the idealistic individual who wanted to make a difference.

educational resource. In the former capacity, it keeps the student mindful of original ideals; in the latter role, it prompts the law teacher to turn diverse life backgrounds into a new source of instructional material.

*Reading through my personal statement for the first time [in three years] left me feeling both empty and complete. The emptiness I felt was for the person I was before law school, the idealistic individual who wanted to make a difference. . . . Looking back, my first reflection was that law school robs or strips people of these goals. The whole first year of law school I felt beat down, confused, and lost.*

You have probably wondered, as I have, what more we can do to help sec-

ing commitment to legal education. As they ponder that question, I tell them the answer is "yes" and that I can prove it *in their own words*.

Puzzled looks turn to surprise and then sheepishness as I inform the class that I have reviewed each of their personal statements and have with me a copy of their essays. I read excerpts, many of which speak eloquently to the denial of justice and the need to press forward in the struggle for equality. I recite from their papers the pervasive theme that the study of law will benefit not only themselves but their "people," their family and friends. I remind them of the zeal they once had to make a positive difference in

Students report that engaging in this introspective exercise is so unexpected and strange that they do not know how to proceed initially. They tell me that they feel disoriented, as though pulled away from a myopic focus on legal rules to once again behold a broad social vision. Taking this sobering look at where they are in light of where they thought they would be, most students discover that they would apply themselves eagerly to academics if deeply felt convictions instead of mere concepts were at stake. They would study harder and take classes more seriously if law school instruction were tied to something more important than a final course grade.



*In some ways my personal statement . . . show[ed] my strong idealistic convictions. . . . I assumed that such aspirations were worthy and valuable to the law school community. "Not so!" said my first year of law school. "The only worthy aspiration for a law student is top-10 grades, law review, and an important and lucrative job with a large firm." I suppose I was and am a little disillusioned with the law school culture.*

*I have felt a tugging between my intrinsic convictions of wanting to really make a difference and the use of [legal] knowledge to help people, with the more selfish extrinsic conventions of what "success" really is. I don't understand at this point what I want. I don't understand where I fit in and where I will be satisfied with my personal aspirations. . . . My first year tended to tear me down in many ways.*

At this point, revisiting the personal statement becomes a double-edged sword. Once students are challenged to summon and strengthen their heartfelt resolve to become excellent attorneys, the attention shifts to the law teacher. Is the professor prepared to take full educational advantage of students' profound and diverse reasons to excel? Will the instructor do what is necessary to sustain motivation, reforming law school pedagogy to affirm and integrate the beautifully worded aspirations recorded in the personal statement?

This brings us to the second day of class and the use of the personal statements as an educational resource. Students arrive with their newly revised personal statements in hand. The mood swing from the first hour is dramatic. With the instructor looking into their faces, it is as though their first-day expressions—pensive at best, withdrawn at worst—are now alert and bright, as though a new source of light were shining upon them. Students use other similes, such as "It feels like a tightly shut window has been pried open and a fresh breeze has blown in, reinvigorating parts of [me] that had fallen asleep."

*[O]ne year of law school has actually made me feel less confident, . . . push[ing] my deepest emotions toward discouragement, fear, and intimidation. . . . But when I ponder the many other people (particularly family) who are counting on me, . . . I persist and work harder. My life has become a pattern or example for*

*my younger siblings and other [minority] children in the community. . . . My personal statement stands as it is and as it was written.*

I inform the class that we will engage in an exercise with their updated personal statements that makes plain the limitations of conventional legal study, sheds light on additional problem-solving skills that are otherwise neglected, and sets into motion an instructional pattern that will improve learning relationships among them. In other words, I broaden the purpose of their critical reflection, saying that they revisited their personal statements not only to reinvigorate motivation but moreover to set the stage for our learning adventure together.

I begin the exercise by asking students to list the problem-solving skills that law school training is sharpening. They note such "left-brained" abilities as analytically dissecting facts, spotting relevant legal issues, selecting and applying legal rules, logically arguing over the relative merits of a legal position in light of the facts, advocating policy considerations, and so on. I then ask whether there has been similar development of other, "right-brained" methods of processing disputes, especially those relying on intuitive, creative, empathic, relational, and spiritual strengths.

*In revisiting my personal statement, I am amazed at how optimistic I was about what I could do with my law degree and how I could "make a positive difference." . . . As for my first year of law school, . . . I was exposed to a "How can I help me and me only?" type of world rather than the "How can I learn to help myself and others?" type of world that I was expecting. To put it mildly, this stunned me.*

I ask students to consider whether the diverse aspirations recorded in their personal statements, especially healing social divisions, could be attained using only logical/intellectual aptitude. Invariably, they realize that to meet the career goals set forth in their personal statements, they will need to expand traditional law school problem solving (i.e., theoretical expertise and rights-based advocacy) with far better training in critical reflection, active listening, mediation, goal setting, coalition building, delegation, supervision, accountability, evaluation, and other interactive skills to manage group conflict.

*[T]hose who are the most respected, and consequently can do the most good, are not separated but [rather] connected to everyone else. I need to remember to reach for great heights while at the same time not just visiting those [people] below. I must be with them and take them with me to higher levels. . . . The simple reading of my personal statement has helped return me to my prior course. . . . I am excited about the chance to continue to do some introspection to make those necessary adjustments in my course to allow me to be an influential lawyer and to become a better person.*

I challenge students to remain true to their newfound resolve. Specifically, I ask them to consider preparing a videotape at the end of the term that responds to the following questions: If they were chosen to address the entire law school community, what would they say regarding the law school curriculum and educational process? Would they be able to say that they were in danger of losing their connection to their deepest concerns but then recovered, redeeming their ties to ancestry, family, gender, race, economic class, nationality, and other loyalties? Would they look back and take pride in reclaiming aspirations expressed in their revised personal statements?

The personal statement exercise jump-starts a semester-long commitment to integrate student ideals into the learning enterprise. We have added other interactive experiences such as interviews, team assignments, videotaped negotiations, teaching on campus and in the community, and other forms of fieldwork.

Last fall semester I asked students whether they would favor a law school campaign to persuade faculty members and fellow students of the motivational and educational value of the personal statement. In light of our just-completed exercise with their own essays, they could see how our first week turned typical classroom relations into the beginnings of a healthy, integrated community. Most of the 19 students voted to be part of the larger campaign. Hence, we are now exploring ways to extend the personal statement exercise to those outside our classroom and hope to model a compelling vision of the optimal law school learning process.

Some say the practice of law teaches greed, subterfuge, and cynicism. They are right. Life's experiences may, depending on predilection and resolve, work either godly or ungodly effects on us.<sup>1</sup> Indeed, contradictory interpretations of the law are the predicate for Satan's leading us "away carefully down to hell"<sup>2</sup> on the one hand, and the Savior's "pleading [our] cause"<sup>3</sup> with the Father on the other. So it is not surprising that the practice of law shapes not only Korihor and Cain<sup>4</sup> but also Howard W. Hunter, Marion G. Romney, J. Reuben Clark, Jr., and Abraham Lincoln. ○ For those of us practitioners struggling in the right direction, I submit the following interim report on the teachings of law practice.

BY RALPH R. MABEY

1 Human justice is imperfect justice.

While it is our job to improve it, human justice may fail. After all, those despitely used are not promised treble damages. So deal with it.

As Elder Neal A. Maxwell has penned:

*Help me in my duress  
To endure it well enough  
And to say, . . .  
"Nevertheless."*<sup>5</sup>

The greatest test of honesty ever devised is the billable hour.

The test includes: Was the time expended? Was it necessary? What if I miss the bogey? What if I miss the piano recital?

2

3 A lawyer who files a responsive pleading a day early is a lawyer who miscounted.

Given this endemic problem, maybe the best we lawyers can hope for is to learn the "six" habits of highly effective people.<sup>6</sup>

4 Yesterday's victory is good for getting clients, but not for keeping them.

A client is proud of your good record, until *her* trial begins. "No other success can compensate for failure in her own."

5 Lawyers are an insecure lot: either their practice is too busy and they fear malpractice, or too slow and they fear unemployment.

Perhaps a law practice breeds insecurity because outcomes and opportunities are sometimes hard to predict. (See Teachings Nos. 1 and 4.)

6 Life is too short to work for clients you can't trust.

Unless appointed by the court or otherwise acting in the public interest, it's better to be unemployed.

7 In commerce, wise counsel must include legal counsel.

Otherwise, even the honest and well-intentioned may offend the law.



8 Discovery may reveal more about the opposing lawyer than about her case.

The means a lawyer employs will define her, personally and professionally, at least as much as the results obtained.

9 Scheduling a law practice is as difficult as scheduling the weather: it is going to snow at the wrong time.

If you can't change the weather, enjoy it. Snow can be pretty and sometimes pretty exciting.

10 Good people who want a mean-spirited pit bull for their lawyer risk becoming one.

When your lawyer gnaws on your opponent's leg and devours the bait when you take him fishing, remember: from a moral perspective, you are what your lawyer eats.

11 If your client thinks you know more than you do, you face the second greatest test of a lawyer's honesty.

When your client overestimates you, it's hard not to play the expert—especially at our hourly rates.

12 The Constitution only recites our freedoms; the lawyer earns them.

We must earn the benefits of the law for our clients by, among other things, study,<sup>7</sup> importuning,<sup>8</sup> and advocacy.<sup>9</sup>

13 A lawyer's rhetoric is more likely to sway himself than anybody else.

It just sounds so clever when we say it ourselves.

14 An arrogant lawyer is a loaded revolver; a humble lawyer is a problem solver.

Pride obscures judgment and weakens our ability to analyze and assess. Humility sharpens

The Geneva Convention protects a prisoner of war against questioning better than we protect a deponent. And where else does etiquette allow you to plead inconsistent defenses with a straight face?

16 Lawyer jokes and humor intersect occasionally.

However, I can't recall an example offhand.



our observations, strengthens our judgment, and gets our egos out of the way. Believe it or not, even lawyers grow stronger and stronger through humility.<sup>10</sup>

15 Legal etiquette is to etiquette as holy war is to holy.

17 Acting and lawyering have one principal difference: nobody applauds lawyers.

On the other hand, there seems to be work for more lawyers than actors.

18 Preparation beats pretension.

In other words, the best lawsuit is not determined by the lawyer's best suit. Victory doesn't go to the best dressed but to the best redressed.

19 A lawyer's fear of leaving a dollar on the table usually costs the client more than that dollar.

As a result, to measure your success by your opponent's failure is a double negative: his and yours.

20 In summary, practicing law is like fasting: it can be good for the soul—until it kills you.

Balance is the point. It's better to avoid too much of even this good thing.

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<sup>1</sup>Cf., 2 Corinthians 7:8–10.

<sup>2</sup>2 Nephi 28:21.

<sup>3</sup>D&C 45:3–5.

<sup>4</sup>Moses 5:18–21; Alma 30:52–53.

<sup>5</sup>From the poem "Submission," by Neal A. Maxwell, contained in the epilogue of his book *If Thou Endure It Well* (Bookcraft, 1996).

<sup>6</sup>Cf., Stephen R. Covey, *The Seven Habits of Highly Effective People* (Simon & Schuster, 1990), (particularly Habit 3).

<sup>7</sup>D&C 93:53.

<sup>8</sup>D&C 101:76.

<sup>9</sup>D&C 134:11.

<sup>10</sup>Cf., Helaman 3:35.