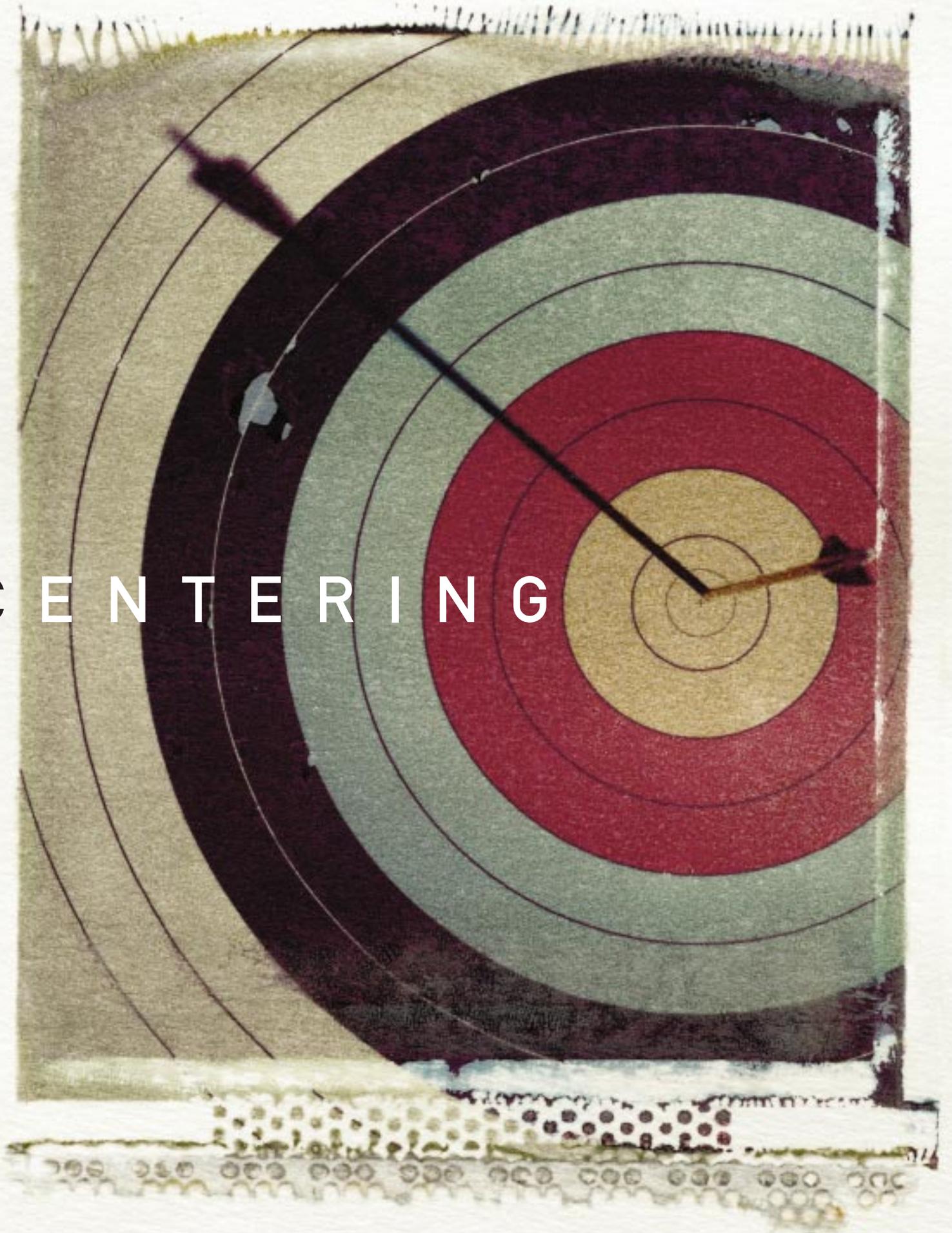
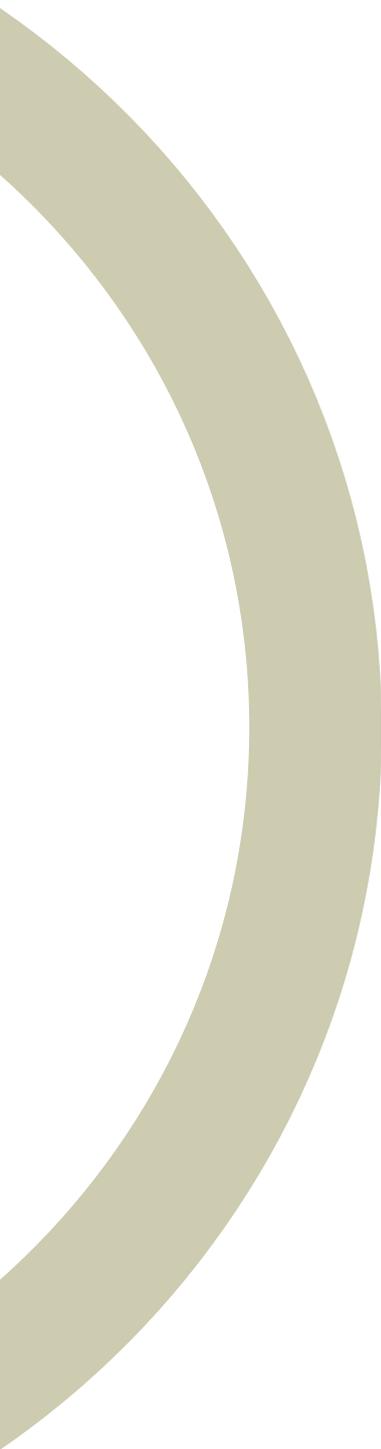


CENTERING



[BY BRETT SCHARFFS¹]



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.”² 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.³ If laws are not executed and punishments not inflicted, justice cannot be done. If laws are implemented unflinchingly, mercy is not possible.⁴ 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.⁵ 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:

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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.⁶

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.⁷ 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.⁸

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,"⁹ 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.¹⁰

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?"

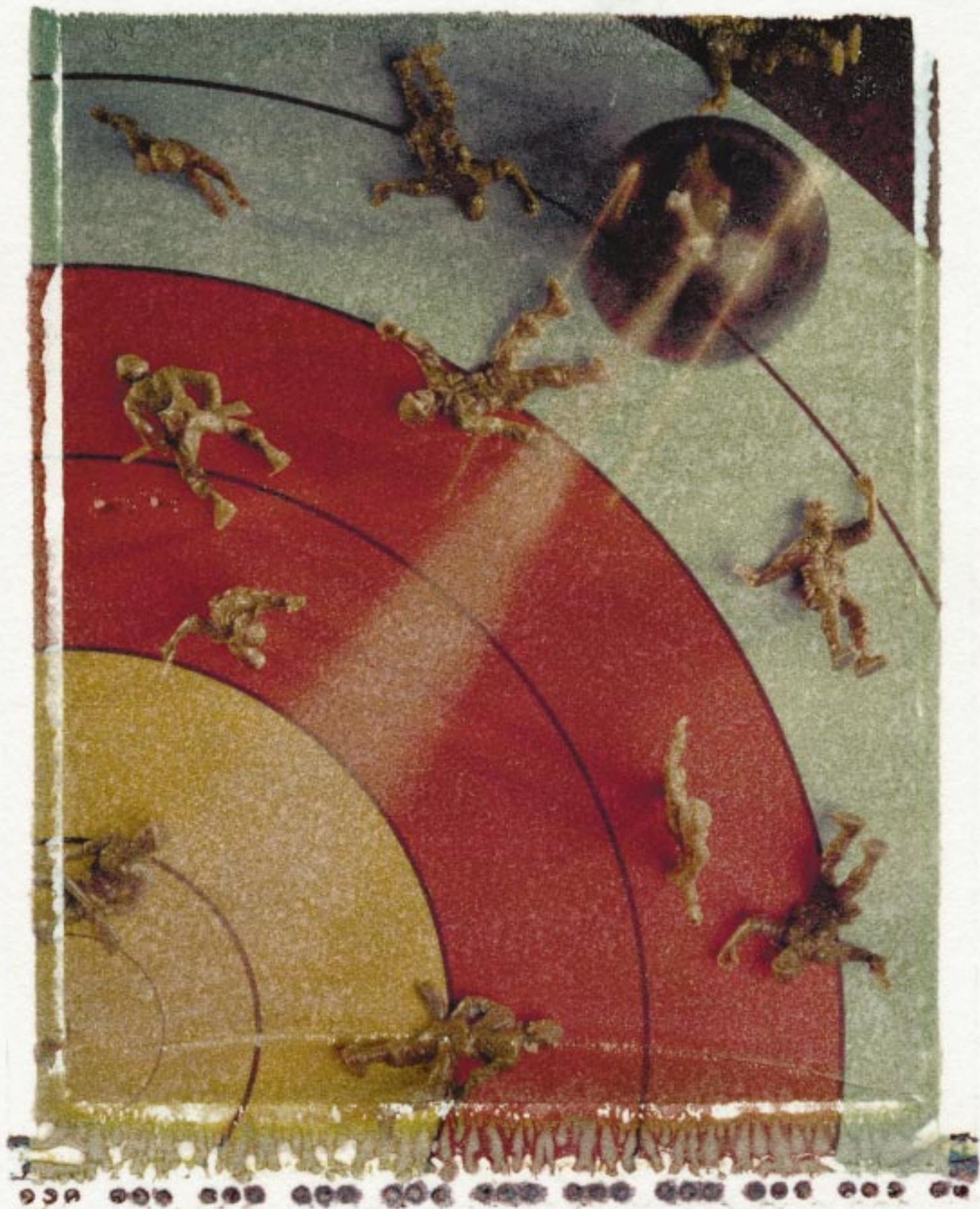
What does God require? With elegant clarity, God asks his people to be just,¹¹ merciful,¹² and humble.¹³ More precisely, he employs a series of action verbs, asking them to do, love, and walk¹⁴ with justice, mercy, and humility.¹⁵

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.⁷

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

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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.⁸ 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.⁹ 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.”²⁰ 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.”²¹ 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.²²

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.²³

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.²⁴ 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.²⁵ 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.²⁶ 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.”²⁷ 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-

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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.”²⁸ 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.”).

NOTES

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;

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).