The Role of Humility in Exercising Practical Wisdom

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> Humility is the most difficult of all virtues to achieve.
>
> – T.S. Eliot[1]

> If anyone would like to acquire humility, I can, I think, tell him the first step. The first step is to realize that one is proud. And a biggish step, too. At least, nothing whatever can be done before it.
>
> – C.S. Lewis[2]

> [F]irst and foremost [Supreme Court Justices should bring to their task] humility and an understanding of the range of the problems and of their own inadequacy in dealing with them . . . .
>
> – Felix Frankfurter[3]

INTRODUCTION

Recent academic jurisprudence has witnessed an impassioned revisiting of the ancient questions of what judges do and what they ought to do.[4] Some accounts treat law primarily as an autonomous discipline, and look inward for the sources of legal authority and their force and scope. For many, merely mentioning their labels — originalism,[5] formalism,[6] traditionalism[7] — summons imagina-

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[1] T.S. ELIOT, SHAKESPEARE AND THE STOICISM OF SENECA 8 (1927).

[2] C.S. LEWIS, MERE CHRISTIANITY 99 (1965).

[3] Felix Frankfurter, *Chief Justices I Have Known*, 39 VA. L. REV. 883, 905 (1953).

[4] *See* Brian Leiter, *Heidegger and the Theory of Adjudication*, 106 YALE L.J. 253, 255-61 (1996). Leiter discusses the "strange hybrid" of the descriptive (what judges do) and the normative (what judges should do) in adjudicative theory. *See id.* However, "most philosophical theories do not aim to discharge both descriptive and normative functions . . . ." *Id.* at 256.

[5] *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) (defending originalism); ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990) (defending originalism); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (defending originalism); STEPHEN B. PRESSER, RECAPTURING THE CONSTITUTION: RACE, RELIGION, AND ABORTION RECONSIDERED (1994) (defending originalism); Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 YALE L.J. 1419 (1990) (criticizing originalism); Paul Brest, *The Intentions of the Adopters Are in the Eyes of the Beholder, in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 17 (Eugene W. Hickok, Jr. ed., 1991) (criticizing originalism); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980) (criticizing originalism); William J. Brennan, Jr., Address at the Text and Teaching Symposium, Georgetown University (Oct. 12, 1985), *in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 11, 14 (The Federalist Soc'y ed., 1986) (calling assumption that we can discover Framer's original intent "little more than arrogance cloaked as humility"); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996) (arguing that while originalism seems to offer neutral, apolitical method of interpretation, it has been used by Madison and others to serve interpreters' political agendas).

tions of dramatic, sometimes subtle, and usually spirited arguments for and against these conceptions of how judges do and should decide cases. Other approaches look to disciplines outside the law for insights into the limitations and biases of conventional approaches to adjudication. These include movements such as legal realism,[8] law and economics,[9] critical legal studies,[10] law and femi-

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[6] *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (defending formalism); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (defending formalism); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991) (defending formalism); Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (contrasting formalism and balancing); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983) (criticizing formalism); Walter Benn Michaels, *Against Formalism: The Autonomous Text in Legal and Literary Interpretation*, 1 POETICS TODAY 23 (1979) (criticizing formalism); STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1989) (criticizing formalism); Cass R. Sunstein, *Problems With Rules*, 83 CAL. L. REV. 953 (1995) (criticizing formalism).

[7] *See, e.g*, Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987) (defending traditionalism); Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990) (defending traditionalism); Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985) (defending traditionalism); Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551 (1985) (defending traditionalism); Stanley Fish, *Interpretation and the Pluralist Vision*, 60 TEX. L. REV. 495 (1982) (criticizing traditionalism).

[8] *See, e.g.*, Karl N. Llewellyn, *A Realistic Jurisprudence — The Next Step*, 30 COLUM. L. REV. 431 (1930) (defending legal realism); JEROME FRANK, LAW AND THE MODERN MIND (1949) (defending legal realism); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935) (defending legal realism); Jerome Frank, *What Courts Do In Fact*, 26 ILL. L. REV. 645 (1932) (defending legal realism); Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931) (criticizing legal realism); L.L. Fuller, *American Legal Realism*, 82 U. PA. L. Rev. 429 (1934) (criticizing legal realism); H.L.A. HART, THE CONCEPT OF LAW 141-47 (1961) (criticizing legal realism); RICHARD A. POSNER, OVERCOMING LAW (1995) (criticizing legal realism); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267 (1997) (reconstructing and defending legal realism).

[9] *See, e.g.*, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (defending law and economics); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (4th ed. 1992) (defending law and economics); Ronald Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980) (criticizing law and economics); Guido Calabresi, *An Exchange: About Law and Economics: A Letter to Ronald Dworkin*, 8 HOFSTRA L. REV. 553 (1980) (defending law and economics).

[10] *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977) (defending critical legal studies); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979) (defending critical legal studies); ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1983) (defending critical legal studies); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986) (defending critical legal studies); John M. Finnis, *On "The Critical Legal Studies Movement,"* 30 AM. J. JURIS. 21 (1985) (criticizing critical legal studies); Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1 (1986) (criticizing critical legal studies and law and economics movement); Owen M. Fiss, *Objectivity and Interpretation*, 34

nism,[11] and critical race theory.[12] Inward looking theories that treat law as an autonomous discipline tend to be viewed as, in some broad sense, conservative, while "law and . . ." theories that look outside the garden of the law tend to be viewed as liberal. Conventional political labels, however, are of limited usefulness in pigeonholing various theories.[13]

Some conceptualizations of judicial decision making do not fit comfortably into either of the aforementioned categories.[14] One such theory, if indeed it is accurate to call it a theory,[15] is the view

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STAN. L. REV. 739 (1982) (criticizing critical legal studies); William Ewald, *Unger's Philosophy: A Critical Legal Study*, 97 YALE L.J. 665 (1988) (criticizing critical legal studies).

[11] *See, e.g.*, Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10 (1987) (defending law and feminism); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) (defending law and feminism); CATHERINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989) (defending "radical" feminism); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990) (defending law and feminism); Drucilla Cornell, *The Doubly-Prized World: Myth, Allegory and the Feminine*, 75 CORNELL L. REV. 644 (1990) (criticizing radical feminism); Drucilla Cornell, *Sexual Difference, The Feminine, and Equivalency: A Critique of MacKinnon's Toward a Feminist Theory of the State*, 100 YALE L.J. 2247 (1991) (criticizing radical feminism); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989) (criticizing cultural feminism).

[12] *See* CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995) (defending critical race theory); Richard Delgado, *Brewer's Plea: Critical Thoughts on Common Cause*, 44 VAND. L. REV. 1 (1991) (defending critical race theory); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et. al eds., 1995) (defending critical race theory); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (criticizing critical race theory).

[13] Political categorizations are of limited use for several reasons. Debates rage both within and between each of these schools of thought, whether of an inward or outward looking nature. For example, "conservatives" disagree, sometimes vehemently, about the relative merits of originalism versus formalism; and the arguments within feminist legal thought are at least as heated as arguments from those who disagree with the appropriateness of judges relying upon feminist theory in deciding cases. Second, not all theories that look outside law for their normative insights can comfortably be labeled liberal. Law and economics is an obvious example (given its reputation as being somehow conservative), but it is by no means the only example; certain strands of "radical" feminism are radically illiberal. Third, theories considered "conservative" can be used for a wide variety of ends. For example, Guido Calabresi has argued that liberal judges in Mussolini's Italy were quick to utilize formalist and textualist legal arguments to thwart fascism. *See* Guido Calabresi, YALE/VIDEO, THE STORY OF ITALY, *The Modern Italian Legal System: A Lecture by Professor Guido Calabresi*, 2 (undated lecture) (on file with author); *see also* STEPHEN ERIC BRONNER, OF CRITICAL THEORY AND ITS THEORISTS 292 (1994) (noting that European admirers of pragmatism included Mussolini). On the other hand, Richard Weisberg has persuasively argued that lawyers and judges of the Vichy period in France invoked a mechanistic formalism to justify their strict obligation to enforce laws which were harshly discriminatory against Jews. *See* RICHARD H. WEISBERG, VICHY LAW AND THE HOLOCAUST IN FRANCE 393 (1996).

[14] *See* Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987) (cataloging weakening of view that law is "a subject properly entrusted to persons trained in law and nothing else").

[15] For a discussion of the anti-theoretical nature of practical reason and practical wisdom "theories," see, for example, Brian Leiter, *Heidegger and the Theory of Adjudication*, 106

that adjudication should be understood as an exercise of what Aristotle calls practical wisdom.[16] For while practical wisdom looks to the insights of philosophy, it conceives of adjudication in an important sense as an autonomous discipline.[17]

YALE L.J. 253 (1996). Leiter defines "[a] theoretical understanding of any domain of human activity [as] one that provides an explicit articulation or reconstruction of the rules that govern and explain activity in the domain," and argues that a theory of adjudication is an impossibility. *Id.* at 258. Leiter recommends that

> proponents of practical reason or practical wisdom should really adopt what we might call the "No-Theory" Theory of Adjudication. According to the No-Theory Theory, judicial decision is not something about which one should expect to have a theory, because one can never produce the needed theoretical reduction of adjudication to explicit rules of decision.

Id. at 280.

[16] *See, e.g.*, ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 109-25 (1993) [hereinafter KRONMAN, THE LOST LAWYER] (discussing legal knowledge, education, and employment in context of "lawyer-statesman" ideal); Anthony T. Kronman, *Precedent and Tradition*, *supra* note 7; Anthony T. Kronman, *Practical Wisdom and Professional Character*, *in* PHILOSOPHY AND LAW 203 (Jules Coleman & Ellen Frankel Paul eds., 1987) [hereinafter, Kronman, *Practical Wisdom and Professional Character*] (stating that imagination exists as one core concept of lawyers' professional character); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992) (comparing practical reason and formalism); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 352 (1990) (discussing protection of "preunderstanding" as dynamic of legal interpretation); Lawrence B. Solum, Comment, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 S. CAL. L. REV. 1735 (1988) (arguing need of "judicial virtue" as meritorious basis for selection of judges); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990); Steven J. Burton, *Law as Practical Reason*, 62 S. CAL. L. REV. 747 (1989) (discussing impoverishment of legal discourse due to imposition of Holmesian concept of law); Vincent A. Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. COLO. L. REV. 45 (1985) (discussing judicial justification); *see also* NATURAL LAW AND NATURAL RIGHTS 100-33 (1980) (discussing practical reasonableness); PRACTICAL REASONING (Joseph Raz ed., 1978) (collecting 14 essays on practical reason by various authors); JOHN M. COOPER, REASON AND HUMAN GOOD IN ARISTOTLE 33-35 (1975) (discussing practical reason); NORMON O. DAHL, PRACTICAL REASON, ARISTOTLE, AND WEAKNESS OF THE WILL 4 (1984) (discussing practical reason).

The terms "practical reason" and "practical wisdom" are sometimes used interchangeably. Practical reason is reasoning about how to act in a particular situation of choice; practical wisdom is the virtue of reasoning well about such practical choices. *See supra* note 15.

[17] Several scholars have addressed the use and misuse of the insights of philosophy in discussions of jurisprudence and adjudication. *See* Martha C. Nussbaum, *The Use and Abuse of Philosophy in Legal Education*, 45 STAN. L. REV. 1627, 1644 (1993) (defending philosophy as part of legal education but noting that "legal academics who pick up a bit of philosophy and do a thing or two in that field do it pretty badly"); Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191 (1991); Jay P. Moran, *Postmodernism's Misguided Place in Legal Scholarship: Chaos Theory, Deconstruction, and Some Insights From Thomas Pynchon's Fiction*, 6 S. CAL. INTERDISC. L.J. 155, 157 (1997) (criticizing critical legal studies and arguing that "the use of postmodern theory in contemporary legal scholarship has accomplished very little"); *see also* Harry T.

The problem with practical wisdom is that it is almost impossible to pin down what it means,[18] much less what its implications are for a judge deciding cases.[19] At times, one is tempted to conclude that appeals to practical wisdom should be relegated to law school

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Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34, 36 (1992) (criticizing "many law schools — especially the so-called 'elite' ones — [for] abandon[ing] their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy" and bemoaning fact that "[o]ur law reviews are now full of mediocre interdisciplinary articles").

[18] For a noteworthy attempt, which illustrates how difficult it is to describe practical reason, see Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 838 (1988). Posner asserts that practical reason

> is not a single analytical method or even a set of related methods but a grab bag of methods, both of investigation and of persuasion. It includes anecdote, introspection, imagination, common sense, intuition . . ., empathy, imputation of motives, speaker's authority, metaphor, analogy, precedent, custom, memory, "induction" (the expectation of regularities, related both to intuition and to analogy), "experience."

Id.; *see also* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 73 (1990) (describing practical reason in slightly varied terms). Posner also thoughtfully discusses some methods of practical reason, including the use of authority, analogy, interpretation, means-ends rationality, tacit knowledge, and the test of time. *See* Posner, *The Jurisprudence of Skepticism*, *supra*, at 841-58; RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra passim*.

[19] *See, e.g.*, Farber, *supra* note 16, at 554 (acknowledging that practical reason theorists must describe practical reason in way that gives "confidence in its ability to guide judicial decisions," and arguing that while practical reason includes broader range of cognitive activities than formalists realize, its descriptions are helpful). Some defenders of practical reason argue that practical reason should not be defensive about not being able accurately to describe or prescribe how judges decide or should decide cases, because no theory is capable of doing so. *See, e.g.* Leiter, *supra* note 4, at 261 (stating that "[t]o the extent that the theory of adjudication is in the business of *description*, the theory of adjudication is out of business," because "a theory of adjudication can never discharge its descriptive ambitions"). Leiter develops a Heideggerian theory of practical reason based upon the view that all human understanding depends upon the possession of mindless coping skills that resist theoretical articulation. *See id.* at 268-69. *But see* Linda Ross Meyer, *Is Practical Reason Mindless?*, 86 GEO. L.J. 647, 651-52 (1998) (critiquing Leiter's view "that the descriptive failure of legal theory is evidence that legal reason is 'mindless' and legal theory (mostly) superfluous," by arguing that "practical reason is thinking, and is not merely 'mindless' habit, routine, 'coping' skills, or robotics"). Meyer maintains that

> [f]orgetting or lowering our esteem for practical reason is nihilistic. We should not devalue or attempt to control practical reason, through "real" theoretical or scientific thinking, but we should remember and celebrate it, for within our practices lie our aspirations, our self-knowledge, our history, our mutual connection, and our better selves.

Id. at 652; *see also* Nussbaum, *supra* note 17, at 1634 (noting "[t]here is a remarkable degree of consensus, in recent philosophical work — and in anthropological and psychological work as well — that emotions are not just mindless pushes and pulls, but forms of perception or thought, highly responsive to beliefs about the world and changes in beliefs" (footnotes omitted)).

commencement addresses and funeral orations, occasions for celebrating the vague, inspiring, and possibly defunct ideals of the legal profession. Such a temptation should be resisted, because practical wisdom is the best available model for understanding the work of judges. In so arguing, I acknowledge the need for friends of practical wisdom to do a better job of explaining what it is, why it is important, and what implications it would have for adjudication and our legal culture if it were to be widely embraced as an ideal. This Article is intended as a small step towards accomplishing that goal.

Part I begins with Aristotle's description of practical wisdom, and briefly outlines some of the difficulties of applying Aristotle's definition. Part II examines Yale Law School Dean Anthony T. Kronman's effort to identify the particular virtues of character that are required to exercise practical wisdom. These virtues of character, Kronman argues, are sympathy and detachment. I suggest that while Kronman is correct that sympathy and detachment are habits of character that facilitate deliberating well, Kronman's account is incomplete because it does not sufficiently address the conflicts that may arise when one simultaneously tries to exercise these two virtues. These conflicts, I suggest, are analogous to the conflicts that arise when one tries to be at once merciful and just. While it is commonplace to recognize that we want judges who are both merciful and just, it is less common to acknowledge that the requirements of mercy and justice may be in opposition to each other. It is less common still to inquire as to how the conflicts between mercy and justice can be reconciled or harmonized.

To elucidate this conflict, Part III turns to a biblical text, a divine lawsuit between God and the children of Israel, recorded in the sixth chapter of Micah. In the climax of this lawsuit, the prophet Micah instructs the children of Israel to "do justly, and to love mercy, and to walk humbly with thy God."[20] For years I have been perplexed by Micah's injunction to be both just and merciful, because justice and mercy often lie in opposition to each other. Recently, I have become convinced that Micah's injunction illuminates the paradox raised by the conflicts that occur between justice and mercy. Moreover, by including humility, Micah also points the way towards resolving, or at least meaningfully addressing, this

[20] *Micah* 6:8 (King James). Unless otherwise indicated, all biblical references are to the King James Version.

paradox. Micah invites us to recognize that humility is the key to synthesizing or mediating the demands of justice and the demands of mercy.

Building upon this insight, Part IV attempts to clarify what humility means and what exercising the virtue of humility requires. This Part conceptualizes humility as a virtue in the Aristotelian sense, as a mean between the defect of pride and the excess of subjugation or inferiority. Part V then seeks to explain how humility serves a synthesizing or mediating role between justice and mercy. Finally, Part VI enumerates several reasons why we should particularly value the character trait of humility in judges. Throughout, the Article stresses the importance of humility to the exercise of practical wisdom, both in everyday life and, in particular, for those acting in an adjudicative role.

I. ADJUDICATION AND PRACTICAL WISDOM

The view that judicial decision making is an exercise in practical wisdom is usually traced back to Aristotle, through Burke, Llewellyn, and Bickel.[21] What exactly does it mean to have or exercise practical wisdom? Aristotle's answer to this question is notoriously

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[21] *See* ARISTOTLE, NICOMACHEAN ETHICS, especially Book VI, Chapter 5, *in* THE NEW ARISTOTLE READER (J.L. Ackrill ed., Clarendon Press, Oxford 1987); EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (H.D. Mahoney ed., Macmillan 1955) (1790); KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 59-61, 121-22 (1960); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 235-43 (1962); ALEXANDER BICKEL, THE MORALITY OF CONSENT 3-25 (1974); Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L. J. 1567 (1985); Kronman, *Practical Wisdom and Professional Character*, *supra* note 16; John Moeller, *Alexander M. Bickel: Toward a Theory of Politics*, 47 JOURNAL OF POLITICS 113-39 (1985). Terrence Irwin notes in his translation of the *Nicomachean Ethics* that *phronesis*, or practical wisdom (translated by Irwin as "intelligence," which he notes is misleading to the extent that it is associated exclusively with an intellectual ability), might helpfully be translated as "prudence," but "we tend to associate prudence with a rather narrow-minded caution, and we do not assume that a prudent person is necessarily reflective or deliberative at all." Irwin suggests that "[t]he 'prudence' in 'jurisprudence' comes closer to Aristotle's use of *phronesis*." ARISTOTLE, NICOMACHEAN ETHICS 411-12 (Terence Irwin trans., Hackett Publishing Co. 1985). *But see* Martha C. Nussbaum, *Skepticism About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714 (1994) (discussing similarities among ancient and modern criticisms of practical reasoning). Other defenders of practical reason base their accounts on Wittgenstein and Heidegger. *See, e.g.*, Steven J. Burton, *Law as Practical Reason*, 62 S. CAL. L. REV. 747, 785 (1989) (citing Wittgenstein); Thomas Morawetz, *Understanding Disagreement, The Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory, and Judging*, 141 U. PA. L. REV. 371, 456 (1992) (citing Wittgenstein); Dennis M. Patterson, *Law's Pragmatism: Law as Practice and Narrative*, 76 VA. L. REV. 937, 965 (1990) (citing Wittgenstein); Leiter, *Heidegger and the Theory of Adjudication*, *supra* note 4, at 280 (citing Heidegger); Meyer, *supra* note 19, at 647 (citing Heidegger).

cryptic.[22] Aristotle tells us that practical reason is reasoning about what should be done on each particular occasion, and involves deliberation, desire, choice, and action.[23] He defines practical wisdom as the virtue of practical reasoning,[24] and maintains that virtue is a state of character that lies in a mean between two extremes.[25]

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[22] *See* ARISTOTLE, *supra* note 21, at VI.5. The best way to gain an appreciation of the plasticity and perplexity of Aristotle's account of practical wisdom is to read Aristotle's primary account of *phronesis*, found in Book VI, chapter 5 of the *Nicomachean Ethics*. For a sampling of commentator's views about the enigmatic nature of Aristotle's account, see W.F.R. HARDIE, ARISTOTLE'S ETHICAL THEORY 212-239 (2d ed. 1980). Hardie states that

> Book VI of the [Nicomachean Ethics], which deals primarily with *phronesis*, the excellence of the practical intellect, contains, as we should expect, much that is of great importance for the understanding of Aristotle's ethical theory. But, if we are not to be misled or needlessly puzzled by what we find and fail to find in it, we should begin by recognizing that, in its literary form, the book is casual and that it does not offer us reasoned answers to all the central questions which we might expect it to answer.

Id. at 212; *see also* J. L. ACKRILL, ARISTOTLE THE PHILOSOPHER 136-38 (1981). Ackrill maintains that "[t]he moral philosopher . . . has an obligation to state what the aim or goal or criterion is, to which the [person of practical wisdom] looks in thinking out what should be done. Aristotle recognizes that he has this obligation, but it is not clear that he fulfills it." *Id.* at 138.

[23] *See* ARISTOTLE, *supra* note 21, at VI.2.1139a31-35. Aristotle states that:

> [t]he origin of action — its efficient, not its final cause — is choice, and that of choice is desire and reasoning with a view to an end. This is why choice cannot exist either without thought and intellect or without a moral state; for good action and its opposite cannot exist without a combination of intellect and character.

Id. at VI.5.1140a24-30. Aristotle also maintains that:

> Regarding *practical wisdom* we shall get at the truth by considering who are the persons we credit with it. Now it is thought to be a mark of a man of practical wisdom to be able to deliberate well about what is good and expedient for himself, not in some particular respect, e.g., about what sorts of thing conduce to health or to strength, but about what sorts of thing conduce to the good life in general. This is shown by the fact that we credit men with practical wisdom in some particular respect when they have calculated well with a view to some good end which is one of those that are not the object of any art.

Id. In contrast, *sophia*, or wisdom, is an intellectual virtue that operates in the realm of *theoria* and concerns only study, not action. *See id.* at VI.7.1141a16-20. *Techne*, or craft, has to do with making or production and does not require virtue of character. *See id.* at VI.4.1140a1-22, VI.6.1141a9-16.

[24] *See id.* at VI.5.1140a25-32.

[25] *See id.* at II.6.1106b36-1107a7, VI.1.1138b18-25. J. L. Ackrill explains that readers and commentators often mistake Aristotle's "doctrine of the mean" — the view that "virtue is a state of character that lies in a mean" — for a

> middle-of-the-road view of morality, and that [Aristotle] is advising us

Aristotle also tells us that practical wisdom is a virtue both of intellect and of character.[26] But how does the person of practical wisdom decide on the appropriate action in a particular situation? Does she[27] engage in calculations based upon the possible conse-

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> always to feel and act in a cautions and moderate way (Horace's "golden mediocrity"). But this is a misunderstanding. For Aristotle does not say that every good *action* is intermediate — so that one should never, for example, give away *all* one had. It is the *virtue*, the state of character, that is, according to him, intermediate. . . . The right state of character is that from which on each occasion the appropriate feeling and action results. On some particular occasion the appropriate action or feeling may be "extreme" — all or nothing.

J. L. ACKRILL, *supra* note 22, at 136-37. Nevertheless, as Nancy Sherman has argued, the doctrine of the mean does have relevance to "tailoring action to particular circumstances," because it "can lead to more individualized strategies for accurately grasping what is relevant in a case. . . . The general notion is that determining the mean will presuppose critical and self-reflective ways for accurately reading the ethically relevant features of the case." NANCY SHERMAN, THE FABRIC OF CHARACTER 35 (1989).

[26] *See* ARISTOTLE, *supra* note 21, at VI.1.1139a21-30, VI.13.1144b14-1145a2, X.8.1178a16-19.

[27] In general, in this Article I use gender pronouns interchangeably, and no significance is intended or should be attached to the use of either the masculine or feminine form. However, my use of the feminine pronoun here is intentional, because it highlights Aristotle's conspicuous and illegitimate exclusion of women (as well as anyone else who was not a free male of the aristocratic class) from his account of practical wisdom. Several scholars have discussed Aristotle's sexism. *See* Sandra Harding & Merrill B. Hintikka, DISCOVERING REALITY: FEMINIST PERSPECTIVES ON EPISTEMOLOGY, METAPHYSICS, METHODOLOGY, AND PHILOSOPHY OF SCIENCE at xi-xii (Sandra Harding & Merrill B. Hintikka eds., 1983) (arguing that Aristotle's sexism warps his entire political philosophy); Stephen R.L. Clark, *Aristotle's Woman*, 3 HIST. POL. THOUGHT 177, 179-80, 182 (1982); MARTHA NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 370-71 (1986) (suggesting that Aristotle's investigation of women's potential for excellence was notoriously crude and hasty). Professor Nussbaum explains that Aristotle "is able to bypass the problem of developing their [women's] capabilities and he is able to deny them a share in the highest *philia*, as a result of bare assertions about their incapacity for full adult moral choice that show no sign of either sensitivity or close attention." *Id.* at 371 (citing G.E.R. LLOYD, SCIENCE AND SPECULATION 128-64 (1983)) (arguing that Aristotle echoes and supports pervasive ideology of his culture in his work on women); Martha C. Nussbaum, *Comments*, 66 CHI.-KENT L. REV. 213, 221, 227, 230 (1990) (stating that in Aristotle's ideal political arrangement everyone has potential to flourish and noting that Aristotle clearly excluded women and slaves); SHERMAN, *supra* note 25, at 153-54 (noting tension between Aristotle's view of women as rationally defective and lacking control of their passions and central role he assigns mothers in moral education of their children); Nicholas D. Smith, *Plato and Aristotle on the Nature of Women*, 21 J. HIST. PHIL. 467 (1983) (contrasting Aristotle's and Plato's views on women); Johannes Morsink, *Was Aristotle's Biology Sexist?*, 12 J. HIST. BIOLOGY 83, 110-12 (1979) (arguing Aristotle's view of biology of men and women was advanced for that time).

Kronman explains that Aristotle thought some human beings are

> unqualified for participation in political affairs on account of their age or sex, and others — whom he called natural slaves — because of their native incapacity for self-government. In fact Aristotle ascribed the capacity for citizenship to only one small group of human beings: the adult male heads

quences of each alternative? Does she apply certain general rules? Aristotle's answer is not clear, and literally millennia of reasoned discussion has not resulted in agreement about what is Aristotle's answer, much less what is the correct answer.[28]

Aristotle does say much that is helpful. He observes that choosing what to do involves both deliberation and desire,[29] and thus choosing well will involve both deliberating well and having the right desires.[30] Practical reason involves choice and action in concrete, particular situations, not just apprehending or understanding universal rules.[31] Aristotle sensibly advises that if we want to know what to do in a difficult situation, we should seek the advice of a good and wise person,[32] and he emphasizes the importance of experience to practical reason.[33] A person of practical wisdom may be able to give good advice about what should be done, even if she cannot explain with precision all the reasons for the advice.[34] Aris-

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> of households. All others, he felt, were incapable of the self-rule that politics implies and so had to be ruled despotically, outside the realm of politics, by others.

KRONMAN, THE LOST LAWYER, *supra* note 16, at 37. Kronman notes that we have every reason to reject Aristotle's "biological elitism," because "there is no reason to believe that men are any more capable of self-rule than women." *Id.* at 42. But, Kronman notes, this still leaves Aristotle's "character-based elitism" in place. *See id.* "[Aristotle] also assumed, more reasonably, that a person's capacity for self-rule depends on the character traits that he or she possesses, traits some possess to a greater degree or in a more developed form than others." *Id.*; *see also* Richard A. Posner, *Ms. Aristotle*, 70 TEX. L. REV. 1013, 1017 (1992) (maintaining that "[y]ou can jettison Aristotelian biology and Aristotle's aristocratic values, without jeopardizing what he has to say about reasoning in the face of uncertainty or about corrective justice or about the interpretation of laws").

[28] *Cf.* JONATHAN LEAR, ARISTOTLE: THE DESIRE TO UNDERSTAND 171 (1988) (stating that there are no rules that prescribe virtuous acts in certain circumstances under Aristotle's practical wisdom).

[29] *See* ARISTOTLE, *supra* note 21, at VI.2.1139a21-25.

[30] *See id.* at VI.2.1139a31-35, VI.13.1144b30-1145a7.

[31] *See id.* at VI.7.1141b7-8, VI.7.1141b14-16.

[32] *See id.* at VI.4.1140a24-1140b10.

[33] *See id.* at VI.7.1141b12-18, VI.8.1142a11-21, VI.11.1143b10-14 (stating that "we ought to attend to the undemonstrated sayings and opinions of experienced and older people or of people of practical wisdom not less than to demonstrations; for because experience has given them an eye they see aright").

[34] *See id.* at VI.8.1142a23-31 (distinguishing practical wisdom from knowledge and comprehension and likening it to perception); *see also* J.L. ACKRILL, *supra* note 22, at 138 (suggesting that man of practical wisdom "can often 'see' what is the best thing to do in the circumstances, without necessarily being able to explain why it is best"); SHERMAN, *supra* note 25, at 5 (maintaining that practical reason process does not begin with practical syllogism, but "further back with a perception of the circumstances and a recognition of its morally salient features"). According to Sherman, Aristotle understood perception to be informed by the virtues: "The agent will be responsible for how the situation appears as well as for omissions and distortions. Accordingly, much of the work of virtue will rest in knowing

totle also advises that with respect to the most difficult practical problems, we should not trust our own judgments alone, but rather we should reason together with others.[35] Aristotle contrasts practical wisdom with cleverness — the ability to "do the things that tend towards the mark we have set before ourselves, and to hit it" — which may be laudable "if the mark be noble," but if "the mark be bad, the cleverness is mere villainy."[36] The person of practical wisdom will be clever, but not merely clever; in addition, he will have virtue of character, which will make the aim right.[37] Aristotle concludes that "it is not possible to be good in the strict sense without practical wisdom, nor practically wise without moral excellence."[38]

II. SYMPATHY AND DETACHMENT

What are the particular virtues of character that a person of practical wisdom will have? Although Aristotle provides a catalogue of moral virtues,[39] he does not articulate which particular

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how to construe the case, how to describe and classify what is before one." *Id.* at 29.

[35] *See* SHERMAN, *supra* note 25, at 118-56 (discussing collaborative dimensions of practical reason). Aristotle vividly contrasts human friendship, which involves sharing in discussion and thought, with the life of cattle which involves merely grazing in the same pasture. *See* ARISTOTLE, *supra* note 21, at IX.9.1170b11-12. Aristotle suggests that even when the activity is contemplation and the "wise man, even when by himself, can contemplate truth" and "this activity [is] . . . loved for its own sake" and "nothing arises from it apart from the contemplating[,]" even then, "he can perhaps do so better if he has fellow workers." *Id.* at X.7.1177a33-1177b2.

[36] ARISTOTLE, *supra* note 21, at VI.12.1144a22-27.

[37] *See id.* at VI.12.1144a19-20; *cf. id.* at III.5.1114b1-25.

[38] *Id.* at VI.13.1144b30-32. There has been a resurgence of virtue-centered ethics in philosophy and popular culture as well as in law. *See, e.g.*, WILLIAM BENNETT, THE BOOK OF VIRTUES (1993); STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM (1991); ALASDAIR MACINTYRE, AFTER VIRTUE (2d ed. 1984); WILLIAM A. GALSON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE (1991); ON CHARACTER: ESSAYS BY JAMES Q. WILSON (1991).

[39] *See* ARISTOTLE, *supra* note 21, at II.7.1107a28-1108b10, III.5.1115a2-III.12.1128b35. Moral virtues (virtues of character) identified by Aristotle include courage (lying in a mean between rashness and cowardice), temperance (between profligacy or self-indulgence and insensibility), liberality (between prodigality and illiberality), magnificence (between tastelessness or vulgarity and meanness), gentleness (between irascibility and unirascibility), truthfulness (between boastfulness and self-depreciation), wittiness (between buffoonery and boorishness), friendliness (between obsequiousness and sulkiness), modesty (between bashfulness and shamelessness) and righteous indignation (between envy and malevolence). *See id.* Humility is not a virtue identified as praiseworthy by Aristotle. On the contrary, humility is considered to be a defective state regarding honor and dishonor, the mean of which is proper pride, the excess of which is empty vanity. *See id.* at II.7.1107b22-30. I discuss Aristotle's views about humility *infra*, text accompanying notes 91-94. For a helpful catalogue of Aristotle's moral virtues, see W.D. ROSS, ARISTOTLE 202-208 (1923).

habits of character are crucial to practical wisdom.[40] Aristotle's account of practical wisdom has found a recent and provocative defense in the work of Dean Kronman.[41] In his noteworthy book

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[40] *See* ARISTOTLE, *supra* note 21, Book VI. The following is typical of what Aristotle has to say about the relationship between virtues of character and practical wisdom:

> The origin of action — its efficient, not its final cause — is choice, and that of choice is desire and reasoning with a view to an end. This is why choice cannot exist either without thought and intellect or without a moral state; for good action and its opposite cannot exist without a combination of intellect and character.

Id. at VI.2.1139a31-35. Aristotle takes the view that the virtues imply one another and are inseparable, and thus having practical wisdom implies possessing all the virtues, or complete virtue. *See id.* at VI.13.1145a1-2, I.7.1098a17-18.

Aristotle does emphasize the importance of the virtue of justice, calling it the "greatest of excellences." *See id.* at V.1.1129b27. He characterizes justice as

> complete excellence in its fullest sense, because it is the actual exercise of complete excellence. It is complete because he who possesses it can exercise his excellence towards others too and not merely by himself; for many men can exercise excellence in their own affairs, but not in their relations to others.

Id. at V.1.1129b30-34. But justice does not mean merely lawful. As Nancy Sherman explains,

> To speak legally (*nomikos*) is to speak of general types (*tous tupous*), leaving aside for further consideration a more precise treatment of individual cases . . . . Within the judicial process, this more precise treatment is the special claim of equity (*epieikeia*). Its aim is not to make the law more comprehensive or exhaustive, but to tailor its judgments to the requirements of the case: "And this is the nature of what is equitable: it is a rectification of law in so far as the universality of law makes it deficient."

SHERMAN, *supra* note 25, at 15-16 (footnote omitted, *citing* ARISTOTLE, *supra* note 21, at V.10.1137b26-27).

Another famous passage about the importance of "moral excellence" is often quoted out of context for the proposition that reason has to do with means only and never ends: "Again, the function of man is achieved only in accordance with practical wisdom as well as with moral excellence; for excellence makes the aim right, and practical wisdom the things leading to it." ARISTOTLE, *supra* note 21, at VI.12.1144a6-8. For a persuasive refutation of the claim that Aristotle thought reason pertains to means only, see David Wiggins, *Deliberation and Practical Reason, in* ESSAYS ON ARISTOTLE'S ETHICS (Amélie Oksenberg Rorty ed., University of California Press 1980). *Cf.* LEAR, *supra* note 28, at 173-74.

[41] *See* KRONMAN, THE LOST LAWYER, *supra* note 16, at 11-52 (accounting genesis, development, criticism, and near demise of practical wisdom ideal). Kronman uses the term "lawyer-statesman ideal" interchangeably with "ideal of practical wisdom." *See id.* For an earlier version of Kronman's views, see Kronman, *Practical Wisdom and Professional Character, supra* note 16. *See also* MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 118 (1994) (calling for return to judicial virtues of "impartiality, prudence, practical reason, mastery of craft, persuasiveness, a sense of the legal system as a whole, [principled continuity, and] self-restraint"); Lawrence B. Solum, *The Virtues and Vices of a Judge: An Aristotelean Guide to Judicial Selection*, 61 S. CAL. L. REV. 1735, 1738 (1988) (arguing that good appellate judge "must possess at least

The Lost Lawyer, Kronman argues that practical wisdom is the lost ideal of the legal profession,[42] as well as the paradigm for good judicial decision making.[43] Deliberative inquiry, Kronman observes, always involves imagination:

> A person who is attempting to choose among commensurable goods must use imagination to anticipate the costs and benefits of each alternative. And the person who is deliberating about incomparably different options, of the sort we face at crucial turning points in life, needs imagination . . . to construct a concrete mental image of the choices he might make.[44]

Only by exploring, in imagination, the implications and effects of each option can we acquire an adequate understanding for making a choice. Kronman asserts that two moral virtues are necessary in order to properly engage in this type of imaginative deliberation:

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three virtues: a faculty for theoretical understanding of the law, a concern for the integrity of the law, and a practical ability to choose wisely in particular circumstances").

[42] *See* KRONMAN, THE LOST LAWYER, *supra* note 16, at 1-2. Kronman begins his book by lamenting what he sees as a crisis of morale in the legal profession, attributable to the

> demise of an older set of values that until quite recently played a vital role in defining the aspirations of American lawyers. At the very center of these values was the belief that the outstanding lawyer — the one who serves as a model for the rest — is not simply an accomplished technician but a person of prudence or practical wisdom as well. . . . [E]arlier generations of American lawyers conceived their highest goal to be the attainment of a wisdom that lies beyond technique — a wisdom about human beings and their tangled affairs that anyone who wishes to provide real deliberative counsel must possess. . . . But in the last generation this ideal has collapsed, and with it the professional self-confidence it once sustained.

Id. at 2.

[43] *See id.* at 319-20. Kronman states that

> [j]udging is a paradigm of deliberation, and so here if anywhere in the legal profession practical wisdom ought to be a well-understood and valued trait, especially given the absence, within the judicial sphere, of those intellectual and material forces that have helped to put this virtue on the defensive elsewhere.

Id. Kronman observes, however, that "anyone who inquires into the working habits of the American judiciary with this expectation in mind is likely to be disappointed," not just because judges, being human, fall short of their ideals, but due to a reorientation of the entire professional culture in which our judges work. *See id.* "In recent years there has occurred, within the sphere of adjudication, a depreciation of the lawyer-statesman ideal similar to the one that has taken place in the areas of teaching and practice as well." *Id.* at 320.

[44] *Id.* at 69.

sympathy and detachment.

A. Sympathy and Detachment in Deliberation

Kronman suggests that the first habit of character needed for imaginative deliberation is "a certain measure of sympathy or compassion, in the literal sense of 'feeling with.'"[45] Kronman describes sympathy as an attitude midway between observation and identification or endorsement. "To sympathize with the values represented by a particular choice is to do more than observe their association with a given way of life, to take note of the fact that those living the life in question typically affirm values of a certain sort."[46] This may be a first step towards sympathetic consideration of these values, but

> [o]nly those who have experienced something of the power and appeal of a value and who understand why others are drawn to it even if they themselves ultimately are not, may be said to have sympathetically considered it — to have entertained the value rather than merely noted its existence as anthropological fact.[47]

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[45] *Id.* at 70. As used by Kronman, "sympathy," meaning compassionate fellow feeling, should be considered synonymous with "empathy," meaning the capacity for participation in another's feelings or ideas. Some have drawn a distinction between sympathy (meaning "feeling for"), as involving primarily an intellectual state, and empathy (meaning "feeling with"), as involving also an emotional state. Others have drawn a distinction based upon the view that only sympathy includes a cognitive appraisal that the sufferer does not deserve his suffering. *See, e.g.*, Martin L. Hoffman, *Empathy and Justice Motivation*, 14 MOTIVATION & EMOTION 151, 157-58, 161 (1990) (discussing various definitions of sympathy and empathy). Kronman clearly does not intend to make such distinctions, and I will follow him in treating sympathy and empathy synonymously. See Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1, 3-4 (1997), for a contrary view about whether we should encourage sympathy in legal decision making. Feigenson argues "that what we know about the social psychology of the emotions, and of sympathy in particular, should dissuade us from promoting more sympathetic decision-making than the law now allows." *Id.* (footnote omitted).

[46] KRONMAN, THE LOST LAWYER, *supra* note 16, at 71.

[47] *Id.*; *see* Feigenson, *supra* note 45, at 4-8. Feigenson provides a psychological definition of sympathy:

> A basic definition of "sympathy" is a heightened awareness of the suffering of another and the urge to alleviate that suffering. Sympathy, like most if not all emotions, combines cognitive, affective, and action-oriented features. The awareness of the other's suffering is both thought and felt, and is accompanied by the desire to do something about it. Sympathy involves the ability to imagine oneself in the sufferer's predicament and, in some sense, to feel the other's pain. It also requires the ability to discriminate between feeling one's own pain and sympathizing with another's pain, be-

While sympathy goes beyond mere observation, it also falls short of outright acceptance. "It is possible to entertain a point of view without making it one's own, in the sense of giving the values associated with that point of view one's full endorsement."[48] Thus, the second habit of character or virtue that a person of practical wisdom will have is detachment:

> A person who is faced, let us say, with a difficult choice between two careers must make an effort to see the claims of each in its best light and to feel for himself their power and appeal. At the same time, he must preserve a certain distance or detachment from them. From each imaginative foray into the possible future lives that his choices represent, he must be able to withdraw to the standpoint of decision, the position he occupies at present. At least he must be able to do this if he is genuinely to choose among the alternatives and not merely be swept along by the tide of feeling that any sympathetic identification with a particular way of life — even an imagined one — can arouse.[49]

Kronman compares the combination of sympathy and detachment needed in practical deliberation and decision making to wearing bifocals: "Through one lens the alternatives are seen not merely at close range but (in contrast to the attitude of observation) from within, from the normative and affective points of view that the alternatives themselves afford. Through the other lens, each of the alternatives appears at an equally great distance."[50] Kronman observes that seeing through bifocal lenses can be difficult and disorienting, and it takes practice to get used to shifting between perspectives and combining them in a single field of vision.[51] So too with deliberation:

> It is difficult to be compassionate, and often just as difficult to be detached, but what is most difficult of all is to be both at once. Compassion and detachment pull in opposite directions and we

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cause "only action driven by the recognition of others'" pain as theirs, and the urge to relieve it in them, qualifies as sympathetic helping.

Id. (footnotes omitted).

[48] KRONMAN, THE LOST LAWYER, *supra* note 16, at 71.

[49] *Id.* at 72.

[50] *Id.* at 70.

[51] *See id.*

> are not always able to combine them, nor is everyone equally good at doing so.[52]

Kronman observes that, nonetheless, it is "just this combination of opposing dispositions that deliberation demands . . . ."[53]

B. A Missing Ingredient

Kronman thoughtfully identifies sympathy and detachment as moral virtues or habits of character that facilitate practical wisdom.[54] But his account leaves several important questions insuf-

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[52] *Id.*

[53] *Id.* Kronman's account of sympathy and detachment shares certain resonance's with Adam Smith's ideal of the "impartial spectator" who "change[s] places in fancy" with the sufferer, thus obtaining the most complete possible appreciation of the sufferer's predicament, while at the same time attempting the perhaps impossible task of regarding that suffering "with his present reason and judgment." ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 9-13 (D.D. Raphael & A.L. Macfie eds., 1976) (1759); *see also* Robert M. Gordon, *Sympathy, Simulation, and the Impartial Spectator*, *in* MIND AND MORALS 165, 178 (Larry May et al. eds., 1996) (suggesting that it is possible for impartial spectator to apply standard of spectator's sense of what justice requires, and not merely subjective standard of her own feelings); Fiegenson, *supra* note 45, at 70. According to Fiegenson,

> [b]y filtering sympathetic reactions through a non-sympathetic standard, the device of the impartial spectator appears to address concerns about both the possible subjectivity and the bias of sympathetic decision-making. It seems to complete a model of good judgment in which the decision-maker experiences his or her sympathy (natural or induced) to know and feel more thoroughly where justice lies, and then brackets the emotion so that it does not undermine the law's professed goals of objectivity and impartiality.

Id.

[54] Kronman also discusses how the virtues of sympathy and detachment are cultivated and developed, focusing upon the importance of learning through the case method in law school. KRONMAN, THE LOST LAWYER, *supra* note 16. According to Kronman,

> [t]he case method of law teaching presents students with a series of concrete disputes and compels them to reenact these disputes by playing the roles of the original contestants or their lawyers. . . . The case method thus works simultaneously to strengthen both the student's powers of sympathetic understanding and his ability to suppress all sympathies in favor of a judge's scrupulous neutrality.

Id. at 113. Kronman notes that

> [t]his experience, which law students sometimes describe, not inappropriately, as the experience of losing one's soul, strongly suggests that the process of legal education does more than impart knowledge and promote

ficiently answered. For example, how are these dispositions of sympathy and detachment to be reconciled or integrated into good judgment? How do we know when we are leaning too far in one direction or another?

Kronman follows Aristotle in addressing these issues, focusing upon the importance of experience in judgment about practical matters. Aristotle famously stated that when evaluating competing possible courses of action, we look to the voice of experience in a way that we do not with respect to purely theoretical matters. Thus, while we are used to seeing child prodigies in fields such as mathematics or science, we expect the good judgment and wisdom of great diplomats or judges to be born of much experience.[55] Kronman echoes this view, noting that "[w]e all recognize that

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> new perceptual habits. In addition it works — is meant to work — upon the students' dispositions by strengthening their capacity for sympathetic understanding. The strengthening of this capacity often brings with it the dulling or displacement of earlier convictions and a growing appreciation of the incommensurability of values, changes of attitude that many experience as personally transforming.

Id. at 115. *But see* Mark Neal Aaronson, *We Ask You To Consider: Learning About Practical Judgment in Lawyering*, 4 CLINICAL L. REV. 247, 265, 318 (1998) (criticizing Kronman's view that case method facilitates development of empathy and detachment and suggesting that live-client clinics are most helpful in awakening students' "appreciation of the multi-dimensional considerations that comprise good lawyering").

Aristotle maintains that character is developed from habit, and the Greek words for character and habit are almost identical. *See* ARISTOTLE, EUDEMIAN ETHICS 1220a39-b3 (Michael Woods trans., Clarendon Press 2d ed. 1992). Aristotle explains that

> excellences we get by first exercising them, as also happens in the case of the arts as well. For the things we have to learn before we can do, we learn by doing, e.g., men become builders by building and lyre-players by playing the lyre; so too we become just by doing just acts, temperate by doing temperate acts, brave by doing brave acts.

ARISTOTLE, *supra* note 21, at II.5.1103a30-1103b-2. This is not to say that virtue is developed by sheer mechanical repetition of an action. We learn to play the lyre, Aristotle says, not merely through persistence, but by trying to measure our performance against that of the expert. The instruction and monitoring of a conscientious teacher is also important. *See id.* at II.5.1103b6-11. Aristotle reasoned that:

> Again, it is from the same causes and by the same means that every excellence is both produced and destroyed, and similarly every art; for it is from playing the lyre that both good and bad lyre-players are produced. And the corresponding statement is true of builders and of all the rest; men will be good or bad builders as a result of building well or badly. For if this were not so, there would have been no need of a teacher.

Id.; *see also* SHERMAN, *supra* note 25, at 157-99 (providing insightful discussion of Aristotle's views about habituation of character).

[55] *See* ARISTOTLE, *supra* note 21, at VI.8.1142a12-21.

there is a distinctive form of understanding that comes only with experience, and that those who lack it do not possess."[56] But surely this is only a partial answer. Experience does not transform all politicians into statesmen or make all judges wise.[57] And while age and experience are and should be given deference, the oldest judge or diplomat is not necessarily the best.

Has Kronman identified a pair of opposing virtues, each important, but with no real guidance about how they can be balanced, reconciled, or integrated? Or, to put it another way, as promising as his insight seems to be, is he really telling us nothing more than to be both merciful (sympathetic) and just (detached)? After all, it seems that Kronman's appeal for sympathy could easily be recast as an invitation to be merciful; if we are truly sympathetic to a person, we are much more likely to treat him with mercy. And Kronman's petition for detachment seems to be another way of urging us to be just. After all, the symbol of justice is a woman blindfolded, holding a scale, which could just as easily be a metaphor for detachment.[58]

Moreover, sometimes one cannot satisfy both the demands of mercy and the demands of justice. Often the principal reason for one course of action is that it would be merciful, while the principal reason for another course of action is that it would be just.[59]

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[56] KRONMAN, THE LOST LAWYER, *supra* note 16, at 73.

[57] Indeed, in *Rhetoric, II*, in contrasting the inexperience of youth with the experience of age, Aristotle notes that while the young are overly confident about their own abilities and the goodness of others, the elderly tend to err in the other direction:

> They have lived many years, and have been deceived many times and have made many mistakes . . . And they are cynical, and this cynicism is a matter of seeing everything in the worst light. And furthermore, their experience makes them distrustful, and their distrust makes them suspicious of evil. . . And they lack confidence in the future, because of experience, for most things go wrong or at least turn out for the worse . . . And they feel pity for others, not out of kindness, as youth do, but out of weakness, for they imagine that anything that befalls anyone else might easily happen to them.

ARISTOTLE, RHETORIC, II, 1389b13-1390a21, *cited in* SHERMAN, *supra* note 25, at 197 (1989).

[58] *See* Dennis E. Curtis & Judith Resnik, *Images of Justice*, 96 YALE L.J. 1727 (1987) (discussing iconographic history of Justitia — sword and scales with blindfolded eyes — and reviewing imagery associated with justice).

[59] *See, e.g.*, WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1 (Jay L. Halio, ed., Clarendon Press 1993). The play presents Shylock seeking to enforce a contract that will result in Antonio forfeiting a pound of flesh because a debt was not paid on time. Portia, disguised as a doctor of law, urges Shylock to be merciful:

> The quality of mercy is not strained.

Reflecting upon the difficulties of integrating or mediating the demands of mercy and justice, I believe we are left with an uneasy suspicion that something important is missing from Kronman's discussion. It is not enough to instruct someone who strives to exercise practical wisdom to be both sympathetic and detached, just as it is not enough to instruct a judge to be both merciful and just.[60]

> It droppeth as the gentle rain from heaven
> Upon the place beneath. It is twice blest:
> It blesseth him that gives and him that takes.

Id. at 197. Shylock remains unpersuaded and demands justice. One need not sympathize with the play's harsh turnabout, where Shylock is condemned for seeking the life of a citizen of Venice and granted mercy only if he agrees to convert to Christianity, in order to appreciate the conflict between justice and mercy that Shylock faces.

Some commentators have identified a gender dimension to the conflict between justice and mercy. *See, e.g.*, Suzanne Last Stone, *Justice, Mercy, and Gender in Rabbinic Thought*, 8 CARDOZO STUD. L. & LITERATURE 139 (1996). Stone argues,

> the duality of self and other in terms of male and female is replicated in a series of binary oppositions, in which male and female are contrasted and asymetrically valued in terms of characteristics such as reason and emotion, abstract justice and mercy, and impartiality and passion. . . . The asymmetrical valuing of male and female is part and parcel of the traditional philosophic dichotomy between reason and emotion, with justice associated with dispassionate reason and mercy with passion and emotion.

Id. at 140. Stone analyzes a rabbinic midrash that deals with the tension between justice and mercy, where "the rabbis conceived of justice and mercy as two polarities of a paradoxically unified divine whole." *Id.* at 145; *see also* Feigenson, *supra* note 45, at 9 (stating that "[w]hen measured by self-reports, women appear to be significantly more empathic than men, but when physiological or facial measures are used, the differences tend to disappear." (citing studies)); *infra* note 53 and accompanying text.

[60] While it is widely acknowledged that judges are, should, and must be concerned with justice and mercy, this is not a matter beyond dispute. Perhaps the most famous story defending the contrary view was told by Judge Learned Hand of an encounter he had with Justice Oliver Wendell Holmes:

> I remember once I was with [Justice Holmes]; it was a Saturday when the Court was to confer. It was before we had a motor car, and we jogged along in an old coupé. When we got down to the Capitol, I wanted to provoke a response, so as he walked off, I said to him: "Well, sir, goodbye. Do justice!" He turned quite sharply and he said: "Come here. Come here." I answered: "Oh, I know, I know." He replied: "That is not my job. My job is to play the game according to the rules."

LEARNED HAND, *A Personal Confession*, *in* THE SPIRIT OF LIBERTY 302, 306-07 (Irving Dilliard ed., 3d ed. 1963).

See Michael Herz, *"Do Justice!": Variations of a Thrice Told Tale*, 82 VA. L. REV. 111, 114 (1996), for an interesting survey and analysis of the various ways and the multiple purposes for which this story has been quoted, misquoted and told. *See id.* (attempting to show "how lawyers, judges, and commentators have used Hand's story . . . to make a point, enlist an ally, mock a foe, and generally create a narrative that better supports their own views on that topic"). Justice Holmes is also often quoted as having said that the Supreme Court is not a

The seemingly intractable problem remains: how does one know when one is erring on the side of being overly merciful or overly just, overly sympathetic or overly detached?

III. A DIVINE LAWSUIT

In contemplating how we might integrate or reconcile the competing demands of justice and mercy, we can profitably turn to the Old Testament book of Micah. This text contains a beautiful exposition on the importance of justice and mercy, and illuminates the possibility that humility may play an important role in synthesizing, or at least mediating, the tension between justice and mercy.[61] The passage should also be of particular interest to lawyers, because it is cast as a divine lawsuit, with God as the prosecutor and judge in a cosmic complaint against Israel, his chosen people, the defendants.

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.[62]

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.[63]

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court of justice but of law. *See, e.g.*, EUGENE W. HICKOK & GARY L. MCDOWELL, JUSTICE VS. LAW: COURTS AND POLITICS IN AMERICAN SOCIETY (unnumbered page) (1993) (quoting Holmes as stating: "I am always suspicious of an advocate who comes before the Supreme Court saying this is a court of justice; it is a court of law"). On another occasion, concerning the Sherman Act, Holmes in a letter wrote, "I hope and believe that I am not influenced by my opinion that it is a foolish law. I have little doubt that the country likes it and as I always say, as you know, that if my fellow citizens want to go to Hell I will help them. It's my job." Letter from Oliver W. Holmes to Harold J. Laski (Mar. 4, 1920), *in* 1 HOLMES-LASKI LETTERS 1916-1935, 248-49 (Mark D. Howe ed. 1953). See David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 453 (1994), for an interesting analysis of Justice Holmes's conception of judicial restraint. *See id.* (arguing Holmes's views about structural position of judge in our constitutional scheme "was a strange, attractive, yet ultimately unacceptable philosophy . . .").

[61] *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].

[62] *Micah* 6:1.

[63] *Micah* 6:2. *The Abingdon Bible Commentary* also notes that "[t]he mountains and the

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 messenger from the heavenly court or assembly, 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.[64]

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 that God provided the children of Israel in their Exodus from Egypt.[65] The events alluded to in the following verse may not be as familiar to twentieth century readers, but they would have resonated strongly with Micah's listeners. Verse five refers to Balak, the king of the Moabites, who promised honors and riches to Balaam, a diviner from Northern Syria, if Balaam

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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].

[64] *Micah* 6:3-5.

[65] This assistance included the plagues. *See Exodus* 7:19-25 (discussing rivers of blood), 8:1-15 (discussing plague of frogs), 8:16-32 (discussing plagues of lice and flies), 9:1-7 (discussing murrain of beasts), 9:8-12 (discussing plague of boils and blains), 9:13-35 (discussing plague of hail), 10:12-20 (discussing plague of locusts), 10:21-23 (discussing plague of darkness). Additionally, the assistance included the Passover, *see id.* at 11-12, the pillars of fire and cloud, *see id.* at 14:19-24, the parting of the Red Sea, *see id.* at 14:26-31, the manna and quail, *see id.* at 16:1-15, and the water from rock, *see id.* at 7:1-7. 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 (stating: "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 wouldest keep his commandments, or no").

would curse Israel.[66] 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.[67] The phrase, "from Shittim unto Gilgal," refers to the critical period when the Israelites entered the promised land.[68]

The prophet Micah has presented a powerful case for the prosecution. 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, perhaps predictably, with a voice of self-justification and defiance:

> 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?[69]

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?[70] In verse seven, one detects a 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,"[71] when they demand, "Shall I give my firstborn for my transgression, the fruit of my body for the sin of my soul?"[72] From a Christian perspective,

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[66] *See Numbers* 22:1-8.

[67] *See id.* at 23:22-35; *see also id.* at 24:10-13, 24:15-19.

[68] *See* JEROME, *supra* note 61, at 288 (noting that: "Shittam 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"); *Joshua* 3:1 (from Shittim); *Joshua* 4:20 (unto Gilgal).

[69] *Micah* 6:6-7.

[70] Such burnt offerings, or *holocausts*, "were distinct from other sacrifices inasmuch as they were completely destroyed by fire and nothing was eaten by the priests or donors." JEROME, *supra* note 61, at 288. In addition, yearlings were more valuable than younger animals. *See id.*

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

[72] *See id.*; JEROME, *supra* note 61, at 288; 2 *Kings* 16:3, 21:6; *Jeremiah* 7:21. "The ancient Semites believed that the first-born were to be sacrificed to God because they belonged to

this last question is bitterly ironic, given the doctrine of the Atonement, which maintains that God the Father sent His only begotten Son, Jesus Christ, to take upon himself the sins — not of God, but — of the world.[73]

Given the defensive, self-justificatory, and strident tone of the defendants' response, the reader might expect God to answer in judgment 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?[74]

What does God require? With elegant clarity, God instructs His people to be just,[75] merciful,[76] and humble.[77] More precisely, he

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him. This barbarous practice of child sacrifice was condemned in the Mosaic Law; nevertheless, it was not unknown in Israel." JEROME, *supra* note 61, at 288; *see also Genesis* 22:1-19 (discussing Abraham's near sacrifice of his son Isaac).

[73] *See John* 3:16. This verse reads, "[f]or God so loved the world, that he gave his only begotten Son, that whosoever believeth in him should not perish, but have everlasting life." *Id.*

[74] *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 63, 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.

[75] The Hebrew word "*mispat*" 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 74, at 141-42. Mays's account of doing justice accords with the traditional view that the tension between positivist and natural law accounts of justice does not arise in the ancient Israelite context, because God's law is by definition just, thus eliminating the possibility of internal conflict within the concept justice (i.e., between a positivist understanding of justice as following the law and a natural law understanding of justice as doing the right thing). Nevertheless, biblical judges did not understand their role to be one of simply applying rules laid down by a higher authority. *See* Bernard S. Jackson, *Legalism and Spirituality: Historical, Philosophical, and Semiotic Notes on Legislators, Adjudicators, and Subjects, in* RELIGION AND LAW: BIBLICAL-JUDAIC AND ISLAMIC PERSPECTIVES 243, 245 (Edwin B. Firmage et al. eds., 1990) (commenting on existence of written Torah in pre-exilic period). Jackson

noted that while written *Torah* existed in pre-exilic period, "a number of sources seem to indicate that its function was *not* the provision of statutory rules to be applied as such by the judges, in the sense of rules regarded as authoritative in their linguistic form as well as their content." *Id.*; *see Deuteronomy* 16:18-20 (instructing Judges to judge with "just judgment" and avoid corruption); 2 *Chronicles* 19:6-7 (warning judges against injustice, partiality, and bribery).

[76] 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 74, 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 (David J.A. Clines & Philip R. Davies eds., 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, "*[h]esed*, 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*, at 61. Allen also translates *hesed* as "loyalty." *See* ALLEN, *supra* note 71, at 373. Allen explains that "[a]s a word of partnership it betokens mutual loyalty, not only the faithfulness of God to man but man's faithfulness to God." *Id.* Aubrey R. Johnson has argued that the English word "loyalty" is not an adequate translation due to the close association of *hesed* and the root *rhm* which connotes compassion, mercy or sympathy. *See* AUBREY R. JOHNSON, *Hesed and Hasid*, INTERPRETATIONES AD VETUS TESTAMENTUM PERTINENTES SIGMUNDO MOWINCKEL 100-12 (1955), *cited in* Gerald A. Larue, *Introduction* to NELSON GLUECK, HESED IN THE BIBLE 26, 27 (Elias L. Epstein ed. & Alfred Gottschalk trans., Hebrew Union College Press 1967) (1927).

The Jerome Biblical Commentary states that "[*h*]*esed* (goodness) is the response made not out of duty but out of love." JEROME, *supra* note 61, at 288. Wolff explains that "Luther translated this second ingredient of what is good as 'practicing love.' In Hebrew it is 'loving *hesed*'. But what is *hesed*?" WOLFF, *supra* note 75, at 194. Wolff translates *hesed* as "loving community solidarity." *Id.* The biblical reason this second virtue is necessary, Wolff maintains, is that "we all live by God's gratuities and acquittals, by his overwhelming compassion." *Id.*, at 195. The Rev. John Owen, the translator of 3 JOHN CALVIN, COMMENTARIES ON THE TWELVE MINOR PROPHETS: JONAH, MICAH, NAHUM (Rev. John Owen trans., W.B. Eerdmans Publ'g Co. 1950), notes that the expression to "*love mercy*, or benevolence, beneficence, or kindness" is remarkable: "it is not only to show mercy or kindness, but to *love* it, so as to take pleasure and delight in it." *Id.* at 343 n.1. Mays renders *hesed*, as "to love mercy." MAYS, *supra* note 74, at 142.

Max L. Margolis translates *hesed* as "to love kindness," and contrasts it with justice by noting:

> the doing of such favors as are not exactly a matter of justice, and certainly not of legal requirement; it is more comprehensive than, and therefore inclusive of, "mercy," i.e., kindness extended to the lowly, needy and miserable. In the phraseology of the rabbis, "the doing of kindnesses[]" is a wide term designating all charitable acts to persons not necessarily dependent, especially such as go with personal service.

MAX L. MARGOLIS, THE HOLY SCRIPTURES WITH COMMENTARY: MICAH 64 (1908).

[77] The meaning of the Hebrew verb *hasenea*, which is translated as "humbly" in the King James version, has been the object of considerable commentary and disagreement. The word *hasenea* 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* CALVIN, *supra* note 76, at 343 n.2. John Calvin explains the

employs a series of action verbs, asking them to do, love, and walk[78] with justice, mercy, and humility.[79]

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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.* at 343. 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 75, at 196. Wolff states that "[i]nvestigations of the word *hasenea* 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 74, at 142 (footnote omitted). The second century B.C. translators of the Septuagint rendered the passage *hetoimon einai touporeuesthai meta Kuriou Theou sou* (to "be ready to walk with the Lord thy God"), indicating an attitude of readiness and willingness. *See Michæas* VII.1-17 (Sepuagint Version).

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 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." MARGOLIS, *supra* note 76, at 65. 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). For a discussion of my conceptualization of what humility means, see *infra*, Part V.

[78] 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." JAMES LIMBURG, HOSEA-MICAH 193 (1988).

[79] 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 61, at 288. *The Abingdon Bible Commentary* refers to "justice," "mercy or kindness," and "a humble walk with God." ABINGDON, *supra* note 63, 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 76, at 342 (italics omitted).

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. *See* JEROME,

While Micah's injunction is undoubtedly majestic, upon reflection its instruction is far from simple. Micah's words illustrate 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?[80] In the context of adjudica-

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supra note 61, at 288. For an arresting and provocative account of such a tragic conflict, see Martha Nussbaum's discussion of Agamemnon's decision whether to kill his own daughter, Iphigenia, in response to a divine command and to save the lives of everyone else in an expedition. *See* MARTHA CRAVEN NUSSBAUM, FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 32-38 (1986).

Similar conflicts arise between duty and loyalty (Allen's translation of *mispat* and *hesed*). For example, David Kaczynski, the brother of the so-called "Unabomber," Theodore Kaczynski, had to choose between duty to society and loyalty to family in deciding whether to inform officials of his suspicion that his brother was the Unabomber. *See* Mairianne Lavelle, *Defending the Unabomber*, U.S. NEWS & WORLD REP., Nov. 17, 1997, at 18. Before David contacted authorities about similarities between the Unabomber's manifesto and his older brother's writings, Theodore Kaczynski was not even a suspect. *See id.* David hoped that in acting to prevent further bombings, prosecutors would be attentive to his request that the government try his brother as a noncapital defendant. *See id.* Facing an irreconcilable conflict between duty and loyalty, David chose duty in an effort to prevent further killings by the Unabomber, although in seeking to spare Theodore's life, he attempted to give loyalty its due as well. David's actions elicited a wide array of responses. *Compare* Amy E. Schwartz, *A Family That Did Its Duty*, WASH. POST, Apr. 10, 1996, at A19 (praising Kaczynski family's "moral fortitude" in turning in Theodore), *with* Don Oldenburg, *What If He Were Your Brother?; When David Kaczynski Fingered the Unabomber Suspect, He Became the Star of a Morality Play*, WASH. POST, Apr. 11, 1996, at C1 (noting that radio talk show host G. Gordon Liddy — "the convicted Watergate felon who spent time behind bars rather than turn informant" — referred to David Kaczynski as "lowly 'snitch' who betrayed his brother"). In spite of David's efforts, Attorney General Janet Reno decided to seek the death penalty. *See* Lavelle, *supra*, at 18. Theodore Kaczynski eventually pled guilty and was sentenced to life without parole. *See* William Booth, *Kaczynski Pleads Guilty to Bombings*, WASH. POST, Jan. 23, 1998, at A1. David Kaczynski expressed relief that the life of his brother had been spared. *See* William Booth, *Kaczynski's Brother Expresses Sadness, Relief in Aftermath of Plea; Accuser Still Feels Powerful Sibling Connection*, WASH. POST, Jan. 24, 1998, at A3.

In other translations, the conflict between the three directives in Micah's injunction may seem less apparent. For example, the English translator of Wolff's *Micah the Prophet*, translates Micah's injunction as "to practice justice, to love community solidarity and to live attentively with your God." WOLFF, *supra* note 75, at 187. Even as between justice and community solidarity, significant conflicts can arise. Consider, for example, the conflict faced by one who lives as part of a majority in a community that discriminates against a minority group in that community.

[80] The tension in *Micah* 6:8 between being at once just and merciful has been largely overlooked by commentators. In fact, some commentators have suggested that there is no tension at all. For example, according to Mays, the requirement to

> walk humbly with your God . . . is not . . . a separate requirement, but the final and most inclusive of an ascending series from the concrete to the general. The specific requirement is to do justice which is a way of loving mercy, which in turn is a manifestation of walking humbly with God.

MAYS, *supra* note 74, at 142. Other commentators have noted the different requirements of these injunctions, without noting the tension that arises as a result. Rev. E.B. Pusey states that "[*t*]*o do justice*, are chiefly all acts of equity; *to love mercy*, all deeds of love. *Justice*, is what

tion, the question raised by Micah's injunction is how should a judge evaluate, integrate, or balance the competing demands of justice and mercy?[81] For example, 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.[82] Justice

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right requires; *mercy* what love." 2 REV. E.B. PUSEY, THE MINOR PROPHETS, MICAH 82-83 (1885). Pusey does not address the conflicts that may arise between equity or the right on the one hand and love on the other. Cohen has noted that "Micah places justice first, because the great sin against which he cries out is the denial of social justice. But justice, the letter of the law alone, is not enough; there must be mercy as well." COHEN, *supra* note 8, at 181. Cohen seems to consider justice and mercy as lying in a vertical relationship, with justice at the bottom, being satisfied by adherence to the "letter of the law," and mercy on the top, requiring something more. *See id.* Conceptualizing justice and mercy lying in such a vertical relationship, or mercy as being "justice plus," ignores the conflicts that may arise between attempting to be at once just and merciful.

[81] See Thomas A. Wiseman, Jr., *What Doth the Lord Require of Thee?*, 27 TEX. TECH L. REV. 1403, 1403 (1996), for a sitting Federal District Judge's reflections on this question. *See id.* (citing *Micah* 6:8 as "a personal creed" which occasionally conflicts with "the secular demands of my job").

[82] Sentencing criminal defendants under the Federal Sentencing Guidelines may also present conflicts between justice and mercy. *See, e.g.*, Michael Joseph Woodruff, *Lawyers and Sacred Gold*, 27 TEX. TECH L. REV. 1411, 1417 (1996) (criticizing mandatory sentencing guidelines). Woodruff argues that morality

> is in conflict with a legal system that mandates sentencing guidelines, removes rehabilitation as a goal of the criminal justice system, and does not allow the judiciary to function with discretion beyond a mere clerk, a decision-maker who applies the law in the totality of the circumstances and with regard for equity as "law's conscience." Society is less humane when justice without mercy is sought. Justice becomes mechanistic, serving retribution of a kind.

Id. (footnotes omitted); *see also* Jack B. Weinstein, *No More Drug Cases*, 209 N.Y. L.J., Apr. 15, 1993, at 2. Exercising the prerogative of a senior judge to remove himself from hearing criminal drug cases, Judge Weinstein stated:

> I need a rest from the oppressive sense of futility that these drug cases leave. . . . I have taken my name out of the wheel for drug cases. . . . This resolution leaves me uncomfortable since it shifts the "dirty work" to other judges. At the moment, however, I simply cannot sentence another impoverished person whose destruction has no discernible effect on the drug trade. . . . I am just a tired old judge who has temporarily filled his quota of remorselessness.

Id.

Before the Supreme Court upheld the constitutionality of the Federal Sentencing Guidelines in *Mistretta v. United States*, 488 U.S. 361 (1989), more than 200 district court judges had held the Guidelines unconstitutional, while approximately 120 judges adhered to them. *See* Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 257 n.116 (1989); Jose A. Cabranes, *Sentencing Guidelines: A Dismal Failure*, 207 N.Y. L.J., Feb. 11, 1992, at 2 (providing example of strong personal conflict experienced by some federal judges in following sentencing guidelines); Jose A. Cabranes, Letter to the Editor, *Incoherent Sentencing Guidelines*,

may direct the payment of a penalty in consequence of violating a law; mercy may advise the issuance of a pardon.[83] 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.[84] Many circumstances seem to present a choice between acting justly and acting mercifully. Moreover, justice and mercy may be mutually exclusive — doing mercy may destroy the work of justice, and doing justice may destroy the work of mercy.[85] If laws are not executed and punishments not inflicted, justice cannot be done.[86] If justice is implemented unflinchingly, mercy is

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WALL ST. J., Aug 28, 1992, at A11 (criticizing sentencing guidelines because they "ignore individual characteristics of defendants and sacrifice comprehensibility and common sense on the altar of pseudoscientific uniformity"); *see also* Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search For a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 190, nn.40-47 (1993) (discussing Congress's role in federal sentencing system and decline but not eradication of sentencing disparities under federal sentencing guidelines). *But see* Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 680 (arguing that sentencing guidelines are "at worst, a marked improvement over the system they replaced and are, on balance, a notable, albeit certainly imperfect, success").

[83] *See, e.g.*, NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW (1982) (urging that justice should be tempered with mercy in criminal sentencing); Joan H. Krause, *Of Merciful Justice and Justified Mercy: Commuting the Sentences of Battered Women Who Kill*, 46 FLA. L. REV. 699 (1994) (discussing opposing views of justice, mercy, and gender roles when governors commute sentences of women who have been convicted of assaulting or killing their abusive mates).

[84] *See* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975) (providing account of behavior of antislavery judges who put aside their personal convictions and returned fugitive slaves to slavery). Cover presents a rich and disturbing example of the conflict that can arise between duty and conscience or, as he puts it, between the "demands of role" and the "voice of conscience." *See id.* For example, Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court "was a noted, strong opponent to slavery and expressed his opposition privately, in print, and in appropriate judicial opinions. Yet, in the great causes célèbres involving fugitive slaves, Shaw came down hard for an unflinching application of the harsh and summary law." *Id.* at 4-5.

[85] *See* Frederick Mark Gedicks, *Justice or Mercy? A Personal Note on Defending the Guilty*, 13 J. LEGAL PROF. 139, 148 (1988), 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 id.* ("Criminal defense lawyering . . . is an act of Christian charity. It is the setting aside of judgment to help one's neighbor.").

[86] In one sense this will always be true, because at a minimum justice requires that like cases be treated alike. In some circumstances, such as the fugitive slave laws, laws themselves may be unjust and following the law might represent a deeper injustice than disregarding it would. I do not prescribe to the view that justice means nothing more than following the letter of laws validly enacted, but the timeless debate between positivist and natural law-based accounts of justice is beyond this Article's scope. See HART, *supra* note 8, for an introduction to these conflicting conceptualizations of the meaning of justice. *See id.* (defending positivism); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979)

not possible.[87]

IV. CONCEPTUALIZING HUMILITY

The climax of the divine lawsuit in Micah chapter six suggests that humility may be 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. Because the virtue of humility is so widely misunderstood and lightly appreciated,[88] I would like to explain what I understand

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(defending positivism); Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 797 (1993) (defending positivism); Jules L. Coleman & Brian Leiter, *Legal Positivism*, *in* A COMPANION TO THE PHILOSOPHY OF LAW AND LEGAL THEORY (D. Patterson, ed., 1996) (defending positivism); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980) (defending natural law); LLOYD WEINREB, NATURAL LAW AND JUSTICE (1987) (defending natural law).

[87] Some theorists see no conflict between justice and mercy. For example, Kathleen Moore has argued that "a justified pardon is one that corrects injustice rather than tempers justice with mercy." KATHLEEN D. MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 213 (1989). On this view, "mercy is either justice or it is unjust." *Id.* at 192; *see also* Stephen J. Morse, *Justice, Mercy and Craziness*, 36 STAN. L. REV. 1485, 1507, 1514 (1984) (reviewing MORRIS, *supra* note 83) (criticizing Morris's use of mercy as "fudge factor" and arguing that "[t]ensions between moral guilt and legal guilt can be resolved in two ways: by granting mercy when legal guilt is too harsh, or by reforming the law to avoid unjust attributions of guilt and punishment," and advocating latter approach "because definitions of crimes and defenses should accurately and specifically reflect our attributions of blameworthiness"). Such accounts place a tremendous burden on the concept of justice, going far beyond positivist conceptualizations of justice as meaning properly lawful. Such accounts also have a difficult time acknowledging that some actions are merciful and go beyond the demands of justice, such as when a private creditor waives a personal debt.

[88] Humility does not even make it into William Bennett's catalogue of virtues in his *Book of Virtues*. *See* WILLIAM J. BENNETT, THE BOOK OF VIRTUES: A TREASURY OF GREAT MORAL STORIES (1993). Acknowledgments of the value of humility in judges are limited primarily to retirement tributes and judicial investiture speeches. *See, e.g.*, James J. Ammeen, Jr., *Developments in Appellate Practice in 1996*, 30 IND. L. REV. 1165, 1188 (1997) (praising retiring Indiana Supreme Court Justice Roger DeBruler for embodying "the qualities of kindness, compassion, humility and integrity"); Lawrence W. Crispo, *A Tribute to Richard A. Gadbois, Jr.*, 30 LOY. L.A. L. REV. 1425 (praising federal Judge Richard A. Gadbois, Jr., in memorial dedication, for maintaining "his good humor, humility, and compassion and never [becoming] afflicted with the federal judge-itis bug"); Charles M. Elson, *Remembering Judge Elbert P. Tuttle, Sr.: Dedication*, 82 CORNELL L. REV. 15 (1996) (praising Federal Circuit Judge Elbert P. Tuttle, Sr. as "a man of tremendous accomplishments, yet he was quiet, humble, even slightly self-effacing"); Stewart F. Hancock, Jr. et al., *Dedication to the Honorable Richard D. Simons*, 47 SYRACUSE L. REV. 287, 289 (1997) (noting that, on retirement of Judge Simons as associate judge of the New York State Court of Appeals, "[d]espite Judge Simons' many accomplishments, both professionally and personally, [Simons] remains today an unassuming and humble man who never sought publicity"); Mary Ann G. McMorrow, *On Judging . . .*, CBA REC., Apr. 1996, at 48 (urging, as Illinois Supreme Court Justice, new judges to fulfill duties

"with a sense of humility and courage and independence"); Charles E. Rice, *This Was A Man: In Memoriam, The Honorable J. Daniel Mahoney*, 72 NOTRE DAME L. REV. 1221, 1222-23 (1997) (praising Federal Court of Appeals Judge J. Daniel Mahoney as "not a power tripper. Especially as a judge, he had the humility to see that his commission was to interpret the law and not to create it as the spirit might move him."); Mark Schneider, *Justice Blackmun: A Wise Man Walking the Corriodors of Power, Gently*, 83 GEO. L.J. 11 (1994) (stating, "[i]t seems hardly plausible that an important public figure here and today could be most fairly described not as right or left, but as humble, serious of purpose, diligent, and intelligent. But that is Justice Blackmun."); Gerald F. Uelmen, *Otto Kaus and the Crocodile: Memorial Dedication to Otto Kaus*, 30 LOY. L.A. L. REV. 971 (1997) (praising California Supreme Court Justice Otto Kaus as "the most thoughtful, humble, and genuinely likable judge I have ever met"); Alan M. Wilner, *A Humble Giant: Tribute*, 56 MD. L. REV. 631, 636 (1997) (praising Robert C. Murphy, retiring Chief Judge of Court of Appeals of Maryland, as "a very special person — a humble soul with keen insights into human nature and the ways of the world").

Humility is occasionally included (sometimes half-heartedly) in laundry-lists of judicial virtues. *See, e.g.*, Lawrence H. Averill, Jr., *Observations on the Wyoming Experience With Merit Selection of Judges: A Model for Arkansas*, 17 U. ARK. LITTLE ROCK L.J. 281, 320-21 (1995). Averill opines:

> Society needs judges who are intelligent, honest, diligent, self-disciplined, decisive, reflective, courteous, organized, courageous, and learned in the law. Judges should also possess an inherent sense of good ethical behavior, high personal integrity, justice, compassion for people, *personal humility*, and fidelity to their oaths of office and legal institutions.

Id. (footnotes omitted) (emphasis added); *see* Ruth Gavison, *The Implications of Jurisprudential Theories For Judicial Election, Selection, and Accountability*, 61 S. CAL. L. REV. 1617, 1628-29 (1988). Gavison reasons:

> The conclusions of this pre-theoretical sketch are that judges need to have legal competence (which is itself a complex characteristic, involving many skills), commitment to the laws of the land, capacity at mediation, compassion, a sense of justice, knowledge of the beliefs and preferences in their society and the willingness to grant them proper weight in their decisions, the skills of a fact finder and an administrator, and the capacity to conduct a trial with courtesy and efficiency. The judge needs powers of moral and political reasoning, respect for others, moral courage and integrity, and *the ability to strike balances between activism and restraint, daring and humility, vision and caution.* A Herculean creature indeed. In addition, the good judge seemingly needs to be slightly schizophrenic as well: *a person with the required wisdom and integrity is unlikely to be self-restrained and humble. . . .*

Id. (emphasis added); *see* Patricia M. Wald, *Disembodied Voices — An Appellate Judge's Response*, 66 TEX. L. REV. 623, 628 (1988). Wald reasons:

> Finally, and frighteningly, having to deal with the human voice might backfire and make appellate judges more humble about their ability to discern and apply immutable principles for the conduct of other people's lives. Some might think this hesitancy a bad result because they believe our law is presently not bright and clear enough and is too full of special fact-balancing formulas. Others might think it a good thing for judges to be even more restrained in their rulings than they are now.

Id.; *see also* Patricia M. Wald, Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, Speech at Yale Law School (Feb. 2, 1988), *reprinted in The Circuit Bench: A Lonely Job Full of Hard Questions*, N.Y. TIMES, Mar. 18, 1988, at B5. Wald suggests that

humility to mean before defending this proposition.[89]

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an appellate judge should have the following personal qualities:

> alertness, sensitivity to the needs of the system and one's colleagues, raw energy, unselfishness, a healthy sense of history, *some humility*, a lively interest in the world outside the courthouse and what makes it tick, an ability to make hard decisions with only a little bit of post mortem regret, quickness — the ability to read fast, lucidity — a comparable ability to write well.

Id. (emphasis added).

[89] *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 130 (1990). Several theorists have included, usually indirectly, a place for humility in their accounts of legal interpretation and choice. For example, Richard Posner articulates a conception of reasonableness as "the Judicial Lodestar." *See id.* Posner maintained:

> I can think of no better approach than for judges to conceive of their task, in every case, as that of striving to reach the most reasonable result in the circumstances — which include though are not limited to the facts of the case, legal doctrines, precedents, and such rule-of-law virtues as stare decisis. Bland as this recommendation may seem, it differs from both the orthodox legal view of the judge's task and the various natural law approaches by substituting the *humble*, fact-bound, policy-soaked, instrumental concept of 'reasonableness' for both legal and moral rightness.

Id. (emphasis added). In a similar vein, in his discussion of "prudentialism," Posner stated that

> [t]he prudentialists emphasize human fallibility, *urge humility*, counsel adherence to immemorial custom, deplore breaking with the past, recommend prudence as the central principle of politics and judgment as the central principle of law, elevate the particularism and (apparent) lack of system of the common law over the generalizing tendencies of statutes and codes, and stress the limitedness of intellect as a tool of social reform.

Id. at 443 (emphasis added). According to Posner, the "problem with prudentialism is that it is a mood rather than a method of analysis," although it is "the right mood in which to do law." *Id.* Elsewhere, Posner speaks approvingly of "conventionalists" who are "skeptical of the power of reason and therefore insist[] that the judge approach his task with *humility*, reverence for professional tradition, and faith in the wisdom of the past." *See* Posner, *The Jurisprudence of Skepticism*, *supra* note 18, at 887 (emphasis added).

Cass Sunstein, in his defense of "incompletely theorized agreements," argued that such agreements "have the advantage, for ordinary lawyers and judges, of *humility* and modesty: they allow past judgments to be treated as given and make it unnecessary to create the law anew in each case." Cass Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1749 (1995) (emphasis added). Sunstein explained,

> [t]he search for full theorization may be simply too difficult for participants in the law to complete, and so too for others attempting to reason through difficult problems. . . . In this respect, the principle of stare decisis is crucial: attention to precedent is liberating, not merely confining, since it is far easier for judges to decide cases if they can take much law as settled.

Id. Additionally, Sunstein noted that

> well-functioning legal systems often tend to adopt a special strategy for producing agreement amidst pluralism. Participants in legal controversies try to produce incompletely theorized agreements on particular outcomes. They agree on the result and on relatively narrow or low-level explanations for it. They need not agree on fundamental principle.

Id. at 1735-36 (footnotes omitted); *see also* Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 782 (1993). Sunstein asserted:

> [o]ften there are too many practical constraints to work out a fully general theory. As compared with the search for reflective equilibrium, analogical reasoning has the advantage, for ordinary lawyers and judges, of *humility* and circumspection. To engage in analogical reasoning, one need not take a stand on large, contested social issues, some of which can be resolved only on a sectarian basis. A lawyer or judge who claims to have reached reflective equilibrium may seem immodest, insufficiently cautious, or even hubristic.

Id. (emphasis added).

Lawrence Lessig has argued for a theory of interpretive fidelity based upon the analogy of translation — transforming a source text in a source language into a target text in a target language. Lessig maintained that judges face a similar task as linguistic translators:

> Like the linguistic translator, the judge is faced with a text (say, the Constitution), written in an original or source context (America, late eighteenth century); she too must write a text (a decision, or an opinion) in a different context (America, today); this decision, in its context, is to have the *same meaning* as the original text in its context.

Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1371 (1997). Lessig has suggested that good translator must be humble. Lessig reasoned:

> If translation requires creativity — if there is no such thing as "mechanical" translation — then some counsel the translator to a kind of *humility*. Humility means this: to avoid translations that the translator believes make the text a better text; to choose instead translations that will carry over a text's flaws as well as its virtues. This counsel to humility is offered as a virtue in the translator's practice. It is an integrity — to be faithful to the strengths of a text as well as the vice; to exercise the power of the translator in a sense not to change the text translated, while in a sense changing the text translated fundamentally. On this view of the translator's task, fidelity requires a certain restraint — the restraint to minimize the voice of the translator in the text being translated.

Id. at 1372 (footnotes omitted) (emphasis added). Felix Frankfurter also used the metaphor of translation to characterize the judge's task in interpreting statutes, citing the judge's "duty of restraint, this *humility of function* as merely the translator of another's command. . . ." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 534 (1947) (emphasis added); *see also* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1206-11 (1993) (defending humility as aspect of equivalence in translation and noting that "the translator is perhaps the only modern artist who acts and behaves as if he were only an artisan") (quoting George Steiner, *After Babel: Aspects of Language and Translation*, at 402 (1975)).

Lawrence Tribe has warned against a "dangerously ambitious judiciary" that loses "touch with the need for continuing self-doubt in the exercise of adjudicatory power." LAWRENCE H. TRIBE, CONSTITUTIONAL CHOICES 21 (1985). Tribe also implied that scholars

A. Humility as a Mean

I have turned to the biblical text of Micah to explore an Aristotelian concept, practical wisdom. In an effort to better understand the virtue of humility and how it helps us address the justice-mercy paradox, I now propose to take a brief reciprocal Aristotelian turn. Aristotle argued 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.[90] Similarly, humility 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 worthlessness, subjugation, or servility.[91]

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and commentators should also be humble, because they

> wield a kind of power, too — not the direct coercive force wielded by courts and the policy, but a power to affect belief and thus, to some degree, to shape social reality. Like judges, those who study and write about the work of courts — and those who read such writings — may be lulled into a false repose by theories that purport to legitimate the scholar's proper enterprise as one of "merely" objective and unbiased description of text or history, or one of dispassionate and careful observation of doctrine or theory. Such repose is false because *all* social description and observation are bound up in the describer's and observer's point of view. Substantive perspective, reflecting the observer's past and context, is inescapable; its influence on perception and description is pervasive.

Id. at 7-8.

Paul Gewirtz, commenting upon the objection that judicial review is countermajoritarian, observes that "one element that helps to accommodate judicial review and democratic values is a feeling and attitude — *a judge's feeling of humility*, an internalized sense that he is not the sole repository of constitutional truth, an attitude of restraint that is an aspect of temperament." Paul Gewirtz, *On "I Know It When I See It,"* 105 YALE L.J. 1023, 1034-35 (1996) (emphasis added) (arguing that there is proper role for emotion and nonrational elements in judicial decision making).

Other writers have noted other benefits of humility in the law. In his book on legal writing, David Mellinkoff argued that one of the reasons lawyers' prose is so pompous and verbose is that lawyers are inflated with a sense of self-importance. As an antidote to this problem, Mellinkoff recommended a "*touch of humility*" on the part of lawyers and judges. *See* DAVID MELLINKOFF, LEGAL WRITING: SENSE AND NONSENSE 122 (1982) (emphasis added). Ronald J. Allen has argued in defense of the jury system by suggesting that jurors "are a tremendous reservoir of knowledge, learned over their entire lives, who perhaps possess sufficient *humility* to actually listen to the stories (told by the parties) without prejudging the outcome." Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 NW. U. L. REV. 604, 632 n.87 (1994) (emphasis added).

[90] *See supra* note 25 (discussing Aristotle's doctrine of virtue lying in mean between extremes).

[91] *See supra* notes 39-44 and accompanying text (describing the manifestation of humility's extremes). The conceptualization of humility as a virtue lying in a mean was not shared by Aristotle, who considered *tapeinos*, the Greek word translated as humility, to be a defective

We could easily fail to realize that one can have too much as well as too little of the feelings or attitudes underlying humility. While most people see pride (too little humility) as opposed to humility, few 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 accept 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.[92] The essence of humility is treating other things — 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

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state relating to proper pride. *See id.* In a biblical, theological sense, *tapeinos* seems to connote primarily the idea of bowing down or making low, belonging to, or being a servant of God. *See* 8 THEOLOGICAL DICTIONARY OF THE NEW TESTAMENT 11-12 (Gerhard Friedrich ed. & Geoffrey W. Bromiley trans., Wm. B. Eerdmans Publ'g Co. 1972) [hereinafter TDNT]. The theological dictionary notes:

> The different estimation of the word group [*tapeinos*] in Greek literature and the Bible is governed by the different understanding of man. The Greek concept of free man leads to contempt for lack of freedom and subjection. This qualifies [*tapeinos*] and derivates negatively. In Israel and post-exilic Judaism, however, man is controlled by God's action. Man must listen to God and obey Him, so that he can call himself God's servant. This gives to the group [*tapeinou-tapeinos-tapeinosis*] a positive sense to the degree that it expresses the doing of acts by which man is set in a right relation to God.

Id. Some biblical scholars, both Jewish and Christian, would disagree with my conceptualization of humility, and would characterize humility more closely with what I take to be an excessive state. For example, according to the TDNT, the meaning of humility in Rabbinic literature finds "expression in a life of denial in which a man 'makes himself a desert on which all tread.'" *Id.* at 13. Similarly, John Calvin maintained that being humble means bringing oneself down to nothing and holding a low opinion of oneself. *See supra* note 77.

[92] *See supra* note 77 (presenting discussion of various commentators's views on meaning of Hebrew word *hasenea*, translated as humility). In *Mere Christianity*, C.S. Lewis noted:

> Do not imagine that if you meet a really humble man he will be what most people call "humble" nowadays: he will not be a sort of greasy, smarmy person, who is always telling you that, of course, he is nobody. Probably all you will think about him is that he seemed a cheerful, intelligent chap who took a real interest in what *you* said to *him*. If you dislike him it will be because you feel a little envious of anyone who seems to enjoy life so easily. He will not be thinking about humility: he will not be thinking about himself at all.

LEWIS, *supra* note 2, at 99. Hardy Dillard when asked about what it was like to be a judge of the World Court replied: "I have approached the job in a spirit of *exuberant humility*." Judge Dillard, *Talk of the Town*, THE NEW YORKER, Mar. 28, 1970, at 27 (emphasis added) (describing Dillard's apprehension with undertaking position).

personal weaknesses.

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

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. By mistakenly viewing victims of subjugation as exemplars of humility, we distort the meaning of humility. More importantly, we may seriously mislead such victims with general exhortations to be humble or with praise of their humility.[93] These victims might misinterpret such admonitions as an instruction to regard themselves as even more inferior or subservient than they already do, when in fact 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.

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,

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[93] Pride, however, is not a monopoly of the powerful. Victims must also beware of the seductive power of pride. Victims are susceptible to the temptation to wear their victimhood as a badge of honor, to blame others for all that is wrong in their lives, and to find fault exclusively in others, and in so doing can become prideful. The temptation for victims to become prideful has an additional face. Having been treated unjustly or unmercifully by others, the inclination to err on the side of being unjust or unmerciful towards others, particularly those who are not a part of one's group, is naturally very strong. But categories of "victim" and "victimizer" or "outsider" and "insider" change from context to context. *See, e.g.*, ROBERT HUGHES, THE CULTURE OF COMPLAINT: THE FRAYING OF AMERICA (1993) (discussing how victimhood has created "culture of complaint" in American society); Elizabeth M. Schneider, *Feminism and the False Dichotomy of Victimization and Agency*, 38 N.Y.L. SCH. L. REV. 387 (1993) (suggesting that incomplete view of women as either victims or agents has shaped feminist work); Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411 (1993) (presenting examples of why victimhood is attractive); ALAN M. DERSHOWITZ, THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES AND EVASIONS OF RESPONSIBILITY (1994).

humility is difficult; it is no exaggeration to say that it takes a considerable amount of courage to be humble. Rarely will one encounter someone who is humble and considers himself to be a "self-made" person, because humility will compel him to acknowledge the sustenance and assistance he 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 submit to legitimate authority, but it does not require subservience to illegitimate authority.

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 her conclusions are wrong; that her perspectives are limited and should be broadened; that her settled opinions merit reconsideration. One who is humble will possess a quiet confidence that enables learning and reassessment, because she is not defensive or insecure. What is more, one who is humble will seek the insights and viewpoints of others, because she will not have an unwarranted confidence in the power of her own intellect or the rightness of her every conclusion. One who is humble will have the capacity to be surprised by an argument or insight that causes her to rethink long-held opinions or favorite theories. Humility does not imply softheadedness or intellectual weakness, although the learned and mentally acute are particularly susceptible to becoming prideful.

A judge is more likely to err on the side of having too little humility than too much, regardless of the judge's gender or race.[94] The temptation to be prideful is based upon the judicial role, not upon the individual judge's status. A judge who is humble is more likely to be just and merciful than a judge who is prideful. A humble judge may not be able to do both justice and mercy on a particular occasion, but a judge who herself is both just and merciful will be better able to determine the appropriate course in the circumstances of that particular case. 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.

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[94] *See* Wiseman, *supra* note 81, at 1408. 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." *Id.*

B. Misunderstanding Humility

Critics of humility often conceptualize humility in its most overdone form. Such was the case with the ancient Greeks in general, and with Aristotle in particular.[95] As used in the ancient Greek and Hellenistic world, the Greek *tapeinos* means lowly, mean, insignificant, weak, or poor, or a city, country, state, or diplomat of trivial power or significance; and the Latin *humilis* means low or flat.[96] Not only is humility omitted from Aristotle's catalogue of virtues, he considers it a defective state in relation to proper pride or magnanimity, which has to do with honors and dishonors. Aristotle asserts that "[w]ith regard to honor and dishonour the mean is proper pride, the excess is known as a sort of empty vanity, and the deficiency is undue humility."[97] Aristotle's hostility to humility is probably at least in part attributable to the fact that he lived in a slave society, and humility was considered to be a dispositional attribute of slaves.[98] Due to this misconceptualization of humility, as

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[95] *See supra* note 39.

[96] *See* TDNT, *supra* note 91, at 1.

[97] *See* ARISTOTLE, *supra* note 21, at II.7.1107b23-25. Elsewhere, in contrasting the inexperience of youth with the experience of age, Aristotle spoke somewhat more sympathetically about humility:

> And youth trust others readily because they have not yet often been cheated; and they are optimistic . . . for they have as of yet met with few disappointments. And they live their lives for the most part in hope; for hope looks to the future and memory to the past, and for youth the future is great, the past brief. . . And they are great-souled, for they have not yet been humbled by life or learned its necessary limitations.

SHERMAN, *supra* note 25, at 197 (citing ARISTOTLE, RHETORIC, II, 1389a16-31). Sherman concludes that for youth, Aristotle views the experience of disappointment or failure as necessary to "knock them out of their naïve trust of others and over-confidence in their abilities." *Id.* at 197.

[98] *See* TDNT, *supra* note 91, at 2 (stating that ancient Greek slaves were thought to be born into humility). According to TDNT,

> [w]ith respect to the spiritual and moral state of man [*tapeinos*] means "lowly," "servile," often with other terms which show that [*tapeinos*] is used disparagingly. For the aristocratic culture of ancient Greece the worth of a man was determined by his parentage. A noble mind and virtue were inherited and could not be acquired. [*Tapeinos*] expresses both the low estate of the man who lives in poor and petty relations, especially the slave, and also the base disposition resulting therefrom.

Id. In his discussion of the virtue of magnanimity, Aristotle states that "the well-born and the powerful or rich are thought worthy of honour, since they are in a superior position, and everything superior in some good is more honoured. Hence these things also make people more magnanimous, since some people honour their possessors for these goods."

well as the aristocratic nature of ancient Greek culture, it is little wonder that Aristotle did not consider humility a praiseworthy virtue.

When humility is mischaracterized in an extreme, overdone form as slavishness or servility, not only is humility an unattractive ideal, but it ceases to be a concept that is helpful in resolving the tensions between justice and mercy. When humility is understood as lying in a mean between the defective state of pride and the excessive state of subordination or subjugation, it not only is an attractive ideal, it is an essential component of practical wisdom. To this argument I turn next.

V. 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 is not immediately 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).[99] Put another way, someone

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ARISTOTLE, *supra* note 21, at III.12.1124a22-24. Aristotle did add that "[i]n reality, however, it is only the good person who is honourable," indicating that conventional wisdom might be mistaken on the matter. *Id.* But then he added, "[s]till, anyone who has both virtue and these goods is more readily thought worthy of honour." *Id.* at III.12.1124a25-27. A few paragraphs later he identifies *tapeinoi* (translated by Irwin as "inferior people") as flatterers, and associates them with attributes of slavishness and servility. *See id. at* III.12.1125a2-3.

[99] *See* ARISTOTLE, *supra* note 21, at V.5.1133b31-33. Book V of the *Nicomachean Ethics* contains an elaborate discussion of justice as a virtue of character that exemplifies the doctrine of the mean, although Aristotle maintained that "[j]ustice is a kind of mean, but not in the same way as the other excellences . . ." *Id.* Aristotle identifies two types of injustice. One may be unjust by being lawless, or one may be unjust by being unfair and grasping, aiming to get more than one's fair share. *See id.* at V.1.1129a27-1129b2. The bulk of Aristotle's discussion in Book V is of what he calls "particular justice," which is concerned with people getting their fair shares. *See id.* at V.4.1130b16. Particular justice, is, in turn, divided into two types, called distributive and rectificatory. *See id.* at V.4.1130b30-1131a10. Distributive justice has to do with the "distributions of honour or money or the other things that fall to be divided" and rectificatory justice with restoring fair shares when injustice has occurred. *See id.* at V.4.1130b30-1131a1. Thus, with respect to distributive justice, injustice corresponds to awarding to oneself too much of what is desirable, or of suffering the receipt of too little of what is desirable by others. *See id.* at V.5.1133b29-1134a16. As noted, Aristotle also distinguishes between law and equity. *See supra* note 39. In some circumstances, the effect of equity can be to render mercy in the circumstances of a particular case. Nancy Sherman explains: "The effect of equity in counteracting legal rigorism is perhaps clearest in the setting of punishments. It is associated with considerateness (*suggnome*) and a disposition to show forgiveness, leniency, or pardon (all possible renderings of *suggnome*)." SHERMAN, *supra* note 25, at 18.

who is unjust has too little commitment to being just, while someone who is retributive or vengeful is too consumed with being just, and may become perversely preoccupied with retribution.[100] Something similar is the case with respect to mercy. One who is insufficiently merciful will be hardhearted or cruel, while one who is overly merciful will be permissive, indulgent, or lenient.[101] One can err in having an insufficient commitment to justice or mercy as well as an excessive and inappropriate commitment to justice or mercy.

If it is true that mercy and justice are each virtues that lie in a mean, how is one to know that he 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 initially like a difficulty of evaluating, reconciling, or balancing the demands of justice and mercy now appears to be an even more complicated problem. Not only must one strive to balance justice and mercy, one must also attempt to balance the extremes within each virtue.

A. Humility Within Justice and Mercy

Humility helps to resolve the internal tension within justice. As noted, justice is a virtue that lies in a mean between injustice and vengefulness.[102] One who is humble is less likely to be unjust. If one is humble, it is difficult to be unjust, because irrelevant differ-

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As used in this article, justice is to be understood at a rather high level of generality, to include notions of lawfulness as well as fairness. At a minimum, as Aristotle explained, justice consists in treating equals equally and unequals unequally, each in proportion to their relevant differences. *See* ARISTOTLE, *supra* note 21, at V.3.1131a18-24. This implies notions such as impartiality or equality (placing each party's interests, including one's own, on an equal footing with others' interests; justice is no respecter of persons), relevance (taking into account only those factors that are pertinent to the present inquiry), and distinction (having sound grounds for differentiating between cases). Justice implies equal treatment, unless relevant differences exist and have been proved. *See* 4 THE ENCYCLOPEDIA OF PHILOSOPHY 299 (1967). This of course begs a number of important questions, such as what will count as a relevant distinction, which must — happily — be left for another day.

[100] *See supra* note 75 (discussing meaning of *mispat*, Hebrew word translated as justice in *Micah* 6:8).

[101] *See supra* note 76 (discussing different meanings ascribed to Hebrew word *hesed*, which King James version of *Micah* 6:8 translates mercy). Perhaps Luther's translation of *hesed* as "practicing love" or Margolis's translation of *hesed* as "loving kindness," comes the closest of the various translations to what I mean by mercy. Being merciful implies being and acting with compassion, benevolence, beneficence, love, and kindness.

[102] *See supra* notes 99-100 and accompanying text (discussing justice as mean between injustice and vengefulness).

ences between oneself and others are seen as small. One who is humble is able to recognize that roles could easily be reversed if fortuities of birth, opportunity, economic status, race, gender, or nationality, among other grounds for differentiation, were otherwise.[103] Thus, for one who is humble, it is more difficult to differentiate between us and 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 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 side. Humility enables one to acknowledge that fault lies partially — perhaps even equally or predominantly — with oneself or one's people.

Humility plays a similar role in becoming merciful, in striking a balance between being merciless or hardhearted at one extreme and permissive or indulgent at the other extreme. The relationship between humility and mercy is very similar to the relationship between humility and justice. If one is humble, one is less likely to differentiate inappropriately between persons. It is much easier to act mercifully towards someone whom one sees as similar to oneself. Studies of the Jewish Holocaust have taught us that genocide became possible only when the perpetrators ceased to view their victims as truly human — an extreme form of inappropriate differentiation.[104] The importance of rejecting false differences between

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[103] *See* JOHN RAWLS, A THEORY OF JUSTICE 17-22, 118-92 (1971). Rawls, and other impartialists, consider the imaginative adoption of an impersonal point of view — Rawls's "original position" — to be the cornerstone of constructing a sound conceptualization of what justice means. *See id.*

[104] 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). Sara Nomberg-Przytyk, another Holocaust survivor, tells of being subjected with the other female prisoners to the humiliation of having her hair cut off, a practice apparently designed to make the prisoners seem less human:

> We were not allowed any modesty in front of these strange men. We were nothing more than objects on which they performed their duties, nonsentient things that they could examine from all angles. It did not bother them that cutting hair close to the skin with dull scissors was excruciat-

people is at the core of the biblical doctrine that we are all children of God, created in His likeness.[105] It may also partly explain the emphasis placed upon humility in the Bible.[106]

> ingly painful. It did not bother them that we were women and that without our hair we felt totally humiliated. In a few hours we had been robbed of everything that had been ours personally. We were shown that here in Auschwitz we were just numbers, without faces or souls.

SARA NOMBERG-PRZYTYK, AUSCHWITZ: TRUE TALES FROM A GROTESQUE LAND 14-15 (1985), *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); *see also* Eugene Kamenka, *The Holocaust: Explaining the Inexplicable?*, *Introduction* to WHY GERMANY? NATIONAL SOCIALIST ANTI-SEMITISM AND THE EUROPEAN CONTEXT 1, 2 (John Milfull ed., 1993). Kamenka explains:

> The impact of the Holocaust on the moral consciousness of those who saw themselves as standing in the Western European tradition has been very great. We now recognize, or many of us do, the extent to which evil has to deny the humanity of others, has to pretend that they are not human, has to shut them out from the wider community in which they live.

Id. Kamenka goes on to say that

> [e]vil is a powerful, active historical force distinguished from moral wrongness precisely by the fact that it never becomes reasonable, understandable, in the circumstances. It challenges the very basis of our humanity. People may slide into evil gradually, through external pressure and example. They may begin by being unthinking, unimaginative, insensitive. But there is in morality, and in human action generally, a need for the doctrine of the last clear chance. The slide from thoughtlessness and moral indifference or cruelty to evil may be gradual; but there comes a point when we have a right to demand that human beings, including the agent, stop in revulsion. The failure to do that involves a failure to recognize evil. That failure, or the lack of revulsion from it, is the ultimate moral explanation of the Holocaust. To cut up a woman thinking she is a leg of lamb is to be mad, suffering from a delusion; it is not to be evil. To butcher, as animals, Jews or Aborigines, recognizing them as such, but denying that they "deserve" to be treated as human, is more than making a mistake or committing a moral wrong; it is evil.

Id. at 4; *cf.* Jean-Paul Sartre, *The Anti-Semite*, *in* THINKING THE UNTHINKABLE: MEANINGS OF THE HOLOCAUST 167, 174 (Roger S. Gottlieb ed., 1990). Sartre notes that

> A man who finds it entirely natural to denounce other men cannot have our conception of humanity; he does not see even those whom he aids in the same light as we do. His generosity, his kindness are not like our kindness, our generosity. You cannot confine passion to one sphere.

Id.

[105] *See, e.g.*, *Ephesians* 4:6 (King James) (stating: "One God and Father of all, who *is* above all, and through all, and in you all."); *Genesis* 1:26 (King James) (noting: "And God said, Let us make man in our image, after our likeness. . . ."); *Malachi* 2:10 (King James) (stating: "Have we not all one father? Hath not one God created us? Why do we deal treacherously every man against his brother, by profaning the covenant of our fathers?").

[106] *See* MARGOLIS, *supra* note 76, at 65 (suggesting that "humility" is keynote of ethical

Humility is also a bulwark against overdoing mercy and becoming permissive or indulgent. Being overly merciful may result from identifying too thoroughly with only one of the relevant points of view. An indulgent parent may identify too thoroughly with the child's perception of her 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 identifying too closely 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 by seducing 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 for external authority.

B. Humility Between Justice and Mercy

Not only is humility the key to striking the appropriate balance within the virtues of justice and mercy, it is also the key to synthesizing or mediating between the competing claims of justice and mercy. As noted earlier, the demands of justice are often incompatible with the demands of mercy.[107] This conflict is illustrated by the tension that, at least occasionally, arises between duty (the dictate of justice) and conscience (the dictate of mercy). Humility helps to defend against erring on the side of 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

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teachings). Humility is also an important concept in Jewish law, which included humility in its list of seven qualifications for lower court judges. *See* Misehneh Torah Sanhedrin 2:7, *translated in* J. ROTH, THE HALAKHIC PROCESS: A SYSTEMIC ANALYSIS 144-45 (1986) (listing wisdom, humility, fear of God, hatred of unjust gain, love of truth, respected and upstanding reputation). According to Ze'ev W. Falk, "[t]he quality of *shiflut ru'ach* (humility) and *perishut* (self-restraint) occupies a high place in the rabbinical hierarchy of values, and even among the qualities of the judge, Jewish law counts *'anawah* (humility)." Ze'ev W. Falk, *Jewish Religious Law in the Modern (and Postmodern) World*, 11 J.L. & RELIGION 465, 498 (1994-95) (footnotes omitted) (citing JT Sanhedrin 1:6, 19c; BT Sanhedrin 88b.); *see also* Steven F. Friedell, *The "Different Voice" in Jewish Law: Some Parallels To a Feminist Jurisprudence*, 67 IND. L.J. 915, 927 (1992) (outlining some requirements for Jewish judges).

[107] *See supra* notes 80-87 and accompanying text.

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 importantly, 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. Rather, she will strive to view the controversy from the perspective of each of the contending parties.[108]

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[108] One might question whether, as a matter of historical or contemporaneous fact, the judges we consider great were or are humble. Perhaps, to the contrary, the great judges of the past and present are remarkable in their shared tendency not to be humble. This objection may rest in part upon a misunderstanding of what humility requires. *See supra* text accompanying notes 88-98. But this objection cannot be dismissed by definitional sleight of hand. John Marshall, Oliver Wendall Holmes, Earl Warren, William Brennan, Antonin Scalia, Richard Posner — these may not be names that immediately come to mind when we think of judges who have been or who are humble. Yet, these are judges who by many measures are considered to be great.

My response to this objection is somewhat tentative. Perhaps some of these judges did or do in fact exhibit humility in their approach to their judicial work, possibly in ways that are not easily observable. Perhaps some of these judges were or are great in spite of the fact that they are not humble, and their greatness could be enhanced if they were more so. Perhaps some of these individuals' reputations for greatness are undeserved or merit reassessment. Perhaps the list of judges above is deficient in that it omits a number of judges who more apparently seemed or seem to exhibit humility in their personal conduct and judicial philosophies. One reason why my response is tentative is that humility has often gone unrecognized as even possibly relevant to judicial character or performance. Another difficulty is that, as C.S. Lewis noted, what we may think of as humility may not be the genuine article, and our ability accurately to perceive and assess humility in others may be limited, in large part because of the difficulties in understanding what lies inside the human heart. *See* LEWIS, *supra* note 2, at 116. In any event, an historical analysis of judicial character must await another day. I would not be surprised, however, if upon conducting such an investigation, we were to conclude that at least some effective and praiseworthy judges were and are humble. Conversely, we might find that a good portion of the arrogant blowhards that have served as judges are not individuals who merit our esteem and praise, and that their pride posed an obstacle to their effectiveness as judges. Such an inquiry, of course, could not be scientific and conclusions would in important respects be subjective and contestable.

Moreover, such an inquiry would need to be undertaken with care. Judicial biographies may not be reliable sources of information, because they are often used as "a vehicle for expounding the biographer's judicial philosophy." *See* Richard A. Posner, *Judicial Biography*, 70 N.Y.U. L. REV. 502, 511 (1995). Judge Posner suggests that Laura Kalman's biography of Abe Fortas is

> a rare, perhaps unique example of an edifying judicial biography. . . . Fortas had a meteoric rise followed by an even more meteoric fall due, as Kalman skillfully and unobtrusively demonstrates, to the arrogance, pride, loss of touch, overconfidence, close-mindedness, and lack of self-knowledge that are the occupational hazards of the highly successful. It is the only judicial biography known to me that can be recommended to

> judges and lawyers as a warning not to stray too far from the paths of virtue, humility, and prudence.

Id. (commenting on LAURA J. KALMAN, ABE FORTAS: A BIOGRAPHY (1990)).

A voluminous literature exists attempting to rate and rank judges, but little or no attention is paid to humility in the explanations that accompany such evaluations. *See, e.g.*, CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 58 (1928) (presenting informal list of eight leading Supreme Court justices); ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 4, 30-31 (1938) (listing John Marshall, James Kent, Joseph Story, John Bannister Gibson, Lemuel Shaw, Thomas Ruffin, Thomas McIntyre Cooley, Charles Doe, Oliver Wendell Holmes, and Benjamin Cardozo as top 10 judges in American judicial history); Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 783-84 (1957) (listing 16 greatest Supreme Court justices); JOHN P. FRANK, MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE 42-86 (1958) (listing 23 justices); George R. Currie, *A Judicial All-Star Nine*, 1964 WIS. L. REV. 3, 4 (1964) (selecting John Marshall, William Johnson, Joseph Story, Roger B. Taney, Samuel Freeman Miller, Joseph P. Bradley, Oliver Wendell Holmes, Jr., Louis Dembitz Brandeis, and Charles Evans Hughes); SIDNEY H. ASCH, THE SUPREME COURT AND ITS GREAT JUSTICES (1971) (listing 15 justices); Albert P. Blaustein & Roy M. Mersky, *Rating Supreme Court Justices*, 58 A.B.A. J. 1183 (1972), *reprinted and expanded in* ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES 37-38 (1978) (surveying law school deans, political science professors, and Supreme Court historians, and concluding that 12 "greatest" Supreme Court justices are John Marshall, Joseph Story, Roger Taney, John Harlan, Oliver Wendell Holmes, Louis Brandeis, Charles Evans Hughes, Harlan Fiske Stone, Benjamin Cardozo, Felix Frankfurter, Hugo L. Black, and Earl Warren); James E. Hambleton, *The All-Time All-Star All-Era Supreme Court*, 69 A.B.A. J. 462-64 (1983) (listing nine Supreme Court justices); Bernard Schwartz, *The Judicial Ten: America's Greatest Judges*, 1979 S. ILL. U. L.J. 405 (1979) (naming 10 justices as greatest); David P. Bryden & E. Christine Flaherty, *The "Human Resumes" of Great Supreme Court Justices*, 75 MINN. L. REV. 635, 637 (1991) (naming 12 justices as great); WILLIAM D. PEDERSON & NORMAN W. PROVIZER, GREAT JUSTICES OF THE U.S. SUPREME COURT: RATINGS AND CASE STUDIES 1-31 (1993) (listing great justices according to variety of authority); Bernard Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 31 TULSA L.J. 93, 94 (1995) (applying Justice Potter Stewart's "I know it when I see it" test in selecting John Marshall, Joseph Story, Roger Brooke Taney, Stephen J. Field, Oliver Wendell Holmes, Louis Dembitz Brandeis, Charles Evans Hughes, Hugo Lafayette Black, Earl Warren, and William J. Brennan as 10 greatest Supreme Court justices); William G. Ross, *The Ratings Game: Factors That Influence Judicial Reputation*, 79 MARQ. L. REV. 401 (1996) (including results of 1993 update of the Blaustein-Mersky survey). Ross concludes that the greatest judges

> have shared formidable internal qualities, including powerful intellects, writing talents, abundant energy, pleasing personalities, and the ability to influence their fellow justices and future generations of jurists. These traits do not alone make great reputations, however, for judicial renown is heavily influenced by three external factors: longevity of tenure, the ideological predilections of those who evaluate the justices, and proximity in time.

Id. at 443. Reverse inquiries into the least significant justices have also been attempted. *See* David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466, 480 (1983) (reaching no definitive conclusion); Frank H. Easterbrook, *The Most Insignificant Justice: Further Evidence*, 50 U. CHI. L. REV. 481, 496 (1983) (nominating Justice Thomas Todd, who authored 14 opinions in 17 Terms).

C. An Example: The Abusive Relationship

A practical example may help to illustrate the relationship between justice, mercy, and humility. Consider the all too common occurrence of an abusive relationship. My concern here is not with the details of a particular relationship. For example, it may involve a parent and child, husband and wife, supervisor and employee, or coach and player. The abuse in question may take many forms, including physical, verbal, sexual, or psychological.[109] Each case is complex and unique, and generalities about the causes, motivations, excuses, or explanations of the behavior of those who are abusive or those who are abused are hazardous.[110] Sometimes the

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[109] *See* Linda E. Offner, *Power & Control — Dispelling the Myths Surrounding Domestic Violence*, ARIZ. ATT'Y, April 1998, at 16, 18. Physically expressed abuse is not simply an expression of physical control. *See id.* Offner states that

> domestic violence is not only about broken bones and black-and-blue marks. It is a cohesive pattern of coercive controls that encompasses verbal and emotional abuse, sexual coercion, psychological manipulation, intimidation, using male privilege, using children, control of economic resources, minimizing, denying, blaming and isolation. The coexistence of these controlling behaviors serve to remind the victim subliminally of the potential for physical abuse and to undermine her independence.

Id. Karla Fischer and her colleagues from Duke University refer to "any or all of the multiple forms of abuse: emotional, physical, sexual, familial, and property." Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2120 (1993). They note that the prevailing view of domestic violence is that the harm inflicted is physical, but "the reality of battered women's lives does not conform solely to this image. Advocates for battered women have long noted that financial abuse and property abuse are forms of emotional abuse inflicted upon women." *Id.* at 2121. Focusing exclusively upon violence "misses what is almost always the hallmark of the battering experience, 'entrapment.' In addition to violence, entrapment entails a pattern of control that extends structural inequalities in rights and opportunities to virtually every aspect of a woman's life, including money, food, sexuality, friendships, transportation, personal appearance, and access to supports including children, extended family members, and helping resources." Evan Stark, *Framing and Reframing Battered Women*, *in* DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 271, 282 (Eve S. Buzawa & Carl G. Buzawa eds., 1992).

[110] Hara Estroff Marano has suggested that

> spouse abuse looks a lot like a very strange onion — the product of many forces operating and interacting at many levels between an individual and his environment. There are intimations of influences at the biological level, including disturbances in the activity of the neurotransmitter serotonin, high levels of testosterone production prompting men to aggression, possibly brain damage from head injury. There are elements that work at the cognitive level, like a propensity to misread social cues and attribute hostile intent to others. There are defects in interpersonal skills, like a lack of ability to de-escalate the conflict that is inevitable in relationships. There are intrapsychic deficits — a hypersensitivity to abandonment, inability to control negative emotions, and poor impulse control. And, of course, there are general cultural contributors like the traditional

abuse is reciprocal.[111] Nevertheless, if we speak tentatively and cautiously, it is possible to speak meaningfully about the dynamics of abusive relationships.[112]

1. The Abuser

For starters, it is safe to say that an abuser acts unjustly as well as unmercifully.[113] Additionally, the abuser is not humble.[114] Significantly, the abuser may err with respect to humility in either, or both, of two ways.[115] On the one hand, he may have too little humility.[116] This prideful abuser may imagine himself to be somehow

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> role structure of marriage. Just when one thing is true at one level, its opposite appears to be true at another.

Hara Estroff Marano, *Inside the Heart of Marital Violence*, PSYCHOL. TODAY, Nov.-Dec. 1993, at 48, 50-51.

[111] Abusive relationships in a domestic setting are sometimes typified by violence on both sides. Emily Goodman has observed that in abusive marriage relationships there is often "some evidence of general violence by both spouses." Emily Jane Goodman, *Legal Solutions: Equal Protection Under the Law, in* BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE 139, 148 (Maria Roy ed., 1977). This is not to say that abusers always or usually are met with violence from their victims, or that both parties will be hurt equally. In their book about terminating violence against domestic partners, Richard Stordeur and Richard Stille conclude that mutual spouse abuse is "relatively rare." *See* RICHARD A. STORDEUR & RICHARD STILLE, ENDING MEN'S VIOLENCE AGAINST THEIR PARTNERS 90 (1989). "Occasionally a man who has been violent will claim that his partner used violence against him. Although this is sometimes true, it is usually a distortion or a lie." *Id.* at 200.

[112] For a sampling of studies and writings about abuse and abusive relationships, see Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991) and LENORE E. WALKER, THE BATTERED WOMAN SYNDROME (1984).

[113] This is not to say that this will be a complete account of the abuser's failings. Nor is it simply to say that the abuser's actions will be unjustified or objectionable. By unjust, I mean that the actions will likely be vengeful, retributive or controlling. They will go beyond an appropriate response to any perceived provocation, real or imagined. By unmerciful, I mean that the actions will likely be hardhearted or cruel. They will be harsh, harmful, injurious or offensive. The purpose of the words or actions will be to demean or humiliate.

[114] Humility is a virtue of character that lies in a mean between a defective state of excessive pride and an attitude of inferiority, worthlessness, or subjugation. *See supra* Part V (discussing meaning of humility).

[115] The propensity for an abuser to be prideful on the one hand or have low self-esteem on the other may be mutually self-reinforcing. An abuser may perceive himself to be superior, but he may not recognize his own low self-esteem, which may underlie his tendency to overcompensate by adopting an attitude of superiority. In turn, the abuser may be sufficiently self-aware to recognize that his of superiority is a fraud, which may reinforce his underlying lack of self-esteem. *See supra* note 114 and accompanying text (outlining how abuser may swing between excessive and defective extremes with respect to humility).

[116] An abuser's pridefulness may manifest itself in a number of ways, including minimizing the frequency, intensity, severity, and consequences of his violence, outright denial of his behavior, seeking to justify or excuse his behavior, and projecting blame upon his victim or external circumstances. *See* STORDEUR & STILLE, *supra* note 111, at 41-43 (citing studies about men's defense mechanisms for avoiding responsibility for abusive behavior).

superior to the person he is abusing, or blame the victim of the abuse, convincing himself that his victim somehow deserves it.[117] Advantages of physical strength and size, economic power, experience, or social standing might augment such arrogance or pridefulness. A prideful parent may rationalize abuse as necessary "tough love" to control the behavior of a child; a prideful husband may convince himself that his wife deserves the treatment she gets, or that she provokes him; a prideful boss may convince himself that the only way to communicate with or encourage a "slacker" employee is to berate and humiliate him; a prideful coach may believe abuse is the best way to motivate his players and keep them in their place.

On the other hand, the abuser may err in the opposite direction with respect to humility. An abuser with low self-esteem may regard himself as worthless and inferior.[118] Such an individual may also tend to act unjustly and unmercifully. In such a case, the abuser may use whatever advantage he has, be it physical or psychological, to control, manipulate, reduce to his level, or punish the abused for what he is not.[119] Feeling inferior, the abuser may seek

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[117] *See* Linda E. Offner, *Power & Control — Dispelling the Myths Surrounding Domestic Violence*, ARIZ. ATT'Y, Apr. 1998, at 16, 18. Offner provides several possibilities: "While some men rationalize their violence, others merely lie about it or perceive it as self-defense rather than violence." *Id.* A common "manipulation pattern of the abusive man is to project blame for the violence onto his wife, e.g., 'she drove me to it,' 'she really knows how to push my buttons.'" *Id.*

[118] *See* STORDEUR & STILLE, *supra* note 111, at 48 (citing research studies and clinical reports indicating that many wife assaulters have low self-esteem, low ego strength, and feelings of inadequacy); Philip C. Crosby, *Custody of Vaughn: Emphasizing the Importance of Domestic Violence in Child Custody Cases*, 77 B.U. L. REV. 483, 494 (1997). Crosby argues, "[t]he batterer is usually a man with low self-esteem who seeks to compensate by controlling and isolating his partner and family from social contacts." *Id.* Crosby continues, "Batterers experience high levels of unhappiness and dissatisfaction within their lives, and exhibit personality traits such as dependence, depression, anxiety, paranoia, dissociation from their feelings, poor impulse control, antisocial tendencies, and hostility toward women. Abuse arises as the men attempt to control their homes and families." *Id.* at 495-96.

Possession of an inferiority complex is one of the "general themes" mentioned by Lenore Walker in her discussion of the characteristics of batterers. *See* WALKER, *supra* note 112, at 130. Walker notes, "It is believed that these men's strong psychological dependency on the women with whom they are in a relationship is partly due to low self-esteem and to their learned response of projecting anger on external objects." *Id.*

[119] *See* WALKER, *supra* note 112, at 11. Walker notes,

> Batterers tend to be less educated than their wives, from a lower socioeconomic class, and from a different ethnic, religious, or racial group. . . . It is probable that these issues are other measures of the fundamental sexist biases in these men that indicates their inability to tolerate a disparity in status between themselves and their wives. Perhaps they used violence as a way to lower the perceived status difference.

to humiliate his victim.

It might seem odd to suggest that the abuser is likely to depart from humility by erring either in the direction of the defective state (pride) or the excessive state (worthlessness), or both. But this is what happens. Abusers often vacillate dramatically between feeling superior and prideful on the one hand and feeling inferior and threatened on the other, without ever seeming to strike an appropriate equilibrium. Perhaps this is why Aristotle described moral virtue as a mean or steady state.[120] This steady equilibrium of character that distinguishes moral virtue can be illustrated by imagining a heavy object, such as a wrecking ball, suspended from the end of a rope. 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 stable and its destructive capacity is under control. Similarly, humility is a steady state of character that is not easily moved, whereas a character that is out of balance with respect to humility is likely to swing destructively between excessive and defective extremes.[121]

If the abuser were to strike a more appropriate balance with respect to humility, she would more likely have greater success with

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Id.; *see also id.* at 16 (stating that "batterers resort to violent acts as a way of competing with women's superior abilities," especially their greater verbal skills).

[120] ARISTOTLE, *supra* note 21 at VI.1.1138b20-25. Aristotle noted,

> [i]n all the states we have mentioned, as in all other matters, there is a mark to which the man who possesses reason looks, and heightens or relaxes his activity accordingly, and there is a standard which determines the mean states which we say are intermediate between excess and defect, being in accordance with right reason.

Id.

[121] 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. It would be odd to think of *selflessness* as a mean or middle state between two extremes that are in important ways characterized by *self-awareness*. Thus, in this sense it is misleading to conceive of the virtue of humility as a stopping point along a spectrum or trajectory. *See* Lewis, *supra* note 2, at 114 (observing that humble man "will not be thinking about humility: he will not be thinking about himself at all"). 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, I do think there is a real danger that we will swing between defective and excessive states.

respect to justice and mercy as well. Humility would facilitate becoming both more just and more merciful.[122] Humility would occasion self-examination, which would expose the futility of the abuser's excuses such as temper, alcohol or other drugs, or finger pointing.[123] One who is humble would be less likely to minimize or deny the seriousness of her malicious behavior.[124] Humility might also enable an abuser to break free from the cycle of provocation and escalation that often leads to abusive behavior. Humility might occasion a change of heart that would help the abuser repent and forsake the abusive behavior. For an abuser, admitting she has a problem and seeking help is a large step towards breaking free from her abusive behavior.[125]

2. The Victim

Consider the victim in our example.[126] Is she humble? We may be tempted to say yes. But she may err on the excessive extreme of humility, exhibiting an attitude of servility or feelings of worthlessness, which conspire to keep her in the abusive relationship.[127] She

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[122] This is not to say that humility is the answer to all evil, or an antidote to mental illness, delusions, etc. Rather, it plays a specific, significant role in striking a proper middle ground with respect to certain virtues of character, such as being just and being merciful.

[123] *See, e.g.*, WALKER, *supra* note 112, at 129 (discussing studies that encourage assertiveness training and cognitive restructuring techniques which help abusers cope with their anger and avoid escalation to violent behavior). Overcoming abusive tendencies may be difficult, but it is not impossible. *See id.*; LEE H. BOWKER, BEATING WIFE-BEATING 134 (1983) (stating that when male dominance decreased, violence ceased in many relationships); *see also* STORDEUR & STILLE, *supra* note 111, at 189-96 (describing and outlining use of "control plans" as way to break out of abusive habits).

[124] *See* WALKER, *supra* note 112, at 129 (noting that "[a]mong the most prevalent characteristics [of batterers] is the tendency to minimize or deny the seriousness of their violent behavior").

[125] *See id.* at 132.

[126] A particular note of caution is warranted here. Any generalizations about victims and victimhood are perilous. Many — perhaps most — victims are simply victims. That is, nothing that they do or do not do, or that they are or are not, contributes to their being victimized. In what follows, I focus on what may be the exceptional case, instances in which victims may to some extent contribute to or enable their victimhood, or at least the perpetuation over time of their victimhood. This is not to say that they deserve to be victims, or that their abuser is somehow absolved of fault or responsibility. But it does a disservice to victims to imagine that in all cases a victim is completely powerless and is dependent entirely upon others for getting out of an abusive situation.

[127] *See* Evan Stark, *Framing and Reframing Battered Women*, *in* DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 271, 278-79 (Eve S. Buzawa & Carl G. Buzawa eds., 1992). A victim of abuse may not start out exhibiting these characteristics:

> By describing abuse as a process with cumulative effects over time, [the Battered Woman Syndrome or BWS] explains why a specific woman may

may be submissive or subservient as a result of fear, weak self-esteem, or lack of options.[128] Or the reasons for overdoing humility may stem from cultural training that self-sacrifice is noble and will eventually be rewarded.[129] In addition, stark realities of economic and social dependence leave some victims with few choices even if considered with full rational faculties.[130] Alternatively, victims of

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> become acutely sensitized to the danger of assault and feel particularly vulnerable to assaultive or threatening behavior from her partner. Most puzzling to a court is why women stay in abusive relationships or fail to escape when an attack seems imminent. In explanation, the BWS offers a psychological framework, the "learned helplessness" model of depression. Here again, cumulative exposure to violence leads victims to respond passively, even to what outsiders perceive as the most obvious avenues of safety. Breaking with traditional victim-blaming explanations, such as the theory of masochism, the BWS traces the profile of victimization, dependence, and relative helplessness commonly seen among abused women to the experience of violence, not to any intrinsic personality defects.

Id.

[128] It can often be very difficult to extricate oneself from abusive relationships, because they often involve the most intimate familial ties. It is difficult enough for a wife to escape an abusive husband, but if there are children, the scenario is greatly complicated. *See* Felicia E. Franco, *Unconditional Safety for Conditional Immigrant Women*, 11 BERKELEY WOMEN'S L.J. 99, 135-36 (1996) (explaining that female immigrants remain in abusive relationships "because they fear that leaving their husbands will mean losing their children"); David E. Poplar, Comment, *Tolling the Statute of Limitations for Battered Women After* Giovine v. Giovine*: Creating Equitable Exceptions for Victims of Domestic Abuse*, 101 DICK. L. REV. 161, 170 (1996) (stating that many battered women remain in abusive relationships "because they fear for the well-being of their children"). *But see* Alan J. Tompkins et al., *The Plight of Children Who Witness Women Battering: Psychological Knowledge and Policy Implications*, 18 L. & PSYCHOL. REV. 137, 162 (1994) (suggesting that at times, psychological factors cause abused women to ignore or underestimate danger to their children). Children who are victims of abuse are in a particularly vulnerable position, where extricating themselves from abusive situations can be beyond their powers of control. Even adult children may find it very difficult to sever ties with an abusive parent, especially because the abusive aspect of a relationship may only be one aspect of the overall relationship.

[129] *See* Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 472 (1992) (hypothesizing that women are drawn to Christianity because it gives "meaning to the suffering and pain of their own lives").

[130] Many authors have commented on the influence that economic dependence and social pressure can have on a person trying to leave an abusive relationship. *See, e.g.*, ANDREW R. KLEIN, THE QUINCY COURT MODEL DOMESTIC ABUSE PROGRAM SPOUSAL/PARTNER ASSAULT: A PROTOCOL FOR THE SENTENCING AND SUPERVISION OF OFFENDERS 9 (1993), cited in Elena Salzman, Note, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. Rev. 329, 331 n.11 (1994); Debbie S. Holmes, Comment, *Marital Privileges in the Criminal Context: The Need for a Victim Spouse Exception in Texas Rule of Criminal Evidence 504*, 28 HOUS. L. REV. 1095, 1111-12 n.105 (1991) (listing economic dependence as one reason why wives may refuse to testify); Joan M. Schroeder, Note, *Using Battered Woman Syndrome Evidence in the Prosecution of a Batterer*, 76 IOWA L. REV. 553, 556 n.28 (1991) (noting economic dependence as one reason why battered women may refuse to leave).

In addition, abuse occurs in many forms and extremes. If we fled every relationship that could be characterized on some occasion as having been abusive, we might find our-

abuse may err on the defective extreme of humility. Some victims' reaction to abuse may be prideful,[131] manifesting itself in denial or a reluctance to seek help.[132] Victims may even adopt an attitude of pseudo-humility in order to be reciprocally controlling or manipulative.[133]

A victim of abuse who strikes a proper balance with respect to humility might — perhaps with the help of others — muster the courage, self-respect, and strength to extricate himself from the abusive situation.[134] The player might quit the team, or report the coach. The employee might stand up to the abusive boss. The spouse might leave the abusive partner. This is not to say that ex-

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selves devoid of human relationships. While there is a danger of trivializing abuse by broadening its definition to include all wrongful, injurious, hurtful, manipulative, or controlling behavior, I believe there is a greater danger in characterizing abuse in such an extreme form that one is able to imagine that abusive behavior is entirely the problem of "others," and certainly not something to which oneself is susceptible.

[131] *See* WALKER, *supra* note 112, at 151. Walker's research concluded that "[b]attered women rated themselves high on a self-esteem measure, indicating that they do not perceive themselves as having low self-esteem, as professionals in this area tend to think." *Id.* Walker notes that battered women "perceived themselves as stronger, more independent, and more sensitive than other women or men," and hypothesizes that "battered women develop a positive sense of self from having survived in a violent relationship which causes them to believe they are equal to or better than others." *Id.* at 100. Walker notes, however, that "there is incompatibility between these high self-esteem findings and the reports of depression and other learned helplessness measures." *Id.* at 100.

[132] *See* Linda Kelly, *Domestic Violence Survivors: Surviving the Beatings of 1996*, 11 GEO. IMMIGR. L.J. 303 (1997) (footnotes omitted) (stating that society pressures battered women into denial or reluctance to report abuse). Kelly asks, "Is any woman comfortable discussing horrific sexual abuse with a room full of strangers?" *Id.* at 310. In response, she asserts that

> [t]he fear of public humiliation becomes compounded by the battered woman's concern that her story will be distorted through the negative stereotypes that the listener holds of abusers and the abused. Thus, a woman's denial and pride become a "deadly combination," preventing her from seeking help while exposing her to further danger.

Id.

[133] *See* WALKER, *supra* note 112, at 100.

[134] A strong sense of self appears vital to the process of escaping from an abusive situation. *See* Beth Bjerregaard & Anita Neuberger Blowers, *Chartering a New Frontier for Self-Defense Claims: The Applicability of the Battered Person Syndrome as a Defense for Parricide Offenders*, 33 U. LOUISVILLE J. FAM. L. 843, 867 (1995) (footnote omitted). Bjerregaard and Blowers reason that "victims [of abuse] often exhibit feelings of low self-esteem, guilt, depression, hopelessness and isolation. [Furthermore,] [a]ll of these factors operate to limit the abused woman's attempts to escape from her situation." *Id.* Some studies suggest that a positive self-image is more important even than outside help. *See* Evan Stark, *Framing and Reframing Battered Women*, *in* DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 271, 281 (Eve S. Buzawa & Carl G. Buzawa eds., 1992) (noting: "[T]hat battered women are normally aggressive in pursuing their safety and defense is revealed by data showing that 65% of battered women eventually escape the abusive situation, even without outside intervention . . .").

tricating oneself from an abusive situation is simple or easy. In some cases, it is not even possible. Many women who attempt to leave abusive relationships are killed during the separation or during their attempt to leave.[135] Children who are victims of abuse are in a particularly vulnerable position, without defenses and options, given their almost complete dependence upon their parents.[136]

Victims of abuse who are excessively humble may themselves find it difficult to strike a proper balance within justice and mercy, both in their relationships with their abusers and in their relationships with others. One who feels worthless, weak, and exploited is not in a good position to behave justly or mercifully towards others. If

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[135] *See* Christine Conover, Recent Development, *The Violence Against Women Act: Stabilizing Commerce Through a Civil Rights Remedy*, 1 J. GENDER RACE JUST. 269, 278-79 (1997). Conover notes that

> [m]any women seeking to end abusive relationships travel across state lines to find a destination where they can be anonymous. Conversely, other women do not leave a relationship because their abusers threaten to kill them for leaving or seeking outside help. Statistics confirm these threats — abusers most often kill their female victims when the victims try to leave.

Id. Furthermore,

> [a]lthough one way to end the violence in an intimate relationship is to end the relationship itself, battered women are often afraid to do so. Some studies show that at least half of the women who leave violent relationships are subsequently followed and threatened by their abusers. This harassment, which is terrifying and threatening to a battered woman, frequently presages further violence. In fact, the most severe abuse is often committed when a batterer attempts to prevent his partner from leaving, to retaliate for her departure, or to forcibly end the separation.

Developments in the Law — Legal Responses to Domestic Violence, 106 HARV. L. REV. 1498, 1534 (1993) (footnotes omitted). Susanne Browne maintains that "[o]ver fifty percent of battered women who flee are harassed and attacked by their batterers and forced to return. Fleeing the batterer is the most dangerous time for a battered woman. More battered women are killed as they try to escape than at any other time." Susanne M. Browne, Note, *Due Process and Equal Protection Challenges to the Inadequate Response of the Police in Domestic Violence Situations*, 68 S. CAL. L. REV. 1295, 1296-97 (1995) (footnotes omitted).

[136] *See* Laura Oren, *The State's Failure to Protect Children and Substantive Due Process:* Deshaney *in Context*, 68 N.C. L. REV. 659, 702 (1990). Oren notes,

> The helplessness of the abused child is magnified by her isolation. Even older children who are verbal are often intimidated by the abuser from alerting anyone to their plight, and toddlers . . . are in worse shape. They rarely have contact with anyone outside their family, unless their parents permit it; they cannot protect themselves; and they cannot escape. Eventually, children become conditioned to the abuse and accept it as their due.

Id.

and when such a victim of abuse does strike back, the retaliation may itself be disproportionately vengeful (excessively just) or cruel (excessively unmerciful). Battered Woman Syndrome is a criminal defense that has been created for women who have retaliated by attacking or killing their abusive husbands or partners.[137] Such retaliation, however, is infrequent and in general is not consistent with the abused personality.[138] More commonly (although by no

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[137] *See* WALKER, *supra* note 112, at 137. In some cases such a response might not be an overreaction given the nature of the abuse and the persistence of the abuser. The retaliating victim may believe — perhaps correctly — that killing the abuser is the only way to end the abuse. In other cases, the victim's retaliation may be disproportionate to the abuse. *See* Lenore E. Walker, *Battered Women and Learned Helplessness*, 2 VICTIMOLOGY 525, 532 (1978) (identifying three-stage "cycle of violence" — tension building phase, acute battering incident, and tranquil/loving phase — and "learned helplessness" that work to trap women in abusive relationships). *See generally* LENORE E. WALKER, THE BATTERED WOMAN (1979) (explicating cycle of violence and learned helplessness); WALKER, *supra* note 112 (describing psychological effects of domestic violence); CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW (1989) (defending use of expert testimony about Battered Woman Syndrome to demonstrate that woman's conduct was reasonable and hence justified).

The Battered Woman Syndrome has been controversial among feminists, especially the "learned helplessness" component, for allegedly depicting women as weak and emotionally damaged. *See, e.g.*, BELL HOOKS, TALKING BACK: THINKING FEMINIST, THINKING BLACK 88 (1989) (stating that women "do not want to be placed in the category of 'battered woman' because it is a label that appears to strip [them] of dignity"). Others have noted that there is an inherent incongruity in the Battered Woman Syndrome defense. *See, e.g.*, Susan Estrich, *Defending Women*, 88 MICH. L. REV. 1430, 1433 (1990) (reviewing GILLESPIE, JUSTIFIABLE HOMICIDE) (quoting Gillespie as stating that "women who arm themselves and succeed in killing their husbands are, by definition, hardly the 'helpless' creatures [Battered Woman Syndrome suggests exist]"). Others have criticized the Battered Woman Syndrome defense for depicting only the experiences of white, middle-class women. *See, e.g.*, Sharon Angella Allard, Essay, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191, 204 (1991) (noting that black women may be seen as too strong and assertive for "learned helplessness" to be plausible explanation for their behavior); Shelba A.D. Moore, *Battered Woman Syndrome: Selling the Shadow to Support the Substance*, 38 HOW. L.J. 297, 346 (1995). Moore examines Battered Woman Syndrome's message of general female victimization and its impact on African American women, and concludes that

> [o]ne of the major defects in the model of the battered woman is the interpretation of the theory of learned helplessness, which presents women as weak and dependent victims. . . . Specifically, African American women, because of their race, history as slaves, and prevailing stereotypes, present a glaring example of women who have not been traditionally viewed as victims and who, consequently, do not fit the model developed for battered women.

Id.

[138] Studies show that, in general, women just want out and away from abusive relationships and, once freed, are unlikely to go back and inflict punishment. Rather, it is abusive men who are more likely to continue to stalk, punish, and retaliate against women who leave them. *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 64-65 (1991). Martha Mahoney notes that "[i]n one study of interspou-

means in a majority of cases), victims of abuse become abusers in their relationships with others.[139] Paulo Freire has observed that "[t]he oppressed, instead of striving for liberation, tend themselves to become oppressors . . . . Their ideal is to be men; but for them, to be men is to be oppressors."[140] Some studies suggest that a disproportionate share of child abuse is perpetrated by women who are themselves victims of abuse by others.[141] The movement from abused to abuser can also be intergenerational.[142]

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sal homicide, more than half of the men who killed their spouses did so when the partners were separated; in contrast, less than ten percent of women who killed were separated at the time." *Id.* (footnotes omitted).

[139] *See* Aimee L. Widor, *Fact or Fiction?: Role-Reversal Sexual Harassment in the Modern Workplace*, 58 U. PITT. L. REV. 225, 225 (1996). Aimee L. Widor, in her discussion on women sexually harassing men, notes that as some women achieve greater success in the workplace, "they adopt not only the successes of their male predecessors, but also their vices." *Id.* Furthermore, Widor notes "[j]ust as some men abuse the power and influence that accompanies their elevated positions, women too can be driven by libidinous instincts that spur them to behave egregiously and commit similar abuses of power." *Id.* Widor observes that while any sexual harassment is deplorable, such harassment is a "disguised sign of advancement for women," and "it is encouraging that women are increasingly attaining positions which put them in a position where they could be classified as a harasser under Title VII." *Id.* at 251.

[140] PAULO FREIRE, PEDAGOGY OF THE OPPRESSED 29-30 (M. Ramos trans., Herder & Herder 1st ed. 1970) (1968).

[141] *See* Ruth Jenny & Kelly Gaines Stoner, *Domestic Violence and the North Dakota Best Interests Statute*, 72 N.D. L. REV. 1011, 1015 (1996) (suggesting that "[m]others who were abused were twice as likely to abuse their children") (footnote omitted); MURRAY A. STRAUS & RICHARD J. GELLES, PHYSICAL VIOLENCE IN AMERICAN FAMILIES 415 (1990) (stating that "victims of violence tend to victimize others more than do nonvictims . . ."). Straus and Gelles state, "For mothers, [studies show] that the rate of child abuse by those who have been beaten is at least double that of mothers whose husbands did not assault them." *Id.* at 409. But the notion that most child abuse comes at the hands of mothers has been challenged. *See* Marjory D. Fields, *The Impact of Spouse Abuse on Children and its Relevance in Custody and Visitation Decisions in New York State*, 3 CORNELL J.L. & PUB. POL'Y 221, 225 (1994). Fields suggests, "Literature on child abuse and neglect portrays mothers as being primarily responsible for child mistreatment." *Id.* Furthermore, Fields states: "The psychological and sociological evidence is clear, however, that in large proportion of child abuse cases the perpetrators are male." *Id.*; *see also* Judith Martin, *Maternal and Paternal Abuse of Children*, *in* THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH 293 (David Finkelhor et al. eds., 1983) (reporting that popular idea that women are responsible for most child abuse is generally overstated).

[142] *See* Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1, 107 (1997). Phipps notes:

> A significant concern relating to the effects of abuse is whether sexually abused children will grow up to become the next generation of abusers. While there is no support for the proposition that abused children will unavoidably become abusers, research demonstrates that sexually abused children are nonetheless at greatly increased risk of becoming offenders.

Id.

The Battered Child Syndrome defense has been created to defend abused children

In any event, it may be that both the abuser and the abused are out of balance with respect to the virtue of humility.[143] As a result, both the party with a defect of humility (typically, the abuser) and the party with an excess of humility (typically, the abused) may find it very difficult to strike a proper balance between and within justice and mercy. What is more, when roles change, the party that

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who kill their parents. *See* Catherine S. Ryan, *Battered Children Who Kill: Developing an Appropriate Legal Response*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 301, 301, 336 (1996) (noting that in 1993 parricides accounted for 306 of the 23,271 murders and nonnegligent manslaughters reported in United States). Ryan urges acceptance of Battered Child Syndrome, and argues that the "admission of evidence of a history of abuse as well as expert testimony explaining the effects of that abuse is essential to a fair trial for the abused child who kills." *Id.*; *see* Joelle Anne Moreno, *Killing Daddy: Developing A Self-Defense Strategy for the Abused Child*, 137 U. PA. L. REV. 1281, 1285 (1989) (predicting that battered children's self-defense claims may achieve same level of judicial recognition as those of battered adult women).

While the conventional wisdom regarding abuse by abuse victims has long been that it occurs in the vast majority of cases, this thinking is now being questioned. *See* Joan Kaufman & Edward Zigler, *Do Abused Children Become Abusive Parents?*, 57 AM. J. ORTHOPSYCHIATRY 186, 190 (1987). Kaufman and Zigler write:

> The rate of abuse among individuals with a history of abuse (30 to 5%) is approximately six times higher than the base rate for abuse in the general population (5%). Although this suggests that being maltreated as a child is an important risk factor in the etiology of abuse, the majority of maltreated children do not become abusive parents. As discussed elsewhere, many mediating factors affect the likelihood of transmission; consequently, unqualified acceptance of the intergenerational hypothesis is simply unwarranted.

Id.

Stark and Flitcraft move even further from the formerly accepted view. *See* Evan Stark & Anne H. Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 INT'L J. HEALTH SERVICES 97, 100 (1988). Stark and Flitcraft note that

> [w]hile boys experiencing violence as children are disproportionately violent as adults, 90 percent of all children from violent homes and even 80 percent from homes described as "most violent" do not abuse their wives. Conversely, a current batterer is more than twice as likely to have had a "nonviolent" than a violent childhood . . . . Reviewing studies in this genre, Kaufman and Zigler conclude that no more than 30 percent of those who experienced or witnessed violence as children are currently abusive, an estimate we believe is too high.

Id.

Older studies more often reflect the idea that the abused themselves become abusive. *See e.g.*, Jean Giles-Sims, *A Longitudinal Study of Battered Children of Battered Wives*, 34 FAM. REL. 205, 209 (1985) (suggesting that any decrease in battering that children experience when abused wives leave their batterers is due to cessation of abuse at the hands of father, not because wife stops beating child); MURRAY A. STRAUS ET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY 216-17 (1980) (stating that abused women are twice as likely to abuse their children as women who are not abused).

[143] It should go without saying, but I will say it anyway: This does not mean victims should be blamed for their abuse. Abusers have no valid excuse.

erred to one extreme of humility in one relationship may err to the opposite extreme in another relationship.[144] Humility on the part of the abuser will facilitate contrition, repentance, and changed behavior; humility on the part of the abused will encourage forgiveness.

D. Humility and Adjudication

To come full circle, what Kronman calls detachment, I have been calling justice, and what Kronman calls sympathy, I have been calling mercy. The difference in terminology, utilized to introduce Micah's account of the divine lawsuit between God and Israel, should not pose an obstacle to a similar analysis with respect to Kronman's concepts. In the same way that a commitment to justice can be overdone or underdone, a commitment to detachment can be overdone or underdone. As Kronman persuasively argues, without detachment a judge may err too far on the side of sympathy with one party. On the other hand, when detachment is overdone, it may become indifference. We want judges who are disinterested, not uninterested.[145] Similarly, a commitment to sympathy can be underdone (resulting in disregard or even enmity) or overdone (resulting in identification with only one of the relevant points of view). Humility is a safeguard against erring in either the direction of being overly sympathetic or detached or insufficiently so.

Humility, I believe, is also important in synthesizing or mediating

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[144] *See, e.g.*, James Q. Wilson, *Sorry I Killed You, But I Had a Bad Childhood*, CAL. LAW., Jun. 17, 1997, at 43, 43, *excerpted from* JAMES Q. WILSON, MORAL JUDGMENT: DOES THE ABUSE EXCUSE THREATEN OUR LEGAL SYSTEM? (1997) (noting that "there is a sense . . . that the legal system has become excessively tolerant of 'abuse excuses,' in which social causes and mental conditions are used to explain and ultimately excuse criminal behavior"). The attempt to excuse abuse by those who were formerly abused has led to what has come to be known as the "abuse excuse." *See id.*; ALAN M. DERSHOWITZ, THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY 45-47, 321-41 (1994). Dershowitz asserts that "[t]he popularity of the abuse excuse poses real dangers to our safety and to the integrity of our legal system." *Id.* at 47. In addition, Dershowitz provides a glossary of over 50 "abuse excuses," including Battered Persons Syndrome, Black Rage Defense, Football Widow Syndrome, Legal Abuse Syndrome, Nicotine Withdrawal Syndrome, Rock and Roll Defense and the Twinkie Defense. *See id.* at 321-41.

[145] *See* Felix Frankfurter, Some Observations on the Nature of the Judicial Process of Supreme Court Litigation, Address Before the American Philosophical Society (April 22, 1954), *in* FRANKFURTER PAPERS, U.S. Library of Congress, Container 197 Reel 125, at 300, 314, *cited in* Alfred S. Neely, *Mr. Justice Frankfurter's Iconography of Judging*, 82 KY. L.J. 535, 573 n.178 (1994). Frankfurter notes a connection between humility and disinterestedness. *See id.* He maintains that "true humility and its offspring, disinterestedness, are more indispensable for the work of the Supreme Court than for a judge's function on any other bench." *Id.*

between virtues and values other than justice and mercy.[146] Similarly, I believe humility can be a valuable character trait of a judge at times other than when she is struggling to strike a proper balance between justice and mercy, or within one of those virtues.[147] The role humility plays with respect to justice and mercy is paradigmatic rather than exclusive.

VI. DO WE WANT HUMBLE JUDGES?

The answer to this question should be a resounding yes, although a survey of literature by and about judges concerning the judicial role might lead one to suspect the opposite.[148] In this Arti-

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[146] *See supra* note 143 (describing conflicts that can arise between other important values, such as duty and love, or loyalty and community solidarity). Humility can play an analogous role in synthesizing or mediating the conflicting demands of these important devotions. *See id.*

[147] Although a defense of this assertion is beyond the scope of this paper, I believe that in analogous ways, humility is helpful in synthesizing or mediating a wide variety of other important and often seemingly (and occasionally genuinely) intractable conflicts. These conflicts include those that arise between individual rights and community welfare, plain meaning of statutes and legislative history, and precedent and progress, as well as conflicts between other important values, including those that are incommensurable. But to repeat: this is not to say that humility is the cure to all ills or the solution to all difficult questions.

[148] *See, e.g.*, JUDGES ON JUDGING: VIEWS FROM THE BENCH 343-53 (David M. O'Brien ed., 1997) (failing to include entry for humility in 11 page subject matter index). The literature about judges and judging does not contain much serious consideration of humility as an important character trait. *See id.*; Ruggero J. Aldisert, *What Makes a Good Judge? in* HANDBOOK FOR JUDGES: AN ANTHOLOGY OF INSPIRATION AND EDUCATIONAL READINGS 29-32 (George H. Williams & Kathleen M. Sampson eds., 1984) (identifying six characteristics that "an ideal appellate judge should possess," but not mentioning humility); Edward J. Devitt, *Ten Commandments for the New Judge, in* HANDBOOK FOR JUDGES: AN ANTHOLOGY OF INSPIRATION AND EDUCATIONAL READINGS, *supra*, at 29-32 (including commandment number four: "Don't take yourself too seriously.").

Several judges — notably, Learned Hand, Felix Frankfurter, Oliver Wendell Holmes, and Benjamin Cardozo — have considered humility to be an essential feature of the good judge. *See* GLENDON, *supra* note 41, at 124. Mary Ann Glendon has noted that "Cardozo was a judge's judge. To men like Learned Hand and Felix Frankfurter he represented the very embodiment of the quality they professed to honor most: humility." *Id.*; *see* Felix Frankfurter, *Benjamin N. Cardozo, in* COLLIER'S ENCYCLOPEDIA 418-20 (1962), *reprinted in* FELIX FRANKFURTER, OF LAW AND LIFE AND OTHER THINGS THAT MATTER 188 (Philip B. Kurland ed., 1965). Felix Frankfurter praised Benjamin Cardozo for the sophisticated restraint in Cardozo's approach to adjudication, noting "the almost automatic exercise of the two most important faculties called for in a Justice — disinterestedness and humility." *Id.* Felix Frankfurter attributed Holmes's deference to majorities to "humility in passing judgment on the experience and beliefs expressed by those entrusted with the duty of legislating," thus reaching "the democratic result by the philosophic route of skepticism." Felix Frankfurter, *in* 11 DICTIONARY OF AMERICAN BIOGRAPHY 423 (Harris E. Starr ed., 1944); *see also* Wallace Mendelson, *Mr. Justice Holmes — Humility, Skepticism and Democracy*, 36 MINN. L. REV. 343, 343 (1952) (noting that "Holmes brought to the Supreme Court . . . two striking qualities, skepticism and intellectual humility . . . .").

cle I have argued 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.[149]

A. Relationship to Sources of Authority

A humble judge will have a better understanding than a prideful judge of his 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 his behavior. The types of authority that

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Thomas Grey notes,

> It used to be said of Holmes that his judicial restraint was the result of his personal humility. But the late Yosal Rogat destroyed this characterization, appealing to such passages as Holmes's description of his work on the Court as "preparing small diamonds for people of limited intellectual means." In a humility contest, Rogat concluded, Holmes would 'tie for last with General DeGaulle." As best I know, no biographer since has described Holmes as humble.

Thomas C. Grey, *Unrepeatable Lessons*, 70 N.Y.U. L. REV. 524, 527 (1995) (footnotes omitted) (citing Mendelson, *supra*, at 343 and Yosal Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213 (1964)); *see also* David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 491 (1994) (citing with approval Yosal Rogat's observation that "Holmes held to his social and economic views with no trace of either humility or skepticism.").

For a more recent defense of humility and judicial restraint by a sitting Federal Court of Appeals Judge, see J. Clifford Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 GEO. WASH. L. REV. 1 (1981), *reprinted in* JUDGES ON JUDGING: VIEWS FROM THE BENCH (David M. O'Brien ed., 1997). Wallace states that "[a] judge cannot act on the belief that he or she knows better than the legislature on a question of policy, because the judge can never be justifiably certain that he or she is right even when the judge happens to be right." *Id.* at 6. Furthermore, Wallace maintains that "appropriate judicial humility weighs against judicial activism." *Id.* Later, Wallace notes,

> Judicial restraint simply urges that the judge bear in mind the value of deference to democratically elected officials and lawmakers, as well as the values of uniformity and predictability. In addition, the philosophy urges against innovation for the sake of innovation and against the substitution of the judge's own moral and political values and sociological theories for those of our elected representatives. It charges a judge with the humility to recognize his or her personal limitations.

Id. at 16.

[149] While the focus of my discussion in this section is upon judges, the reasons why humility is important apply to the rest of the legal profession and beyond.

should constrain judges are numerous, and include constitutions, statutes, rules, and regulations.[150] Text, history, tradition, and precedent should also influence judges.[151] 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 are closely tied to their obligation to interpret and follow the relevant authoritative materials and institutions. When authoritative texts or precedents are on point, a humble judge will be more inclined to follow 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 as if 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.

B. Attitude Towards Revolutionary Change

A humble judge is also less likely than a prideful judge to be enamored of revolutionary change. 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."[152] 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.[153] Deference to precedent can be defended on a num-

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[150] On the importance of consulting text, history, tradition and precedent, *see, e.g.*, Mary Ann Glendon and Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477 (1990) (arguing for religious freedom jurisprudence emphasizing text, history, and tradition); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1292 (1997) (discussing text, history, tradition, and precedent as "means of tempering judicial arrogance").

[151] *See* McConnell, *supra* note 150, at 1292 (arguing that judges should take into account text, constitutionality, presumption, tradition, and precedent).

[152] Kronman, *Precedent and Tradition*, *supra* note 7, at 1034.

[153] *See* KRONMAN, THE LOST LAWYER, *supra* note 16, at 154-62. As Kronman points out,

ber of grounds, including utilitarian,[154] deontological,[155] and traditionalist.[156] 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. . . ."[157] A

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the prevailing attitude towards precedent in the legal academy is one of suspicion, if not hostility, and in that climate it should go without saying that a mindless devotion to precedent may have the effect of perpetuating and reinforcing rules of law that have been exclusionary and discriminatory. *See id.*; Cheryl B. Preston, *This Old House: A Blueprint for Constructive Feminism*, 83 GEO. L.J. 2271 (1990). Cheryl Preston has observed that legal professionals "have inherited a beautiful old building: a structure of laws, methods, theories, and attitudes with a proud history — and a desperate need for remodeling." *Id.* To this list of inheritances, we might add precedent. Preston compares the need for renovation in the law with renovation in architecture and notes that "[i]n the study of buildings, the prevailing climate is one of respect and admiration for things old and historic. In the study of law and social institutions, the prevailing climate is one of change and modernization." *Id.* at 2272. The goal is to find the best combination of both innovation and preservation. *See id.* (stating that "[s]ome combination offers the best of both innovation and preservation"). The same can be said with respect to the attitude that judges should adopt towards precedent.

[154] *See* Kronman, *Precedent and Tradition*, *supra* note 7, at 1038-39 (summarizing utilitarian argument for doctrine of precedent as sum of social welfare is enhanced by enhancing law's predictability, economizing judicial resources, and strengthening the prestige of legal institutions).

[155] *See id.* at 1039-43 (explaining deontological argument for precedent as like cases must be treated alike if legal system is to be even minimally fair).

[156] *See id.* at 1047-68 (summarizing traditionalist argument that past has authority of its own derived from each generation's obligation to transmit culture inherited from its ancestors to its posterity). Kronman states that

> One generation may . . . damage the cultural inheritance of the next not only by actively destroying what has been given to it, but also merely by neglecting to keep it up. No generation of human beings can pass on to its successors the cultural world it has received without devoting considerable resources (including many individual lives) to its preservation. This is an iron law, and the responsibility it creates is the chief one that the world of culture imposes on all those who inhabit it, a responsibility that goes with culture's liberating freedom and which indeed is its condition.

Id. at 1053-54.

[157] MICHAEL OAKESHOTT, *On Being Conservative*, *in* RATIONALISM IN POLITICS AND OTHER ESSAYS 169 (1962). To have such a conservative disposition "is to prefer the familiar to the unknown, to prefer the tried to the untried, fact to mystery, the actual to the possible, the limited to the unbounded, the near to the distant, the sufficient to the superabundant, the convenient to the perfect, present laughter to utopian bliss." *Id.* at 169. Of course, the extent to which one considers precedent as representing something that one has "learned to care for," will in large measure depend upon whether one perceives the legal system to be fundamentally just and fair. Oakeshott's description of the "man" who is "acutely aware of having something to lose," although certainly not intended to make a gender differentiation, fairly shouts out the possibility that perceptions about what one has "to lose" and whether the past represents something one should have "learned to care for" may vary greatly based upon one's status as an "insider" or "outsider" in a society. *See id.*; Mari J. Matsuda, *Public Responses to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323-26 (1989) (designating "outsider" as social group whose perspective is not recognized

judge with such a disposition might be more inclined to employ what Alexander Bickel called the "passive virtues," such as withholding judgement based upon doctrines such as ripeness, political question, and standing, or, in the case of the Supreme Court, by denying certiorari.[158]

C. *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.[159] To be sure, the volume, variety, and com-

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by dominant culture, and "outsider jurisprudence" as "jurisprudence derived from considering stories from the bottom").

[158] *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 111-98 (1962). These devices for "not doing" are important judicial resources, Bickel argues, because of the fundamentally countermajoritarian nature of judicial review. *See id.* Judicial review is countermajoritarian because when judges declare a democratically enacted statute unconstitutional, it represents "control by an unrepresentative minority of an elected majority." *Id.* at 16. Judicial enthusiasm for exercising jurisdiction in every case brought before it, Bickel maintains, "may lead to a rampant activism that takes pride in not 'ducking' anything . . . ." *Id.* at 128. The contrary view that all cases of a constitutional description are justiciable and must be heard and decided is illustrated by the dicta in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). In *Cohens*, Justice Marshall declared that

> [t]he judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

Id.

Bickel suggests that such a view does "not care to recognize a need for keeping the Court's constitutional interventions within bounds that are imposed, though not clearly defined, by the theory and practice of political democracy." BICKEL, *supra*, at 128; *see also* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998) (explaining historical origins of countermajoritarian difficulty and arguing countermajoritarian criticism flourishes during periods of perceived and actual judicial supremacy).

[159] *See* HART, *supra* note 8, at 127. Hart noted that legal theory "is apt either to ignore or to exaggerate the indeterminacies of legal rules." *Id.* In some legal systems at some times "judicial interpretation of statutes or of precedent is too formal and so fails to respond to the similarities and differences between cases which are visible only when they are considered in the light of social aims," while in other systems or at other times "too much is treated by courts as perennially open or revisable in precedents, and too little respect paid to such limits as legislative language, despite its open texture, does after all provide." *Id.*; *see also* Larry Alexander, *The Banality of Legal Reasoning*, 73 NOTRE DAME L. REV. 517, 519 (1998) (stating that "[p]erhaps the largest number of cases the lawyer confronts — although traditional legal education would mislead on this point — consists of cases requiring the application of a controlling posited norm, whether the norm be constitutional, statutory, adminis-

plexity 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 U.S. Supreme Court, which obscures the primary role of judges of following and implementing existing law.[160] Fidelity to role and following the law is less exciting and sometimes less gratifying than creating new law, finding laws unconstitutional, or declaring new rights.[161] Prideful judges are more likely to be seduced by the temptation of judicial activism, the invitation to go beyond the judicial role.[162] Similarly, a prideful judge is less likely to have a skeptical disposition, never doubting that he knows best. To put it

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trative, or judge made"); Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989) (arguing that law is at most moderately indeterminate and that indeterminacy is much less serious defect in law than it is often thought to be).

[160] *See* Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2111 n.55 (1989) (noting that "[t]he law school emphasis on the indeterminacy of rules may be exaggerated, in part because of professors' tendency to focus on difficult appellate cases").

[161] *See* GLENDON, *supra* note 41, at 128, 152 (contrasting "romantic judges" who consider themselves to be free "from the constraints of statute, precedent, constitution, or tradition" with "classical judges" who seek to restrain their biases even though "total objectivity is an unattainable goal"). Glendon maintains that to a romantic judge, the classical conception of the judicial role is "too confining, boring, unrewarding, or insufficiently responsive to social problems." *Id.* at 151. Glendon associates the romantic ideal with judges such as William O. Douglas, Earl Warren, Thurgood Marshall, J. Skelley Wright, and William Brennan. *See id.* at 152. The classical ideal is represented by judges such as John Marshall, Oliver Wendell Holmes, Louis Brandeis, Felix Frankfurter, Benjamin Cardozo, Learned Hand, Augustus Hand, and Henry Friendly. *See id.* at 118-29. According to Glendon,

> [t]he beginning of wisdom would be to recognize that, whatever the pros and cons of adventurous judging by the Supreme Court on momentous occasions, romantic ideals are a poor guide to how judges throughout the system should comport themselves as a general matter. The unique political role of the nation's highest court may require its members at times to show the sorts of excellence that are traditionally associated with executives or legislators — energy, leadership, boldness. But, day in and day out, those qualities are no substitute for the ordinary heroism of sticking to one's [task], of demonstrating impartiality, interpretive skill, and responsibility toward authoritative sources in the regular administration of justice.

Id. at 169-70.

[162] *See id.* at 126. Glendon notes humility was a prized attribute of the classical judge:

> That special kind of humility goes along with a particular sort of pride — the pride one takes in mastery of one's craft and in the tradition of which one feels a part. Unlike vanity or hubris, the traditionalist's pride rests heavily on the shoulders of those who bear it, like a burdensome legacy.

Id.

another way, some judges would rather be prophets than priests.[163] Prophets declare God's law while 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.[164]

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[163] *See* COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS, *supra* note 84, at 128. Defending judicial prophets, Cover states,

> There are those [judges] who speak law-language poorly — whose departures from the rules will not live; who reflect neither the wave of the future to be washed into prophecy by the acceptance of the masses nor the compelling idiosyncratic departure of the master, which will pull the masses after it. Others — the vast majority — speak according to the rules, for the rules are largely derived from such as these. They depart occasionally, usually inadvertently. Then there are prophets and masters who move the law more than their democratic, *per capite* share. Either they evoke the response: "This is what we've known or wanted all along, but never before so articulated." Or they strike the chord: "we've rejected or never thought of this before, but your argument compels attention, even conviction."

Id. In contrast, Felix Frankfurter praised Benjamin Cardozo's detachment and "the priestlike disinterestedness" of his mind. *See* Felix Frankfurter, OF LAW AND MEN: PAPERS AND ADDRESSES OF FELIX FRANKFURTER 33 (Philip Elman ed., 1956); *see also* ROBERT A. BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND 126 (1988) (contrasting Louis Brandeis, judicial "prophet" who sustained his identification with outcast with Felix Frankfurter, judicial "priest" who sought to abandon his outcast status); MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY 147 (1988). Perry suggests that, while judges are not moral prophets,

> it is not at all quixotic to suppose that the members of the Supreme Court, because of their political insularity, are in an institutionally advantaged position to play a prophetic role: first, by taking seriously the prophetic potential of aspirational meaning of the constitutional text; second, by taking seriously the prophetic voices that emerge from time to time, in the community . . . .

Id.; *see also* David R. Barnhizer, *Prophets, Priests and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 U. PITT. L. REV. 127, 133 (1988) (arguing that one role of legal scholars and judges is to act "as reformulators (priests and prophets) of 'ultimate truths' in particular language of each culture and generation"); Jay M. Feinman, *Priests and Prophets*, 31 ST. LOUIS U. L.J. 53, 57 (1986) (arguing that in its critique of mainstream legalism Critical Legal Studies Movement acts in prophetic tradition); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 24 (1984) (maintaining that we should beware scriptural analogy and understand that justices are not priests and certainly not prophets); Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT L. REV. 211, 222 (1988) (suggesting we can learn from scripture and constitution and that priests and prophets may be distinguished from others). Gray noted that "we can learn practical lessons from both the similarities and the differences between scripture and constitution," and that "[p]riests, prophets and believers are structurally parallel to but — given a secular conception of law and politics — importantly different from judges, politicians and citizens." *Id.*; *see also* Mark V. Tushnet, *Legal Realism, Structural Review, and Prophecy*, 8 U. DAYTON L. REV. 809, 828-30 (1983) (arguing that term "prophetic" does not apply to even visionary judges).

[164] *See* J. Clifford Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50

Ironically, while a prideful judge will feel inclined to elevate himself to the status of prophet, humility is one of the cardinal virtues that God seeks in actual prophets.[165] For this reason, prideful, self-anointed judicial prophets are a particular hazard.[166]

D. Proclivity to Abuse Power

Judges wield enormous power and, as has often been observed, power tends to corrupt.[167] It is the nature of power that those who

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GEO. WASH. L. REV. 1, *reprinted in* JUDGES ON JUDGING: VIEWS FROM THE BENCH 163-74 (David M. O'Brien ed., 1997) (advocating, as sitting Federal Court of Appeals Judge, judicial restraint "based upon concerns of legal predictability, uniformity, and judicial economy, and most importantly, upon values of liberty and democracy . . . ."); *see also* The Honorable Orrin G. Hatch, *Avoidance of Constitutional Conflicts*, 48 U. PITT. L. REV. 1025, 1041-42 (1987) (maintaining that "[b]y judicial restraint, we generally mean that judges should remain faithfully anchored to their constitutional moorings, that they should be satisfied by and function within their role in the constitutional system"); *cf.* William Wayne Justice, *The Two Faces of Judicial Activism*, *in* JUDGES ON JUDGING: VIEWS FROM THE BENCH 302-14 (David M. O'Brien ed., 1997) (describing himself as member of "ten most-wanted list" of judicial activists, and arguing that "activist" label "is simply a rhetorical device to avoid making a more convincing attack on the results that the judge has reached").

[165] *See Numbers* 12:3 (stating: "Now the man Moses *was* very meek, above all the men which *were* upon the face of the earth.").

[166] Some might object that my account amounts to nothing more than a warmed-over argument for judicial restraint and prudential incrementalism. According to those critics, rather than judges who are humble, we need judges who are willing to lead, who are willing to act with boldness in responding to social injustice, who are not afraid to depart from misguided precedents. Perhaps we do want our judges to be prophets rather than priests. This objection is based in part upon a misunderstanding of what humility is. Humility does not imply weakness or timidity; rather, it connotes an appropriate understanding of the source of one's strength, a willingness to reconsider settled understandings, and a somewhat cautious attitude toward revolutionary change. *See supra* notes 77, 88, 89, and accompanying text. As noted earlier with respect to the doctrine of the mean, the attributes I have been defending — justice, mercy, and humility — are virtues of character, not rules for deciding actions. *See supra* note 25. It is not the *action* that is intermediate, it is the *virtue* or state of character that lies between undesirable extremes. In other words, humility is at least in part a process virtue, rather than an outcome virtue. *See id.* Humility does not foreclose extreme action, although it is doubtlessly true that in most circumstances someone who is humble will be less likely than someone who is prideful to resort to extreme action. Nevertheless, the criticism is not without force. I have argued that, in contrast to a prideful judge, a judge who is humble will be inclined to adopt an attitude of greater attentiveness to sources of authority that constrain judges, will be less likely to be enamored of revolutionary change, and will be less likely to be seduced by the temptation to become a judicial activist. *See supra* note 77. To the extent that these traits inspire judicial restraint and prudential incrementalism, then, without apology, I acknowledge not only that this likely will be the case, but that we should want this to be the case.

[167] *See* Letter from Lord Action to Bishop Creighton (Apr. 5, 1887), *in* ESSAYS ON FREEDOM AND POWER 329, 335 (Gertrude Himmelfarb ed., 1972). The classic citation in support of this proposition is Lord Action's dictum, "Power tends to corrupt and absolute power corrupts absolutely." *See id.* Alan Dershowitz observed that

have it tend to abuse it.[168] 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, both in court and in chambers.[169] In court, judges wear robes, symbolic of a sort of secular priesthood, and are addressed as "your honor."[170] Everyone stands when a judge enters the courtroom, and advocates stand when addressing a judge. Judges wield a gavel that is used to silence others. Judges are 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 look to her for direction.

Judges usually receive similar deference in chambers. There, judges interact primarily with secretaries and law clerks, both of whom sit in a vertically subordinate professional role. Moreover, law clerks are professional neophytes and occasionally sycophants who have just finished law school, have little knowledge of or experience in the law, and are often selected by judges on the basis of their similar political outlooks. In this milieu, with the trappings of power and prestige, it is easy to understand how a judge might be-

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> [e]very trial lawyer knows from personal and often bitter experience that there are few more tyrannical figures than an autocratic trial judge, of which, sadly, there are more than a few. . . . Glaring down from their elevated perches, insulting, abrupt, rude, sarcastic, patronizing, intimidating, vindictive, insisting on not merely respect but almost servility — such judges are frequently encountered in American trial courts. . . . Such godlike powers over life, liberty and property ought to produce a corresponding humility, but, as with most mortals, power usually breeds arrogance.

ALAN M. DERSHOWITZ, THE BEST DEFENSE 192-231 (1982).

[168] *See* JOSEPH SMITH, THE DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 121:39 (Greenwood Press 1971) (1880). "We have learned by sad experience that it is the nature and disposition of almost all men, as soon as they get a little authority, as they suppose, they will immediately begin to exercise unrighteous dominion." *Id.*

[169] *See, e.g.*, JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS at x (2d ed. 1997) (noting Justice Abrahamson as commenting that "[j]udges' vast power over lawyers and litigants sometimes brings forth judges' arrogance, not humility").

[170] *See* Symposium, *Panel Five: Term Limits For Judges?*, 13 J.L. & POL. 669, 699-700 (1996). Judge Laurence H. Silberman, Circuit Judge, United States Court of Appeals for the District of Columbia, has suggested an interesting justification for wearing judicial robes. *See id.* Judge Silberman was asked the question: "Doesn't the fact that judges wear robes make them seem more imperial by setting them off from other lawyers? Wouldn't it be better if judges wore suits? Robes are a symbol of power. Suits might make the judge more humble." *See id.* Judge Silberman answered: "I do not think you recognize the meaning . . . of the black robe. The black robe obliterates your identity, and it is stunningly effective." *See id.* Judge Silberman then recounted an anecdote about being at a dinner where a lawyer was complaining bitterly about the outcome in a case he had recently lost in the D.C. Circuit, without recognizing Judge Silberman who had written the opinion. *See id.* at 700.

come prideful.[171] And a prideful person is much more likely than a humble person to abuse whatever power, real or supposed, that she has.

Judicial abuse of power should be of particular concern to judges and those governed by judges, because the power of judges has real consequences. In his monumental article, *Violence and the Word*,[172] Bob Cover explains the violent nature of judicial power. "Legal interpretation," he says, "takes place in a field of pain and death."[173] Cover suggests that this is true in several senses:

> 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. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence.[174]

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[171] *See, e.g.*, ROBERT YATES, BRUTUS NO. XV (1788), *reprinted in* THE ANTI-FEDERALIST 352 (Cecelia M. Kenyon ed., 1966) (regarding judges empowered through the good-behavior clause as "[m]en placed in this situation will generally soon feel themselves independent of heaven itself"). *But see* THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that judiciary least threatens political rights of Constitution because it relies on Executive for efficacy of its judgments). Hamilton asserts that

> [w]hoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its function, will always be the least dangerous to the political rights of the Constitution[.] . . . It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

Id. Federal District Judge Edward J. Devitt warned new judges that "daily association with these external trappings may mislead us to an inflated appraisal of our own importance, so a practical application of the virtue of humility counsels that we must be on our guard." EDWARD J. DEVITT, YOUR HONOR 4 (1986).

[172] Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

[173] *Id.* at 1601. Cover points out that legal interpretation is a form of practical wisdom, not only because it "seeks to 'impose meaning on the institution . . . and then to restructure it in the light of that meaning,'" but also because "[t]he judicial word is a mandate for the deeds of others." *Id.* at 1610-11 (quoting RONALD DWORKIN, LAW'S EMPIRE 47 (1986)). Cover explains that "[l]egal interpretation must be capable of transforming itself into action; it must be capable of overcoming inhibitions against violence in order to generate its requisite deeds; it must be capable of massing a sufficient degree of violence to deter reprisal and revenge." *Id.* at 1617.

[174] *Id.* Cover notes,

Such violence may be justified, but its existence should not be obscured or ignored.[175] 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.

E. Treatment of Parties

Judges who are humble are more likely to adopt a respectful attitude towards the parties who appear before them.[176] 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 are by definition 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

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> If it seems a nasty thought that death and pain are at the center of legal interpretation, so be it. It would not be better were there only a community of argument, of readers and writers of texts, of interpreters. As long as death and pain are part of our political world, it is essential that they be at the center of the law.

Id. at 1628.

[175] *See id.* at 1608. Cover states:

> If I have exhibited some sense of sympathy for the victims of this violence it is misleading. Very often the balance of terror in this regard is just as I would want it. But I do not wish us to pretend that we talk our prisoners into jail. The "interpretations" or "conversations" that are the preconditions for violent incarceration are themselves implements of violence. To obscure this fact is precisely analogous to ignoring the background screams or visible instruments of torture in an inquisitor's interrogation. The experience of the prisoner is, from the outset, an experience of being violently dominated, and it is colored from the beginning by the fear of being violently treated.

Id.

[176] *See* Justice Lewis F. Powell, Jr., *Foreword* to GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE at xi (1994). Justice Lewis Powell writes in his Forward to Gerald Gunther's biography of Learned Hand that Judge Hand's "imposing courtroom manner could strike terror into the heart of any young lawyer." *Id.* Gunther notes that Judge Hand "would occasionally berate himself for impatient outbursts in the courtroom, outbursts that caused some lawyers to blanch and shake." *Id.* at 301. Gunther also insists that behind this intimidating facade, there was a "warm, modest, and charming human being." *Id.* at 169; *see also* Frank M. Coffin, *Reclaiming a Great Judge's Legacy*, 46 ME. L. REV. 377, 390-91 (1994) (reviewing GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE) (recounting stories of Judge Hand's legendary temper). Coffin notes that "several generations ago, expectations and traditions were such that the peremptory, authoritarian, and irascible judge was a more familiar and acceptable role model. Today, however, lack of civility on the part of both trial and appellate judges ought to be beyond the pale." *Id.* at 391.

by no means all — of the judges are to the attorneys arguing cases before them. Questions are asked gruffly; lawyers are interrupted before speaking the first sentence of their answer; other 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.[177] However, a humble judge will strive to avoid humiliating the advocates before him and treat them with courtesy and respect.

F. Willingness to Reassess Previous Positions

Judges must take definite positions on complex issues, often very quickly.[178] Because their conclusions and the reasons supporting

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[177] In a case I observed as a clerk, a lawyer had stated a proposition in his written brief, followed by the citation, "*see, e.g.*, . . ." The law clerks could not find another case that supported his position, so in oral argument the judge asked for the name of another case that stood for the proposition cited by the attorney. He could not name one, and that lawyer was properly dressed down for citing a case "for example," when he had no other examples.

[178] Judge Harry T. Edwards, Circuit Judge, United States Court of Appeals for the District of Columbia, has noted that between 1972 and 1992 the number of filings in the courts of appeals increased by 218% from 13,694 to 43,481. *See* Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1191 n.103 (1996). Edwards maintains that

> appellate judges know that their colleagues on the district court, who also labor under a heavy case load, do not want their cases returned for additional proceedings. Indeed, several district court judges have told me, only half jokingly, that they can tolerate our reversals, so long as we do not combine them with a remand.

Id. at 1191. Judge Judy Harris Kluger, Administrative Judge of the Criminal Court of the City of New York, has described her court as follows:

> The criminal court where I sit is one of the biggest and busiest in the country. Last year, over one million appearances were scheduled in that court and a half million were processed. With heavy case loads and inadequate facilities, judges and court personnel function under conditions that are less than ideal, to say the least. . . . [O]n any given day a judge handles between 150 and 200 calendar cases, each involving different issues and parties who deserve the judge's time and attention . . . . Some court parts worked until seven, eight and nine o'clock at night, just to finish their calendars. Many crucial decisions have to be made in minutes and sometimes in seconds.

them are public, and often written down in formal judicial opinions that form binding precedent for that judge and other judges in the future, judges are in a position where it is very difficult to reassess prior positions or admit they were wrong.[179] 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 their rulings.[180] Nevertheless, we also do not want judges who are unwilling to reconsider prior conclusions, cannot admit they were wrong, or even acknowledge (at least to themselves) that

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Hon. Judy Harris Kluger, *Independence Under Siege: Unbridled Criticism of Judges and Prosecutors, A Panel Discussion Sponsored By the Brooklyn Women's Bar Association, November 21, 1996*, 5 J.L. & POL'Y 535, 538 (1997) (footnote omitted). In 1992, Ninth Circuit Court of Appeals Judge Stephen Reinhardt, in an open letter to Congress, stated "[t]hose who believe we are doing the same quality work that we did in the past are simply fooling themselves. We adopt more and more procedures for 'expediting' cases, procedures that ensure that individual cases will get less attention." Stephen Reinhardt, *Too Few Judges, Too Many Cases*, A.B.A. J., Jan. 1993, at 52.

[179] Glendon recounts that when Learned Hand was asked about his judicial philosophy, he liked to say that it was "summed up in Oliver Cromwell's utterance before the battle of Dunbar: 'I beseech ye in the bowels of Christ, think that ye may be mistaken.' Those words, said Hand, should be inscribed on the portals of every courthouse in the nation." GLENDON, *supra* note 41, at 129 (quoting THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND at xxiv-xxv (Irving Dilliard ed., 1953)). In 1958, when at age 87, Hand delivered the Oliver Wendell Holmes Lecture at Harvard Law School, to the dismay of many in the audience, he expressed doubt about the correctness of the recent school desegregation cases. *See* Learned Hand, *The Bill of Rights* 55 (The Oliver Wendell Holmes Lectures, 1958) (Harvard University Press 1958). But, quoting Benjamin Franklin, Hand acknowledged his doubts about his own conclusions. *See id.* at 75. Franklin asserted:

> [H]aving lived long, I have experienced many instances of being obliged by better information or fuller consideration to change opinions even on important subjects, which I once thought right, but found to be otherwise. It is therefore that the older I grow, the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others.

Id.

[180] This is not to say that great judges will necessarily always be certain that they are correct. Justice Felix Frankfurter occasionally referred to Judge Learned Hand as "the modern Hamlet." GUNTHER, *supra* note 176, at 136 (quoting Letter from Felix Frankfurter to Charles C. Burlingham (Jan. 1933) (Burlingham Papers, Harvard Law School)). Gunther states that Hand "was uncertain about the proper result in most cases, even after decades of judicial experience . . . ." *Id.* at 289. Charles Alan Wright suggests that "[i]n spite of being a modern Hamlet — or, more likely, because of it — Learned Hand is firmly enshrined in the small group of judges who universally are regarded as great." Charles Alan Wright, *A Modern Hamlet in the Judicial Pantheon*, 93 MICH. L. REV. 1841, 1844 (1995) (reviewing GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1994)). Commenting on Judge Learned Hand's skeptical spirit, David Crump observed that "[s]elf-doubt in a judge is arguably both attractive and unattractive: When it appears as humility that spurs diligence, it is a positive quality, but when it manifests itself in avoidance behavior that delays the hard work of making decisions, it is a serious negative." David Crump, *On the Uses of Irrelevant Evidence*, 34 HOUS. L. REV. 1, 17-18 n.72 (1997).

someone else (including the advocates before them) might know more than they do about a question of law. Judicial open-mindedness is hampered by the fact that some lawyers prevaricate, misrepresent, mislead, and try to trick judges.[181] Doubting their ability to trust lawyers, judges may become more inclined to rely upon their own counsel and close their minds to the reasons and arguments of others. A humble judge will take the risk of listening to others with a willingness to be persuaded, even of the possibility that what she previously thought was wrong.[182]

CONCLUSION

Practical wisdom provides a powerful paradigm for understanding legal reasoning and adjudication. One of the primary insights of practical wisdom is that it recognizes a role for character as well as intellect in deliberation. Intellect alone may suffice to make one clever, enabling one to figure out how to achieve one's ends. As Aristotle notes, however, if the ends are wrong, cleverness may facilitate mere villainy. Virtue of character, together with experience, transforms cleverness into practical wisdom. Kronman's account of the virtues of character necessary for exercising practical wisdom — sympathy (or mercy) and detachment (or justice) — is helpful but incomplete. The (or at least a) missing ingredient is humility. Humility helps one to become more just and more merciful. It also aids deliberation and choice by one who is just and merciful, one who is trying to determine the appropriate course of action in a particular situation. For these reasons, humility is a virtue of character that we should especially seek and value in judges.

In the end, I do not have tremendous confidence in my ability to convince the truly skeptical — certainly not the cynical — that hu-

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[181] *See* Richard C. Howe, *Professionalism Before the Courts*, 8 UTAH B.J. 31, 32 (1995). Justice Richard C. Howe of the Utah Supreme Court has noted that the "expedient or short-sighted lawyer who . . . misleads judges is quickly pegged. . . . And unlike the litigation you will be handling, be aware that once the verdict of your professional peers is in, there is no formal due process, no rebuttal, no appeal from that verdict." *Id.* The Rules of Professional Conduct of most states prohibit lawyers from making false statements of material fact or law to a tribunal. *See, e.g.*, UTAH CODE ANN. § 3.3(a)(1) (1998).

[182] *See* Wiseman, *supra* note 81, at 1408. Judge Wiseman notes in his discussion of Micah's injunction to be humble that "[r]ecognition of one's capacity for error is an aspect of humility. . . . In the act of judging, it is indeed a rare occurrence when all the right is on one side, when the correct judgment is crystal clear." *See id.*

mility is a virtue of character that we should value.[183] When Micah identifies justice, mercy, and humility as the things God requires, he declares, "He hath *shewed* thee, O man, what is good."[184] The injunction to do justly, to love mercy, and to walk humbly is not intended as new news; it comes after an indictment 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, acknowledge and put into practice what we already know.

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[183] *See* SHERMAN, *supra* note 25, at 7, *citing* ARISTOTLE, *supra* note 21, at I.4.1095b4-6. The intended audience for Aristotle's lectures recorded in the *Nicomachean Ethics* are those who already care about virtue, "and the end is to deepen their commitment (and ability) to lead a good life." *See id.* Similarly, my purpose is to persuade those who care about virtue and adjudication that the virtue of humility is vital for the exercise of practical wisdom, both in everyday life and in judicial decision making. Near the end of the *Nicomachean Ethics*, Aristotle asks whether a thorough study of virtue and happiness marks the end of our examination of these matters, and concludes, "[s]urely, as is said, where there are things to be done the end is not to survey and recognize the various things, but rather to do them; with regard to excellence, then, it is not enough to know, but we must try to have and use it, or try any other way there may be of becoming good." ARISTOTLE, *supra* note 21, at X.8.1179a33-X.9.1179b4.

[184] *Micah* 6:8 (emphasis added).