IN SEARCH OF HUMBLER—AND WISER—JUDGMENTS

In a new book, Chad Oldfather, professor of law at Marquette University, advocates for judges to be countercultural, in a sense.

The dozen words in the title—*Judges, Judging, and Judgment: Character, Wisdom, and Humility in a Polarized World*—indicate the scope of the challenge that Professor Chad Oldfather has taken on in his new book, published by Cambridge University Press. Most basically, his hope is that the United States can increase the number of judges and (more broadly) lawyers who demonstrate the best traits of the legal profession, including probing deeply to understand issues and acting wisely, with a concomitant sense of humility. In this interview with the *Marquette Lawyer*, Oldfather gives an overview of the themes of the book.



Congratulations on the publication of* Judges, Judging, and Judgment. *It's a book that covers a lot of territory, so how about you tell us where you'd like to begin?

I appreciate it. I'll begin with what I take to be an uncontroversial point: We live in a very divided society. Few things seem exempt from politicization, and too often politics appear to have become a sport in which the goal is simply to win rather than to work toward, or even try to define, the common good. Over the course of my three-plus decades in the legal profession, and two-plus decades as someone teaching law and studying courts, I've seen those changes in the broader world make their way into the legal system.

The sort of thinking that seems so characteristic of our politics—the emphasis on "winning this fight" without looking down the road to think about how it affects the common good, or to consider the implications of the answer to the question at hand, in this case, on the next case and the case after

that—seems to me to be fundamentally contrary to a core part of what "thinking like a lawyer" is supposed to mean.

Our job is to be mindful of notions like "hard cases make bad law" and to understand that the decision in front of us has implications for decisions still to come, but somehow we seem to be losing sight of that. It's especially apparent in Wisconsin, where our nominally nonpartisan state supreme court elections are widely perceived to be proxy battles in a larger political struggle. But our state is hardly unique. One way to think of this book is as an effort to explore how that came to be and what we might do about it.

What led you to take all this on now?

Part of the answer is pure happenstance. Since 2008, I've regularly taught a class we call Judging and the Judicial Process. We spend the semester studying and thinking about courts and judges from every angle we can find the time to explore. We talk about the roles that courts exist to serve, and the various factors that inevitably lead to their falling short of the ideal.

The course doesn't cover just federal courts, or appellate courts, but instead attempts to capture the full range of institutions and people we call courts and judges. Depending on the semester, we'll get into topics such as small-claims courts and non-lawyer judges, differences between the judicial role in the United States versus that in other common-law countries versus civil-law systems, and even the role of architecture in fostering the legitimacy of courts. We explore general topics such as the balance between judicial independence and judicial accountability, the benefits and drawbacks of specialization, and selection processes at the federal and state levels. We look outside the legal literature to political science, psychology, and philosophy.

Over that same period of teaching, I have explored these same sets of issues in my research and writing. I'd long had the idea that there was a book-length project that could come out of that work. It just so happened that in 2022 I got asked to teach the Judging and the Judicial Process class in both the spring and fall semesters. That meant that the work I was planning to do over the summer, involving creating new materials for an altogether different class, was no longer so urgent. And by that time I'd developed a sense of what the book might try to do. I pitched it to a few publishers, got an immediate expression of interest, and set to work.

What was that "sense of what the book might try to do"?

The book's goal involves a few things. The first is an effort to pin down the functions that courts exist to serve, to set a baseline of sorts, and to identify the forces that work against meeting the ideal. Courts are human institutions, of course, and, to a considerable degree, judges are susceptible to the same sorts of influences on their thinking as people more generally. We often think of that in simple, political terms—this judge is liberal, that judge is conservative. It might sometimes be as simple as that, but people don't tend to regard themselves as acting in bad faith, so I'd be surprised if judges are actually thinking, "These are my political loyalties, therefore this is the result I should reach in this case." And yet correlations are there. It's just that the mechanisms are likely to be more complex and indirect.

The second is to point out that the design of the judicial system anticipates and attempts to counter these influences. Here we're talking about things such as the adversarial process and the expectation that judicial decisions will be justified in writing, both of which ideally function to get a judge to obtain a deep sense of an issue and to truly grapple with its complexities. Both of those mechanisms have weakened, largely as a product of the need to deal with increasing caseloads.

When I entered the academy in the early 2000s, there was a relatively fresh literature bemoaning these developments—the "bureaucratization" of justice, the overreliance on law clerks and on nonprecedential opinions, and the demise of what one pair of commentators called "the Learned Hand model" of judging. But the lawyers, judges, and professors who were concerned about these developments have largely left the scene. What they regarded as a crisis became "the new normal" and finally just "normal." But it wasn't without costs. For example, editing a draft opinion is not the same as writing it, and especially so when that draft was written by a skilled but inexperienced lawyer whose immediate incentive will be to write the best possible version of the case for the position their boss is inclined to take.

The third thing the book does is to consider possible responses. One is increased emphasis on interpretive methodologies that purport to make things more determinate. Here, of course, I'm talking primarily about textualism and originalism, which attempt to constrain judges by restricting the scope of information that properly factors into decision-making. There's a sense in which these approaches are unremarkable. Law is filled with rules, and rules of thumb, designed to guide decision-makers by screening off some types of information and emphasizing others.

My concern is that they don't appear to live up to their proponents' promises, and—for one of the book's major themes—they don't eradicate the need for judgment, which, no surprise, is central to the judicial role. The limits of language and of foresight, coupled with the fact that our values and goals often conflict, mean that "the law," at least when it is narrowly defined, can never provide clear or easy answers to all the questions that arise under it. Where this leads me—and I'm hardly the first person to take this position—is that we must focus our efforts on selecting judges who possess, and rewarding judges who exercise, good judgment.

On the one hand, that sounds appealing, because it's hard to imagine someone's being opposed to good judgment. But on the other hand, what does that mean? Is that just another way of saying, "I want judges who think the way I do"?

Those are fair questions. I'll start by talking about someone else's book. A little more than 30 years ago, right about the time I was entering the profession, Yale law professor Anthony Kronman published a book called *The Lost Lawyer: Failing Ideals of the Legal Profession*. Kronman lamented the demise of what he called "the lawyer-statesman ideal"—a conception of the outstanding lawyer as someone who was "not simply an accomplished technician but a person of prudence or practical wisdom as well." He didn't believe that lawyers would stop being leaders, but he predicted they would stop leading well because they would lack the key thing that had made them, and the profession, such a crucial part of the nation's success.

I didn't read the book until I was well into my career, and as I looked back, I could see that I had encountered remnants of the world, and worldview, that Kronman elegized. The judge for whom I clerked, Jane Roth of the U.S. Court of Appeals for the Third Circuit, was a tremendous example, as seemed to me to be her husband, Senator William Roth. For another instance, the more senior lawyers at my law firm, then called Faegre & Benson, in Minneapolis, struck me as having had a fundamentally different mindset concerning the nature of their professional role as contrasted with those who came later. It's difficult to capture well in words, at least in any sort of pithy way, but I saw it. The terms of the social contract had subtly shifted.

But I also recognized that some of what Kronman lauded was still present. Over the course of my career, I've seen that some lawyers have good judgment and others don't, and that those with it have it to varying degrees. And these aren't idiosyncratic evaluations. At every stop along my professional journey, it's been understood that there are some people you go to with hard problems, other people you avoid, and some whose instincts are middling. The people with the best instincts aren't one-trick ponies. They tend, in philosopher Isaiah Berlin's famous formulation, to be foxes, people who know many things, rather than hedgehogs, who know one big thing. They're able to appreciate, evaluate, and navigate an effective course through all the conflicting and often incommensurable features of a situation and of the world more generally. The trait isn't perfectly correlated with raw intelligence, and certainly not with strong political leanings. It might be hard to pin down, but that doesn't mean it's not real.

Let's continue with that last point. In the book, you get a bit into larger cultural factors bearing on our assessment of things that are difficult to pin down. What's the relationship there?

It seems to me, and I'm hardly alone in this, that we've become a culture that distrusts things that are hard to quantify. We're drawn to metrics, and we distrust expert knowledge. Economics has dominated policymaking for decades. Sports have been transformed by analytics. Metrics are everywhere. That work is obviously of great value and has helped surface things that are invisible to the naked eye, so to speak.

But as we're increasingly, and naturally, drawn to focus on things that can be quantified, we tend to discount that which cannot be. My sense is that this is at least part of the appeal of the stronger forms of textualism and originalism. Especially in their popular forms, they depict the processes of textual interpretation as capable of being mechanized, performed according to algorithm and therefore in ways that avoid all the very human, external influences I mentioned earlier. Their more sophisticated advocates understand and acknowledge that those methodologies don't eliminate the need for the exercise of judgment. The rhetoric of politics, and even of more strident judicial opinions, often fails to acknowledge this. It's the hedgehog asserting that if something isn't done in accordance with the one big thing, then it is done illegitimately.

I'm inclined, certainly by temperament but also with some experience, to side with the fox. In my view, the world is too complex to be unlocked by a single key, especially when the potential for the influence of ideology has increased.

How so?

The legal profession has not been immune from polarization. This matters because of a source of discipline on judicial behavior that we haven't yet talked about, which is professional norms. Here again, I'll refer to a book written by others. A few years back Professors Neil Devins and Lawrence Baum published a book called *The Company They Keep: How Partisan Divisions Came to the Supreme Court*.

One of the core ideas on which it was based is that we're all influenced in our conduct by our sense of how it will be regarded by the audiences

that matter to us. We want our parents to be proud of us, so we try to act accordingly. The same holds true for our estimation by colleagues and friends, and, if you're a judge, by the legal profession in general. If I were a judge, I'd want to be thought of as a good judge, and while it would be nice if my mom might think this, and the people I went to high school and college with did so as well, their views aren't the ones that will really matter to me. It's the members of the bar whose regard I'd want to have.

That works pretty well when the membership of the bar is, generally speaking, on the same page when it comes to how cases should be decided. As a judge who cares about the regard of the profession, I won't decide cases by flipping a coin or cutting cards because that's not how it's done. I'd be ridiculed. But the bar isn't on the same page with respect to many aspects of how cases should be decided. And there's nothing wrong with that by itself.

What's problematic is that the bar has self-segregated. And if I as a judge view myself as a member of one side or the other, of Team Federalist Society or Team American Constitution Society, then I'm not going to care so much about whether I'm held in high regard by the other side. And if groups tend to go to extremes, as plenty of research suggests is the case, what can result is a dwindling set of norms that are shared by both sides. That's my worry.

So what do we do about it?

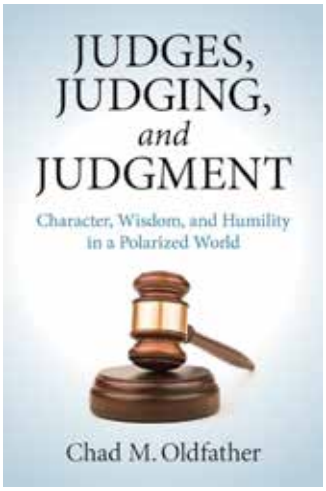
That's a difficult question, of course. I'd love to be able to offer the solution for polarization in society, but its presence in the profession is a tough enough problem. I'd be happy if the book persuaded people as to the nature of that problem. But I do venture some tentative solutions, which I hint at in the second part of the title: *Character, Wisdom, and Humility in a Polarized World*.

Again, I don't doubt that most judges perceive themselves as acting in good faith, and regard other judges, rather than themselves, as the problem. But we're all susceptible to biases, and we're also susceptible to what's sometimes called "the bias blind spot." We don't see our own biases, which makes sense, because if we saw them, we'd presumably try to overcome them. That said—and this connects back to the idea that some people have better judgment than others—susceptibility to bias isn't likely to be uniformly distributed. In other words, some people are better able to resist or overcome the improper influences and are better able to monitor themselves to detect possible bias.

There's more to it, of course. The book's last chapter builds on work done by others who have attempted to pin down the essential components of good judicial character. I survey that work and linger on two concepts.

One is the "practical wisdom" that was Kronman's focus. That's a big topic, of course, but part of it involves recognition that the function of the legal system is ultimately to provide answers to very practical questions.

Another is the notion of intellectual humility. By that I don't mean institutional or individual timidity, but rather an ongoing vigilance about the possibility that one might be wrong or might have an incomplete or insufficient understanding. As I put it in the book, it's the cognitive analog of "measure twice, cut once," and there's a small but growing body of interdisciplinary research exploring its nature and its value in decision-making.



Putting this to work is a long-term project. Members of the bar can come together to identify what it is they seek from judges and then work to praise judges who exemplify appropriate behavior and, when needed, criticize those who appear not to. They can work to improve selection mechanisms to emphasize character over ideological loyalty. Law schools can build out professional formation efforts to emphasize the desired characteristics, including by holding up as examples judges who consistently demonstrate good character.

Thank you. Any final words?

Earlier this year I watched the movie *Conclave* with my wife and one of our daughters who, as a theology major at a different Jesuit university, was especially interested to see it. (We're not Catholic, but rather Lutheran, which doesn't really matter except insofar as it allows me to note that if this book can in any way be likened to nailing theses to doors, I at least come to it honestly.) The film is about the conclave of cardinals assembled to select a new Pope. Early on, in the sermon he delivers at the beginning of the process, Cardinal Lawrence, who is responsible for presiding over the conclave, offers that "the one sin I have come to fear more than any other is certainty. Certainty is the great enemy of unity. Certainty is the deadly enemy of tolerance." Almost of necessity, I have to admit that I could be wrong, and indeed those are the words that close out the book. For I think Cardinal Lawrence is right. ■