



Book Review: “Judges, Judging, and Judgment: Character, Wisdom, and Humility in a Polarized World”

SAMUEL A. THUMMA

BOOK REVIEW



ABSTRACT

Chad M. Oldfather’s thoughtful, interdisciplinary book *Judges, Judging, and Judgment: Character, Wisdom and Humility in a Polarized World* (2024 Cambridge University Press) discusses a variety of different issues facing the judiciary in a polarized society. The book is masterfully researched, citing hundreds of recent sources from various disciplines, showing profound intellectual depth and representing a capstone of Oldfather’s service as a law professor for more than a generation. The target audience seems to be other legal academics, written as part of a broader conversation between law faculty focusing on jurisprudence and legal philosophy. Along the way, however, the book provides insight about what it takes to be a good judge, especially in its final chapters where Oldfather’s thoughtful, personal thoughts emerge. The book underscores the importance of fostering judicial traits that enhance fairness, independence, and public trust in the legal system.

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For centuries, philosophers, judges, law professors and others have written about what it takes to be a good judge. Socrates is attributed with the following: “Four things belong to a judge: to listen courteously, to answer wisely, to consider soberly and to decide impartially.” Far more recently, then-US Supreme Court nominee John G. Roberts, Jr., quipped that “Judges are like umpires.” More basically, I think, a judge applies the law as written to the facts presented, something admittedly far easier said than done. When I started reading *Judges, Judging, and Judgment: Character, Wisdom, and Humility in a Polarized World*, by Professor Chad M. Oldfather (2024 Cambridge University Press), I thought it would be an in-depth discussion of, and expansion on, these and similar mantras. It is different from that.

To avoid burying the lead, let me start with my conclusions: I am much impressed with and appreciate Oldfather’s book, which contains 205 pages of thorough, deep, and recent research that is the product of enormous care and skill in writing. I certainly learned a great deal from reading the book. I came away with the impression, however, that the book’s audience is narrower than I had presumed based on its title, and that I am not a member of that audience. With much appreciation for the author’s work in gathering the views of others, I was also left with a hunger for more of Oldfather’s original thoughts.

To betray some of my biases leading to these conclusions, I serve as a judge on an intermediate state appellate court, and have done so for more than thirteen years, having previously served for five years as a state court trial judge. Before that, I was in private practice as a civil litigator at large law firms for more than fifteen years, mostly in Arizona, but also in Washington, D.C. And I served as a law clerk for the Chief Justice of Arizona’s Supreme Court and a Judge on the United States District Court. Along the way, I have served as chief judge, participated in judicial performance reviews, served on lawyer and judicial ethics advisory groups and thought, written, and taught about judicial leadership and management, along with dabbling in other law-related topics. These experiences undoubtedly influenced my thoughts about what I expected to be in Oldfather’s book.

The cover note describes the book as “an accessible” and “interdisciplinary account of the constraints and pressures on judges in our polarized world.” The book is interdisciplinary and masterfully researched. It is meticulously footnoted, citing hundreds of sources from various disciplines, most of which are quite recent, to support specific propositions. Not infrequently, sources are offered as a helpful sort of “hub and spoke” approach for related concepts, with any number of footnotes offering cites for a discussion (general, detailed or otherwise) of a topic, an overview of a topic, and similar roadmaps to other literature. Unquestionably, the book is well researched and thorough, and it lays a solid foundation for the topics it addresses. I did not, however, find the book particularly accessible.

The cover note suggests that the book “is a valuable resource for academics, students, lawyers, judges, and anyone else interested in the legal system’s legal workings.” I think the audience is narrower than that. My impression is that much of the book was written as part of a broader conversation between law faculty focusing on jurisprudence and legal philosophy, as well as some federal appellate judges (and, perhaps, some state appellate justices and judges smarter than me). Not being a member of that target audience, and likely incorrectly assuming what the substance of the book would provide, I was hoping to like it more than I did.

The cover note also states that the book “emphasizes the inescapable need for judges to exercise judgment and highlights the value of selecting judges who possess good judgment and character,” also focusing on “the importance of judicial character, specifically practical wisdom, and intellectual humility.” The book does so in eight chapters. Following an introduction, the work begins in earnest with what the author calls “The Standard Model of Judging,” followed by chapters titled “Indeterminacy and Ideology” and “The Psychology of Judging,” chapters on internal and external constraints on judicial behavior, then chapters titled “The Importance (and Erosion) of Norms,” “Specialization and Methodology as Partial Solutions,” “Character, Wisdom, and Humility” and a Conclusion.

Much of the text is a masterful collection and summary of the work of others from various disciplines. The book covers an incredibly broad swath of topics, including the legal Realist movement, the Critical Legal Studies movement, a lengthy discussion of the Federalist Society, a less-lengthy discussion of the American Constitution Society, judicial law clerk selection and functions, the private practice of law (particularly “large-firm practice”), law firm management, judicial opinion writing, judicial ethics (and lapses in judicial ethics), judicial selection, the common law, different methods of textual and statutory interpretation, law schools, how legal education has changed over time, law school rankings, data analytics, left- and right-brain thinking, specialized courts, corpus linguistics, and others. The book also mentions, typically as a given for the reader, terminology that was foreign to me, like the “Overton window,” “Sorites paradox,” a rock band called “The Vulgar Boatmen,” “*kennen*” and “*wissen*,” the “Dunning-Kruger effect” (and what I learned is sort of the converse called the “Cassandra Quandary”) and “the logic of Shapiro’s triad.” I looked up these phrases, and I am better for it: now I understand a bit more about what they are, at least on the surface (although I confess I have yet to listen to the rock band’s songs).

Oldfather’s book is a capstone, based on his more than a generation serving as a law professor and his writings on various topics. Not surprisingly, and quite appropriately, it contains numerous citations to the author’s own scholarship. The citations also betray other author insights (he appears to be a fan of former Judge Richard Posner, given the number of citations to his articles) and are a sort of “who’s who” in legal jurisprudence and philosophy circles, including citations to H.L.A. Hart, John Hart Ely, Ward Farnsworth, Cass R. Sunstein, Ronald Dworkin, Karl Llewellyn, William Eskridge, Bryan Garner, and Mark Tushnet.

The primary focus of the book is the appellate judicial process, particularly in federal courts. This is particularly true for concerns the author expresses about the role of law clerks in the judicial system, recognizing that most state trial judges do not have law clerks. And the case-based examples cited largely address civil law issues, not criminal law concerns. But, to Oldfather’s credit, the book focuses far more on concepts and approaches to the law, with the few cases discussed providing examples of judicial approaches, not critiques of specific decisions. There is very little focus on judicial discretion, either in what a trial judge (federal or state) is asked to apply on a daily basis, or on the deferential standards of review applied on appeal when those discretionary decisions by trial judges are challenged. Exercising discretion, it would seem, is an essential aspect of judges, judging and judgment, and I would have welcomed a robust conversation of the topic.

Along with appreciating the Herculean effort Oldfather took to research, write, annotate, and craft the book, a highlight for me was Chapter 8, “Character, Wisdom,

and Humility.” In ways that I very much appreciated, most of this Chapter steps away from capturing and summarizing the work of others. Instead, Oldfather’s own voice comes through crisply and thoughtfully, synthesizing his views on these important topics for a judge. He describes things based on his experiences and decades in the law. The same is true of his Conclusion. I was left wanting more of Oldfather’s own voice, which I view as high praise for the author.

Oldfather clearly and wisely captures many important (and at times forgotten) maxims that collectively should provide a sort of north star for good judges, for evaluating judges, for selecting judicial candidates who will become good judges, and for lawyers who want to become good judges. A few examples plucked from Chapter 8 and the Conclusion are worth noting here:

- If it is inevitable that judges will exercise judgment (and the book correctly indicates it is inevitable), “then surely we want our judges to have the capacity for and to exercise *good* judgment.”
- In identifying the correctness of a judicial decision, along with the law, we should look at “norms, knowhow, and tacit knowledge, all as situated in the facts of a particular case as well as a larger institutional and sociopolitical context.”
- It is important for judges to have practical wisdom, including “an ability to reconcile, or to make the best sense of, the conflicting views and values that present themselves in the context of a given dispute, not to impose one’s own views of what the situation requires.”
- It is important for judges to have humility, more specifically “intellectual humility,” the thought being that “one best performs the judicial role while maintaining a certain intellectual stance, one that involves skepticism about the nature and correctness of one’s own knowledge.” The book quips that “[i]ntellectual humility is a cognitive analog of ‘measure twice, cut once,’” a directive I first learned in high school vocational agriculture that rings true all these years later and is applied by Oldfather perfectly in describing judicial humility.
- The maxim that doing justice and appearing to do justice are both essential, which the book elegantly addresses and expands upon.

Oldfather closes by exploring four suggestions about how judicial character might be enhanced for the benefit of all, focusing in particular on ways to foster intellectual humility and practical wisdom. First, he offers suggestions (like panel composition on appellate courts and appellate process changes) “for channeling judicial behavior” to build on and perhaps enhance “intellectual openness,” conceding these efforts need further refinement. He then states that law schools “provide a second avenue for fostering judicial character,” pausing to lament “that the kinds of judges who most exhibit desirable judicial character are not the sorts of judges who make a name for themselves” and concluding by encouraging law school education to recognize that “[i]deals matter, theory matters, institutional context matters, realism matters, and character matters.” Third, he offers a call to action to redouble a focus on “judicial audiences,” particularly the public at large and also the bar, citing research that the public “prefers judges with strong professional qualifications rather than judges who will decide cases in accordance with their preferred ideology” and encouraging the legal profession to “embrace a character-based vision of the judicial role,” while

recognizing the challenges in such an effort. Finally, he points to judicial selection, having previously expressed concern that partisan selection of judges threatens the independence of the judiciary and, more broadly, the rule of law.

A litmus test for any book is whether the reader is better for having read it. There is no doubt I am better for having read Oldfather's book. Although not in the primary audience for the focus of much of the book, it addresses issues that I am better for thinking more about. In short, although perhaps not my "cup of tea," I am greatly impressed by and appreciate *Judges, Judging, and Judgment Character, Wisdom, and Humility in a Polarized World* by Professor Chad M. Oldfather (2024 Cambridge University Press).

COMPETING INTERESTS

The author has no competing interests to declare.

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