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JUDGES AS HUMANS: INTERDISCIPLINARY RESEARCH AND THE PROBLEMS OF INSTITUTIONAL DESIGN

*Chad M. Oldfather**

I. INTRODUCTION

We demand a lot from judges. The job description calls for traits such as impartiality, fairness, independence, integrity, civility, and professionalism.¹ What is more, the judge should exemplify these traits not merely on good days, but every day in every case. The longstanding conception of the judge in the American legal system calls for an Olympian figure, who remains above the fray and whose primary mode of action is detached reaction.²

That, of course, is an impossible ideal. Judges are people, and people are fallible. Observers have undoubtedly always recognized this, regardless of however strong the tendencies to believe otherwise.³ Lately, however, the recognition has become more systematic, evidenced by a proliferation of empirical work by both legal scholars and political scientists, as well as work drawing on the insights of psychology to illuminate judicial behavior.⁴ The result is an increasingly nuanced picture of judicial behavior, and the ways in which it departs from our idealized conception.

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1. See, e.g., Alfred P. Carlton, Jr., *Preserving Judicial Independence—An Exegesis*, 29 *FORDHAM URB. L.J.* 835, 838-39 (2002); M. Margaret McKeown, *Don't Shoot the Canons: Maintaining the Appearance of Propriety Standard*, 7 *J. APP. PRAC. & PROCESS* 45, 47 (2005); Tobin A. Sparling, *Keeping up Appearances: The Constitutionality of the Model Code of Judicial Conduct's Prohibition on Extrajudicial Speech Creating the Appearance of Bias*, 19 *GEO. J. LEGAL ETHICS* 441, 446 (2006).

2. For one of the classic depictions of this conception of the judicial role, see Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 *HARV. L. REV.* 353 (1978).

3. See *infra* Part II.

4. See *infra* Part III.A.

This Article begins the task of considering how we might put this work to use to improve judicial institutions. Assuming the idealized judge represents not merely a popular but also a normative ideal, we must consider whether and how to modify the constraints on judicial behavior so as to channel it more toward that end. My focus is on one recent example of this scholarship—Lawrence Baum’s book *Judges and Their Audiences: A Perspective on Judicial Behavior*.⁵ In the book, Baum draws on social psychology in an effort to take account of the effect of judges’ audiences—people whose regard is important to them—on their behavior.

The result of Baum’s inquiry is certainly valuable in enhancing our descriptive understanding of judicial behavior. He convincingly argues that judges care about what their audiences think of their behavior, that they do so largely for non-instrumental reasons, and that this can meaningfully affect their behavior as judges. What is less clear are the implications of this enhanced understanding for the design of judicial institutions and practices. Some of the audiences—such as family and social groups—are not the sort from which we could realistically isolate judges, nor would that be desirable. A more general difficulty stems from the problem of partial information—studies like Baum’s provide us with a better understanding of the factors that affect judicial behavior, but the picture remains far from complete. Reforms based on a partial understanding of the forces at play might, by failing to account for less salient aspects of judging, distort rather than reform. While it is tempting to suggest that the appropriate response is to wait to implement change until we can develop a more complete understanding of judicial behavior, waiting is often not a realistic option. Just as courts must decide cases based on the information that is available to them, so must we, whether by action or inaction, make choices about the nature of judicial institutions.⁶ This requires that we consider and implement appropriate changes to the judiciary—such as changing selection procedures or ethical rules, creating new courts, or otherwise changing the processes of adjudication—without a certain sense of what the effects of those changes will be. In doing so, however, we must remain mindful of our limitations, making the avoidance of unintended negative consequences as prominent a part of the analysis as achieving desired ends.

5. LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2006).

6. Cf. ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 3 (2006) (discussing what he calls “the institutionalist dilemma”).

The remainder of this Article proceeds as follows. Part II discusses our collective reluctance to regard judges as ordinary humans, and outlines changes in the context in which judging takes place that suggest the need for, at the least, greater receptivity to the notion that judges are human. Part III discusses Baum's book, outlining the dominant academic conceptions of judicial behavior and Baum's response to them, as well as Baum's application of psychological work on self-presentation to judicial behavior, and situates it within the larger body of legal scholarship drawing on psychology. Finally, Part IV takes up the question of how best to use this sort of scholarship in changing judicial institutions.

II. THE MYTH OF THE NON-HUMAN JUDGE

However much we may understand, on an intellectual level, that judges are mere humans, we have a tendency to believe that somehow the process of becoming a judge effects a substantial transformation, and that judges become different from the rest of us.⁷ At least implicitly, we impute near-magical properties to the acts of taking an oath and donning a black robe, as if they somehow eliminate one's susceptibility to all the foibles, biases, and petty jealousies that are the stuff of day-to-day life. Jerome Frank called this "the myth about the non-human-ness of judges."⁸ This myth persists not only in the eyes of the public, but also to a large degree in the estimation of practicing lawyers and legal academics. Law school faculties are filled with those who purport to take a cynical view regarding the purity of judicial motives. But an awful lot of legal scholarship proceeds not only on the assumption that the judicial role, properly conceived, involves a search for a more-or-less objectively correct answer, but on the further assumption that judges might reach

7. Cf. Louise Otis & Eric H. Reiter, *Mediation by Judges: A New Phenomenon in the Transformation of Justice*, 6 PEPP. DISP. RESOL. L.J. 351, 365 (2006) (noting "the perception of the judicial office as one of impartiality and independence, which confers on judges a degree of moral authority"). Another perspective on this is that we are engaged in a process of willful blindness. "Judges have a special role to play in our democracy; they decide when others have messed up or been messed with, and the other branches of government have stepped out of line. If we don't want judges popping up on Nightline to weigh in on the latest legal controversy, it's because we don't want anything to disturb our image of them as black-robed and aloof. Keeping judges at a distance from the rest of us makes it easier to hope that they're also less fallible." Emily Bazelon, *Judges Should Have the Right Not to Remain Silent*, LEGAL AFFAIRS, Nov./Dec. 2002, at 30.

8. JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 147 (1949).

that answer if only someone (typically, the author of the scholarship in question) will point them the way.⁹

This is not to suggest that no transformation accompanies the transition from lawyer to judge. Judges consistently report that their lives changed in all sorts of ways when they assumed their new role.¹⁰ Their relationships with their former professional peers became more distant and formal. They had to curtail their political activity. They acquired a new first name. While perhaps disconcerting to the new judge, all of this serves a purpose. It reinforces society's high expectations. Though she may never be able to achieve the ideal, we expect the judge to make every effort to do so. But it is unrealistic to suppose that any transformation is or could be as great as that for which the idealized version of the judicial role would call. Judges are, after all, human.¹¹ And most are not merely humans, but also quite ordinary

9. See David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 731 (1987).

10. See AM. BAR ASS'N STANDING COMMITTEE ON JUDICIAL INDEPENDENCE, REPORT OF THE STUDY GROUP ON PRE-JUDICIAL EDUCATION 15-16 (2005).

11. This is not an infrequently made observation. Indeed, a simple Westlaw search ("judge /3 human") turns up all manner of interesting assertions regarding the implications of the humanity of judges. These assertions generally take the form "because judges are human, they possess or lack characteristic X." Almost always the existence or non-existence of X is implicitly deemed self-evidently to flow from the fact that judges are human, and the point is developed no further. Examples of the results turned up by such a search include the following: Stephen M. Bainbridge, *Abolishing LLC Veil Piercing*, 2005 U. ILL. L. REV. 77, 98 (2005) ("Like all humans, judges have inherently limited memories, computational skills, and other mental tools."); Wendy Nicole Duong, *Law Is Law and Art Is Art and Shall the Two Ever Meet? Law and Literature: The Comparative Creative Processes*, 15 S. CAL. INTERDISC. L.J. 1, 7 (2005) ("Judges (as human beings with passion, emotions and prejudices, living in a multi-faceted society), also read and hear other things besides legal precedents."); Daniel A. Farber, *Backward-Looking Laws and Equal Protection: The Case of Black Reparations*, 74 FORDHAM L. REV. 2271, 2298 (2006) ("Judges are human beings and necessarily bring their own past experiences to bear when they consider legal issues."); Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the "Affirmance Effect" on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357, 375 (2005) ("Judges, too, are human beings, and like other human beings, judges surely employ heuristics in their own decisionmaking."); Amy Zimmerman Hodges, *Identifying the Linguistic Boundaries of Sex: Court Language Choice in Decisions Regarding the Availability of Sex and Procreation*, 11 CARDOZO WOMEN'S L.J. 413, 415-16 (2005) ("Simply by being human, a judge, like any of us, uses basic knowledge of language as a necessary, often subconscious tool in any writing."); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 392 (2006) ("[T]he judge, being human, is as subject as anyone to the environment and the news coverage that shape public opinion in the first place . . ."); Seth D. Montgomery & Andrew S. Montgomery, *Jurisdiction As May Be Provided By Law: Some Issues of Appellate Jurisdiction in New Mexico*, 36 N.M. L. REV. 215, 253 (2006) ("[J]udges, like other humans, surely are susceptible to the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives.") (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)); James Michael Scheppele, *Are We Turning Judges Into Politicians?*, 38 LOY. L.A. L. REV. 1517, 1524 (2005) ("Judges are only human, and do not want to lose their jobs or be sent to undesired

humans.¹² They are therefore susceptible to the same sorts of pressures as the rest of us.¹³

This hardly constitutes a fresh insight. Indeed, the law recognizes the reality of judicial humanity, requiring recusal in situations that present temptations that are simply too great for judges to consistently ignore. What is more, the law's conception of those circumstances has expanded over time. Early restrictions barring judges from sitting on cases in which they have a financial interest have expanded to the broader prohibition of "impropriety and the appearance of impropriety,"¹⁴ and restraints against presiding over cases where "the judge's impartiality might reasonably be questioned."¹⁵

While recognition of the basic idea of judicial humanity may not be new, there is cause to believe that we are coming to an enhanced understanding of what it means for judges to be human. Scholars are studying judges and judging from an increasing array of perspectives.

assignments."); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1995 (1989) ("Judges are human and humans tend to abuse power when they have it . . ."); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1323 (2005) ("Judges are indeed human; like jurors, they are often unable to 'close the [v]alves of [their] attention.'") (quoting THE COMPLETE POEMS OF EMILY DICKINSON 143 (Thomas H. Johnson ed., 1960) (1890)).

12. "Politics, personal friendships, ideology, and pure serendipity play too large a role in the appointment of federal judges to warrant treating the judiciary as a collection of sainted genius-heroes miraculously immune to the tug of self-interest." RICHARD A. POSNER, *OVERCOMING LAW* 110 (1995).

13. Cardozo's classic statement of the point is worth revisiting:

I have spoken of the forces of which judges avowedly avail to shape the form and content of their judgments. Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed. But the subject is not exhausted with the recognition of their power. Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge. . . . There has been a certain lack of candor in much of the discussion of the theme, or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations. I do not doubt the grandeur of the conception which lifts them into the realm of pure reason, above and beyond the sweep of perturbing and deflecting forces. None the less, if there is anything of reality in my analysis of the judicial process, they do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.

BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 167-68 (1921).

14. ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 29 (2004) (quoting Canon 2: "A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities.>").

15. *Id.* at 184 (quoting Canon 3E(1): "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . .").

Although social-scientific evaluation of judicial behavior dates back to at least the 1930s,¹⁶ recent years have witnessed the application of a growing array of methodological tools to the study of judicial behavior.¹⁷

Meanwhile, the contours of the judicial role have changed. Whatever the normative desirability of a system in which the Olympian judge largely reacts to what the parties have put before the court,¹⁸ such a depiction is no longer descriptively accurate. Today's judges preside over caseloads many times the size of those of their counterparts a half-century ago, and involving a vastly larger range of issues and often considerably more complicated factual inquiries.¹⁹ As a consequence, the nature of the tasks judges must perform has likewise evolved. Trial court judges rarely preside over trials,²⁰ instead filling a more "managerial" role and influencing cases from a relatively early stage.²¹ Appellate court judges no longer enjoy the ability to engage in unhurried reflection over the cases before them, or even to write most of the opinions issued under their names.²² They, too, have assumed a more managerial role, presiding over a staff of law clerks who draft most opinions and perform many of the other tasks traditionally within the judicial role.

It seems reasonable to imagine that these sorts of changes in the context in which judging takes place—and indeed in the nature of judging itself—have affected judges' perception of and performance in their role. Indeed, some have suggested that what has resulted is bureaucratized justice.²³ One of the characteristics of this phenomenon is that judges take a very different orientation to their work than did their predecessors, potentially viewing it as a product of their chambers—"the product of 'many hands'"²⁴—rather than as their own, personal product.

16. See Brian Leiter, *Legal Realism*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 261, 269-75 (Dennis Patterson ed., 1996).

17. See *infra* notes 29-43, 94-104 and accompanying text.

18. Indeed, Fuller's work appears to be enjoying something of a renaissance as a basis for suggestions regarding the appropriate content of the judicial role. See, e.g., Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 34-37 (2003); Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 349 & n.138 (1997).

19. See Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743, 768-79 (2006).

20. See, e.g., Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

21. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376-78, 386 (1982).

22. Oldfather, *supra* note 19, at 768-71.

23. See, e.g., Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1444-49, 1452-59 (1983).

24. *Id.* at 1456 (internal citations omitted).

This, in turn, results in a reduction in the judge's sense of responsibility for that product, and in a consequent reduction in its overall quality.²⁵

These changes underscore the need to revisit the institutional architecture of the judiciary. Whatever the appropriate balance of independence and accountability, there is no reason to believe that the mechanisms developed to achieve that balance in the past continue to perform that task in an adequate fashion. We might likewise question whether concepts like "impropriety" and "impartiality" adequately capture the appropriate metrics by which to police judicial ethics.

Indeed, a number of commentators have recently considered the effects of the systemic changes identified above (and more) on the administration of justice, and to developing appropriate responses.²⁶ This work, like most legal scholarship more generally, has tended to rely on casual empiricism in the form of "common-sense" conjecture about the likely effects of a given rule on judicial behavior. Put another way, the analysis tends toward the speculative, both in terms of describing how the world presently operates and predicting how a proposed modification would affect that operation. Such analysis has historically been necessary in law simply because institutions must function and cases must be decided, and in neither situation can the task await the development of a comprehensive understanding of human behavior or scientific causation or whatever might be necessary to a fully informed decision. We do the best we can with the information available, and hope that time reveals our decision to be correct.

The recent surge in interdisciplinary analysis of judicial behavior holds out the promise—or perhaps the illusion—that this will change. With a more nuanced appreciation of the forces at work in judicial behavior, one imagines, we will be able to more carefully calibrate the various constraints on judges to achieve our desired ends. But there is reason for skepticism. The law does not, of course, have a perfect track record in terms of incorporating scientific insights. A great deal of the law of evidence, for example, is based on long-discredited assumptions about human behavior.²⁷ This is unfortunate. To the extent that the

25. *Id.*

26. *See, e.g.*, RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* (1996); THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* (1994).

27. *See, e.g.*, DAVID P. LEONARD & VICTOR J. GOLD, *EVIDENCE: A STRUCTURED APPROACH* 316-17 (2004) (exploring the questionable psychological underpinnings of evidentiary doctrine relating to character evidence); *see also* John Leubsdorf, *Presuppositions of Evidence Law*, 91 *IOWA L. REV.* 1209 (2006) (discussing the untrustworthy generalizations that laws and rules of evidence may be based on).

sciences have developed an understanding germane to a particular topic, we ought to draw on that understanding. The question is how best to do so.

III. JUDGES AND THEIR AUDIENCES

A. *The Incompleteness of Dominant Models of Judicial Behavior*

Among the many recent efforts to begin the process of rounding out our understanding of judicial behavior is Laurence Baum's *Judges and Their Audiences: A Perspective on Judicial Behavior*.²⁸ Baum is a political scientist, and part of his project is to demonstrate the incompleteness of his discipline's description of judicial behavior. He opens by surveying the dominant conceptions of the judicial role as viewed by political scientists. There are three: the legal, attitudinal, and strategic models. The legal model views the judicial role as involving primarily an effort to follow the requirements of legal doctrine and to make good law in those cases where existing doctrine does not supply the required answers.²⁹ Under the strongest versions of this model, judging entails complete indifference to the policy consequences of decisions.³⁰ Although this extreme version did not survive the legal realist movement, many scholars (to a considerably larger extent in law schools than on political science faculties) continue to view legal doctrine as playing a meaningful, if not dispositive, role in judicial decision making.³¹ Attitudinal models, in contrast, view judges as acting purely on the basis of their policy preferences.³² "They cast votes and write opinions that perfectly reflect their own views, regardless of what their court colleagues and other policymakers might do in response."³³

28. BAUM, *supra* note 5.

29. *Id.* at 8-9.

30. *Id.* at 8.

31. *Id.* at 9.

32. *Id.* at 7. For discussions of the attitudinal model, see JEFFREY A. SEGAL ET AL., *THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM* 38-39 (2005); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86-97 (2002).

33. BAUM, *supra* note 5, at 7. The attitudinal model rests on a relatively narrow conception of the factors that motivate judges. For example, at its most basic level, the attitudinal model holds that "Rehnquist [voted the way he did] because he [was] extremely conservative; Marshal voted the way he did because he [was] extremely liberal." SEGAL & SPAETH, *supra* note 32, at 65. One exception involves "public choice" or "interest group" models of judging. *See, e.g.*, POSNER, *supra* note 12, at 109-44 (positing that judges might derive utility from various aspects of the position including not only the salary and possibly enhanced leisure opportunities, but also popularity, prestige, reputation, public interest, and the inherent joys of playing the "judicial game"). Another alternative uses legal

Strategic models likewise view judges as acting to effect their policy preferences, but in a considerably more nuanced and less reflexive manner.³⁴ They do not focus simply on the case at hand, but take a longer view. Thus, for example, a strategic judge will be content to agree to a result that she might not view as optimal in the present case in order to secure the votes of her colleagues and thereby to avoid the greater evil of the contrary result.³⁵ What is more, she will take other considerations into account, such as the need to seek reelection or even to satisfy the public's expectation that judicial decisions will be based on legal considerations.³⁶ Due in part to its relative comprehensiveness, "a strategic conception of judicial behavior is now the closest thing to a conventional wisdom about judicial behavior."³⁷

One of Baum's central points is that these models share a fundamental shortcoming arising out of one of their common assumptions. That assumption is that judges "act solely on their interest in the substance of legal policy, whether that interest is centered on policy or on a combination of law and policy."³⁸ Judges under the legal and attitudinal models bear a resemblance to Mr. Spock³⁹ in that they "act without emotion or self-interest in order to advance the general good."⁴⁰ This tendency is even more pronounced in the strategic models. Because of the large number of inputs judges acting under that model take into account in making their strategic calculations—Baum invokes Dworkin's Hercules⁴¹ as an example of a fully strategic judge⁴²—the task of judging requires tremendous mental effort. "These judges court

interpretive approaches and institutional characteristics to model judicial decision making. See Jason J. Czarnecki & William K. Ford, *The Phantom Philosophy? An Empirical Investigation of Legal Interpretation*, 65 MD. L. REV. 841 (2006).

34. The strategic "account rests on a few simple propositions: justices may be primarily seekers of legal policy, but they are not unconstrained actors who make decisions based only on their own ideological attitudes. Rather, justices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of other actors, the choices they expect others to make, and the institutional context in which they act." LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 10 (1998).

35. BAUM, *supra* note 5, at 6.

36. *Id.* at 6-7.

37. *Id.* at 7.

38. *Id.* at 9; see also SEGAL ET AL., *supra* note 32, at 34-35; EPSTEIN & KNIGHT, *supra* note 34, at 23.

39. Baum felt it necessary to further identify Mr. Spock in a footnote, which suggests that I ought to as well. As Baum notes, Spock "was one of the leading characters in the *Star Trek* television show and movies. Spock was half-Vulcan, and Vulcans were characterized by both their altruism and their devotion to reason." BAUM, *supra* note 5, at 18 n.16.

40. *Id.* at 18.

41. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 105-06 (1977).

42. BAUM, *supra* note 5, at 18 n.16.

exhaustion with their arduous and often futile efforts to advance their conceptions of good policy, efforts they expend only for the personal satisfaction of trying to improve public policy . . . [B]y standards of ordinary behavior the fully strategic judge seems enormously altruistic.”⁴³

Baum concedes that there may be good reason to believe that judges are concerned with making good law or good policy. But there is not, he suggests, good reason to believe that this is their only concern, or even their dominant concern. Judges lack a strong incentive to make decisions on that basis, particularly given that they generally stand to gain very little in the way of direct benefits from their rulings.⁴⁴ At the same time, other factors might sway a judge from the path of pursuing legal or policy goals, such as a desire to get along with one’s colleagues on a multimember court, to advance one’s career, or to lessen the burdens posed by one’s workload.⁴⁵

In light of this, Baum characterizes the strategic conception of judicial behavior as requiring something quite extraordinary. He demonstrates by contrasting the assumptions of a strategic model of judging with those made by standard economic models of human behavior. The latter assume that people are consistently rational and motivated by self-interest, assumptions that have been called into increasing question in recent years.⁴⁶ Yet “[j]udges in the dominant models of judicial behavior depart further from reality: they share rationality and self-control with orthodox economic actors but act on the basis of complete altruism rather than complete self-interest.”⁴⁷

This conception is remarkable not only in its general denial of a basic aspect of judicial humanity, but also in its implications. Among other things, the single-minded focus on policy envisioned by the dominant models suggests that judges care what others think of their performance only to the extent that others’ impressions have instrumental significance. Thus, if a given group’s opinions will have no bearing on the success of the judge’s efforts to advance his conception of appropriate policy, then that group’s esteem will have no effect on the judge’s behavior. Whatever the merits of the dominant models—and

43. *Id.* at 18.

44. *Id.* at 10-11.

45. *Id.* at 11-14.

46. See, e.g., Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1055 (2000).

47. BAUM, *supra* note 5, at 21.

Baum is clear about his belief that they have considerable merit—Baum deems this to be too large an oversight of too fundamental a component of human nature. Judges are humans, and a realistic conception of judicial behavior must account for that basic humanity.

B. Judges and the Company They Keep

Baum's central argument is that judges *are* concerned with others' assessments of their performance, and that the bases of this concern are not exclusively, and not even primarily, instrumental. He contends "that judges care about the regard of salient audiences because they like that regard in itself, not just as a means to other ends. Further, [he argues,] judges' interest in what their audiences think of them has fundamental effects on their behavior as decision makers."⁴⁸ Baum does not propose an alternative model of judicial behavior based on the relationship between judges and their audiences, but rather suggests that such a perspective is useful to enhance the descriptive power of the dominant models.⁴⁹

C. The Importance of Personal Audiences

Drawing on the work of social psychologists, Baum identifies three simple premises:

1. People want to be liked and respected by others who are important to them.
2. The desire to be liked and respected affects people's behavior.
3. In these respects, judges are people.⁵⁰

The mechanism through which the desire to be liked affects our behavior is that of self-presentation—conscious and semiconscious efforts to make a favorable impression on others. These efforts fall into two broad categories: self-presentation motivated by instrumental concerns (the desire to secure some concrete gain from an audience), and that motivated by personal concerns (the desire to "seek popularity and respect as ends in themselves, not as means to other ends").⁵¹

Self-presentation motivated by instrumental concerns sounds an awful lot like strategic judging, and it is not Baum's focus. He instead directs his attention to personally motivated self-presentation. In order to

48. *Id.* at 4.

49. *Id.* at 23 n.19.

50. *Id.* at 25.

51. *Id.* at 28-29.

justify that focus, he must of course make the case that some significant portion of judicial behavior is motivated by personal rather than instrumental concerns.

Baum begins by identifying two primary instrumental purposes that might motivate judicial self-presentation: career advancement, and the furthering of legal or policy goals.⁵² Baum then argues that these types of instrumental motivations cannot account for all of judges' activities in presenting themselves to their audiences. He bases this in part on the claim that a judge's incentives to make good law or effect good policy simply are not that strong, such that there is plenty of room for other motivations to affect behavior.⁵³ He also provides examples, pointing to Judges Samuel Kent and Alex Kozinski as among those whose written opinions are inconsistent with what one would expect from judges seeking elevation to a higher court—an ambition that Judge Kozinski at least has quite openly held.⁵⁴ Judge Kent's opinions colorfully berating lawyers have been widely circulated via the Internet,⁵⁵ and Judge Kozinski has a history of colorful language both in his opinions and in his nonjudicial writings, as well as of such nonstereotypical behavior as nominating himself as a "Superhottie[] of the Federal Judiciary."⁵⁶ Baum likewise suggests that Justice Scalia provides an example of a jurist whose judicial writings—particularly his "strongly worded dissents"—are unlikely to serve him well in advancing his legal and policy goals.⁵⁷

These examples may not make the point as forcefully as Baum intends. At least for a time, Judge Kozinski's quirkiness looked like it might well land him on the Supreme Court. And it seems far from certain that Justice Scalia's irascibility has served him poorly. Indeed, some argue that he has been remarkably effective in advancing his

52. Somewhat curiously, in light of the dominant models' assumption that judges are motivated solely by their legal and policy goals, Baum suggests that career advancement is probably the strongest of these instrumental motivations. *Id.* at 39-40.

53. *Id.* at 44.

54. *Id.* at 40.

55. See Steven Lubet, *Bullying from the Bench*, 5 GREEN BAG 11, 11 (2001). Judge Kent has recently made the news for even less savory behavior. See Lise Olsen & Harvey Rice, *The Case of a Federal Judge Who Went Much Too Far*, HOUSTON CHRON., Nov. 11, 2007, at B1, available at http://www.chron.com/CDA/archives/archive.mpl?id=2007_4458658.

56. BAUM, *supra* note 5, at 38 & n.10; Underneath Their Robes: Courthouse Forum: The Hot. Alex Kozinski, http://underneaththeirrobes.blogspot.com/main/2004/06/courthouse_foru.html (last visited Oct. 26, 2007).

57. BAUM, *supra* note 5, at 40-41.

agenda, especially given the frequency with which he is not in the majority.⁵⁸

More generally, there is a considerable distance between “instrumental considerations are not everything” to “personal explanations are the best explanation for judges’ off-bench self-presentation.” Baum acknowledges that instrumental and personal motivations often reinforce one another, and that their effects are consequently often difficult to disentangle.⁵⁹ Yet Baum does very little to justify the dominant role he ascribes to personal motivations.⁶⁰ As noted above, Baum relies in part on his conclusion that legal and political goals provide relatively weak incentives for judicial behavior as compared to personal regard. Elsewhere he suggests that the immediacy of the payoff to the judge may also play a role. While the ultimate impact of a decision in terms of law or policy may be hard to measure and may take a long time to manifest itself, the approval of a personal audience is likely to be more tangible and immediate.⁶¹ But these assertions are not presented together as part of a cohesive argument, and instead must be cobbled together from various sections of the book.

Indeed, at times it is difficult to determine precisely what claim Baum is making. While he generally suggests that personal audiences are the most significant thing (“Those audiences whose esteem is important to judges chiefly for personal reasons are typically more salient and thus have greater potential impact on judicial behavior.”⁶²), his language occasionally evokes the more limited claim “that personal audiences have a substantial impact on judges’ choices.”⁶³

Still, Baum succeeds in making the fundamental point that judges’ personal self-presentation ought to be taken into account. That he is comparatively less able to articulate the precise sorts of situations in which personal and instrumental motivations might pull in different directions is undoubtedly not the result of shortcomings in his efforts so much as of the difficulties inherent in generalizing from conclusions drawn from controlled experimentation to the considerably messier

58. See, e.g., Posting of Michael Dimino to PrawfsBlawg, http://prawfsblawg.blogs.com/prawfsblawg/2006/09/happy_anniversa.html (Sept. 26, 2006, 12:57 EST) (“Though many disagree with his methodology and conclusions, there can be no doubt that he has changed the way legal arguments are made, and that the views he has championed carry much more weight now than they did twenty years ago because of the voice he has given to them.”).

59. BAUM, *supra* note 5, at 29, 45-46.

60. See *id.* at 40-42.

61. *Id.* at 45.

62. *Id.* at 48.

63. *Id.* at 49.

reality of the legal system. This is not to suggest that his conclusion is necessarily wrong so much as it is to suggest that he has not fully made the case that personal motives are at the heart of judicial behavior, or provided a concrete framework based on which to assess the relative importance of personal and instrumental motivations.

The analysis nonetheless produces some useful insights. For example, even if one suggests that judges are likely to choose personal audiences that reflect their pre-existing policy and legal positions, it does not follow that personal audiences will have no effects. First, we do not always have the luxury to choose our personal audiences.⁶⁴ Our families, social groups, and professional peers are often selected for reasons independent of our free choice. Second, personal audiences can affect behavior even where the judge and the audience share the same basic points of view.⁶⁵ If an instrumental audience also has personal significance to a judge, the judge will not only be that much more likely to reach decisions consistent with the audience's preference in any given case, but also to do so in a manner that is more aligned with the audience's preference in a qualitative sense. Put differently, a judge with conservative personal audiences would thereby be more likely not only to reach conservative decisions, but also to reach decisions that are more conservative than they would otherwise be.

D. The Identity of Judges' Personal Audiences

The bulk of Baum's analysis considers the various audiences to whom judges might engage in self-presentation.⁶⁶ He contends that judges social groups and professional peers are the audiences that have the greatest influence on their behavior. The dominant models assume that the influence of social groups on judges' behavior has run its course by the time they reach the bench, and that in any case judges have no great incentive to please their social groups for their own sake simply because those groups have no ability to frustrate the judges' legal or policy goals.⁶⁷ These assumptions do not hold, Baum asserts, if judges are like the rest of us. "Because social groups are so integral to people's

64. *Id.* at 46.

65. *Id.* at 46-47.

66. Chapter three focuses on the audiences that have already received consideration in prior scholarship on judicial behavior, including judges' judicial colleagues, the public, and the other branches of government. In general, Baum concludes that the influence of these audiences is not significant. *Id.* at 86-87.

67. *Id.* at 89.

sense of themselves, people have strong incentives to please members of these groups and to avoid alienating them.”⁶⁸

The nature of the resulting influences is unclear:

As an audience, social groups can affect judges in multiple ways. To take one example, judges may want their families and friends to perceive them as people who embody virtues such as impartiality that they associate with good judges. This goal could move judges to act in ways that emphasize their fealty to the law as a basis for judgment. Alternatively, judges may want to be seen as acting consistently with the policy views that predominate in their social circles. This second type of impact is not necessarily the more powerful, but its potential effects are easier to trace.⁶⁹

Baum uses the federal courts’ response (often better characterized as a lack of response) to the Supreme Court’s decision in *Brown v. Board of Education* as one illustration of the powerful effect that personal audiences can have on the judiciary,⁷⁰ and judicial responsiveness to women’s rights issues as another.⁷¹

An orientation toward the legal community as a personal audience might pull in a slightly different direction. Because lawyers are socialized to value the role of law as the appropriate source of legal decisions, “judges who want the respect of practicing lawyers, legal academics, and other judges have an incentive to be perceived as committed to the law and skilled in its interpretation.”⁷² As a result, here is another way in which judicial backgrounds might matter. Judges who spent most of their pre-judicial careers in the practice of law should be more responsive to the legal community as an audience. Those coming from a largely political career, in contrast, could be expected to be relatively indifferent to the bar.⁷³

Baum also examines the possibility that policy groups and news media might also function as personal audiences for judges. Policy groups can of course play a significant role as instrumental audiences, both in terms of career advancement as well as through the work of advocating on behalf of a judge’s preferred policies. But there can be a substantial personal aspect as well. “If people who share a point of view about legal policy function as a reference group for a judge, the judge

68. *Id.*

69. *Id.* at 90.

70. *Id.* at 90-94.

71. *Id.* at 94-97.

72. *Id.* at 106.

73. *Id.* at 114.

has an incentive to take actions that those people approve. That is especially true when their approval would counterbalance criticism from other sources.”⁷⁴ What results is not fundamental change—a policy group is unlikely to serve as a personal audience for a judge that does not already share its basic conception of good policy—but rather the reinforcement of the judge’s preexisting viewpoint, and of greater consistency in its application.⁷⁵ Because the judge values, for its own sake, the esteem in which she is held by a policy group, she has an incentive to reach decisions that will maintain that esteem, even if those decisions are different from the decisions she would have made in the absence of the policy group.

The possibility that interest in obtaining favorable news coverage might motivate judicial decisions has received attention lately. Thomas Sowell called this “the Greenhouse effect” after *The New York Times* reporter Linda Greenhouse. Sowell believed that Greenhouse’s flattery of Justice Blackmun provided an important impetus for the Justice’s decisions.⁷⁶ Baum posits that the news media might serve as an important personal audience in two respects. First, for the simple reason that favorable coverage may represent an end in itself.⁷⁷ Second, the media are a mechanism through which judges can reach their other audiences.⁷⁸ Because of this, he finds a Greenhouse effect plausible. “The claim of a Greenhouse effect is especially intriguing because it can encompass all four categories of personal audiences discussed in this chapter and the preceding one: social groups, the legal profession, the mass media, and—less directly—policy groups.”⁷⁹

Indeed, he presents empirical support for the claim, in the form of an analysis of changes in the voting patterns of Supreme Court Justices in civil liberties cases from their first two years on the Court to later periods in their tenure. He found that among the nine Republican Justices who did not reside in Washington before their elevation to the Court—who had not, one might surmise, inoculated themselves against the Greenhouse effect:

[T]here were clear and substantial increases in liberalism for four and more limited or ambiguous increases for three others. In contrast, only

74. *Id.* at 119.

75. *Id.* at 121.

76. Baum cites Thomas Sowell, *Blackmun Plays to the Crowd*, ST. LOUIS POST-DISPATCH, Mar. 4, 1994, at 7B, as the first use of the phrase. BAUM, *supra* note 5, at 139.

77. BAUM, *supra* note 5, at 136.

78. *Id.* at 135-36.

79. *Id.* at 142.

one of the nine justices in the other groups [which included Democrats and Republicans who resided in Washington before joining the Court] had more than minimal increases in liberalism.⁸⁰

Significantly, Baum does not present this as conclusive proof of the existence of a Greenhouse effect. Other interpretations of the data are possible, such as that the changes were motivated by strategic concerns, or by basic changes in the Justices' policy positions as a result of the force of contrary argument.⁸¹ Moreover, his results "suggest that residency had a greater impact on voting change than initial ideological positions."⁸² Nonetheless, the possibility of a Greenhouse effect is plausible under an audience-based conception of judging, and Supreme Court Justices, because of their autonomy and insulation from political or career-based pressures, might be uniquely susceptible to it.⁸³

E. The Implications of Baum's Analysis

The conclusions that Baum draws from his analysis are, as they necessarily must be, tentative. His emphasis remains on the central point that taking judicial audiences into account reveals shortcomings in the perspective of the dominant models. Still, Baum suggests some ways in which an audience-based perspective will provide insights not otherwise accounted for in the dominant models. Among other things, he suggests quite plausibly that judges' personal audiences are likely to consist largely of elites.⁸⁴ Thus, he suggests, Justice Scalia's assertion in *Lawrence v. Texas*, that the majority of his colleagues on the Supreme Court acted in large part due to their having been influenced by elite legal culture, may have some truth to it.⁸⁵ This is not an effect that is necessarily consistent, either in terms of its effect across the range of judges (who will differ in the nature of the elites that form their social groups and personal audiences) or in terms of its political valence (elites might tend to be more socially than economically liberal). But the point remains that "[g]roups that do not serve as personal audiences for judges are at a relative disadvantage in shaping judges' choices unless they connect well with judges' instrumental incentives."⁸⁶ General public

80. *Id.* at 149.

81. *Id.* at 149-50.

82. *Id.* at 150.

83. *Id.* at 151.

84. *Id.* at 163.

85. *Id.* at 90, 163.

86. *Id.* at 163.

opinion, in other words, will likely have a weaker effect on judicial behavior than the opinion of judges' personal audiences.⁸⁷

All of this suggests a related point of difference. If judges are affected by their personal audiences, and if their personal audiences differ, then a one-size-fits-all approach to assessing the determinants of judicial behavior will miss much of what actually drives that behavior.⁸⁸ Thus we might profit from studying judicial behavior in light of the number and type of appearances that judges make before policy groups.⁸⁹ In similar fashion, because judges' career paths are likely to be suggestive of some of the audiences to which they orient themselves, increasing study of judicial backgrounds might prove useful.⁹⁰ And because "the sets of audiences that are most salient to judges may vary systematically across courts"⁹¹ an increased focus on the differences between judges at varying levels of the judicial hierarchy could likewise prove beneficial.⁹² Since lower-court judges are more likely to have personal ties with their local counterparts in other branches of government, for example, we might expect to see such judges place greater weight on those sets of interests.⁹³

IV. A CALL FOR METHODOLOGICAL PLURALISM AND THEORETICAL AGNOSTICISM

Judges and Their Audiences is not the sort of book that breaks new ground by uncovering previously hidden aspects of judicial behavior. Nor does it purport to do so. Consequently, along that dimension there is little, if anything, new here. For example, the notion that the interaction between judges and their colleagues (that is, one of their personal audiences) will tend to reinforce and strengthen preexisting decisional tendencies lies at the heart of Cass Sunstein's recent exploration of "ideological amplification,"⁹⁴ and has a relatively lengthy pedigree.⁹⁵

87. *Id.*

88. *Id.* at 168.

89. *Id.* at 167.

90. *Id.* at 167-68.

91. *Id.* at 170.

92. *Id.* at 169-70.

93. *Id.* at 170-71.

94. See CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 8-16 (2006) (exploring the effects of "ideological amplification" and "ideological dampening").

95. Sunstein and his colleagues cite to ROGER BROWN, SOCIAL PSYCHOLOGY (2d ed. 1986). See SUNSTEIN ET AL., *supra* note 94, at 154 n.8. Steven Pinker has traced the underlying

Nor is Baum the first to apply insights from psychology to judicial decision making. “Behavioral law and economics” draws heavily on cognitive psychology to portray human decision making as boundedly rational and as incorporating all manner of biases and heuristics that lead to regular departures from rationality.⁹⁶ This has led to a tremendous amount of interesting legal scholarship, some of which has focused specifically on the judging process.⁹⁷ There are other examples. Lawrence Wrightsman has devoted an entire volume to various applications of psychology to judicial decision making.⁹⁸ Dan Simon has developed a psychological model of judicial decision making.⁹⁹ And these are only a few.

The portrait that emerges from this growing body of work is messy and complex. Judges are susceptible to all sorts of influences and psychological processes as they make decisions, only some of which are consistent with the dispassionate, rational, Olympian figure at the heart of our conception of judging. In this respect judges are—like the rest of us—human.

A substantial part of Baum’s contribution here is that he underscores this point. Political scientists have developed a conception of judicial behavior that, in placing a desire to achieve policy goals as its centerpiece, departs from reality. Legal academics, though perhaps adhering less consistently to a single, coherent model of how judges act, likewise tend to assume that judges are driven largely by legal doctrine. Both camps have remained largely oblivious not only to one another, but

psychological research back to the 1950s. *See* Posting of Steven Pinker to The New Republic: Open University, <http://www.tnr.com/blog/openuniversity?pid=35618> (Sept. 4, 2006, 14:03 EST).

96. *See generally* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1475 (1998) (arguing that “behavior is systematic and can be modeled” and providing numerous examples of such models); Korobkin & Ulen, *supra* note 46, at 1058 (arguing that this new approach allows scholars “to understand the incentive effects of law better than modern law and economics is able to do by enlisting more sophisticated understandings of both the ends of those governed by law and the means by which they attempt to achieve their ends”).

97. *See, e.g.*, Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163 (2000); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); Adam J. Hirsch, *Cognitive Jurisprudence*, 76 S. CAL. L. REV. 599 (2003); Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199 (2006); Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227 (2003); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998).

98. LAWRENCE S. WRIGHTSMAN, *JUDICIAL DECISION MAKING: IS PSYCHOLOGY RELEVANT?* (1999). Wrightsman covers some of the same ground as Baum, but does so within the framework of the attitudinal model. He assumes that policy goals drive decision making, and explores how the concept of “motivated reasoning” might enable judges with differing policy goals to come to divergent assessments of the same case. *Id.* at 55-56.

99. *See* Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1 (1998).

to the rest of social science (with economics being a notable exception in the case of legal scholars).¹⁰⁰ This is changing. The legal academy has, for example, become increasingly receptive to the sorts of quantitative empirical analysis practiced by political scientists. At least as between law and political science, then, “interdisciplinary ignorance” seems to be in moderate decline.¹⁰¹ Psychology is a relative latecomer, but one with significant insights that have themselves found increasing play in the depiction of judicial behavior.

The complex, human judge presents a difficult creature for the legal system.¹⁰² We cannot count on him to reliably follow the law, or even to reliably decide cases consistent with some relatively constant, underlying conception of good policy. Indeed, given the number of cases on his docket and the amount and nature of assistance provided by his law clerks, it may not even be that we can meaningfully count on him to “decide” some of the cases before him at all.¹⁰³ Not surprisingly, any effort to take all of this complexity into account would make for difficult prediction, which is why academic models tend toward simplification.¹⁰⁴ The fewer the variables under consideration, the easier it tends to be to account for the impact of those variables.

But what makes for bad, or at least cumbersome and inelegant, social science may be necessary in the context of legal reform. Efforts to refine the institutional context in which judging takes place—that is, to structure the judicial role in such a way as to channel actual judicial behavior closer to ideal judicial behavior—are likely to benefit from more developed knowledge of judicial psychology. Institutional reform based on the sort of necessarily incomplete picture of judicial behavior imagined by the predominant models may be undesirable simply because it fails to account for all of what is driving the phenomena sought to be addressed. Under the legal model, for example, the response to a series of bad decisions is to call for better law. But if the law is insufficiently determinate to compel the “right” results in every case,

100. See Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251 (1997); Gerald N. Rosenberg, *Across the Great Divide (Between Law and Political Science)*, 3 GREEN BAG 2D 267 (2000).

101. See Posting of William Ford to Empirical Legal Studies: Blog Forum—Interdisciplinary Ignorance and the Great Divide, http://www.elsblog.org/the_empirical_legal_studi/2006/10/blog_forum_inte.html (Oct. 1, 2006, 23:10 EST).

102. For a discussion of this phenomenon with specific reference to behavioral law and economics, see Jeffrey J. Rachlinski, *The “New” Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739, 748-52 (2000).

103. See Oldfather, *supra* note 19, at 770-71.

104. “In theory-making, descriptive accuracy is purchased at a sacrifice of predictive power.” RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 263 (2001).

and cannot realistically be made specific enough to compel those results in all or most of the cases that might arise, then such a remedy will be incomplete. Alternatively, such regulation may have unintended consequences. If we accept the attitudinal model's assumption that ideology is the driving force behind judicial behavior, then we might consider altering judicial selection procedures to exclude or discourage those with a strong history of political activity from becoming judges. But in so doing, we might inadvertently lower the quality of judging if political activity turns out to be positively correlated with some trait that we accept as desirable in judges, such as life experience or raw intelligence.¹⁰⁵

Only by first locating the potential weak points in the judicial psyche can we hope to create institutions and develop mechanisms that serve as prophylactics against any resulting undesired consequences. Baum's analysis provides some examples. If mere contact with personal audiences tends to skew judicial behavior in what we conclude are undesirable ways, then we might want to rethink the way we go about regulating those relationships. And if some of the influences seem to be beyond direct regulation, then we should consider mechanisms for indirect regulation. We might, for example, be willing to entertain the possibility of enhanced restrictions on, or greater disclosure and monitoring of, interactions between judges and policy or legal groups. We are considerably less likely to regulate the relationships between judges and their families or social groups. If we conclude that the latter sorts of interactions are likely to have pernicious effects, we will need to explore alternative means of attempting to channel judicial behavior in more appropriate directions, such as efforts to make the process of judging more transparent in general.¹⁰⁶

Of course, a commitment to taking psychology into account presents its own, parallel set of dangers. An incomplete or inaccurate psychological account can just as easily produce prescriptions that misdirect behavior as an erroneous account generated on any other basis. It may well be that the process of becoming a judge actually does insulate judges from some of the psychological shortcomings that afflict

105. This dynamic is hardly unique to this context. For example, the risk of such unintended consequences is one of the drawbacks of informational regulation. Oldfather, *supra* note 19, at 785-87.

106. I have advanced one such proposal elsewhere. *Id.* at 795-801.

most humans.¹⁰⁷ There are other reasons to suspect that the insights of psychology ought not to be too aggressively applied to judging. Greg Mitchell has made such a point in arguing that much of the early work in behavioral law and economics is insufficiently grounded in, or too aggressively extends, the psychological research on which it is based.¹⁰⁸ What is more, psychology may ultimately tell us that people possess certain traits only intermittently, depending on context, mood, and so forth.¹⁰⁹ Thus a focus on the apparent revelations of psychology might lead to an overemphasis on the identified features of behavior to the exclusion of unstudied, and thereby unappreciated but potentially powerful, behaviors.

These points are well taken. Still, the response cannot be simply to declare the questions too difficult to address. A complete understanding of human—and thus judicial—behavior remains far off, if it is attainable at all. In the meantime, we must choose whether to continue with the present design of our judicial system or make any of a number of potential modifications to it.¹¹⁰ These choices must be informed, and undertaken with appropriate caution. Thus we should pursue the task by way of methodological pluralism, pursuant to which a given problem should be studied using as many methods as available.¹¹¹ At least as a default position, reforms ought to be fashioned in such a way as to “do no harm”—that is, be designed to minimize their unintended consequences.¹¹² This is not to advocate a general aversion to change. The status quo may be, and in many corners of the judiciary undoubtedly is, so unacceptable as to warrant some amount of risk that a reform will not have its intended or anticipated effects. And bold reform might serve goals beyond its instrumental effects, such as by enhancing perceptions of judicial legitimacy. None of these things are inconsistent with the sort of prudence involved in adopting a broad perspective.

This approach should be coupled with what we might call “theoretical agnosticism.” From a normative perspective, the proper

107. See generally Frederick Schauer, *Is There a Psychology of Judging?*, in *THE PSYCHOLOGY OF JUDICIAL DECISION MAKING* (David E. Klein & Gregory Mitchell, eds.) (forthcoming 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1015143.

108. Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 *GEO. L.J.* 67, 73-74 (2002).

109. *Id.* at 87-119.

110. For an overview of the sorts of modifications that have been proposed or actually made, in the context of appellate courts, see DANIEL J. MEADOR ET AL., *APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL* 421-570, 951-1057 (2006).

111. Mitchell, *supra* note 108, at 127-32.

112. *Id.* at 132.

nature of the judicial role is both contestable and contested.¹¹³ Those charged with the task of institutional design and modification must accordingly avoid becoming wedded to any particular account of judicial motivations or capacities. They must instead draw on all of what is available, and remain mindful of the likelihood that no single theory or method will capture all of the factors at play. In this respect it is the institutional architects, rather than the judges, who must strive for something approaching omniscience.

V. CONCLUSION

The belief that those charged with designing the institutions and procedures in which judges work can take appropriate account of all relevant inputs may be only slightly more realistic than the belief that the strategic judge can do so. Still, the appropriate response is not to wait for the day we develop a comprehensive understanding of human, and thus judicial, behavior. That day may never come. And even if it does, we cannot afford to wait. Judges do not have the luxury of deferring rulings on complex, contested questions that arise in litigation until the underlying science is settled. Neither should we defer questions of how best to design institutions to shape judicial behavior until we have a complete sense of how specific modifications might interact with human psychology. We should instead act with a full understanding that our knowledge is provisional and subject to revision, and that mistakes will accordingly be made. Such is the way of human institutions.

113. See generally Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121 (2005) (discussing judicial inaction and providing a framework and various criteria for assessing and debating the adjudicative process).