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Series Foreword

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Ronald Roesch
Series Editor
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Over the years, psychologists have devoted uncountable hours to learning how human beings make judgments and decisions. Legal scholars and political scientists have expended immeasurable intellectual energy trying to understand why those particular human beings who sit on courts act as they do in presiding over and deciding cases. It might seem obvious that fertile intellectual ground lies at the intersection of these disciplines, and certainly some scholars have seen it this way. As far back as 1930, Jerome Frank drew on contemporary psychology to explain judging in his *Law and the Modern Mind*. And yet, nearly eighty years on, the area under active cultivation is quite small. To be sure, psychological concepts crop up in studies of judicial behavior from time to time, but it would be difficult to name a score of published studies that have relied extensively on current ideas and evidence in psychology to generate major theoretical propositions about judging. This is partly because students of judicial behavior traditionally have not engaged deeply with scholarship in psychology, but only partly; it is also the case that psychologists have tended not to focus on the kinds of questions that would be most helpful for understanding what professional judges do. This volume of essays grows from a belief that students of both judges and psychology would benefit from a dramatic expansion of research into the psychology of judicial decision making and closely related behavior.

The study of judicial decision making has indisputably made great strides in recent years, through the labors of hundreds of scholars from political science, law, economics, and other disciplines. Nevertheless, one could argue...
that there remains a lack of both depth and breadth to our understanding of what judges do. Even where scholars can make consensual and successful predictions of a judge’s behavior—for example, that Justice J will vote for the conservative position in case C—they will often disagree sharply about exactly what happens in the judge’s mind to generate the predicted result. (Does Justice J vote conservatively in a conscious effort to further his policy preferences, in an unconscious effort to do so despite a sincere desire to be guided by legal texts, or as a result of a method of interpretation that is independent of his ideology?) And as soon as we move beyond ideology, we enter areas where good predictions are much harder to come by. How will a judge’s decision on a motion, verdict, or appeal be affected by precedents, the presence of an amicus curiae brief from the federal government, the plaintiff’s race, a particularly eloquent brief or oral argument by the defendant’s attorney, the preferences and arguments of other panelists on a collegial court, the opinions of the local bar, the presentations of expert witnesses, other demands on the judges’ time? Why will it be affected that way? Some of these questions have been the subject of excellent scholarly analysis, but none have received definitive answers.

Naturally, various methodological difficulties unrelated to psychology have hindered attempts to study judging, and as scholars devise creative new ways to measure previously intractable concepts, observe hidden behaviors and influences, and design studies so as to control for more confounding factors, our understanding of judging will continue to improve. Still, anyone who has ever tried to choose fairly between serious competing legal arguments must have been struck by the depth, complexity, and mysteriousness of the mental processes involved in the evaluation. It is hard to see how we can hope to achieve a profound understanding of the far more complex and difficult undertaking we call judicial decision making without a close analysis of these underlying mental processes.

Thinking about the intersection of psychology and judicial decision making can do more than help us answer questions that have long troubled scholars; it can also point us toward equally exciting but less explored questions. To give just a few examples: What does it mean to judge well? Are some circumstances, personalities, or cognitive styles more conducive to good judging than others? Do most judges possess special reasoning skills that other people lack? Do judges care what other people think about them, and, if so, how does this affect their decision making? When different motivations come into play at the same time, which have the most influence on judges’ behavior, and why?

While students of judging may be the primary beneficiaries of an engagement with psychology, the topics covered in this book should also interest academics doing basic research in the psychology of expertise, analogical reasoning, judgment and decision-making, and the psychology of small group behavior, with applications to the real-world behavior of professional decision makers rather than ordinary people providing opportunities to test
the limits of basic theories and experimental studies. Do professional judges think the same way as ordinary people? Is their behavior affected by the same forces that affect the behavior of other people? If not, in what ways do their thinking and behavior differ, and why? Confronting questions like these can only strengthen research in psychology.

The authors of the essays in this book do not always agree about exactly how we should blend the study of psychology and judging or what we can expect to learn from doing so. But all agree that more rigorous thinking about the nature of the mental processes involved in judges’ work will lead to deeper understandings of professional judging and psychology generally. Their essays can best be understood as invitations to other scholars to join in this enterprise, offering suggestions for research and surveying the theoretical and methodological promise and problems of different approaches. The authors occasionally present original empirical evidence, but more often their emphases are theoretical. In fact, the authors were encouraged to engage in free speculation, with the intention that the book raise more questions than it answers.

The book is divided into three sections. Essays in the first two sections are concerned with the empirical investigation of decision making. The third part of the book raises questions about whether and how we can evaluate judicial performance, with implications for the possibility of improving judging through the selection and training of judges and structuring of judicial institutions.

What chiefly distinguishes the first set of essays from the second is the perspective from which each set approaches the incorporation of psychology into the study of judging. Essays in the first section take as their starting point the fact that judges are human beings. From this perspective, one asks, “Knowing what we do about people generally, what should we expect of people put in the positions judges are and asked to do what they do?” For example, people generally tend to engage in certain suboptimal reasoning processes at times (see Guthrie, Rachlinski, & Wistrich, 2001). How often and under what circumstances does judicial reasoning fall short in these ways? Among the general population, people vary in their characteristic ways of thinking (Stanovich, 1999). What kind of variation in cognitive styles might we find among judges, and with what impact on their behavior and the outputs of the judicial system? Or, to take the most common theme in the first section’s essays, human beings act on a wide range of motivations. Which of those motivations influence the work of judges, and how?

An alternative approach to the psychology of judicial decision making eschews this focus on what judges have in common with other people and instead begins with what makes, or is supposed to make, judges different from other people or the mental processes judges employ different from the thinking other people do. The second set of essays begins with Frederick Schauer’s argument for this approach. The other essays either engage this argument directly or direct our attention to specific tasks judges are required to perform or particular modes of reasoning in which they are expected to engage.
The essays in the third part of the book turn from what we know and can learn about how judges make decisions to reflections on the assessment of judicial performance. Understanding judicial behavior is not, after all, simply an academic exercise. Judges wield substantial power, including the power to make policy, and we naturally want our judges to exercise that power as fairly, competently, and appropriately as possible. The ability to draw on research to improve judging, say by predicting which of two candidates was more likely to excel as a judge or how court practices could be changed to help sitting judges perform better, would provide important practical benefits to society. In the final essay of the book, Daniel Farber and Suzanna Sherry make the best of current knowledge to offer some prescriptions. But the dominant focus of the essays in this section, beginning with Gregory Mitchell’s, is on the challenges posed by this project, on the theoretical side as we attempt to determine precisely what it means for judges to perform well, and on the methodological side as we seek to assess judges’ performance.

The practical and technical difficulties involved in studying judges are daunting, to say the least. Psychological research most often entails conducting experiments with the subjects of interest, but this method can take us only so far in studying judges. Judges are far from the most accessible subjects and typically are considerably less willing than undergraduates to participate in experiments. Even when researchers can persuade judges to participate (e.g., Guthrie, Rachlinski, & Wistrich, 2001), the experiments must necessarily lack something of the complexity and unpredictability of real-world judging situations; more importantly, they lack the stakes. The challenges involved in analyzing judges’ thinking occupy the attention of a number of the authors here.

Methodological challenges is just one of several themes running through the book. Two others are particularly important. One of these is skepticism about the theoretical approaches to judicial decision making that dominate the political science and legal literatures. Viewed through the lens of psychological research, these approaches (fully described in Lawrence Baum’s chapter in this volume) can appear both overly simplistic and unrealistically demanding. The essays point to a number of ways in which the dominant theories seem psychologically implausible and in which we can improve our understanding of judging by going beyond them.

The other major theme is the importance of differences across individuals, tasks, and situations. To be sure, students of judging have not simply ignored such differences in the past. But it seems fair to say that—perhaps because of excessive attention to the U.S. Supreme Court—we have often given less attention than we should to variation in types of cases judges hear, the environments in which they operate, and the exact nature of the reasoning tasks they are asked to perform. Psychology teaches us that we should not expect the mental processes judges engage in to remain invariant across very different conditions. It also teaches us to expect variation across individual judges in what they want to accomplish and how they think, but this kind of variation in particular has been the subject of precious little analysis.
As noted, the essays in this volume raise more questions than they answer. Furthermore, they are naturally not comprehensive in their coverage, and there may be some topics discussed only briefly here that should be part of a full-fledged psychology of judging. For example, psychologists in recent years have devoted considerable attention to the role—both positive and negative—that emotion plays in people’s thinking (Forgas, 2000; Thagard, 2006). This could be an important area of inquiry for students of judges (see Posner, 2008, pp. 105–107). But the aim of this volume is not to lay out a complete framework for the study of psychology in judicial decision making; rather it is meant to encourage more scholars to engage in that study and provide suggestions for where to begin. To the extent it convinces readers that doing so can be intellectually exciting and practically important, it will have succeeded in its task.

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