
The Psychology of Judicial Decision Making

American Psychology-Law Society Series

Series Editor

Ronald Roesch

Editorial Board

Gail S. Goodman

Thomas Grisso

Craig Haney

Kirk Heilbrun

John Monahan

Marlene Moretti

Edward P. Mulvey

J. Don Read

N. Dickon Reppucci

Gary L. Wells

Lawrence S. Wrightsman

Patricia A. Zapf

Books in the Series

The Psychology of Judicial Decision Making

David Klein and Gregory Mitchell

Trial Consulting

Amy J. Posey and Lawrence S. Wrightsman

Death by Design

Craig Haney

Psychological Injuries

William J. Koch, Kevin S. Douglas, Tonia L. Nicholls, and Melanie L. O'Neill

Emergency Department Treatment of the Psychiatric Patient

Susan Stefan

The Psychology of the Supreme Court

Lawrence S. Wrightsman

Proving the Unprovable

Christopher Slobogin

Adolescents, Media, and the Law

Roger J. R. Levesque

Oral Arguments Before the Supreme Court

Lawrence S. Wrightsman

God in the Courtroom

Brian H. Bornstein and Monica K. Miller

Expert Testimony on the Psychology of Eyewitness Identification

Edited by Brian L. Cutler

The Psychology of Judicial Decision Making

Edited by
David Klein
Gregory Mitchell

OXFORD
UNIVERSITY PRESS
2010

OXFORD
UNIVERSITY PRESS

Oxford University Press, Inc., publishes works that further
Oxford University's objective of excellence
in research, scholarship, and education.

Oxford New York
Auckland Cape Town Dar es Salaam Hong Kong Karachi
Kuala Lumpur Madrid Melbourne Mexico City Nairobi
New Delhi Shanghai Taipei Toronto

With offices in
Argentina Austria Brazil Chile Czech Republic France Greece
Guatemala Hungary Italy Japan Poland Portugal Singapore
South Korea Switzerland Thailand Turkey Ukraine Vietnam

Copyright © 2010 by Oxford University Press.

Published by Oxford University Press, Inc.
198 Madison Avenue, New York, New York 10016

www.oup.com

Oxford is a registered trademark of Oxford University Press

All rights reserved. No part of this publication may be reproduced,
stored in a retrieval system, or transmitted, in any form or by any means,
electronic, mechanical, photocopying, recording, or otherwise,
without the prior permission of Oxford University Press.

Library of Congress Cataloging-in-Publication Data
The psychology of judicial decision making / edited by David Klein, Gregory Mitchell.
p. cm. — (American Psychology-Law Society series)
Includes bibliographical references.
ISBN 978-0-19-536758-4
1. Judicial process—United States—Psychological aspects. I. Klein, David E., 1970—
II. Mitchell, Gregory, J.D.
KF8775.P78 2010
347.73'14019—dc22

2009023896

9 8 7 6 5 4 3 2 1

Printed in the United States of America
on acid-free paper

Series Foreword

This book series is sponsored by the American Psychology-Law Society (APLS). APLS is an interdisciplinary organization devoted to scholarship, practice, and public service in psychology and law. Its goals include advancing the contributions of psychology to the understanding of law and legal institutions through basic and applied research; promoting the education of psychologists in matters of law and the education of legal personnel in matters of psychology; and informing the psychological and legal communities and the general public of current research, educational, and service activities in the field of psychology and law. APLS membership includes psychologists from the academic research and clinical practice communities as well as members of the legal community. Research and practice is represented in both the civil and criminal legal arenas. APLS has chosen Oxford University Press as a strategic partner because of its commitment to scholarship, quality, and the international dissemination of ideas. These strengths will help APLS reach its goal of educating the psychology and legal professions and the general public about important developments in psychology and law. The focus of the book series reflects the diversity of the field of psychology and law, as we continue to publish books on a broad range of topics.

Ronald Roesch
Series Editor

Contents

Series Foreword v

Contributors ix

Introduction xi

Part I. Judges and Human Behavior

- 1 Motivation and Judicial Behavior: Expanding the Scope of Inquiry 3
Lawrence Baum
- 2 Multiple Constraint Satisfaction in Judging 27
Jennifer K. Robbennolt, Robert J. MacCoun, and John M. Darley
- 3 Top-Down and Bottom-Up Models of Judicial Reasoning 41
Brandon L. Bartels
- 4 Persuasion in the Decision Making of U.S. Supreme Court Justices 57
Lawrence S. Wrightsman
- 5 Judges as Members of Small Groups 73
Wendy L. Martinek
- 6 The Supreme Court, Social Psychology, and Group Formation 85
Neal Devins and Will Federspiel

viii Contents

Part II. Judging as Specialized Activity

- 7 Is There a Psychology of Judging? 103
Frederick Schauer
- 8 Features of Judicial Reasoning 121
Emily Sherwin
- 9 In Praise of Pedantic Eclecticism: Pitfalls and Opportunities in the
Psychology of Judging 131
Dan Simon
- 10 Judges, Expertise, and Analogy 149
Barbara A. Spellman
- 11 Thresholds for Action in Judicial Decisions 165
Len Dalglish, James Shanteau, and April Park
- 12 Every Jury Trial Is a Bench Trial: Judicial Engineering of Jury
Disputes 183
C. K. Rowland, Tina Traficanti, and Erin Vernon
- 13 Searching for Constraint in Legal Decision Making 203
Eileen Braman

Part III. Evaluating and Improving Judging

- 14 Evaluating Judges 221
Gregory Mitchell
- 15 Defining Good Judging 249
Andrew J. Wistrich
- 16 Expertise of Court Judges 269
James Shanteau and Len Dalglish
- 17 Cognitive Style and Judging 279
Gregory Mitchell and Philip E. Tetlock
- 18 Building a Better Judiciary 285
Daniel A. Farber and Suzanna Sherry
- References 297
- Index 329

Contributors

Brandon Bartels is Assistant Professor of Political Science, George Washington University.

Lawrence Baum is Professor of Political Science, The Ohio State University.

Eileen Braman is Assistant Professor of Political Science, Indiana University.

Len Dalglish is Professor of Decision Making, University of Stirling, and head of the Decision Making program of HealthQwest.

John Darley is Warren Professor of Psychology, Princeton University.

Neal Devins is Goodrich Professor of Law and Professor of Government, College of William and Mary.

Daniel Farber is Sho Sato Professor of Law, Boalt Hall, UC-Berkeley.

Will Federspiel is an associate at McGuireWoods.

David Klein is Associate Professor of Politics, University of Virginia.

Robert MacCoun Professor of Law Public Policy, UC-Berkeley.

Wendy Martinek is Associate Professor of Political Science, Binghamton University.

Gregory Mitchell is Daniel Caplin Professor of Law, University of Virginia.

April Park is a Ph.D. Candidate in Psychology, Kansas State University.

Jennifer Robbennolt is Professor of Law and Psychology, University of Illinois.

C. K. Rowland is Professor Emeritus of Political Science at Kansas University and Founder, Litigation Insights.

Frederick Schauer is David and Mary Harrison Distinguished Professor of Law, University of Virginia.

x Contributors

James Shanteau is University Distinguished Professor of Psychology, Kansas State University.

Suzanna Sherry is Herman O. Loewenstein Professor of Law, Vanderbilt University.

Emily Sherwin is Professor of Law, Cornell Law School.

Dan Simon is Professor of Law and Psychology, University of Southern California.

Barbara Spellman Professor of Law and Professor of Psychology, University of Virginia.

Philip Tetlock is Professor of Organizational Behavior and Mitchell Chair in Leadership, UC-Berkeley.

Tina Traficanti is a attorney at Litigation Insights.

Erin Vernon is a law student at Duke University.

Andrew Wistrich is United States Magistrate Judge, Central District of California.

Lawrence Wrightsman is Professor Emeritus of Social Psychology, University of Kansas.

Introduction

David Klein

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.

This volume grew out of a workshop held in Charlottesville, Virginia, in March, 2007. The editors and contributors are grateful to the National Science Foundation for support of the workshop and book.

