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## Judges on Judging: A Bibliography.

Shirley S. Abrahamson

Susan M. Fieber

Gabrielle Lessard

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## JUDGES ON JUDGING: A BIBLIOGRAPHY<sup>1</sup>

SHIRLEY S. ABRAHAMSON\*  
SUSAN M. FIEBER\*\*  
GABRIELLE LESSARD\*\*\*

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### I. INTRODUCTION

The genesis of this bibliography was Judge Henry J. Friendly's observation that "the question how judges go about the business of judging continues to hold interest—although apparently more for lawyers and law professors than for judges."<sup>2</sup> Although decision-making has traditionally been viewed as a mysterious phenomenon not amenable to precise description, both trial and appellate judges have long been exploring the mental processes through which they reach judgment. Judges have been examining the "is" and the "ought"—how they actually reach decisions and how they believe they should be doing it.

Of course, judging and decision-making are not activities limited to judges and courts of law. They are pervasive, recurring human exper-

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\* B.A., New York University; J.D., Indiana University—Bloomington; S.J.D., University of Wisconsin—Madison. Justice, Wisconsin Supreme Court.

\*\* B.A., University of Wisconsin—Milwaukee; M.B.A., University of Wisconsin—Madison. Special Assistant to Justice Abrahamson.

\*\*\* B.A., Boston College; J.D., University of Wisconsin. Law Clerk to Justice Abrahamson.

Our thanks to Richard Bonnie, Paul Slovic, David Wexler, and the other members of the John D. and Catherine T. MacArthur Foundation Research Network on Mental Health and the Law, of which Justice Abrahamson is a member, for their discussions about decision-making and their help in locating literature from other disciplines on decision-making. Also, thanks to Jane Colwin, Aaron Retish, Elaine Sharp, Jeffrey Worthen, Betsy Wright, and the other members of the staff of the Wisconsin State Law Library for their help and their inexhaustible patience.

1. The *Ohio State Law Journal* periodically runs a column entitled "Judges on Judging," which researchers may find useful. This project is unrelated to the column.

2. Henry J. Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 *YALE L.J.* 218, 229 (1961).

iences. Over the years, the processes of judging and decision-making have been studied in disciplines as diverse as accounting, economics, education, engineering, law, management science, marketing, medicine, philosophy, political science, and psychology. Indeed, in psychology, behavioral decision research has emerged as a separate field of study and a recognized subdiscipline.

Several themes appear in the literature on decision-making, regardless of the arena of decision-making or the identity of the decision-maker. First, decisions fall along a continuum of difficulty. Second, decision-making requires information processing and, as information becomes more plentiful and more complex, decision-making becomes increasingly difficult. Third, decision-making involves choice and uncertainty. Fourth, intuition appears to be a major component of many decisions. Finally, the effect of individual bias on decisions is a problem for decision-makers and decision researchers alike. Not surprisingly, we uncovered these major themes of behavioral decision research in the writings of judges themselves and in social scientists' studies of decision-making by trial and appellate judges, especially the United States Supreme Court, which some researchers view as having the attributes of small-group decision-makers.

While working on the companion piece, the Rosenfield Family Lecture, "Judging in the Quiet of the Storm," we increasingly felt a need for a bibliography of writings by judges on judging. Not finding one, we decided to compile our own. As we entered the task, we understood why others had not undertaken the project. There is a huge body of writings on judicial decision-making, and it is not possible to tell at a glance which authors are judges.

To narrow the task, we made some preliminary decisions: We would begin our search for judges' writings with the year 1921, with the publication of *The Nature of the Judicial Process* by Benjamin N. Cardozo. Our bibliography would supplement Cardozo's work, reflecting his influence on subsequent decision-makers' thinking. We would not seek out collections of the correspondence or personal papers of individual judges, biographies of judges by other judges, annual reports on the state of the judiciary, book reviews, tributes, or eulogies. We would, however, include these items when we encountered them by chance, if they contained relevant information.

To begin the collection process, we searched the computerized *Legal Resource Index*, published by Information Access Company, for articles published since 1980, and the *Index to Legal Periodicals*,

published by the H.W. Wilson Company, for articles published before 1980. We searched for books through the online card catalogues of the University of Wisconsin—Madison and the Wisconsin State Law Library.

Because we also expected judges to publish in “non-law” periodicals, we went to the *Readers’ Guide to Periodical Literature*, which proved a useful resource. We also explored the *Social Science Index*. Our preliminary research indicated, however, that an in-depth search of the *Social Science Index* would not be fruitful, because judges rarely publish in social science journals. As we searched, some writings led us to others. For example, the bibliography from Henry J. Abraham’s *The Judicial Process* (Oxford University Press 1986) was very helpful.

In compiling this bibliography, our greatest difficulty was in delineating the subject matter. Although it is arguable that anything written by a judge sheds light upon that judge’s thinking and decision-making, we recognized a need to draw some lines in our selection of materials. Nevertheless, it will quickly become apparent to users of the bibliography that we have taken an inclusive approach to the writings. Although many entries deal directly with the decision-making process, others cover it in a tangential way, and still others require the reader to draw inferences about the author’s philosophy of decision-making. We tried to err on the side of inclusiveness; however, we would not be surprised if some relevant works have been missed.

Despite errors of both inclusion and exclusion, we hope this bibliography will be useful to those interested in decision-making, particularly judicial decision-making. We enjoyed observing how “hot” judicial issues, and the style and substance of judges’ writings, changed over the years. If our broad-brush approach seems to place demands on the user, that is our intention. We do not want to limit each user’s opportunity to determine what he or she may find of interest.

We encourage readers to apprise us of new writings or those we may have overlooked. Perhaps our bibliography will be the springboard for more focused collections of writings on judicial decision-making and a starting place for judges and non-judges who seek further insight into the judicial decision-making process.

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