

**ARTSSCI 4MN1 / Theories of Decision-Making and Judgment:
A Practical Course for the Indecisive Artsci**

January 18 - 19, 2020

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Introduction

Making good decisions and cultivating judgment is not something that can be learned in a weekend– but we can spend some time thinking about it together! (And learn about law, psychology, and feminist theory along the way.) This course is grounded in law. Our jumping off point is how judges make decisions. From there we will branch out to other disciplines, notably psychology and feminist theory. Our aim is to help you feel more comfortable making decisions for yourself and decisions that affect other people.

Readings

This detailed syllabus can guide your reading, as there is a fair amount of material to get through. Feel free to focus on the readings of greatest interest to you.

Assignments

Reading response paper: Please submit one reading response paper of 300-400 words by Wednesday January 15, 2020 at 5 pm to leannagkatz@gmail.com and dcnedelsky@gmail.com. You may respond to one or more of the questions below, compare and contrast readings from different modules, or write about something else of your choosing as long as it relates to the readings.

Journal entry: Please write a journal entry of approximately 250 words about one problem you are dealing with – for example a hard choice you have to make or a recurring choice you struggle with. Describe why you are having trouble making this choice. The idea is to have a concrete problem in mind as you go through the course (though of course we will think about other decisions as well). Please choose a decision you would feel comfortable discussing in class, but we are not asking you to send us the journal entry in advance.

Module 1: The Law, Decision-Making and Judgment

OpenLearn Website: Week 5, Judges Read section 1 - section 6.2, including examples boxes, but skip exercises.

↳ <https://www.open.edu/openlearn/ocw/mod/oucontent/view.php?id=72115>

A brief introduction to key concepts in legal reasoning. Do not spend much time here, just click through to get an idea of basic concepts (e.g. judicial precedent, syllogistic reasoning, duty of care).

Good Judgment: Making Judicial Decisions by Justice Robert Sharpe, Chapter 6 Disciplined Judicial Decision-Making Read p. 125-145.

Justice Sharpe of the Ontario Court of Appeal writes about a judge's role based on his experience. He describes the "discipline of reasons," that is, how writing reasons constrains decision-making. He also tackles how to deal with the "judicial hunch." In his conclusion, he lists indicia of what makes a good decision.

Chapter 12 A Judicial State of Mind Read pages 249-269.

Justice Sharpe identifies and discusses core values for judging: integrity, independence, impartiality and compassion.

Reflection question: What are your core values? Feel free to riff on the values identified by Justice Sharpe or depart entirely from the qualities he identifies. Why do these values resonate with you?

Administrative Tribunals and the Courts: An Evolutionary Relationship by Former Chief Justice McLachlin. <https://www.scc-csc.ca/judges-juges/spe-dis/bm-2013-05-27-eng.aspx>

Former Chief Justice of the Supreme Court of Canada Beverley McLachlin describes how administrative decision makers are different from courts of law and the tension between the rule of law (and values of fairness, consistency, non-arbitrariness) and the benefits of administrative tribunals (efficiency and expertise).

Reflection question: Think about how you would like individuals who make decisions that affect your life to act. What constraints should be placed on their decision-making? Consider instances when you have interacted with administrative decision-makers. Did you feel they made fair decisions?

Strange Alchemy of Life by Justice Albie Sachs

Chapter 2 Tick Tock The Working of a Judicial Mind. Read pages 47-58.

Albie Sachs, a former judge on the Constitutional Court of South Africa, gives a different take on a judge's role. Admitting "law depends heavily on mystique," he demystifies his role by speaking about his far-from-linear thought process.

Reflection questions: Contrast Justices Sharpe and Sachs' descriptions of how they reach a decision. Do you see your own thought patterns reflected more in the decision of one judge or the other? Do you ever find yourself making the same sort of moves as Justice Sachs – justifying a decision as more rational than you at one point thought they were?

Module goals:

- An introduction to some fundamental concepts in the legal system, in particular judicial and administrative decision-making.
- Learn three judges' perspectives on their role as decision-makers and as part of the legal system. Develop an understanding of the principles underlying judicial decision-making and judgment, its limits and failures.
- Understand some of the constraints on legal decision-making and the extent to which those constraints are real or illusory.

Overall reflection question for Module 1: Write a paragraph capturing the essence of what judicial decision-making involves. Is judicial decision-making a unique form of decision-making, or does it resemble decision-making in your own life? In what ways is it similar and different?

Module 2: The Psychology of Decision-Making

We look to psychology and behavioral economics to open up from the legal framework and explore what other disciplines say about how we make decisions, and how we can make better decisions. These disciplines provide an empirically grounded approach, but there are limits to what they can tell us. Do these lessons confirm or contradict what we learned about legal decisions?

Ted Radio Hour: Decisions decisions decisions (48 minutes)

www.npr.org/programs/ted-radio-hour/519264798/decisions-decisions-decisions

Malcolm Gladwell: Do More Choices Make Us Happier?

Gladwell says the key to making decisions is to recognize that we don't always know what we want. He says what we're inclined to state about our wants and needs is different from what is actually the case. His prescription is that since we cannot know the consequences of a given choice, we should simply stop worrying about it.

Sheena Iyengar: Why Are Some Choices So Paralyzing?

Sheena Iyengar says we're often asking ourselves two questions: what do I want and what should I choose? She has an interesting take on how our culture influences our perception of choice. American individualism sees choice as a virtue whereas collectivist cultures see more value in protecting us from bad choices.

Reflection questions: When have you found yourself caught between the choice you want to make and the choice you should make? How did you reconcile the two?

Do you feel the level of choice in your life is commensurate to the amount of choice you'd like to have? In what areas would you prefer to have more choice? Less?

Ruth Chang: How Can Making Hard Choices Empower Us?

Philosopher Ruth Chang offers 5 steps for making hard choices, that is, choices where there is no best option.

Step 1: Figure out what matters in the choice between the alternatives

Step 2: Gather the information you can.

Step 3: Recognize you're in a hard choice, no best answer.

Step 4: Commit to one option; create a reason to pursue that option.

Step 5: When you commit, you create your own identity.

In short, hard choices offer a chance to *make reasons for ourselves* and in doing so, be the person we want to be. It's a chance to exercise our normative power and put ourselves behind a decision.

Reflection question: Has Chang's advice for making hard decisions – choose an option and put your agency behind it – been borne out by your experience? Do you see a downside to making choices that become a narrative you tell about your life?

Dan Ariely: When Are Our Decisions Made For Us

Dan Ariely, Professor of Psychology and Behavioural Economics' ideas on choice architecture tell us both that many of our decisions are made for us *and* that we have control by designing the environments in which we make decisions.

Reflection question: How often do you think your decisions are made for you simply by the way they are presented to you? How might you craft circumstances to enable you to make good decisions when these decisions are important to you?

Reflection question for Ted Radio hour: what lessons do you take away from these talks about making decisions? Do you see overlap between these various ideas?

Heart Versus Head: Do Judges follow the Law or Follow Their Feelings by Andrew J. Wistrich, Jeffrey J. Rachlinski, Chris Guthrie

Read Sections I and II (p. 856-874), IV D + E (p. 887-893), V A, C(iii) (898-900, 909-910), VI (911-912). Skip footnotes and pay particular attention to p. 862-874 on social psychology's findings on the effect of emotion on decision-making.

<http://texaslawreview.org/wp-content/uploads/2015/08/Rachlinski-93-4.pdf>

This article studies the role of emotions when judges make decisions. It bridges modules 1 and 2 by applying the psychology of decision-making to the legal context. Consider to what extent this paper agrees or disagree with Justices Sharpe and Sachs' view of what judges do. How do emotions affect your decision making in a routine and invisible basis?

Module goals:

- Understand the basics of what psychology can tell us about how we make decisions and what fosters good decision-making.
- Develop a sense of when emotions, evidence, the availability of options, and the framework for the decision, influences decisions you make.

Overall reflection question for Module 2: What sources of information constrain your decisions when you make hard choices? How might you change your environment or the information you're exposed to in order to put yourself in a position to make a better decision?

Module 3: Feminist Theory and Broadening Perspectives

Ezra Klein and Robert Sapolsky on the Toxic Intersection of Poverty and Stress

<https://www.stitcher.com/podcast/vox/the-ezra-klein-show/e/58359498>

Ezra Klein's conversation with neurologist Robert Sapolsky continues our exploration into what science can teach us about decision making. How does poverty impact our brain development and the way we make decisions? How should this be taken into account as we develop social policy? Consider the lessons for you as an individual, for the law, and for how society should design institutions.

Reflection question: What is an area of life where you notice you have a stress brain response? What would it take for you to think your way out or otherwise overcome that thought pattern? Are you the "you" you want to be while you are stressed?

The Reciprocal Relation of Judgment and Autonomy: Walking in Another's Shoes and Which Shoes to Walk In by Jennifer Nedelsky

Law Professor Jennifer Nedelsky reframes our thinking from an individualist mentality to a relational standpoint – that is, seeing ourselves in relation to others. She develops the idea of relational autonomy, understanding that we are self-governing agents who are constituted by our relationships with others. She introduces these ideas in the first part of the reading. In the second half, she applies them to a real-life decision about whether to wear high-heels. Are these ideas new to how you think about decision making?

Reflection question: Have you previously exercised an "enlarged mentality" when making a difficult decision?

Decide: A Short Story by Blair Hurley

<https://the-toast.net/2015/06/26/decide-a-short-story/>

Creative writing can help break away from formal theories and their limits. Blair Hurley writes about some of the reasons that decision-making strategies may fail: "The problem is, the decision is not two roads diverging in a yellow wood. It is two roads in the wood and a third you think you can see just out of the corner of your eye. It is a fourth dashing through the woods like a wolf. It is a fifth in the sky. It is a sixth in the ground."

Reflection question: Can fiction assist you in developing an "enlarged mentality"?

List the reasons why the theories you've read so far might not actually help you make hard decisions. Does any one idea stand out as the strongest idea, despite your critiques?

The Road Not Taken by Robert Frost

<https://www.poetryfoundation.org/poems/44272/the-road-not-taken>

Frost's poem is often interpreted as a call for non-conformism and taking "the one less traveled by." But Frost warns his readers that this is a tricky poem – the two roads diverging in a yellow wood are "really about the same."

Reflection question: In your experience, is it the case that taking one road over another "has made all the difference"? How does this poem relate to the idea (seen in Ruth Chang and Dan Ariely) that making decisions is deeply constitutive of the stories we create for ourselves?

Module goals:

- Learn about how stress affects decision-making, both structurally and individually.
- Develop an understanding of ideas in relational theory, and how these ideas are absent and present in other theories (like law and psychology).
- Consider how fiction can give voice to profound ideas that also have an academic expression.

Overall reflection question for Module 3: Consider what ideas that you have read seem intuitively true to you versus what ideas you may initially disagree with, but perhaps can provide a useful new perspective? How do the concepts and theories in this section inform your understanding of Modules 1 and 2?