

Fair Procedures

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General

Trials should precede convictions. Hearings should precede deportations. In general, there is a procedurally fair way to reach legal decisions. But many basic aspects of procedural fairness are unclear. In this mini option, we will try to make them a bit clearer.

Procedural fairness is a vast and varied area, so we need to be selective. We will focus on procedures that lead to decisions in specific cases (so, democracy qua procedure won't be discussed). And we will focus on administrative procedures, drawing analogies to other governmental decisions where it is helpful.

More specifically, we'll focus on three topics, which I've chosen because they are individually interesting, important, and topical, and because together they allow us to cover a range of issues.

The first topic is, broadly, *how* decisions should be made. Within this topic, we'll ask: when should we give someone a hearing before deciding how to treat them? The second topic is *the basis on which* decisions should be made. Should we always decide based on reasons, or should we sometimes let chance have a role? The third topic is *who* should decide. Should humans always make public decisions in specific decisions, or should we sometimes let "machines" make them instead?

Times and Location

Tuesdays, weeks 5-7 TT, 3-5pm.
Platnauer Room, Brasenose College.

Format and Expectations

Although I will spend some of the time telling you about the topics, this is not a lecture course. We'll aim to spend most of each class in discussion. It's okay to just listen and think some of the time. But the classes will go better – and you'll have more fun – if everyone is engaged. Say *something* every class.

There is required reading. Make sure you do all of it *before* the relevant class: it's the way to get the most out of class, and it will help us to have a good discussion. The further reading is not required but it will help you understand the topics. It will also be useful for the essay. You should think about the Discussion Questions in advance; even better would be to write short answers to each.

WEEK 5 PARTICIPATION IN PROCEDURES: HEARINGS & TRIALS

Required reading

- J Rawls, *A Theory of Justice* (Harvard University Press 1971), §14/pp 72-28
- J Mashaw, 'Dignitary Process and the Liberal Tradition' in *Due Process in the Administrative State* (Yale University Press 1985)
- R Dworkin, 'Principle, Policy, Procedure' in *A Matter of Principle* (OUP 1986)
- D Galligan, 'The Virtues of Participation' in *Due Process and Fair Procedures* (OUP 1996)
- D Meyerson, 'The Moral Justification for the Right to Make Full Answer and Defence' (2015) 35 OJLS 237

Illustration

- *R v Deputy Chief Constable of Thames Valley Police Force ex p Cotton* [1998] Lexis Citation 1187

Further reading

- R Summers, 'Evaluating and Improving Legal Processes – A Plea for “Process Values”' (1974) 60 Cornell Law Review 1
- S Darwall, 'Two Kinds of Respect' (1977) 88 Ethics 36
- L Kaplow, 'The Value of Accuracy in Adjudication' (1994) 23 Journal of Legal Studies 307
- TRS Allan, 'Procedural Fairness and the Duty of Respect' (1998) 18 OJLS 497
- L Solum, 'Procedural Justice' (2004) 78 Southern California Law Review 181
- A Duff et al, *The Trial on Trial*, vol 3 (OUP 2007), chs 3-5
- G Cananea, *Due Process of Law Beyond the State* (OUP 2016), chs 6 and 7
- C Crummey, 'Why Fair Procedures Always Make a Difference' (2020) 83 MLR 1221
- T Tyler, *Why People Obey the Law* (Princeton University Press 2006), ch 5
- 'Intrinsic vs extrinsic value' in *Stanford Encyclopedia of Philosophy*, especially §2 <https://plato.stanford.edu/entries/value-intrinsic-extrinsic/#WhalntVal>

Discussion questions

- What is the difference between an instrumental value and an intrinsic value?
- Does Dworkin endorse an instrumental account of fair procedures? Does Galligan?
- What are “process values”?
- Does it matter whether people *believe* or *feel* that they have been treated fairly?
- Does fairness entitle an affected person to a hearing, even if there is no realistic chance it would affect the outcome? Does the answer change if the “affected person” is a criminal defendant and the “hearing” is a trial?

WEEK 6 THE BASIS OF DECISIONS: REASONS VS CHANCE

Required reading

- L Kornhauser and L Sager, 'Just Lotteries' (1988) 27 *Social Science Information* 483
- J Elster, 'Taming Chance' in *Solomonic Judgments* (CUP 1989)
- N Duxbury, *Random Justice* (OUP 1999), ch 4
- A Vermeule, 'Rationally Arbitrary Decisions in Administrative Law' (2015) 44 *Journal of Legal Studies* 475
- P Stone, *The Luck of the Draw* (OUP 2011), pp 3-12, 19-42
- G Hersch and T Rowe, 'Lotteries, Queues, and Bottlenecks' in D Sobel and S Wall, *Oxford Studies in Political Philosophy*, vol 10 (OUP 2024)

Illustration

- School Admissions Code, Appendix 2; https://assets.publishing.service.gov.uk/media/60ebfeb08fa8f50c76838685/School_admissions_code_2021.pdf

Further reading

- G Sher, 'What Makes a Lottery Fair?' (1980) 14 *Nous* 203
- J Elster, 'Custody by the Toss of a Coin?' (1988) 27 *Social Science Information* 517
- A Samaha, 'Randomization in Adjudication' (2009) 51 *William & Mary Law Review* 1, pp 8-27
- P Stone, 'Access to Higher Education by the Luck of the Draw' (2013) 57 *Comparative Education Review* 577
- R Perry and TZ Zarsky, "'May the Odds be Ever in Your Favor": Lotteries in Law' (2015) 66 *Alabama Law Review* 1036
- T John and J Millum, 'First come, First Served?' (2020) 130 *Ethics* 179

Discussion questions

- What is a lottery? What is a fair lottery?
- Should public decisions always be based on reasons?
- Are decisions based on lottery necessarily "unreasoned"?
- Should custody decisions ever be made on a randomized basis?
- Are there cases when a lottery would be justified but a queue would not be, or vice versa?
- When two people have equally strong claims, only one of which can be satisfied, is a lottery morally *required*?

WEEK 7 THE NATURE OF DECISION MAKERS: HUMANS VS MACHINES

Required reading

- J Danaher, 'The Threat of Algocracy' (2016) 29 *Philosophy and Technology* 245
- E Volokh, 'Chief Justice Robots' (2019) 68 *Duke Law Journal* 1136
- C Sunstein, 'Algorithms, Correcting Biases' (2019) 86 *Social Research* 499
- A Huq, 'A Right to a Human Decision' (2020) 106 *Virginia Law Review* 611
- B McGurk and J Tomlinson, *Artificial Intelligence and Public Law* (Hart 2025), pp 1-8, 172-179
- J Tasioulas, 'The Rule of Algorithm and the Rule of Law' in C Bezemek, M Potacs, and A Somek (eds), *Vienna Lectures on Legal Philosophy*, vol 3 (Hart 2025)

Further reading

- A Deeks, 'The Judicial Demand for Explainable Artificial Intelligence' (2019) 119 *Columbia Law Review* 1829
- M Zalnieriute et al, 'The Rule of Law and Automation of Government Decision-Making' (2019) 82 *MLR* 425
- R Williams, 'Rethinking Administrative Law for Algorithmic Decision Making' (2021) 42 *OJLS* 468
- K Vredenburg, 'The Right to Explanation' (2022) 30 *Journal of Political Philosophy* 209
- N Frost, 'The Impoverished Publicness of Algorithmic Decision Making' (2024) 44 *OJLS* 780
- S Daly, 'Artificial Intelligence, the Rule of Law, and Public Administration: the Case of Taxation' (2024) 83 *Cambridge Law Journal* 437
- A Huq, 'Artificial Intelligence and the Rule of Law' in M Sevel, *Routledge Handbook of the Rule of Law* (Routledge 2024)
- S Lazar, 'Legitimacy, Authority, and Democratic Duties of Explanation' in D Sobel and S Wall, *Oxford Studies in Political Philosophy*, vol 10 (OUP 2024)

Discussion Questions

- What is algorithmic decision-making? What is automated decision-making? What is artificial intelligence?
- Does algorithmic decision-making imperil "process values"?
- Can algorithmic decision-making promote the rule of law?
- Is there a morally important difference between (1) a fully automated decision and (2) a decision rubber-stamped by a human?
- Is there a moral right to a human decision? Is there a moral right to a *non*-human decision?