



Paul Brest and
Linda Hamilton
Krieger

**PROBLEM SOLVING,
DECISION MAKING, AND
PROFESSIONAL JUDGMENT**

A Guide for Lawyers and Policymakers

OXFORD

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POLICY MAKERS

**PAUL BREST
LINDA HAMILTON KRIEGER**

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We began teaching a course in Problem Solving, Decision Making, and Professional Judgment in 1994, when Paul was Dean of Stanford Law School and Linda was a lecturer there.¹ The main motivation for developing the course was to provide law students with a foundation in the problem-solving skills that are a core part of the repertoire of excellent lawyers but are for the most part ignored by legal education. The development of the course was encouraged and supported by Charles T. Munger and by the Radcliffe Institute for Advanced Study at Harvard University, where Linda held a research fellowship during the 2004–2005 academic year.

We greatly appreciate the following contributions to this book. Iris Brest read and edited the revisions of each chapter more times than she would care to recall. Tom Griffiths wrote an initial draft of the statistics chapters; Brit Turnbull reviewed and corrected our revisions to these chapters, and then essentially wrote an entirely new version; Christopher Bryan, David Nussbaum, and Aner Sela helped develop and teach the first version of the book to include materials on public policy.² Alicia Thesing drafted the wastewater treatment plant problem in Chapter 4. Marc B. Victor provided great assistance with the decision tree problem in Chapter 15.³ Rick Hanushek helped us develop the regression example in Chapter 6. Donna Shestowsky wrote an early draft of the material on social influence in Chapter 17. Jimmy Benjamin provided useful ideas for the decision-making chapters. Caeli Higney added material on program evaluation

1. Linda subsequently accepted a position at Boalt Hall, where she served as a professor of law from 1996 to 2009, and Paul became president of the William and Flora Hewlett Foundation (though he continues to teach a course on problem solving and decision making at Stanford). Linda is now a professor of law at the University of Hawai'i and a Senior Research Fellow at the Center for the Study of Law and Society at the University of California at Berkeley.

2. Chris contributed to the material on complexities of decision making (Chapter 13) and developed much of the material on persuasion through argument and priming (Chapter 18). Aner developed the material on metacognition in Chapter 9, and also worked on priming. Dave contributed to the material on belief revision in Chapter 10.

3. Marc Victor is an attorney and president of Litigation Risk Analysis, Inc., <http://www.litigationrisk.com>. He has performed decision-tree analyses on behalf of clients involved in complex, high-stakes litigation since the 1970s.

to Chapter 7. Kelly Spann contributed greatly to the material on scenario planning in Chapter 3. Chris Baker, Molly Elgin, Lauren Finzer, Bria Long, Daniela Rubio, and Tony Wang helped develop, edit, and cite-check various chapters. Chris Baker read the manuscript from cover to cover, and sharpened the statistics chapters and the portions of the teacher's manual accompanying them. Kathryn Segovia did amazing work on the page proofs.

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PREFACE

Law schools prepare students for work as business dealmakers, litigators, legal services lawyers, city attorneys, public interest advocates, and corporate general counsel, among other careers. Schools of public policy prepare their graduates for careers in state, local, national, and international governments and in the nonprofit sector; their graduates carry out a vast range of activities including making and implementing policy, advocating for policy changes, and influencing the behavior of consumers, citizens, and businesses.

This book is concerned with a set of qualities and skills that we believe to be important across the entire range of careers that lawyers and policy makers pursue—skills that are also important in people’s everyday lives as citizens and consumers. The qualities are sometimes defined in terms of judgment or practical wisdom; the skills in terms of problem solving and decision making.

“Everyone complains about his memory; no one complains about his judgment.”

—La Rochefoucauld

The title of this book uses the terms problem solving and decision making in their conventional senses. It uses judgment in two quite different ways. In common parlance, the term implies good judgment—the capacity to assess situations shrewdly and to draw sound conclusions.¹ We hope that the book will contribute to improving readers’ judgment in this sense. But we also draw heavily on the field of social science known as “judgment and decision making” (JDM), in which “judgment” refers mainly to the processes of empiricism—how one ascertains facts and makes predictions about the physical and social world.

Much JDM research asks how people actually come to judgments and make decisions; it focuses particularly on the systematic errors made by intuitive decision makers—all of us, much of the time. In addition to introducing basic analytic and quantitative tools of decision making, the book surveys the JDM literature in the hope that understanding these errors can at least sometimes help avoid them.

1. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 72–73 (New York: Cambridge University Press, 1993).

The book is divided into four parts.

Part 1 is a once-over-lightly introduction to problem solving and decision making.

Because good decision making depends on accurate empirical knowledge, and because most important legal and policy decisions are based on probabilistic knowledge rather than certainties, **Part 2** introduces the basic concepts of statistics and identifies the systematic errors that bedevil intuitive empiricists.

Part 3 is about making decisions. Analogous to Part 2, it introduces the concepts and techniques of rational choice and then devotes considerable attention to systematic ways that intuitive decision makers deviate from models of rationality.

Part 4 considers how people's decisions and behavior can be guided or influenced—for better or worse—by individuals or groups. It asks how lawyers and policy makers can use the insights of social psychology and the JDM literature to counsel clients and improve decisions by citizens and consumers.

The last chapter briefly summarizes the material covered in the course and suggests how students can use the knowledge they have gained in the classroom to continue developing professional expertise over the course of a lifetime.

This book was originally intended for a stand-alone course, taught together with problems or “situational” case studies of the sort used in business and public policy schools and in some law schools as well.² The authors have used the text for comprehensive courses in law schools and public policy programs. As a stand-alone course, it should be of interest to students wishing to become better problem solvers and decision makers in any aspect of their work—including their everyday lives—as well as to those with an academic interest in statistics, decision making, JDM, and behavioral economics.

But the book also readily lends itself to being used in parts in conjunction with courses including ethics, counseling, and negotiation. Most clinical legal instructors begin with **Part 1** (Chapters 1–4) and then teach selected chapters. Chapters 5–8 offer an introduction to probability and statistics that can be taught as a stand-alone course for students (and by instructors) who have little appetite for the quantitative. For someone interested in teaching the core insights of the JDM literature, they are contained mainly in Chapters 9 and 10 and 12–16 with some snippets in the preceding chapters on probability and statistics.

The book focuses on individual decision makers who, in their roles as lawyers and policy makers, are required to take others' interests into account. While these professionals are often involved in negotiations and mediations, the book does not encompass game theory or negotiation as such. We have bitten off a big enough piece as it is, and hope that the book will provide a solid foundation for approaching this next level of complexity.

2. See, e.g., <http://www.law.stanford.edu/casestudies/>.

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