Introduction

We Americans love the idea of “equal justice under law,” the words inscribed above the main entrance to the Supreme Court building. We want similar cases to have similar outcomes. We publish tens of thousands of judicial decisions and have enshrined the concept of precedent in order to reduce the likelihood that Jane’s case, adjudicated in December 2006, will come out very differently from Joe’s very similar case adjudicated in January 2007. We have adopted sentencing guidelines in the hope that the punishment meted out to offenders depends on their offenses and prior records rather than on the whims, personalities, or ideologies of the sentencing judges. We use pattern jury instructions in both civil and criminal cases to guide lay adjudicators to apply the same law to similar disputes. When civil juries depart significantly from established norms, judges use remittitur to reduce awards, enter judgments that are at odds with the jury’s verdict, or grant new trials.

Americans don’t love consistent decision making merely because we think that fairness to the parties requires that similar cases should have similar outcomes. We also like the predictability that following precedent offers. Most disputes can be settled without all-out litigation when the results of formal adjudication can be predicted in advance with reasonable certainty. In addition, and perhaps most pertinent, we don’t like the idea that litigants’ lives, liberty, or property could be determined by the predilections or personal preferences of the individual men and women who happen to judge their cases. The very essence of the rule of law, embodied in the Due Process Clause of the Fifth Amendment, is that individual cases should be disposed of by reference to standardized norms rather than by arbitrary factors, particularly the personal biases, attitudes, policies, or ideologies of government adjudicators.

In recent years, however, the public and the press have become skeptical about the extent to which American judging reflects only the law and not the predilections of the adjudicators. Judges (and entire courts) are commonly referred to in the press as liberal or conservative, and many lawyers believe that although they cannot predict the outcome of a trial-level case on the day before it is filed, or the outcome of an appeal on the day before it is docketed, they can do so once they know which judge or judges have been assigned to decide it. In response to this public skepticism, Chief Judge Harry Edwards of the U.S. Court of Appeals for the D.C. Circuit wrote a noteworthy law review article defending the notion that
“it is the law—and not the personal politics of individual judges—that controls judicial decision making.” His article spawned a series of rebuttals and counter-rebuttals. Professor Richard Revesz conducted a careful empirical study of decisions by the judges of Edwards’s court in challenges to rules of the Environmental Protection Agency (EPA). He concluded that the political composition of three-judge panels often mattered a great deal.1

Judge Edwards wrote a surprisingly harsh critique of the Revesz “so-called ‘empirical study,’” claiming that its interpretations were “bogus.”2 Revesz then rebutted this critique,3 and Edwards published a further article rejecting the “neo-realist arguments of scholars who claim that the personal ideologies [rather than law and collegiality] . . . are crucial determinants” of outcomes.4

Much of the Edwards-Revesz debate concerned relatively small differences in the voting patterns of the various judges. For example, in two of six periods of time reported, Democratic judges voted 44% of the time to sustain environmentalists’ challenges to EPA rules, while Republican judges did so only 42% of the time (a 2% disparity). In another period, the Democratic-to-Republican ratio was 47% to 33%. In the other periods, Republican judges were more prone to sustain such challenges than Democratic judges. In some periods, a Democratic judge was perhaps 50% more likely to vote for an environmentalist challenge than a Republican judge, a difference that should perhaps be disturbing if we expect judges to leave their political leanings behind when they take the bench. The differences were somewhat more dramatic in the case of industry challenges to the EPA. Republican judges voted nearly twice as often as Democratic judges to sustain those challenges.5 In other words, a judge might be nearly 100% more likely to vote for an industry-requested remand if the judge were Republican rather than Democratic—a statistic that may again suggest cause for concern. Those percentages are far larger than the 16% to 18% disparity (about five months) in the lengths of sentences meted out by federal judges in 1986–1987, before federal sentencing guidelines took effect, a disparity thought so great as to warrant a federal statute imposing those guidelines.6

But how about a situation in which one judge is 1,820% more likely to grant an application for important relief than another judge in the same courthouse?8 Or one in which one U.S. court of appeals is 1,148% more likely to rule in favor of a petitioner than another U.S. court of appeals considering similar cases?9

Welcome to the world of asylum law.

Collectively, asylum officers, immigration judges, members of the Board of Immigration Appeals, and judges of U.S. courts of appeals render about seventy-nine thousand asylum decisions annually.10 Almost all of them involve claims that an applicant for asylum reasonably fears imprisonment, torture, or death if forced to return to her home country. Given our national desire for equal treatment in
adjudication, one would expect to find in this system for the mass production of justice many indicators demonstrating a strong degree of uniformity of decision making over place and time. Yet in the very large volume of adjudications involving foreign nationals’ applications for protection from persecution and torture in their home countries, we see a great deal of statistical variation in the outcomes pronounced by decision makers. The statistics that we have collected and analyzed in this book suggest that in the world of asylum adjudication, there is remarkable variation in decision making from one official to the next, from one office to the next, from one region to the next, from one court of appeals to the next, and from one year to the next, even during periods when there has been no intervening change in the law. The variation is particularly striking when one controls for both the nationality and current area of residence of applicants and examines the asylum grant rates of the different asylum officers who work in the same regional building, or immigration judges who sit in adjacent courtrooms of the same immigration court. When an asylum seeker stands before an official or court who will decide whether she will be deported or may remain in the United States, the result may be determined as much or more by who that official is, or where the court is located, as by the facts and law of the case. The fact that the outcome of a case appears to be strongly influenced by the identity or attitude of the officer or judge to whom it is assigned is particularly discomfiting in asylum cases, because when a bona fide application is erroneously denied, the applicant is almost always ordered deported to a nation in which she will be in grave danger.11

We cannot prove that the variations in outcomes based on the locations or personalities of the adjudicators are greater in asylum cases than in criminal, civil, or other administrative adjudications. Only a few scholars, such as Revesz, have attempted to analyze similarities or differences in adjudication in a large database of cases that involve particular subject matters and were governed by a single body of law.12 In this book, however, we report and analyze new statistical data that suggest to us that very significant differences from one decision maker to the next in the adjudication of asylum cases should be a matter of serious concern to federal policymakers.13 The new statistics show disconcerting variability among individual adjudicators in the institutions for which adequate data are available for analysis.

Part 1 of this book reports our study of disparities in asylum adjudication. In chapter 1, we describe the systems through which asylum cases are adjudicated and the four institutions that decide them: the asylum offices, the immigration courts, the Board of Immigration Appeals, and the United States courts of appeals.

In chapter 2 we look at the first stage of decision making: adjudications by asylum officers. The Department of Homeland Security provided us with grant
rate data for each of the 928 asylum officers who served during fiscal years 1999–2005. For decisions on cases of applicants from eleven key countries that generate many valid asylum claims, the department also provided individual grant rates by nationality of the applicant. From these data, we measured changes in the rate at which asylum was granted by the department from region to region (holding constant the group of countries of greatest interest and, in some cases, limiting our study to a particular country) and variations from officer to officer within each of the department’s eight regional asylum offices (again controlling for countries of the applicants).

Chapter 3 examines statistics in asylum cases decided by 247 immigration judges from fiscal years 2000–2004. We investigated disparities in grant rates between different immigration courts, but more important, we examined disparities in the grant rates of different judges within the largest courts. We were also able to correlate the grant rates of individual judges with biographical information about those judges and with additional information about the cases. Certain correlations surprised us and raise serious questions about whether the results of cases are excessively influenced by personal characteristics of the judges, such as their gender and their prior government service.

We would have liked to include an analysis of how individual members of the Board of Immigration Appeals resolve cases assigned to them, but the Department of Justice does not keep statistics on the dispositions of appeals by individual members of the Board, and it does not make public the vast majority of its asylum decisions. We were able to examine variations from year to year in the Board’s treatment of asylum appeals. Our study included the period just before, during, and after FY 2002, when the Board was in great turmoil due to substantial personnel and procedural changes. Although we could not compare individual Board members’ grant rates because the Board lacks the relevant data, we were able to measure the effect of these changes on its overall rate of decisions favorable to asylum applicants. Chapter 4 describes and analyzes the data that the Board was able to provide to us.

Chapter 5 investigates variations in the treatment of asylum cases in the U.S. courts of appeals from one circuit to another. We examined the rate at which asylum denials by the Board of Immigration Appeals were remanded by courts in all of the circuits. We were able to compare these rates both for all cases and for cases from a group of fifteen countries that generate a particularly large number and high percentage of successful asylum cases. We were also able to compare the rates at which individual judges in two circuits voted to remand cases.

In chapter 6, we summarize and comment on our findings and suggest several steps that might be taken to advance the degree to which the outcomes in asylum cases could become somewhat more uniform. These reforms are largely aimed
at making the immigration courts and the Board of Immigration Appeals into more independent and professional adjudicative bodies. We suggest that these agencies should be moved from the Department of Justice to a new, independent agency within the executive branch, insulated from political directives; that standards for hiring and training judges should be made more rigorous; that more staff resources should be given to the new agency; and that the attorney general should be denied the power to remove immigration judges or Board members (except for cause) and to alter asylum decisions. We also propose that the United States should provide legal representatives for indigent asylum seekers who are threatened with deportation to countries in which they face danger, just as it does for criminal defendants who may be incarcerated in our own country.

The findings that we report in chapters 2 through 5 were originally posted on the internet in May 2007 and reported in a law review in November of that year. In September 2008, the Government Accountability Office (GAO) published two studies that it conducted of the adjudication of asylum cases. The GAO used slightly different counting methods and significantly different measures of disparity than we did, and its database of cases covered somewhat different time frames. Nevertheless, its data largely confirm our findings. Where appropriate, our end notes compare the results of our research with the results reported by the GAO.

Part 2 of the book consists of commentaries on implications of the data, and further suggestions for policy and administrative reform, by several experts from academic life, from the judiciary, and from other nations that also seek consistency in their asylum decisions. Bruce J. Einhorn, who served as an immigration judge for nearly seventeen years, offers his observations on why different judges come to quite different conclusions in different cases, focusing on the difficulty of assessing credibility and the preconceptions that immigration judges bring to this task. Professor Carrie Menkel-Meadow looks at one particular factor that correlates with different grant rates: the gender of the judge. She explores why male and female judges might have different reactions to similar groups of asylum applicants. Professors Margaret H. Taylor and Steven H. Legomsky examine the problem of disparities from the perspective of administrative law (the law governing the executive branch of government). Professor Taylor compares efforts to reform the immigration court system with similar efforts to improve the adjudication of Social Security claims, and Professor Legomsky explores possible reforms that might reduce unwanted disparities, suggesting that improvements are possible but that some cures would be worse than the disease. Professor Audrey Macklin of the University of Toronto and Robert Thomas of the University of Manchester provide international perspectives. Professor Macklin relates a series of experimental Canadian efforts
to reduce disparities in asylum adjudication. Mr. Thomas describes the British experience in which selected cases, tried under special conditions, were used to guide court decisions involving similar facts. Finally, Judge M. Margaret McKeown and her former clerk Allegra McLeod explore another element that strongly affects the outcome of asylum decisions. They suggest that the 40.5% rate at which represented asylum seekers prevail in immigration court may mask vast differences in success rates that are associated with the quality of representation, and they suggest ways in which more competent representation might be encouraged.

The final section of the book consists of two appendices. The first is a methodological appendix, explaining in detail our processes and the decisions we made as we worked on the raw data provided by the U.S. government. The second applies our methodology to data collected by Prof. David Law, who looked at disparities in the adjudication of asylum cases by the U.S. Court of Appeals for the Ninth Circuit, the circuit with the nation’s largest immigration docket.

Human judgment can never be eliminated from any system of justice. But we believe that the outcome of a refugee’s quest for safety in America should be influenced more by law and less by a spin of the wheel of fate that assigns her case to a particular government official.19

NOTES

2. Looking only at individual votes, Revesz found that (1) for industry challenges [to EPA rules on procedural grounds], Republicans had a higher reversal rate [that is, rate of reversing the EPA] than Democrats in all the periods [of time studied]; and (2) for environmental [group] challenges, Democrats had a higher reversal rate than Republicans in all the periods. . . . These relationships are consistent with the selective deference hypotheses (that judges’ votes are determined by their preferences concerning the substance of environmental policy). . . . (Richard L. Revesz, Environmental Regulation, Ideology, and the D.C. Circuit, 83 Va. L. Rev. 1717, 1738–39 (1997))

Turning to the composition of three-judge panels, Revesz found that judges were significantly more likely to vote to invalidate an EPA rule when at least two of the three members of the panel had been appointed by a president whose party could be expected to disagree with the rule (i.e., when at least two Republicans considered an industry challenge or when at least two Democrats considered an environmentalist challenge). In other words, “the effects of panel composition are far greater than the effects of individual ideology,” id. at 1764. The effects were presumably greater because, on a three-judge appellate panel, when members who had been appointed by a party that was more likely to disagree with an EPA decision constituted a majority of the panel, they had the power to change it or at least to force the EPA to reconsider its decision.

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8. See chapter 3 infra (discussing the difference in grant rate of two New York immigration judges for Albanian applicants).
9. See chapter 5, infra, and accompanying text (discussing the difference in remand rates of the Fourth and Seventh Circuits when considering asylum claims from the same group of fifteen countries from which asylum is frequently granted).
10. In FY 2005, asylum officers rendered 28,305 merits decisions (grants, denials, referrals after interviews, and rejections after interviews based on failure to meet the statutory deadline) for applicants from all countries other than Mexico. E-mail from Ted Kim, Chief of Operations, U.S. Citizenship & Immigration Servs., to Philip Schrag (Aug. 23, 2006) (attaching “Refugees, Asylum, and Parole System: Grant Rates by Asylum Officer—FY99 through FY05 National Table (All Officers),” which contains the data) (on file with authors). In the same year, immigration judges made 30,903 decisions on the merits in asylum cases. U.S. Dep’t of Justice, Immigration Courts, FY 2005 Asylum Statistics (2006), available at http://www.usdoj.gov/eoir/efoia/FY05AsyStats.pdf. During that year, the Board decided 16,762 asylum cases (this number excludes about two thousand cases that the Board is not able to characterize as favoring either party). Computer disk from Brett Endres, Executive Office of Immigration Review, to Andrew I. Schoenholtz (May 31, 2006) (on file with authors) (attaching Board of Immigration Appeals, “Crosstabulation for Decision Type by Attorney and Nationality per Year of Appeal”). Finally, during calendar year 2005, the U.S. courts of appeals decided 2,163 asylum cases, as described in chapter 5 of this book.
11. This book explores statistical disparities in asylum adjudication but does not attempt to convey the human suffering attendant on the denial of an application for asylum. One of us has recently coauthored, with an unsuccessful asylum applicant who had been tortured and nearly executed, a full account of the applicant’s persecution and flight to the United States, and of the adjudication of his case. His application went through all of the stages of hearing and appeals that are described in this book. After his request for asylum was turned down by an asylum officer and denied by the immigration judge who had the lowest grant rate in her immigration court, his appeal was rejected by a single member of the Board of Immigration Appeals and then by the U.S. court of appeals in the circuit that had the lowest rate of remanding cases to the Board. Forced to return to Africa, he was nearly murdered once again. David Ngaruri Kenney & Philip G. Schrag, Asylum Denied: A Refugee’s Struggle for Safety in America (Berkeley: University of California Press, 2008).

13. A recent law journal article reviews some of the data relating to disparities in immigration courts (looking only at rates within the New York City immigration court and ranking disparity levels for twenty-eight immigration courts) and briefly examines reversal rates in the courts of appeals (looking only at the Seventh Circuit and the combined reversal data for all federal circuits). Sydenham B. Alexander III, A Political Response to Crisis in the Immigration Courts, 21 Geo. Immigr. L.J. 1 (2006). That article does not analyze the Asylum Office and Board of Immigration Appeals data that we obtained, and does not engage as comprehensively with the data on the immigration courts and courts of appeals. It instead focuses on the evidence it examines to advocate compellingly for a political solution to the immigration court crisis. The article notes that legal scholars “concerned about IJ inconsistency . . . have been slow to incorporate statistical analysis into their work.” Id. at 21 n.125.

14. “The fiscal year is the accounting period for the federal government which begins on October 1 and ends on September 30. The fiscal year is designated by the calendar year in which it ends; for example, fiscal year 2006 begins on October 1, 2005 and ends on September 30, 2006.” United States Senate, Glossary, http://www.senate.gov/reference/glossary_term/fiscal_year.htm.

15. The Board claims that it does not track decisions by outcome, but there is some evidence to the contrary. See John R. B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review, 20 Geo. Immigr. L.J. 1, 56 n.248 (2005). Even if the Board does track decisions by outcome, it apparently does not track them by member.

16. Confidentiality concerns could justify the Board’s refusal to publish decisions that include identifying information about asylum applicants, as they or their relatives could suffer retaliation for reporting on their countries’ human rights violations. However, the Board does not publish or otherwise make available even redacted copies of most of its asylum decisions.


19. We agree with Stephen Legomsky that accuracy, consistency, and public acceptance are among the most important goals of any adjudicative system, and particularly one in which human life and liberty are at stake. See Stephen H. Legomsky, An Asylum Seeker’s Bill of Rights in a Non-Utopian World, 14 Geo. Immigr. L.J. 619, 622 (2000).