To appear in Law and Social Inquiry

"Judicial decision making as knowledge work"

Proposed Running head: Judicial Decision Making

Lee Epstein, William Landes and Richard Posner. 2013. *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice*. Cambridge: Harvard University Press. Hardback, 440pp. $49.95.

Richard Posner. 2008. *How Judges Think*. Cambridge: Harvard University Press. Paperback, 400pp. $21.

B. Robert Owens

Department of Sociology

University of Chicago

1126 E. 59th St.

Chicago, IL 60637

Email: browens@uchicago.edu

Phone: 617-308-9082

Acknowledgements:

Thanks to Andrew Abbott, Keith Bybee, Elisabeth Clemens, James Evans, Tom Ginsburg, Neil Gross, Terry Halliday, Ben Merriman and Miriam Goldberg Owens for comments on this essay and earlier drafts of these ideas. Anna Marshall proposed the idea. I am especially appreciative of Richard Posner for reading and offering comments.

Abstract. I review two recent studies of judicial behavior, Posner's *How Judges Think* (2008) and Epstein, Landes and Posner's *Behavior of Federal Judges* (2013). Epstein et al.'s volume, the empirically richer of the two books, builds on the conceptual model for explaining judicial behavior put forward in Posner's *How Judges Think*. I discuss this conceptual model and argue in outline for an alternative model, complementary in part and antagonistic in part to the behaviorist research agenda. Posner and Epstein et al. argue for viewing the judge as a rational actor in a labor market. I argue that analyzing judicial decisions from the perspective of the sociology of knowledge, without axiomatically assuming rationality, will allow us to bring more evidentiary sources to bear on the problem and will allow for a more adequate test of competing theoretical interpretations. Law and society scholars are well positioned to contribute to this line of inquiry.

The discovery of meaning in legal texts is one of the core competencies of law and society scholarship. How legal text becomes socially efficacious, how it admits of multiple symbolic and instrumental meanings for different audiences, how those meanings eventually become settled (or do not)—these questions are asked and answered continuously in contemporary law and society work, in empirical domains ranging from the enforcement of hate crime law (Phillips and Grattet 2000; Grattet and Jenness 2005; 2008) and the historical development of affirmative action policies (Skrentny 1996) to international nuclear nonproliferation treaties (Mallard 2014). Ambitious attempts to develop something like a general theory of meaning in legal language (e.g., Constable 2014) still attract serious attention.

Within this discursive world, however, there is not much systematic attention to appellate court judicial decisions, despite the expressly interpretive character of judicial decisions and their strong hold on the public interest (the strong public interest, at least, in the steady stream of highly politicized cases decided by the U.S. Supreme Court). Phillips and Grattet's (2000) close reading of 38 appellate court decisions on the constitutionality of hate crime law is a notable exception. There does exist a large body of "behaviorist" studies of judicial decisions, including the books under review by Posner and by Epstein, Landes and Posner, but because of divergent methodological approaches and divergent explanatory ambitions, the scholarship on judicial behavior occupies an intellectual world that overlaps relatively little with law and society. The goal of this essay is to clarify the nature of these two divergences and to point out what more could be said about the social production of judicial decisions[1] than what the judicial behaviorists are currently saying.

Research into the social production of judicial decisions could benefit from an expanded repertoire of evidentiary sources and corresponding analytical tools as well as a reconsideration of theoretical premises, and law and society scholars are well positioned to make decisive and constructive interventions in this line. I will also argue that my own field of the sociology of knowledge can provide important resources for this research agenda. While sociologists of knowledge have hitherto paid little or no attention to judicial decisions as data, their analyses of knowledge work in other settings provides them with a highly relevant and flexible set of analytical tools.

Sociologists of knowledge tend to employ nominalist rather than essentialist definitions of "knowledge," "knowledge production" and "knowledge work." "Expert knowledge" is what scientists, artists, professionals, political ideologists and so on produce when they advance propositions in their respective domains of expertise. The outcomes of this knowledge work are generally judged by sociologists by heuristic criteria—knowledge work is effective if it wins recognition or acceptance, or if it helps its producers and consumers to navigate the world. For sociologists studying knowledge production in physics, for example (e.g. Collins 1975; Pickering 1984; Knorr Cetina 1999), it matters not at all whether the physicists have uncovered the true nature of reality. What matters for sociological analysis is our ability to follow the internal logic, the heuristic utility and the practical and theoretical implications of their expert knowledge claims.

I adopt a nominalist approach here. I regard appellate judges as knowledge workers, which is to say that I regard them as advancing interpretive claims about the law that are neither purely mechanical nor purely instrumental. In the course of this

essay I also argue that there is good evidence that judges understand themselves as knowledge workers, and that this self-understanding ought to figure into our explanations of the decisions that they produce. The normative question of how judges *ought* to interpret the law, in general or in particular, is beside the point.

The foundation for much of the contemporary research on judicial behavior, including Epstein et al.'s *Behavior of Federal Judges*, is a set of large datasets: the comprehensive Spaeth Supreme Court database (Spaeth et al. 2013), the Songer Courts of Appeals database (Songer 1998; Kuersten and Haire 2007) and the Sunstein Courts of Appeals and district courts database (Sunstein et al. 2006). Epstein et al. also rely on four additional datasets that provide partial coverage of district court decisions, focused in particular on sentencing and civil procedure, and they rely on these datasets to the near-total exclusion of other empirical sources. These datasets encode information about a huge number of U.S. appellate and trial court cases, and they formally operationalize features of those cases (by, for example, taking the party of the president who nominated a given judge to the bench as a proxy measure for judge ideology) in ways that allow for the construction of formal judicial utility functions that can in turn be fit to the data.

This statistical modeling approach, which is frequently accompanied by a rational choice theoretical framework, is broadly characteristic of judicial behaviorist research in law, political science and economics. It has revealed many highly suggestive patterns. Among the notable empirical conclusions in Epstein et al. are: that "dissent aversion" is stronger in the Courts of Appeals than in the Supreme Court (255ff., 279);[2] that apparently ideological voting is much less pronounced in the Courts of Appeals than in

the Supreme Court (189); that dissents have a jurisprudential impact in high impact cases—specifically, "the more frequently the majority opinion is cited, the more frequently the dissent is cited" (289). The authors find statistically significant differences between the voting records of conservative and moderate judges and between the voting records of moderate and liberal judges in civil liberties cases, economic and labor law, criminal law and constitutional law, consistently over time (115, 165).[3]

The behaviorist datasets, however, need not be taken as the exclusive sources of useful evidence when we seek to explain judicial decision making and judicial decisions. Several sources of data are mostly neglected by behaviorist scholarship—I discuss three broad categories of sources here. In the exploration of these auxiliary sources, and in the refinement of methodological and theoretical approaches appropriate to the available data, there is great potential for growth in this area. I argue, accordingly, for a closer engagement from law and society with judicial decisions as data and with the existing behaviorist scholarship. When empirical examples are called for in the discussion below, I draw on my own ongoing research into judicial decision making in the realm of political asylum law.

A first broad evidentiary source for this agenda is data on the structure, functioning and culture of courts and the legal profession as institutions. Organizational analyses of courts are already plentiful (e.g., McCloskey 1960; Shapiro 1981; Ginsburg 2003; Rosenberg 2008) and could be read for insights into how institutional context informs legal reasoning of judges (or of other actors in the legal system). These legal organizational analyses have not focused on knowledge production as the outcome of primary interest, but we can look to the sociology of knowledge for guidance on how to

give substantive meaning to the rough idea that institutional structure, function and culture can affect knowledge outcomes. To note just two highly successful examples, Fourcade (2009, 38–40) reviews the nineteenth century emergence of the modern research university to frame her international comparative analysis of the discipline of economics in the twentieth century; Abbott (1988, 280–314) looks back to the inchoate cultural awareness of “personal problems” in 1850 to ground his account of the eventual emergence of professional psychiatry. Fourcade and Abbott successfully mobilize sociological understandings of the path dependence of organizational developments, the interplay of structure and function and the exogenous influences of competition and political culture to explain how two bodies of professional knowledge—academic economics and professional psychiatry—came into being.

The judicial behaviorist data allow us to identify some suggestive patterns of institutional variance in the federal courts. Examples include (1) variance in decision making tendencies between the several appellate Circuit Courts that exceeds the within-Circuit variance and (2) greater ideological divisions in the US Supreme Court than in the lower courts. But the standard behaviorist datasets alone cannot sustain very complex arguments about institutional culture or functioning. They provide us no information, for example, about the structure of communication and information flow within the courts, which may vary by judge and by court, or about the role of lawyers in influencing case outcomes, which since Galanter’s foundational work (1974) has been of central interest to law and society scholars. When Epstein et al. do discuss institutional structures, they treat them rather narrowly as regulatory responses to market failures: e.g., the system of appointing the longest-serving judge under 65 as the

chief judge is described as "[trading] off competence against the danger of infighting" (Epstein et al. 2013, 32).

Second, research into the social production of judicial decisions could benefit from a close attention to rhetorical meaning-making in the texts of judicial decisions themselves. I have already mentioned this as a core competency of law and society scholarship. Sociologists of knowledge have likewise paid close attention to language use—particularly the uses of nonliteral language and the social efficacy of so-called "speech acts"[4]—to great effect. They have found that successful knowledge work often depends on highly particularistic language and invokes cultural understandings that are only narrowly shared and understood. Karin Knorr Cetina's (1999) and Bruno Latour's (1987) ethnographies of scientific laboratories point out the allusive, metaphorical language regularly employed by scientists in the working out of precise quantitative results: a biologist complains of a "bad gut" and discards the specimen (Latour 1987, 66); high energy physicists rely on symbolic language to interpret the signs and traces of events that cannot be directly observed (Knorr Cetina 1999, 49–50) and speak of their technical instruments as if they were conscious agents—as "looking," "watching" and sometimes "blind" (114).

These sociological observations on the role of language use in knowledge work are clearly applicable to judicial decisions as data. Judicial decisions are paradigmatic examples of speech acts, and they can be at the same time complex rhetorical documents. Most of the time, judicial decisions are written in response to narrow and clearly defined questions of law, but there is no second-order rule (or "rule of recognition," to borrow the language of legal theorist H.L.A. Hart (1961)) that dictates

how federal judges will approach the interpretation of legal rules. In some areas of law, the outcome is a bewildering variety of approaches and reliances on different sources of law from case to case. In political asylum decisions, we sometimes find judges making recourse to "practical realities" over and against "semantic niceties" (see the dissent by Justice Powell in *INS v. Cardoza-Fonseca*, 1987) and sometimes insisting that such practical considerations are legally unsupportable. In other instances, judges focus on the importance of methodological consistency in their own construction of concepts, or on the question of *Chevron* deference,[5] or on international legal norms or on the adequacy of the factual information available to make a determination. In still other instances, they frame their legal reasoning with reference to standing and procedural questions or to the constraints imposed by common law precedent.

Understanding how legal language "acts," both in its technical function as speech act and through the rhetorical framing that makes a complex argument either persuasive or unpersuasive, is a problem basic to the understanding of the social production of judicial decisions. Sociologists and non-sociologists alike have written on the social efficacy of legal language (e.g., Matoesian 2001; Mertz 2007; Ng 2009; Constable 2014), although usually not with explicit reference to the central sociology of knowledge problem—how does legal language affect legal judgment and other forms of knowledge work within the legal system? It is possible to integrate key insights into the social efficacy of language use into broader institutional or cultural analyses of the social production of ideas, as in Knorr Cetina's comparative ethnography of science laboratories (see also Collins 1975 on the linked challenges of communicating results and facilitating replication in scientific experiments). This work can and should be done

with reference to judicial decisions and courts.

Third, research into judicial decision making could benefit from attention to the broad array of methodological approaches—textual interpretation, interviews, ethnography and laboratory experiments—that can provide clues to the relationship between the self-understandings of judges and the processual, phenomenological experience of judging, on the one hand, and the production of written judicial decisions that have the force of law, on the other hand. Sociologists of knowledge have tackled this problem of linking the self-understandings of individual actors to knowledge production in, for example, Randall Collins's sprawling *Sociology of Philosophies* (1998), and on a much smaller scale, Charles Thorpe's "sociological biography" of Robert Oppenheimer (2006) and Neil Gross's account of philosopher Richard Rorty's early career (2008). Thorpe and Gross both rely primarily on archival and other textual evidence, modeling a method that analyses of judicial decisions could follow.

There is good evidence that something like "intellectual self-concept" (Gross 2008) plays a role in the framing of some judicial decisions. In political asylum cases, we can readily find judges signaling moral commitments that are irrelevant to the law. In the Tenth Circuit case of *Nalwamba v. Holder* (2010), Judge Henry's separate concurrence stresses the point that "had I been the hearing judge in this matter, I believe I would have calculated differently," apparently lamenting the deferential standard of review in the federal courts required by the law. In a case before the Federal Court of Canada, a decision against a sympathetic appellant (a stateless Palestinian) was made "with no joy whatever" (*Elastal v. Canada* (*Minister of Citizenship and Immigration*), 1999). We find judges expressing irritation in their decisions when

political actors speak publicly on a case and so preemptively stain the judiciary with the implication of political motive.[6] We find some judges proclaiming their commitments to certain interpretive standards, sometimes even by impugning the competence or integrity of their fellow judges (see, for example, Justice Scalia's decision in *INS v. Elias-Zacarias* (1992) overturning a Ninth Circuit decision (*Elias-Zacarias v. U.S. INS*, 1990)). In *Elias-Zacarias*, Scalia declared the Ninth Circuit's reasoning in part "irrelevant" and in part "untrue." In the long term, this kind of adversarial stance undermines the judiciary's claim to be disinterested interpreters of the law, presumably an undesirable outcome from the perspective of any professional judge. Judges who act this way may be privileging their ideological purity, their sense of self-importance or their intense desire to model the *right* way to decide cases for misguided colleagues, above considerations of collegiality or even long term strategic interest.[7]

I am not proposing that we should appropriate judges' self-accounts as a true model of their decision making procedures. For one thing, judges are often not the sole authors of their opinions (clerks can play a large role), and as Posner has written, "cats are not consulted on the principles of feline psychology" (2008, 2). Nonetheless, what judges think they are doing when they author decisions, and what they wish the public to think they are doing, can be interpreted as evidence for what they are actually doing. This is particularly true if we focus narrowly on explicit *disputes* over questions of law that appear with and between cases. Judges hearing cases are required to issue an opinion, so the issuance of an opinion does not necessarily signal a judgment that might, under different circumstances, have turned out differently. But neither ideology nor professional obligation can fully account for which cases judges will dispose of with

simple memoranda dispositions and which ones will prompt them to write long opinions, which can be by turns impassioned, exhaustively analytic, speculative, moralistic, combative and so on. The straightforward and convincing explanation is that they are sometimes engaged in genuine intellectual disagreement about the application of legal rules. When we find judges raising explicit disputes with one another over questions of law (as opposed to merely issuing opinions at different points on an ideological scale), the sociology of knowledge may provide the best framework to make sense of their activity.

Cognitive anthropologists and cognitive psychologists have made complementary contributions to our understanding of the phenomenological process of judgment and decision making. The anthropologists have observed judges in action but have not had the ability to test hypothesized cognitive mechanisms under experimental conditions. A foundational example is Hutchins (1980), whose ethnographic analysis of Trobriand land dispute settlement made persuasive reference to laboratory experiments (Wason and Johnson-Laird 1972) to show that logical inferences are made easier when they can be performed with culturally familiar objects arranged in culturally meaningful ways (Hutchins 1980, 10–11). Cognitive psychologists, by contrast, have been able to conduct controlled laboratory experiments (e.g., Simon and Scurich 2011) but without professional judges as subjects, and without being able to recreate fully in the laboratory the remarkable social import of judicial decisions as speech acts. Psychological studies of legal judgment and decision making tend to focus on jury rather than judicial decision making (e.g., Hastie 1994; Connolly et al. 2000, 197–240; Dhami et al. 2007), likely because it is much easier to model adequately the situation of

a juror than a judge in an experimental setting.

There are, then, many sources and associated analytical tools that could be brought to bear on the explanation of judicial decisions and judicial decision making but are at present underutilized in the dominant behaviorist scholarship. I hope that many law and society scholars and sociologists of knowledge—particularly those who work on textual interpretation or on how individuals understand their own identities and social roles in relation to the law—will already see promise in these lines of potential inquiry. It remains a challenge to explain why the behaviorist research has not already adopted a broader methodological and empirical base, and in turn to assess what would be gained and lost in a move to greater evidentiary and analytical pluralism in studies of the social production of judicial decisions.

This problem manifests even within the behaviorist literature. Posner begins *How Judges Think* with an explicit reflection on the question of what a complete explanation of the social conditioning of judicial decision making would have to include, and his answer, which Epstein et al. expressly adopt as their interpretive theoretical framework in *Behavior of Federal Judges* (25), seemingly aligns with the multipronged research agenda I have outlined. Posner delineates nine dimensions of explanation: the attitudinal, the strategic, the sociological, the psychological, the economic, the organizational, the pragmatic, the phenomenological and the legalist. He presents this as a list of “nine theories” but makes it clear that they are not mutually exclusive, and indeed he argues that there are many overlaps and that all the theories will be relevant to some degree (Posner 2008, 19). His framework has much to recommend it as a set of organizing propositions to guide empirical research. There is nothing obviously left

out,[8] and the framework matches up well with the ways that sociologists of knowledge have collectively described the social conditioning of knowledge production. Posner does not make any reference to the sociology of knowledge, so we have, encouragingly, a kind of independent attestation of the likely social sources of knowledge from Posner, on the one hand, and the field of sociology of knowledge, on the other.

Posner and Epstein et al. give more definite shape to their explanatory framework with the proposal that the nine theories can be "integrate[d]…into a single theory, that of the judge as a participant in a labor market—that is, as a worker" (Epstein et al. 2013, 25). My conceptualization of judges as knowledge workers—i.e., as workers whose work is neither merely deductive nor entirely instrumental, for whom inferential reasoning and judgment mediate between their initial situation and the output (judicial decisions) that they produce—finds support from Posner and Epstein et al. in some passages, particularly when they stress the conceptual impossibility of judge-made law being completely rule-determined (e.g., Posner 2008, 7–9, Epstein et al. 2013, 44–45). But their gambit in positing the judge as participant in a labor market narrows the scope of the thing to be explained much more dramatically than does my focus on knowledge work. The authors of both volumes axiomatically assume a rational actor model. Epstein et al., working with systematic empirical data, present judges' preferences in the form of utility functions. In *How Judges Think*, Posner does not systematically analyze any empirical data, but he relies on the language and heuristics of rational choice theory throughout.

If we probe the rationale for Epstein et al.'s choices of data and methodology (statistical datasets and utility function modeling), we ultimately come to an

epistemological justification. Posner, on the basis of many years of service writing appellate court decisions on the Court of Appeals for the Seventh Circuit, argues consistently that the rhetoric of judicial decisions tends to conceal rather than reveal the true motivation and reasoning behind them. This position is wholly characteristic of judicial behavior scholarship more broadly (see Bybee 2012, 70ff. for a literature review that emphasizes just this point). Furthermore, the version of rational choice theory that Posner maintains takes no account of the self-descriptions or self-understandings of actors: "rationality means little more to an economist than a disposition to choose, consciously or unconsciously, an apt means to whatever ends the chooser happens to have selected, consciously or unconsciously…it would not be a solecism to speak of a rational frog" (Posner 2007, 15). In light of this epistemological positioning—or to put it in slightly different terms, this theorizing about what would count as an adequate explanation of judicial decision making—Posner's and his coauthors' decision to eschew any close textual analysis, analysis of institutional culture or any systematic interest in the self-understandings of judges[9] seems to be a positive and categorical choice rather than merely a matter of emphasis.

Here the sharp edges of the epistemological question emerge and provide a key to understanding the communicative breakdown between law and society scholars and the judicial behaviorists. I tend to think that a detailed answer to the epistemological question—what would count as an adequate explanation of judicial decision making?—matters fundamentally to the methodological question—how should we organize empirical research in pursuit of a complete (or, as complete as possible) explanation of

the social conditioning of judicial decision making? Others may consider the first concern more easily avoidable for the purposes of practical research.

Posner's and Epstein et al.'s integrated theory of judicial behavior places its emphasis on the economic (which subsumes the attitudinal, the sociological and parts of the psychological) and a version of the pragmatic (which subsumes the legalist in certain instances) dimensions of explanation. In one respect this does look like a genuine integration of the chaotically diverse explanatory dimensions initially posited: political ideology (the focus of the attitudinal theory) really can be modeled in a utility function (the framework of the economic theory), as can "dissent aversion" and other consequences of small group dynamics (the focus of the sociological theory). Incomplete information and cognitive limitations (the core of the psychological theory) "can be modeled as costs of processing information" (Posner 2008, 37). It is right to say that a judicial decision that treats law as determinate and deductively applied in the courts (the legalist view) is sometimes the best practical strategy for a judge to adopt. Finally, practical designs and strategies for achieving them can be understood in a utility-maximization framework, so Posner ultimately claims that the nine theories are wholly commensurate when expressed in terms of an individual judge's utility function. There is an admirable elegance and formal clarity to this explanatory gambit, but it is deceptive when presented as a genuine unification of the nine dimensions outlined at the start.

Specifically, the assumption of a rational actor model precludes the possibility of genuine unification of all that the nine dimensions of Posner's framework have to offer, although Posner and Epstein et al. do not consider all the constraints imposed by their

theoretical assumptions. The pragmatist and the phenomenological theories are the most severely diminished in Posner's combinatorial exercise, and I discuss them in turn below.

Posner glosses pragmatism as "an extension of the scientific method into all areas of inquiry" (2008, 231) and as a school of thought that bears a "family resemblance to utilitarianism" on account of its instrumental focus on outcomes (Posner 2008, 40). Epstein et al. only touch on pragmatism obliquely, but they follow Posner's lead in treating the term as a stand-in for instrumental practicality: "shortsighted pragmatism…inflects the consequences for the [political] parties with the judge's political preferences or personal sentiments" (Epstein et al. 2013, 28). Posner and Epstein et al. do not recognize pragmatism as the basis of a theory of meaning-making through social action as developed by Dewey (1930), Mead (1967[1934]), Joas (1993; 1996) and the symbolic interactionists (e.g., Goffman 1974). This is not merely a matter of definitional difference—Posner cites the names of Peirce, James and Dewey to indicate that he intends to invoke the highest philosophical meaning of pragmatism (Posner 2008, 231). Epstein et al. contribute to the same flattening of philosophical differences when they identify Bentham's *Introduction to the Principles of Morals and Legislation* (1780) as "the first full articulation of the realist conception of judging" (Epstein et al. 2013, 27) and trace a line from Bentham to Oliver Wendell Holmes, Jr. without mention of the pragmatist influence on Holmes (cf. Menand 2002) and by extension on the legal realists who followed in his footsteps.

The failure to recognize pragmatism as a distinctive theory of action and a profound critique of utilitarianism really matters. The major pragmatist philosophers and

social theorists have all rejected the essential utilitarian premise that preferences are well defined in the abstract in such a way that they can straightforwardly guide action. The pragmatist perspective is rather that *interpretation,* continuously developed in concrete situations of lived experience, is crucial to the conduct and therefore to the explanation of social action. Some of the major pragmatists, especially James (2002[1902]) and Joas (2000), have further challenged the notion that the individual is wholly analytically separable from social forces—norms and values—that the individual internalizes in moments of self-transcendence. By contrast, the clearly bounded individual whose identity persists over time is the indispensable unit of analysis in utilitarian thought. It is difficult to see how a pragmatist theory of judicial decision making could be reconciled with the basic epistemological assumptions of the behaviorists. The rational choice framework they adopt does not seem capable of adjudicating between the processual, interpretive meaning-making that interests pragmatist philosophers and sociologists, on the one hand, from instrumental rationality, on the other.[10]

The place of phenomenology is likewise problematic in Posner and Epstein et al., although from omission rather than simplification and distortion. Whereas pragmatism's greatest relevance to the social science is as an epistemology and a theory of action, the basic meaning of phenomenology—and the meaning that Posner apparently intends—is the designation of a level of analysis. It is of particular interest to cognitive anthropologists and psychologists who study decision making, as noted above, and there is at least one well-known example of applied phenomenology in the realm of legal studies: Duncan Kennedy's essay, "Freedom and Constraint in Adjudication" (1986). Kennedy proposes a "phenomenology of adjudication," which is to proceed by

assessing what might happen when a judge is faced with an intuited gap between "how-I-want-to-come-out" [sic] and "the law." The *subjective experience of judging* is the key phenomenon to be explained. It is important to recognize that this explanandum is something that cannot be read from a utility function, so Kennedy's essay would seem to be an important foil to the behaviorist account of judge-as-labor-market-participant. Yet Posner does not return to the phenomenological perspective in *How Judges Think* after introducing its baseline possibility (although he has recently written a volume in part on his own subjective experience of judging; see Posner 2013). Epstein et al. do not mention phenomenology at all. It is, therefore, difficult to know on what grounds Posner claims that the model of judge as rational labor market participant can successfully incorporate phenomenological insights.

Embracing analytical pluralism in the study of the social production of judicial decisions would mean giving up on some of the formal clarity and parsimony that appears in behaviorist scholarship. It is not immediately clear that the tradeoff would amount to substantive progress. Interpretive approaches to analyzing judicial decisions are not new, and often they resort to the well-worn division between legalism and realism as a basic interpretive framework. This tendency is exemplified in a recent *Annual Review of Law and Social Science* by Keith Bybee (2012), in which Bybee advocates a move in studies of judicial decision making towards "paying attention to what judges say." Bybee makes common cause with my argument here, although he does not provide many resources to advance the constructive project of coordinating judges' self-understandings with cultural and institutional context in a single explanatory account. It does seem right that U.S. judges at least sometimes think of their work and

the decision making process in terms of a choice or balance between legalist and realist considerations.[11] Bybee is also persuasive that the tension is productive in certain ways—and that "useful pretenses" are important in supporting the legitimacy of the U.S. federal appellate courts. But to make legalism vs. realism the central tension in a broad theory of judicial decision making is to sidestep or distort a great deal of complexity in how judges write and self-present, especially beyond the borders of the United States.

Those judges who are most explicit and vocal about their interpretive approaches tend to adopt more elaborate models than a balancing of legalism and realism—textual originalism, the economic analysis of law or pragmatism, for example. Other judges have expressed interpretive affinity with legal theorists such as H.L.A. Hart or Ronald Dworkin.[12] If the interpretive work of judicial decision making bears any relation to developments at the leading edge of legal theory, then legalism vs. realism will be a poor model for understanding the substantive problems facing judges in the twentieth and twenty-first centuries. Furthermore, the legalism vs. realism division assumes a focus on the United States—with its highly politicized and politically powerful courts—and is of limited use elsewhere. Two major issues in contemporary judicial decision making are (1) the status of international law and (2) the appropriateness of borrowing legal reasoning from the court systems of other nations governed by different constitutional orders (see Slaughter 2004; Black and Epstein 2007). Debates over these issues play out both within and outside the United States. In political asylum law, the UN *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (2011[1979]) and interpretive guides to comparative jurisprudence (e.g., Hathaway and Foster 2014; Goodwin-Gill and McAdam 2007) are regularly cited in judicial decisions.

One of the few asylum cases to reach the Supreme Court included an extended discussion of the meaning of the French word *refoulement* and the legislative intent of the Netherlands' delegate before the UN Convention.[13] These debates often do not manifest as problems of choosing between legalist and realist interpretive approaches.

Much like the various strands of legal realism, the sociology of knowledge has found analytical pluralism to be a stumbling block to collective progress. The subfield is methodologically pluralistic, as many areas of sociology are, and its boundaries are sometimes blurry (for instance, Marion Fourcade's work cited above might easily be reclassified as sociology of organizations). In general, sociologist of knowledge pose empirical instantiations of the general theoretical question, "why did *these* particular ideas emerge in *these* particular times and places?" A persistent and somewhat discouraging feature of sociology of knowledge as a disciplinary endeavor has been that individual scholars faced with that same basic question have pitched their responses at quite different levels of analysis. They have treated knowledge production as the product of competition within an ecology (Abbott 1988; Bourdieu 1988), as the product of institutional culture (Camic 1992; Knorr Cetina 1999; Lamont and Huutoniemi 2011), national culture (Fourcade 2009), local culture and micro-level interaction (Collins 1998), personal biography and self-understanding (Gross 2008) or position within a communication network (Knorr Cetina and Bruegger 2002; Knorr Cetina and Preda 2005; Vilhena et al. 2014).

Judicial decisions as data, however, are especially well suited to the adjudication between social effects on knowledge production at different levels. Appellate court judicial decisions—in the United States as in many other modern constitutional

democracies—respond to narrow and clearly defined questions of law, they are strongly bounded in time (i.e., it is clear what is part of the decision and what is not, and it is clear when a decision has been finally determined), and in substantively difficult areas of law they are repeated over and over again under only slightly variant conditions as new appeals raising the same formal questions of law come to the courts. The social identity of the judge is clear, and professional judiciaries in modern states have in general been extremely successful in maintaining jurisdictional control over their key social function—namely, producing interpretations of law that carry the authority of the state. These key features of judges and judicial decisions are a gift to scholars who seek to identify the social factors that condition decision making and to isolate inference and judgment from potential confounding factors.

To see that knowledge work makes up some part of judicial decision making does not require us to ignore the robust behaviorist finding that some part of judicial decision making is the strategic enactment of personal or policy preferences. We need only to refocus attention on different parts of the evidentiary record and reframe our theoretical conception of judges (and their co-author clerks) as social actors. There is thus good reason for sociologists of knowledge to care about judicial decisions just as there is good reason for law and society scholars and judicial behaviorists to invest in understanding the toolkit of sociology of knowledge.

Political asylum law is one example of a substantive area of law where a relatively simple statutory law has produced richly suggestive interpretive disputes in case law. The core of political asylum law is the definition of a “refugee” as someone who has a well-founded fear of persecution for reasons of race, religion, nationality,

political opinion or membership in a particular social group. This is the definition that governs the recognition of refugee status under the UN Convention and Protocol Relating to the Status of Refugees, and it has been adopted in essentially the same language in national legislation in the United States and in many other countries.[14] The application of this legal rule in the federal courts has been complex and sometimes contradictory, most especially through the efforts of the courts to clarify the meaning of the residual protected class, "particular social group." Nuclear families have been recognized as a "particular social group," but Senegalese wives abused by their husbands have been denied status.[15] Gang membership has been recognized, but "tattooed youth" have been denied status, even though the appellant in question claimed a well-founded fear precisely because his facial tattoos signified gang membership.[16] Iranian feminists are out but parents of Burmese student dissidents are in.[17] Two mutually exclusive rules have been proposed for the recognition of a "particular social group" in the Ninth Circuit alone: that it should be characterized by a "voluntary association," on the one hand, or by an "immutable characteristic," on the other hand.[18] No court has yet succeeded in producing a determinate rule to settle the legal question.

Judges deciding these cases must make complex conceptual judgments about what constitutes a "particular social group," about the material and the intersubjective social and emotional conditions for the existence of a "well-founded fear" and so on. They must do so, furthermore, in cases that frequently turn on empirical details of events that played out in distant lands under morally ambiguous, poorly documented circumstances. It is no surprise that they have regularly disagreed. Descriptive statistical

and behaviorist work on political asylum law has already pointed to some of the significant patterns of that disagreement. David Law (2005) reviews the apparently political calculus behind the publication or non-publication of asylum decisions in the Court of Appeals for the Ninth Circuit. Ramji-Nogales et al. (2007, 363) show the dramatic variation in remand rates in asylum cases by Circuit Court, ranging from 2.4% (Fourth Circuit) to 37.7% (Seventh Circuit) in 2005. There is similarly striking variation in remand rates by applicant country of origin. In 2001, appellants from Haiti were admitted at a rate of about 7%; appellants from Armenia, Brazil, India, Iran and Russia were all admitted at rates greater than 50% (Ramji-Nogales et al. 2007, 361).

A two-level analytical approach to judicial decisions has the potential to enrich the behaviorist reliance on statistical data alone. At one level would be historical and institutional accounts of the courts and the legal systems in which they are embedded. A historically informed institutional analysis may help us to explain otherwise mysterious between-Circuit variations. The Ninth Circuit, which processes more political asylum cases than any other federal court, also generates panel disputes at a higher rate than any court save the Supreme Court and the District of Columbia Circuit, is reversed by the Supreme Court at a higher rate than any other Court of Appeals and is implicated in by far the greatest number of Circuit Court splits. This disputatiousness cannot be attributed to a small number of especially zealous or outlying judges. Of the 67 judges who were on the Ninth Circuit bench for any period of time between the introduction of the Refugee Act in 1980 and 2011, 47 of them (70%) at least once authored or joined a separate opinion expressing a legal disagreement with the panel majority over a question of political asylum law.[19] Ten have authored or joined 12 or more disputes

(O'Scannlain, Pregerson, Kleinfeld, Reinhardt, Kozinski, Thomas, Callahan, Rawlinson, Bea and Paez). By contrast, in the Second Circuit, the only other court that processes a similar number of asylum cases as the Ninth Circuit, 13 judges have authored or joined a disputing opinion on a panel dealing with a question of political asylum law. That amounts to 28% of the 45 judges who were on the Second Circuit bench for any period of time between 1980 and 2011. Only three of those authored or joined more than one such opinion. We ought therefore to look for an *institutional* explanation for the highly disputatious Ninth Circuit decision making in political asylum law. Institutional factors such as the size of the court (more judges sit on the Ninth Circuit bench than on any of the other several Circuits), the structure of communication within the court and the role of clerks and other staff vis-à-vis the judges are clear examples of institutional dynamics that might make a decisive difference to the decision making process within the Ninth Circuit.

The second level of analysis would be pairwise comparisons of formally similar cases within the large network of judicial decisions. Over 20,000 political asylum cases have been heard in the U.S. federal courts under the modern legal regime of refugee protection, and interpretively suggestive disputes have emerged at every level at which dispute is possible: within panels, within courts over time, across the Courts of Appeals with equal jurisprudential authority ("Circuit Court splits") and in cases overturned in the judicial hierarchy. These disputes raise two core questions for the sociology of knowledge and law and society scholarship: "why do we find different answers to formally identical questions of law in different social contexts?" "why do some legal interpretive questions remain unsettled, while others become settled or even pass

uncontested through appellate court cases?" When behaviorist studies have focused specifically on case law disputes, it has usually been with respect to the dynamics of dissents within panels, and disputes are usually taken to be manifestations of fixed underlying preferences (Epstein et al. 2013, 255–303). The explanandum for behaviorist scholars is then, "under what conditions will judges express their disagreements?" rather than, "how does social context affect inference and judgment such that judges produce different legal judgments in response to formally identical questions?"

Instances of notable consensus can also be subject to investigation—for instance, we can interrogate the *lack* of any dispute in the US appellate courts over the interpretation of "race" or "religion" for the purposes of asylum protection, in contrast to "particular social group" and "political opinion."[20] Judicious reliance on such surprising non-results can rescue the case analysis procedure I am proposing from the problem of selection on the dependent variable. With enough such cases to compare, we will be able to assess how some fairly narrow and well-defined, but still substantively interesting, knowledge problems have been answered differently in response to social contextual variation and path dependency[21] at the level of individual experience and self-understanding, at the level of small group dynamics, at the level of institutional culture and at the level of national culture.

Ultimately, my proposal to bring sociology of knowledge tools to the analysis of judicial decisions will stand or fall on the empirical results that it produces. Within the scope of this essay and with the examples I have mentioned in passing, I mean only to propose a plausible idea. I close with two comments to meet potential objections that may already have arisen for the reader.

First, I recognize that what I outline here is only antagonistic to parts of the behaviorist agenda—most fundamentally, to the notion that modeling utility functions can in principle be the basis for a complete explanation of the social conditioning of judicial decision making. The behaviorist datasets will be an important descriptive base for any work in the near future on judicial decision making. I have embraced and elaborated on Posner's basic framework for what a comprehensive investigation of judicial decision making should look like, although I have disagreed about how his nine dimensions of explanation can be made conceptually commensurate and how they can be most effectively investigated in empirical work. Finally, we should leave open the possibility that for some judicial decisions, a behaviorist account may be the essentially correct and complete explanation. If we were to take Posner himself as the subject of analysis (at some level this seems unavoidable—he is the most prolific and highly cited U.S. Courts of Appeals judge of his time[22]), even the phenomenological and pragmatist dimensions of explanation, which I have insisted are conceptually speaking *not* expressible in terms of a utility function, might add little. Posner makes it clear in his writings that his intellectual self-concept is of someone who searches for efficiency rationales when making legal decisions (Posner 2013, 26) and who understands his own action or behavior in terms of utility maximization. In some areas of law, such thinking in terms of utility maximization may turn out to be a generalized practice of judges, and hence "the logic of the law might be economics" (Posner 2007, 26). Antitrust law is one likely candidate. In such cases, the best account of the social production of judicial decisions would converge on a behaviorist model, albeit with some presentational differences.

Second, I recognize the limited empirical applicability of the approach to judicial decisions I have outlined in this essay. A great advantage of the behaviorist research agenda is that at least basic models can be constructed with respect to any area of law for which systematic judicial decision data has been collected. To implement a rigorous interpretive analysis of judicial decisions along the lines I have suggested requires that we make empirical reference to areas of law where formally similar questions of law are answered differently in the courts with some frequency. Not every area of law will be amenable to that kind of analysis. Areas of law governed by complex and regularly changing statutes—intellectual property law, for example—may not produce a set of judicial decisions that can easily be analyzed in rigorous comparative context. Consequently, the sociology of knowledge as an interpretive lens cannot claim the same scope as the behaviorists' rational actor models.Nonetheless, it remains worth pursuing because of the light it can shed on some areas of law and because it would be useful to show by example the limitations of the behaviorist explanatory mandate.

Works referenced

<u>Published works</u>

Abbott, Andrew. 1988. *The System of Professions: An Essay on the Division of Expert Labor*. Chicago: University of Chicago Press.

Austin, J.L. 1975. *How to Do Things with Words*. Cambridge: Harvard University Press.

Balkin, J.M. 1989. “The Domestication of Law and Literature.” *Law and Social Inquiry* 14:4, 787–822.

Black, Ryan and Lee Epstein. 2007. “(Re-)Setting the Scholarly Agenda on Transjudicial Communication.” *Law and Social Inquiry* 32:3, 791–807.

Bourdieu, Pierre. 1988. *Homo Academicus*. Translated by Peter Collier. Stanford: Stanford University Press.

Bybee, Keith. 2010. *All Judges are Political—Except When They are Not: Acceptable Hypocrisies and the Rule of Law*. Stanford: Stanford University Press.

Bybee, Keith. 2012. “Paying Attention to What Judges Say: New Directions in the Study of Judicial Decision Making.” *Annual Review of Law and Social Science* 8, 69–84.

Camic, Charles. 1992. “Reputation and Predecessor Selection: Parsons and the Institutionalists.” *American Sociological Review* 57:4, 421–445.

Collins, H.M. 1975. “The Seven Sexes: A Study in the Sociology of a Phenomenon, of the Replication of Experiments in Physics.” *Sociology* 9: 205–224.

Collins, Randall. 1998. *The Sociology of Philosophies: A Global Theory of Intellectual Change*. Cambridge: Belknap.

Connolly, Terry, Hal Arkes and Kenneth Hammond, eds. 2000. *Judgment and Decision Making: An Interdisciplinary Reader*. Cambridge: Cambridge University Press.

Constable, Marianne. 2014. *Our Word is Our Bond: How Legal Speech Acts*. Stanford: Stanford University Press.

Dewey, John. 1930. *Human Nature and Conduct: An Introduction to Social Psychology*. New York: Modern Library.

Dhami, Mandeep, Reid Hastie, Jonathan Koehler and Richard Wiener. 2007. "Introduction to the Special Issue: Decision Making and the Law." *Journal of Behavioral Decision Making* 20, 453–454.

Epstein, Lee and Jack Knight. 2004. "Building the Bridge from Both Sides of the River: Law and Society and Rational Choice." *Law and Society Review* 38: 207–212.

Epstein, Lee, Jack Knight and Olga Shvetsova. 2002. "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government." *Law and Society Review* 35, 117–164.

Epstein, Lee, William Landes and Richard Posner. 2013. *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice*. Cambridge: Harvard University Press.

Fourcade, Marion. 2009. *Economists and Societies: Discipline and Profession in the United States, Britain and France, 1890s to 1990s*. Princeton: Princeton University Press.

Galanter, Marc. 1974. "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change." *Law and Society Review* 9:1, 95–160.

Garth, Bryant. 1988. "Privatization and the New Formalism: Making the Courts Safe for Bureaucracy." *Law and Social Inquiry* 13:1, 157–174.

Ginsburg, Tom. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. Cambridge: Cambridge University Press.

Goffman, Erving. 1974. *Frame Analysis: An Essay on the Organization of Experience*. New York: Harper and Row.

Goodwin-Gill, Guy and Jane McAdam. 2007. *The Refugee in International Law*. Third Edition. Oxford: Oxford University Press.

Grattet, Ryken and Valerie Jenness. 2005. “The Reconstitution of Law in Local Settings: Agency Discretion, Ambiguity, and a Surplus of Law in the Policing of Hate Crime.” Law & Society Review 39:4, 893–941.

Grattet, Ryken and Valerie Jenness. 2008. “Transforming Symbolic Law into Organizational Action: Hate Crime Policy and Law Enforcement Practice.” Social Forces 87:1, 1–28.

Gross, Neil. 2008. *Richard Rorty: The Making of an American Philosopher*. Chicago: University of Chicago Press.

Hart, H.L.A. 1961. *The Concept of Law*. Oxford: Clarendon.

Hastie, Reid, ed. 1994. *Inside the Juror: The Psychology of Juror Decision Making*. Cambridge: Cambridge University Press.

Hathaway, James and Michelle Foster. 2014. *The Law of Refugee Status*. Second Edition. Cambridge: Cambridge University Press.

Hirsch, Werner and Evan Osborne. 1992. “Law and Economics—Valuable but Controversial.” *Law and Social Inquiry* 17:3, 521–537.

Hutchins, Edwin. 1980. *Culture and Inference: A Trobriand Case Study*. Cambridge: Harvard University Press.

James, William. 2002[1902]. *The Varieties of Religious Experience*. Mineola: Dover.

Joas, Hans. 1993. *Pragmatism and Social Theory*. Chicago: University of Chicago Press.

Joas, Hans. 1996. *The Creativity of Action*. Translated by Jeremy Gaines and Paul Keast. Chicago: University of Chicago Press.

Joas, Hans. 2000. *The Genesis of Values*. Chicago: University of Chicago Press.

Kennedy, Duncan. 1986. “Freedom and Constraint in Adjudication: A Critical Phenomenology.” *Journal of Legal Education* 36, 518–562.

Knight, Jack and Lee Epstein. 1996. “On the Struggle for Judicial Supremacy.” *Law and Society Review* 30: 87-130.

Knorr Cetina, Karin. 1999. *Epistemic Cultures: How the Sciences Make Knowledge*. Cambridge: Harvard University Press.

Knorr Cetina, Karin and Urs Bruegger. 2002. “Global Microstructures: The Virtual Societies of Financial Markets.” *American Journal of Sociology* 107:4, 905–950.

Knorr Cetina, Karin and Alex Preda, eds. 2005. *The Sociology of Financial Markets*. Oxford: Oxford University Press.

Kuersten, Ashlyn and Susan Haire. 2007. *Songer database update*. URL: http://artsandsciences.sc.edu/poli/juri/appct.htm. Last accessed: June 6, 2014.

Lamont, Michèle and Katri Huutoniemi. 2011. “Comparing Customary Rules of Fairness: Evaluative Practices in Various Types of Peer Review Panels.” In *Social Knowledge in the Making*, edited by Charles Camic, Neil Gross and Michèle Lamont. Chicago: University of Chicago Press, 209–232.

Landes, William, Lawrence Lessig and Michael Solimine. 1998. “Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges.” Coase-Sandor Institute for Law and Economics Working Paper No. 51.

Latour, Bruno. 1987. *Science in Action: How to Follow Scientists and Engineers Through Society*. Cambridge: Harvard University Press.

Law, David. 2005. "Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit." *University of Cincinnati Law Review* 73, 817–866.

Mallard, Grégoire. 2014. *Fallout: Nuclear Diplomacy in an Age of Global Fracture*. Chicago: University of Chicago Press.

Matoesian, Gregory. 2001. *Law and the Language of Identity: Discourse in the William Kennedy Smith Rape Trial.* New York: Oxford University Press.

McCloskey, Robert. 1960. *The American Supreme Court*. Chicago: University of Chicago Press.

Mead, George Herbert. 1967[1934]. *Mind, Self and Society from the Standpoint of a Social Behaviorist.* Chicago: University of Chicago Press.

Menand, Louis. 2002. *The Metaphysical Club*. New York: Farrar, Straus and Giroux.

Mertz, Elizabeth. 2007. *The Language of Law School: Learning to 'Think Like a Lawyer.'* Oxford: Oxford University Press.

Ng, Kwai. 2009. *The Common Law in Two Voices: Language, Law, and the Postcolonial Dilemma in Hong Kong*. Stanford: Stanford University Press.

Phillips, Scott and Ryken Grattet. 2000. "Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law." *Law and Society Review* 34:3, 567–606.

Pickering, Andrew. 1984. *Constructing Quarks: A Sociological History of Particle Physics*. Chicago: University of Chicago Press.

Posner, Richard. 1981. *The Economics of Justice*. Cambridge: Harvard University Press.

Posner, Richard. 2007. *Economic Analysis of Law*. Seventh edition. New York: Aspen.

Posner, Richard. 2008. *How Judges Think*. Cambridge: Harvard University Press.

Posner, Richard. 2012. “The Incoherence of Antonin Scalia.” *New Republic*, Sept. 13.

Posner, Richard. 2013. *Reflections on Judging*. Cambridge: Harvard University Press.

Posner, Richard. 2014. *Economic Analysis of Law*. Ninth edition. New York: Aspen.

Ramji-Nogales, Jaya, Andrew Schoenholtz and Phillip Schrag. 2007. “Refugee Roulette: Disparities in Asylum Adjudication.” *Stanford Law Review* 60:2, 295–412.

Rosenberg, Gerald. 2008. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University of Chicago Press.

Shapiro, Martin. 1981. *Courts: A Comparative and Political Analysis*. Chicago: University of Chicago Press.

Silver, Charles. 1991. “Outsider Jurisprudence from an Insider.” *Law and Social Inquiry* 16:3, 575–592.

Simon, Dan and Nicholas Scurich. 2011. “Lay Judgments of Judicial Decision Making.” *Journal of Empirical Legal Studies* 8:4, 709–727.

Skrentny, John David. 1996. *The Ironies of Affirmative Action: Politics, Culture and Justice in America*. Chicago: University of Chicago Press.

Slaughter, Anne-Marie. 2004. *A New World Order*. Princeton: Princeton University Press.

Songer, Donald. 1998. *The Multi-User Database on the United States Courts of Appeals, 1925-1996*. URL: http://artsandsciences.sc.edu/poli/juri/appct.htm. Last accessed: June 6, 2014.

Spaeth, Harold, Sara Benesh, Lee Epstein, Andrew Martin, Jeffrey Segal and Theodore Ruger. 2013. *Supreme Court Database*, Version 2013 Release 01. URL: http://supremecourtdatabase.org. Last accessed: May 14, 2014.

Sunstein, Cass, David Schkade, Lisa Ellman and Andres Sawicki. 2006. *Are Judges Political? An Empirical Analysis of the Federal Judiciary.* Washington, DC: Brookings.

Thorpe, Charles. 2006. *Oppenheimer: The Tragic Intellect*. Chicago: University of Chicago Press.

United Nations High Commissioner for Refugees. 2011[1979]. *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*. Geneva: UNHCR.

Vilhena, Daril, Jacob Foster, Martin Rosvall, Jevin West, James Evans and Carl Bergstrom. 2014. “Finding Cultural Holes: How Structure and Culture Diverge in Networks of Scholarly Communication.” *Sociological Science* 1, 221–238.

Wason, P.C. and P.N. Johnson-Laird. 1972. *Psychology of Reasoning: Structure and Content*. Cambridge: Harvard University Press.

Legal cases

Canada

Canada (*Minister of Citizenship and Immigration*) *v. Huntley*, Federal Court of Canada 2010, 2010 FC 1175.

Elastal v. Canada (Minister of Citizenship and Immigration), Federal Court of Canada 1999.

United States

Castellano-Chacon v. INS, 341 F.3d 533 (6th Cir., 2003).

Chevron USA, Inc. v. National Resources Defense Council, 467 U.S. 837 (S. Ct., 1984).

Elias-Zacarias v. U.S. INS, 921 F.2d 844 (9th Cir., 1990).

Fatin v. INS, 12 F.3d 1233 (3rd Cir., 1993).

Faye v. Holder, 580 F.3d 37 (1st Cir., 2009).

Gomez v. INS, 947 F.2d 660 (2nd Cir., 1991).

Haitian Centers Council, Inc. v. McNary, 969 F.2d 1350 (2nd Cir., 1992).

Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir., 2000).

INS v. Cardoza-Fonseca, 480 U.S. 421 (S. Ct., 1987).

INS v. Elias-Zacarias, 502 U.S. 478 (S. Ct., 1992).

Koudriachova v. Gonzales, 490 F.3d 1187 (2nd Cir., 2007).

Lopez-Soto v. INS, 383 F.3d 228 (4th Cir., 2004).

Lwin v. INS, 144 F.3d 505 (7th Cir., 1998).

Martinez v. Holder, 740 F.3d 902 (4th Cir., 2014).

Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (S. Ct., 1993).

Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir., 1986).

Singer Management Consultants v. Milgram, 650 F.3d 223 (3rd Cir., 2011).

Urbina-Mejia v. Holder, 597 F.3d 360 (6th Cir., 2010).

Administrative decisions

Board of Immigration Appeals. *Matter of Acosta*. 1985 WL 56042.

[1] "Social production of judicial decisions" is an unwieldy phrase, but it is the clearest encapsulation of the focal point of this essay. The scholarship and avenues for future scholarship I discuss here involve more than the study of judicial decisions by themselves. References to "judicial behavior" (we might also say "action," although neither term is innocent of theoretical implications in the history of social science) draw our attention to the level of individual experience and the social role of the judge, but they do so at the expense of the many institutional, cultural and social structural factors that may influence the production of judicial decisions, for example the organization of professional legal training and the role of law clerks in drafting opinions. "Judicial behavior" also carries the implication of a set of methodological and theoretical commitments that I see as potentially problematic. "Judicial decision making" emphasizes process and experience, but the phrase marginalizes the relevance of both outcomes (the decisions themselves) and the social context in which they are produced. We are ultimately interested in judicial decision making in large part because the decisions that judges make are socially efficacious and self-consciously performative. Judges not only decide legal questions, they transform their decisions into documents for public consumption in the fulfillment of a peculiar social role, and the force of the state in turn backs up their interpretations of the law. I aim throughout this essay to strike a balance between clarity and precision in the use of these several terms.

[2] Epstein et al. find that in the Courts of Appeals, judges dissent less frequently in practice than imputed political preferences would predict. There are a variety of plausible explanations for this observed dissent aversion: the negotiated exchange of favors by judges sitting together on a panel; an aversion to extra work when one knows that one's opinion will not become law; and perhaps most simply, an aversion to controversy or political disputes with one's colleagues. Epstein et al. find "weak" dissent aversion in the Supreme Court, but they do find evidence that Supreme Court Justices, like their counterparts on the Courts of Appeals, think instrumentally about whether or not to write dissents—for example, the dissent rate increases as caseload decreases.

[3] In these statistical tests, the Supreme Court Justices are coded as conservative, moderate or liberal based on "an assessment…developed from secondary sources" (113). Epstein et al. take multiple approaches to coding the ideologies of Courts of Appeals judges (70ff., 158ff., 199–204). All of these are rough and imperfect measures, and all of them except the simplest (taking the party of appointing president as proxy for judge ideology) are subject to coder reliability problems. One of the other approaches Epstein et al. use is to code the ideological valence of a set of case decisions (criminal cases, sex discrimination cases and commercial speech cases) to identify the deciding judges as strongly conservative, moderately conservative, moderately liberal or strongly liberal. This procedure is explained on pp. 199–204.

[4] In J.L. Austin's originary formulation, speech acts are utterances for which "to utter the sentence (in, of course, the appropriate circumstances) is not to *describe* my doing of what I should be said in so uttering to be doing or to state that I am doing it: it is to do it" (Austin 1962, 6).

[5] The principle of *Chevron* deference, established in the Supreme Court case *Chevron USA, Inc. v. National Resources Defense Council* (S. Ct. 1984, 467 U.S. 837) holds that the federal courts owe deference to bureaucratic agencies on the interpretation of statutes that those agencies administer. The principle is commonly expressed in terms of a two-step test: if (1) the statute is

ambiguous or does not address the question at issue and (2) the agency's interpretation of the statute is reasonable, then the courts ought to defer.

[6] Here another Canadian case provides a clear example: *Canada* (*Minister of Citizenship and Immigration*) *v. Huntley* (Federal Court of Canada 2010, 2010 FC 1175). *Huntley* concerned a white South African who claimed and was initially granted political asylum in Canada on the basis of well-founded fear of racial discrimination. Some authorities in the South African government publicly decried the initial decision as racist. When the case was reheard on appeal in the Federal Court of Canada, the Hon. Justice Russell wrote, "attempts to exert diplomatic pressure on the Government of Canada to ensure that the Decision was reversed give rise to complex constitutional, Charter and jurisdictional issues that the Court will now need to address as part of this application. If such threats are representative of the attitude of the South African authorities then they suggest an unfortunate misunderstanding of the way the rule of law works in Canada and an equally unfortunate lack of sympathy for South African citizens who find the current situation in their own country to be intolerable."

[7] Epstein et al. seem to agree with this point when they posit that the desire for "external satisfactions"—"prestige, power, influence, and celebrity"—is a major motivator for the Supreme Court justices, given that they have little or no prospect of upward mobility and a light caseload, so "leisure activities and nonjudicial work activities are not significantly constrained by [their] judicial duties" (Epstein et al. 2013, 103). They further note that the Justices are "unlikely to defer to any supposed superior expertise" of their colleagues, given the "tendency of prominent people to be self-important" (310). Behaviorist analyses tend not to delve deeply into interpretations of individual careers, but in a journalistic setting, Posner has offered an interpretation of Justice Scalia's outspoken commitment to textualism that focuses on his apparent "defensiveness" and his claim to intellectual leadership of the conservative faction of the current Supreme Court (Posner 2012).

[8] Network effects is one possible omission, but we should allow the possibility that network effects can be adequately expressed in terms of what Posner terms "sociological" and "organizational" analysis. Nothing Posner writes in outlining his framework would militate against the use of network analytic methods.

[9] I say "systematic," because in some places Posner and Epstein et al. do engage in some ad hoc theorizing about self-understandings and psychological motivations. See fn. 7 above.

[10] Posner has a ready answer to the challenge that rational choice models preclude adequate testing of alternative theories, encapsulated in his comment about the "rational frog" quoted above (Posner 2007, 15). Such a purely descriptive (and if not for the "little more" qualification, trivially true) concept of "rationality" may have some uses, but it is difficult to see how it can contribute to our social scientific understanding of action, intention or judgment. The meaning of "rationality" is a thorny conceptual problem, but I would at least like to suggest that the burden of proof is on Posner to demonstrate the explanatory value of a unitary concept of rationality against a more differentiated typology of action orientations (Max Weber's, for example). Posner collapses under a single term consciousness and the unconscious, intentional action and instinctual behavior, impulsive outbursts and five year planning, normative and deviant action, value-orientation and ends-orientation. Weber posits a typology of "ideal type" action orientations (instrumental rational, value rational, traditional and affective) that is more susceptible to criticism on the level of concept formation, but for precisely that reason it seems to give us more explanatory purchase over social action at the outset.

A later edition of Posner's *Economic Analysis of Law* (2014) softens his rhetoric around the posited scope of rationality by allowing that it is possible to be irrational. The distinguishing principle Posner proposes is that rational behavior, unlike irrational behavior, can be fitted to a utility function.

[11] Bybee defines "realism" in "rough-and-ready" fashion as "the theory that suggests judicial decision making is essentially a matter of politics" (Bybee 2010, 1, 107).

[12] For an example from the US federal courts, see *Singer Management Consultants v. Milgram*, 650 F.3d 223, 245 (2011).

[13] See *Haitian Centers Council, Inc. v. McNary* (969 F.2d 1350, 2nd Cir.); *Sale v. Haitian Centers Council, Inc.* (509 U.S. 155; S.Ct.).

[14] The only difference between the UN's core definition of "refugee" and the one given in the 1980 U.S. Refugee Act is the language that characterizes the necessary causal link between persecution and one of the protected categories. The UN identifies as protected those who are persecuted "for reasons of" race, religion, etc.; the Refugee Act protects those who are persecuted "on account of" race, religion, etc.

[15] Compare *Lopez-Soto v. INS* (383 F.3d 228, 4th Cir.) with *Faye v. Holder* (580 F.3d 37, 1st Cir).

[16] Compare *Urbina-Mejia v. Holder* (597 F.3d 360, 6th Cir.) and *Martinez v. Holder* (740 F.3d 902, 4th Cir.) with *Castellano-Chacon v. INS* (341 F.3d 533, 6th Cir.).

[17] Compare *Fatin v.* INS (12 F.3d 1233, 3rd Cir.) with *Lwin v. INS* (144 F.3d 505, 7th Cir.).

[18] Compare *Sanchez-Trujillo v. INS* (801 F.2d 1571, 9th Cir.) with *Hernandez-Montiel v. INS* (225 F.3d 1084, 9th Cir.). The "immutable characteristic" standard comes originally from a 1985 Board of Immigrations Appeals decision, *Matter of Acosta* (WL 56042). The proposal in *Sanchez-Trujillo* that a "voluntary association" is of "central concern" in the recognition of a particular social group is original formulation in the Ninth Circuit.

[19] I identified political asylum cases in Westlaw with the Boolean search terms (asylum AND refugee). Among the set of political asylum cases, those with separate opinions were identified with a Boolean search for (dissent OR dissenting OR concur OR concurring). False positive results were eliminated on a case by case basis. Concurrences that dispute a question of law were distinguished from those that do not on a case by case basis.

[20] The major disputes over political opinion are whether political neutrality can count as a political opinion and whether imputed political opinion can count as a political opinion (see *INS v. Elias-Zacarias* (S. Ct., 1992, 502 U.S. 478)). The designation of "particular social group" generates a bewildering array of approaches that still remain unsettled in case law in the US. There are multiple inconclusive attempts in the case law record to formulate a determinate rule for the designation of "particular social group"; for one strand of this, compare *Gomez v. INS* (2nd Cir. 1991, 947 F.2d 660); *Castellano-Chacon v. INS* (6th Cir. 2003, 341 F.3d 533); and *Koudriachova v. Gonzales* (2nd Cir. 2007, 490 F.3d 1187).

[21] Controlling precedents are the clearest sources of path dependency in the development of case law. Before the U.S. Supreme Court decision in *Cardoza-Fonseca* (S.Ct. 1987, 480 U.S. 421) it was standard for judges to read "well-founded fear" as requiring the demonstration of a "clear probability" of persecution. Justice Stevens's holding in that case that even a 10% chance of persecution could lead to a well-founded fear abruptly changed the standard that federal court judges applied. When legal principles and guidelines like this emerge from case law on the basis

of inductive reasoning from the contingent facts of a particular case, the idea of path dependency can give us analytic leverage in explaining their emergence.

[22] Landes, Lessig and Solimine (1998) calculate the average number of signed opinions per year (81.5 for Posner) and citation rank using data from the beginning of Posner's tenure to 1995. Their ordinal rankings of citations and output volume are constructed by comparing all active circuit court judges as of 1992 who had been on the bench for at least 6 years as of 1995, using data for the entirety of every qualifying judge's individual career.