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A Refugee from Justice? Disparate Treatment in the Federal Court of Canada

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This article paints a troubling picture of disparate treatment in the Federal Court of Canada. Examining more than 600 immigration and refugee claims, the results link judicial action to litigants' representation, their demographics and national region, and the background and ideology of the judges involved. When compared with prior research in Canada and similar studies from the United States, the findings suggest that an applicant in search of a just result would do as well to hire an experienced lawyer and hope for a sympathetic judge as to prepare an excellent appeal. Canada's immigration process requires greater attention so that the reality of its operation matches the promise of the nation's intentions.

INTRODUCTION

In May of 2007, readers of the *New York Times* may have been shocked to learn that "asylum seekers in the United States face broad disparities in . . . immigration courts, with the outcome of cases influenced by things like the location of the court and the sex and professional background of judges" (Preston 2007). Readers should not have been surprised by the story, however, for this phenomenon is neither new nor limited to the United States. More than fifteen years ago, researchers in Canada linked immigration decisions of the Federal Court of Canada (FCC) to the backgrounds and attitudes of individual judges (Greene and Shaffer 1992). Studies of disparate treatment in the justice system now have an extensive history, but few projects have looked closely at decisions of the courts when judges consider the most vulnerable of populations: noncitizens who seek asylum or protection.

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In an effort to update the 1992 study of the FCC, and as a comparative supplement to research done in the United States, three researchers analyzed decisions of the FCC to grant leave and consider the appeals of applicants bringing immigration claims. Drawing a sample of immigration cases filed with the FCC in 2003, we tested four categories of hypotheses for the court's decisions. Similar to prior research, we identified several extralegal factors that are linked to the FCC's rulings, including such influences as an applicant's gender, age, and ability to retain an experienced attorney, and the backgrounds and attitudes of the FCC judges who hear these appeals. Some of these findings were noted in earlier research, but the extent of the influences has both broadened and deepened over the last decade.

In the article that follows we describe that research project, providing background on past research and also explaining the process of immigration appeals in Canada. Separate sections explain the hypotheses tested and the findings uncovered. In the end, the results of this study raise serious questions about the FCC's treatment of immigration appeals and the distribution of justice in the Canadian immigration system.

PRIOR RESEARCH ON DISPARATE TREATMENT

For several decades now, researchers have investigated bias and disparate treatment throughout the criminal justice system. Although the level of discretion assigned to police officers and prosecutors accounts for many of these differences, the effects of judicial discretion and other court processes are much less understood. This may be due, in part, to the difficulty of accessing courts and their records and also because the courts are presumed to deliver fair and impartial judgments regardless of the litigants who come before them.

Much of the research examining litigant demographics and case outcomes has considered criminal cases, often with mixed results. In terms of race and ethnicity in the United States, African American defendants are "5.3 percentage points more likely than whites to be sentenced to prison," and they "have twenty percent longer sentences than whites, on average, holding constant age, gender, and [the] recommended sentence length from [sentencing] guidelines" (Bushway and Piehl 2001, 752, 733). Research also has shown that prosecutors are more likely to seek the death penalty for black defendants than white defendants (Kleck 1981; Baldus, Woodworth, and Pulaski 1990; Jacobs et al. 2007). Other studies have focused on the interaction between the races or ethnicities of the defendant and the victim (Baldus, Woodworth, and Pulaski 1990). In 1994, Mazzella and Feingold found that black defendants received more severe penalties than white defendants if the victim was white.

Studies of the effects of gender on criminal court outcomes have generally shown some effect, typically with females receiving more lenient treatment

than males. Studies from the 1980s, for example, show a gender effect related to pretrial release (Parisi 1982; Nagel and Hagan 1983). This effect has been consistent across time, and, in 2004, Demuth and Steffensmeier found that women and whites were more likely to receive favorable outcomes, including lower bail amounts and release, than males, blacks, and Hispanics. Once convicted, women also are less likely to be incarcerated. In their meta-analysis of criminal case processing, Daly and Bordt (1995) found the gender effect to be more pronounced for the in/out decision of a prison sentence than for the length of the term.

Disparities based on race or ethnicity and gender also have been found in the outcomes of civil litigation. Studies have continually shown that "awards received by women and minorities tend to be smaller than those received by white men" in personal injury cases (Chamallas 1994, 84). For example, a study by the Rand Corporation concluded that African American plaintiffs received smaller awards than their white counterparts in the United States (ibid.). These effects extend to mediation and arbitration, with a 1996 study concluding that non-Hispanic mediators in the United States were more likely to give higher monetary awards to non-Hispanic claimants, and female minority claimants received lower awards if both mediators were female (Lafree and Rack 1996).

ASYLUM AND REFUGEE CASES

Despite these conflicting results, little research has focused on the effects of race, ethnicity, and gender on outcomes in asylum or refugee cases. One such study in the United States, conducted by Ramji-Nogales, Schoenholtz, and Schrag (2007), found that nonlegal factors affected the likelihood of an individual's receiving asylum. The authors looked at four levels of the asylum adjudication process, including asylum officers, immigration judges, the Board of Immigration Appeals, and the U.S. courts of appeals.

The study found that the random assignment of cases to specific immigration judges as well as various judicial characteristics, including gender and previous work experience, was related to the granting of asylum. Specifically, female judges were more likely to grant asylum, a finding the authors attributed to female judges' own experience with sex discrimination. Further, male judges had more extensive experience in jobs that were traditionally adverse to asylum seekers. The study also found differences in rulings based on the quality of the applicants' legal representation, with attorneys who sought corroborating evidence and expert witnesses more likely to win their cases. There were significant differences in grant rate between the various immigration courts as well. Although the overall grant rate was 40 percent, rates varied from 12 percent in Atlanta to 54 percent in San Francisco. Some of the discrepancy can be attributed to differences in individual judges, even when controlling for the nationality of the applicants (ibid.).

The Transactional Records Access Clearinghouse at Syracuse University (TRAC) has conducted studies of immigration based on data collected by the U.S. Executive Office for Immigration Review between 1994 and 2005. Analyses show significant individual differences between judges and their likelihood of granting or denying asylum. TRAC researchers found that denial rates "ranged from a low of 10% to a high of 98%" (TRAC 2006b). TRAC implies that some of the discrepancy might be attributed to the judges' previous careers. The study also found a difference in granting asylum based on whether the individual had legal representation, with those individuals represented by attorneys enjoying a much greater success rate. Nationality mattered as well, with individuals from El Salvador, Mexico, and Haiti more likely to be denied asylum and those from Afghanistan and Burma more likely to be successful. The authors noted that these discrepancies, particularly "the extent of the judge-by-judge disparity," have existed "for at least a decade" (ibid.).

Research also has examined immigration inspectors at U.S. airports, whose work involves a great deal of discretion with little supervisory oversight. An observational study found that inspectors utilize categorization schemes to identify potential problem travelers; these criteria, however, are not exclusively based on legal distinctions. The inspectors are tasked with identifying "suspicious persons" whom they refer for secondary inspection (Gilboy 1991, 578). The inspectors showed pride in their ability to determine nationality based on physical characteristics and often made judgments of credibility that related to an individual's nationality, saying, for example, that some countries "have reputations for honesty and integrity" (ibid., 571).

Within Canada, the nation's Immigration and Refugee Board (IRB) has undergone changes in an attempt to increase consistency across decision makers by limiting their individual discretion. A study of cases filed in 2006, however, found continued disparities across case adjudicators. According to Rehaag (2009), hearing officers varied greatly in granting refugee status, with some officials granting protection in 95 and 96 percent of their cases and others in 2, 7, and 9 percent of cases. The IRB has attempted to explain these disparities by the nonrandom assignment of cases, noting that certain adjudicators specialize in particular geographic areas and that hearing officers face different rates of expedited cases. When controlling for these factors, however, including case type, country of origin, office location, and the percentage of expedited cases, the disparities between adjudicators remained. The author attributed the findings to personal characteristics of hearing officers and noted the need for future research to look at factors such as political party, experience, legal training, prior professional positions, country of origin, first language, minority status, and gender. Additionally, he recommended further review of the appointment process and the implementation of the Refugee Appeal Division (ibid.).

Rehaag's (ibid.) findings challenge the popular vision of Canada "as a welcoming haven for immigrants and refugees" (Dua, Razack, and Warner 2005, 1). Given its "policies of multiculturalism" (ibid.), Canada annually resettles 10,000 to 12,000 individuals, or "one out of every 10 refugees resettled globally" (Citizenship 2008). Further, Canada "is characterized in national mythology as a nation innocent of racism" (Dua, Razack, and Warner 2005, 1).

Refugees and other foreign nationals who wish to reside in Canada first bring their claims to the IRB, an administrative tribunal charged with all first order "decisions on immigration and refugee matters in Canada" (Immigration and Refugee Board of Canada 2006). Applicants who lose before the IRB may bring their appeals to the FCC.

The IRB considers refugee and immigrant claims through one of two processes. Refugee matters are heard by the Refugee Protection Division (RPD) of the IRB. The RPD determines who qualify as convention refugees or people in need of protection and has an obligation to grant protection to those who do.[1] A high legal standard is applied to these claims, and the claimant has the burden of proof. In deciding a claim, the IRB may use an expedited process, but the great majority of claims are decided by a full hearing. Indeed, refugee claimants have the right to a hearing and the right to present evidence and arguments on their own behalf. They also have the right to be represented at their own expense, although the legal representative does not have to be a lawyer (Immigration and Refugee Board of Canada 2006). Three out of the ten provinces provide some legal aid for refugee claimants.

Refugee hearings are inquisitorial rather than adversarial. Under this model, the IRB shares the responsibility of obtaining evidence relevant to the claim, and the hearing officer—known as a "board member"—may directly question witnesses (ibid.). According to Leslie Lakos, an immigration consultant, "the core of any refugee claim is credibility" (Paolinelli 2008). The members determine the "credibility and probative value of the evidence . . . in the light of what is generally known about conditions and the laws in the claimant's country of origin, as well as the experiences of similarly situated persons in that country" (Immigration and Refugee Board of Canada 2004, 2). The RPD "cannot reject evidence simply because it is hearsay" or uncorroborated, and "where the [IRB] finds a lack of credibility based on inferences, there must be a basis in the evidence to support the inferences" (ibid.).

In addition to the RPD, the IRB's Immigration Division holds "admissibility hearings for foreign nationals or permanent residents who" the Canadian Border Services Agency believes have sought to enter Canada illegally.[2] The Immigration Division determines whether individuals "may enter or remain in Canada," and issues departure, exclusion, and deportation orders

(Immigration and Refugee Board of Canada 2006). The Immigration Division also reviews all decisions to detain people who are found to be inadmissible to Canada (ibid.).

Refugee claimants who lose before the IRB's RPD may apply to the FCC for judicial review after first obtaining the court's permission (or "leave") (Rousseau et al. 2002; Immigration and Refugee Board of Canada 2006). Those who lose before the Immigration Division, though, must take their appeal first to the Immigration Appeal Division (IAD) of the IRB. The IAD hears several types of appeals from the Immigration Division, including sponsorship for permanent residence, removal orders against visa holders and permanent residents, loss of permanent residency, and ministers' appeals. Appeals are not automatic, and the IAD may overturn an officer's decision only "if there was an error in law or fact [or] a breach of a principle of natural justice" (ibid.). Applicants are permitted to seek leave for judicial review from the FCC following any IAD decision (ibid.), although those who lose before the Immigration Division on an order of detention may appeal directly to the court.

THE FEDERAL COURT OF CANADA

The FCC was formed in 1971, in succession to the Exchequer Court of Canada. The court has jurisdiction to resolve legal disputes involving claims against the government of Canada, including appeals by litigants who have lost at the IRB (Courts Administrative Service 2006). Originally, the FCC had two divisions, one for trial and another for appeal. In 2003, the Federal Court Act formally created two separate courts, the Federal Court and the Federal Court of Appeal.

Immigration appeals may comprise upwards of 85 percent of the FCC's caseload.[3] In appealing an adverse decision of the IRB, petitioners have fifteen days to file an application with the FCC if the decision was issued in Canada and sixty days if the decision was reached by a Canadian immigration officer outside the country.[4] The appeal, known as an application for leave, is randomly assigned to an FCC judge,[5] where it proceeds in two steps. First, a judge must decide whether to grant leave and permit a hearing to consider the merits of the appeal. In granting leave, judges must determine whether there is a serious issue at hand, whether the applicant is a Convention refugee or a person in need of protection (both of which have a high legal standard of proof), and whether the applicant can be considered credible. In making the decision, the FCC typically defers to the IRB, with official court records showing that only 10 to 15 percent of cases are granted leave. According to the FCC, the leave decision is typically "determined without the personal appearance of the parties" (Courts Administrative Service 2006).

If leave is refused, the matter is dismissed. No reasons for the refusal are given, and there is no right of appeal (Immigration and Refugee Board of

Canada 2006) Courts 2006). If leave is granted, the judge sets a date for judicial review, which resembles a hearing, typically between thirty and ninety days from the date granted. The case is randomly assigned to a different judge, who hears oral arguments in support of the application (Courts Administrative Service 2006). The result at judicial review is either the dismissal of the case or the return of the claim to the immigration authority that reached the original decision (Immigration and Refugee Board of Canada 2006). An appeal of a judicial review order is only available where the presiding judge agrees to certify a question to be considered by the Federal Court of Appeal. Without the judge's certification, no appeal is available (ibid.).

CONCERNS ABOUT THE CANADIAN PROCESS

The 1951 UN Convention Relating to the Status of Refugees dictates that member countries provide "surrogate national protection to individuals" who have left their home country due to persecution (Anker 2002, 134). "Asylum decisions are discretionary, meaning the decision maker can weigh all the evidence and other factors and decide purely on the basis of his or her judgment" (TRAC 2006a). Although "each decision is handed down within a framework of law and judicial opinions interpreting the law" (ibid.), "there is no regularized monitoring of states' compliance with their obligation to provide surrogate protection" (Anker 2002, 135).

In Canada, refugee protection falls to the IRB and the FCC. The IRB, in an effort to monitor and improve its functions, focuses on different priorities over time. In 2003, officials at the IRB were concerned with the efficiency of the adjudication process, in part due to an increasing number of claims, and implemented an action plan to address those issues. They developed "initiatives and tools [that] focused on standardizing and simplifying the case management process, establishing greater institutional guidance for quality and consistent decision making, and improving the efficiency of hearings" (Sgro 2004).

But while the 2003 measures reflected a greater emphasis on productivity, there has been no analogous push to improve the quality of the IRB's decision making. As currently constituted, IRB members need not be lawyers or have legal training (Immigration and Refugee Board of Canada 2006), and they are appointed at the arbitrary discretion of the Governor in Council. Moreover, the IRB has not implemented an appeals process within the RPD, even though a Refugee Appeal Division was provided for in the Immigration and Refugee Protection Act (2001) (IRPA) in 2002. "In drafting IRPA, the government acknowledged the need for an appeal of single member decisions to a specialized tribunal but did not follow through, thus foisting the primary role of catching RPD errors to the generalist Federal Court with its limited leave procedure and limited judicial review authority" (Personal Communi-

cation #1).[6] Indeed, this may be one reason why Rehaag (2009) has found such tremendous disparities in the rate with which IRB members grant refugee status.

Even more disconcerting was a 1992 study that linked immigration decisions of the FCC to the backgrounds of the individual judges. The authors looked at a random sample of cases filed with the FCC in 1990 and found the likelihood that leave was granted to be significantly related to the individual judge. Across the twelve practicing judges, "leave was granted in 25 percent of the cases," but the research showed that applicants appearing before one specific judge "[were] 5.4 times more likely to succeed in their applications for leave to appeal" than those appearing before another (Greene and Shaffer 1992, 76, 82). Although the research indicated some relation between the country of origin of the leave applicants and the judges' decisions, and found that judges had different proportions of cases from certain regions, these factors did not account for all of the variation in leave rates. Further, the nationality of applicants succeeding before the IRB was not related to their success rate in the FCC. In the end, the authors concluded that the association might be due to unclear legislative criteria or, more troubling, that applicants were being denied fundamental justice due to individual judicial differences. Rather than point to specific characteristics, however, the authors of the study noted that "social science research has shown that judges generally do their level best to decide cases impartially," but they are human and thus will "vary in their approach to dispositions for similar cases" when the law is unclear (ibid., 82).

A NEW EMPIRICAL APPROACH TO CANADIAN PRACTICE

With fair treatment an enduring commitment and continuing challenge for Canada, and given comparative studies showing evidence of bias and disparate treatment in immigration cases, a combined Canadian and U.S. research team undertook a study of the FCC's treatment of immigration appeals. Over a three-month period, the team traveled to the FCC's registry offices to analyze case files of individuals who had filed immigration appeals with the FCC during calendar year 2003. Using a variety of statistical techniques, and supplementing their efforts with input from Canadian experts on immigration law and practice, the research team analyzed a cohort of FCC judicial review applications to determine how the FCC considered and treated claimants and to identify those factors that best explain and predict the FCC's actions.

POTENTIAL EXPLANATIONS FOR THE FCC'S DECISIONS

This study seeks to examine two discretionary decisions of the FCC in immigration appeals: the judgment to grant leave for applicants so that their

cases may be considered at a hearing and the decision to grant or deny relief to them if a hearing is held. Past studies of immigration cases in the United States and Canada, as well as research on judicial discretion as a general matter, suggest that extraneous, "extralegal," forces may influence judicial decisions. That is, apart from those legal doctrines that should influence a judge's action, prior research suggests that litigants' demographics, access to lawyers, and even judges' ideology may predict the outcome of a jurist's rulings (Baum 1994; Epstein and Knight 1998; Greene and Shaffer 1992; Ramji-Nogales, Schoenholtz, and Schrag 2007).

Here, we begin with the null hypothesis that the FCC's immigration rulings will not show any influence from these extralegal forces, or, put another way, by process of elimination we will be able to exclude predictive forces that are not linked to precedent or the strength of case facts. To be sure, it is unlikely that we can eliminate all such extraneous factors that may predict the FCC's decisions, and, to that end, it may be impossible to effectively establish the null hypothesis. But, to the extent that the research identifies causal relationships between extralegal forces and the FCC's immigration decisions, we will be able to reject the null hypothesis, at least in connection to those extralegal influences.

LEGAL RESOURCES

We group the extralegal factors into four categories of alternative hypotheses for the FCC's immigration decisions. Initially, we predict that the court's decisions may be linked to the litigants' abilities to marshal legal resources. Here, we expect that those litigants who are represented by an attorney will fare better in the FCC's leave decisions and perhaps even when the court considers their substantive claims. It is widely understood that unrepresented litigants stand a worse result in judicial proceedings (Greacen 2002), as lawyers can more effectively steer litigation, and there is no reason to expect otherwise in the FCC. Even recognizing that some litigants employ the services of a "consultant" when appearing before the IRB and then at least initially when filing a case with the FCC, an attorney is likely to command more respect from the court and be of greater service than any other representative. Similarly, we expect that those litigants who are represented by an attorney whose firm has considerable experience before the FCC are likely to fare better than are others. Immigration practice is a relatively narrow specialty, and, as with other areas of law, those attorneys who are most experienced in its substance and practice are likely to achieve a better result for their clients.

STRUCTURAL FACTORS

Alternatively, the court's decisions may be related to structural factors in the litigation. Initially, we predict a connection between the type of case filed—

refugee claims vs. all others—and the court's decisions. Refugee claims may be appealed directly from the RPD of the IRB, whereas other immigrant claims (exclusive of detention orders) must first be brought to the Immigration Appeals Division of the IRB following an adverse decision of the Immigration Division. Figuring that the FCC is likely to be more skeptical of appeals that themselves have been appealed once administratively within the IRB, we anticipate that the court is likely to grant leave more often in refugee claims where the FCC is the first site of appeal.

We also expect regional differences in the court's decisions, predicting that the court will favor cases filed outside of Ontario and Quebec. Statistics from 2003 show that the IRB was more likely to rule favorably for refugee claimants who filed in Montreal and Toronto than it was for applicants from Calgary and Vancouver (Immigration and Refugee Board of Canada 2004). Of course, this phenomenon could have several sources, including the nature of immigrant communities in various locations or the availability of experienced counsel outside of Canada's two largest cities. Here, though, we are after a different notion of local legal culture suggested to us by a Canadian colleague. To the extent that IRB officers in Ontario and Quebec are more experienced in immigration matters—if only from the larger caseloads of their metropolitan environs—we anticipate that the FCC will look more critically at decisions made by IRB officers in other locales and show a greater willingness to grant relief to petitioners from those provinces. Furthermore, we anticipate that this effect will exist even when controlling for the quality and experience of an applicant's attorney.

Finally, for those cases granted leave, we predict that the court will defer to decisions of an immigration officer or board member when predicated on a finding below about the credibility of the claimant. This may well be a "legal" factor, but a review of IRB decisions in our database shows that immigration officers made credibility determinations in three-quarters of refugee cases but in only 40 percent of nonrefugee claims. To the extent that the court's deference to the IRB does not follow similar patterns in its rulings, we will have further evidence to question whether the court is following legal criteria in its decisions.[7]

LITIGANTS' DEMOGRAPHICS

A third category of hypotheses predicts that the FCC's actions may be related to the demographics of the litigants who appear before it. Here, though, it is important to underscore that these hypotheses do not necessarily envisage judicial prejudice. Rather, they predict that different categories of litigants are likely to fare better than others, and that these differences, although related to the litigants' demographics, may ultimately be explained by other nondiscriminatory factors. For example, if, as expected, female claimants are less likely to be granted leave than are male litigants, it is possible that the difference may be explained by their inability to afford

representation compared to men (who, on the whole, earn more than do women) than by the court's openly devaluing women's claims.

Nonetheless, since prior research has uncovered demographic disparities in judicial treatment, it is important to test for those influences in the FCC, as well. Here, we examine six such demographic differences, including litigants' (1) gender, (2) age, (3) nationality, (4) ethnicity, (5) geographic region, and (6) number of applicants. Consistent with prior research on the state of women in Canada and elsewhere (Immigration and Refugee Board of Canada 1996; Chamallas 1994), we anticipate that women will fare worse before the FCC. If comparative research from the United States is applicable, then the FCC may show greater deference to the "able-bodied" over the young or elderly (Manning, Carroll, and Carp 2004); however, given Canada's image "as a welcoming haven for immigrants and refugees" (Dua, Razack, and Warner 2005, 1), it is also possible that the FCC will provide greater protection to those who are least able to care for themselves. In this respect, we predict that the FCC will be more likely to grant claims from multiple applicants—most likely families, where the effect of an adverse decision is compounded—than for individual claimants. Prior to the research, we are not prepared to predict those nationalities, ethnicities, or regions that may be seen most sympathetically by the FCC, although, as a general matter, we would expect that, all other factors being equal, applicants from developed countries will fare worse before the FCC than those from poor countries, as developed countries are generally more civil societies with less objective evidence of persecution.

There is one hypothesis not found in this category, although we believe it to be operative, and that is the socioeconomic standing of claimants before the FCC. Similar to most interactions with government, we believe that higher-status litigants are likely to fare better before the FCC than lower-class litigants. Not only are the higher status better able to marshal financial, informational, and experiential resources on behalf of their claims (Black 1976), but the court also may view them more favorably (perhaps unconsciously) as a resource for, rather than a "drain" on, Canadian society. Unfortunately, available data do not permit us to estimate the class of litigants, whether by their income, education, or parents' backgrounds. To some extent, a claimant's ability to hire an experienced attorney may be a partial substitute for this construct, and if it should prove influential, we will discuss its implications in later sections of the article.

JUDICIAL INFLUENCES

Finally, the study considers the influence of a judge's background and ideology on his or her decisions in immigration cases. To be clear, this is an extralegal factor, in that individual judges are expected to approach "the law" similarly, regardless of background and disposition (Bork 2003). Nevertheless, there is considerable research to suggest that judges' decisions may

be influenced by work experience, career identity, and ideology (Baum 1994; Epstein and Knight 1998; Greene and Shaffer 1992). For this reason, we incorporate several measures of judge-specific influences on the decision to grant leave and the ultimate judgment on the merits. These examine a judge's prior career, hypothesizing that those with prior governmental experience will be more amenable to immigration and asylum cases;[8] primary language, predicting that Francophone judges will be sympathetic to claimants from French-speaking countries; experience on the bench, suggesting that there is likely to be a "learning curve" under which judges shift their rulings over time; political ideology, presuming that judges with a liberal reputation will provide greater protection for claimants than will conservative judges; and gender, hypothesizing that, as in prior studies of rights claims, female judges will be more sympathetic to applicants than will their male colleagues (Ramji-Nogales, Schoenholtz, and Schrag 2007).

METHODOLOGY

To examine the influence of these extralegal factors on the FCC's consideration of immigration appeals, we drew two samples of immigration cases filed with the FCC in 2003. Ideally, we would have drawn a single sample, but because the FCC grants leave in only a small percentage of petitions, we had to oversample cases in which leave was granted. In the end, we had two comparison groups of cases: 275 cases in which leave was denied, and 342 cases in which leave was granted, for a total of 617 immigration cases filed with the FCC in calendar year 2003. The cases in each set were drawn randomly from the FCC's list of case filings available on its Web site and represented about 6 percent of all immigration appeals filed with the FCC in 2003.[9]

We coded these cases for two outcomes, or dependent, variables. First, we were interested in whether the court granted leave—that is, whether it granted the applicant's request for a hearing to reconsider the immigration decision below. These rulings were coded dichotomously, as the FCC either permitted or denied the petition for leave. For those cases in which the court granted leave, we also recorded whether the FCC upheld the immigration decision below or whether it granted the applicant a new hearing before the IRB or the appropriate immigration officer. In all but two of the 342 cases analyzed at this level the court either granted or denied the applicant's original appeal, and in order to enable logistic regression, we excluded the two cases in which the court issued a different ruling. In addition, we eliminated five other cases in which the court's decision was unavailable. Ultimately, then, we included 335 cases in our analysis of the FCC's decisions on the merits.

Researchers coded these variables and the many independent variables involved by a combination of information obtained from the FCC's Web site

and from onsite research at Registry Offices of the FCC across Canada. Most of this work was done in the Registry's main office in Ottawa, where three researchers read each case file and recorded relevant data on two separate trips. Intercoder checks were performed, with coders reliable at rates between 92 and 95 percent.

Much of the coding for the independent variables was straightforward. For example, the IRB's report to the FCC listed the basis of the application (e.g., refugee status) and the number of applicants in a petition, as well as the gender, age, and nationality of the lead applicant. We chose to code for the demographics of the named applicant on the theory that, even in a petition of multiple applicants, this person's efforts would likely direct the petition. The applicant's ethnicity was often mentioned by the IRB or the FCC, as, for example, when the IRB noted that a Sri Lankan national claimed refugee status because of his Tamil ancestry. Other cases were more difficult to decipher, such as when the applicant—and then the IRB in its report—identified the applicant based on his minority religion. In these cases, we equated religion with ethnicity in the coding. In other cases, where no information was provided on the individuals' ethnicity, we recorded their ethnicity as their nationality; for example, a citizen of the Ukraine was coded as Ukrainian for both nationality and ethnicity.

We also recorded information on the applicant's legal representative, although here the coding was limited to the attorney of record. A number of applicants seemed to approach the court initially with an informal "consultant," but it was not always clear from court records when, and to what extent, the consultant was involved. Instead, we coded for an applicant's representation by counsel, and here we noted the lawyer's name and the name of his or her firm. As will be shown later, particular lawyers consistently proved more successful with the FCC than did others.

Finally, we recorded a number of variables about the judges of the FCC who heard these cases. Some of these data were easy to obtain—judges' gender, prior work experience, years on the bench, and primary language were available in their public biographies. But we also wanted to record assessments of the judges' ideology. Unlike studies of U.S. judges (Fischman and Law 2009), it was not advisable to represent this construct by the party of the appointing government. Not only is the process of judicial appointment less polarized in Canada than the United States,[10] but also the same political party was in power for many of the years preceding the start of this study. For that matter, we sought a measure that would reflect a judge's general philosophy of the role of government rather than an oblique representation of a judge's political allegiances at the time of appointment. To assess a judge's ideology, we assembled a panel of five anonymous Canadian experts who were specialists in immigration law and also familiar with the judges of the FCC. Each had considerable experience either practicing before the FCC or studying its decisions, and all felt comfortable gauging the judges. We asked the five experts to complete a five-point scale assessing the

ideological reputation of the FCC judges on the bench in 2003.[11] Using "very liberal" at one end and "very conservative" at the other, the scale defined liberality as an expansive reading of the Canadian Charter of Rights and Freedoms, meaning that government would be expected to provide additional services and greater procedural protections to Canadian residents.[12] All five separately and confidentially rated each of the FCC judges; the scores were then totaled and averaged for each judge. The variance between individual assessments was small, giving us confidence in this, admittedly inventive, measure. In total, the experts evaluated thirty-six judges of the FCC, assessing 9 percent as having very liberal reputations, 33 percent as liberal, 33 percent as moderate, 12 percent as conservative, and 13 percent as very conservative.[13]

FINDINGS—FCC DECISION TO GRANT LEAVE

Before turning to the FCC's decisions on immigration and asylum cases, it is instructive to consider the nature of immigration practice before the FCC. Regardless of whether the court granted leave, the vast majority of litigants in our sample were represented by an attorney (87 percent), and an equally large number of these lawyers (86 percent) came from firms that appear regularly before the FCC. Three-quarters of the court's immigration caseload (74 percent) was derived from refugee matters, meaning as well that the large majority of cases were appealed directly from a decision of the IRB and not an immigration officer situated elsewhere in the Canadian government. As an experienced immigration advocate explains, "There are a few reasons for this. The most serious decisions from the view of the applicant are refugee decisions and family sponsorships heard by the IRB. Apart from applications for permanent residence for humanitarian reasons and pre-removal risk decisions, other immigration decisions deal with temporary status or are overseas decisions where only the exceptional applicant will have the education and wherewithal to challenge the decision" (Personal Communication #2).[14]

Finally, many of the cases before the court came from a common collection of countries. More than half of the court's immigration caseload involved countries that appeared more than five times in our sample (64 percent), a pattern that almost replicated itself for common ethnicities as well (58 percent). To be sure, there are many isolated petitions from single countries, but the court tends to see a number of cases from common countries. This is not surprising considering immigration patterns to Canada, a country where people of similar backgrounds may seek to join their national communities in Canada and one to which world events may cause people of particular countries to flee their homelands in search of refuge. Furthermore, these trends are similar to refugee claims heard by the IRB in which nearly 30 percent of the caseload at the RPD comes from two countries (Frecker 2002).

Court records indicate that the FCC grants leave in 10 to 15 percent of immigration cases (Courts Administrative Service 2006), but these statistics do not explain what factors influence the court's determinations. In an effort to answer these questions, we performed cross-tabular analyses, testing the independent variables we coded against the FCC's determination to order leave in 2003 immigration cases. Initially, we were able to rule out one variable as explanatory. In the cross-tabulations, there was no statistically significant relationship between the number of applicants in a case and the court's decision either to grant leave or order relief. Other variables were statistically significant in one or both of the cross-tabulations (e.g., with respect to the court's decision on leave or the merits) and were left in for further consideration.

Table 1 presents the cross-tabulations for the FCC's decision to grant leave, the variables listed in the order of the hypotheses with which we started the study. So, for example, the two variables associated with the "legal resources" hypothesis—representation by an attorney and by an experienced law firm—provide support for the underlying theory. Litigants who were represented by an attorney were much more likely to be granted leave than were the self-represented, and those claimants with an experienced law firm behind them were more likely to receive a favorable leave ruling from the FCC as well.

The cross-tabulations provide mixed support for the "structural" hypotheses. There were regional differences in the court's decision to grant to leave, with the relationship falling in the direction predicted; cases filed in Ontario and Quebec were less likely to be granted leave than those coming from elsewhere throughout the country. However, the nature of the claim had the opposite effect as anticipated. Refugee claims were less likely to be granted leave than were nonrefugee cases, with both relationships reaching a level of statistical significance. Perhaps this is because nonrefugee claims are disproportionately brought by applicants with the knowledge and resources to employ an experienced advocate, a point suggested to us by an experienced immigration advocate. We take up this possibility later in the regression analysis.

Litigants' demographics appeared powerful in explaining the decision to grant leave. Men were more likely to be granted leave than were women, and those in their most productive work years (ages 26–64) were more likely to be granted leave than were the old and young. Interestingly, the analysis identified a statistically significant correlation between the court's leave decisions and the applicants' nationality and ethnicity. But the number of applicants from particular countries was often so small that it made the analysis difficult to interpret. Instead, we tried aggregating applicants by several factors related to their home region or conditions on the ground in their home countries in 2003, including measures for economic development, human rights,[15] and geography (no table shown). Here, the variable that remained statistically significant in both cross-tabulations was the continent of the

Table 1. Factors Affecting the Leave Decision

Independent Variable	% Applicants Granted Leave	Number of Applicants
Representation by an Attorney *		
Represented	63%	537
Self-represented	6%	80
Law Firm Experience *		
Five or more cases in sample	78%	159
Fewer than five	28%	28
Nature of Claim *		
Refugee Cases	53%	459
Nonrefugee Cases	63%	158
Registry Office Where Case Was Filed *		
Ontario and Quebec	53%	542
Nova Scotia	60%	5
Alberta	69%	26
British Columbia	72%	34
Manitoba	100%	8
Newfoundland	100%	1
Applicant's Gender *		
Male	75%	311
Female	39%	251
Applicant's Age *		
26–64	66%	388
Other ages	37%	229
Applicant's Region *		
From Asia	67%	255
Elsewhere	47%	362
World Bank Economic Rank		
High Income	63%	57
Upper Middle Income	56%	139
Lower Middle Income	63%	212
Lower Income	63%	137
Political Terror Scale		
High	51%	41
Middle High	63%	131
Middle	63%	215
Middle Low	62%	111
Low	78%	9
Virtually None	50%	36
Multiple Applicants From Same Nation *		
5 or more cases in sample	62%	397
Fewer than 5	44%	220
Multiple Applicants From Same Ethnicity *		
5 or more cases in sample	64%	357
Fewer than 5	44%	260
Judge's Gender *		
Male	58%	442
Female	46%	127
Judge's Ideology *		
Liberal	67%	243
Neutral	50%	193
Conservative	46%	144
Judge's Primary Language		
English	57%	421
French	54%	129
Judge's Time on Bench *		
1–4 years	49%	331
4–9 years	71%	160
10–14 years	52%	58
15+ years	55%	31
Judge's Most Recent Job *		
Government service	61%	279
Other position	52%	274

Chi-square: *≤ .05

applicant, with petitioners from Asia consistently faring better before the court on decisions to grant leave or order relief.

In an attempt to tease out this relationship, we considered whether the FCC's apparent favoritism for Asian applicants actually reflected the court's greater familiarity with claims from these countries rather than a distinct regional preference. Examining cases by the rate filed with the FCC, we found that applicants who came from commonly seen nationalities or ethnicities (defined as those appearing more than five times in our sample) were more likely to be granted leave than those from isolated cases. However, Asians were no more likely than North Americans or Europeans to be among these heavily represented groups (no table shown).

Finally, several variables connected to the "judicial influence" hypothesis showed a correlation to the court's granting of leave, although not always in the direction predicted. Contrary to our original hypothesis, male judges were more likely to grant leave than were female judges. As predicted, judges known for a more liberal perspective on the Canadian Charter were more willing to order a hearing than were moderate or conservative judges. Judges who reached the bench from government service favored leave over those who came from private practice, and in what seems to be an odd relationship, judges who had served between 5 and 9 years on the FCC were much more likely than their brethren to grant leave.

A correlated relationship, of course, does not establish causality, and, in fact, some of these relationships likely mask other causal influences. For example, a judge's tenure on the FCC is strongly correlated with his ideology (two-thirds of judges with five to nine years of service were coded as liberal versus one-third of all other judges). Thus, rather than reflecting any change in decisions over time on the bench, the relationship found in Table 1 between judicial experience and leave decisions is likely explained by judicial ideology.[16] Similarly, although Table 1 indicates that women were less likely to be granted leave than were men, further analysis shows that women were less likely than men to be represented by counsel before the FCC (no table shown). Might the gender disparities in leave, then, be a result of inequitable access to representation rather than a deliberate preference by the court?

To address these and related questions, we ran a series of logistic regressions between several of the independent variables in Table 1 and the FCC's decision to grant leave. Initially, we had to drop the variables representing multiple applicants from the same nationality or ethnicity, as these were strongly correlated with an applicant's representation by lawyer and the experience of that attorney.[17] Similarly, we omitted the variable measuring a judge's time on the bench because it covaried with judicial ideology. We tested both measures in the regressions and found that judicial ideology explained more of the variation in the dependent variable even if we divided judicial tenure dichotomously to account for the apparent cohort effect. Finally, we created a new variable to better interpret the influence of Asian nationality identified in Table 1. Although other tests indicated that Asian

Table 2. Logit Regression on FCC Leave Decision

	Model One—Reduced[†]			Model Two—Full[‡]		
Independent Variable[§]	**B**	**(S.E.)**	**Odds Ratio**	**B**	**(S.E.)**	**Odds Ratio**
Represented	3.48***	(1.10)	32.76	2.64**	(1.19)	14.09
Law Firm Experience	1.82***	(0.57)	6.21	2.20***	(0.76)	9.07
Refugee				–0.25	(0.57)	0.77
Ontario/Quebec				–0.76	(0.88)	0.46
Age (26–64)	0.82	(0.51)	2.83	0.27	(0.62)	1.31
Gender (Male)	0.72	(0.47)	2.05	0.57	(0.52)	1.76
Asia				–0.32	(0.59)	0.73
Country Development				–0.46	(0.53)	0.62
Judge Gender (Male)				0.12	(0.65)	1.13
Judge Ideology (Liberal)	0.38*	(0.22)	1.46	0.26	(0.29)	1.30
Judge Language (French)				0.76	(0.96)	2.15
Judge Last Job (Govt.)				0.14	(0.53)	1.15
Constant	–3.41**	(1.47)	0.68	–0.87	(2.16)	0.41

NOTES:
*$p \leq 0.1$; **$p \leq 0.05$; ***$p \leq 0.01$.
[†]H&L Chi-square: 4.84, 7df (.67); –2 log likelihood: 122.13, 6df (.00); Nagelkerke R^2: 0.41.
[‡]H&L Chi-square: 6.09, 8df (.63); –2 log likelihood: 106.49, 12df (.01); Nagelkerke R^2: 0.32.
[§]Chi-square for contribution of independent variable blocks in full model:
Legal Resources: <0.01
Structural: 0.57
Litigant Demographics: <0.01
Judge Factors: 0.02

nationality was not correlated with a country's economic or political conditions (no table shown), we wondered whether these influences would affect one another in a regression if combined into a single variable. So, we created a three-point variable, called "country development," which combined the economic and human rights conditions in various countries. On one end of the spectrum were those countries scoring high in the World Bank's economic index and low in Professor Gibney's (n.d.) political terror scale, while countries at the other end were coded for low per capita income and worse human rights conditions under the same measures.

Table 2 presents the results from two Logit regressions. We first ran a reduced, or parsimonious, model to examine those independent variables that seemed most explanatory in the cross-tabulations. We then expanded the model to incorporate variables from each of the four categories of hypotheses (e.g., legal resources, structural factors, litigant demographics, and judicial influences). Regardless of the model employed, an applicant's legal resources had an extremely strong and positive influence on the court's decision to grant leave. Applicants who were represented by counsel from experienced law firms were substantially more likely than others to receive leave from the court. Further, in the reduced model, litigants whose cases were heard by

judges known for a liberal reputation were more likely to receive leave than others.

Although none of the other independent variables in the full model proved statistically significant, it is instructive that the odds ratio for legal representation dropped by more than half when other variables were included in the regression. This suggested to us that other influences were afoot in the FCC's decision to grant leave, even if they did not rise to the level of statistical significance individually.[18] As a result, we ran a series of regressions in which we removed blocks of independent variables by category and tested the change in the chi-square of the negative log-likelihood. The significance of the chi-square changes are presented at the bottom of Table 2. They suggest that the variables associated with a litigant's demographics or nationality—age, gender, Asian nationality, and country development—collectively influenced the FCC's decision to grant leave. So, too, the four variables related to a judge's demographics and background added a statistically significant influence as a block. This block included judicial ideology, which was statistically significant in the reduced, but not full, regression model. However, we note that the Beta value, standard error, and odds ratio remained relatively similar for judicial ideology between both regressions. When considering that the variable had an odds ratio of 1.46 across five units of measurement, we believe the block analysis confirms our supposition that judicial ideology is predictive of the court's leave decisions.

In sum, the block analyses lead us to conclude that other characteristics of the FCC judges and litigants[19] may be influential in explaining leave decisions, even if their precise role must await additional, future research. Still, their potential influence should not take away from the striking conclusion that an applicant's access to counsel from an experienced law firm has a strong, positive, effect on the likelihood of receiving leave.

FINDINGS—IF LEAVE IS GRANTED

Even if the FCC grants an applicant leave, his chance of a favorable ruling on the appeal is still weak. Of those cases in our sample in which the FCC granted leave, only one-third were returned to the IRB or an immigration officer for new consideration. As we did when analyzing leave decisions, we performed a series of cross-tabulations to test the correlations between the independent variables and the FCC's ultimate ruling on a petitioner's immigration case. The results quickly eliminated the legal resources hypothesis as explanatory of the court's ultimate decision on immigration appeals, and, in fact, the reason is relatively simple: most litigants who were granted leave were represented by an attorney, and many of these attorneys came from law firms that specialize in immigration law and thus they had appeared before the FCC on a regular basis. (For that matter, the leave process itself may weed out those petitions submitted by applicants represented by weaker attorneys.)

Table 3. Factors Affecting the Ultimate Appeal

Independent Variable	% Petitions Granted	Number of Applicants
Nature of Claim **		
Refugee Cases	30%	243
Nonrefugee Cases	45%	92
Registry Office Where Case Was Filed*		
Ontario or Quebec	33%	284
Elsewhere	43%	51
Applicant's Gender **		
Male	31%	229
Female	44%	96
Applicant's Region **		
From Asia	41%	167
Elsewhere	28%	168
Judge's Gender*		
Male	40%	217
Female	30%	74
Judge's Ideology **		
Liberal	47%	114
Neutral	37%	108
Conservative	18%	105
Judge's Primary Language **		
English	42%	216
French	17%	83
Judge's Most Recent Job **		
Government service	39%	197
Other position	28%	120

**Chi-square $\leq .05$; *Chi-square ≤ 1

We also narrowed the potential structural and demographic factors slightly by eliminating four variables whose statistical significance in the cross-tabulations did not achieve a level of 0.1. These included variables representing multiple applications to the court by petitioners of common ethnicities or nationalities, the age of petitioners, and the IRB's consideration of the applicant's credibility. Furthermore, we eliminated the variable reflecting a judge's tenure on the FCC, for, as with the leave stage, this variable was collinear with, but not as powerful in the regressions as, judicial ideology.

The remaining eight variables are listed in Table 3 in the cross-tabulations. Of these, seven reflected the relationships found earlier in the leave analysis. Applicants from Asia continued to fare well before the FCC on their ultimate claims, as did litigants who brought nonrefugee claims. Judges who were coded as more liberal, whose primary language is English, who are men, and who had previously served in government were all more likely to grant an applicant's claim. Further, the court was more likely to rule favorably for petitioners who filed their claims outside of Ontario or Quebec. Only the litigant's gender seemed to have a different effect than in the leave analysis. If

Table 4. Logit Regression on FCC Ultimate Appeal

	Full Model[†]		
Independent Variable[‡]	**B**	**(S.E.)**	**Odds Ratio**
Refugee	–0.62**	(0.32)	0.53
Ontario/Quebec	–0.37	(0.38)	0.68
Gender (Male)	–0.50*	(0.31)	0.60
Asia	0.30	(0.31)	1.30
Country Development	–0.36	(0.29)	0.69
Judge Gender (Male)	0.25	(0.35)	1.28
Judge Ideology (Liberal)	0.48***	(0.43)	1.62
Judge Language (French)	–0.82**	(0.17)	0.44
Judge Last Job (Govt.)	0.66**	(0.30)	1.95
Constant	2.70***	(0.94)	15.36

NOTES:
*p < 0.1; **p < 0.05; ***p < 0.001.
[†]H&L Chi-square: 3.07, 8df (0.93); –2 log likelihood: 285.96, 9df (.00); Nagelkerke R^2: 0.21.
[‡]Chi-square for contribution of independent variables in full model:
Province filed: 0.44
Asia and country development: 0.08
Judge gender: <0.01

female petitioners were able to get past the decision to grant leave, Table 3 suggests they had a better chance of winning their ultimate appeal in the FCC than did their male counterparts.

As before, we tested the variables from Table 3 in a logistic regression to identify more precisely their respective influence over the FCC's decision to grant immigrants relief. In doing so, we once again included the country development variable, reflecting a country's economic and human rights conditions, to more precisely assess the effect of the court's seeming partiality for Asian applicants. Table 4 presents the findings from that Logit regression. Strikingly, a judge's background, experience, and ideology all appear to have a strong influence over his decision to grant or deny immigration applications. As these results show, liberal judges, judges who came to the bench from government service, and Anglophone judges were more likely to grant relief on the merits. Among these, it is important to note that an odds ratio of 1.62 for judicial ideology, which was coded on a five-point scale, means that the effect of a judge's ideology on the court's ultimate decision is quite powerful.

Two of the other variables had modest effects on the FCC's decision on the merits. Nonrefugee claimants stood a better chance of a favorable decision from the court than did refugee petitioners, and female petitioners may win more often than their male counterparts. This last result is at the cusp of reliability, as its statistical significance is 0.1. A pseudo R^2 of 0.21 for this regression suggests, of course, that we are capturing some, but certainly not all, of the influences over the court's decision on the merits.

At the same time, it is possible that these results may mask the influence of other independent variables on the FCC's ultimate decision. We performed a series of regressions in which we dropped a single variable at a time and calculated the change in chi-square for the new model. As Table 4 indicates, the province of filing, which itself is intended as a measure of local legal culture, had little effect on the fit of the regression equation. By contrast, nationality measures were at the border of influence, and a judge's gender had a strong influence over the regression. If the nationality measures are to be believed, then the court's ultimate decisions in immigration cases show a preference for Asian petitioners even when controlling for a nation's economic and political development. This latter measure also may indicate that the court is less likely to grant the claims of immigrants who come from more developed countries, although, again, neither this variable nor that reflecting Asian nationality reached statistical significance on its own in the full model. Finally, it is worth noting that the influence of a judge's gender is also correlated with ideology. As a separate cross-tabulation remarkably shows, female judges in our sample were more than twice as likely as their male counterparts to be ranked conservatives, even while showing no cohort effect to time on the bench (no table shown). That a judge's gender is so significant in the changed chi-square test gives us greater confidence that we should consider this variable influential in predicting a judge's ultimate decision on the merits.

DISCUSSION

The results of this study raise serious questions about the FCC's treatment of immigration appeals and the distribution of justice in the Canadian immigration system.

LEGAL RESOURCES

At the most basic level, the quantitative results indicate that petitioners require a legal advocate—and an experienced one at that—to get inside the door of the FCC to have the merits of their claims considered. These resources strongly overshadow the other explanations for the court's leave decisions. By contrast, once a petitioner is granted leave and appears before the court at a hearing on the merits, almost all litigants are represented by counsel and, thus, stand on a more equal playing field. Although these findings should not be surprising (Galanter 1974), they are troubling, nonetheless. A system designed to provide due process of law ought not to be tilted in favor of those who can hire an experienced lawyer, and yet that is exactly what is happening when applicants appear before the FCC seeking leave for immigration or asylum cases. The odds are thirty-two times greater that a represented claimant will be granted leave over someone who appears by

him-/herself or with a consultant (Table 2). Furthermore, women are more likely than men to go unrepresented before the FCC, which only exacerbates the disproportionate effects of these processes on litigants.

LITIGANTS' GENDER AND AGE

Interestingly, the influence of gender appears to reverse itself once the court grants leave. Whereas men had twice as great the odds as women of receiving a hearing, their odds were only 60 percent as great as women of winning on the merits. This transformation mirrors the influence of age in many ways. In securing leave, those aged 26–64 had almost three times the odds of the young and old of earning a hearing. The effect of age appears to evaporate once the court decides to grant leave, however. It is difficult to know what to make of these findings. Because they are based on a regression that found these demographics influential as a block but not statistically significant on their own (Table 2), it is possible that age and gender are immaterial in predicting the FCC's leave decisions. Further, because gender only reaches the 0.1 level of statistical significance in the second regression (Table 4), it may be unreasonable to see it as explaining the court's ultimate decision on the merits.

It seems implausible that a judicial preference for a particular group would show up in one set of decisions (leave) but disappear in the other (merits), so we are inclined to reject the hypothesis that FCC judges prefer one gender over the other or one age group over another. Rather, we wonder whether these differences are an extension of the legal resources hypothesis. Since men generally have higher incomes than women, and considering as well that those aged 26–64 have greater earning power than the young or elderly, might men and the middle-aged be able to afford greater attorney time or additional advice from a consultant to perfect their applications to the FCC and avoid careless errors? If so, the leave decision would become a threshold of sorts, separating those appeals with legal plausibility from those that are baseless or have failed to meet the court's minimum requirements for further consideration. Thus, if women are slightly favored in the FCC's ultimate decision on the merits, the reason might be that their perfected claims present more deserving circumstances. This supposition is consistent with the fact that female refugees are more likely than men to present claims of mass sexual abuse, which if unaddressed by the applicant's home country, are grounds for refugee protection.

To be sure, this hypothesis is so complicated as to be open to question. For that matter, the odds ratios of these variables—and, thus, their potential influence—are smaller than those of other factors included in the regressions. Our conclusion, then, is not that gender and age must be seen as explanatory for the FCC's immigration decisions. Rather, we suggest that there are reasons not to reject their influence as a potential explanation. If anything, their effects are likely mediated through institutions—most notably the ability of litigants to secure an experienced and effective attorney.

STRUCTURAL INFLUENCES

With respect to the structural hypothesis, most of the variables related to this theory eventually proved insignificant. Any effect of local legal culture—as represented by the province in which the appeal was filed—was explained away by other influences in the regressions, and the IRB's consideration of the applicant's credibility is not important in explaining the FCC's eventual decision, either. Only the nature of the claim seemed to have an effect, with nonrefugee claims obtaining a better result on the ultimate appeal. Here, it is difficult to understand why nonrefugee claims would do better on the merits but that the nature of the claim would prove insignificant in explaining the court's leave rulings. Of course, nonrefugee claims were more successful in the cross-tabular analysis of leave decisions, but this effect evaporated when the variable was tested in a multivariate regression. It is worth noting that the negative log likelihood of the second regression—that exploring the FCC's decision on the merits—is much larger than that for the regression examining the leave decision. Perhaps the finding for nonrefugee claims in this second regression might drop out if other factors were to be included in the regression. Still, employing the variables we have collected for this study, the nature of an applicant's claim nonetheless had a statistically significant effect in predicting the FCC's ultimate decision on immigration appeals. As such, although the structural hypothesis has little to recommend itself after quantitative analysis, we cannot fully reject it as irrelevant.

JUDICIAL IDEOLOGY

Fortunately, the interpretation of judicial influences is much easier, as these variables showed considerable effect in explaining both the court's leave decision and its ultimate decision on the merits. With respect to granting leave, a judge's ideology had a significant, powerful effect in predicting his or her judgment, with liberal judges more likely than conservative judges to grant an applicant leave. Considering that judicial ideology is measured on a five-point scale in this study, the regression results in Table 2 indicate that liberal judges were several times more likely than conservative judges to grant leave.

This same effect played out in virtually the same pattern when assessing a judge's ultimate decision on the appeal. If anything, the influence of judicial ideology increased slightly in the second regression, but even more significantly, several other characteristics of the FCC judges proved influential in explaining their decisions. Judges who came to the court from government service, as well as Anglophone judges, were more likely to grant petitioners their appeals.

What should we make of these findings? On one level, they are entirely consistent with modern research on judicial decision making, which routinely finds that judges' "personal attributes" and ideology help to predict their decisions, at least on issues of civil rights when there is little prospect of

further appellate review (Epstein and Knight 1998). In the immigration context, past research in the United States reached similar conclusions, as the authors Ramji-Nogales, Schoenholtz, and Schrag (2007) found that immigration decisions were related to the backgrounds and political ideology of the judges appointed. Most importantly, research conducted more than fifteen years ago on the FCC was unable to exclude judges' attributes as the basis for their leave decisions in immigration cases (Greene and Shaffer 1992). There, as we must affirm here, the authors concluded that applicants may be denied fundamental justice due to individual judicial differences in immigration appeals.

Interestingly, although a judge's primary language proved significant in the second regression, it was not, as predicted, related to the nationality or primary language of the applicant. If anything, a judge's language was related to the province in which the appeal was filed. Francophone judges were more likely to hear cases filed in Quebec, which additional research suggests is related to the primary language of the petitioner. (Applicants to the FCC may file in either English or French.) But, other than facing a slightly higher percentage of cases from Africa and a smaller percentage from the Caribbean than do their Anglophone colleagues, Francophone judges do not hear a significantly different range of cases by region. Nor, for that matter, do Francophone judges show a statistically significant preference for litigants of a particular region when compared to Anglophone judges (no table shown). Rather, on the whole, Francophone judges are simply more skeptical of the merits of immigration appeals, even when controlling for the fact that they are more conservative than their Anglophone colleagues.

GEOGRAPHIC EFFECTS

The statistical analysis presents a conundrum in evaluating the effect of geographic region on the outcome of immigration appeals. Although the cross-tabulations showed that Asian nationals were more likely than other applicants to be granted leave and win on the merits of their appeals (Tables 1 and 3), these effects seemed to evaporate in the regression for leave decisions when a control was introduced to represent a nation's economic and human rights conditions (Table 2). Further, although neither Asian nationality nor the control variable was statistically significant in the regression for the court's ultimate decision on the merits, the combination of the two was at the cusp of statistical significance ($p = .08$) in the chi-square test for the regression (Table 4). Recalling that Asian nationality showed a relationship with the FCC's decisions in the cross-tabulations while the control variable did not, we are not prepared to rule out the effect of Asian nationality on judicial treatment, although we cannot at this point say precisely what that effect may be. We note that Asians were the only regional group in our research who appeared to receive any special treatment by the FCC.

Table 5. Success of Immigration Appeals in the FCC by Nationality of the Applicants

Nationality	% Winning Appeal	Number of Applications in Sample
Highest "Winning" Percentage		
Turkey	57%	7 applications
Bangladesh	50%	10 applications
China	50%	14 applications
Peru	50%	6 applications
Albania	40%	10 applications
Grenada	40%	5 applications
Sri Lanka	40%	40 applications
Lowest "Winning" Percentage		
Hungary	9%	11 applications
Argentina	14%	7 applications
Russia	14%	7 applications
India	15%	13 applications
Nigeria	15%	13 applications
Trinidad & Tobago	20%	5 applications
Democratic Republic of Congo	23%	13 applications

Prior research has shown that Asian nationals fare well before the IRB. That work identified four Asian countries—Sri Lanka, China, Pakistan, and Turkey[20]—as among the five most successful nationalities before the IRB (U.S. Commission for Refugees 2004). Examining similar questions from our sample, applicants from seven nations had significantly higher success rates before the FCC. As Table 5 indicates, they included litigants from Turkey (57 percent victorious on the merits), Bangladesh (50 percent), China (50 percent), Peru (50 percent), Albania (40 percent), Grenada (40 percent), and Sri Lanka (40 percent).[21] Three of these nations—Turkey, China, and Sri Lanka—match the top "success rates" found at the IRB and, not coincidentally, sit predominantly in Asia. Perhaps, then, both the IRB and the FCC sought to shelter immigrants from these areas.

Of course, that is a stretch of a supposition given the relatively small number of cases in Table 5, making it is both difficult and inadvisable to reach broad conclusions from the data. Among other things, it is odd that applicants from Nigeria and the Democratic Republic of Congo (DRC)—two countries with a poor record on human rights—have among the lowest winning percentages in the FCC. For that matter, the rates in Table 5 reflect applications that already have been granted leave. Recalling that access to legal resources did not explain the court's ultimate decisions on immigration appeals (Tables 3 and 4), it is not the case, for example, that applicants from Turkey obtained quality representation while litigants from the DRC appeared before the court unaccompanied. Nor are the differing rates a result

of the court's familiarity with applicants from particular countries. When testing for the influence of multiple applications from a single nation or ethnicity, neither the Nationality5+ nor the Ethnicity5+ variables were statistically related to the FCC's immigration decisions. Of course, Sri Lankan applications dominate the sample, numbering forty of the 328 cases granted leave, so it is possible that the preference shown Asian applicants may be explained by the FCC's deference to Sri Lankan appeals (which are granted at a rate of 40 percent following the issuance of leave). But, a separate regression that substituted Sri Lankan nationality for Asian background failed to reach statistical significance (no table shown). In the end, then, the analysis simply returns us to our conundrum. Asian immigrants appear to succeed at a higher rate before the FCC than do others, but our research is not able to say why. Perhaps additional research will be able to provide more specific explanations.

LEGAL CRITERIA

With respect to alternative hypotheses, it is important to note that, for the most part, the study did not include a measure for the legal legitimacy of the court's decisions—that is, a variable that would estimate the legal justification for an applicant's case. The closest such variable was the court's notation of a credibility finding—whether the IRB had considered the applicant's credibility in its original decision. As described earlier, this factor was not correlated with the FCC's rulings.

It is theoretically possible, then, that the disparate regression results found in this study could be "explained away" by their correlation with appropriate legal criteria. For example, the court's potential preference for women in Table 4 might be explained by the fact that these applicants disproportionately raise meritorious legal issues. Although this is a possibility, the larger conclusion rests on the presumption that judges of particular ideologies and primary languages are better equipped than their colleagues to discover the proper application of the law. That seems so unlikely as to be incredible. Thus, although the study did not include measures for legal criteria, the disparate findings uncovered in the present research strongly suggest that immigration decisions—both the court's granting of leave and its ruling on the ultimate appeal—are heavily influenced by extralegal criteria.

CONCLUSION

In the end, this study suggests that, rather than occupying a special sphere, immigration decisions of the FCC conform largely to prior findings about judicial decision making. As others have shown in the U.S. civil (Seron et al. 2001) and criminal justice processes (Pearson 1984), litigants who are represented by counsel fare better before the court than do those appear pro se.

The same is very much true in the FCC when would-be immigrants appeal the denial of their applications by the IRB. Indeed, representation by an experienced attorney is the most influential factor in this study in explaining the FCC's decision to grant leave.

Similarly, a great deal of prior research has shown that a judge's ideology may predict the outcome of his rulings (Baum 1994; Epstein and Knight 1998). The present study confirms those findings, indicating that judges' ideological reputation, and to a lesser extent their background and language, help to explain their rulings on immigration appeals. Liberal judges, those who came to the bench from government service, and to some extent Anglophone judges were all more likely to grant immigrants' petitions than were their colleagues.

If anything, the research confirms the picture of the FCC produced over a decade earlier when Greene and Shaffer (1992) first published their work on the court's treatment of immigration appeals. Here, as there, "the conclusion is inescapable that an association exists between individual judges on the Federal Court . . . and the rate of success of applicants for leave to appeal" (ibid., 81). Of course, "the mere existence of this association" does not itself prove "an inherent injustice" (ibid., 81–82). But, unlike the earlier study, the present research has been able to document a relationship between several extralegal factors and the FCC's immigration decisions. Indeed, when weighed against the FCC's rulings, these influences offer "few objective standards" to justify the FCC's decisions (ibid., 81–82).

It is important to note the limitations of this study. We only coded the FCC's decision in an applicant's initial appeal to the court. As described earlier, a petitioner who "wins" before the FCC is sent back to the IRB for a new hearing, where he may (or may not) prevail. So, an applicant who receives a favorable decision from the FCC may nonetheless lose again before the IRB and face the prospect of a second appeal to the FCC. Future researchers may wish to track the longer path of these appeals, perhaps over multiple years, and undertake qualitative research of the FCC's judges and the lawyers or litigants who appear before them. Quantitative research can identify potential and likely explanations for the FCC's decisions, but interviews or individual case studies would presumably provide more descriptive accounts.

Further, we cannot say precisely whether a petitioner's nationality affects the FCC's treatment of his case, nor whether other demographic characteristics of litigants prove influential in the court's consideration. Thus, unlike prior studies of sentencing (Bushway and Piehl 2001; Mazzella and Feingold 1994), we do not conclude that particular races, ethnicities, or nationalities necessarily receive disparate treatment from the FCC, even if there are reasons nonetheless to be mindful of the possibility. Rather, the picture of the FCC's decision making here looks very much like that of the asylum adjudication process in the United States chronicled by Ramji-Nogales, Schoenholtz, and Schrag (2007), where a judge's background and the quality of legal representation strongly influenced an applicant's outcome in court.

That the present findings are consistent with prior studies of judicial decision making does not dilute their significance. To the contrary, when read together with past studies of the FCC (Greene and Shaffer 1992) and the IRB (Rehaag 2009), the present results underscore concerns about the FCC's treatment of immigration and asylum cases and raise questions about the very legitimacy of Canada's immigration and refugee system. At its most basic level, a system designed to provide due process of law ought not to be tilted in favor of those who can hire an experienced lawyer. But, more importantly, the heavy influence of a judge's background and ideology is antithetical to the purpose of refugee law, which is designed to protect the persecuted. If, as the results indicate, the FCC is considering a number of extralegal, indeed inappropriate, factors when hearing immigration appeals, and if, as Rehaag (2009) shows, the IRB is doing so as well at the initial stage, then the Canadian system of immigration and refugee determination has significant flaws. To maintain its best image as "a welcoming haven for immigrants and refugees" (Dua, Razack, and Warner 2005, 1), Canada's immigration process will require greater attention so that the reality of its operation matches the promise of the nation's intentions.

NOTES

1. The 1951 UN Convention Relating to the Status of Refugees dictates that member countries provide "surrogate national protection to individuals" who have left their home country due to persecution, namely "convention refugees" and "persons in need of protection" (Anker 2002, 134). The IRB considers convention refugees to be "people who have left their home country and have a well-founded fear of persecution based on race, religion, nationality, political opinion, or membership in a particular social group" (Immigration and Refugee Board of Canada 2006). In addition, persons in need of protection "are people whose removal to their home country would subject them personally to a danger of torture, a risk to their life, or a risk of cruel and unusual treatment or punishment" (ibid.).
2. Among such grounds are constituting a security threat, violating human or international rights, lacking sufficient funds to support oneself, or misrepresenting oneself (Immigration and Refugee Board of Canada 2006).
3. According to statistics released by the FCC, in 2003, 12,405 applications were commenced in the FCC, of which 10,496 were immigration related (Federal Court of Canada 2004).
4. Of note, judicial review under the Immigration and Refugee Protection Act (2001) (IRPA) is the only application to the FCC that requires leave.
5. Although judges of the FCC receive leave applications "on a weekly rotation basis," regional and linguistic factors can affect which judges receive particular cases (Greene and Shaffer 1992).
6. From 2007 to 2009, the authors had several personal communications with various journalists, academics, and lawyers. In order to preserve requested anonymity, we have labeled these as "Personal Communication" and numbered them to differentiate one from another.

7. Under its jurisprudence, the FCC is said to defer to the IRB or immigration officers, who have had an opportunity to hear witnesses, rather than substituting its judgment for a factual finding that was made generally in person and before the claim reached the court.
8. To some extent, an asylum case is a rights-based case, and we predict that those judges who have dedicated themselves to government service, as opposed to private industry, will be more amenable to a rights claim.
9. Interestingly, the percentage of applicants granted leave in 2003 was similar to that in 1990, when Greene and Shaffer (1992) conducted their study of the FCC. Thus, even if the events of September 11, 2001, in the United States had an effect on political or legal culture in Canada, they do not appear to have influenced the FCC's overall consideration of immigration appeals.
10. Personal Communications #1 through #6. See endnote 6, above.
11. It is important to recognize that this is a reputational, not necessarily a behavioral, variable. We did not seek, for example, to code each of the judges' decisions for ideological influences, which, to a large extent, would have been tautological. Rather, the variable estimates the ideological reputation of the FCC judges.
12. Adopted in 1982, the Canadian Charter of Rights and Freedoms is a constitutional document guaranteeing political rights to Canadian citizens and civil rights to persons present in Canada. It is enforceable against all levels of Canadian government by judicial review.
13. These proportions, which tilt towards a liberal definition of ideology, are not surprising since Canadian constitutional law is widely seen as providing additional services and greater procedural protections for individuals than other common law countries offer, including, most notably, the United States.
14. See endnote 6, above.
15. We employed, respectively, a ranking by the World Bank of per capita income by country and a "political terror scale" created and maintained by Professor Mark Gibney (n.d.) and based on country reports from the U.S. State Department (http://www.politicalterrorscale.org).
16. We are not sufficiently familiar with the system of judicial appointment in Canada to say whether there is a cohort effect, but the data do suggest that the class of FCC judges appointed between 1994 and 1998 is more liberal than its brethren. Those four years represent the beginning of Jean Chretien's tenure as prime minister, with his Liberal Party having taken over from Brian Mulroney and the Progressive Conservatives in 1993, following their nine years in power. Mr. Chretien served as prime minister until 2003, when Paul Martin, also of the Liberal Party, succeeded him. Stephen Harper and the Conservative Party won election in 2006 and have served since.
17. Of course, this finding is interesting in itself, suggesting that applicants from commonly seen countries are better able to secure experienced counsel.
18. Indeed, a pseudo R^2 of 0.32 in the full model and 0.41 in the parsimonious model suggest that neither regression tells the complete story in predicting the court's leave decisions.
19. We note that a petitioner's age and gender, although not reaching a level of statistical significance individually, have consistently large effects in the regression models and as a block contribute to a statistically significant influence on the FCC's decision to grant leave. If they are to be included, they indicate that the FCC is more likely to grant leave for men and the middle-aged over others. This is potentially an important finding because, in Table 2, we have controlled for the greater likelihood of men to be represented by counsel. If the block analysis of litigants' demographics is to believed, then we cannot rule out the possibility the FCC may be more likely to grant leave to men over women.

20. Turkey, of course, is a hybrid between Europe and Asia.
21. Note that nationalities are limited to those with five or more applications. "Winning percentage" presumes that the applicants have first been granted leave.

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