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### What Difference Does Law Make in Immigration Policy Making?

In 1952, at the height of Cold War tensions, the U.S. Supreme Court in the case of *Harisiades v. Shaughnessy* upheld the government's efforts to deport a longtime legal permanent resident who had briefly joined the American Communist Party more than a decade earlier. In holding Peter Harisiades deportable, the Court's majority decision gave no consideration to his lack of criminal record, the length of his residence in the United States, or the possibility that he would be politically persecuted in his native Greece. "That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities," wrote the Court, "but such is the traditional power of the Nation over the alien."<sup>1</sup> The justices declined to interfere with the way Congress had exercised this power in the Alien Registration Act of 1940, which authorized the deportation of a legally resident alien because of membership in the Communist Party even when such membership terminated before enactment of the act. Nor was the Court willing to consider the fairness of the manner in which administrative officials had conducted Harisiades's deportation proceedings. The justices made clear that immigration policy making would be shielded from juridical interventions, or as the Court put it, "We leave the law on the subject as we find it."<sup>2</sup> The *Harisiades* decision was a major blow to the efforts of leftist legal networks that had organized Harisiades's defense in the hopes of securing the rights of the foreign born (Ginger 1993, 544). More broadly, for a generation of activist lawyers, the lesson of the case was that challenging immigration policy in court was essentially a hopeless cause.

Two decades later, as the 1973 oil shocks ushered in the contemporary period of immigration restrictionism, a new generation of activist lawyers sought to reopen debates over the role of law and courts in immigration policy making. Members the 1970s generation of law graduates, both in the United States and elsewhere, were galvanized by the tightening of immigration controls. In

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taking up the cause of immigrant defense as a form of political engagement, they dreamed of using law as a tool for social change and sought to enroll judges as allies in this project. Initially, the boundaries and goals of this project were relatively inchoate. As we will see, however, a particular form of immigration-centered advocacy gradually emerged – one that I have termed “immigrant rights legal activism” – characterized by a conscious effort to use litigation to proactively assert or develop rights for noncitizens in the domain of immigration policy making. Although these efforts frequently involve collaborations with immigration attorneys involved in more client-centered legal practice, legal activism’s aspiration to intervene in national-level debates over immigration policy making sets it apart.

Previous sociolegal scholarship has not explicitly considered the constitutive relationship between immigration-centered legal activity and elite policy making. Instead, sociolegal ethnographies have shown how, at the level of local interactions, law constitutes the understandings of citizenship and justice that are formed and contested within administrative immigration hearings and immigrants’ encounters with community-based legal services programs (McKinley 1997, Coutin 2000, Kelly 2012). In addition, studies of immigrant social movements have demonstrated how the language of rights can support grassroots mobilization efforts and immigrant community empowerment (Coutin 1993, Voss and Bloemraad 2011, Gleeson 2013). But what about juridically oriented activity that aims to impact immigration policy making on a national scale? What are the implications of these targeted and high-profile legal interventions? What modality of politics do they construct?

This study seeks to answer these questions by offering an in-depth examination of the emergence and development of immigrant rights legal activism within two sharply contrasting politico-legal settings, those of the United States and France. The analysis is centered around the activities of jurists who, over the past forty years, have pioneered efforts to contest immigration policies in court. As we will see, it is a project that has come to assume strikingly distinct features in each country. Focusing on the specificities of each national context, my analysis explores how immigrant rights legal activism has assembled its professional identity and how it has been taken into account by actors in the immigration policy domain. In tracing the policy-level effects of court-centered contestation, I follow in the footsteps of several generations of sociolegal scholars who have examined the “radiating effects” of action in court (Galanter 1983). Challenging the hierarchic ideal of legal positivism, the key insight of this sociolegal approach is the observation that practical engagement with law is a culturally productive process. By shifting the focus away from the official rules laid out in immigration cases and toward the *process*

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by which immigration policy has been contested in court, we can explore how legal engagements generate identities and meanings whose repercussions extend far beyond any single case's judicially enforced remedy or doctrinal contribution.

LEGAL CONSTRAINTS ON MIGRATION POLICY: DEFERENTIAL  
DOCTRINE AND CONTAINED COMPLIANCE

Legal interventions have attracted what might best be described as passing attention within the large and growing body of scholarship that examines the dynamics of immigration policy making. To the extent that court-centered activity has been discussed by scholars in this area, analysis has centered on high-profile judicial decisions that extend the set of formal rights available to noncitizens.<sup>3</sup> On the whole, studies of immigration policy making have associated legal interventions with the official dispositions of high-profile cases, and debate has centered on how far the legal rules and remedies produced by courts can be said to constrain the realization of legislative and administrative preferences in the domain of immigration policy.

Among the first to call attention to the adjudication of immigration policy issues as a new and significant development were liberal international relations scholars and political sociologists, who linked high-profile court decisions on immigration issues to shifting arrangements at the international level. According to one line of argument, propounded most prominently by James F. Hollifield, when national courts issue decisions that protect the rights of noncitizens, they are acting out their part in a postwar international system of embedded liberalism that ensures a commitment to free trade while demanding some level of demonstrated respect for individual rights (Hollifield 1992, Gomes 2000, Hollifield 2004). Others have suggested that it is the contemporary move toward transnationalism, visible in the “web of rights” contained in international human rights instruments and supranational treaties, that has created opportunities for judicial engagement with immigration policies by opening up legal avenues outside of the framework of national self-determination (Jacobson 1996, Jacobson and Ruffer 2003). Sociologist Yasemin Soysal likewise sees the international legal order as a source of migrant rights, though she focuses relatively less on juridical developments (Soysal 1994). In these accounts, judicial interventions are noteworthy as a break from the past, but they are best understood as instantiations of normative regimes operating across national borders.

Comparativist political science studies of immigration policy making have likewise called attention to the increased judicial role in migration governance

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over time, and, in contrast to international relations scholars, they have emphasized the distinct institutional characteristics of the judiciary. This contrast is made most emphatically by Christian Joppke, who argues that judicial decisions creating rights for noncitizens have their origins not at the international level but rather in national constitutional principles that are extended into the immigration policy domain. Joppke suggests that the principles enunciated in these high-profile decisions may make it difficult for policy makers to manipulate migration channels opened up for humanitarian reasons, such as asylum and family reunification, and may force political elites to reformulate their overall approach to immigrant communities (Joppke 1998, 83–4). Other comparativist studies similarly present legal decisions articulating rights for migrants as having substantially “tempered” (Geddes 2003, 22) and “softened” (Ellermann 2009, 169) restrictive policies. Even when few generalizable principles are enunciated and review is primarily subconstitutional, invoking and extending judicially enunciated standards is argued to shift administrative practices “millimeter by millimeter” (Sterett 1997, 180). Entrepreneurship by courts in immigration issues is said to constitute the “permanent consolidation of a serious new actor” in the politics of “managed migration” (Menz 2009, 135). Indeed, in some national settings, the adjudication of immigration has been identified as an important site for debating and developing the judiciary’s broader institutional role (Soennecken 2008, Law 2010, Bonjour 2014, Hamlin 2014).

Yet, as other studies of immigration policy making have emphasized, courts do not always have the final say. Successful litigation may prompt governments to modify statutes to limit the substantive or jurisdictional grounds for appealing future immigration-related decisions. Venue shopping is another possible response to judicial decisions that place limits on how governments can regulate migration. Virginie Guiraudon’s analysis draws attention to the way that European restrictionists have adapted to judicial interventions by shifting the institutional context of policy making to the European level and by moving border control operations overseas and thus beyond the jurisdiction of national courts (Guiraudon 2000). The effect of venue shopping, according to Guiraudon, is that different types of actors are included or excluded from migration politics, thereby placing fewer obstacles in the way of restrictionist policy making. Focusing on the international level, Lisa Conant’s analysis similarly goes beyond the official dispositions of high-profile migrant rights decisions to focus on the extent to which their holdings constrain subsequent policy decisions. According to Conant, there has been a persistent tendency of national policy makers to evade or actively resist the policy implications of immigration case law and supporters of migrant rights have generally been

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unable to break these “cycles of contained compliance” (Conant 2002, 207). Along similar lines, Martin Schain finds no appreciable impact when measuring the political significance of migrant rights decisions in forcing administrators to admit migrants they would prefer to exclude or in compelling political parties to shift their restrictionist programs (Schain 2008). According to this analysis, the overall level of migrant admissions and removals provides a comprehensive measure of how states regulate migration, and judicial interventions can be dismissed because they have hardly constrained the restrictionist tendencies of either legislators or administrative officials.

In sum, to the extent that studies of immigration policy making have considered law and legal institutions, they have tended to concentrate on the rules and remedies produced by judicial decisions in immigration matters. Debate has centered on the extent to which these official case dispositions are taken into account in migration policy determinations. In particular, studies of compliance have questioned how often formal norms actually constrain the restrictionist tendencies of policy makers. These analyses emphasize the weak coercive power of legal rules in the migration policy domain.

AN ALTERNATIVE UNDERSTANDING: LEGAL CONTESTATION AS  
 A SITE FOR REASSEMBLING THE SOCIAL

This study takes a different approach by focusing not on the coercive power of official rules and remedies but rather on the capacity of juridical engagements with immigration to construct and reconstruct social relations, what sociolegal scholars have termed law’s “constitutive” dimension (Hunt 1985). A central premise of this constructivist sociolegal approach is that the capacity of judicial decisions to constrain policy makers is only one aspect of how law contributes to reshaping political dynamics. No doubt, both legal activists and the administrative officials whose policies they challenge care about judicial decisions primarily in terms of their coercive capacity. However, the constructivist sociolegal approach urged here calls for a more capacious conceptualization of both law and its effects, one that looks beyond official case dispositions in order to explore legal contestation as a culturally productive process.

This constitutive dimension of law, overlooked by a focus on official rules and remedies, is revealed in ethnographic studies of disputing, which explore how the process of formulating claims in terms of higher order normative referents can introduce powerful new elements into the social world (Comaroff and Roberts 1981). These legal frames and narratives may reproduce established designations, metaphors, and styles of discussion. Alternatively, they may establish new categories that change the perspective through which the

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social world is perceived. As Lynn Mather and Barbara Yngvesson argue, it is through this “expansive rephrasing,” which extends the webs of relations united under potent legal symbols, that legal change may be linked to social change (Mather and Yngvesson 1980, 279). This capacity of legal practice to construct social reality is particularly potent in immigration matters. As Kitty Calavita points out, there was no category of “immigrant” when European explorers “immigrated” to the shores of what was to become the Americas (Calavita 2010). And to the extent that we see distinct political dynamics at work in debates over “illegal immigrants” and debates over “refugees,” this is due to the fact that law has created these two categories of migrants and endowed them with normative significance. Moreover, as Susan Coutin has shown through her ethnographic research, the strictures of official immigration law are rarely synonymous with everyday understandings of justice, and court-centered contestation offers one possible space for constructing alternative framings of migrants and their identities (Coutin 2011).

In addition to examining the discursive elements assembled through law, sociolegal scholars have productively explored the performative dimension of court-based interactions. Early studies adopting a constitutive sociolegal approach called attention to the distinct legal “subjectivities” engendered by law in such organizationally distinct settings as mediation procedures (Harrington and Merry 1988) and the processing of consumer protection claims (Silbey 1981). More recent work has traced the distinct “emotional valences” shaped by months and years of ongoing legal entanglements (Berrey, Hoffman, and Nielsen 2012), showing that whether people assume the role of skilled operator or humble supplicant in part depends on the specific organizational settings in which they engage the law (Ewick and Silbey 1998). What we learn from this body of work is that repeatedly engaging the law has a powerful affective influence on participants in this process, whose own local ontologies are reflexively made and remade through interactions within the space of legal institutions.

Some examples will help to illustrate how ritualized courtroom interaction can work to construct a distinct phenomenal field. In his study of a trial court in Toronto, Michael Lynch shows how participants in adversarial trial proceedings collectively produce “the judge” as a fact observable to them and to any competent watcher (Lynch 1997). Certainly, the judge is sitting in the courtroom, wearing a robe, and with formal authorization to preside over the proceedings. Yet to the extent that the courtroom continues to make sense as a place in which judges alone hold power to officially enunciate the law, it is in part because lawyers, their clients, witnesses, and courtroom staff continually orient their interactions to the judge’s physical or symbolic presence. This

informally patterned behavior ensures that the courtroom's local ontologies, including its hierarchy of power and authority, remain in place even when formal rules do not provide a behavioral script.

Through her fieldwork in the organizational action-setting of domestic violence control programs, anthropologist Sally Engle Merry provides another example of how routine procedures construct and hold together a phenomenal field in which legal interactions can be intelligibly accomplished and the meaning of legal institutions reinforced. Merry focuses on the way in which domestic violence court hearings and court-mandated therapeutic programs differentially position their male and female participants, thereby producing "legally engendered selves" with distinct concepts of responsibility and agency (Merry 1999). Male participants experienced the controlling side of the law and are symbolically positioned by ostensibly rehabilitative procedures as criminals behind bars. By contrast, female participants are offered a supportive environment connected to and provided by the courts, which positions them to think of themselves as endowed with rights and entitlements. As legal actors are repeatedly brought into contact with one another in these organizationally bounded experiential spaces, roles and identities that seem natural and objective are performatively constructed through the accumulation of myriad discrete signs and interactions.

Though law and society scholars have tended to focus on the experiences of ordinary citizens (and noncitizens) in courtroom settings, this does not mean that a culturally productive dimension is absent from interactions undertaken by law's trained practitioners. To the contrary, recent work by scholars of in the field of Science and Technology Studies (STS) has demonstrated that law's constitutive dimension can be explored by "studying up" as well as by "studying down." We see an important development of this mode of inquiry in constructivist STS scholar Bruno Latour's study of legal knowledge production within the particularly rarefied setting of France's highest administrative jurisdiction, the Conseil d'Etat (see Box 1). Comparing the Conseil d'Etat to a scientific laboratory, Latour investigates how the daily operations of this "factory of law" construct the necessary sense of certainty to competently render judgment in complex and difficult cases (Latour 2002). Just as laboratory scientists apply a variety of material and literary inscription devices to distill abstract claims, so too, according to Latour, do the jurists of the Conseil d'Etat rely upon devices – fact-finding methods and techniques of casuistry – to translate complex events and relationships into legal enunciations that stand up to doctrinal scrutiny. As Latour puts it, the two settings have "very different modes of reducing the world to paper" and yet both are concerned with the manipulation of these abstracted inscriptions, subjecting them "to a subtle



exegesis which seeks to classify them, to criticize them, and to establish their weight and hierarchy” (Latour 2004b, 96). Without dwelling on the point, Latour notes that the dispositions of the human components of these processes are likewise reconfigured as scientists and jurists engage in the task of stitching their abstracted inscriptions into generalized knowledge.

The present study takes up Latour’s invitation to study the “laboratories” of technical law from a constructivist perspective. As Latour emphasizes, expert jurists do not simply apply existing legal rules to the case at hand, but neither do they merely mediate between lived reality and preexisting structures of power. Rather, the “passage of law” should be understood as a process of ontological translation that assembles the human and nonhuman elements of the social world into webs of meaning whose precise elements cannot be known in advance and that are always subject to reassembly (Latour 2004a). Latour’s unique combination of pragmatist empiricism and poststructuralist material-semiotics supplies an analytical toolkit for unpacking the “black box” of formalist lawmaking, in which legal technicians are sealed off from the sociopolitical world and where attention to official case dispositions makes it difficult to appreciate all of the other new elements forged in these laboratories of law. Just as law and society scholars elucidated the constitutive dimension of everyday dispute processes, Latour shows how *technical legal work* might also be insightfully analyzed through this lens.

Moreover, the pluralistic constructivism of Latour’s approach suggests that activity in court comprises only one cluster of translations in a broader set of actor-network webs that draw political elements into the “laboratory of law” and legal elements into the “laboratory of politics.” Sociolegal scholars have long recognized that the political effects of action in court are not limited to the regulatory impact of black letter law. Mark Galanter nicely encapsulates this finding when he writes that, “The product of the court is not doctrine with a mix of impurities but, instead, a whole set of messages that can be used as resources in making (or contesting) claims, bargaining (or refusing to bargain), and regulating (or resisting regulation) (Galanter 1983, 134). In other words, once we conceptualize activity in court as a site for constructing social reality – the approach adopted in both sociolegal studies of everyday disputing and constructivist studies of the laboratories of technical law – we can then look beyond the bounds of legal institutions and explore the radiating effects of legally generated frames, narratives, and performances within the broader political sphere.

One path by which these legal forms acquire a wider political salience is through their impact on social movement activity. As Michael McCann and others have demonstrated, action in court can catalyze the political



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mobilization of previously unpoliticized individuals while also attracting broader public support (McCann 1994, NeJaime 2011). Even when they fail to produce new doctrine, rights-based narratives may be taken up by local leaders and organizations and inspire new ways of understanding contestatory politics. At the same time, the empowering embodied experience of bringing charges and filing suits may have important effects on social movement activity. As Francesca Polletta shows in her historical study of the U.S. civil rights movement, appeals to formal procedures gave black participants the feeling “that whites were not invulnerable to challenge” (Polletta 2000, 385). Studies of legal mobilization in a comparative context have similarly emphasized the capacity of high-profile litigation to generate feelings of empowerment, forge bonds of solidarity, and support ongoing resistance even in the absence of constitutionally based judicial review (Abel 1995, Vanhala 2011, Chua 2014).

Moreover, social movements are not the only political actors whose ideas about the world are constructed through law. As scholars of judicial politics have shown, legal phrasing and staging also leaves an impact on political elites. For instance, Alec Stone Sweet’s pathbreaking study first explored how repeated “dialogue” with a constitutional court sets in motion a process whereby the norms and vocabularies of constitutional law are elaborated and then absorbed into the norms and language of policy making (Stone 1992). While Stone Sweet’s generalized model of the process ultimately gravitates toward an instrumentally based approach, he acknowledges that constitutional dialogues also shift the terms of debate insofar as parliamentarians come to understand themselves as having responsibilities to protect rights and to engage in balancing analyses when formulating policy (Stone Sweet 2000, 103). Judicial politics scholars have offered different assessments of how this phenomenon plays out in distinct national contexts and across diverse policy domains. Seeing the effects of engagement with law in a positive light, Stone Sweet contends that French “parliamentary life was gradually ‘juridicized’ and revitalized” by the Constitutional Council’s interventions (Stone 1989, 31). By contrast, American public law scholar Gordon Silverstein sees the “spiraling of precedent” that accompanied the emergence of assertive judicial review in some policy areas as prompting a hardening of positions, which in turn has discouraged legislative actors from devoting energy to the difficult political work of bargaining, tradeoffs, negotiations, and persuasion (Silverstein 2009, 128–51). Regardless of whether these radiating effects are assessed positively or negatively, legally generated forms potentially exert a strong influence over policy makers, shaping how they define their sense of mission, how they understand the issues at stake, and the types of strategies they pursue.

Sociolegal scholars have not yet considered the way these dynamics play out in the immigration policy domain. This may be due in part to the fact that constitutionally based judicial review is rarely exercised to overturn immigration policies enacted at the national level. As critical legal scholar Catherine Dauvergne demonstrates in her cross-national study of immigration jurisprudence, the legal claims of individual foreign migrants tend to be “overshadowed” by a countervailing right of the sovereign nation to shut its borders (Dauvergne 2008, 27). Although lower courts may be relatively less attuned to paradigms of sovereign authority and thus relatively more hospitable to immigrant claimants than courts at the pinnacle of the judicial hierarchy, the interventions of lower court judges in immigration cases are most often confined to an incremental “error-correcting function” that shies away from any direct challenge to policy making (Law 2010, 174). Empirical studies across national contexts indicate that immigration cases “have had generally conservative endings” at all levels of the judicial hierarchy (Legomsky 1987, 224), both in terms of judges’ limited willingness to offer short-term remedies and in the sense that rules laid out in judicial opinions in immigration cases have rarely compelled other state officials to explicitly increase migrant admissions or to reduce migrant expulsions. Courts have been most assertive when applying subconstitutional norms to immigration matters, but these interventions are rarely interventionist.

I suggest that the constrained nature of judicial review in immigration matters, at least in comparison to other policy domains, adds particular poignancy to calls by sociolegal scholars over the past three decades for a research agenda that conceptualizes law’s power and political impact in constructivist terms. My interpretation of immigration politics in the United States and France confirms that the official case dispositions of courts in these countries have eschewed an interventionist stance on matters of national immigration policy. Nevertheless, I contend that this conception of both law and its effects is too narrow. By limiting our understanding of law to official case dispositions, and then assessing the degree to which these rules and remedies do or do not constrain the realization of restrictionist policy preferences, we neglect to consider how the process of contesting immigration policy in court may constitute the very terms of immigration politics.

Drawing on a constructivist sociolegal approach, the present study conceptualizes court-centered contestation of immigration policy as a culturally productive activity with potentially important radiating effects. In the chapters that follow, I seek to go beyond the legal positivist approach that sees law as a mode of hierarchical control. Instead of examining how legal rules and remedies invoke responses of compliance or of evasion, my goal is to explore the