

ISSA Proceedings 2006 - A Typology Of Arguments In U.S. Judicial Opinions About Immigration



Judicial opinions are exemplars of legal reasoning in the common law systems of the United States and the British Commonwealth. Appellate court decisions are judges' notions about "what constitutes public policy, the existing state of morality, and the political and economic conditions of the day" (Gall 1977, p. 6). One general distinction is that judges construct the common law through their interpretations of precedents, and civil judges apply rules to determine how existing codes resolve legal disputes. Viewed in another way, judges in the common law system decide the meaning of legal principles from the evidence found in precedents, language, and social facts; whereas civil law judges interpret new legal facts according to explicit rules. Although this general summary oversimplifies the distinctions between the two legal systems, it identifies differences that affect how judges argue.

In the common law system, judicial opinions are the means for resolving legal disputes; they "validate or authorize . . . one kind of reasoning, one kind of response to argument, [and] one way of looking at the world" (White 1990, p. 101). Judges construct their opinions in written discourses that interpret precedents, statutes, codes, constitutions, and administrative regulations. In doing so, they construct arguments that modify, extend, and apply legal principles.

The goal of this essay is to develop a typology of U.S. judicial opinions related to recent immigration disputes. The essay

- (1) describes U.S. immigration laws and procedures;
- (2) identifies the features of legal arguments, including judges' goals, assumptions and standpoints, reliance on precedents, processes of reasoning, and roles;

- (3) provides definitions and examples of five different types of arguments according to the aforementioned features; and
- (4) states the implications of the study for research on legal argument.

1. *U.S. immigration law*

This essay focuses on judicial opinions that interpret U.S. immigration law. The primary sources of immigration law are statutes passed by the U.S. Congress that become part of the U.S. Code. In the mid-nineteenth century, Congress created laws to limit the number and quality of immigrants that the government would allow into the country. These early laws prohibited immigration of racial groups, such as the Chinese, as well as “convicts, prostitutes, lunatics, idiots, diseased, and those likely to become wards of the government” (Weissbrodt & Danielson 2005, p. 7). The first systematic statute was the 1952 Immigration and Nationality Act (INA) which introduced quotas on the number of persons permitted to enter the U.S. from various parts of the world. This law also established procedures for naturalization, refugee status, deportation, and conditions justifying asylum. In 1980, Congress created the Refugee Act to bring the U.S. Code into conformity with international conventions and protocols related to refugees and asylum (Weissbrodt & Danielson 2005).

The U.S. immigration code evolved as it addressed emerging social and political issues. By 1986, Congress enacted the Immigration Reform and Control Act (IRCA) to deal with the influx of millions of undocumented aliens coming to the U.S. from Mexico and Central America. This law forbade discrimination on the basis of national origin or of citizenship status and prohibited employers from hiring illegal immigrants. In 1990 and 1996, Congress amended the 1952 INA by modifying the rules pertaining to the legal entry of immigrants and by permitting exceptions for aliens with high levels of education. These amendments excluded immigrants with health problems, records of criminal behavior and fraud, and loyalties to governments unfriendly to the U.S. (Weissbrodt & Danielson 2005). These amendments also gave authority to the Justice Department and the U.S. Attorney General to implement immigration laws.

Since immigration laws grant due process to aliens, legal disputes involving these non citizens are decided in different immigration legal forums. The legal process commences with an immigration hearing, a fact-finding forum in which aliens present evidence and testimony about how they want their case to be decided. A single judge decides the case. When aliens dispute the ruling of the hearing

judge, then they have the right to appeal that decision to the Bureau of Immigration Appeals (BIA), a three-judge panel that decides if the immigration hearing judge abridged the aliens' rights. If aliens and their legal representatives convince a federal circuit court that the previous judges have incorrectly decided their dispute, then federal judges may agree to hear the appeal. In most disputes, the federal court's decision is final, but in rare cases, the U.S. Supreme Court will decide an immigration case. Only a few of the hundreds of cases decided by immigration hearing judges are appealed. When federal or Supreme Court judges issue an opinion, that opinion becomes a precedent for all other subsequent immigration disputes. Since the government official that implements immigration policy is the U.S. Attorney General, the title of many cases includes this official's surname (e.g., *Ashcroft* or *Gonzales*).

2. Features of legal arguments

Although this essay concentrates on opinions in U.S. immigration cases, judges use similar arguments when writing their opinions in other common law countries. If federal appeal judges offer both a majority and a dissenting opinion, the arguments from the majority opinion likely will differ from those in the dissent according to the judges' goals, philosophy and standpoints, use of precedents, processes of reasoning, and roles. Many opinions contain more than one type of argument.

2.1 Goals

The decisions of appellate judges serve multiple goals. One goal is to express the values and traditions of the country. Since the U.S. is largely composed of people that were once immigrants, judges may use their legal opinions to express the positive values the country places on immigrant labor and cultural diversity. Or judges may express the importance of civil rights for immigrants, a prominent value in contemporary U.S. law.

A second goal is to educate other members of the judiciary and the public about what the law means. To achieve this goal, judges may incorporate information about why a law was created, what the language of the law means, or what societal circumstances underlie the legal dispute. For example, judicial opinions about immigration might emphasize how a particular law, such as the U.S. PATRIOT Act, resulted from the terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001. Many judicial opinions also educate the public about the history, meaning, and/or importance of the law.

A third goal is to demonstrate that a decision is legally legitimate. One sense of legitimacy is that the decision is correctly grounded in the written law. Judges demonstrate legitimacy by defining legal principles according to formal and normative standards of evidence and then by using these principles as grounds for their reasoning. Judges demonstrate legitimacy by making their decisions appear correct and reasonable. A judge who concentrates on the definitions of legal and illegal immigrants and the rights associated with a particular statute or precedent is demonstrating legitimacy. Judges pursue the goal of legitimizing a decision in a second sense; that is, they try to demonstrate that their opinion supports the public's sense of reasonableness given certain social and political issues (Toulmin 2001). In other words, they try to persuade both judicial and public audiences that their decisions are legally sound (Levin 1992; Sunstein 1996).

Specific objectives underlie the goals of judicial arguments, including error correction, doing justice, and law development. Error correction means that judges seek to correct errors made in a lower court in order to protect individuals from arbitrariness in the way justice is administered (Martineau 1985; Posner 1990). For example, if judges decide to grant asylum to illegal immigrants because they likely will face persecution in their home country, then higher level appellate judges can reverse that decision if they determine that a previous court erred in denying asylum. Another specific objective is to do justice by treating similarly situated people in the same way (Perelman 1963). In immigration cases, judges in one jurisdiction are obliged to treat disputants the same way as judges in other jurisdictions do. One purpose of law development is to accommodate the needs of immigrants in relation to the values and needs of the country. Because the situations of countries and immigrants change from one time period to another, judges make new interpretation of existing laws so they can expand the law to take into account new facts and issues. Thus, the interpretations can refine, clarify, or elaborate a law. Depending on judges' philosophy and standpoints, one goal or objective may be primary and another secondary; or one goal may meet all of the aforementioned objectives.

2.2 Judicial philosophy and standpoints

Scholars of jurisprudence identify several different legal philosophies to which common law judges adhere (Carter 1984; Posner 1990; Levin 1992; Sunstein 1996). One position, legal formalism, is a conservative position that binds judges

to rules of statutory interpretation. Legal formalists believe that law is permanent and unchanging and that reading the law correctly will produce a legitimate decision (Savellos & Galvin 2001, p. 80). Judges subscribing to this approach treat the words of the law as if they had literal and discernible meaning. In legal formalism, judges apply their knowledge and use their authority to decide what the framers of the law meant; they seek to preserve the traditional interpretations. By following general rules of interpretation, judges emphasize why a legal principle from a statute or precedent applies to new disputes. In a broad sense, the legal principle serves as the major premise, the facts of a dispute are the minor premise, and the conclusion asserts the connection between the legal principle and the case facts. To achieve their goal of legitimizing their decisions as correct, legal formalist judges decide which statutes and precedents are appropriate and what legal rules apply.

Legal realism is a liberal position that allows judges to deviate from the norms of their judicial predecessors' decisions and to develop laws in accordance with the evolving issues and needs of society. Judges adopting the realist approach understand the law as dynamic and as evolving in response to public opinions and needs. Judges who adopt legal realism assume that the meaning of the law comes from external sources rather than from strict adherence to legal rules. Their goal is to inform the public at the same time they engage in error correction, doing justice, and law development. In this philosophy, judges adopt the standpoint that the law should serve the needs of the people. Realist judges use a variety of evidence in addition to precedents to construct their arguments. Judicial realists emphasize the rights of the people and the responsibilities of the judicial system (Levin 1992).

Legal pragmatism, a third type of legal philosophy, assumes that law is an ongoing activity that adapts to changing social circumstances and serves the needs of the public. This approach denies that a logically correct legal interpretation exists because the law is shaped by the needs of the people and the discretion of judges. All judge-made law is socially constructed. In other words, legal pragmatists make, rather than find law; they derive meaning, not as much from statutes and codes, as from situational facts that underlie a legal dispute. Furthermore, pragmatist judges emphasize the consequences that come from applying the law in a certain way, rather than from demonstrating that a particular decision is legitimate and correct (Posner 1990).

These three positions represent a few of the mainstream philosophies and

standpoints adapted by contemporary U.S. judges working in the common law system. These positions are not the only ones that judges use, nor do judges adopt assumptions in isolation from each other. Judges' philosophical positions affect their standpoints in the way they advocate, defend, or refute a legal interpretation, and their standpoints vary according to the issues of a legal dispute. For example, a judge adopting a realist standpoint may defend the rights of aliens who have violated the requirements of their student Visa by faulting the educational institution or the government rather than the student. The same judge, however, might take a legal pragmatist view and decide that a penalty should be applied equally to the student who violated the rules of his or her Visa and the host educational institution who provided incorrect information to the student. In common law systems, judges have discretion to embrace one particular philosophy or to change positions according to the facts and issues of a dispute. Judges' goals, philosophy, and standpoints figure into their preferences for evidence, reasoning processes, and judicial roles.

2.3 Using precedents

Judges often use precedents as key evidence for their interpretations, and the judges' preferred philosophy and standpoint influence what precedents they choose and how they use this evidence. For example, legal formalists assume that precedents are the primary evidence that bind judges to prior similar cases because of the principle of *stare decisis* - previous cases are decided law. Legal realists and pragmatists, on the other hand, tend to select social, historical, theoretical, and scientific evidence to supplement old precedents or construct new ones. Legal formalists tend to use precedents as prescriptive rules for deciding disputes, but judges adopting legal realist or pragmatist assumptions recognize that relevant precedents do not exist for many disputes. The extent to which judges rely on precedents as evidence differs according to their goals, philosophies and standpoints, and the situational factors of a legal dispute.

In most cases, common law judges use some precedents as evidence, but the rules of interpretation do not prescribe the reasoning process nor certify the correctness of the conclusions they draw from this evidence. A variety of reasoning processes occur in common law systems. Formal deductive reasoning from rules is the least common. This process considers a legal rule as a "statement of legal requirements in a given set of circumstances." A judge adopting this approach can follow a three-step process of

- (a) identifying the rule that applies to the case,
- (b) interpreting the rule according to its intended meaning, and
- (c) applying the rule to the facts of the dispute (Savellos & Galvin 2001, p. 72).

Many judges decide not to follow rigorous deductive processes because they believe that the rules are indeterminate due to “ambiguities and vagueness in language” and specific situational considerations (p. 73). Judges often manipulate rules in order to achieve a particular goal.

2.4 Reasoning processes

Although judicial decisions do not follow rigorous logical processes, they do assert causal connections and associations between fact situations and existing laws. Judges utilize practical reasoning that is “a grab bag that includes anecdotes, introspections, imagination, common sense, empathy, imputation of motives, speakers’ authority, metaphor, analogy, precedent, custom, memory, . . . and induction” (Posner 1990, p. 73). Reasoning by analogy, consequence, and definition is commonly found in judicial opinions.

Analogical reasoning evolves from judges’ reliance on precedents that are sufficiently similar to new disputes so that the ruling or conclusion from the precedent applies directly to a case (Savellos & Galvin 2001, p. 69). For example, in a U.S. deportation case, a judge using analogical reasoning can justify deporting an immigrant for committing a crime because the precedents state that this is one of the correct legal grounds for deportation.

Consequential reasoning emphasizes legal, social, and political consequences that emanate from judges’ interpretations. Consequential reasoning takes the form of conditional claims—if immigrants obey the laws of the host country, then they can remain as that country permits them to stay. Consequential reasoning can also identify causes and assert their effects. For example, a legal judgment may identify causes for a decision that limits the rights of aliens and then explain the effects of this judgment on future decisions or public policy. In this type of reasoning, judges concentrate on the effects of their legal interpretation on other judges, the public, and government agencies and structures. Judges’ consequential reasoning may infer broad or narrow consequences from a particular opinion. A broad consequential argument identifies general effects for a class of people or institutions. If immigrants enter the country without legal work permits, for example, judges reason that they should be deported because their failure to secure a legal work permit encourages lawlessness among other potential immigrant workers. A narrow consequential argument, on the other

hand, addresses the specific circumstances of a few people in particular circumstances. If a legal immigrant's spouse is an illegal resident, then judges can decide whether or not that the illegal spouse should be deported on legal grounds even if the spouse likely will suffer adverse consequences from being separated from his or her family.

Judges use definitional reasoning both separately and in conjunction with analogical and consequential reasoning. In this kind of reasoning, judges stipulate a definition as if it were an "undisputable fact" (Zarefsky 1998, p. 5). Definitions take several forms. First, a stipulative definition asserts premises that represent judges' philosophy and standpoints. This kind of definition surfaces "when a controversial definition is advanced in support of claim for purposes of framing that claim to the advantage" (Zarefsky 1998, p. 5). For example, judges can stipulate the meaning of the phrase "due process," and then use this stipulation as a premise for an argument about deportation. Second, a conceptual definition gives coherence to the legal opinion by isolating "important ideas or attributes of a concept" that could later be questioned if the argument changes or if substantive refutations are made against it (McGee 1999, p. 153). A conceptual definition can elaborate what factors constitute legal immigration and which ones do not, or it can identify the attributes of "a terrorist," a categorization that can lead to the deportation of an alien or naturalized citizen in U.S. law. Third, denotative definitions give authority to judges to designate precise meanings for legal principles that otherwise are vague. A denotative definition, for example, may be used in an immigration dispute to designate the meaning of the word "persecution" in an asylum dispute. Definitions help to complete an argument by stipulating issues, clarifying legal concepts, and providing precise explanations of legal principles (Levin 1992). For example, a judge can argue that an immigrant should be deported because he or she received training to be a militant while visiting a country that supports terrorism. In order to make the argument for deportation, the judge stipulates a definition of a terrorist act that fits with the provisions of the U.S. statutes and then gives a denotative definition that sets forth precise procedures for deportation. Although some denotative definitions may create circular or equivocal reasoning, they usually make an argument appear internally consistent.

2.5 *Judicial roles*

Those studying judicial opinions discover particular judicial roles associated with

the different features of argument. The features listed above reinforce the conception of judges as public officials that use their knowledge, experience, and authority to achieve the goals of expressing, educating, and legitimating the law as well as the objectives of error correction, doing justice, and law development (Posner 1990; Levin 1992). Subsequent analysis identifies the roles of historical researcher, translator, structural analyst, sage, and enforcer in relation to five different types of arguments.

3. *Types of legal argument*

Historical, textual, structural, prudential, and doctrinal arguments provide five frameworks for analyzing judicial opinions. The names for this typology first appeared in the work of legal scholar Philip Bobbit (1982) in his explanations about how judges decide constitutional law. This section extends these categories to include judicial opinions in general and U.S. immigration decisions in particular. The typology that follows differentiates the types of argument according to goals, philosophy and standpoints, evidence, reasoning, and roles.

3.1 *Historical arguments*

Historical arguments are possible because lawmakers create statutes, precedents, administrative rules, and constitutional codes. The goal of the historical argument is to retain the continuity of the legal tradition of a country and to remind the citizens of their legal legacy. Judges using historical argument adopt the assumptions of legal formalism by trying to discover and enforce the meanings of the creators of the law. To accomplish this goal, judges find evidence about the “controversies, the attitudes and the decisions of the period” using letters, diaries, and legislative debates of the creators of the law (Bobbit 1982, p. 223). Such evidence conveys the impression that judges have a certain and authoritative basis for their interpretations of the law. Judges integrate the historical evidence with stipulative and conceptual definitions that serve as premises for the conclusions they deduce. In this type of argument, judges adopt the role of researchers seeking a concise meaning of laws from historical evidence.

Historical arguments surface in immigration law decisions despite the fact that this body of legal discourse constantly adapts and changes to meet the needs of the host country and of the immigrants. Justice David Souter constructed a historical argument in his dissenting opinion in *Jama v. Immigration and Customs Enforcement* (2005). Somali alien Keyse Jama was admitted to the U.S. as a

refugee, but the government revoked his legal status because he was convicted of a felony crime while residing in the US. The Immigration and Naturalization Service attempted to deport Jama to Somalia, his country of birth, but Jama protested by claiming that Somalia had no functioning government. After refusing to identify another country for his deportation, Jama asked the Supreme Court to allow him to stay in the U.S. Justice Antonin Scalia wrote the majority opinion as a textual argument, and he denied Jama's request to remain in the U.S. Specifically, Scalia's opinion upheld the federal circuit court decision to deport Jama to any country that would have him.

Justice Souter, however, wrote a dissenting opinion based on the following historical argument about the terminology of the 1996 amendments to the immigration and naturalization statutes. He noted:

(3.1) "If there is any doubt about what Congress was getting at when it changed 'any country' to 'another country,' the legislative history and prior case law combine to show what Congress had in mind. At least one House of Congress intended various 1996 amendments including 'any country' to [mean] 'another country' [and] to make no substantive change in the law" [He cited evidence from a judicial conference and a judiciary committee report]. Justice Souter also quoted Judge Learned Hand as validating the position that "an alien cannot be deported to another country unless its government is willing to accept him into its territory." He emphasized that both the rulings of the Board of Immigration and memorandum from deputy attorney generals require that a government must be willing to accept the deportee (pp. 342-43) before he or she can be deported.

This historical argument adopts the standpoint of legal formalism by explaining what the creators meant when they passed the 1996 amendments to the 1952 and 1980 immigration statutes. Souter expresses the values of American law by supplying evidence about the intentions of the creators of the law, stipulating definitions as premises for deductive reasoning, and situating himself in the role of a historical researcher. His opinion supplements his historical with some doctrinal argument.

3.2 Textual arguments

In textual arguments, judges concentrate their interpretation on the language of the written law. In the tradition of legal formalism, this type of argument assumes the law is static and that judges should deduce meaning from what the language says. The judges' standpoint is to defend the text and translate its legal content.

In this type of argument, the legal language supplies evidence for judges' authoritative statements about what the language means. Judges first establish grounds in their stipulative and denotative definitions and then draw conclusions about what the words mean in terms of ordinary language. Textual arguments place judges in the role of translators of legal language, because they adopt the role of "a conduit" who explains what laws prohibit (Bobbit 1982, p. 31). Since judges are the authorities on the legal language, their goal is to translate the language into simple, direct, and easily understood words that the public will grasp.

(3.2) An example of textual argument appears in the majority opinion of Justice Antonin Scalia in *Jama v. Immigration and Customs Enforcement* (2005). Scalia first establishes his premise that under the provisions of the 1996 immigration law the U.S. Attorney General can remove Jama to any country deemed appropriate. To justify his position, Scalia concludes that none of the clauses contain "a word about acceptance by the destination country." Instead, he says, the 1996 amendments to the INA give the U.S. Attorney General discretion to limit the removal of an alien based on circumstances that are "impracticable, inadvisable or impossible." He further claims that the law never states that the country to which Jama is deported must agree to accept him. The text of the law, he says, allows the Attorney General "to take both practical and geopolitical concerns into account when selecting a destination country." He concludes that "absence of advance consent is hardly synonymous with impracticability or impossibility" (p. 350).

Scalia's decision educates the public about the terminology of the law while refuting the dissenting opinion of Souter. By adopting the assumption of legal formalism, Scalia interprets the meaning of the statutory language using precedents and denotative definitions that serve as the grounds for the conclusions he draws about the meaning of immigration laws. When making his textual argument, Scalia assumes the role of translator of the law.

3.3 *Prudential arguments*

Prudential arguments specify the limitations of laws and acknowledge the importance of judicial discretion. The goal of this type of argument is to educate judicial and public audiences about the political, economic, and social circumstances that influence a decision. Judges using this type of argument decide how rights and relations should be determined. Prudential arguments

permit judges to be self-reflective and allow them to evaluate legal principles in terms of their own practical wisdom (Levin 1992, p. 58). Those engaging in prudential reasoning adopt assumptions compatible with both legal realism and pragmatism. This kind of argument resembles that of business leaders who learn from their experiences that the best decision they sometimes can make is to abstain from deciding or to defer the decision making to others. Judges are likely to use evidence about “the political and economic circumstances surrounding the decision” (Bobbit 1982, p. 61) rather than history, texts, or structures. In order to achieve their goals, judges use prudential arguments to emphasize the situational details of a legal dispute. This type of argument depends on consequential reasoning that identifies how the results of the judges’ reasoning will affect other judges and the public. The role adopted by the judge is that of sage or wise person who first assesses the complexity of the legal situation and then makes a judgment based on that assessment.

The federal court decision in the asylum case of *Asad v. Ashcroft* (2005) provides an example of prudential argument. In this dispute, Sawsan Mousa Asad challenged the ruling of both an immigration judge and judges from the Board of Immigration Appeals who ruled that she was ineligible for asylum in the U.S. Her appeal claimed that these judges violated her due process rights because they denied her asylum after she had proved she had been persecuted as a child in Israel and Kuwait before taking up residence in Jordan. Asad first entered the U.S. using a visitor Visa in 1987, stayed in the U.S. illegally for eighteen years, failed to appear for a deportation hearing in 1990, eventually appeared before an immigration judge in 1998, and at that time, she asked the judge to grant her asylum in the U.S. (pp. 304-05).

(3.3) Both the hearing and BIA judges denied asylum to Asad because she had not followed the legal procedures and she offered no compelling evidence that she deserved asylum. Instead Asad claimed she would suffer future persecution if deported to Jordan and that she would be unable to find a good job there to support her family. This federal court denied her appeal, claiming she was a citizen of Jordan and would receive the rights and responsibilities of that country. The judges noted that “Asad admitted carrying a Jordanian passport. . . . The State Department Advisory Opinion states that if the applicant’s Jordanian passport is of a five-year validity, then she is either a citizen of Jordan or a person entitled to enter Jordan for permanent residence. Such persons enjoy all the privileges and obligations of citizens of Jordan. . . . Her passport contains no

limitation on rights whatsoever. . . . Asad is entitled to diplomatic protection which is generally limited only to nationals or citizens. . . . She had demonstrated no likelihood of persecution in Jordan” (*Asad v. Ashcroft* 2005, pp. 307).

The extensive factual details presented in this opinion show that these federal court judges value situational evidence more than precedents and statutory language, adopt legal realism, use self reflection as the basis for inductively derived conclusions, exercise their judicial discretion, and concentrate on social and political consequences from their interpretation rather than the meaning of the words in the statutes. For this decision, the federal court judges adopted the role of sages.

3.4 *Structural arguments*

Structural arguments concentrate on the procedures of judicial jurisdictions and the relationships that government structures have with one other in implementing the law. The goal of this type of argument is to establish which “structures of government” have legitimate legal responsibilities in a dispute. Structural arguments look to the propositional statements in the statutes to establish legal jurisdictions and procedures (Bobbit 1982). This type of argument evolves from the philosophy and standpoints of legal pragmatism. Judges try to determine what the legal structures are and what procedures each structure should follow. In doing so, judges defend the provisions and procedures of statutes using precedents, stipulative and denotative definitions, and consequential reasoning. For example, if judges follow the procedures outlined in legal codes for a particular jurisdiction and legal process, then the appeal court should uphold that decisions made by the judges of those lower courts. In this type of reasoning, judges draw conclusions about the consequences of implementing the law derived from the procedures designated to the legal structures. The role of judges using this type of argument resembles that of a structural analyst who deciphers how a legal system should work.

(3.4) The appeal court in *Asad v. Ashcroft* (2005) used structural arguments along with prudential arguments. The appeal judges first explain that the deportation and asylum cases are under the jurisdiction of the Home Land Security Act (2002), disputes of this type are first heard in a deportation hearing before an administrative judge, and then the deportee can appeal the decision of the judge to the Bureau of Immigration Administration (BIA) based on legal considerations. If the deportee rejects the BIA’s decision and demonstrates that legal errors were

committed by the judges in that jurisdiction in his or her case, then the deportee can appeal the case to the federal circuit courts. The judges in the *Asad* appeal specifically noted the structures and functions of the immigration courts and the processes that Asad followed in her asylum appeal (p.307). They stipulated definitions for the terminology of the Immigration and Nationality Act, reported the decisions of the judge in the immigration hearing, and noted that the BIA judges had correctly followed procedures. These federal court judges concluded that “a discretionary decision to deny asylum” under the U.S. law “shall be conclusive unless manifestly contrary to the law and an abuse of discretion” (p. 309). They further asserted that at the time of the appeal, Attorney General Ashcroft was the assigned person in the Justice Department who had discretion to implement the law and refuse asylum to Asad.

The opinion of these federal court judges calls attention to the jurisdictional structures and procedures, makes assumptions associated with legal pragmatism, offers evidence from relevant precedents and the propositional statements in the statutes, and engages in consequential reasoning. This decision features judges in the role of legal analysts.

3.5 *Doctrinal arguments*

Doctrinal arguments follow normative rules for statutory interpretation. The goal of judges is to render a legitimate decision that is legally correct. When using doctrinal arguments, judges engage in a strict interpretative process based on legal formalism and relevant precedents enabling them to follow the “rule of law.” As a result, they apply rules in a deliberate process that excludes facts and issues external to the written law. Judges adhering to doctrinal arguments claim that all other types of argument are weak because “the rule of law” requires a systematically reasoned process that produces a “written-opinion-governed law” (Bobbit 1982, p. 42). This kind of argument proceeds by analogical reasoning in which judges assert that precedents are sufficiently analogous to a current case so that the reasoning in the legal dispute should follow the conclusions of the precedent, a principle called *stare decisis*. Judges that rely on this kind of established doctrine legitimate the legal canon constructed by their judicial predecessors.

The centerpiece of a 2005 federal court decision concerning the asylum of a South African family (*Thomas v. Gonzales*) used extensive doctrinal argument. The legal dispute began with these facts. The Thomases and their two children

came to the U.S. as visitors in 1997. Within one year of their arrival, they requested asylum because they said their family had been victims of physical violence, intimidations, and abusive and racist conduct initiated by Boss Ronnie, the paternal grandfather of the Thomas children. Both the immigration judge at the asylum hearing and the BIA judges denied asylum to the Thomas family, stating they had failed to prove that as a family group they qualified as asylum seekers and that they suffered persecution in their home country of South Africa (pp. 30-31).

(3.5) The federal circuit appeal court overturned the prior immigration court rulings based on a detailed and systematic argument from precedents. The judges noted that the members of the family followed the rules established by the precedents of *Rojas-Garcia v. Ashcroft* (2003) by raising the issue that the family as a group qualified for refugee status, complied with the precedent in *Zara v Ashcroft* (2004) that defined the procedures that enable refugee status, and acted in accordance with other precedents “putting the BIA on notice” about the family as a persecuted group (p. 32). Furthermore, the federal appeal judges acknowledged that kinship ties are a legitimate basis for defining group persecution according to several previous decisions. Specifically, *Gebremichael v. INS* (1993) and *Solis v. INS* (1999) demonstrated clearly that nuclear families qualify as a persecuted social group (p. 36). In this opinion, the judges cited more than 25 different precedents to support their interpretation that the family was a persecuted group eligible for refugee status (pp. 35-38). The judges deduced from the precedents that “the family constituted a particular social group” under immigration statutes because they “suffered harm” that was “solely a result of their common and immutable kinship ties with the father-in-law” (p. 39).

The opinion in *Thomas v. Gonzales* (2005) exemplifies doctrinal argument. In this type of argument, the judges rely almost exclusively on evidence from precedent and defend a particular meaning of the legal language using many precedents as the basis for analogical reasoning. As a result, the judges in this case adopted the role of enforcer of the legal canon.

4. Implications

The typology provides a starting point for scholars interested in investigating the features of argument found in judicial opinions in common law systems. Specifically, the typology offers a framework for analyzing five types of arguments that appear frequently in judicial opinions in the U.S. legal law system. This

framework emphasizes key features of argument, including explanations of judges' goals, philosophy and standpoints, uses of evidence, processes of reasoning, and roles. Recent immigration decisions reveal that certain types of arguments dominate in a particular judicial opinion although one opinion may contain more than one type of argument. The typology also can be applied to the judicial opinions in other types of U.S. cases as well as to judicial opinions in and other common law countries.

REFERENCES

- Asad v. Ashcroft* (2005). 31 Immig. Rpt. 302.
- Bobbit, P. (1982). *Constitutional Fate*. New York: Oxford University Press.
- Carter, L.H. (1984). *Reason in Law*. Boston: Little, Brown and Company.
- Gall, G. L. (1977). *The Canadian Legal System*. Toronto: Casswell Company Ltd.
- Gebremichael v. INS* (1993). 10 F.3d 28.
- Jama v. Immigration and Customs Enforcement* (2005). 543 U.S. 335.
- Levin, J. (1992). *How Judges Reason: The Logic of Adjudication*. New York: Peter Lang.
- Martineau, R. (1985). *Fundamentals of Modern Appellate Advocacy*. Rochester, NY: Lawyers Co-Operative Publishing Co.
- McGee, B.R. (1999). The argument from definition revisited: Race and definition in the progressive era. *Argumentation and Advocacy* 35, 141-58.
- Perelman, C. (1963). *The Idea of Justice and the Problem of Argument*. Trans. J. Petrie. New York: Humanities Press.
- Posner, R.A. (1990). *The Problem of Jurisprudence*. Cambridge, MA: Harvard University Press.
- Rogas-Garcia v. Ashcroft* (2003). 339 F.3d 814.
- Savellos, E.E. & Galvin, R.F. (2001). *Reasoning in Law*. Belmont, CA: Wadsworth.
- Solis v. INS* (1999). 168 F.3d 565.
- Sunstein, C.R. (1996). *Legal Reasoning and Political Conflict*. New York: Oxford University Press.
- Thomas v. Gonzales* (2005). 31 Immig. Rptr. 29.
- Toulmin, S. (2001). *Return to reason*. Cambridge, MA: Harvard University Press.
- Weissbrodt, D. & Danielson, L. (2005). *Immigration Law and Procedure*. St Paul, MN: West Publishing.
- White, J. B. (1990). *Justice as Translation*. Chicago: University of Chicago Press.
- Zara v. Ashcroft* (2004). 383 F.3d 927.
- Zarefsky, D. (1998). Definitions. In: J.F. Klumpp (Ed.), *Arguments in a Time of*

Change: Definitions, Frameworks, and Critiques (pp. 1-11). Annandale, VA:
National Communication Association.