

INDEPENDENT JUDGES IN A DEMOCRACY: A RESEARCH NOTE

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This research note tests the proposition that different local selection processes recruit judges with different outlooks about the roles they ought to perform as democratic officials and as legal professionals. Based on interviews with ninety-four state and local trial judges in California, Louisiana, and Massachusetts, I conclude that there is no statistically significant relationship between selection process and role orientation.

This is a report on research in progress. The broader research project explores the proposition that different local political cultures recruit judges with different perspectives about the roles they ought to perform as accountable democratic officials and as independent legal professionals. The data reported here deal with a narrower issue: Does the judicial selection process predict the role orientations of state and local trial judges?

Previous research has been conflicting. Jacob (1964) uncovered significant differences in the backgrounds of state trial and appeals court judges chosen through different selection processes. There is a suggestion in his study that partisan elections tend to recruit judges with closer ties to the local community than do "merit" or Missouri plan procedures. Canon (1972) discounts the importance of selection processes, finding regional differences rather than the actual selection process better predictors of the background characteristics of the state supreme court judges he studied. Other studies, such as Dubois's analysis of non-southern state supreme court judges (1980), conclude that ideological affiliation rather than selection process best explains how judges decide controversial political and economic disputes.

I begin from the premise that the relationship between selection process and judicial attitudes may be more subtle than previous research allows. Different selection processes may not recruit trial judges with

powerfully different individual characteristics, but a selection process may exert a more indirect but nevertheless important influence. A particular selection process may be an expression of the local political culture's expectations about the kinds of factors that ought to influence a judge when governing in the locality. Specifically, selection processes may recruit personnel with the type of role orientations which satisfy the local culture's estimation of what tradeoffs are permissible between democratic and legal professional norms.

Case studies conducted by Levin (1974), Howard (1977) and Gibson (1978) lend credence to this approach. For example, Levin reports that Minneapolis and Pittsburgh judges bring very different perspectives to the ways they conduct their trials and their sentencing practices which coincide with the local political culture's expectations about what judges ought to do. Gibson's 1978 analysis of the sentencing behaviors of Iowa trial judges suggests that role orientations are weak but significant predictors of sentencing patterns. Finally, Howard's 1977 study of selected federal circuit court judges found that political attitudes and role orientations tend to coincide rather than conflict.

In this paper I explore the proposition that different local selection processes recruit judges with different outlooks about the roles they ought to perform as democratic officials and as legal professionals. I hypothesize that the more involved citizens are in the selection of judges, the more judges will define their role as that of "democratic officials" rather than as "legal professionals."

Election, Selection, and Judicial Roles

Data for this analysis is based upon interviews with twenty-eight state or local trial judges in Orleans Parish, Louisiana; thirty-five judges in Alameda County, California; and thirty-one judges in Suffolk County, Massachusetts.¹ These judges comprised approximately eighty percent of the sitting judges in Orleans Parish, fifty percent in Alameda County, and forty percent in Suffolk County. Alameda County interviews were conducted in 1976-1977 and 1982, in Orleans during 1979-1982, and in Suffolk between 1982 and 1984.

Orleans is the home parish of New Orleans. It possesses strong racial and religious divisions, a history of machine politics, and has recently experienced a reinvigorated two-party system, albeit in the peculiarly

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southern form of "old-line" versus "progressive" Democrats. The latter reflects the growth in political awareness and power among blacks.

Louisiana law mandates an open, bipartisan election process. Vacancies are filled by special elections; until filled, the state supreme court appoints an acting judge. Acting judges are barred from running as candidates for the regular positions. This procedure prevents the informal practice in some states where judges are encouraged to resign during their terms of office in order to allow the governor to appoint a replacement from the same party. Given the low voter turnouts for special elections and the advantages of incumbency, more than half of the judges in states with nominally partisan or nonpartisan election procedures were originally appointed by governors and retained office at the special election (Dubois, 1980, p. 105; Herndon, 1962, pp. 64-65; Baum, 1983, pp. 424). Louisiana has deliberately foreclosed opportunities for ostensibly electoral selection processes to be displaced by an informal process of gubernatorial appointments.

Contests for judicial seats in Orleans Parish have been vigorous in the last two decades. Elections have been hard fought, attracting several qualified and well-financed candidates. While incumbents have not been rejected in large numbers, they have not been unopposed. Incumbents have had to confront challengers, have had to seek campaign moneys and endorsements from local groups, and have occasionally suffered defeat.

Alameda County contains Berkeley (home of the University of California), Oakland (site of one of the world's largest ports), and smaller suburban communities such as Alameda (a haven for retired naval officers). While there are considerable differences among these cities--Berkeley is controlled by a socialist mayor and left-leaning city council, Oakland is governed by a black mayor and a "reform government" administration--county politics reflects a strong professional middle-class influence with some ethnic factions.

California law prescribes that judicial elections be nonpartisan at the trial court level. However, the governor fills vacancies until the next election, and most interim judges run and are elected to full terms of office. Moreover, there is little vigorous competition for posts held by incumbents. Most lawyers abide by the "sitting judge rule" and are unwilling to challenge incumbents unless there has been a powerful demonstration of the incumbent's ineptitude. Open seats are contested, but local bar endorsements are highly valued and holders of such endorsements typically win election.

Suffolk County contains Boston and a few smaller communities. Like Orleans Parish, Suffolk is divided by racial, ethnic, and socio-economic identities. There is a long tradition of ethnic politics with vestiges of an Irish-Catholic urban machine.

In some respects, the Massachusetts approach to judicial selection approximates the federal procedure. All judges are appointed by the governor with the consent of an Executive Council. The Executive Council rarely rejects appointees. The real check on gubernatorial discretion comes from the executive's sensitivity to the mores of the locality about who should be appointed to serve in the county and from the role played by the Judicial Nominating Commission which advises on judicial appointment. Dominated by lawyers, the Commission emphasizes standards of legal professionalism. However, as Watson and Downing have noted about the so-called "merit-selection" or Missouri plan, such a process tends to replace the politics of elections with the politics of the local bar (1969). There are some indications of similar influences at work in the Judicial Nominating Commission especially in small and large firms' efforts to affect outcomes.

Orleans, Alameda, and Suffolk offer three different kinds of selection procedures and encourage three different levels of citizen involvement. Orleans Parish with its populist political tradition and its competitive judicial elections offers the greatest opportunity for citizen input into the recruitment of judges. If a selection process stands as a surrogate for a local political culture's expectations, Orleans is the most likely recruiter of judges who identify themselves in terms similar to other political officials--as members of a responsive and accountable democratic system. The federal model followed by Massachusetts minimizes citizen participation while emphasizing the legal-professional norms dominating the law guild. Alameda's selection process would appear to stand somewhere between the Orleans and Suffolk extremes.

These selection processes are assigned a place on an ordinal scale with the Suffolk procedure labeled "1," Alameda's "2," and Orleans' "3." This corresponds with the narrowness ("1") or breadth ("3") of direct public input into the recruitment of judges.

The dependent variable "role orientations" is defined as the expectations judges have about how they ought to act in their capacity as judicial officials. For the purpose of this analysis, a "democratic official" role orientation would prompt a judge to view his or her proper duties as a willingness to invoke other than strictly "legal" factors in determining how his or her courtroom is to be conducted and how decisions are reached. A "legal

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professional" orientation concentrates on purely legal attributes, emphasizing an attention to the values of due process and impartiality, and a cultivated inattention to the personal attributes of litigants. A "midrange" orientation supports a judge's self-image as both a democratic official and a legal professional as we have used these terms.²

Indicators of role orientation were responses to a set of intentionally provocative questions prepared for this study asking, "Would you agree or disagree with the statements:

"1. A trial judge's responsibility is to insure that justice is done to the individuals present in his/her courtroom. Broader community interests are not appropriate considerations."

"2. A good judge appraises his/her performance in terms of due process values such as adversariness and the testing of evidence and arguments, not public satisfaction with his/her decisions."

"3. Judges are legal professionals. Their abilities are best evaluated by lawyers, not by lay members of the community. Elections introduce undesirable partisan influences in the election of qualified judges."

Respondents were encouraged to go beyond simple "agrees" or "disagrees." It was the overall expression of support for or objection to the statement which form the data.³

An index was constructed with judges agreeing with two or more of the assertions being called "legal professional," those agreeing with one labeled "midrange," and those disagreeing with all three called "democratic official." Using Kruskal's gamma and Kendall's tau c, I tested the relationship between selection process and role orientation.

There are some cautionary caveats that must be attached to an enterprise such as this one. Most of the day-to-day routine of state and local trial judges has little to do with grand policy making or challenging public opinion. Plea-bargaining dominates the criminal justice courtroom while the civil justice system spends much of its time processing settlements made outside of the courtroom. Thus, role orientations may not often be significant in the everyday operations of lower courts. We are obliged to be cautious about generalizing too broadly about what judges actually do by extrapolating from what they think they ought to do in extraordinary

situations. However, while grander notions of what judges ought to do are seldom explicitly called upon, their more indirect and subtle effect may mold even the everyday conduct of "normal" judging. Role orientations may also be affected by socio-economic or other background variables. However, an earlier presentation of the data discussed here concluded that background characteristics such as working class origins or status of law school did not predict role-orientation (Parsonian r ranged from $-.07$ to $.13$, $p < .05$) (O'Neill, 1987).

Finding

The expected relationship between selection process and role orientation did not occur. As Table I demonstrates, there was no significant relationship between the kind of selection process and a judge's tendency to be a "legal professional" or a "democratic official." Gamma was $.15$ and tau c was $.10$ ($p < .05$); both tests indicate that there is no significant level of association between our set of variables. Since Alameda County possesses the least homogeneous political culture of the three counties tested, it may distort our findings. However, when the Alameda data is dropped from our sample in order to consider the effect of selection process on the two most cohesive cultures, Gamma was still only $.23$ while tau c was $.15$ ($p < .05$).

It is interesting to note that there is a slightly greater tendency for the Suffolk County judges to reflect a "legal professional" orientation than their peers in Alameda and Orleans. When the "midrange" column is removed in order to sharpen this distinction, only a slightly stronger Gamma of $.24$ and a tau c of $.15$ ($p < .05$) result. The tau c measure is critical here since Gamma yields deceptively high values when margin totals are skewed. The difference is thus insufficient to satisfy standard measures of statistical association.

Conclusions and Speculations

The lack of an association may be the result of a defect in the study such as the crudeness of the measure of role orientation used. Moreover, we may need to compare within as well as between selection processes. There may be significant differences between different kinds of partisan elections or between true "merit selection" and the gubernatorial approaches. The fact that there is a slight tendency for Suffolk judges to be "legal professionals" may indicate that "merit selection" would result in more self-consciously

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"legal" judges than those recruited by other selection procedures. But given the low associational levels, there seems little reason to pursue the matter. The clear and convincing distinctions between the "legal professional" and "democratic officials" roles Levin and others found are not generalizable to the three counties studied in this analysis. Whatever may be the tie between political culture and role orientation, the selection process is not the mechanism.⁴

It is possible that selection process and role orientation were unrelated because the socialization experience of being a judge outweighs the influence of the processes through which an individual becomes a judge. Interactions among judges and with practicing attorneys may overcome any influence exerted by the process of recruitment. If we could compare the responses of successful candidates for judicial office with their responses after sitting on the bench, we could check the independent effect of judicial socialization.

Another possibility is to refine the hypothesis by exploring whether a self-selection process affects who enters the race for judicial office. Lawyers believing strongly that judges ought not to conduct themselves as if they were berobed politicians may be discouraged from entering judicial elections with their strong "political" overtones. If self-selection operates on a subtle level, a level which is not tapped by the formal selection process, then we may be able to understand how judges are preselected for desirable traits. A study investigating how a self-screening process filters out lawyers with the "wrong" outlook, as defined by the local political culture, while encouraging lawyers with the "right" outlook to run would be useful. Such a study would have to be more subtle in its examinations of motivations than this study has been and would have to explore the self-perceptions of lawyers in the community from which candidates for judicial office are drawn. Perhaps the development of a more sophisticated personality inventory assessing self-image and perceptions of the legal profession is called for.

Table 1. Relationship Between Selection Process and Role Orientation

Selection Process	Role Orientation		
	"Legal Professional"	"Midrange"	"Democratic Official"
Suffolk County (N=31)	52% (16)	29% (9)	19% (6)
Alameda County (N=35)	46% (16)	20% (7)	34% (12)
Orleans Parish (N=28)	43% (12)	21% (6)	36% (10)
Total	(44)	(22)	(28)
			N=94

Gamma= .15

Tauc= .10

p< .05

NOTES

1. Federal and state appellate judges were purposely excluded since the hypothesis concentrates on local political cultures and local selection processes. It is rare that the same political culture so dominates an entire state, especially one as populous as California or as different in its religious, racial, and cultural antecedents as Louisiana, that sensible connections could be found between appellate judges' role orientations and local expectations. In order to insure consistency, only judges presiding over courts of original jurisdiction--trial courts--were interviewed. Juvenile court judges, justices of the peace, magistrates, land, housing, and probate judges, small claims judges, and traffic court judges were excluded because not all kinds of courts are present in the three jurisdictions. Moreover, traffic, small claims, and juvenile courts tend not to be operated as normal courts are, while land, probate, and housing courts often serve as "appeals" courts for state or local administrative agency decisions.
2. Originally, I used "strict" and "moderate" categories in order to differentiate between "strict legal professional" and "moderate legal professional" or between "strict democratic official" and "moderate democratic official" role orientations. However, the number of respondents fitting the "strict" cells were so small that I was obliged to collapse a five cell division into three cells.
3. In order to insure consistency in categorizing responses, panels of students at the University of California, Santa Cruz, at Tulane University, and at Wellesley College and M.I.T. were asked to listen to tapes of selected interviews and to code each respondent's remarks. When discrepancies arose between the panels' assignments, I conducted follow-up interviews with the pertinent judges.
4. Flango and Ducat (1979) offer some interesting speculations on other factors which may affect selection processes and judicial behavior which might serve as the starting point for further analysis.

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