

Chapter 2

The Judicial Role Orientation

This work offers a theoretically grounded and empirically tested answer to an enduring puzzle in the study of judicial behavior: Why are some judges motivated by what they see as good law while other judges are motivated by what they see as good policy? Though this work is specifically concerned with judicial decision-making, it follows from a puzzle ever present in the social sciences: Why do individuals who occupy the same position behave differently? To inform theoretical development, this chapter begins by speaking about this larger puzzle and attempts by other social scientists to answer it. Next, puzzles within political science are discussed, first from the field of legislative politics and then within the field of immediate interest, judicial politics. Finally, adopting and building on the extant literature, the chapter offers a theoretical framework to answer this puzzle of judicial behavior.

2.1 Role Theoretic Literature

2.1.1 *Broader Social Sciences*

An ever present question in the social sciences is why individuals who occupy the same position behave differently. A very simple and compelling explanation is offered by role theory. Deriving its theoretical foundations from the literatures of anthropology, social psychology, and sociology, role theory provides that behavior is the product of (1) the environment in which an individual operates and (2) what the individual, as well as other relevant actors, define as position-appropriate behavior. This section provides crucial context for the instant study by chronicling some attempts by scholars from other disciplines to craft role theoretic explanations of social phenomena.

In research on higher education, for example, Rosch and Reich (1996, 115–116) study how “different academic disciplinary subcultures selected, socialized, and expressed institutional culture to new faculty, and the degree to which

professional identity and role orientation were carried over, or adjusted, during the entry period.” To explain these phenomena, the authors construct a four-stage theoretical model that includes: (1) the prearrival stage, which deals with a new faculty member’s predispositions prior to entering their new position; (2) the encounter stage, which deals with a new faculty member’s preconceptions formed during the recruitment and selection process; (3) the adaptation stage, which deals with external socialization and the new faculty member’s identification with the organization; and (4) the commitment stage, which deals with the extent to which the norms and values of the new subculture are assimilated by the new faculty member (1996, 116).

To test their theory, the authors collect both quantitative and qualitative data. The former come by way of a survey to the current faculty of three academic departments at a doctoral-granting institution that hired new, first-time tenure-track faculty members. These current faculty members were asked to “describe their perceptions regarding the institutional culture, the degree of similarity or differences of institutional ideology between subcultures, and the role orientation of current group members in each subculture” (1996, 119). The role orientations are identified by way of “observation, structured and open-ended interviews, and a log format for new faculty to record their affective and cognitive reactions during the entry period” (1996, 119).

Related to role orientation, Rosch and Reich (1996) find that, while self-reported professional values remained relatively constant from before the new faculty member started their position to after they started their new faculty position, role orientation shifted slightly as faculty assimilated to their new setting. The authors conclude that while professional values are acquired during graduate training, role orientations appear only to be tentatively formulated then. Said another way: New faculty members automatically adopt the professional values learned during graduate school, but do not automatically adopt the role orientation espoused in graduate school. Rather, new faculty members gradually formulate their faculty role orientation by weighing the “role orientation espoused in graduate school against [their] personal values” (1996, 124).

From the disciplines of organizational management and psychology, Scandura and Ragins (1993), for example, examine the effect that both biological sex and gender role orientation have on the development of professional mentoring relationships in the male-dominated occupation of certified public accounting. The authors define the gender role orientation in terms of a spectrum where by masculinity and femininity are on opposite ends and androgyny is in the middle. The authors hypothesize that individuals who identify as having a masculine or androgynous role orientation will be more likely to have a mentor than individuals who identify as having a feminine role orientation, and that gender role orientation will explain more variation in mentorship than will biological sex.

The data for their study comes from a mail survey sent to a random sample of 3,000 certified public accountants by the authors. The useable responses numbered 800. To measure role orientation, respondents were asked a short form of the Spence Personal

Attributes Questionnaire.¹ To identify mentorship, respondents were asked whether they had a working relationship that significantly affected their career mobility. If the respondents answered yes, they were then asked a battery of 20 statements meant to measure the effectiveness of their relationship with a mentor.

The authors find that, while biological sex is not related to mentoring, gender role orientation is. Individuals who describe themselves as having an androgynous role orientation report more mentorship than individuals with either feminine role orientations or masculine role orientations. The authors suppose that this result might be because self-identified androgynous individuals, “who display both masculine and feminine characteristics, may have the potential to benefit more from mentoring relationships than individuals who display either masculine or feminine attributes” (1993, 262). To explain these findings, the authors note that, according to existing theory, androgynous individuals have greater behavioral flexibility than masculine or feminine individuals, which may be a factor in the effectiveness of mentor relationships. “Individuals with masculine orientations may be too independent, and therefore unable to accept their mentor’s advice. On the other hand, proteges with feminine orientations can be overly dependent on their mentors, and may view their mentors as ‘career saviours.’ Androgynous proteges may be optimally suited for mentoring relationships in that they may have the flexibility to accept their mentor’s help without becoming overly dependent” (1993, 262).

Also from organizational management and psychology, Shivers-Blackwell (2004) offers an explanation for why managers with similar jobs within similar organizations exhibit different leadership behaviors. She argues that people experience organizational role expectations and role pressures differently, which leads to the utilization of different leadership behaviors within the same context. While she does not empirically test the propositions that she creates to explain this phenomenon, she does develop an empirically-testable theory for future researchers to deploy. Her theory maintains that managers who perceive their organization’s culture as being transformational are more likely to use transformational leadership. Conversely, managers who perceive their organization’s culture as being transactional are more likely to use transactional leadership.

Borrowing from the extant literature, Shivers-Blackwell (2004, 43) defines a transformational leader as one “who articulates a vision of the future that can be shared with peers and subordinates, intellectually stimulates subordinates, pays attention to individual differences among people, is likely to use personal resources including time, knowledge and experience, and serves as a coach, teacher and mentor.” Conversely, she defines a transactional leader as one who “exchange[s] rewards contingent upon performance and use[s] positional resources in order to encourage desired behaviors” (2004, 43).

Lastly from organizational management and psychology, Parker (2007) explores how the flexibility in an employee’s role orientation affects his job performance. She defines flexibility in role orientation as the extent to which “various problems

¹For more information on the Spence Personal Attributes Questionnaire, see Spence (1984) and Spence and Helmreich (1978).

reflecting longer-term goals beyond one's immediate technical job (e.g., customer dissatisfaction, slow delivery times) would be of personal concern to them rather than 'someone else's concern'" (2007, 412). The author hypothesizes that the more flexible an employee's role orientation, the higher the employee's job performance reviews will be.

To test her hypothesis, Parker (2007) studies the assemblers at a medium-sized electronics company in the United Kingdom. Controlling for background characteristics and job satisfaction, she attempts to predict the job performance reviews of employees based upon the flexibility in their role orientation. Parker (2007) finds, as hypothesized, that the more flexible an employee's role orientation is, the more favorably the employee's job performance review will be.

Finally, from the discipline of psychology, Tarter et al. (1975), for example, examine the effect that social role orientation has on the lethality of suicide attempts. The authors define social role orientation as "the disposition to turn anger inward as opposed to either avoidance or acting out of hostility" (1975, 295). They hypothesize that the most lethal attempts at suicide would be attempted by those most severely depressed, "since this type of affective disorder is often associated with introjection of anger" (1975, 295).

To test this hypothesis, two groups of subjects are examined. The first group contains 50 individuals who were admitted to a hospital for attempting suicide. The second group contains 50 individuals who were admitted to a hospitalized for mental health issues, but had never attempted suicide. Both groups were asked three questions to ascertain their role orientations and a set of questions related to their mental health. The authors make interesting discoveries related to sex, but do not find a statistically significant relationship between role orientation and the lethality of suicide attempts.

Many scholars have leveraged role theory to explain the social phenomena they observe. The works discussed above provide a sample of the various applications of role theory from other disciplines and provide crucial context for the instant study. From the enculturation of new faculty members, to the effect gender role orientations have on professional mentoring, and finally to the effect social role orientation has on the lethality of suicide attempts, scholars have found role theory a useful tool to explain a wide range of human behavior. Such uses support the adaptability of role theory to the study of state high court judges.

2.1.2 Political Science

2.1.2.1 Studies in Legislative Politics: Comparative Context

Just as role theory has been widely used across the social sciences, role theory has been widely used in various fields of political science, particularly in the study of legislatures and judiciaries. First, in the field of comparative legislatures, Gherghina (2011), for example, examines the effect that party type and size have on the role

orientations of members of parliament (MPs) elected just after the fall of the communist governments in Poland, Hungary, the Czech Republic, and Slovakia. These MPs are extraordinarily unique and important, because “acting in ‘adolescent’ parliaments and non-institutionalized political systems, [they] were given fundamental tasks, such as being asked to draft constitutions, set institutions, and enact laws” (2011, 45).

Gherghina (2011) defines the MPs role orientation as being either that of delegate, trustee, or politico. An MP with a delegate role orientation is one who emphasizes the opinion of their voters or their party as a priority. An MP with a trustee role orientation is one who emphasizes his or her own judgment. An MP with a politico role orientation is one who alternates on whose opinion to emphasize, depending on the context.

The data for the MPs’ role orientations come from interviews conducted with 600 newly elected MPs after the fall of each country’s communist government.² To measure role orientation, MPs were asked, “If an MP has to vote, but holds an opinion which is different from the one held by his parliamentary club, should he then vote in accordance with the opinion of the parliamentary club or should he follow his own opinion?” (2011, 51). The MPs could choose between three categories: ‘parliamentary club,’ ‘own opinion,’ or ‘it depends.’ MPs who chose the first category were classified as delegate, the second as trustee, and the third as politico.

Gherghina (2011) finds that members of parliament from newly emerged parties are more likely to be delegates of either their constituents or their party than members of parliament from continuing parties or revived parties. She also finds that MPs from small parties are more likely to have delegate role orientations than MPs from large parties and that MPs from large parties are more likely to have politico role orientations than are MPs from small parties.

Van Vonno (2012, 131) argues that the difficulty previous legislative studies have had in finding a significant effect of role orientation on legislators’ behavior might be explained by “scholars’ tendency to focus on the classification of legislators according to one role orientation in a given typology, leading to the oversimplification of what is acknowledged to be a complex phenomenon.” To address this deficiency, she explores whether Dutch MPs specialize in a particular role orientation or switch between role orientations depending on the situations which they find themselves in.

For this study, van Vonno (2012, 122) adopts the executive–legislative relations role orientations created by King (1976), as applied by Andeweg (1997). Specifically, the role orientations are defined as: nonparty mode, wherein an MP views his or her job as that of a parliamentarian whose main task is to check and balance the government; interparty mode, wherein an MP views his or her job as that of a partisan party member who is loyal to the party; and crossparty mode, wherein an MP views his or her job as that of an advocate who focuses on representing a particular interest or issue area.

The data for the MPs’ role orientations comes from the 1990, 2001, and 2006 Dutch Parliamentary Studies. Specifically, the MPs were asked, “What do you

²Communism fell in each of these countries in either 1989 or 1990.

consider the best description of executive–legislative relations in each of the following situations?” (2012, 123). The situations the MPs were presented with were: in general, in budget proceedings (or committee work for the 2001 survey), and with regard to affairs or reports from Parliamentary Committees of Inquiry. Van Vonno (2012, 131) hypothesizes that “the context of executive–legislative relations in general will generate responses coupled to the interparty mode, budget proceedings is associated with the crossparty mode, and the context of affairs or reports from the Parliamentary Committee of Inquiry invokes responses connected to the nonparty mode.”

Findings indicate that, as time goes on, MPs tend to switch roles less often and instead trend towards adopting the interparty mode role orientation. These findings run contrary to what might have been assumed in the literature. As van Vonno (2012, 131) explains, “The decrease in the number of role–switchers between 1990 and 2006 is indeed impressive, especially considering Andeweg’s (1997) proposition that role–switching would be more important than role specializing in the Dutch Parliament.” Also of interest, she finds that when MPs adopt the nonparty mode role orientation, opposition MPs are more likely to adopt the interparty mode role orientation.

2.1.2.2 Studies in Legislative Politics: American Context

In the field of American legislative studies, Wahlke et al. (1960), for example, examine the effect that state legislators’ role orientations have on their relationship with interest groups. Wahlke et al. (1960, 205) argue that defining role orientations in accordance with legislators’ perceptions of what constitutes legitimate, desirable, or harmful activity “by pressure groups or other factors, as well as their perceptions of the supposedly objective ‘facts’ about such activity, are not random or idiosyncratic opinions held independently by each legislator individually, but are opinions intimately associated with what Truman (1951) has called the ‘influence of office’ and Latham (1952) has called ‘officiality’.”

The authors operationalize legislators’ role orientations toward interest groups as either: a facilitator, who has a friendly attitude toward interest groups and knows much about interest group activity; a resister, who has a hostile attitude toward interest groups and knows much about interest group activity; and a neutral, who either has no strong attitude toward interest groups or has little knowledge about interest group activity (or both).

The data for the legislators’ role orientations come from the 1957 survey responses of 474 legislators from four states.³ Specifically, legislators were asked four questions: “Would you say that, on the whole, the legislature would work [better or worse] if there were no interest groups or lobbies trying to influence legislation? [Do you agree that] the job of the legislator is to work out compromises among conflicting interests? [Do you agree that] lobbyists and special interests have entirely too much influence in American state legislatures? [Do you agree that] under our form of

³The included legislatures were those of: California, New Jersey, Ohio, and Tennessee.

government, every individual should take an interest in government directly, not through interest group organizations?" (1960, 208). A role orientation scale was constructed by awarding the most interest group–friendly response four points, the second most interest group–friendly response three points, an undecided response two points, one point for responses on the unfriendly side of undecided, and zero points for the most interest group unfriendly response.

Confirming their hypotheses, Wahlke et al. (1960, 216) find that "facilitators are more likely to be aware of the nature of group demands and respond to them; resisters to be aware of them but deliberately fail to respond; neutrals to respond or resist, but for assorted other reasons, without caring or without knowing that a demand has been made by a group." Interestingly, in a tangential finding, the authors demonstrate that facilitators are significantly more likely to feel themselves to be effective legislators than are resisters or neutrals, and, while neutrals rank lowest of the three types in actual effectiveness, resisters rank lowest in sense of effectiveness.

Next, Prewitt et al. (1966, 569) challenge conventional wisdom that "adult political behavior is little more than an elaboration of patterns rooted in childhood experiences." To test the validity of this conventional wisdom, Prewitt et al. (1966) examine the role orientations of state legislators and city council members to determine whether those who became interested in politics at or prior to college have different role orientations than those who became interested in politics after college.

The authors define these legislators' role orientations in terms of representation, acceptance of interest group participation in the legislative politics, and how they formulate the job of lawmaker. For the representative role orientation, Prewitt et al. (1966) use the trustee, delegate, and politico designations. Interest group acceptance is defined in terms of: facilitators, who respond to and even seek out spokesmen for collective interests; neutrals, who occupy a more cautious but not necessarily hostile spot; and resisters, who view themselves as rejecting group demands. The final role orientation is operationalized as: inventor, who emphasizes policy initiation and innovative solutions to community problems; broker, who defines the legislator's function as compromising, arbitrating, and integrating differences; tribune, who expresses the will of the people; and the ritualist, who stresses the mechanisms of the legislative process and the mechanics of the legislator's job.

The data for the study comes from survey responses of 421 state legislators and of 129 city council members.⁴ The survey wording for the role orientation questions is not provided. For the independent variable capturing when a legislator became interested in politics, survey respondents were asked, "How did you become interested in politics? For example, what is your earliest recollection of being interested in it? What other members of your family or close relatives held public or political office before you yourself did?" (1966, 572). This response was then categorized as: childhood or grammar school, adolescence or high school, college or equivalent period, after college or equivalent period, at time of entry into public life.

⁴The included state legislatures were those of: California, New Jersey, Ohio, and Tennessee. The cities analyzed were not identified.

The authors find early political socialization unrelated to major aspects of legislators' role orientations. They conclude, "[D]ifferences in orientations toward significant actors in the legislative arena and differences in self-evaluations are not rooted in experiences associated with the genesis of the political career" (1966, 581). The authors go on to posit, "A counter-hypothesis can be suggested: Intervening between initial political socialization and incumbent behavior are political experiences that condition subsequent behavior irrespective of factors associated with initial socialization. These experiences interrupt the career sequence and retard or even reverse patterns formed during earlier stages" (1966, 581).

Hadley (1977, 309) criticizes the state of the legislative role orientation literature: "Despite heavy investment of research effort in legislative role orientations, political scientists have produced scant evidence that role orientations are related to observable behavior." To remedy this deficiency, he creates a multidimensional role orientation and examines the relationship between this role orientation and roll-call voting behavior in the Indiana House of Representatives.

The four dimensions of Hadley's (1977) role orientations are: party, separation of powers, style, and areal focus of representation. For party role orientation, he classifies legislators as strongly pro-party, moderately pro-party, and party neutral. The separation of powers role orientation classifies legislators as those favoring strict separation between governor and legislature, moderate separation between governor and legislature, and favorable to gubernatorial involvement in the legislative process. The style role orientation represents the traditionally-defined legislative role orientation: trustee, politico, and delegate. Lastly, the areal focus role orientation captures whether the legislator views his or her relevant constituents as residents of the district, residents of the state, or both.

Role orientation data and the data needed for other independent variables for Hadley's (1977) study comes from interviews conducted in 1969 with members of the Indiana House of Representatives. An impressive 99 out of 100 of the Indiana House members were interviewed and a total of 11 questions were asked to capture legislators' views on the appropriate level of influence the party and the governor should have on legislators and the legislators' own views about who they represent. The decisional dependent variable comes from the roll-call votes of House members on all bills for which the author could identify either party position or gubernatorial position.

Hadley (1977) finds that the role orientations toward party, separation of powers, style, and areal focus of representation are correlated with legislators' support for party and gubernatorial positions. However, when these role orientations are entered into a multiple regression analysis with control variables, the significance of role orientations diminishes greatly. An interesting distinction appears in the difference in effect role orientations have on members of the majority and minority: role orientations appear to be more important among the minority Democratic legislators than they do the majority Republican legislators. The authors speculate that the pressure of party may be sufficient to overcome the role orientations of majority party members because the majority party stands a good chance of being able to enact its preferred policy and create a record for itself.

2.1.2.3 Studies in Judicial Politics: Comparative Context

Finally though the focus of this study is on the role orientations of state high court judges, it is useful to explore some studies of the role orientations of other judges. In the field of comparative courts, Flango et al. (1975, 278), for example, examine the role orientations of European appellate judges “in order to begin clarifying some... ambiguities” around the judicial role orientation. Particularly, the authors argue that, instead of only thinking of judges’ role orientations in terms of adherence to precedent, we should rather consider “at least two clearly distinguishable dimensions: judges’ orientation toward precedent, and toward the public they serve” (1975, 277).

The data for the study comes from a mail survey of 238 German-speaking mid-level appellate judges in Austria and Switzerland during the fall of 1972. The survey questions were borrowed from role theoretic studies of American judges and were converted into German “after lengthy discussions with European attorneys, judges, and law professors about the technicalities of translating the English questionnaire into German” (1975, 280). To measure the judges’ role orientations, they were asked how influential several factors were to a judge when deciding cases. For the first dimension, the factors presented were: “1. Decisions closest in facts to the present case; 2. Past decisions of the supreme court; 3. Precedent, when clear and directly relevant; 4. Judges are merely instruments of the law and can will nothing; 5. It is possible for a judge always to be politically neutral and nonpartisan in deciding cases; and 6. Adherence to precedent must be the rule rather than the exception if litigants are to have faith in the continuity of law” (1975, 281). For the second dimension, the factors presented were: “1. What the public expects; 2. The social consequences of the decision; 3. Requirements of the social order; 4. Judges should use their knowledge of social and political factors, as well as the law, in making their decisions; 5. Through cases brought to the courts, judges must constantly balance conflicting interests in society; 6. It is important that judges keep in constant contact with changing social mores in order to make their decisions relevant to the community; 7. Judges’ view of justice in the case; and 8. It is more important that judicial decisions be just than that the letter of the law be adhered to” (1975, 283).

Flango et al. (1975) conclude both dimensions appear to be present in judges’ role orientations. The judges, the authors find, can be broken down into four ideal role types: First are the ‘law appliers,’ who rank precedent high, but are not concerned with the community. Second are the ‘law extenders,’ who rank both precedent and community high. Third are the ‘mediators,’ who rank both precedent and community low. Fourth are the ‘policy makers,’ who rank precedent low and community high. The authors find the ‘law applier’ role orientation to be the most prevalent. Indeed, 40% of the Austrian judges and 53% of the Switzerland judges identify as such. The authors compare these findings to similar studies and conclude that this high proportion of ‘law appliers’ is not unique to Austria and Switzerland, supposing “This may mean that Law Applier is the easiest judge to identify, both for researchers and for respondents, since it does appear to represent the ‘ideal’ judicial role” (1975, 285).

Likewise in comparative politics, Itoh (2010, 239) explores Japanese Supreme Court justices' perceptions of their role orientation as a lens through which to view their "attitudes toward elitist governance." He defines role orientation in terms of the Japanese Supreme Court's agreement with the political branches of government on constitutional issues and operationalizes the justices' role orientations in terms of a two-by-two approach to judicial activism and judicial restraint. A Court is seen as activist, as Itoh (2010, 242–243) defines it, "if it changed the existing judicial precedent while the political branch stood pat," "where conflict occurred due to a change of policies by law-makers while the judicial precedent remained unchanged," or "if both sides changed their policies at different paces or in different directions." A Court is seen as restraintist, on the other hand, when it adheres to its own precedent or "when it changes its existing judicial precedent while policy-makers also change their policies in such a way that both sides agree on the direction and pace of a change" (2010, 242).

The data for this study comes from a doctrinal case analysis of cases decided by the three petty benches of the modern Japanese Supreme Court.⁵ Itoh (2010) finds that the Japanese Supreme Court was occasionally activist in the early days of its existence. Beginning in the mid-1970s, however, the Japanese Supreme Court became restraintist on 'law and order' and labor rights issues. He concludes, "The Court became rigidly pro-government and maintained harmony with the conservative government not because the Court was powerless and subservient but because of the shared values of governance regarding the primacy of national security, public welfare and corporate capitalism" (2010, 272).

2.1.2.4 Studies in Judicial Politics: Federal Context

In terms of the U.S. Supreme Court, James (1968, 160) seeks to answer the question "How far does the Court form the Justice's conception of his role, and how far is that conception formed by his previous experience and opinions." James (1968, 162) sees a role theoretic explanation of particular value because of "its ability to bridge the dichotomy between structural and behavioral elements" and thereby define "a set of structural and behavioral elements [that] can be organized to specific aspects of the judicial role set."

Adopting a case-study approach, James (1968) considers the justices appointed by Franklin Roosevelt because, "Prior to their appointment, these men had been active, vocal supporters of the New Deal. They had experienced the frustration of their legislative goals... Their involvement thus invited the development of explicit judicial philosophies prior to their accession to the Court" (1968, 162–163). Of the eight Roosevelt appointees, James (1968, 163) decides to select Justices Robert

⁵These petty benches are similar to the appellate panels of the U.S. Courts of Appeals in that they are subsets of the entire bench. Any of the three five-member petty benches must forward a case to the grand bench in order to change judicial precedent, however (Itoh 2010, 244).

H. Jackson and William O. Douglas because they stood on opposite sides of the “spectrum of thought on the Supreme Court of their day.”

James’s (1968) data comes from the words of the justices themselves. She examined the two justices’ unpublished speeches, published writings, and their judicial opinions. Justice Douglas was also personally interviewed. In addition, secondary materials were consulted including biographies of the justices, their colleagues, and contemporaries; interpretations of the justices’ work; and memorial tributes to Justice Jackson (whose death preceded publication of the work).

James (1968) finds that role orientation led Justice Jackson to place greater emphasis on stability and continuity in the law. In contrast, Justice Douglas considered the values of flexibility and change more significant. James (1968) speculates that the justices’ role orientations are products of their life experiences. “The entire pattern of Justice Douglas’ life was one of reaching the desired conclusion over great odds by sheer force of will. When there was something desired, such as strong legs, or a trip to New York, or the protection of civil liberties, it had to be accomplished... Justice Jackson’s comfortable rural background, wide and reflective reading, and experience at the Nuremberg Trials made him profoundly aware of the limitations of his own views as well as those of all men, and the significance of ‘the safeguards of law so painstakingly built up in the course of the centuries’” (1968, 184–185).

Next, Howard (1977, 917) confronts a vexing status quo: “Since the Supreme Court grants certiorari in less than 2% of federal appeals, internalized professional values have traditionally been regarded as essential controls binding federal courts into a system. Yet, the appropriate roles and functions of federal appellate judges have never been fixed nor universally accepted.” To address this deficiency, Howard (1977, 918) explores “the relationships among judicial role perceptions and voting behavior in three leading intermediate tribunals—United States Courts of Appeals for the Second, Fifth, and District of Columbia Circuits—against a backdrop of the political orientations of their members.”

Howard (1977, 918) defines the judges’ role orientations in terms of the permissible range of discretion judges have in making law. He operationalizes judges’ role orientations in terms of their function as law-makers. ‘Innovators’ are those judges who “felt obliged to make law ‘whenever the opportunity occurs’” (1977, 919). ‘Interpreters’ are those judges who felt “judicial lawmaking should be held to a minimum” (1977, 920). Finally, ‘realists’ are those judges who took a middle position.

The data for Howard’s (1977) study comes from off-the-record interviews conducted in 1969–1971 with 35 active and senior judges of the three circuit courts. Role orientations were inferred from the interviewees’ “responses to open-ended and structured questions, including the following query concerning innovation: ‘Some people think circuit judges should be legal innovators, thus illuminating issues for the Supreme Court; others argue that circuit judges should merely apply the law, leaving legal innovations to legislatures and the Supreme Court. What do you think?’” (1977, 919). The dependent voting data was compiled by analyzing all decisions of the three courts decided between 1965–1967.

Howard (1977) finds that five judges were ‘innovators,’ 20 judges were ‘realists,’ and nine judges were ‘interpreters.’ Interestingly he notes, “that these federal circuit judges, unlike some members of state supreme courts, differed over issues of degree rather than of kind. Virtually all of them agreed that, while bold policy ventures such as *Brown v. Board of Education* (1954) should be left to the high court or Congress, *stare decisis* is ‘not an unbreakable rule’ (1977, 919).” Howard (1977) also finds moderate support for his proposition that ‘innovators’ are generally more libertarian in their voting behavior than are ‘realists’ and ‘interpreters.’

2.1.2.5 Studies in Judicial Politics: State Context

Scholars have explored the role orientations of state court judges for nearly fifty years. In one of the earliest works on the subject, Becker (1966) examines the impact of judicial role orientation upon judicial decision-making. To do so, 30 Hawaiian judges were surveyed, of which 22 responded. The judges were first asked to indicate, on a five-point scale, the influence each of seven factors had on the judge’s decision-making process.⁶ The judges were then asked to decide a hypothetical scenario involving a suit against a hospital claiming damages for the negligence of a nurse operating within the scope of her employment. The scenario was constructed in such a way that the ‘objective’ response, according to the author, was that the hospital should be absolved from liability.

When the survey results were combined with the judge’s decision in the hypothetical scenario, Becker (1966) finds that judges who consider precedent to be the most important decisional factor are more likely to rule ‘objectively.’ Judges who do not consider precedent to be the most important decisional factor or who consider personal factors (their view of ‘justice’ or ‘common sense’) to be the most important decisional factor are more likely to rule ‘subjectively.’ This work improves upon Becker (1965), wherein the author used law students instead of judges to gauge the impact of role orientation on judicial decision-making.⁷ Like much of the scholarship to follow, however, this study suffers from a lack of variation in role orientation responses:

Over 90% of the judges in Becker’s study rated ‘precedent’ as ‘extremely’ or ‘very’ influential, and the remaining two judges rated it as ‘influential.’ The variance of the responses to this item is smaller than the variance for any of the other items. Becker’s analysis is based in part on dichotomizing the judges into two groups: those who rated precedent as ‘extremely influential’ and those who rated precedent as ‘very influential’ or as just ‘influential.’ This

⁶These factors were: (1) what the public needs, as the times may demand; (2) what the public demands; (3) the decision-maker’s view of justice in the particular case; (4) common sense; (5) a highly respected lawyer as advocate; (6) a highly respected lawyer as an esteemed and/or influential member of the community; and (7) precedent, when clear and directly relevant.

⁷Surveying judges to gauge their role orientation is preferable to surveying law school students to obtain their best guess of how judges perceive their role orientation because law school students have no experience as a judge. Not having performed the job of judge affects the accuracy with which a law school student could describe the role orientation of judges.

seems a rather artificial division point, one which is dictated by the lack of variance in the responses rather than by a theoretical concern...it seems possible that a great amount of within-group variance still exists (Gibson 1981b, 298).

Perhaps, as argues Gibson (1981b), a more significant problem with Becker's (1966) measure of role orientation lies in its lack of conceptualization. What does it mean to say that a judge is strongly oriented toward precedent? Becker (1966) essentially argues that relying on precedent is 'objective' while relying on some other factor is 'subjective.' Gibson (1981b) notes one further problem with the measure of role orientation: Becker's (1966) question requires a judge to determine how influential several decisional criteria *actually are* to the judge. However, "The proper form of the question, if it is to be used as a measure of role orientations, should express valuation of each of the criteria—the question should ask how influential the criteria *should be* [to the judge]" (Gibson 1981b, 299).

The next scholars to examine the judicial role orientation, Jaros and Mendelsohn (1967), attempt to determine what effect role orientation has on traffic court sentencing. The authors argue that, because the role orientation of judge includes the right to be respected, defendants who fail to demonstrate respect will receive a more severe sentence than defendants who are respectful. To conduct this study, secondary school teachers were trained and dispatched to observe the behavior of judges and defendants in Detroit Traffic Court for two weeks during the summer of 1966. The teachers were asked to observe the nature of the charges; disposition of the case; the sex, race, and age of the defendant; how the defendant was dressed; and whether the defendant failed to use an honorific title when addressing the judge, expressed disagreement, raised his or her voice, used sarcasm, expressed disparagement of the court or the police, or failed to express repentance.

The study concludes that, in low to moderately severe crimes, defendants who dress poorly are more likely to be jailed than defendants who dress well.⁸ The defendant's demeanor, however, does not have a significant impact on jail sentences or fine magnitude. This research is compelling in that it deals with observed behavior: the disposition of cases by Detroit Traffic Court judges. It is limited, however, because of the same. As Gibson (1981b) explains, when the observed decisional behavior of judges is used to *infer* the existence of particular role orientations, the degree to which role orientations are related to behavior cannot be specified. "Indeed, the hypothesis that role attributes and behavior are unrelated cannot be tested. Nor can the relative impact of role orientations and other possible determinants of behavior be estimated" (1981b, 295).

Several years later, Ungs and Baas (1972) created a 'typology' of judicial role orientations by examining 120 articles authored by incumbent or retired judges, judicial opinions, and various other comments by judges in which a judge expressed an opinion about the judicial role orientation. From these, four role orientations

⁸The authors find no relationship between highly severe crimes and dress, or between dress and fine amount.

are created: (1) ‘law interpreter,’⁹ (2) ‘law maker,’¹⁰ (3) ‘adjudicator,’¹¹ and (4) ‘administrator.’¹² A sample of 48 statements used to create these role orientations was mailed to a random sample of 109 Ohio State judges. Each judge was asked to rate his or her agreement with the 48 statements on an 11–point scale. Fifty judges responded. Because no judge factored as a ‘law maker,’ the authors remove that category, though they identify two new role orientations from survey responses: ‘trial judge’¹³ and ‘peacekeeper.’¹⁴

As suggested by previous studies, and in accord with the articulated views of judges,¹⁵ the authors hypothesize that appellate judges will have a ‘law maker’ or ‘adjudicator’ role orientation and trial judges will have a ‘law interpreter’ or ‘administrator’ role orientation. This hypothesis receives only limited support: A greater proportion of appellate judges factor as an ‘adjudicator’ and a greater proportion of trial judges factor as a ‘trial judge.’ However, other differences among appellate and trial court judges do not emerge in the remaining role orientations.

This work is laudable in that it is the only study of appellate and trial judges that does not combine the responses of the two. However, several questions remain. Why did no judge identify as a ‘law maker’? There are certainly reasons to believe that (at least) some judges act in ways that are comparable to law–makers. Motivated reasoning tells us that, since it is generally considered ethically or socially unacceptable for judges to say that they consider their role as that of law–maker, these judges might not publicly identify as such yet continue to act in a manner consistent with that of ‘law maker’ (Segal and Spaeth 1996; Braman 2009). Moreover, according to Gibson (1981b), this study is plagued with additional deficiencies. “First, a potpourri of 48 items, with enormously diverse content, was employed. Second, no attention was given to scale building: rather than R–analysis, the data were analyzed through Q factor analysis. This technique locates respondents, not scale items, in

⁹The ‘law interpreter’ believes that legal precedent should comprise the major criteria in judicial decisions and, consequently, advocates judicial self–restraint as a necessary control over reading personal predilections into law (Ungs and Baas 1972, 345).

¹⁰The ‘law maker’ argues that the acquired attitudes and experiences of a judge should be major factors in judicial decision–making (Ungs and Baas 1972, 346).

¹¹The ‘adjudicator’ sees his or her job as that of “balancer of contending principles, evaluator of the conditions in society, and as a decision maker to achieve the welfare of society” (Ungs and Baas 1972, 347).

¹²The ‘administrator’ views his or her job as that of an executive. In order to administer justice, close attention must be paid to judicial procedures since procedures are as important to the judicial task as the decisions themselves (Ungs and Baas 1972, 347).

¹³The ‘trial judge’ feels his or her job is to interpret and carry out the decisions of higher courts (Ungs and Baas 1972, 358).

¹⁴The ‘peacekeeper’ perceives the role of the court “not only with reference to the results of particular cases, but also in terms of an activist in maintaining harmonious social relations” (Ungs and Baas 1972, 360).

¹⁵See, for example, Friend (1954), Martin (1945), and Medina (1963).

multidimensional space. Nevertheless, the authors discussed their results as if R-analysis had been conducted” (1981b, 300–301).¹⁶

In the first multi-state analysis of judicial role orientations, Wold (1974) interviewed 22 members of the Delaware, Maryland, New York, and Virginia high courts. In order to determine their role orientation, each judge was asked, “What do you think of the controversy over whether appellate judges should act as law interpreters or law-makers?” (1974, 239–240). Twelve responded that appellate judges should be ‘law interpreters,’ three that appellate judges should be ‘law makers,’ and seven that appellate judges should be some mix of the two. Each judge was then asked to identify his or her ideological predisposition before joining the court. Ten considered themselves to be ‘conservative,’ six were ‘moderate,’ and six were ‘liberal.’

Next, the author asked about each judge’s background (rural or urban upbringing, class, political party affiliation, religion, education, career background, age, and length of service). Wold (1974) finds that self-expressed ideology relates much more strongly to the judges’ orientation toward judicial law-making than does social background characteristics or recruitment methods. This study is quite innovative in that it examines judges in different states and that it includes information about the judges’ backgrounds.

However, one cannot put too much weight on the findings that background and institutional differences do not matter. These findings might very well be an artifact of the research design. The judges’ role orientations were obtained through response to a single open-ended question, the use of which poses a serious threat to reliability. “Even though coding open-ended responses is a perilous task, intercoder reliability coefficients are rarely reported (and are somewhat disconcerting when they are reported). This approach also makes comparison across studies difficult, especially since there is no evidence that different researchers use a standardized set of coding instructions” (Gibson 1981b, 297).

Furthermore, like Becker (1966), both Unga and Baas (1972) and Wold (1974) suffer from the use of a measure that yields little variation in the role orientations among judges. “Most studies have revealed that a majority of judges are ‘law interpreters,’ but it is extremely unlikely that judges are as homogeneous as the responses to this question make them appear. Instead there is probably substantial variation in the beliefs of ‘interpreters’ about what constitutes the proper bounds of ‘interpretation,’ variation which is critically important to understanding the decisions of the judges” (Gibson 1981b, 296–297). In other words, these studies operationalize role orientation in such a way that the category of ‘law interpreter’ captures judges who should be classified as something else.

In another study on criminal sentencing, Gibson (1977) examines the severity of the sentence received by defendants in 1,194 felony cases heard by the judges of the

¹⁶R-analysis, or normal factor analysis, finds correlations between variables across a sample of subjects. Q factor analysis, on the other hand, looks for correlations between subjects across a sample of variables (Kerlinger 1964, 581–582).

Superior Court of Fulton County, Georgia, between 1968 and 1970. For each case, seven non-legal variables were coded: (1) the defendant's race; (2) the defendant's sex; (3) the type of plea entered by the defendant; (4) whether the number of charges on which the defendant was convicted were reduced; (5) the length of time between arrest and trial; (6) whether the pre-trial period was spent in jail or on bail; and (7) an interactive variable that measured the pre-trial sanctions on the defendant (length of time between arrest and trial multiplied by pre-trial period in jail or on bail).

With these factors acting as independent variables and the defendant's sentence as the dependent variable, discriminant functions were calculated.¹⁷ If the discriminant function is a good predictor of behavior, then the judge is considered an 'activist;' if the equation is not a good predictor, then the judge is considered a 'restraintist.' Gibson (1977) finds that, for five of the 11 judges studied, the seven non-legal stimuli explained 20% or more of the variance in sentencing behavior. Quite correctly, Gibson (1977, 999) notes that "while activism is a concept frequently associated with 'liberals' it may be very much more useful to think of the concept... [as] the ability of political or non-legal factors to explain variation in voting behavior."

This work, however, is not timeless. The cases under examination are from a trial court in Atlanta during the years 1968–1970. Sentencing behavior was picked because, at the time, judges were relatively unrestrained in sentencing defendants. Gibson (1977, 987) states, "A great deal of discretion is granted to trial court judges in sentencing; indeed, discretion is so great that some judges have bitterly complained about the lack of guidance for their decision." This is no longer the case. Much of judges' sentencing discretion has been replaced with legislative proclamations in the form of mandatory minimums, sentencing guidelines, and three-strikes laws.¹⁸ This new reality surely has since been incorporated into the role orientation of judges and, as such, our operationalization of the judicial role orientation must evolve.

Gibson (1978) next attempts to determine the effect of both ideology and role orientation on trial court judges. To do so, he examines the sentencing behavior of 27 Iowa trial court judges in 2,715 felony or indictable misdemeanor cases filed during 1972 or 1973 and completed by 1974. Twenty-six of the 27 judges under investigation were interviewed. Ideology was determined by asking the judges to place themselves on the liberal-conservative spectrum and for their opinion about government economic intervention, class-based beliefs, and religious influence on society. Role orientation was also obtained through survey questionnaire, though the exact wording of the question(s) is not made clear. The analysis controls for the following nine case and defendant characteristics: the seriousness of the charge; whether the defendant was released on bail; the plea of the defendant; whether the defendant's counsel was privately retained; the defendant's sex; whether there

¹⁷Discriminant function analysis predicts group membership based on a linear combination of interval variables (Stockburger 2001).

¹⁸For example, there are currently at least 171 individual mandatory minimum provisions in the federal criminal statutes (United States Sentencing Commission 2009) and 25 states have adopted three-strikes laws (Murphy 2009).

were multiple cases against the defendant; the number of previous misdemeanor convictions; the number of previous felony convictions; and the age of the defendant.

Gibson (1978) finds little support for his initial hypothesis that liberals are more lenient sentencers. When he adds the judges' role orientations (conceptualized as the degree of ideological influence allowed) it appears that role orientation is intervening between ideology and sentence. The author explains, "[R]ole orientation specifies... the range of legitimate criteria of decision making... The data demonstrated that the role orientations of judges do indeed block the relationship between attitudes and behavior, a finding also consistent with the experimental literature" (1978, 922). But, as he goes on to note, "The generalizability of this model of decision making is indeed limited by the small number of judges analyzed [and] the lack of comparative data" (1978, 922). Moreover, one must wonder if the judges' self-reported ideology (one of the two main independent variables) is truly a non-biased indicator.¹⁹

Following the release of what could be considered his 'state of the theory' piece, Gibson (1981a) endeavors to avoid the pitfalls he observed as well as put a new conceptualization of role orientation to use. This research attempts to determine the effect of self-esteem on role orientation. Gibson (1981a) hypothesizes that the *role characteristics* of judges low in self esteem will be more strongly influenced by the *role expectations* of others than will the role characteristics of judges with high self esteem.²⁰ To determine if this is indeed the case, interviews were conducted in 1977 with 48 California judges who were selected because they shared a common trait—each had previously been elected to the legislature prior to becoming a judge. The judges' self-esteem was first gauged. Next, the judges' perceptions of role expectations were measured by asking the judges to rate nine *role alters* in terms of their importance in defining the 'proper' behavior for judges.²¹

Two indices were created from these responses. The first indicates the degree of importance ascribed to the expectations of external role alters (the media, the public, political party leaders, and attorneys), while the second indicates the importance of the expectations of internal role alters (trial judges, legal organizations, appellate judges, and attorneys). Judges were then asked to rate 19 stimuli on the degree of legitimate influence they should have on judicial decision-making. *Role behavior* was determined by asking the judges to indicate how often they overturn or

¹⁹Often, individuals have very different conceptualizations of what the term 'liberal' and 'conservative' mean. Therefore, when self-reporting ideology, these judges (like participants of other surveys) might very well have characterized themselves in ways that an objective party might not. This could be most pronounced in surveys of elites, where self-reporting a particular ideology might be in an individual's best interest.

²⁰Briefly, *role characteristics* are the behaviors believed appropriate for a particular role occupant. *Role alters* are those who interact with the role occupant. Each role alter has *role expectations*, or normative beliefs, about how the role occupant ought to behave. For a more detailed discussion, see the section entitled "Conceptualizing the Judicial Role Orientation" below.

²¹The concept of role alters is very similar to a recently developed theory in the field of psychology of judicial decision-making. In *Judges and Their Audiences: A Perspective on Judicial Behavior*, Baum (2006) argues that judicial decision-making is influenced by judges' interest in popularity and respect. Moreover, Baum (2006) maintains that this regard for audience approval holds not just as a means to other ends, but also for that regard in-and-of itself.

significantly modify precedents in making decisions (1981a, 115).²² Gibson's (1981a) results lend support to the idea that the impact of role expectations is strongly contingent upon the self-esteem of the judge.

There are two causes for concern with this work, however. First, because the judges are not selected at random, but rather because they share a common trait, the generalizability of these findings is unknown. It is certainly plausible to believe that individuals who have held both a legislative position *and* a judicial position are different from the general population of judges. This could be the case for several reasons—two of which go to the core of Gibson's (1981a) study. First, the experience of serving in the legislature could cause these judge-legislators to have a different role orientation than the typical judge. Second, the level of self-esteem required to subject oneself to a campaign for both a legislative position and judicial position might be significantly higher than the self-esteem required to only seek a judicial position, particularly during this time when judicial campaigns were less aggressive. Thus a study of the judge-legislators' self esteem is only applicable to other judge-legislators.

Second, the research lacks any data on the actual behavior of the judges. Asking how often a judge overturns or significantly modifies precedent creates a great probability of inaccuracy, either because the judge does not know this statistic or cannot accurately recall it when asked during an interview. In addition, the psychological theory of cognitive dissonance tells us that an individual wishing to minimize the discomfort of appearing inconsistent will only report behavior consistent with their self-identified role orientation.²³

Following several years' void of judicial role orientation research, Scheb and Ungs's (1987) survey of 75 judges of the Tennessee court system reveals two role orientations: 'restraint-institutionalist' and 'activist-realist.' The authors do not find judicial role orientations to be either the rational choice of an autonomous actor or the determinant of the social, economic, and political environment. Rather, they suggest, the judicial culture supplies individuals with certain intellectual and behavioral parameters of permissibility and that individuals develop their particular role orientations within these parameters.

While creating an eleven-point scale for each question in order to allow judges variation in their responses is certainly an advancement, the authors do not take advantage of this available variation but rather dichotomize the role orientations. In addition, because all judges that operate under the state of Tennessee (except local judges) were surveyed and the results combined, any difference in role orientation among judges at the different court levels was ignored by the authors. Finally, Scheb and Ungs (1987, 398) acknowledge the uncertainty about the generalizability of their study: "We are confident that our survey results can be generalized to the population of Tennessee judges from which our sample is drawn. Whether these results apply to state court judges generally is unknown, and we make no such claim."

²²*Role behavior* is the term used for role-relevant activity.

²³For a seminal work on cognitive dissonance, see Festinger (1957). For a thorough examination of cognitive dissonance in the arena of judicial decision-making, see Collins (2011).

In the final study on the role orientation of state judges, Scheb et al. (1991) set out to empirically test Gibson's (1978) model.²⁴ In order to do so, 151 active state high court judges were surveyed. The judges were asked to identify their role orientation and ideology. This self-reported role orientation and ideology were then used to predict the judges' support for the prosecution in nonunanimous criminal cases. The authors find: (1) judicial role orientation is independent of ideology; (2) contrary to their expectation, role orientation and behavior are directly related; and (3) judicial 'activists' do not appear more ideological than their 'restraintist' colleagues.

This study suffers from several weaknesses. Most importantly, although high court judges from many states were surveyed, no institutional variables are included in the analysis. This is a significant fault because, in role theoretic terms, the institutional design of the court determines who some of the relevant role alters are.²⁵ Second, judges were asked to identify their own ideology. As noted above, survey respondents often have very different definitions for the terms 'liberal' and 'conservative.' Therefore, when self-reporting ideology, these judges, like any other individual, might very well characterize themselves in ways that an objective party might not.²⁶

Despite the existence of a voluminous literature, substantial opportunity remains for scholarship on the judicial role orientation. First, as almost all of the existing scholarship on judicial role orientation examines trial court judges,²⁷ the existing literature does not adequately explore the role orientation of appellate judges, a group of individuals who, because of their place atop each state's judiciary, play an even more important role in our legal system. As role theory explains, one's role orientation is a synthesis of the role expectations of various role alters given one's environment. Therefore, because trial and appellate court judges operate in different environment and have some number of different role alters who possess different role expectations, it is reasonable to believe that the role orientation of each will be different. As such, attempts to leverage research on trial judges' role orientations to explain appellate judges' role orientations are less than optimal.²⁸

Second, the existing research on appellate role orientation is not cross-institutional. A state's mechanism for the selection and retention of its judges provides constraints within which judges operate. These mechanisms are meant, by design,

²⁴Behavior = Attitudes + Role Orientations + (Attitudes × Role Orientations).

²⁵In states that popularly elect judges, for example, the voters are relevant role alters and, as such, their role expectations are legitimate decisional stimuli that must be given decisional weight by the judges of that state. Likewise, in states where the legislature selects members of the court, the legislators are relevant role alters and, therefore, their role expectations are legitimate decisional stimuli that must be given decisional weight by the judges of that state.

²⁶For example, though measures of the ideology of Supreme Court justices developed by scholars place former-Justice John Paul Stevens as the Court's most liberal member (see, e.g., Martin and Quinn 2002), Justice Stevens couldn't disagree more. "I don't think of myself as a liberal at all. I think as part of my general politics, I'm pretty darn conservative" (Rosen 2007).

²⁷See, e.g., Becker (1966), Gibson (1977, 1978, 1981b), and Jaros and Mendelsohn (1967).

²⁸Likewise, combining trial and appellate court judges into a single analysis, as Gibson (1981a), Scheb and Ungs (1987), and Ungs and Baas (1972) do, in order to determine role orientation is also questionable because of the differences in environments, role alters, and role expectations.

to affect the decision-making process of the judges within that state by signaling to the judge who relevant role alters ought to be. States that make judges stand for popular election do so to provide incentive for judges to take the will of the people into account and provide the people with recourse (in the form of removal from office) against those judges who fail to do so (Bonneau and Hall 2009, 2–3). Legislative or executive appointments attempt to remove popular sanctions for unpopular rulings, thereby insulating judges from political pressure. States that use merit selection do so to reward attorneys and judges for doing what those on selection committees deem appropriate by granting said committees the power of judicial appointment. In a similar fashion, a long tenure is meant to insulate judges from frequent review (and potential removal from office) while a short tenure is meant to keep judges on a ‘short leash.’

These institutional structures matter not because they force judges to rule in a particular manner, or even because they affect behavior directly, but rather because they signal to judges what stimuli can or should legitimately be allowed to influence decision-making. As Gibson (1978, 918) notes, “The basic function of decision-making role orientation is to specify what variables can legitimately be allowed to influence decision-making, and in the case of conflict, what priorities to assign to different decisional criteria.”

Finally, much of the previous scholarship suffers from an inadequate conceptualization and/or operationalization of role orientation. Researchers often conceptualize role orientation as having a direct relationship to behavior. “For instance, a typical hypothesis is that ‘activism’ is related to ‘liberal’ decisions. Yet there is no theoretical structure supporting such a hypothesis—activism may be in favor of conservative values (e.g., the Hughes Court) or liberal values (e.g., the Warren Court)” (Gibson 1981b, 292).²⁹ Role theory should instead be conceptualized, as it is argued below, as a specification of what stimuli it is proper to allow to influence decision-making, and in the case of conflict, what priorities should be assigned to the different stimuli.

In addition, role orientation is almost always operationalized in such a way that there is little to no variation in the reported orientation. It is extremely unlikely that judges are as homogeneous as their responses to survey and interview questions have made them appear (Gibson 1981b, 296–297). If judges were that homogeneous it would make us question most of what we *know* about judges. Finally, few attempts have been made to demonstrate the impact of role orientation on the decision-making process. Those that have often use the judge’s own reports of his or her behavior, such as how often he or she overturns precedent, rather than objectively observing role behavior.

²⁹For more on this distinction, see the discussion below in the section entitled “Operationalizing the Judicial Role Orientation.”

2.2 A Role Theoretic Framework

As perhaps two of the subject's most influential sociologists, Thomas and Biddle (1966, 4), write, "Individuals in society occupy positions, and their role performance in these positions is determined by social norms, demands, and rules; by the role performances of others in their respective positions; by those who observe and react to the performance; and by the individual's particular capabilities and personality." This, in short, describes role theory, a perspective that is said to have begun life as a theatrical metaphor,³⁰ yet, intellectually, can be traced to two theoretical trends in sociology: the symbolic interactionism of Cooley (1902), Mead (1934), and Blumer (1969)³¹ and the structural-functionalism of Linton (1936), Parsons (1951), and Merton (1957).³²

2.2.1 *Conceptualizing the Judicial Role Orientation*

The way individuals act within an institution differs from the way they act in non-institutional settings; that is to say, environment influences behavior. *Roles* are the constraints imposed on decision-makers by institutional structure. These roles limit, but do not eliminate, discretion in the interest of advancing organizational objectives (Gibson 1981b, 292–293). "[R]ole theory provides a means of moving beyond an exclusive focus on individuals to consider the influence of the institutional constraints on decision making" (Gibson 1983, 17) because "institutions exist... to circumscribe the alternatives available to the decision-maker" (Gibson 1981b, 293).

Roles do not constrain behavior alone, however. Role expectations are the normative beliefs held by the role occupant and role alters—or those who interact with

³⁰Since performances in the theater are differentiated and predictable because actors are constrained to performing parts for which scripts are written, early scholars found it reasonable to believe social behaviors in other contexts could also be associated with parts and scripts understood by social actors (Biddle 1986, 68).

³¹As Knowles (1982, 6) describes, the symbolic interactionist perspective on roles developed in order to account for how an individual becomes a member of society. The essential answer provided by this school of thought is that the self does not exist without the social group because it is only through interaction with others that individuals learn to identify, label, and value objects.

³²The structural-functionalist perspective, on the other hand, grew out of attempts to represent the social system. The basic assumption of this perspective is that "actions are patterned into coherent and ordered systems that govern both interpersonal interaction and societal functioning. Actions are patterned, in this sense, because certain aspects of behavior seem more characteristic of the relationship or the setting than of the particular individuals involved" (Knowles 1982, 6–7). Structural-functionalists assume that the social structure is known and that this knowledge is commonly shared. As Davis (1948, 88) described this assumption, an individual carries his role orientation around in his head, putting it into action when the appropriate occasion arises. He adds that, "[n]ot only does he carry it in his head but others also carry it in theirs, because [role orientations] are matters of reciprocal expectations and must be publicly and commonly conceived by everyone in the group."

the role occupant—about how the role occupant ought to behave. For example, it is expected that all judges are (at least somewhat) constrained by precedent. The extent to which this role expectation influences judicial decision-making varies, however, by the judge's position within the judiciary, the value the judge assigns precedent over other decisional criteria, the expectations of influential role alters, the age of the precedent, etc. "Each role occupant must synthesize these expectations, accepting some, rejecting others, to form a role orientation, a belief about proper behavior within the institutional position" (Gibson 1983, 17). Role-relevant activity is known as role behavior.

Thus, there is no consensually accepted judicial role orientation. Rather the process is "stochastic and is one of individuals' reacting in a variety of distinctive ways to the expectations they experience" (Gibson 1983, 17). Because the position of judge is incredibly complex, "judges' beliefs about the limits of proper behavior are also complex" (Gibson 1981b, 302). 'Proper' in this context does not refer to the policy content, but rather to the process of decision-making and, in particular, the kinds of stimuli that should influence decisions. "Some judges may believe it proper to be influenced by a particular stimulus while other judges may regard the stimulus as improper. More generally, judges vary in the breadth of stimuli they deem legitimate" (Gibson 1978, 918).

Following in the steps of Gibson, role orientation is conceptualized here as the stimuli, or variables, that a judge feels can legitimately be allowed to influence his or her decision-making and, in the case of conflict among influences, what priorities to assign to different decisional criteria. This conceptualization of role orientation is completely compatible with the norms for judging.

A central expectation of judicial and legal traditions concerns the decision-making criteria employed by judges. For instance, equality before the law is not an empirical statement; it does not assert that individual litigants are in fact equal. Rather, the phrase is an exhortation to ignore the variables (stimuli), such as power, on which litigants are unequal and render decisions only on variables that provide for equality. For instance, it is generally regarded as illegitimate to discriminate on the basis of social class in sentencing decisions. This means that it is illegitimate to allow the social class of the defendant to influence the decision: class should be weighted at zero. Similarly, such concepts as the presumption of innocence in criminal cases are expectations that court officials will not allow empirical stimuli relating to the factual guilt of the defendant to influence their pretrial decisions (Gibson 1981b, 302-303).

2.2.2 Operationalizing the Judicial Role Orientation

While few terms describing a court or judge can conger a more visceral reaction, either positive or negative, the competing notions of judicial 'activism' and judicial 'restraint' provide an avenue for the operationalization of role orientation. In *Measuring Judicial Activism*, Lindquist and Cross (2009) note, the origin of the term judicial 'activism' can be traced to historian Arthur Schlesinger who, in an article on the U.S. Supreme Court, described 'activist' judges as those most inclined to

use judicial power “for their own conception of the social good” and ‘restraintist’ judges as those most predisposed to “expand the range of allowable judgement for legislatures” (1947, 201). Though Schlesinger coined the term, the theoretical underpinnings of the debate around judicial ‘activism’ be traced back to the framing of the U.S. Constitution (Lindquist and Cross 2009, 2).³³

In academic circles, the debate around judicial ‘activism’ has taken two tracks: one normative and the other empirical. Along the normative line, Thayer (1893), and his contemporaries, argue that a court (a counter-majoritarian body) should not overrule a legislature’s (a majoritarian body) evaluation of their “legislation’s wisdom and constitutionality” (Lindquist and Cross 2009, 21). This is true, according to Thayer et al., for both theoretical and practical reasons. Theoretically speaking, Bickel (1962, 27), for example, maintains, “democracies do live by the idea... that the majority has the ultimate power to displace the decision-makers and to reject any part of their policy.” Moreover, “when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it” (1962, 16–17).

Practically speaking, according to Tushnet (1999, 57–65), the presence of judicial ‘activism,’ or judicial supremacy, weakens the work of legislators in three important ways: it promotes irresponsibility, distorts legislation, and misleads legislators. Tushnet’s (1999, 57–58) first criticism of judicial supremacy, adopted from Thayer (1893), postulates that legislators feel they need not concern themselves with the constitutionality of their work since courts will ultimately review the legislation and determine its legality. Second, judicial activism, according to Tushnet (1999, 60), distorts legislation because the possibility of a court striking down its work might cause the legislature to pursue laws that “could not accomplish what its members, and the American people want[.]” Finally, the public nature of modern confirmation hearings incentivizes legislators to ask policy questions of nominees, yet, at the same time, incentivizes nominees to avoid answering such questions, to inadequately explain (either to the legislators or the public) constitutional law when they do, or, possibly, to distort their own jurisprudence (Tushnet 1999, 63–65).³⁴

On the other side of the normative debate is Miller, and his contemporaries, who argue that result-oriented judges are good “because of the limits of the conventional electoral process. Insulated from this process, the judiciary could be a force for ‘decency’...” (Lindquist and Cross 2009, 24). This is true, according to these scholars, for both theoretical and practical reasons. Theoretically speaking, Miller (1982) postulates, after considering the preamble to the Constitution, that justice should be a driving goal of the United States. Defining justice as “the satisfaction of basic human needs [that] can be summed up in the concept of human dignity” (1982, 168), courts should play two roles in securing justice:

³³For an excellent discussion of the history of judicial ‘activism,’ as well as an examination of the extent to which U.S. Supreme Court justices engage in such activity, see Lindquist and Cross (2009).

³⁴But, see, Collins and Ringhand (2013).

First, accountability of those who exercise governing power, insofar as it is within the capacity of the High Bench to impose it, must encompass the affirmative dimension of justice as defined above. Second, ...[c]ourts as part of the political process cannot avoid deep and continuing involvement in the never-ending quest for social justice. However much judges have reflected, and still reflect, the wishes and values of the governing class in America, they and others in government must confront and deal with—effectively, one hopes—the growing passionate desires of people everywhere for both a fair shake of the social (and thus the legal) dice and a fair share of the planet’s riches...Judges, including those on the the Supreme Court, can participate in society’s struggles and labors: they can assist in making government officers (public and private) in the Corporate State accountable, both procedurally and substantively...[A]n avowed commitment to human dignity should be emblazoned on the escutcheons of those who serve on the nation’s courts.

These arguments come not only from scholars, but also from judges themselves. For example, in his treatise on constitutional interpretation, *Active Liberty: Interpreting Our Democratic Constitution*, U.S. Supreme Court Justice Stephen Breyer (2005, 109–110) writes, “reference to the Constitution’s basic democratic objectives can help courts shape constitutional doctrine, reconcile competing constitutional values, time judicial intervention, interpret statutory ambiguities, and create room for agency interpretations... I, a judge who has a role in playing the complex score provided me in the form of constitutional and statutory text, history, structure, and precedent, can perform my role with less discord, more faithfully to the entire enterprise, and with stronger justification for the power I wield in a government that is of, by, and for the people, by paying close attention to the Constitution’s democratic active liberty objective.”

Practically speaking, Peretti (1999, 100) argues that the selection system for the federal judiciary and the benches’ frequent turnover ensures courts who are dynamically representative of the values currently dominant in the society and in the government. The judges’ value-voting based decision-making, therefore, is a “democratic proxy of sorts” (1999, 132). “Contrary to the conventional view that it is arbitrary, idiosyncratic, and illegitimate,” she argues, “value-voting may instead be regarded as a source of coherence, predictability, and democratic legitimacy” (1999, 132).

Providing a conservative defense of judicial supremacy, Bolick (2007, A.15) maintains, “[J]udicial activism—defined as courts holding the president, Congress, and state and local governments to their constitutional boundaries—is essential to protecting individual liberty and the rule of law... [and] was essential to the scheme of republican government established by our Constitution.” Bolick concludes, “Properly wielded, a court gavel can be David’s hammer against the Goliath of big government. Among our governmental institutions, courts alone are designed to protect the individual against the tyranny of the majority—and against special interest groups with outsized influence” (2007, A.15).³⁵

Like the normative debate surrounding the legitimacy of judicial ‘activism,’ the academic debate surrounding its prevalence is likewise diverse. For example, in an early seminal work, Dahl (1957) finds that the U.S. Supreme Court upholds statutes enacted by the current national majority; only voting to strike those statutes enacted

³⁵See, also, Barnett (1987).

by national majorities no longer in power. “The fact is, then, that the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States. Consequently it would be most unrealistic to suppose that the Court would, for more than a few years at most, stand against any major alternatives sought by a lawmaking majority” (1957, 285).

In questioning Dahl’s (1957) conclusions, Casper (1976, 50) writes, “Consideration of the way he interprets his own evidence and of other relevant evidence that is excluded from his analysis suggests that the Court participates more significantly in national policy making than Dahl’s argument suggests.” He continues:

One reason that courts may have particular importance in placing issues on the agenda of other political institutions and in development of interest groups is that “success” in a court requires only that a party convince a relatively small number of decision makers. At the trial level, success requires only a favorable decision from a single individual; at the Supreme Court level, success requires the approval of five of nine. Thus, interests that lack resources for effective influence in legislative, executive, or administrative arenas may find the legal system an attractive spot in which to attempt to influence public policy. “Success” in a court then becomes useful in participation in these other arenas the court’s decision may require other institutions to come to grips with an issue they have ignored; the legitimacy conferred by victory in court may be useful in attracting members and resources and mobilizing others (1976, 63).

Mishler and Sheehan (1993) find a U.S. Supreme Court much more responsive to public opinion than does Dahl (1957). Employing more sophisticated empirical testing than was available to either Dahl (1957) or Casper (1976), Mishler and Sheehan (1993, 96) conclude,

For most of the period since 1956, a reciprocal relationship appears to have existed between the ideology of the public mood in the United States and the broad ideological tenor of Supreme Court decisions. The impact of the public mood on the Court’s decisions occurs at a moderate lag; a somewhat shorter lag appears to exist in the reciprocal effects of Supreme Court decisions on public opinion. That both are strongly positive suggests the existence of a responsive Court whose decisions not only reflect changes in public opinion but also serve to reinforce and legitimize opinion change in an iterative process.

Following logically from the conceptualization of judicial role orientation adopted above, and grounded firmly in the judicial ‘activism’ literature, this study operationalizes judges’ role orientations as being somewhere on a continuum that ranges from ‘restraintist’ to ‘activist.’ A ‘restraintist’ judge will be one who believes that precedent, the strict construction of constitutions, and giving deference to legislative intent are extremely important decisional criteria.³⁶ An ‘activist’ judge, on the other hand, will be one who gives greater decisional weight to personal attitudes, values, and case outcomes (Gibson 1983, 17–18).³⁷ This operationalization improves upon others in that it will allow for a direct examination of the degree to which role orientations influence judges’ voting behavior.

³⁶This term, at least loosely, corresponds to what some other role theoretic scholars term the ‘law–interpreter,’ ‘institutionalist,’ and ‘interpreter’ role orientation.

³⁷Likewise, other scholars have referred to similarly defined role orientations as ‘law–maker,’ ‘realist,’ and ‘innovator.’

A few final notes on this operationalization are necessary. First, despite what many commentators and politicians might assert, ‘judicial activism’ is not the same as liberalism, nor is ‘judicial restraint’ the same as conservatism.³⁸ Conceptually, as Itoh (2010, 263) writes, “The judicial role of activism and restraint is different from the judicial attitudes of liberalism and conservatism and should be kept separate for the purpose of judicial decision-making analysis.” For his analysis, “The former refers to relations between the judiciary and the political branches and depicts the conflict and harmony between both sides whereas the latter describes judicial attitudes toward civil rights and liberties... There are conceptually four pairs of judicial behavior between the two variables” (2010, 263).

In the present analysis, given the operationalization of judges’ role orientations as being ‘activist’ if greater decisional weight is given to personal attitudes, values, and case outcomes and ‘restraint’ if precedent, the strict construction of constitutions, and giving deference to legislative intent are instead given greater decisional weight, there are also four pairs of judicial behavior between the two variables: (1) A judge is an ‘activist’ if he or she would vote to strike down a law even if it is conservative; (2) A judge is an ‘activist’ if he or she would vote to strike down a law even if it is liberal; (3) A judge is a ‘restraintist’ if he or she would vote to uphold a law even if it is conservative; and (4) A judge is a ‘restraintist’ if he or she would vote to uphold a law even if it is liberal. These are each regardless of the judge’s own ideology.

Recently, scholars have sought to make clear the distinction between the unrelated concepts of judicial roles, classified as ‘activist’ and ‘restraintist,’ and judicial attitudes, classified as liberalism and conservatism. For example, Howard and Segal (2002) systematically test the influence textual and originalism arguments have on the decisions of U.S. Supreme Court justices. To do so, the authors examine all merits briefs filed by petitioners and respondents in 1979, 1980, 1985, 1986, 1991, 1992, 1993, and 1994 looking for language indicating explicit textual support,³⁹ or implicit original intent support.⁴⁰ The authors find, “Anomalies aside, Justices might speak about following an ‘originalist’ jurisprudence, but they only appear to do so when arguments about text and intent coincide with the ideological position that they prefer” (2002, 133).

Similarly, Epstein and Landes (2012) test Judge Posner’s (2012) suggestion that the common notion of judicial ‘restraint,’ a reluctance by judges to declare legislation or executive action unconstitutional out of deference to the judgments of the elected branches of government, is dead. To do so, the authors construct a dataset of U.S. Supreme Court cases that consider the constitutionality of federal laws between 1937–2009. Epstein and Landes (2012, 557) find that while “there was such a thing as judicial self-restraint, but there no longer is, just as Judge Posner suggests.” Justices

³⁸Indeed, the “inherently pejorative” connotation of the term ‘judicial activism’ has led some to call for the adoption of a more neutral “judicial engagement [which] doesn’t call for a particular result. It calls for a particular approach to judging” (Neily, 2013).

³⁹Such phrases include: ‘plain meaning,’ ‘plain language,’ or ‘the language.’

⁴⁰These include: references to legislative history and arguments about the original intent of the framers or the original meaning of the Constitution.

appointed since the 1960s are ideological in their approaches to the constitutionality of federal laws, such that “liberal justices are significantly more likely to strike conservative laws, and conservative justices are more likely to strike liberal laws” (2012, 567).

Likewise, Epstein and Martin (2012) question whether the Roberts Court is especially ‘activist,’ with ‘activism’ being defined as the propensity to strike down laws as unconstitutional. The authors conclude that the Roberts justices “just as their immediate predecessors, are neither uniform activists nor committed restraintists... In a nutshell, liberal Justices tend to invalidate conservative laws and conservative Justices, liberal laws. This holds regardless of whether we examine all the Justices’ votes simultaneously or each Justice individually” (2012, 737–738).

Second, while the ‘activist–restraintist’ spectrum is an operationalization of the judicial role that makes logical sense and is firmly rooted in the literature, there are, of course, alternative dimensions of the judicial role orientation. For example, in his groundbreaking book, *Judges and Their Audiences: A Perspective on Judicial Behavior*, Baum (2006) theorizes that, rather than just considering the traditional attitudinal or legal influences on judicial decision-making, we should also consider that judges might as well be influenced by relevant audiences. Judges, Baum (2006, 4) argues, “care about the regard of salient audiences because they like that regard in itself, not just as a means to other ends.”

This makes intuitive sense. As Baum (2006, 3) notes, people outside the academic world would have an easy time explaining some judicial behavior: “judges, like other people, get satisfaction from perceiving that other people view them positively.” Yet scholars have been reluctant to entertain a notion so readily understandable by laymen. Why? Because it is extraordinarily difficult to empirically test this theory. First, as Baum (2006, 171–172) himself notes, a judge’s relevant audiences must be identified. If dealing with a small number of judges, archival, interview, and survey data might be useful in these regards. But, such tools are of little use when dealing with many judges. Second, a dependent variable of judicial behavior that could be explained by the influence of an audience must be created.⁴¹

While this work does not directly operationalize a judge’s role orientation in terms of following the will of salient audiences, its conceptualization of role orientation presumes such an influence is possible and its operationalization does allow for such an influence. Indeed, one strength of this role theoretic approach is that it allows for the inclusion of relevant audiences through the concepts of role alters and role expectations. As described above, an individual’s role orientation is the product of his own expectations for proper role behavior, the expectations of various role alters (or audiences), and the constraints imposed by the institution within which he finds himself. Therefore, in the present analysis, it is assumed that a judge will consider the role expectations of role alters in regards to their ‘activism.’

⁴¹For example, scholars typically operationalize judicial behavior as a judge’s decision in a case. This is often in the form of a conservative or liberal vote. It is not obviously clear how an audience might affect that variable. Instead, a dependent variable that might be susceptible to a measurable audience effect would need to be adopted.

A similar, though not identical dimension, is one that considers judges' orientation toward the public they serve. This dimension of role orientation, included in Flango et al.'s (1975) analysis, identified mid-level appellate judges in Austria and Switzerland who ranged from not at all concerned with community to very concerned with community. Though the instant study does not include such an explicit dimension, just as discussed with Baum (2006) above, the conceptualization and operationalization adopted here does allow for such an influence. Moreover, one of the questions used in this study to measure the judges' role orientations at least measures a component of such a dimension.⁴²

Another possible dimension of the role orientation is the court's agreement or disagreement with the political branches. Such an operationalization, as adopted by Itoh (2010), is not practical in the present study due to this study's scope. As the goal of this project is to survey the entire population of state high court judges (over 350 individuals) to obtain their role orientations, determine the causes of role orientation development, and test the effect role orientations have on judicial decision-making, a doctrinal case analysis approach such as Itoh's (2010) is not feasible. That being said, the 'activism—restraintist' operationalization adopted here does measure the judges' own perception of harmony with the political branches. A judge is identified as a 'restraintist' if he or she feels, among other things, that deference should be given to the political branches. This would equate with at least the judges' attempt to harmonize with the political branches.

2.3 Conclusion

This research is motivated by the absence of a theoretically grounded and empirically tested answer to the puzzle of why some judges are motivated by providing what they see as good law while other judges are motivated by providing what they see as good policy. To begin the process of crafting such an answer, this chapter surveyed role theoretic literature from across the social sciences and from within the discipline of political science. In particular, weaknesses in the existing literature on the role orientations of state judges were identified.

Then, adopting and building on the existent literature, a theoretical framework grounded in the role theoretic literature was identified. This framework provides that judges' role orientations are the product of their own preconceived notions about proper behavior and the expectations of relevant others, given the institution within which they find themselves. This role orientation then determines for the judge which

⁴²Survey respondents were asked, among other questions, whether judges should be allowed great discretion in decision-making in order to ensure that their decisions are 'just.' Judges' responses to this question at least indirectly allow for some measure of the public's influence in the judge's role orientation through the concept of justice.

decisional criteria are proper and, in the case of conflict among influences, what priorities should be accorded each. This conceptualization was then operationalized as lying on a spectrum that ranges from 'restraintist' to 'activist,' a practice clearly in line with the judicial role orientation and judicial decision-making literatures.

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Role Orientations

Carman, R.

2017, VIII, 140 p. 4 illus., Hardcover

ISBN: 978-3-319-53380-3