Judicial Incentives: Some Evidence from Urban Trial Courts

Greg A. Caldeira

University of Iowa, Iowa City, caldeira.1@osu.edu

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Judicial Incentives:
Some Evidence from Urban Trial Courts

GREG A. CALDEIRA

That the trial judge is one of the key actors in the administration of justice, civil and criminal, in the United States is surely a proposition that no one can controvert. In the federal judicial system, for example, the Supreme Court is highly dependent upon U.S. District Judges for the implementation of its legal policies; most of the civil and criminal litigation in the federal system begins and ends in the federal district courts. In state and local judicial systems, evidence suggests that almost all litigation terminates in a trial court; few cases are appealed to higher courts. Because opinions of federal and state appellate courts are rarely unambiguous, the trial judge has an enormous amount of discretion — and therefore power — in the processing and deciding of specific cases. Even when the public policies of appellate jurisdictions are relatively clear, however, the trial judge can evade these mandates through the use of an arsenal of available strategies and tactics. In his own territory, the courtroom, the trial judge’s definition of the situation is rarely challenged. Most vivid, of course, is his power to sanction, in a wide variety of ways, the litigants before the court. And the sanctioning power is never more awesome than when the trial judge passes sentence on a convicted criminal. For the most part, the members of the trial courtroom — prosecutors, defense attorneys, bailiffs, clerks, defendants, police, probation officers — are dependent upon the good will of the judge for immediate outcomes or continued effectiveness. In U.S. District Courts, for example, the U.S. Attorney and his staff are quite dependent upon the continuing support of the trial judge; as one judge put it, “I’m in a good position. The U.S. Attorney wants plenty from me, and I don’t want anything from him.” There are, of course, courtrooms in which the prosecutor dominates (e.g., the plea bargaining process); but regardless of who dominates the processes of the court, the trial judge almost always has the option of imposing his will on the other members of the “courtroom team”. Even in prosecutor-dominated judicial processes, actors seem to anticipate the reactions of the trial judge to outcomes clearly outside the “rules of the game”. Depending upon jurisdiction, the trial judge can exercise despotic control over juries — via either formal or informal means. Through a well-placed incredulous facial expression during testimony or a
turning up of the eyebrow at a crucial point of his charge to the jury, the
shrewd trial judge can exercise an enormous, if not determinative, influence
over the jury’s verdict.

Lawyers and social scientists interested in the intersections of law and
society, one might assume, would be quick to study an actor of such
obvious importance. If the point is obvious, however, most have missed it.
Scholars of law and society, perhaps influenced by what Jerome Frank
dubbed the “upper court myth”, have, until relatively recently, systematically
ignored the roles of the trial judge in the political system.9 In a recent essay,
Shapiro quite appropriately observed that “the discovery of trial courts by
political science came only in the 1960’s. It came partially from the urban
politics specialists who, beginning from a genuine political science or public
policy perspective, saw criminal law as a major and obvious facet of local
governance.”10 What then, do we know about trial judges?

Thus far, there have been four main foci in research on trial judges.
First, several political scientists have considered the role of trial judges in
the local political system. In their analysis of New York city politics, for
example, Sayre and Kaufman emphasize the important role that trial judges
play in the urban political process. “Like all other governmental officials
and employees engaged in the quest for the stakes of political contest, judges
and their staffs are both claimants and distributors.”12 Judges are
“distributors” of patronage, interpreters of the “rules of the game”, and
“umpires” between the other political contestants. But trial judges also share
in the rewards of urban politics. Inside and outside the courtroom, lawyers,
other political contestants, and persons in any social gathering defer to
them. While the work can be taxing, the conditions are relatively pleasant;
chances for advancement are good; compared to other public officials,
salaries and pensions are quite lucrative; and, finally, there is a high degree
of independence and security. Dolbeare examined the impact of trial judges
on urban public policy in his study of law and politics in a New York
county, and found that, of six fields of public policy, judges played
politically consequential roles in taxation, licensing, governmental powers
and procedures, and zoning.13

Role theory lends itself nicely to the study of judicial behavior, so it is
not at all surprising that social scientists would begin to look at trial judges
through these lenses.14 In an exploratory study of trial judges, Jackson
presents several interesting observations. First of all, most trial judges in his
sample did not perceive themselves as engaging in lawmaking. Trial judges
perceive the major aspects of their role to be problems of (1) objectivity and
fairness, (2) doing justice to the parties in litigation, (3) clearing the docket
of large numbers of cases filed. In contradiction, however, most
judges perceive themselves as possessing considerable discretionary powers. The
judges identified (in order of importance) lawyers, other judges, state
appellate judges, the “trial bar”, jurors, and the public as their most
significant referents.15 In a recent paper, Walker contends that trial judges
conceive of their roles on a “law-regarding — public-regarding”
continuum.16 Earlier research suggested that the trial judge perceives his role
in terms of a single precedent-situation orientation.17 The latest research
suggests that the trial judge can be placed along two dimensions, public
orientation and precedent orientation, yielding four role-types—Law Applier,
Law Extender, Mediator, and Policymaker.18
The trial judge as a member of the "court organization" is a third theme in the literature. Here, for the most part, the focus has been on pre-trial dispositions and sentencing behavior. Before a case enters the trial stage, the judge can have an enormous amount of influence on its disposition; in fact, many argue that his influence before trial is greater than after the trial begins. In the criminal process, the trial judge's role perceptions, attitudes, and idiosyncrasies constitute the environmental structure in which bargaining takes place. Lawyers, as they bargain among themselves, must also anticipate what sorts of "deals" the judge will find acceptable. In the civil process, trial judges are very active in pre-trial settlement, facilitating negotiations, suggesting — and sometimes forcing — settlements. Though he usually receives cues from probation officials, prosecutors, and defense attorneys, the trial judge must act alone in making sentencing decisions. His discretion is wide, and its use depends upon many complex variables, including individual attitudes, political culture, recruitment systems, and defendants' characteristics.

Finally, trial judges themselves have generated a considerable literature, not generally noted by social scientists, on what it means to be a trial judge. These judges have explored in rich detail the complex role demands of trial judging, suggesting that such a role entails much more than merely sitting on the bench.

For all the recent progress made in the study of trial judges, social scientists and lawyers know little or nothing about the motivational basis of trial judging — and, I might add, the situation is no better at the appellate level. Lawyers and judges themselves were the first to recognize the tremendous influence over the decisional outputs of the courts that the motivations of judges might have. In his famous Storrs Lectures of 1921, Cardozo complained of the lack of candor on the part of judges and lawyers about the psychological forces molding the law, remarking that "deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex instincts and emotions and habits and convictions, which make the man whether he be litigant or judge." Jerome Frank, steeped in the literature of psychoanalysis and the other social sciences, called upon lawyers, judges, and citizens to abandon the illusory goal of objectivity and certitude in the law. Rejecting the need for law as a "father-figure", Frank wrote that "until we become thoroughly cognizant of, and cease to be controlled by the image of the father hidden away in the authority of the law, we shall not reach that first step in the civilized administration of justice, the recognition that man is not made for law, but that law is made by and for men." Empirical evidence, however, on the role of psychological influences in judicial decision-making has been, and still is, sparse and of uneven quality. Examining the statistical records of New York City's Recorders' Courts in 1922, Haines found an extraordinary variation in the disposition of similar cases by different judges. Those data led him to conclude that "justice is a personal thing, reflecting the temperament, the personality, the education, the environment, and personal traits of judges." Lasswell, most noted for his seminal proposition that politicians displace their private emotional needs upon public objects, presented a psychoanalytic portrait of three trial judges (X, Y, and Z) whom he personally observed, collected testimony on from friends and associates, and subjected to a psychiatric
interview. He found that two of the three fit his "agitator" and "administrator" personality types; the third, though not fitting symmetrically into Lasswell's typology, resembled most closely the "agitator".

In the following pages, I shall outline the basics of a method for studying the motivations of trial judges — or any public officials, for that matter — that I find particularly interesting and fruitful — "incentive theory". The use of incentive theory is, in my view, a preliminary contribution to an ongoing movement to fill glaring gaps in the literature on judicial motivation and trial judging.

**INCENTIVE THEORY AND THE POLITICAL PROCESS**

Incentive theory springs from several lines of research relating personal motivation to political activity. Lasswell was among the first to suggest the typologies of political motivations might be developed. Theorizing that public men displace their conscious and unconscious private emotional needs on their political behavior, as I noted earlier, Lasswell constructed a typology of political actors, each category or type consisting of a syndrome or collection of personality traits. He argued that the most common of these private needs leads to the seeking of power.

More than thirty years elapsed before anyone took action on Lasswell's proposals. In the meantime, though, several scholars utilized motivational typologies in a manner that left politicians' deep emotional needs implicit. Clark and Wilson, for example, contend that three basic motivations draw men into political organizations: Material; Solidary, deriving from the act of participation itself, the conferring of status, prestige, etc.; and Purposive, attained through achievement of organizational goals. In an empirical piece, Wilson develops a two-fold classification of party members based on the personal rewards sought: (1) the Professional, who is apt to be male, oriented toward material incentives or careers in government, and is likely to exhibit little concern with issues; and (2) the Amateur, who is not oriented toward material rewards and participates in politics as a response to a concern for a particular issue or set of issues. Building on Clark and Wilson's work, Wildavsky classified the delegates to the Republican National Convention of 1964 into two categories: (1) Purists, who emphasize internal decisional rules, reject compromise, lack an orientation toward winning, and stress the style and purity of decision. (2) Politicians, who believe in compromise and bargaining, realize that public policy is developed incrementally, are concerned with conciliating their opposition and broadening their popular appeal, and are willing to bend in order to garner public support.

Specifically focussing on the emotional needs of politicians, Barber developed a four-fold typology of political motivation to explain recruitment and turnover in state legislatures. The motivations moving men to seek public office have an influence over how they view their legislative role, how they feel about their colleagues, and how they behave in the legislature. By constructing a four-fold table with two variables (willingness to return to the legislature and level of legislative activity), Barber came up with four political personality types: (1) The Lawmaker, who enjoys working on policy development and promoting particular issues; (2) The Advertiser, who needs to gain attention, publicity, and prestige; (3) The Spectator, who seeks
to make friends and to gain social approval of the leaders; (4) The Reluctant, who needs to fulfill a social duty, to accept a social responsibility.

Flowing from Barber's theory of political personality is "incentive theory", an approach to political motivation explicitly employed in previous studies by Payne in Colombia, Virginia, and the Dominican Republic; by Woshinsky in France and Connecticut; and by McCullough in Brazil. Incentives are defined as "the emotional needs which individuals seek to fill, or the satisfactions they get, through political participation." These needs explain why men participate in politics. Politicians' hours are never nine to five — ten or twelve or fourteen hours a day is much closer to the mark. Nor is the pay sufficient to compensate them for the amount of effort exerted. In most political positions there is also a lack of security; fierce competition is needed to stay where you are or to get ahead. Why, then, do people enter and remain in political life? Incentive theory provides an answer to the question: emotional needs are filled, or satisfaction is gained, through political participation.

Underlying incentive theory is a basic premise, that "participants behave in a manner consistent with their incentives." To be more exact, "other things being equal, men will act in a manner which satisfies their basic needs." If one can uncover the motivations of political actors, he can then predict their behavior more accurately; and, if one knows the incentives of political actors, one can offer a substantial explanation of group and individual behavior within an institution or political system. Given a similar set of environmental constraints, men with different incentives will behave differently. An institution or system dominated by politicians of one incentive type will perform in a much different manner than institutions in which another incentive pattern prevails.

In their research over the last few years, Payne and Woshinsky have generated seven incentive types: Program, Game, Obligation, Conviviality, Mission, Status, and Adulation. From the text of a personal interview in which the respondent indicates his primary area of satisfaction (in addition to numerous other traits and attitudes) one determines the incentive of a particular political actor:

The interview reveals, first, the central interest or concern of the participant. He talks about this subject more than any other; he is enthusiastic and knowledgeable about it; and he voluntarily returns to it during the interview. Because a person's attention focuses upon objects relevant to his satisfaction, these foci indicate his area of satisfaction. This area of central concern is the main identifying characteristic of the incentive.

The process of classification is iterative, moving from reading of the interview transcript to the incentive description and back to the transcript, over and over again. Coding procedures suggested by Payne, involving a relatively simple scoring system — or content analysis — permitting quantitative validation of incentive classifications can be used and are extremely helpful.

In research to date, Payne and others have rejected what would seem a distinct possibility: politicians with more than one incentive. Payne stresses
— and I concur — that the fact that politicians have only one incentive is of extraordinary utility:

It was often the presumed complexity of political motives which discouraged researchers from pursuing the subject. With scores of different motive combinations, analysis would become hopelessly entangled.40

There is also the possibility that some politicians would not have an incentive — i.e., they would not have an emotional need salient enough to color the way they look at the world, their colleagues, and their jobs. This has not proved a problem, however. Of the numerous politicians — judges, bureaucrats, legislators, executives, party officials — interviewed, only a minute percentage has defied incentive classification. In the case of inability to classify, one should differentiate between the respondent for which the incentive is "unknown" and the one who has no incentive. The "no incentive" classification (meaning a "respondent who does not clearly exhibit any of the clusters of attitudes as appropriate to each incentive when afforded ample opportunity for expression of such attitudes") has not as yet been utilized in incentive research. Perhaps the most important reason for this is that one always suspects that one has not generated enough data in order to make the difficult determination that a politician has no incentive. Of the "no incentive" category, Payne writes:

... one has to know clearly: (a) what incentives look like, and (b) what a person with an incentive would have said. The "no incentive" classification means, "I looked closely enough to have seen something if it had been there." Therefore, to make it requires more information than ascribing an incentive.42

One might expect "no incentive" politicians in small, rural communities. In the study of urban trial judges, however, one should expect to find an incentive in each case because (1) the role demands of the position are heavy and (2) the probability of an accidental entry into the trial system is almost zero.43

Incentive theory can be used to infer the behavioral properties of political units (e.g., legislatures, nations, states, etc.) from the dominant incentive found among the individuals in the unit under investigation. This is a research strategy known as "building up", one entailing that "individual psychological characteristics be observed in situ".44 The assumption upon which the strategy stands or falls is "that such limited, short-term analyses can be proliferated and made to dovetail and cumulate towards still larger explanations of aspects of system functioning." The obvious objection to this strategy is, "Can the theoretical leap from individual incentive to system functioning be made successfully?" The results of several studies in which the researchers employ a "building up" strategy suggest that such a leap may indeed be fruitful. In a particularly interesting study, Browning and Jacob examined the power, achievement, and affiliational needs of politicians and businessmen in Connecticut and Louisiana. Building up from the psychological properties of the individuals, they were able to make more general statements about the functioning of the political systems of Connecticut and Louisiana.46 The logical process of building up, of course, must be very tight.
Finally, there is the charge that political life is not simple enough to be explained by six or seven incentives. Of course I agree.

Categorizations are useful only insofar as they help us to make interesting observations and obtain insights not otherwise possible. When one says, for example, that a politician holds a program incentive, one is not saying that his incentive is a full description or understanding of the man; merely, that this classification seems to be useful in distinguishing him from other politicians and predicting his behavior.47

**DATA AND DESIGN**

The present paper reports the findings of a study of state trial judges in heavily urbanized cities in New Jersey. Its purpose is twofold: (1) identification and description of trial judges' incentives; and (2) examination of the relationships between motivational bases for judicial participation and the attitudes and behavior of trial judges. The main source of data is a set of personal interviews conducted with twenty-six Superior Court and County Court judges in the winter of 1973 and the summer of 1975. These are the basic trial courts of general jurisdiction in New Jersey and handle both civil and criminal matters. The choice of New Jersey as a research site was dictated by its geographical proximity.

There has been little research on the judicial process in New Jersey, but several aspects of the recruitment process and judicial administration are relevant to the present discussion. First, the Governor makes all judicial appointments with the advice and consent of the State Senate. In practice, however, judges are selected through a process in which the Governor's staff and the party leaders and State Senator from the county where the position is open participate. The bar association's committee on judicial qualifications screens all the candidates and classifies them as "qualified", "well-qualified", or "unqualified". The custom established, though occasionally violated, is that the Governor will not appoint anyone labeled "unqualified". Judicial appointments are bipartisan, i.e., the two major parties alternate making judicial appointments. Second, the judiciary in New Jersey is divided into a Supreme Court, Superior Courts, County Courts, Municipal Courts, and District Courts. The Superior Court consists of Law, Chancery, and Appellate Divisions. Finally, because of the role demands they place on the trial judge, four facets of judicial administration are important: (1) the Chief Justice of the New Jersey Supreme Court is the administrative head of the court system and has the power to assign any judge to sit temporarily in any court; (2) each judge must account for time spent on and off the bench, the name and nature of each case heard, and the result of cases yet undecided in a weekly report to Administrative Office of the Courts; (3) if the decision of a case is delayed, the judge must explain in writing the reasons behind such delay; and (4) the Assignment Judge, appointed by the Chief Justice, constructs calendars for each judge within his jurisdiction.

Throughout the presentation that follows, I shall marshall evidence, consisting of lengthy verbatim quotations of comments made by the respondents in the course of the interview, in support of inferences made about characteristics present in the basic incentive syndromes the judges display. Lengthy quotations are utilized because only they bring home the
“reality” of the incentive. Though it sacrifices some literary precision in the
course, this mode of presentation preserves rich content otherwise lost. To
complement this evidence, I shall discuss the relationships between judicial
backgrounds and judicial incentives. Finally, in order to assess the
explanatory power of incentive theory, I shall analyze the impact, if any, of
judicial incentives on role perceptions, and feelings about the independence
of trial judges vis-a-vis administrative authorities.

JUDICIAL INCENTIVES IN URBAN TRIAL COURTS

In their research thus far, as noted earlier, Payne and his associates
have encountered seven different incentive types. In the present study,
however, I found only game, status, program, and obligation judges. Of
course, in the context of American urban politics, one would not expect
to find incentives, seemingly peculiar to Latin America, such as adulation
or mission.

The Game Judge.

The trial judge with a game incentive derives his emotional satisfaction
from applying and exhibiting his skills in a structured, challenging, and
competitive situation; he perceives the judicial process as a complex game.
Unlike the program judge, he is not attracted to the bench by a desire to
piece together specific bits of law into a coherent mass; nor is he attempting
to gain position or prestige. His motivation “lies . . . simply in his desire to
take an active part in an ongoing, exciting series of events involving a
complex mixture of human interactions.” When asked about specific
accomplishments, he cannot put his fingers on any. Once the “game” is
over, the game judge’s memory of the subject of competition is hazy. Issues
and cases in and of themselves are not salient to him; he relishes the
personal interaction of the courtroom:

You can’t talk of accomplishments as such. You hope you’re doing
a good job. If you want to think of a good job, if you preside over
a jury trial and the jury’s verdict is sustained by the appellate
courts, that’s a good feeling. You do a lot of work, though, not
subject to appeal.

His reaction is pale in contrast to the richness of the replies elicited from
program judges on their personal accomplishments. The same judge
demonstrates his delight with being a judge on the stage in his courtroom,
his love of the action of the trial court, by his dread of a position on an
appellate court:

I don’t think I’d relish the job of an appellate judge, because
there you don’t get any contact with the bar. I wouldn’t want
to be cooped up, reading and writing in my office all day.

By the game judge’s measure, activity for activity’s sake is the most
important aspect of his job, not the cases he handles.

He understands well the norms by which his courtroom is run
harmoniously. To keep the competition a “game”, one must never let
the case or issue at hand devolve into a personal conflict:
You have a personal reaction, but your judicial temperament should control this; you must have self-discipline. No matter what is said, you have to maintain a certain amount of decorum. I've had the experience with defendants of going through a long, arduous process of pleadings in which the defendant evokes a strong reaction in me. But in these cases, I disqualify myself and hand the case to another judge, so my personal feelings won't enter into the trial.

The ideal of the adversary process involves two parties who are attempting to push their own versions of the “truth” as far as the court will permit. Trial judges must understand the nature of the game and take it into account when handling lawyers. The courtroom “fight” is bound to degenerate into uncontained conflict on occasion. The judge, as arbiter of the “fight”, must guard against this happening too often, for the continuing playing of the game depends upon a stable structure within which participants may compete:

Generally, you get cooperation. You might get a heated point of contention between the lawyers; they may be adamant on a certain point, and you'll have to put a halt to it. But they want to help the client — you can't fault the attorney for pushing his case. You hit the same thing in a civil case; he thinks his client is in the right, so he pushes his own case. You try to settle the point, interpret the “rules of evidence”.

If avoiding “personalization” of the game is important in the courtroom, the principle takes on added meaning when the trial judge is dealing with his superiors. The very existence of the judicial system depends upon open lines of communication between the trial and appellate levels. But a certain personal distance seems to make this task a bit easier:

I know some of the people in the Supreme Court and the Appellate Division of the Superior Court. I have worked with some of them. Some of my cases have been affirmed, others overturned. But this is never done on a personal basis. I've never heard that this was the case. You're bound to know them, meet them, know of them, but no real close relationships, though.

The game judge seems to evaluate the judicial office in terms of the terms amount of manipulation it affords him, not its prestige-rating in society. He quite readily differentiates between himself and the office:

(What is the reaction of people in court to you?) To me as a person I assume that they are being respectful, not to me, but to my position....

(What do you enjoy about the work?) There's no one particular work, the whole trial system, getting involved with the lawyers, their competition in court. I had no particular plan to become a judge in my mind, but since I've become one, I enjoy it immensely. You never have anything happen twice.
You're able to control things. Theoretically, a judge is supposed to sit back and watch things happen, but that's a theory. I try to run my courtroom so that everyone gets a fair shake. If I see some lawyer out there that doesn't know what he's doing. I may sometimes jump in and try to even things up a bit. You're doing the best you can do to see to it that justice is done. Sometimes it isn't. But then your control makes it that. Sometimes you can't control something . . . sometimes you not only can't, you shouldn't.

The words and phrases the game judges use betray their orientation to politics and law: "involved with", "control things", "competition in court", "jump in and even things up a bit", etc. He fulfills an emotional need through interaction in a tightly-structured, competitive situation. In another political culture, perhaps he would have found business the best environment in which to test his skills. Law and politics in New Jersey, however, provide him with a wide range of contests in which to compete; the situation he has chosen — the trial court — affords him broader scope for manipulation than many others.

Finally, the game judge demonstrates obvious delight in setting up a strategy, listing factors and considerations, and ticking off conditions necessary for its successful completion:

(How did you get appointed to the bench?) Get into the party, you must get yourself well-known, make a good reputation as a lawyer. If the rest of the lawyers seem to trust you, they may give you a chance. . . I had a political background. I had as much possible advancement of my name, talked to political leaders, State Senators, the Governor's Office in order to try as hard as possible to solicit this office — to suggest my desire for the office.

. . . .

Let me tell you how this happened. When I was ___ years old, I started practicing law, later than most start. I went in with a local man here who had a big trial practice and I did nothing but try cases and try them pretty well. Pretty good reputation for winning cases. In 19__, Governor ___ put my name into the Senate for County Court Judge. This was to be a Republican appointment. However, any appointment is subject to some control by the county chairman or powers that be. And the Republican chairman, I'm told, put the thumb on me that I was either not a good Republican or if I was, I was such a poor one or I hadn't been involved long enough to be sufficiently enough qualified for the job. So I never got the job. I was never confirmed. The Senate just sat on it for nine months until Governor ____ was out of office. So, because of that, I had a falling out with my employer. He had always wanted the job, but he was never going to get it. As a result, I left him and started my own practice. The practice got bigger and better and it occurred to me that there might come a time in later years when the opportunity might arise again where I might be appointed, so I decided I would become active in the Republican Party. Active only in the sense that the party was
desperate for candidates. It was a loser deal. They needed a candidate for the _____, someone who'd put his neck out on the line, and I went out. I ran and lost. No problem in losing. But now I was a Republican!!! Three years later, Governor ____ appointed me to the County Court and they (the Party Chairmen) couldn't say a damned word about it!!!

How do the background characteristics of game trial judges differ from those of his colleagues? (See Table I.) First, game judges tend to have

Table I

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<th>Incentives and Background Characteristics of Trial Judges</th>
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<tr>
<td>Average Age</td>
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<td>Out-of-state law school</td>
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<td>Average length of judicial service</td>
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<td>Parents interested or active in politics</td>
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<td>Held other elective or appointive office</td>
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<td>Identifies self as a &quot;politician&quot;</td>
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<td>Originated activity to get judgeship</td>
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<td>Religion (percent Catholic or Jewish)</td>
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accumulated more bench experience than other types — if one excludes the obligation judge. Second, he is, on the average, older than the other trial judges. Third, game judges tend to come from instate law schools. Fourth, more than others, game judges have held other elective or appointive office, report parental interest or activity in politics, identify themselves as politicians, and admit to having originated activity to obtain a judgeship. These men also tend to be Democratic and Catholic. From the data, both qualitative and quantitative, one can construct a picture of a judge who enjoys politics immensely, considers judging an extension of politics, and makes no bones about the interconnections of law and politics.

The Program Judge.

The individual holding a program incentive enjoys the role of the trial judge, by and large, because it allows him to work on and solve challenging problems in the administration of justice. The motivation is
similar to that of Barber's Lawmakers. Unlike the program politicians that Payne and Woshinsky have encountered, however, the trial judge whose incentive is programmatic does not usually enter politics in order to participate in debate on specific issues or the formulation of public policies. For the most part, the program judge enters public life because of the nature of private law practice. Programmatic trial judges are realistic about the reasons for their appointment:

When I went to law school, any law school was a hotbed of politics; most lawyers are in politics as a matter of survival. I commuted from ________ to ________ with a group of eight guys, and two of them got interested with me in the Young Democrats. But I didn't have the political background, really, my family was split... and I didn't have a strong identification with the Democratic Party as I grew up. It was more because of local politics, not national politics, that I became interested. To get to be a judge in New Jersey, you need sponsorship. The firm I was associated with had Congressman ________ as a partner—I got awfully close to it. I lucked out; I got my first appointment in 19______.

The program judge has the ability of looking at himself and his place in the world of politics in an objective manner. Asked how he would rate his performance as a judge, one replied:

I'm satisfied with myself that I did the best I could. And, as I say, outside of a couple of incidents in which policemen wrote in and complained, I've never had any criticism. (How did you get appointed?) There are two ways. You would have to be such an outstanding scholar of the law that you would be recognized by the appointing authority. Or you would take it the way I did it. If you want a judge to be a Phi Beta Kappa type in his knowledge of the law, I don't put myself in that class. I think that I would be, without hesitation, average. ... the appointment comes from the Governor and he will name this Phi Beta Kappa type because of his knowledge and his activity in the law that has been outstanding. This other way, you will graduate from law school, be very successful in the practice of law. You're fairly successful with the leadership. You see, I was part and parcel of that. And when I wanted to become a judge, I was in a position to speak to those above and say, "I'm interested in becoming a judge."

Though he can look at himself objectively and admit he is not the greatest legal mind ever to sit on the bench, he also has the self-esteem to recognize that he has other valuable qualities, and that he had done a respectable job. Hence, the program judge is, first and foremost, reality-oriented.

He is interested in problems and their solutions. When one turns to the focus of his energies, the program incentive emerges:

(What are the most important problems you have here?) Finding alternatives to, finding solutions within the homes. Most problems are outside the home. We just don't have enough
alternatives; it's either reformatory or letting the juvenile go free again. We really need more money to get these alternatives. Very practically speaking, we need more foster homes. There are a lot of things needed: better and more family services, psychiatric help for poor families and many other services either not provided adequately or not at all. . . The most important aspect is to rehabilitate. And I think we're honest in that desire. To the contrary, in criminal courts, they talk a lot about rehabilitation, but they don't really do it. Our job is to rehabilitate those who come into our court.

His primary interest is in accomplishing the perceived goal of his court, rehabilitation. Frustrations, thus, are greatest when this goal is thwarted. Moreover, he can hardly hide his distaste for fellow judges who merely give lip service to the proper function of courts. The program incentive is also demonstrated in his desire to have more policy options to exercise in his duties — in order better to effectuate the “program” in which he invests his energies. This type of trial judge plunges into detailed discussions of problems he is in the process of solving upon the slightest provocation of the interviewer. For him working on problems is a reward in itself. Prestige, money, and friendship are of only secondary interest to him in politics. He fills his emotional needs through the solution of complex problems.

The programmatic trial judge does not rebel against his superiors in the judicial hierarchy; the system is impersonal, so one does not interpret demands as threats to one's position:

I was very friendly with the former Administrative Director; we knew each other well for years, got along, knew each other well and on a personal basis in my administrative work and reports and things. As a matter of fact, I sat for ___ years on the Supreme Court's ______ Committee, and I served as Chairman, which I found very interesting. I've always gotten along all right with people in administrative areas and Assignment Judges. (What causes tensions in the relations?) It's the personal antagonisms that they connect with assignments, demanding that they do some further work on the reports that go to the taxpayer.

His attitude toward his superiors is that of a man who is deeply interested in his own job, is preoccupied with interesting problems to solve, and who can look at others objectively:

I feel no pressure. I spend a lot of time reading memos from the Administrative Office, though. I don't feel that there is pressure. (What kind of a job do you think your superiors are doing?) I think it's excellent. I would say that it's one of the best (supreme courts) in the country. I don't have any association with them at all, except for two in ______. They're in a whole different ballpark. You see them once a year at the Conference in Cherry Hill, just before the start of the session. You just don't deal with them; you deal with the Assignment Judge.
Though he feels that his superiors are doing a fine job, he really does not have extensive dealings with them, and he seems not to be overly concerned about the situation. He stresses instead his interest in particular public policies.

And he seems to have no more than an average amount of trouble getting along with his fellow workers in the courtroom organization:

I find them (lawyers) extremely cooperative people. I really enjoy working with them. Especially with the younger lawyers, I try to help them when I can. Whenever I see a problem or a weakness in a young lawyer, I call him aside and point it out. If it's during a trial, I'll be sure to let him know, so that he can correct it. . . . When I get into court, I should be prepared. The lawyers will start to explain their cases and I will be able to expedite matters by already knowing their arguments. Whenever you go into court, you should be prepared; you should have your homework done.

The satisfaction the program judge derives from engaging in problem-solving causes him to develop the expectation that others involved in the same process should be as diligent as he in preparing themselves. His interest in substantive matters colors his views of others. The norm of "hard work" has been discussed at length in the literature on legislative behavior. He becomes annoyed with those who do not do their "homework":

I always tried to be prepared in my work, whether as a judge or an attorney. And I get impatient with those who aren't. I try to do my best on each job I do. I see many younger lawyers who just aren't doing their jobs as best they can. This is one thing I don't like. You should do your best on cases, spend a lot of time on them.

The pragmatic nature of the judge with a program incentive rejects panaceas; he is a man who wants something that will work. When asked his opinion about a certain judicial reform proposal, one judge remarked:

Most people talk but they don't come out with most of the solutions they have in mind. We can say that about anything you want — we can say there's a waste and we should go without this or that, but unless you come up with something to take its place you're not helping much.

Yet piecemeal reforms that seem to have the promise of being both realistic and effective are accepted with pleasure:

We have this no-fault which may take care of negligence cases, but of course, the other cases will be with us. We might eliminate the group in which they don't amount to much — they never get into litigation and that might be a help.

Thus, two of the characteristics distinguishing program judges from others are: (1) he is interested in the stability and orderliness of the institution in which he functions, because they are prerequisites for a facilitative
environment for managing and solving problems; and (2) he demonstrates a positive orientation to compromise; it is, of course, necessary for the successful solution of pressing problems.

The backgrounds of program judges are different from those of others in several respects. First, he has served a relatively short time on the bench. It may be, as Sarat suggests, “that there is a transition from program to game type which occurs the longer a judge has been on the bench, a transition from specific problems to a more ritualistic activity orientation.” My data seem to support such an interpretation. But, of course, more ingenious research designs are needed to test such an hypothesis. Of all the incentive types, more program judges have graduated from out-of-state law schools, most of which are policy-or issue-oriented in teaching style. Though the program judge comes from a politically oriented family more often than his status colleague, he is less likely to be from one than are game or obligation judges. He also tends to have had little experience in appointive or elective office. Unlike Sarat’s program judges, most did not seek a judgeship, most claim to have been drafted. Yet a good portion consider themselves “politicians.” Finally, program judges are Protestant and Democratic, suggesting parallels with Wilson’s research on “amateur Democrats.”

The Status Judge.

The status participant is in politics to demonstrate to himself and others that he is indeed an adequate human being. To prove his adequacy, he seeks the social prestige inhering in political positions — he seeks respect and deference from others. His focus is on the judgments of worth or “success” made by society at large, not on particular policies, issues or cases. For the status judge, the bench is of value because of the social prestige attached to it, not the latitude it affords in problem-solving, game-playing, or conscience-soothing. He is abnormally preoccupied with getting and keeping positions, his own personal political history, and the strategy and tactics of campaigning and politicking. A cool attitude is taken toward leaders because they are above him, and he resents any possibility of being controlled. Moreover, in discussing the motives of others, he projects upon them evil and selfish designs. Though he may claim to enjoy politics, the status judge does not. For the status judge, then, life in the world of politics is “nasty, poor, brutish, and short”. He feels that other men are to be stepped on or stepped over; cooperation is not possible.

Payne and Woshinsky observe that the status politician has a “tendency to be brisk and formal in the interview.” They attribute this to “his need to establish his own importance, to impress others with his status, and to escape the dependent role of respondent.” Contrary to my initial expectation, one status judge demonstrated his incentive by talking openly, freely, permitting me to ask a question after a forty-minute monologue. Thus, he escaped the dependent role via the lecture method, demonstrating to me that he was not under my control.

The status trial judge has a cynical view of the motives and behavior of other judges — especially those higher up in the judiciary. He views men as base in their seeking of power; it seems to be part of human
nature. The military imagery in his references to judges makes obvious his consciousness of rank, *i.e.*, status:

I was aboard a ship during the war for three years . . . about fifteen officers and one hundred and twenty men lived together all the time. I never saw a ship captain who wasn't a son of a bitch. They weren't that way when they became a captain — sometimes maybe they were — it's something about the job that makes them that way. You never know what a captain is like until he gets on the bridge of the ship. You never know what a judge is like until he gets on the bench. . . . The position rocks most people because most people cannot handle authority; they abuse it; they want to be captains; judges want to be ship captains. When you get a person that way, it is an imposition of the lawyers, it is very difficult. I've seen the ship captains in operation in the State of New Jersey.

The animosity toward authority is manifest throughout. "Captains" are *above* him and are, therefore, a threat to him because they reveal what he is not — a "Captain".

A view toward cooperation among men is not in the nature of the status trial judge. Asked about his future plans, one said he might retire tomorrow, or he might not. Then he confided to me that someone was already attempting to obtain his position, the moral to him being that "people are always trying to stab you in the back."

Though lawyers are not as bad as most professionals, the richest and best-known — who have more prestige than he — are a selfish and greedy lot:

If you're handling a matter with a lot of money, you've got a problem, a real problem. Because lawyers want the money. And I've seen some of the most dignified in the profession here in this state on an estate before me behave very, very badly when it comes to putting pressure on the judge for his money. I think the best lawyers can behave like bums. I'm talking about high-class lawyers, not some shyster. But these people in the other professions, don't worry, they are worse.

Unlike other judges in the sample, who had to be questioned specifically about their education before giving me any such information, one status judge volunteered his accomplishments:

My academic background is 19—, *University of ______*, I was in the top ten percent, on the law review — back when it meant something—and served as clerk to the Chief Judge of the ______ U.S. Court of Appeals.

In parading his symbols of status before me, he demonstrates that he is a "success" — after all, he has been recognized as such. Moreover, he accentuates the prestige-value of his tenure on the law review by insinuating that the honor is no longer given for reasons of merit — as it was in his day.

The judicial bureaucracy draws the wrath of the status trial judge.
One, in fact, was almost obsessed with the idea he no longer has control over his activities:

Talking about this built-in bureaucracy . . . the gauge for being a good Assignment Judge is what kind of storm trooper or ship captain he is. He's got to be a judge who'll force them through the production line. Keep that calendar moving. So, he's got that power . . . . The problem is that in this chain of command, when you get down to the trial level, I get it; I'm on the receiving end of a lot of people not around me who are telling me what to do. Sometimes it's helpful; sometimes it's not. But there is so much administrative control over us that we have lost the right to run our own courtroom. Now, all of this has an emotional impact on the judge. You've got great pressures on administratively.

While program and game judges understand the need for bureaucracy and can look at it objectively, the status judge perceives it as a threat to his independence; he fears being controlled. For him, the judicial process is a taxing emotional experience. It is taxing because he cannot get along with his fellow judges. As Woshinsky points out, the status participant's "personalization of all political events make politics a series of intense emotional experiences for him. Because of his emotional involvement in politics, seemingly trivial events may trigger strong emotional reactions." Status judges repeatedly mentioned conflicts, all rooted in "personalities."

One judge was queried at length concerning the functioning of his courtroom. The relevant portion of the reply concerns the personal relations in his court. Clearly, I think, he evaluates himself by the opinions of others and judges his "success" by external, rather than internal, standards:

Are we harmonious? I think that if you check out with any of the people I do business with, that they will say that the Judge has a happy ship. ______, who is one of the deans of the legal profession, was in my office the other day and asked me, "Judge, where do you get your compassion? Please don't retire from the bench; we need you. Where did you get your compassion?"

The story is calculated to show me, as well as himself, that he is indeed an important person who is needed and has desirable personal qualities. Further, note that in telling the story, he refers to himself as "Judge", seemingly indicating that he feels more secure as "Judge" than he does as himself. His success is symbolized by a "dean" of the legal profession deeming him "indispensable".

In terms of his background, the status judge is a bit younger than his colleagues and tends to have attended an in-state law school. Compared to others, fewer report parent interest or activity in politics or consider themselves politicians. But two-thirds held a public office before coming to the bench and all admitted having initiated activity for judicial office. Finally, he tends to be Protestant and Republican.

The Obligation Judge.

The trial judge who is moved by an obligation incentive resembles
closely the "Purist" Wildavsky found in his analysis of the 1964 Republican Convention and the "Reluctant" Barber developed in his study of freshmen legislators. The desire to fulfill a social obligation characterizes this type. For the obligation judge, political activity helps to relieve feelings of guilt he possesses. His anxiety is brought about by the perception of a "discrepancy between his normative beliefs and his failure to act upon them." The decision to enter politics is a moral one for him:

I would have to say that, as far as a philosophy of life, a career in political office has tended to reinforce the ideas I have: that one of the first things someone could do was not to go out and make money but to contribute something of his potential to the general good. Though I've had discouragements and disappointments from time to time, I'd have to say that, basically, it has been reinforced.

Discussing the most important aspect of his job, the obligation judge emphasizes the style by which one should make decisions; he stresses process, not substance:

To maintain the confidence not only of the bar, but the public generally. It's really an immense burden to call upon an individual — a judge — to hear factual testimony without a jury, to make resolutions of fact, conferring on some witnesses or falsifying a testimony or have blurred or hazy recollections that can't be believed, yet to reach a decision on the facts of cases fitting those factual determinations within a body of law which is not as clear or explicit as I'm suggesting. And to come out of it where, perhaps the losing litigant and attorney, nonetheless, say, "we have had a fair trial and that was an impartial result. It was based on reasoning and it had no prejudice or outright mistake in it as far as the law is concerned." I think that's the chief burden I'm facing.

The obligation trial judge emphasizes both his integrity and that of the court. Symbols and forms — the "appearance of justice" — instead of results, are the focus of his energies. That he describes his job as a "'burden," i.e., a duty which must be borne, is indicative of the orientation he has toward the adjudicatory process.

For the obligation judge, the freedom to follow the dictates of his conscience in making decisions is a cherished value. Unlike the attorney who is practicing, the trial judge may use normative principles to decide cases, having no regard to the practical restraints of his environment.

Probably I would miss most having the opportunity to consider and decide cases on what I thought the merits were without any consideration as to what a client wanted or what a client's position was. I have the luxury, you might say, which the practicing attorney does not have. Considering both sides of the case, whatever my predilections or prejudices. That I have been able to search out all the law and all the facts to the best of my ability, and then to reach a decision not bound by an attorney-client relationship.
The obligation trial judge's relationships with his superiors in the judicial hierarchy are tense; his perceptions of the role of the trial judge, especially decision-making style, make this collision almost inevitable.

(Are the relationships good?) Probably not. But that may be the result of a case I decided. The Supreme Court rule on ______ was developed. I would say that my relationship with the Chief Justice ______ Court was very abrasive and I hope that they're improved with the Chief Justice ______ Court. (Why the poor relationship?) I think that most trial judges who have courage, you might say, in carving out the law in areas where it had not been carved out before. I tended to find that there was absolutely no approval or commendation for it. And, if anything, it was regarded with disfavor: "What do you think you're doing, making the law in this state?" That sort of thing.

I must emphasize that my sample is so small that caution is necessary in making any inferences. But, contrary to other research, I find the obligation judge about as old and even more experienced than his colleagues on the trial bench. On the one hand, he reports family involvement in politics and has held previous political office. On the other hand, he refuses to identify himself as a "politician" or to admit that he initiated a campaign for judicial office. The portrait, then, is one of a trial judge who considers himself a "citizen" and a law officer, not a "politician", despite frequent forays into the political arena.59

JUDICIAL INCENTIVES AND JUDICIAL BEHAVIOR

The previous section demonstrated the rich descriptive power of incentive analysis; it captures, in vivid terms, the multi-faceted nature of trial judging. The theoretical utility of incentive analysis in the study of trial judges depends, however, upon its ability to explain or predict judicial behavior or attitudes. Trial judging, as the quotations I have presented suggest, involves a variety of functions, administrative as well as judicial. In the present paper, however, I have limited myself to a very small segment of the trial judge's attitudes and behaviors: role perceptions, and feelings about the independence of trial judges vis-a-vis administrative authorities.

Role Perceptions.

The normative concept of a role "is a pleasing notion in that it immediately explains in an intuitive manner much of the conflict that has occurred among judges" and scholars concerning the proper behavior of common-law judges in a democratic polity.60 Though discussions of the normative role of judges have in the past been mainly polemical in content, in recent years political scientists have begun to explore the empirical dimensions of judicial role perceptions.61 In Civil Liberties and the Vinson Court, C. Herman Pritchett explained the theoretical significance of the concept of role:

Every judge in deciding a case must give some thought to what is appropriate for him as a judge to do. The pressures which bear upon him are many, and they are mostly toward a pattern
of conformity — conformity with the tradition of the law, conformity with public expectations as to how a judge should act, conformity toward established divisions of authority in a federal system based on the principle of separation of powers. While no justice can be oblivious to these pressures, they are not self-enforcing and he is free to make his own interpretations of their requirement.  

Of the many consequential dimensions of judicial role, the present research focuses on orientations toward two objects, precedent and the public. The first, precedent orientation, “concerns the judges' perceptions of their relationship to former and present judges, particularly those who set precedents in courts superior to their own.” The second, public orientation, concerns “the judge's relationship with the public which he serves, whether he views his role as a matter of settling individual disputes between a limited number of litigants or one of creating policy for a larger class of citizens.”

Each of the judges interviewed in this study was presented two batteries of statements concerning his role vis-a-vis his colleagues, past and present, and the public. Because of his desire to demonstrate to others his own power and prestige, I hypothesized that status judges would be most willing to approve a creative role for judging at the trial level. The obligation judge, because he is concerned with the normative style of decision-making, should be most begrudging of the exercise of discretion. Program judges are interested in concrete policy accomplishments, so they should closely resemble the status judges in terms of precedent orientation. Because he is acutely aware of the importance of following the “rules of the game”, the game judge should more closely resemble the obligation judge.

Table 2

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<th>Precedent Orientations of Trial Judges</th>
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<tbody>
<tr>
<td>Game</td>
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</tr>
<tr>
<td>High</td>
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<tr>
<td>Low</td>
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mixed results. First of all, there is a relatively high regard for precedent throughout the sample. Contrary to expectation, status judges demonstrate “high” regard for precedent as an element in decision-making. There is, however, no readily apparent reason for such a pattern; and reexamination of the interviews discloses no clues. Perhaps status judges find other areas of the judicial turf better outlets for their anxieties. In line with my hypothesis, obligation judges showed a high degree of respect for precedent. Unexpectedly, however, game judges are more like program, not obligation, judges. From a reading of the interviews, it is my impression that game judges, despite an acute awareness of the “rules”, are more tolerant of the ambiguities inherent in any decisional process than are
their obligation-oriented colleagues. That most program judges are also precedent-oriented is not, as it first seems, a paradox. Once again drawing on the interview data, I gather that the program judge believes that, even if he follows precedent in a religious fashion, there are still enough interstices to permit a considerable amount of policy accomplishment.

The obligation judge, because of his strict feelings about internal decisional criteria, should be more oriented toward the individual than the community. Geared to results and not decisional rules, program judges should steer a middle-course. The status judge, since his primary source of satisfaction is the respect and deference of others, should be more public-regarding than other trial judges. Game judges, concerned with process and not result, should bear close resemblance to their obligation colleagues.

"Public orientations" of the trial judges appear in Table 3.

Table 3

<table>
<thead>
<tr>
<th></th>
<th>Game</th>
<th>Program</th>
<th>Status</th>
<th>Obligation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual</td>
<td>67%</td>
<td>40%</td>
<td>33%</td>
<td>50%</td>
</tr>
<tr>
<td>Community</td>
<td>33%</td>
<td>60%</td>
<td>67%</td>
<td>50%</td>
</tr>
<tr>
<td>N</td>
<td>6</td>
<td>10</td>
<td>6</td>
<td>4</td>
</tr>
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</table>

results, once again, are mixed. First of all, the obligation judges split on the individual-community dimension. Upon reconsideration, this finding is not unreasonable. Different judges feel different sorts of obligations. In the present sample, some are deeply committed to serving their individual conceptions of right; others, to serving the public's conception of right — but both of these commitments are "internalized". Though not all status judges focus on the community, the relationship is the correct direction. Program judges, following expectation, divide their attention about evenly between the individual and the community. Finally, in accord with the hypothesis, game judges focus more on the individual than on the community.

By constructing a fourfold table with two variables, precedent- and public-orientation, one comes up with four ideal role types. The Law Applier is characterized by the high regard he has for precedent; neither societal needs nor social consequences of his decisions are legitimate criteria in choice-making. The Law Extender, like his colleague, the Law Applier, feels that nearly all cases can be decided using precedent. Unlike the Law Applier, he is clearly conscious of societal needs and the social consequences of his decisions. Following Walker, one might say that he is both public-regarding and law-regarding. The Mediator places low on both scales; he is not sanguine about finding clear and relevant precedents in every case he decides; nor does he seek to conform his decisions to public needs. He is, as Flango and associates observe, "inclined to rely largely on his own common sense and understanding of the meaning of justice to reach his decision," rather than on public needs or desires. Placing low on precedent orientation and high on public orientation, the
Policymaker feels that he should be making socially-relevant decisions, not engaging in mere dispute settlement. He is expected to be a proponent of the explicitly political functions of courts.

Table 4 presents the distribution of role perceptions among the trial judges in this sample. The results do not coincide completely with what one might expect, but the relationships are in the correct directions. Game judges, expected to be dominated by Mediators, instead perceive themselves as Law Appliers. (There are, in fact, no Mediators in the sample.) But the distributions of role perceptions among game and status judges are quite different. Though several program judges are Law Appliers, more than half are either Law Extenders or Policymakers. The status judges, following expected patterns, are more discretion-oriented and individual-oriented. Some of the obligation judges, as I noted earlier, feel strongly that their internalized decisional criteria should be those of the public. Thus, contrary to expectation, these judges conceptualize their role as Law Extender.

The Independence of Trial Judges.

Up until quite recently, the power of the trial judge in his own court was absolute; he was sovereign on his own turf. But no longer. The independent trial judge, as Cook said of one-judge courts, "is going the way of the one-room schoolhouse. Structural change is forcing established judges to adjust their role definitions and performance to suit the requirements" of modern administrative controls. The pressure of litigation, the increasing complexity of cases, and insufficient budgeting have forced increased restrictions on the discretion of the "independent trial judge." It is no secret that many trial judges chafe under modern administrative controls.

From several closed-ended and open-ended items, I have determined each judge's orientation to administrative control. There are two basic types, "traditionals" and "moderns." The first, traditionals, feel strongly that administrative controls usurp their prerogatives and threaten independence of substantive judicial decision-making. Moderns, on the other hand, feel that some restrictions on judicial discretion are both necessary and sometimes helpful.

I had certain expectations concerning the relationship between judicial...
incentive and modernism-traditionalism. First, because of his desire to demonstrate his power to others, to maximize his own discretion, the status judge should take on a traditional orientation. The obligation judge also desirous of maximum discretion, because of his conscience, not recognition should also be traditional in his orientation. Third, both program and game judges are tolerant of structural limitations, so one should expect both to be moderns; but, because of a greater need for manipulative scope, the game judges will also have a tendency to feel circumscribed by administrative controls.

The results, presented in Table 5, fit expectations quite well. First,

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<th>Game</th>
<th>Program</th>
<th>Status</th>
<th>Obligation</th>
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</thead>
<tbody>
<tr>
<td>Traditionals</td>
<td>67%</td>
<td>40%</td>
<td>100%</td>
<td>100%</td>
</tr>
<tr>
<td>Moderns</td>
<td>33%</td>
<td>60%</td>
<td>0%</td>
<td>0%</td>
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<td>N</td>
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game and program judges are more tolerant of limits on their discretion, and the game judges are more jealous of their prerogatives. Second, both status and obligation judges are “traditionals”, wed to classical notions of judicial independence.

CONCLUSION

Incentive theory, I observed earlier, is a particularly interesting and fruitful method of studying the motivations of trial judges. Though the study presented here is exploratory, I believe nonetheless that the results justify my optimism. There is no doubt that incentive analysis has a rich descriptive power, capturing the multi-faceted nature of trial judging more adequately than other approaches. The data marshalled here suggest, too, that incentive theory has considerable explanatory or predictive power.

I would like to conclude by directing attention to a couple of directions for future research. First, there is a need for more sophisticated behavioral indices, covering thoroughly all aspects of trial judging, to put the discriminatory power of incentive analysis to a more rigorous test. Second, “building up,” a task I have eschewed because of the exploratory nature of this study, should be pursued. Comparison of judicial incentives in states with divergent selection systems, political cultures, administrative structures, and career patterns should prove helpful. Entire “courtroom teams” should be examined to develop a fund of data on how combinations of incentives in courtroom teams influence behavioral patterns of both individuals and systems as a whole.
Footnotes

*For helpful comments on a much different version of this paper, I would like to thank Fred I. Greenstein, Princeton University; William K. Muir, University of California, Berkeley; James L. Payne, Texas A & M University; and Oliver H. Woshinsky, University of Maine, Portland-Gorham. For access to his unpublished research, I am indebted to Austin D. Sarat, Amherst College. I would also like to thank James Gibson, University of Wisconsin, Milwaukee, for providing perceptive criticism of a version of this paper delivered before the 1975 Annual Meeting of the Southern Political Science Association, Nashville, Tennessee.


2See H. Glick and K. Vines, State Court Systems (1973); and H. Jacob, Urban Justice (1973). There is, however, a gross lack of literature on litigation flow in state courts.

3For the uses and effects of ambiguity in judicial decisions, see W. Murphy, Elements of Judicial Strategy (1964), passim.

4See Murphy, Lower Court Checks on Supreme Court Power, 53 American Political Science Review 1017 (1959); J. Peltason, supra note 1; and Vines, Federal District Judges and Race Relations Cases in the South, 26 Journal of Politics 337 (1964).

5See H. Jacob Justice in America, supra note 1, and Urban Justice, supra note 2, for sanctions a trial judge can impose. There are a variety of less obvious, but nevertheless effective, sanctions a judge can inflict. See H. Jacob and J. Eisenstein, Sentencing and Other Sanctions in Baltimore, Chicago, and Detroit Felony Dispositions (unpublished paper delivered at the 1974 Annual Meeting of the American Political Science Association).


9For example, W. Murphy and J. Tanenhaus, The Study of Public Law (1972), exclude trial courts from their review of the literature.

10Shapiro, From Public Law to Public Policy, or the "Public" in "Public Law," 5 P.S. 413, at 418 (1972).


12K. Dolbeare, Trial Courts in Urban Politics (1967). See also M. Levin, Urban Political Systems and Judicial Behavior: The Criminal Courts of Minneapolis and
Pittsburgh (unpublished Ph.D. dissertation, Department of Government, Harvard University, 1970); and his Urban Politics and Judicial Behavior, 1 JOURNAL OF LEGAL STUDIES 193 (1972). In this fascinating study, Levin assesses the consequences of different political cultures and recruitment systems for the sentencing behavior of criminal court judges in Minneapolis and Pittsburgh. Pittsburgh has a formally partisan and highly centralized municipal government. The city has not been at all receptive to attempts to take judges "out of politics": Thus, political parties look upon the courts as primary sources of rewards for their workers. Minneapolis, on the other hand, is non-partisan and has a structurally fragmented government. The parties are weak and positions on the bench are not available to the political parties as rewards for faithful workers. As a result of the differences in culture and recruitment, the sentencing behavior of Pittsburgh judges is highly particularized and pragmatic, resulting in lenient penalties. The culture and recruitment of Minneapolis trial judges, however, have produced judicial sentencing that is highly universalistic, resulting in harsher sentencing decisions.

See, for example, J. Ish, Trial Judges: Their Recruitment, Backgrounds, and Role Perceptions (unpublished paper delivered at the 1975 Annual Meeting of the American Political Science Association); W. Beaney, Relationships, Role Conceptions, and Discretion Among the District Court Judges of Colorado (unpublished paper delivered at the 1970 Annual Meeting of the American Political Science Association); P. Renstrom, Some Aspects of Role and Constituency Perceptions of Metropolitan Trial Court Judges (unpublished paper delivered at the 1972 Meeting of the American Political Science Association); Cook, Role Lag in Urban Trial Courts, 25 WESTERN POLITICAL QUARTERLY 234 (1972); Cook, Perceptions of the Independent Trial Judge Role in the Seventh Circuit, 6 LAW AND SOCIETY REVIEW 615 (1972); J. Walker, Role Perceptions as a Linkage Between Urban Trial Courts and the Local Political System: Are Trial Judges Reactionary?; and D. Jackson, The Incapsulation of the Trial Judge — Who Makes the Law? (unpublished paper delivered at the 1972 Meeting of the Midwest Political Science Association).

See Jackson, supra note 14.

See Walker, supra note 14.


See supra note 6.

See, for example, M. Rosenberg, The Pre-Trial Conference and Effective Justice (1964).


See, for example, B. Botein, The Trial Judge (1952); and C. Wyzanski, Whereas (1965).


Lasswell, Self-Analysis and Judicial Thinking, 40 INTERNATIONAL JOURNAL OF ETHICS 342 (1930); H. Lasswell, Psychopathology and Politics, at 38-172 (1930); and H. Lasswell, Power and Personality (1948).
He was not the first to do so, however. See H. Lasswell, *Psychopathology and Politics*, supra note 26, chapter 4, for a discussion of previous typological developments.


M. McCullough, The Brazilian Congress (unpublished paper).


*Id.*


See J. Payne, Determining the Incentives of Political Participants, *supra* note 31, and his Some Objective Interview Variables: Length, Respondent Talkativeness, and Ego Reference Ratio (unpublished paper, Department of Political Science, Texas A & M University, 1973). He shows rather persuasively that the methodology used in incentive research is both valid and reliable.


*Id.* at 158.

*Id.* at 159.

There are, in fact, "accidental entrants" into the judicial system, as my research on both state and federal trial judges has shown. It is, however, a relatively rare occurrence.


*Id.*

As Payne himself acknowledges, incentives, at most, can explain only 18% of the variation in the political behavior of an individual. “It is not the whole picture of him, nor even half the picture.” Incentive Theory and the Political Process, supra note 32, at 7-8.


For the organization of state judiciaries, see H. Glick and K. Vines, State Court Systems, supra note 48, and H. Jacob, Justice in America, supra note 1, chapter 8.


Cf. Browning, The Interaction of Personality and Political System in Decisions to Run for Office: Some Data and a Simulation Technique, supra note 46; Browning and Jacob, Power Motivation and the Political Personality, supra note 46; and H. Lasswell, Psychopathology and Politics, supra note 26.

See, for example, H. Eulau and J. Sprague, Lawyers in Politics: A Study in Professional Convergence (1964).


Payne and Woshinsky, Incentives for Political Participation, supra note 35, at 527.

O. Woshinsky, Incentives to Political Participation: Connecticut Legislators, supra note 33, at 21.

Payne and Woshinsky, Incentives for Political Participation, supra note 35, at 527.


W. Murphy and J. Tanenhaus, The Study of Public Law, supra note 9, at 140.


C. Pritchett, Civil Liberties and the Vinson Court, at 191-192 (1953).

Flango, Wenner, and Wenner, supra note 18, at 286.

See id. at 280-287 for a discussion of the items used.

Of all the powers of the trial judge, perhaps the most studied, most important, and most likely to be affected by emotional characteristics of individuals is sentencing. Though sentencing maxima and minima are normally defined in legislation, such definitions are usually wonderfully wide and leave enormous room for judicial discretion. Whenever discretion is present, personality has an opportunity to affect behavior. The impact of judicial incentives on judicial sentencing behavior, of course, is of great interest. However, I have not been able to collect data on sentencing in any systematic fashion (for reasons stated later). Thus, I present my thought and impressions here to provoke further research and discussion on the subject.

There are at least two modes of attacking the problem of sentencing. First, one might pose to each respondent hypothetical cases, including detailed descriptions of defendants, charges, and sentencing reports. Two problems assert themselves: (1) unless one matches the hypotheticals with the actual content of the judge's caseload, results may be misleading; (2) even if one can be assured that cases are representative, the fact that cases are hypothetical — that no live defendant goes to jail or goes free — may tend to make verdicts unreal. Second, one might probe the records of actual sentencing behavior. But, once again, two problems assert themselves: (1) it is difficult to obtain access to sentencing data (in my own explorations, I ran into the barrier of a resolute and protective Administrative Office); (2) it is difficult — if not impossible — to match offenses and offenders to produce comparable cases. Despite its inherent liabilities, I have opted for the second approach. Because of official restrictions placed on me, however, my explorations were tentative. Suffice it to say that the following discussion is the result of examinations of files and observation of sentencing.

First of all, it is useful to set out hypotheses about the relationships between judicial incentive and sentencing behavior. Trial judges who are motivated by a program incentive should tend to mete out moderate sentences, varying the degree of harshness in close measure to the gravity of the crime. Depending upon his ideological position, the obligation judge should tend to give the defendant sentences that are either extremely severe or extremely lenient. The status judge should confer overly stringent penalties on convicts of lower socioeconomic status; conversely, he should dispense overly indulgent sentences to convicts whose status is equivalent to or above his own. Judges with a game incentive will tend to behave in a manner similar to the program judge, though they will more likely than not take an even more pragmatic orientation in sentencing decisions than will the program type.

My impressions comport nicely with the hypotheses: obligation and status judges are the harshest sentencers and game judges are more moderate in sentencing decisions.

In a future paper I hope to present systematic data on the relationships between judicial incentives and judicial sentencing behavior.

There is a small but growing literature on judicial administration. See, for example, P. Fish, The Politics of Federal Judicial Administration (1974); C. Baar and E. Baar, Judges as Middlemen? (unpublished paper delivered at the 1975 Annual Meeting of the American Political Science Association); C. Baar, The Growth of Federal Judicial Administrative Structures: Implications for Judicial Behavior (unpublished paper delivered at the 1970 Annual Meeting of the Midwest Political Science Association); Cook, Perceptions of the Independent Trial Judge Role in the Seventh Circuit, supra note 14; Cook, Role Lag in Urban Trial Courts, supra note 14; R. Wheeler, What is Judicial Administration? (unpublished paper delivered at the 1975 Annual Meeting of the American Political Science Association); and D. Jackson, Research and Resources in Judicial Administration (unpublished paper delivered at the 1975 Annual Meeting of the American Political Science Association).

See, for example, Chandler, The Role of the Trial Judge in the Anglo-American Legal System, 50 American Bar Association Journal 125 (1964).