

RULE DEPARTURES AND MAKING LAW: JURIES AND THEIR VERDICTS

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This study addresses the issue of rule departures and law-making activity by juries adjudicating guilt in felony cases. Analysis of data from a sample of jury trials suggests considerable conformity to rules. That is, jury verdicts are influenced by evidence of the defendant's guilt and credibility as a witness. Rule departures appear to be limited. They reflect a concern not only with the defendant *per se*, but also with his choice of a victim and with the seriousness of the prosecution charge against him. The findings suggest that, as actually performed, the jury role is neither clerklike nor discretionary. Rather, it conforms more closely to Kadish and Kadish's (1973) notion of a recourse role, where rule departures occur only under certain circumstances.

In American law the jury is symbolically significant as a protection against the arbitrary exercise of state power. In the past 150 years, however, jury power has declined considerably (Howe, 1939; Yale Law Journal, 1964; Sheflin, 1972), while criticism of the competence and representativeness of its members has increased.¹ Currently, court officials are reluctant to use juries to adjudicate guilt in many criminal cases (Newman, 1966; Blumberg, 1967). Although this reluctance may stem in part from constraints on office resources, it has an additional source in the pervasive distrust with which officials view jury deliberations and verdicts.

It is this distrust, and the more general criticism of jury competence, that is of concern in this paper. In the first section, I examine the presumption that underlies many criticisms—namely that juries depart from formal instructions and, in so doing, make or nullify existing law. To determine whether this presumption and the criticisms it generates are warranted, the second section reports the analysis of data obtained from a sample of jury trials.

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¹ For more thorough discussion of recent criticisms of the jury, see Kalven and Zeisel (1966), Simon (1967), and Yale Law Journal (1974). The specific issue of jury nullification is discussed in greater detail by Sheflin (1972), Kadish and Kadish (1973), and Christie (1974).

I. JURY RULE DEPARTURES

One of the most serious criticisms of the jury bears on the competence of its members to decide issues of fact. Although some socialization is provided by the *voir dire* (Balch *et al.*, 1976), jurors, it is said, lack the legal training and experience deemed necessary to decide matters of fact. But few critics take the extreme position that lack of legal training and experience renders juries *incapable* of understanding and following instructions. Indeed, the work of Reed (1965) and others (e.g., Kalven and Zeisel, 1966; Simon, 1967; Elwork *et al.*, 1977) indicates that jurors comprehend instructions, are willing to follow them, and are responsive to changes in them.

Rather, the specific charge is that, because they are not professionally trained, jurors permit "irrational," "extralegal," and "extraneous" considerations to affect their verdicts (Newman, 1966; Miller, 1970; Neubauer, 1974). In particular, values or sentiments intrude upon and affect the fact-finding process, with the frequent result that jurors take a "merciful view of the facts" (Devlin, 1965: 21).² The intrusion of personal values and sentiments leads juries to add to or override distinctions the law makes. Where juries fail to follow judicial instructions they are, in effect, legislating "interstitially," articulating their own legal policies and, in so doing, making new law and nullifying existing law (Jacobsohn, 1977).

The charge that jurors depart from instructions and make law is a serious one, because it implies that they are improperly performing their role as fact-finders.³ To the extent that juries cannot be trusted to discharge their duty properly, a reliance on such other methods of guilt determination as bench trials and, more frequently, guilty pleas, is seen by law enforcement officials as legitimate and necessary.

Whether rule departures are proper or not depends on one's interpretation of the jury's role (Kadish and Kadish, 1973;

² While our attention is confined to irrelevant characteristics of the case that juries might consider, a related argument posits that juries are inappropriately swayed by the mode and order in which testimony is presented. For research and discussions of these issues, see Walker *et al.* (1972), Miller *et al.* (1974, 1975), and Lawson (1969).

³ The observational literature documents no pervasive distrust or criticisms of judges in their role as fact-finders during bench trials. While this lack of criticism could reflect a desire to maintain smooth working relationships, it could also suggest a more liberal interpretation of the judge's role. Rather than defining it as a recourse or clerk role, prosecutors and other court officials could define the judge's role during trial as discretionary and, consequently, as one that requires no justification for rule departure. Or court officials could simply assume (quite incorrectly, see Newman, 1966) that judges do not depart from the law.

Christie, 1974). At its most extreme, a critical stance toward rule departures implies that the jury's role involves a straightforward and strict expectation to follow instructions. This interpretation equates jurors with clerks and gives them no "discretion to disobey" (Kadish and Kadish, 1973; Brooks and Doob, 1975).

Judicial opinions (e.g., *Williams v. Florida*, 1970; Bazelon, J., dissenting in *United States v. Dougherty*, 1972) and theoretical discussions (Kadish and Kadish, 1973) offer a different interpretation of the jury's role. It is *not* clerklike. Nor does it contain the wide discretionary powers that characterize the roles of the prosecutor and police. Rather, the jury's role is more appropriately conceptualized as a *recourse* role that permits jurors to "evaluate the consequences of adhering to the role's prescribed means in terms of the role's prescribed ends" (Kadish and Kadish, 1973: 61). Where these consequences conflict with or preclude attainment of prescribed ends, jurors have the liberty, but not the right, to depart from instructions. For proponents of this interpretation, then, the mere existence of rule departures is neither improper nor subject to criticism. Rather, it is the *grounds* for these departures, and the nature of the law-making activity that results, which merit scrutiny and can be criticized as improper.

This paper does not propose to resolve interpretational issues about the jury's role. Rather, it is concerned with two prior empirical questions that are central to a consideration of those issues. First, do rule departures occur? Second, if such departures occur, of what do they consist, and what kinds of rule-making activity do they reflect? Preliminary answers to these questions may serve to ground theoretical debate about the jury's role more firmly in empirical knowledge of how that role is actually performed.

II. PRIOR RESEARCH

Despite the frequency of allegations about jury rule departures, there is little direct evidence supporting the assertion. The extensive literature on jury decision making has been reviewed elsewhere (Erlanger, 1970; Brooks and Doob, 1975; Kessler, 1975; Stephan, 1975; Colasanto and Sanders, 1978) and will not be discussed here. It is sufficient to note that prior research has shed little light on the issue of rule departures, for two reasons. First, many studies (e.g., Nemeth and Sosis, 1973; Sue *et al.*, 1973) used simulated juries. As a result, their findings may not be generalizable to complex situations where

adjudications of legal responsibility actually affect a defendant's life chances (Hamilton, 1978). Second, studies of actual jury outcomes do not include the range of variables necessary to determine the extent and nature of rule departures. Measures of evidence and witness credibility are often lacking. Thus, while there is some indication that "irrelevant" factors such as defendant's socioeconomic status affect verdicts (Broeder, 1965; Judson, *et al.*, 1969; Nagel, 1969), the findings could be spurious and must therefore be treated with caution.

The recent work of Eisenstein and Jacob (1977) is an exception to the general trend. It reports that, while jurisdictional variation is considerable, characteristics of the defendant and the offense affect jury verdicts. At times, they find that this effect is stronger than the effects of the evidence in a case. But while this research is more useful than earlier work, it uses only a few measures of evidence and suffers from the absence of data on credibility-related victim characteristics (e.g., race, age, sex, relationship with the defendant). In addition, along with most other researchers, Eisenstein and Jacob fail to explore the possibility that the effects of legally irrelevant factors on verdicts depend on the strength of the evidence in the case. As a result, they could not test the hypothesis proposed by Kalven and Zeisel (1966) that juries consider legally irrelevant factors only under certain circumstances, in particular, when the evidence in a case is "close."

Research using quantitative data does not provide unequivocal support for the contention that juries depart from instructions. Most support for that proposition appears to be anecdotal; at best it is indirect. For example, the influential work of Kalven and Zeisel (1966), which more than any other study purported to document the intrusion of values into the fact-finding process, relied exclusively on self-reported judicial perceptions and interpretations of jury behavior. These perceptions may be accurate, but they require independent validation and are no substitute for direct analyses of jury verdicts themselves.

The analysis reported below is a partial attempt to fill the need for a direct study of jury decision making. It focuses on the product of jury deliberations, the verdict, and seeks to answer the following questions:

1. To what extent do juries consider the evidence presented to them?
2. What kinds of evidence, if any, have the strongest effects on verdicts?

3. To what extent do verdicts reflect the intrusion of values into the fact-finding process? Is this intrusion contingent on the evidence? Does a “close” case “liberate” the jury to consider “extraneous” factors?

4. To what extent do jury findings reflect sentiments about the defendant and the law? Of what does the law-making activity of jurors appear to consist?

III. THE DATA

The original data set was a random sample of 980 defendants charged with felonies in Marion County (Indianapolis), Indiana. The sample excluded crimes without victims (e.g., drug law violations and gambling), and consisted of cases disposed between January, 1974, and June, 1976. Of 980 defendants, 317 (or 32 percent) went to trial; of those who went to trial, 63.4 percent (or 201) were tried by jury. The remainder were dismissed by the court or tried by a judge.⁴ Analysis focuses on the 201 cases tried by jury.

The file folder of the assistant prosecutor who tried the case provided most of the information about the criminal event. Where there were missing data, criminal court records, police arrest records, and telephone interviews with victims were used. During the eight-month period of data collection, I was a member of the prosecutor’s staff and conducted informal discussions with prosecutor and court personnel. The qualitative data I collected guided categorization of the independent variables and are used to shed light on the findings reported below.

Dependent Variable

Table 1 presents the variables and their frequencies.⁵ The dependent variable, verdict, is dichotomized as an acquittal (0) or guilty verdict (1).

Legally Relevant Independent Variables

The first set of independent variables are measures of evidence. Since access to court transcripts was not possible, I obtained information from the assistant prosecutor’s notes for case presentation and from a summary sheet of the evidence submitted for the probable cause hearing. It merits emphasis, then, that data on the evidence for each case are not complete. This is particularly true with respect to circumstantial evidence

⁴ Unfortunately, there were too few bench trials in this jurisdiction to reliably compare judicial and jury decision making.

⁵ Although the independent variables are categorized according to their legal relevance, they will be considered separately during analysis rather than scaled in order to maintain comparability with the work of Kalven and Zeisel (1966).

Table 1. Notation, Coding and Frequencies of Variables

Variable	Coding	Frequencies
Y Verdict	0 Not guilty 1 Guilty	31.3 (63) 68.7 (138)
<u>Evidence</u>		
X ₁ Victim Identification of Defendant	0 None 1 One or more	33.3 (67) 66.7 (134)
X ₂ Eyewitness(es) Identification of Defendant	0 None 1 One or more	63.7 (128) 36.3 (73)
X ₃ Testimony of Defendant and/or Accomplices	0 None 1 One or more statements	82.1 (165) 17.9 (36)
X ₄ Amount of Expert Testimony	0 None 1 One expert 2 Two or more experts	68.2 (137) 26.9 (54) 5.0 (10)
X ₅ Recovered Property	0 No property loss 1 Unrecovered loss 2 Recovered loss	38.8 (78) 35.8 (72) 25.4 (51)
X ₆ Recovered Weapon	0 No weapon used 1 Unrecovered weapon 2 Recovered weapon	37.8 (76) 42.8 (86) 19.4 (39)
X ₇ Number of Witnesses	Interval	$\bar{X} = 6$
<u>Witness Credibility</u>		
X ₈ Defendant Prior Convictions	Interval	$\bar{X} = 2.7$
X ₉ Victim Prior Convictions	0 None 1 One or more	85.6 (172) 14.4 (29)
X ₁₀ Prior Victim-defendant Relationship	1 Family or friend 2 Acquaintance 3 Stranger	8.0 (16) 24.9 (50) 67.2 (135)
<u>Sympathy-Related Factors</u>		
X ₁₁ Defendant Sex	0 Female 1 Male	4.0 (8) 96.0 (193)
X ₁₂ Defendant Age	Interval	$\bar{X} = 27$
X ₁₃ Youth/Old Age of Defendant	0 Under 20 or over 45 1 21 to 45	26.4 (53) 73.6 (148)
X ₁₄ Defendant Employment Status	1 Unemployed 2 Employed 3 Self-employed	45.1 (71) 52.0 (89) 6.4 (11)
X ₁₅ Victim Sex	0 Female 1 Male	40.8 (81) 59.7 (120)
X ₁₆ Victim Age	Interval	$\bar{X} = 34$
X ₁₇ Youth/Old Age of Victim	0 Under 17 or over 59 1 17 to 59	19.3 (38) 80.7 (159)
X ₁₈ Victim Employment Status	1 Unemployed 2 Employed 3 Self-employed	19.5 (32) 57.3 (94) 23.2 (38)
<u>Other Legally Irrelevant Factors</u>		
X ₁₉ Alleged Victim Conduct ^a	0 No allegation 1 One allegation 2 Two or more allegations	71.1 (143) 19.4 (39) 9.5 (19)
X ₂₀ Racial Composition I	0 Other events 1 Black v. white events	65.3 (126) 34.7 (67)

X ₂₁	Racial Composition II	0 Other events	75.1 (146)
		1 White v. white events	24.9 (48)
X ₂₂	Victim Injury	1 None	64.7 (130)
		2 Minor	15.0 (30)
		3 Required hospitalization	7.0 (14)
		4 Fatal	13.4 (27)
X ₂₃	Prosecution Charge ^b	Interval	$\bar{X} = 17$
X ₂₄	Defendant Pretrial Release Status	0 In jail	72.1 (145)
		1 Out on bond	27.9 (56)
X ₂₅	Bond Amount	Interval	$\bar{X} = \$12,821$
X ₂₆	Counsel	0 Court-appointed	47.8 (96)
		1 Privately-retained	52.2 (105)

^a The measure for alleged victim conduct is the sum of responses (no = 0; yes = 1) to items regarding: (1) victim provocation; (2) prior victim-defendant conflict; (3) questionable moral character of the victim; and (4) victim's sexual misconduct or potentially criminal behavior.

^b This variable refers to the rank of the most serious prosecution charge. The rank is based on (1) the prison sentence stipulated by law, if given in years (e.g., 20 years); or (2) the mean prison sentence, if the stipulated penalty is given as a range of years (e.g., 10 to 30 years).

and the testimony of character and corroborative witnesses. Thus, the data provide only a first approximation of the case's evidence, and our test for its relevance to jury verdicts is therefore conservative. On the positive side, however, our approximation is a closer one than has previously been possible (see Eisenstein and Jacob, 1977). A wide range of evidence is considered, such as the presence of eyewitness identification of the defendant and other factors usually thought crucial or indispensable to the determination of guilt.

Following Cleary's (1972) classification, the measures of evidence, as presented in Table 1, are:

1. testimony of eyewitnesses (victims and others) who identified the defendant (X₁ and X₂);
2. testimony of the defendant and/or accomplices about their involvement in the crime or lack thereof (X₃);
3. testimony of experts (such as polygraph examiners) about the victim and defendant, fingerprint and ballistics experts, and psychiatrists giving evidence of the defendant's capacity to stand trial (X₄);
4. real or demonstrative evidence, that is, material objects in the form of stolen property (X₅) or a recovered weapon (X₆);
5. the number of witnesses specified in the information or indictment (X₇); this variable provides a rough and indirect indication of the amount of testimonial evidence.

The second set of independent variables consists of indicators of *witness* credibility.⁶ In actual practice it is difficult to distinguish credibility-related factors from those eliciting sympathy, but the conceptual distinction made by Kalven and Zeisel (1966) is retained. Because a prior record of convictions

⁶ Data on the full range of characteristics that establish credibility were not available. For example, there is no information about the presentational skills of witnesses (Miller *et al.*, 1975). Thus, the data provide only an initial and approximate indication of victim and defendant credibility.

is a legally permissible consideration when assessing witness credibility, analysis includes the prior conviction record of the defendant (X_8) and victim (X_9). Since few victims ($n = 16$) had more than one conviction, the measure was dichotomized as no convictions (0) and one or more convictions (1). An interval measure was retained for defendant's conviction record, because the distribution was not seriously skewed.

Instructions also permit a consideration of potential bias against the defendant when assessing the *victim's* credibility. As an indicator of bias, I use the prior relationship between the victim and defendant (X_{10}). The underlying presumption is that, like official agents (Emerson, 1969; Reiss, 1971; Stanko, 1977), jurors may use prior relationship as a guide to the victim's credibility. They may be more likely to question the motives and doubt the allegations of a victim who knew the defendant prior to the offense.

Legally Irrelevant Independent Variables

The remaining variables attempt to capture in an indirect way two potential jury "sentiments" discussed by Kalven and Zeisel (1966)—namely, those toward the defendant, and those about the law. I enlarge the former category to include sentiments toward the victim on the grounds that, just as a sympathetic or attractive defendant may elicit leniency, so too may an unsympathetic or unattractive victim.⁷ Similarly, juries may be more likely to convict not only where the defendant is unattractive, but also where the victim is seen as attractive or helpless (Landy and Aronson, 1969; Yale Law Journal, 1974; Williams, 1976).

Because they could relate to witness attractiveness and/or helplessness (Kalven and Zeisel, 1966; Williams, 1976), the sex (X_{11} , X_{15}), age (X_{12} , X_{16}) and employment status (X_{14} , X_{18}) of defendants and victims, respectively, are included. Since extremely young or old witnesses may appear particularly sympathetic (Williams, 1976), the effects of age on verdict could be curvilinear. To examine this possibility, both measures of age are dichotomized and dummy-coded (X_{13} , X_{17}).⁸ To test for

⁷ Given limitations on the data to which access was possible, this set of victim and defendant characteristics is not exhaustive. Rather, it gives a first and indirect approximation of the importance of sympathy factors to jury verdicts.

⁸ The categories used for defendant's age differed because fewer than two percent were under 17 or over 59 years old. The measures for age were also trichotomized (under 17, 17-59, over 59 for victims and under 20, 20-45, over 45 for defendants). This coding produced essentially the same results as the dichotomization.

curvilinearity, each dummy variable will be entered into a regression equation that contains all independent variables (including the interval measures for age). The significance of the increment in R^2 produced by the addition of the dummy variable will then be determined.⁹

The second set of “legally irrelevant” variables taps sentiments about the law. It consists of circumstances or characteristics that, while not formally recognized as reducing the defendant’s culpability, may predispose jurors to acquit despite the evidence. The first variable (X_{19}) taps the use of victim conduct to assess defendant culpability, and subsumes sentiments regarding both self-defense and “contributory fault.” A single variable was constructed by summing allegations regarding (1) victim provocation—that is, whether the victim allegedly struck the first blow or began an argument that culminated in his own victimization; (2) prior victim-defendant conflict—that is, whether the victim allegedly argued with or harassed the defendant in the past; (3) the questionable moral character of the victim; and (4) the victim’s sexual misconduct or potentially criminal behavior.¹⁰ This measure provides some indication of whether juries are more likely to acquit if the victim is seen as partly responsible for, or deserving of, the injury sustained.

The second possible mitigating circumstance, subcultural orientation of the victim and defendant, permits a test of the hypothesis that events involving black defendants and victims are treated more leniently than others, in part because the parties are “disreputable” (Garfinkel, 1949; Wolfgang and Riedel, 1973; Black, 1976). Racial composition is dummy-coded to compare black intraracial events with both black defendant-white victim (X_{20}) and white intraracial events (X_{21}). There were no white defendant-black victim events.

⁹ The test for curvilinearity in the effect of defendant’s age, for example, will be

$$F = \frac{(R^2 \text{ with } X_1 \text{ to } X_{26} - R^2 \text{ with all variables but } X_{13}) / k}{(1 - R^2 \text{ with } X_1 \text{ to } X_{26}) / (N - k - 1)},$$

with (k) and (N - k - 1) degrees of freedom, where k is equal to 1, the number of dummy variables. The interval measure of age is included in the equation with the dummy-coded variable to compensate for information lost in recoding (Nie *et al.*, 1975: 376-377).

¹⁰ While it would have been preferable to examine the effects of each type of allegation separately, the extreme skew in the distribution of each variable introduced multicollinearity problems and required the construction of a single measure.

The third possible mitigating circumstance, jury notions of *de minimis*, tests the hypothesis that acquittal is more likely if the offense is minor and if the harm the victim sustained was not serious. Two indicators are used: (1) the extent of physical injury suffered by the victim (X_{22}); and (2) the legal seriousness of the offense (X_{23}).¹¹ The latter refers to the rank of the most serious prosecution charge, where rank is based on the prison sentence stipulated in the criminal code. Where the penalty is stipulated as a range of years (e.g., 10-30 years), rank is based on the mean prison sentence (e.g., 20 years).

The final set of legally irrelevant variables are procedural. They are included because the literature (e.g., Ares *et al.*, 1963; Roballo *et al.*, 1974; Swigert and Farrell, 1977) suggests their importance to criminal justice outcomes. The defendant's pretrial release status (X_{24}), if known, could be used by jurors in either of two contrasting ways. It could indicate the defendant's presumed dangerousness. If so, having been detained in jail could increase the probability of conviction. Or, alternatively, pretrial release status could indicate the extent to which the defendant has already suffered (by being incarcerated) or has been discriminated against. In this case, having been detained in jail could increase the probability of acquittal (see Bernstein *et al.*, 1977).

To estimate the effect of pretrial release accurately, analysis includes as a control variable the amount of final bond (X_{25}). Type of counsel (X_{26}), whether court-appointed or private, is included to determine whether juries are affected by the character of counsel.

Frequencies

As Table 1 indicates, there was little variation in several independent variables. Cases that proceeded to jury trial involved victims who appeared credible. Few victims had provoked the defendant, engaged in misconduct prior to the crime, or established a conviction record. On the other hand, most defendants had prior convictions, and may thus have appeared discreditable. With respect to evidence, expert testimony and statements from defendants and accomplices were relatively rare. This homogeneity suggests considerable screening of cases prior to trial. It also presents problems for

¹¹ Although Kalven and Zeisel (1966) emphasized the seriousness of the offense, there is some evidence that the type of crime may affect outcomes and the criteria used to prosecute the case (Williams, 1976). However, the size of our sample precluded any comparisons by offense type.

analysis, since limited variation could reduce the ability of these variables to account for differences in jury verdicts.

IV. RESULTS

To determine whether the effects of legally irrelevant variables depend on the case's evidence, I constructed an interactive model of jury decision making (see Hanushek and Jackson, 1977: 97-101).¹² First, the values of all variables were incremented by 1 to eliminate zero values. Then, the natural logarithm of the dependent variable was regressed on the natural logarithms of the independent variables. The resulting equation,

$$\log Y = a + b_1 \log X_1 + b_2 \log X_2 + \dots + b_{26} \log X_{26} + U,$$

estimates a fully multiplicative model, whose functional form is

$$Y = e^a X_1^{b_1} X_2^{b_2} \dots X_{26}^{b_{26}} e^u.$$

This model assumes that the change in the dependent variable (Y) associated with the change in a specific independent variable (e.g., X_1) varies with the magnitude *both* of the specific independent variable and the other independent variables in the equation (X_2 through X_{26}).

The data were then analyzed using dummy variable regression procedures.¹³ In contrast to the interactive model, ordinary least squares assumes that the effects of the independent

¹² An alternative procedure would have been an analysis of covariance design in which, for each measure of evidence, interaction terms between the measure and each of the remaining independent variables were constructed. A test for the significance of the increment in R^2 produced by adding these terms to the regression equation would then have been performed. Given our sample size, the number of regressors this procedure involves would have been unwieldy and conducive to the production of misleadingly inflated coefficients. The procedure described in the text avoids this problem. It has the added virtue of testing an hypothesis about jury decision-making that is more general than the liberation hypothesis proposed by Kalven and Zeisel (1966). Specifically, it enables us to test whether the effect *each* independent variable has on outcome depends on its magnitude and on the magnitude of the remaining variables, evidentiary as well as nonevidentiary. Such a test would not have been possible using analysis of covariance.

¹³ Since the dependent variable is binary, the assumption of homoskedasticity is difficult if not impossible to meet. Concretely, this means that, while estimates are consistent and unbiased, both they and their standard errors are inefficient (Hanushek and Jackson, 1977: 148, 154). The usual response to this problem is to use a weighted least squares (WLS) solution. Goldberger's (1964: 231-248) "two-round" procedure produces estimated coefficients that are unbiased, consistent, and efficient. The standard errors of the estimates are also efficient. For our sample, WLS produced results that were strikingly similar to those reported in the text. However, conviction was slightly more likely if the victim was a stranger to the defendant, bond was high, and counsel was court-appointed. Since these coefficients were modest, with significance levels between .05 and .10, they do not alter our basic conclusions. The results of the WLS were not reported in the text because the small sample size exacerbated the problems of multicollinearity produced by the weights. Coefficients tended to be artificially inflated and therefore misleading. The results are available to interested readers on request.

variables are additive rather than multiplicative. To determine which model (the interactive or additive) fits the data better, the R^2 of the interactive model was transformed¹⁴ so that it could be compared with the R^2 of the linear model.

A comparison of the findings of the interactive and additive models revealed no essential differences. The former explained 23.3 percent of the variance in verdict, while the latter explained 27.1 percent. Reasons of parsimony dictate subsequent focus solely on the additive model. Substantively, the lack of difference in explained variance means that the data provide no statistical support for the argument that the effects of legally irrelevant characteristics on verdict depend on the extent or nature of the evidence. The liberation hypothesis proposed by Kalven and Zeisel (1966) receives no support, then, from these data.

The addition of the dummy variables for defendant and victim age (X_{13} and X_{17}) did not significantly increase the proportion of explained variance. The analysis reported below is based, then, on an additive model that excludes these variables. Table 2 presents the coefficients of variables in this model whose effects on verdict were significant at $p < .10$. Before discussing the individual coefficients, it should be noted that while the proportion of explained variance is significant and larger than that typically encountered (see, e.g., Eisenstein and Jacob, 1977), it is nonetheless modest. A majority of the variance remains unexplained, in part because of limits on the information contained in the data to which access was possible.

As Table 2 indicates, juries were more likely to convict if: the defendant or accomplice made a statement about his involvement in the crime or lack thereof (X_3); a weapon was recovered (X_6); and a large number of witnesses was specified in the indictment or information (X_7). Jury verdicts did *not* depend on eyewitness identification of the defendant (X_1 , X_2), on expert testimony (X_4), or the recovery of stolen property (X_5). Taken together, these findings indicate that juries accord evidence differential weight. Their selectivity in this regard is surprising, since eyewitness identification and expert testimony are often assumed to be more convincing than other kinds of evidence.

Juries were more likely to convict if the defendant had numerous prior convictions (X_8), and thus may have been

¹⁴ To obtain an R^2 that could be compared with the R^2 from the linear regression model, we squared the correlation coefficient of the dependent variable with the antilog of the unstandardized predicted scores for the natural logarithm of the dependent variable (Hanushek and Jackson, 1977: 101).

Table 2. Regression Coefficients and Related Statistics for Variables Significant at $p < .10$ on Verdict (Y)

Variable	r	b (Standard error)	β
X ₃ Testimony of Defendant and/or Accomplice	.212	.327 (.120)	.278
X ₆ Recovered Weapon	.108	.113 (.063)	.191*
X ₇ Number of Witnesses	.223	.041 (.017)	.223
X ₈ Defendant Prior Convictions	.182	.049 (.017)	.306
X ₁₄ Defendant Employment Status	-.097	-.128 (.076)	-.178*
X ₁₆ Victim Age	-.027	-.005 (.003)	-.173*
X ₂₃ Prosecution Charge	-.024	-.028 (.011)	-.272
	R ²	.271	
	Number of Cases ^a	134	

* Significant at $.06 < p < .10$.

^a Attrition in the number of cases is due to missing data on one or more independent variables.

potentially discreditable as a witness. In contrast, characteristics related to the *victim's* credibility, namely, prior conviction record (X₉) and relationship with the defendant (X₁₀) had no measurable effect on the verdict.

In general, variables expected to elicit sympathy toward the defendant or victim had more modest effects. Consistent with the findings of Reed (1965) and others (Broeder, 1965; Judson *et al.*, 1969; Nagel, 1969), conviction was slightly more likely if the defendant was unemployed (X₁₄). Juries were also more likely to convict if the victim was young (X₁₆). Though both results could have occurred by chance, they may reflect an underlying sympathy toward young victims and employed defendants.

Juries did not appear to be influenced by the past conduct of the victim (X₁₉), or by the subcultural orientation of victims and defendants (X_{20,21}). There was no evidence, then, of greater leniency toward defendants who victimized persons who might have been considered partly deserving of, or responsible for, the injury inflicted on them.

Although juries were not predisposed to acquit if physical injury was minor (X₂₂), they were more likely to acquit if the offense was serious (X₂₃). This reluctance to convict in serious crimes has a number of possible interpretations. It could

reflect hesitance to make an adverse ruling where the ramifications of the ruling would be seriously damaging to the defendant—that is, involve a long period of incarceration—or where the jury believed the punishment was nonetheless disproportionately severe. Instances of such leniency have been reported by Kalven and Zeisel (1966) and, in experimental settings, by Vidmar (1972) and Hester and Smith (1973). A tendency to acquit where the crime is serious might also reflect the use of a higher standard of proof for these crimes. Where the crime is not as serious, juries may accept a lower standard of proof. Finally, it is possible that jurors could not decide on, or lacked a sufficient understanding of, alternative lesser-included offenses. Thus, the prosecutorial tendency to charge the maximum in the hope of conviction of a lesser-included offense, may have consequences that are both unanticipated and, from the prosecutor's point of view, adverse.

Apart from its direction, the finding that juries were less likely to convict in more serious crimes is noteworthy in light of the zero-order correlation between prosecution charge and verdict ($r = -.024$). As shown in Table 2, this correlation is small and statistically insignificant. A strong relationship emerged only when the remaining independent variables were controlled. Additional analysis, using stepwise regression, revealed that the partial correlation became significant when the testimony of defendant and/or accomplice (X_3), prior victim-defendant relationship (X_{10}), bond amount (X_{25}), and counsel (X_{26}) were controlled. Thus, an unbiased estimate of the effect of prosecution charge on verdict requires the inclusion of both legally relevant and legally irrelevant variables.

Jury verdicts did not depend on the defendant's pretrial release status (X_{24}) or on type of counsel (X_{26}). These findings diverge from those of other studies (e.g., Ares *et al.*, 1963; Roballo *et al.*, 1974; Bernstein *et al.*, 1977; Swigert and Farrell, 1977), that have shown both factors to be important in other jurisdictions and for other decisions made during the prosecution of the defendant.

V. CONCLUSION

The data provided a preliminary indication of the factors jurors consider. In this jurisdiction, verdicts depended on the evidence, but not all evidence was accorded the same weight (Miller and Boster, 1975). The amount of testimony and whether its source was the defendant or an accomplice, rather than the victim, appeared to be especially persuasive. In

contrast, and perhaps because they considered such evidence fallible (see, e.g., Buckhout, 1974; Goldstein, 1977), juries did not rely significantly on eyewitness identification or expert testimony.

Juries also assessed the credibility of the defendant. Their rulings tended to be adverse where the defendant was discredited or discreditable. In contrast, juries appeared to be relatively unconcerned both with the evidence offered by victims (*viz.*, eyewitness identification) and with their credibility as witnesses.

Juries exercised their liberty to depart from instructions only in certain circumstances, particularly in cases involving a serious offense, a young victim, and an employed defendant. In adding distinctions—victim's age and defendant's employment status—that the law rarely, if ever, makes, juries were, in a sense, making law. And, to the extent that their reluctance to convict where the crime was serious reflected an opinion that prescribed punishments may be excessive, juries were nullifying existing law. The interesting feature of these results is that, in addition to being motivated by subjective considerations about the defendant (as Kalven and Zeisel [1966] emphasize), jury departures and law-making activity were motivated by characteristics of the victim and, more strongly, by the prosecutor's allegations about the defendant's criminal behavior (*viz.*, the prosecution charge).

Our findings of substantial rule departures thus challenge the orthodox "clerk" theories of jury decision making. But these departures are more limited in nature and in scope than many revisionists or jury critics would have us believe. Jury discretion, at least in Marion County, Indiana, does not appear to be excessive. Rather, the performance of juries in our sample of cases came closest to what Kadish and Kadish (1973) called a "recourse role," where rule departures occurred only under fairly specialized circumstances. More definitive conclusions about the extent, and abuse, of jury discretion await the reporting and analysis of information that only jurors themselves can supply.

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