

JUDGE – JURY OPTIONS: FACTORS INVOLVED IN COUNSEL DECISIONS**Margaret Platt Jendrek, Miami University, Ohio****BACKGROUND**

Three issues emerge in jury research: 1) jury competence, 2) jury representation, and 3) the social-psychological dynamics of jury deliberations (Erlanger 1970). Research on jury competence has explored how jurors arrive at a verdict. Do jurors rely on facts and evidence, or do they render verdicts based on their own ideas of law and equity? Do jury panels reflect the socioeconomic character of the communities from which they were drawn? What is the impact of socioeconomic status of jurors' roles in, and satisfaction with the deliberation process? Here, we examine a fourth issue which has received little attention. *What factors influence attorneys to advise clients to seek a judge trial or a jury trial?*

THE RESEARCH PROBLEM

The United States Constitution provides for a trial by one's peers. This phrase has been interpreted and reinterpreted by state courts and the United States Supreme Court. The definition of a trial by peers in modern day America seems embodied in Justice Murphy's statement (Thiel v. Southern Pacific Co, 1946 328 US 22).

The American tradition of a trial by jury considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross section of the community. This does not mean of course that every jury must contain representatives of all the economic, social, religious, racial, political, and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups.

A trial by peers means the random selection of jurors from a population such that the final arrays reflect a cross section of the community. But trial attorneys do not select jurors on a random basis (Ginger 1971). Trial lawyers are very interested in the mesh between the socioeconomic and psychological character of prospective jurors and clients. Trial lawyers "... believe that selecting a jury with the right mixture of social characteristics can mean the difference between winning and losing a

case." (Simon 1980 32) Many have studied the impact of these factors on jurors (Stephan 1975). Now some lawyers are beginning to conduct the *voire dire* examination of prospective jurors with these social science findings in mind (Ginger 1969; 1971). A prior question which needs to be explicitly addressed is: Why do attorneys advise clients to select jury trials as opposed to judge trials?

Assuming that defense attorneys wish to have their clients acquitted, it could be hypothesized that they advise clients to have cases heard before the most lenient forum, whether that be the judge trial or the jury trial. In their classic study of the American jury, Kalven and Zeisel (1966 58) found that the judge and jury agreed on outcome in about 78 percent of the cases. The jury was more lenient in 19 percent and less lenient for 3 percent of the remaining cases. Juries thus showed a net leniency preference of 16 percent. This suggests that the jury trial is preferable to the judge trial for the defendant. Faced with such a forum decision, defense attorneys would be expected to advise clients to seek a jury trial. Such a preference should be reflected in court statistics. This is not the case.

Statistics indicate that few cases are tried by jury. The 16 percent figure "... must not be made the basis of a general probability calculus by any defendant, because the cases to which the 16 percent applies have been selected for jury trial because they are expected to evoke pro-defendant sentiments." (Kalven, Zeisel 1966 59) Then why do attorneys advise clients to seek a judge trial or a jury trial? For the type of trial advice attorneys would give clients, I examined the influence of four factors: 1) race of the client; 2) racial composition of the community where the case is to be heard; 3) the type of case; and 4) the state's level of legal centralization.

RACE OF THE CLIENT

During the late 1960's black activists in the civil rights movement identified the American legal system as an instrument of oppression. They argued that the law and the courts imposed white law and white standards of

morality on the black community (Cleaver 1968). The jury system was not immune to these attacks. Several of the jury representation studies found that juries could not accurately reflect the conscience and mores of their communities because juries did not reflect a cross section of the community. Blacks were consistently underrepresented on jury panels (Dibble 1967; Comment 1970; Stephan 1975). Some researchers even voiced the idea that the underrepresentation of blacks on juries has had negative consequences for the legitimacy of the American legal system (Van Dyke 1977). They argue that the lack of blacks on juries results in mistrust and hostility toward the justice being rendered especially when the case involves black litigants, black witnesses, and black defendants.

It was claimed in testimony at the murder trial of Bobby Seale and Ericka Huggins in 1970 that a:

..white juror sitting in a jury box listening to the testimony of a black witness would sift and evaluate and appraise that testimony through a screen of preconceived notions about what black people are. .. some notions may be based in fact .. and some are greatly exaggerated .. and others of those screening biases are completely contrary to fact. None of these things would be as likely to be true of a black juror listening to and appraising and judging the same testimony. The black juror, because of more similar life experiences to the black witness would .. appraise the testimony from a distinctively different vantage point and from a distinctively different life experience.. (Van Dyke 1977 32).

The charge of racially biased jury verdicts has been supported. Blacks were considered to be unattractive defendants by jurors, and "... where the judge acquits the presence of this factor will at times induce the jury to disagree with the judge and convict." (Kalven, Zeisel 1966 217) Other researchers say that judges are less likely than jurors to be swayed by the individual characteristics of the defendant, and are more likely to render decisions grounded in the law (Merryman 1969; Damaska 1975; Stuckey 1976).

Hypothesis 1: Attorneys of black clients are more likely to advise a judge trial than are attorneys of white clients.

COMMUNITY RACIAL MAKEUP

The second factor expected to influence the judge - jury decision is the racial composition of the community where the case is heard. Studies of the deliberation process show that black jurors are more likely to vote for acquittal and higher compensation than are white jurors (Simon 1967; Stephan 1975).

Hypothesis 2: Attorneys are more likely to advise jury trials in predominantly black communities than they are in predominantly white communities.

Assumption: The likelihood of obtaining black jurors is higher in predominantly black communities than it is in white communities.

TYPE OF CASE

The Kalven and Zeisel study of the jury trial showed a marked variation in the selection of the jury trial by type of crime. For murder, manslaughter and rape, the jury trial was waived only 13, 25, and 25 percent of the time, respectively; but jury trial was waived 57, 59, and 70 percent of the time respectively for the less serious crimes of larceny, auto theft, and drug law violations (1966 26).

Hypothesis 3: Attorneys are more likely to advise jury trial for more serious crimes and the judge trial for less serious crimes.

Some suggest that the jury trial is used for the most serious offenses because of the delay this engenders in coming to trial. Others argue that judges give harsher sentences to those found guilty who opted for the jury trial (Casper 1972; Silberman 1978).

LEGAL CENTRALIZATION

The fifty state court systems do not form a unified system of justice. Each state has its own government and courts to make and enforce the law. Each state has adopted a structure for court operations. Decisions are made about such structural characteristics as the method for selecting the judiciary, the length of judicial terms, the educational requirements for judges, the method for conducting voir dire examination of jurors, and the use of lay personnel in judicial decision making procedure. Some of these variations affect the operations of the state's legal order.

The method of judicial selection has an impact on the characteristics of persons selected to serve as judges. Individuals recruited in

partisan elections were more likely to be locally oriented, politically adept, and dependent on the continuing votes of constituents, compared to justices selected by gubernatorial appointment (Jacob 1964; Canon 1972).

Short judicial terms can threaten judicial independence and impartiality, and may cause judges to be susceptible to political influence (Vines 1964; 1965). Conversely, a long term of office is seen as a mechanism to protect the judge from local political pressure.

The conduct of *voire dire* has received increasing scrutiny (Fried 1975). Debates focus on who should conduct the examination – the judge, the attorney, or both. Proponents of the judge-conducted *voire dire* argue that lawyers abuse this privilege. They claim that attorneys attempt to sway prospective jurors by explaining elements of their case in a sympathetic way. Proponents of the lawyer-conducted *voire dire* claim that "... only attorneys can knowledgeably question jurors to lay the groundwork for challenges, and that questioning by attorneys is essential to preserve the adversary system..." (Van Dyke 1977 164) By combining these two structural characteristics, we can identify 1) a centralized or government controlled legal order, and 2) a decentralized, or community controlled legal order.

These two legal structures were developed from Weber's concepts of formal rationality and substantive irrationality and Damaska's concepts of the hierarchal and coordinate models of legal authority (Damaska 1975). In a liberal state the centralized or government controlled legal order is supposed to adhere to a policy of formal rationality. In a centralized legal order the administration of justice is supposed to respond only to specific acts and only the "unambiguous general characteristics are taken into account." (Weber 1987 657) According to Balbus (1973 8):

.. the law in an ideal typical formal rational system takes no notice of the characteristics of the alleged offender; rich or poor, black or white, ideological dissident or staunch supporter of the existing order, all are held to be equal in the eyes of the court and all are guilty or innocent by virtue of their acts alone.

A centralized legal system operates on universal criteria. To guarantee certainty and uniformity in the decision making process,

the central government seeks to remove all nonlegal issues from that process. To enhance the use of universal criteria, such structural characteristics as the appointment of judges for long terms of office, authorization of the judge to conduct the *voire dire*, and the requirement of a law degree for all appointees are instituted.

In contrast, the decentralized or community controlled legal order operates on a basis of substantive irrationality. The community decides when justice is done, influenced by "concrete factors of the particular case as evaluated on ethical, emotional or political basis rather than by general norms." (Weber 1978 656) Particularist criteria guide the administration of justice in a community-controlled legal order. Assuring justice according to community standards incorporates such structural factors as the election of judges for short terms in office, making no educational requirements for judicial service, and authorization of lawyers to conduct the *voire dire* examination.

By hypothesis, the state's level of legal centralization will affect the forum decision. Centralized legal orders give the attorney a choice between community involvement in the decision by jury trial, or non-involvement, choosing the judge trial. In decentralized legal orders attorneys cannot rule out community sentiments in legal decision making. The community is involved directly through the jury trial, or indirectly through election of judges. *Hypothesis 4: Attorneys in centralized legal orders are more likely to advise the judge trial than are attorneys in decentralized legal orders.*

Interaction is predicted between the race of the client and the racial makeup of the community where the case is heard. Black offenders may prefer a jury trial when the case is heard in a black community (Eisenstein, Jacob 1979). Accordingly, a white offender in a black community may prefer the judge trial, and white offenders in white communities may prefer the jury trial where black offenders would prefer a judge trial.

Hypothesis 5: When the race of the client and the racial makeup of the community are similar attorneys will be more likely to advise jury trials. Attorneys advise the judge trial when the two differ.

This effect is expected to be mediated by the state's level of legal centralization in conjunction with race of client and racial makeup of the community.

In the centralized legal order the judge is an appointed official whose long term of office is not dependent on either performance at the polls or the assistance of local politicians. Authorized to conduct the voir dire examination of the jury, the judge controls courtroom operations. The only procedure which involves the community in judicial decisions is the jury trial. In the decentralized state, to maintain his/her office the judge depends on both the local politicians and the local voters. Attorneys conduct the voir dire, limiting the judge's control of courtroom operations. The choice between a judge trial and a jury trial determines whether the community is to be involved directly or indirectly in judicial decision making.

Hypothesis 6: In a decentralized legal order attorneys of black clients and white clients will give similar forum advice regardless of the racial composition of the community where the case is heard. Attorneys in centralized legal orders will be more inclined to advise clients on the basis of mesh between the client's race and the community's racial composition.

A four-way interaction between race of client, racial makeup of community, the state's level of centralization and the type of case is predicted. In highly inflammatory and serious cases such as those involving bodily harm, the media can sensationalize and arouse community sentiments. Here, attorneys should carefully consider whether to maximize or minimize the community's role in the legal process. In less serious cases, it is difficult to arouse or shock community sentiments. Thus the choice of whether to actively involve the community or minimize its role may be less crucial.

Hypothesis 7: Attorneys in decentralized legal orders are more likely to give similar forum advice to their black and white clients than are attorneys in centralized legal orders. In centralized legal orders attorneys base their forum advice on the mesh between the racial composition of the community, their client's race, and the type of case.

DATA AND METHODS

The data were collected in a mail survey, of summer 1978, from trial lawyers in Baltimore Maryland, Houston Texas, and New Orleans Louisiana. Maryland approximated the centralized model of legal authority. Trial judges are appointed by the governor for fifteen-year terms (Desk Book 1974). There are educational requirements for prospective judges. The voir dire can be conducted only by the judge (Van Dyke 1977). Texas approximates the decentralized model of legal authority. There judges are elected in popular elections to four-year terms, and there are no educational requirements. Attorneys are authorized to conduct the voir dire examination of the jury (Desk Book 1974; Van Dyke 1977). Louisiana is the only state which adopted the Napoleonic Code, and its structural features include both centralized and decentralized models of legal authority (Desk Book 1974).

Within each of these three states one area was selected with a large black population. Lawyers responding to the questionnaire had to have some knowledge of what it meant to represent a black client. To assess the effect of the racial composition of the community on the strategy decision, geographic areas were selected where adjacent communities were white, racially mixed, and black. In Maryland, Baltimore City is 47 percent black, Baltimore County is 3 percent black, and Anne Arundel County is 11 percent black. The Houston Standard Metropolitan Statistical Area (SMSA) of Texas contained three contiguous but racially different communities. Waller County is 53 percent black; Brazoria County is 9 percent black; and Harris County is 20 percent black. The New Orleans SMSA of Louisiana had three racially different contiguous communities. Orleans Parish is 45 percent black; St Bernard Parish is 5 percent black; and Jefferson Parish is 13 percent black. (US Census Bureau County & City Data Book 1972)

From these nine communities, lawyers were randomly sampled from the geographic rosters of two trial lawyer associations. From each state, 150 lawyers were selected; 75 were mailed a form saying they were counsel to a white client, and 75 were told they were counsel to a black client. The final sample included 182 attorneys, a 40 percent response rate. The analysis is based on a sample of

136, after cases were removed where data was missing on relevant variables. Of the 136 lawyers in this group, 3 were women and 5 were nonwhite. Demographic statistics for the attorneys were as follows: mean age, 40 years, $s = 9.9$; mean income from law practice, \$50,000, $s = 23,000$; 41 percent worked alone or in small firms of 2 to 5 persons; 29 percent worked in medium size 6 to 15 person firms. For their legal specialty, 43 percent said that civil or criminal trial work was primary; 10 percent said trial work was secondary. Years of legal and trial practice averaged 12.5.

The questionnaire was designed to tap the judge-jury strategy decisions or lawyers according to race of client and racial character of the community. They were given facts for a rape case, a simple assault case, and a civil eviction case. The rape case represented a serious personal injury crime. Forcible rape, defined as the carnal knowledge of a female forcibly and against her will, is listed among the seven most serious crimes in the United States (FBI Uniform Crime Reports 1978 13). The simple assault case represented the less serious personal injury crime. In a simple assault there is no intent to kill or inflict severe bodily injury. The eviction case represented a civil case, in the branch of law affecting relations between individuals, defining legal rights and obligations. In this civil case, the tenants of an apartment building were bringing suit for damages against a landlord who was seeking to evict them. Plaintiffs alleged that the eviction was sought to prevent their report of housing code violation to the authorities.

Two forms of the questionnaire were used. 1) Lawyers were told they were representing a black offender in the two criminal cases and the black litigants in the civil case. The victims in the criminal cases were white, and the defendant in the civil case was a white landlord. 2) Lawyers were told that they represented white offenders with white victims in the criminal cases and a white litigant with a white defendant in the civil case. In both forms, lawyers were told to assume that their clients refused to plea bargain in the criminal cases or to settle out of court in the civil case.

Previous research shows that offenses committed by blacks against whites are considered the most serious, offenses committed by whites against whites the next most serious,

offenses by blacks against blacks the less serious, and offenses committed by whites against blacks the least serious.

Lawyers were asked to indicate their judge - jury strategy decision for the rape case, the simple assault case, and the eviction case when the trial was to take place: 1) in the predominantly black community; 2) in the racially mixed community; and 3) in the predominantly white community in Maryland, Louisiana, and Texas.

RESULTS

Lawyers representing black clients appear more likely to advise judge trial than lawyers of white clients, in support of Hypothesis 1 ($F = 3.46$; $p = .065$). As predicted, the responses of lawyers reveals that the trial forum is linked to the state's level of legal centralization. Attorneys in a highly centralized legal order are more likely to advise the judge trial than those in a decentralized legal order, as stated in Hypothesis 4 ($F = 17.38$; $p = .001$).

The impact of the racial composition of the community on the judge or jury decision is in the predicted direction. Lawyers with clients in black communities are the least likely to advise the judge trial, while those in racially mixed or predominantly white communities are more likely to select the judge trial, as stated in Hypothesis 2 ($F = 21.51$; $p = .001$). Thus lawyers with clients in black communities are more favorable to direct involvement of the community by jury trial. Supporting Hypothesis 3, the effect for the type of case indicates that for the less serious criminal offense, attorneys prefer the judge trial, and for the more serious offense they prefer the jury trial. The degree of preference for the civil case falls between that of the two criminal cases ($F = 14.39$; $p = .001$).

The interaction between race of client, racial makeup of community, level of legal centralization, illustrated in Figure 2, is significant, as indicated in Hypotheses 6, and 7 ($F = 1.98$; $p = .047$).

With the higher level of centralization attorneys of white clients base their forum decision on the type of case. In Texas, the most decentralized state, lawyers of white clients are not influenced by either the type of case or the racial makeup of the community in their forum decision. The jury trial is

FIGURE 1: JUDGE TRIAL PREFERENCE (%) BY CENTRALIZATION, CLIENT, COMMUNITY & SERIOUSNESS

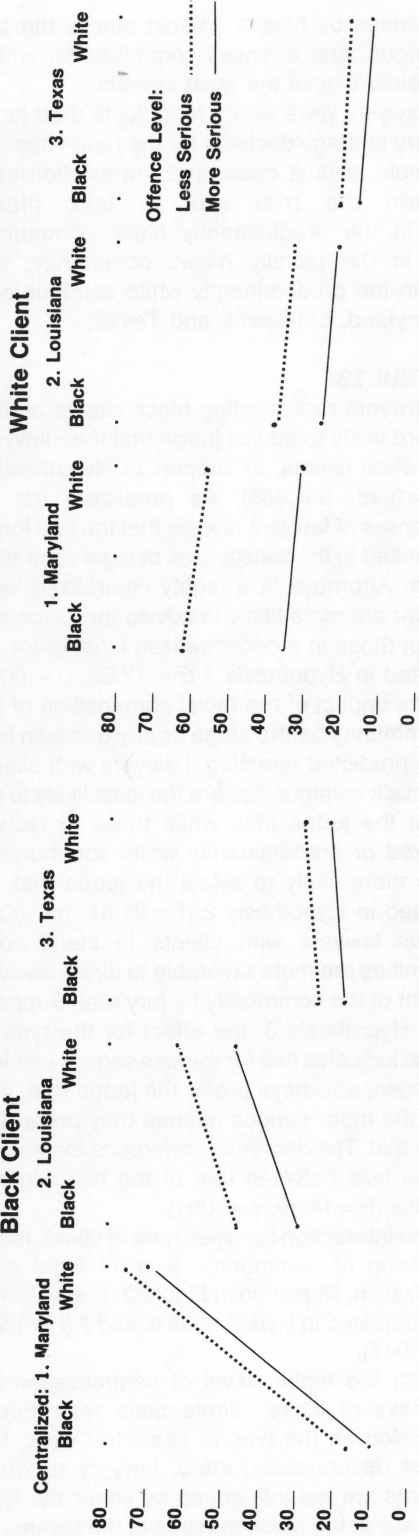
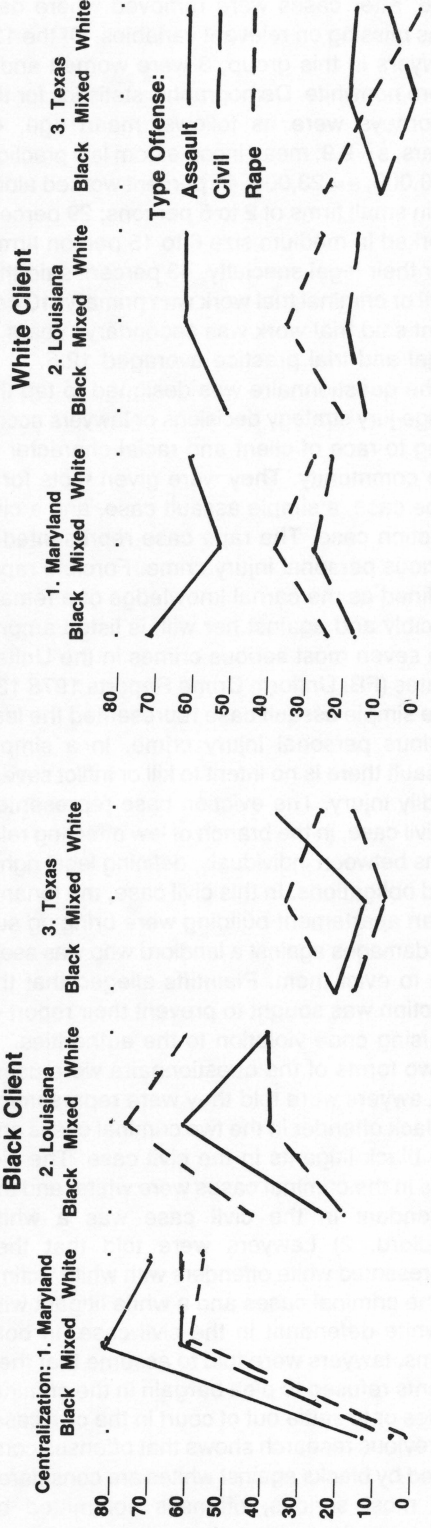


FIGURE 2: TRIAL JUDGE PREFERENCE (%) BY CENTRALIZATION, CLIENT, COMMUNITY & TYPE CRIME



always preferred. In Louisiana, and still more in Maryland, the most centralized state, attorneys of white clients clearly base their forum advice on the type of case. Regardless of the community racial makeup, attorneys of white clients advise a judge trial for the assault case and a jury trial for a rape or eviction case.

The emergent pattern of advice with attorneys of black clients is very different. They are not inclined to make strategy decisions based on type of case. With higher levels of legal centralization, attorneys of black clients base forum advice on the community's racial character. In Texas, attorneys of black clients do not distinguish between judge and jury trial based on racial composition of the community or the type of case. Texas attorneys always advise a jury trial. In Louisiana the emerging pattern shows that attorneys for blacks rely on the community racial makeup in the forum decision. This pattern is clear in Maryland, the most centralized state. Attorneys for black clients in Maryland base the judge - jury decision on the community racial character. Regardless of the type of case, the judge trial is advised in predominantly white and racially mixed communities, and the jury trial is advised in black communities.

CONCLUSION

Both the structural character of the legal order and the racial components of a case are important factors in the attorney's judge - jury advice. There is need for further research. This study examined two situations: 1) a situation where an attorney represented a black client in an interracial case; and 2) a situation where an attorney represented a white client in an intraracial case. What about the other cells of the matrix? What happens when attorneys represent white clients in interracial cases and black clients in intraracial cases? With increasing levels of centralization, do attorneys of black clients involved in intraracial cases become increasingly concerned with the racial composition of the community, or does the type of case gain importance in arriving at the forum decision? Similarly, with increasing levels of centralization, what factors influence the advice lawyers give white clients involved in interracial cases? Does the type of case remain as the major variable in the judge - jury decision, or does the racial

composition of the community gain in importance?

A second area for future inquiry is the congruence between the forum strategy which attorneys claim to advise and what they actually do advise. An examination of docket data might allow for a comparison of attorney's theoretical advice and their actual strategy decisions.

Since most cases do not go to trial, a third area of inquiry is the extension of options given to lawyers in plea bargaining. Is the choice between the type of trial and plea bargaining affected by the race of the client, the racial character of the community, the state's level of legal centralization, and the type of case?

Finally, a new concept was developed in this research: the state's level of legal centralization. Based on Weber's work, I developed a variable to study empirically a highly centralized rational system of law as compared to a decentralized system. Since this variable did affect the forum decision in the predicted direction, its validity and utility for research seems to be indicated. A literal operational replication of this study is needed to assess further the validity and reliability of the concept.

REFERENCES

- Alker H, C Hosticka, M Mitchell 1976 *Jury selection as biased social process: The case of Eastern Massachusetts. Law & Society Rev* 11 9-41
- Balbus I D 1973 *Dialectic of Legal Repression: Black Rebels before American Courts*. NY Sage
- Blumberg A 1973 *Law and Order: The Scales of Justice*. New Brunswick NJ Transaction Books
- Broeder D W 1965 *The negro in court. Duke Law Rev* 17-31
- Canon B C 1972 *Impact of formal selection procedure on characteristics of judges. Law & Society Rev* 6 579-593
- Casper J D 1972 *American Criminal Justice: The Defendant's Perspective*. New Jersey Prentice Hall
- Cleaver E 1968 *Soul on Ice*. New York Delta
- Comment 1970 *The case for black juries. Yale Law Rev* 70 531-550
- Damaska Mirjan 1973 *Evidentiary barriers to conviction and two models of criminal procedure: A comparative study. Pennsylvania U Law Rev* 121 505-589
- Desk Book 1974 *Documents* 69, 70, 72, 73, 93, 96, 97.