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FIJA

Monkeywrenching the Legal System

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You are a juror. These are the facts:

- A young man is permanently paralysed from the neck down in a motorcycle accident. He is in unspeakable agony which will continue for the rest of his life. He begs his younger brother to kill him. The brother does, as he later explains, out of love. The charge: first-degree murder.[1] What is your verdict?

- An unemployed black teenager, raised in a fatherless welfare family, robs a liquor store. When the white proprietor draws a gun, the startled youth shoots and kills him. The prosecutor asks for the death penalty. The charge: first-degree (felony) murder. In this Southern state, the jury determines guilt or innocence, but the judge sets the penalty.[2] You know that it is more than twice as likely

[1] Paige Mitchell, *Act of Love: The Killing of George Zygmanik* (New York: Alfred A. Knopf, 1976).

[2] As in Florida, Fla. Stat. Ann. § 921.141. The judge makes the death penalty decision in seven states altogether. Welsh S. White, *The Death Penalty*

that a black who has murdered a white will be sentenced to death than if his victim were black.[3] What is your verdict?

- A wife has suffered years of violence at the hands of her husband, a foreign-born physician. One morning, after beating her, he threatened her with a gun and ordered her out of the house. When he put the gun down, she picked it up, shouting that "I am not going to leave you, I mean it," and shot him to death. The charge: second-degree murder. The defense: self-defense.[4] What is your verdict?

- A cocaine addict becomes a dealer in order to support his habit. During a traffic stop, police discover 1.5 pounds of cocaine. The charge: possession (not possession with intent to sell) of more than 650 grams of cocaine. In this state — and in this state alone — the penalty for this offense, even a first offense, is mandatory life imprisonment without possibility of parole.[5] What is your verdict?

- A college student publicly announces his refusal to register with the Selective Service System. A libertarian, he believes conscription is a violation of natural law and his

in the Nineties: An Examination of the Modern System of Capital Punishment (Ann Arbor, Mich.: The University of Michigan Press, 1991), 92 n. 2.

[3] McCleskey v. Kemp, 481 U.S. 279 (1987) (upholding a Georgia death sentence despite statistical proof of such a disparity); James R. Acker, "Social Sciences and the Criminal Law: Capital Punishment by the Numbers — An Analysis of *McCleskey v. Kemp*," *Criminal Law Bulletin* 23 (Sept.-Oct. 1987): 454–482; see generally Gregory D. Russell, *The Death Penalty and Racial Bias: Overturning Supreme Court Assumptions* (Westport, Conn.: Greenwood Press, 1994).

[4] Ibn-Tamas v. United States, 455 A.2d 893 (D.C. 1983); Ibn-Tamas v. United States, 407 A.2d 626 (D.C. 1979).

[5] Harmelin v. Michigan, 111 S. Ct. 2680 (1991) (upholding such a sentence as not constituting cruel and unusual punishment).

natural right of self-ownership of his person. As a male between the ages of 18 and 26 he is, nonetheless, required to register. The charge: nonregistration (a felony).[6] What is your verdict?

If in every one of these cases your verdict is "guilty," you were — legally — absolutely right. And you are everything the law requires of a good juror: a good soldier who is "only obeying orders," as the Nuremberg defendants used to say. In a jury trial, the orders are known as "instructions." The judge informs the jurors what he considers the applicable law to be, and tells them to apply this judge-chosen (and often judge-made) "law" to the "facts." Not all the facts, though — just the ones the judge allows the jury to "find" — facts filtered through the world's most complex rules of evidence by (guess who?) the judge.[7] No juror, for example, ever gets to ask a witness a question she considers "relevant" and "material." Nor may she make use of any facts about the case (even if they are relevant) learned out of court. Indeed, had it been known she possessed any such information, she would not have been allowed to be a juror at all. Even some information the jurors did acquire in court they will be, again, "instructed" to ignore if it was something the judge thinks the witness should not have said.

Thus, trial by jury as the judges envision it today is a black box set-up. The judge-given law is the box. The judge-filtered facts are put into the box. The verdict (and, in about 13 states,

[6] For some reasons for the legal futility of these moral claims, see L.A. Rollins, *The Myth of Natural Rights* (Port Townsend, Washington: Loompanics Unlimited, 1983); Robert Anton Wilson, *Natural Law, or, Don't Put a Rubber on Your Willy* (Port Townsend, Washington: Loompanics Unlimited,).

[7] A lawyer, an expert in the field, referred to American rules of evidence as "the most careful attempt to control the processes of communication to be found outside a laboratory." E.W. Cleary, "Evidence as a Problem in Communicating," 5 *Vanderbilt Law Review* (1952), 282.

also the sentence[8]) comes out of the box. But if this is all there is to the jury's role, trial by jury is obviously a costly, inefficient anachronism; no wonder the rest of the world has largely done away with it. The judge might as well "find" the facts himself, as indeed he does in the "bench trials" which comprise about one-third of all criminal trials.

Trial by jury would have gone the way of trial by ordeal or trial by battle except for one thing: the United States Constitution. In no less than three places the Constitution guarantees the right of trial by jury in certain civil and criminal cases.[9] Clearly the Founding Fathers envisioned a wider role for the jury than the judges now allow — and the historical record reveals exactly what juries then did and what they were supposed to do.

From the colonial era until well into the nineteenth century, American juries were judges of "law" as well as judges of "fact."[10] This meant two things. First, juries didn't have to take the judge's word for it as to what the law was. This made good sense at the time. Most judges were not even lawyers; most lawyers for that matter were self-taught and less than learned in the law; and the sources of the law weren't readily available (publication of judicial "opinions" was barely beginning).

Second, and more important, a jury had the right to "nullify" the law — to return a verdict in favor of a defendant even if, on the facts and given the applicable law, he was guilty of a crime or liable for damages in a civil suit. If the jury thought the applicable law was bad law, or ought not to be applied in the particular circumstances of the case, it nullified the law in

[8] Rita J. Simon, *The Jury: Its Role in American Society* (Lexington, Mass.: Lexington Books, 1980), .

[9] Art. II, § 2; Am. VI; Am. VII; see also n. 19, *infra*. Similar provisions appear in all state constitutions.

[10] Lawrence M. Friedman, *A History of American Law* (2d ed.; New York: Touchstone Books, 1985), 155–156; Kermit L. Hall, *The Magic Mirror: Law in American History* (New York: Oxford University Press, 1989), 107–108.

drugs, guns — the best things in life are free! Or soon would be. And where society is morally polarized it will be legally paralysed. There will be no point prosecuting pro-life or pro-choice "criminals": they will have to fight out their differences directly. The legislating of morality or ideology might not soon cease, but it might dwindle to a source of only symbolic satisfaction. That will be how anarchy returns, if it ever does. The state will not be overthrown — just ignored. Perhaps the criminal justice system will persist, shorn of state power, as a game — like chess, or Dungeons & Dragons. And the American Bar Association can merge with the Society for Creative Anachronism.

the case at hand by finding for the defendant. Jurors could, and sometimes did, vote their consciences. Probably not very often. Most jurors don't, and never did, have any principled objections to laws against murder, rape, robbery, reckless driving and so forth. Most crimes are not, for instance, by any stretch of the imagination "victimless." And most jurors are not anarchists. But in a legal system otherwise completely dominated by officials and professionals, the jury — a temporary body of citizen-amateurs — still has the power to thwart the state. Here and only here "the people," not their "representatives" or "public servants," wield power directly.

For though the judges from the U.S. Supreme Court on down[11] have nullified the jury's "right" to judge the law, they affirm its power to do so. This is no verbal quibble. If nullification were a right, jurors would be "instructed" about it — but such instructions, requested by defendants, are always refused. Indeed, prospective jurors (prospective jurors take note!) who reveal their knowledge of the power are apparently routinely disqualified.[12] Yet the power is real. To say that jurors have the nullification power means that, if they use their power, they will get away with it. They cannot be prosecuted or punished. They cannot be sued or in any way held to answer for what they do in the privacy of the jury room. Nor are they susceptible to the informal controls, the interaction patterns which transform the courtroom regulars into "work groups" of professionals with shared understandings and with a common interest in moving the cases along.[13] Once they return a

[11] Sparf and Hansen v. United States, 156 U.S. 51 (1895); United States v. Dougherty, 473 F.2d 113 (D.C. Cir. 1972).

[12] *E.g.*, Kathy L. Harrer, "Fun With FIJA in Federal District Court," *The FIJActivist* No. 12 (Summer 1993), 18 (reprinted from the *Arizona Libertarian*).

[13] James Eisenstein and Herbert Jacob, *Felony Justice: An Organizational Analysis of Criminal Courts* (Boston: Little, Brown and Company, 1977), chs. 2 & 3.

verdict the jurors go home, probably never to return. They of course don't have to subordinate law to justice — but they're the only actors in the system who can do so with impunity.

In just a few years a grass-roots movement has sprung up whose aim is to restore to the jury as a right the power it still has to nullify the law: FIJA. FIJA stands for three things. It is an organization, the Fully Informed Jury Association. It is a proposed (Federal and/or state) constitutional amendment, the Fully Informed Jury Amendment; and it is proposed legislation, the Fully Informed Jury Act, to implement the amendment. FIJA (the amendment) exists in short and long ("Maxi-FIJA") versions — this is the short form: "Whenever government is one of the parties in a trial by jury, the court shall inform the jurors that each of them has an inherent right to vote on the verdict, in the direction of mercy, according to his own conscience and sense of justice. Exercise of this right may include jury consideration of the defendant's motives and circumstances, degree of harm done, and evaluation of the law itself. Failure to so inform the jury is grounds for mistrial and another trial by jury."[14] So worded, FIJA would apply to some (not many) civil actions, but this analysis will be confined to FIJA's impact on criminal cases.

FIJActivists are a disparate lot with, it may be, inconsistent or unrealistic expectations as to what the Amendment would actually accomplish. Libertarians apparently expect nullification in regulatory and victimless-crime cases. So-called Constitutionalists evidently expect that fully informed jurors would sympathize with their peculiar ideas about taxation, legal tender and other issues. Some ethnic activists are interested in FIJA as a check on the racial bias they perceive in the legal system. And assorted legally aggrieved individuals suppose that they would have fared better with a fully informed jury. There

[14] *'FIJA' Jury Power Information Kit* (Helmville, Montana: Fully Informed Jury Association, n.d.), 2.

cannot predict (or agree on) what the verdict will be. Under FIJA there will be more such cases, and therefore more trials. The more trials there are, the more acquittals there will be, if there are any cases at all (there must be some) in which the jury acquits where the defendant would formerly have taken a plea. And the more often defendants win at trial, the more often other defendants will go to trial. There is no telling how big the snowball will get or how far it will roll.

The business-as-usual of the legal system already strains the resources of a society which wasted its money-to-burn on wars, bailouts and previous bouts of throwing money at cops, courts and corrections. They just keep coming back for more, but there isn't much more. Possibly there are nations so rich, so homogeneous and so law-abiding — Sweden or Singapore, perhaps — that they could afford our sort of system. But we can't. Especially post-FIJA.

The difference that many more jury trials before fully informed juries would make is not that jurors understand the law better than judges and lawyers (that is ridiculous). Or that they are better triers of fact (there is probably not much difference). Or that they do, and others don't, consider motives and circumstances and temper law with equity. The crucial difference is this: the courtroom regulars have vested interests in the system itself. No case matters in any way nearly as much as expediting all the cases. In the informal, the working system, "the network of interactions is largely defined by the perceived interests of the primary participants — judges and attorneys. The dominant interests are (1) systemic and individual efficiency in the use of time and (2) inter-party cooperation and accomodation."34 Even less than the defendants do the jurors have a stake in the ongoing system. Because being a juror means never having to say you're sorry.

My best guess is that FIJA would break down the legal system unless the insiders adapted, as they surely would, by beating a strategic retreat from entire sectors of social life. Sex,

Prosecutors will soon learn to charge lesser offences or none at all.

Is it even possible to have a criminal justice system in which trials — and jury trials — are the norm? The answer is yes. Such systems operated in pre-modern England and America. They were tolerably effective, so far as historians can tell, for two reasons. The first is that defendants had few rights. The second is that defendants had no lawyers. In England, accused felons had no right to counsel (those accused of misdemeanors had the right but rarely had lawyers). Until after the Civil War, American criminal defendants lacked even the right to testify, to say nothing of all the other rights bestowed on them in recent decades.33 Trials were short and usually held in batches. Verdicts were usually rendered immediately (often juries didn't even retire to deliberate), and punishment swiftly followed — most felons were hanged within a day or two.

This regime, which may well have for some readers considerable appeal, is now legally impossible. In all but the most trivial criminal cases defendants now have the right to (retained) counsel, and indigent defendants — most of them — have the right, at the trial level and in some cases on appeal, to government-appointed counsel. And the right to counsel is the right that effectuates all the others. Of the 23 specific guarantees of the Bill of Rights, a majority — 12 — pertain to criminal justice. The decisional law based on these guarantees is vast and complex — which is more important, in terms of system impact, than whether this or that doctrine is pro- or anti-defendant. And under FIJA, any adverse ruling by the judge can always be reargued to the jury — including those (such as motions to exclude illegally obtained evidence) which are rendered in the jury's absence. For the first time in history, juries will actually have access to nearly all the information that the judge and the lawyers do as well as the right to act on it as they see fit. It is already true that trials take place, when they do, especially in cases where the professionals

is even some support for jury nullification instructions from legal academics,[15] although I have found no reference to FIJA itself in law texts and journals.[16]

My interest in FIJA is different. One court in refusing to give jury nullification instructions claimed that jurors already know of their nullification powers — a blatant falsehood — but that "to institutionalize these powers in routine instructions to the jury would alter the system in unpredictable ways."[17] I think FIJA might well "alter the system" — that's the point! — but perhaps in predictable ways.

Many FIJActivists sincerely desire the return of a Golden Age of upright yeoman jurors and adversarial justice that probably never was. Historically, some juries did nullify prosecutions based on religious bigotry (William Penn) or political persecution (John Peter Zenger). Juries nullified cases against fugitive slaves in the 1850s and bootleggers in the 1920s. But other juries condemned John Brown and the Haymarket anarchists and Sacco and Vanzetti and the Scottsboro Boys and Leonard Peltier. It won't do to romanticise the jury. Judges agree with the great majority of jury verdicts.[18] After all, most cases, civil and criminal, are pretty cut-and-dried. An extensive body of

[15] *E.g.*, A Schelfin and A. Van Dyke, "Jury Nullification: The Contours of a Controversy," 43 *Law & Contemporary Problems* (1980): 51–115.

[16] Based on a recent (1994) term search of the TP-ALL (Texts & Periodicals) database of the computerized legal research program WESTLAW.

[17] United States v. Dougherty, *supra*, 473 F.2d at 115. In other words, jurors are presumed to be ignorant of every single principle of law except one — their power to nullify all the others! Jury simulation research confirms the common-sense intuition that FIJA-like nullification instructions *do* affect some verdicts. Irwin A. Horowitz, "The Effect of Jury Nullification Instructions on Verdicts and Jury Functioning in Criminal Trials," 9 *Law & Human Behavior* (1985): 25–36.

[18] Harry Kalven, Jr. and Hans Zeisel, *The American Jury* (Boston: Little, Brown and Company, 1966), 56–57 (approximately 75% agreement).

research confirms that juries assign highest importance to just what the system asks them to pass upon — the evidence.[19]

And yet — and yet — the jury is unlike any other institution of government. The same U.S. Supreme Court which opposes jury nullification instructions paradoxically agrees with the FIJActivist premise that "[a] right to jury trial is granted to criminal defendants in order to prevent oppression by the government."[20] A black-box jury can do nothing of the sort.

If there is any place to sabotage the system from within, this is probably it. But if FIJA has any potential as a monkey-wrench it will have to be estimated, not by some constitutional or moral ideal, not by the "law on the books," but by what Roscoe Pound called the "law in action" — the real world of the present-day criminal justice system.

The first lesson to be learned about the real-world criminal justice system is that trial — much less trial by jury — is the exception, not the rule. Only about 10% of felony cases go to trial. An almost imperceptible fraction of misdemeanor cases go to trial.[21] One-third of felony trials are, by request of the defendants, bench trials (nonjury trials). The vast majority of cases are either dismissed or else resolved by guilty pleas (often, but not always, pleas to lesser charges). There is a popular misconception that plea-bargaining is necessitated by heavy caseloads. It isn't. Plea-bargaining is about as fre-

[19] Kalven & Zeisel, *supra* n. 17, at 162; Diane L. Bridgeman and David Merlowe, "Jury Decision Making: An Empirical Study Based on Actual Felony Trials," 64 *Journal of Applied Psychology* (1979), 97–98.

[20] Duncan v. Louisiana, 391 U.S. 145 (1968) — the case which held that the Fourteenth Amendment guarantees *state* criminal defendants a jury trial in every case where Federal criminal defendants would be entitled to one under the Sixth Amendment.

[21] In a leading study of a misdemeanor court the sample of hundreds of cases analysed included *no* trials at all! Malcolm M. Feeley, *The Process Is the Punishment: Handling Cases in a Lower Criminal Court* (New York: Russell Sage Foundation, 1979), 127.

comes.[31] But the influence of community values is mediated by system professionals, not by the jury whose distinctive contribution is supposedly its independent access to those very values, undistorted by the system-maintenance interests of the courtroom professionals.

But even a relatively small increase in trial rates would have a tremendous impact on most courts, as it did in New York. Some cases which would have been pled out in minutes will take days to try. Prosecutors and judges will make mistakes, some of them grounds for a mistrial or reversal on appeal. (Somebody has estimated that in the typical trial there is a technical violation of the rules of evidence every 30 seconds.) Trials will take longer because the range of relevant evidence is widened by FIJA. In fact, an inevitable by-product of FIJA would be the junking of most rules of evidence (which were mostly invented to empower judges to keep juries from doing what FIJA authorizes). For example, rape shield laws forbidding consideration of a rape victim's previous sexual history would presumably have to go.

FIJA would probably call a halt to the nefarious fad for mandatory minimum sentences for possessory crimes. In Michigan, for instance, the penalty for mere possession of over 650 grams of cocaine is the same as the penalty for first-degree murder: life imprisonment without possibility of parole. The U.S. Supreme Court has held — unbelievably — that this is not "cruel and unusual punishment."32 But even in this period of renewed anti-drug hysteria, there will probably be several members of almost any jury who will nullify this barbaric law. Defendants charged with this offence have every incentive to exercise their right to trial by jury at which, under FIJA, it is also their right to argue that the law is immoral or unconstitutional, no matter what the Supreme Court says.

[31] Vera Institute of Justice, *Felony Arrests: Their Prosecution and Disposition in New York City's Courts* (rev. ed.; New York: Longman, 1981).

dispositions. The conviction rate was generally unaffected, but there were indications that there was more screening-out of weak cases after the prosecutor put an end to explicit plea negotiations.[30]

Here is a scenario — a legal impact statement on FIJA — consistent with common sense and extant empirical studies and omitting the qualifiers and "maybes" to make the main points. FIJA would increase the number of jury trials. Increasing the number of jury trials would increase the number of dispositions favorable to defendants, whether acquittals (as in "Vario County," California) or dismissals (as in New York) or prosecution decisions not to proceed in weak cases (as in El Paso, Texas). And it would decrease the rate of dispositions — potentially a serious problem for prosecutors, since the Constitution guarantees to most criminal defendants the right to a speedy trial. It will not take the legal professionals of the courtroom work groups very long to calibrate a new equilibrium. They will sort out the many cases where appeals to conscience would be ludicrous from the few which would get a boost from FIJA. A prosecutor would rather drop the charges than lose a case. A judge or defense attorney would rather he dismiss that case too and save them all a lot of unnecessary trouble. He will dismiss the case.

If that is all FIJA accomplished it wouldn't matter much. FIJActivists appear to be largely unaware that some of the extralegal circumstances which are withheld from juries already routinely figure in the discretionary choices of police, prosecutors and judges — for example, the prior relationship between victim and criminal is an important influence on felony out-

[30] Malcolm D. Holmes, Howard C. Daudistel and William A. Taggart, "Plea Bargaining Policy and State District Court Loads: An Interrupted Time Series Analysis," 26 *Law & Society Review* (1992): 139–159. One wonders whether the generally unchanged conviction rate masks any ups and downs in convictions for various *kinds* of cases.

quent in low-caseload courts as in high-caseload courts.[22] Historical evidence suggests that plea-bargaining is nothing new — that it goes back at least to the later nineteenth century,[23] when caseloads were light. Interestingly, that is the very period in which the judiciary accelerated its encroachment upon the jury's legal autonomy. Both trends — toward pretrial dispositions and toward judge-controlled juries — had a common consequence: the resolution of cases by legal professionals, not ordinary community people.[24]

What does this have to do with FIJA? Only everything. Without a trial there is no trial by jury. Without a trial by jury, FIJA is irrelevant. FIJA would matter if, and only if it made a difference, not only in what juries do, but in how often cases go to trial. There is evidence that juries usually agree with judges but that when they do not, the direction of the difference is usually, as FIJA presupposes, in the direction of leniency.[25] And there is evidence that juries given nullification instructions do, in certain sorts of cases — murder prosecutions for mercy-killing, for instance — override the letter of the law,[26] as FIJActivists hope and expect they would. FIJA would, then, probably make some difference in what juries do, on the relatively infrequent occasions they get to do anything.

[22] Feeley, *Process*, ch. 8; Milton Heumann, *Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys* (Chicago: University of Chicago Press, 1978), 157 & *passim*.

[23] Lawrence M. Friedman, *Crime and Punishment in United States History* (New York: Basic Books, 1993), 251–252; Kermit L. Hall, *The Magic Mirror: Law in American History* (New York: Oxford University Press, 1989), 183–184.

[24] Not that I want to indulge in the romanticism I say some FIJActivists exhibit. Local powerholders have often had much influence over jury selection, and discrimination in jury selection on many bases — race, class, gender, ideology — was long lawful and still occurs unofficially. But the ideal of the jury as representative of the community *as opposed to* the state apparatus still has some vitality.

[25] Kalven and Zeisel, *supra* n. 17, at 58.

[26] Horowitz, *supra* n. 17.

But would it lead to more jury trials? And if it did, what would that lead to?

Although criminal trials are exceptional, they set the standard for the terms of the far more numerous pretrial dispositions. It is with reference to what probably would happen at trial that prosecutors, defense attorneys and sometimes judges arrive at a "going rate" for a particular offense, sometimes by bargaining, but often also by arriving at an implicit consensus. As Malcolm Feeley puts it, the expression "plea bargaining" is often misleading insofar as it suggests haggling over the price of a particular product in an Oriental bazaar. There is some of that, but the better analogy is the supermarket where prices are, to be sure, determined by prior trends in supply and demand but which are normally not negotiated at the checkout stand.[27] A criminal conviction is a sort of anti-commodity: you pay a fixed price, not to obtain it, but not to obtain it.

If the criminal justice system is a commodities market, its currency is time. No one ever has enough of it, not because everybody is swamped with work, but because none of the courtroom regulars sees any reason to waste his time and antagonize his counterparts by aggressively litigating any case (and this is the typical case) whose outcome is a foregone conclusion. All the professionals have an interest in moving their caseloads — it is almost their only objective measure of accomplishment, and accomplishments which cannot be measured do nothing for anybody's career. The partial exception is the prosecutor, for whom the conviction rate is a still more crucial pseudo-objective measure of performance. But the prosecutor is at least as zealous for negotiated settlements as anybody else, since a plea-bargain guarantees a conviction for something, whereas at trial there's a risk, if not a very high risk, of acquittal. Plea bargains also insulate the police, on whom prosecutors rely to supply defendants to prosecute and evidence to convict them,

[27] Feeley, Process, 185–196.

from any accountability for their illegal arrests, searches and seizures, to say nothing of their gratuitous brutalities. These rights violations strengthen the defense attorney's bargaining hand — that's part of the game — but get traded away for better deals. But whether a defendant gets a good deal or a bad one, too harsh or too lenient, no jury has any say in the matter. Unless FIJA has some serious impact on these entrenched arrangements, it might still be a worthy if marginal reform but it is likely to disappoint FIJActivists and antinomian monkey-wrenchers.

How might jury trials, if there were more of them, change the outcomes of cases? In New York, the Rockefeller drug law of the early 1970s mandated harsh penalties (and limited plea bargaining) for even minor first-time offenses. Judges no longer inflicted harsher penalties on those convicted after a trial than on those who copped pleas. Having nothing to lose, more defendants went to trial — 15%, up from 6.5% — overwhelming the system despite massive appropriations for new courts. After two years the worst features of the law were repealed.[28] In a California county at about the same time, one judge placed what the public defender's office considered unreasonable time limits on plea bargaining. In retaliation, the office took all felony cases to trial. Defendants won 12 out of 16 jury trials, although the defense attorneys would have accepted some sort of guilty plea in 9 out of 10 of those cases. The judge quietly abandoned his new rule.[29] A final example: a careful study of a natural or "quasi-experiment" in the banning of felony plea bargaining in El Paso, Texas, in 1975 resulting from a clash between the prosecutor and the judges. The ban caused a considerable increase in jury trials which was in turn largely responsible for a substantial (but gradual) decrease in

[28] Malcolm M. Feeley, *Court Reform on Trial: Why Simple Solutions Fail* (New York: Basic Books, 1983), 118–128.

[29] Lief H. Carter, *The Limits of Order* (Lexington, Mass.: Lexington Books, 1974), 109–110.