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Juris-Imprudence

Law and Disorder at the Texas Court of Criminal Appeals

by

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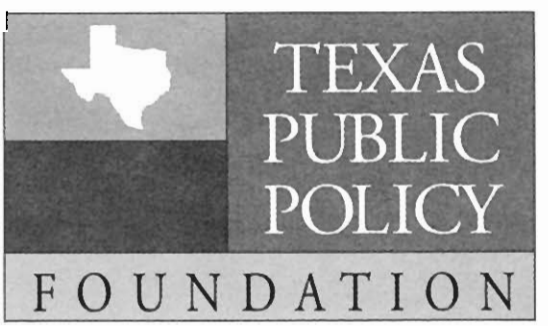

Executive Summary

JURIS-IMPRUDENCE: LAW AND DISORDER AT THE TEXAS COURT OF CRIMINAL APPEALS

DON R. WILLETT

All those hoping to creep into guaranteed obscurity just missed their chance. January 2 was the sign-up deadline for Texas' own version of the Federal Witness Protection Program —a/k/a membership on the Texas Court of Criminal Appeals, our State's highest criminal court. In the wilderness of Texas political life, the CCA delivers the impossible: instant camouflage.

Sadly, most Texans know zero about the CCA—charitably described as "the Rodney Dangerfield of the Texas judiciary"—or that we even have a separate high court for criminal matters. The Court welcomes the anonymity. The CCA, you see, has always had something of a pro-defendant tilt (much like Nolan Ryan has something of a pro-fastball tilt). Indeed, the CCA's notorious appetite for technicalities is the stuff of Lone Star legend. As celebrated Dallas prosecutor Henry Wade once grumbled, "We convict 'em on the front page; they reverse 'em on the back." And therein lies the problem.

The Gee family from Houston knows the CCA's slant all too well. A few years ago, Tracy Gee, the youngest of eight sisters, was shot with a military rifle while waiting at a neighborhood traffic light. Tracy's confessed killer, you see, was out of gas and looking for somebody to rob, "like in the movies," he said. The jury wasted little time convicting Tracy's admitted murderer. "Not so fast," said the Court Jesters, engaging in one of their infamous cosmic debates. Did a 60 Minutes exposé unearth new evidence exonerating the defendant? Hardly. Tracy's predator, it seems, was cruelly victimized because the jury pool was randomly shuffled twice instead of once. Fond of dispensing reversals like lemonade, and impervious to public criticism at its all-too-common reversals, the Court spoke: case reversed.

The Gees' unspeakable agony is shared by the family of 5-year-old Lottie Rhodes, who was plucked from her bedroom window before being raped, beaten, strangled, and left in a muddy ditch with greasy tire tread marks on her back. Lottie's murderer was likewise savaged, said the CCA, because prosecutors had the audacity to strike a prospective juror who admitted he was biased against the State. Case reversed . . . along with several other capital murder cases that were similarly infected by this virus-like precedent.

A vital part of our State's struggle against violent crime, this forgotten stepchild of Texas politics slinks along below the radar, issuing rulings that are, in Alice's words, "Curiouser and curiouser!" Thus, at a time when crime in Texas has become Public Enemy No. 1, when new surveys show that Texans fear crime more than other people, we fight Lone Star violence on two fronts: first against the predators who rape and rob and maim and murder our families, and then against a stealth Star Chamber that concocts silly ways to reverse their convictions.

It has always been thus. In 1910, the American Institute of Criminal Law called the CCA "one of the foremost worshipers among the American appellate courts of the technicality." Little has changed. The Court once ruled in favor of a man charged with drowning his wife because prosecutors neglected to say what she'd drowned in (water, hot chocolate, eggnog, or whatever). Two years later, the CCA sided with a man convicted of "kicking and stomping" an elderly woman to death because the State didn't say that he did so with his feet. And then there are the Court's really bizarre decisions . . .

Courtesy of Texas' Yogi Berra-designed judicial system (the only truly bifurcated scheme in the nation), we suffer a specialized Court whose members fancy themselves to be criminal law "experts." In this case, though, Texas' rugged uniqueness is a source of ridicule, not pride. Drunk with minutiae, the Court wields its analytical micrometer and breathes in technicalities as if they were air. To this judicial appendix, the

forbidden "t-word" (technicality) is muttered only by the ignorant, unwashed masses who are unschooled in legal niceties. The imperial Court prefers a judicial game of "gotcha," where truth-seeking and justice-doing have become collateral luxuries.

In this era of leaner government and a crime-weary citizenry, the CCA is sporting an irresistible and well-deserved bullseye. Indeed, even those unbothered by the Court's passion for reversing open-and-shut cases on fanciful grounds agree that a unified judiciary is best for Texas. So does every blue-ribbon commission that has ever examined our State's convoluted court structure. Why? Structural sanity. The Texas judicial "system" is Byzantine at best, and our twin high courts is a particular anomaly. The clutter is so bad that even the Attorney General's office (the "law firm of Texas") sometimes doesn't know which court has jurisdiction over a given case. History is replete with needless jurisdictional and interpretive clashes between our dual high courts. Governors, legislators, lawyers, journalists, the families of victims (remember them?), and even CCA judges themselves have offered spirited attacks on our crazy-quilt scheme.

Countless studies have chronicled the imperative need for visionary, top-to-bottom judicial reform, including consolidation of our two high courts. State Senator (and former prosecutor) John Montford dislikes the system's myriad inefficiencies, and he's currently touting a pristine, condensed Constitution for the next millennium that features a single high court.

Long ago, Governor Sull Ross described the "destruction of public confidence in the judiciary" as the "greatest curse" that could ever befall Texas. Texas is befallen. Nobody disputes that the bedrock protections afforded personal liberty deserve zealous defense. But the Court's myopic sacrifice of truth on the altar of triviality ignores that average, working Texans (i.e., nice people) have rights too. We must, as Cardozo implored, "keep the balance true."

It won't be easy. The road to meaningful change is littered with prize oxen, those who, as Machiavelli put, "profit by the old order." Giving life to the adage that there are, in ascending order of deception, "liars, damned liars, and statisticians," defenders of the current chaos will trot out rigged numbers and drip on with a straight face about how pro-prosecution the Court is. They need to go lie down. The Court's pockmarked historical record—one of "trial by technicality"—is clear. And the CCA's pedantic approach forgets that an individual crime is not some electronic blip in a data base; it's a violent eruption that shatters people . . . and each one matters beyond measure. The Court's rebuff of common sense harms us in transcendent ways that can never be measured.

One of the scariest sentences Texans can read often begins, "The Texas Court of Criminal Appeals decided yesterday that . . ." Indeed, the long arm of Texas law is in a sling. The CCA is in the business of creating miscarriages of justice, not preventing them. And after 120 years, business continues to boom. Watching the CCA mock justice by exalting form over substance and inventing new ways to return predators to our streets inspires nothing but fury. Enough is enough; a century-plus of Texas-sized silliness is plenty. Only criminals and inefficiency would suffer in the Court's absence.

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We convict 'em on the front page;
they reverse 'em on the back.[1]

And therein lies the problem. The 13 words quoted above, courtesy of Henry Wade, the celebrated former Dallas County District Attorney, express the uniform frustration of Texas prosecutors. The object of their exasperation? The Texas Court of Criminal Appeals ("CCA"), the Lone Star State's highest court for criminal matters,[2] which has something of a pro-defendant tilt (much like Nolan Ryan has something of a pro-fastball tilt).

While the Texas Department of Criminal Justice—the board governing our corrections system—often fields the blame for *another* capital murder, *another* drive-by shooting, *another* car-jacking, a separate and even more critical part of Texas' criminal justice system slinks along, rarely subject to the public's outrage. Indeed, aside from those who practice before it, the Court of Criminal Appeals remains one of our State's best kept secrets, the forgotten stepchild of Texas politics.

Unlike its sister court, the Texas Supreme Court, the CCA doesn't entertain high-profile cases involving monied interests.[a] Except for the small fury accompanying an all-too-common reversal, the Court's caseload of murders, rapes, and burglaries rarely attracts voters' attention. But having the final say in all criminal matters—from traffic tickets to capital murder—the CCA plays a vital role in our losing struggle against violent crime. And its rulings guide the actions of subordinate criminal courts. Which is too bad, since the Court has never mirrored our State's intolerance for crime and criminals.

Under Siege ... And Then Some

Texans live in a State doubly besieged. First, criminals commit crimes. Then, the Court of Criminal Appeals, shrouded in anonymity, reverses their convictions. In a time when spiraling public fears have vaulted crime to Public Issue No. 1,[3] and when many Texans have lost confidence in the way our courts assess guilt and innocence, the CCA (securely obscure) stumbles on. Notwithstanding daily headlines that fuel our worst imaginings, the Court seems all too eager to invent silly ways to reverse convictions.

Were the State's public safety and welfare not at stake, the bizarre rulings of this mysterious Star Chamber would be downright comical. The comedy, though, is certainly lost on the family of Tracy Gee, a young Houston woman robbed and killed at a neighborhood traffic light. Her killer received hope for freedom in June 1993, when the CCA reversed his capital murder conviction on a razor-thin technicality ... and a concocted technicality at that. The family of Jackie Wilson's young victim probably agrees. Wilson's capital conviction for kidnaping, raping, and strangling 5-year-old Lottie Margaret Rhodes was also overturned. Not because a *60 Minutes* exposé unearthed watertight evidence absolving Wilson or because the presiding judge was bribed by Wilson's defense team. It was because the trial judge had the audacity to strike a potential juror who admitted he could never follow what the law permitted when assessing Wilson's punishment.

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a This odd civil/criminal distinction seemed even too slippery for one of the Supreme Court's recent would-be justices, who touted her misplaced "courage to sentence a murderer to death." *Candidate's Ads Mislead Voters on Courts' Role,* Wichita Falls Times (Febr. 22, 1994)

Indeed, the Court's tradition for triviality is nothing new. In the mid-1940s, the CCA erased the murder conviction of Chesley Gragg, charged with drowning his wife, because the State didn't say what she had drowned *in*. Two years later, still woozy from the rarefied air atop Mt. Ridiculous, the Court threw out an indictment alleging Buster Northern killed a woman "by kicking and stomping her" because it didn't mention that he did so with his feet. And then there are the Court's *really* silly decisions ... but you get the point.

Texas — A Beacon State, Especially for Criminals

It's tough to comfort ourselves with news that the nation's murder rate is down from three years ago... when it remains *twice* what it was three decades ago.[4] It's tough to comfort ourselves with news that the State's overall crime rate has waned in recent years ... when youth crime rates, especially for violent crimes, have been soaring. Feel safer now? Recent figures from *Crime and Justice in Texas*, a newly-published book by researchers from the Criminal Justice Center at Sam Houston State University, paint a bleak picture. While the more-is-better theory works fine with touchdowns and lottery winnings, it doesn't apply to crime. Nonetheless, the 178-page study shows that, like our Dallas Cowboys and Houston Rockets, Texas thugs are tops in their chosen sport. In the ten years studied, 1984 to 1993, violent crime rose 51 percent in Texas, compared to 38 percent nationally. The Lone Star State outpaced the nation in all categories: in assault, 76 percent to 52 percent; in robbery, 26 percent to 25 percent; and in rape, 20 percent to 14 percent.[5] Nearly a quarter of recently-surveyed Texans said they knew a murder victim in 1994, and 39 percent said they themselves were crime victims at some point during the year.[6]

The incidence of violent crime has indeed mushroomed across our nation—1.1 million Americans were victims of gun-related violence in 1993, and 55 percent of murdered Texans in 1994 were killed with guns—and its randomness is petrifying. In 1991, for the very first time, most murders were committed by complete strangers. Consider this:

> The blot of violence has spread over more and more of our social space. People in the late twentieth century have lost a sense of safety, of immunity against sudden, unprovoked attack. They feel themselves surrounded and trapped in a jungle of ruthless, hidden predators. Danger is everywhere, and comes from everywhere. Perhaps the ultimate nightmare is the drive-by shooting — random bullets sprayed from a car, ricocheting off walls and sidewalks, endangering us in our cars, at home, in our yards, putting at risk even children at play.[7]

> ***AUTHORS'S NOTE:*** *As I wrote the preceding page bemoaning the utter randomness of modern-day violence, I chillingly received word from my mother that my cousin's husband had been shot and killed in a drive-by attack at a Dallas-area traffic light.*

Today, we cower. We have children we classify as "724 children," kids who are kept at home, indoors, every hour of every day, because of the staccato of neighborhood gunfire. Who can blame their parents ... when there are more gun dealers in America than gas stations, when firearms cause more deaths among those 15 to 24 years of age than all natural causes combined, when the number of persons killed in robberies and by strangers has risen throughout the 1990s, when teenagers today have become more likely victims of violent crime than adults older than 25, when the most basic staple of American entertainment—television—brings the average viewer 150 acts of violence and 15 murders every week?

Fearing crime, though, is to also sacrifice a vital measure of freedom, says New York City Police Commissioner Raymond Kelly, who adds that tolerating destructive and antisocial behavior—only 38 percent of America's crimes were even reported in 1990—"is abetting our own enslavement." Indeed, the death toll at Chicago's Saint Valentine's Day Massacre in 1929 (seven) would now be a light night in the Windy City; on some nights, *stray* bullets probably kill more than that. The battlefield is littered with our capitulation. Today, parked cars sprout signs in their windows reading NO RADIO ... "flags of urban surrender," Kelly calls them, that try to speak in conciliatory terms with destructive punks.

And a Child Shall Lead Them

Suffer no delusions. America's drumbeat of violence, both real and media-supplied, is summoning a hellish payday. The recent national lull in overall violent crime is precisely that, the lull before a horrific storm. As bad as things are, they *will* get worse ... a lot worse. As Attorney General Janet Reno predicts, "the beginning of the 21st century could bring levels of violent crime to our community that far exceed what we have experienced." Why? Because we face a demographic time bomb. The dip in violent crime has come primarily from adults older than 23. Meanwhile, roughly 40 million Americans are children 10 years old and younger. The juvenile population is expected to grow by 22 percent over the next decade, and a good measure of today's children are growing up "fatherless, Godless, and jobless."[8]

Simply put, there is *nothing* more petrifying than the thought of this group, the largest slice of adolescents since the post-World War II surge, growing up to be armed teenagers. The Justice Department recently projected that our nation's already-terrifying youth crime wave—the number of child murderers alone more than doubled from 1984 to 1991—could itself double within 15 years, by the year 2010. Leading crime doctors predict that, applying the proven axiom that "6 percent do 50/66 percent"—6 percent of young males are responsible for over half the serious crimes committed by their age group and *two-thirds* of all the violent crimes—the additional 500,000 boys who will be 14 to 17 years old in the year 2000 will translate into at least 30,000 more murderers and rapists than we endure today. What's worse, findings show that each generation of young criminals has done roughly three times as much serious crime as the one before it. As a leading expert has noted, the Jets and Sharks from *West Side Story* are pussycats today, and even the Bloods and Crips from Los Angeles may be considered "tame" tomorrow. The bomb must be defused. America's rash of kiddie crime (increasingly from children still shy of puberty) has definitely yet to peak, and it promises an army of hardened, stone-cold kids who are rooted in abject moral poverty ... children who hold absolutely no regard for human life, vacant children who rob and rape and maim and murder (often in gangs) on raw impulse alone.[9]

Texas is no exception. Violence in the Lone Star State increasingly bears a younger, angrier face; youth crimes are skyrocketing and growing more vicious by the day. "Juvenile delinquency" used to mean stealing apples, joy riding, and playing hookey from school. Today, as we near the 100th anniversary of our nation's juvenile court system, the phrase sounds much too flabby, unable to capture today's young toughs whose swagger and violence and menace, if not their ages, rival that of their adult counterparts. It's true that gun homicides by juveniles (*i.e.*, children) have tripled nationwide since 1983, and that roughly 20 percent of all violent crimes today are committed by kids younger than 18.[10] But recent Texas statistics are even more staggering. In 1993 (the last year for which full statistics are available), 26 percent of all people arrested in Texas were juveniles ... nearly double the 1984 figure of 14 percent; compared with adult arrests, which rose 1.3 percent over the past decade, juvenile arrests jumped 47.4 percent.[11] And the growing *viciousness* among our youth is chilling; from 1984 to 1993 in Texas, arrests of those between the ages of 10 and 16 for violent crimes nearly tripled.[12] During the same ten-year period, murder involving juveniles—who now account for one in eight Texas homicides—exploded by 291 percent; assault, 242 percent; robbery, 224 percent; sexual assault, 798 percent![13] Every 73 minutes, another Texas child commits a violent crime; every 28 hours, another young Texan kills someone.[14]

Crime control may be a vexing problem, but one thing is clear: judges seemingly indifferent to setting criminals free don't help. The best hope we have for a safe society is an effective and responsive criminal justice system ... not lawyer- or judge-dominated circuses in which the truth is sacrificed on the altar of hyper-complex procedures. On that front, the law-abiding citizens of Texas deserve better than the Court of Criminal Appeals. A century-plus of silliness is much too much. The Legislature should heed the oft-voiced call to let us abolish the CCA, and then—like 48 of the nation's other states and our federal system—establish a single court of last resort responsible for both criminal *and* civil matters. Thumb-twiddling "observers" may doubt whether criminals would suffer if the CCA were eliminated; criminals don't.

I. Trial, then Error: Decades of Judicial Folly

> *Nowhere in America—nowhere—is the mockery of justice in the name of civil liberties more common, more harmful, or more idiotic than in our highest criminal court.*[15]

The longtime philosophical makeup of the Court of Criminal Appeals—aptly described as "the Rodney Dangerfield of the Texas judiciary"[16]—has always irked prosecutors and victims' rights advocates. Various groups routinely call for its abolition because the Court routinely issues decisions that baffle most citizens. The usual response? The commotion eventually subsides, everyone yawns, and the issue evaporates ... until the Court commits its next outrage (which, unfortunately, is rarely a long wait). The CCA's history has yielded ample profiles in absurdity, and recent years have been especially bad.

A. And Justice For None

Doing the Justice Shuffle

The most notorious lowlight of 1993 involved the killer of Tracy Gee, a 22-year-old woman and the youngest of eight sisters. Gee was robbed and shot in the head with a military rifle from close range as she waited at a Houston traffic light on September 4, 1990.[17] Her predator was Lionell Rodriguez, who along with his cousin, tossed Gee's body to the pavement and, seated in a large pool of her blood, sped off in her blood-soaked car. The jury, certain that the death penalty would doubtless serve as a deterrent to Rodriguez, wasted little time in convicting him of the State's worst crime—capital murder—and opting for lethal injection. After all, he *admitted* murdering Gee and taking her car because, you see, his was low on gas. He and his cousin, you understand, were out looking for someone to rob "like in the movies," he said. He was captured in her car, covered in her blood, with bits of her brain tissue in his hair. Open ... and ... shut.

"Not so fast," said the Court of Criminal Appeals, in an unpublished masterpiece written by that courageous jurist, *Per Curiam.*[b] Mr. Rodriguez, you understand, was the true victim here ... cruelly victimized because the trial judge allowed the names of potential jurors to be shuffled twice before jury selection began.[c] The Court ruled that state law allowed only one shuffle, and it ordered a new trial without even considering whether Rodriguez's right to a fair trial had been harmed in *any way.* The injury was certainly a mystery to Rodriguez himself, who had never claimed that this supposed flaw diluted the fairness of his trial. After all, if randomness is the goal of a jury shuffle (and it is), two shuffles obviously results in *more* randomness, not less. And after all, the trial judge—out of an over-abundance of caution—had already granted Rodriguez more jury strikes than the statute allows. Rodriguez got what he was due, a randomly-drawn jury pool. No matter, said the CCA, ignoring the fact that the shuffle occurred only because the trial judge had granted Rodriguez an extra peremptory challenge to which he wasn't entitled. In an unsigned and unpublished 5-4 decision, the CCA granted the confessed killer a new trial.

The decision sparked outrage in Houston and among State leaders and victims' rights advocates—indeed, everybody except the criminal defense bar and a few legal scholars—who argued the Court had lost touch. Law-abiding Texans would insist that, in this case, it was *justice* that was ultimately shuffled. Seeming to agree, Harris County saw a proliferation of t–shirts emblazoned with the statement: "Shuffle Judges, Not Jurors."

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b Decisions issued *per curiam* cannot be traced to a particular author.

c During jury selection, potential jurors are assigned numbers. Because they are interviewed in numberical order, it is unlikely that anyone with a high number will last long enough to be chosen. If prosecutors or defense lawyers want to enhance the chances of someone with a high number, they ask that the numbers be randomly shuffled so that the new sequence will be more favorable.

The Court first adopted this obtuse "reasoning" earlier in 1993 when it reversed the conviction of William Wesley Chappell, a child molester, arsonist, and triple murderer, who also suffered the brutality of a second jury shuffle ... even though (like Rodriguez), he never complained to the trial judge that the "defect" affected his trial's fairness.[18] This case helped launch the line of cases that has most infuriated prosecutors—*i.e.*, the State—over the past few years. In Chappell, also a narrow 5-4 decision, the CCA embraced Chappell's Point of Error No. 19 and stated that Texas law only allows one jury shuffle.[d] If the State has already used one, the defendant isn't entitled to a shuffle of his own, and vice versa. Aside from the incidental fact that the statute says no such thing,[19] the most troubling part of the opinion was the Court's complete abandonment of the "harmless error" doctrine, a time-honored rule that advises against reversals when the supposed defect caused no prejudice to the defendant. In opting for automatic reversal, the CCA refused to consider whether poor Mr. Chappell was actually harmed by the additional shuffle—indeed, Chappell *never* argued a lack of evidence either to convict him or to support the death penalty—*even though* the same Court had recently stated that "harm or injury [must] be shown for any violation of jury law."[20] And *even though* the obsolete cases requiring automatic reversal for any and all jury selection errors were decided prior to the Court's formal adoption of the harmless error doctrine, Texas Rule of Appellate Procedure 81(b)(2).[e]

> *The details of Mr. Chappell's unique evil, which went unmentioned in the Court's written opinion, explain the fury that accompanied the reversal. After molesting a four-year-old Tarrant County girl, Chappell faced indecency charges filed by the child's heroic mother and grandmother. He was swiftly convicted, but while he was free on an appeal bond, Chappell decided to retaliate. He threatened to blow the grandmother's nose off because she was sticking it in his business; he burned down a house the family owned; he tried to burn down the house the family lived in, but they escaped safely. Then, on May 3, 1988, after setting up an elaborate alibi with his wife, Chappell entered the charred house and murdered three people: the child's grandmother and grandfather, and an aunt. When he reached the grandmother, Chappell shot her twice with a 9-millimeter handgun and once with a .25-caliber handgun... but "carefully," so as not to kill her. As she lay on the floor wounded, Chappell strolled over to her, shoved the gun barrel to her nose, and—carrying out his earlier threat to teach her a lesson—shot her dead. Then, while in jail awaiting trial for capital murder, Chappell hired one of his fellow inmates to kill his wife once the inmate was released.*

Poisonous precedent. Rejecting the harmless error analysis in Chappell, in turn, led to a particularly silly result in the Tracy Gee case. In that case, the record plainly showed that the trial court's unique jury selection procedure meant that, even with the second shuffle, the jury would've consisted of the same 12 people anyway. In other words, the CCA was able to see both (i) the verdict *with* the shuffle—GUILTY—and (ii) what it would have been *without* the shuffle—GUILTY again. Undeterred, the Court voted to reverse, thus putting Texas through the expense and Tracy Gee's family through the senseless agony of reconvicting a confessed murderer. Here's how Suzanne Gee, testifying in March 1995 before the Senate Criminal Justice Committee, described the "cruel and unusual punishment" her family endured when the conviction of her sister's murderer was overturned:

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d When writing an appellate brief, criminal defense attorneys always list their strongest arguments first. The CCA bit late... on Number *19*.

e Although used primarily in criminal trials, the jury shuffle is also prescribed in Texas Rule of *Civil* Prodedure 223, which – unlike article 35.11 – explicitly states that "[t]here shall be only one shuffle and drawing by the trial judge in each case." Even though Rule 223 flatly forbids a second shuffle – again, unlike article 35.11 – the Texas Supreme Court rightly insists upon a showing of actual harm before reversing. *See* S —— C—— v. State, 715 S.W.2d 379,382 (Tex. App. – San Antonio 1986, *writ ref'd n.r.e.) (citing* Rivas v. Liberty Mutual Ins. Co., 480 S.W.2d 610 (Tex. 1972)).

> This "error" did not erase the truth that Lionell Rodriguez was and is guilty. Rodriguez's guilt was proven again during the arduous and painful retrial that our family had to endure. With anxiety, we waited as the State tried to get the Court of Criminal Appeals to reconsider their decision. With anger, we waited as the trial was delayed several times. With concern, we waited as we learned of details that could possibly make the second trial more difficult. With each passing day, not only were we feeling the grief of missing Tracy all the more but now we had to deal with the emotions of anger, fear and doubt that this harmless error had produced. The second trial is now over and after many months of anguish for our family and after thousands of tax dollars have been spent retrying the case, Lionell Rodriguez is once again on death row. Waste of time, waste of money, waste of pain ... yes.

Juries and Jeers

> *Our search for justice must not be twisted into an endless quest for technical errors unrelated to guilt or innocence.*
>
> Chief Justice Warren Burger[21]

Another case that recently angered prosecutors came early in 1993, when the Court overruled a wealth of precedent to limit severely the way prosecutors may use juror challenges in capital murder cases. In Garrett v. State,[22] the CCA reversed the conviction of Daniel Ryan "Danny" Garrett, a misunderstood young man charmingly known as one of Houston's pick-ax murderers. Garrett and his girlfriend, Karla Faye Tucker (a former Allman Brothers Band groupie),[f] were convicted in June 1983 for hacking a young couple repeatedly with a 3-foot-long pick-ax, which was left imbedded in Deborah Thornton's chest. In Garrett, the CCA held that the trial judge erred in striking a potential juror who admitted that he could have never assessed Garrett's future dangerousness based on the facts of the two murders alone ... even though Texas law permits an answer based solely on those facts. Prosecutors rightly blasted the Court's ruling as requiring the State to prove more than the legal minimum. Certainly, no juror is *required* to assess future dangerousness based solely on the capital offense itself. But the majority's "reasoning" invites absurd situations. For example, no juror is *required* to convict upon circumstantial evidence, or upon the testimony of a single eyewitness, or upon the testimony of a corroborating accomplice witness, etc. But if a prospective juror says he would never, under any circumstances, consider convicting based on such evidence, like this juror did, "then he has a bias against the law upon which the State is entitled to rely and is subject to challenge for cause."[23] In any event, striking a juror who says he would require the State to prove more than the legal minimum is certainly harmless when the prosecution, as in Garrett, enjoys extra peremptory challenges it can use if the trial judge denies its challenge for cause. Moreover, even assuming (without conceding) that a phantom "error" occurred, why reverse the *entire conviction* when the imagined misstep affected only the punishment phase of the two-step capital trial? Why not spare Texas taxpayers, our dwindling faith in the judicial system, and especially the victim's battered family, and go straight to the punishment phase?

Garrett's aftermath has been predictable: several capital murder convictions have been overturned. In June 1994, for example, the CCA used Garrett to reverse the murder-robbery conviction of Cedric Lamont Ransom.[24] Again unwilling to reverse only the punishment phase of the trial—even though (i) the venireman was challenged and struck solely for his anti-death penalty views,[25] and (ii) Texas law requires only a "new punishment hearing" in such circumstances[26]—the Court demanded a complete retrial. The CCA also employed Garrett to grant hope to Dale Wayne Sigler, a sociopath with a lengthy criminal history who, after "drinking beer, whiskey, smoking marijuana, smoking speed, and doing lines of speed," decided that he

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f Following their convictions for capital murder, Tucker and Garrett realized their relationship didn't have much of a future, and they split. But Tucker – one of five female inmates on death row in Texas – recently found true love. In June 1995, she married Dana Brown, a prison ministry worker. The beaming couple's honeymoon plans were not revealed. *See Death Row Woman Weds Ministry Worker,* Austin American-Statesman at 3B (June 29, 1995)

needed some money and boasted that he was "drunk enough where he could rob some place."[27] That he did, along with emptying a .45-caliber handgun into a store clerk's body as the terrorized employee lay on a back-room floor.

Earlier, in June 1993, the Court used the same strained analysis to reverse the capital murder conviction of Jackie Barron Wilson, a lowlife who kidnapped a 5-year-old child from her bed at night before raping and strangling her, then running over her with his car.[28] In one of 1988's most high-profile murder cases, a sickened jury opted for the death penalty, thus showing little regard for child-killers; five years later, a blind CCA opted for reversal, thus showing little regard for society (not to mention the law).

The news was torture for the slain girl's mother, who heard it from a friend: "I just started yelling," said Toni Rhodes. "I was shaking all this morning... I had finally gotten to where I could talk about my daughter without breaking down."[29] After scrambling for hours for an explanation why the dreg who had murdered Lottie Margaret Rhodes might go free, she got her answer. Sure, there was plenty of evidence to sentence Wilson to death—the jury certainly thought so—but the prosecution had "improperly" eliminated a potential juror.

Although Maggie's mother cannot endure the gruesome facts, they bear mentioning in order to fully grasp the weight of the CCA's decision. Early on November 30, 1988, Ms. Rhodes was terrified to see her daughter's bed empty and her bedroom window shattered. She soon heard the wrenching details:

> [S]he learned that her daughter's frostbitten body had been found at the side of a deserted Grand Prairie road by a truck driver who originally thought he had seen a large doll.
>
> She had been raped, suffocated, beaten, run over by a car and left in a muddy ditch.
>
> Mr. Wilson's fingerprints were found on shards of glass from the broken bedroom window. And greasy tire tread marks left on Maggie's legs and back matched the tires on the car he drove the morning of the killing.
>
> Furthermore, a woman who lived in the same apartment complex as Maggie testified that Mr. Wilson had sneaked into her apartment through a bedroom window about an hour before Maggie's abduction and begun molesting her as she slept.
>
> The evidence in this case was so compelling that the jury took less than a half hour to sentence Mr. Wilson to death.
>
> And the evidence was so heinous that Ms. Rhodes remained outside the courtroom during most of it.[30]

The family of Eugene Heimann, a murdered sheriff's deputy in Fort Bend County endured similar treatment when the Court used Garrett to reverse the death penalty conviction of the officer's *confessed* killer, Francisco Cardenas. Again, the CCA said that the trial judge improperly eliminated from the jury pool a woman who stated she could never decide, based solely on the facts of the case, whether Cardenas represented a future danger to society ... again, even though that finding is sufficient under Texas law to support a capital sentence. Former Fort Bend County prosecutor Bryan Best, now serving with the U.S. Attorney's office in Houston, put it simply: "The problem doesn't lie in Fort Bend County; it lies in Austin."[31]

Again, lest they go ignored, the underlying facts deserve mentioning:

> Heimann died from five .38-caliber gunshot wounds to the chest, back and face after he stopped two hitchhikers near Damon during a burglary investigation.
> Cardenas told investigators in a videotaped confession, that he, his brother, and a Houston woman were burglarizing houses. He said he got scared and admitted pulling the gun from

> a potato chip bag, shooting Heimann, then fleeing in the officer's patrol car, leaving the victim's body in the middle of FM 1462. Cardenas wore the deputy's straw hat as they fled, witnesses testified.
>
> The brothers later hijacked another car near Needville and fled to Houston. They were arrested the same night at a girlfriend's apartment, and Heimann's gun was found under a mattress.[32]

The CCA blew Charles Sonion a similar kiss of hope last October when it reversed his capital conviction for the most stomach-wrenching murder this author can recall. Discretion forbids even the most general description of how Sonion manifested his intense evil at the expense of his elderly next-door neighbor, Ora Pearson. (The CCA's unpublished opinion likewise omits the brutal, underlying facts).[33]

Miscellaneous Missteps

The beat goes on. In Cabezas v. State,[34] a unanimous CCA ruled in 1993 that trial judges can grant defendants deferred adjudication probation even where the minimum punishment exceeds 10 years. The significance of this case is hard to overstate because it grants willing judges a way to dodge the minimum 25-year sentence for habitual offenders. Why? Because deferred adjudication is different from court- and jury-imposed probation in that there is no adjudication of guilt and no assessment of punishment. Thus, the Court reasoned, "the minimum and maximum sentence length is in no way controlling of the issue of whether a defendant is eligible for deferred adjudication probation."[35] Of all the Court's recent decisions, this one—which at least enjoys the virtue of being arguably based in law—has had one of the most immediate impacts.

A few years ago, the Court reversed the conviction of Kunlay Sodipo.[36] Because newly disclosed evidence proved his innocence? Hardly. Because someone else confessed to the crime? Nope. Sodipo's conviction was fatally flawed, decreed the Court from its tower of technicality, because the trial judge had allowed the prosecutor to correct a infinitesimal clerical error—changing "427424" to "427427"—in one paragraph of the indictment, and didn't give the defendant an additional ten days to prepare for trial. Even Mr. Sodipo's lawyer conceded that it was an immaterial typo, and that he'd known about the mistake all along. The CCA didn't care, arguing that because it couldn't imagine how Mr. Sodipo could have been harmed, automatic reversal was appropriate. Said the Court: "[I]t is not worth expending the judicial resources necessary to evaluate the effect of the error."[37] Rather, it is easier for the CCA cavalierly to require that the trial judge, court reporter, bailiff, jury, prosecutor, witnesses, victims (remember them?), defendant, defense attorney, etc., all expend *their* resources completely retrying the case from scratch.

In January 1990, the Court reversed the capital murder conviction of Allen Wayne Janecka, a hired hit man who had written a detailed, voluntary confession of his 1979 triple murder, which included shooting a baby in the head as it lay in its crib. Ignoring the killer's cold and unchallenged confession, the conclusive ballistics tests, and Janecka's boasting all over Houston about his feat, the CCA reversed. Why? Because the person who paid Janecka to kill the family wasn't himself named in the indictment. Absent the remunerator's identity, Janecka's defense team argued, Janecka was unable to challenge and impeach his testimony. So far, the surface logic is persuasive. Defendants *should* have the chance to examine and challenge such material witnesses. Here's why the Court's reversal was so maddening: Janecka knew perfectly well who was paying him; it was his longtime friend Walter Waldhauser, Jr., whom Janecka's confession shows actually assisted Janecka in the grisly murders that night in Houston. The confession even discusses the money "Walt" was supposed to pay Janecka. Nothing ... *nothing* prevented Janecka's lawyers from calling Waldhauser to the stand to impeach him. Their reason for not doing so certainly was *not* because the remunerator's identity was unknown, but rather because their client's case would've been devastated even more. Janecka's harm resulted solely from being *admittedly* guilty of a monstrous crime ... nothing else. The CCA, staggered by its own illogic (as happens all too often) and coarse enough to attach Janecka's legal confession to its decision, just couldn't understand that the missing name was harmless.

This inane decision prompted one observer to join an ever-lengthening bandwagon calling for the Court's abolition:

> [T]o read of the Texas Court of Criminal Appeals reversing the convictions of the guilty is frustrating and inspires nothing but rage. The court does no good. It helps the guilty while ignoring the innocent who languish in jail. It costs us time and money and worse, robs us of faith in the wisdom and fairness of the judicial system. It should be abolished. Only the guilty will suffer in its absence.[38]

Gustavo Julian Garcia, whom you hear laughing up his sleeve, would heartily agree. In December 1994, Garcia was convicted of capital murder for the 1990 shotgun killing of a Plano liquor store clerk. Garcia confessed and signed a written statement detailing his crime. To be sure, reversing such an airtight case offered a daunting challenge. But our CCA, never one to disappoint, found a way! Poor Gustavo's admitted guilt wasn't the issue at all, said the Court. Rather, it was whether perfect procedure had been followed. Sure, Garcia had initialed each of his *Miranda* warnings (*i.e.*, the right to remain silent, to have an attorney present, etc.) on his confession, but that just meant that he read and understood them ... not that he was somehow waiving them.[39] Case reversed.

On May 10, 1995, the court jesters outdid even themselves. In January 1993, a jury of Aaron Wade Stine's peers convicted him of aggravated assault and sentenced him to 20 years in prison. At the time of Stine's trial (a full nine months after the attack), his victim, Johney Verzwyvelt, was *still* hospitalized and not expected to live much longer. Eager to wrap up the case before Mr. Verzwyvelt died—when the case would then become a murder prosecution—Stine's defense lawyer made a strategic decision urging everyone to travel to Mr. Verzwyvelt's hospital bed to get his testimony. The trial judge made it crystal clear that Stine's counsel had no problems with that. "No, sir," said the lawyer, "We'll concur with that. Seems like that's the most efficient way to do it." Everyone agreed and convened for a short time at Mr. Verzwyvelt's bedside, where he was fighting death from the shotgun blast Stine had put in his chest. After hearing all the evidence, the jury wasted little time: "guilty." On appeal, Stine said the trial court erred in doing what he requested, although he couldn't explain in the least how he'd been harmed by this grave "error." That's okay, said the CCA: automatic reversal.[40]

Here's why. Article V, § 7 of the Texas Constitution instructs district courts to try cases "at the county seat of the county in which the case is pending." Consequently, said the Court, since Mr. Verzwyvelt's near-fatal wounds were being tended a full ten miles from the Bosque County Courthouse (in the neighboring town of Clifton), his testimony was improper, and Stine's conviction was irretrievably poisoned. But wait a second. Didn't Stine's lawyer explicitly agree to move the proceedings for the day? Doesn't article 1.14(a) of the Code of Criminal Procedure allow a defendant to waive *any* right except the right to trial by jury in a death penalty case? And doesn't Texas law require a trial court to conduct its proceedings in an "orderly and expeditious manner and [to] control the proceedings so that justice is done"?[41] And doesn't a trial court have a duty to "exercise reasonable control over ... presenting evidence" so as to (i) make the presentation of evidence "effective for the ascertainment of the truth," (ii) "avoid needless consumption of time," and (iii) "protect witnesses from harassment"?[42] And doesn't the Penal Code itself invite courts to exercise common sense in order to promote justice?[43] And didn't Stine admit his guilt at the punishment phase of the trial? Yes. Yes. Yes. Yes. Yes. Yes. Typically, the Court offered no reasoning (such as it is) for its view that a criminal defendant should be permitted to concoct his own "error." The concluding sentence of the four-judge dissent hit the bullseye:

> *[T]he majority opinion represents yet another triumph of narrow technicalities over practical common sense.*[44]

In a recent article criticizing the Court for its frequent lack of coherence, the First Assistant State Prosecuting Attorney (and CCA candidate in 1996) concluded his discussion of Stine with the obvious question:

> What purpose is served by reversing a conviction on the basis of "error" that had no effect upon the fairness of the defendant's trial? Can such a rule be justified in the real world outside our courtrooms, where real victims are assaulted, robbed and murdered by real criminals?[45]

Law? What Law?

To its credit, the Legislature sometimes tries to temper the Court's more bizarre rulings ... rulings that often turn on tortured constructions of state procedural laws. By enacting or amending legislation in response to bizarre CCA decisions, our elected representatives try to steer the Court toward sanity. The Court, unfortunately, is not often impressed by such trivialities as legislative intent or even by the actual letter of the law. For example, in its October 1991 decision in Grunsfeld v. State,[46] a sharply divided CCA (after considerable, albeit common, delay) decided 5-4 that evidence of a convicted criminal's prior unadjudicated offenses is inadmissible at the punishment phase of a noncapital trial. Thus, a jury who has already convicted someone of aggravated rape is forbidden, when deciding his sentence, from hearing that this same defendant had assaulted a dozen other women, even if the attacks occurred *after* he was charged in the instant case. Again, the unmentioned facts deserve mentioning. Robert Charles Grunsfeld of Dallas County was convicted of the aggravated sexual assault of a woman he had taken on a date. His victim testified that Grunsfeld raped her repeatedly and assaulted her with a stun gun throughout the attack at his mother's home. At the trial's punishment phase—the jury had already voted to convict Grunsfeld—the State presented testimony from three other women that they had also been sexually assaulted by him.[47]

To be sure, many observers may believe that limiting the mention of prior offenses to actual convictions is altogether fair (although most lower courts admitted such evidence). But the CCA's activist decision flouted a 1989 amendment to the Code of Criminal Procedure that, in response to earlier Grunsfeld-type rulings, had expanded the range of evidence admissible at the penalty phase to include "*any matter the court deems relevant to sentencing*, including the prior criminal record of the defendant, his general reputation and his character."[48] This language allowing such testimony differed greatly from the pre-amendment version, which (arguably) recognized only conduct resulting in *conviction* as permissible. The four dissenters issued blistering rebukes, accusing the slim majority of ignoring the Legislature's intent in enacting the 1989 amendment and, paradoxically, "interpret[ing] the amendatory language in a way that leaves it essentially ineffectual." Presiding Judge Michael McCormick issued a stinging dissent. Accusing the majority of "unwarranted and unconstitutional judicial activism," he wrote that the Court's failure to recognize its limited role "openly thwarts the will of the people ... in order to substitute its own sense of justice."[49] Judge Bill White's dissent, the most biting of all, said he was at a loss for how the Legislature could be any clearer:

> Perhaps they will print the amendatory language in extra-large bold type, not unlike that of a grade school primer. Or perhaps they will, somehow, be able to find more direct language to use, much like a farmer would use a two-by-four across the nose of a recalcitrant mule in order to convince it that it is time to get off its hind quarter and pull the wagon. Whatever method the Legislature selects, it will be interesting, to say the least, to witness how the aggressive and assertive members of this Court rewrite[ ] it.
>
> This is another attempt to prevent law abiding citizens of Texas (juries) from meting out proper punishment to those criminals who rape, rob and murder their children and their families.[50]

A June 1994 death penalty decision is especially troubling. In State v. Soria, the CCA voted 5-4 to reduce Juan Soria's death sentence for the robbery-murder of Allen Bolden to life in prison. Taking upon itself the role of the omnipotent 13th juror, the Court simply decided that the jury's decision to sentence Soria to death

was, well ... it was just too harsh. Citing no error in the trial itself or any airtight evidence of innocence, the Court simply sat atop their sovereign bench, took out their private micrometers, and ruled that, in their hallowed opinion, Bolden's murder enjoyed no "special depravity or cruelty" that warranted the death penalty. WHAT? Tell that to Mr. Bolden's family. Moreover, the jury of Soria's peers, the 12 men and women who heard all the evidence of Soria's evil firsthand, had a different view. And in *their* opinion—the only one that matters under the law absent reversible error—death was a fit penalty. One Texas columnist, in a column aptly titled *'Nincompoops' on Court of Criminal Appeals Turning System on its Ear*, put it bluntly:

> Soon, perhaps, we can forgo juries altogether. Just send every case directly to these wise men in Austin.
>
> Speaking only for myself, I suggest that Texas voters go to some pains to reward these five judges by returning them to private practice at the earliest opportunity, lest they accidentally stumble over the law and harm themselves.[51]

The high-profile death penalty case of Gary Graham is yet another example. Mr. Graham was sentenced to die for the 1981 robbery-murder of Bobby Grant Lambert, who was paying a fatal visit to his local supermarket (ironically, a "Safeway"). Thirteen years after his conviction, Graham raised an eleventh-hour claim of "actual innocence," with several people (including his relatives) attesting that Graham wasn't the real killer after all.[g] An unwavering eyewitness, by the way, insists otherwise. After navigating a legal maze that has taken him to the U.S. Supreme Court twice (so far), and buoyed by an entourage of misguided Hollywood celebrities campaigning for mercy—mercy for Graham, that is, not for Mr. Lambert's family—Graham finally zig-zagged his way back to the CCA. On April 20, 1994, the Court opened the floodgates. In an opinion destined for the textbook, "How Not To Be a Supervisory Court," a splintered CCA issued six different opinions and ruled 5-4 that Graham was entitled to showcase his "new" evidence *regardless of what governing Texas law said about the matter.*[52] And what decades-old Texas law—enacted by the people's elected representatives—said was quite clear: defendants have 30 days after their convictions to request a retrial based on new exonerating evidence ... period. Undeterred by such incidentals as "the law," unimpressed that other courts had already found the statements of Graham's witnesses not credible, and undaunted by its own countervailing precedents, the CCA said that Graham should be allowed to present his so-called new evidence to a judge, followed by further appeals, etc., Etc., ETC.

Certainly innocent people should not be convicted, much less executed. And one can certainly argue that the 30-day limit on new evidence is poor legislation that needs to be changed (although several states have comparable laws on their books). But that obscures the larger point. Erecting this never-ending cycle of appeals was a naked power grab. It was pure legislation enacted by judges who feel, perhaps because they're elected, they can act as a super-legislature immune from a system that's comprised of three separate and distinct branches. Swatting at binding law as if it were a pesky insect, the Court created a legal HOV lane for convicted murderers, rapists, and other predators.[53]

Texas already *has* a "fail safe" process designed to hear exceptional cases: state executive clemency, which the U.S. Supreme Court has said provides sufficient constitutional safeguards.[54] Apparently, however, the CCA views Texas' clemency procedures as flawed because governors and parole boards are hesitant to use them ... as they should be when criminals have already enjoyed countless layers of appeals. But deliberate infrequency of use is no license to write the process out of our Constitution by fiat and concoct new protections the Legislature and citizens have never imagined.[55] Ignoring the availability of clemency,

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g Not that the angelic Mr. Graham had been sitting idly at home. While denying involvement in Mr. Lambert's murder, Graham confessed to a series of crimes in the same area around the time of the killing, including several armed robberies, two shootings, and a rape.

the Court brushed aside dissents blasting the decision as having created yet another "unnecessary and dangerous" remedy and warning of defense attorneys using the invented procedure as a "crowbar to open the door to a state forum ... for every inmate to re-litigate his conviction." So what, replied the CCA. Naively believing that frivolous appeals will be discouraged by the rigorous standard of review,[56] the Court blew it again: frivolous suits, *by definition*, won't be deterred. Although a case may rarely if ever succeed, countless ones will be tried. Nothing aside from the threat of perjury will dissuade people from crawling out of the woodwork and manufacturing every sort of "new evidence," particularly if the "real" killer is dead (as was argued in a U.S. Supreme Court case from Texas)[57] or if the applicable statute of limitations has conveniently expired.

Voting by the Numbers

One of the byproducts of having an elected judiciary, as we sadly do in Texas, is that our jurists, needing to hustle the votes of a crime-numbed public, are presumably number-sensitive ... aware of how their actions translate to the public. On this point, a 1993 empirical analysis of the CCA's recent voting behavior is enlightening.[58]

In examining the overall voting patterns of the Court and its individual judges, the study's authors painstakingly analyzed every published and on-line decision issued from early 1991 until July 1, 1992. The results of these 251 cases, analyzed with a standard statistical technique, the Guttman scalogram, can be stated simply: there seems to be a lot of "vote hedging" going on in Austin. A judge's "hedge" factor is defined as "the difference between the frequency with which a judge votes for the prosecution in easy cases and the frequency with which he votes for the prosecution in close cases."[59] The distinction between "easy" and "close," in turn, depends upon the margin by which the Court reached its decision; a "close" case, for example, is one where the decision would have been different if two judges or fewer had voted differently.[60]

The empirical study revealed that fully two-thirds of the then-constituted CCA displayed a remarkable tendency to uphold prosecution victories when their vote was *not* outcome-determinative. That is, when it was clear that the defendant was destined to lose with or without their vote, they were more likely to err toward the State. The necessary converse is the more troubling part: when these judges realized their vote was more likely to swing the result in the defendant's favor, they were *less* likely to err toward the State.

This penchant for looking over their judicial shoulders in pivotal cases should cause Texans immense pause. Why? Because, if true, it demonstrates shifting, nonprincipled decisionmaking rather than decisionmaking rooted in solid jurisprudential values. And here's what else it demonstrates: certain CCA judges try to "improve" their records with pro-prosecution votes in easy cases while voting for the defendant when their votes may actually be decisive. This is to be expected in the legislative sphere, where lawmakers vote strategically all the time based upon a bill's likelihood of passage; if there's a train coming your way, you're better off on it than under it. But voting by the numbers is troubling in the judiciary, where we expect jurists to check their political baggage at the courthouse door.

The CCA's Hall of Shame

Unfortunately, the CCA's exaltation of form over substance is nothing new; its history has long been pockmarked with triviality and injustice. Indeed, way back in 1910, the American Institute of Criminal Law remarked that "The Texas Court of Criminal Appeals enjoys the reputation of being one of the foremost worshipers among the American appellate courts of the technicality." Even before that, in 1881 (barely five years after the Court's birth), an already-frustrated Legislature passed the Common Sense Indictment Act, which the infant CCA promptly sabotaged. Little has changed. But even more unfortunate is the fact that because the rulings from this judicial wonderland are so commonplace, they hardly raise eyebrows anymore. Consider these Lewis Carroll-type gems which are, in Alice's words, "Curiouser and curiouser!":[61]

- During the early 1900s, when the CCA clung to technicalities in order to blunt draconian punishments (reversing more than 40 percent of the convictions it touched), the Court erased the conviction of a man charged with burglarizing a house occupied by six men. The error? Only five lived there; the sixth, you understand, was merely visiting. Case reversed.

- And who can forget Billy Wayne Gibbs, the thief caught *red-handed* with stealing a $39.88 socket set from a Montgomery Ward department store in Pasadena? The jury, given a routine open-and-shut case free of ambiguous clues or missing evidence or Fuhrman-esque cops or allegations of parental abuse, swiftly convicted. Over three years later, in December 1980, the CCA calmly reversed. Why? Because the State's witnesses at trial had referred only to Montgomery Ward, while Gibbs was charged with stealing from *Montgomery Ward and Company, Incorporated.* Billy Wayne, by the way, escaped scot-free since double jeopardy prevented the State from retrying him.[62]

- Then there's the murder trial of Leon Rutherford King, who kidnapped a couple, bashed the man's head in with the butt of a shotgun, repeatedly raped and sodomized the woman, and then robbed her. The trial judge promptly rejected King's argument that the indictment was fatally flawed since the rape victim's name didn't appear on it because, as King's lawyer admitted, King had enjoyed access to the State's entire case file, which included the missing name. The CCA was unimpressed, holding that the rape victim's name "was clearly a fact which was critical to King's defense preparation." But didn't King already know the woman's name? The Court didn't mention that fact. Case reversed.[63]

- The King case soon proved to be a noxious precedent. Philip Brasfield was sentenced to death for kidnaping a six-year-old child from the local playground and killing him. Again, as in King, the victim's name was omitted, but *here*, they were one and the same; the abducted boy was the same child who was murdered. Even more clearly than in King, there's no way Brasfield was prejudiced, except in the Court's odd imagination. No matter. Case reversed.[64]

- After much trying, the Court reached absurdity's heights in the 1940s. As mentioned above, Chesley Gragg was charged with murdering his wife, Flora, "by then and there drowning" her. He was swiftly convicted, but the eager CCA came to his rescue, buying the line that the trial judge (being a rational man) had rejected. The State erred, you see, in neglecting to say whether the deceased was drowned in water, chocolate milk, a mint julep or whatever. Case reversed.[65]

- Two years later, the Court tried to one-up itself in the murder case of Buster Northern. Northern had killed an elderly woman "by kicking and stomping" her to death. The CCA reversed because—you can see this one coming—the indictment didn't say whether he did so *with his feet.*[66]

> *When Northern was reindicted for stomping her "with his feet," the astute* Dallas Morning News *(which regularly called for the Court's extermination), predicted another reversal since the indictment neglected to specify the number of feet.*

- Apparently unfazed by ridicule, the Northern Court referred to one of its earlier decisions in which it held that charging someone with killing a man by shooting him was insufficient "in that it failed to charge that he did so with a gun."[67]

- In 1978, Stanley Crowl was indicted for possessing cocaine. The exact wording of the law prohibited the possession of "coca leaves and any derivative thereof." Because Crowl, a

Garland attorney, was indicted for having "cocaine," his conviction was overturned ... and literally hundreds of criminals doing time for possessing cocaine piggybacked their way to freedom also.[68]

- The indictment idiocy continues. In 1974 (April Fool's Day to be exact), Kelly Gene Reynolds lifted a man's wallet inside a Houston Walgreens. He fled and was quickly captured. The CCA was troubled for poor Mr. Reynolds because, after all, the indictment failed to state that he stole the wallet "without the effective consent of the owner." All together now: "Case reversed." Or, more accurately, *cases* reversed ... *thousands of them.* The CCA's obtuse ruling erased every theft conviction in Harris County for three years![69] Another Houston case did the same for forgery.

- And then there was the favorite son of Sulphur Springs, Texas, Billy Ray Wallace, who was convicted of his wife's murder, to which he pled guilty and waived his right to appeal. Repeat: *to which he pled guilty and waived his right to appeal.* Undeterred, the CCA still reversed ... after all, the charging instrument failed to include the magic words "In the name and by the authority of the State of Texas" at the beginning.[70]

- And we can't forget the overturned conviction of the defendant who received stolen property "from persons unknown." The reversal came because, during the trial, the prosecution suffered the misfortune of discovering who the victim was.

- Then there was Trummie Neal Rucker, the rapist who crept into the back seat of a nurse's station wagon while she was mailing a letter. Springing forward once she began driving, Rucker pummeled the woman's face while she drove, trapped by her seat belt. When she was finally able to stop the car, he dragged her from her car, battered her some more, ripped off her clothes after she refused to do so, shoved her into the gravel and weeds below, and raped her. When she answered "no" to Rucker's inquiry of whether she was "enjoying it," he smashed her face again. He then dragged her naked body down the gravel road, told her to either flee or be killed, and stole her car. Rucker was convicted of aggravated rape and sentenced to life. On appeal, the CCA's duty was to decide whether Rucker's actions threatened the woman with serious bodily injury or death. "Of course not," said the Court. After all, Rucker hadn't made any threats before the rape; he was unarmed; he inflicted no serious bodily injury — "no concussion, no broken bones, no internal injury, no serious permanent disfigurement, and no protracted loss or impairment of any part of her body." Case reversed.[71]

  Once the time for Rucker's retrial arrived, he was already serving 20 years for aggravated robbery, the same sentence as for rape. The State decided against retrying him. The bottom-line message was brutal: "Sorry, ma'am — your rape was free."

- Even the 1990s invite ridicule. In Warren v. State,[72] the CCA reversed the theft conviction of Elisa Warren for stealing a watch, gold chain, and $230 from an undercover Houston police officer posing as a target in a Mickey Finn robbery. Warren was arrested by the possum-playing officer as she was leaving his hotel room. The indictment read that she stole the officer's "watch, chain, money and pants," although she had left the pants behind while exiting. Because prosecutors didn't use the word "or" instead of "and," the *entire* conviction was thrown out.

Impervious to well-deserved criticism, the CCA stumbles on, blaming the press or citizens ignorant of the law for even whispering the forbidden "t-word": technicality. But the Court's slavish appetite for technicalities (*i.e.*, microscopic, meaningless stuff) and aimless, cosmic debates too often runs amok. Instead of protecting fundamental liberties, the CCA's love for hairsplitting is like building the Hoover Dam in the Sahara Desert

... a pricey defense that offers little in the way of meaningful protection for the citizens who bear its multi-million dollar cost, not to mention the immense costs (both financial and emotional) of untold retrials and all the attendant delays. And what do we get for our tax dollars? A "badly fractured" court with a marked "inability to decide key issues with more than a plurality of judges"[73] ... airtight proof that the uncollegial Court is falling short on one of its chief duties as caretaker of Texas criminal law — to provide clear, intelligible guidance to lower courts and to the public.

All too often, the Court of Criminal Appeals—once described by a visiting criminal law expert as "beyond a doubt the worst court of last resort in the country"[74]—seems to be in the business of *creating* miscarriages of justice, not preventing them. And business continues to boom.

B. The Threat of "New Federalism"

In June 1991, the CCA's aggressive liberal majority weighed in when the Court decided Heitman v. State,[75] which unfurled the worrisome banner of what prosecutors had long feared, "new federalism." Although it sounds innocuous and even somewhat august, the doctrine of new federalism is a Pandora's box fraught with mischief. In Heitman, the Court broke with settled precedent and boldly declared itself free to interpret the Texas Constitution in pro-defendant ways that the U.S. Supreme Court has flatly rejected when construing parallel provisions of the U.S. Constitution. Put simply, the Texas Constitution—via judges eager to swell (abandon?) their judicial role and foist their policy views upon the unwashed masses—may now afford criminal defendants greater protection than its federal counterpart. Certainly, nobody disputes the CCA's authority to interpret the Texas Constitution independently; federalism recognizes states to be the sole custodians of their organic charters. But doing what is permitted is far different from doing what is judicious. As expected, the Court's sudden embrace of innovation over stability, without laying down any analytical guidance for lawyers and judges, left everyone scrambling for direction. The Court's peculiar embrace of new federalism was aptly described by a notable practitioner and Court-watcher:

> The Court of Criminal Appeals, like the U.S. Supreme Court, is entitled to change its mind when it finds that prior cases, even a long line of firmly entrenched precedent, have been wrongly decided. But to discover suddenly that the same or similar words in two documents serving the same interests and designed to protect the same rights do not necessarily mean the same thing after so many years of saying the reverse suggests that what the court wants to change is not its mind, but the Texas Constitution.[76]

Some say the concerns with experimental constitutional analysis are overblown, that if the Court "come[s] up with some goofy decision, we can vote them out and change the Constitution."[77] That, in fact, is exactly what happened in Florida and California when their highest state courts adopted new federalism. In 1982, Floridians approved a constitutional amendment adopting the U.S. Supreme Court's interpretation of the Fourth Amendment's "search and seizure" provision.[78] That same year, California passed the California Crime Victim's Bill, which included a "truth in evidence" provision admitting any evidence seized in compliance with the U.S. Constitution as construed by the U.S. Supreme Court.[79]

Prior experience in Texas, however, isn't so hopeful. The CCA's *first* major embrace of new federalism, after years of flirting with the idea, occurred three years before Heitman, in the 1988 decision, Forte v. State.[80] In response, State Senator J.E. "Buster" Brown introduced a proposed constitutional amendment to the Legislature that would have conformed the Texas-stated rights of criminal defendants to those announced by the U.S. Supreme Court when construing the federal Constitution. The proposed amendment never even enjoyed a committee hearing.[81]

Contrary to prosecutors' collective dismay, defense lawyers were, of course, jubilant at the Court's decision to overrule roughly 50 years of established precedent (again, even though the Court issued absolutely no guidance to lower courts on how to apply their new toy). One sympathetic expert called Heitman "a declaration of independence for the Texas judiciary in criminal cases ... . It couldn't be more significant, and it's about time."[82]

New federalism, though, is pernicious because the ratchet turns in only one direction ... in favor of the criminally accused. Texans plagued and victimized by crime will never benefit from independent state constitutional analysis. Stated differently, the still-gauzy notion of new federalism can only work to *expand* the accused's protections; it cannot work to limit federal guarantees, which set a floor for the rights of criminal defendants. If left unchecked, the ultimate result of the Court's self-described "opportunity to experiment with constitutional rights" will likely be an ever-expanding menu of "rights" for criminals.

Indeed, in October 1993 the CCA inched closer. In Richardson v. State,[83] the Court encouraged criminals when it refused to say that the use of "pen registers" doesn't qualify as a "search" under the Texas Constitution. Pen registers are mechanical or electronic devices that record outgoing phone numbers dialed from a particular phone line; they cannot record the origin of an incoming call or the call's content. Their use is widespread in criminal cases, particularly drug transactions. If pen registers are deemed to be "searches," drug pushers who use the telephone when marketing their poison would enjoy privacy protections under the search-and-seizure provision of the Texas Constitution, even though the U.S. Supreme Court has flatly rejected the idea that pen registers constitute searches under the Fourth Amendment to the U.S. Constitution.[84] (Richardson's intercepted calls, by the way, were made *from a county jail phone*, which he was using to traffic drugs while he was detained).

In another important search-and-seizure case, State v. Sanchez,[85] the Court dealt Texans another blow when it strayed from a recent landmark U.S. Supreme Court decision that DWI roadblocks don't offend the Fourth Amendment.[86] Then, while ruling that officers must follow certain guidelines in setting up sobriety checkpoints, the Court neglected to say what those guidelines should be. The CCA stumbled again in June 1994, when it struck down a roadside checkpoint set up by the Arlington Police Department that resulted in the arrests of 10 people suspected of driving while intoxicated.[87] Even though the checkpoint met all the U.S. Supreme Court's requirements—*i.e.*, it followed clearly written procedures, was publicized, and promoted the State's interest in preventing drunken driving (the leading cause of death among people ages 15 to 24)—the 6-3 Court of Criminal Appeals said that wasn't good enough. In what a dissenting judge termed "an unjustifiable quantum leap," the Court insisted that local plans, however well-drafted, weren't sufficient; instead, the procedure for DWI roadblocks must be enacted *statewide*. Compounding their shoddy decision, which contorted the U.S. Supreme Court ruling it purported to follow, the Court then dodged (again) the question of what would pass constitutional muster. Thus, Texas prosecutors anxious for guidance on how to conduct permissible checkpoints —proven deterrents to drunken driving, which takes 17,000 lives nationwide each year—will have to wait a little longer. Or maybe a *lot* longer. To their credit, lawmakers weary of the Court's silliness—and frustrated that roughly 35,000 Texans are killed or injured each year in alcohol-related accidents—swiftly proposed in the 74th Legislature statewide rules that would have sanctioned temporary roadside checkpoints.[88] The bill—described bluntly by one legislator as an effort "to kick some butt and do what's right"—passed unanimously in the Senate, but died in the House Criminal Jurisprudence Committee.[89] A final effort to add it as an amendment to the Legislature's major anti-crime package also failed, falling ten votes short of House passage.

Last year, the Court threw Texas criminals another "new federalism" bone. In Autran v. State,[90] a cocaine possession case, the Court answered the question that Heitman winked at but left unanswered: whether Article I, § 9 of the Texas Constitution (the "search and seizure" provision) provides criminals with greater protection than the Fourth Amendment to the U.S. Constitution in the context of inventories — searches of closed containers found within impounded automobiles.[91] The Court continued down the slippery slope, concluding that Autran's cocaine (found in a plastic spare key box under the driver's seat and *after* officers had already discovered about $500,000 in the trunk) was seized in violation of his enhanced rights under Article I, § 9. Case reversed.

The Presiding Judge issued a blistering dissent calling the ruling raw "judicial activism" and "unprincipled, result-oriented decision-making as a means for judges to impose their views on others."[92] The ruling, he said, shows that the CCA's voice is "one of power, not reason ... [that] the Texas Constitution means whatever five elected judges to this Court says it means." He also urged Texans to amend their Constitution if necessary, like Californians and Floridians have done, "to prevent the judiciary from judicially legislating what it consider[s] to be socially desirable results." "Forty years of this kind of judicial activism is enough," he concluded. He's exactly right (aside from understating by about 80 years the Court's insatiable appetite

for hyper-technical, political judging). What's more, aside from failing to explain why it was departing from a wealth of prior U.S. Supreme Court and CCA precedents, the Autran Court *still* neglected to provide lawyers and judges with any useful guidance when it comes to independent constitutional interpretation.[93] While producing four opinions—none getting enough votes for a majority—the CCA provided zero answers to some elementary questions: (i) how are Texas courts and police officers *supposed* to analyze inventory searches; and (ii) more generally, just how should our courts interpret our State's organic document, anyway?[94]

The CCA's foray into new federalism is certainly welcome news to giddy defense lawyers (and their clients), who stand to gain handsomely once the doctrine has time to percolate in the intermediate courts of appeal and gain some steam. Once the lawyers become fluent in briefing and arguing new federalism angles—and they're getting more polished with every case—the flare sent up in Heitman will lead our State into a judicial swamp. And average, hard-working Texans, those most affected by Heitman's repercussions, will see more criminals go free and wonder why. In today's climate of well-founded fear, it is indeed difficult to envision a Texas citizenry clamoring for greater constitutional protections for the criminally accused.

C. The Case Against Hyper-Technicality, and the Ascension of "Victimology"

> *[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.*
>
> Justice Benjamin Cardozo, Snyder v. Mass., 291 U.S. 97 (1934)

The revered Justice Cardozo had it right. Judges should not fury against technical gnats while ignoring the camel of justice. The CCA seems to forget, however, that it is not only the last legal resort for predator-criminals, but also for the innocent victims of crime as well. Average, law-abiding Texans deserve fair enforcement of the law, and their rights to security in their own homes, safe streets, etc., should be honored with equal (if not greater) force. They are, after all, an equal party to every criminal proceeding ... if not the most important party.

Indeed, the overarching purpose of the Texas Code of Criminal Procedure—adopted in 1965 to eradicate judges' fascinations with slender technicalities—was designed to simplify matters and promote justice: "The provisions of this code shall be liberally construed, so as to attain the object intended by the Legislature: the prevention, suppression and punishment of crime." The linchpin of that preamble—drafted by the people's elected representatives—was the harmless error doctrine, that "no affirmance or reversal of a case shall be determined on mere technicalities."[95] The statute required application of a common-sense harmless error rule—like most other states and the federal system since 1911 have used—and its purpose was a simple one: to ensure that "justice is the end result of a criminal trial."[96] In 1985, though, the Legislature granted the CCA authority to promulgate rules of criminal evidence and appellate procedure for itself and for all subordinate courts. Thus unleashed, the Court immediately jettisoned the Legislature's harmless error rule, replacing it with the most pro-defendant standard of all — that *any and all* errors, whether a constitutional violation or a trivial variance from the most minute housekeeping rule of procedure, warrant immediate reversal unless the prosecution can prove the misstep was harmless beyond a reasonable doubt.[97]

In recent years, however, the Court of Criminal Appeals has even refused to follow this heightened, pro-defendant rule ... *which the Court adopted for itself.* All too often, the CCA summons its early 1900's rule of automatic reversal (which earned Texas disrepute as one of the "impregnable citadels of technicality").[98] Indeed, the CCA's philosophical bent scoffs at even *mentioning* the public's legitimate interests, much less balancing them against those of the criminal defendant. Instead, meaningless "flaws"—real or imagined—often translate into automatic reversals, regardless of whether the accused suffered any measurable prejudice.

Criminal trials, though, are not designed to be a judicial game of "gotcha," wherein imperial jurists plant technical mines to trip up those trying heroically to accomplish what the preamble demands: "the

prevention, suppression and punishment of crime." The U.S. Supreme Court has stated it bluntly: "The basic purpose of a trial is the determination of truth."[99] More recently, the Court has cautioned again that "a criminal trial is not a game."[100] Rules of legal procedure and evidence are merely means to an end — the fair and just conviction or acquittal of a criminal defendant. And that procedure is best which most fully promotes our discovery of truth. While barristers proclaim that the rough-and-tumble adversary system is superior for rooting out the truth, we know all too well that many of the devices of adversary litigation are aptly suited to *defeat* truth. The CCA's history, too, shows that it considerably overrates the importance of the trial "contest" and considerably undervalues accurate truth-discovery. But as esteemed Harvard Law Professor and Dean Roscoe Pound noted 70 years ago, where the adversary system rubs up against the ultimate goal of ascertaining truth, our worship of the adversary system must give way: "Nothing is so subversive of the real purposes of legal procedure as individual vested rights in procedural errors."[101]

Properly understood, therefore, legal procedure is not a self-standing end in itself, independent of justice and superior to truth. And faithful allegiance to an ordered scheme need not trump *in any way* our system's paramount quest for truth and justice. That price is needless and too high. But the CCA's appetite for meaningless, insipid debates furthers the "lawyer as gladiator" and "trial as coliseum" metaphors; all the procedural swords and shields ritualize the aggression. The cold result of embracing this sporting theory of justice—which is dotted with tricks and schemes and surprises and concealments and stratagems and ruses—is that criminals, protected by their twin semantic warriors (their lawyers *and* the CCA), too often win by technicality when they cannot win by truth. Reliable fact-finding and truth-seeking become collateral luxuries that would kill to be even *second* fiddle. As the CCA's inglorious record shows, this gymnastic Court dodges and twists and distorts and perverts in its efforts to sacrifice truth. One distinguished expert characterized the CCA's mischief this way:

> Nowhere in these recent capital murder cases reversed on tortuous interpretations of reasonable rules does this court ever ask the question of whether the accused received a fair trial in accord with procedural rules fairly interpreted. Never does it ask whether the defendant has been harmed or prejudiced in any way by the "error" the court has discovered. Never does this court mention article 1.26 concerning the liberal construction of the code. Never does this court balance the rights of society and of the victims of crime against those of the accused.[102]

Put simply, cases should not be reversed where the technical "error" caused no deprivation of concrete rights. Automatic reversal is properly reserved for those errors that strike at our notions of fundamental fairness. Mere procedural rules enjoy no special sanctity ... unlike bedrock constitutional guarantees. They merely help secure the orderly administration of our laws. As one court recognized almost a century ago, technical rules of practice and evidence serve their purpose "so far as, and only so far as, they conduce to a fair trial. But instead of serving as a means of securing justice, they have been made to usurp dominion as if their observation were the end to be attained."[103] Such nonsense, says one eminent commentator, is forged by courts who "become victims of their own verbiage" ... courts whose "myopic concern" for technical missteps urge them to treat harmless errors like the "operations of an automatic cash register."[104] The result, as we have seen in Texas, is plain: bizarre reversals. Not surprisingly, such nonsensical results, says another revered commentator, "especially where the error may not have affected the outcome of the proceeding, are exceptionally likely to erode public confidence in the proper administration of justice."[105]

What's more, as we have seen, technicalities, once planted in a single case, have a nasty habit of spreading like a doctrinal virus to infect countless others. As noted in Paul Burka's 1982 Texas Monthly article, *Trial By Technicality*, the threat of faulty decisions passionately expressed in *The Merchant of Venice* by Portia—literature's first cross-dressing lawyer—rings true 400 years later: "Twill be recorded for a precedent, / And many an error by the same example / Will rush into the state. It cannot be." Oh, but with the Court of Criminal Appeals—a habitual offender every bit as much as the criminals who appear before it—it can be ... and can be again ... and can be again.

The Judge as Legislator

As mentioned above, the Court of Criminal Appeals displays a strong affinity for the siren song of political judging ... for cold-shouldering the law whenever it frustrates the Court's whims. While the charge should not be overstated—although a strong tendency, it is not invariable conduct—the Court's appetite for rewriting the law in order to expand its turf or do "justice" is certainly hearty. But whenever the Court of Criminal Appeals assumes its legislative mode by rewriting or ignoring controlling law, it subverts the idea of constitutionalism ... that we enjoy a government of delegated, enumerated and limited powers. And in denying that judges are bounded by the law, the CCA fails to grasp a great truth: judging, properly understood, is anchored in renunciation, in refusing to infuse the law with content the Constitution's framers or the statute's drafters never imagined. By displacing democratic choice in order to do "good," the CCA dilutes the intended sovereignty of the people through their elected representatives.

When the choice is between its malleable version of justice (which may well be—but usually isn't—noble) or respecting our chosen form of self-government, the CCA too often opts for the former. Thus rampant and unrestricted by anything except their own subjective inclinations, the CCA's aggressive liberal majority guts the separation of powers and tramples the law's integrity. But the Court's heresy—the heresy of political judging—is masked in a shrewd way that disguises its departures from principled law. Through the sly misuse of materials or brash illogic, the CCA issues opinions *claiming* to be rooted in settled legal principles; there's a smug pretense of objectivity. But under the surface, the Court merely supplants analysis with rhetoric. And, as the Court's checkered history demonstrates, legislative judging is an addictive habit.

The CCA would do better to follow the wisdom of Justice Oliver Wendell Holmes. When driving off after lunching with fellow jurist Learned Hand, the latter exclaimed: "Do justice, sir, do justice." Holmes stopped his carriage to admonish Hand: "That is not my job. It is my job to apply the law."

I'm Dysfunctional, You're Dysfunctional

Converging with the Court's preference for form over substance is another pernicious phenomenon, today's national fascination with the newest growth industry, "victimology." Aside from a CCA unwilling to punish criminals, we have strange juries all-too-willing to excuse them. The daily parade of dysfunctionals on Geraldo and Sally Jessy disseminates the notion that you can escape society's wrath if you can contrive an external excuse for your behavior. The result of today's age of predator-as-victim? Vicious but Academy Award-caliber criminals escape society's rage because crime is viewed as a condition to be treated, not as conduct to be punished. Responsibility disperses into a soup of "socioeconomic factors" that so often comforts elites when they are faced with atrocities. And bit by bit, we are losing our moral vocabulary ... our ability to speak out with emphatic judgment against evil ("Evil? What a primitive, uncivilized thing to say.") and in favor of swift punishment (as opposed to therapy). In U.S. Senator Daniel Patrick Moynihan's recent article, *Defining Deviancy Down*, he writes that over the last generation the nation has been (i) redefining deviancy to exclude much behavior previously stigmatized, and (ii) diluting the standard of what are deemed "normal" levels of destructive conduct ... levels that would have been intolerable by former standards. Once upon a time, when our bearings were surer, we housed society's predators in *pen*itentiaries, so they could do "*pen*ance" for their misdeeds. Today, as some have noted, we place them in "correctional facilities," so we can, I suppose, "correct" them.

Such squeamishness carries a hefty price, though. The "Oprah-ization" of America has helped make us a nation of buckpassers. And today's trendy defenses have zealous defenders who scream bloody murder (pun intended) if you question their validity. Disagree and you threaten their attempt to piggyback their agenda onto passing horrors, or to commit "sociology" ... sparing themselves the reality of personal evil by sociologizing it away. But a society queasy about recognizing evil (crime) will likewise flinch, too, when it comes time to punish. Coupled with a CCA downright gymnastic when straining to coddle criminals, today's alphabet soup of various syndromes—*e.g.*, post-traumatic stress, xyy chromosome, black rage, premenstrual, urban stress, etc.—threatens to warp our legal system even further. But we must always, as Cardozo

advised, "keep the balance true." We must always distinguish the victim from the victimizer, the brutalized from the brute.

The daily news is not encouraging:

- Recently—in the same California courthouse that saw jurors deadlock over the guilt of self-styled abuse victims Lyle and Erik Menendez—Moosa Hanoukai escaped a murder conviction by convincing the jury that his now-dead wife of 25 years, whom Hanoukai admitted bludgeoning with a wrench, had heaped years of psychological abuse on him. Like what? Like making him sleep on the floor. Although the jury ultimately compromised on manslaughter, some jurors even came to the sentencing hearing asking the court to impose probation.

- Not long ago, a Fort Worth jury deadlocked after the defense attorney insisted that the daily horrors of slum life (*i.e.*, "urban survival syndrome") had led his client to gun down two unarmed men who had allegedly been threatening him.[106]

- March 1994 saw a San Francisco jury reject a murder charge in a case involving a 24-year-old who said sexual and physical abuse left him no choice but to fire a rifle shot into his father's brain after a family party. Having done so (after lying in wait for the right moment), "I looked at him and he was still breathing ... . So I shot him two more times."[107]

- Meanwhile, back in the Menendez/Hanoukai courthouse—evidently still infected with residual psychobabble—a jury waited to hear from another accused murderer. The details of the woman's misdeeds? Hiring a hit man to kill her husband, having the hit man murdered for his trouble, and then posing for a snapshot wearing her birthday suit ... and $100 bills from the insurance money. Her attorneys, of course, asked jurors to keep an open mind. After all, their client's testimony will describe wrenching details of spousal abuse.[108]

Never mind the children who overcome hellish childhoods without riddling their television-watching parents with bullets or the heroic inner-city residents who respect the law or the battered spouses who say "Enough!" to their abusers and leave.

Given the frequency of today's bizarre outcomes, it is little wonder that the American people are losing respect for their system of justice. Would-be criminals are certainly not deterred by such nonsense. A judge's robes, however auspicious, should never confer such piercing "wisdom" as to stifle common sense. Feel-good justice—a hallmark of the CCA—carries a high price, namely the public's growing sense that crime is increasingly punishment-free.

To put it simply, the Court of Criminal Appeals is a corrosive institution. It always has been. And through its one-sided handwringing over criminals' rights, the CCA's judicial tyranny stiffarms our civil morale. Even as we rage against crime, we are all softened. We hear weird prayers of solace being offered for O.J. Simpson from the podium of the U.S. Senate and read of chummy mixers being held among the Menendez brothers and their baffled jurors and see that Damion Williams (the Los Angeles brick hurler) escaped punishment because the "mob" was the guilty party (not poor lamb Damion). But in softening, we neglect larger society ... and especially the families of those lying six feet under, stripped brutally of life's simplest joys. If O.J. Simpson is guilty, then he *should* feel depressed for having deprived his children of both their mother and father in one wicked act. The Menendez brothers *should* pay a hefty price for firing countless shotgun blasts into their parents, who were, I concede, armed heavily with ice cream and popcorn. Damion Williams' novel defense—"the mob is guilty so nobody else can be"—*should* give us pause.

In its own way, the CCA has subjected Texans to yet another syndrome, JDS, "justice deprivation syndrome." In so doing, the Court spurns the public's desire that the legal system and legal norms reflect

society's quest for law and order. We must recognize, however, that traditional Texan individualism unhinged from a sense of moral accountability invites *dis*order. We must recognize the State's rightful role as society's moral tutor, particularly in matters of public safety, government's most fundamental responsibility. We must recognize that the legal system should tilt in favor of the law-abiding, and away from a quickly mushrooming number of miscreants and delinquents. *Certainly*, the criminally accused is constitutionally entitled to the full measure of due process and fairness. But once fairly (albeit not always *perfectly* convicted), punishment must be swift ... and severe ... and certain.

> *POSTSCRIPT: Spurred by the notorious Tracy Gee case, Senator Brown—defeated in his earlier bid to curb "new federalism"—introduced in the 74th Texas Legislature Senate Bill 280, a law aimed squarely at the CCA. SB 280 would have codified (put in statute form) the "harmless error" rule, which already exists in rule form ... the often-ignored Texas Rule of Appellate Procedure 81(b)(2). Stated differently, the bill would have simply enforced the "harmless error" rule that the Court has already adopted for itself.*
>
> *Newspapers' editorial pages and victims' advocates from around the State urged its passage,[109] and SB 280 passed unanimously out of the Senate. The criminal defense lobby was staggered. Caught flat-footed by the statute's swift Senate passage, the Texas Criminal Defense Lawyers Association rallied and re-doubled its lobbying efforts in the House against what it considered to be (i) a "most heinous bill," (ii) "the most worrisome bill conservatives threw at them," and (iii) "insidious Machiavellianism" (descriptions offering airtight proof of the bill's merit).[110] In attacking the bill, the defense lobby resembled, charitably viewed, a pyromaniac in a field of straw men. But when the dust cleared, the criminal defense bar, and by extension their clients (i.e., accused criminals), had won. SB 280 languished for two months in the House Criminal Jurisprudence Committee—where the defense bar had targeted the Committee's Chairman, a fellow defense lawyer—and the bill emerged only when it was clearly too late for the Calendars Committee (the legislative boneyard that schedules bills for floor debate) and the full House to take action on it. The lobbying paid off ... meaning criminals will get off.[111]*
>
> *Hope springs eternal, however. During SB 280's Senate hearing, Vice-Chair Florence Shapiro responded to this author's testimony in support of SB 280 with this comment favoring outright abolition of the CCA: "I also would like to tell you that I think you may find a lot of support from a lot of us in the area of abolishing the court completely. I think I've heard that now for a number of years, and this may be the first step in that direction." Senator Shapiro's remarks, coupled with the visions of structural reform discussed below, hopefully signal a brighter day for crime-weary Texans.*

II. Today's Byzantine Court Scheme

Even putting aside the CCA's often-dismal performance, there remains an altogether separate reason for consolidating our two high courts: structural sanity.

Pick a Court, Any Court

Most observers agree that the Texas judicial system is mystifying at best.[112] A jurisdictional crazy-quilt has emerged, due chiefly to our antiquated state Constitution, confusing both lawyers and lay people alike. Charitably put, Texas courts are in disarray. As one public policy research organization wrote, our State's fragmented system is "a tangle of mixed jurisdictions where overlapping is the rule rather than the exception."[113] In an earlier report, the group concluded that "[b]ecause the courts are so decentralized and because individually they are quite independent, it is difficult to call the Texas judiciary a system" at all.[114]

Indeed, Texas has no uniform judicial framework or modern communications system, and today's technologies have made the reasons underlying our cumbersome and haphazard structure totally obsolete. Several provisions of our 120-year-old charter—which was purposefully designed to curb government

powers in the wake of a Reconstruction-era carpetbagger government—are cluttered with microscopic details; even fine-tuning requires a constitutional amendment. Unlike the U.S. Constitution, which has been amended only 17 times since the Bill of Rights was ratified in 1791, the antiquated Texas Constitution—the greatest single obstacle to meaningful judicial reform—has been amended 364 times (out of 535 tries) since 1876 ... and 171 times since a modernized rewrite was voted down 20 years ago.[h] A judge can barely get his robe cleaned absent a new amendment to this 76,000 word beast, which, like the CCA, has more to do with paralyzing minutiae than with astute guidance. Efforts at reform are regularly mounted, but the ponderous improvements are piecemeal at best.[115] The result? A fragmented organizational and administrative structure that (i) frustrates society's interests in predictability and accountability, and (ii) lessens our regard for the judiciary.

The architecture (such as it is) is flat-out bizarre. Many courts at the same level have overlapping but non-identical geographical boundaries. Our 14 intermediate courts of appeals, for example, often overlap each other. In fact, 14 counties lie in the First and Fourteenth Courts of Appeals districts, "the only instance in the United States of a major population center [the greater Houston area] being served by separate appellate courts of coterminous jurisdiction."[116] Overall, 23 counties lie in two separate districts.[117] Even worse, Brazos County is actually located within *three* different courts of appeals districts.[118]

The numbing intricacies of Texas' chaotic trial courts are even worse. Texas has six primary types of trial courts, and each type suffers its own weird defects. The product of patchwork legislation, even the Committee on Judicial Affairs of the Texas House of Representatives has charged that "current judicial districts are so fundamentally unfair and so irrationally configured as to shock the conscience of all Texans who familiarize themselves with the present system."[119] Most courts overlap jurisdictionally with one or more other courts. Courts bearing the same name may in fact decide altogether different types of cases. And most of our State's 2,600 judges are only part-time officials without law degrees. Moreover, many of the auxiliary officials helping our courts deliver justice—prosecutors, clerks, etc.—don't serve geographical districts that correspond to the judicial districts they serve.

The Texas Research League's conclusion hit the mark:

> The Texas court system really is not a system at all. Indeed, Texas' courts are fragmented without a central focus and are going along in their own discretion and at their own pace.[120]

Scholars have been unanimous in condemning our State's cryptic court system.[121]

Thin Air Rises

This convoluted complexity naturally floats to the top, and our dual high courts are a particular anomaly. The CCA, which is co-equal in power with the Texas Supreme Court and has exclusive jurisdiction over criminal cases, is one of only two such criminal high courts in the nation. Oklahoma is the only other state having a separate court of last resort devoted exclusively to criminal appeals.[122] Even in Oklahoma, however, the Supreme Court is truly supreme, retaining under the Oklahoma Constitution the authority to (i) decide questions of jurisdiction between the courts, (ii) modify the criminal high court's jurisdiction, and (iii) abolish the sister court entirely.[123] Texas, therefore, is the only state in the country with a wholly separate high court structure where neither court is subordinate to the other.[124]

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h In 1973, a diverse, 37-member Texas Constitutional Revision Commission began crafting a new nodel Constitution for Texas. Their document was considered as a working document by the Legislature during the 1974 Consitutional Convention but lawmakers, embroiled in an election-year fight over a proposed right-to-work provision, failed to take a final vote before the midnight deadline for forwarding the proposal to the voters. During the next regular session in 1975, the Legistlature attempted to salvage the Convention's work by re-packaging some of the proposals as eight amendments to the existing Consitution. But post-Watergate voters suspicious of government would have none of it – at least the majority of the minority who actually voted on November 4, 1975 – and they rejected everything.

Not surprisingly, today's dichotomized system—apparently designed by Yogi Berra— invites needless inter-Court confusion and conflicts.[125] Owing to the absence of a body designated to decide questions of jurisdiction, Texas history is replete with jurisdictional and interpretive clashes between the CCA and the Texas Supreme Court. As one recent study of Texas courts has pointed out,[126] conflicts between the dual high courts have arisen, for example, over the conclusivity of the courts of appeals' factual determinations under Article V, § 6 of the Texas Constitution,[127] the constitutionality of the "Pool Hall Law,"[128] and whether journals of the Senate and House of Representatives can be used to contradict an enrolled bill.[129] The Supreme Court has, in fact, ruled on the constitutionality of laws affecting *criminal* defendants, including probation revocations and the right to a speedy trial.[130] Moreover, under our slap-dash Constitution, *both* courts sometimes have jurisdiction over certain matters, such as a petition for a writ of habeas corpus from incarceration for contempt in a civil case.[131]

Indeed, the two high courts have *themselves* often emphasized the friction that befalls a bifurcated system. In the most spirited attack yet on "the flaw in the present structuring in our court system," former CCA Judge Truman Roberts, weary of diverting lost litigants to the correct forum, vigorously argued for wholesale structural reform highlighted by a single court of last resort:

> [U]nder the dichotomized system of courts of last resort in Texas, the person seeking relief may well find, despite all his good intentions, that he has placed himself before the wrong tribunal... . because of the split court system, we now send this appellant on his way to begin yet another search for the proper forum[.]
>
> Texas law books are replete with confusing overlap, necessitated by the two courts of last resort[.]
>
> • • •
>
> It is my firm belief that many of the problems outlined above [litigants appearing before the wrong tribunal] could be avoided if Texas had but one court of last resort, one which would have jurisdiction over both civil and criminal matters. Without doubt, aggrieved persons seeking relief in this State could do so with a great deal more assurance than they are presently afforded, as to the correct forum. Texas' court system already possesses strength in that our courts represent a blend of law and equity jurisdictional powers. I sincerely believe that a merger of the State's two highest courts would add to that strength, by dispelling much of the confusion and overlap between the civil and criminal law in Texas.[132]

Today, a full century-plus after the Court's inception, the "confusing overlap ... necessitated by the two courts of last resort" continues unabated. And even the Texas Attorney General's Office—the "law firm of Texas" itself—is not immune from the jurisdictional confusion. In May 1992, when appealing a politically dicey ruling that declared the State's anti-sodomy law unconstitutional (a 1983 ruling from the U.S. Supreme Court had upheld the 113-year-old law), the Attorney General took the unusual step of appealing to both the Texas Supreme Court *and* the Court of Criminal Appeals. The lead attorney on the case said he feared that if he picked the wrong court in which to file the State's appeal, it would be too late to start anew in the proper court: "We want to make sure we're not locked out of an appeal. It was either file with both or roll the dice."[133] Professor Robert Dawson of the University of Texas School of Law wasn't quite certain either: "It seems to me better than a 50-50 chance that the Supreme Court is the place to go."[134] Surprisingly, even the CCA's executive administrator was puzzled: "[I]n all likelihood, one of the courts will indicate early on" it doesn't have jurisdiction.[135] The CCA eventually declined jurisdiction, thereby punting to the Supreme Court and avoiding a potential constitutional crisis.[136]

The sodomy case, however, is no anomaly. Because neither high court has the authority to decide jurisdictional questions—as does Oklahoma's (truly) Supreme Court—the two courts "commonly" transfer cases that have been improperly filed.[137] The peculiar step of bringing *dual* appeals, covering your legal bases by appealing to both courts, illustrates the problem even further.[138]

> *(Postscript: The Texas Supreme Court lost the judicial game of "hot potato" in the sodomy case and eventually ruled that... it had no jurisdiction after all. The Court concluded 5-4 that it—as a civil court—is powerless to declare a criminal statute unconstitutional unless someone's property or personal rights are threatened with irreparable injury. Because neither those suing (nor anyone else) had ever been prosecuted under the statute, no harm could be proven. In any event, said the Supreme Court, the CCA is the proper court for review of criminal matters.[139])*

The above-cited decision granting hope to death row inmate Gary Graham is another fair and on-point example. Twelve years after his initial conviction and nearly a month before the execution date, Graham (a criminal) filed a *civil* suit in Travis County, seeking an order compelling the Board of Pardons and Paroles to give him a clemency hearing. The Board, by the way, had already denied 10-7 an earlier clemency request, a decision that the Governor snubbed when she granted Graham a 30-day reprieve. The Travis County judge agreed with Graham and entered an order requiring the Board to either hold another hearing before the execution date or postpone the execution date (again) until the hearing could take place. The Board was unimpressed with this judge's civil order and appealed to the Third Court of Appeals, which bolstered Graham further by prohibiting the Board from proceeding with the scheduled execution. The Board took a deep breath and appealed to the CCA, arguing that the Third Court of Appeals was wrong to interfere with Graham's criminal case.[140]

The CCA first ruled that the lower courts had overstepped their bounds in halting Graham's execution; although Graham's latest legal effort was styled as a *civil* case, the courts had no jurisdiction to enter the legal fray. Holding that "the entry of an order which stays the execution of a death row inmate is a criminal law matter," the majority stated that *it* enjoyed exclusive appellate jurisdiction over Graham's case. The majority's brethren, however, held a different view of the Court's proper jurisdiction. One dissenter argued that the Third Court of Appeals' injunction "does not impermissibly interfere with this Court's exclusive appellate jurisdiction in death penalty cases because it did not and does not address the merits of the capital murder conviction."[141] Three other dissenters voiced a different jurisdictional view, urging that the CCA should've declined to hear the case because the issues Graham raised in his civil suit likely would've never reached the CCA on appeal (since final civil appeals rest with the Texas Supreme Court). Consequently, the dissenters wrote, the majority interrupted the normal appellate process with an "extraordinary writ, commanding the lower courts to relinquish jurisdiction of these matters, precisely in order to prevent the usual appellate process from leading eventually to the Texas Supreme Court or from terminating in the 3rd Court of Appeals."[142] Thus, the Court should not have engaged in "a guerrilla raid" and "hysterical interference" to snatch the case out of the civil court process.[143] The three dissenters, who described the majority's attitude as "indefensibly chauvinistic," then hit the mark:

> While I too am concerned that *this State's bifurcated judicial process could sometimes generate conflicting decisions at the highest level on identical questions of law,* I am not willing to torture our ... jurisdiction in order to fight a turf war with other Texas courts.
>
> If there is a problem, it lies with the lines dividing the constitutional jurisdiction of this Court and the Texas Supreme Court.[144]

Yet another dissent, upset with the high standard for showing actual innocence, expressed another critical view:

> I cannot help but come away with an abiding impression that the majority's objective in this whole matter has been to wrest control of [Graham's] destiny from the courts of equity, and the executive branch[.] In my view, the Court is entirely too jealous of its turf.[145]

> Countless other decisions from both high courts highlight the unnecessary tension accompanying a split system.[146]

Further muddying the waters is today's ever-murkier distinction between criminal and civil law ... a distinction that is "collapsing across a broad front."[147] While it's important to draw principled lines between the two (particularly when you insist on having a separate high court for each), an increasing number of cases resist easy classification, and stubborn attempts to fit them neatly into one category or the other are often easier said than done.[148] In Texas, for example, *all* matters involving juvenile justice are considered to be civil law. Therefore, unless a young criminal is certified as an adult, his appeal will maneuver its way not to the Court of Criminal Appeals, but to the Texas Supreme Court.[149]

Moreover, as mentioned above, Texas' bifurcated system could easily result in the same provision having two definitive interpretations, depending on the procedural setting. A good example is Right to Life Advocates, Inc. v. Aaron Womens' Clinic,[150] where anti-abortion protestors opposed an injunction against them under Article I, § 8 of the Texas Constitution. Aaron was postured as a civil case and was thus within the Texas Supreme Court's jurisdiction. By contrast, Hoffart v. State,[151] in which pro-life demonstrators were prosecuted for criminal trespass and unsuccessfully raised only their federal First Amendment rights, was brought as a criminal case and was thus within the CCA's jurisdiction. "In both cases the highest Texas court declined to review; in the future, however, both could conceivably review similar cases raising demonstrators' rights under Article I, § 8 and reach conflicting results."[152] In 1983, the Texas Supreme Court declined to entertain a constitutional challenge to Texas' marijuana possession statute because it realized that a potential for conflicting decisions was a very real danger.[153] As one lower court noted a half-century ago, the prospect of both criminal *and* civil courts construing criminal statutes (like the marijuana and anti-sodomy laws),

> would tend to "hamstring" the efforts of [law] enforcement officers, create confusion, and might result finally in precise contradiction of opinions between the [civil courts] and the Court of Criminal Appeals to which the Constitution has intrusted supreme and exclusive jurisdiction in criminal matters.[154]

In short, Texas' fragmented court structure, while not yet in meltdown, is ill-equipped to meet the needs of the twenty-first century. Our judicial system must be simplified; it must be rationalized; it must be streamlined and made easier to administer; it must reduce jurisdictional squabbles; it must be more understandable to the public. But, for once, we must begin to think outside the lines. We must be bold, not timid. A consolidated, single high court—as part of a larger reform scheme—is one sensible way to help regain some order and restore public confidence.

III. Various Visions of High Court Reform

> *There is nothing more difficult to carry out, nor more doubtful of success, not more dangerous to handle, than to initiate a new order of things. For the reformer has enemies in all who profit by the old order, and only lukewarm defenders in all those who would profit by the new order.*
>
> Machiavelli

Mercifully ridding the State of the CCA, our judicial appendix, is hardly a novel idea. The Court's status has never been solid, and the past few generations have witnessed several calls for a CCA "death penalty." For all its flaws, however, Texas' dual high court system seems Teflon-coated and impervious to change ... not that would-be reformers haven't tried. Indeed, earnest proposals to abolish it have been launched steadily throughout this century:

> In 1913, the Texas Senate nearly passed a joint resolution calling for a constitutional amendment to create a 15-member Supreme Court with separate criminal and civil divisions ... an idea similar to that first proposed by Delegate Charles De Morse at the Texas Constitutional Convention of 1875.
> Five years later, the Texas Bar Association recommended the same thing.
>
> In 1933, the Texas Civil Judicial Council urged a nine-member, unified Supreme Court with jurisdiction over both criminal and civil matters.
>
> In 1943, Dean of the University of Texas School of Law, Charles T. McCormick, repeated the 1913 suggestion of a single Supreme Court of 15 members, to be reduced in size over time.[155]
>
> Ten years later, in 1953, the State Bar of Texas recommended a consolidated high court of 14 judges, with an eye toward reducing it to nine by attrition.

More recent legislative looks at our judicial system have recommended total consolidation of the two high courts,[156] a move that would (i) conform Texas to the federal system and virtually every other state, and (ii) bring Texas into line with the American Bar Association's recommended guidelines.[157] While some critics are spurred by frustration with the Court's bizarre rulings,[158] others view consolidation with the Texas Supreme Court as merely a common-sense part of a sweeping restructuring of our State's weird judicial system. Even current, former, and would-be CCA judges have urged its elimination.[159]

Aside from the ill-fated rewrite considered during the 1974 Constitutional Convention,[160] which urged outright abolition of the CCA, below is a sampling of more recent rumblings:

The Citizens' Commission on the Texas Judicial System

The latest blue-ribbon proposal to overhaul the CCA was the 84-member Citizens' Commission on the Texas Judicial System, created in November 1991 by the Supreme Court to scrutinize our State's entire court system. The broad-based Commission, hardly a collection of prosecution-minded, law-and-order types, even devoted an entire committee to our dichotomized system, the Committee on Courts of Last Resort, headed by former Texas Attorney General and Speaker of the Texas House of Representatives Waggoner Carr. At day's end, the top of the Commission's flowchart included a recommended merger of our separate high courts into a single body with civil and criminal divisions. After two hours of debate and a doomed bid to scrap the consolidation idea, the larger Commission opted for merger by a 29-9 vote.

Under the Commission's controversial proposal—a full circle return to the scheme first proposed by Delegate De Morse in 1875—the Chief Justice of the Texas Supreme Court, elected statewide, would be the administrative head of both divisions, each of which would have its own presiding judge selected by its respective members. In essence, separate courts would still exist, comprised of seven justices each. The chief justice could sit on both civil and criminal high court cases and could call the entire 15-member court *en banc.*

The Citizens' Commission call for merger, as part of a centralized Texas judiciary, doesn't want for detractors.[161] Their angles are predictable. Of course, criminal defense lawyers and the ACLU crowd think it's a terrible idea (which, for most people, is a sure sign that it's a *swell* idea). Besides, says the pro-defendant lobby, the CCA is already a conservative Court. But if the CCA is not truly pro-defendant—as defense lawyers somehow manage to argue with a straight face—then why does the idea of high court consolidation drill into such a raw nerve? The overwrought reaction is plainly a ploy of distraction, and also powerful evidence that we're onto something. Not surprising, a majority of CCA judges are likewise skittish,[162] especially those who are frequent targets of Court-watchers. One such target insists the reason behind attempts to scrap the Court is simple: "the desire of some judges and lawyers who want to enhance the dignity of the Supreme Court of Texas... . That's what they've been after for a long time."[163] Other

apologists and merger-opponents limply insist that the Court doesn't make up facts to set murderers free; it merely calls balls and strikes. But from the narrowness of the CCA's strike zone, it seems as though they're umpiring from high atop the Goodyear blimp.

Those favoring the status quo insist that law is becoming more specialized and that calls for judges to be more generalized, vis-a-vis consolidation, are misguided. But civil and criminal law in Texas is no more complex than in 48 of the nation's other states, and they seem to get along just fine, as does the federal system where judges handle both types of cases. Moreover, this assumed trend toward specialization—especially on the criminal side—is largely judge-driven. *Because* the CCA is so narrowly focused, *because* the judges fancy themselves as criminal law "experts" convinced of their own superior "enlightenment," they exercise a troubling penchant for minutiae, for losing sight of basics, and for impressing themselves and each other with how cleverly they can overturn seemingly open-and-shut cases: "You mean that poor boy caught red-handed stealing from Montgomery Ward and Company, Incorporated was nailed even though the witnesses had referred only to Montgomery Ward? Why, that jury must've been insane. We must do justice and reverse!"

A law degree, though, is a license to pursue justice, not to ignore common sense. And in this judicial shell game, as some have noted, simple common sense is the rarely-found pea. But criminal law does not raise technical, legal issues impenetrable to average mortals who aren't so-called "specialists" or who aren't part of the legal elite that haunts exceedingly narrow corridors of analysis. At heart, criminal law is about uncomplicated notions ... and it's about *real* people who are murdered, raped, and robbed by *real* criminals. Common sense, fairness, and justice will always be the casualties of a CCA jealously hoarding Texas criminal law. Moreover, specialized courts are, if anything, on the *decline* nationwide. Few scholars and lawyers believe the legal system suffers from judges with a broader, big-picture perspective. Rather, criminal-only courts breed what the CCA demonstrates all too well: a proclivity toward embracing hypertechnical positions that do little to promote justice and everything to promote more bars on our homes.

Finally, we really should care little about whether the Supreme Court's dignity is enhanced at the CCA's expense. Those wringing their hands over the CCA's lower profile should recognize what the Court too often refuses to apply to criminals: actions have consequences ... period. And those grumbling over the CCA's comparative lack of stature need to realize that it's the Court's troubling decisions, not its title, that matters most to crime-weary Texans.[164] In any event, under the Citizens' Commission's proposal—which, while a marginal improvement, still has the wrinkle of a separate criminal division—judges of both divisions would share membership of equal stature on the revamped Supreme Court.

Unlike Texans who are petrified over crime, however, most CCA members worry little about their Court's future. Said one member, "I don't get real excited about it because of the history of what's happened to other proposals."[165] There are, however, current CCA members who see some value in merger, especially when viewed as part of a top-to-bottom revamping of the State's judiciary. One CCA jurist notes that, "for purposes of efficiency," a centralized, statewide system of case administration would reduce duplication and streamline the movement of cases through the courts.[166]

Overall, the Commission's top-to-bottom recommendations are quite bold,[167] and several prize oxen get gored. Whether the Legislature will fend off the criminal defense bar and other vested interests eager to maintain the current chaos and put such enlightened changes before the voters, though, is another story. The Commission's recommendations certainly merit a thorough hearing, not a dusty shelf or, worse, a brick wall in the Legislature.

The National Center for Policy Analysis

In 1991, the NCPA, a Dallas-based nonprofit and nonpartisan research institute, published a report recommending three ways to reduce Texas' crime rate. Not surprisingly, a centerpiece of the report was to abolish the CCA. The report, written by Texas A&M economist Morgan O. Reynolds, noted the obvious:

> This court, separate from the rest of the court structure, has created more legal privileges for criminal defendants than those created by the U.S. Supreme Court. The federal system does not separate criminal appeals from civil appeals, nor should the state. Criminal law does not raise narrow technical questions, but general issues that should be decided by Supreme Court justices rather than crime specialists and defendants' attorneys... . It is time we in Texas got back to basics and punished without shame and without misguided illusions of rehabilitation.[168]

Replete with statistics illustrating the economic theory of crime, Reynolds's study explained that the expected punishment for all serious crimes in Texas has dropped by two-thirds since 1960.[169] Accordingly, would-be criminals—thinking, rational actors who are drawn to rewards but put off by penalties—realize that punishment is less likely and that the expected benefits of crime outweigh the expected costs. The result of these cost-benefit calculations? A sixfold increase in Texas' crime rate over the last 30 years.

The fact that Texas has been in the midst of one of the world's largest and costliest prison construction programs is, Reynolds would argue, partly attributable to our criminal high court, whose wacky rulings help send a green-light message to prospective crooks: crime pays.

"Texas People Against Crime"

The raucous campaigns for the Court in 1990 were arguably the first time the CCA received any scrutiny; that is, when actual issues of law and order replaced the earlier, more genteel, somnolent, and issue-less campaigns. It was indeed a watershed year for the CCA; five of the Court's nine seats were up for grabs, and prosecutors feared a bad-to-worse swerve in court philosophy. Former Harris County prosecutor Russell T. "Rusty" Hardin Jr. led the movement by (i) launching in September 1990 the first true law enforcement-oriented political action committee, Texas People Against Crime ("TPAC"), (ii) detailing the voting records of several of the Court's more liberal members, and (iii) promoting its own bipartisan slate of candidates interested in crime's victims as well as its perpetrators. TPAC's mission, said Hardin, was to promote "qualified, common-sense, and even-handed" candidates who "will be sensitive to the concerns of victims, law enforcement and the general public while remaining mindful of the rights of defendants and the proper role of the courts."

TPAC's 1990 effort to boost victim- and prosecution-friendly candidates was only marginally successful; of the four races contested by the two major parties, TPAC—hamstrung by a late start and lackluster fund raising—tasted victory only once (and the group was 0-3 in 1992). But its application of hardball tactics to what are, after all, political campaigns, roiled Texas political theater and helped alter how the public perceives the CCA. Emphasizing the forgotten casualties of crime, TPAC—which was inactive in 1994 given Hardin's assistance in the independent counsel's Whitewater investigation—staged press conferences featuring earnest, weeping victims and, significantly, issued the first longitudinal empirical study stressing the pro-defendant voting patterns of the Court generally and certain CCA judges in particular. In this 1990 analysis, patterned after a similar statistical study conducted annually by the Harvard Law Review on the U.S. Supreme Court, TPAC examined every published, full-court opinion issued by the Court since it became a supervisory appellate court with discretionary review power in September 1981. Of the 1,927 decisions examined, the CCA's overall reversal rate—the rate at which the Court "voted in favor of the defendant and against the State on the principal issue before the Court"—was a startling 47.4 percent (more than twice the

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i Limiting the analysis to published opinions is empirically sound, given that these are the *only* opinions that have any jurisprudential and precedential value for Texas. In fact, lawyers are flatly forbidden from relying on unpublished decisions, which virtually nobody sees except the parties themselves. So as the CCA articulates our State's body of criminal law, the core decisions truly worth examining are those (i) that speak broadly to the public and have legal value in future cases, and (ii) where the CCA actually addressed the principal legal issue before them. An unpublished decision or order that, for example, summarily rejects a prisoner's complaint that he requested creamy instead of crunchy peanut butter merits little serious attention.

national rate of 20 percent, and well above the U.S. Supreme Court's rate of 28.8 percent).[i] And two of the Court's members had individual reversal rates hovering above 60 percent![170]

> *Shuffling judges via the ballot box may indeed seem to be the best answer to a Court gone astray. "Don't abolish the CCA," goes the argument, "just alter its personnel in such and such a way." This view—"I wouldn't mind the CCA so much if only it behaved in a desirable way"—would indeed work a marginal benefit if carried out, but its premise is captured in what Milton Friedman once described as the "barking cat" dilemma.[171] Simply put, it cannot happen. And the physiological laws that control the behavior of cats are no more fixed than those that control the behavior of parochial, government organizations (i.e., criminal-only courts) once they are established. The CCA's often-ignoble history is therefore no accident, but an expected consequence of its constitution as a specialized Court. Natural scientists, says Friedman, realize they cannot assign characteristics at will to chemical and biological properties ... they cannot demand that cats bay at the moon or that water burst into flames. Similarly, why should those in the policy sciences suppose that a Court focused solely on the nit-picky minutiae of criminal law, day in and day out, should behave any differently?*

Governor Bill Clements

In 1987, former Governor Bill Clements qualified his support for merit selection of appellate judges by linking it to a constitutional amendment merging the dual high courts:

> There is only one other state, and that's Oklahoma, that has a parallel system like we do. The only reason they have it is because all the people that crossed the Red River were from Texas, and they didn't know any better... . I think we need one court called the Supreme Court of Texas that functions just like all the other states except Oklahoma. I'll bet you if a poll should be taken, you'd find that probably 96, 97, 98 percent of the people of Texas have no idea we have a parallel system of courts and that the Supreme Court, in fact, is not supreme. The people of Texas don't understand that. They don't know that. I can assure you. We can have a better court system if we start right at the top and combine these two courts into one court.[172]

State Senator John Montford

This respected Lubbock legislator continues to float a dramatically condensed Texas Constitution to supplant the rickety one adopted over a century ago and amended since then *ad nauseam*.[173] Among his numerous suggestions to streamline our cumbersome 1876 charter is his common-sense proposal to eliminate the CCA. More accurately, he would eliminate the CCA and create a Supreme Court with separate civil and criminal divisions (with Supreme Court justices elected to 8-year terms in nonpartisan elections). Although he didn't submit his "bigger is not better" proposal in the 74th Legislature, he says his goal is the year 2000.

His proposal has plenty of supporters, who agree that scrapping this embarrassing cousin of War and Peace would serve Texas well as she enters the next millennium:

> *A New State Constitution Would Mean a Better Texas*, El Paso Times (Mar. 12, 1995)
>
> *Texas Constitution: State Should Overhaul This Outmoded Relic*, Dallas Morning News (Nov. 12, 1995)
>
> *State Constitution's Quirks Show*, Houston Chronicle (Nov. 6, 1995)
>
> *Revise State Constitution: Unwieldy 1876 Document Should Be Modernized Before 21st Century*, Waco Tribune Herald (Oct. 26, 1995)

Stuck With Archaic Constitution, Austin American-Statesman (Oct. 25, 1995)

Texas Needs Constitution Rewritten, League [of Women Voters] Says, Austin American-Statesman (Oct. 25, 1995)

League of Women Voters Urges Revision of Texas Constitution, Dallas Morning News (Oct. 25, 1995)

Fourteen More Reasons to Write New Constitution, San Angelo Standard Times (Oct. 18, 1995)

A few years ago, Senator Montford urged a similar draft proposal to guide Texas into the next century. And there, too, his vision of a leaner state charter contained the long overdue suggestion of consolidating our State's high courts (along with other inferior courts). Liberal critics were—surprise, surprise—predictably skittish, calling the proposal to scrap the CCA "problematic, given that there are periods when one high court is more protective of individual rights than the other."[174] Insisting that Texans "ultimately gain by having two high courts protecting our rights,"[175] the anti-merger forces obviously do not define "our" to mean "law-abiding society's." But we can certainly improve things without threatening the bedrock protections afforded to personal liberty. Also, as mentioned above, the citizens in 48 of our nation's other states—not to mention litigants in our federal system, too—somehow manage to find their liberties protected quite well without a separate criminal court.

Aside from criminal defense lawyers, certain CCA members, and liberal interest groups, there is near-unanimous agreement that a single high court is best for Texas. In fact, the only major study lukewarm on the idea of merger itself recognized the efficacy of a single high court. While recommending retention of the separate courts for logistical reasons—reasons that could *all* be addressed in a well-crafted proposal—the Texas Research League noted that "[i]deally, a court system should have only one court of last resort [and] this bifurcated system of appeals has the potential for problems and hence injustices[.]"[176]

IV. Conclusion: Enough is Finally Enough

In all the talk about our
criminal justice system
There is one indisputable thing:
Texas' "long arm of the law"
Is certainly in a sling![177]

One of the scariest sentences Texans can read today frequently begins, "The Texas Court of Criminal Appeals decided yesterday that ..." And much too often, the captions of criminal cases would be more accurately styled if they read Court of Criminal Appeals v. State. To be sure, *all* the Court's jurists are conscientious public servants who take their oaths seriously, abhor crime, and hate to see the guilty go free. And Texas has benefitted from countless CCA judges who have been highly competent and professional. But good people wrestle within a pitiful system. Like Jessica Rabbit, the CCA isn't bad; it's just drawn up that way. And despite the Court's often-capable personnel, the Court's historical performance as a whole has fallen woefully short of what law-abiding Texans expect and deserve. Indeed, as the Court's pock-marked history demonstrates, it is structure—as much as personnel—that explains the CCA's century-old obsession with technicalities. Ignoring this simple fact is like trying to ignore the alligator in your bathtub.

Certainly, an increase in affirmed convictions won't alone erase crime away. But that misses the point. Just ask the families of Tracy Gee, or Lottie Rhodes, or Eugene Heimann, or Allen Bolden, or Ora Pearson, or Bobby Lambert, etc. **Ask them.** An individual crime is not a mere statistic, a small electronic blip buried away in some cold data base. Each crime is also a violent eruption, an intense event that shatters people. And each one matters a great deal. Thus, numbers alone are not the measure; rather, it's the Court's pedantic approach to cases. And cases like these injure us in transcendant ways that can *never* be measured.

The State Comptroller's recent analysis of crime in Texas paints an ominous picture:

> The most basic guarantees of civilized life are reasonable protection from bodily harm and the security of one's possessions. Such guarantees are necessary if society is to maintain order, stability and productivity; and Texas must be able to offer these guarantees if it is to thrive in the future.
>
> In today's Texas, however, these guarantees seem at risk.
>
> * * *
>
> Crime in Texas is bad now, and judging from the underlying forces driving crime, will get gradually but increasingly worse in the future. There are few positive indicators or policies in place now that will significantly curtail the growth of crime, particularly violent crime. Finally, the "window of opportunity" to make a significant impact on crime in Texas is short. Policies and programs need to be put into place by the end of the decade to achieve long-term benefits. One should not hope for easy or quick fixes. But changing the course of actions by only a few degrees now could result in substantial change by 2025.[178]

Abolishing the Court of Criminal Appeals—Texas' very own criminal justice "trabbi" (the polluting, inefficient car manufactured by the factories of former East Germany)—is a nice starting point. The CCA is a political black box, unknown to everyone except the lawyers who appear before it and the families whose agonies it needlessly prolongs. Despite initial outcries when criminals go free, the roar quickly subsides and memories soon begin to fade. And every other November, the names far down the ballot are barely, if ever, recognizable (Judge Sam Houston Clinton notwithstanding).

Sadly, President Sam Houston's admonition to the Sixth Congress of the Republic of Texas in 1842 goes unheeded today: "To maintain an able, honest and enlightened Judiciary should be the first object of every people."[179] A generation later, at the State of Texas' 1875 Constitutional Convention, General Lawrence Sullivan Ross described the "destruction of public confidence in the judiciary" as the "greatest curse that can befall a country."[180] Texas is befallen.

Ever since the Court's inception as the "Court of Appeals" in 1876,[181] common sense and justice have been the casualties of a judiciary fascinated with analytical micrometers, drunk with minutiae, and obsessed with form over substance. There's no doubt that judges can remain loyal to their constitutional oath while rejecting lawlessness. The CCA, however, has kidnapped justice and hidden it in something they call "the law." Hoarding its sympathy for the criminal (never for the victim), the Court is intoxicated by technicalities ... wafer-thin "defects" that didn't have the tiniest effect on a trial's fairness. But average, ordinary, law-abiding folks (*i.e.*, nice people) have rights, too. They include the right to push your children in a local park swing ... the right to walk to school safely in the morning ... the right to take a nap with the door unlocked ... the right to celebrate your next birthday ... .

The public, fatigued with a pendulum stuck on the side of the criminals, is beginning to reach its saturation point. Consider just a few recent headlines:

Criminal Appeals: Texas Court Needs An Overhaul, Dallas Morning News (Febr. 16, 1994)

'Nincompoops' on Court of Criminal Appeals Turning System on its Ear, Houston Chronicle (June 19, 1994)

State's 'Invisible Court' Said No Longer Needed, Tyler Morning Telegraph (Mar. 25, 1994)

A Final Explosion of Trial by Technicality, Abilene Reporter-News (Febr. 20, 1995)

Pass "Tracy Gee" Bill: It Curbs Criminal Case Reversals on Technicalities, Houston Post (Mar. 11, 1995)

On the Right Road to Uphold Convictions, Abilene Reporter-News (Mar. 19, 1995)

Juris-Imprudence: Judge Elected to Rule on Law, Not on Social Issues, Houston Chronicle (June 27, 1995)

Do Away With State Court of Criminal Appeals, Houston Chronicle (Oct. 27, 1994)182

Justice Isn't Served in Appeals Court, Beaumont Enterprise (Apr. 17, 1994)

The Texas Court of Criminal Appeals: Abolish Me Before I Reverse Again!, Forney Messenger (Apr. 7, 1994)

Law and Disorder at the Court of Criminal Appeals, Austin American-Statesman (Dec. 29, 1994)

It seems that little has changed since 1982, when Paul Burka penned his acerbic Texas Monthly piece, *Trial by Technicality*. (The magazine's front-page headline read "*[T]he Texas Court That Sets Criminals Free*"). Eight years later, in 1990, Gregory Curtis sounded a similar and even blunter note in the same pages: *Abolish the Court of Criminal Appeals*. The Court still has a ravenous appetite for reversing open-and-shut cases whenever an "i" wasn't perfectly dotted or a "t" wasn't crossed at precisely the right angle.

The surprise race in 1994 for presiding judge—the challenger launched his bareknuckles attack just hours before the filing deadline and called the incumbent presiding judge a lazy, part-timer—helped crystallized things: law enforcement vs. the criminal defense bar. Fortunately, the incumbent's vow not to "turn over the Court to a bastion of liberalism" by losing to "the most liberal member of the Court" prevailed. Those who would enhance the rights of criminals at the expense of larger society were dealt a setback. That's a modest first step.

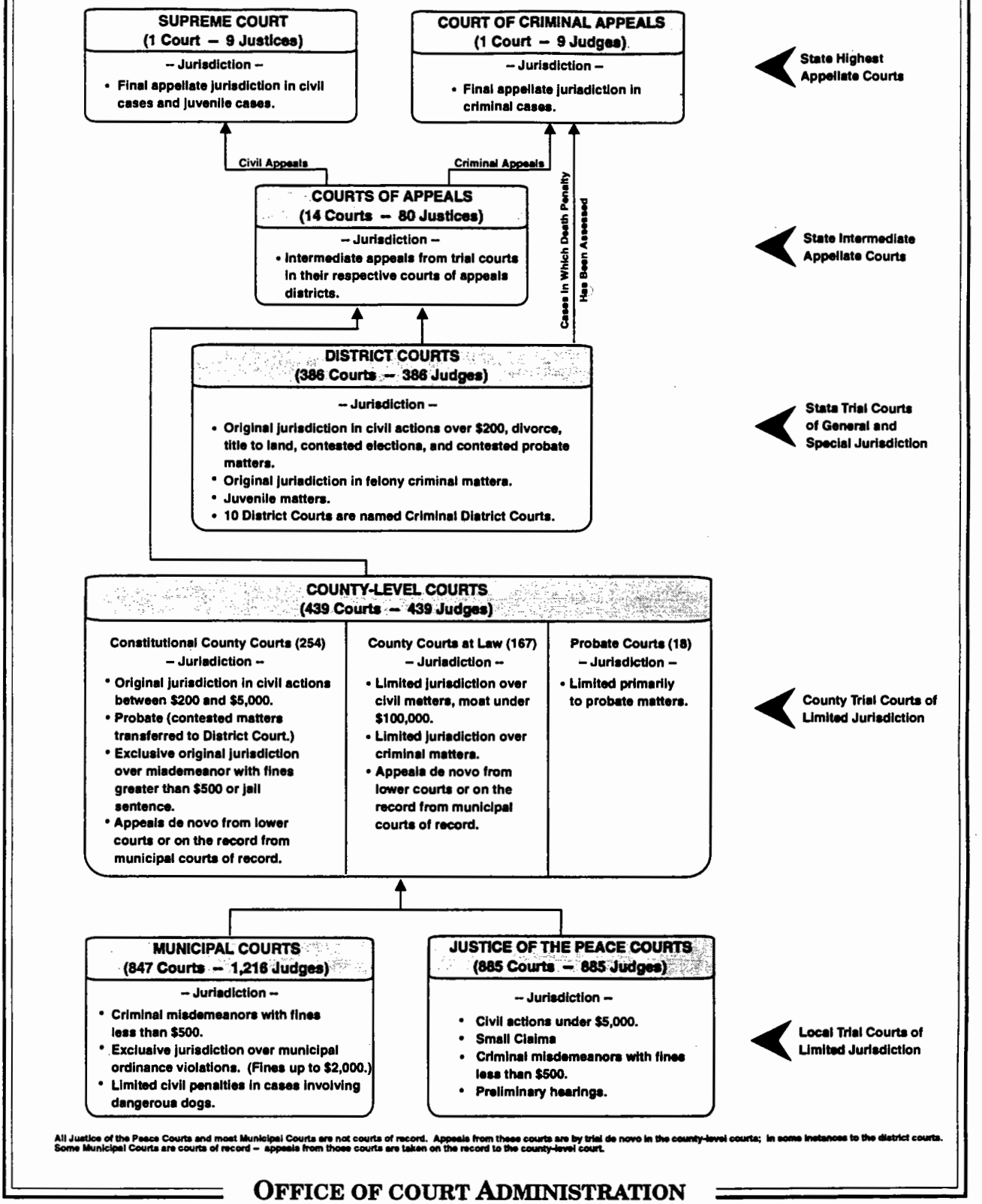
All the structural arguments for merger aside—and there are plenty of them—steady upsurges in violent and juvenile crime should alone focus the public's spotlight on the little-known Court of Criminal Appeals, whose rulings directly impact public safety, peace of mind, and Texans' confidence in their system of justice. Throughout our State's history, the Court's effect has been decidedly negative on all fronts. In its zealous crusade to prize the rights of the criminally accused, the CCA has neglected the most basic civil right of all: freedom from crime. We should bid the Court a fond farewell, and direct it to the nearest judicial tar pit.

As Texas enters the next millennium, she deserves to begin afresh ... with a single, revamped high Court that champions the rights of a citizenry desperate for—and entitled to—our Constitution's promise to "establish Justice, insure domestic Tranquility."[183]

COURT STRUCTURE OF TEXAS

TABLE I

SEPTEMBER 1, 1993



All Justice of the Peace Courts and most Municipal Courts are not courts of record. Appeals from these courts are by trial de novo in the county-level courts; in some instances to the district courts. Some Municipal Courts are courts of record – appeals from those courts are taken on the record to the county-level court.

OFFICE OF COURT ADMINISTRATION
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AUSTIN, TEXAS 78711-2066

Appendix J

TABLE II

JUDICIAL SELECTION AND TERMS OF STATES' HIGHEST COURTS AND THEIR PRESIDING OFFICERS

State	Type of Election/ Selection*	No. of Judges	Statewide or District	Length of Term (years)**	How Chief Justice is Selected	Chief Justice's Length of Term (years)
Alabama	Partisan Election[1]	9	Statewide	6	Partisan Election[1]	6
Alaska	Merit Selection	5	Statewide	3/10[2]	Court Selection	3
Arizona	Merit Selection	5	Statewide	6	Court Selection	5
Arkansas	Partisan Election[3]	7	Statewide	6	Partisan Election[3]	8
California	Gubernatorial Apptmt.[4]	7	Statewide	12[5]	Gubernatorial Apptmt.[4]	12
Colorado	Merit Selection	7	Statewide	10	Court Selection	Indefinite
Connecticut	Legislative Apptmt.[6]	7	Statewide	8[7]	Legislative Apptmt.[6]	8
Delaware	Gubernatorial Apptmt.[8]	5	Statewide	12	Gubernatorial Apptmt.[8]	12
Wash., D.C.	Presidential Apptmt.[8]	9	Districtwide	15	Commission Apptmt.	4
Florida	Merit Selection	7	Statewide	6	Court Selection	2
Georgia	Nonpartisan Election[9]	7	Statewide	6	Court Selection	4
Hawaii	Gubernatorial Apptmt.[8]	5	Statewide	10	Gubernatorial Apptmt.[8]	10
Idaho	Nonpartisan Election[9]	5	Statewide	6	Court Selection	4
Illinois	Partisan Election[10]	7	District	10[5]	Court Selection	3
Indiana	Merit Selection	5	Statewide	2/10[2]	Commission Apptmt.	5
Iowa	Merit Selection	9	Statewide	8	Court Selection	8[11]
Kansas	Merit Selection	7	Statewide	6	Rotation by Seniority	Indefinite
Kentucky	Nonpartisan Election[9]	7	District	8	Court Selection	4
Louisiana	Nonpartisan Election[10]	7	District	10	By Seniority	Duration of service
Maine	Gubernatorial Apptmt.	7	Statewide	7	Gubernatorial Apptmt.	7
Maryland	Merit Selection	7	District	10	Gubernatorial Apptmt.	10[12]
Massachusetts	Gubernatorial Apptmt.[8]	7	Statewide	Age 70	Gubernatorial Apptmt.[8]	Age 70
Michigan	Nonpartisan Election[13]	7	Statewide	8	Court Selection	2
Minnesota	Nonpartisan Election[1]	7	Statewide	6	Nonpartisan Election[1]	6
Mississippi	Partisan Election[9]	9	District	8	By Seniority	Duration of service
Missouri	Merit Selection	7	Statewide	1/12[2]	Court Selection	2
Montana	Nonpartisan Election[14]	7	Statewide	8[15]	Nonpartisan Election[14]	8
Nebraska	Merit Selection	7	District/State[16]	6	Merit Selection	6
Nevada	Nonpartisan Election[9]	5	Statewide	6	By Rotation	2
New Hampsh.	Gubernatorial Apptmt.	5	Statewide	Age 70	Gubernatorial Apptmt.	Age 70
New Jersey	Gubernatorial Apptmt.	7	Statewide	7[17]	Gubernat. Apptmt.	Duration of service
New Mexico	Merit Selection[18]	5	Statewide	8	Court Selection	2
New York	Gubernatorial Apptmt.[8]	7	Statewide	14	Gubernatorial Apptmt.	14
No. Carolina	Partisan Election[1]	7	Statewide	8	Partisan Election[1]	8
North Dakota	Nonpartisan Election[1]	5	Statewide	10	By S.Ct./Dist.Judges.	5[11]
Ohio	Nonpartisan Election[13]	7	Statewide	6	Nonpartisan Election[13]	6
Oklahoma	Merit Selection	14[21]	District	6	Court Selection	2
Oregon	Nonpartisan Election[1]	7	Statewide	6	Court Selection	6
Pennsylvania	Partisan Election[14]	7	Statewide	10[5]	By Seniority	Duration of term
Rhode Island	Legislative Election	5	Statewide	Life	Legislative Election	Life
So. Carolina	Legislative Election	5	Statewide	10	Legislative Election	10
South Dakota	Merit Selection	5	District/State[19]	8	Court Selection	4
Tennessee	Partisan Election[1]	5	Statewide	8	Court Selection	1/5 term
Texas	Partisan Election[1]	18[22]	Statewide	6	Partisan Election[1]	6
Utah	Merit Selection	5	Statewide	3/10[2]	Court Selection	4
Vermont	Merit Selection	5	Statewide	6	Merit Selection	6
Virginia	Legislative Apptmt.	7	Statewide	12	By Seniority	Indefinite
Washington	Nonpartisan Election[1]	9	Statewide	6	Shortest term[20]	2
West Virginia	Partisan Election[1]	5	Statewide	12	By Seniority	1
Wisconsin	Nonpartisan Election	7	Statewide	10	By Seniority	Indefinite
Wyoming	Merit Selection	5	Statewide	8	Court Selection	2

* Many appointments, regardless of the type of election or selection, require confirmation by the Senate or Governor's Council.

** "Merit Selection" states have retention elections for subsequent terms.

[1] Gubernatorial appointment for interim vacancies.
[2] Initial term/retention term.
[3] Gubernatorial appointment for interim vacancies; appointees ineligible to seek re-election.
[4] Confirmation by Commission on Judicial Appointments.
[5] Retention elections for subsequent terms.
[6] Candidates nominated by Governor from judicial nominating commission.
[7] Judicial nominating commission appointment for subsequent terms.
[8] Appointment from judicial nominating commission.
[9] Gubernatorial appointment from judicial nominating commission for interim vacancies.
[10] Court selection for interim vacancies.
[11] Stated number or years or until term expires, whichever occurs first.
[12] Chief Justice's term expires with his/her 10-year term unless renewed by the Governor.
[13] Partisan Primary; gubernatorial appointment for interim vacancies.
[14] Gubernatorial appointment from judicial nominating commission for interim vacancies.
[15] Retention election only if unopposed.
[16] Chief Justice elected statewide; Associate Justices elected by district.
[17] Receives tenure to age 70 "during good behavior" upon second gubernatorial appointment.
[18] Initial partisan election after merit selection.
[19] Initial election by district; retention election statewide.
[20] Chief Justice must have 1) seniority among the three justices with shortest terms remaining, and 2) no prior service as Chief Justice.
[21] Oklahoma has two courts of last resort: a 9-member Supreme Court and a 5-member Court of Criminal Appeals.
[22] Texas has two courts of last resort: a 9-member Supreme Court and a 9-member Court of Criminal Appeals.

Revised by Office of Court Administration January, 1992.

Endnotes

1. Bobette Riner, *Dallas Legend Henry Wade: He's a Tough Act to Follow,* Nat'l Law J. at 28 (Jan. 29, 1990) (quoting former Dallas County District Attorney Henry Wade).

2. The Court of Criminal Appeals enjoys exclusive (final) appellate jurisdiction over all criminal matters. TEX. CODE CRIM. PROC. ANN. art. 4.04, § 2 (Vernon Supp. 1994).

   Aside from post-conviction habeas corpus proceedings, cases reach the CCA via one of three routes: (i) a petition for discretionary review, following the decision by a lower court of appeals; (ii) the Court's own motion, following a lower court decision; or (iii) a direct appeal from the trial court whenever the death penalty has been imposed. The entire Court, sitting *en banc* (as a whole), hears every case calendared for oral argument. TEX. CODE CRIM. PROC. ANN. arts. 44.45(b), 44.45(a), and 4.04, § 2 (Vernon Supp. 1994), respectively.

3. Recent polls show that crime easily tops the list of important problems facing the country today. While only 4% of Americans thought so in February 1993, that number increased almost *fivefold* to 19% by January 1994. Richard Lacayo, *LOCK 'EM UP! With Outraged Americans Saying That Crime is Their No. 1 Concern, Politicians Are Again Talking Tough. But Are They Talking Sense?*, Time at 52 (Febr. 7, 1994). More recent numbers show that Texans are even more fearful. In an April 1995 survey of 1,001 randomly selected registered voters, 38% listed crime and drugs as the single greatest problem facing Texas today.

4. Id.

5. *See Good News Scarce on Crime in Texas,* Tyler Morning Telegraph (Mar. 16, 1995)(citing the new, Legislature-funded study from SHSU, which also showed Texas leading the nation in property crimes).

6. *Poll Reveals a Shift in Texans' Attitudes on Crime, Punishment,* Corpus Christi Caller Times (June 23, 1995).

7. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY at 454 (Basic Books, 1993).

8. For an excellent discussion of America's "ticking crime bomb," and what we can do about it, *see* John J. Dilulio, Jr., *The Coming of the Super-Predators,* The Weekly Standard at 23 (Nov. 27, 1995).

9. Id. at 25 (discussing these and other features of crime-prone young males).

10. *LOCK 'EM UP!* at 53 (cited at endnote 3).

11. *See State Takes Aim at Juvenile Criminals,* Abilene Reporter-News (Apr. 3, 1995)(citing the SHSU study). *See also, e.g.,* Michael Graczyk, *Juvenile Arrests Rise 282% Over 10 Years, Study Says,* Austin American-Statesman (Mar. 22, 1995)(same).

12. *See Juvenile Crime: Once Again, Texas Must be Both Tough and Smart,* Houston Chronicle (Mar. 27, 1995)(citing the SHSU research findings that such arrests "have shot up 282 percent"). *See also, e.g., Juvenile Crime: Texas Must Ante Up to Stop the Killing,* Dallas Morning News at 2J (May 15, 1994); Yvonne Barlow, *Juvenile Court System Struggles With Rising Youth Crime,* Dallas Morning News (Mar. 26, 1995).

13. *See Juvenile Arrests* (cited at endnote 11) and *Juvenile Crime* (cited at note 12). The State Comptroller's recent study of crime in Texas is similarly alarming: from 1987-91, the number of homicides committed by juveniles jumped 143%; robbery, 123%; aggravated assault, 109%; and sexual assault, 58%. *FORCES OF CHANGE: Shaping the Future of Texas*, vol. II, pt. 1 at 339 (Texas Comptroller of Public Accounts, Nov. 1993). According to the Texas Juvenile Probation Commission, juvenile crime has swelled by roughly 33% since 1990.

14. *FORCES OF CHANGE: Shaping the Future of Texas* at 339 (cited at endnote 13).

15. Gregory Curtis, *Behind the Lines: Abolish the Court of Criminal Appeals*, 18 Texas Monthly at 5 (Apr. 1990).

16. Janet Elliott, *STARTING OVER: Term's Big Cases, Abolition Threat Nothing New*, Texas Lawyer at 1 (Sept. 14, 1992).

17. Rodriguez v. State, No. 71,273 (unpublished *per curiam*).

18. Chappell v. State, 850 S.W.2d 508 (Tex. Crim. App. 1993).

19. The jury shuffle statute, article 35.11 of the Texas Code of Criminal Procedure, says *nothing* about limiting the number of jury shuffles. It simply states that "the trial judge, on the demand of the defendant or his attorney, or of the State's counsel, shall ..." shuffle the prospective jurors. The statute doesn't set forth how many, but rather who and when. And the CCA's flawed construction of article 35.11 in Chappell flies in the face of its earlier decisions that approved a trial judge's implicit authority to shuffle the panel *sua sponte* (on its own motion), despite the absence of specific authorization for such independent action. James v. State, 772 S.W.2d 84 (Tex. Crim. App. 1989); Wilkerson v. State, 681 S.W.2d 29 (Tex. Crim. App. 1984). Thus, the bizarre rule seems to be this: one shuffle is always okay, and shuffling twice is fine if the court does it, but *not* if requested by the State, when it magically becomes reversible error.
For its part, the prosecution was armed with a clear decision by the local appellate court that the State was entitled to a second shuffle once the defendant had received one. *See* Urbano v. State, 760 S.W.2d 33 (Tex. App.—Houston [1st Dist.] 1988, *pet. ref'd*).

20. Cooks v. State, 844 S.W.2d 697, 727 (Tex. Crim. App. 1992); *see also* Lewis v. State, 815 S.W.2d 560 (Tex. Crim. App. 1991)(overruling prior law that said a defendant need not show he was actually harmed by the jury selection "error").

21. Chief Justice Warren Burger, *Annual Report to the American Bar Association*, 67 ABA J. 290, 292 (1981).

22. 851 S.W.2d 853 (Tex. Crim. App. 1993)(*overturning* Marras v. State, 741 S.W.2d 395 (Tex. Crim. App. 1987); Fuller v. State, 829 S.W.2d 191 (Tex. Crim. App. 1992); Caldwell v. State, 818 S.W.2d 790 (Tex. Crim. App. 1991); Barnard v. State, 730 S.W.2d 703 (Tex. Crim. App. 1987); Phillips v. State, 701 S.W.2d 875 (Tex. Crim. App. 1985)).

23. Garrett, 851 S.W.2d at 861 (McCormick, P.J., dissenting)(*citing* TEX. CODE CRIM. PROC. ANN. art. 35.16).

24. Ransom v. State, No. 71,633, 1994 Tex. Crim. App. LEXIS 79 (June 15, 1994).

25. Indeed, opposition to the death penalty is *itself* grounds for disqualification. Id. at *18 (*citing* Wainwright v. Witt, 469 U.S. 781 (1985)). But even this common-sense holding was diluted by the CCA's recent decision in Riley v. State, 889 S.W.2d 290 (Tex. Crim. App. 1994)(*opinion on rehearing*) (*overruling* Farris v. State, 819 S.W.2d 490 (Tex. Crim. App. 1990)), which ruled that trial judges cannot exclude for cause potential jurors who are morally opposed to capital punishment. So long as

the veniremember says he can still vote for the death penalty, said the Court, the trial judge cannot strike him, no matter how convinced the judge is that the prospective juror's demeanor suggests extreme vacillation, equivocation, or uncertainty.

26. TEX. CODE CRIM. PROC. ANN. art. 44.29(c) (Vernon Supp. 1994).

27. Sigler v. State, 865 S.W.2d 957, 959 (Tex. Crim. App. 1993).

28. Wilson v. State, 863 S.W.2d 59 (Tex. Crim. App. 1993).

29. Anne Belli Gesalman, *Slain Girl's Mother Outraged After Man Wins New Trial*, Dallas Morning News at 29A (June 11, 1993).

30. Id.

31. Patti Muck, *Fighting to Escape Death Row's Grip; Capital Murder Conviction Reversed*, Houston Chronicle at 21A (June 10, 1993).

32. Id.

33. Aside from the Court's usual refusal to recount the heinous facts underlying the convictions it reverses, one CCA judge would marginalize crime victims even further ... omitting from the Court's written legal opinions the names of victims "unless it cannot be avoided." *Juris-Imprudence: Judge Elected To Rule on Law, Not on Social Issues*, Houston Chronicle (June 27, 1995); *Appellate Judge Says Opinions Shouldn't Name Crime Victims*, Dallas Morning News (June 15, 1995). While the judge's recommendation (which he would extend to news reports as well) may spring from admirable compassion, it sends a raft of negative messages: victims don't matter; our criminal justice system short-changes openness and frankness; the courts don't belong to the people, etc.

> An individual crime shatters dozens of people for dozens of years, and each one matters beyond measure. Seeing the written names of crime victims—aside from the closure and grief-*sparing* it may bring to them—also puts a human face on the receiving end of often-inhuman acts. The immediacy of crime, and its profound impact on our communities, is infinitely more piercing when you read what depravities "Ora Pearson," "Tracy Gee," "Lottie Rhodes," etc. endured, rather than Generic Victim A, B, or C. Reading about nameless and nondescript victims would desensitize us, breeding the notion that crime is an ephemeral force that isn't personal. It *is* personal.

34. 848 S.W.2d 693 (Tex. Crim. App. 1993).

35. Id. at 694.

36. Sodipo v. State, 815 S.W.2d 551 (Tex. Crim. App. 1991)(*opinion on rehearing*).

37. Id. at 555.

38. *Behind the Lines: Abolish the Court of Criminal Appeals* at 6 (cited at endnote 15).

39. Garcia v. State, No. 71,417, 1994 Tex. Crim. App. LEXIS 144 (Dec. 21, 1994).

40. Stine v. State, No. 044-94, 1995 Tex. Crim. App. LEXIS 52 (May 10, 1995).

41. TEX. GOV'T CODE § 21.001(b).

42. TEX. R. CRIM. EVID. 610(a).

43. *See, e.g.*, VTCA Penal Code § 1.05.

44. Stine, 1995 Tex. Crim. App. LEXIS at *25.
An ironic aside: *Texas Lawyer*'s story on the Stines reversal, *Testimony Void Outside County Seat*, appears on the page facing an article discussing a sputtering effort in the Legislature to restrict the Court's appetite for such absurd results. *See* Robert Elder Jr. and Richard Connelly, *Criminal Court Still Targeted*, Texas Lawyer at 5 and 4, respectively (May 15, 1995).

45. Matthew Paul, *In Search of Coherence*, Texas Lawyer at 28 (July 10, 1995).

46. 843 S.W.2d 521 (Tex. Crim. App. 1992)(consolidated with Hunter v. State, No. 1092-91).

47. The consolidated case, Hunter, involved Jerred J. Hunter of Tarrant County who was convicted of raping a woman in a deserted building after giving her a ride from a meeting. Hunter's victim testified that Hunter had threatened to kill her if she told anyone about the crime. During the penalty phase—again, after the jury had already voted to convict Hunter—another woman testified that Hunter had sexually assaulted her under eerily similar circumstances.

48. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 1994)(emphasis added).

49. Grunsfeld, 843 S.W.2d at 552 (McCormick, P.J., dissenting). Judge McCormick's view enjoys support reaching back to the mid 1850s:

> It is no part of the duty of the judiciary to resort to technical subtleties to defeat the obvious purposes of the legislative power in a matter over which that power has a constitutional right to control.
>
> Cain v. State, 20 Tex. 355 (1857).

50. Grunsfeld, 842 S.W.2d at 565 (White, J., dissenting).
Fortunately, the 1993 Legislature rewrote the statute to include "any other evidence of an extraneous crime or bad act ... regardless of whether [the defendant] has previously been charged with or finally convicted on the crime or act." TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 1994).

51. Pat Truly, *'Nincompoops' on Court of Criminal Appeals Turning System on its Ear*, Houston Chronicle, Outlook at 4 (June 19, 1994).

52. State ex rel. Holmes v. 3rd Court of Appeals, No. 71,764, and Texas Board of Pardons and Paroles, et al. v. 3rd Court of Appeals, No. 71,765, 1994 Tex. Crim. App. LEXIS 52 (Apr. 20, 1994).

53. *See, e.g.*, Rep. Dalton Smith, *Gary Graham Has Been Treated Fairly, But People of Texas Haven't Been*, Houston Chronicle, Outlook at 4 (May 1, 1994).

54. Under Texas' clemency scheme, the governor has the power, upon the recommendation of a majority of the Board of Pardons and Paroles, to grant executive clemency. TEX. CONST. art. IV, sec. 11; TEX. CODE CRIM. PROC. ANN. art. 48.01 (Vernon Supp. 1994).

55. In any event, the argument that executive clemency exists only on paper is flatly untrue. "Recent authority confirms that over the past century clemency has been exercised frequently in capital cases in which demonstrations of 'actual innocence' have been made." Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 868-69, 122 L.Ed.2d 203 (1993)(*citing* M. RADELET, H. BEDAU, & C. PUTNAM, IN SPITE OF INNOCENCE at 282-356 (1992)). A governor's decision whether or not to exercise clemency rests solely with her.

56. The newly adopted two-part test runs this way: first, the defendant must show the trial court that the evidence is so strong as to undermine confidence in the original verdict, which would likely have been different; second, if the trial court agrees, the inmate gets a hearing to prove that no rational jury would have found him guilty.

57. Herrera, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (Herrera asserted newly discovered evidence that his dead brother committed the murder)

58. *See* Keith A. Rowley & Michael D. Weiss, *Voting Behavior on the Texas Court of Criminal Appeals, 1991-1992*, 34 South Texas L. Rev. 1 (Jan. 1993)(cites are made to the reprint on file with the author).

59. Id. at 4 and n.12.

60. Id. at 3. This easy/close classification, proxied by the closeness of voting, makes intuitive sense. The margin *should* be more narrow in difficult cases. In "easy" cases, well-settled procedures and controlling precedent decide the case and crowd out a judge's subjective biases.

61. For a lengthier discussion of these cases and of the Court's fascination with silliness, *see generally* Paul Burka, *Trial by Technicality*, Texas Monthly 127 (Apr. 1982).

62. Gibbs v. State, 610 S.W.2d 489 (Tex. Crim. App. 1981).

63. King v. State, 594 S.W.2d 425 (Tex. Crim. App. 1980).

64. Brasfield v. State, 600 S.W.2d 288 (Tex. Crim. App. 1980).

65. Gragg v. State, 186 S.W.2d 243 (Tex. Crim. App. 1945).

66. Northern v. State, 203 S.W.2d 206 (Tex. Crim. App. 1947).

67. Id. at 207.

68. Crowl v. State, 611 S.W.2d 59 (Tex. Crim. App. 1981).

69. Reynolds v. State, 547 S.W.2d 590 (Tex. Crim. App. 1977).

70. Ex parte Wallace (unpublished).

71. Rucker v. State, 599 S.W.2d 581 (Tex. Crim. App. 1979).

72. 810 S.W.2d 202 (Tex. Crim. App. 1991).

73. Janet Elliott, *With Conservative Bloc At Its Heart, Criminal Court Gropes For Its Soul*, Texas Lawyer at 1 (July 10, 1995).

74. *Trial by Technicality* at 210 (cited at endnote 61).

75. 815 S.W.2d 681 (Tex. Crim. App. 1991)(holding that federal interpretation of the Fourth Amendment to the U.S. Constitution does not mandate a parallel construction of Article I, § 9 of the Texas Constitution).

76. Cathleen C. Herasimchuk, *Heitman v. State: A Tentative Step Toward Constitutional Uncertainty*, Texas Lawyer at 8 (July 22, 1991). Ms. Herasimchuk now serves as Governor Bush's adviser on criminal policy matters.

77. Id. (quoting South Texas College of Law Professor Neil McCabe).

78. *See* Florida v. Casal, 462 U.S. 637, 637-39, 103 S.Ct. 3100, 3101-02, 77 L.Ed.2d 277 (1983)(Burger, C.J., concurring).

79. *See* In re Lance, 37 Cal.3d 873, 210 Cal.Rptr. 631, 634, 694 P.2d 744, 747 (1985)(describing the constitutional amendment that abrogated the new federalism decision, People v. Brisendine, 13 Cal.3d 528, 119 Cal. Rptr. 315, 531 P.2d 1099 (1975)). In 1990, after their courts had continued to stray, Californians adopted the Crime Victims Justice Reform Act, which further limited their courts' ability to impose their pro-defendant policy preferences on the citizenry. *See* Raven v. Deukmejian, 52 Cal.3d 336, 276 Cal. Rptr. 326, 801 P.2d 1077 (1990).

80. 759 S.W.2d 128 (Tex. Crim. App. 1988).

81. In any event, the CCA subsequently overruled its "reasoning" in Forte and returned to construing the Texas Constitution in harmony with its federal counterpart. McCambridge v. State, 778 S.W.2d 70 (Tex. Crim. App. 1989).

82. Clara Tuma & Diane Burch Beckham, *Criminal Court Unfurls New Federalism Banner*, Texas Lawyer at 1 (July 8, 1991)(quoting Professor McCabe).

83. 865 S.W.2d 944 (Tex. Crim. App. 1993). The writer for a confused 6-3 majority wrote:

> The mere fact that a telephone caller has disclosed the number called to the telephone company for the limited purpose of obtaining the services does not invariably lead to the conclusion that the caller has relinquished his expectation of privacy such that the telephone company is free to turn the information over to anyone, especially the police, absent legal process.

84. Smith v. Maryland, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979).

85. 856 S.W.2d 166 (Tex. Crim. App. 1993).

86. Michigan v. Sitz, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990).

87. State v. Holt, No. 599-93, 1994 Tex. Crim. App. LEXIS 80 (June 15, 1994)(In a bit of near-irony, the State's appellate attorney in Holt was an unsuccessful candidate for the authoring judge's seat on the Court last year.)

88. Chip Brown, *Lawmakers Propose Bill for Sobriety Checkpoints*, Austin American-Statesman at 2B (July 1, 1994).

89. The proposed legislation was loaded with privacy- and convenience-protecting safeguards. As passed by the Senate, the bill would have authorized temporary roadblocks only if (i) approaching motorists were informed of the stop (and not punished for not driving through it), (ii) officers videotaped the stops, (iii) cars were stopped according to a predetermined selection process, such as every third car, (iv) the stops lasted less than four hours, (v) officers didn't target the same location twice in the same seven-day period, (vi) the checkpoint imposed a wait in line of less than ten minutes, (vii) the stop itself took no more than two minutes, and (viii) the field sobriety test was warranted by reasonable suspicion or probable cause to believe the driver had committed an offense. *See* Mike Ward, *Sobriety Checkpoints Fail in Crime Bill*, Austin American-Statesman at 3B (May 25, 1995); Chip Brown, *Senate Votes for Sobriety Checks, New DWI Penalties*, Austin American-Statesman (May 5, 1995); *Senate Approves Crackdowns on DWI*, Houston Chronicle (May 5, 1995).

90. 887 S.W.2d 31 (Tex. Crim. App. 1994).

91. As the U.S. Supreme Court has stated, the virtues of inventories are threefold: (i) they protect the owner's property while it's in custody; (ii) they insulated the police against disputes over lost or stolen property; and (iii) they protect the police and the public from potential danger. South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976).

92. Autran, 887 S.W.2d at 43-49 (McCormick, P.J., dissenting).

93. *See generally* Heitman v. State: *The Question Left Unanswered*, 23 St. Mary's Law J. 929 (1992)(and authorities cited therein).

94. Lower courts have quickly begun applying Autran's pro-defendant view. *See* Lawson v. State, 886 S.W.2d 554 (Tex. App.—Fort Worth 1994, *pet. ref'd*).

95. TEX. CODE CRIM. P. art. 44.23 (Vernon 1966)(repealed 1986). The Legislature also instructed appellate courts that, when reviewing a jury charge, the court couldn't reverse the trial court's judgment "unless the error appearing from the record was calculated to injure the rights of the defendant, or unless it appears from the record that the defendant has not had a fair trial." Id. art. 36.19.

96. Williams v. State, 522 S.W.2d 488, 493 (Tex. Crim. App. 1975).

97. TEX. R. APP. PROC. 81(b)(2) (West 1994)(mandating reversal unless the record shows "beyond a reasonable doubt that the error made no contribution to the conviction or to the punishment").

98. *See generally* Kotteakos v. United States, 328 U.S. 750, 758-60 (1946)(chronicling the desperate need for the harmless error doctrine and setting forth "a very plain admonition: 'Do not be technical where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects.'").

99. Tehan v. United States ex rel. Shott, 382 U.S. 406, 416 (1966).

100. United States v. Cronic, 466 U.S. 648, 657 (1984). *See also* Morris v. Slappy, 461 U.S. 1, 15 (1983); Williams v. Florida, 399 U.S. 78, 82 (1969)("The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played.").

101. Roscoe Pound, *The Canons of Procedural Reform*, 12 ABA J 541, 543 (1926).

102. Cathleen C. Herasimchuk, ... *And Justice for Some*, Texas Lawyer at 8 (July 12, 1993).

103. State v. Crawford, 96 Minn. 95, 104 N.W. 822, 824 (1905).

104. J. WIGMORE, WIGMORE ON EVIDENCE at 895 (Tillers rev. ed. 1958).

105. CHARLES MCCORMICK, MCCORMICK ON EVIDENCE at § 182, p. 536 (3d ed. 1984).

106. State v. Osby, No. 0516549.

107. People v. Bradshaw, No. 146426.

108. People v. Samuels, PA 002269 (Los Angeles Superior Court, Van Nuys branch).

109. *See Pass "Tracy Gee" Bill: It Curbs Criminal Case Reversals on Technicalities*, Houston Post (Mar. 11, 1995) and *On the Right Road to Uphold Convictions*, Abilene Reporter-News (Mar. 19, 1995).

110. Janet Elliott, *Penal Code Rewrite Turns Back the Clock*, Texas Lawyer at 32 (June 5, 1995). *Penal Code Follies*, Texas Lawyer at 3 (June 5, 1995); Shawna L. Reagin, *Brown's Bill: A Descent to "Vigilantism,"* Texas Lawyer at 29 (May 29, 1995).

In their frenzy to sink SB 280, the defense bar employed arguments that were somewhat lacking in candor. The way the defense lawyers (and the press) spun it, the criminal defendant would have borne the "near-impossible" burden of proving he "would not have been convicted but for the error." *Penal Code Rewrite Turns Back the Clock* at 32. *See also Testimony on Senate Bill 280 Before the Senate Criminal Justice Committee* (Mar. 7, 1995)(various defense lawyers blasting the bill for placing "the burden" on the accused); Robert Elder Jr. and Richard Connelly, *Criminal Court Still Targeted*, Texas Lawyer at 5 (May 15, 1995)("Reversals would be allowed only if the appealing party showed it is more probable than not that the error affected the outcome."); *Brown's Bill* (decrying "SB 280's shift of the burden to the appellant to prove non-constitutional error was harmful"). All the reports were wildly off-the-mark. SB 280 placed the burden squarely on the *court*, not the defendant, to assess an error's harmfulness (*i.e.*, prejudice). Stated differently, reversal would have turned on whether, as SB 280 put it, "the *record* shows" that harm occurred ... that is, whether the court determined that the record's facts satisfied the requisite standard.

A recent U.S. Supreme Court decision, O'Neal v. McAninch, clarifies the burden-of-persuasion issue and makes plain that the critics' "burden of proof" argument regarding SB 280 was about as solid as warm toothpaste. — U.S. —, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995). In McAninch, the Court expressly declined to put the question in terms of "proof burdens," instead preferring to let the judge simply ask, "Do I, the judge, think that the error substantially influenced the jury's decision?" This instructive opinion settles the issue. *Courts* are to determine harmfulness by examining the record, and the conceptually muddy notion of "proof burdens" does little to help their inquiry. Indeed, McAninch made clear that if anyone bears the burden of showing the absence of harm, it's the Government. Even in his dissent, Justice Thomas writes that he does "not quarrel with the majority's conclusion that once an error has been shown on direct appeal, the government must demonstrate that it was harmless if the conviction is to stand." And if the court's review of the record leaves the judge with "grave doubt" as to the error's harmfulness, the defendant wins ... period.

McAninch, followed on the heels of the Court's 1993 decision in United States v. Olano, 507 U.S. —, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), which further undercuts the defense lawyers' fanciful "proof burdens" attack on SB 280. In Olano, the Supreme Court stated that, once a non-forfeited error (even one of less-than-constitutional dimension) has been shown on direct appeal, it is "the *Government* who bears the burden of persuasion with respect to prejudice." 113 S.Ct. at 1778 (emphasis added). *See also* id. at 1781 ("the *Government* [bears the] burden of showing the absence of prejudice")(emphasis added). Nothing in SB 280 intimated otherwise.

At day's end, though, the heading atop *Texas Lawyers'* post-mortem on SB 280, *Harmless Error Rule Intact*, is true enough ... if you define "intact" as "remains dormant, ignored, stiffarmed, cold-shouldered, and flouted." *See Penal Code Rewrite Turns Back the Clock* at 32.

111. Following the 74th Regular Session, where a raft of important legislation died in the final days because of timing differences between the House and Senate, several observers suggested that the two chambers adopt joint legislative rules that would provide each body with ample time to debate each others' bills. *See, e.g., Texas House and Senate Need Joint Legislative Rules*, El Paso Times (July 9, 1995).

112. Critics of Texas' judicial labyrinth have ranged from Dean Roscoe Pound in 1918 to current Texas Comptroller John Sharp. *Compare* Proceedings of the Thirty-Seventh Annual Session of the Texas Bar Assoc. at 205-16 (J.G. Lord, reporter, 1918) *with* Texas Crime, Texas Justice at 43-55 (Texas Comptroller of Public Accounts 1992)(both denouncing the complexity of our decentralized court structure).

113. Texas Research League, *TEXAS COURTS: Report 2, The Texas Judiciary: A Proposal for Structural-Functional Reform* (1991).

114. Texas Research League, *TEXAS COURTS: Report 1, The Texas Judiciary: A Structural-Functional Overview* xvii (1990).

115. For a survey of recent efforts at structural reform, *see The Citizens' Commission on the Texas Judicial System: Report and Recommendations* at 3-4 (1993).

116. Id. at 13.

117. *Texas Judicial System Annual Report: Fiscal Year 1993* (Office of Court Administration, Dec. 1993).

118. *Citizens' Commission on the Texas Judicial System* at 13 (cited at endnote 115).

119. Texas House of Representatives, *Committee on the Judiciary, Interim Report to the 72nd Legislature* at 8 (1990).

120. *TEXAS COURTS: Report 2, The Texas Judiciary* (cited at endnote 113).

121. *See, e.g.*, JAMES E. ANDERSON, ET AL., TEXAS POLITICS: AN INTRODUCTION at 246 (1984)(remarking that the "Texas court system is complicated, diffused, and at times confusing, with series of layers and special courts within layers"); CLIFTON MCCLESKEY, ET AL., THE GOVERNMENT AND POLITICS OF TEXAS at 217 (7th ed. 1982)(noting that our "decentralized system of judicial administration appears to be a significant cause of the delays in the judicial process"); CHARLES F. CNUDDE & ROBERT E. CREW, JR., CONSTITUTIONAL DEMOCRACY IN TEXAS at 135 (1989)(bemoaning how the system's "complexity gives advantages to those with information and the wherewithal to afford information").

    For the reader's benefit, a chart illustrating our State's court structure as of September 1, 1993 is attached as Table I ... which looks so complex because it happens to be accurate. *Texas Judicial System Annual Report* at 9 (cited at endnote 116)(reprinted with permission).

122. Alabama and Tennessee have bifurcated intermediate appellate courts, as did Texas until 1981, but those states' supreme courts are the courts of last resort for both criminal and civil matters.

123. OKLA. CONST. art. VII, § 4 and § 1.

124. Texas also has more judges on its high courts than any other state, with 18 on the two courts compared with Oklahoma's 14. Of the 48 states with a single court of last resort, four have nine judges, 26 have seven judges, and 18 have five judges. Moreover, our nation's ten most populous states (not including Texas) are served by seven-judge courts, while several smaller states opt for five-judge courts. *Citizens' Commission on the Texas Judicial System* at 9 (cited at endnote 114). Indeed, as this paper went to press, the Washington State Legislature was considering a proposed constitutional amendment that, if adopted, would *reduce* the number of Supreme Court justices from nine to seven. Why the downsizing proposal? Because, say the amendment's proponents—*who also happen to be members of the Court*— administrative problems "multiply geometrically" with nine justices instead of seven; the Court runs more efficiently with fewer justices. Also, they say, the judicial branch shouldn't be immune from the notion of a shrinking government that operates more efficiently and at less cost. Aside from increased efficiency at issuing opinions—"The point is to write them, not admire them," says Justice Barbara Durham—a leaner Supreme Court would save the state $1.2 million in salaries and staff costs alone. *See* untitled article from N.Y. Times News Service (Apr. 9, 1995)

For ease of comparison, a complete chart of the organization of the high court(s) in each state as of January 1992 is provided in Table II. Id. at Appendix J (reprinted with permission).

125. For a thorough discussion on how our bifurcated system has the potential for problems, *see* GEORGE D. BRADEN, ET AL., THE CONSTITUTION OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS at 376-98 (2 vols.; Texas Advisory Commission on Intergovernmental Relations, 1977).

126. *Citizens' Commission on the Texas Judicial System* at 11-12 (cited at endnote 115).

127. *Compare* Cropper v. Caterpillar Tractor Co., 754 S.W.2d 646 (Tex. 1988) *with* Van Guilder v. State, 709 S.W.2d 178 (Tex. Crim. App. 1985).

128. *Compare* State ex rel. McNamara v. Clark, 187 S.W. 760 (Tex. Crim. App. 1916) *with* Ex Parte Mitchell, 177 S.W. 953 (Tex. 1915)(both construing S.B. 220, 33rd Leg., R.S. 1913 Tex. Gen. Laws 136).

129. *Compare* City of Houston v. Allred, 71 S.W.2d 251 (Tex. 1934) *with* Long v. State, 127 S.W. 208 (Tex. Crim. App. 1910).

130. Janet Elliott, *State Appeals Twice in Sodomy Case, But Neither High Court May Want 'Hot Potato'*, Texas Lawyer at 22 (May 18, 1992)(citing University of Texas School of Law Professor Robert O. Dawson).

131. *See* Ex parte Cvengros, 384 S.W.2d 881 (Tex. Crim. App. 1964).

132. Bretz v. State, 508 S.W.2d 97, 98-100 (Tex. Crim. App. 1974)(Roberts, J., concurring).

133. *State Appeals Twice in Sodomy Case* at 1 (cited at endnote 130).

134. Id. at 22.

135. Id. at 1.

136. *Order Dismissing Petition for Discretionary Review*, No. 669-92 (Tex. Crim. App. May 29, 1992).

137. Id. at 1, 22. *See, for example*, Crank v. The Hon. Mark S. Tolle, 37 Tex. Sup. Ct. J. 755 (May 4, 1994); Simon v. Bozarth, 37 Tex. Sup. Ct. J. 714 (Apr. 28, 1994).

138. The same scenario could conceivably happen regarding the abortion issue. For example, had the U.S. Supreme Court used recent abortion cases to overrule Roe v. Wade, Texas' strict anti-abortion law (which prohibits abortion unless necessary to save the life of the mother and was never repealed after Roe) would arguably have been in effect. The threshold question would be which court should determine the statute's validity. "The criminal appellate court would have the last say over an appeal of an abortion clinic operator convicted of violating the law. But the Supreme Court could be given a shot at resolving the controversy if a clinic operator were to file a civil lawsuit challenging the old statute." Clay Robison, *Judicial Candidates Put on the Hot Seat; Elections Targeted as Abortion Issue Heats Up*, Houston Chronicle, State at 1 (Febr. 2, 1992). One abortion-rights leader said, "It could go either way. You may have two different lawsuits going on at once and have a jurisdictional dispute." Id.

139. State v. Morales, 869 S.W.2d 941 (Tex. 1994). The fact that neither court stepped forward to decide the question was roundly criticized. The editorial page of a leading state newspaper put it this way: "What's the point of having not one, but two final state appellate courts if neither of them has the authority to rule on the constitutionality of a Texas criminal statute?" *Texas' Top Courts Dodge Decision*, San Antonio Express-News at 40 (Jan. 15, 1994).

140. Holmes, 1994 Tex. Crim. App. LEXIS at *15 (cited at endnote 52).

141. Id. at *58 (Overstreet, J., dissenting).

142. Id. at *103 (Meyers, J., dissenting).

143. Id. at *112, *109.

144. Id. at *103-04 (emphasis added).

145. Id. at *101.
This particular judge's concern over "turf wars" is longstanding. In his concurrence in Smith v. Flack, 728 S.W.2d 784, 795 (Tex. Crim. App. 1987)(Clinton, J., concurring), he bemoaned the majority's broad determination of what constitutes a "criminal law matter" under the Texas Constitution and state statutes:

> [T]he interpretation of the majority here is fraught with much difficulty, and is surely to cause a great deal of confusion — more than once found in our appellate judicial system [citing Judge Roberts's concurrence in Bretz blasting the bifurcated system].
>
> > With little imagination one may conjure up civil actions in which "a criminal law" is "the subject of the litigation," or "directly involve[d]" in it.

The judge offered as an example "the fertile field of civil actions for wrongful bodily injury or death in which the defense is justification under Chapter 9 of the Penal Code." Id. at 795. The majority, he argued, would find such a case to be a "criminal law matter" and, *to jealously guard against the court's power being "seriously eroded or eliminated altogether,"* would assert authority to issue a writ of mandamus against a trial judge "in what is otherwise purely a civil action pending in trial court." Id. (emphasis added).

146. Here are just a few examples:

> We give thoughtful consideration to [the CCA's] analysis in part to avoid conflicting methods of constitutional interpretation in our unusual system of bifurcated highest courts of appeal.
>
> Davenport v. Garcia, 834 S.W.2d 4, 14 (Tex. 1992).
>
> > It is indeed regrettable that today's holding flies into the teeth of the holding of the Supreme Court of Texas that revocation of probation proceedings are a "criminal prosecution" within the meaning of the state constitution... .
> >
> > A conflict between the two courts of last resort is totally unnecessary to the proper disposition of this cause... .
> >
> > * * *
>
> I can find no basis for substituting the personal notions of the judges of this court after the Legislature has prescribed the procedure to be followed.
>
> Hill v. State, 480 S.W.2d 200, 206-07 (Tex. Crim. App. 1972)(Onion, P.J., dissenting).
>
> The proper administration of justice demands that harmony exist in the construction of statutes criminal in their nature between our two courts of last resort. Some of the older members of the Bar will recall the confusion created in 1911 when these two courts rendered conflicting decisions with reference to the validity of a provision for initiative and referendum in a city's charter.

Shrader v. Ritchey, 309 S.W.2d 812, 814 (Tex. 1958).

A conflict between the decisions of the two courts of last resort is greatly to be regretted, and should be avoided whenever it is possible to do so. But the question under consideration is of such great importance in its relation to the civil branch of the law, that we cannot agree with [the Court of Criminal Appeals]... . The decision, if followed, would seriously affect the administration of the civil laws of the state, of which this court has final jurisdiction[.]
Harris County v. Stewart, 41 S.W. 650, 657 (Tex. 1897).

[The Court of Criminal Appeals'] decisions are final upon the questions determined by them, and settle the law in purely criminal matters... . In like manner the decision of the Supreme Court is final and authoritative over questions not involving the criminal laws. Such is the constitutional prerogative of the two courts. Neither is in any manner subordinate to the other.

Yet there are criminal cases which may incidentally involve a question of civil law, and civil cases in which like manner points of criminal law call for solution.

Commissioners' Court of Nolan County v. Beall, 81 S.W. 526, 528 (Tex. 1904).

In such cases, the Supreme Court in Nolan County said, "upon questions of criminal law which might arise in the Supreme Court, that court would bow to the decisions of the Court of Criminal Appeals, and that upon those of civil law the latter would accept the rulings of the Supreme Court." But the Court feared disharmony if the Legislature were to pass a statute that both confers civil rights and declares offenses punishable in the criminal courts:

The question of the validity of the act is peculiar to neither jurisdiction. Under it, if valid, there are not only civil rights to be protected, but also criminal offenses to be prosecuted. Upon the question of the validity of the act neither court should be bound by the decision of the other... Therefore as to that class of cases there may be conflict between the decisions of the two courts; and there is no provision in the Constitution for settling the law in such cases and enforcing harmony of decision. So it must remain until the Constitution is amended. Id.

147. *See generally* Mary M. Chen, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 Hastings Law J. 1325 (1991).

148. As one scholar has noted,

If "criminal case" is defined too broadly, then the cumbersome baggage of criminal procedure will be carried into a wide range of government and private lawsuits. If it is defined too narrowly, then the values that underlie various constitutional provisions will be sacrificed simply because they arise in a proceeding denominated as civil.

Id. at 1329.

149. TEX. FAM. CODE ANN. §§ 54.02, 56.01(a) (Vernon 1986 & Supp. 1994).

150. 737 S.W.2d 564 (Tex. App.—Houston [14th Dist.] 1987, *writ denied*), *cert. denied*, 109 S.Ct. 71 (1988).

151. 686 S.W.2d 259 (Tex. App.—Houston [14th Dist.] 1985, *pet. ref'd*), *cert. denied*, 479 U.S. 824 (1986).

152. Peter Linzer, *Symposium on the Texas Constitution: Why Bother With State Bills of Rights?*, 68 Tex. L. Rev. 1573, 1604 n.227 (1990).
Recent federal legislation regarding access to abortion clinics, however, will perhaps remove this issue from state courts.

153. Dearing v. Wright, 653 S.W.2d 288, 290 (Tex. 1983).

154. Roberts v. Gossett, 88 S.W.2d 507, 509 (Tex. Civ. App.—Amarillo 1935, *no writ*).

155. Charles T. McCormick, *Modernizing the Texas Judicial System*, 21 Tex. L. Rev. 673, 695 (1943). Under Dean McCormick's proposal, the Governor would appoint the Chief Justice, who would appoint all justices, subject to retention elections. Id. at 679-80. Also, the Court could sit *en banc* or in smaller panels. Id. at 695.

156. *See, for example,* Chief Justice's Task Force for Court Improvement, *Proposed Judiciary Article of the Texas Constitution* (1972)(a complete revision of the Constitution's judiciary articles was submitted to the Legislature in 1973 as a proposed constitutional amendment for subsequent submission to the voters, who ultimately rejected the convention's rewrite, which included a unified 14-member high court); Interim Report of the Judiciary Committee, Texas House of Representatives (1972)(also recommending a merged court of 14 judges). *See also* Tex. H.R.J. Res. 9, 63rd Leg. R.S. (1973); Tex. S.J. Res. 4, 63rd Leg. R.S. (1973); Tex. H.R.J. Res. 3, 63rd Leg. R.S. (1973); Tex. S.J. Res. 2, 63rd Leg. R.S. (1973). For substantial commentary on the specific provisions, *see* Thomas M. Reavley, *Court Improvement: The Texas Scene*, 4 Tex. Tech. L. Rev. 269 (1973). *See also* Report of the Judiciary Committee of the Texas Constitutional Convention (Aug. 31, 1973); Texas Constitution Revision Commission, *A New Constitution for Texas* (1973); *A Proposal for the Comprehensive Revision of Article V*, Committee on the Judiciary, Texas House of Representatives (Oct. 1974); Information Booklet on the Proposed 1976 Revision of the Texas Constitution at 37 (1976).

157. Judicial Admin. Div., Amer. Bar Assoc., *Standards Relating to Court Organization*, § 1.11, at 6-7 (1990).

158. *E.g., Behind the Lines: Abolish the Court of Criminal Appeals* at 5 (cited at endnote 15); *Trial by Technicality* at 127 (cited at endnote 61).

159. *State's 'Invisible Court' No Longer Needed*, Tyler Morning Telegraph (Mar. 25, 1994)(citing Sam Bayless, a run-off candidate for Place 2).

The editorial concluded that "there appear to be some very solid reasons that can be given to justify claims that it is no longer needed." Id.

160. *See* endnote 156. The Constitutional Convention's genesis was a task force on judicial reform headed in 1971 by Chief Justice Robert W. Calvert. This group, in turn, was an outgrowth of a judicial reform committee established in 1970 by the Judicial Section of the State Bar. Among the suggested reforms, included in a complete top-to-bottom revision of the Constitution's judiciary article, was consolidation of the two high courts. *See Task Force Suggests Merger for Court Modernization*, Texas Bar J. at 494 (June 1972). A number of other measures (reducing jurisdictional confusion and overlapping, providing for leaner court administration, etc.) have since been paralleled by subsequent study groups.

161. *Court Changes Lots of Folks Can Gag On*, 8 Texas Weekly at 1 (June 15, 1992)(criticizing changes reported to be in the Commission's report). Of course, sweeping structural reform will *always* encounter entrenched opposition (*e.g.*, incumbent and would-be judges, elected and appointed officials of the judicial department, lawyers who are comfortable dealing with the current scheme, special interests who are likewise fond of certain courts, etc.). As one Texas government text put it,

> [A] major change in the structure of the judicial branch would inevitably have far-ranging political consequences — there would be winners and losers. It's the nature of politics that those groups and individuals who think they might be hurt by a structural reform will oppose it. In this instance, that would include, of course, judges whose jobs might be abolished by a judicial reorganization, but it would also include those interest groups that are uncomfortable with the system as it is and fear the uncertainty of change. Couple that with the general public apathy about judicial reform and the procedural difficulties inherent in any constitutional change, and the prospects for a major overhaul of the judicial branch of Texas government are slight.
> NEAL TANNAHILL & WENDELL M. BEDICHEK, TEXAS GOVERNMENT POLICY AND POLITICS at 296 (1989).

162. Janet Elliott, *The Architect: Critics Attack Judicial Overhaul, Which Bears Chief Justice's Stamp*, Texas Lawyer at 1 (Sept. 21, 1992).

163. Id.

164. Former CCA Presiding Judge John Onion twice attempted to change the Court's name to the Texas Supreme Court of Criminal Appeals, a failure he attributes to prickly members of the other high court who were leery of sharing the word "Supreme."

> "The first time there was a proposed constitutional amendment (to change the name), they [the Supreme Court] went over and told the sponsors that the mail would get mixed up and there'd be too much confusion," Onion said. The second time, he said, he agreed not to change the name if lawmakers would expand the criminal appeals court from five to nine members. They did.
>
> Gardner Selby, *Hutchison Trial Judge Built Reputation as a Stickler for Law*, Houston Post (Jan. 31, 1994).

165. *STARTING OVER: Term's Big Cases, Abolition Threat Nothing New* at 1 (cited at endnote 16).

166. Id.

167. Several of the Commission's proposals resemble reforms proposed in a 1990-91 series of reports by the Texas Research League, a business-funded research organization.

168. Morgan O. Reynolds, *Crime in Texas* (Nat'l Center for Policy Analysis, 1991).

169. Reynolds calculates the "expected punishment" by multiplying four probabilities—the chances of (i) being arrested for a crime after it is committed; (ii) being prosecuted if arrested; (iii) being convicted if prosecuted; and (iv) going to prison if convicted—and then multiplying the product by the median time served for an offense. Reynolds thus computes the expected punishment for murder in Texas at two years, rape 5.3 months, robbery two months, aggravated assault 8.2 days, burglary 6.7 days, auto theft 2.8 days, and larceny theft less than one day. Id.

> "By some estimates, roughly a fifth of all crimes result in an arrest, only about half of those lead to a conviction in serious cases, and less than 5% of those bring a jail term." *LOCK 'EM UP!* at 52 (cited at endnote 3).

170. Earlier, in 1989, Hardin was a key lobbyist for the Texas District and County Attorneys Association, which countered the Forte decision—which first acknowledged "new federalism"—by leading the charge for the proposed (and doomed) constitutional amendment forbidding the pernicious doctrine. Rubbing salt in the wound, three of the Court's new members in 1990 all voted with the Heitman majority favoring new federalism.

171. The "barking cat" theory, I believe, originated over 20 years ago with Milton Friedman, who used it to refute the arguments of those who favored tinkering with the Federal Drug Administration rather than abolishing it. The gist of the theory, though, is equally applicable to the CCA.

172. Bob Lowry, *Clements Favors High Court Consolidation*, UPI (Mar. 17, 1987). *See also* G. Robert Hillman, *Clements Wants One Texas Supreme Court*, Dallas Morning News at 1A (Mar. 18, 1987).

173. *A New State Constitution Would Mean a Better Texas*, El Paso Times (Mar. 12, 1995).

174. James C. Harrington, *Montford's Constitution Falls Short*, Texas Lawyer at 17 (Jan. 20, 1992).

175. Id.

176. *TEXAS COURTS: Report 2, The Texas Judiciary* at 25 (cited at endnote 113).

177. With apologies to Eli Cass, who penned a slightly different version of the poem, *No Reach*.

178. *FORCES OF CHANGE: Shaping the Future of Texas* at 323, 357 (cited at endnote 13).

179. Message to the Sixth Congress, Republic of Texas, 1842.

180. DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875 at 429 (Seth S. McKay, ed.)(1930).

181. Although the Texas Court of Criminal Appeals was designated by constitutional amendment in 1891 to be the State's highest criminal tribunal, it actually replaced in name the three-judge Court of Appeals initially created in the Constitution of 1876 to relieve the Supreme Court of some of its workload. The newly-christened CCA was manned by the same three judges.

182. This guest column, and the three following, were written by the instant author.

183. U.S. CONST. pmbl.