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The Texas Court of Criminal Appeals: A Modest Critique of Appellate Decisionmaking

J. Thomas Sullivan*

Lawyers must understand the court's attitude toward the law as well as the substantive content of its decisions in order to advise clients. To accurately predict how the court will decide a given case a lawyer must be able to anticipate the directions in which the court is moving.

This paper offers a look from the standpoint of a defense lawyer at the performance of the Texas Court of Criminal Appeals, the state court of last resort in criminal appellate matters. This study focuses on decisions which are at least arguably wrong. The point, however, is not mere disagreement with the court's results, but an analysis of the technique which led the court astray. The aim of this approach is to shed light on the court's reasoning and mode of operation, not to attack the substantive basis for the court's ruling.¹

By statute,² the Court of Criminal Appeals is required to provide a written opinion or explanation of its decisions. Only a small number of these opinions, however, are published in the national reporter system. By rule of the court, unpublished opinions are not deemed, or cited as, precedent.³ Most studies of the court's work do not include unpublished opinions, but because of the insight they provide into why cases succeed or fail on appeal, this study refers to them.

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1. Alternative approaches to the study of performance of the Court of Criminal Appeals would have equal or greater validity, of course. For example, social science methodology could be applied to overall disposition rates in the Court, comparing rates of reversal/affirmance based upon: type of offense; whether the offense reviewed was one of violence or non-violence; whether the accused was represented by appointed or retained counsel on appeal; whether the accused was free on bail or incarcerated during the time of the appeal, etc. A novel approach might be to follow cases through affirmance by the Court and into the federal courts to determine the extent to which federal judges tend to overrule the elected judges of the Court of Criminal Appeals, particularly with respect to disposition of an individual ground of error—e.g., improper final argument by the prosecution—or with respect to a given category of offense, such as death penalty cases.


The following principles provide a framework for analyzing appellate decisions. First, an appellate court bears the responsibility to protect the constitutional interests of the individual, while also preserving legislative enactments wherever possible. Second, the court must apply rules of law without concern for political expediency or unpopularity of result. Third, the court should not apply its decisions retroactively to the detriment of an individual accused. Fourth, the lower appellate courts must give full effect to decisions of higher appellate courts. Fifth, the court should directly address issues to give effect to individual rights and to provide notice of what activity is proscribed by law. Sixth, the courts must afford the accused access to appellate review in order to provide a means for fair litigation of claims. Seventh, it is of paramount importance that the court treat factually similar cases consistently. These principles represent concepts a defense attorney must work with in counseling clients.

Each section of this paper focuses on an area where the Court of Criminal Appeals has failed to apply the principles set out above in rendering its decisions. For the most part, the results themselves are not particularly offensive, but the process employed by the court in reaching its results is not based on sound decisionmaking principles.

I.

Defense Counsel rely on the willingness of an appellate court to void unconstitutional legislative enactments which improperly in-

All of the influences that can produce a lack of congruence between judicial action and statutory law can, when the court itself makes the law, produce equally damaging departures from other principles of equality: a failure to articulate reasonably clear general rules and an inconstancy in decision manifesting itself in contradictory rules, frequent changes of direction, and retrospective changes in the law.

5. In National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1, 30 (1937), Chief Justice Hughes wrote:
We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same.


7. Fuller, supra note 4.

8. Weber v. Kaiser Aluminum and Chemical Corporation, 611 F.2d 132, 133 (5th Cir. 1980), opinion of Gee, J., on remand from the Supreme Court:
For myself only, and with all respect and deference, I here note my personal conviction that the decision of the Supreme Court in this case is profoundly wrong.


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fringe upon liberties guaranteed by the federal or state constitutions. The proper exercise of discretion by an appellate court requires the court to uphold legislative enactments as the proper expression of the will of the people, provided the enactments can be construed consistently with constitutional limitations on the powers of government. When an appellate court fails to void an improper act, the judicial system fails to provide the check on legislative power contemplated by the separation of powers concept.

An elected judge may deem it politically unwise to interfere with legislation enacted by the representative body, particularly if the measure can be characterized as "anti-crime" in nature. In at least two recent instances the Court of Criminal Appeals has deviated from the principle that the judiciary should protect individual rights granted by constitutional provisions against legislative infringement. In *Ex parte Huffhines*, Judge Onion presided over a panel of the court which expressly recognized that the legislatively created procedure for asserting double jeopardy claims was defective, yet failed to take action to either void the legislative enactment or to create an alternative procedure.

Huffhines was convicted of the offense of unlawful possession of

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11. One of the critical questions regarding appellate judicial behavior is to what extent courts should intervene to nullify actions of the legislature. The debate has often focused on the United States Supreme Court and is characterized by differing views on the role of the Court as expressed by the Justices themselves. For example: "The Court's essential function is to act as the final arbiter of minority rights," Chief Justice Warren, *The Philadelphia Inquirer*, October 4, 1978, p. 2.

The people have seemed to feel that the Supreme Court, whatever its defects, is still the most detached, dispassionate, and trustworthy custodian that our system affords for the translation of abstract into concrete constitutional commands.

Yet, others on the Court have resisted the tendency to intervene in activity where the legislature has acted. Consider, for example, the discussion of Justice Felix Frankfurter's views in *Gideon's Trumpet*, 82-83 (1964).


Chief Justice Roger J. Traynor of the California Supreme Court told a judicial conference in the fall of 1970 that the "greatest single improvement that could be made in the administration of this country would be to get rid of the popular election of judges." *The New York Times*, October 5 1970, p. 34.) At that time fully 82 per cent of the judges on local and state courts were elected. *(Ibid.) That figure has dropped but slightly since.

13. *Ex parte Huffhines*, # 60, 749-60, 751 (Tex. Crim. App. 1979), one opinion, unpublished (hereinafter: *Huffhines*). Other members of the panel serving with Presiding Judge Onion were Judges Roberts and Clinton.
a firearm silencer. He gave notice of appeal and his counsel filed an appellate brief in his behalf. Pursuant to his statutory authority, the trial judge reviewed the briefs of the parties and ordered that Huffhines be granted a new trial. The trial court then set the cause for trial.

Huffhines, however, interposed a double jeopardy claim by filing an application for writ of habeas corpus alleging, inter alia, that the evidence was insufficient to support conviction in the first trial. He argued that the state was barred from further prosecution by the decisions of the United States Supreme Court in *Burks v. United States* and *Greene v. Massey*. The trial court issued the writ and conducted a hearing, but denied the requested relief. Huffhines then appealed the denial of relief to the Court of Criminal Appeals.

The court denied the petitioner's requested relief on appeal. In reaching its conclusion, the panel determined that it could not reach the merits of his claim because the legislature had provided only one means by which a claim of prior jeopardy could be litigated. The defensive plea authorized by the legislature requires that the accused raise his claim of prior jeopardy as a pre-trial motion in advance of retrial. Once raised, the plea is heard by the trial court and the decision is appealed, if necessary, in the appeal taken from the subsequent conviction, if any.

The Court recognized that claims of prior jeopardy fall within the particular constitutional guarantees of the Fifth Amendment.
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and article 1, section 14, of the Texas Constitution. It also recognized that the double jeopardy clause of the Fifth Amendment has been defined by the Supreme Court to not only preclude a second conviction for a given offense, but a second trial as well. Quoting from the opinion of Chief Justice Burger in Abney v. United States, the Court emphasized the Chief Justice's comment:

Finally, the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence. To be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal following final judgment, as the Government suggests. However, this Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to trial for the same offense.

Yet, despite the emphasis Abney placed upon "being twice put to trial" as a critical element of double jeopardy protection, the panel concluded that the Texas Legislature had resolved the matter by requiring that an accused plead prior jeopardy as a matter to be litigated in the second trial. The practical impact of the procedure is to delay any appellate consideration of the double jeopardy claim until the appeal from a subsequent conviction.

In rejecting the use of the writ of habeas corpus as a means of raising a prior jeopardy claim, the panel observed:

Were we writing on a clean slate, as well as the rationale of the Supreme Court in Abney, supra, other cogent pol-

25. Tex. Const., art. I, § 14, provides:

No person, for the same offense shall be twice put in jeopardy of life or liberty, nor shall a person again be put on trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction.

The Texas Double Jeopardy guarantee expressly provides a greater coverage for the accused than that included in the language of the Fifth Amendment in that the Clause proscribes a second trial after verdict of acquittal.

27. Hujhines, at 6.
28. 437 U.S. 660-663.
29. 473 U.S. 660-663.
30. U.S. Const., amend. V.
31. Hujhines, at 7, citing and quoting from Ex parte Crofford, 47 S.W. 533 (Tex. Crim. App. 1898):

This is not a novel question in Texas. Since the case of Perry v. State, 41 Tex. 488, the decisions have been uniform that the writ of habeas corpus cannot be resorted to for the purpose of discharging an appellant on a plea of former jeopardy.
icy considerations might impel us to formulate a bar to exposure to jeopardy through a second trial.\textsuperscript{32}

The other "cogent policy considerations" noted by the court included reducing pressures on the judicial and penal systems by avoiding lengthy trials which might be rendered unnecessary by pre-trial determination of a prior jeopardy claim.\textsuperscript{33} The panel also noted that the \textit{Abney} rationale\textsuperscript{34} took into consideration the mental and financial strain imposed on an individual required to undergo a second trial before the prior jeopardy claim can be disposed of on appeal.\textsuperscript{35}

Despite the constitutional reasoning relied on in \textit{Abney}\textsuperscript{36} and the "cogent policy considerations" cited by the panel,\textsuperscript{37} the Court refused to authorize litigation of prior jeopardy claims by writ of habeas corpus.\textsuperscript{38} The court instead referred to the "settled practice" in Texas of litigating these issues by defensive plea raised in advance of the second trial.\textsuperscript{39} The panel concluded:

Bound as we are by an unwavering line of precedent, yet straining against the binds, we must nevertheless hold that the issue of former jeopardy may neither be raised by petitioner nor decided by this Court on application for writ of habeas corpus.\textsuperscript{40}

The panel further noted that its hesitance to approve the use of the writ for litigating prior jeopardy issues in \textit{Huffhines} was based in part on certain inadequacies in the appellate record.\textsuperscript{41} The entire court rejected further review in denying the petitioner/appellant leave to file his motion for rehearing.

The problem posed for defense counsel by the \textit{Huffhines} deci-
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sion is that the court appears unwilling to enforce protected rights when the legislature has taken an improper position.\textsuperscript{42} The panel perhaps correctly sensed that the special plea procedure could with-stand constitutional scrutiny\textsuperscript{43} and thus exercises sound discretion in refusing to void an otherwise sound legislative enactment.\textsuperscript{44} However, in light of the state's constitutional protection of the accused's interest against multiple prosecution,\textsuperscript{45} the panel's reluctance to recognize an alternative to the special plea is questionable.

The Texas Constitution provides that an accused is not to be tried for the same offense once he has been acquitted of the charge. Thus, if federal constitutional protections mandate that a conviction not supported by sufficient evidence must be reversed and followed by a verdict of acquittal—as \textit{Green v. Massey}\textsuperscript{46} provides—then the Texas provision arguably protects an accused from a second trial when he raises a legitimate claim that his first conviction is not supported by sufficient evidence. The panel decision, leaving intact the special plea procedure as the only vehicle for raising a claim of prior jeopardy, fails to recognize that the Texas Constitution provides broader protection of the accused's rights than does the fifth amendment.\textsuperscript{47}

The \textit{Huffhines} court would not have had to void the legislatively created special plea in order to give full effect to the \textit{Abney} concept embraced in the decision. The panel could simply have recognized an alternative to the special plea, the writ of habeas corpus, as a means of raising a prior jeopardy claim when the issue is a claim of

\begin{itemize}
\item \textsuperscript{42} Lewis, \textit{supra}, note 1, at 83. Justice (Hugo) Black ... has emphasized the duty of judges to preserve individual liberty, and has argued that excessive deference to other branches of government amounts to abdication of that responsibility. In the Black view, the framers of the Constitution made the decision to protect individuals from governmental repression, so a judge should not feel timid or self-conscious about doing so.
\item \textsuperscript{43} The Supreme Court dismissed an appeal for want of substantial federal question in which appellant specifically attacked the special plea procedure in \textit{Reed v. Texas}, 344 U.S. 851 (1981).
\item \textsuperscript{44} "Judicial self-restraint" is defined by Smith and Zurcher, \textit{Dictionary of American Politics}, Barnes and Noble (1968), as:
\begin{quote}
The tendency of some judges to interpret narrowly the power of judicial review, as by holding that changes in the law to achieve social goals is a responsibility of the legislative and executive departments; and by questioning and even opposing the transfer of functions from the States to the federal government. As typified by Justices Holmes and Frankfurter, they are inclined to express doubts as to judicial infallibility.
\end{quote}
\item \textsuperscript{45} Tex. Const., art. I, § 14.
\item \textsuperscript{46} 437 U.S. 19 (1978).
\item \textsuperscript{47} Compare notes 24 and 25.
\end{itemize}
insufficient evidence in the first trial.\textsuperscript{48}

While the special plea has withstood constitutional attack thus far, the Fifth Circuit Court of Appeals has recognized the right of an accused to seek relief by way of federal habeas corpus once attempts to gain relief through state remedies have been exhausted.\textsuperscript{49} The Fifth Circuit's position implicitly suggests that Texas procedure suffers from exactly that deficiency admitted by the panel in \textit{Huffhines}. A firmer posture by the Court of Criminal Appeals, recognizing the need to tailor appellate jurisdiction within the constitutional powers accorded the court in the Texas Constitution, would have adequately protected the rights of criminal defendants without necessitating federal court intervention in these matters.

\textit{Huffhines} hardly represents the most egregious action on the part of the Court of Criminal Appeal in construing constitutional provisions protecting criminal defendants. While \textit{Huffhines} merely reflects a failure to act, the Court has acted positively to emasculate the Texas constitutional limitation on appeal by the state in criminal matters.\textsuperscript{50} The state has traditionally been precluded from undertaking an appeal from an adverse decision. In \textit{Texas v. White},\textsuperscript{51} for example, a prosecutor successfully appealed an adverse ruling from the Court of Criminal Appeals to the United States Supreme Court. The federal constitution contains no express limitation on the government's right to appeal in criminal actions, and thus the Court was not prohibited from hearing the case by the Texas provision. On remand, however, the Court of Criminal Appeals chastised the prosecutor for taking an appeal in direct violation of the state constitution.\textsuperscript{52}

Subsequently the court split in holding that the state could seek review in the United States Supreme Court when a decision adverse to the state was rendered, basing its holding on its interpretation of a

\footnotesize{\textsuperscript{48} Thus, the court could have taken a new position on the availability of habeas corpus based on the newly announced constitutional requirements of \textit{Burks} and \textit{Green}.

\textsuperscript{49} Thus, in Baker v. Metcalfe, 633 F.2d 1201 (5th Cir. 1981), the court concluded that federal habeas relief was proper for raising the issue of prior jeopardy in light of the lack of availability of interlocutory of extraordinary relief in Texas procedure.

\textsuperscript{50} Tex. Const., art. 5, § 26, provides: "The state shall have no right of appeal in criminal cases."

\textsuperscript{51} 423 U.S. 67 (1975).

\textsuperscript{52} 543 S.W.2d 366, 369 (Tex. Crim. App. 1976)

"We reiterate that we do not challenge the Supreme Court's holding in \textit{Texas v. White}; rather, we accord it its full binding effect. However, we do hold as a matter of Texas criminal procedure that the State is, in the future, precluded from appealing a case—by certiorari or otherwise, from this court to the United States Supreme Court." at 369.
federal constitutional guarantee. The court's opinion in *Faulder*, however, intimates that no additional erosion of the constitutional constraint would be permitted.

The court has once again departed from the clear wording of the Texas Constitution in affording the state the right to discretionary review in the Court of Criminal Appeals from an adverse decision rendered in the Court of Appeals. With the restructuring of criminal appellate review in the state, the court has adopted an approach in which only discretionary appellate review in the Court of Criminal Appeals is available in most matters. The state, by virtue of rules issued by the court, is now accorded an opportunity to seek review from any adverse decision suffered during the first round of appellate review.

Thus, in the period since *White* the court has not only reversed itself on the issue of review of its decisions in the Supreme Court, but also on issues of exclusively state law arising in matters confined to the jurisdiction of Texas courts as well. This departure from the unambiguous language of the constitutional limitation might be argued as justified on the theory that the state does not enjoy a "right to appeal," but only the right to seek discretionary review. The distinction might be analogized to the distinction between a right to appeal in the federal system and the right to seek discretionary review by petition for certiorari. The problem with this argument is that it rests largely on distinctions which ignore the increasing perception that appellate review in the courts of last resort is realistically a matter of discretion. Further, it ignores the fact that the Court of Criminal Appeals has now achieved by rulemaking what the people of Texas have resisted when they defeated a proposed amendment to the Texas Constitution which would have accorded the state a right to appeal. Both *Huffhines* and the evolution of the state's right of appeal demonstrate the lack of commitment to the constitution on the part of the court. In the first instance, the panel's hesitance to recognize the legitimacy of the writ of habeas corpus as

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54. Id.
58. Supra, n. 55.
60. The court did not, however, distinguish between appeal and petition for writ of certiorari in "prohibiting" the State from seeking Supreme Court review in *White*, id.
a means for reviewing double jeopardy claims suggest the court is unwilling to take a position in defense of individual rights that might be construed as violative of the legislature's position. In "inviting" the legislature to update the procedure, albeit by implication only, the court merely displays weakness in confronting a difficult issue. Political expedience may not be the only reason for the court's shifting position on the state's interest in appeal, but it is one factor that explains why the court has abandoned its forceful, constitutional defense in *White.*

Defense counsel are acutely sensitive to the interaction between an appellate court and constitutional guarantees because the failure of the court to enforce those guarantees renders their protections virtually meaningless. The court cannot be expected to formulate law on the basis of policy; such a position is inconsistent with recognized notions of the limitations of judicial review. However, where the court recognizes a problem of constitutional magnitude or ignores the clear protection afforded the individual by a constitutional guarantee, the court fails to act soundly.

II.

Defense counsel frequently complain that appellate courts do not apply principles of law logically or consistently. The complaint is particularly appropriate when the decision and rationale suggest that political considerations have influenced the court. This causes counsel to lose confidence in the appellate court's willingness to correct errors made by trial judges, and defeats reliance on appellate decisionmaking as an instrument of "corrective justice."

*Collins v. State* demonstrates the type of problem inherent in faulty judicial reasoning which undermines the appellate court's work and image. In *Collins,* a panel of the Court of Criminal Appeals reversed the appellant's conviction on the ground that the state had failed to prove, beyond a reasonable doubt, an essential element of the offense, "penetration of the female sex organ by the male sex organ." The panel opinion was not published but instead,

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63. The panel opinion issued in Collins v. State, was delivered in #58,247 (Tex. Crim. App. 11/21/79), authored by Judge Tom Davis. Serving on the panel with Judge Davis were Judges Odom and Clinton [hereinafter referred to as *Collins* panel].
64. The Appellant was charged with the offense of rape of a child, defined by Section 21.09(a) of the Texas Penal Code.
was withdrawn after rehearing was granted by the entire court.65

On rehearing, the Court of Criminal Appeals sustained the panel's reversal of the conviction, but altered significantly the relief accorded the appellant. The panel concluded that since the state failed to prove an essential element of the offense charged, the cause should be reversed and judgment of acquittal entered. In its *en banc* decision, however, the court ruled that the proper disposition of the case was remand for new trial.66 Analysis of the *en banc* opinion rationale points up several deficiencies in the court's reasoning.

The *Collins* reversal was predicated on the improper admission of hearsay testimony concerning the issue of penetration of the victim during the assault.67 The trial court improperly permitted the victim's grandmother and a detective to testify regarding statements made by the victim concerning the assault. This testimony was critical because the complainant could not, herself, provide testimony at trial regarding this element of the offense. According to the panel,68 the testimony of the grandmother and the detective constituted the only "evidence" offered by the state at trial tending to prove that the accused had penetrated the complainant. The panel concluded this testimony was improperly admitted, a point conceded by the state in moving for rehearing. The court, *en banc*, agreed that the trial judge had committed reversible error in permitting the state to offer this testimony.

The critical distinction between the relief afforded by the panel—acquittal—and that authorized by the *en banc* reversal—remand for new trial—is that the panel's disposition would have barred retrial for the offense under the rule announced by the Supreme Court in *Burks v. United States*69 and applied to the states in *Greene v. Massey*.70 In *Burks* and *Greene* the Court held that a conviction based upon insufficient evidence is constitutionally defective and requires reversal and entry of acquittal. However, the rule

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A person commits an offense if he has sexual intercourse with a female not his wife and she is younger than 17 years.

"Sexual intercourse" is defined in Section 21.01(3) of the Texas Penal Code as "... any penetration of the female sex organ by the male sex organ."

66. 602 S.W.2d 539.
67. *Id.* at 538-539.
68. *Collins* panel, supra, note 63.
is complicated by the circumstances of Greene,\textsuperscript{71} in which a reversal by the Florida Supreme Court could not clearly be construed as based on the grounds of insufficiency of evidence. In reaching the rule applying the Double Jeopardy Clause to state convictions based on insufficient evidence, the Court noted that a reversal based on trial error would not necessarily result in entry of judgment of acquittal barring further prosecution.\textsuperscript{72} The Florida reversal in Greene had been based, in part, on a special concurrence by some members of that court indicating trial error as the basis for their decision, rather than insufficiency of evidence.

Thus, the Greene court opened the door for appellate determination of the cause of reversal as a critical factor in assessing whether the Double Jeopardy Clause bars retrial. The Court of Criminal Appeals had adopted the Burks rule in decisions antedating Collins, applying it both on direct appeal\textsuperscript{73} and in attacks on convictions by post-conviction writs of habeas corpus.\textsuperscript{74} The Collins court, however, chose to characterize its basis for reversal as trial error in the admission of the hearsay, following the suggestion of Greene.\textsuperscript{75} Thus, since the court rejected the panel's conclusion\textsuperscript{76} that insufficiency provided the basis for reversal, the judges were not required to order entry of acquittal barring any further prosecution of the appellant.\textsuperscript{77}

Moreover, the Collins court refused to examine the record to determine whether the properly admitted evidence would have been sufficient to support the conviction.\textsuperscript{78} Instead, Judge Clinton con-

\textsuperscript{71} Id.
\textsuperscript{72} The panel opinion relied on both Burks and Greene, notes 8 and 9, as authority for its conclusion that re-trial would not be proper in Collins, panel, supra at 64.
\textsuperscript{73} Walden v. State, 579 S.W.2d 499 (Tex. Crim. App. 1979), holding retrial barred where first conviction resulted from insufficient evidence.
\textsuperscript{74} Ex parte Duran, 581 S.W.2d 683 (Tex. Crim. App. 1979), reversal for trial error does not preclude a second trial.
\textsuperscript{75} 437 U.S. 19.
\textsuperscript{76} Thus, the panel concluded, with respect to the essential element of the offense, penetration:
  The testimony of the prosecutrix that appellant "put something between her legs" does not prove penetration nor does this testimony, coupled with the other probative testimony suffice to disprove every outstanding reasonable hypothesis except that of the guilt of the accused. We find the evidence insufficient to support the conviction.
\textsuperscript{77} Collins panel, at 3. The panel applied the Texas construction of the State's burden of proof in a circumstantial evidence case, that the evidence disprove every reasonable hypothesis except that of the guilt of the accused. Cf. Draper v. State, 513 S.W.2d 563, 565 (Tex. Crim. App. 1974).
\textsuperscript{78} 602 S.W.2d 539.
\textsuperscript{79} Id.
cluded that trial error constituted grounds for reversal and that no consideration of the evidence within the context of the "harmless error rule" could lead to a conclusion other than reversal. Yet, he declined to lead the majority into an examination of the sufficiency of the properly admitted evidence:

Having found error and made the determination that it is reversible, we should simply reverse the judgment of conviction and remand for a new trial if the State be so advised, without undertaking to examine appellant's contention that the evidence is insufficient to convict. What evidence? That error-tainted evidence which the jury heard and obviously considered or that which remains after the contamination is metaphysically eliminated? The former manifestly will not do and the latter becomes an exercise in the abstract—"forming conclusions for ourselves" is the way the court put it more than 120 years ago in Draper v. State. . . . (emphasis added).

Thus, Judge Clinton expresses the court's reluctance to supplant the thinking of the jury with that of the appellate judges, characterizing the process as an "exercise in the abstract." Although he refers to the century-old rule of Draper in support of his argument, his point hardly rings true in light of the court's willingness to supplant its judgment for that of the jury when ruling that improperly admitted evidence will not require reversal in some cases because the error is "harmless," the principle he refers to in refusing to deem the error in Collins "harmless."

Further, Judge Clinton's perception that the "jury heard and obviously considered" the hearsay, suggests that he cannot fully divorce himself from invading the mind of the jury in assessing the probable basis for the verdict.

In Collins the appellant requested the court to review the evidence properly admitted at trial to determine whether the state of-
ferred sufficient competent evidence to sustain a conviction. The *en banc* opinion attempts to explain that a court cannot properly try a case omitting improperly admitted evidence, to make a proper determination. Yet, when the court holds that improperly admitted evidence did not prejudice the rights of an accused, and does not require reversal, it essentially performs the same type of mental—not metaphysical—function. Similarly, the appellate court makes the same type of determination when it reviews sufficiency of accomplice testimony to determine whether the testimony is adequately corroborated to insure accuracy necessary for conviction. The court’s opinions readily admit that it must engage in a weighing of the relative merits of testimony and sources of testimony in gauging sufficiency when accomplice testimony is essential for conviction.

Apparently, the court is simply unwilling to engage in the same process when the result could render a decision favorable to an accused and barring retrial. While the court will engage in speculating that improperly admitted evidence did not unduly influence a jury to convict, the court is not willing to afford the same benefit of speculation to the accused.

Judge Roberts, joined by Judges Phillips and Dally, concurred with Judge Clinton in the result reached in *Collins*. He argued that the accused simply did not phrase his point of error properly. The point, according to the concurring judges, should have focused on the entire body of evidence presented, rather than asking the court to consider only properly admitted evidence:

> If Collins had claimed that all the evidence—including the hearsay which was improperly admitted—was insufficient, we would have considered the claim even though we had found reversible trial error.

This position suggests that improperly admitted evidence could have formed an adequate basis for conviction. The problem with this is that it leads to the conclusion that hearsay, as the court characterizes the improperly admitted testimony in *Collins*, can be considered evi-

87. *Id.*
88. "Harmless error rule," *see supra* cases cited note 84.
89. *Collins* note 80 and accompanying text.
91. 602 S.W.2d at 539-540, opinion of Roberts, J., concurring.
92. *Id.*, at 540.
93. *Id.*
This conflicts with prior decisions in which the court has ruled that hearsay is incompetent and has no probative value. Some evidentiary irregularities leading to reversal could, of course, be corrected on retrial, such as the case where the state fails to lay a proper predicate for testimony which would otherwise be properly admitted. In that type of case, reversal based on trial error should not result in a bar to further prosecution. However, the statements admitted in Collins were so clearly improper that the court indicated no hesitancy in reversing and even led the state to confess error in its application for rehearing. The court offers no explanation of how the state could properly qualify the statements on retrial under any exception to the hearsay rule. Thus, there is no basis for arguing that the error could be cured by proper action in the trial court which would permit the state to establish the essential element of the offense of rape by relying on the testimony of the grandmother and the detective.

Judge Clinton misses the point when he suggests that the appellant’s request would require the court to improperly evaluate the deliberative process of the jury. Instead, appellant merely asked the court to search the record for competent evidence supporting an essential element of the offense charged. In absence of competent evidence supporting the element of penetration, the evidence would have been in any case insufficient to support conviction. This determination is far easier than the one required by the “harmless er-
ror" principle which necessarily requires the court to speculate on the use made of evidence by the jury.

A second problem demonstrated by the court's disposition in Collins is the failure of the court to adequately explain the basis for its decision. Judge Clinton writes that the judgment of acquittal would result in an unsatisfactory result for the appellant:

We torture the rights of the appellant as well, for he is entitled to have his fate decided by a jury upon competent evidence under proper instructions from the trial court.\(^\text{100}\)

As a general principle, Judge Clinton's point is valid. To suggest however, that the appellant would prefer retrial before another jury based on "competent evidence" and 'proper instructions," rather than the acquittal ordered by the panel, is fanciful at best. The reasoning completely ignores the risk of conviction which appellant would face, coupled with the pressures of a second trial noted by the Supreme Court in Abney v. United States.\(^\text{101}\) Judge Clinton's personal speculation of how the appellant would view the acquittal denied by the court on rehearing is apparently the basis of this statement. It is possible, of course, that an accused might prefer retrial under some remote circumstance, but a system of criminal law which places the burden of proof on the state\(^\text{102}\) and affords the accused an absolute right not to testify,\(^\text{103}\) presupposes virtually the opposite—that an accused would not welcome trial if acquittal on the record were the alternative. Had appellant Collins truly sought the fair trial suggested by Judge Clinton instead of the panel's order of acquittal, he could conceivably have moved for rehearing himself. The court fails to mention any demand of this by the appellant.

Conversely, the court strains to suggest that entry of acquittal would be unfair to the state because the prosecution may have elected to rely on the inadmissible hearsay, rather than competent evidence, in proving its case:

In pursuing such a fanciful endeavor (reviewing only the admissible evidence to determine sufficiency) we do an injustice to the State, for necessarily it must be assumed what could well be absolutely contrary to the case: that the prosecuting attorney mustered, assembled and laid before the jury all evidence known and available to him. . . .

For this Court to award appellant the acquittal he

\(^{100}\) 602 S.W.2d at 539.
\(^{101}\) 431 U.S. 651 (1977).
\(^{103}\) U.S. CONST. amend. V; Tex CONST. art. I, § 10.
desires on "insufficient" evidence without assurance that the State has exhausted its resources—and this record surely does not provide it—thwarts the quite valid public concern that the guilty be punished.\textsuperscript{104}

Based on this reasoning the Double Jeopardy Clause would never bar reprosecution unless the record affirmatively demonstrated that the state utilized all available witnesses and evidence in the initial prosecution. This interpretation wholly fails to satisfy the protection against continuing prosecution inherent in both the Fifth Amendment and the double jeopardy guarantee of the Texas Constitution.\textsuperscript{105}

Judge Clinton's approach demonstrates a preference for conviction at the expense of fair trial. It compromises the right of an accused to be free from multiple jeopardy in order to afford the state additional opportunities to get its case right. In the concurring opinion, however, Judge Roberts recognized that the majority opinion went too far in suggesting that the state should be afforded unlimited opportunities to try the accused. He observed:

The general principle mandated by our double jeopardy provisions is that the State acts at its peril if it fails to put on sufficient proof. We should not be understood to say that the State can unjustifiably rely on improper proof while holding back its available proper proof for the retrial which will follow reversal.\textsuperscript{106}

Interestingly, Judge Roberts is able to conclude that the State should be able to retry appellant Collins since it relied on the ruling of the trial court that the hearsay could be offered before the jury. Of course, this distinction is artificial since all error is the result of the action of the trial judge and not the attorney for the State. This being the case, one can conceive of few instances in which the state could not rely on Judge Roberts' "catch 22" in arguing for retrial on

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\textsuperscript{104} 602 S.W.2d at 539. \\
\textsuperscript{105} U.S. CONST. amend V; Tex CONST. art. I, § 14. \\
\textsuperscript{106} 602 S.W.2d 540. Consider also Hudson v. Louisiana, 445 U.S. 960 (1981). In \textit{Hudson}, the Supreme Court rejects the proposition put forward by Judge Clinton in \textit{Collins}. Hudson was tried for the offense of murder and convicted by a Louisiana jury. He was granted a new trial, on motion, by the trial judge who stated in the record that the evidence was wholly lacking to establish Hudson’s guilt of the offense. The State’s application for certiorari to the Louisiana Supreme Court was denied, but the State commenced a new prosecution against the accused. During the second trial, the State offered the testimony of an eyewitness to the crime who had not testified in the first trial. The conviction obtained after the second trial was affirmed, 361 So. 2d 858 (La. 1978) and habeas relief also denied, 373 So. 2d 1294 (La. 1979). On writ of certiorari, the Supreme Court reversed, holding that the second trial was barred by the grant of new trial for insufficient evidence, and that the State was precluded from trying the accused a second time even with the additional probative testimony.
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the theory that it was the trial judge who allowed the state to offer inadmissible testimony. This formulation ignores the professional duty of the prosecutor to know the rules of evidence and exercise proper discretion in offering evidence at trial. In *Collins* the appellate court found no question that the hearsay had been erroneously admitted and even the state conceded the error in making its application for rehearing.

The court's action in *Collins*, moreover, is not likely to be criticized on appeal to federal courts. In *Tapp v. Lucas* the Fifth Circuit held that it would be bound by the characterization of a state appellate court in ruling the basis for reversal is "trial error." Thus, an appellant deprived of an acquittal by mischaracterization will not likely be afforded relief by taking his case to a higher court.

*Collins* is the type of frustrating opinion which illustrates the work of a court not impartial in its review of convictions obtained in lower courts. The decision reflects a concern on the part of the court for conviction of the expense of protecting constitutionally guaranteed promises of liberty. This type of decision might be expected to avoid unpopularity with an electorate concerned with effective prosecution of criminals. Additionally, it suggests that the court withholds from criminal defendants the benefits of intellectual processes routinely used by the court to support affirmances. In fact, the reality of *Collins* is that the court faced the alternative of acquitting a child rapist or remanding the case. The probable consequence of remand would be a plea bargain, especially in light of the earlier conviction and reversal. Rather than make a difficult choice, it searched and found a theory for returning the decision to the trial court.

III.

The stance taken by a legal system toward *ex post facto* application of law reveals the quality of justice it provides. Article 1, 107. TEX. CODE CRIM. PROC. ANN. art. 201 (Vernon 1965).
108. 658 F.2d 383 (5th Cir. 1981).
110. The principle *nulla poena sine lege* is one generally respected by civilized nations.

The reason the retrospective criminal statute is so universally condemned does not arise merely from the fact that in criminal litigation the stakes are high. It arises also—and chiefly—because of all branches of law, the criminal law is most obviously and directly concerned with shaping and controlling human conduct. It is the retrospective criminal statute that calls most directly to mind the brutal absurdity of commanding a man today to do something yesterday.

section 16 of the Texas Constitution, provides:

No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.\(^{111}\)

This provision echoes the prohibition against retroactive legislation incorporated in the United States Constitution.\(^{112}\)

How a court deals with the issue of retroactivity indicates the extent to which the appellate courts seek to promote fairness in administering the criminal law. The simplest example of the interplay between fairness and retroactivity is the concept of notice: retroactive legislation imposes criminal penalties for conduct the individual did not know was criminal.\(^{113}\) Generally, an individual is entitled to the benefits afforded by changes in the law, but is not to be penalized retroactively by changing doctrine or legislation.\(^{114}\)

A "hard case" is presented by the decision in *Johnson v. State*,\(^ {115}\) a prosecution for theft,\(^ {116}\) in which the defendant's conviction resulted in an enhanced punishment of life imprisonment.\(^ {117}\) The unpublished opinion of the court provides little insight into the problem discussed here. Johnson was tried and convicted on the testimony of a security guard serving as the complaining witness in the case. After conviction, but before his appellate briefs had been filed with the trial court, the Court of Criminal Appeals issued reversals of conviction in *McGee v. State*\(^ {118}\) and *Commons v. State*,\(^ {119}\) the latter an *en banc* opinion. In these decisions the court ruled that testimony of a security guard would not be sufficient to establish that the accused had taken property "without the effective consent of the owner"\(^ {120}\) since the guard lacked the necessary ownership interest in the property.

111. Tex Const. art. I, § 16.
114. In order to be characterized as retroactive or ex post facto, the law must be "more onerous than the prior law." Dobbert v. Florida, 432 U.S. 282, 294 (1977).
117. Tex Penal Code Ann. § 12.42(d) (Vernon 1965). This provision has been upheld by the Supreme Court in Rummel v. Estelle, 445 U.S. 263 (1980).
Applying the court's reasoning in *McGee*, Johnson's attorney on appeal attacked the sufficiency of the evidence at trial to establish the ownership element of the offense. His motion for expedited appeal based upon the *McGee* holding was granted. However, the court did not expedite the matter, and *Johnson* remained undecided a year later when the court overturned *McGee* in *Compton v. State*, an *en banc* decision in which the court reversed its stance on the security guard issue. Based on *Compton*, the court affirmed Johnson's conviction and life sentence, holding that the security guard's testimony was sufficient to demonstrate that Johnson had taken property "without the effective consent of the owner."

The court's changing position on the use of security guard testimony to prove ownership presents little substantive problem. It seems logical that a corporate owner can not lawfully delegate sufficient possessory interest in merchandise or property so as to enable a security guard to hold a greater interest in the property than the accused, although Judge Clinton provides a stinging argument against this position in his dissent. The problem is the court's disposition of cases on appeal at the time a new ruling is issued, reversing a previous statement of law. In *Johnson*, the court's backlog and delay, causing cases not to be decided for 24-30 months, worked to deprive the appellant of a favorable statement of law applicable at the time he filed his appellate brief. Counsel for the appellant, recognizing that the *McGee* holding should have permitted the court to dispose of the case expeditiously, sought relief that would have afforded appellant a favorable judgment based upon the *McGee* reasoning.

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121. Johnson's theft offense was alleged to have been committed in 1977, which antedated the decision in *McGee*.
122. Commons had affirmed *McGee*, by *en banc* opinion, in the interim.
124. The affirmation came on October 22, 1980, two weeks after the Court's reversal of *McGee* in *Compton*.
125. Judge Clinton, dissenting in *Johnson*, found the substantive shift in the law to be of considerable consequence, however. He argued that the shift toward liberalizing proof of ownership effectively diluted the requirement that the State demonstrate lack of consent of the owner to the asportation. For Judge Clinton the ultimate consequence of the Court's retreat on the issue would be to permit persons who could never give consent in the context of ownership, a dockworker, eg, to testify that they had not consented to the taking of the accused.
127. Based on estimates given the author by Court of Criminal Appeals staff in 1981.
128. Whether proof of ownership offered through a security guard constitutes a legal failure of proof, such that the reversal should also entitle a litigant to entry of judgment of acquittal, is not clear. The Supreme Court's decisions in *Burks v. United States*, 437 U.S. 1 (1978) and *Greene v. Massey*, 437 U.S. 19 (1978) would seem to suggest that acquittal is proper
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The difficulty posed by the Johnson affirmance is not that the appellant suffered a serious injustice because he was convicted on the testimony of a security guard. Instead, the problem is the failure of an appellate court to accommodate both the interests of justice and the reality of its own docket. The error in Johnson went not to trial error conceivably waived by appellant’s failure to make objection at trial;\(^{129}\) this has long been an accepted, if unsatisfactory, theory for explaining why some litigants will ultimately be deprived of the benefits of changing law. Rather, the error involved the sufficiency of the evidence to support the conviction, a constitutional matter that cannot be waived except by plea of guilty. If the defendant pleads guilty, he has supplied the proof that might have been missing from the state’s case. Thus, when the court issued McGee and Commons, it held that a conviction could not rest on security guard testimony alone as to matters of ownership. These holdings announced a rule for validity of the conviction, not for admission of evidence or exclusion\(^ {130} \) or any other matter relating to the conduct of trial.

When the court changed its position appellate counsel properly presented the argument that Johnson’s conviction must fail because it rested on inadequate evidence. Had the court decided the case in timely fashion, Johnson would have been freed from his life sentence.\(^ {131} \) Instead, the court waited until two weeks after its reversal of McGee and Commons to affirm Johnson.\(^ {132} \) The timing suggests that, despite the motion to expedite and the clear authority of McGee

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\(^{129}\) Sufficiency of evidence is waived only by entry of a plea of guilty. Otherwise, it is subject to litigation even by collateral attack. Jackson v. Virginia, 443 U.S. 307 (1979).

\(^{130}\) Consider the court’s refusal to apply Mincey v. Arizona, 437 U.S. 385 (1978) to appellant’s complaint of an illegal search in Swink v. State, 617 S.W.2d 203 (Tex. Crim. App. 1981). The search occurred after the date of the search in Mincey, but prior to the date of the Supreme Court’s decision. In Linkletter v. Walker, 381 U.S. 618 (1965), Justice Clark, author of the Mapp v. Ohio, 367 U.S. 643 (1961) opinion, considered the retroactive application of the principle of exclusion to state convictions which had become final prior to the issuance of Mapp. Speaking for the majority, he concluded that those state court defendants whose convictions had become final prior to Mapp could not enjoy its benefits. However, as Justice Clark noted, Mapp “has also been applied to cases still pending on direct review at the time it was rendered.”

\(^{131}\) Assuming the reversal was based on insufficient evidence; see supra note 128.

\(^{132}\) Compton was decided on October 8, 1980. The Court affirmed Johnson on October 22, 1980.
and Commons, the court simply held the case until the law was changed.

Johnson presents a difficult problem of appellate justice because the accused was deprived of a favorable change in the law due to the failure of the appellate court to hear his case in timely fashion. For a brief period of time, between McGee and Compton, an accused litigating a security guard issue in a Texas trial court would have benefited from the court's construction in McGee. However, an accused making his claim on appeal during the same period of time could have been deprived of the court's favorable interpretation by its inability or unwillingness to hear his case before the law was changed.

The Johnson case does not present the traditional ex post facto law issue since the law was essentially identical at the time of his trial and on the date of the appellate court's decision. However, in terms of the constitutional application of due process standards in the evaluation of sufficiency of evidence contentions, it is arguable that the court's disposition of his claim reached the same result that is traditionally associated with ex post facto application of law. The case points to the injustice that may result from delay in the judicial process. In Johnson, delay worked to deprive the appellant of proper application of changing law.

IV.

Defense counsel are often confronted by the ambiguities produced when an appellate court refuses to take a stand on a particular issue. When the court bases its rulings on alternative grounds, attorneys are forced to guess what the court will do when it ultimately decides a point. This problem occurs either when the court fails to interpret a statute or fails to give constitutional or statutory language effect based on its plain meaning.

The treatment given searches for blood is an example of the Court of Criminal Appeals' failure to take a stand.\textsuperscript{133} Searches and seizures of blood, particularly under warrant, have presented no constitutional problem for the United States Supreme Court. In

\textsuperscript{133} Fearance v. State, 620 S.W.2d 577, (Tex. Crim. App. 1980), cert. denied, 102 Sup. Ct. 400 (1981). In Fearance, the accused was convicted of capital murder and sentenced to death. The evidence included testimony from an expert witness that the blood of the accused and of the deceased were both present on clothing owned by the accused. His blood had been taken, for purposes of testing by the expert, pursuant to a warrant authorizing the seizure. The case was reversed and remanded on other grounds and the issue of legality of the search was not ruled upon by the Court.
Appellate Decisionmaking

*Schermer v. California,*\(^\text{134}\) the Court held that the Fifth Amendment\(^\text{135}\) protection against self-incrimination was not violated by the introduction of evidence related to the blood of the accused. Thus, seizure of blood is measured solely by Fourth Amendment\(^\text{136}\) standards governing search and seizure.

Under Texas law, the Court of Criminal Appeals has held that blood may be seized only if the appropriate constitutional and statutory requirements are met.\(^\text{137}\) Thus, Article 1, Section 9\(^\text{138}\) was initially construed as prohibiting seizures of blood, even under warrant, because the statutory provision governing issuance of warrants did not authorize seizure of this type of material.\(^\text{139}\) The court’s approach demonstrates a situation in which the state constitutional or statutory provision may restrict police activity to a greater extent than the federal constitution.\(^\text{140}\)

Article 18.02 of the Texas Code of Criminal Procedure governs issuances of search warrants.\(^\text{141}\) The Court of Criminal Appeals held, prior to the amendment of this section, that the provision did not authorize issuance of a warrant for seizure of blood. A defendant who was subjected to seizure of blood, even under warrant, had a valid objection to introduction of evidence resulting from such a seizure since no warrant for blood could constitutionally issue. In *Escamilla v. State,*\(^\text{142}\) the Court of Criminal Appeals reversed, based


\(^\text{135}\) U.S. Const. amend. V.

\(^\text{136}\) U.S. Const. amend. IV.


\(^\text{138}\) The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation. 


\(^\text{140}\) Article 18.02 of the Texas Code of Criminal Procedure specifically lists those things which may be subjected to search under warrant.

\(^\text{141}\) There are areas of substantive and procedural rights in which state law may afford an accused greater protection, based upon state constitutional or statutory construction, than that required by the United States Constitution. Thus, an accused in Texas will enjoy protection of a higher burden of proof upon the State when it relies on circumstantial evidence than would be afforded by federal principles. Griffin v. State, #62, 792 (Tex. Crim. App. April 15, 1981); a more liberal rule of standing to challenge searches and seizures serves Texas defendants than that announced in Rakas v. Illinois, 439 U.S. 128 (1978)—consider Johnson v. State, 583 S.W.2d 399 (Tex. Crim. App. 1979); Kleasen v. State, 560 S.W.2d 938 (Tex. Crim. App. 1977) (an accused may demonstrate standing by showing that possession of the object seized is itself an essential element of the offense with which he is charged.)

\(^\text{142}\) Supra, note 139.
upon the express limitation on warrants created by Articles 18.01\textsuperscript{143} and 18.02.

Despite the rationale advanced in *Escamilla*, the court has held in other cases that the accused could waive his right not to have blood seized and the resulting evidence could be introduced against him at trial. In *Ferguson v. State*,\textsuperscript{144} the court suggested that an accused could waive his rights under Article 1, Section 9, just as he could waive rights under the Fourth Amendment by failing to make a timely objection to introduction of the blood-related evidence. The *Ferguson* court did not address the issue of whether Article 18.02, as amended, authorized seizures of blood.\textsuperscript{145} The amended language provides that a warrant may issue for:

- (10) property or items, except the personal writings of the accused, constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense.\textsuperscript{146}

Clearly, blood might satisfy the latter definition of evidence subject to seizure. It could be defined as "property or items," but that use of the statutory language is likely to generate some argument.\textsuperscript{147} In *Ferguson*, the court did not rule on whether the amended language included seizures of blood under warrant.\textsuperscript{148} Instead, the court focused on the dual issues of waiver\textsuperscript{149} and harmless error,\textsuperscript{150} and

\begin{itemize}
\item \textsuperscript{143} "(a) A 'search warrant' is a written order, issued by a magistrate and directed to a peace officer, commanding him to search for any property or thing and to seize the same and bring it before such magistrate." Tex. Code of Crim. Proc. Ann. art. 18.01(a) (Vernon 1965).
\item \textsuperscript{144} Ferguson v. State, 573 S.W.2d 516 (Tex. Crim. App. 1978).
\item \textsuperscript{145} Id.
\item \textsuperscript{146} The amended provisions of Article 18.02 include a general provision relating to seizure of property or items which are either evidence of an offense, or that tend to show that a particular individual committed an offense.
\item \textsuperscript{147} Whether "blood" could be appropriately characterized as either "property" or "items" is an issue open to debate. Section 31.01(6) defines "property" as: "(A) real property; (B) tangible or intangible personal property including anything severed from land; (C) a document, including money, that represents or embodies anything of value."
\item In Article 3.01, Texas Code of Criminal Procedure, the Legislature has mandated that "words, phrases and terms used in this Code are to be taken and understood in their usual acceptation in common language, except where specifically defined." Absent such definition which would include "blood," a substance, in the commonly used concept of "item," it would seem that it is neither "property or items" for purposes of the Code.
\item \textsuperscript{148} Yet, the Court suggests in *Ferguson*, supra note 144, that "blood" will ultimately be held to be included in the meaning of Subsection (10) as either property or items subject to seizure. The Court observes that blood can only be obtained as a result of lawful search under warrant, or upon consent of the accused.
\item \textsuperscript{149} That an accused may waive any right secured to him by law, except the right to trial by jury in a capital case, is established by Article 1.14, Texas Code of Criminal Procedure. In *Jurek v. Estelle*, 593 F.2d 672 (5th Cir. 1979), the Court suggested that constitutional error relating to improper exclusion of capital veniremen based on violations of Witherspoon v.
concluded that the conviction did not merit reversal, even though it rested in part on the evidence resulting from the blood seizure.

Ferguson followed Smith v. State, a decision predating the amendment to Article 18.02. There, the court expressly held that the pre-amendment language of the statute could not be construed to authorize seizures under warrant for blood. Yet, the court had noted, a free and voluntary consent to the seizure could excuse the absence of a legally-sufficient warrant. The Smith court based its affirmance on the "harmless error" doctrine, applied in spite of the constitutional error.

The sequence of cases suggests the curious situation in which otherwise illegal activity by the state—such as a search conducted under an invalid warrant—might prove "legal" based upon the consent of the accused. Although consent is a recognized basis for waiver of constitutional rights, it necessarily opens the door to coercion and unsatisfactory after the fact determinations of whether the accused actually gave his consent freely and voluntarily.

More importantly, the blood search cases pose a dilemma when the issue of waiver does not rest on consent. In Bell v. State, the court affirmed the conviction despite counsel's objection to introduction of evidence based on the seizure of appellant's blood under a search warrant. The objection was couched in terms of the accused's rights arising under the Fifth Amendment, an issue disposed of adversely in Schmerber. Counsel did not phrase his objection in terms of rights protected under Article 1, Section 9 of the Texas Constitution and the court held that there was a waiver of any claim under that provision because he based the objection improperly.

The problem with the court's disposition of the blood search issue in Bell is that, while "consent" may waive a constitutional right, in Bell it is not consent that is held to have caused a waiver, but error by the accused's counsel. The accused did not in any sense

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150. The "harmless error" rule was approved in Chapman v. California, 386 U.S. 18 (1967).
152. The concept of consent, which carries with it the implied waiver of a protection, has been discussed and applied with respect to Fourth Amendment protections in Schneckloth v. Bustamonte, 412 U.S. 218 (1973) and Bumper v. North Carolina, 391 U.S. 543 (1968).
154. Supra, note 134.
155. 582 S.W.2d 800.
consent to the introduction of the evidence since an objection was, in fact, lodged at the time of trial. The effect of the court's holding in *Bell* is that the state can produce evidence of trial which it gained illegally. This posture violates Article 38.23 of the Code of Criminal Procedure which states that evidence seized in violation of either the federal or Texas constitutions is not to be used in any criminal proceeding. This statutory language is designed to prevent unlawful police activity and to protect individual criminal defendants from conviction based upon use of illegally secured evidence.

Assuming that the intent of Article 38.23 is best served by exclusion of unlawfully seized evidence, the consent to illegal activity suggested by the court as an acceptable basis for admission of evidence in *Smith* and *Ferguson* raises an interesting issue. How far may "consent" be applied to excuse illegal activity? For example, one might question whether a confession, obtained as a result of physical brutality should ever be admitted into evidence. Even if the accused fails to object at trial, introduction of such a confession could hardly be reconciled with the legislative intent of Article 38.23 since assault committed by law enforcement officials constitutes a violation of law. Once the accused offers any objection to the introduction of the evidence, whether properly phrased or not, the court should have some duty to weigh whether the evidence was obtained in violation of law.

In the case of search warrants issued for seizure of blood, there is no question that after *Smith* the court held warrants of this type constitutionally invalid. That being the case, the *Bell* rationale warps the protection ostensibly guaranteed by Article 38.23 since its prohibition will be applicable only to illegal police activity correctly objected to by the accused at trial.

In the blood search cases the court has made two essential mis-
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takes. First, it failed to address the critical issue posed by the amendment of Article 18.02 at the earliest opportunity: whether the amended language would authorize a seizure of blood under warrant.\(^{157}\) It chose instead to sidestep the central issue while discussing the doctrines of consent and waiver. Thus, cases arising after the effective date of the amendment were not clearly resolved by simple decision on whether the amended language could accommodate warrants for blood.

Second, the reliance on consent and waiver as bases for admissibility and appellate approval of blood-seizure related evidence in difficult cases deprives Article 38.23 of its clear legislative intent. These cases do not present the issue of police activity in a judicial vacuum in which officers are required to make decisions without advice regarding search and seizure. Instead, the court has held that the issuance of a search warrant for seizure of blood, at least prior to the amendment of Article 18.02, was improper under the Texas constitution. However, when confronted with judicial acts apparently undertaken in violation of Article 1, Section 9, the court has chosen to hold that those acts can be ratified either by consent of the accused or by failure to make a proper objection at trial. The very fact that a warrant was used to obtain the sentence argues against the idea of consent. The court fails to adequately delineate how far the state may go in attempting to gain consent.

Only by ignoring the language of Article 38.23 can the court’s failure to enforce *Escamilla* through subsequent decision be explained. Otherwise, the sanction of that provision rests solely on the knowledge and ability of the accused to properly exercise his constitutional rights.\(^{158}\) As *Bell* demonstrates,\(^{159}\) this is often a difficult

\(^{157}\) The Court of Criminal Appeals has held that section 18.02 as amended will authorize a warrant for blood in Gentry v. State, 640 S.W. 2d 899 (Tex. Crim. App. 1982).

\(^{158}\) By analogy, the Court places an almost impossible burden on an accused who asserts error in prosecutorial argument. The objection must be correctly phrased, Plunkett v. State, 580 S.W.2d 815 (Tex. Crim. App. 1978), and timely made, Stone v. State, 583 S.W.2d 410 (Tex. Crim. App. 1979). Further, the accused must press his objection until he secures an unfavorable ruling from the trial court, DeRusse v. State, 579 S.W.2d 224 (Tex. Crim. App. 1979). Even when the ruling is obtained on the objection, motion to instruct the jury to disregard, or mistrial—in that order, properly—the Court will often conclude that the instruction to the jury by the trial court was sufficient to cure the alleged error and, thus, the motion for mistrial was properly overruled. Johnson v. State, 583 S.W.2d 399 (Tex. Crim. App. 1979).

The burden placed on the defendant to continually object to improper argument by the prosecutor, where the error was virtually continuous and prejudicial, so prejudiced the right of the accused to a fair trial that the District Court granted habeas relief in Brown v. Estelle, 468 F. Supp. 42 (E.D. Tex. 1978), even though the defendant failed to object to each instance of impropriety. The grant of relief was affirmed, 591 F.2d 1207 (5th Cir. 1979).

\(^{159}\) The Court concluded in *Bell*, supra note 153, that counsel’s failure to object to admis-
proposition, even when the accused has the benefit of counsel.

V.

The federal judicial system depends upon lower court compliance with decisions rendered by higher courts. An appellate court needs to apply the decisions of the Supreme Court in the cases it decides and state courts need to apply Supreme Court decisions to the federal questions raised before it. Failure of state courts to apply federal constitutional principles to issues raised in state proceedings jeopardizes the structural integrity of the system. It undermines the binding effect of decisions of the highest court.

The admission of oral statements alleged to have been made by the accused, while in custody at the time the statements were offered, waived any error in trial court’s refusal to order the State to disclose the statements prior to trial. An issue regarding the accused's competence, based on his alleged retardation, was also not properly preserved for appellate review due to a failure by counsel to object to the court’s charge or request a special instruction. To the extent that the accused in Bell was denied reversal on any one of the grounds discussed above, simply because of a failure of counsel, one might examine the propriety of penalizing the accused for the errors of his lawyer. If we are not to assume that any such error renders the representation incompetent, then clearly trial judges must assume greater responsibility for controlling trials and ensuring that the rights of criminal defendants are not subject to infringement.

160. In Martin v. Hunter’s Lessee, 1 Wheat. 304 (1816), the Supreme Court held, in a Virginia case, that it had power to exercise appellate jurisdiction over state courts whenever cases pending or decided in such courts come within the scope of the judicial power of the United States. Thus holding, the Court effectively established the role of federalism in judicial matters.

161. Weber v. Kaiser Aluminum and Chemical Corporation, 611 F.2d 132 (5th Cir. 1980), opinion of Gee, J., on remand from the Supreme Court:

For myself only, and with all respect and deference, I here note my personal conviction that the decision of the Supreme Court in this case is profoundly wrong. . . .

Subordinate magistrates such as I must either obey the orders of higher authority or yield up their posts to those who will. I obey, since in my view the action required of me by the Court’s mandate is only to follow a mistaken course and not an evil one.


163. A concise discussion of the “incorporation” of federal constitutional guarantees in the area of criminal law and procedure into the guarantee of due process of law contained in the Fourteenth Amendment—thereby imposing those guarantees on the states in their criminal prosecutions is presented by Professor Abraham. Abraham, The Judiciary: The Supreme Court in the Governmental Process, 53-93 (1973).

164. Failure to correctly apply a decision of the United States Supreme Court in review of a state prosecution is demonstrated by the Court’s decision in Adams v. Texas, 448 U.S. 38 (1980). The Texas Death Penalty statute, Article 37.071, Texas Code of Criminal Procedure and Section 19.03, Texas Penal Code, had been upheld by the Court in Jurek v. Texas, 428 U.S. 262 (1976). The Legislature had also required capital veniremen to swear under oath that the mandatory penalty of death or life imprisonment would not “affect his deliberations on any issue.” Texas trial courts used the provision of Section 12.31(b), Texas Penal Code, requiring the
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Once a decision is rendered by the Supreme Court or by lower federal courts exercising jurisdiction in a state, a state court deciding the same case or considering the same issue should apply the appropriate rule to the extent that the federal decision precludes alternative disposition options.\textsuperscript{165}

The disposition and opinions rendered in \textit{Craven v. State}\textsuperscript{166} represent the difficulty appellants may experience in attempting to use federal authority in the Court of Criminal Appeals. Appellant Craven initially pleaded guilty to a charge of burglary\textsuperscript{167} and was placed on probation. Subsequently, the states successfully moved to revoke his probation. He appealed from the trial court decision. The burglary indictment to which he initially pleaded guilty alleged that he committed the offense by entering a building not open to the public without the effective consent of the owner and "did then and there commit theft."\textsuperscript{168}

The Appellant signed a judicial confession admitting the offense which was offered into evidence in support of the plea of guilty. A

\begin{footnotes}
\item[165] Another fact of the judicial process that invites noncompliance (with Supreme Court decisions) in certain instances is that in the case of state, rather than in federal, courts, the United States Supreme Court has no power to make a final determination of any cases in which it reviews judgments of state courts. All it can do here is to decide the federal issue involved and remand the case to the state court below, usually its higher appellate court, for a final adjudication not inconsistent with its opinion. Since the state courts may then raise new issues on remand, it is not terribly difficult, if the desire exists, to alter "legally" or even evade the substantive intent of a United States Supreme Court decision. \textit{Abraham, supra} note 2, at 4.

\item[166] \textit{Craven v. State}, 607 S.W.2d 527 (Tex. Crim. App. 1980), motion for rehearing \textit{en banc} overruled, with three judges dissenting, herein after referred to as Craven, panel, and Craven, \textit{en banc}, respectively.

\item[167] \text{Section 30.02 of the Texas Penal Code, provides, in pertinent part:}

\begin{enumerate}
\item A person commits an offense if, without the effective consent of the owner, he:
  \begin{enumerate}
  \item enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony or theft. . . .
  \end{enumerate}
\end{enumerate}

\item[168] \textit{Id.}
\end{footnotes}
judicial confession is required by Article 1.15, Texas Code of Criminal Procedure. The Code provides that a plea of guilty before the court must be supported by evidence.\textsuperscript{169} At the hearing on revocation of probation counsel objected to the proceedings on the ground that the judicial confession, which admitted only that Appellant entered a building "with intent to commit theft," was insufficient to support the allegations in the indictment and, thus, that the conviction rested on insufficient evidence.\textsuperscript{170} Relying on \textit{Whitlow v. State},\textsuperscript{171} Appellant Craven contended that evidence of burglary with intent to commit theft could not support a conviction for a burglary in which a completed theft was alleged in the charging instrument.\textsuperscript{172}

On appeal, a panel composed of Judges Roberts, Tom Davis and W.C. Davis affirmed the revocation by \textit{per curiam} decision.\textsuperscript{173}

\textsuperscript{169} Article 1.15, Texas Code of Criminal Procedure, provides:

No person can be convicted of a felony except upon the verdict of a jury duly rendered and recorded, unless in felony cases less than capital, the defendant, upon entering a plea, has in open court in person waived his right of trial by jury in writing . . . provided, however, that it shall be necessary for the state to introduce evidence into the record showing the guilt of the defendant and said evidence shall be accepted by the court as the basis for its judgment and in no event shall a person charged be convicted upon his plea without sufficient evidence to support the same. The evidence may be stipulated if the defendant in such case consents in writing, in open court, to waive the appearance, confrontation and cross-examination of witnesses, and further consents either to an oral stipulation of the evidence and testimony or to the introduction of testimony by affidavits, written statements of witnesses, and any other documentary evidence in support of the judgment of the court. . . .

\textsuperscript{170} Such review has been held unavailable in \textit{Rincon v. State}, 615 S.W.2d 527 (Tex. Crim. App. 1980).

\textsuperscript{171} \textit{Whitlow v. State}, 567 S.W.2d 522 (Tex. Crim. App. 1978). In \textit{Whitlow}, the Court had found fundamental error in the charge of the trial court, which authorized the jury to convict if it found that the accused had entered the structure with intent to commit theft. The indictment had charged that he entered and did then and there commit theft. The charge authorized conviction on a theory of the offense different from that charged, and one which have required a less strenuous burden of proof.

\textsuperscript{172} \textit{Craven} carried the \textit{Whitlow} logic one step further, alleging that the confession's admission of an intent to commit theft would not satisfy the language of the indictment, which had pleaded that he did commit theft. On appeal, the appellant contended that there was no evidence in the record to support the allegation that he had, in fact, committed a theft.

\textsuperscript{173} \textit{Craven}, panel. The panel relied on the decision issued in \textit{Dinnery v. State}, 592 S.W.2d 343 (Tex. Crim. App. 1980), in which the Court had affirmed a conviction, \textit{en banc}, in which the accused had argued the same variance between the indictment and judicial confession raised by the appellant in \textit{Craven}. Significantly, however, the \textit{Dinnery} record had also shown that the accused affirmed that he was pleading guilty to the indictment and the allegations contained therein. An affirmative admission by the defendant that the allegations in the indictment are true, Adam v. State, 490 S.W.2d 189 (Tex. Crim. App. 1973); Miles v. State, 486 S.W.2d 326 (Tex. Crim. App. 1972), or an admission of each element of the offense charged while testifying, Spruell v. State, 491 S.W.2d 115 (Tex. Crim. App. 1973), had previously been held sufficient to satisfy the statutory requirements for evidence supporting the plea of guilty. In \textit{Craven}, no admissions of either type appeared in the record of the proceedings at the time he entered his plea of guilty to the burglary indictment.
The panel concluded that Texas law has traditionally not permitted collateral attack on a final conviction based on insufficiency of evidence. However, the panel did note that other decisions had permitted collateral attack where the point raised alleged "no evidence" supporting the conviction.

Prior to the panel opinion in *Craven* the Supreme Court had ruled in *Jackson v. Virginia* that the "no evidence" standard of review was constitutionally impermissible. The Court held that the proper standard for review of criminal convictions is whether the evidence is sufficient to establish guilt beyond a reasonable doubt when viewed from the perspective of a rational trier of fact. The requirement demands that all elements of an offense be subjected to this test, a standard reflected in Section 2.01, Texas Penal Code.

On Appellant's Motion for Rehearing En Banc, the panel decision was affirmed without written opinion. Three judges of the Court of Criminal Appeals, however, dissented. Judge Clinton, joined by Presiding Judge Onion, attacked the majority reasoning on the ground that the panel opinion contravened the clear intent of Article 1.15, Texas Code of Criminal Procedure.

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175. *Ex parte Moffett*, 542 S.W.2d 184 (Tex. Crim. App. 1976), involved a successful collateral attack based on a claim of "no evidence." Since Appellant Craven had offered a judicial confession, the Panel concluded that the case did not involve "no evidence," but actually raised a question of insufficient evidence.
177. *Id*.
178. Section 2.01, Texas Penal Code, provides:
All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial.
179. *Craven, en banc*.
180. [W]hat the panel and, by overruling the motion for rehearing, now the Court are doing is extending the *Dinnery* notion of a 'judicial confession.' Here is the germane testimony, appellant being questioned by his own attorney:

\[
\begin{align*}
Q: & \text{You are the same Lemuil H. Craven as charged in this case, is that right?} \\
A: & \text{Yes, sir.} \\
Q: & \text{Is that a cause that lists an offense on January the 15th, 1975, is that right?} \\
A: & \text{Yes, sir.} \\
Q: & \text{And you are pleading guilty to that Indictment?} \\
A: & \text{Yes sir.}
\end{align*}
\]

By calling this brief exchange a 'judicial confession' the Court puts its imprimatur on a permit finally to demolish Article 1.15, V.A.C.C.P. To the demise of Article 1.15, supra, and its intended protections, I dissent.
Craven, en banc (Clinton, J., dissenting).
the ground that the judicial confession and attendant examination of
appellant at the time he entered his plea were insufficient to sustain
his conviction. He concluded that he would vote to reverse the
conviction.

Craven points up two distinct features of the federal judicial sys-
tem. First, Texas law differs markedly from federal law in requiring
that conviction upon guilty plea be supported by evidence sufficient
to establish guilt. Had the statute not mandated such supporting
evidence, no issue of law would have been raised by the appeal since
the plea of guilty itself would probably have passed constitutional
muster. The dissenting judges, of course, expressed their collec-
tive and individual reservations about the implications of the decision
for continued viability of the requirement of Article 1.15. Yet, no issue of inherent fairness is raised by the evidentiary require-
ment; a voluntarily offered plea and knowing and intelligent waiver
of jury trial would seem adequate to fully protect an individual’s
rights without insistence that the plea be supported by independent
evidence.

Second, the case demonstrates the difficulty encountered when
an individual asks a state appellate court to apply federal constitu-
tional principles in his behalf. In neither the panel nor en banc deci-
sions was Jackson v. Virginia cited or discussed, despite the fact
that appellant expressly relied on the decision in his motion for re-
hearing. Since the majority en banc decision is not a written opin-

181. Craven, en banc (Roberts, J., dissenting). Judge Roberts noted that the panel had
relied on the opinion in Dinnery, supra note 11, and concluded that the reliance was improper
since unlike Dinnery, Craven had not testified that the allegations in the indictment were true
and correct. In the absence of testimony that the allegations were true and correct, Judge
Roberts argued, the evidence was insufficient, citing Drain v. State, 465 S.W.2d 939 (Tex.
182. Ibid.
184. Even though a plea of guilty in a federal action need not be supported by evidence
independent of the plea, procedural guidelines do mandate action by the trial court which will
ensure that a plea of guilty is made knowingly and voluntarily. Thus, the trial court must
explain to the defendant the nature of the charge, for example. United States v. Benavides,
596 F.2d 137, (5th Cir. 1979).
185. Craven, en banc (Clinton, J., dissenting) (Onion, P.J., joins dissenting).
186. However, the evidentiary requirement may serve the important function of notifying
the accused of the exact nature of the charge. Pleas of guilty in state prosecutions are subject
to review to determine if an accused has been properly advised concerning the nature of the
188. During oral argument before the panel, Judge Roberts inquired of counsel’s familiarity
with the then-quite recent decision in Jackson v. Virginia.
ion, it appears that the panel opinion expresses the opinion of a majority of the members of the court, despite the fact that the panel opinions rests on a statement of law contrary to that expressly affirmed in *Jackson*. Federal review is virtually precluded, however, because an alternative theory for affirmance exists in the panel opinion: that the evidence was sufficient, under Texas law, to support the conviction. Thus, since the requirement that guilty pleas be supported by evidence is purely a creature of state legislative action, the court’s action in *Craven* would appear to eliminate further appeal in the federal system based on the court’s apparent reliance on the “no evidence” rule.

The court’s reluctance to apply the clear mandate of *Jackson v. Virginia* to Texas prosecutions is not confined to the silence which marks the *Craven* opinion. In *Ex parte Easter*, the petitioner attacked his conviction by a jury collaterally, raising insufficient evidence as his ground for relief. The court held that a conviction could not be collaterally attacked based on insufficient evidence, basing its ruling in part on the traditional Texas rule prohibiting such collateral attack. *Jackson*, by holding that an accused is entitled to attack a conviction not supported by sufficient evidence as a matter of constitutional right, would appear to require that the collateral attack be heard in order to determine if the accused is being subjected to jeopardy by a constitutionally defective conviction. Nevertheless, in *Easter*, the court apparently chose to disregard the obvious implication of *Jackson* and rely on less favorable Texas law.

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190. The conclusion reached by the panel, apart from its consideration of the sufficiency of Appellant Craven’s judicial confession, might have still provided a basis for federal review in light of *Jackson* v. Virginia.


192. *Craven, en banc*. Implicit in Judge Roberts’ dissent, however, is the conclusion that insufficient evidence may be the basis for collateral attack, since he would have reversed the revocation of probation, based on the attack of the underlying felony conviction.

Thus, in *Galloway v. State*, 578 S.W.2d 142 (Tex. Crim. App. 1979), the Court concluded that only some collateral attacks upon prior convictions alleged in enhancement paragraphs would be permissible in the trial on the merits. Where the indictment alleging the offense upon which a prior conviction was obtained was fatally defective, the conviction could be attacked since the conviction was rendered void by the fundamentally defective charging instrument. This rule was applied in *Ex parte Stewart*, 582 S.W.2d 144 (Tex. Crim. App. 1979). However, the *Galloway* Court defined to permit collateral attack based upon insufficient evidence supporting the conviction alleged in the enhancement paragraph. This type of infirmity was deemed to be of a lesser nature by the Court, a surprising conclusion in light of *Burks v. United States*, 439 U.S. 1 (1978), requiring reversal on such a ground to result in acquittal and bar to further prosecution.
Refusal of the Court of Criminal Appeals to apply principles of federal constitutional law in its review of state convictions poses serious problems for litigants. First, because alternative grounds for the decision may be given in any appellate opinion, federal relief may never prove available despite apparent non-compliance with federal constitutional rules governing criminal prosecutions. Second, even when federal relief may be theoretically available, financial constraints may preclude application for federal relief, particularly since no provision of the Code of Criminal Procedure authorizes payment for counsel pursuing the interests of indigent prisoners in the federal courts. Third, where rights secured to an accused are the products of state law, the applicant may experience frustration in trying to persuade federal courts to implement those rights where concomitant federal sources of the right do not exist.

VI.

An appellate court frustrates both the role of defense counsel, and the expectations of litigants, when it creates an insurmountable or overwhelming burden of proof for the appellant challenging a ruling which rests on evaluation of the factual state of the record. While it is often said that issues of fact decided by a jury are not to be disturbed by a reviewing court, other factual issues which ap-

193. Texas law, pursuant to the decisions of the Supreme Court in Gideon v. Wainwright, 372 U.S. 335 (1963) and Argersinger v. Hamlin, 407 U.S. 25 (1972), provides for court-appointed attorneys to represent indigent defendants. Article 26.05, Texas Code of Criminal Procedure, establishes the right of court-appointed counsel to payment from the general fund of the county in which the prosecution is had or habeas corpus hearing held, in the following amounts: (a) a minimum payment of $50 for each day in court representing an indigent defendant charged with felony or misdemeanor punishable by imprisonment, or fraction thereof; (b) a minimum payment of $50 for each day, or fraction thereof, spent by counsel representing an indigent in a habeas corpus action; (c) a minimum fee of $350 for prosecution to final conclusion of an appeal to the Court of Criminal Appeals. Higher minimum payment amounts are set out in the statute for representation in capital cases. The Article makes no provision, however, for payment for representation of an indigent in an appeal to the United States Supreme Court or in federal habeas actions.

194. In Jackson v. Virginia, 443 U.S. 307 (1979), considerable discussion is given the probable effect of the Jackson decision upon review of state court convictions in federal courts in the dissenting opinion of Stevens, J. Justice Stevens warned of an overwhelming workload as a result of an increase in habeas petitions raising issues of insufficient evidence. To the extent that state appellate courts fail to implement the Jackson decision, the threat would appear far more credible. The majority had answered the dissenters' contention by noting that most state convictions would have been properly examined for sufficiency errors in the state appellate courts.

195. For example, Tex. Code Crim. Pro. Ann. art. 38.04 (Vernon 1977), mandates:

The jury, in all cases, is the exclusive judge of the facts proved, and of the weight to be given to the testimony, except where it is provided by law that proof of any
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pear in the record may be subject to review and thereby form the basis for reversal. Even the traditional reluctance to review jury questions has eroded with the increased significance of evidentiary sufficiency in Supreme Court decisions. 196

Richardson v. State, 197 a case involving whether an accused was represented by counsel in a prior proceeding resulting in conviction, illustrates the type of factual issue which is often presented for appellate review. 198 Richardson was convicted of the burglary of a building. This is a second degree felony 199 carrying a maximum punishment of 20 years confinement in the Texas Department of Corrections. 200 His punishment was enhanced under the Texas habitual criminal statute, 201 however, by allegations that he had twice previously been convicted of felony offenses. The statutory penalty of life imprisonment was imposed when evidence apparently supported the allegations in the enhancement paragraphs.

...
In his motion for new trial\(^{202}\) Richardson alleged that the first prior conviction used for enhancement was void because he was not represented by counsel. The record reflected,\(^{203}\) however, that he had been represented by an attorney, "Don Alexander," on the date he entered a plea of guilty to an indictment charging the equivalent of unauthorized use of a motor vehicle. Despite the form recitation that he had been represented by counsel, Richardson testified that he had no attorney at the time he entered his plea of guilty. This testimony was insufficient, however, to rebut the presumption accorded the recitals in the judgment by a consistent line of decisions by the Court of Criminal Appeals.\(^{204}\)

Appellant's counsel did not rely exclusively on his client's testimony. He developed a far more comprehensive record regarding the circumstances of the challenged conviction. First, he called the attorney who had allegedly represented Richardson in the case who testified he had no recollection of representing the Appellant;\(^{205}\) had no record of file reflecting such representation;\(^{206}\) the signature in the court's record purporting to be his was not\(^{207}\) and on the date when he allegedly had represented appellant he had only been licensed to practice law for nine days;\(^{208}\) and finally, that after being licensed, he had worked for some time selling clothes in order to pay debts incurred in attending law school.\(^{209}\)

Second, counsel subpoenaed records of the State Bar of Texas which showed that only one "Don Alexander" was licensed to practice in the state on the date in question.\(^{210}\) Third, the subpoenaed records of the Dallas County Auditor's Office were introduced to show that no fee was paid to the attorney for representation on the date of the plea of guilty in the case.\(^{211}\) Fourth, counsel offered the affidavit of the complaining witness in the case which stated that had he been approached by counsel investigating the case he would have declined to prosecute.\(^{212}\)

\(^{202}\) A motion for new trial on this ground could be made pursuant to Tex. Code Crim. Pro. Ann. art. 40.03(2) (Vernon 1977).

\(^{203}\) \textit{Richardson, supra} note 3, p.5.


\(^{205}\) Brief for Appellant, pp. 16-17.

\(^{206}\) \textit{Id.}, at 17.

\(^{207}\) \textit{Id.}

\(^{208}\) \textit{Id.}

\(^{209}\) \textit{Id.}

\(^{210}\) \textit{Id.}, at 18.

\(^{211}\) \textit{Id.}

\(^{212}\) \textit{Id.}
A panel of the court composed of Judges Douglas, Roberts and Davis rejected appellant's claim that the prior conviction used to enhance his punishment was void because he had been deprived of assistance of counsel.\footnote{Richardson, supra note 3, at 5.}

Since the Supreme Court's decision in Gideon v. Wainwright,\footnote{372 U.S. 335 (1963).} requiring the states to provide counsel to indigent criminal defendants, uncounseled convictions have been subject to collateral attack as void.\footnote{A conviction which is obtained when the accused is indigent, and the state fails to afford him counsel, is constitutionally defective and cannot be used for enhancement of punishment in subsequent proceedings. Burgett v. Texas, 389 U.S. 109 (1967). This rule has previously been applied by the Court of Criminal Appeals in Ex parte Martinez, 508 S.W.2d 359 (Tex. Crim. App. 1974) and Ex parte Swinney, 499 S.W.2d 101 (Tex. Crim. App. 1973).} A favorable disposition of appellant's appeal would have resulted in a new trial and maximum potential punishment range of five to 99 years or life, set at the discretion of the jury or trial court, rather than the mandatory life sentence originally imposed.\footnote{Under Tex. Penal Code Ann. § 12.32 (Vernon 1974).}

The court's disposition in Richardson reflects a posture of total rigidity toward the resolution of factual disputes that affect important constitutional issues. While the regularity of judgments undoubtedly can be presumed in most cases, the court should be sensitive to the possibility that recitations in form judgments will not always accurately reflect the facts. Given the exhaustive record produced in support of Richardson's testimony that he did not have an attorney at the time of his guilty plea some twenty years before, the court could hardly have concluded that the only basis for the issue of fact was the self-serving testimony of the accused interested in suppressing his prior record and avoiding enhancement of punishment. In this case, other evidence supports his claim and indicates that his testimony is not the product of fabrication. Despite this, the court failed to look past the recitations in the form judgment.

The record developed by appellant's counsel should have constituted a model for collateral attack on judgment allegedly containing inaccurate recitals. The court's position in this case can be compared with other situations in which it has dealt with form documents which purport to incorporate all material statements of fact later attacked.

Two specific examples of attacks on form recitals in judgments

\footnote{213. Richardson, supra note 3, at 5.}
\footnote{214. 372 U.S. 335 (1963).}
\footnote{215. A conviction which is obtained when the accused is indigent, and the state fails to afford him counsel, is constitutionally defective and cannot be used for enhancement of punishment in subsequent proceedings. Burgett v. Texas, 389 U.S. 109 (1967). This rule has previously been applied by the Court of Criminal Appeals in Ex parte Martinez, 508 S.W.2d 359 (Tex. Crim. App. 1974) and Ex parte Swinney, 499 S.W.2d 101 (Tex. Crim. App. 1973).}
\footnote{216. Under Tex. Penal Code Ann. § 12.42(b) (Vernon 1974), a defendant convicted of a second degree felony who has previously been convicted of a felony grade offense, the punishment shall be as for a first degree felony. First degree felony punishment range is five years to 99 years, or life, imprisonment. See Tex. Penal Code Ann. § 12.32 (Vernon 1974).}
demonstrate the direction the court has apparently taken in reviewing attacks based on conflict over facts. First, the court traditionally followed a firm policy requiring the state to waive trial by jury in writing when an accused enters his plea to the trial court.\textsuperscript{217} The traditional rule is in accord with the statutory requirement that the conviction was void unless the state waived jury trial in these cases in writing.\textsuperscript{218} This requirement appears designed to prevent the public's interest in jury trials of felony cases from being waived without the consent of the state's attorney. In \textit{Ex parte Collier},\textsuperscript{219} the court apparently overruled those decisions which had previously granted relief when the state's attorney failed to execute the waiver of jury trial.

Even prior to the ruling in \textit{Collier}, however, the court avoided reversals by simply relying on the recitations in the judgment which related that jury trial had been waived by the attorney for the state in writing. In \textit{Handsbur v. State},\textsuperscript{220} for example, a panel composed of Presiding Judge Onion and Judges Douglas and Davis rejected appellant's claim that his conviction was void because the form document lacked the signature of the prosecutor. Appellant had pleaded guilty to burglary, waiving jury trial, and was assessed a probated sentence. He appealed from the revocation of probation, alleging the failure of the state's attorney to execute the form waiver voided his conviction and the subsequent proceedings. The panel held that, because the form judgment recited that the waiver had been executed and no objection was offered at the time appellant originally entered his plea of guilty, the recitals in the judgment were entitled to the presumption of regularity. The panel did not address the fac-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{218} Tex. Code Crim. Pro. Ann. art. 1.13 (Vernon 1977) provides in pertinent part:
\begin{quote}
The defendant in a criminal prosecution for any offense classified as a felony less than capital shall have the right, upon entering a plea, to waive the right of trial by jury, conditioned, however, that such waiver must be made in person by the defendant in writing in open court with the consent and approval of the court, and the attorney representing the State. The consent and approval by the court shall be entered of record on the minutes of the court, and the consent and approval of the attorney representing the State shall be in writing, signed by him, and filed in the papers of the cause before the defendant enters his plea. . . .
\end{quote}
\item \textsuperscript{219} \textit{Ex parte Collier}, 614 S.W.2d 429 (Tex. Crim. App. 1981). In \textit{Collier}, the Court finally held that, absent a showing of harm, a conviction otherwise proper would not be disturbed merely because State failed to sign consent to jury waiver form.
\item \textsuperscript{220} Handsbur v. State, No. 65,977 (Tex. Crim. App. December 26, 1980), \textit{per curiam} panel opinion; leave to file motion for \textit{en banc} rehearing was denied.
\end{itemize}
\end{footnotesize}

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...tual issue raised by the face of the judgment itself—that the document did not contain a signature of the assistant district attorney representing the state. The panel relied, instead, in prior decisions in which the court had applied the rule that recitals in the judgment would be entitled to the presumption of regularity, citing *Waldrop v. State.* In *Waldrop,* however, there was evidence in the record that the waiver had been executed by the prosecutor although the document did not appear in the record. The court relied on the trial judge's notation that the waiver had been executed and then lost. The *Waldrop* court concluded:

> The judgment recites that this written consent and approval had been filed. There is nothing before us legally combatting the recitals of the judgment.

In *Handsbur* there was no issue of lost waiver. The form judgment upon which the court relied was included in the record and was before the panel. To suggest that a signature is present simply because a pre-printed form document recites it to be so, is hardly defensible when the form is available for the court's scrutiny and no signature appears on the document.

One could hardly argue that appellant *Handsbur* was prejudiced because the state's attorney failed to execute a waiver of jury trial. Yet, the implications of the reasoning applied in that case spill over into cases in which the potential for prejudice is readily apparent, as in *Richardson.* Judge Davidson pointed out this deficiency in reasoning in his dissenting opinion in *Ex parte Johnson,* another case

221. *Waldrop v. State,* 83 S.W.2d 974, 976 (Tex. Crim. App. 1935). There, the trial court had conducted a hearing based on the claim of omission by the prosecutor. The trial court noted that all parties had represented to the court that the necessary papers had been signed, and that the court could simply not certify whether the waiver had been "lost, misplaced, or destroyed, or never filed." The Court of Criminal Appeals held that this finding supported the presumption of the judgment recital that the waiver had been signed and filed.

222. *Id.*

223. *Id.,* at 975-976.

224. *Gonzales v. State,* 508 S.W.2d 388 (Tex. Crim. App. 1974). The Court relied on the judgment recital which included the notation that the court had accepted the executed waiver by the State.

225. *Collier,* supra note 26, requires a showing of harm if the judgment is collaterally attacked. The Court distinguished the standard for collateral attack from the standard applied on direct appeal in *Lawrence v. State,* 626 S.W.2d 56 (Tex. Crim. App. 1981). On direct appeal from conviction, the accused is not required to demonstrate harm to gain reversal, apparently reflecting a change in law from the court's previous rule that lack of a signed waiver to jury trial by the State renders a conviction void.

226. *Ex parte Johnson,* 296 S.W.2d 239 (Tex. Crim. App. 1956), dissenting opinion of Davidson, J. Judge Davidson's reservations about the intellectual dishonesty engaged in by the Court in affirming, by overlooking the lack of an executed consent, foreshadows the far more
involving the state's failure to execute a waiver of jury trial. Judge Davidson argued that reliance on recitals in the form judgment or any form document in the record, when in conflict with a controlling document in the record, places form above substance.

Curiously, the court flirted with the reverse position for some time in dealing with the issue of form waivers of counsel executed by indigent defendants. The court adopted the position that execution of a form waiver of counsel was inadequate either to preserve the right to counsel, or demonstrate a knowing and intelligent waiver of counsel, absent a showing that the accused understood the implications of the waiver. Thus, the court gave effect to the traditional suspicion of waivers of counsel expressed by the Supreme Court in *Johnson v. Zerbst*.

In *Barbour v. State*, for instance, the court held that the record must reflect that the accused was made aware of the disadvantages of self-representation if the waiver is to be given effect.

As might have been expected, the court has tempered the position taken in *Barbour* and decisions like *Lisney v. State*, where the court had expressly required a showing in the record that the accused understood the significance of the waiver. In *Johnson v. State*, the court limited the application of its rule on the validity of waivers of counsel, thereby overruling *Lisney*. Under the *Johnson* formulation, the rule of *Lisney* and *Barbour* is only applicable in cases in which the accused actually attempts to contest his guilt.

reasonable posture taken by the Court in finally overruling its prior decisions in *Collier, supra* note 20.

227. Tex. Code Crim. Pro. Ann. art. 1.14 (Vernon 1977) provides that the accused may waive any right secured to "him by law except the right of trial by jury in a capital felony case." However, the current reading of Tex. Code Crim. Pro. Ann. art. 1.13 (Vernon 1977), precludes waiver of a trial by jury unless the accused is represented by counsel, if necessary, appointed counsel.


232. In adopting the new position, the Court applied the concept of self-representation, as enunciated by the Supreme Court in *Faretta v. California*, 422 U.S. 806 (1975), only to situations in which the accused actually contests the charges. The *Johnson* formulation applies to misdemeanor cases since felony prosecutions will likely still be controlled by Tex. Code Crim. Pro. Ann. art. 1.13 (Vernon 1977). Despite the less serious potential for lengthy incarceration which attends misdemeanor prosecutions, it would be difficult to imagine a more critical decision than the one made when an accused must decide whether to contest the charges and demand trial. Under *Johnson*, the Court virtually presumes that a defendant may make that
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Thus, in cases in which the accused enters a plea of guilty, the form waiver will be given effect, precluding the accused from attempting to attack his conviction by contesting the validity of the waiver. One might argue that the court's reasoning, though initially appearing sound, misses the point, since the decision to waive trial and plead guilty is generally considered to be the singularly most significant decision an accused makes.

*Johnson* does leave intact the court's distrust of the form waiver in cases in which an accused persists in a plea of innocence and attempts to represent himself.233 However, the court's retraction from the posture of *Barbour* and *Lisney* suggests that the court is unwilling to abandon the luxury of relying on form documents in assessing waivers of both important constitutional rights, and statutory guarantees of minimal significance to defendants, such as the requirement that the state waive jury trial.

Every waiver of counsel cannot be condemned simply because it is documented by a form reciting the elements of waiver. Nor can the court's reasoning rejecting reversal as a proper remedy when the state fails to execute a jury trial waiver be reasonably assailed as an infringement on the concept of fair trial.234 However, the ease with which an appellate court can substitute reliance on form documents to preclude inquiry into important issues of law or fact is more dangerous when the court chooses to rely on forms in spite of the type of record developed by the appellant in *Richardson*. The form over substance approach demonstrated by the *Richardson* court gives the accused virtually no opportunity to overcome the presumption of regularity of pre-printed form documents.235

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233. The Court does conclude in *Johnson*, supra, note 39, that the form waiver of counsel will be viewed with suspicion if the waiver precedes a contested decision. However, as noted in the preceding paragraph, the exercise of the right to contest guilt itself does not, in the Court's eyes, require advice of counsel.

234. Both lines of decision taken by the Court will have greatest impact in precluding successful attack on convictions obtained upon pleas of guilty. Were safeguards adequate to guarantee that all such convictions were based only upon knowing and intelligent pleas, and that all legal rights of the accused were properly preserved, the Court's direction might be laudable simply in light of the need to control appellate backlog. This goal would be in line with the Legislature's expressed intent in restricting appeals from conviction obtained on guilty pleas in cases in which a negotiated plea bargaining agreement was accepted by the trial court. Tex. Code Crim. Pro. Ann. art. 44.02 (Vernon 1977) limits the right of appeal when the trial court imposes punishment not in excess of that agreed upon in the plea bargaining agreement.

235. One might question what additional evidence Appellant Richardson could have conceivably offered to discharge his burden of overcoming the presumptive validity of the recitals in the form judgment.
Richardson demonstrates, as well, that justice is not available in the appellate process when a court established a burden of persuasion which is unreasonable. Even the court would have to admit that it has established its preference for pre-printed form documents over fully developed records by this type of ruling. In taking this position the court displays an insensitivity to well-reasoned, documented challenges which should trigger closer appellate scrutiny.

CONCLUSION

The foregoing discussions demonstrate how an appellate court may fail to discharge its duties in compliance with established principles of judicial behavior, frustrating efforts of defense counsel to properly assess the significance of decisions. The consequences of appellate court failure do not simply fall on the legal profession. The public at large will ultimately suffer if appellate decision-making is unprincipled. The community's loss of confidence in appellate courts may result from practicing attorneys loss of confidence in the system of appellate decision-making. The practical impact of the loss is that attorneys may no longer trust their own judgment in ad-

236. Mulchahey, supra note 16, suggests that it is not only the recitals in the judgment that are given great weight, but the mere fact of conviction will ultimately come to carry with it a presumption of regularity with respect to protection of the rights of the accused. The concept of the record itself, loses validity where pre-printed forms satisfy all requirements to establishing valid convictions. A record should be required to reflect actual events, recorded at the time they transpire, in order to fully establish that such constitutional and statutory requirements as may be essential to valid convictions are recognized and met.

237. Professor Fuller discusses eight routes to failure of a legal system:

The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules is announced and their actual administration.

238. “Organized, predictable procedure is of the essence to any judicial body, particularly to the highest tribunal, for the vast majority of its work and certainly its raison d'etre is appellate.” Abraham, The Judiciary: The Supreme Court in the Governmental Process 176 (— ed. 1977).
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vising clients. The quick overruling of precedent, as illustrated by the Court of Criminal Appeals in its rulings on proof of ownership in theft cases, and in the criteria applied in evaluating waivers of counsel, confuse, rather than clarify the court's posture on these matters.

Further, the political implications of the court's major shifts in policy are likely to be viewed as a result of popular election of judges in an emerging two-party state. Decisions which appear to be “tough on crime” may be viewed as attempts to avoid defeat at the ballot box. The general attack on judicial decision-making may also result in the failure of the court to void legislation when necessary to protect individual rights, as the Huffhines opinion admits. The dissenters in Jackson v. Virginia argued that imposition of the “reasonable doubt” standard of review of state convictions would overwhelm the federal district courts. The majority answer was that most state cases would have been properly decided—in the state appellate courts, thus averting the burden on federal habeas. Yet,

239. Consider the following passage describing the changing character of the Supreme Court after the resignation of Chief Justice Earl Warren:

"It was unlikely that a Nixon Court would reverse all the Warren Court's decisions. Though Justices John Harlan, Potter Stewart and Bryon White had dissented from some of the famous Warren decisions, each of them had strong reservations on the matter of the Court's reversing itself. They firmly believed in the doctrine of stare decisis—the principle that precedent governs, that the Court is a continuing body making law that does not change abruptly merely because Justices are replaced.” Woodward and Armstrong; The Brethren, 10 (1979).

The foregoing passage illustrates the concern which attends overruling of precedent because of changing composition of an appellate court. While this concern is acute when the Supreme Court is the subject of discussion, a similar uneasiness attends a rapid shift in legal position by the highest court of a jurisdiction.


242. An illustration of the Court's sensitivity to public and legislative sentiment may be exemplified by its treatment of death penalty cases. After the Texas death penalty statute had been invalidated by the Supreme Court in Branch v. Texas, 408 U.S. 238 (1972), the Legislature moved to enact a new statutory scheme of capital punishment, Section 19.03, Texas Penal Code and Article 37.071, Texas Code of Criminal Procedure. This scheme was upheld in Jurek v. Texas, 428 U.S. 262 (1976). However, in three recent cases, decisions of the Court of Criminal Appeals in capital cases have been reversed by the federal courts: Adams v. Texas, 448 U.S. 38 (1980); Jurek v. Estelle, 450 U.S. 1014 (1981); and Smith v. Estelle, 451 U.S. 454 (1981). Recent history suggests that the Court is content to permit federal judges to review Texas death penalty cases for consideration of constitutional claims.


244. 443 U.S. 307, dissenting opinion of Stevens, J.

245. Ibid.

246. One theory advanced by some attorneys has been that the Court of Criminal Appeals
the failure of state appellate courts to recognize and incorporate the *Jackson* holding in their decision-making cannot help but inspire further application by state prisoners for federal relief, requiring more extensive federal intervention in state criminal procedure.

The integrity of the federal division in appellate responsibilities can only be preserved if state courts properly apply federal constitutional principles in review of state convictions. Reliance on the integrity of state courts underlies the Supreme Court’s decision in *Stone v. Powell*, limiting review of state prisoner’s Fourth Amendment claims previously reviewed in the state appellate process. The integrity of the Court of Criminal Appeals is not served by the decisions in *Richardson* or *Handsbur*, in which the court reveals preference for form over substance in adjudicating rights of defendants. Rather than ignoring the absence of an actual signature on the form waiver of jury trial, the *Handsbur* court should have simply reversed and announced prospectively that the state’s failure to execute a written waiver of jury trial would not constitute a ground of attack absent a showing of harm to the accused.

The undermining of the perception of judicial integrity and the effectiveness of the criminal justice system is likely to have severe

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reads *Jackson* to require only that a federal court reviewing a claim of insufficient evidence in state court conviction must apply the standard announced in the *Jackson* decision. In this context, the Court would not be required to apply the standard in its own review of sufficiency questions. While this theory is tenuous, at best, it would explain an unwillingness to directly apply *Jackson* and its rule to review of Texas convictions.

247. It would be unjust to leave the impression that the Court of Criminal Appeals never reviews legislation in light of constitutional requirement. In *Tamez v. State*, 534 S.W.2d 686 (Tex. Crim. App. 1976), for example, the Court reversed a revocation of the appellant’s probation for violation of a judicially imposed condition of probation which required the appellant/probationer to submit his person and residence to search at any time. This condition was held violative of both federal and Texas constitutions. The Court also effectively extended the probation revocation proceedings the exclusionary rule, a minority position among American jurisdictions at the time. See Note/Texas Developments, 4 Am. J. Crim. Law 334, 336, n.11 (1976).

248. *Stone v. Powell*, 428 U.S. 465 (1976). The Court held that the remedy of federal habeas corpus would no longer be available for review of Fourth Amendment claims brought by petitioners convicted in state courts if a full and fair review of said claims had been afforded on appeal from conviction in state appellate courts.


252. This is eventually what the Court did in *Ex parte Collier*, 614 S.W.2d 429 (Tex. Crim. App. 1981).
ramifications that will affect the general public. The current concern with inadequacies in the penal system, ranging from rioting in the past few years in New Mexico, Michigan, Nevada, Florida, New York and other jurisdictions to the far-sighted opinion of the district court in *Ruiz v. Estelle*, fails to touch upon a significant factor in the rehabilitation process. That factor involves the perception of individual defendants as to quality of justice dispensed by a given court or system of courts.

The resilience of the United States Constitution depends, in part, on the simplicity of its promises of protection of individual rights. To the extent that the simple guarantees of the Constitution are compromised by overly complex or seemingly dishonest opinions, an appellate court cannot elude responsibility for the consequent damage to society. Although the impact is impossible to discern empirically, one must assume that an individual convicted of a criminal offense will assess the fairness of the means by which the

253. It is often the case that reasoning employed by a court in reaching a result is attacked on the grounds that the reliance on constitutional or statutory provision, or prior case law, is incorrect. Thus, while a result may be just, or considered so by the commentator, the route to the result may be subject to criticism. For instance, Professor Fuller disagrees with the route—the Eighth Amendment—taken by the Supreme Court to invalidate a statute making narcotics addiction criminal in Robinson v. California, 370 U.S. 660 (1962). Lon L. Fuller, *The Morality of Law* 104–106 (rev. ed. 1969).


255. The issue of whether the provisions of the Constitution are truly clear is open to debate, of course, and individuals considering particular guarantees, regardless of training or education in law, are likely to arrive at different meanings for the requirements of the document. These may simply reflect individual concepts of fairness. Trained observers, however, are likely to view the document as especially susceptible to interpretations. Consider the following comments:

"The Constitution, and particularly the Bill of Rights, is designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest. Some of these constitutional restraints take the form of fairly precise rules, like the rule that requires a jury trial in federal criminal proceedings or, perhaps, the rule that forbids the national Congress to abridge freedom of speech. But other standards take the form of what are often called ‘vague’ standards, for example, the provision that the government shall not deny men due process of law, or equal protection of the laws." R. Dworkin, *Taking Rights Seriously*, 133 (1978).

"What is perfectly clear is that many of provisions of the Constitution have the quality I have described as that of being blunt and incomplete. This means that in one way or another their meaning must be filled out." Fuller, *supra*, at 102.

That portions of the Constitution are "blunt and incomplete," or "vague" is hardly subject to dispute among legal scholars. But it is less clear that large segments of the population will share that view, as evidenced by the belief held by many that the Constitution forbids busing for integration purposes or abortion—and that court decisions upholding such practices on constitutional grounds are themselves violative of the document's commands.
appellate court deals with his case. When the conclusion that he has been unfairly treated is supported by the opinion of members of the legal profession, the individual and those familiar with his case will lose respect for the internal integrity of the system.

The simple guarantees such as the right to jury trial, the right to confront and cross-examine witnesses, the right to effective assistance of counsel, the right to be free from unreasonable search and the right not to be twice put in jeopardy for the same offense are rendered complex primarily by the decisions of appellate courts which have drawn limits—often quite necessary—to the application of those rights. The more sophisticated the reasoning employed in drawing the lines of limitation, the more likely the reasoning will be lost in translation when viewed from the position of the uneducated layperson. Ultimately the response will be cast in

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256. A much discussed concept in the opinions of the Supreme Court has been the internal integrity of the criminal justice system. Thus, despite the fact that exclusion of illegally obtained evidence may result in the criminal going free “because the constable has blundered,” in the words of Justice Cardozo when a judge of the New York Court of Appeals, People v. Defore, 242 N.Y. 13, at 21 150 N.E. 585, at 387 (1926), the Court held in Mapp v. Ohio, 367 U.S. 643 (1961), that exclusion of evidence was a rule necessary to preserve the integrity of the criminal justice system. Justice Clark, writing for the majority, observed: “Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, to disregard the charter of its own existence.”

He then quoted from the dissenting opinion of Justice Brandeis, issued in Olmstead v. United States, 277 U.S. 438 (1928):

Decency, security, and liberty alike demand that governmental officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the laws scrupulously. Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

For purposes of this discussion, it is not the alleged illegal act of the State that is directly placed in issue. Rather, of concern is the action of an appellate court in sanctioning such conduct, tacitly, by relying on interpretative freedom in implementing constitutional protections as a means of denying relief that the literal language of the guarantees would promise.


259. Supra, note 20.


262. The Court's disposition of appellant's sufficiency of evidence claim in Collins v. State, 602 S.W.2d 537 (Tex. Crim. App. 1980), en banc, provides classic example of this problem. The Court declined to review the claim, which would have afforded the accused a possible acquittal and bar to re-prosecution—as the panel opinion had done—and not only did it deprive the accused of this determination, but Judge Clinton further suggested that the State might be able to bring additional evidence to a second trial. The accused, if personally aware of the Supreme Court decisions Burks v. United States, 437 U.S. 1 (1978), Greene v. Massey,
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distrust of the judicial system that refuses to enforce constitutional guarantees by resorting to concepts of waiver, failure of counsel to preserve error and the “harmless error” rule.

Just as penal systems which reinforce antisocial behavior through poor conditions lead to further antisocial behavior, a judicial system which obscures the meaning of clear language in both the federal and Texas constitutions breeds hostility and lack of respect.

The overriding concern of any system of law should be fairness. By dispensing with fundamental fairness as an important concern in decision-making and supplanting it with complex or technical rationalization, the system becomes merely a shell, and fails to achieve the legitimate goals of the system. Increasing rates of crime will no doubt prompt efforts to maximize penalties and limit procedural guarantees for the criminal defendant.\(^{263}\) However, attention should also be focused on the internal workings of the criminal justice system and particularly, the courts, and the extent to which their mode

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437 U.S. 19 (1978) and Hudson v. Louisiana, 450 U.S. 40 (1981), must be at best confused by what has happened to his Double Jeopardy Clause protections in the Court of Criminal Appeals.

263. One can look to the legislative effort expanded in the increasing range of severe penalties, such as the death penalty, Section 12.31, Texas Penal Code, and enhancement of punishments, Section 12.42, Texas Penal Code, as evidence of the Legislature’s response to public outcry for greater punishment options. This instinct is not limited to Texas, or the United States, however. The same sentiment was expressed by Lord Denning in his argument to the Royal Commission on Capital Punishment:

“The punishment for grave crimes should be adequately reflect the revulsion felt by the majority of citizens for them. It is a mistake to consider the object of punishment as being deterrent or reformatory or preventative and nothing else. The ultimate justification of any punishment is not that it is a deterrent but that it is the emphatic denunciation by the community of a crime and from this point of view there are some murders which in the present state of opinion demand the most emphatic denunciation of all, namely the death penalty.” Hart, Law, Liberty and Morality, 65 (1963).

By way of comparison, consider the language of the statement of objectives of the Texas Penal Code. Section 1.02 of the Code states:

The general purposes of this code are to establish a system of prohibitions, penalties, and correctional measures to deal with conduct that unjustifiably and inexcusably causes or threatens harm to those individual or public interests for which state protection is appropriate. To this end, the provisions of this code are intended, and shall be construed, to achieve the following objectives:

(1) to insure the public safety through:
   (A) the deterrent influence of the penalties hereinafter provided;
   (B) the rehabilitation of those convicted of violations of this code; and
   (C) such punishment as may be necessary to prevent likely recurrence of criminal behavior.

The Code fails to expressly state retribution as a goal of its provisions, although arguably, one could infer a retributive sentiment expressed in subsection (c).

For an example of the Supreme Court’s evaluation of a state statute implementing the death penalty as a punishment for the type of murder noted by Lord Denning, see Godfrey v. Georgia, 446 U.S. 420 (1980).
of operation may contribute to declining respect for law should be assessed.264