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Is Texas Tough on Crime but Soft on Criminal Procedure?

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IS TEXAS TOUGH ON CRIME BUT SOFT ON CRIMINAL PROCEDURE?

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Although Texas is well known for imposing tough punishments on convicted defendants, it is surprisingly generous in affording criminal procedure protections. In a variety of areas, including search and seizure rules, confession requirements, the availability of bail, prosecutorial discovery obligations, and jury trial guarantees, Texas affords protections vastly in excess of what is required by the United States Constitution. Even more shocking, these criminal procedure guarantees come almost entirely from Texas statutes approved by the legislature, not activist rules imposed by judges. This Article explores Texas's reputation as a tough-on-crime state and the seeming inconsistency between Texas being tough on crime but generous on criminal procedure.

Everyone knows that Texas is tough on crime. Over the last four decades, Texas has sent more than 1000 inmates to death row, making it the "capital of capital punishment."[1] Texas is also a leader in incarceration: with nearly 175,000 of its residents behind bars,[2] Texas ranks first in the nation in raw incarceration[3] and second in per capita incarceration.[4] Shaming punishments are also popular in the Lone Star State; one judge shamed so many offenders that his constituents elected him to Congress as a result.[5] It is therefore not surprising that many people mistakenly think "Don't Mess With Texas" is the state's motto,[6] rather than simply a clever bumper sticker designed to fight littering.[7]

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* Professor of Law, William & Mary Law School. An earlier draft of this Article was presented at the Southeastern Association of Law Schools panel "Is Criminal Procedure Less Countermajoritarian Than We Think?" I am grateful to Doug Berman, Corinna Barrett Lain, Arnold Loewy, Richard Meyers, and Ron Wright for helpful suggestions.

1. *See* Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 VAND. L. REV. 307, 308 (2010) [hereinafter Gershowitz, *Statewide Capital Punishment*] (referring to Texas as the "capital of capital punishment").

2. *See* HEATHER C. WEST, U.S. DEP'T OF JUSTICE, DATA BRIEF: PRISONERS AT YEAREND 2009—ADVANCE COUNTS tbl. 1 (2010), http://www.bjs.gov/content/pub/pdf/py09ac.pdf.

3. *See* Adam Liptak, *1 in 100 Adults Behind Bars, New Study Says*, N.Y. TIMES, Feb. 28, 2008, at A14 (noting that Texas had recently passed California in having the nation's largest number of inmates).

4. *See* Mike McPhee, *State's Inmate Count Up 3.3%: Growth Outpaces National Rate*, DENVER POST, Aug. 12, 2001, at B-04 (explaining that Texas had the second highest per capita incarceration rate, following Louisiana).

5. *See* Ryan J. Huschka, *Sorry for the Jackass Sentence: A Critical Analysis of the Constitutionality of Contemporary Shaming Punishments*, 54 U. KAN. L. REV. 803, 833–34 (2006) (explaining the popularity of judges who use shaming punishments).

6. Ironically, the state motto is actually "Friendship." *See Texas Facts*, SAN ANTONIO EXPRESS-NEWS, Dec. 31, 2001, at 2B.

7. The slogan "Don't Mess With Texas" was created by the State Transportation Department for an anti-littering campaign in 1985. *See "Don't Mess" with This Texas Slogan: State Agency Might Sue over Use of Its*

Yet, the story about Texas criminal justice is far more complicated than its reputation reveals. Despite its tough-on-crime reputation, Texas actually has numerous criminal procedure rules that are very favorable to criminal defendants. These pro-defendant protections are not mandated by the United States Constitution or the courts. Rather, Texas's pro-defendant criminal procedure rules are almost exclusively created by Texas statutes enacted by elected legislators, not judges.[8] These protections include strict rules on the admissibility of confessions, extremely pro-defendant search and seizure guarantees, tough limits on denying bail to criminal defendants, favorable discovery rules, and expansive jury trial rights, to name a few. In some instances, the rules are so favorable to defendants that almost every other state in the nation has rejected them. These rules are a major hindrance to prosecutors and thus directly contradict the notion that Texas is universally hostile to criminal defendants.

This Article explores Texas's reputation as a tough-on-crime state, as well as the little-known fact that the Texas Code of Criminal Procedure ("Texas Code") is quite favorable to criminal defendants. Of course, I do not want to overstate my case. I am not arguing that Texas has the most pro-defendant code of criminal procedure in the nation, nor am I asserting in any way that the protections Texas affords are bad public policy. Rather, I am simply making a descriptive observation that Texas is not nearly as tough as its reputation suggests when it comes to criminal procedure. Part I of this Article begins by reviewing reasons why Texas is commonly seen as tough on crime: from its use of the death penalty, to its packed prisons, to its indeterminate sentencing scheme which can result in huge upfront sentences that are reduced on the back-end by parole. Part II then reviews some of Texas's criminal procedure rules that make it far more favorable to criminal defendants than other states. Finally, Part III raises possible reasons for the inconsistency between Texas's punitiveness and its favorable criminal procedure rules.

I. TEXAS IS TOUGH ON CRIME (OR SO IT SEEMS)

It is not hard to make the case for Texas being tough on crime. From capital punishment to incarceration to shaming sanctions, Texas is at the forefront of imposing stiff punishments. In the Sections below, I offer a brief tour of Texas's reputation for punitiveness.

Catchphrase, ASSOCIATED PRESS (June 6, 2004), http://www.msnbc.msn.com/id/5151681/ns/business/t/don't-mess. However, it was quickly co-opted by bumper sticker and t-shirt manufacturers. *See id.*

8. Indeed, it is only recently that the Texas Court of Criminal Appeals rejected the lockstep approach and began to interpret the Texas Constitution independently of the United States Constitution. *See* George E. Dix, *Judicial Independence in Defining Criminal Defendants' Texas Constitutional Rights*, 68 TEX. L. REV. 1369, 1374 (1990) ("Texas has a tradition of general judicial passivity in criminal litigation."); Jessica L. Schneider, *Breaking Stride: The Texas Court of Criminal Appeals' Rejection of the Lockstep Approach 1988–1998*, 62 ALB. L. REV. 1593, 1598 (1999).

A. The Capital of Capital Punishment

Texas is the most frequent user of capital punishment in the United States, sending more people to death row than any other state.[9] And unlike other states that frequently impose the death penalty,[10] Texas actually carries out executions.[11] Since the Supreme Court reinstated capital punishment in 1976, Texas has executed more than 460 inmates,[12] which is well over one-third of all executions nationwide.[13] In some years, Texas accounts for nearly half of all executions.[14]

Because of its frequent use of the death penalty, Texas has been responsible for a large share of controversial executions, which has furthered the state's reputation for punitiveness.[15] In 2007, the presiding judge of Texas's highest criminal court, Sharon Keller, received nearly universal condemnation for closing the courthouse doors at 5pm to an inmate seeking a stay of execution following a promising Supreme Court decision.[16] Despite an initial finding of misconduct, Judge Keller was eventually spared any punishment on technical grounds, thus prolonging the firestorm about the failures of Texas's capital punishment system.[17]

In 2010, *The New Yorker* published an exposé on the 2004 execution of Cameron Todd Willingham, who had been executed for killing his three children in conjunction with the arson of his home.[18] Based on analysis by nationally

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9. *See Death Sentences in the United States from 1977 by State and by Year*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008 (last visited Jan. 24, 2012). Until 2004, Texas was the consistent leader nationwide. *See id.* In recent years, Texas has taken a backseat to California and Florida. *See id.*

10. For example, California has roughly 700 people languishing on death row. *See State by State Database*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/state_by_state (last visited Jan. 24, 2012).

11. *See Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. (2012), *available at* http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (providing statistics showing Texas's execution rate of roughly fourteen people per year to be higher than that of any other state).

12. *See id.*

13. *See id.*

14. For instance, in 2009, Texas was responsible for twenty-four of the fifty-two executions in the United States. 2009 Execution Statistics, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/home (follow "Execution Database" hyperlink; then search "Year" for "2009"; then follow "Apply" hyperlink). In 2006, Texas accounted for twenty-four of the fifty-three executions. *See* 2006 Execution Statistics, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/home (follow "Execution Database" hyperlink; then search "Year" for "2006"; then follow "Apply" hyperlink).

15. *See, e.g.*, James C. McKinley, Jr., *Controversy Builds in Texas over an Execution*, N.Y. TIMES, Oct. 20, 2009, at A4 (discussing the national attention paid to Texas executions).

16. *See, e.g.*, Michael Hall, *The Judgment of Sharon Keller: As She Goes on Trial This Month, Nearly Everyone—Journalists, Lawyers, and Even Some of Her Colleagues—Is Calling for Her Head*, TEX. MONTHLY, Aug. 1, 2009, at 106; Hilary Hylton, *A Texas Judge on Trial: Closed to a Death-Row Appeal?*, TIME (Aug. 13, 2009), http://www.time.com/time/printout/0,8816,1915814,00.html.

17. *See* Mary Alice Robbins, *Case Closed: Special Court of Review Vacates Public Warning, Charges Against Keller*, TEX. LAWYER, Oct. 18, 2010, at 1, http://www.law.uh.edu/news/faculty-news/Fall2010/1018Dow.pdf. Rather than quietly let the sorry episode disappear, the judge lashed out at critics by brashly (and inaccurately) claiming, "I won . . . People can call it what they want." *See id.*

18. *See* David Grann, *Trial by Fire: Did Texas Execute an Innocent Man*, THE NEW YORKER, Sept. 29, 2009, at 34.

renowned fire investigators, the article concluded that the fire had been accidental, not arson, and that Willingham had been innocent.[19] The article unleashed a mountain of negative publicity about Texas's use of capital punishment.[20] And rather than own up to the wrongful execution, state leaders attempted to scuttle the truth.[21] Just two days before a forensic commission was due to begin hearings on the matter, Governor Rick Perry replaced the head of the body, and the new commissioner promptly canceled the hearing, leading once again to major national coverage.[22]

Less than a year later, Texas made headlines with the release of death row inmate Anthony Graves, who was not simply mistakenly convicted,[23] but was railroaded onto death row as a result of egregious prosecutorial misconduct.[24] Graves was the twelfth Texas inmate exonerated from death row since the reinstatement of capital punishment.[25]

Nor are controversies over the Texas death penalty exclusively of recent vintage. The 1998 execution of Karla Faye Tucker, a born-again Christian who found God in prison, sparked a national debate about rehabilitation when then-Governor George W. Bush refused to pardon her.[26] And Governor Bush's seeming indifference to whether the death penalty had been fairly administered under his watch—along with criticism of his legal team's inattention to clemency requests[27]—tagged Texas with a reputation for executing first and asking questions later, or perhaps not at all.[28]

The dozens of Texas death penalty cases decided by the Supreme Court have left an indelible impression that Texas is synonymous with capital punishment.[29] And

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19. *See id.*

20. *See, e.g.*, McKinley, Jr., *supra* note 15.

21. *See* Christy Hoppe, *Perry Ousts Officials Before Arson Hearing: He's Assailed as New Head Delays Session on Flawed Case That Led to Execution*, DALL. MORNING NEWS, Oct. 1, 2009, at 1.

22. *See id.*; *see also* Steve Mills, *Texas Death Penalty Inquiry Shaken: The Chairman, Fired Recently by Gov. Perry, Says Officials Pressured Him in the Case of an Executed Man*, L.A. TIMES, Oct. 12, 2009, at 15.

23. *See Former Death Row Inmate Freed in Texas*, NAT'L PUB. RADIO, ALL THINGS CONSIDERED, Oct. 28, 2010; Brian Rogers, *Prisoner Ordered Free from Texas Death Row*, HOUS. CHRON., Oct. 28, 2010, at 1.

24. *See* Brian Rogers, *Prosecutors Blast Former DA Who Handled Graves Case*, HOUS. CHRON., Oct. 28, 2010, at A1.

25. *See Innocence and the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/innocence-and-death-penalty#inn-st (last visited Jan. 24, 2012).

26. *See, e.g.*, Sam Howe Verhovek, *Karla Tucker Is Now Gone but Several Debates Linger*, N.Y. TIMES, Feb. 5, 1998, at A12.

27. *See* Alan Berlow, *The Texas Clemency Memos*, THE ATLANTIC, July/Aug. 2003 (recounting the slipshod work of legal counsel Alberto Gonzales in analyzing clemency petitions, and observing that Governor Bush never looked at clemency petitions filed by inmates, only summaries compiled by Gonzales); *see also* R. Jeffrey Smith, *Attorneys Criticize Gonzales Clemency Memos*, WASH. POST, Jan. 6, 2005, at A04 (same).

28. *See, e.g.*, Derrick Z. Jackson, *Op-Ed, Bush's "Blind" Justice in Texas*, BOS. GLOBE, July 2, 2003, at A19.

29. For a sampling of the most notable decisions, see Miller-El v. Dretke, 545 U.S. 231 (2005); Callins v. Collins, 510 U.S. 1141 (1994); Herrera v. Collins, 506 U.S. 390 (1993); Penry v. Lynaugh, 492 U.S. 302 (1989); Satterwhite v. Texas, 486 U.S. 249 (1988); Barefoot v. Estelle, 463 U.S. 880 (1983); Estelle v. Smith, 451 U.S. 454 (1981); Jurek v. Texas, 428 U.S. 262 (1976).

in a number of recent cases, the Supreme Court has smacked down Texas capital convictions as unconstitutional.[30]

Of course, the amount of attention paid to capital punishment in Texas is disproportionate to its real-world impact.[31] The State of Texas handles more than 700,000 criminal cases per year,[32] including more than 1000 homicides.[33] Death-penalty prosecutions account for only a few dozen of those cases.[34] Yet, rhetoric often outpaces reality. Both supporters and opponents of tough-on-crime policies point to Texas's use of capital punishment to make their cases.[35] The result is near universal agreement that Texas is the national leader in the death penalty and that it is tough on crime.[36] As detailed below, other criminal justice policies in Texas reinforce the state's reputation for punitiveness.

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30. *See Miller-El*, 545 U.S. at 231 ("The state court's conclusion that the prosecutors' strikes of Fields and Warren were not racially determined is shown up as wrong to a clear and convincing degree; the state court's conclusion was unreasonable as well as erroneous."); Adam Liptak & Ralph Blumenthal, *Death Sentences in Texas Cases Try Supreme Court's Patience*, N.Y. TIMES, Dec. 5, 2004, at A1 ("In the past year, the Supreme Court has heard three appeals from inmates on death row in Texas, and in each case the prosecutors and the lower courts suffered stinging reversals."); *see also* Linda Greenhouse, *Justices, 5 to 4, Overturn 3 Texas Death Sentences*, N.Y. TIMES, Apr. 26, 2007, at A22.

31. Professor Doug Berman has raised a related point about the Supreme Court's excessively large death penalty docket and its focus on fixing individual errors in capital cases. Douglas A. Berman, *A Capital Waste of Time? Examining the Supreme Court's Culture of Death*, 34 OHIO N.U. L. REV. 861 (2008).

32. *See* 2010 County Court Activity Summary by Case Type, TEX. OFFICE OF CT. ADMIN., http://168.39.176.29/OCA/ReportSelection.aspx (select "County Court Data Reports" from drop-down "Report Type" menu, and select "Case Activity by County" from drop-down "Report" menu; then follow "Continue" hyperlink; then search "From" for "January 2010" and "To" for "December 2010"; then follow "Run Report" hyperlink) (noting more than 508,000 misdemeanor cases filed in county criminal courts during 2010); 2010 District Court Activity Summary by Case Type, TEX. OFFICE OF CT. ADMIN., http://168.39.176.29/OCA/ReportSelection.aspx (select "County Court Data Reports" from drop-down "Report Type" menu, and select "Case Activity by County" from drop-down "Report" menu; then follow "Continue" hyperlink; then search "From" for "January 2010" and "To" for "December 2010"; then follow "Run Report" hyperlink) (identifying more than 210,000 felony cases filed in 2010). Additionally, justice of the peace courts in Texas handle more than two million fine-only misdemeanor cases per year. *See* 2010 Justice Court Caseload Trends, TEX. OFFICE OF CT. ADMIN., http://168.39.176.29/OCA/ReportSelection.aspx (select "Justice Court Data Reports" from drop-down "Report Type" menu, and select "Case Activity by County" from drop-down "Report" menu; then follow "Continue" hyperlink; then search "From" for "January 2010" and "To" for "December 2010"; then follow "Run Report" hyperlink).

33. *See* 2008 District Court Activity Summary by Case Type, TEX. OFFICE OF CT. ADMIN., http://168.39.176.29/OCA/ReportSelection.aspx (select "District Court Data Reports" from drop-down "Report Type" menu, and select "Case Activity by County" from drop-down "Report" menu; then follow "Continue" hyperlink; then search "From" for "January 2008" and "To" for "December 2008"; then follow "Run Report" hyperlink) (identifying more than 1200 murder cases filed by indictment or information in Texas district courts during calendar year 2008).

34. *See* Adam M. Gershowitz, *Imposing a Cap on Capital Punishment*, 72 MO. L. REV. 73, 93–94 (2007).

35. *See, e.g.*, Brandi Grissom, *Perry's Death Penalty Stance a Mixed Bag Nationally*, TEX. TRIB. (July 5, 2011), http://www.texastribune.org/texas-politics/2012-presidential-election/perrys-death-penalty-stance-a-mixed-bag-nationally/.

36. *See* Gershowitz, *Statewide Capital Punishment*, *supra* note 1, at 312.

B. Texas Is a National Leader in Incarceration

While Texas is most famous for its use of the death penalty, it is also a leader in the total number of inmates incarcerated. Texas regularly vies for first place in this category with the much more populous state of California.[37] As of the end of 2008, Texas had more than 172,000 people in prison.[38] California, which has twelve million more residents than Texas,[39] had only 1100 more inmates.[40] To its credit, Texas has taken steps to reduce its prison population by shifting offenders to substance abuse and mental health treatment centers.[41] Yet, when 2009 came to a close, Texas still had more than 171,000 people incarcerated.[42]

It is not just raw incarceration figures in which Texas is a leader. As a per capita matter, Texas ranks second nationally (behind Louisiana) in the number of inmates per residents.[43] According to the National Institute of Corrections, Texas's incarceration rate is about sixty percent higher than the national average.[44] Texas also vastly exceeds the national average in terms of the percentages of people on probation and parole.[45]

In almost every category of prison statistics, Texas leads the nation. As one author recently explained,

> The state's per capita imprisonment rate . . . [is] three times higher than the Islamic Republic of Iran's. Although Texas ranks fiftieth among states in the amount of money it spends on indigent criminal defense, it ranks first in prison growth, first in for-profit imprisonment, first in supermax lockdown, [and] first in total number of adults under criminal justice supervision . . . .[46]

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37. *See* WILLIAM J. SABOL ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STAT., PRISONERS IN 2008 app. 2 at 17–18 (2010), http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1763 (indicating that Texas led the nation in incarcerations in 2000, but that California edged ahead in 2008).

38. *Id.*

39. *Compare* U.S. CENSUS BUREAU, STATE AND COUNTY QUICK FACTS: CALIFORNIA, *available at* http://quickfacts.census.gov/qfd/states/06000.html (2010 population estimate is 37,253,956), *with* U.S. CENSUS BUREAU, STATE & COUNTY QUICK FACTS: TEXAS, *available at* http://quickfacts.census.gov/qfd/states/48000.html (2010 population estimate is 25,145,561).

40. SABOL ET AL., *supra* note 37, at 17–18.

41. *See Unlikely Role Model: Tough-on-Crime Texas Leads the Way in Prison Reforms, Less Crowded Prisons*, HOUS. CHRON., Jan. 2, 2010, at B1.

42. WEST, *supra* note 2, at tbl. 1.

43. McPhee, *supra* note 4; *see* PEW CTR. ON THE STATES, TEXAS 2 (2007), http://www.pewcenteronthestates.org/uploadedFiles/TX%20State%20Profile%202-22-07.pdf.

44. DEP'T OF JUSTICE, NAT'L INST. OF CORR., STATISTICS FOR THE STATE OF TEXAS, *available at* http://nicic.gov/StateStats/?st=tx.

45. *See id.*

46. ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE 4 (2010).

The huge number of persons sentenced to incarceration or awaiting trial in Texas has resulted in overcrowding at jails throughout the state.[47] In counties across the state, this overcrowding has led a number of jails to fail inspection.[48] The overcrowding situation is so bad in Houston that the county government has had to contract with out-of-state jails to house hundreds of its inmates.[49] Despite having added 100,000 prison beds since the 1980s, the number of Texas prisoners is shortly expected to exceed beds by 17,000.[50]

Not surprisingly, the over-crowding of Texas prisons and jails goes hand-in-hand with awful conditions of confinement. Local media regularly report inmate deaths occurring in jails due to overcrowding.[51] Texas newspapers have also highlighted recent federal investigations of both Dallas and Houston jails for civil rights violations.[52] And Texas politicians do not appear remorseful about prison and jail conditions: although Texas spends forty-three percent less than the national average to incarcerate each inmate,[53] politicians regularly demand that it

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47. *See* TEX. CRIM. JUSTICE COAL., COSTLY CONFINEMENT & SENSIBLE SOLUTIONS: JAIL OVERCROWDING 3–4 (2010), http://www.criminaljusticecoalition.org/files/userfiles/Jail_Overcrowding_Report_FOR_WEB.pdf (identifying reasons for overcrowding among both county jails and private detention facilities).

48. *See* Lynne Brezosky, *1 in 3 Jails Failing State Check: Harris County Expected to Seek Bonds for More Beds at Facility, on 2006 List*, HOUS. CHRON. Apr. 2, 2007, at A1 (noting that 73 of 286 jails failed inspection in 2006 and that 4 jails inspected in the first few months of 2007 were under remedial orders for overcrowding). For a discussion of the most overcrowded jails, see *Officials Trying to Ease Overcrowding*, DALL. MORNING NEWS, Aug. 14, 2010 (noting that Dallas jails failed inspections from 2003 until 2010, and that when the jail finally passed inspection in 2010, overcrowding threatened to put it out of compliance again); Tom Bower, *Inmates Move into New Jail Annex; $26.4 Million Addition Raises Total Capacity to 4,294 Prisoners*, SAN ANTONIO EXPRESS-NEWS, Aug. 6, 2002, at 3B (noting that Bexar County jail failed inspection because nearly 400 inmates were sleeping on the floor due to lack of beds); Roma Khanna, *Harris County Jail Fails Inspection: Overcrowding, Broken Toilets Among Complaints*, HOUS. CHRON., Apr. 18, 2009, at B2 (describing effects of overcrowding); Ken Rodriguez, *Commissioners' Concerns About Jail Go Unaddressed*, SAN ANTONIO EXPRESS-NEWS, Jan. 30, 2009, at 1B (noting that Bexar County jail had failed inspection six of the last eight years in part because of overcrowding).

49. *See* Steve McVicker, *First 60 Prisoners Bused to Louisiana: Crowding here Could Force County to Eventually Send 400 to Private Jail*, HOUS. CHRON., July 14, 2007, at B4 (describing transfer of Harris County inmates to Louisiana prisons); Chris Moran, *Excess Jail Space to Reduce Tab for County Taxpayers*, HOUS. CHRON., Dec. 8, 2010, at B1 (explaining how Harris County sends thousands of jail inmates to Louisiana because of lack of space).

50. PEW CTR. ON THE STATES, *supra* note 43, at 1.

51. *See, e.g.*, Ed Housewright, *Jailhouse Deaths Spur Lawsuit Against County: 63 Have Died in Seven Years*, DALL. MORNING NEWS, Oct. 14, 2002, at A21 (describing a series of inmate deaths); Steve McVicker, *Six Years, 101 Deaths in Harris County Jails: Cruel and Unusual Punishment for Inmates?*, HOUS. CHRON. (Feb. 18, 2007), http://www.chron.com/news/houston-texas/article/Six-years-101-deaths-in-Harris-County-jails-1545025.php (explaining that the large jail population and staffing shortages result in a lack of adequate medical care).

52. *See* Cindy George & Bill Murphy, *Feds Launch Investigation of County Jail: Department of Justice Looking for Federal Violations*, HOUS. CHRON., March 8, 2008, at A1 (discussing federal investigations of both Harris County and Dallas County jails).

53. While the national average to incarcerate an inmate is approximately $24,000 per year, Texas spends less than $14,000. DEP'T OF JUSTICE, NAT'L INST. OF CORR., *supra* note 44.

be done cheaper.[54] The result, not surprisingly, is terrible conditions of confinement.[55]

C. Huge Prison Sentences Create Big Headlines

In addition to frequent use of capital punishment and overflowing prisons, Texas also makes headlines by imposing seemingly astronomical sentences in particular cases. For example, while the mean sentence for robbery defendants in the federal system is less than seven years,[56] Texas's robbery defendants regularly receive sentences of forty-five,[57] fifty,[58] seventy,[59] even ninety-nine[60] years of incarceration.

Consider the defendant who received thirty-five years for burglary,[61] or the repeat driving-while-intoxicated ("DWI") defendant (who was charged as a habitual based on a robbery conviction from many years prior) who was sentenced to twenty-five years.[62] White-collar offenders are not immune from stiff sentences either: an offender who stole between $100,000 and $200,000 received a sentence of twenty years,[63] while a defendant recently convicted of laundering a similar amount of money received forty years.[64] Similarly, one Texas drug offender caught with twenty-eight grams of cocaine (and with two prior drug infractions from years before) received a sentence of ninety-nine years.[65] Sentences may thus seem unbelievably tough to the public not versed in the availability of parole—particularly as the media only reports these large upfront sentences—and thus adds to Texas's reputation of being tough on crime.[66]

These huge sentences contribute to Texas's reputation for punitiveness (and rightly so), but they are somewhat deceiving given Texas's robust parole system.

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54. *See* Chris Moran, *Eversole Slams Sheriff over Jail Outsourcing Costs*, HOUS. CHRON. (June 22, 2010), http://www.chron.com/news/houston-texas/article/Eversole-slams-sheriff-over-jail-outsourceing-costs-1717246.php (describing Harris County Commissioner Jerry Eversole's demands that inmates be housed in cheaper facilities).

55. For an excellent account of the years of litigation aimed at improving the conditions of Texas's prisons, see generally BEN M. CROUCH & JAMES W. MARQUART, AN APPEAL TO JUSTICE: LITIGATED REFORM OF TEXAS PRISONS (1989).

56. U.S. SENT'G COMM., STATISTICAL INFORMATION PACKET: FISCAL YEAR 2009, STATE OF TEXAS 10 (2010), http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/State_District_Circuit/2009/tx09.pdf (identifying the national median and mean sentences for robbery in the federal system as 63 months and 82.2 months).

57. *See, e.g.*, Clemons v. State, 893 S.W.2d 212, 214 (Tex. App. 1995).

58. *See, e.g.*, Fluellen v. State, 71 S.W.3d 870, 873 (Tex. Crim. App. 2002).

59. *See, e.g.*, Murray v. State, 857 S.W.2d 806, 807 (Tex. App. 1993).

60. *See, e.g.*, Darden v. State, 430 S.W.2d 494, 495–96 (Tex. Crim. App. 1968).

61. Tomas v. State, 707 S.W.2d 221, 221 (Tex. App. 1986).

62. Harris v. State, 204 S.W.3d 19, 21–22 (Tex. App. 2006).

63. Quast v. State, No. 01-02-00384-CR, 2003 WL 21470370, at *21–22 (Tex. App. 2003).

64. King v. State, No. 01-08-00457-CR, 2009 WL 1025733, at *1 (Tex. App. 2009).

65. Davis v. State, 905 S.W.2d 655, 659 (Tex. App. 1995).

66. *See* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 927–28 (2006) (discussing how criminal justice outsiders often misperceive the severity of punishments).

For most felonies, Texas law requires the defendant to serve only one-quarter of his sentence before becoming eligible for parole.[67] And credit that prisoners receive for good behavior—days they did not actually serve—counts towards completing the one-fourth requirement.[68] For the most serious felonies—murder, aggravated kidnapping, sexual assault, and a few others—the Code is slightly tougher and requires defendants to serve at least one-half of their sentences.[69] Yet, even parole eligibility after serving half of a sentence is a stark contrast from the federal system and the many other states that have eliminated parole altogether.[70]

The option for this early parole almost certainly figures into the sentencing decisions of judges and plea bargain offers of prosecutors. Judges and prosecutors who believe a defendant deserves three years' incarceration may impose a considerably longer sentence to offset parole eligibility and ensure that the defendant serves at least three years.[71] And because Texas has extremely broad sentencing ranges—for instance, five years to life for first degree felonies[72]—prosecutors and judges have considerable room to increase sentences to account for the possibility of parole.

The news media dutifully reports the large upfront sentences.[73] After all, it is easy for reporters (who are already stationed in the courthouse) to generate stories

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67. *See* TEX. GOV'T CODE ANN. § 508.145(f) (West 2011).

68. *See id.* For example, in an analysis of Texas offenders who had been paroled between September 1, 2010 and September 1, 2011 for the crime of burglary of a habitation, I discovered many offenders who served well less than twenty-five percent of their sentences, with some serving less than fifteen percent. *See* Texas Department of Criminal Justice Response to Public Information Request of Adam Gershowitz, Dec. 12, 2011 (on file with the author).

69. *See* § 508.145(d).

70. For a list of states that have abolished parole, see Dhammika Dharmapala et al., *Legislatures, Judges, and Parole Boards: The Allocation of Discretion Under Determinate Sentencing*, 62 FLA. L. REV. 1037, 1045–46 (2010).

71. Take the crime of bribery as an example. Under Texas law, bribery is a second degree felony, which carries a sentencing range of two to twenty years. *See* TEX. PENAL CODE § 12.33 (West 2011). The average bribery case would seem to be on the less serious end of the class of second degree felonies. (For instance, the crime of robbery, which involves force or threat of force, is also a second degree felony. *See id.* at § 29.02(b) (West 2011). One would therefore expect bribery defendants to be sentenced on the lower end of the two-to-twenty-year sentencing range. Yet, there are cases in which defendants get much stiffer sentences. *See, e.g.*, Matt Flores, *ACCD Gets Good Report Card: But Strayhorn's Audit Urges Measures That Could Save Millions for District*, SAN ANTONIO EXPRESS, Aug. 23, 2003, at B4 (noting that former official was sentenced to twelve years for bribery). These tougher sentences may be imposed simply because the defendant deserves the punishment. Another quite plausible explanation, however, is that prosecutors, suspecting that white-collar defendants charged with non-violent offenses will receive early parole, push for tougher upfront sentences to offset the possibility of early release. *Cf.* Elizabeth Albanese, *Ex-Trustee Loses Appeal*, THE BOND BUYER, Oct. 10, 2006, at 41 (noting that Texas official sentenced to twelve years for bribery was released on probation after sixteen months).

72. *See* TEX. PENAL CODE § 12.32 (West 2009).

73. *See, e.g.*, *Serial Child Molester Is Sentenced to Life in Prison for Abusing 8 Boys in Arizona*, WASH. POST (Jan. 13, 2011), http://www.washingtonpost.com/national/one-of-arizonas-most-prolific-child-molesters-sentenced-to-560-years-in-prison/2012/01/13/gIQAPSIbwP_story.html (reporting that one Arizona defendant received eleven consecutive life sentences).

when the facts are neatly packaged for them. News articles about how much time a paroled felon actually served are much harder to prepare, however.[74] Thus, the general public hears about the huge upfront sentences, but not the shorter amount of time that inmates actually serve.

This problem of misinformed or incomplete media reporting also applies before sentencing even occurs. When a defendant in a high-profile case is on trial, reporters regularly inform the public of the maximum punishment the defendant could receive even if, in reality, there is no chance the defendant will be sentenced anywhere close to that. Although this problem exists in criminal justice systems across the country, it is particularly problematic in Texas because of the state's broad sentencing ranges. Consider the crime of possession of certain controlled substances[75]—for instance 200 to 400 grams of codeine—which is a second-degree felony[76] punishable by two to twenty years.[77] When NFL football player Johnny Jolly was arrested for codeine possession, the media explained that Jolly "face[d] up to twenty years in prison."[78] Yet, when his case was actually resolved, Jolly escaped jail time and was placed on probation.[79]

To be sure, Texas authorizes and imposes extremely lengthy sentences on many defendants. And even with early eligibility for parole, many offenders never again see the light of day after entering the Texas criminal justice system. Yet, when it comes to handing down astronomical sentences, Texas's bark appears to be worse than its bite. In many cases, the availability of parole greatly offsets the ultimate time served, though not Texas's reputation for toughness.

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74. Indeed, even legal academics who rail against the Texas clemency system in death penalty cases have devoted virtually zero attention to analyzing how parole is granted in non-capital cases. A search of "parole w/10 eligib! w/10 Texas" in the JLR database on Westlaw brings up only fifty-five entries, most of which relate to the death penalty.

75. Another common example is the crime of DWI, which is a Class B misdemeanor for first-time offenders. *See* TEX. PENAL CODE § 49.04 (West 2011). Television and newspaper stories across the state regularly report that the defendant could be sentenced to up to 180 days of incarceration if convicted. For example, when the daughter of Houston's mayor was charged with DWI, media reports regularly stated that she faced "up to 180 days in jail." *See, e.g.*, Dale Lezon, *Deputy Says Mistakes Made in Mayor's Daughter's Arrest: Elena White Pleads Not Guilty in First Day of Her DWI Trial*, HOUS. CHRON., Feb. 6, 2007, at B3. But in the overwhelming majority of cases, the defendant typically receives probation and serves no jail time. *See* Adam M. Gershowitz, *12 Unnecessary Men: The Case for Eliminating Jury Trials in Drunk Driving Cases*, 2011 U. ILL. L. REV. 961, 965 [hereinafter Gershowitz, *12 Unnecessary Men*]. Thus, a criminal justice outsider who follows mainstream media coverage might believe that Texas punishes its DWI offenders far more harshly than it actually does.

76. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.118(d) (West 2011).

77. *See* TEX. CODE CRIM. PROC. ANN. art. 12.33 (West 2011).

78. *See NFL League Suspends Jolly for 2010: Packers DE Facing Drug Charges After 2008 Arrest*, HOUS. CHRON., July 17, 2010, at 6.

79. *See Deal Gets Jolly Out of Drug Trial: Packers DE Can Have Case Dismissed if He Fulfills Probation Requirements*, HOUS. CHRON., Aug. 4. 2010, at 7. And while the media reported both the statutorily authorized *and* actual sentences in Jolly's case, in many cases with less famous defendants, news reports cover only the maximum statutorily authorized sentence without running a story when the defendant ultimately receives one far milder.

D. Shaming Punishments Attract Enormous Attention

Over the last few decades, shaming punishments have garnered increased attention.[80] Academics have almost universally condemned shaming on numerous grounds, including the harm caused to human dignity.[81] Despite all the academic attention, shaming punishments are still fairly rare in the criminal justice system.[82] Yet, when such punishments are imposed, they receive enormous media attention. And Texas has received a healthy size of that attention.

In the 1990s, the so-called "King of Shame" in the United States was Ted Poe, a felony court judge in Houston, Texas.[83] Judge Poe imposed a variety of shaming punishments, including sandwich boards, public apologies, and a requirement that DWI offenders place bumper stickers on their cars announcing their crimes.[84] Judge Poe was known both for the creativity of these alternative sanctions and also for the sheer number—more than 300—that he imposed.[85] Poe apparently relished the publicity that came with alternative sanctions and even coined a term—"Poetic Justice"[86]—for his punishments. Local news stories about Poe's sentences abounded,[87] and Poe turned his publicity into a seat in the United States House of Representatives.[88]

The actions of a single Houston judge would not be particularly remarkable, except that the publicity has drawn national attention to Texas. For example, a recent story in *USA Today* discussed how former-Judge Poe had sentenced offenders to shovel manure and how another Texas judge had ordered an abusive father to sleep in a doghouse for thirty days.[89] Similar stories about Poe's creative sentences have appeared in *The Washington Post*,[90] *The*

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80. For an example in the academic literature, see Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991) (criticizing shaming punishments); Dan M. Kahan, *What Do Alternative Sanctions Mean*, 63 U. CHI. L. REV. 591 (1996) (favoring shaming punishments).

81. *See* Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2219 (2001) ("Because shaming punishments have as their goal the destruction of a person's reputation and dignity the shaming punishment denies the very dignity of moral agency that the retributive encounter is designed to uphold.").

82. *See* Huschka, *supra* note 5, at 815.

83. *Id.* at 833.

84. *See Developments in the Law, The Legality of Innovative Alternative Sanctions for Nonviolent Crimes*, 111 HARV. L. REV. 1944, 1949 & n.47 (1998).

85. *See* Huschka, *supra* note 5, at 833.

86. *Id.*

87. *See The Original Shame Sentence? Rattling the Bones in Ted Poe's Closet*, HOUS. PRESS, Jan. 22, 2004 ("In 22 years as a Harris County district judge, Lloyd 'Ted' Poe garnered gallons of ink and miles of videotape from a fawning local media with his zany so-called shame sentences for defendants in his court.").

88. *See* Huschka, *supra* note 5, at 833–34.

89. *See* Jonathan Turley, *Shaming Undermines Justice: Americans May Cheer the Idea of Retributive Punishment, but Such Judgments Threaten the Principles of Our Legal System*, USA TODAY, Nov. 17, 2009, at A13.

90. *See* Jonathan Turley, *Shame on You*, WASH. POST (Sept. 17, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/09/17/AR2005091700064.html.

Baltimore Sun,[91] *Los Angeles Times*,[92] *The Boston Globe*,[93] and local newspapers around the country.[94] Poe even appeared on Oprah Winfrey's nationally syndicated television show to discuss his shaming sanctions.[95] Even after leaving the bench and spending half a decade in Congress, Poe has continued to tour the country advocating shaming sanctions.[96] In a Pittsburgh suburb, a prosecutor sought a shaming sanction after hearing Congressman Poe speak to a district attorney's conference in 2009.[97] The prosecutor explained that Poe is "sort of the modern father of this kind of stuff. So we thought we'd give it a try."[98]

It is important not to make too much of Judge Poe's notoriety, or to focus too heavily on shaming sanctions themselves. As with the death penalty, shaming sanctions are still relatively rare in the context of the entire Texas justice system. Nevertheless, just like capital punishment, the association of shaming sanctions with Texas serves to foster the state's reputation for being tough on crime.

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As Part I demonstrates, it is not difficult to see why Texas has a reputation for being tough on crime. The story is, of course, more nuanced than the bumper sticker warning not to mess with Texas. In recent years, the Texas criminal justice system has improved mental health care, added drug and alcohol treatment, and imposed less stringent penalties for violations of parole and probation.[99] At bottom, it seems fairly clear that Texas has earned a national reputation for being tough on defendants who have been convicted, although there is good reason to believe its reputation is somewhat exaggerated. As detailed in Part II, even if we

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91. *See* Kate Shatzkin, *Shame Becomes a Barb in Judges' Quivers*, BALT. SUN, May 17, 1998, at A20 (quoting then-Judge Poe).

92. *See* Kate Shatzkin, *Judges Are Resorting to Shame in Sentencing Criminals: Criminals Wear Placards or Apologize to Victims Publicly, but Some Legal Experts Say the Tactic Is Useless at Best and Repugnant at Worst*, L.A. TIMES, Apr. 26, 1998 (same).

93. *See* Michael Grunwald, *Shame Makes a Comeback in Courtrooms: US Judges Say Public Humiliations Can Work Better Than Prison Time*, BOS. GLOBE, Dec. 28, 1997 (describing Judge Poe as a "leading advocate").

94. For a sampling of the numerous articles, see Tim Hrenchir, *Innovative Judge to Speak at Dinner*, TOPEKA CAP. J., Mar. 30, 2002, at 1 ("A Texas district judge known for giving out sentences designed to shame criminals, Poe will be guest speaker for the annual fund-raising banquet of Crime Stoppers of Topeka Inc."); Lyda Longa, *Does Shame Deter Crime? That's a Matter of Opinion*, ATLANTA J. CONST., June 21, 1999, at A1 (describing "Texas State Judge Poe" as a "leading proponent").

95. *See* Sarah Fenske, *After* Oprah*: Ted Poe Got the Spotlight for a Shame-Based Sentencing—The Victim Says It Was a Sham*, HOUS. PRESS (Oct. 7, 2004), http://www.houstonpress.com/2004-10-07/news/after-oprah/.

96. *See* Jon Schmitz & Torsten Ove, *Sentence for Theft Is Humiliation in Bedford Town Center*, PITTSBURGH POST-GAZETTE, Nov. 4, 2009, at A1.

97. *Id.*

98. *Id.*

99. *See* Gray Rohrer, *Florida Senators Look to Texas for Prison System Cuts: But Money-Saving Programs Could Be Too Costly in Tight Budget Year*, SUNSHINE ST. NEWS (Jan. 25, 2011), http://www.sunshinestatenews.com/story/florida-senators-look-texas-prison-system-cuts.

assume Texas is tough on punishment, the complete picture is far more complicated because Texas appears to be quite generous on criminal procedure.

II. TEXAS IS PROGRESSIVE (OR AT LEAST NOT "TOUGH") ON CRIMINAL PROCEDURE

As every student of criminal procedure knows, the Supreme Court of the United States sets a floor of minimum protection for each constitutional guarantee.[100] States may not adopt rules that fall beneath that floor (for example, they may not eliminate the right to counsel guaranteed by *Gideon v. Wainwright*),[101] but they are free to adopt more protective ones (for instance, to mandate counsel in all misdemeanor cases, although the Supreme Court has not required it).[102] While no two states have identical codes of criminal procedure, it is clear that some states have gone well beyond what the Supreme Court mandates, while others have afforded little additional protection for criminal defendants.[103] Given Texas's tough-on-crime reputation, conventional wisdom would suggest that the Texas Code of Criminal Procedure should offer criminal defendants little or no added protection beyond the guarantees of the United States Constitution. That conventional wisdom, however, is wrong.

In a variety of areas, Texas has adopted criminal procedure rules that are much more favorable to criminal defendants than has been required by the Supreme Court. While some of these guarantees may be characterized as nuisances to prosecutors, many of the added protections are major hindrances to their efforts to convict criminal defendants. Moreover, because most of these protective rules exist by statute, they could be eliminated by a simple legislative vote. Yet, efforts to scale back these statutory guarantees have been rejected time and again by the Texas legislature.

In the Sections that follow, I review a number of the most salient protections afforded by the Texas Code of Criminal Procedure as well as a few rights guaranteed by the Texas Constitution. My purpose is not to argue that these protections are unnecessary or harmful to the criminal justice system. To the contrary, in many areas, the Texas rules helpfully fill in gaps where the Supreme Court has been insufficiently protective of criminal defendants. My point is to

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100. *See* Adam M. Gershowitz, *The Invisible Pillar of* Gideon, 80 IND. L.J. 571, 585 (2005) [hereinafter Gershowitz, Gideon].

101. 372 U.S. 335 (1963) (guaranteeing indigent felony defendants a right to appointed counsel); *see* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) ("We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.").

102. *See* State *ex rel.* Winnie v. Harris, 249 N.W.2d 791 (1977) (extending the right to counsel in Wisconsin state court to all cases in which the possibility of incarceration exists, rather than all cases in which incarceration is actually imposed).

103. *See generally* David C. Brody, *Criminal Procedure Under State Law: An Empirical Examination of Selective New Federalism*, 23 JUST. SYS. J. 75 (2002).

demonstrate that even though Texas is a tough-on-crime state, it has a remarkable number of generous statutory rules of criminal procedure.

A. Unlike Almost Every Other State, Texas Has No Inevitable Discovery Exception, Making It Difficult to Admit Illegally Seized Evidence

For nearly three decades, the Supreme Court has recognized an inevitable discovery exception that allows prosecutors to admit illegally seized evidence when the trial court finds the police eventually would have found it in a lawful fashion.[104] By way of example, imagine that a police officer pulls over a suspect for drunk driving. Upon arresting the driver, the officer unlawfully searches the trunk of the car and finds cocaine.[105] Even though the cocaine was actually found during an illegal search, it would be admissible in most courthouses under the inevitable discovery doctrine: Upon arrest for drunk driving, the car would have been impounded and the trunk would have been inventoried pursuant to department policy.[106] At that point, the bag of cocaine would inevitably have been discovered, thus making it admissible.[107] This scenario—and the dozens of similar ones that occur daily in the United States—demonstrates why prosecutors love the inevitable discovery exception.[108]

When the Supreme Court officially recognized the inevitable discovery doctrine in 1984,[109] it came as no surprise. In a brief opinion, the Court remarked that every federal court of appeals in the nation and many state courts had already endorsed the inevitable discovery doctrine.[110] And the trend has remained one-directional. Almost thirty years after the Supreme Court's decision, only two states in the country expressly reject the inevitable discovery doctrine: Texas and Indiana.[111]

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104. *See* Nix v. Williams, 467 U.S. 431 (1984) (adopting the inevitable discovery exception to the exclusionary rule).

105. The search of the trunk is unconstitutional because police cannot search the trunk of the car incident to arrest, there is no consent for search of the trunk, nor any probable cause to believe contraband is located there. *See* State v. Ferguson, 678 S.W.2d 873, 876 (Mo. Ct. App. 1971) ("Although there was probable cause to arrest the defendant . . . the officers additionally needed a basis for believing that particular evidence of a crime or specific contraband was being concealed within the trunk before conducting a warrantless search.").

106. *See* Colorado v. Bertine, 479 U.S. 367, 375 (1987) (upholding inventory searches of vehicles so long as police "discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity").

107. *See Ferguson*, 67 S.W.2d at 877 ("The evidence [discovered during an illegal roadside search of defendant's trunk] would have been inevitably discovered [during subsequent inventory search] if it had not been removed during the roadside search.").

108. *See* Albert W. Alschuler, *The Exclusionary Rule and Causation:* Hudson v. Michigan *and Its Ancestors*, 93 IOWA L. REV. 1741, 1814 (2008) (noting the frequency with which the inevitable discovery exception is invoked).

109. *See Nix*, 467 U.S. 431.

110. *Id.* at 440 & n.2.

111. *See* State v. Flippo, 575 S.E.2d 170, 188 n.23 (W. Va. 2002) ("Only [Indiana and Texas] appear to have expressly refused to recognize the inevitable discovery rule. . . . Additionally, we have found only three states, South Carolina, Vermont, and Wyoming, . . . that appear never to have directly addressed the issue of the inevitable discovery rule.").

The Texas Code of Criminal Procedure rejects the inevitable discovery doctrine by statute.[112] The state's exclusionary rule expressly forbids the admission of any evidence obtained "in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America."[113] In 1996, Texas's highest criminal court explicitly rejected prosecutors' arguments to ignore the plain text of the Code,[114] practically inviting the legislature to amend the statute:

> Were we implementing a court-made rule we would of course be free to follow the lead of the United States Supreme Court. However, because this is a statute enacted by the Texas Legislature, we are required to interpret the language of the statute in order to implement the legislative intent in enacting it.[115]

A concurring judge was even blunter, noting that the Texas courts are "obliged to implement the expressed will of the Legislature."[116] Despite these direct references to the legislature's primacy and two impassioned dissents to the decision to bar the inevitable discovery exception,[117] the Texas legislature has never moved to revise the Code so as to authorize the exception.[118]

The Code of Criminal Procedure's continued rejection of the inevitable discovery doctrine makes Texas a complete outlier. The only other state to completely reject the doctrine—Indiana—has done so based on its state constitution, not because of a statute that could be overruled by legislative action.[119] Texas stands alone in rejecting the inevitable discovery doctrine by statutory design. Considering how prosecutors are hampered by the lack of an inevitable discovery exception, the legislature's inaction is nothing short of stunning.

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112. TEX. CODE CRIM. PROC. ANN. art. 38.23 (West 2011).

113. *Id.*

114. *See* State v. Daugherty, 931 S.W.2d 268, 269–70 (Tex. Crim. App. 1996).

115. *Id.* at 271.

116. *Id.* at 274 (Baird, J., concurring).

117. *See id.* (McCormick, J., concurring in part); *id.* at 281 (Mansfield, J., dissenting).

118. The text of article 38.23 has changed very little since it was implemented in 1925, despite numerous court decisions interpreting it. *See* Nathan L. Mechler, *Texas's Statutory Exclusionary Rule: Analyzing the Inadequacies of the Current Application of "Other Person(s)" Pursuant to Article 38.23(a) of the Texas Code of Criminal Procedure*, 36 ST. MARY'S L.J. 195, 207–09 (2004).

119. *See* Ammons v. State, 770 N.E.2d 927, 935 (Ind. Ct. App. 2002) ("[T]he inevitable discovery exception has not been adopted as a matter of Indiana constitutional law. Our state supreme court has previously held that our state constitution mandates that the evidence found as a result of an unconstitutional search be suppressed. In light of this clear language we are not inclined to adopt the inevitable discovery rule as Indiana constitutional law.") (internal citations omitted); *see also* Bradford R. Shively, *The Inevitable Discovery Doctrine: Indiana as the Exception, Not the Rule*, 43 VAL. U. L. REV. 407, 430–32 (2008).

B. Texas Has an Expansive Exclusionary Rule That Suppresses Evidence Illegally Seized by Private Actors

As all criminal justice observers know, the United States Constitution requires the suppression of evidence found by illegal *police* activity.[120] Texas's statutory exclusionary rule goes even further by excluding evidence illegally procured by private citizens.[121] Similar to the lack of an inevitable discovery exception, Texas's expansive exclusionary rule is drastically out-of-step with the rest of the nation and very beneficial to criminal defendants.

The Texas Code of Criminal Procedure specifies that "[n]o evidence obtained by an officer *or other person* in violation of [federal or state law] . . . shall be admitted in evidence against the accused on the trial of any criminal case."[122] Under this rule, if an individual citizen violates a statutory or constitutional guarantee and turns the resulting evidence over to the police, that evidence will be inadmissible, even if the police had no connection to the misconduct.[123]

For example, in 2005, a priest in Grand Prairie, Texas was charged with possession of child pornography.[124] Because the lurid images had been illegally procured by private actors—another priest and a church deacon—who searched his computer without consent, the judge was forced to suppress the photos.[125] With no evidence to rely on, state prosecutors had no choice but to dismiss the charges.[126] Although Texas's statutory exclusionary rule decimated the state prosecution, federal prosecutors were not restricted by a private actor exclusionary rule.[127] Federal prosecutors therefore charged the then-former priest with violation of federal child pornography laws and relied on the very same evidence that was inadmissible in Texas state court.[128] The former priest pleaded guilty to the federal charges and was sentenced to more than four years in federal prison.[129]

Texas stands alone in embracing a private actor exclusionary rule. In addition to the federal system, every other state in the nation admits evidence that was unlawfully seized by private actors.[130]

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120. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

121. TEX. CODE CRIM. PROC. ANN. art. 38.23 (West 2011).

122. *Id.* (emphasis added).

123. *See, e.g.*, Robert Tharp, *Evidence Against Priest Tossed in Child Porn Case: GP: Judge Says Evidence Was Searched Illegally*, DALL. MORNING NEWS, June 10, 2006, at 1B (describing the exclusion of evidence illegally obtained by private citizens).

124. *See id.*

125. *See id.*

126. *See* Jason Trahan, *Former Grand Prairie Priest Sentenced to 51-Month Prison Term for Viewing Child Porn*, DALL. MORNING NEWS, Dec. 2, 2009, at 1B (explaining that federal charges were brought after state prosecutors were forced to drop the case for lack of evidence).

127. *See id.*

128. *See id.*

129. *See id.*

130. *See* Smith v. State, 623 So. 2d 382 (Ala. Crim. App. 1993); Cullom v. State, 673 P.2d 904 (Alaska Ct. App. 1983); Hill v. State, 868 S.W.2d 44 (Ark. 1990); People v. Warren, 219 Cal. App. 3d 619 (1990); People v. Siegl,

There is a historical reason why Texas has such an expansive private actor exclusionary rule. Prior to prohibition, Texas had its own liquor laws, and private vigilante groups assisted the police in searching for unlawful whiskey.[131] When the Texas legislature drafted its exclusionary rule in 1925, legislators were concerned that these vigilante organizations might take matters into their own hands and undertake searches without police participation, and that private citizens would then hand the evidence to law enforcement on a "silver platter."[132] The legislature thus adopted an exclusionary rule that barred evidence seized illegally by private citizens.[133]

With the disappearance of prohibition and organized vigilante organizations, the rationale for a private-party exclusionary rule has, at least in part, disappeared.[134] However, the Texas Court of Criminal Appeals has refused to eliminate the rule.[135] In a recent opinion, the Court explained: "Until the Legislature itself decides that the type of vigilante action prevalent during the early Prohibition era is no longer a threat to the privacy interests of Texas citizens, we are bound to follow both the plain language and the manifest legislative intent of the [statute]."[136]

The Texas legislature has considered legislation that would delete the "other person" language, but declined to act on it. Shortly after the Texas Court of Criminal Appeals held in 1995 that the statutory exclusionary rule applied to evidence gathered by private citizens, the Texas House of Representatives intro-

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914 P.2d 511 (Colo. App. 1996); State v. Betts, 942 A.2d 364 (Conn. 2008); State v. Phillips, 366 A.2d 1203 (Del. Super. Ct. 1976); Pomerantz v. State, 372 So. 2d 104 (Fla. Dist. Ct. App. 1979); Pruitt v. State, 373 S.E.2d 192 (Ga. 1988); State v. Araki, 923 P.2d 891 (Haw. 1996); State v. Johnson, 716 P.2d 1288 (Idaho 1986); People v. Clements, 400 N.E.2d 483 (Ill. App. Ct. 1980); Gajdos v. State, 462 N.E.2d 1017 (Ind. 1984); State v. Flynn, 360 N.W.2d 762 (Iowa 1985); State v. Boswell, 549 P.2d 919 (Kan. 1976); Brock v. State, 947 S.W.2d 24 (Ky. 1997); State v. Abram, 353 So. 2d 1019 (La. 1977); State v. LeGassey, 456 A.2d 366 (Me. 1983); Herbert v. State, 269 A.2d 430 (Md. Ct. Spec. App. 1970); Commonwealth v. Robinson, 503 N.E.2d 654 (Mass. 1987); People v. Holloway, 267 N.W.2d 454 (Mich. Ct. App. 1978); State v. Buswell, 460 N.W.2d 614 (Minn. 1990); Lucas v. State, 381 So. 2d 140 (Miss. 1980); State v. Brasel, 538 S.W.2d 325 (Mo. 1976); State v. Christensen, 797 P.2d 893 (Mont. 1990); State v. Jolitz, 435 N.W.2d 907 (Neb. 1989); State v. Miller, 877 P.2d 1044 (Nev. 1994); State v. Keyser, 369 A.2d 224 (N.H. 1977); State v. Frank, 272 A.2d 309 (N.J. Super. Ct. App. Div. 1971); State v. Hernandez, 865 P.2d 1206 (N.M. Ct. App. 1993); People v. Adler, 50 N.Y.2d 730 (N.Y. 1980); State v. Sanders, 395 S.E.2d 412 (N.C. 1990); State v. Seglen, 700 N.W.2d 702 (N.D. 2005); State v. Grant, 620 N.E.2d 50 (Ohio 1993); Turner v. State, 542 P.2d 955 (Okla. Crim. App. 1975); State v. Bryan, 457 P.2d 661 (Or. Ct. App. 1969); Commonwealth v. Borecky, 419 A.2d 753 (Pa. Super. Ct. 1980); State v. Pailon, 590 A.2d 858 (R.I. 1991); State v. McSwain, 355 S.E.2d 540 (S.C. 1987); State v. Cundy, 201 N.W.2d 236 (S.D. 1972); State v. Burroughs, 926 S.W.2d 243 (Tenn. 1996); State v. Newbold, 581 P.2d 991 (Utah 1972); State v. Young, 12 A.3d 510 (Vt. 2010); Mills v. Commonwealth, 418 S.E.2d 718 (Va. Ct. App. 1992); State v. Agee, 552 P.2d 1084 (Wash. Ct. App. 1976); State v. Riser, 294 S.E.2d 461 (W. Va. 1982); Mears v. State, 190 N.W.2d 184 (Wis. 1971); State v. Heiner, 682 P.3d 629 (Wyo. 1984).

131. *See* Miles v. State, 241 S.W.3d 28, 34–35 (Tex. Crim. App. 2007).

132. *Id.* at 35.

133. *See id.*

134. *See id.* at 36.

135. *See id.* at 35–36.

136. *Id.* at 36.

duced a bill to delete that language.[137] After the proposal was rejected, the bill was renewed in the subsequent legislative session, but failed once again.[138]

Texas's exclusionary rule is considerably more expansive than constitutionally required. The judiciary has made clear that the legislature alone can change this rule, yet the legislature has considered and rejected bills to do so. Thus, the Texas legislature has explicitly chosen to leave a pro-defendant statute on the books.

C. Texas Has an Extremely Narrow Good Faith Exception

In addition to rejecting the inevitable discovery doctrine and excluding evidence illegally seized by private actors, the Texas statutory exclusionary rule also contains a very narrow good faith exception. Unlike most jurisdictions, the Texas exclusionary rule does not allow evidence seized without probable cause to be admitted simply because of police good faith reliance on a warrant.[139]

In 1984, in *United States v. Leon*, the United States Supreme Court recognized a good faith exception for evidence seized based on a defective search warrant.[140] In *Leon,* police had procured a warrant for drugs based on an informant's tip and confirming observations.[141] The trial court later ruled that there was insufficient evidence to create probable cause, thus rendering the warrant invalid.[142] On appeal to the Supreme Court, the legal question was whether evidence seized based on a warrant lacking probable cause could still be admissible if the officer had acted in good faith reliance on the warrant.[143] The Court sided with the prosecution and adopted a good faith exception, allowing for the admission of evidence seized with less than probable cause,[144] so long as the officer relied in good faith on a search warrant issued by a magistrate.[145]

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137. *See* H.R. 2281, 75th Leg., Reg. Sess. (Tex. 1997).

138. *See* H.R. 1320, 76th Leg., Reg. Sess. (Tex. 1999).

139. *See* Matthew A. Nelson, *An Appeal in Good Faith: Does the* Leon *Good Faith Exception to the Exclusionary Rule Apply in West Virginia?*, 105 W. VA. L. REV. 719, 747–50 (2003) (discussing adoption and rejection of the good faith exception).

140. *See* 468 U.S. 897 (1984).

141. *See id.* at 901–02.

142. *See id.* at 903.

143. *See id.* at 905.

144. *See id.* at 926. The Court did issue caveats indicating that the good faith exception could not apply if the magistrate was not detached or if the officers were dishonest or reckless in preparing the warrant application. *See id.*

145. The Supreme Court's good faith exception caused great concern among the Court's more liberal Justices because they believed it would green-light police to conduct searches in the absence of probable cause. In the end, however, the decision has been primarily symbolic. *See id.* at 928–29 (Brennan and Marshall, J.J., dissenting). Police officers rarely procure warrants because most searches fall under one of the exceptions to the warrant requirement. It is even rarer for police to procure a warrant, execute it in good faith, but later find out that there was insufficient evidence to support probable cause. Nevertheless, most states have embraced the Supreme Court's good faith exception. For a discussion of these points and criticism of the *Leon* decision on a more fundamental level, see Donald A. Dripps, *Living With* Leon, 95 YALE L.J. 906 (1986).

Many states have accepted the Supreme Court's invitation and adopted a good faith exception for warrants lacking probable cause.[146] Once again, however, Texas has declined to adopt the rule favored by prosecutors. The Texas statutory exclusionary rule clearly states that the good faith exception applies only to a warrant issued by a neutral magistrate "*based on probable cause.*"[147] Despite protestations by prosecutors, Texas courts have maintained for over two decades that the Texas good faith exception can only apply to small technical requirements (such as typographical errors or omissions) in warrants, not to a lack of probable cause.[148]

On multiple occasions, legislators have introduced bills to bring the Texas rule into line with the federal good faith exception.[149] In 1995, 1997, and 2007, the Texas legislature rejected these bills,[150] thus retaining a more defendant-friendly good faith exception.

D. The Texas Code Imposes Tough Restrictions on Admitting Confessions

In addition to the protective search and seizure rules discussed above, the Texas Code of Criminal Procedure also imposes significant restrictions on confessions that are not required by the federal Constitution.

In the eyes of juries, confessions are typically the most powerful evidence against criminal defendants.[151] Prosecutors thus love confessions.[152] Because confessions are so powerful, they are particularly useful when other evidence is lacking. As a result, police may push hardest for a confession—and use improper tactics—in the very cases where the evidence is the weakest, thus leading to the

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146. *See* Nelson, *supra* note 139, at 747–50 (discussing states that have adopted and rejected the good faith exception).

147. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23(b) (West 2011) (emphasis added).

148. *See* Gordon v. State, 801 S.W.2d 899, 912–13 (Tex. Crim. App. 1990) (rejecting good faith exception).

149. *See* H.R. 1578, 80th Leg., Reg. Sess. (Tex. 2007); H.R. 1365, 75th Leg., Reg. Sess. (Tex. 1997); H.R. 2047, 74th Leg., Reg. Sess. (Tex. 1995).

150. *See* H.R. 1578, 80th Leg., Reg. Sess. (Tex. 2007); H.R. 1365, 75th Leg., Reg. Sess. (Tex. 1997); H.R. 2047, 74th Leg., Reg. Sess. (Tex. 1995).

151. *See* Saul M. Kassin et al., *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 LAW & HUM. BEHAV. 187, 187 (2003) ("In criminal law, confession evidence is the state's most potent weapon. Mock jury studies have shown that confessions are more persuasive than other forms of incriminating evidence, such as eyewitness identifications or character testimony."); Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule*, 21 LAW & HUM. BEHAV. 27, 42–43 (1997) ("[M]ock jurors did not sufficiently discount a defendant's confession in reaching a verdict—even when they saw the confession as coerced . . . . Our results thus suggest that confession evidence has a profound, context-resistant impact on jurors and should be admitted only with extreme caution.").

152. *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 922 (2004) ("Like police, prosecutors rarely consider the possibility that an entirely innocent suspect has been made to confess falsely . . . . When there is a confession, prosecutors tend to charge the defendant with the highest number and types of offenses and are far less likely to initiate or accept a plea bargain to a reduced charge.").

possibility of false confessions.[153] Accordingly, critics have argued that courts should impose rigorous procedural safeguards—such as videotaping all custodial interrogations—to ensure that defendants' rights are protected.[154] The Supreme Court has not done so, however. With the exception of the *Miranda* doctrine, which is commonly seen as a "spectacular failure,"[155] the Court has imposed little regulation on confessions.[156] As a supposedly tough-on-crime state, it would make sense for Texas to follow the Supreme Court's approach and abdicate the regulation of confessions. Once again, however, Texas has done the opposite by imposing rigorous statutory rules to regulate confessions.

Although the Supreme Court has long permitted oral confessions to be admitted so long as they are voluntary and comply with the *Miranda* doctrine, the Texas Code of Criminal Procedure heavily disfavors them.[157] And there are only two main exceptions to Texas's general statutory prohibition on oral confessions.[158] First, and in line with the recommendations of many scholars, oral confessions are permitted in Texas if the statement was electronically recorded and the defendant clearly waived his rights on the recording.[159] Second, an oral confession can be admitted against a defendant at trial if, *after* procuring the confession, police discover evidence that supports the confession.[160] This "found to be true" exception applies, for instance, if the defendant orally confessed to a burglary and the confession led officers to the location of the stolen property.[161] While not as protective as an electronic recording, the "found to be true" exception helps to

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153. *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Visions in Criminal Cases*, 2006 WIS. L. REV. 291, 335–36 (2006).

154. *See* Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127 (2005) (arguing first for legislation, but then for court action as a fallback); *see also* Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1059 (2010) (noting that mandatory videotaping of confessions is on the rise).

155. George C. Thomas, III, Miranda*'s Illusion: Telling Stories in the Police Interrogation Room*, 81 TEX. L. REV. 1091, 1092 (2003); *see* Sandra Guerra Thompson, *Evading* Miranda*: How* Seibert *and* Patane *Fail to "Save"* Miranda, 40 VAL. U. L. REV. 645 (2006).

156. *See* Garrett, *supra* note 154, at 1110 ("Criminal procedure regulates solely the provision of *Miranda* warnings at the outset of a custodial interrogation and the voluntariness of admissions of guilt. Having found the admission of guilt voluntary, a court does not assess the formation of a confession narrative, no matter how tainted or unreliable.").

157. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3 (West 2011) (allowing statements "made as a result of custodial interrogation" to be admissible in trial in only limited circumstances).

158. In addition to the two exceptions discussed above, Texas courts are permitted to admit oral statements that were procured in other states in compliance with those states' law or oral statements procured by federal officials. *See id.* at § 8.

159. *See id.* at § 3(a). The Code also requires that all relevant warnings can be heard on the recording, all material voices (i.e. the interrogating officers and the suspect) are identified on the recording, and a copy of the recording is produced to the defendant well in advance of trial. *See id.*

160. *See id.* at § 3(c).

161. For examples of the "found to be true" exception, see Robert R. Barton, *The Code Means What It Says: Revisiting the Admissibility of Corroborated Unwritten Custodial Statements*, 26 TEX. TECH L. REV. 779, 799–805 (1995).

prevent against wrongful confessions because the confession must be sufficiently accurate to lead police to further evidence of the crime.

In addition to strongly favoring written confessions, the Texas Code also requires that *Miranda* warnings, plus an additional warning that the defendant has "the right to terminate the interview at any time," be provided to the suspect in writing.[162] Moreover, the suspect's waiver of those warnings must be recorded on the face of his written statement.[163] The Supreme Court of the United States has never required the *Miranda* warnings to be in writing, never specified that the suspect be advised of his "right to terminate the interview at any time," and never mandated that waiver be in writing on the face of the confession. Indeed, the Supreme Court recently issued a decision substantially weakening the waiver doctrine by putting the onus on the defendant to invoke his rights.[164]

Finally, and most dramatically different from Supreme Court precedent, the Texas Code of Criminal Procedure actually permits the jury to disregard a confession if it does not believe the confession was made voluntarily. As in other states, Texas judges rule on defendants' motions to suppress confessions.[165] However, if a Texas judge refuses to suppress the confession and there is any evidence presented at trial from which the jury could conclude the confession was involuntary, the judge must instruct the jury not to consider the confession unless the jury believes beyond a reasonable doubt that the confession was voluntary.[166]

For example, imagine that a defendant contends that an officer threatened to break his arm unless he confessed. The officer maintains that no such threat was made, and the trial judge, believing the officer, denies the suppression motion. In many courthouses outside of Texas, that would be the end of the matter and the evidence would be admissible.[167] In Texas, however, if the defendant is able to put his allegation before the jury, the defendant should have another chance to have the confession thrown out, this time by the jury.[168]

In practice, it is rare for juries to find confessions involuntary.[169] Nevertheless, the option to place the confession's admissibility before the jury, and effectively to

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162. *See* § 2(a).

163. *See id.* at § 2(b).

164. *See* Berghuis v. Thompkins, 130 S. Ct. 2250 (2010).

165. *See* § 6 ("In all cases where a question is raised as to the voluntariness of a statement of an accused, the court must make an independent finding in the absence of the jury . . . .").

166. *See id.*

167. *See* Jackson v. Denno, 378 U.S. 368, 378 (1964) (noting the Massachusetts rule, which was similar to the Texas approach, differed from the "orthodox rule" under which "the judge himself solely and finally determines the voluntariness of the confession . . ."); *see also* T. C. Williams, *Voluntariness of Confession Admitted by Court as Question for Jury*, 170 A.L.R. 567 (1947) (categorizing twelve states as leaving the issue of voluntariness solely for the court, twenty-four states as leaving the issue ultimately for the jury, and seven states as being in doubt).

168. *See* § 6.

169. Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CAL. L. REV. 465, 470 (2005).

put the police department on trial, is an additional tactic available to defense attorneys.

The Texas Code's detailed requirements for admitting confessions as evidence makes it more difficult for state prosecutors to utilize confessions than it is for federal prosecutors working across the street. As with other generous criminal procedure rules, the legislature has contemplated eliminating the statutory protections for confessions.[170] In 1977, the legislature considered a bill that would have made oral statements admissible in all cases.[171] Ultimately, the legislature rejected this sweeping change and instead authorized only a limited exception for recorded oral confessions.[172] Further bills to eliminate or scale back the oral confession rule were introduced in 1981, 1985, and 1987, with support of prosecutors from across the state, yet these efforts failed.[173]

E. The Legislature Has Refused to Authorize Sobriety Checkpoints

Despite the fact that Texas has a serious problem with drunk driving—Texas had more than 1200 drunk-driving fatalities in 2010 and was ranked by MADD as the second worst state for DWIs[174]—law enforcement officers have not been permitted to set up sobriety checkpoints for nearly two decades.[175] As explained below, the prohibition on sobriety checkpoints stems from a poorly reasoned Texas Court of Criminal Appeals decision that the legislature could easily overrule. Yet, despite numerous bills having been introduced, the legislature has never acted.

In the 1990 case of *Michigan Department of State Police v. Sitz*,[176] the Supreme Court upheld the use of sobriety checkpoints under the special needs exception to the Fourth Amendment.[177] So long as the checkpoints are effective and operated with minimum intrusion, they do not violate the Fourth Amendment.[178] A few years after the Supreme Court's decision in *Sitz*, the Texas Court of Criminal Appeals ruled on the legality of sobriety checkpoints.[179] The Texas Court of Criminal Appeals held that the Fourth Amendment requires the legislature or another politically accountable body to specifically authorize sobriety checkpoints

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170. George E. Dix, *Texas "Confession" Law and Oral Self-Incrimination Statements*, 41 BAYLOR L. REV. 1, 10–11 (1989) [hereinafter Dix, *Texas "Confession"*] (describing some of the legislative history of the bill).

171. *See id.*

172. *See id.* at 11.

173. *See id.* at 11–14.

174. *See Texas*, MADD, http://www.madd.org/drunk-driving/campaign/state-stats/Texas.html (last visited Nov. 19, 2011).

175. *See* Holt v. State, 887 S.W.2d 16, 19 (Tex. Crim. App. 1994) (en banc) (holding sobriety checkpoints to be unconstitutional unless and until a politically accountable state body enacted constitutional guidelines for their use).

176. 496 U.S. 444 (1990).

177. *Id.* at 449–50, 455.

178. *See id.* at 455.

179. *Holt*, 887 S.W.2d at 19.

before they can be established[180]—a complete misreading of the Supreme Court's *Sitz* decision.[181] Because the Texas legislature had never explicitly authorized checkpoints, the Texas court reasoned, such checkpoints are prohibited.[182]

As a result of the *Holt* decision, Texas has become one of only ten states that forbid sobriety checkpoints.[183] And the majority of those ten states prohibit checkpoints because their state constitutions require greater protection than the Fourth Amendment.[184] The Texas Constitution does not preclude checkpoints, however. A simple bill enacted by the legislature and signed by the Governor could authorize sobriety checkpoints in Texas.[185] Legislators have attempted to pass a bill authorizing sobriety checkpoints in almost every legislative session since the Texas Court of Criminal Appeals' *Holt* decision.[186] Yet, despite the enormous drunk driving problem in Texas[187] and the repeated endorsement of law enforcement organizations,[188] every sobriety checkpoint bill has been defeated.[189]

F. The Texas Rules for Denying Bail to Dangerous Defendants Are Confusing and Restrictive

In addition to the evidentiary issues discussed above, Texas has pre-trial release rules that are favorable to criminal defendants. The Texas Constitution makes it

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180. *Id.*

181. The Supreme Court never specified approval by a legislative body as a prerequisite to a valid sobriety checkpoint. On the ambiguities of the *Holt* decision, see GEORGE E. DIX & ROBERT O. DAWSON, 40 TEXAS PRACTICE, CRIMINAL PRACTICE AND PROCEDURE § 10.72 (2d ed. 2001 & Supp. 2009).

182. *Holt*, 887 S.W.2d at 19.

183. Those states are Idaho, Iowa, Michigan, Minnesota, Oregon, Rhode Island, Texas, Washington, Wisconsin, and Wyoming. *See Sobriety Checkpoints*, MADD (2011), http://www.madd.org/laws/law-overview/Sobriety_Checkpoints_Overview.pdf.

184. *See* State v. Henderson, 756 P.2d 1057, 1063–64 (Idaho 1988); Sitz v. Dep't of State Police, 506 N.W.2d 209, 224–25 (Mich. 1993); Ascher v. Comm'r of Pub. Safety, 519 N.W.2d 183, 187 (Minn. 1994); State v. Boyanovsky, 743 P.2d 711, 712 (Or. 1987); Pimental v. Dep't of Transp., 561 A.2d 1348, 1351–53 (R.I. 1989); City of Seattle v. Mesiani, 755 P.2d 775, 776 (Wash. 1988).

185. *See Holt*, 887 S.W.2d at 19.

186. *See* H.R. 169, 81st Leg., Reg. Sess. (Tex. 2009); S.B. 298, 81st Leg., Reg. Sess. (Tex. 2009); S.B. 59, 80th Leg., Reg. Sess. (Tex. 2007); S.B. 233, 80th Leg., Reg. Sess. (Tex. 2007); H.R. 253, 80th Leg., Reg. Sess. (Tex. 2007); H.R. 50, 79th Leg., Reg. Sess. (Tex. 2005); H.R. 309, 79th Leg., Reg. Sess. (Tex. 2005); S.B. 44, 78th Leg., Reg. Sess. (Tex. 2003); H.R. 226, 78th Leg., Reg. Sess. (Tex. 2003); S.B. 398, 76th Leg. Reg. Sess. (Tex. 1999); H.R. 1927, 76th Leg., Reg. Sess. (Tex. 1999); S.B. 499, 75th Leg., Reg. Sess. (Tex. 1997); S.B. 357, 74th Leg., Reg. Sess. (Tex. 1995); H.R. 263, 74th Leg., Reg. Sess. (Tex. 1995); H.R. 950, 73rd Leg., Reg. Sess. (Tex. 1993).

187. *See* MADD, *supra* note 174 and accompanying text.

188. *See, e.g.*, Guillermo Garcia, *SAPD Proposals Win Council OK*, SAN ANTONIO EXPRESS-NEWS, May 2, 2008, at 3b (noting that the Police Chief of San Antonio was "seeking the Legislature's support for several beefed-up DWI efforts, including random, roving sobriety checkpoints—a method that is limited under current state law").

189. *See News Roundup*, SAN ANTONIO EXPRESS-NEWS, Nov. 28, 2010, at B2 ("North Texas lawmakers plan to try again to introduce a sobriety checkpoints bill in the new legislative session. Similar legislation has failed before. The checkpoints have been banned since 1994.").

difficult for prosecutors to deny bail to dangerous defendants.[190] Not only does the state constitution impose a complicated set of rules that lawyers can easily misunderstand, but it also imposes a short window for prosecutors to produce live evidence in support of a motion to deny bail.[191] Additionally, bond amounts for many Texas defendants are considerably lower than the amounts imposed by jurisdictions outside of Texas.[192] In part because of these rules, many defendants who would be detained in advance of trial in other states are granted bail in Texas.

The Texas Constitution does not permit judges to simply deny bail because the defendant committed a particularly egregious crime, is a clear threat to the community, or has a laundry list of prior convictions.[193] Rather, the judge must determine whether the defendant fits specifically into one of a handful of (complicated) categories provided by the Constitution. In short, the Texas Constitution allows a defendant to be "no-bonded" when he is accused of committing (1) a felony and has two previous felony convictions; (2) a felony while out on bail for a pending felony; (3) a felony involving a deadly weapon, when he has a previous conviction for a felony; (4) a violent or sexual offense while under supervision such as probation; (5) a crime of family violence, which violates a condition of bail; or (6) a capital felony where proof is evident.[194]

As the long list of rules above indicates, the Texas bail rules are complicated. Anecdotally, prosecutors and defense attorneys would likely concede that many practicing lawyers and felony court judges—even those with considerable experience—simply do not understand the rules governing the denial of bail in Texas cases. And because prosecutors and judges sometimes do not understand the rules, they mistakenly fail to deny bail to defendants who fall within the statutory requirements.

Additionally, even if judges properly deny bail, there is another trap for the unwary prosecutor. The Texas Constitution requires that judges hold a hearing on the denial of bail within seven calendar days of defendants' initial incarceration.[195] As Professors Dix and Dawson have observed, the Court of Criminal Appeals treats the seven-day rule as jurisdictional and enforces it with "care and rigor."[196] Accordingly, in cases where prosecutors and judges fail to initiate such a hearing

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190. *See* GEORGE E. DIX & ROBERT O. DAWSON, 41 TEXAS PRACTICE, CRIMINAL PRACTICE AND PROCEDURE § 16.181 (2d ed. 2001) ("The provisions for denial of bail in certain noncapital cases, contained in article I, section 11a of the Texas Constitution, are in many ways more specific and certainly are more procedurally complex than those for denial of bail in capital prosecutions.").

191. *See* TEX. CONST. art. 1, § 11(a).

192. *See, e.g.*, *District Court Bail Schedule*, HARRIS CNTY. DIST. CT., http://www.justex.net/BailBondSchedule.aspx (last visited Dec. 31, 2011); *see also infra* note 199 (demonstrating Harris County's low rates, as compared by the author to rates in other jurisdictions).

193. *See* DIX & DAWSON, *supra* note 190, at § 16.12 ("Bail cannot, for example, be denied on the basis that a felony defendant is accused of numerous offenses.").

194. *See* TEX. CONST. art. 1, §§ 11–11c; TEX. CODE CRIM. PROC. ANN. art. 17.152 (West 2011).

195. *See* TEX. CONST. art. 1, § 11a.

196. DIX & DAWSON, *supra* note 190, at § 16.192.

and savvy defense lawyers lay low for seven days, the defendant must be granted bail.[197]

Moreover, when bail is available—which it is in most cases—the amount of money is surprisingly low. In Harris County—Texas's largest jurisdiction—the standard bail amount for a first degree felony is only $20,000.[198] For non-capital murder cases, the presumptive bail amount is only $50,000.[199] Similarly low bail amounts are in place in Fort Worth[200] and Dallas.[201] Judges, of course, are free to increase bail beyond the standard amounts[202] so long as they do not raise it impermissibly high.[203] Nevertheless, it is not the least bit unusual for alleged murderers to be granted bail at fairly low rates in Texas, and remain free pending trial.[204] And occasionally, murder defendants who have posted low bail amounts of $50,000,[205] $35,000,[206] or as low as $10,000[207] decide to flee rather than show up for trial.

By contrast, jurisdictions outside of Texas impose much tougher bail amounts. Many counties—including some in the more liberal state of California—deny bail outright to all murder defendants.[208] In New Jersey, the statewide bail schedule sets the presumptive minimum bail for murder cases at $250,000, which is more than five times the presumptive amount in Houston.[209] In Los Angeles County,

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197. *See id.*

198. *See* HARRIS CNTY. DIST. CT., *supra* note 192. The Court of Criminal Appeals has largely declined to intervene in counties' use of bail schedules. *See* DIX & DAWSON, *supra* note 190, at § 16.102.

199. *See* HARRIS CNTY. DIST. CT., *supra* note 192.

200. *See* TARRANT COUNTY CRIMINAL DISTRICT JUDGES RECOMMENDED BOND SCHEDULE (2011) (on file with the author).

201. *See* DALLAS COUNTY RECOMMENDED BOND SCHEDULE (2009) (on file with the author).

202. *See* Brian Rogers, *Pasadena Man Accused of Killing Stepdaughter Posts Bail: Woman Died Saving Mother from Attack, Husband Says*, HOUS. CHRON. (Aug. 18, 2008), http://www.chron.com/neighborhood/pasadena-news/article/Pasadena-man-accused-of-killing-stepdaughter-1779454.php (explaining how judge raised murder defendant's bail from $50,000 to $100,000).

203. The TEXAS CODE OF CRIMINAL PROCEDURE states, quite ambiguously, that bail cannot be used as an "instrument of oppression." *See* TEX. CODE CRIM. PROC. ANN. art. 17.15(2) (West 2011).

204. *See* Renee C. Lee, *Defendant Skips Out on Capital Murder Trial: Huntsville Man Was Freed on Bond Twice in 2006 Case*, HOUS. CHRON., May 9, 2008, at B1 (quoting Montgomery County District Attorney as saying that "$100,000 bail is not unusual for a non-death penalty capital murder case").

205. *See id.* ("A Huntsville man who was charged with capital murder in 2006 and then released twice on [$50,000] bail . . . is on the lam after not showing up for his trial.").

206. *See* Susan Carroll, *Elusive Justice: An Abuse of Freedom, Dozens of Illegal Immigrants out on Bail Commit Another Crime or Vanish Before Trial*, HOUS. CHRON., Nov. 17, 2008, at A1 (fleeing while on $35,000 bond).

207. *See* Brian Rogers, *Change Inspired by 1987 Homicide: Defendant Fled but Did Not Hide His Identity*, HOUS. CHRON., Apr. 26, 2009, at A8 (fleeing after posting $10,000 bail in 1988 and not located until 2009).

208. *See, e.g.*, CRIMINAL BAIL SCHEDULE FOR SEMINOLE COUNTY, FLORIDA, NO. 08-03-2(A2) (2010) (on file with author) (prohibiting bail for any first degree felony punishable by life); SUPER. CT. OF CAL., COUNTY OF NEVADA FELONY BAIL SCHEDULE (on file with the author) (prohibiting bail in murder cases); TULARE COUNTY SUPERIOR COURT FELONY/MISDEMEANOR BAIL SCHEDULE (2009) (on file with author) (same).

209. *See* Memorandum from Phillip S. Carchman, Admin. Dir. of the Courts, to Assignment Judges (May 12, 2005) [hereinafter NEW JERSEY BOND SCHEDULE], http://www.judiciary.state.nj.us/directive/criminal/dir_09_05.pdf.

California—a jurisdiction every bit as busy as Texas's largest cities—the presumptive bail amount for non-capital murder is $1,000,000.[210]

The divergence is equally clear for felonies other than murder. For many first degree felonies—for instance, kidnapping, manslaughter, and sexual assault—other states require hundreds of thousands of dollars for defendants to post bail,[211] compared to $20,000 in Houston[212] or $25,000 in Fort Worth[213] and Dallas.[214] To paint an even starker picture, consider that some California jurisdictions set the same presumptive bail amount for burglary cases and campaign finance violations that Texas cities use for murder cases.[215]

In sum, many Texas defendants find it considerably easier to post bail than their counterparts in other states. Unlike the search and seizure and confession rules discussed above, Texas's bond rules result not from the state legislature's choices, but from the state constitution and from local bond schedules. Nevertheless, the fact remains that defendants seeking bail in Texas are in a far better situation than would be expected in a tough-on-crime state.

G. Statutory Discovery Rules Are Far More Favorable to Defendants in Texas than Most Other Jurisdictions

As a general matter, there is far less discovery in criminal cases than in civil matters.[216] Defendants have a limited constitutional guarantee to receive favorable and material evidence under the *Brady* doctrine,[217] but beyond that, the availability of discovery is almost entirely a creature of statute.[218] And while informal discovery is present and effective in most well-functioning criminal courthouses,[219] defendants' statutory rights to discovery remains important, and, in most states, quite limited. To the extent there is a national trend toward more discovery in criminal cases, it is actually a trend toward defendants being required

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210. *See* SUPER. CT. OF CAL., LOS ANGELES COUNTY, FELONY BAIL SCHEDULE 3 (2011) (on file with the author).

211. *See id.*; *see also* NEW JERSEY BOND SCHEDULE, *supra* note 209.

212. *See* HARRIS CNTY. DIST. CT., *supra* note 192.

213. *See* TARRANT COUNTY CRIMINAL DISTRICT JUDGES RECOMMENDED BOND SCHEDULE, *supra* note 200.

214. *See* DALLAS COUNTY RECOMMENDED BOND SCHEDULE, *supra* note 201.

215. *See* LOS ANGELES COUNTY, *supra* note 210, at 3 ($50,000 for campaign violations); TULARE COUNTY SUPERIOR COURT FELONY/MISDEMEANOR BAIL SCHEDULE, *supra* note 208 ($50,000 for burglary).

216. *See* John G. Douglass, *Balancing Hearsay and Criminal Discovery*, 68 FORDHAM L. REV. 2097, 2146–50 (2000).

217. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that "suppression . . . of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment").

218. *But see* Williams v. Florida, 399 U.S. 78 (1970) (upholding state rules requiring defendants to provide notice and information to prosecution about their alibi defense).

219. *See* John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 457–62 (2001) (discussing informal discovery and noting that "[f]or the most part, the process works effectively").

to *produce* information to the prosecution.[220] Once again, however, Texas is different. Not only do Texas defendants have a statutory right to receive considerable discovery, but the Texas Code rejects most of the defendant disclosures adopted by other states over the last few decades. Additionally, Texas has detailed discovery obligations with which prosecutors must comply for evidence to be used at the sentencing phase of trials. These pro-defendant discovery rules are explained below.

1. Texas Defendants Have Greater Statutory Rights to Discovery than Defendants in Federal Court and Many Other States

Defendants' rights to statutory discovery vary widely by jurisdiction. As Professor Jenny Roberts has explained,

> Around one-third of the states have relatively broad discovery rules or statutes, modeled on American Bar Association standards. But about a dozen states follow the highly restrictive federal rule, which is premised in part on the idea that a defendant should not be entitled to witness names or statements for pretrial investigation, but rather only for cross-examination purposes should the case ever get to that stage. The remaining states fall between the two models.[221]

The discovery divide among the states is best illustrated by the crucial question of witness lists. In the federal system and in some states, the defendant is not entitled to know the identity of the prosecution's witnesses until the jury has been sworn.[222] Prosecutors may, as a matter of courtesy, inform defense lawyers in advance, but there is nothing to prevent prosecutors from the Perry Mason moment in which the unknown witness walks through the courtroom doors. By contrast, about half of the states require prosecutors to provide not just witness names, but also their addresses and prior statements before trial.[223]

Texas falls on the more generous end of the scale. Courts have interpreted the Texas Code to require[224] the State to disclose "a list of witnesses it intends to use at

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220. *See* Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CAL. L. REV. 1567, 1569 (1986) ("Beginning early in the 1970's, revolutionary expansion occurred in criminal discovery by the prosecution against the defense.").

221. Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1099 (2004).

222. *See* Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 578–79.

223. *See* Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1623 (2005).

224. While courts regularly order the disclosure of witness lists, at least two commentators caution that the word "require" may be too strong. As Professors Dix and Dawson have observed, "the appellate case law contains no case in which a trial judge's refusal to require the state to provide a complete witness list is held reversible error." GEORGE E. DIX & ROBERT O. DAWSON, 42 TEXAS PRACTICE, CRIMINAL PRACTICE AND PROCEDURE § 22.171 (2001).

trial, photographs, defendant's written statements, letters, accounts, and other evidence material to any matter in the case."[225] While Texas is not the single most generous state in terms of discovery, it is certainly more generous in providing information to criminal defendants than many states and the federal system. Moreover, as discussed below, Texas is among a dwindling minority of states that prevents prosecutors from discovering valuable information from defendants in advance of trial.

2. *Despite a National Trend Toward Requiring Disclosure by Defendants, Texas Requires Defendants to Produce Almost Nothing in Advance of Trial*

Over the last few decades, states have imposed reciprocity requirements that force defendants to disclose witness lists and preview their defense theory in exchange for receiving certain discovery from the government.[226] And many states go even further by giving prosecutors an independent right to discover information from the defense.[227] State statutes across the country permit prosecutors to discover information about the defendant's alibi, statements by defense witnesses, expert reports, tangible objects and a slew of other information.[228]

As noted, Texas prosecutors must turn over witness lists and other materials to defendants in advance of trial.[229] Yet, these prosecutors have no reciprocal right to receive such discovery from defendants. Texas judges lack statutory authority to force defendants to produce any information about fact witnesses.[230] As two noted commentators have remarked, "[t]here is universal agreement that trial judges lack authority to compel the defense to provide the State with its witness list."[231]

While there is good reason not to impose discovery obligations on defendants,[232] it is clear that such a firm stance handicaps the government's efforts to convict defendants. Prosecutors must sometimes "fly blind" at trial and during plea bargaining because they have no idea who the defense might call and what theory of the case might be put forward.[233]

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225. Henricks v. State, 293 S.W.3d 267, 274 (Tex. Crim. App. 2009) (citing TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2011)). Although very difficult to obtain, Texas defendants may also seek permission to take depositions of prosecution witnesses. *See* TEX. CODE CRIM. PROC. ANN. art. 39.02 (West 2005).

226. *See* Mosteller, *supra* note 220, at 1580.

227. *See id.* at 1580–81.

228. *See id.* at 1579–82.

229. *See* Brown, *supra* note 223, at 1623.

230. Under the Texas Code, judges may, but need not, require the disclosure of the names and addresses of expert witnesses. *See* TEX. CODE CRIM. PROC. ANN. art. 39.14(b). Defendants who wish to offer evidence of the insanity defense must provide notice of their intent to offer that evidence at least twenty days before trial. *See id.* at art. 46C.051 (West 2005).

231. *See* Thornton v. State, 37 S.W.3d 490, 492 (Tex. Crim. App. 2000) (alteration in original) (quoting DIX & DAWSON, *supra* note 190, at § 22.81 (1995)) (internal quotation marks removed).

232. For an argument against too much discovery from defendants, see generally Mosteller, *supra* note 220.

233. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2531 (2004).

Once again, the Texas legislature has been in a position to follow the national trend and adopt a pro-prosecution rule that permits some discovery from defendants before trial, but it has not done so. Indeed, in 1999, the legislature made a very narrow change to the Texas discovery statute so that judges could, but were not obligated to, order defendants to disclose their expert witnesses prior to trial.[234] The legislature could have imposed additional burdens on defendants to disclose fact witnesses and to provide notice of alibi defenses (as many other states have done),[235] but it declined to do so.

3. Prosecutorial Disclosure of Extraneous Offenses for the Punishment Phase Is Required by the Code and Is Burdensome to Prosecutors

The Texas Code of Criminal Procedure also causes discovery headaches for prosecutors at the punishment phase of trials. At sentencing, judges and juries are called upon to consider not just the gravity of the offense committed, but the offender himself. To do so, the fact-finder looks beyond the instant crime and considers extraneous behavior, such as prior criminal convictions and bad acts that did not result in conviction.[236] Under article 37.07 of the Texas Code, prosecutors must give advance notice of all extraneous offenses they plan to introduce at the punishment stage.[237] Prosecutors must identify the nature of the act, the date when it happened, the county where it occurred, and the victim who was harmed.[238]

Although disclosure of extraneous offenses seems simple in the abstract, it is actually burdensome to prosecutors. In many Texas counties, prosecutors are overburdened with huge caseloads and they struggle even to prepare their case-in-chief.[239] Accordingly, prosecutors sometimes do not turn their attention to the punishment phase until the eve of trial, and often do not discover valuable extraneous offenses in time to give notice of the date, location, and victim of prior misconduct by the defendant.[240] At that point, judges must exclude those extraneous offenses from consideration.[241]

For example, consider a hypothetical case in which a defendant has been indicted for fraudulently selling land she did not own to a poor immigrant named Maria. A few days before trial, Maria off-handedly mentions to the prosecutor that

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234. *See Thornton*, 37 S.W.3d at 493 (discussing the 1999 revision to TEX. CODE CRIM. PROC. ANN. art. 39.14(b)).

235. *See supra* notes 226–28 and accompanying text.

236. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(3)(g) (West 2011).

237. *See id.* Defense attorneys are required to request notice in order for this provision to be applicable, but most defense attorneys simply do so in a standard form discovery request in all of their cases.

238. *See id.*

239. *See generally* Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261 (2011).

240. *See, e.g.*, James v. State, 47 S.W.3d 710 (Tex. Ct. App. 2001) (vacating punishment because prosecutor failed to provide notice of the date of extraneous sexual abuse allegations admitted into evidence at punishment stage).

241. *See id.*

the defendant committed the same type of land fraud against three other victims who Maria knew only on a first-name basis. The prosecutor tries to get in touch with these other three victims but, because time is short, she is unable to contact them before trial begins. Without the victims' full names and the dates when they were defrauded, the prosecutor is unable to give proper notice of these extraneous offenses as required under the Texas Code. In the middle of trial, the prosecutor finally locates the other three victims and they all indicate they would testify that, just like Maria, they were tricked into paying for land that the defendant did not own. This evidence is certainly relevant at the punishment stage and would be quite helpful to the prosecutor in showing a pattern of misconduct by the defendant. Yet, the prosecutor likely will be prohibited from using this testimony because of lack of notice.[242] (And, if the statute of limitations has passed, a stand-alone prosecution for the land fraud would be forbidden as well.)

In the case outlined above, the Texas discovery rules would work an injustice by forbidding the fact-finder from considering relevant punishment evidence. On the other hand, there are surely cases where defendants would suffer unfairly if the rules allowed prosecutors to surprise them with extraneous offenses without adequate notice. While the optimal amount of notice is debatable, it is noteworthy that once again Texas has adopted a rule that is more favorable to defendants than is required. In fact, in requiring notice of extraneous offenses in non-capital cases, Texas has rejected its own notice rule for death penalty cases.[243] Under the separate Texas statute governing capital murder cases, prosecutors are not required to give advance notice before introducing extraneous offenses at the punishment phase.[244] The legislature could easily apply this rule to non-capital cases, but has chosen not to do so.

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In sum, the Texas Code of Criminal Procedure requires prosecutors to provide defendants with considerable fact discovery as well as notice of extraneous offenses for the punishment stage, while receiving little discovery in return. The Texas Code thus advantages defendants by making the discovery process more burdensome for prosecutors.

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242. *But see* Edward L. Wilkinson, *Punishment Evidence:* Grunsfeld *Ten Years Later*, 35 ST. MARY'S L.J. 603, 629, 632 (2004) (noting that "the reasonableness of the State's notice turns on the facts and circumstances of each individual case" and indicating that "[w]hile notice as late as the Friday before trial beginning the following Monday has been held to be unreasonable, under other circumstances notice while trial is underway has been held to be 'reasonable'").

243. *See* Janet Morrow & Robert Morrow, *In a Narrow Grave: Texas Punishment Law in Capital Murder Cases*, 43 S. TEX. L. REV. 979, 1095 (2002) ("A capital defendant is not entitled to notice by statute that the State intends to offer evidence of an unadjudicated extraneous offense against him at punishment, even though Texas statutes require such notice to the defendant in a non-capital case.").

244. *See id.*

H. Texas Defendants in All Criminal Cases—Including Traffic Violations—Are Entitled to a Jury Trial and Can Even Request That the Jury Decide Their Sentence

The Supreme Court of the United States has long made clear that criminal defendants do not have a Sixth Amendment right to a jury in all criminal cases.[245] Rather, defendants must be charged with an offense that carries more than six months' incarceration in order to qualify for a jury trial under the federal Constitution.[246] Additionally, with the exception of death penalty cases, the Supreme Court has never required any jury involvement at the sentencing phase of trial.[247] These two limitations on the jury trial right ostensibly benefit the prosecution.[248] Texas has rejected both rules, however.

1. Defendants in All Cases—Even Those Charged with Running a Stop Sign—Can Demand a Jury Trial in Texas

Although most states continue to afford a jury trial right in all criminal cases carrying jail time, nine states have accepted the Supreme Court's invitation and eliminated the requirement of a jury trial for low-level misdemeanors carrying six months or less incarceration.[249] In these states, defendants charged with drunk driving, marijuana possession, and other similarly minor offenses can be sentenced to jail time without the benefit of a jury. Some states that cannot take this approach (because their state constitutions require jury trials in all criminal cases) have managed to eliminate juries for the lowest level offenses by classifying them as infractions, rather than conventional crimes.[250]

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245. *See* Duncan v. Louisiana, 391 U.S. 145, 159–60 (1968) (requiring jury trial only in non-petty criminal cases).

246. *See* Baldwin v. New York, 399 U.S. 66 (1970) ("[N]o offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized."); Gershowitz, *12 Unnecessary Men*, *supra* note 76, at 10 & n.60.

247. On the history of jury sentencing, see Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311 (2003).

248. As Professor Andrew Leipold has documented, defense lawyers have a strong preference for juries. *See* Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone*, 83 WASH. U. L. Q. 151, 158–63 (2005). The saying goes that a guilty defendant tries his luck with the jury, while an innocent defendant goes to the judge. *See* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1501 (1999) ("If juries are less accurate guilt determiners than judges, innocent defendants will choose to be tried by judges rather than run the risk of jury mistake, while guilty defendants will choose to be tried by juries, hoping for a mistake. The acquittal rate should therefore be higher in bench trials—and it is.").

249. *See* Gershowitz, *12 Unnecessary Men*, *supra* note 76, at 10 & n.61 (enumerating the states that have taken this approach).

250. *See, e.g.*, Mitchell v. Super. Ct., 783 P.2d 731, 738 (Cal. 1989) ("In contrast to the federal jury trial guaranty which draws a distinction between 'serious' and 'petty' criminal offenses and requires a jury trial only for those offenses which fall into the 'serious' category, the right to trial by jury embodied in the California Constitution extends to so-called 'petty' as well as to 'serious' criminal offenses, i.e., to all misdemeanors as well as to all felonies. Under the California Constitution, only infractions not punishable by imprisonment (§ 19c) are not within the jury trial guaranty."); *see also* MODEL PENAL CODE § 1.04(5) (setting forth a category of

In Texas, the right to a jury trial remains sacrosanct.[251] Much like the Sixth Amendment, the Texas Constitution specifies that "[i]n all criminal prosecutions the accused shall have a speedy public trial by an impartial jury"[252]; and over thirty years ago, the Texas Court of Criminal Appeals rejected the Supreme Court's invitation to eliminate jury trials in minor cases.[253] Moreover, the Texas Penal Code classifies even the most minor offenses—such as a traffic ticket for running a stop sign or driving without insurance—as criminal offenses, not non-criminal infractions.[254] While these tickets carry only a fine and no jail time, they are classified as Class C misdemeanors in the Texas Penal Code.[255] Thus, when a defendant is ticketed for a traffic offense, she has a right to a jury trial.[256]

Texas's expansive jury trial right is not simply a paper guarantee with no real-world significance. Every day, Texas juries are empanelled to handle traffic cases and other low-level offenses. For instance, on November 4, 2010, the author, along with thirty-two other people, was called for jury duty in justice of the peace court in Harris County, Texas to adjudicate a case where the defendant was charged with running a stop sign. After voir dire, the court empanelled a six-person jury to hear testimony. The defendant was ultimately convicted.

In another similarly low stakes case, a Harris County defendant was charged with catching a fish that was a few inches too small—a Class C misdemeanor in Texas carrying a maximum fine of $500.[257] Rather than pay the fine (which the prosecutor offered to knock down to $50), the defendant insisted on having a trial by jury.[258] The court summoned forty prospective jurors and empanelled a six-person jury.[259] After the jury acquitted the defendant, one juror remarked that he thought the defendant was guilty, but voted to acquit because "it was a waste of everyone's time for the prosecutor to drag everyone into court over a fish."[260]

"violations" which do not constitute a crime and which "shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense").

251. TEX. CONST. art. 1, § 10.

252. *Id.*

253. *See* Franklin v. State, 576 S.W.2d 621 (Tex. Crim. App. 1978).

254. *See* TEX. PENAL CODE ANN. § 12.41 (West 2009) ("[A]ny conviction not obtained from a prosecution under this code shall be classified as follows . . . 'Class C misdemeanor' if the offense is punishable by fine only.").

255. *See id.* at § 12.23 (West 1994) ("An individual adjudged guilty of a Class C misdemeanor shall be punished by a fine not to exceed $500.").

256. In fact, the Texas jury trial right is so expansive that it permits defendants convicted of Class C misdemeanors in justice of the peace court to appeal the conviction to county court and receive a trial de novo. *See* TEX. CODE CRIM. PROC. ANN. art. 4.08 (West 2011).

257. *See* Interview with Danny Lacayo, Assistant Dist. Att'y, Harris Cnty. Dist. Attorney's Office (Jan. 24, 2010) (on file with author).

258. *See id.*

259. *See id.*

260. *See id.*

As the under-sized fish case demonstrates, Texas jurors will sometimes nullify the prosecution of factually guilty defendants because they blame the prosecution for wasting their time (even though it was the defendant, not the prosecutor, who invoked the jury trial). Regardless of whether one believes expansive jury trial rights are good or bad public policy,[261] it seems clear that the policy makes it harder for prosecutors to convict some defendants.

2. *Criminal Defendants Have the Option to Choose Between the Jury and Judge for Sentencing, Allowing Them to Pick Whomever They Think Will Be Less Punitive*

In the federal system and almost all of the states, judges are exclusively responsible for sentencing in non-capital cases.[262] The Texas framework is very different, however. In Texas, defendants have the exclusive option, prior to trial, to choose whether to be sentenced by the judge or the jury.[263] So long as the defendant does not try to change his election after trial has begun, prosecutors have no authority to impede a defendant's choice.[264] This approach is so unique—and so favorable to criminal defendants—that only one other state in the nation has adopted it.[265] As with the search and seizure and confession rules discussed above, this unique pro-defendant rule is a statutory right that could easily be overruled by the legislature.[266]

The option for jury sentencing is very favorable to Texas criminal defendants. Because judges are repeat players in the criminal justice system and sentence hundreds of defendants per year, it is well known in the courthouse which judges are tough and which are lenient.[267] And because Texas is an indeterminate sentencing state with extremely broad sentencing ranges, the possible difference

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261. I have previously argued that guaranteeing jury trials for low-level offenses is bad public policy. *See* Gershowitz, *12 Unnecessary Men*, *supra* note 76.

262. *See* Nancy J. King & Roosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three State Survey*, 57 VAND. L. REV. 885, 886 (2004) (explaining that Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia allow jury sentencing).

263. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07 § 2(b) (West 2011).

264. *See id.* The only time a defendant needs permission from the prosecution to change his election from jury to judge is if he has elected jury sentencing before the start of trial and has subsequently changed his mind. *See id.*

265. Missouri is the only state to adopt the Texas framework. *See* MO. ANN. STAT. § 557.036(4)(1) (West 2003). A few other states have adopted jury sentencing, but they give prosecutors more input on the decision to waive the jury. *See* Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 1006 (2003) (explaining that in Arkansas, the defendant needs the consent of the prosecution to waive jury sentencing, and that in Oklahoma and Virginia, the defendant can only waive jury sentencing with the consent of the prosecutor and the judge); Iontcheva, *supra* note 247, at 376–77 ("Kentucky allows waivers of jury sentencing only with the assent of the prosecution.").

266. As one Texas appellate court explained, "[a] defendant in a criminal case has no *constitutional* right to have a jury assess punishment. . . . He does, however, have a statutory right to have the jury assess punishment." Sterry v. State, 959 S.W.2d 249, 257 (Tex. App. 1997) (emphasis added) (internal citations omitted).

267. *See* Gershowitz, *12 Unnecessary Men*, *supra* note 76, at 36–37.

between the punishment a judge or jury might impose is enormous.[268]

If judge *A* is reputed to be extremely tough, defendants in that court typically elect to have the jury assess punishment because they have better odds of a lighter sentence. If judge *B* is regarded as lenient, defendants almost always elect to have the judge, not the jury, impose punishment.[269] Consider a real-world example from Harris County, Texas. From 2005 to 2008, Judge Devon Anderson presided over the 177th District Court and was regarded as a tough sentencing judge.[270] Defendants who proceeded to trial were thought to regularly elect sentencing by the jury because they believed they would receive a lighter sentence. In 2008, Kevin Fine, a defense attorney who campaigned on the idea that his prior problems with drug addiction would better enable him to deal with many felony defendants, unseated Judge Anderson.[271] Not surprisingly, in the two years since Judge Fine has taken the bench, a majority of defendants in the 177th District Court are now expected to decline jury sentencing and elect to be sentenced by Judge Fine.

This is not to say that Texas prosecutors always hate the idea of the defendant having a choice between jury and judge sentencing. As prosecutors and defense attorneys well know, jury sentencing is a wild card, and sometimes defendants make the wrong choice. Many prosecutors have war stories in which they feared a jury would impose a light sentence, only to have the jury impose a far tougher sentence than the judge likely would have handed down. Those stories are the exception, however. In most cases, when defendants have basic background information about the presiding judge and are presented with the option to choose between the judge and the jury, the defendants choose the opposite of what the prosecution would prefer. And the sentence imposed is typically lighter than what prosecutors would have expected from the other body.

Of course, I do not want to suggest that the lighter sentences defendants sometimes receive by having the option of choosing between judges and juries is always a bad thing. In some instances, the option of jury sentencing may serve as a check against overly punitive judges. My point is that the sentencing choice

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268. For instance, in a first degree felony case, a judge could choose to impose ten years while a jury might opt to give the defendant thirty years or more. *See* TEX. PENAL CODE § 12.32 (West 2009) (carrying a range of five to ninety-nine years for first degree felonies). In a second degree felony, the judge could choose to impose the maximum of twenty years, while the jury could impose the minimum sentence of two years. *See id.* at § 12.33 (West 2009) (carrying a range of two to twenty years for second degree felonies).

269. To put the matter metaphorically, although Texas defendants do not get two bites at the sentencing apple, they do have the opportunity to look carefully at one of the apples before deciding which one to bite into.

270. *See The 177th District Court Judicial Race*, LIFE HARRIS COUNTY CRIM. JUST. CENTER, (Oct. 1, 2008, 11:32 PM), http://harriscountycriminaljustice.blogspot.com/2008/10/177th-district-court-judicial-race.html (discussing Judge Anderson, in blog maintained by former Assistant District Attorney and current defense attorney, and noting that she was a "tough judge").

271. *See* Brian Rogers, *Real-Life Experience: With the "Four-Horsemen of Addiction" Behind Him, Newly Elected Judge Says He's Ready*, HOUS. CHRON. (Nov. 17, 2008), http://www.chron.com/news/houston-texas/article/New-judge-says-his-former-addiction-can-help-1540561.php.

afforded to Texas defendants is a procedural rule that prosecutors almost uniformly dislike and that every other state in the nation, save one, has rejected.[272]

* * *

The discussion in Part II.A through II.H highlights a number of areas in which the Texas Code of Criminal Procedure and the Texas Constitution guarantee significant rights to Texas defendants that they would not receive under the federal Constitution. These protections, while the most significant, are in no way the only pro-defendant guarantees provided to Texas defendants. The Texas Code of Criminal Procedure also imposes more rigorous requirements for conducting warrantless arrests,[273] tighter restrictions on the execution of search warrants,[274] a broader right to counsel at probation revocation hearings,[275] and a variety of other safeguards not compelled by the federal Constitution.

It is important to be modest in stating the limits of my argument. I am not arguing that Texas has the (or even one of the) most pro-defendant codes of criminal procedure in the nation. I am also not arguing that the criminal procedure protections afforded by the Texas Code are bad public policy. Rather, I am simply making the descriptive observation that Texas is not nearly as tough as its reputation suggests when it comes to criminal procedure.

III. WHY IS TEXAS TOUGH ON CRIME, BUT SOFT ON CRIMINAL PROCEDURE?

Having demonstrated that Texas can be simultaneously tough on crime and generous in its statutory criminal procedure protections, the lingering question is "why?" As explained below, there are a number of possible explanations as to why the Texas Code of Criminal Procedure may be protective of criminal defendants. To be clear at the outset, I do not attempt to offer a unifying theory that reconciles all of Texas's procedural rules with all of its tough-on-crime policies. It may very well be impossible, for instance, to explain why the nation's most prolific user of capital punishment is the only state that rejects the inevitable discovery doctrine by statute. What I offer below is instead a series of starting points to explain the Texas dichotomy.

A. There Is No Inconsistency Between Being Tough on Crime and Generous on Criminal Procedure

The first explanation for the contradiction between being tough on crime and generous on criminal procedure is that there is in fact no contradiction. Texas could

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272. *See supra* note 263 and accompanying text.

273. *See* TEX. CODE CRIM. PROC. ANN. art. 14.01–06 (West 2011).

274. *See id.* at art. 18.06 (West 1981) (setting time limit of three days, not counting day of issuance or day of execution).

275. *See Ex parte* Shivers, 501 S.W.2d 898, 900–01 (Tex. Crim. App. 1973) (interpreting TEX. CODE CRIM. PROC. ANN. art. 42.12 § 3 (West 1965)).

choose to give defendants robust procedural protections before finding them guilty, but thereafter punish them harshly for violation of the social compact. Put differently, it is logical to punish harshly when we have afforded defendants vigorous procedural protections and are sure of their guilt. This theory might explain why Texas is willing to endure inefficient practices such as jury trials for traffic infractions and onerous rules for confessions.[276] It also could explain why the Texas Constitution offers only limited opportunities to deny bail to defendants who have not yet been convicted.[277] And the theory seems particularly well-suited to Texans who see their state not simply as a location but as a way of life.[278] An offense against the State of Texas and its citizens—if we are sure you committed it—is a great sin deserving of harsh punishment given how exceptional the state is in the eyes of its citizens.

On a very general level, the social compact theory seems to make sense. But the explanation breaks down when applied to certain situations. For instance, while the Texas Code of Criminal Procedure offers run-of-the-mill defendants a series of robust protections, the Texas Code certainly does not go out of its way to protect capital defendants from unjust death sentences.[279] The Texas death penalty statute is the most pro-prosecution capital punishment scheme in the nation, and has long been criticized for offering insufficient procedural protection.[280] For decades, Texas juries have sentenced inmates to death after inadequate trials and substandard representation.[281] Texas's death penalty record therefore makes it difficult to assert that Texas criminal law and procedure is founded on an idea of giving all criminal defendants every benefit of the doubt before punishing them harshly. The social compact argument is also unconvincing when we consider how Texas has occasionally fought payment to exonerated individuals who are entitled to compensation under the state's wrongful conviction statute.[282] In short, while there may be something to the idea that Texas's toughness follows directly from vigorously protecting procedural rights, the argument has limitations.

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276. *See supra* Parts II.H & II.D.

277. *See supra* Part II.F.

278. *See* J.A. Burkhart, *Texas, Texans, and Texanism*, 9 ANTIOCH REV. 316, 318 (1949).

279. *See supra* Part I.A.

280. *See* Morrow & Morrow, *supra* note 243, at 1002. For a discussion of the legal questions raised by the statute, see Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations, Implementation of the Death Penalty in "Executing" Versus "Symbolic" States in the United States*, 84 TEX. L. REV. 1869, 1890–95 (2006).

281. *See, e.g.*, DAVID R. DOW, EXECUTED ON A TECHNICALITY: LETHAL INJUSTICE ON AMERICA'S DEATH ROW (2005).

282. *See, e.g.*, Harvey Rice, *State Rejects Compensation for Wrongly Convicted Man*, HOUS. CHRON. (Feb. 14, 2011), http://www.chron.com/default/article/State-denies-compensation-to-wrongly-convicted-man-1692982.php (refusing to pay $1.4 million to man wrongfully on death row for eighteen years because the judge's order dismissing the charges did not specifically say the inmate was innocent).

B. Texas's Distrust of Government Power, Its Penchant for Private Ordering, and Its Emphasis on Individual Liberty May Explain Criminal Procedure Guarantees and Tough Punishments

A second, and slightly more persuasive, argument centers around Texas's engrained gun culture[283] and its disdain for excessive government interference.[284] Texans believe strongly in gun ownership and the concomitant idea of private ordering. They have no problem with punishing offenders harshly and indeed, Texas has a long history of lynching and vigilante justice.[285] But when it comes to government power, Texas has historically been suspicious.[286] While the Texas Rangers have been revered law enforcement figures for over a century,[287] Texans by and large remain skeptical of anything that might be seen as encroaching on individual liberties. This might explain why Texas is unwilling to accept an inevitable discovery exception that excuses illegal conduct by law enforcement officers,[288] a good faith exception allowing for warrants lacking probable cause,[289] or sobriety checkpoints that give police wide authority to stop anyone without suspicion.[290]

Texas's concern about governmental power is in contrast to the deference shown to law enforcement by other states.[291] To be sure, politicians in other states and in Congress do occasionally enact pro-defendant criminal procedure protections. Yet,

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283. *See The Future Is Texas*, ECONOMIST (Dec. 21, 2002), http://www.economist.com/node/1487487 ("Texas was tamed by gun-wielding cowboys and remains thoroughly marinated in gun culture."). On Texas gun laws, see Riley C. Massey, *Bull's Eye: How the 81st Texas Legislature Nearly Got It Right on Campus Carry, and the 82nd Should Still Hit the X-Ring*, 17 TEX. WESLEYAN L. REV. 199, 202–05 (2011); Robert G. Newman, *A Farewell to Arms?—An Analysis of Texas Handgun Control Law*, 13 ST. MARY'S L.J. 601 (1982).

284. *See* WILLIAM P. RUGER & JASON SORENS, GEO. MASON U., MERCATUS CTR., FREEDOM IN THE 50 STATES: AN INDEX OF PERSONAL AND ECONOMIC FREEDOM 9–10 (2009), http://mercatus.org/sites/default/files/publication/Freedom_in_the_50_States.pdf (ranking Texas fifth nationally with respect to fiscal policy, regulation, and paternalism). To name but two prominent anecdotal examples, Texas is home to libertarian hero Ron Paul and has been at the forefront of electricity deregulation.

285. *See* PERKINSON, *supra* note 46, at 142–43.

286. *See* RANDOLPH B. CAMPBELL, GONE TO TEXAS: A HISTORY OF THE LONE STAR STATE 471 (2003) (discussing Texas's distinctiveness and explaining that it has "developed outsized emphasis on many of the qualities and characteristics regarded as being especially American—a fierce devotion to personal liberty, rampant individualism, and admiration for the superrich, for example"); *see also id.* at 316 (noting that Democrats in charge of state government in the late 1800s "offered the least government possible—one that did what was necessary to protect property and preserve law and order and otherwise kept spending and taxing to a bare minimum"); *id.* at 382–92 (describing skepticism of Texans toward big-government New Deal programs).

287. *See generally* MIKE COX, TIME OF THE RANGERS: FROM 1900 TO THE PRESENT (2009).

288. *See supra* Part II.A.

289. *See supra* Part II.C.

290. *See, e.g.*, Larry Copeland, *Drunk Drivers Push Limits: Hard-Core Offenders Prompt Zero Tolerance*, USA TODAY, Dec. 8, 2010, at 3A, *available at* http://www.usatoday.com/news/nation/2010-12-08-drunken08_ST_N.htm (noting that efforts to establish sobriety checkpoints in Texas have failed because of resistance from "drunks, people who make money off of drunks and civil libertarians").

291. *See, e.g.*, Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 378–79 (1974) ("Legislatures have not been, are not now, and are not likely to become sensitive to the concern of protecting persons under investigation by the police.").

as Professor Craig Lerner has shown, this often comes from self-interest or cases where politicians have had personal encounters with law enforcement.[292] Texas politicians may not fit this mold, however, because they represent a more libertarian electorate that harbors a greater distrust of police power.[293] Thus, where politicians in other states might be unwilling to vote for criminal procedure protections that would be seen as pro-defendant, Texas politicians may be willing to do so because the vote would be seen as pro-individual liberty.

C. Longstanding Statutory Protections and Short Legislative Sessions May Keep Pro-Defendant Rules on the Books That Would Otherwise Be Rejected

A third explanation combines the age of Texas's statutory protections with the very busy and very short legislative sessions in Texas. Some of Texas's pro-defendant criminal procedure protections were codified a century ago, before the politicization of criminal justice issues.[294] And while Texas legislators might reap political dividends by repealing these protections today, they simply lack the time to do so because of Texas's brief legislative session. The Texas legislature meets for only a few months every two years[295] and there is little time for non-essential bills.[296] Hence, old laws remain unchanged unless there is an enormous groundswell for revision.

For example, the prohibition on oral confessions was added to the Texas Code in 1907.[297] There is no definitive explanation for what led to its enactment a century ago,[298] but it is clearly unpopular and ripe for deletion from the Code today.[299] Although the legislature has considered repealing the protection a few times in the past, most legislative efforts have not made it out of committee.[300]

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292. Craig S. Lerner, *Legislators as the "American Criminal Class": Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599. As the saying goes, "if a conservative is a liberal who's been mugged, then a liberal would seem to be a conservative who's been indicted." *See id.* at 603–04.

293. *See* CAMPBELL, *supra* note 286, at 316.

294. Criminal justice issues did not become a major electoral focus until the 1960s. *See* Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1, 39–40 (2010).

295. *See* TEX. CONST. art. 3, §§ 5(a), 24 (limiting the legislative session to 140 days every 2 years).

296. *See, e.g.*, Editorial, *Our Turn; Don't Let Technicalities Torpedo the Worthy Bills*, SAN ANTONIO EXPRESS, May 25, 2007, at 8B ("The Texas Legislature meets for five months every two years. That's precious little time to take care of state business.").

297. *See* Act of April 16, 1907, ch. 68, 1907 Tex. Gen. Laws 219; *see also* Dix, *Texas "Confession"*, *supra* note 170, at 7.

298. Scholars cite a case in which a sheriff claimed a prisoner had orally confessed to murder, but it was later discovered that the prisoner only spoke Swedish, which the sheriff clearly did not speak. *See* Dix, *Texas "Confession"*, *supra* note 170, at 8. As Professor Dix has explained, "[w]hether such a case ever occurred and, if so, whether it was the motivating factor for the oral confession rule is uncertain." *Id.*

299. *See id.* at 4 (recounting outraged reaction when a high-profile murder case was overturned due to the oral confession rule).

300. *See id.* at 13–14.

The same logic helps to explain why the Code's restrictive good faith exception and its private actor exclusionary rule have not been jettisoned.[301] Individual legislators have introduced legislation to abolish those protections, but the efforts have never proceeded very far.[302] For example, in 1997, a bill with the sole purpose of eliminating the exclusionary rule for evidence seized illegally by private actors died in committee a month after being introduced.[303] In 1999, a similar bill fared even worse, never even receiving a sub-committee hearing.[304] Multiple bills to expand Texas's narrow good faith exception have likewise never been reported out of subcommittee.[305]

The explanatory power of the "old rule, busy legislature" theory is limited, however. Texas is not the only state with a busy legislature, and Texas politicians know just as well as their colleagues in other states that being tough on crime (including eliminating unpopular protections for unpopular defendants) sells well at the ballot box.[306] In short, the theory that limited legislative time preserves pro-defendant rules likely explains why less salient criminal procedure protections have not come under attack. But the theory, by itself, is insufficient to explain the continued existence of the most valuable procedural protections (such as the statutory confession rules) guaranteed in the Texas Code of Criminal Procedure.

D. Being Tough on Crime May Provide Cover for Being Generous on Criminal Procedure

A fourth explanation is that Texas's well-known reputation for being tough on crime eliminates or at least reduces pressure on Texas legislators to curb criminal-procedural protections. Under this explanation, the harsh punishments imposed in Texas leads to its citizens either: (1) wrongly assuming that the state is also stingy on criminal procedure protections for defendants; or (2) not being troubled by any beneficial procedural protections because of the sheer magnitude of punishment for those who are convicted. Under either theory, there is less public outrage about pro-defendant protections in Texas than in other states, and less pressure on Texas politicians to eliminate those statutory guarantees.

Once again, there is likely some truth to this argument. Very few citizens (whether from Texas or elsewhere) recognize that the Texas Code of Criminal

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301. *See supra* Parts II.B & II.C.

302. *See* H.R. 2281, 75th Leg., Reg. Sess. (Tex. 1997).

303. *See id.*

304. *See* H.R. 1320, 76th Leg., Reg. Sess. (Tex. 1999).

305. *See* H.R. 1578, 80th Leg., Reg. Sess. (Tex. 2007); H.R. 1365, 75th Leg., Reg. Sess. (Tex. 1997); H.R. 2047, 74th Leg., Reg. Sess. (Tex. 1995).

306. *See* Gruber, *supra* note 294, at 60. Moreover, by eliminating obstacles to convictions, politicians increase the number of felons. The disenfranchisement of these felons in turn reduces the number of progressive voters who might vote against sitting conservative politicians. *See id.* ("Supporting crime control initiatives is especially rewarding for conservative politicians because increasing felony convictions leads to the disenfranchisement of those who, if they chose to vote, would likely vote for progressive candidates and policies.").

Procedure contains numerous pro-defendant guarantees. And to the extent that observers are aware of pro-defendant rules, they may wrongly attribute them to court decisions, rather than blame the legislature for them.[307]

It is important not to take this explanation too far, however. As I explained in Part I, Texas is not as tough on crime as it appears. Defendants often receive the lower end of huge sentencing ranges,[308] and when tough sentences are meted out, they are often reduced by parole.[309] More to the point, when defendants receive lighter than expected sentences[310] or when criminal cases fall apart because of procedural problems (such as illegal searches[311] or invalid confessions[312]), the news media is all too happy to highlight those cases.[313] Similar news stories abound when accused criminals are granted bail and subsequently flee or commit new crimes.[314] With media attention brought to bear, public backlash is inevitable. Texas politicians, just like their counterparts throughout the nation, therefore campaign as being tough on crime.[315] Once elected, politicians who want to bolster their reputations (and be re-elected) should seemingly look to statutory criminal procedure guarantees as low-hanging fruit to be eliminated. And, in fact, individual legislators have unsuccessfully moved to scale back many of the pro-defendant statutory rules discussed in Part II.[316]

At bottom, Texas reputation for being tough-on-crime likely staves off some public resentment toward favorable criminal procedure guarantees. But, by itself, the perception of Texas's punitiveness is likely insufficient to explain its favorable Code of Criminal Procedure.

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In the end, there is likely some truth to all four explanations discussed above. Protective criminal procedure protections are not necessarily inconsistent with

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307. Popular (though not necessarily accurate) criticism of the criminal justice system almost universally lays blame on "activist judges" rather than legislative decisions. *See, e.g.*, MARK R. LEVIN, MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA (2005).

308. *See supra* notes 72–76 and accompanying text.

309. *See supra* notes 63–67 and accompanying text.

310. *See* Richard Stewart, *Sentence Angers Victims' Family: Brazoria County Jury Gives Driver 4 Years in Prison for 2 DWI Deaths*, HOUS. CHRON., Oct. 30, 2008, at B2 (describing disappointment of victim and prosecutors with "very light" sentence).

311. *See, e.g.*, Tanya Eiserer, *Prosecutors Seek Dismissal of Drug-Case Charges: Judge Throws Out Evidence; Police Unit Already Under Review*, DALL. MORNING NEWS, Mar. 17, 2009, at 3B (suppressing search premised on consent because police threatened to incarcerate suspect's wife and place his child with protective services).

312. *See, e.g.*, Amy Green, *Judge Tosses Out Nowak Evidence: Impact on the Ex-Astronaut's Case Is Unknown After the Ruling She Was Misled by Police*, HOUS. CHRON., Nov. 3, 2007, at A3.

313. *See supra* notes 277–79.

314. *See supra* notes 183–86 and accompanying text.

315. *See, e.g.*, Ian McCann, *Challenger Calls Out Madden on Ethics: Incumbent Dismisses Allegations, Says Cole Inexperienced*, DALL. MORNING NEWS, Feb. 28, 2008, at 1B (noting that challenger asserted his opponent was "soft on crime").

316. *See supra* notes 127–28, 138, 156–58, 167, 212–13 and accompanying text.

punishing convicted defendants harshly. And Texas's historical distrust of governmental power may explain why the Texas Code makes it easier to suppress searches and confessions than other states. To the extent there is public support for eliminating some pro-defendant rules of procedure, entropy and a short legislative session may keep those protections on the books. And perhaps more so than in other states, the universal recognition that Texas is tough on crime may limit public pressure to roll back criminal procedure protections.

CONCLUSION

When it comes to punishing convicted defendants, Texas Toughness[317] is no myth. Texas is the most prolific user of capital punishment, and it is a national leader in incarceration. From a symbolic standpoint, Texas imposes enormous prison sentences on many offenders and has been at the forefront of the public shaming movement. Texas, simply put, is tough on crime.

Yet, the story of Texas criminal procedure is much more complicated and more pro-defendant than Texas's general reputation for punitiveness suggests. Texas defendants benefit from a variety of criminal procedure protections that go well beyond what is mandated by the Supreme Court of the United States. And contrary to the tough-on-crime rhetoric of Texas politicians, many of these criminal procedure protections could have been eliminated long ago because they are statutory, rather than judicial, rules. Yet, legislators have declined to repeal the numerous pro-defendant protections found in the Texas Code of Criminal Procedure.

The point of this Article is not to definitively resolve the reason for the Texas dichotomy. Nor is my goal to encourage legislators to abolish favorable rules of procedure. The aim of this Article is to demonstrate that Texas is not nearly as tough on criminal procedure as its reputation suggests.

There are a number of possible reasons why Texas continues to retain a generous code of criminal procedure. Distrust of governmental power may explain the continued existence of certain protections against aggressive police tactics, while Texas's short legislative session may protect less prominent rules from being repealed. In the bigger picture, Texas's reputation for punitiveness may insulate legislators from pressure to scale back procedural protections. Texans may also see robust procedural protections as essential before punishing offenders for breaking the social compact. In all likelihood, all of these explanations have a role to play in explaining the wide divergence between Texas's reputation for punitiveness and its generous statutory code of criminal procedure.

317. *See* PERKINSON, *supra* note 46.