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AN ANALYSIS OF BIFURCATED COURTS OF LAST RESORT IN TEXAS AND OKLAHOMA

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I. History	166
A. Texas	166
1. Pre-Civil War	166
2. Reconstruction	167
a. Constitution of Texas (1866)	168

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b. Constitution of 1869	169
c. Constitution of 1876	170
3. Amendments to 1876 Constitution	172
a. 1891 Amendment	172
b. Trial Courts in Texas	173
c. Amendments Since 1891 Regarding the Structure and Function of the Appellate Courts in Texas	175
B. Oklahoma	176
1. 1907 Constitution	176
2. 1967 Amendment to the 1907 Constitution	177
3. Current Operation	180
II. Current Issues in Jurisdiction	182
A. Texas	182
B. Oklahoma	192
III. Attempts to Eliminated Bifurcated Courts	201
A. Texas	201
B. Oklahoma	202
IV. Analysis	202
V. Conclusion	202

On April 29, 2014, Clayton Lockett was executed by lethal injection in Oklahoma.¹ Lockett was convicted of murdering nineteen-year-old Stephanie Neiman, whom he shot twice with a shotgun and then buried while still alive, with the help of his accomplices.² Of his own volition,³ Lockett confessed three days later and was subsequently convicted and sentenced to death. Lockett's death resulted from a botched lethal injection.⁴ The drugs

¹ Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, THE ATLANTIC (June 2015), <https://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/>.

² *Id.*

³ *Id.*

⁴ *See id.* (“Governor Fallin gave a press conference to remind everyone about Lockett’s crimes, voice her support for the

used to execute Lockett were both confidential and experimental.⁵ The intravenous line (“IV”) used to render Lockett unconscious was pulled from his vein and became infiltrated, and much of the lethal drugs did not make it into Lockett’s bloodstream.⁶ As a result, Lockett awoke and sat up on the gurney in the middle of his execution, unable to speak, with blood pooling beneath him caused by the infiltrated IV.⁷ The execution was botched to such a level that the warden actually tried to stop it, eventually calling and briefing the governor on the situation.⁸ However, there were already enough drugs in Lockett’s system; he died ten minutes later, apparently in agony the entire time.⁹

Prior to this incident, on April 23, 2014, the Oklahoma Supreme Court dissolved a stay of execution and rendered a per curiam opinion that resulted in Lockett’s execution.¹⁰ *Lockett v. Evans* is the result of more than ten years of interrelated appeals and constitutional challenges, spanning federal courts of appeals and state courts of last resort.¹¹ Lockett’s later appeals, challenging a lethal injection disclosure prohibition statute, also included Charles Warner, a man

death penalty, and announce an investigation into what had gone wrong.”).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* (“Ten minutes later, at 7:06 p.m., Clayton Lockett was declared dead. He had been dying amidst all the chaos, just very slowly and in apparent agony.”).

¹⁰ *Lockett v. Evans*, 330 P.3d 488, 492 (Okla., 2014) (“The stay of execution entered by this Court on April 21, 2014, is hereby dissolved.”).

¹¹ *See, e.g., Lockett v. Trammel*, 711 F.3d 1218 (10th Cir. 2013); *Lockett v. Workman*, No. CIV-03-734-F, 2011 U.S. Dist. LEXIS 157157 (W.D. Okla. Jan. 19, 2011); *Lockett v. Evans*, 356 P.3d 58 (Okla. 2014); *Warner v. State*, 29 P.3d 569 (Okla. Crim. App. 2001).

facing execution for raping and murdering an eleven-month-old baby.¹² The state of Oklahoma executed Warner on January 15, 2015,¹³ after a 180-day stay of execution during which authorities investigated the botched execution of Lockett.¹⁴ Warner's last words were, "My body is on fire."¹⁵

Warner's and Lockett's appeal process was unique because they challenged the constitutionality of a law that classified the lethal injection drugs used to execute them.¹⁶ If Warner and Lockett succeeded in their constitutional challenge, their executions would be stayed. In forty-eight states, there would be no question that a court of last resort could render a decision on the constitutionality of a lethal injection classification law. Oklahoma, however, is not one of them, due to its bifurcated court of last resort structure. The only other state that maintains a bifurcated structure of civil and

¹² Diana Baldwin, *Man Found Guilty of Baby Rape, Murder*, NEWSOK (June 24, 2003), <http://newsok.com/man-found-guilty-of-baby-rape-murder/article/1934580>.

¹³ Cary Aspinwall, *Charles Warner is Executed*, TULSA WORLD (Oct. 8, 2015), http://www.tulsaworld.com/news/courts/charles-warner-is-executed-here-s-the-story-of-his/article_af39c542-08d0-5bd6-80ac-01a6f1c668ee.html.

¹⁴ Katie Fretland, *Oklahoma Agrees to 180 Day Stay of Execution for Death-row Inmate*, THE GUARDIAN (May 8, 2014), <http://www.theguardian.com/world/2014/may/08/oklahoma-180-day-stay-execution-charles-warner>. The Oklahoma Court of Criminal Appeals issued the stay of execution for Mr. Warner, rather than the Oklahoma Supreme Court. *Id.*

¹⁵ Sean Murphy, *Charles Warner Executed: Baby Killer Says 'My Body Is On Fire' During Lethal Injection In Oklahoma*, HUFFINGTON POST (Jan. 15, 2015), http://www.huffingtonpost.com/2015/01/15/charles-frederick-warner-executed_n_6483040.html.

¹⁶ *Lockett*, 356 P.3d at 61 ("The appeal by the DOC and its interim Director has placed the issue of the secrecy provision of section 1015(B) undisputedly within this Court's appellate jurisdiction.").

criminal courts of last resort is Texas.¹⁷ This Article explores the history of Texas's and Oklahoma's bifurcated courts of last resort, the similarities and differences between the two systems, as well as some of the controversies that have arisen due to jurisdictional questions. The Article concludes with a recommendation that Oklahoma and Texas each adopt a unified court of last resort.

When cases arise that implicate both civil and criminal issues, the Oklahoma and Texas judiciaries are likely to suffer from “judicial hot potato,” by sending the cases back and forth between the criminal and civil divisions of the respective court.¹⁸ That is not to say, however, that questions of jurisdiction do not arise in unified systems, such as the United States federal courts. The key difference there lies in the vesting of a single court, rather than dual courts, with the final decision on whether a case is civil or criminal in nature. Although no system is perfect, by adopting a unified court of last resort, Texas and Oklahoma will have a single decision-maker with a clear grant of jurisdiction to determine the classification of cases.

¹⁷ LESTER BERNHARDT ORFIELD, CRIMINAL APPEALS IN AMERICA 220 (1939) (“[N]o state in the Union except Texas and Oklahoma has a separate court of criminal appeals.”); *see also* Ben L. Mesches, *Bifurcated Appellate Review: The Texas Story of Two High Courts*, 53 JUDGES’ J. 4 (2014).

¹⁸ The colloquial phrase “hot potato” is defined as “a controversial question or issue that involves unpleasant or dangerous consequences for anyone dealing with it.” *Hot Potato*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/hot%20potato>. The phrase derives from the popular children’s party game in which participants toss to each other a small object resembling a potato while music is playing. *See generally* JACK MAGUIRE, HOPSCOTCH, HANGMAN, HOT POTATO & HA HA HA: A RULEBOOK OF CHILDREN’S GAMES (1990). When the music stops playing, the player holding the object is eliminated and cannot proceed to the next round. *Id.*

I. History

Both Texas's and Oklahoma's court structures have evolved over time, becoming the labyrinths they remain today. Political motivations and increased case volume have contributed to the byzantine network of trial and appellate courts that Texas maintains. In Oklahoma, large-scale reforms were achieved in the wake of scandal, but those reforms failed to address the problems inherent in bifurcated courts of last resort. Both states have failed to eliminate their bifurcated structures throughout their history, despite attempts to do so.

A. Texas

1. Pre-Civil War

Texas became a republic in 1836,¹⁹ after declaring independence from Mexico.²⁰ Texas's first judiciary as an independent nation had a single supreme court composed of a chief justice and associate justices.²¹ The associate justices were judges of the district courts and functioned as the supreme court when a majority was present, which constituted a quorum.²² These provisions were in the original draft of the constitutional convention of 1836 as well,²³ likely indicating that the judiciary was not a contested issue throughout the convention.

¹⁹ REP. OF TEX. CONST. pmbl. (1836).

²⁰ TEX. DECLARATION OF INDEPENDENCE (1836).

²¹ REP. OF TEX. CONST. art. IV, §§ 1–9 (1836).

²² *Id.* § 7.

²³ JOURNALS OF THE CONVENTION OF THE FREE, SOVEREIGN, AND INDEPENDENT PEOPLE OF TEXAS, IN GENERAL CONVENTION, ASSEMBLED 821–904 (H.P.N. Gammel, ed., Gammel Book Co. 1898) (1836).

In 1845, the United States annexed Texas.²⁴ With its annexation, Texas adopted a state constitution.²⁵ The new constitution changed the structure of the judiciary, with three justices (one chief justice and two associate justices) sitting on the supreme court, any two of whom would constitute a quorum.²⁶ The 1845 Constitution specifically granted habeas corpus jurisdiction to the Texas Supreme Court, a power it did not retain in the 1836 Constitution of the Republic of Texas.²⁷ In addition, the 1845 Constitution gave district courts original jurisdiction in all criminal cases, which those courts did not retain under the 1836 Constitution.²⁸

In 1861, Texas seceded from the United States and ratified a new constitution upon joining the Confederate States of America.²⁹ Notably, the 1861 Secession Constitution did not come with changes to the judicial department, however. The Constitution of 1861 kept the judiciary provisions in Article IV, and even maintained the same sections.³⁰ Texas became a member of the Confederate States of America on March 23, 1861, when the Secession Convention adjourned for the last time.³¹

2. Reconstruction

After the Civil War, Texas began a tumultuous period of constitutional change in its judiciary. During Reconstruction, Texas was subject to federal military

²⁴ C.T. Neu, *Annexation*, HANDBOOK OF TEXAS ONLINE (Sept. 23, 2015), <https://tshaonline.org/handbook/online/articles/mga02>.

²⁵ *Id.*

²⁶ TEX. CONST. art. IV, § 2 (1845).

²⁷ *Id.* § 3.

²⁸ *Id.* § 10.

²⁹ JOURNAL OF THE SECESSION CONVENTION OF TEXAS 8 (William Winkler, ed., 1912) (1861).

³⁰ TEX. CONST. art. IV, § 1–5, 10 (1861).

³¹ Walter L. Buenger, *Secession Convention*, HANDBOOK OF TEXAS ONLINE (Mar. 8, 2011), <http://www.tshaonline.org/handbook/online/articles/mjs01>.

occupation and ousted all five supreme court justices on September 10, 1867.³² Between 1866 and 1876 Texas had three different constitutions.³³

a. Constitution of Texas (1866)

The Constitution of 1866 was written in order to regain admittance to the Union. Among other changes, the Constitution of 1866 significantly changed the structure of the Texas judiciary. Section 1 of Article IV added new constitutional courts (courts created by the constitution) including criminal courts, county courts, and corporation courts.³⁴ The county courts had original jurisdiction in “all misdemeanors and petty offences, as the same are now, or may hereafter be defined by law; of such civil cases, where the matter in controversy shall not exceed five hundred dollars.”³⁵ The Constitution of 1866 also added justices of the peace, whose jurisdiction is further defined by law, and who had jurisdiction in civil matters totaling less than \$100.³⁶

The Constitution of 1866 also added two more justices to the Texas Supreme Court, for a total of four associate justices and one chief justice.³⁷ The appellate jurisdiction of the supreme court changed slightly in 1866. Formerly, the supreme court had appellate jurisdiction that extended to all matters, but the legislature could limit appellate jurisdiction in criminal cases and interlocutory judgments.³⁸ In the 1866

³² Hans W. Baade, *Chapters in the History of the Supreme Court of Texas: Reconstruction and “Redemption”* (1866-1882), 40 ST. MARY’S L.J. 17, 25 (2008).

³³ TEX. CONST. art. V (1876); TEX. CONST. art. V (1869); TEX. CONST. art. IV (1868); TEX. CONST. art. IV (1866).

³⁴ TEX. CONST. art. IV, § 1 (1866).

³⁵ *Id.* § 16.

³⁶ *Id.* § 19.

³⁷ *Id.* § 2.

³⁸ TEX. CONST. art. IV, § 3 (1861).

Constitution, the legislature could no longer limit felony criminal jurisdiction from the supreme court through law.³⁹ The Constitution of 1866 also provided for the election of district judges and expanded their jurisdiction beyond that of the Constitution of 1861 to include appellate jurisdiction from the inferior courts, original jurisdiction in cases dealing with slander or libel, and suits for the trial or title to land.⁴⁰

b. Constitution of 1869

Shortly after the ratification of the Constitution of 1866, Winfield Scott Hancock, the military commander over Texas during Reconstruction, called for an election in Texas to determine whether a new constitution should be created.⁴¹ Texans overwhelmingly voted for a new constitutional convention, and the convention assembled on June 1, 1868.⁴² The convention lasted 150 days but the delegates did not complete a constitution.⁴³ Nonetheless, what was written was submitted to the voters of the state and became the Constitution of 1869.⁴⁴

The judicial department, particularly the Texas Supreme Court, was significantly changed in the Constitution of 1869. The supreme court was reduced to three justices⁴⁵ who were subjected to nine-year term limits, rather than the ten-year terms under the Constitution of 1866.⁴⁶ The district court judges retained appellate jurisdiction of inferior courts.⁴⁷ The county

³⁹ TEX. CONST. art. IV, § 3 (1866).

⁴⁰ *Id.* § 6.

⁴¹ Claude Elliot, *Constitutional Convention of 1868-69*, HANDBOOK OF TEXAS ONLINE (June 12, 2010), <http://www.tshaonline.org/handbook/online/articles/mjc04>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ TEX. CONST. art. V, § II (1869).

⁴⁶ *Id.*

⁴⁷ *Id.* § VII.

courts were merged with the justice of the peace courts, the extent of their jurisdiction to be delineated by the legislature.⁴⁸

c. Constitution of 1876

The Constitution of 1876 is the current constitution of Texas, but it has been amended numerous times since its ratification in 1876.⁴⁹ The Constitution of 1876 differed greatly from the Constitution of 1869. It included, as constitutional requirements, a supreme court, a court of appeals, district courts, county courts, commissioners' courts, courts of justices of the peace, and other courts that may be established by law.⁵⁰ The Constitution of 1876 also gave the legislature the ability to establish specifically criminal district courts as long as the city had over 30,000 residents.⁵¹ The Texas Supreme Court remained a three-justice court,⁵² but, critically, its jurisdiction over criminal matters was eliminated. The supreme court had civil appellate jurisdiction only, reaching only the cases in which the district courts had original or appellate jurisdiction.⁵³ With the absence of criminal jurisdiction, the supreme court also lost the ability to issue writs of habeas corpus.

The Constitution of 1876 created the Texas Court of Appeals, possibly in response to a congested docket.⁵⁴ Contrary to its usual nomenclature, the court of appeals was not an intermediate appeals court. Rather, it had exclusive jurisdiction in all criminal matters, as well as

⁴⁸ *Id.* § XX.

⁴⁹ *See, e.g.*, TEXAS RESEARCH LEAGUE, TEXAS COURTS: REPORT ONE, THE TEXAS JUDICIARY: A STRUCTURAL-FUNCTIONAL OVERVIEW 3–5 (1990).

⁵⁰ TEX. CONST. art. V, § 1 (1876).

⁵¹ *Id.*

⁵² *Id.* § 2.

⁵³ *Id.* § 3.

⁵⁴ *In re Reece*, 341 S.W.3d 360, 379 (Tex. 2011).

some civil cases arising from the county courts.⁵⁵ The court of appeals was also elected every six years and consisted of three sitting judges.⁵⁶

There are multiple theories for the bifurcation of civil and criminal jurisdiction between the Texas Supreme Court and the Texas Court of Appeals.⁵⁷ Most hold the view that the courts' jurisdiction was bifurcated due to a backlog of cases.

Others hold the view that the Constitution of 1876 was a “revanchist document: The fruition of a resurgence of state power by segregationist, mostly ex-Confederate Democrats after a decade under Union-run Reconstruction.”⁵⁸ The resurgence of state power by segregationists allowed the Texas Democrats to change the constitution in order to bypass a “radical Republican” reconstruction court.⁵⁹ This new court would allow the Democrats to ignore odious precedent laid down by the Texas Supreme Court, further reinforced by the fact that in the new constitution only the Texas Court of Appeals could hear habeas petitions during a time of martial law.⁶⁰ The state could now avoid a reconstruction court when trying to enforce Jim Crow laws.⁶¹

Either way, the bifurcated system failed to achieve what the drafters wanted. By 1879, the courts continued to fall behind in their caseloads, and the

⁵⁵ TEX. CONST. art. V, § 6 (1876).

⁵⁶ *Id.* § 5.

⁵⁷ See Maurice Chammah, *Bill Renews Debate on Merging Top Two Courts*, THE TEXAS TRIBUNE (Dec. 13, 2012, 6:00 AM), <http://www.texastribune.org/2012/12/13/bill-merge-highest-courts-brings-back-old-debate/>; Scott Henson, *Caveats to Debate on Merging Texas Supreme Court, Court of Criminal Appeals*, GRITS FOR BREAKFAST (Dec. 13, 2012, 11:00 AM), <http://gritsforbreakfast.blogspot.com/2012/12/caveats-to-debate-on-merging-texas.html>.

⁵⁸ Henson, *supra* note 57.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

legislature created a commission of appeals.⁶² This too failed, and by 1891, the citizenry of Texas voted to entirely supplant the judicial article of the Constitution of 1876.⁶³

3. Amendments to 1876 Constitution
a. 1891 Amendment

In 1891, the state of Texas adopted a wholesale replacement of its judiciary through an amendment.⁶⁴ The 1891 amendment removed the Texas Court of Appeals and replaced it with the Texas Court of Criminal Appeals and the Texas Court of Civil Appeals.⁶⁵ Thus, the new system added a mid-level appeals court and gave the Texas Supreme Court the responsibility of resolving conflicts between the courts of civil appeals.⁶⁶

The Texas Supreme Court maintained its limit of three sitting justices, as did the Texas Court of Criminal Appeals.⁶⁷ The Texas Court of Civil Appeals was also composed of three judges per court.⁶⁸ After adopting the 1891 amendment, the Texas legislature added two more

⁶² James T. Worthen, *The Organizational & Structural Development of Intermediate Appellate Courts in Texas, 1892–2003*, 46 S. TEX. L. REV. 33, 34 (2004).

⁶³ *Id.* at 35.

⁶⁴ *See generally* S.J. Res. 16, 22d Leg., Reg. Sess. (Tex. 1891).

⁶⁵ *Id.* § 1.

⁶⁶ *Id.* Additionally, it is important to note that the 1891 amendment gave the Texas Supreme Court the ability to issue writs of habeas corpus, which had not been present in the Constitution of 1876. S.J. Res. 16, 22d Reg. Sess. § 3 (Tex. 1891); *see also* Tex. Const. art. V § 3 (1876). The 1891 amendment also explicitly eliminated the use of the writ of mandamus by the Texas Supreme Court against the Governor. S.J. Res. 16, 22d Reg. Sess. § 3 (Tex. 1891).

⁶⁷ S.J. Res. 16, 22d Reg. Sess. at §§ 2, 4 (Tex. 1891).

⁶⁸ *Id.* § 6.

courts of appeal.⁶⁹ The term limits remained six years for each justice and judge, with each elected by popular vote.⁷⁰ No additional courts were changed by the 1891 amendment.⁷¹

The next set of constitutional amendments affecting the judiciary did not occur until 1954.⁷² That does not mean, however, that there were no legislative changes to the judiciary. Between 1893 and 1967, Texas added eleven new appellate districts.⁷³ The further constitutional changes were concerned, primarily, with the supreme court and the court of criminal appeals. Before addressing these changes, I will briefly describe what has occurred at the trial court level since 1876.

b. Trial Courts in Texas

Texas has a dizzying array of trial courts. Constitutional trial courts include district, county, and justice of the peace courts. There are currently 507 district courts across the state.⁷⁴ Unfortunately, the legislature, in an effort to deal with changing caseloads, has created statutory district courts that have specific jurisdictional preferences.⁷⁵ Thus, a litigant will have to determine the correct district court in which to bring her

⁶⁹ W.O. Murray, *Our Courts of Civil Appeals*, 25 TEX. B.J. 269, 270 (1962).

⁷⁰ S.J. Res. 16, 22d Reg. Sess. at §§ 2, 4, 6 (Tex. 1891).

⁷¹ There still remained district courts, county courts, commissioner's courts, and courts of justices of the peace. S.J. Res. 16, 22d Reg. Sess. § 1 (Tex. 1891).

⁷² TEXAS LEGISLATIVE COUNSEL, AMENDMENTS TO THE TEXAS CONSTITUTION SINCE 1876 65–70 (Feb. 2016).

⁷³ See Worthen, *supra* note 62 at 36.

⁷⁴ State District Courts, TEXAS STATE DIRECTORY, <https://www.txdirectory.com/online/dist/> (last visited on Dec. 2, 2016).

⁷⁵ TEXAS RESEARCH LEAGUE, TEXAS COURTS: REPORT ONE, THE TEXAS JUDICIARY: A STRUCTURAL-FUNCTIONAL OVERVIEW 30 (1990).

claim, even though she may live within the geographical confines of multiple district courts. Litigation in Texas is further confused by the existence of the county courts, which consist of statutory county courts and constitutional county courts.⁷⁶ Statutory county courts actually have no common thread: They are simply a patchwork creation of local judicial needs.⁷⁷ There is no commonality among them. Constitutional county courts are required in each county, where the judge is the chief executive officer of the county. A county court judge is not constitutionally required to be an attorney, and she has limited jurisdiction in both civil and criminal cases.⁷⁸

Finally, there are the justice of the peace courts. These courts have varying jurisdiction by statute and primarily operate as small claims courts and cases involving traffic fines.⁷⁹ Only about eight percent of the justices of the peace are lawyers,⁸⁰ yet justice of the peace courts are responsible for a significant portion of state revenue.⁸¹

There are many other forms of trial courts in Texas, but the subject is beyond the scope of this Article.⁸² It is enough to know that the Texas judicial system includes a confusing mass of overlapping jurisdictions and courts, oftentimes run by non-lawyers. The existence of this patchwork only adds to the confusion of litigants. As will be discussed later, litigants struggle already in

⁷⁶ *Id.* at 41, 45.

⁷⁷ *Id.* at 41–43.

⁷⁸ *Id.* at 48.

⁷⁹ *Id.* at 49.

⁸⁰ *In re Reece*, 341 S.W.3d 360, 383 (Tex. 2011).

⁸¹ TEXAS RESEARCH LEAGUE, TEXAS COURTS: REPORT ONE, THE TEXAS JUDICIARY: A STRUCTURAL-FUNCTIONAL OVERVIEW 49 (1990).

⁸² For more information on Texas's judicial system, see Guittard, *infra*, note 84; 2010 Annual Report for the Texas Judiciary, OFFICE OF COURT ADMINISTRATION (Dec. 2010), http://www.txcourts.gov/media/454879/2010-Annual-Report2_25_11.pdf.

the quest for the proper trial court. Bifurcated courts of last resort only add to the confusion and headache faced by litigants, especially when they do not know which appeals court has jurisdiction in their case.

c. Amendments Since 1891 Regarding the Structure and Function of the Appellate Courts in Texas.

In 1945 Texas increased the size of its supreme court from three to nine justices.⁸³ In 1966, Texas increased the criminal court of appeals from three to five members.⁸⁴ Then, in 1977 the criminal court of appeals increased to nine sitting judges.⁸⁵ The court of appeals has also changed significantly since 1891, including the addition of criminal jurisdiction.

In 1978, Texas adopted a constitutional amendment allowing for more than three members on the court of civil appeals.⁸⁶ In 1980, the criminal backlog was so great that the average disposition of a criminal appeal was three years.⁸⁷ The resulting constitutional amendment gave the court of appeals appellate jurisdiction over all civil and criminal appeals, except death penalty cases.⁸⁸ This system is how the Texas appellate courts operate today. There are fourteen appellate districts, with varying numbers of judges on each court. This appellate court has both civil and criminal jurisdiction, with the sole exception of death penalty cases. The Texas Supreme Court and Texas

⁸³ S.J. Res. 8, 49th Reg. Sess. TEX. CONST. amend. art. V, § 2 (Tex. 1945).

⁸⁴ Clarence Guittard, *The Expanded Texas Courts of Appeals*, 14 TEX. TECH. L. REV. 549, 551 (1983).

⁸⁵ *Id.* at 552.

⁸⁶ Worthen, *supra* note 62 at 38.

⁸⁷ Guittard, *supra* note 84, at 552.

⁸⁸ S.J. Res. 36, 66th Reg. Sess. TEX. CONST. amend. art. V, §§ 5, 6 (Tex. 1979).

Court of Criminal Appeals each have nine justices and exercise only civil or only criminal jurisdiction, respectively. The stopgap legislation and patchwork courts in Texas used to alleviate backlogs of cases has led to the jurisdictional issues which will be taken up in Part II, *infra*.

B. Oklahoma

1. 1907 Constitution

The original judiciary article of the Oklahoma Constitution, ratified in 1907, provided specifically for a supreme court, district courts, county courts, courts of justices of the peace, municipal courts, and allowed for the creation of a criminal court of appeals.⁸⁹ The Oklahoma Supreme Court maintained criminal jurisdiction as long as there was *not* a statutorily created criminal court of appeals.⁹⁰ The Oklahoma Supreme Court was composed of five justices, divided into five judicial districts, nominated by political parties, and voted for by the state in an at-large election.⁹¹ The term of office was six years.⁹²

District courts were courts of general jurisdiction, and divided into twenty-one districts.⁹³ County courts were specifically for probate, matters in controversy less than \$1,000, and misdemeanors.⁹⁴ County courts were also courts of appeals for justice of the peace courts.⁹⁵ Justice of the peace courts had concurrent jurisdiction with county courts, but for less money, and lesser offenses.⁹⁶

⁸⁹ OKLA. CONST. art. VII § 1 (1907).

⁹⁰ *Id.* § 2.

⁹¹ *Id.* § 3.

⁹² *Id.*

⁹³ *Id.* §§ 9, 10.

⁹⁴ *Id.* §§ 12, 13.

⁹⁵ *Id.* § 14.

⁹⁶ *Id.* § 18.

The first criminal court of appeals was created in the 1907–1908 session of the Oklahoma legislature, which was the first legislative session of Oklahoma.⁹⁷ This act gave the Oklahoma Criminal Court of Appeals exclusive criminal appellate jurisdiction, with the exception that the Oklahoma Supreme Court was to make determinations of constitutionality, should they arise.⁹⁸ The 1909 legislature perpetuated the criminal court of appeals, repealed all prior acts in conflict, and gave it exclusive appellate jurisdiction of criminal matters.⁹⁹ The 1909 act created three judicial districts, and provided for general elections of the judges.¹⁰⁰ In 1959, the legislature changed the name of the Oklahoma Criminal Court of Appeals to the Oklahoma Court of Criminal Appeals.¹⁰¹

2. 1967 Amendment to the 1907 Constitution

There were other changes along the way, but in 1967, in response to serious criticism and cries for reform, Oklahoma adopted a new judicial system.¹⁰² According to Dean Earl Sneed of the University of Oklahoma Law School, the judicial system of Oklahoma by the 1960s was, “ancient, creaky, inefficient, outmoded, complex, costly, and antiquated.”¹⁰³ He further stated that the system “was not good in 1907, and has grown progressively worse in the fifty-eight years since statehood[.]”¹⁰⁴ While Oklahoma’s appeals courts

⁹⁷ *History of the Court*, OKLAHOMA COURT OF CRIMINAL APPEALS (2014), <http://www.okcca.net/History.html>.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See, e.g., Earl Sneed, *Unfinished Business or All the Way in One Play*, 19 OKLA. L. REV. 5, 6 (1966) (expounding his dissatisfaction with the system of justice in Oklahoma).

¹⁰³ Sneed, *supra* note 102, at 7.

¹⁰⁴ *Id.*

remained largely unchanged since 1907, its lower courts were a mess by the 1960s. Dean Sneed provided an anecdote that illustrates the frustrating complexity of the lower court system.

Fred [a research assistant to Dean Sneed] produced seven pages of legal size, single spaced material with just the most basic facts about our court system. It would have been longer, but I told Fred that because of the virtual impossibility of the task, he should omit any detail about police and municipal courts and courts of specialized jurisdiction such as the juvenile court in Tulsa County, and that he should just mention the superior and common pleas courts which exist only in a few counties in Oklahoma. And of course, since Fred did that work in 1954, we have created small claims courts, the children's court in Oklahoma County, the aforementioned special session courts, and city courts. I have added three more pages to Fred's work.¹⁰⁵

At the appellate level, Dean Sneed's derision of the Oklahoma court system focused on judicial appointment and selection, judicial salaries, and centralized rulemaking power.¹⁰⁶

One central impetus for the revision of the Oklahoma judiciary was the scandal of the 1960s. It came to be known that from the 1930s until the 1950s, Justice N.S. Corn, along with possibly four other justices, took bribes in exchange for dispositions in supreme court

¹⁰⁵ *Id.* at 10.

¹⁰⁶ Phillip Simpson, *The Modernization and Reform of the Oklahoma Judiciary*, 3 OKLA. POL. 1, 6 (1994).

cases.¹⁰⁷ The scandal came to a head in 1956, with a \$150,000 bribe in the *Selected Investment* case.¹⁰⁸ In July of 1964, Justice Corn was sentenced to eighteen months in prison.¹⁰⁹ Justice Welch was also sentenced to prison, and Justice Johnson was impeached.¹¹⁰ In 1966, Oklahoma adopted a court on the judiciary.¹¹¹

The battle for reform was hardly over. Once it was clear that reform was necessary, Dean Sneed and the legislature went to work.¹¹² Dean Sneed would have to go to the voters with an initiative petition in order to bypass the legislature.¹¹³ During this time, anti-reformers were ousted in the election of 1966.¹¹⁴ The Sneed plan was submitted to the voters, but the legislature had already devised its own reform plan.¹¹⁵ The voters rejected Sneed's plan, but reform was ultimately achieved through the legislature.¹¹⁶

In July 1967, the constitutional provisions that repealed and replaced the 1907 Article VII of the Oklahoma Constitution were approved.¹¹⁷ "The two most significant changes . . . [to Article VII were the creation of] one state trial court of general jurisdiction[,] and . . . [the creation of a judicial system] under the supervision and control of the [S]upreme Court."¹¹⁸ The Article

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* See generally *Selected Invs. Corp. v. Okla. Tax Comm'n*, 309 P.2d 267 (1957).

¹⁰⁹ Simpson, *supra* note 106, at 7.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 8.

¹¹² *Id.* at 8–9.

¹¹³ *Id.* at 9.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 9–12.

¹¹⁶ *Id.* at 12.

¹¹⁷ George B. Fraser, *Oklahoma's New Judicial System*, 21 OKLA. L. REV. 373 (1968).

¹¹⁸ *Id.* Note that although the Oklahoma Supreme Court is the highest court, it still does not maintain jurisdiction in criminal

further provides that justices of the supreme court and court of criminal appeals shall be nominated by a commission and appointed by the governor,¹¹⁹ and that other judges are selected through a non-partisan election.¹²⁰ The constitution kept the Oklahoma Court of Criminal Appeals, and the Oklahoma Supreme Court was to have the final say regarding jurisdiction if a disagreement between the supreme court and the court of criminal appeals arose.¹²¹

3. Current Operation

Oklahoma's judiciary currently includes four courts of limited jurisdiction, one trial court of general jurisdiction, one civil appeals court, and the Oklahoma Supreme Court and Oklahoma Court of Criminal Appeals as courts of last resort.¹²²

The four courts of limited jurisdiction are statutory courts.¹²³ They include the Workers' Compensation Court of Existing Claims, the Court of Tax Review, the Municipal Courts not of Record, and the Municipal Courts of Record.¹²⁴ The workers' compensation court and Court of Tax Review are appealable directly to the Oklahoma Supreme Court. The Municipal Court not of Record is appealed to the district court.¹²⁵ The Municipal Court of Record is appealable

matters. Criminal appeals still only go to the Oklahoma Court of Criminal Appeals. OKLA. CONST. art. VII, § 4.

¹¹⁹ OKLA. CONST. art. VII-B, § 4.

¹²⁰ OKLA. CONST. art. VII, § 9.

¹²¹ *Id.* § 4. Unfortunately, as will be discussed *infra*, the court of criminal appeals does not always follow the jurisdictional mandates of the Oklahoma Supreme Court.

¹²² The Oklahoma Judicial Center, Supreme Court Brochure (2016), <http://www.oscn.net/oscn/schome/fullbrochure.htm>.

¹²³ OKLA. CONST. art. VII, § 1.

¹²⁴ The Oklahoma Judicial Center, *supra* note 122.

¹²⁵ *Id.*

directly to the Oklahoma Court of Criminal Appeals.¹²⁶ District court decisions can be appealed to both the Oklahoma Supreme Court and the Oklahoma Court of Criminal Appeals, depending on whether the matter is civil or criminal.¹²⁷

The civil appellate court in Oklahoma operates differently than most judicial systems. The constitutional amendment of 1967 allowed for the adoption of an intermediate appellate court, and the resulting statute requires the appeal to go to the Oklahoma Supreme Court, which then may assign appeals to the intermediate courts unless otherwise provided by statute.¹²⁸ In other words, all appeals go to the supreme court, which then decides which cases it gives to the court of civil appeals. All decisions by the court of civil appeals are final unless the Oklahoma Supreme Court grants certiorari.¹²⁹ The court of civil appeals currently has four divisions, each with three judges. Two divisions are in Tulsa County and the other two are in Oklahoma County.¹³⁰

The courts of last resort in Oklahoma are set up differently than they are in Texas because Oklahoma places ultimate power to decide jurisdictional conflicts in the Oklahoma Supreme Court.¹³¹ The Oklahoma Supreme Court is composed of nine members coming

¹²⁶ *Id.*

¹²⁷ *Id.*; see also OKLA. CONST. art. VII, § 4.

¹²⁸ OKLA. CONST. art. VII, § 5.

¹²⁹ *Id.* The statutes governing the Oklahoma Court of Civil Appeals can be found in OKLA. STAT. ANN. tit. 20, § 30.1 (West 2017).

¹³⁰ OKLA. STAT. ANN. tit. 20, § 30.2 (West 2017). This law became effective in 1982. 5 OKLA. PRAC., APPELLATE PRAC. § 1:26 (2016 ed.).

¹³¹ OKLA. CONST. art. VII, § 4. Texas courts of last resort are coequal, which can result in instances where jurisdiction is contested and there is no resolution. See discussion *infra* Part II.A.

from nine different districts.¹³² The Oklahoma Court of Criminal Appeals maintains exclusive jurisdiction in criminal appeals,¹³³ and is composed now of five members.¹³⁴

II. Current Issues in Jurisdiction

Both Texas and Oklahoma suffer from “judicial hot potato,” where the courts of last resort either fight over jurisdiction to hear a case, or pass a case back and forth until the case is either dismissed or forced upon one of the courts. This usually results from hard cases that have both civil and criminal aspects. Below, I will provide examples of different cases that resulted in “judicial hot potato” in each of the states’ courts of last resort, and compare issues, where relevant, to the federal system.

A. Texas

This section will explore a few examples that demonstrate the issues caused by Texas’s bifurcated court structure. These cases involve contempt,¹³⁵ a civil exercise of a stay of execution,¹³⁶ appeals from property forfeiture orders in criminal prosecution,¹³⁷ and the exercise of equity jurisdiction to enjoin enforcement of arguably unconstitutional penal laws.¹³⁸ In the analysis section, I will tie together the when and why of these jurisdictional tangles.

¹³² OKLA. STAT. ANN. tit. 20, §§ 1- 2 (West 2017).

¹³³ *Id.* § 40 (West 2017).

¹³⁴ *Id.* (West 2017). The Texas Court of Criminal Appeals is composed of nine members. TEX. GOV’T CODE ANN. § 22.112 (West 2017).

¹³⁵ *In re Reece*, 341 S.W.3d 360 (Tex. 2011).

¹³⁶ *Holmes v. Honorable Court of Appeals for Third Dist.*, 88 S.W.2d 389 (Tex. Crim. App. 1994).

¹³⁷ *Bretz v. State*, 508 S.W.2d 97 (Tex. Crim. App. 1974).

¹³⁸ *Texas v. Morales*, 869 S.W.2d 941 (Tex. 1994).

The primary drawback in a bifurcated court of last resort system is determining which courts get which cases when there are both civil and criminal aspects. In Texas, an illustrative example of this situation occurred in *In Re Reece*.¹³⁹ In *Reece*, the Texas Supreme Court grappled with the question of whether a litigant can be held in contempt for perjury committed during a deposition.¹⁴⁰ The Texas Court of Criminal Appeals refused to grant habeas review because the case that gave rise to the contempt order was civil.¹⁴¹ The Texas Supreme Court held that it could exercise mandamus jurisdiction because the relator did not have an adequate remedy by appeal, precisely because there was not a criminal appeals court that would hear his habeas petition.¹⁴²

The Texas Supreme Court can only exercise habeas jurisdiction when “the contemnor’s confinement is on account of a violation of an order, judgment, or decree previously made in a civil case.”¹⁴³ The Texas Court of Criminal Appeals, on the other hand, maintains general habeas jurisdiction.¹⁴⁴ The law giving the Texas Supreme Court habeas jurisdiction was designed to keep civil trials on the civil side of the bifurcated courts.¹⁴⁵ Because the Texas Court of Criminal Appeals refused to hear the relator’s habeas petition, and the Texas Supreme Court did not have habeas jurisdiction because there was not a violation of a specific court order, the relator claimed he was without adequate remedy by appeal.¹⁴⁶

¹³⁹ 341 S.W.3d 360 (Tex. 2011).

¹⁴⁰ *Id.* at 362.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 369 (citing TEX. GOV'T CODE ANN. § 22.002(e)).

¹⁴⁴ TEX. CONST. art. V, § 5.

¹⁴⁵ See Tex. S.B. 36, 29th Leg., R.S. (1905).

¹⁴⁶ *Reece*, 341 S.W.3d at 369.

The Texas Supreme Court, through statutory construction and reliance on prior case law, determined that mandamus jurisdiction was broad enough to cover instances in which an individual was wrongly held in contempt.¹⁴⁷ Because the statute in question grants broad mandamus jurisdiction, and because there was no prohibition on the use of mandamus to free someone from confinement, the court reasoned that mandamus jurisdiction was permissible.¹⁴⁸ Ultimately, because the Texas Supreme Court found that the underlying case here was civil and there was no habeas jurisdiction, there was no adequate remedy by appeal, and thus mandamus jurisdiction could be used.¹⁴⁹

Justice Willett's dissent is the most informative aspect of this case for this Article's purposes, because he outlines many of the flaws in Texas's bifurcated court system.¹⁵⁰ Justice Willett noted the court of criminal appeals' "lateral[ed]" to the Texas Supreme Court because they mistakenly believed that the supreme court had habeas jurisdiction in this case.¹⁵¹ The supreme court agreed, 9-0, that there was not habeas jurisdiction.¹⁵² The

¹⁴⁷ *Id.* at 373–75.

¹⁴⁸ *Id.*; see also TEX. GOV'T CODE ANN. § 22.002(a).

¹⁴⁹ *Reece*, 341 S.W.3d at 376.

¹⁵⁰ See *id.* at 378–402 (Willett, J., dissenting). Justice Willett begins his jurisdictional diatribe with statements such as, "Unfortunately, the juris-imprudent design of the Texas judiciary does not make the list. Today's case is a byproduct of that recondite web, sparking a game of jurisdictional hot potato between us and our constitutional twin, the Court of Criminal Appeals." *Id.* at 378.

¹⁵¹ *Id.* at 378 n.1. ("Although this Court does have the authority to act in this case pursuant to Article 5, § 5, of the Texas Constitution, we decline to do so. Effective 1981, Article 5, § 3(a) of the Texas Constitution was amended to give the Texas Supreme Court and the Justices thereof the authority to issue writs of habeas corpus.") (quoting *In re Reece*, No. WR–72,199–02, slip op. at *2 (Tex. Crim. App. June 29, 2009)).

¹⁵² See *id.* at 378.

point Justice Willett made was that even the Texas Court of Criminal Appeals, the state court of last resort for criminal cases, made a mistake navigating the judicial labyrinth that Texas created.

Justice Willett also pointed out how difficult this jurisdictional issue was (and continues to be) for litigants. There is a stock letter informing litigants that the Texas Supreme Court has no jurisdiction in a particular area, directing them to re-file in the Texas Court of Criminal Appeals.¹⁵³ Justice Willett described other instances, discussed *infra*, in which there have been jurisdictional quandaries between the two courts of last resort.¹⁵⁴

When Justice Willett arrived at the heart of the immediate case, he argued that the Texas Supreme Court did not have jurisdiction to grant mandamus.¹⁵⁵ Both he and the majority recognized that the supreme court is prohibited by statute from using habeas jurisdiction.¹⁵⁶ Nevertheless, Justice Willett contended that using mandamus jurisdiction as a patch to do exactly what habeas jurisdiction entails is prohibited by statute.¹⁵⁷ Justice Willett countered the majority's argument that mandamus existed because there was no adequate remedy at law by pointing out that there was an adequate remedy by appeal through a motion for rehearing in the court of criminal appeals.¹⁵⁸ Justice Willett then pointed out the perils of deciding this case via mandamus jurisdiction: If the court granted mandamus here, when

¹⁵³ *Id.* at 380.

¹⁵⁴ *Id.* at 384 (including a notable case dealing with anti-sodomy laws in 1992).

¹⁵⁵ *Id.* at 391.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* (“Where the Legislature has spoken clearly and removed the kind of case now before us from our jurisdiction, it is disingenuous to circumvent the rule by renaming the remedy.”).

¹⁵⁸ *Id.* at 399.

the court of criminal appeals also has habeas jurisdiction, litigants will be unsure of the proper court in which to file.¹⁵⁹ Finally, Justice Willett pointed to the issue of a civil court hearing cases in which the appeal arises from a criminal penalty.¹⁶⁰ The Texas Supreme Court acknowledged that the bifurcation issue between civil and criminal cases is determined by the nature of the court's punishment.¹⁶¹ Justice Willett concluded his dissent with some judicial "shade-throwing,"¹⁶² by stating, "At the very least (and it grieves me to use these six words) Texas should be more like Oklahoma" by vesting one court with final determination of jurisdictional questions.¹⁶³

It is important to note that the distinction between civil and criminal contempt in federal court can also be a difficult line to draw. My argument throughout is that a bifurcated system takes a difficult question and

¹⁵⁹ *Id.* ("Similarly, this case leaves open the question of whether and when a petitioner may seek review in both courts, and in what order. Such confusion could lead to an unnecessarily increased docket in either court, or at least wasted resources spent shuffling cases between the two systems (or discussing whether to do the shuffle in the first place).")

¹⁶⁰ *Id.* at 401 ("Further, hearing this case, and perhaps future cases like it, may force us to handle appeals from civil cases with criminal penalties, and force us at least in part to take on quasi-criminal matters.")

¹⁶¹ *Id.* at 371.

¹⁶² See Justice Don Willett (@JusticeWillett), TWITTER (Apr. 16, 2015, 7:10 PM), <https://twitter.com/justicewillett/status/588887181554417664> (using "throw shade" colloquially). See generally Linette Lopez, *This is Where the Expression 'Throw Shade' Comes From*, BUSINESS INSIDER (Mar. 4, 2015), <http://www.businessinsider.com/where-the-expression-throw-shade-comes-from-2015-3> (describing what it means to throw shade).

¹⁶³ *Reece*, 341 S.W.3d 360 at 402 (describing his desire for a court that has clear authority to determine jurisdiction, similar to what Oklahoma's judicial system contains).

makes it harder. The decision as to whether an appeal from a contempt order is civil or criminal “drives the process that is required, including the type of notice, the standard of proof, the relevance of the validity of the underlying order, and the level of intent.”¹⁶⁴ As Judge Hartz has noted, the way federal courts determine civil and criminal appeals hinges upon “the essential nature of the action, not the underlying proceeding it arose from”¹⁶⁵ For contempt, this means the distinction is whether the judgment is ordered to achieve compliance with an order or to punish.¹⁶⁶

Texas’s habeas statute attempts to meet this distinction by only granting habeas powers to the Texas Supreme Court if the confinement is in violation of a court order. An individual was found in contempt of court for lying during a deposition, not as a result of a court order or decree previously made. It is clear that the purpose of the contempt order in this case was to punish. The real problem in this case was that the underlying civil case resulted in what appears to be a criminal contempt judgment. Thus, the purpose was criminal, but the underlying proceeding was civil. While the federal system may have difficulty distinguishing between criminal and civil contempt at times, at least the courts and litigants know which judge or court will decide the issue. In Texas, the status of the underlying action is added to the mix, which means that Judge Hartz’s observation will not provide redress to Texas state court litigators. One must take into account both the purpose of the order and the underlying action. And, the litigator, without the supreme court’s creation of the mandamus

¹⁶⁴ 16A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3950.8 (4th ed. 2016).

¹⁶⁵ *In re Special Grand Jury 89–2*, 450 F.3d 1159, 1167 (10th Cir. 2006) (citing *United States v. Holland*, 214 F.3d 523, 526 (4th Cir. 2000)).

¹⁶⁶ *See, e.g., Shillitani v. United States*, 384 U.S. 364, 369–70 (1966).

loophole, would actually be without a court to appeal a criminal contempt order arising out of civil trial.

In *Holmes*, the Texas Court of Criminal Appeals held that they could exercise mandamus jurisdiction to prevent an appeals court from exercising civil jurisdiction over a stay of execution pending a hearing on clemency.¹⁶⁷ The case concerned inmate Gary Graham, who was convicted of murder and sentenced to death. This particular case was an attempt by Graham to force the Board of Pardon and Paroles to hear Graham's request for clemency through an injunction. The district court entered an order to either provide a hearing or enjoin the execution until the hearing occurred.¹⁶⁸ The Board appealed, and the court of appeals entered an injunction preventing the execution.¹⁶⁹ The relators (the district attorney and the Board of Pardons and Pleas) appealed up to the court of criminal appeals seeking a writ of mandamus.¹⁷⁰ The Texas Court of Criminal Appeals found that the stay of execution was a criminal law matter because capital punishment only arises from capital murder convictions.¹⁷¹

Judge Meyers noted in dissent that the controversy surrounding this case arose from the bifurcated nature of Texas courts of last resort,¹⁷² identifying the language in the Texas Constitution that gave rise to the confusion in this case.¹⁷³ If "criminal law

¹⁶⁷ *Holmes v. Honorable Court of Appeals for Third Dist.*, 885 S.W.2d 389 (Tex. Crim. App. 1994).

¹⁶⁸ *Id.* at 391.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 394.

¹⁷² *Id.* at 418 (Meyers, J., dissenting).

¹⁷³ *Id.* ("Our Constitution provides that the Supreme Court's 'appellate jurisdiction shall be final and shall extend to all cases except in criminal law matters,'" while "[t]his Court, on the other hand, has 'final appellate jurisdiction . . . in all criminal cases of whatever grade . . .'" (quoting TEX. CONST. art. V, §§ 3, 5)).

matters” and “criminal cases,” as used in the state constitution, mean the same thing, then the court of criminal appeals would have exclusive jurisdiction.¹⁷⁴ But if they mean something different, then it is possible that there is overlapping jurisdiction with civil courts.¹⁷⁵ Judge Meyers suspected that the majority of the court refused to allow this case to go through a normal appeal process for fear of it being appealed to the Texas Supreme Court instead of the Texas Court of Criminal Appeals, and thus stepped in to prevent that possibility.¹⁷⁶ Judge Meyers ended his dissent with a scathing statement regarding the jurisdictional warfare that he accused the majority of waging:

Our entire manner has had the appearance of a guerilla raid, when it should instead have been a cooperative effort to construe fundamental aspects of Texas constitutional law. In the process, we have violated basic principles of our own mandamus jurisprudence, encouraged the misuse of habeas corpus, and shamelessly interrupted an appellate process which was running exactly as prescribed by law, and which might very well have produced results better than expected by the majority had it been permitted to proceed to final judgment.¹⁷⁷

Bretz v. State, which involved an individual acquitted of receiving and concealing stolen property and

¹⁷⁴ *Holmes v. Honorable Court of Appeals for Third Dist.*, 885 S.W.2d 389, 418 (Tex. Crim. App. 1994) (Meyers, J., dissenting).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 418–19. (stating that Judge Meyers himself is not willing to “fight a turf war with other Texas courts”).

¹⁷⁷ *Id.* at 421.

ordered to return the property to the complaining witness, provides a much simpler example.¹⁷⁸ The defendant in the case appealed the order to the Texas Court of Criminal Appeals,¹⁷⁹ but the court held that it did not have jurisdiction.¹⁸⁰ Judge Roberts concurred and took time to expound the issues presented with bifurcated appeals.¹⁸¹ Judge Roberts lamented that even though this appeal came from a judgment in a criminal trial governed by the Code of Criminal Procedure in Texas, the court had to send Bretz “on his way to begin yet another search for the proper forum,”¹⁸² which, in this case, was the Texas Supreme Court.

In addition to forfeiture, Judge Roberts brought to light a few other instances of the confusion litigants face in Texas’s bifurcated court system.¹⁸³ For example, bond forfeiture proceedings are reviewed by the Texas Court of Criminal Appeals, yet are governed by the rules of civil procedure.¹⁸⁴ When a defendant seeks a writ of mandamus to enforce his right to a speedy trial, the defendant must file his petition for the writ in the Texas Supreme Court, not the Texas Court of Criminal Appeals, where presumably the defendant later will be able to appeal a conviction and argue that he was denied the right to a speedy trial.¹⁸⁵

The federal courts face similar issues. Bond forfeiture proceedings are civil;¹⁸⁶ property forfeiture

¹⁷⁸ Bretz v. State, 508 S.W.2d 97, 97 (Tex. Crim. App. 1974).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 98 (“Further, I feel that this case presents an excellent example of a problem often encountered in this State.”).

¹⁸² *Id.*

¹⁸³ *Id.* at 98–99.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*; see also Fariss v. Tipps, 463 S.W.2d 176 (Tex. 1971) (judgment set aside on other grounds).

¹⁸⁶ United States v. Plechner, 577 F.2d 596, 597 (9th Cir. 1978).

proceedings are criminal.¹⁸⁷ But in Texas, the outcomes can be absurd. A court that has jurisdiction solely in criminal matters must use the rules of civil procedure. That scenario cannot exist in a unified system.

One high profile case in Texas highlighting the problems inherent in a bifurcated court structure came in 1994 with a challenge to Texas's anti-sodomy law.¹⁸⁸ In *State v. Morales*, the Texas Supreme Court ruled that the Texas anti-sodomy law, a criminal statute, could be declared unconstitutional by the Texas Supreme Court only if it resulted in an irreparable injury to a property right.¹⁸⁹ The majority held that the court should avoid construing rights concerning a penal statute and further expressed pragmatic concerns with conflicting opinions between the two courts of last resort, noting that the Texas Court of Criminal Appeals also refused to exercise its jurisdiction in this Texas constitutional challenge.¹⁹⁰ It is not clear why the Texas Court of Criminal Appeals declined to hear this case, although one could postulate that because there was no criminal prosecution, the court saw no need to take jurisdiction. As a result, the lower court's decision declaring the law unconstitutional was reversed, and the matter was remanded to the trial court to dismiss the case for want of jurisdiction.¹⁹¹ Thus, *both* of Texas's courts of last resort decided that they lacked jurisdiction in this case. What is the point of having two courts of last resort if neither of them can take a particular case?

Another question arises from the *Morales* cases: How might one case end up in front of both courts of last resort? The Attorney General appealed to both courts at the same time. The Attorney General was quoted as

¹⁸⁷ *United States v. De Los Santos*, 260 F.3d 446, 448 (5th Cir. 2001).

¹⁸⁸ *State v. Morales*, 869 S.W.2d 941 (Tex. 1994).

¹⁸⁹ *Id.* at 942.

¹⁹⁰ *Id.* at 948 n.16.

¹⁹¹ *Id.* at 949.

saying, “We want to make sure we're not locked out of an appeal. It was either file with both or roll the dice.”¹⁹² Even the Attorney General’s office, the law firm of Texas, was unsure how to navigate the bifurcated court structure.

B. Oklahoma

Oklahoma’s judiciary, although not loved by all members of the Oklahoma bar, seems to enjoy fewer jurisdictional quandaries than Texas as a result of the 1967 large-scale judicial reforms. However, issues still remain with Oklahoma’s bifurcated system of courts, including the exercise of civil jurisdiction to enjoin an execution, juvenile delinquency, and contempt.¹⁹³

The procedural paths of Clayton Lockett and Charles Warner’s cases through the Oklahoma judiciary form a most tangled web. Warner was convicted at trial of first-degree murder and first-degree rape.¹⁹⁴ The trial court’s conviction was reversed, and the case was remanded for a new trial.¹⁹⁵ Warner’s second trial also resulted in conviction for first-degree murder and first-degree rape.¹⁹⁶ This time, on appeal, Warner’s conviction was upheld.¹⁹⁷ After losing in the Oklahoma Court of

¹⁹² *In re Coy Reece*, 341 S.W.3d 360, 385 n.68 (Tex. 2011) (quoting Janet Elliott, *State Appeals Twice in Sodomy Case, But Neither High Court May Want ‘Hot Potato’*, TEX. LAWYER, May 18, 1992, at 1).

¹⁹³ *See, e.g.*, *Carder v. Court of Crim. App.*, 595 P.2d 416 (Okla. 1978) (deciding a jurisdictional issue against the determination made by the court of criminal appeals); Ronald N. Ricketts, *Indirect Contempt in Oklahoma*, 27 OKLA. L. REV. 213 (1974) (discussing the thorny issue of the quasi-criminal nature of contempt in a bifurcated appeal system).

¹⁹⁴ *See generally* *Warner v. State*, 29 P.3d 569 (Okla. Crim. App. 2001).

¹⁹⁵ *Id.* at 575.

¹⁹⁶ *Warner v. State*, 144 P.3d 838, 896 (Okla. Crim. App. 2006).

¹⁹⁷ *Id.*

Criminal Appeals, Warner appealed to the U.S. Supreme Court, which denied certiorari.¹⁹⁸ Warner then filed a writ of habeas corpus in the U.S. District Court for the Western District of Oklahoma.¹⁹⁹ The writ was denied, and Warner appealed to the Tenth Circuit, where the district court's decision was affirmed.²⁰⁰ Warner then appealed to the U.S. Supreme Court, and the writ of certiorari once again was denied.²⁰¹

Clayton Derrell Lockett was charged with conspiracy, first-degree burglary, assault with a dangerous weapon, forcible oral sodomy, first-degree rape, kidnapping, robbery by force and fear, and first-degree murder.²⁰² Lockett was convicted on all nine counts and sentenced to death.²⁰³ The Oklahoma Court of Criminal Appeals affirmed the trial court below.²⁰⁴ Lockett then appealed to the U.S. Supreme Court, where the petition for a writ of certiorari was denied.²⁰⁵ Lockett then filed for a writ of habeas corpus in the U.S. District Court for the Western District of Oklahoma, where the writ was denied and judgment was entered against Lockett.²⁰⁶ Lockett appealed to the Tenth Circuit where the judgment was affirmed.²⁰⁷ Certiorari was denied by the U.S. Supreme Court.²⁰⁸

Lockett and Warner then joined as plaintiffs and filed a petition for declaratory relief and requested an injunction against the Oklahoma Department of

¹⁹⁸ Warner v. Oklahoma, 550 U.S. 942 (2007).

¹⁹⁹ Warner v. Workman, 814 F. Supp. 2d 1188 (W.D. Okla. 2011).

²⁰⁰ Warner v. Trammell, 520 Fed. Appx. 675 (10th Cir. 2013).

²⁰¹ Warner v. Trammell, 134 S. Ct. 924 (2014).

²⁰² Lockett v. State, 53 P.3d 418, 421 (Okla. Crim. App. 2002).

²⁰³ *Id.*

²⁰⁴ *Id.* at 431.

²⁰⁵ Lockett v. Oklahoma, 538 U.S. 982 (2003).

²⁰⁶ Lockett v. Workman, No. CIV-03-734-F, 2011 WL 10843368 (W.D. Okla. Jan. 19, 2011).

²⁰⁷ Lockett v. Trammel, 711 F.3d 1218, 1255 (10th Cir. 2013).

²⁰⁸ Lockett v. Trammel, 134 S. Ct. 924 (2014).

Corrections on a challenge to the constitutionality of an Oklahoma statute²⁰⁹ that concealed the identity of the drugs to be used in their executions.²¹⁰ The Oklahoma Attorney General's Office removed the case to the United States District Court, due to Lockett and Warner's invocation of the Eighth Amendment of the U.S. Constitution.²¹¹ Lockett and Warner then amended their complaint to remove federal issues, and the case was remanded back to the Oklahoma district court.²¹² The Oklahoma district court then found that jurisdiction for issuing a temporary injunction lays solely in the Oklahoma Court of Criminal Appeals.²¹³ Plaintiffs appealed the trial court's order finding jurisdiction lays solely in the Oklahoma Court of Criminal Appeals to the Oklahoma Supreme Court.²¹⁴ The Oklahoma Supreme Court remanded the declaratory judgment matter to the trial court for resolution of civil matters, and transferred the emergency stay of execution motion to the Oklahoma Court of Criminal Appeals.²¹⁵ During this time, however, the state of Oklahoma was unable to procure execution drugs, and thus a thirty-day stay was entered and the Oklahoma Court of Criminal Appeals dismissed the emergency stay motion as moot.²¹⁶

The district court then ruled on the declaratory judgment and found the confidentiality law unconstitutional under the Oklahoma Constitution as a

²⁰⁹ See generally OKLA. STAT. tit. 22 § 1015(B) (2011) ("The identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution shall be confidential and shall not be subject to discovery in any civil or criminal proceedings.").

²¹⁰ Lockett v. Evans, 356 P.3d 58, 58 (Okla. 2014).

²¹¹ *Id.* at 59.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 60.

denial of the plaintiffs' right to access the courts.²¹⁷ The plaintiffs then sought a stay of execution pending the appeal of the district court's declaratory judgment.²¹⁸ The Oklahoma Court of Criminal Appeals, however, denied the stay of execution, holding that it may only issue a stay of execution pending a challenge to conviction or sentence of death.²¹⁹ The plaintiffs again appealed to the Oklahoma Supreme Court, which exercised jurisdiction in deciding the constitutional question²²⁰ but ruled that the Oklahoma Court of Criminal Appeals maintained jurisdiction to issue a stay of execution.²²¹ Thus, the Oklahoma Supreme Court—per its constitutional authority—instructed the court of criminal appeals to take jurisdiction.²²² Unfortunately, this was not the end of the judicial hot potato.

Upon receiving the case from the Oklahoma Supreme Court for a second time, and after a clear pronouncement of jurisdiction from that court, the Oklahoma Court of Criminal Appeals refused to exercise its jurisdiction and held:

While the Oklahoma Supreme Court has authority to deem an issue civil and so

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Lockett v. State*, 329 P.3d 755, 759 (Okla. Crim. App. 2014). Note the similarity to the Texas Court of Criminal Appeal's denial of review in *Reece*. Because the appeal arose out of a civil matter, the *Reece* court denied relief.

²²⁰ *Lockett v. Evans*, 377 P.3d 1254, 1254 (Okla. 2014).

²²¹ *Id.*

²²² *Id.* at 1254–55 (“In exercising our constitutional power to determine jurisdiction, we transfer ‘only’ the Application for Emergency Stay to the Court of Criminal Appeals. In so doing, we urge the appellate criminal court to be cognizant of the time restraints associated with the submission of the appeal(s) to this Court along with the gravity of the first impression constitutional issues this Court will be charged with in addressing the civil appeal, or appeals.”).

within its jurisdiction, it does not have the power to supersede a statute and manufacture jurisdiction in this Court for Appellants' stay request by merely transferring it here. Therefore, Appellants' application for stays of execution is DENIED.²²³

In response to the court of criminal appeals' refusal to exercise its jurisdiction, the Oklahoma Supreme Court wrote:

On April, 17, 2014, Thursday last, *we exercised our constitutional authority to determine the appropriate tribunal for resolution of the stay issue under the Oklahoma Constitution, Article 7, section 4, vesting this Court with the sole power to determine whether the jurisdiction of the stay issue was within this Court or the Court of Criminal Appeals.* In so doing, we transferred the request for stay "alone" to the Court of Criminal Appeals.

The majority of the Court of Criminal Appeals refused to exercise this Court's order and to address the merits of the stay. That order, which we consider to be invalid as not having followed the constitutional directive of this Court, have [sic] now resulted in a situation never contemplated by the drafters of Oklahoma's ultimate rule of law—that this tribunal be inserted into death penalty

²²³ *Lockett*, 329 P.3d at 758.

cases. A position generally reserved for the Court of Criminal Appeals.²²⁴

As a result, the Oklahoma Supreme Court determined that the rule of necessity required them to take jurisdiction in this case to issue a stay of execution pending the outcome of the civil challenge to the confidentiality statute.²²⁵ For the first time in the state's history, the Oklahoma Supreme Court took jurisdiction in a death penalty appeal.²²⁶ Unfortunately, the stay of execution was not the end of the matter.

In the final opinion issued before the executions of Lockett and Warner, the Oklahoma Supreme Court appeared to backpedal. The supreme court reversed the trial court's decision, which held section 22.1015(B) unconstitutional.²²⁷ The supreme court also dissolved its stay of execution.²²⁸ The concurrence rings of "I told you so," when Justice Taylor writes:

I warned this Court in my previous dissents against crossing the Rubicon and now that crossing has caused a quagmire. Had this Court transferred all issues in this appeal to the Court of Criminal Appeals as I previously advocated, the matter would have been resolved without this Court ignoring precedent and the Court of Criminal Appeals' role in our judicial system.²²⁹

²²⁴ Lockett v. Evans, 356 P.3d 58, 61 (Okla. 2014) (emphasis in original).

²²⁵ *Id.*

²²⁶ *Id.* at 62 (Taylor, J., dissenting).

²²⁷ Lockett v. Evans, 330 P.3d 488, 491 (Okla. 2014).

²²⁸ *Id.* at 492.

²²⁹ *Id.* at 493 (Taylor, J., concurring).

Why did the court experience such a rapid about-face regarding these jurisdictional issues? Between the opinion issuing a stay of execution on April 21, 2014, and the opinion dissolving the stay of execution on April 23, 2014, some unusual events transpired in the governance of Oklahoma. First, Governor Mary Fallin proclaimed that she would not comply with the Oklahoma Supreme Court's stay of execution, stating, "I cannot give effect to the order by that honorable court."²³⁰ Let that sink in: The executive branch of Oklahoma refused to comply with the stay of execution issued by the Oklahoma Supreme Court, and would execute the inmates regardless, by reasoning that the supreme court's "attempted stay of execution is outside the constitutional authority of that body" and that only an order by the Oklahoma Court of Criminal Appeals would be binding in this case.²³¹ The next day Representative Mike Christian of the Oklahoma legislature began impeachment proceedings against the justices in the majority opinion issuing the stay of execution.²³² As a result, the supreme court reversed its position and allowed the executions to proceed, despite the secrecy of the drugs—the very same drugs that caused Warner's last word to be, "My body is on fire."²³³

What ultimately caused this jurisdictional hot potato was the insertion of a civil suit into a death row case. The Oklahoma Supreme Court felt compelled by necessity to enter the "quagmire" of a suit requesting a stay of execution in order to decide the constitutional implications of the government's policy forbidding disclosure of the lethal injection drugs. Events like this could not occur in the federal system. Every Article III

²³⁰ Andrew Cohen, *Oklahoma Just Neutered its State Supreme Court*, THE WEEK, (Apr. 29, 2014), <http://theweek.com/articles/447457/oklahoma-just-neutered-state-supreme-court>.

²³¹ *Id.*

²³² *Id.*

²³³ Murphy, *supra* note 15.

court has the authority to decide the entire controversy (subject to subject matter jurisdiction) regardless of the civil or criminal aspects. A federal court may struggle to determine which rules of procedure may apply, but there is no question as to which court has the ability to hear a case. While the story of Charles Warner and Clayton Lockett is certainly a dramatic example of the pitfalls of bifurcated courts of last resort, there are others that generate less controversy.

In *Carder v. Court of Criminal Appeals*, the Oklahoma Supreme Court held that the court of criminal appeals lacked jurisdiction to issue a writ of prohibition, a demand for a change of custody hearing for a juvenile who had been adjudicated delinquent and a ward of the state.²³⁴ The Oklahoma Supreme Court held that the Oklahoma Court of Criminal Appeals does not have general supervisory jurisdiction of lower courts, and cannot hear cases that do not arise out of criminal matters.²³⁵ It is important to note that had this appeal originated from an adjudication of delinquency or certification to stand trial as an adult, the result would have been different. But because the matter was instead a subsequent court action where the father sought to return his son to his custody, there was no longer court of criminal appeals jurisdiction.

A jurisdictional tug-of-war between the Oklahoma Supreme Court and the Oklahoma Court of Criminal Appeals that remains unresolved is that of contempt, which, as already noted, has aspects of both criminal and civil jurisdiction. Contempt, according to the Oklahoma Supreme Court, is *sui generis* and not criminal. In the federal system, contempt can be either criminal or civil. The distinction lies in whether the purpose is to punish or to induce compliance.

In *State ex rel. Attorney General v. Owens*, the dispute arose out of the contempt conviction of a certain

²³⁴ 595 P.2d 416, 418 (Okla. 1978).

²³⁵ *Id.* at 419.

Mr. O. O. Owens, who published defamatory statements about some of the Oklahoma Supreme Court's members.²³⁶ From a federal perspective, the purpose was to punish Mr. Owens for his statements. Owens filed a habeas petition with the Oklahoma Court of Criminal Appeals after being found in contempt by the Oklahoma Supreme Court.²³⁷ The supreme court directed a writ of prohibition to the court of criminal appeals regarding the habeas petition, but the court of criminal appeals proceeded anyway and ordered Owens's release.²³⁸ Once again, here is an instance in which the constitutionally-superior Oklahoma Supreme Court is defied by the Oklahoma Court of Criminal Appeals. One can hardly blame the court of criminal appeals, however, because the punishment of Mr. Owens for his defamatory statements appears to be criminal through any lens.

The Oklahoma Supreme Court subsequently quashed the order of release in *Dancy v. Owens*.²³⁹ Fortunately, in this case—juxtaposed with the *Lockett v. Evans* saga—the Oklahoma Court of Criminal Appeals did not act in further contravention of the holding of the supreme court.²⁴⁰ Less fortunate is the fact that there still remains jurisdictional confusion with regard to contempt because the court of criminal appeals held that contempt is a misdemeanor in *Roselle v. State*²⁴¹ and the supreme court still maintained that contempt is *sui generis* in *Young v. Woodson*.²⁴² As noted above in my

²³⁶ State *ex rel.* Attorney Gen. v. Owens, 256 P. 704, 705 (Okla. 1927).

²³⁷ See Ricketts, *supra* note 193, at 216.

²³⁸ See generally *Ex parte Owens*, 258 P. 758 (Okla. Crim. App. 1927).

²³⁹ 258 P. 879 (1927).

²⁴⁰ See Ricketts, *supra* note 193, at 217 (noting that it was not until forty years after *Dancy* that the Oklahoma Supreme Court once again addressed contempt).

²⁴¹ 503 P.2d 1293, 1295 (Okla. Crim. App. 1972).

²⁴² 519 P.2d 1357 (Okla. 1974).

discussion of contempt in Texas, it is often difficult to determine whether contempt is civil or criminal. But once again, the difficulty is exacerbated when two courts of last resort have to decide the question.

III. Attempts to Eliminate Bifurcated Courts A. Texas

Texas has not been silent in its desire to eliminate the bifurcated court system. There have been four distinct proposals in the past twenty years to eliminate the bifurcated court system, some introduced more than once.²⁴³ The 1993 effort proposed to eliminate the Texas Court of Criminal Appeals and transfer all criminal cases to the Texas Supreme Court. A 1999 proposal would have merged the two courts into one high court composed of fifteen justices: seven would be appointed by the governor, seven would be elected, and the chief justice would be appointed and had to be from a different district than the previous appointment.²⁴⁴ In 2003, the proposal was substantially the same as 1993—eliminate the Texas Court of Criminal Appeals and transfer jurisdiction to the Texas Supreme Court.²⁴⁵ In 2011 and 2013, the same bill to eliminate the Texas Court of Criminal Appeals was introduced.²⁴⁶ Unfortunately, none of the bills presented received any real consideration.²⁴⁷

²⁴³ Bill Raftery, *Trying to Eliminate the Texas Court of Criminal Appeals: Will Fourth Attempt in 20 years Succeed?*, GAVEL TO GAVEL (Dec. 6, 2012), <http://gaveltogavel.us/2012/12/06/trying-to-eliminate-the-texas-court-of-criminal-appeals-will-fourth-attempt-in-20-years-succeed/>.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *See id.* (noting that only a few bills even received a hearing).

B. Oklahoma

Oklahoma, despite the controversies it has endured, has had far less legislative attempts to eliminate its bifurcated court structure. Although it has been criticized on record as early as 1919 at a meeting of the Oklahoma State Bar Association,²⁴⁸ there have only been two instances of proposed reforms since the Sneed plan in 1967.²⁴⁹ One was an attempt to create a *third* court of last resort specifically for capital cases.²⁵⁰ Oklahoma's other attempt to modify its court structure occurred in 2012; the proposal called for the elimination of the Oklahoma Court of Criminal Appeals as well as the transfer of the power of constitutional review by the Oklahoma Supreme Court to an ad hoc court of constitutional review created by the legislature.²⁵¹

IV. Analysis

A bifurcated court system causes unique jurisdictional “quagmires.” Bifurcating criminal and civil jurisdiction is usually intuitive and simple in the vast majority of cases, but there are enough significant issues

²⁴⁸ PROCEEDINGS OF THE THIRTEENTH ANNUAL MEETING OF THE OKLAHOMA STATE BAR ASSOCIATION 126 (Walter Lybrand, ed.1919) (discussing a wholesale replacement of the Oklahoma judiciary, including a single supreme court).

²⁴⁹ See Simpson, *supra* note 106 (noting that the Sneed plan was defeated).

²⁵⁰ H.R.J. Res. 1022, 55th Leg., 1st Sess. (Okla. 2015) (introduced by the same individual who introduced articles of impeachment against the Oklahoma Supreme Court in response to the Lockett debacle).

²⁵¹ See S.J. Res. 83, 53d Leg., 2d Sess. (Okla. 2012); Bill Raftery, *Recent Legislative Efforts to Eliminate, or Create, Bifurcated Criminal and Civil Appellate Courts*, GAVEL TO GAVEL (Apr. 30, 2014), <http://gaveltogavel.us/2014/04/30/recent-legislative-efforts-to-eliminate-or-create-bifurcated-criminal-and-civil-appellate-courts/>.

to justify greater scrutiny of the system. Oklahoma and Texas are the only two states in the union that maintain this judicial system. No other state (including those with large populations such as California, New York, and Florida) maintains a bifurcated system of courts of last resort. If the overwhelming majority of states and the federal system maintain a single court of last resort, there might be good reason for Oklahoma and Texas to consider following the crowd.

Texas and Oklahoma suffer from failures to distinguish between civil and criminal jurisdiction in cases that maintain aspects of both. These cases create confusion for litigants as well as inter-judicial warring. Texas and Oklahoma do not have a compelling justification for maintaining bifurcated courts and should either combine the two courts into one, or develop a bifurcated system of intermediate appellate courts, with one court of last resort that has full appellate jurisdiction for all matters.

When one looks at the cases listed in Part II, one can find a unifying theme in the jurisdictional quandaries in which these courts have found themselves. In every single case outlined above, there have been aspects of both civil and criminal jurisdiction. *In re Reece* involved contempt in the context of a civil deposition.²⁵² This case arose out of a civil case, but was essentially a habeas petition, which the Texas Supreme Court generally cannot hear.²⁵³ However, the Texas Court of Criminal Appeals refused to hear the habeas petition because it determined the case was civil in nature, arising from a civil case.²⁵⁴ In Oklahoma, contempt jurisdiction is still unresolved. The Oklahoma Supreme Court determined that contempt is *sui generis*,²⁵⁵ but the Oklahoma Court of Criminal Appeals decided that

²⁵² *In Re Reece*, 341 S.W.3d 360 (Tex. 2011).

²⁵³ *Id.*

²⁵⁴ *Id.* at 362.

²⁵⁵ *Young v. Woodson*, 519 P.2d 1357 (Okla. 1974).

contempt is a misdemeanor and thus under its sole jurisdiction.²⁵⁶

One might point to the federal system and suggest that contempt is a difficult distinction even for a unified court system.²⁵⁷ This underscores my point. If it is difficult for a single court, it is even more complicated for a bifurcated system. At the end of the process, at least the litigant has the promise of finality in a unified system. The U.S. Supreme Court can make a determination and it will be the end of the matter. In Oklahoma and Texas, the litigant still does not know! If past performance is evidence of future conduct, Texas's and Oklahoma's high courts will play judicial hot potato again.

Other examples where the federal courts have struggled to determine the difference between civil and criminal jurisdiction include: appeals from criminal forfeiture,²⁵⁸ appeals from firearms prohibitions imposed on felons,²⁵⁹ and appeals from denials of requests to release grand jury transcripts for use in a habeas proceeding.²⁶⁰ In each of these cases there are aspects of both civil and criminal jurisdiction, yet the firearms appeals and the jury transcript requests were both held to be civil and the forfeiture of assets appeal was held to be criminal. In Texas and Oklahoma, the supreme court must think about how the court of criminal appeals would rule, and vice versa, in order to prevent jurisdictional holes or gaps from propagating. *Reece* is a perfect example. The Texas Supreme Court had to contort its

²⁵⁶ *Rosell v. State*, 503 P.2d 1293, 1295 (Okla. Crim. App. 1972).

²⁵⁷ *See, e.g., Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827–28 (1994).

²⁵⁸ *United States v. De Los Santos*, 260 F.3d 446, 448 (5th Cir. 2001).

²⁵⁹ *Palma v. U.S., Dept. of Alcohol, Tobacco and Firearms*, 228 F.3d 323, 327 (3d Cir. 2000).

²⁶⁰ *United States v. Miramontez*, 995 F.2d 56, 58 (5th Cir. 1993).

jurisdiction to meet a gap in habeas jurisdiction.²⁶¹ At least unified systems will generate an answer that will effectively guide litigants, and keep them from having to “roll the dice.”²⁶²

Litigants themselves struggle to navigate the system. In *State v. Morales*,²⁶³ the Attorney General of Texas appealed to both the Texas Supreme Court and the Texas Court of Criminal Appeals, not knowing which court had jurisdiction. In *Bretz v. State*, a litigant appealed an order to return property that he was acquitted of stealing.²⁶⁴ One could reasonably assume that because the order came from a criminal trial, the appeal would be to the Texas Court of Criminal Appeals. Unfortunately, Texas maintains that this appeal belongs in a civil appeals court, not criminal. Texas does follow the federal rule,²⁶⁵ but in Texas, one has to file an entirely new motion and appeal to an entirely different court if the original appeal was brought in the wrong court. In federal court, a litigant could simply amend her motion and remain in front of the same court.

Because it is difficult to determine which court of last resort has jurisdiction, litigants have to expend more resources identifying the appropriate appellate forum, and judicial resources are wasted determining which court has jurisdiction. The *Lockett/Warner* debacle is a perfect example: A case was bounced around for years with the courts fighting over who did or did not have jurisdiction.

Texas and Oklahoma have experienced inter-judicial warring because of their bifurcated court structures. *In re Reece* is an example where the Texas Supreme Court essentially had to step in and take

²⁶¹ *In Re Reece*, 341 S.W.3d 360 (Tex. 2011).

²⁶² *See supra* note 192.

²⁶³ 869 S.W.2d 941 (Tex. 1994).

²⁶⁴ 508 S.W.2d 97 (Tex. Crim. App. 1974).

²⁶⁵ *See, e.g.*, *United States v. Madden*, 95 F.3d 38, 39 n.1 (10th Cir. 1996).

jurisdiction because the Texas Court of Criminal Appeals refused.²⁶⁶ In Oklahoma, *Lockett v. Evans* passed in front of the Oklahoma Supreme Court six times after being sent to the Oklahoma Court of Criminal Appeals on multiple occasions.²⁶⁷ In Texas, it is understandable that the courts of last resort must tread lightly in deferring to the other court. The two courts are coequal, both provided for in the constitution and both with final appellate jurisdiction in their respective spheres.²⁶⁸ In Texas there is no ultimate authority to decide jurisdictional mistakes. If both courts deny jurisdiction, there is no court to hear the case. This is a serious problem that could only be resolved through a constitutional amendment, because interpretation of jurisdiction is a constitutional matter.

Although the Oklahoma Supreme Court has the constitutional power to decide final jurisdictional issues, it appears to be illusory. The Oklahoma Supreme Court made a final adjudication in *Lockett v. Evans*, holding that the court of criminal appeals had jurisdiction, yet the Oklahoma Court of Criminal Appeals refused to exercise its jurisdiction in that case.²⁶⁹

Thus, we find that the expense and headache created by the bifurcated system is not worth the candle. The system is inefficient, confusing, and contentious. The arguments in favor of the system are dispelled below.

The argument that Texas and Oklahoma require bifurcated courts to handle a more significant caseload is not a compelling one. For instance, the California Supreme Court received 9,739 matters in 2013.²⁷⁰ By comparison, the Texas Supreme Court received only 778 and the Texas Court of Criminal Appeals received 5,875,

²⁶⁶ See *supra* Part II.A.

²⁶⁷ *Lockett v. Evans*, 330 P.3d 488, 493 (Okla. 2014) (Taylor, J., concurring).

²⁶⁸ See TEX. CONST. art. V, §§ 2–3, 5.

²⁶⁹ *Lockett*, 330 P.3d 488.

²⁷⁰ JUDICIAL COUNCIL OF CALIFORNIA, 2013 CALIFORNIA COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS xvi (2013).

for a total court of last resort case disposition of 6,653 matters.²⁷¹ This shows that California, with one court, was able to complete 3,086 more matters than Texas with two courts. Oklahoma, being a far less populous state, also cannot justify its bifurcated system based on the number of matters disposed.

The argument that a bifurcated court of last resort system increases the expertise of the judiciary does not outweigh the problems such a system creates. There is little evidence to suggest that federal courts suffer from a lack of expertise in disposing of criminal or civil matters, except for the occasional issue such as ERISA or patent litigation.²⁷² Even if Oklahoma and Texas want to keep their expert judges in criminal and civil matters, they could do so through specialized mid-level appeals courts, which I will outline *infra*.

In light of these jurisdictional issues and the examples from the vast majority of other states, my recommendation is that both Texas and Oklahoma should abolish their bifurcated court system. There should be three constitutional courts including a trial court of general jurisdiction, an appeals court with general appellate jurisdiction, and one supreme court with general appellate jurisdiction. This would require the elimination of the current system in Oklahoma where the Oklahoma Supreme Court handles all appeals and has discretion in passing appeals down to the Oklahoma Court of Appeals.

²⁷¹ OFFICE OF COURT ADMINISTRATION, ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR 2013 24, 30 (2013).

²⁷² See, e.g., Paul M. Secunda, *Cultural Cognition Insights Into Judicial Decisionmaking in Employee Benefits Cases*, 3 LAB. & EMP. L. F. 2 (2013) (arguing for specialized judges to handle ERISA litigation); William Watkins, *We Need a Specialized Patent Trial Court*, LAW 360 (Oct. 20, 2014), <http://www.law360.com/articles/583409/we-need-a-specialized-patent-trial-court>.

Texas would eliminate a significant number of its own courts, including county courts and justice of the peace courts. I also recommend that Texas reduce the total number of courts of appeal from the current fourteen to a more manageable six or seven. Texas should increase the number of judges on the courts of appeal, and limit the districts to readily discernable geographic and demographic areas. This will decrease the role of the Texas Supreme Court as an arbiter of district splits and allow it to grant certiorari on appeals that present novel and important issues.

If, on the other hand, Texas and Oklahoma would like to maintain the specialization in having a bifurcated appeals system, there is still room to clean up the jurisdictional conflicts. In the late 1960s, Tennessee and Alabama both instituted bifurcated mid-level appellate courts.²⁷³ Neither state has attempted to amend or eliminate its system in the past twenty years.²⁷⁴

There are numerous benefits of a bifurcated mid-level appeals court with a single court of last resort. The mid-level appeals courts would develop significant specialties in their respective jurisdiction, thus maintaining one of the principal arguments in favor of the bifurcated courts of last resort while decreasing jurisdictional headaches. The courts would have less work, and thus could reach a disposition more quickly.²⁷⁵ Additionally, the supreme court may come to be viewed as playing more of an administrative role, with the mid-level courts acting similar to a court of last resort. I

²⁷³ See Raftery, *supra* note 243 (listing both Alabama and Tennessee as states that have bifurcated mid-level appellate courts).

²⁷⁴ *Id.*

²⁷⁵ For example, Tennessee's mid-level courts of appeal maintained near or above a 100% clearance rate. See ADMINISTRATIVE OFFICE OF THE COURTS, ANNUAL REPORT OF THE TENNESSEE JUDICIARY: FISCAL YEAR 2013-2014 11, 13 (2014).

would, however, allow mandatory supreme court jurisdiction for death penalty cases due to the incredibly sensitive nature of those cases.

The mid-level court would in most instances be the last court that litigants see. Without a right of appeal to the supreme court (except in capital cases), the mid-level appeals courts would have final authority on nearly all decisions. Only in cases where the supreme court either finds serious errors in reasoning, circuit splits, or jurisdictional mistakes would it review a case. Thus, these specialized courts would for most purposes remain the last court to which litigants argue.

If there are questions regarding jurisdictional issues between the mid-level courts (which, as we have seen from bifurcated courts of last resort, is inevitable) the supreme court could easily dispose of the jurisdictional issue and the lower courts would be bound. There would be no debacles like *Reece* or *Lockett* because the supreme court would have ultimate authority on *all* issues of state law.

For example, if we apply the novel mid-level bifurcated structure to the facts of *Reece*, where the Texas Supreme Court used a tenuous interpretation of its mandamus power to prevent a significant gap in appellate review, there would have been a different outcome.²⁷⁶ If the mid-level court of criminal appeals denied jurisdiction, the civil appeals court would likely have never entered the picture. The appeal of the denial of habeas would go up to the unified supreme court of last resort, where that court presumably would have determined that the court of criminal appeals did have jurisdiction in this case. Because the unified supreme court is a higher court and sets binding precedent for the court of criminal appeals, that court would have heard the case and disposed of the issue.

Cases like *Bretz v. State* would also be avoided. Litigants would have the knowledge that if a mistake

²⁷⁶ See *supra* Part II.A.

concerning jurisdiction was made on their part, the supreme court could remand to the proper court. Additionally, when the mistaken jurisdiction of the litigant is clear to the mid-level court reviewing the case, Texas and Oklahoma could institute a process similar to the process set forth in 28 U.S.C. § 1631.²⁷⁷ This would allow a civil court to transfer a case to a criminal court and vice versa.²⁷⁸ The result would be preservation of the case to avoid timing issues in appeals. Further, if there were a mistake on the part of the transferring court, the supreme court would have the authority to make a final determination and remand for adjudication. There would still remain extra expense in litigation, but there also would be the added benefit of judicial expertise in specialized courts.

One might question whether the outcome of *Lockett* would have been any different in a system of bifurcated intermediate courts. I argue that it would. On the first appeal, Lockett would appeal to either the criminal or civil court of appeals. If he appealed to the wrong court, or the court incorrectly determined that it did not have jurisdiction, the case would be appealed up to the unified supreme court. This court would be able to make a single determination regarding which court had jurisdiction, and its decree would be binding law on all parties. There would not be the denial of the order by the court of criminal appeals because the unified supreme court is objectively higher. Even if the mid-level court of criminal appeals defied the order of the unified supreme court (which is highly unlikely), the supreme court would have jurisdiction to decide the case itself, thus eliminating the tenuous judicial acrobatics necessary to shoehorn civil into criminal, or vice versa. As Justice Jackson famously wrote, “We are not final because we are infallible, but we are infallible only because we are

²⁷⁷ 28 U.S.C. § 1631 (1982).

²⁷⁸ *Id.*

final.”²⁷⁹ One court of last resort eliminates a contest of equals jockeying for position and creates finality binding on all.

V. Conclusion

“Dissatisfaction with the administration of justice is as old as law. Not to go outside our own legal system, discontent has an ancient and unbroken pedigree.”²⁸⁰ The Texas and Oklahoma judiciary systems are problematic. In Oklahoma, the result of a judicial hot potato led to the botched execution of a convicted murderer using experimental drugs.²⁸¹ In Texas, the Texas Supreme Court used mandamus jurisdiction for what was essentially a habeas petition, because the Texas Court of Criminal Appeals held that it did not have jurisdiction to hear a writ of habeas corpus arising from an individual being held in contempt in an underlying civil trial, despite the fact that the purpose of the contempt order was criminal punishment.²⁸² These jurisdictional issues affect real human beings and deserve the attention of legislators and reformers. Texas and Oklahoma should seriously consider amending their constitutions to reconstruct their judicial systems to contain only one court of last resort with general appellate jurisdiction in order to ensure there will always be a court to hear a case.

²⁷⁹ *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J. concurring).

²⁸⁰ Orley R. Lilly, Jr., *Some Thoughts for Judicial Reform in Oklahoma*, 10 TULSA L. J. 91, 91 (1974) (quoting Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice* (1906)).

²⁸¹ See *Lockett v. Evans*, 330 P.3d 488 (Okla. 2014).

²⁸² See *In re Reece*, 341 S.W.3d 360 (Tex. 2011).