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The Dilemma of Interpreting Rules of Civil Procedure: A Proposal for Elastic Formalism.

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ARTICLE

THE DILEMMA OF INTERPRETING RULES OF CIVIL PROCEDURE: A PROPOSAL FOR ELASTIC FORMALISM

L. WAYNE SCOTT*

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This Article is dedicated to Mike Hatchell and the memory of Rusty McMains for aiding and abetting me on many projects, but mainly for their friendship, patience, mentoring, and insights over the years.

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I. RULE INTERPRETATION—THE JUSTICE DILEMMA—MECHANICAL JURISPRUDENCE[1] WITH HEART

THE PROBLEM

A. *Prologue*[2]

When I was in active practice, there was an appellate judge who said: "I'm sorry I had to rule against you, but when you have friends on both sides, you just have to follow the law." That statement illustrates one problem, particularly with rule interpretation and elected judges in the diverse State of Texas. It reflects the potential alteration of a rule in the name of "doing justice" meaning the judge chooses to do.

Likewise, I heard an appellate judge say, "Don't bother me with a bunch of authorities. If I want to rule for you, I will find authority to cite." That statement further illustrates a deeper problem—the law can be manipulated to support any desired outcome.[3] This is most frustrating to lawyers who are well-prepared, know the law, present the law, and have it ignored. When courts publish opinions reflecting this attitude, students often become frustrated or conclude that the law is whatever the judge decides it should be. This idea follows them into their practices and beyond if those students become the judges of the future.

This Article does not focus on unethical judges who decide cases for wrong motives but, rather, focuses on ethical judges who are faced with "hard" (as distinguished from "easy") cases and have the dilemma of having to decide the case, either by the rule or by the judge's concept of fairness. The two situations (wrong motive or hard case), however, are

1. Roscoe Pound, in his article, *Mechanical Jurisprudence*, brought this concept to prominence. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); *see also* Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 518 (2006) (equating "what we would call today 'legal formalism[]'" with "what Pound called 'mechanical jurisprudence'"). I am, to an extent, changing his meaning of the term "Mechanical Jurisprudence" because this Article relates only to the working rules of trial and appellate procedure.

2. This Article is written primarily in the context of Texas law and the examples discussed below arise from the same. The law of other jurisdictions could just as well have been chosen, but the problems are similar regardless.

3. Judges who decide cases, as illustrated by these two quotes, forget "an extremely important, even a defining, element of the judicial protocol[,] . . . what Aristotle called corrective justice. That means judging the case rather than the parties, an aspiration given symbolic expression in statues of justice as a blindfolded goddess and in the judicial oath requiring judges to make decisions without respect to persons. It is also the essential meaning of the 'rule of law.'" Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1056 (2006) (footnote omitted).

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related. In both instances, the judge or judges may ignore or refuse to apply a plainly written rule.[4] If it is proper in the hard case, why isn't it proper to disregard the language of a procedural rule anytime a judge chooses, "for the sake of justice," to ignore the rule? It is the purpose of this Article to propose a set of standards that may be used in hard cases and may demonstrate the impropriety of ignoring a rule when the case is not truly hard.

So what is a hard case? For the purposes of this Article, "[a]n easy case is one where the applicable law is clear; a hard case . . . is one in which a number of rules could arguably be applied."[5]

If this were a philosophical work, I would pursue the broad question of the nature of judicial obligation. But this is only a modest exploration of a few Texas Civil Procedure questions. The fact that it does touch on judicial obligation and judicial ethics is, in one sense, coincidental and, in another, the purpose of the Article.

None of the examples below are intended to imply that political motivation led to the action of the court in the cases used to illustrate the problems. However, it should be recognized that every time a court condones or authorizes a deviation from the published rule, the motivation of the court may not be as pure as in the cases to be discussed.

B. *Proposed Practical Consideration—A Set of Standards*

This Article proposes a set of standards by which any dilemma of rule interpretation can be resolved. This proposal will be viewed by some as a

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4. "Yet appellate court judges take the same approach with alarming frequency when confronted with interminable volumes of precedent. Rather than carefully investigating and understanding those authorities, many judges react by determining the "correct" decision and either utilizing snippets of supporting case law or ignoring prior decisions altogether." Michael Gentithes, *Precedent, Humility, and Justice*, 18 TEX. WESLEYAN L. REV. 835, 836 (2012).

5. Brent D. Lloyd, *Toward a Pragmatic Model of Judicial Decisionmaking: Why Tort Law Provides a Better Framework than Constitutional Law for Deciding the Issue of Medical Futility*. 19 SEATTLE U. L. REV. 603, 622 (1996) (citing Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 833 (1988)); *see also* Gregory B. David, *Dworkin, Precedent, Confidence, and* Roe v. Wade, 152 U. PA. L. REV. 1221, 1224 (2004) ("In the past thirty-five years, two important but fundamentally different legal theories have attempted to address the philosophical question of the nature of judicial obligation. The first approach is modern positivism, best represented by H.L.A. Hart and Joseph Raz. According to this view, a judge is obligated to apply the rules that the legal system recognizes as law. Such law might derive from precedent that judges establish or rules that the legislature or some other lawmaking body creates. . . . [A] rule does not always determine how a judge should decide a case. When this occurs, the judge's decision involves an exercise of discretion because the law poses no obligation to decide the case one way, rather than another." (footnotes omitted)).

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move to formalism.[6] That may be true, but this proposal only applies to rules of procedure and is elastic in nature.

Using suggestions from H.L.A. Hart's proposals (slightly modified), primary and secondary rules are identified for resolution of the dilemma of deciding hard cases—that is, the need for justice and the need for clear and understandable rules of procedure. Integrating a proposal from Lon Fuller, which identifies eight routes to the failure of a legal system, this Article proposes a set of flexible standards to be considered when resolving any dispute between a published rule and a perceived injustice resulting from the application of a rule. With due apologies to Hart and Fuller, these standards or rules can be referred to as "The Elastic Standards for Resolving a Dilemma in Applying Rules of Procedure to Achieve Justice." As modified for this Article, these elastic standards are as follows:

> (1) Lacuna: Is there a lacuna or vacancy in the law that justifies the judicial examination, variation or proposed resolution? If so, and the circumstances are extraordinary or the position of litigants will not be altered, it is proper to make the change to do justice.
> (2) Publication: Is it a single correction of the rule, by published or unpublished opinion? Or, will the resolution be published to affect future litigation? If it is a single correction, it may be justified if extraordinary circumstances demand it. If it impacts all future litigation, it should not be made.
> (3) Ambiguity: Will resolution of this dilemma be clear? Or, will it be unclear and create an ambiguity in the law? If it does create ambiguity, will the variations be published and made known as a Rule of Law? There should be no ambiguities in the rules of procedure.
> (4) Retroactive: Is it retroactive legislation by opinion? There should be no generalized retroactive rule changes by opinion, even when made to accomplish "justice." The Supreme Court of Texas is responsible for issuing the rules of procedure. It is not proper for a rule-making/legislative body to make ad hoc changes to the rules (legislation) which that body promulgates.
> (5) Contradictions: Will the resolution create a contradiction between the published result and the published rule? There should be no contradiction between published rules and the changes effected by a published opinion wherein the court is "doing justice."
> (6) Undue Burdens: Will the resolution create unreasonable demands on the litigants or the courts—that is, demands beyond the power of

6. Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 831 (1988).

either litigants or the courts? If it does, the rule should be applied as written. Resolution of dilemmas should not create burdensome demands on the litigants or the courts.

(7) Instability: Will the resolution create instability in the law? If instability will be created by the proposed action, the court should simply follow the published rule.

(8) Divergence: Is the resolution a generalized divergence from the published rules? There should be no generalized divergence between published rules and published opinions altering those rules.

C. *Recognizing the Problems of Judging*

Hopefully most judges follow the mandate of the rules of procedure and seek to apply them in a way that will "obtain a just, fair, equitable[,] and impartial adjudication of the rights of litigants";[7] in other words, in a way that will accomplish justice, whatever "justice" is.

This Article is written for attorneys, judges, and those who teach law—particularly procedure—not for those who write in the difficult and deep areas of abstract philosophy. Those writing in the area of philosophy[8] have long-range and long-lasting influence on the fashioning of substantive law and in areas of ambiguous laws or decisions. Those philosophers, however, generally deal with concepts, issues, or statutes, and not with the interpretation of rules of procedure. This Article does import concepts of H.L.A. Hart and Lon Fuller, but it does so with modifications to fit the situations discussed below.

Procedural rules exist to be followed as they are written unless they are ambiguous, circumstances warrant flexibility to accomplish "justice," or both. But few of the rules of procedure are ambiguous. These rules develop over time, and ambiguities, if present, are, with few exceptions, eliminated or dealt with through "safety procedures" or amendments. Occasionally, however, circumstances do exist that make judges uncomfortable with the literal application of the rules. This Article deals with such situations.

This Article posits these questions: When is that flexibility (departure from the literal wording of a Texas Rule of Civil Procedure) warranted? What happens when the application of a rule seems to cause a perceived

7. TEX. R. CIV. P. 1.

8. But it should be remembered that "legal philosophy concerns itself with fundamental problems of legitimacy." Stephen M. Richman, *Legal Philosophy: A Palimpsest*, N.J. LAW., Oct. 2000, at 10, 15.

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unjust result? Is it necessary to seek alternate interpretations, especially when some interpretations have better consequences than others as posited by Richard Posner?[9]

In each of the rules to be discussed, there is no question of ambiguity or any need for entering the labyrinth of concepts of interpretation of the wording of the rule.[10] Rather, each of these rules is well thought out, definite in its meaning, and yet, in a given case, is perceived to cause a need for interpretation. On the other hand, the Texas rules are clearly intended to be construed so that they do "justice."[11] So, in any given case, the question becomes, is the deviation from the rule an attempt to do justice? Or, is it the product of a political choice or an attempt to aid a friend or a client who is not properly represented by their attorney? But how is one to tell? This is the dilemma. This Article attempts to provide elastic standards for resolution rather than the ad hoc rule interpretations discussed below.

To some legal philosophers, such as the realist, attitudinalist,[12] functionalist, and the judges influenced by them believe there is no "easy" case. Rakesh K. Anand concluded, however, that

> [t]his denial of the 'easy' case did not itself render legal certainty entirely elusive. Judicial decisions were, to an extent, predictable. To make sense of predictability, however, required jurisprudence to move beyond a rule-governed order and conceive of the judicial decision as a "social event:" .... The social determinants of a judicial decision included both the personal history of the judge and the larger history of society.... For the functionalist, rules fell out of the jurisprudential equation.[13]

Whether the functionalist–realists–pragmatists or the formalists are right, the problems and temptations of those applying the rules are great,

9. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 105 (1990).

10. *See generally* Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985) (surveying various concepts of legal interpretation).

11. TEX. R. CIV. P. 1.

12. "At the opposite extreme from formalism is "attitudinalism." At its crudest, this is the idea that judges and Justices simply vote their political preferences, so if you know whether they are Democrats or Republicans you can predict their decisions; a more refined version substitutes ideology for party affiliation." Posner, *supra* note 3, at 1052.

13. Rakesh K. Anand, *Contemporary Civil Litigation and the Problem of Professional Meaning: A Jurisprudential Inquiry*, 13 GEO. J. LEGAL ETHICS 75, 92 (1999) (footnotes omitted). For other related articles, see Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935), Felix S. Cohen, *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5 (1937), Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930), and Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931).

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and this must be recognized. As Judge Posner stated, "The principal conceptions of the judicial role are the points of an equilateral triangle. They are formalism, politics, and pragmatism. Formalism is the conventional, one might say the official, conception of the judicial role."[14]

Judges have a hard job in all cases, but particularly when deciding hard cases. Most do it with integrity and honor, but all are influenced by different factors.

The judges of all the courts in Texas are elected and must regularly stand for reelection. They are chosen from the community they serve and have past connections with the lawyers and, possibly, with litigants who come before them. The judges depend on those appearing before them for campaign contributions. Additionally, each judge has his or her own beliefs, prejudices, and educational background, and may, at some time, have to return to the practice if they retire or happen to be defeated.

Other than having personal connections with parties or lawyers, some of the factors that may influence a judge in arriving at a decision are so diverse that they are almost impossible to comprehend.[15] Some of the factors[16] that should be considered when determining how and why a judge will rule are beyond the scope of this Article. However, judges should be conscious that each of the factors may influence their decisions when resolving procedural dilemmas. It seems proper to point out all the many forces that may be at work when a judge decides a case.[17] These factors include the following:

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14. Posner, *supra* note 3, at 1051.

15. *See generally* Andrew J. Wistrich et al., *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 911 (2015) (suggesting decisions by judges are susceptible to emotional reactions).

16. There is virtually no limit on the variables that could be considered in examining the process of judicial decision-making. Richard A. Posner suggests:

> Problems of jurisprudence include whether and in what sense law is objective (determinate, impersonal) and autonomous rather than political or personal; the meaning of legal justice; the appropriate and the actual role of the judge; the role of discretion in judging; the origins of law; the place of social science and moral philosophy in law; the role of tradition in law; the possibility of making law a science; whether law progress; and the problematics of interpreting legal texts.

POSNER, *supra* note 9, at xi.

17. *See generally* Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9 (2001) (examining the various factors that may influence judicial decision-making, including personal attributes (age, gender, race, religion), social background (education, prior judicial experience, prior prosecutorial experience, prior public/elected office), and policy preferences (legal doctrine, appointing president, party affiliation)). Of these he found age, religion, and prior judicial experience to be insignificant; and the party affiliation and the appointing president to be the strongest influences. *Id.* at 37 tbl.3.

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(1) educational background of the judge(s)[18]—Was the judge educated in-state or out-of-state? Was the judge educated at an elite or non-elite school?[19] How removed from the educational experience is the judge? And, what was the nature and scope of the education?[20]
(2) practice background of the judge(s);[21]
(3) political party of the judge(s);
(4) personal experience of the judge(s);[22]

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18. *See* Jilda M. Aliotta, *Combining Judges' Attributes and Case Characteristics: An Alternative Approach to Explaining Supreme Court Decisionmaking*, 71 JUDICATURE 277, 278–79 (1988) (describing how educational status has been analyzed by factoring "the prestige of justices' pre-law educations and the prestige of the law schools they attended"); C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916–88*, 35 AM. J. POL. SCI. 460, 463, 468 (1991) (factoring in social class, as derived from education, when setting forth "[a] [p]ersonal [a]ttributes [t]heory of Supreme Court [j]ustice [v]oting [b]ehavior"); *see generally* S. Sidney Ulmer, *Are Social Background Models Time-Bound?*, 80 AM. POL. SCI. REV. 957 (1986) ("The most ambitious of these [social background model] studies . . . has reported . . . from 70% to 90% of variance in the voting of Supreme Court justices in a 30-year period was accounted by seven variables[, including] . . . prestige of prelaw education . . . .").

19. Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 42–44 (1994) (noting a study found "merit-selected judges are less likely to have attended college in-state and are less likely to have been born in-state" (citing Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228, 231 (1987))).

20. *See* Cynthia Stevens Kent, Daubert *Readiness of Texas Judiciary: A Study of the Qualifications, Experience, and Capacity of the Members of the Texas Judiciary to Determine the Admissibility of Expert Testimony Under the* Daubert, Kelly, Robinson, *and* Havner *Tests*, 6 TEX. WESLEYAN L. REV. 1, 28–29 (1999) (concluding Texas judges are ill-prepared to serve as gate-keepers of expert testimony).

21. *See* J. Woodford Howard, Jr., Commentary, 70 N.Y.U. L. REV. 533, 542 (1995) (acknowledging a judge's law practice as a criteria factored by biographers).

22. *See* James J. Brudney et al., *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1763 (1999) (applying the "social background model" of empirical studies to one area of the law (the NLRA)). The authors concluded:

> [O]ur study supports the need for further inquiry into the forces that shape judicial conduct. We are in the midst of a spirited debate between appellate court judges and scholars about the relevance of a judge's political affiliation in predicting votes. Such disagreements should not obscure the importance of developing more sophisticated analyses of other judicial background factors, and of exploring the possible relationships between those factors and specific aspects of legal doctrine. Additional research is especially timely as the federal bench becomes steadily more diverse in a number of demographic and socioeconomic respects. . . . [I]n the years ahead, social background factors will assume an increasingly meaningful role as indicators of judicial voting behavior.

Id. at 1765 (footnote omitted). "The central trait which we seek in judges and the central prerequisite for doing their work well—fairness—is not acquired through professional training, but in personal experience." Louis E. Newman, *Beneath the Robe: The Role of Personal Values in Judicial Ethics*, 12 J.L. & RELIGION 507, 529 (1995–1996).

(5) prior judicial offices held by the judge(s);[23]
(6) future political aspirations of the judge(s);
(7) age of the judge(s);
(8) gender of the judge(s);[24]
(9) length of tenure of the judge(s);
(10) method by which the judge was selected;[25]
(11) family circumstance of the judge(s);
(12) the influence of staff—staff attorneys, research assistants, briefing attorneys, and interns;
(13) the influence of one judge on another, or one group of judges on another judge or judges,[26] including the absence (or presence) of

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23. Professors Lee Epstein, Jack Knight, and Andrew D. Martin argue

> all norms that cut against diversity are problematic because they reduce the ability of the decision-making group (the Supreme Court not excepted) to perform its tasks. We further argue that the norm of prior judicial experience is particularly troublesome for two reasons. First, since virtually all analyses show career path to be an important factor in explaining judicial choices—from the votes Justices cast to their respect for stare decisis—the homogeneity induced by the norm suggests that the current Court is not making optimal choices. Second, since women and people of color are less likely than white men to hold positions that are now, under the norm of prior judicial experience, steppingstones to the bench, the norm is also working to limit diversity on dimensions other than career path.

Lee Epstein et al., *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903, 905 (2003); *see also* Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 273–74 (1995) (reviewing "[c]haracteristics used by prior scholars [to] examine the effect of judicial background on court decisions," including whether a judge had been an elected office holder); Brudney et al., *supra* note 22, at 1704 (stating a variable used for "reporting the professional experience of each judge" included "whether a judge ever held elected office").

24. *See* Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891, 897–98 (1995) (examining gender distinctions among the behaviors of female and male judges and finding, from empirical studies, "only slight, if any[,] differences between the overall voting behavior of male and female judges along the dimension of gender"); *see generally* Megan G. Mayer, Note, In re Marriage of Iverson*: Dubious Benefits in Reducing Judicial Gender Bias*, 3 UCLA WOMEN'S L.J. 105 (1993) (detailing an appellate court's reversal of a case after finding evidence of the trial court judge's gender bias).

25. *See* Victor Eugene Flango & Craig R. Ducat, *What Difference Does Method of Judicial Selection Make? Selection Procedures in State Courts of Last Resort*, 5 JUST. SYS. J. 25, 29 (1979) (illustrating the various methods of judicial selection of judges used by all the states in their court of last resort).

26. *See* Michael R. Murphy, *Collegiality and Technology*, 2 J. APP. PRAC. & PROCESS 455, 457–61 (2000) (discussing collegiality among appellate judges as fragile and delicate to communication tools, such as teleconferencing and e-mail); Francis P. O'Connor, *The Art of Collegiality: Creating Consensus and Coping with Dissent*, 83 MASS. L. REV. 93, 93 (1998) (asserting dissent among judges is entirely consistent with collegiality, thereby, not affecting a judge's decision-making); *see also* Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1689 (2003) (concluding "collegiality mitigates judges' ideological preferences and enables [them] to find common ground and reach better decisions").

judges with diverse points of view;[27]
(14) political pressures of the time;
(15) the cases that are, or are not, brought before the court;
(16) the judge's own perception of how cases are to be decided;[28]
(17) the effect of prior decisions on the court or on an individual judge in the case before the court (the effect of stare decisis);[29]

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27. *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 177 (1921) (arguing "out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements"); *see also* Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1361 (1998) ("A court composed of judges with a diversity of different professional experiences and perspectives makes for better-informed discussion."); Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 852 (commenting the process of decision-making is not subject to enmity, even when a court's panel is "mixed"); Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL'Y REV. 325, 329 (2002) (noting "racial diversity on the bench can enhance judicial decision[-]making by broadening the variety of voices and perspectives in the deliberative process" and "reminds judges that all perspectives inescapably admit of partiality"); Harry T. Edwards, *Reflections (on Law Review, Legal Education, Law Practice, and My Alma Mater)*, 100 MICH. L. REV. 1999, 2006 (2002) (describing the benefit of collegiality as enhanced performance without acrimony from the perspective of a D.C. Circuit's former chief judge).

28. *See* Mark C. Modak-Truran, *A Pragmatic Justification of the Judicial Hunch*, 35 U. RICH. L. REV. 55, 56 (2001) (examining the various theories of legal decision-making, in the context of "argu[ing] that William James's pragmatism provides a compelling epistemological justification for the hunch theory of judicial decision[-]making and saves the hunch from arbitrariness"). *Compare* RONALD DWORKIN, LAW'S EMPIRE 255 (1986) ("Judges who accept the interpretive ideal of integrity decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community."), *with* Anthony D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-aged President*, 84 NW. U. L. REV. 250, 252 (1989) ("Deconstructionists say that all interpretation depends on context. Radical deconstructionists add that, because contexts can change, there can be no such thing as a single interpretation of any text that is absolute and unchanging for all time.").

29. According to Youngsik Lim, Supreme Court decision-making analysis is divided:

> Most studies of Supreme Court decision[-]making can be divided into these two groups—the legal model and the attitudinal model. The legal model argues that the decisions of the Supreme Court are based on the facts of the case, the precedents, the plain meaning of statutes and the Constitution, and the intent of those who framed legal provisions. In contrast, the attitudinal model holds that the Supreme Court justices decide a case in light of their ideological attitudes and values.

Youngsik Lim, *An Empirical Analysis of Supreme Court Justices' Decision Making*, 29 J. LEGAL STUD. 721, 722 (2000). For her first proposition, Lim cites to Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018 (1996), Donald R. Songer & Stefanie A. Lindquist, *Not the Whole Story: The Impact of Justices' Values on Supreme Court Decision Making*, 40 AM. J. POL. SCI. 1049 (1996), and SAUL BRENNER & HAROLD J. SPAETH, STARE INDECISIS (1995). For her second proposition, Lim cites to DAVID W. ROHDE & HAROLD J. SPAETH, SUPREME COURT DECISION MAKING (1976), JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993), and Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, 40 AM. J. POL. SCI. 971 (1996). *See also* Andrew P. Morriss, *Developing a Framework for Empirical Research on the Common Law: General Principles and Case Studies of the*

(18) the willingness of the judge or judges to state the reasons for the decision in question;[30]
(19) the religion of the judge;[31]
(20) time pressures on the judge;[32]
(21) the judge's own perception of self-worth;[33]

Decline of Employment-at-Will, 45 CASE W. RES. L. REV. 999, 1002, 1020–56 (1995) (identifying areas where researchers must make decisions upon examining the common law, given its iterative nature). According to Gregory C. Sisk, Michael Heise, and Andrew P. Morriss,

> Legal concepts, lines of precedent, and doctrinal themes may not be sufficient for understanding judicial decision[-]making, but they are surely essential. Legal analysis, as a distinct method of human reasoning, cannot be reduced to any methodology borrowed from another discipline. The judge brings to bear "not only a range of personal and political preferences[] but also a specialized cultural competence—his knowledge of and experience in 'the law.'" Backgrounds will vary, attitudes will differ, environments will change, but the law remains the alpha and omega of judicial decision[-]making.

Gregory C. Sisk, et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1500 (1998) (footnotes omitted) (quoting Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 24–25 (1993)).

30. Frederick Schauer notes:

> Sometimes people who make decisions give reasons to support and explain them. And sometimes they do not. The conventional picture of legal decision-making, with the appellate opinion as its archetype and "reasoned elaboration" as its credo, is one in which giving reasons is both the norm and the ideal. Results unaccompanied by reasons are typically castigated as deficient on precisely those grounds. In law, and often elsewhere, giving reasons is seen as a necessary condition of rationality. To characterize a conclusion as an *ipse dixit*—a bare assertion unsupported by reasons—is no compliment.
>
> The conventional picture, however, may be mistaken. Like voters who simply say aye or nay, like publishers and journal editors who turn down submissions without explanation, like employers and admissions officers who send rejection letters that announce outcomes without providing justifications, like homeowners who rarely explain to the painters and carpenters whose proposals they have rejected why someone else was chosen, and like referees in sporting events who make calls that are ordinarily unsupported by explanations, many decision[-]making environments eschew the very feature that the conventional picture of legal decision[-]making takes as an essential component of rationality.

Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 633–34 (1995) (footnotes omitted).

31. *See* Mark B. Greenlee, *Faith on the Bench: The Role of Religious Belief in the Criminal Sentencing Decisions of Judges*, 26 U. DAYTON L. REV. 1, 41 (2000) (arguing "[t]here is a role for faith on the bench"); Scott C. Idleman, *The Role of Religious Values in Judicial Decision Making*, 68 IND. L.J. 433, 487 (1993) (asserting "the inclusion of religious values in the law-making process can be justified"); Newman, *supra* note 22, at 508 (stating judges "have the opportunity to draw upon personal (including religious) values in reaching a decision" (footnote omitted)).

32. *See* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 783 (2001) (asserting "judges make decisions under uncertain, time-pressured conditions").

33. *See* James L. Gibson, *Personality and Elite Political Behavior: The Influence of Self Esteem on Judicial Decision Making*, 43 J. POL. 104, 123 (1981) (collecting research indicating that a judge's perception of self-worth may have an influence on decision-making).

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(22) ethnic background of the judge;[34]
(23) the judge's cognitive ability;[35] and
(24) the era (time) in which the judge sits on the bench;[36]

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34. *See* Peter A. Lauricella, *Chi Lascia la Via Vecchia per la Nuova Sa Quel Che Perde e Non Sa Quel Che Trova: The Italian-American Experience and Its Influence on the Judicial Philosophies of Justice Antonin Scalia, Judge Joseph Bellacosa, and Judge Vito Titone*, 60 ALB. L. REV. 1701, 1726 (1997) ("Litigants have many factors to consider when they face a judge, including the judge's 'likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man.' These, as we may or may not realize, appear to be influenced by ethnic heritage." (quoting CARDOZO, *supra* note 27 at 167)); *see also* George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930–1980*, 27 U.C. DAVIS L. REV. 555, 613 (1994) (chronicling support for the assertion that judges are influenced by their own points of view and preconceived ideas).

35. *See* Kathryn L. Mercer, *A Content Analysis of Judicial Decision-Making: How Judges Use the Primary Caretaker Standard to Make a Custody Determination*, 5 WM. & MARY J. WOMEN & L. 1, 67–68 (1998) ("A social cognitive framework has been used to examine the potential for bias in the nature of the categories of information that judges use to make decisions. Human cognitive 'processes guide decision[-]making and personal perceptions and are heavily influenced by culturally determined expectancies.' Thus, where judges have a great deal of discretion awarding custody, the potential for bias is great because the judges' own conceptions of what an adequate parent is may be based on their own racial-ethnic background, subsequently influencing their findings."); *see also* Evan R. Seamone, *Judicial Mindfulness*, 70 U. CIN. L. REV. 1023, 1024 (2002) ("In this Article, I establish a theory of 'judicial mindfulness' that would guard against two types of 'cold' bias when interpreting legal materials. The first harmful bias involves traumatic past events that might unknowingly influence judges when they decide cases that are reminiscent of the trauma. The second harmful bias involves the elimination of valid legal theories or the interpretation of ambiguous phrases to mean only one thing, thus motivating premature decision-making. Judicial mindfulness is attainable when judges implement two psychological techniques that fit within psychologists Wilson and Brekke's general framework for correcting instances of mental contamination: (1) negative practice and (2) transitional or dialectical thought. These systems alert judges to their biases by allowing them to understand how they arrive at decisions, and then offer a framework that analyzes the processes they employ to achieve legitimate legal conclusions."); Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 18 (1998) (advancing a psychological approach to "investigate the cognitive operations" of judicial decision-making).

36. One commentator notes:

> According to Cardozo, judges are not to incorporate into the law their own aspirations, convictions, and philosophies but those of "the men and women of [their] time." Yet, Cardozo understood that the distinction between the judge's personal predilection (the subjective view of decision-making) and the judge's view of the community's convictions (the objective view of decision-making) may be blurred. He wrote that
>
> > [t]he spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us a place. No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties.

Shirley S. Abrahamson, *Judging in the Quiet of the Storm*, 24 ST. MARY'S L.J. 965, 983–84 (1993) (footnotes omitted) (quoting CARDOZO, *supra* note 27, at 173–75).

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Scott: The Dilemma of Interpreting Rules of Civil Procedure: A Proposal

But should each, any, or all of these factors justify the judge's decision to depart from clearly established, clearly written law (as discussed here, rules of procedure)? This Article asserts the answer should be "no" in the context of the application of clear procedural rules unless some extraordinary factor or factors require a departure and that departure will not significantly harm the established procedural system or the opposing party.

With all these factors at play, it is amazing that there is any uniformity in decision-making in any area in Texas or elsewhere. The judicial system, with the pressures of judicial differences, is structured to allow great flexibility in the trial courts, leaving the parties charged with protecting themselves from errors by the judges.[37] With these different influences at work on judges and with the built-in flexibility of the procedural system, there is a great danger that a few judges will misuse the rules of procedure.

The Texas appellate courts exist at the intermediate level to correct preserved errors found to be harmful.[38] The Supreme Court of Texas exists to review certain types of cases and "any other case in which it appears that an error of law has been committed by the court of appeals and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction," thus unifying the answers to issues of law that are fundamental to the jurisprudence of the state.[39]

The Supreme Court of Texas is also charged with writing the Texas Rules of Procedure[40] for both the trial courts and the appellate courts. The judges of the appellate courts, as well as those of the trial courts, face many of the pressures mentioned above.[41] Of these, the greatest pressure is political—in either the partisan sense or in the sense of philosophical leaning.[42]

The Texas Rules of Procedure are more rigid and formal, in general,

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37. *See* Guthrie et al., *supra* note 32 at 784 (concluding judges err in their decision-making, but the courts, legislatures, and litigants are able to, and do, react to mitigate the effects of judicial errors).

38. TEX. GOV'T CODE ANN. § 22.201(a) (West Supp. 2014) ("The state is divided into [fourteen] courts of appeals districts with a court of appeals in each district.").

39. *Id.* § 22.001 (West 2004) (outlining the Texas Supreme Court's jurisdiction).

40. *See* Bruce L. Dean, Comment, *Rule-Making in Texas: Clarifying the Judiciary's Power to Promulgate Rules of Civil Procedure*, 20 ST. MARY'S L.J. 139, 140 (1988) ("[T]here has been a national trend toward shifting the responsibility for court rule-making power from the state legislatures to their respective judicial branches, which Texas has joined.").

41. *See* Guthrie et al., *supra* note 32 at 779–80 (discussing influences on judges).

42. *See id.* (suggesting one school of legal philosophy believes "judges make choices that reflect their political ideology").

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than the Federal Rules of Procedure—as they should be in light of Texas's elective judicial selection.[43] However, some formalized flexibility is built into the rules at most critical junctures.[44]

The debate between natural law, formalism,[45] realism,[46] positivism, pragmatism, and the later theories of legal philosophy may, or may not, have traction in matters of substantive law and general governance[47] but not in resolving most procedural matters.

Procedure,[48] as that term is used here, in one way or another, is involved in every case. Procedure can be referred to as "adjective" law,[49]

43. *See* Dean, *supra* note 40, at 157 (asserting "to understand the past and future of rule-making" in Texas, one must acknowledge the judiciary as a separate and elected body).

44. *See id.* at 165 ("Courts in these jurisdictions [where courts promulgate rules of procedure] are able to respond immediately and with flexibility to current problems . . . .").

45. Discussing legal formalism, Arrie W. Davis notes:

> Classical formalism, at its core, is generally understood as the "traditional" or "conventional" conceptualization of appropriate judicial decision-making. Sometimes described as a "Langdellian" approach to legal reasoning, formalism treats the law as a set of scientific formulae or principles that are derived from the study of case law. These principles create an internal analytical framework which, when applied to a set of facts, leads the decision-maker, through logical deduction, to the correct outcome in a case. Defenders of formalism posit that it "proffer[s] the possibility of an 'immanent moral rationality'" based on careful study of the law."

Arrie W. Davis, *The Richness of Experience, Empathy, and the Role of a Judge: The Senate Confirmation Hearings for Judge Sonia Sotomayor*, 40 U. BALT. L.F. 1, 9–10 (2009) (alteration in original) (quoting Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 950, 953–54 (1998)).

46. "Legal Realism is fundamentally: (1) a descriptive theory about the nature of judicial decision, according to which, (2) judges exercise unfettered discretion, in order (3) to reach results based on their personal tastes and values, which (4) they then rationalize after-the-fact with appropriate legal rules and reasons." Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 268 (1997).

47. *See* Guthrie et al., *supra* note 32, at 779 (discussing "various schools of [legal] thought" providing different explanations for judges' biases in their decisions).

48. Discussing the role of procedure, Charles Rhodes notes:

> The objective of any lawsuit is to establish an enforceable right. By definition, procedure, which is the judicial process for enforcing rights recognized by the substantive law, is inherent in every civil action and implicated in each civil appeal. Indeed, almost all appellate opinions scrutinize procedural issues to some extent, at least to delineate the governing standard of review.

Charles W. "Rocky" Rhodes, *Civil Procedure*, 33 TEX. TECH L. REV. 685, 685 (2002) (footnote omitted).

49. Discussing the origins of the procedure–substance dichotomy, D. Michael Risinger writes:

> The procedure–substance dichotomy is different from the right–remedy distinction. The dichotomy was fathered by Jeremy Bentham in a 1782 work entitled *Of Laws in General, sub nom* the distinction between substantive law and adjective law. Bentham there makes clear that he believes he is drawing a new distinction in the descriptive organization and analysis of the

since it may impact, or modify, every area of the law that becomes involved in litigation.[50] In some instances, it is a matter of pure procedure, relating to everything from instituting a suit; defining the nature of pleadings; describing the parties who may be sued; establishing the venue of the action, the nature, scope, and form of discovery, the charge to the jury (if there is one), and the entry of the judgment; and determining the rights of the parties. In other instances, it defines the scope of review; or, it may define the scope, manner, and nature of "the judicial process for enforcing rights recognized by the substantive law."[51] Procedure controls the future of various classes of litigation.[52] However, shifting interpretation of procedural rules makes it easier for competing political or philosophical points of view to impact the result of the judicial decision-making process, as between the interests of litigants.[53]

"Procedure is an instrument of power that can, in a very practical sense, generate or undermine substantive rights."[54] Texas, for example,

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> concept of law, and an examination of the leading pre-Bentham sources on English legal theory supports his claim.

D. Michael Risinger, *"Substance" and "Procedure" Revisited with Some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumptions"*, 30 UCLA L. REV. 189, 191 (1982) (footnote omitted).

50. *See* Cas. Ins. Co. of Cal. v. Salinas, 333 S.W.2d 109, 112 (Tex. 1960) (considering adjective law to be procedural (citing James P. Hart, *Appellate Jurisdiction of the Supreme Court of Texas*, 29 TEX. L. REV. 285, 297 (1951))); *see also* George W. Barcus, *Appellate Court Procedure*, 7 TEX. L. REV. 107, 107–111, 113 (1928) (outlining the procedure for appealing a case to the Texas Supreme Court and condemning "too much overlapping in getting a case from the trial court through its final disposition in the [s]upreme [c]ourt").

51. Rhodes, *supra* note 48, at 685.

52. *See* Schauer, *supra* note 30, at 654 (stating precedent allows judges to affect future cases that they are presently unable to fully understand).

53. According to Paul MacMahon,

> Procedural questions are important in any legal system, but they often dominate legal debates in the United States to a puzzling extent. As Robert Kagan says, "[c]ompared to other economically advanced democracies, American civi[c] life is more deeply pervaded by [legal] conflict and by controversy about legal processes." Regardless of the *content* of their views on procedure, Americans consider procedural issues to be centrally important. In the depth of their absorption with procedural questions, American lawyers and legal scholars appear to diverge from many of their foreign counterparts.

Paul MacMahon, *Proceduralism, Civil Justice, and American Legal Thought*, 34 U. PA. J. INT'L L. 545, 547 (2013) (quoting ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 3 (2001)); *see also* David Peeples, *Lawsuit Shaping and Legal Sufficiency: The Accelerator and the Brakes of Civil Litigation*, 62 BAYLOR L. REV. 339, 341–42 (2010) (discussing the concepts of "legal sufficiency," "lawsuit shaping," and "judicial boundary-setting" in the context of procedural evolution "[f]rom the rigid common-law forms of action to the Field Code of 1848, to the Federal Rules of 1938 and the Texas Rules of 1941").

54. Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV 801, 802

experienced rapid swings in political views between 1978 and 1992, making it a fertile area for philosophical discussions.[55] As explained by Professor Michael Ariens, "Since 1960, our modern civil liability regime has experienced a conceptual revolution that is among the most dramatic ever witnessed in the Anglo-American legal system."[56] Procedure was often the vehicle for politically and economically motivated change in Texas in the 1980s and 1990s.

Abstractly and aspirationally (without reference to what really occurs), procedural law should be non-political and neutral—a steady rock in a sea of social, economic, and political foment.[57] But this is not to say that procedural rules should remain static. Rather, again, abstractly and aspirationally, changes should be considered and made with deliberation. The procedural rules of court should not, however, be a means of accomplishing broad economic or social change.[58] This is not a reference to constitutional or statutory interpretation; it is only a reference to the "rules of the road" of the courthouse.

(2010).

55. In the final chapter of James L. Haley's book, *The Texas Supreme Court: A Narrative History, 1836–1986*, he reviews "*The Court in Flux*":

> [T]he increasingly political tension on the [c]ourt was apparent when Raul Gonzalez, who was uncomfortable with the result [in *Melody Home Manufacturing Co. v. Barnes*, 741 S.W.2d 349, 354 (Tex. 1987)], asked what could justify repudiating such a recently decided precedent, and Oscar Mauzy offered "the voters of this state" as authority for taking the [c]ourt in a new direction. It was a stance that would have horrified previous generations of justices respectful of stare decisis.

JAMES L. HALEY, THE TEXAS SUPREME COURT: A NARRATIVE HISTORY, 1836–1986, at 216–17 (2013) (footnote omitted).

56. MICHAEL ARIENS, LONE STAR LAW: A LEGAL HISTORY OF TEXAS 267 (2011).

57. There are recognized arguments against this point of view: "Just as anti-matter is an expression of matter[] and atheism is arguably a form of religious belief, many courts and commentators have philosophized that neutrality constitutes a form of political opinion." Mark G. Artlip, Comment, *Neutrality As Political Opinion: A New Asylum Standard for a Post-*Elias-Zacarias *World*, 61 U. CHI. L. REV. 559, 559 (1994); *see* INS v. Elias-Zacarias, 502 U.S. 478, 486 (1992) (Stevens, J., dissenting) ("Choosing to remain neutral is no less a political decision than is choosing to affiliate with a particular political faction." (quoting Bolanos-Hernandez v. INS, 767 F.2d 1277, 1286 (9th Cir. 1984))); *see also* Robert G. Miller, *Machiavellian Justice: A Response to "Law, Morality, and Judicial Decision-Making,"* 65 TEX. B.J. 916, 917 (2002) (discussing "result-oriented jurisprudence" and "how to balance stability against flexibility" in the context of stare decisis); Panel Discussion, *Political Aspects of Appellate Law*, 30 ST. MARY'S L.J. 1137, 1137–62 (1999) (debating political influences on procedure and the judicial system); Rhodes, *supra* note 48, at 685 (2002) (surveying how the Fifth Circuit addresses a variety of procedural issues).

58. *See* Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1687–93 (2015) (describing three particular ways in which the judiciary influences the political realm and operates "as a tool of stealth authoritarianism").

In this area of procedural law, formalism, with some elasticity, seems to be the appropriate approach to interpretation. It is recognized that this is contrary to the view of many writers,[59] but in light of the Texas experience of wide swings in the views held by the members of the Supreme Court of Texas, it seems the safer course is to follow the rules as written, with some clearly delineated elasticity. It is the nature of the elasticity that is the subject of this Article.

D. *The Hart–Fuller Debate*[60]

In discussing the "troublesome" decisions, the debate between H.L.A. Hart[61] and Lon Fuller,[62] which prompted the writing of this Article, illustrates the problem.[63] Hart examined a rule banning vehicles in any public park.[64] He sought to illustrate the difference between the core meaning of laws or rules, the problems associated with the use of the rules in hard cases, and the development of penumbral meanings. As a positivist, he saw that rules have core meanings but recognized the hard

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59. One writer contends:

> American proceduralism is closely related to the history of American legal thought, in general, and to the rise of Legal Realism, in particular. The more obvious place to seek the origins of American proceduralism is the Legal Process movement that flourished in the 1940s and 1950s. But we gain a deeper understanding of the character of American proceduralism by looking back further, to the Legal Realists. I show that, as part of their embrace of an instrumental approach to legal justification, and their skepticism about the determinacy of substantive law, the Realists *themselves* called attention to the significance of procedure. Their work then provoked a proceduralist response in the shape of Legal Process thought. Through the intellectual descendants of the Realists and Legal Process theorists, the strongly proceduralist element in American legal thought lives on today.

MacMahon, *supra* note 53, at 549 (footnote omitted).

60. For a full discussion of the two positions, see generally Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109 (2008).

61. For an excellent biography of Hart, see generally NICOLA LACEY, A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM (2004). *See also* Frederick Schauer, *(Re)Taking Hart*, 119 HARV. L. REV. 852, 863–64 (2006) (reviewing LACEY, *supra*) (discussing the debate between Fuller and Hart).

62. For a biography of Fuller, see generally ROBERT S. SUMMERS, LON L. FULLER (1984).

63. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 627–29 (1958) (rebutting Fuller's "distinction between law as it is and law as it ought to be"); *see also* Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630, 631 (1958) (responding to Hart).

64. *See* Hart, *supra* note 63, at 607 ("A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? Are these, as we say, to be called 'vehicles' for the purpose of the rule or not?").

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cases at the edge of the rule's intent. He argued morality was not necessary to the application of law, at least in core cases, but not that morality was never an issue in rule application.[65] He did argue that sentences, not words, should be the focus of interpretation.[66]

Hart wrote there are "primary rules," which govern social conduct (e.g. criminal laws), and "secondary rules."[67] He broke the "secondary rules" into three categories: rules of recognition[68] (used to discover the primary rules), rules of change[69] (used to create or change primary rules), and rules of adjudication[70] (used to determine whether rules have been violated and the penalty for any violation).

He advocated for an "'external' jurisprudence [that] distanced itself from any legal system's law practice and asked a general question of social science, namely, [W]hat sort of a social practice is law?"[71] Ronald Dworkin, following in the footsteps of Fuller, advanced a form of "internal jurisprudence," which also asks the question, "[W]hat is law?" However, the question is posed from a practical standpoint. It is asked "from the standpoint of a judge within this legal system, or of a lawyer who must argue to such a judge, what are those standards that the role of a legal professional obligates one to follow in his decisions."[72]

Fuller,[73] a natural law advocate,[74] responded to Hart with a question

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65. *See* Anthony J. Sebok, *Finding Wittgenstein at the Core of the Rule of Recognition*, 52 SMU L. REV. 75, 75 (1999) (stating Hart was clearly attempting to "refocus the postwar debate over positivism"). Sebok continues, noting Hart's lecture "dealt with challenges to positivism based on its alleged connections with a variety of unpopular jurisprudential views" and that "Hart challenged the claim, made by many, that there was a necessary relationship between positivism and Bentham and Austin's 'command theory,' Langdellian formalism, and Nazi totalitarianism." *Id.*

66. *See* Schauer, *supra* note 60, at 1122 ("An automobile is plainly a vehicle, Hart argues, but the fact that what counts as a vehicle in ordinary language is (usually) the same as what counts as a vehicle in legal language does not mean that law is committed to the ordinary meaning of ordinary terms.").

67. *See* H.L.A. HART, THE CONCEPT OF LAW 91 (2d ed. 1994) (describing "primary rules of obligation" and their prohibition against behavior that harms the community).

68. *See id.* at 94 (showing how rules of recognition act as a solution for uncertainty).

69. *See id.* at 95 (explaining how rules of change address "the *static* quality of the regime").

70. *See id.* at 96–97 (demonstrating how rules of adjudication are a response to problems of inefficiency).

71. Michael S. Moore, *Legal Principles Revisited*, 82 IOWA L. REV. 867, 868 (1997). *See generally* HART, *supra* note 67, at 98 (arguing primary rules combined with the structure of these secondary rules are "the heart of a legal system").

72. Moore, *supra* note 71, at 868; *see also* HART, *supra* note 67, at 95 (illustrating the inception of a legal system "in embryonic form" that provides the foundation for "the idea of legal validity").

73. LON L. FULLER, THE MORALITY OF LAW 181 (1964) [hereinafter FULLER, MORALITY OF LAW]; *see* Anthony D'Amato, *Lon Fuller and Substantive Natural Law*, 26 AM. J. JURIS. 202, 202 (1981) (disagreeing with Professor Robert Moffat's description of Fuller and arguing aspects of "Fuller's

about mounting a truck on a monument as a war memorial: Would it violate the rule against a vehicle in the park?[75]

Subsequently, in explaining his concept of law, Fuller posited eight routes to the failure of any legal system:

> (1) the lack of rules or law, which leads to ad-hoc and inconsistent adjudication;
> (2) failure to publicize or make known the rules of law;
> (3) unclear or obscure legislation that is impossible to understand;
> (4) retroactive legislation;
> (5) contradictions in the law;
> (6) demands that are beyond the power of the subjects and the ruled;
> (7) unstable legislation (e.g. daily revisions of laws); and
> (8) divergence between adjudication (or administration) and legislation.[76]

According to Fuller, law is meant to "subject[] human conduct to the governance of rules."[77] If any one of the eight principles is missing within any governmental system, the system is not "morally legal."[78] Hart argues Fuller's eight principles are merely matters of efficiency, not morality.[79]

The Hart–Fuller writings have generated much debate. While useful, they are difficult to apply within a state procedural system.[80] Their debate

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theory . . . actually conflict with substantive natural law"). *But see* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 369 (1978) [hereinafter Fuller, *Forms and Limits*] (discussing the "process of conversion" of principles and rights in mundane settings as well as before an arbitrator); Robert C.L. Moffat, *The Perils of Positivism or Lon Fuller's Lesson on Looking at Law: Neither Science nor Mystery—Merely Method*, 10 HARV. J.L. & PUB. POL'Y 295, 333–34 (1987) (debating whether Fuller's views aligned with natural law or positivism and emphasizing the "perception of fluid processes" as Fuller's unique contribution to theories of law and morality).

74. *See* Russell G. Pearce, *The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence, and Legal Ethics*, 75 FORDHAM L. REV. 1339, 1354 (2006) (describing Fuller as "the most influential of the twentieth century natural-law scholars").

75. Fuller, *supra* note 63, at 663 (ruminating on the interaction between a situation where "some local patriots wanted to mount on a pedestal in the park a truck used in World War II" and Hart's hypothetical ban of vehicles in the park).

76. *See* FULLER, MORALITY OF LAW, *supra* note 73, at 33–38 (illustrating, through his story of Rex, the eight ways to fail in lawmaking).

77. *Id.* at 106.

78. *See id.* at 39 (proposing the eight principles are essential and necessary, and suggesting "[a] total failure in any one of" the principles will produce a regime "not properly called a legal system at all"); *see also* H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 347 (1983) (identifying the eight ideals that "a system of rules should strive to satisfy").

79. *See* H.L.A. Hart, *The Morality of Law*, 78 HARV. L. REV. 1281, 1284 (1965) (reviewing FULLER, MORALITY OF LAW, *supra* note 73) (arguing a moral perspective of Fuller's eight principles "breeds confusion" and advancing a pragmatic approach based on "the efficient execution of" rules).

80. Reflecting on the complexities of the procedural system and the impact of the Hart–Fuller

essentially involves the separation of law and morality and the interpretation of statutes or rules. In the context of the problems discussed in this Article, the procedural rules in question relate to the resolution of conflict in the trial and appellate courts, and they are clear. The issue is whether to ignore or bypass the clearly stated rule.[81]

This Article recognizes the philosophical problem inherent in defining "justice" by mentioning the Hart–Fuller debate, and the writer is cognizant of the potential criticism that other schools of philosophical thought are not pursued. But this Article, inspired by reading the Hart–Fuller discussion, is intended to be a discussion of the adjective law of procedure, not one of substance or philosophy. Much of their discussion relates to statutes, but rules of procedure, once adopted, "have the same force and effect as statutes."[82]

1. Primary Versus Secondary Rules of Texas Civil Procedure

Hart's writings lead, not directly but by analogy, to the conclusion that some procedural rules that state the direct rule of procedure should be treated as primary to those—most significantly Rule 1—that allow modification of the primary rule.[83] Modifying rules, such as Rule 1, will

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debates, Frederick Schauer notes:

> Once we see how often law is formal, and once we see how often (especially in the United States) it is not, we can appreciate that the best understanding of rule interpretation in particular, and an important part of law in general, may come neither exclusively from Hart's example of the automobile, nor from Fuller's counterexample of the military truck. Rather, we learn a great deal from the conjunction of both examples and both sides, and from an appreciation that each of the two examples captures an important feature of the legal systems we know best. To the extent that this is so, the real winner of the debate is not Hart, nor is it Fuller, for both neglected something important. Instead, insofar as the two perspectives complemented each other and remedied the too-narrow descriptive account of the other, the real winner turns out to be all of us.

Schauer, *supra* note 60, at 1134.

81. For a deeper discussion of Fuller's theories, see generally Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273 (1995).

82. *In re* City of Georgetown, 53 S.W.3d 328, 332 (Tex. 2001) (quoting Mo. Pac. R.R. Co. v. Cross, 501 S.W.2d 868, 872 (Tex. 1973)); *see* Freeman v. Freeman, 327 S.W.2d 428, 433 (Tex. 1959) ("Our Rules of Procedure have the same force and effect as statutes."). Stare decisis should control decisions on rules. Fiess v. State Farm Lloyds, 202 S.W.3d 744, 749 (Tex. 2006) (acknowledging stare decisis is most potent "in cases construing statutes" but extending the doctrine to an agency policy because "it was the next thing to [a statute]" (citing Lambros v. Standard Fire Ins., Co., 530 S.W.2d 138, 141 (Tex. App.—San Antonio 1975, writ ref'd) (interpreting a homeowner's insurance policy))).

83. *See* F. Patrick Hubbard, *Power to the People: The Takings Clause, Hart's Rule of Recognition, and Populist Law-Making*, 50 U. LOUISVILLE L. REV. 87, 90–91 (2011) (noting primary rules "dictate

be referred to, for the purposes of this Article, as secondary rules. Thus, in the discussion that follows, Rule 1, which mandates the courts do justice, is not primary to the specific rules of procedure but, rather, is secondary to those rules.[84]

2. Using Secondary Rules to Control Primary Rules Is Suspect

Fuller's discussion, while more general, leads to a conclusion that the application of secondary rules to control primary rules are often suspect. Fuller-concepts lead to the development of standards to provide tests for determining the validity (or a court's interpretation) of rules. These concepts may be refined in the future but, for now, will be adopted to illustrate this discussion.

The purpose of the proposal in this Article is to recognize different levels of procedural rules, depending upon the purpose of the rule. Some of the issues discussed below include, but are not limited to, whether the rule is outcome determinative and whether the "crisis" requiring a proposed departure from the rule is the result of the party's action or is due to an outside event or force.

Rules that relate to due process issues and the initiation of a civil action should be analyzed and construed differently from rules relating to the conduct of a trial, an appeal, or both. While the concept discussed here could be applied to the litigation system of any state, this Article focuses on the conduct of trials and appeals in Texas.

E. *The General Rule Used to Construe Rules*

Two lines of discussion are required. One relates to the mandate to the courts found in a secondary rule, such as Rule 1:

> The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall

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certain behavior patterns," such as prohibitions, while secondary rules "confer power" such as requiring two witnesses to render a will signing valid).

84. Some may argue Rule 1 should be the primary rule; however, it only comes into play after the primary rule is found to create a problem. Therefore, it only modifies the specific rule in rare situations. *See* FULLER, MORALITY OF LAW, *supra* note 73, at 82 (describing appropriate judicial interpretation).

be given a liberal construction.[85]

The other relates to specific issues, such as Rule 5, a primary rule, which prohibits the enlargement of time.[86] The built-in elasticity of the Texas Rules of Civil Procedure, which allows for error correction at every step of the litigation process, must be examined to understand the reluctance to treat secondary rules, such as Rule 1, as overarching and controlling in those cases perceived to be hard.

The Texas Rules of Civil Procedure are constructed in such a way as to grant guaranteed rights of procedure to all litigants in the same sense that drivers on a highway are assured that other drivers (at least in the United States) will drive on the right side of the road.[87] In trial, however, it is the duty of a party to call attention to any deviation from the rules through timely, contemporaneous[88] preservation of error.[89] Judges, while they do police trials, are not forced (placed at risk of reversal) to act until a mistake or deviation from the rules has occurred during a trial and is called to their attention.[90] Once error is preserved through some form of objection,[91]

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85. TEX. R. CIV. P. 1. Chief Justice Hecht has, in particular, emphasized this rule:

> Procedural rules exist to subserve the presentation and resolution of cases on their merits. . . .
>
> This court has labored long and hard to remove as many procedural traps from our rules as possible. Litigants are entitled to have their disputes resolved on the merits, not on unnecessary and arcane points that can sneak up on even the most diligent of attorneys.

In re Brookshire Grocery Co., 250 S.W.3d 66, 69 (Tex. 2008) (orig. proceeding) (Hecht, J., dissenting) (quoting Donwerth v. Preston II Chrysler-Dodge, Inc., 775 S.W.2d 634, 643 (Tex. 1989)). In the words of Chief Justice Hecht, "Tricky procedural rules threaten substantive rights." *Id.* at 74 (citing Lane Bank Equip. Co. v. Smith S. Equip., Inc., 10 S.W.3d 308, 314 (Tex. 2000) (Hecht, J., concurring)).

86. TEX. R. CIV. P. 5.

87. *See id.* R. 1 ("The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law.").

88. *See In re* Toyota Motor Sales, U.S.A., Inc., 407 S.W.3d 746, 760 (Tex. 2013) (noting "the party waives any subsequent alleged error" by failing to immediately object or request a limiting instruction).

89. *See* Punch v. Gerlach, 263 S.W.2d 770, 771 (Tex. 1954) ("The spirit of the rules is to charge the attorneys of the litigants with the responsibility of preserving the legal rights of their clients in the progress of litigation by timely action.").

90. *See generally* TEX. R. APP. P. 33.1 (outlining the rules of preservation); TEX. R. EVID. 103 (stating how a party may preserve error when evidence has been admitted or excluded); *see also In re* L.M.I., 119 S.W.3d 707, 708 (Tex. 2003) ("In [an action to terminate parental rights], adhering to our preservation rules isn't a mere technical nicety; the interests at stake are too important to relax rules that serve a critical purpose. . . . '[A]ppellate review of potentially reversible error never presented to a trial court would undermine the Legislature's dual intent to ensure finality in these cases and expedite their resolution.'" (quoting *In re* B.L.D., 113 S.W.3d 340, 353 (Tex. 2003))); Bushell v. Dean,

the complaining party is entitled to a new trial if that party loses, appeals, and the subject of the objection is found to be erroneous and harmful.[92]

But how do judges or courts resolve the dilemma and deal with situations when a rule of procedure produces a result that is viewed to be "unjust" or, at least, unsatisfactory? As seen by the examples discussed below, the Texas Supreme Court has taken different approaches in different situations and in different periods of time. In some instances the rule may be amended, ignored, interpreted, or reinterpreted. Not only is there a danger of favoritism but also, when the language of a rule is unchanged but is reinterpreted to reach a currently perceived just result, the next judge or court composed of different judges may choose to apply the rule as written, forget the reinterpretation, choose to ignore the reinterpretation, or, again, reinterpret the rule another way. More significantly, attorneys relying on the rules of procedure may not find or understand the reinterpretation. Whether this harms the attorney depends on how the rule is reinterpreted.

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803 S.W.2d 711, 712 (Tex. 1991) (per curiam) ("[T]o preserve a complaint for appellate review, a party must present to the trial court a timely[, contemporaneous] request, objection[,] or motion, state the specific grounds therefor, and obtain a ruling."); David F. Johnson, *Preservation of Error and Standards of Review Regarding the Admission or Exclusion of Expert Testimony in Texas*, 48 S. TEX. L. REV. 49, 52–53 (2006) (detailing the ways in which a party may inform the trial court of the error); Sean M. Reagan, *Recurring Themes in Preserving Error in Civil Cases*, 22 APP. ADVOC. 392, 392 (2010) ("[T]he concept that a party must make a timely objection is fairly straightforward and simple black-letter law.").

91. The objection may be to evidence, argument, conduct, judicial action or inaction, special appearance, motion to change venue, objection to charge, receipt of charge, post-verdict actions, and any other procedural or substantive mistake made by the trial court.

92. *See* Reliance Steel & Aluminum Co. v. Sevcik, 267 S.W.3d 867, 871 (Tex. 2008) (stating an "[e]rroneous admission of evidence is harmless unless the error probably (though not necessarily) caused rendition of an improper judgment"). The court continues, recognizing

> "the impossibility of prescribing a specific test" for harmless-error review, as the standard "is more a matter of judgment than precise measurement." A reviewing court must evaluate the whole case from voir dire to closing argument, considering the "state of the evidence, the strength and weakness of the case, and the verdict."

Id. (footnotes omitted) (first quoting McCraw v. Maris, 828 S.W.2d 756, 757 (Tex. 1992); then quoting Nissan Motor Co. v. Armstrong, 145 S.W.3d 131,144 (Tex. 2004); and then quoting Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835, 841 (Tex. 1979))); Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 396 (Tex. 1989) ("[The Supreme Court of Texas] will ordinarily not find reversible error for erroneous rulings on admissibility of evidence where the evidence in question is cumulative and not controlling on a material issue dispositive of the case."); 6 ROY W. MCDONALD & ELAINE A. CARLSON, TEXAS CIVIL PRACTICE § 3:14 (2d ed. 2014) (discussing the effect of error in selecting the wrong court, one without jurisdiction, and the general remedy that comes along with it—dismissal of the case).

F. *Examples of Texas Cases Where the Texas Courts Deal with the Dilemma of Rule Interpretation*

Six examples of "interpretations" have been selected to illustrate the problem—the dilemma of rule interpretation. These examples will be examined in detail in a later section.

1. Apply the Rule as Written

In *Akers v. Simpson*,[93] the court, seeing an unjust result, nevertheless, applied the rule as written and promptly amended the rule so such outcomes would not recur in the future.[94] This is a "plain meaning," or formulistic, interpretation of the rules.[95] While not per se jurisdictional, the result of the rule was to place the party in a position of having to collaterally attack the prior judgment.[96] Such a collateral attack is difficult and would fail because the prior judgment was issued by a domestic court of general jurisdiction having jurisdiction over the party (a Texas resident) with no impropriety appearing on the face of the judgment.[97]

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93. Akers v. Simpson (*Akers II*), 445 S.W.2d 957 (Tex. 1969).

94. *See id.* at 958–59 (holding Akers was an opposing party under Rule 97 despite the fact that he had been served with a suit through his employer and had no knowledge of nor gave authorizing for his employer's attorneys to file an answer in his name); TEX. R. CIV. P. 97 (indicating the rule was amended on July 21, 1970, the year following the *Akers* decision).

95. *See* Murphy v. Friendswood Dev. Co., 965 S.W.2d 708, 709 (Tex. App.—Houston [1st Dist.] 1998, no pet.) ("Where a rule of procedure is clear, unambiguous, and specific, we construe the rule's language according to its literal meaning.").

96. *See Akers II*, 445 S.W.2d at 959 (using Texas Rule of Civil Procedure 97(a) to bar a party's attempt to assert a counterclaim that was compulsory).

97. *See* Gus M. Hodges, *Collateral Attacks on Judgments*, 41 TEX. L. REV. 163, 169 (1962) (noting the limitation of collateral attacks that "only the record may be considered" and "recitals in the judgment may not be contradicted by other parts of the record"); *see also* PNS Stores, Inc. v. Rivera, 379 S.W.3d 267, 273 (Tex. 2012) (holding "a judgment may also be challenged through a collateral attack when a failure to establish personal jurisdiction violates due process"); Browning v. Prostok, 165 S.W.3d 336, 347 (Tex. 2005) ("An attack on a final judgment, otherwise constituting a collateral attack, cannot be maintained on grounds that the judgment was obtained through fraudulent conduct intrinsic to the judgment."); Austin Indep. Sch. Dist. v. Sierra Club, 495 S.W.2d 878, 881 (Tex. 1973) (stating the rule that a judgment entered by a court of general jurisdiction is "not subject to collateral attack except on the ground that it had no jurisdiction of the person of a party or his property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act as a court"); Templeton v. Ferguson, 33 S.W. 329, 333 (Tex. 1895) ("[W]here a court of general jurisdiction, in the exercise of its ordinary judicial functions, renders a judgment in a cause of which it has jurisdiction, such judgment is never void, no matter how erroneous it may appear from the face of the record or otherwise to be."); Crawford v. McDonald, 33 S.W. 325, 328 (Tex. 1895) (describing the general rule that "where a personal judgment has been rendered against a defendant by a domestic court of general jurisdiction" and the defendant's property has been taken and sold, the defendant will not be allowed to make a collateral attack against a judgment, which appears to be

2. Change the Rule by Interpretation

In *Burkitt v. Glenney*,[98] a truly "hard" case, the court found itself in a position where the rules did not provide sufficient elasticity to deal with an unforeseen eventuality. The court, without changing the result, assumed jurisdiction without so stating.[99] This was a jurisdictional error, but the correction did nothing other than change the notation, which indicates the Texas Supreme Court's reasoning was based on the merits, not on jurisdiction as originally indicated.

3. Alter the Rule by Interpretation to Save a Party from an Attorney's Mistake

In *Verburgt v. Dorner*,[100] the court assumed jurisdiction even though one of the two steps necessary to do so was not taken. In this instance, the rule was not changed, and the mistake that had to be corrected was the fault of the party.[101] This was a jurisdictional error. But ignoring the rule gave the offending party a chance to continue the appeal.[102]

4. Change the Interpretation (and, Thus, the Meaning of the Rule) Until a Later Court Changes It Back and Then Solidifies It into a Rule

In dealing with the discovery of the results of investigations following an incident having the potential to lead to litigation, the Texas Supreme Court bounced the interpretation of the rules from one extreme in *Flores v. Fourth Court of Appeals*,[103] to another in *National Tank v. Brotherton.*[104]

5. Announce a New Rule by Opinion that "Politically" Affects Cases

void, but because of "public policy the courts, in order to protect the property rights, apply the rule . . . [that] precludes inquiry into facts dehors the record for the purpose of showing the invalidity of the judgment," resulting in the judgment being held valid).

98. Burkitt v. Glenney, 371 S.W.2d 412 (Tex. Civ. App.—Houston [1st Dist.] 1963, writ ref'd n.r.e).

99. *See id.* at 413–15 (affirming the trial court's ruling without addressing jurisdiction).

100. Verburgt v. Dorner (*Verburgt II*), 959 S.W.2d 615 (Tex. 1997).

101. *See id.* at 616 (attributing the mistake to the appellant's attorney).

102. *See id.* at 616–617 ("[W]e have instructed the courts of appeals to construe the [Texas] Rules of Appellate Procedure reasonably, yet liberally, so that the right to appeal is not lost by imposing requirements not absolutely necessary to effect the purpose of a rule.").

103. *See* Flores v. Fourth Court of Appeals, 777 S.W.2d 38, 39–41 (Tex. 1989) (orig. proceeding) (interpreting rules to establish a test for determining whether investigative documents were prepared in "anticipation of litigation).

104. *See* Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 195 (Tex. 1993) (orig. proceeding) (reinterpreting *Flores* and creating a two-prong test—objective, reasonable person and subjective, good faith—to determine whether documents were prepared in anticipation of litigation).

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In *Cavnar v. Quality Control Parking, Inc.*,[105] the Court made judgments a great investment by determining, without issuing a formal rule, that judgments should accrue compounded prejudgment interest.

Turning then to rules that affect the outcome of a trial, sudden reinterpretations resulting in perceived political consequences may cause a subsequent court to reinterpret and alter the rules.[106]

6. Rewrite a Rule Without Rewriting the Rule

Finally, in an effort to determine the propriety of rule interpretation, this Article looks at the court's treatment of the problems associated with the nature of the jury charge and the ways in which error may be preserved under complicated rules that are now reinterpreted for simplicity. This examination deals with Rules 271–279 of the Texas Rules of Civil Procedure.[107] A number of cases are examined, exploring the ever-changing attempt to perfect the submission of issues to juries and the problems of preservation of error in the proposed charge of the court.

G. *Changing the Rights of Litigants with Court-Created Procedural Devises: Case Law Without Promulgating a Rule*

In *Cavnar*, the Texas Supreme Court made a procedural change by imposing prejudgment interest upon judgments without adopting a rule, and without legislative input.[108] This action created havoc within the personal injury field and was subsequently reversed in *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*[109]

II. THE TEXAS RULES OF CIVIL PROCEDURE ARE FRIENDLY WITH BUILT-IN ELASTICITY

In taking these few select rules, it is possible to see a continuum of potential solutions to procedural problems when some circumstance causes a perceived injustice and the rules do not provide a means for

105. Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549 (Tex. 1985), *abrogated by* Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507 (Tex. 1998).

106. *See, e.g.*, *Flores*, 777 S.W.2d at 40–42 (allowing plaintiffs to discover what had, theretofore, been considered protected work product).

107. TEX. R. CIV. P. 271–79.

108. *Cavnar*, 696 S.W.2d at 556.

109. Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507 (Tex. 1988).

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correction.

To fully understand the dilemmas presented, the stage must be set with a preliminary discussion concerning the ease with which errors are corrected using existing procedures established by the rules as interpreted by the courts. This may seem like a digression, but it is necessary to understand the scope of the problems discussed. It is clear that the rules and the interpretation of the rules, as they have accumulated over time, have created a user-friendly system that allows for the correction of mistakes with relative ease, depending upon when the mistake is caught and when the correction is sought.

The earlier in the process the problem is found, the easier it is to correct. If one can picture a container holding a controversy—with the container wide at the bottom but which narrows to the smallest opening possible at the top—one would see the nature of the Texas procedural system and how that system is designed to deal with procedural problems in contested litigation. It is easy to correct mistakes before judgment (when in the broad base of the container), harder on appeal in the intermediate court of appeal (as the container narrows), and difficult in the Texas Supreme Court (when the container is at its most narrow point).

With such a user-friendly procedural system in place, it does not seem proper to save parties (or really their attorneys) from mistakes that could be avoided by taking advantage of the existing "saving" rules in place.

A. *Trial Courts*

Great flexibility is granted to Texas trial courts in the exercise of their discretion when applying procedural rules. If a mistake is made[110] and the error is promptly[111] and plainly[112] called to the court's attention and a

110. *See* TEX. R. EVID. 103 (describing the procedure by which a party may claim and preserve an error in admitting or excluding evidence).

111. *See* Bushell v. Dean, 803 S.W.2d 711, 712 (Tex. 1991) (per curiam) (requiring a timely objection to preserve error for appellate review).

112. *See* Campbell v. State, 85 S.W.3d 176, 185 (Tex. 2002) (holding an objection insufficient when it did not specify the statute which authorized the objection and when it did not specify the "things" prohibited under the unnamed statute); McDaniel v. Yarbrough, 898 S.W.2d 251, 252 (Tex. 1995) (requiring an objection to "state the specific grounds for the desired ruling if those grounds are not apparent from the context of the objection" because it will "[allow] the trial judge to make an informed ruling and the other party to remedy the defect"); Bridges v. City of Richardson, 354 S.W.2d 366, 368 (Tex. 1962) (per curiam) (recognizing an exception to the rule that a general objection does not preserve error by noting "a general objection that [something] is immaterial and irrelevant is sufficient to preserve right of review of error committed in admitting it").

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ruling from the trial court is obtained[113] or implied, it can be corrected by the trial judge until the judgment becomes final.[114] That is to say, the trial court has a period of plenary power[115] over its judgment, and corrections can even be made after a judgment has been signed and entered. If not corrected, appeal is the general remedy for correction of the mistake if error has been preserved.[116]

There exists a broad range of corrections a trial court can make post-judgment during the trial court's period of plenary power. For example, the court can grant a new trial, a judgment *non obstante veredicto*, a remittitur, or other similar relief.[117] Until recently, that power was broader; trial courts could grant new trials "in the interest of justice."[118] Now, they may do so only when there is an announced and detailed reason for such a new trial.[119] In other words, a statement by a trial court that grants a new

113. *See In re* Z.L.T., 124 S.W.3d 163, 165 (Tex. 2003) (emphasizing the necessity of a trial court expressly or implicitly ruling on a request, objection, or motion to preserve error for appellate review).

114. *See* Orion Enters., Inc. v. Pope, 927 S.W.2d 654, 658 (Tex. App.—San Antonio 1996) (orig. proceeding) (describing the trial court's power to reconsider its judgment and interlocutory orders "until thirty days after the date a final judgment is signed or, if a motion for new trial or its equivalent is filed, until thirty days after the motion is overruled by signed, written order or operation of law, whichever first occurs").

115. *Id.* at 659 ("'Plenary power' is 'that which is "[f]ull, entire, complete, absolute, perfect, [and] unqualified."'" (first alteration in original) (quoting Mesa Agro v. R.C. Dove & Sons, 584 S.W.2d 506, 508 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.))); *see also* Deen v. Kirk, 508 S.W.2d 70, 72 (Tex. 1974) (recognizing thirty days after the rendition of a judgment, a court will lack "jurisdictional power to hear and adjudicate").

116. *See generally* TEX. R. APP. P. 33.1 (listing the requirements to preserve error so that a complaint can be presented on appeal); *In re* L.M.I., 119 S.W.3d 707, 711 (Tex. 2003) (explaining the need for objecting with timeliness and specificity and obtaining a ruling because of the dangers of allowing an appeal based on unpreserved error).

117. *See* 5 ROY W. MCDONALD & ELAINE A. CARLSON, TEXAS CIVIL PRACTICE § 28:44 (2d. ed. 1999) (describing a remittitur as "frequently appropriate when the complaint is that the verdict is so excessive as to shock the conscience of the court," a remedy on which the refusal of a new trial may be conditioned, and results in a remittance "in an amount, set by the judge, that reduces the reward to a proper sum that comports with the evidence"); *id.* § 27:77 ("[U]pon motion and reasonable notice[,] the court may render judgment *non obstante veredicto* if a directed verdict would have been proper, and . . . the court may, upon like motion and notice, disregard any jury finding on a question that has no support in the evidence." (quoting TEX. R. CIV. P. 301)).

118. *See In re* United Scaffolding, Inc., 377 S.W.3d 685, 689 (Tex. 2012) (holding "an order based solely on 'the interest of justice' is insufficient" as is one that "could just as well be construed as relying solely on 'the interest of justice and fairness'").

119. *See id.* at 688–89 (concluding there is no abuse of discretion when a trial court's reasons for granting a new trial are "specific enough to indicate that the trial court did not simply parrot a pro forma template, but rather derived the articulated reasons from the particular facts and circumstances of the case at hand").

trial "in the interest of justice" is an insufficient explanation for setting aside a jury verdict.[120] There must be an "articulable reason" given for the new trial:[121]

> A trial court does not abuse its discretion so long as its stated reason for granting a new trial (1) is a reason for which a new trial is legally appropriate (such as a well-defined legal standard or a defect that probably resulted in an improper verdict), and (2) is specific enough to indicate that the trial court did not simply parrot a pro forma template, but rather derived the articulated reasons from the particular facts and circumstances of the case at hand.[122]

However, once jurisdiction is properly passed to the appellate courts, only those errors that have been properly preserved or are fundamental may then be considered.[123] To pass jurisdiction[124] once a final[125]

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120. *See In re* Columbia Med. Ctr. of Las Colinas, 290 S.W.3d 204, 215 (Tex. 2009) (orig. proceeding) (directing the trial court to state reasons for refusing to enter judgment because "[b]road statements such as 'in the interest of justice' are not sufficiently specific"). For more discussion on the practice of reversing a decision based on the interest of justice, see generally Robert W. Calvert, *In the Interest of Justice*, 4 ST. MARY'S L.J. 291 (1972).

121. *See In re United Scaffolding, Inc.*, 377 S.W.3d at 686 ("[A] trial court's order granting a motion for new trial must provide a reasonably specific explanation of the court's reasons for setting aside a jury verdict.").

122. *Id.* at 688–89.

123. *See* Bay Area Healthcare Grp., Ltd. v. McShane, 239 S.W.3d 231, 234 (Tex. 2007) (per curiam) (acknowledging "[e]ven if a trial court errs by improperly admitting evidence, reversal is warranted only if the error probably caused the rendition of an improper judgment" and the reviewing court will "review the entire record and require the complaining party to demonstrate that the judgment turns on the particular evidence admitted"); Bradley v. State *ex rel.* White, 990 S.W.2d 245, 247 (Tex. 1999) ("When both sides move for summary judgment and the trial court grants one motion and denies the other, the reviewing court should review both sides' summary judgment evidence and determine all questions presented."); Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 443 (Tex. 1993) (holding that standing is an indispensable tool for a court when deciding a case and "is implicit in the concept of subject matter jurisdiction" even though standing was not raised by a party and that is normally fundamental error); Mapco, Inc. v. Carter, 817 S.W.2d 686, 687 (Tex. 1991) (per curiam) ("[L]ack of jurisdiction is fundamental error and may be raised for the first time before [the Supreme Court of Texas]."); Pirtle v. Gregory, 629 S.W.2d 919, 920 (Tex. 1982) (per curiam) ("Fundamental error survives today in those rare instances in which the record shows the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas."); McCauley v. Consol. Underwriters, 304 S.W.2d 265, 266 (Tex. 1957) (per curiam) ("When the record affirmatively and conclusively shows that the court rendering the judgment was without jurisdiction of the subject matter, the error will also be regarded as fundamental.").

124. "After determining that the order may be taken up on appeal, the second and equally important issue is the timing of taking the steps to bring the order before the court of appeals." Tom Cowart, *The Appellate Clock*, 29 ADVOC. (TEX.) 110, 112 (2004). Cowart notes, "This issue is critical because the court of appeals cannot exercise jurisdiction over an order if its jurisdiction is not properly invoked. Thus, blowing a deadline in perfecting an appeal is the kiss of death for the attempt to obtain relief from an adverse order." *Id.*

judgment is entered, a notice of appeal must be filed within thirty or ninety days from when the judgment is signed.[126]

Jurisdictional—Plenary Power, Service, Invoking and Terminating Trial Court Jurisdiction

In the trial courts, jurisdiction[127] is conferred by filing a pleading and effecting service upon the defendant.[128] Once jurisdiction is obtained, a trial court retains jurisdiction until a final judgment is entered and, thereafter, for either thirty days after the judgment is signed or thirty days after the last post-judgment remedy is determined[129]—and longer if a party does not receive notice of the entry of a judgment.[130] Once those time periods pass, jurisdiction over a case in the trial court ends, and a notice of appeal[131] is required to continue a direct ordinary appeal.[132] A short extension for the filing of the notice of appeal is possible under Rule 5 of the Texas Rules of Civil Procedure, with the noted limitation that a trial court "may not enlarge the period for taking any action under the rules relating to new trials except as stated in these rules."[133]

"Judicial action taken after the trial court's plenary power has expired is void and a nullity."[134] Filing a jurisdictionally necessary document outside

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125. Separate rules exist for limited interlocutory appeals and possible mandamus actions.

126. TEX. R. APP. P. 26.1.

127. Jurisdiction relates to the power to hear and decide lawsuits. Morrow v. Corbin, 62 S.W.2d 641, 644 (Tex. 1933).

128. State v. Olsen, 360 S.W.2d 398, 400 (Tex. 1960) (orig. proceeding) (requiring jurisdiction to be "legally invoked; and when not legally invoked, the power to act is as absent as [if] it did not exist"), *overruled on other grounds by* Jackson v. State, 548 S.W.2d 685 (Tex. Crim. App. 1977); Waldron v. Waldron, 614 S.W.2d 648, 650 (Tex. Civ. App.—Amarillo 1981, no writ) (demanding, to invoke the jurisdiction of a court, "that persons or property over which the court has potential jurisdiction be brought before the court by service of process").

129. *See* TEX. R. CIV. P. 329(b) (promulgating the thirty-day time frame within which a motion for new trial must be filed).

130. MCDONALD & CARLSON, *supra* note 117, § 28:2.

131. *See* TEX. R. APP. P. 26 (noting a trial court's jurisdiction is terminated upon expiration of its plenary power).

132. *See* Elaine A. Carlson & Karlene S. Dunn, *Navigating Procedural Minefields: Nuances in Determining Finality of Judgments, Plenary Power, and Appealability*, 41 S. TEX. L. REV. 953, 1016 (2000) ("One party's filing invokes the appellate court's jurisdiction over all parties, but absent good cause, the court may not grant more favorable relief than the trial court in favor of a party who did not file a notice of appeal.").

133. TEX. R. CIV. P. 5.

134. Moore Landrey LLP. v. Hirsch & Westheimer, PC, 126 S.W.3d 536, 543 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (first citing *In re* Dickason, 987 S.W.2d 570, 571 (Tex. 1998) (per curiam); then citing *In re* T.G., 68 S.W.3d 171, 177 (Tex. App.—Houston [1st Dist.] 2002, pet. denied)); *see also* Jackson v. Van Winkle, 660 S.W.2d 807, 808 (Tex. 1983) ("The trial court loses

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a mandated timetable—that is, one or more day(s) late—is fatal to continued jurisdiction.[135]

Jurisdiction is a matter of power; but even here, there is a built-in flexibility in the trial courts of Texas.

The elasticity of the Texas Rules of Civil Procedure, as construed by the courts, is illustrated by the ease with which default judgments can be set aside and clerical mistakes corrected, and by the cushion that is built in for missed deadlines and delayed mail.[136]

plenary jurisdiction [thirty] days after judgment in the absence of a timely filed motion for new trial, so any action taken after the expiration of [thirty] days from judgment would be a nullity."), *overruled in part by* Moritz v. Preiss, 121 S.W.3d 715 (Tex. 2003).

135. *See* TEX. R. APP. P. 2, 25.1(b), 26.3 (promulgating the rules for perfecting and timely filing an appeal); *see also In re* Dickason, 987 S.W.2d 570, 570 (Tex. 1998) (stating when a trial court's plenary power expires, any judgment from the trial court is void); *Verburgt II*, 959 S.W.2d 615, 617 (Tex. 1997) (discussing timing requirements for filing notice of appeal); Levit v. Adams, 850 S.W.2d 469, 470 (Tex. 1993) (per curiam) (stating ninety-first-day notice under Rule 306a is one-day too late); Harris Cty. Toll Rd. Auth. v. Sw. Bell Tel., LP, 263 S.W.3d 48, 53 (Tex. App.—Houston [1st Dist.] 2006) ("The time for filing a notice of appeal is jurisdictional in nature, and absent a timely filed notice of appeal or extension request, we must dismiss an appeal for lack of jurisdiction."), *aff'd*, 282 S.W.3d 59 (Tex. 2009).

136. *See* TEX. R. CIV. P. 5 (providing mail that is "properly addressed and stamped and is deposited in the mail on or before the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed filed in time").

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1. Example—Setting Aside Default Judgments

The clearest example of the friendly nature (the elasticity) of Texas's procedural rules is its handling of default judgments. If a party fails to answer a citation and a default judgment is taken, it is possible to set that judgment aside with ease, *if done in time*.[137] If the party does not act within time for a new trial in the trial court, it may seek a reversal by restricted appeal within six months.[138] Failing that, one more difficult procedure remains: the bill of review.[139] That formalized procedure is allowed for four years.[140]

2. Correction of Clerical Errors[141]

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137. *See* Craddock v. Sunshine Bus Lines Inc., 133 S.W.2d 124, 126 (Tex. 1939) (analyzing the conditions upon which a default judgment may be properly set aside).

138. TEX. R. APP. P. 30.

139. *See* Caldwell v. Barnes, 975 S.W.2d 535, 537 (Tex. 1998) (defining a bill of review and listing the three factors that allow a judgment to be set aside by a bill of review); State v. 1985 Chevrolet Pickup Truck, 778 S.W.2d 463, 464 (Tex. 1989) (per curiam) ("[T]his court has enunciated in specific detail the steps necessary to be followed in a bill of review proceeding."); Transworld Fin. Servs. Corp. v. Briscoe, 722 S.W.2d 407, 408 (Tex. 1987) (discussing the narrow grounds upon which a bill of review can set a judgment aside); Baker v. Goldsmith, 582 S.W.2d 404, 406 (Tex. 1979) (stating "Texas courts have enunciated several requirements that must be satisfied" in filing a bill of review); Schwartz v. Jefferson, 520 S.W.2d 881, 889 (Tex. 1975) (orig. proceeding) (explaining a bill of review is an original proceeding, separate and distinct from the underlying judgment).

140. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (West 2015) (noting the four-year, residual statute of limitations); *Caldwell*, 975 S.W.2d at 538 (providing the residual statute of limitations applies to bill of review actions).

141. The failure to pay a filing fee is similar to a clerical error but is not separately discussed. The Texas Supreme Court has dealt with this problem in a proper fashion. *See* Tate v. E.I. DuPont de Nemours & Co., 934 S.W.2d 83, 84 (Tex. 1996) (per curiam) (holding payment of fee is sufficient before trial court loses plenary jurisdiction). The filing of a post-judgment motion without paying the filing fee results in the extension of the trial court's plenary power, thus extending the appellate timetable if the filing fee is paid within the period of plenary power. *See id.* at 84 ("We held that a motion for a new trial tendered without the necessary filing fee is nonetheless *conditionally filed* when it is presented to the clerk, and that date controls for the purposes of the appellate timetable."). The failure to pay the filing fee before the motion for new trial is overruled by operation of law may forfeit altogether the movant's opportunity to have the trial court consider the motion. However, the court failed to express an opinion on whether the failure to pay retroactively invalidated the conditional filing for purposes of the appellate timetable. That was laid to rest, and properly so, in *Garza v. Garcia*. Garza v. Garcia 137 S.W.3d 36 (Tex. 2004). There, "Garcia timely filed a motion for new trial[] but never paid the fee." *Id.* at 37 (footnote omitted). The court held motion for new trial extends appellate timetables, even if the requisite filing fee is never paid:

> We construe the Rules of Appellate Procedure liberally, so that decisions turn on substance, rather than procedural technicality; nothing in those rules requires a fee to accompany a motion for new trial[] or that such a fee be paid at all. Moreover, once a motion for new trial is conditionally filed and timetables extended, all litigants benefit from knowing what timetables

Again, elasticity is shown by the ease with which clerical errors,[142] as opposed to judicial errors,[143] in a judgment may be corrected at any time.[144] If it becomes obvious on appeal that a court has made a clerical error—such as entering the wrong cause number—in an otherwise properly identified appeal document, such a correction will be allowed.[145] The rules relating to nunc pro tunc correction of judgments, in reality, extend the trial court's plenary power for an indefinite period, but only to

apply even if they do not know whether the requisite fee was paid. The alternative would breed uncertainty, as the deadlines might automatically jump forward when the fee is quietly paid or revert backwards if it is not.

> This is not to say filing fees are irrelevant. . . . "[A]bsent emergency or other rare circumstances[,]" a motion for new trial should not be considered, until the filing fee is paid. Here, Garcia's factual sufficiency complaint had to be raised in a motion for new trial, but because she never paid the $15 fee, the trial court was not required to review it. As her complaint was never properly made to the trial court, it preserved nothing for review; thus, the court of appeals correctly never addressed [Garcia's] factual sufficiency complaint[] but correctly considered her venue complaint.

Id. at 38 (footnotes omitted).

142. *See* Andrews v. Koch, 702 S.W.2d 584, 585 (Tex. 1986) (per curiam) (emphasizing a nunc pro tunc judgment may only be entered to correct a clerical error not a judicial error).

143. *See* Escobar v. Escobar, 711 S.W.2d 230, 231 (Tex. 1986) (reiterating once a trial court's plenary power has expired, it may only modify a judgment to correct a clerical error); Wallace v. Rogers, 517 S.W.2d 301, 303 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.) (evaluating the differences between clerical and judicial errors).

144. *See* Comet Aluminum Co. v. Dibrell, 450 S.W.2d 56, 58 (Tex. 1970) (orig. proceeding) (outlining the timing when clerical errors may be corrected).

145. The Texas Supreme Court has had no problem, in the last thirty-plus years, correcting obvious attorney–party mistakes that do not reflect a lack of intent to act. In *City of San Antonio v. Rodriguez*, the appealing party placed the wrong cause number on the notice of appeal; all other information was correct. City of San Antonio v. Rodriguez, 828 S.W.2d 417, 417 (Tex. 1992) (per curiam). While the court of appeals dismissed the appeal for want of jurisdiction, the Texas Supreme Court reinstated the appeal:

> We have held that a court of appeals has jurisdiction over an appeal when the appellant files an instrument that is "a bona fide attempt to invoke appellate court jurisdiction." More recently, we reaffirmed the policy that "the decisions of the courts of appeals [should] turn on substance rather than procedural technicality." Here, there can be no doubt that the [c]ity's attempt to perfect an appeal was "bona fide" because, but for the erroneous cause number, the [c]ity's notice of appeal complied with the provisions of Tex. R. App. P. 40(a)(2). We hold that the [c]ity's notation of the incorrect cause number on its notice of appeal does not defeat the jurisdiction of the court of appeals.

Id. at 418 (first alteration in original) (citations omitted) (first quoting Grand Prairie Indep. Sch. Dist. v. S. Parts Imports, Inc., 813 S.W.2d 499, 500 (Tex. 1991) (per curiam); and then quoting Crown Life Ins. v. Estate of Gonzales, 820 S.W.2d 121 (Tex. 1991) (per curiam)). This was akin to the correction of a clerical (as opposed to a judicial) error in a final judgment, which may be made even after plenary power has otherwise expired.

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correct the clerical errors.[146] Any nunc pro tunc corrections are subject to appellate review.[147] This nunc pro tunc power, however, does not reawaken the entire case for review—only the clerical mistake is subject to correction.[148]

B. *Appellate Courts: Jurisdictional Power—Invoking and Terminating Appellate Jurisdiction*

Once a timely notice of appeal is filed, jurisdiction passes to the appellate courts. Normally appellate courts may only alter a trial court judgment or remand when harmful error is found to exist on appeal;[149] although in extremely rare circumstances, the Texas Rules of Appellate Procedure allow for the reversal of errorless judgments when it is in the interest of justice.[150]

"When reversing the court of appeals' judgment, the Supreme Court may, in the interest of justice, remand the case to the trial court even if a rendition of judgment is otherwise appropriate."[151] One such exception exists when remand is allowed in the interest of justice because the law changes pending the appeal or as a result of the appeal.[152]

When a plaintiff's judgment is reversed for legal insufficiency, the appellate court is required to render a take-nothing judgment.[153]

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146. *See* TEX. R. CIV. P. 329(b)(f) ("[T]he court may at any time correct a clerical error in the record of a judgment and render judgment nunc pro tunc under Rule 316, and may also sign an order declaring a previous judgment or order to be void because signed after the court's plenary power had expired.").

147. *See Escobar*, 711 S.W.2d at 230 (Tex. 1986) (conducting appellate review of nunc pro tunc order).

148. TEX. R. CIV. P. 329(b)(h).

149. TEX. R. APP. P. 44.1; *see* Holt Atherton Indus., Inc. v. Heine, 835 S.W.2d 80, 86 (Tex. 1992) ("As a general matter, when we sustain a no evidence point of error after a trial on the merits, we render judgment on that point."); Mobil Oil Corp. v. Frederick, 621 S.W.2d 595, 596 (Tex. 1981) (per curiam) ("[A]bsent circumstances of additional evidence to be developed or uncertainty of the decree, the appellate court has a duty to render the judgment which the trial court should have rendered."); *see also* TEX. R. APP. P. 43.3 (stating when an appellate court should render a trial court judgment); *id.* R. 60.2 ("The [s]upreme [c]ourt may reverse the lower court's judgment in whole or in part and render the judgment that the lower court should have rendered.").

150. For a more detailed discussion of the "interest of justice" exception, see generally Calvert, *supra* note 120.

151. TEX. R. APP. P. 60.3.

152. *See* Kerr-McGee Corp. v. Helton, 133 S.W.3d 245, 258 (Tex. 2004) ("The most compelling case for [a remand in the interest of justice] is where we overrule existing precedents on which the losing party relied at trial." (alteration in original) (quoting Westgate, Ltd. v. State, 843 S.W.2d 448, 455 (Tex. 1992))), *abrogated by* Costal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1 (Tex. 2008).

153. *See* Dolgencorp of Tex., Inc. v. Lerma, 288 S.W.3d 922, 929 (Tex. 2009) (per curiam)

However, even there, an exception has been judicially created to apply when both post-answer and no-answer default judgments have been reversed on appeal for legally insufficient evidence.[154]

The appellee will be required to perfect an appeal if the party seeks to alter the trial court's judgment.[155] In passing on the appeal, any procedural problems must be dealt with by the appellate courts before moving on to substance, if substantive matters are even reached. Normally, there is no difficulty with rule interpretation when a plain reading approach is used. However, if circumstances cause a perceived injustice and the rules do not provide a means for correction, the courts must determine what to do. Several such situations and their solutions are dealt with here.

III. EXAMPLES OF WAYS RULES HAVE, OR HAVE NOT, BEEN INTERPRETED TO DO JUSTICE

A. *Apply the Literal, Plain-Meaning Language of the Rule and Correct the Perceived Injustice with a Subsequent Amendment of the Rules*

Ford Motor Co. v. Garcia,[156] reviewing the appointment of a guardian *ad litem*, stated the generally recognized rule for determining the meaning of a rule:

> When construing rules of procedure, we apply the same rules of construction that govern the interpretation of statutes. We first look to the plain language of the rule and construe it according to its plain or literal meaning. In doing so we keep in mind that the rules of civil procedure are given a liberal construction so as "to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law."[157]

To illustrate such a "pure," "plain meaning" (or some would say formalistic) interpretation of rules, one need only look to the 1969 case,

(providing the circumstances under which an appellate court is required to render a judgment).

154. *See id.* at 929 (noting the split between courts of appeal as to the proper disposition of a case when there is insufficient evidence to support a post-answer default judgment).

155. *See* TEX. R. APP. P. 43.3(b) (describing the circumstances under which a court of appeals must remand a case).

156. Ford Motor Co. v. Garcia, 363 S.W.3d 573 (Tex. 2012).

157. *Id.* at 579 (citations omitted) (first citing *In re* Christus Spohn Hosp. Kleber, 222 S.W.3d 434, 437 (Tex. 2007); then citing *In re* E.A., 287 S.W.3d 1, 5 (Tex. 2009); and then quoting TEX. R. CIV. P. 1).

Akers v. Simpson.[158] Akers, a limousine driver, was in a collision with a car driven by Simpson.[159] Simpson sued Akers and Hayden, the employer of Akers.[160] The constable served Hayden, left the process for Akers with Hayden but indicated on the return that Akers was personally served.[161] Hayden's insurance company answered for both Hayden and Akers.[162] In his later personal injury suit, Akers denied that he knew an answer had been filed on his behalf.[163] In the original action, the insurance company negotiated a settlement with Simpson, which was finalized with an agreed judgment against the defendants for the amount of the settlement.[164] While this was going on, Akers filed his own personal injury suit against Simpson. Simpson then moved for summary judgment in the trial court, in the action by Aker against Simpson, on the basis that Akers's claim was a compulsory counterclaim in the trial court for the *Simpson v. Hayden/Akers*[165] action, the first suit.[166] The trial court entered summary judgment for Simpson in Akers's suit against him;[167] the Houston Court of Appeals affirmed;[168] and the Texas Supreme Court affirmed.[169] In these proceedings, Akers tried to show that he, personally, had no notice and took no action in the first suit.[170] All his efforts were rejected. Akers's suit against Simpson was labeled a collateral attack upon the judgment issued in the original *Simpson v. Akers* action that had been settled by the entry of an agreed judgment:

> A collateral attack on a judgment is an attempt to avoid its binding force in a

158. *Akers II*, 445 S.W.2d 957 (Tex. 1969); *see also* Robert M. Roller, Note, *Texas Procedure: A Party Cannot Collaterally Attack a Judgment Recital that He Was Served with Citation in Order to Avoid the Compulsory Counterclaim Effects of a Prior Judgment*, 48 TEX. L. REV. 978, 978 (1970) (analyzing the *Akers v. Simpson* case).

159. *Akers II*, 445 S.W.2d at 958. On October 23, Simpson filed a personal injury suit in the District Court of Harris County, Texas against Hayden and Akers, and on November 20, an answer in the form of a general denial was filed in their names. On December 8, Akers filed a personal injury suit against Simpson in the District Court of Harris County, and on January 23, 1968, Simpson filed an answer to the merits.

160. *Id.* at 958.

161. *Id.* at 959.

162. *Id.*

163. *Id.*

164. *Id.* at 958.

165. Akers v. Simpson (*Akers I*), 437 S.W.2d 429 (Tex. Civ. App.—Houston [1st Dist.]), *aff'd*, 445 S.W.2d 957 (Tex. 1969).

166. *Id.*

167. *Id.* at 430

168. *Id.* at 432.

169. *Akers II*, 445 S.W.2d at 958.

170. *Id.*

> proceeding not instituted for such purpose . . . . Akers chose not to institute a direct attack on the *Simpson* judgment by means of which he could have avoided the compulsory counterclaim effect of the judgment in the suit of Akers against Simpson. Not having done so, the jurisdictional recitals of the judgment in the Simpson suit bring Akers under the decisions which hold that Rule 97(a) bars a subsequent suit growing out of the same accident when a prior suit between the same parties is concluded by a judgment pursuant to a compromise settlement agreement.[171]

As a result of the decision, Akers was left with no remedy for his alleged personal injuries. This could be perceived as an unfair and technical decision.[172] Within a year, the court recognized the problem[173] demonstrated by the *Akers* decision and effectively overruled it by amending Rule 97(a) of the Texas Rules of Civil Procedure to add the following provision:

> [P]rovided, however, that a judgment based upon a settlement or compromise of a claim of one party to the transaction or occurrence prior to a disposition on the merits shall not operate as a bar to the continuation or assertion of the claims of any other party to the transaction or occurrence unless the latter has consented in writing that said judgment shall operate as a bar.[174]

While Akers lost, those who followed did not lose. The rule was changed in an orderly fashion. *Akers* was a hard case with a harsh individual result, but an easy case in light of the goal of maintaining a predictable, functioning procedural system.

There are many such examples of simple application of various rules of procedure with, what could be called, a resulting injustice. One such example of this is *In re Brookshire Grocery Co.*,[175] where the court dealt with, what the dissent called, a "tricky" procedural rule. The result was that it was too late for Brookshire to perfect an appeal. The majority noted, while the trial court's plenary power is usually extended by filing a motion for new trial within thirty days of the signing of the judgment, plenary power was not extended by filing a motion for new trial within thirty days

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171. *Id.* at 959.

172. For a criticism of the *Akers v. Simpson* decision, demonstrating the perceived unfairness of the opinion, see generally Roller, *supra* note 158, at 978–84.

173. Chandler v. Cashway Bldg. Materials, Inc., 584 S.W.2d 950, 954 (Tex. Civ. App.—El Paso 1979, no writ).

174. TEX. R. CIV. P. 97(a).

175. *In re* Brookshire Grocery Co., 250 S.W.3d 66 (Tex. 2008) (orig. proceeding).

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but after a prior motion for new trial had been overruled.[176]

The *Akers* manner of dealing with the dilemma of rule interpretation (application of the plain meaning of the rule) avoids all of the pitfalls of interpretation put forth by Fuller, as modified for the purposes of this proposal:

(1) there was no lacuna, no lack of rules or law, and the result was not ad hoc or inconsistent adjudication;
(2) there was no failure to publicize the rule of law being applied;
(3) there was no unclear or obscure legislation;
(4) there was no retroactive legislation—to the contrary, the rule was applied as written and was subsequently changed in an orderly manner;
(5) there were no contradictions in the law;
(6) there were no demands beyond the power of parties to Texas litigation;
(7) the rule remained stable, and there was no revision of the rule; and
(8) there was no divergence between the administration of the rule, and the declared rule, nor was any party adversely impacted by the court's action.[177]

Dealing with Mistakes that Would Deprive the Court of Jurisdiction

The next two examples involve issues of jurisdiction, which implicates both procedure and judicial power. Rule interpretation becomes more difficult if the error is one of omission that is essential to jurisdiction and relates to perfection of a procedural right, such as perfection of appeal. Then it should be a matter of whether the error is due to an outside event or circumstance, or whether it is due to the mistake of the party.

176. Part of the decision turned on the distinction between the words *or* and *and*. *Id.* at 69 (citing Bd. of Ins. Comm'rs of Tex. v. Guardian Life Ins. Co. of Tex., 180 S.W.2d 906, 908 (Tex. 1944)); *see also* Robinson v. Reliable Life Ins. Co., 569 S.W.2d 28, 29–30 (Tex. 1978) ("While there may be circumstances which call for such a construction, ordinarily the words 'and' and 'or' are not interchangeable."); Bayou Pipeline Corp. v. R.R. Comm'n of Tex., 568 S.W.2d 122, 125 (Tex. 1978) (emphasizing *or* and *and* are not interchangeable); Ron Beal, *The Art of Statutory Construction: Texas Style*, 64 BAYLOR L. REV. 339, 382 (2012) ("The question may arise as to whether the legislature intended the meaning of a word as it was understood at the time of its enactment or its meaning at the time of litigation.").

177. *See* FULLER, MORALITY OF LAW, *supra* note 73, at 33–38 (outlining the eight issues the law should avoid for moral reasons—adopted here, not for moral reasons but to establish an orderly way of interpreting rules of procedure, even in hard cases).

B. *Ignore the Rule to Avoid an Injustice Brought on by External Events*

1. Example: Courthouse Closed

One alternative to a rule that leads to an injustice is to ignore the literal wording of a rule. This seems to be appropriate when justice requires it because of external events and no harm will come to the procedural system or the opposing party. One rare example is *Burkitt v. Glenney*,[178] where the court was faced with a filing problem. The court of appeals issued its opinion for *Burkitt* on October 3, 1963.[179] A motion for rehearing was denied on October 24, 1963.[180] At that time, the application for writ of error was due thirty days thereafter, on Monday, November 25, 1963. On November 22, 1963, President John F. Kennedy was assassinated. A presidential proclamation was issued the next day, announcing a national day of mourning on Monday, November 25, 1963.[181] It was also announced on November 22 that the Harris County Courthouse would be closed on Monday, November 25.[182] Because the

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178. Burkitt v. Glenney, 371 S.W.2d 412 (Tex. Civ. App.—Houston [1st Dist.] 1963, writ ref'd n.r.e.).

179. *Id.* at 412.

180. *Id.*

181. Proclamation 3561: National Day of Mourning for President Kennedy, 1 PUB. PAPERS 2 (Nov. 23, 1963). As one commentator notes,

> It is hard to grasp how deeply the nation was affected by the tragedy. Consider this partial list: From Friday afternoon to Monday evening, TV networks aired nothing but Kennedy-related coverage, no advertisements, no other programming. Religious services were held Friday, Saturday, Sunday and Monday, the day of the funeral. Pope Paul VI said a special mass for Kennedy. Wall Street trading was halted early Friday to avert a panic. The United Nations adjourned all sessions. The Canadian Parliament adjourned; bells rang in Berlin; condolence messages poured in from leaders around the world. Chicago and New York theaters canceled Friday night performances, as did the Lyric Opera of Chicago. The entire Big Ten's Saturday football schedule was called off, though plenty of other college games were played. NFL games were played Sunday, but AFL games were postponed. Public and Catholic schools in the Chicago area closed Monday, the national day of mourning. Most universities also shut down. Most stores, restaurants, businesses and museums closed all day Monday or during the funeral. The Midwest Stock Exchange and the Chicago Board of Trade were closed. A U.S. rocket launch was postponed. Las Vegas casinos closed that Monday for just the third time in history. And finally, this: Telephone operators across the nation stopped accepting calls for a minute of silence at 11 a.m. Monday.

Stephen Benzkofer, *The JFK Assassination: 50 Years Later*, CHI. TRIB. (Nov. 10, 2013), http://articles.chicagotribune.com/2013-11-10/site/ct-per-flash-jfk-1110-20131110_1_jfk-assassination-chicago-board-50-years.

182. *See* Aff. of Rola Hamm Concerning the Harris County Courthouse Closure as It Pertains to *Burkitt v. Glenney* (Feb. 20, 1964) [hereinafter Aff. of Hamm] (swearing it was announced "that the

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courthouse was closed on the due date, the petitioner's attorney was unable to file the application for writ of error until Tuesday, November 26, one day late.[183] The Supreme Court of Texas denied the application for writ of error—writ refused, w.o.j. (want of jurisdiction), and the petitioner filed a motion for rehearing, accompanied by affidavits explaining the delay.[184]

Before this case arrived in the Texas Supreme Court, it had been mentioned in *Smith v. Harris County-Houston Ship Channel Navigation District*[185] as dicta that "only the days designated in Article 4591[186] are legal holidays within the meaning of Rule 4."[187] Thus, while the Harris County courthouse was closed, under that authority, Monday, November 25, was not a legal holiday.

The petitioner's attorney, C.O. Ryan, filed an affidavit averring that the application was ready for filing by mid-morning on Monday, November 25, that he attempted to contact the clerk's office by telephone but learned it was closed, and that the application was filed the following Tuesday morning, at approximately 8:30 a.m.[188] The clerk of the court of

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Harris County Courthouse . . . w[as] to be closed on Monday, November 25[, 1963]").

183. Aff. of C.O. Ryan Concerning the Status of Filing Petitioner's Application for Writ of Error in *Burkitt v. Glenney* (Feb. 20, 1964) [hereinafter Aff. of Ryan] (swearing the writ of error was filed "at approximately 8:30 A.M. on Tuesday, November 26, 1963, as soon as the Clerk's office was open for business").

184. Petitioner's Motion for Rehearing, *Burkitt*, 371 S.W.2d 412 (Tex. Civ. App.—Houston [1st Dist.] 1963, writ ref'd n.r.e.) (No. A-9873) (on file with the *St. Mary's Law Journal*) [hereinafter Petitioner's Motion for Rehearing]; Aff. of Hamm; Aff. of Ryan.

185. Smith v. Harris Cty.-Hous. Ship Channel Nav. Dist., 329 S.W.2d 845 (Tex. 1959).

186. *See* Act of June 11, 1991, 72nd Leg., R.S., ch. 445, § 1, 1991 Tex. Gen. Laws 1616, 1616, *repealed by* Act of Sept. 1, 1993, 73rd Leg., R.S., ch. 268, § 46(1), 1993 Tex. Gen Laws 583, 718 (listing official state holidays).

187. *Smith*, 329 S.W.2d at 847. The *Smith* case was followed in *Dorchester Master Ltd. Partnership v. Hunt*, 790 S.W.2d 552, 553 (Tex. 1990) (per curiam), *Johnson v. Texas Employers Insurance Association*, 674 S.W.2d 761, 762 (Tex. 1984) (per curiam), and *Mid-Continent Refrigerator Co. v. Tackett*, 584 S.W.2d 705, 706 (Tex. 1979) (per curiam). Two courts of appeal have relied upon the Blackman's. Suarez v. Brown, 414 S.W.2d 537, 539 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd), *overruled per curiam by* Miller Brewing Co. v. Villarreal, 829 S.W.2d 770 (Tex. 1992); AAAction Plumbing Co. v. Stewart, 792 S.W.2d 501, 502 (Tex. App.—Houston [1st Dist.] 1990, writ denied). The language of *Smith* "restricting legal holidays to only two categories, and excluding holidays designated by commissioners courts, was not essential to the disposition of the case and was therefore dicta." Miller Brewing Co. v. Villarreal, 829 S.W.2d 770, 771 (Tex. 1992) (per curiam). Note that by rule amendment, some changes have occurred. *See Hunt*, 790 S.W.2d at 552–53 (holding, as a result of rule amendments, "the day after Christmas is a legal holiday within the meaning of [Tex. R. App. P.] 5(a) when Christmas falls on a Sunday," and that the rule "did not limit legal holidays . . . to those specified in [A]rticle 4591" (citations omitted)).

188. Aff. of Ryan., at 1–2.

appeals, swore that on Saturday, upon learning of the Presidential Proclamation and the closing of the courthouse on Monday, she consulted with Chief Justice Bell and, "at his direction and with his approval, determined that the [c]lerk's office should remain closed on Monday, November 25."[189]

As stated, on original submission, the court denied the application for writ of error, w.o.j.,[190] indicating they did not have jurisdiction of the case. On rehearing, the court denied the application writ ref., n.r.e., effectively ignoring their prior interpretation of the statute and finding no error, and after accepting jurisdiction, left the lower court actions unchanged. The results on original submission and on rehearing were, for practical purposes, the same: the prior actions of lower courts were left unchanged. However, on rehearing, there was a perception that justice had been done. This action seems to be both proper and just.

At that time, there was no provision for the extension of an appellate timetable, hence, Rule 1—the secondary rule—could come into play. With this *Burkitt* approach, most of Fuller's objections to ad hoc change were met.

2. Example: Inmate's Mail Was Late Because of Prison Authorities

A situation similar to *Burkitt* occurred with regard to inmates, who have no control of their mail. In *Houser v. McElveen*,[191] another truly hard case, an inmate deposited his notice of appeal in the prison mail service thirty-five days after the trial court's judgment of dismissal.[192] It was not received by the court of appeals until the forty-sixth day.[193] The court of appeals dismissed the appeal.[194] The Texas Supreme Court found this to be in error:

> The notice of appeal was required to be filed within [thirty] days of the judgment, but the court of appeals should have extended that time if, within the next [fifteen] days, Houser filed his notice of appeal and a motion for

189. Aff. of Hamm., at 1–2.

190. From February 1, 1946 until December 31, 1987, the designation "writ dismissed, w.o.j. (want of jurisdiction)" meant the Texas Supreme Court lacked jurisdiction to review the case or that the application of writ of error failed to properly present the error.

191. Houser v. McElveen (*Houser II*), 243 S.W.3d 646 (Tex. 2008) (per curiam).

192. *Id.* at 646.

193. *Id.*

194. Houser v. McElveen (*Houser I*), No. 13-05-00426-CV, 2006 WL 328134, at *1 (Tex. App.—Corpus Christi Feb. 9, 2006) (per curiam) (mem. op.), *rev'd per curiam*, 234 S.W.3d 646 (Tex. 2008).

> extension with a reasonable explanation. The notice of appeal was deemed filed on the day he mailed it, since it was received one day after the [fifteen]-day deadline.[195]

In short, the appealing party had done everything within his power to satisfy the time requirements of the rules and, thus, was not penalized for the late filing error or tardiness of prison officials.[196] Again, this action seems to be both proper and just.

In these cases, the appealing party did everything within his or her power to comply with the primary rule. Without fault, the party did all required by the rules but was prevented from doing so by external forces. Application of the secondary rule, Rule 1, was authorized since there was a circumstance not anticipated by the primary rule and there was no fault on the part of the party in question.

In these circumstances, the primary rule is explicit and directly applicable but applying the secondary rule was proper:

> (1) While these cases involved an ad hoc adjudication, each presented a situation where application of the secondary rule, Rule 1, was appropriate since the application of that rule impacted only the one case before the Court and for external reasons.
> (2) These were ad hoc decisions. The primary rule remained the same, and the application of the secondary rule was justified by circumstances beyond the control of the party and not anticipated by the rules. Individual justice was done and was proper.
> (3) There was no unclear or obscure legislation. The primary rule remained the same. In *Burkitt*, the actual holding of the court was published for those familiar with the writ history system, although for others it was obscure. This action, however, was justified by circumstances beyond the control of the party and not anticipated by the rules. Individual justice was done and was proper. In *Houser*, the court published an opinion which justified treating the notice as timely filed. Again, the primary rule was left in place.
> (4) There was no retroactive legislation. The primary rule remained the same, and application of the secondary rule was justified by circumstances beyond the control of the party and not anticipated by the rules. Individual justice was done and was proper.
> (5) There were no contradictions in the law. The primary rule

195. *Houser II*, 234 S.W.3d at 646 (citations omitted).

196. *Id.* at 647; *see also* Williams v. T.D.C.J.-I.D., 142 S.W.3d 308, 310 (Tex. 2004) (per curiam) (holding an inmate's late filing of a docketing statement was excused because it had been timely mailed but mislaid by the clerk).

remained the same, and application of the secondary rule was publicized and justified for all to see. Application of the secondary rule was justified by circumstances beyond the control of the party and not anticipated by the rules. Individual justice was done and was proper.
(6) No demand was made that was beyond the power of the subjects and the ruled. No party was harmed by these ad hoc decisions.
(7) There was no unstable legislation. The primary rule remained the same, and application of the secondary rule was publicized for those understanding the writ history system and was justified by circumstances beyond the control of the party and not anticipated by the rules. Individual justice was done and was proper.
(8) While there was a divergence as to the primary rule, the application of the secondary rule was justified by the circumstances beyond the control of the party and not anticipated by the rules. Individual justice was done and was proper.[197]

C. *Ignore the Rule to Avoid a Perceived Injustice Even Though the Mistake Is Attributable to the Party*[198]

Unlike the two cases just discussed, *Verburgt v. Dorner*[199] was not a hard case. Not only was the rule in question clear but also the failure to follow the mandate of the rule should have deprived the court of jurisdiction to act.

Under the prior procedures related to the transfer of jurisdiction from the trial court to the appellate court, evolving[200] from convoluted[201] to

197. *See* FULLER, MORALITY OF LAW, *supra* note 73, at 33–38 (detailing the eight principles that govern the moral purposes of the law).

198. *See* TEX. R. APP. P. 44.3 ("A court of appeals must not affirm or reverse a judgment or dismiss an appeal for formal defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects or irregularities.").

199. *Verburgt II*, 959 S.W.2d 615 (Tex. 1997).

200. Nathan L. Hecht & E. Lee Parsley, Procedural Reform: Whence and Whither, *in* MATTHEW BENDER C.L.E., PRACTICING LAW UNDER THE NEW RULES OF TRIAL AND APPELLATE PROCEDURE 1-12 (1997).

201. The court illustrated the difficulties of the former procedure in *El Paso & N.E.R. Co. v. Whatley*:

> Appeals from district courts to the Courts of Civil Appeals are regulated by the following article of the Revised Statutes of 1895: "Art. 1387. An appeal may, in cases where an appeal is allowed, be taken during the term of the court at which the final judgment in the cause is rendered, by the appellants giving notice of appeal in open court within two days after final judgment, or two days after judgment overruling a motion for a new trial, which shall be noted on the docket and entered of record, and by his filing with the clerk an appeal bond, where bond is required by law, or affidavit in lieu thereof, as hereinafter provided, within twenty days

more simplified[202] procedures, the failure to timely file a notice of appeal, cost bond, or affidavit in lieu thereof has always been jurisdictional.[203] While the requirement for the transfer of jurisdictional power remained, in 1997, the rules related to the procedural device for transferring power were amended to simplify the procedure:

> On March 20, 1997, the Supreme Court of Texas and the Texas Court of Criminal Appeals signed orders adopting the new Texas Rules of Appellate Procedure.[204]
>
> . . . .
>
> One of the most drastic changes in Texas appellate procedure is embodied in new Rule 25, which requires the timely filing of a "notice of appeal" to perfect an appeal in all civil cases. Under former practice, except in those cases in which no bond was required by law, a properly and timely filed appeal bond (or substitute) was a mandatory prerequisite to invoke the appellate court's jurisdiction in civil cases. The purpose of the highly technical appeal bond procedure was to provide security for the court reporter, court clerk, and the prevailing party in the trial court, for the costs of the appeal. The requirement of an appeal bond or cost deposit in lieu of a bond is entirely eliminated by new Rule 25.[205]

Thus, the notice of appeal became the procedural device by which

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> after the expiration of the term. If the term of the court may by law continue more than eight weeks, the bond, or affidavit in lieu thereof, shall be filed within twenty days after notice of appeal is given, if the party taking the appeal resides in the county, and within thirty days if he resides out of the county."

El Paso & N.E.R. Co. v. Whatley, 87 S.W. 819, 820 (Tex. 1905).

202. As stated in *White v. Schiwetz*,

> The perfection of an appeal is a prerequisite to invoking the jurisdiction of an appellate court. There are four ways to perfect a civil appeal: (1) by timely filing an appeal bond; (2) by timely depositing cash; (3) by timely filing an affidavit of inability to pay costs on appeal or give security therefor (if the affidavit is contested, when the contest is overruled); (4) by timely filing written notice of appeal if a statutory exemption for costs applies. An affidavit in lieu of bond must be filed within thirty days after the judgment is signed, or, if a timely motion for new trial has been filed, within ninety days after the judgment is signed.

White v. Schiwetz, 793 S.W.2d 278, 279 (Tex. App.—Corpus Christi 1990, no writ) (citations omitted).

203. *See* Davies v. Massey, 561 S.W.2d 799, 801 (Tex. 1978) (orig. proceeding) ("Filing a cost bond . . . is a necessary and jurisdictional step in perfecting an appeal."); Glidden Co. v. Aetna Cas. & Sur. Co., 291 S.W.2d 315, 318 (Tex. 1956) ("It is well settled . . . that the requirement that the bond be filed within thirty days is mandatory and jurisdictional.").

204. John Hill Cayce, Jr. et al., *Civil Appeals in Texas: Practicing Under the New Rules of Appellate Procedure*, 49 BAYLOR L. REV. 867, 872 (1997) (footnote omitted).

205. *Id.* at 877 (footnotes omitted).

jurisdiction is kept alive and transferred from the trial court to the appellate court.[206]

Under Rule 26.1,[207] a party seeking to appeal a case must file a notice of appeal within thirty days of the signing of a judgment if there is no post-judgment motion or within ninety days if there is a post-judgment motion.[208] Rule 26.3 allows for an extension of time, up to fifteen days, if the appealing party files the notice of appeal *and* "files a motion in the appellate court complying with Rule 10.5(b)."[209] The notice of appeal *and* extension must be filed within the period for the notice of appeal and the fifteen days allowed for an extension.[210] If either the late notice of appeal or the motion seeking to extend time by stating an excuse for the late filing was filed late, the appeal, before *Verburgh*, had to be dismissed.[211] Rule 10.5(b) requires any such motion state "the facts relied on to reasonably explain the need for an extension."[212]

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206. *See In re* J.M., 396 S.W.3d 528, 530 (Tex. 2015) (per curiam) ("Filing a notice of appeal invokes the court of appeal's jurisdiction over the parties to the trial court's judgment or order." (quoting TEX. R. APP. P. 25.1(b))).

207. TEX. R. APP. P. 26.1.

208. *See* Jim Claunch, *When Is a Judgment Final?*, 62 TEX. B.J. 536, 538 (1999) (outlining the timeline for filing an extension of time).

209. TEX. R. APP. P. 26.3.

210. *Id.* R. 26.3; *see also Verburgt II*, 959 S.W.2d 615, 617 (Tex. 1997) (Enoch, J., dissenting) (stating the court has held, "to extend the time in which to file the notice of appeal, one must file not only the notice of appeal, but in addition 'a motion' that 'must state: . . . [among other things] the facts relied on to reasonably explain the need for an extension'").

211. "A limitation on the ability of the appellate court to extend the time to file a notice of appeal is that the notice of appeal and the motion to extend time must be filed with the trial court within fifteen days of the original deadline." MCDONALD & CARLSON, *supra* note 117, § 13:8; *see* Brown Mech. Servs., Inc. v. Mountbatten Sur. Co., 377 S.W.3d 40, 42 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (providing an extension of time to file the notice of appeal may be granted if an appellant properly files a motion to extend time within fifteen days after the deadline to file the notice); *see also* B.D. Click Co. v. Safari Drilling Corp., 638 S.W.2d 860, 862 (Tex. 1982) (holding a motion for extension of time must be filed within fifteen days of the last day for filing as prescribed by Rule 21c); Davies v. Massey, 561 S.W.2d 799, 800–01 (Tex. 1978) (orig. proceeding) (providing a cost bond was timely filed and an appeal properly perfected when it was received not more than ten days late); City of Lancaster v. Tex. Nat'l Res. Conservation Comm'n, 935 S.W.2d 226, 227 (Tex. App.—Austin, 1996, writ denied) (per curiam) (providing "appellant must move for extension of time to perfect appeal within fifteen days after perfecting instrument is due"); Fite v. Johnson, 654 S.W.2d 51, 52 (Tex. App.—Dallas 1983, no writ) (stating a party may obtain an extension of time to file a bond from an appellate court if the bond is "filed in the trial court within fifteen days after the last day for filing the bond and a motion to extend the time is filed in the appellate court within the same period"); Flores v. Citizens State Bank of Roma, 954 S.W.2d 78, 79 (Tex. App.—Austin 1997, no writ) (per curiam) (indicating a motion for extension of time must be filed within fifteen day grace period).

212. TEX. R. APP. P. 10.5(b).

In *Verburgt v. Dorner*, the appealing party filed the notice of appeal late but did not file a 10.5(b) motion.[213] The San Antonio Court of Appeals dismissed the appeal, holding

> in the absence of a timely filed cost bond, this court lacks jurisdiction to act unless the appellant filed a motion for extension of time within the fifteen day grace period. Because the motion for extension of time was not timely filed—indeed, it was not filed at all—this court is without jurisdiction to consider the merits of the appeal.[214]

The majority reasoned, "Finality is achieved by the setting of arbitrary deadlines in the rules. And sometimes, as shown in this case, the effect of strict application of the appellate deadlines is unavoidably harsh."[215]

Justice Duncan dissented from the dismissal, arguing the dismissal was not "absolutely necessary" under the facts of the case—where the appellant timely filed a document (the notice of appeal) in a bona fide effort to appeal.[216] The Supreme Court of Texas, following the dissenting opinion of Judge Duncan,[217] held that a motion for extension of time is necessarily implied when an appellant, acting in good faith, files the notice of appeal, brief, or other appellate document late but, within the motion, explains the need for the extension. Thus, the fifteen-day period in which the appellant would be entitled to move to extend the filing deadline under Rule 26.3 has been extended even further if one of the two-rule required steps is taken. In short, the court altered the rule by decision. Justice Enoch, joined by Justices Abbott and Hankinson dissented:

> From today forward, one need no longer timely appeal to invoke an appellate court's jurisdiction. But just two months ago, this Court retained the longstanding rule that only a timely filed appeal invokes appellate jurisdiction. We insisted that to perfect appeal in a civil case, the notice of appeal *must* be filed within the time prescribed in the rules. Further, we insisted that to extend the time in which to file the notice of appeal, one must file *not only* the notice of appeal, *but in addition* "a motion" that "*must*

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213. *Verburgt II*, 959 S.W.2d at 615.

214. Verburgt v. Dorner (*Verburgt I*), 928 S.W.2d 654, 657 (Tex. App.—San Antonio 1996), *rev'd and remanded*, 959 S.W.2d 615 (Tex. 1997).

215. *Id.* at 656.

216. *Id.* at 657 (Duncan, J., dissenting) ("[T]he issue is not whether the rules condone a patently unfair result but whether they require it.").

217. *Id.* at 657–59. It may be significant to note that Justice Duncan was the appellate lawyer in *City of San Antonio v. Rodriguez*, where the Texas Supreme Court properly determined that the use of an incorrect cause number in a notice of appeal did not preclude the consideration of an appeal. City of San Antonio v. Rodriguez 828 S.W.2d 417 (Tex. 1992) (per curiam).

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> state: . . . [among other things] the facts relied on to reasonably explain the need for an extension." Like our new rules, the plain language of the rule that applies to this case, Rule 41(a) (2), mandates that the appeal be timely; consequently, it compels the result the court of appeals reached in this case. Is this a bad result? For the hopeful appellant, perhaps (assuming that the appeal is, in fact, meritorious). But denuding the Court's rules to achieve the Court's chosen result is bad law. I dissent.[218]

Justice Baker filed a separate dissenting opinion, making two points:

> The court of appeals reached the decision required by applying the plain and unambiguous language of Rule 41(a)(2).
>
> The Court's opinion dispenses with Rule 41(a) (2)'s requirements, and amends the rule by judicial fiat. The Court's opinion is contrary to its own precedent. I would deny the writ. Because the Court decides otherwise, I dissent.[219]

The result has (at the time of this publication) produced well to over 1,500 cites (including 1,154 cases) dealing with this judicial amendment-without-amending. In cases, such as *Industrial Services U.S.A., Inc. v. American Bank, N.A.*,[220] it has been determined that this judicially created implication does not remove the requirement that the movant provide a reasonable explanation[221] as to why an extension is necessary. Thus, it is still necessary to demonstrate facts that reasonably show a need to extend the time for filing the notice of appeal.[222]

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218. *Verburgt II*, 959 S.W.2d at 617 (Enoch, J., dissenting) (citations omitted) (quoting TEX. R. APP. P. 26).

219. *Id.* at 619 (Baker, J., dissenting) (citing TEX. R. APP. P. 41(a)(1) (footnote omitted)).

220. Indus. Servs. U.S.A., Inc. v. Am. Bank, N.A., 17 S.W.3d. 358 (Tex. App.—Corpus Christi 2000, no pet) (per curiam).

221. The allegation of a reasonable explanation is not difficult. For example, in *National Union Fire Insurance Co. v. Ninth Court of Appeals*, the court held, "While a court of appeals may not grant a motion that lacks a reasonable explanation, the mere presence of a reasonable explanation does not require that the court of appeals grant the motion. Nothing in the remainder of Rule 54(c) divests the court of appeals of the discretion granted it by the word 'may' in the first line." Nat'l Union Fire Ins. Co. v. Ninth Court of Appeals, 864 S.W.2d 58, 59 (Tex. 1993). One seeking an extension of time to file a statement of facts on appeal is required to reasonably explain the need for an extension of time for the late filing of the statement of facts. *Id.* (quoting TEX. R. APP. P. 54(c)). The phrase "reasonably explaining" means "any plausible statement of circumstances indicating that failure to file within the required period was not deliberate or intentional, but was the result of inadvertence, mistake[,] or mischance." *Id.* at 60. Here, counsel's confusion over the time in which to file an electronic record constituted a reasonable explanation.

222. This holding has been extended into other areas of the procedural timetable. *See* Bennett v. Cochran, 96 S.W.3d 227 (Tex. 2002) (per curiam) (holding the "spirit of [the] appellate rules" was fully served despite a party's late filing of a statement of issues because the delay did not prejudice the other side); *see also Nat'l Union Fire Ins. Co.*, 864 S.W.2d at 64 (holding a writ of mandamus will issue

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It may seem technical to say the two requirements of Rule 26.1 are both jurisdictionally necessary. However, that is the way the rule is written, and it is the way it had been interpreted until the *Verburgt* decision. *Verburgt*'s modification of the rule by published opinion, without later rule changes, fails under the modified Fuller analysis:

(1) Not only was there no lack of rules, there was, and there is, a published rule of procedural law, which remains unchanged. The published holding of *Verburgt* alters the rule without changing the published rule. This was beyond the jurisdiction of the court and may alter the position of the parties to this or future cases. The action was, and will be in future actions, due to the failure of a party to follow the published primary rule. No general set of circumstances existed that prevented the party from complying with the primary rule.
(2) There was no failure to publicize the judicial opinion modifying the rule, but the Rule itself remained unchanged, and in that sense, there was a failure to publicize or make known the rule of law.
(3) The opinion was not unclear, but it was inconsistent with the published rule and, thus, was obscure legislation that could be missed.
(4) This was retroactive legislation.
(5) The opinion did create a contradiction in the law.
(6) The opinion did not announce demands that were beyond the power of the subjects and the ruled, but it did place a heavy burden upon the intermediate appellate courts to deal with the unmodified modified rule.
(7) This opinion did represent destabilization of the Rule and the procedure for rule change.
(8) There was a divergence between adjudication/administration and legislation.[223]

because the court of appeals based its decision on an erroneous legal standard for judging the reasonableness of the movant's explanation). However, it would not necessarily have been an abuse of discretion to deny the extension of time; Rule 54(c) of the Texas Rules of Appellate Procedure specifically makes such a decision discretionary. *Nat'l Union Fire Ins. Co.*, 864 S.W.2d at 59. While a court of appeals may not grant a motion that lacks a reasonable explanation, the mere presence of a reasonable explanation does not require that the court of appeals grant the motion. Nothing in the remainder of Rule 54(c) divests the court of appeals of the discretion granted it by the word "may" in the first line. *Id.*

223. FULLER, MORALITY OF LAW, *supra* note 73, at 33–38 (detailing the eight principles that govern the moral purposes of the law). The Texas Supreme Court also diverged from the holding of the other high court in Texas, the Texas Court of Criminal Appeals, which holds directly contrary to *Verburgt*. *See* Olivo v. State, 918 S.W.2d 519, 522 (Tex. Crim. App. 1996) ("When a notice of appeal is filed within the fifteen-day period but no timely motion for extension of time is filed, the appellate court lacks jurisdiction.").

D. *Rewrite by Interpretation Without Rewriting the Rule: Preserving Error to the Jury Charge*

The Texas rules concerning preservation of error in a jury charge have always been complicated but not difficult if one followed the language of the rules. This was certainly true before broad-form submission of issues; as explained by Professor Dorsaneo,

> Before September 1, 1973, the objection/request practice had a type of disciplined logic to it because under prior law the role of questions and instructions in Texas charge practice was fairly rigidly defined. There were only a few matters that could be incorporated into the charge in question form or as definitions and instructions accompanying the questions.[224]

The most systematic, or basic, explanation of the rules was provided by Judge Frank Wilson of the Tenth Court of Appeals (Waco) in *Lyles v. Texas Employers Insurance Ass'n.*[225] Judge Wilson also taught a practice course for students at Baylor School of Law. It is thought that this opinion may have been drafted as a simple guide for those students to insert into the trial notebook he required each student to prepare.[226]

Jury charges are finalized and prepared after the parties have rested and before the case is presented to the jury.[227] "All objections not so presented shall be considered as waived."[228] Objections are preserved either by a request or objection, depending on whether the defect or omission is in a submitted issue, instruction, or definition and depending on which party carries the burden on the issue.[229] The traditional distinctions are generally explained in *Lyles*:

> [A] request for submission is the method of preserving the right to complain of omission of, or failure to submit an issue which is relied on by the complaining party.[230] Objection, however, is the proper method of

224. William V. Dorsaneo, III, *Revision and Recodification of the Texas Rules of Civil Procedure Concerning the Jury Charge*, 41 S. TEX. L. REV. 675, 692 (2000).

225. Lyles v. Tex. Emp'rs Ins. Ass'n, 405 S.W.2d 725, 728 (Tex. Civ. App.—Waco 1966, writ ref'd, n.r.e.) (holding an appellant did not preserve error in a jury charge by only requesting alternative language and not objecting to the charge).

226. Dorsaneo, *supra* note 224, at 680.

227. TEX. R. CIV. P. 272.

228. *Id.*

229. *Id.*

230. This interpretation of the rules (and the *Lyles* approach) has been criticized. Dorsaneo, *supra* note 224, at 684–85. But *Morris v. Holt* eliminated the requirement by decision. *See* Morris v. Holt, 714 S.W.2d 311, 312–13 (Tex. 1986) (holding either a request or an objection may be used to

preserving complaint as to (1) an issue actually submitted, but claimed to be defective; or (2) failure to submit, where the ground of recovery or defense is relied on by the opposing party.[231]

As stated by Professor Dorsaneo,[232] while the rigid form of "objections" and "requests" required to preserve error to a jury charge in Texas was easier to understand before submission was adopted in 1973—and, even then, before it became a reality following *Burk Royalty Co. v. Walls*[233]—the rules to command "objections" and "requests" continues to control preservation of error to a jury charge.[234] Despite the clear commandments of the rules involved, the Supreme Court of Texas has relaxed their application in two major decisions. First, in *Morris v. Holt*,[235] the court held a requested issue or an objection to the omission will preserve error to the trial court's failure to submit an issue essential to the opponent's case.[236] Then, in *State Department of Highways & Public Transportation v. Payne*, the court issued the following broad statement:

> There should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling. The more specific requirements of the rules should be applied, while they remain, to serve rather than defeat this principle.[237]

Thus, when a party fails to submit a theory to the jury, the trial court cannot deem it found unless some element of the theory was submitted and, then, only if there is no objection to the failure to submit the entire

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preserve error to the trial court's failure to submit an issue essential to the opponent's case).

231. Lyles v. Tex. Emp'rs Ins. Ass'n, 405 S.W.2d 725, 727 (Tex. Civ. App.—Waco 1966, writ ref'd, n.r.e.) (footnote added); *see* Religious of the Sacred Heart v. City of Houston, 836 S.W.2d 606, 614 (Tex. 1992) (discussing a defendant's failure to offer necessary evidence regarding the market value measure of compensation); *see also* Cosgrove v. Grimes, 774 S.W.2d 662, 665–66 (Tex. 1989) (indicating an instance where, although issues were defectively submitted, the opposing party fails to object by "distinctly pointing out any error"); Wilgus v. Bond, 730 S.W.2d 670, 672 (Tex. 1987) (providing a party waives any error in a submission by failing to properly object); Davis v. Campbell, 572 S.W.2d 660, 662 (Tex. 1978) (stating "[w]here a litigant fails to distinctly object upon a certain ground, complaint on that ground is waived on appeal").

232. Dorsaneo, *supra* note 224, at 692.

233. Burk Royalty Co. v. Walls, 616 S.W.2d 911(Tex. 1981).

234. *Id.* at 925.

235. Morris v. Holt, 714 S.W.2d 311 (Tex. 1986).

236. *See id.* at 312 ("Rule 279 permits a party in Morris' position to preserve error as to the trial court's failure to submit an issue by making a timely, specific objection or by requesting submission of the issue in substantially correct form.").

237. State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 241 (Tex. 1992).

theory in a proper manner.[238] Where this occurs, the proper action for the appellate court is to render judgment.[239]

As one commentator observed, "In 1992 the Texas Supreme Court determined in [*Payne*] that a defendant preserved charge error when precedent and the Texas Rules of Civil Procedure held otherwise."[240]

In short, the Texas Supreme Court, in these two opinions, has indicated that it will, or will not, know error when it sees it and not in the manner commanded by the rules. In both *Morris* and *Payne*, the court violated the Fuller proposal (as modified for use in this Article):

> (1) While there was no lack of rules or law, the *Morris* and *Payne* decisions called for ad hoc and inconsistent adjudication contrary to the published rules of procedure.[241]
> (2) There was no failure to publicize or make known the rules of law, but there was an indication that future cases would be decided on an ad hoc basis.[242] This alters the position of parties in these, and future, cases.
> (3) There was no unclear or obscure legislation that was impossible to understand, but in these opinions there was a call for ad hoc decision-making that has no predictability; thus, it destabilized the published rules.[243]
> (4) *Morris* and *Payne* both amounted to retroactive legislation.[244]
> (5) *Morris* and *Payne* contradicted the published law.[245]
> (6) The demands of *Morris* and *Payne* were not beyond the power of

238. *See* Tex. Tech Univ. Health Scis. Ctr. v. Apodaca, 876 S.W.2d 402, 411 (Tex. App.—El Paso 1994, writ denied) (discussing the implication of Rule 279 and deemed findings where neither party objects to a clear omitted element in a charge to the jury).

239. Gibson v. State, No. 01-96-01312-CR, 1999 WL 233411, at *3 (Tex. App.—Houston [1st Dist.] Apr. 22, 1999, pet. ref'd) (not designated for publication).

240. David F. Johnson, *Preserving Error in the Charge*, 29 ADVOC. (TEX.) 42, 42 (2004).

241. *See id.* ("Without expressly amending the Texas Rules of Civil Procedure, the Texas Supreme Court ambiguously loosened the charge preservation of error rules in the case of *State Department of Highways & Public Transportation v. Payne*.").

242. *See* William G. "Bud" Arnot, III & David Fowler Johnson, *Current Trends in Texas Charge Practice: Preservation of Error and Broad-Form Use*, 38 ST. MARY'S L.J. 371, 413 (2007) (discussing repercussions of *Payne* on charge preservation of error including an increase in ad hoc basis).

243. *See* Johnson, *supra* note 240, at 43 ("Correspondingly, the courts of appeals have been inconsistent in using the *Payne* standard versus the Texas Rules of Civil Procedure.").

244. *See* Stephen K. Hayes, *Could You Be a Little More Specific*, 66 ADVOC. (TEX.) 196, 225 (2014) (analyzing the court's establishment of the *Payne* decision as a forerunner to major changes in the Texas Civil Rules of Procedure).

245. *See* Johnson, *supra* note 240, at 43 (discussing the clash between published law and the mandates of the *Payne* decision, particularly "[t]he requirement that a request be in substantially correct wording seems to have been overruled by *Payne* so long as the request brings the error to the attention of the trial court").

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the subjects and the ruled but predicting the outcome of cases is beyond the power of the subjects and ruled.
(7) *Morris* and *Payne* amounted to destabilization of established rules.[246]
(8) There was a divergence between adjudication/administration and legislation.[247]

Since the decision in *Payne*, the Supreme Court of Texas has begun to recognize the problems presented by the broad sweep of *Payne*, but it has not abandoned that approach. As stated in *Cruz v. Andrews Restoration, Inc.*,[248]

> *Payne*'s cure must not worsen the disease. Trial courts lack the time and the means to scour every word, phrase, and omission in a charge that is created in the heat of trial in a compressed period of time. A proposed charge, whether drafted by a party or by the court, may misalign the parties; misstate the burden of proof; leave out essential elements; omit a defense, cause of action, or (as here) a line [in the damage issue] for attorney's fees. Our procedural rules require the lawyers to tell the court about such errors before the charge is formally submitted to a jury. Failing to do so squanders judicial resources, decreases the accuracy of trial court judgments[,] and wastes time the judge, jurors, lawyers, and parties have devoted to the case.[249]

It may be a time for change, but the current state of the law is dependent on the court's interpretation of the rules. As Professor Dorsaneo concludes,

> The court's own efforts to remedy deficiencies in the current rules by judicial decisions are not an adequate substitute for their wholesale revision. It is now unclear whether: (1) an objection is technically necessary when a charge request is made, (2) a charge request is required when an objection does not tell the trial judge how to solve the problem the complaint identifies, and most importantly (3) how informative an objection must otherwise be to pass procedural muster. Adoption of the revised jury charge rules as they appear in the Recodification Draft preferably with a slight modification to the basic preservation rule to make it crystal clear that all objections must

246. *See* Arnot & Johnson, *supra* note 242, at 413 ("[T]he end result of the Texas Supreme Court's *Payne* opinion is great confusion and uncertainty in charge preservation of error.").

247. FULLER, MORALITY OF LAW, *supra* note 73, at 33–38.

248. Cruz v. Andrews Restoration, Inc., 364 S.W.3d 817 (Tex. 2012).

249. *Id.* at 829–30 (first citing TEX. R. APP. P. 272; and then citing *In re* B.L.D., 113 S.W.3d 340, 350 (Tex. 2003)).

provide reasonable guidance, is long overdue.[250]

However, as presently constituted, it is clear the Texas Supreme Court is still willing to ignore the plain language of the current rules. In *Wackenhut Corp. v. Gutierrez*,[251] the court dealt with the troublesome problem of charging a jury on spoliation[252] and with the requirement that objections and additions to the charge must be made after the parties rest but before the charge is read to the jury.[253] In this personal injury suit, the party opposing a spoliation instruction preserved error by responding to a pretrial motion for sanctions[254] even though it later failed to formally object to the instruction's inclusion in the jury charge until after it was read to the jury. As indicated, the jury charge procedural rules state that objections to the charge "shall in every instance be presented to the court . . . before the charge is read to the jury" and that "[a]ll objections not so presented shall be considered as waived."[255] Further, the objecting party "must point out distinctly the objectionable matter and the grounds of the objection."[256]

In *Gutierrez*, the following conversation took place during the hearing on Wackenhut's motion for new trial:

> [COUNSEL FOR WACKENHUT]: [T]he court made a ruling that the instruction would go to the jury, and then the court took argument on that, and that's how we ended up with this particular instruction, but it was given over objection.
>
> THE COURT: [Y]ou are correct. The court heard argument, made its ruling on the instruction.
>
> . . . .
>
> [COUNSEL FOR WACKENHUT]: For the record, Your Honor, I think it is clear that Wackenhut did object to any spoliation instruction going to

250. Dorsaneo, *supra* note 224, at 716.

251. Wackenhut Corp. v. Gutierrez, 453 S.W.3d 917 (Tex. 2015) (per curiam).

252. *See* Brookshire Bros., Ltd. v. Aldridge, 438 S.W.3d 9, 13 (Tex. 2014) ("[S]poliation jury instruction, can shift the focus of the case from the merits of the lawsuit to the improper conduct that was allegedly committed by one of the parties during the course of the litigation process. The problem is magnified when evidence regarding the spoliating conduct is presented to a jury."); *see also* Xavier Rodriguez, *Brookshire Bros: Cleanup on Aisle 9*, 46 ST. MARY'S L.J 447, 455–56 (2015) (referring to the equation of a spoliation instruction to a "death penalty" sanction).

253. TEX. R. CIV. P. 272.

254. *See Gutierrez*, 453 S.W.3d at 920 (showcasing the court's refusal to acknowledge a party's objection to a spoliation charge during pretrial but, nonetheless, preserving the error for appeal).

255. TEX. R. CIV. P. 272.

256. *Id.* R 274.

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the jury at all, . . . and so there is no waiver here. There was an objection to any instruction going to the jury.

THE COURT: I don't deny that, because I noted that on record that the objection was made to the charge.[257]

The court found the response to the pretrial motion for sanctions concerning the spoliation of evidence—in effect a motion in limine, which does not preserve objections—served to preserve the objection to the jury charge, citing to *Payne*:

> In light of Wackenhut's specific reasons in its pretrial briefing for opposing a spoliation instruction and the trial court's recognition that it submitted the instruction over Wackenhut's objection, there is no doubt that Wackenhut timely made the trial court aware of its complaint and obtained a ruling. Under the circumstances presented here, application of Rules 272 and 274 in the manner Gutierrez proposes would defeat their underlying principle.[258]

So, in the name of simplicity, both Rules 272 and 274 are ignored. In both *Morris* and *Payne*, the court acted improperly. The primary rules are directly applicable. Creating a judicial exception to a primary rule is not proper where the primary rule is direct and clear, there are no individual excuses involved, and a procedure exists to modify the rule. Here, there is no lacuna; the rules are published and clear (complicated but clear); and *Morris*, *Payne*, and their progeny are forms of retroactive legislation done on an ad hoc basis. Further, this creates a burden on the parties and the courts, creates instability, and constitutes a clear divergence between the published rules and the holdings.

E. *Change the Law, Then the Rule, Then the Interpretation of the "New" Rule—"Curving the Law"*

In this section, the focus moves from preserving error to the charge to the writing of the questions/issues, instructions, and definitions in the charge.[259]

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257. *Gutierrez*, 453 S.W.3d at 920 (alterations in original).

258. *Id.* at 917–18.

259. Much of this part of the Article comes from my oral and written presentations in a series of continuing legal educations programs presented in the 1970s and 1980s. Some of these include, but are not limited to: L. Wayne Scott, *Procedural Aspects of Special Issue Submission & Court's Charge, in* 3 STATE BAR OF TEX., ADVANCED CIVIL TRIAL COURSE (1978); L. Wayne Scott, *Procedural Aspects of Special Issue Submission in Texas, in* 2 STATE BAR OF TEX., ADVANCED CIVIL TRIAL COURSE (1979); L. Wayne Scott, *Issue Submission and Court's Charge, in* STATE BAR OF TEXAS, ADVANCED CIVIL TRIAL

Here, again, the matter is controlled by rules. In this example, however, Rule 277, which relates to the nature of the issue, is general, not specific, and clearly contemplated some judicial interpretation. This is one of those circumstances where the Texas Supreme Court was required to flesh out the rule by interpretation. The problem was that the court moved in one direction to simple issues; retreated, allowing special or specific issues; and then curved back to more control over the jury through requirements for instructions and restricted issues.

In other words, once Rule 277 was "fleshed out," the question turned into one concerning when the court's action ceased to be an interpretation of a rule and became a new rule, or rules, without a rule change. This problem is particularly apparent in a review of the court's struggle with charging Texas juries in civil cases.

The difficulty of drafting the charge to the jury is one that vexed judges at common law[260] and proved no less troublesome to Texas courts. In an effort to get away from the problems of the general charge, Texas, in 1913, entered into an experiment in the use of a special verdict by adopting a system that allowed deeming unsubmitted issues.[261] The problem was defining what constituted an "issue."

In the 1922 case, *Fox v. Dallas Hotel Co.*,[262] the Supreme Court of Texas, interpreting the statutory scheme[263] and providing for a special issue system in Texas, decreed,

> The statutes make it the duty of the court in trials by jury: [f]irst, to submit all the controverted fact issues made by the pleadings[;] second, to

COURT (1979); L. Wayne Scott, *Procedural Aspects and Pitfalls of Special Issue Submission*, *in* STATE BAR OF TEX., SPECIAL ISSUES (1980); L. Wayne Scott, *Issue Submission and Court's Charge*, *in* STATE BAR OF TEX., CIVIL TRIAL COURSE (1980); L. Wayne Scott, *Procedural Problems with Special Issue Submission*, *in* NUECES CTY. BAR ASS'N, PRESERVATION OF ERROR AND APPELLATE PROCEDURE SEMINAR (1985); L. Wayne Scott, *Overview*, *in* STATE BAR OF TEX., ST. MARY'S NINTH ANNUAL PROCEDURAL INSTITUTE: CIVIL PROCEDURE 1988—RULES AND STATUTORY CHANGES (1987); L. Wayne Scott, *Trends in the Texas Supreme Court*, *in* STATE BAR OF TEX., SEMINAR ON PRACTICE BEFORE THE TEXAS SUPREME COURT (2002); and L. Wayne Scott, *Trends in the Texas Supreme Court*, *in* STATE BAR OF TEX., SEMINAR ON PRACTICE BEFORE THE TEXAS SUPREME COURT (2004). Additionally, parts of this material have appeared in 1999 through 2016 editions of RICHARD E. FLINT & L. WAYNE SCOTT, TEXAS CIVIL PROCEDURE: TRIAL AND APPEAL (2016).

260. *See* Sahr v. Bierd, 92 N.W.2d 467, 470 (Mich. 1958) (exploring the "darkest of the common-law doctrines, that of the attaint of the jury").

261. For a discussion of the developments leading up to the statutory changes, see ARIENS, *supra* note 56, at 253–54.

262. Fox v. Dallas Hotel Co., 240 S.W. 517 (Tex. 1922), *overruled by* Burk Royalty Co. v. Walls, 616 S.W.2d 911 (Tex. 1981).

263. Texas Special Issue Act, 1913 Tex. Laws 1, ch. 59, §§ 1–4, at 113.

> submit each issue distinctly and separately, avoiding all intermingling; and[] third, to give such explanation and definition of legal terms as shall be necessary to enable the jury to answer each issue.[264]

The *Fox* court refused to approve a general contributory negligence issue.[265] This resulted in fragmented questions, leading to detailed jury questions, or "special issues." It was not unusual for the jury charge, in a simple two-party negligence case, to involve forty or more issues.[266]

In 1953, the Supreme Court of Texas was given the opportunity to revisit narrow versus broad issues. In *Roosth & Genecov Production Co. v. White*,[267] the court was faced with the issue of whether an oil derrick, as it stood, was defective at the time it was furnished by the defendant.[268] The court held global, or multifarious, issues were too broad in negligence cases but not too broad in non-negligence cases.[269]

In *Yarborough v. Brenner*,[270] a child, between four and five years of age, was struck by Brenner's car. Brenner pled both unavoidable accident and sudden emergency.[271] Rejecting the former practice, the Texas Supreme Court held inferential rebuttal defenses, such as new and independent cause, should not be submitted to jury as *issues* but should be submitted as *instructions or definitions*.[272] This can be said to be only a reinterpretation of

264. *Fox*, 240 S.W. at 521–22.

265. *See id.* at 522 ("Defendant in error not only objected to the single question submitted, covering all contributory negligence issues, but requested in writing that several contributory negligence issues be separately submitted. The court erroneously refused to submit these issues, as the Court of Civil Appeals rightly determined.").

266. ARIENS, *supra* note 56, at 255.

267. Roosth & Genecov Prod. Co. v. White, 262 S.W.2d 99 (Tex. 1953), *overruled by Walls*, 616 S.W.2d 911.

268. *Id.* at 100.

269. *See id.* at 105 (discussing the jury finding that the party's "failure to warn the plaintiff of defects in the derrick was not negligence, and the trial court accordingly rendered judgment in his favor").

270. Yarbrough v. Brenner, 467 S.W.2d 188 (Tex. 1971).

271. *See* GUS M. HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS 40 (1959) ("Although sudden emergency issues were used before the decision in *Dallas Railway & Terminal Co. v. Darden*, that case clarified the definition of unavoidable accident, distinguishing it from sudden emergency and other defensive theories and held that it should be submitted as an issue in tort cases, where properly raised by pleading, proof, and proper request for inclusion in the charged. Unavoidable accident was an inferential rebuttal issue; that is an issue which 'would disprove the existence of some essential elements of the opponent's cause of action or affirmative defense." (citation omitted)).

272. *See Yarbrough*, 467 S.W.2d at 193 ("[U]pon retrial . . . if the evidence presents these theories, the defendant . . . will be entitled to suitable explanatory charges or definitions which fairly present to the jury the fact that unavoidable accident and sudden emergency may be present. Separate issues will not be necessary.").

the applicable rule, but it had been generally accepted in the profession that it was to be a separate issue until the *Yarborough* case.[273] In 1973, the *Yarborough* holding became part of a broad revision of the Texas Rules of Civil Procedure; thus, the prior interpretation of the applicable rule was ignored until the rule could be changed in 1973.[274]

Mobile Chemical v. Bell[275] was decided three months after the 1973 revision to Rule 277.[276] The court held, in the context of a negligence/res ipsa case, it was permissible to give the jury one broad negligence issue as opposed to submitting issues on each of the many elements found in a particular negligence case.[277]

The change to a broad-form submission was not without problems. District Judge Stovall, in *Members Mutual Insurance Co. v. Muckelroy*,[278] was one of the first to submit a broad-form question in a personal injury case, asking the jury: "Whose negligence, if any, . . . proximately caused the collision . . . ?"[279] In an influential decision, the Houston Court of Appeals affirmed the judgment based upon the jury finding; thereafter, the Texas Supreme Court declined the application for writ of error with an n.r.e. designation.[280]

However, five years later, in *Scott v. Atchison, Topeka & Santa Fe Railway*

273. The problem of dealing with the concept of unavoidable accident has continued. *See* Hill v. Winn Dixie Tex., Inc., 849 S.W.2d 802, 803 (Tex. 1992) (stressing, except in certain types of cases, courts should refrain from submitting an unavoidable accident instruction due to the risk the jury will be misled or confused by the perception that the instruction represents a separate issue distinct from general principles of negligence); *see also* Dillard v. Tex. Elec. Coop., 157 S.W.3d 429, 433 (Tex. 2005) (recognizing the difference of perspective among Texas authorities concerning broad form practices); Reinhart v. Young, 906 S.W.2d 471, 477 (Tex. 1995) (Enoch, J., concurring) (expressing the view that "the instruction should be discarded entirely"); *id.* (Hightower, J., dissenting) ("I would abolish the unavoidable accident instruction, which I view as misleading, confusing and unnecessary.").

274. *See* ARIENS, *supra* note 56, at 255 (discussing the legislative and judicial changes to the procedural law system at that time).

275. Mobile Chem. Co. v. Bell, 517 S.W.2d 245 (Tex. 1974).

276. *See id* at 252–53 (holding, in the context of a negligence/res ipsa case, it was permissible to give the jury one broad negligence issue instead of submitting issues on each of the many elements found in a particular negligence case); *see also* William V. Dorsaneo, III, *Broad-Form Submission of Jury Questions and the Standard of Review*, 46 SMU L. REV. 601, 696 (1992) (confirming the historical preference in Texas for a general charge rather than a detailed inquiry has since shown signs of reversal).

277. *Bell*, 517 S.W.2d at 245; *see* Jack Pope & William Lowerre, *The State of the Special Verdict*, 11 ST. MARY'S L.J. 1, 1 (1979) (stressing the discretion afforded to trial judges to "determine whether to submit issues broadly").

278. Members Mut. Ins. Co. v. Muckelroy, 523 S.W.2d 77 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

279. *Id.* at 79.

280. *Id.* at 83.

Co.,[281] the court reversed a broad-form submission because of the variance between the pleadings and the proof.[282] From *Scott* it was held that it was improper to submit a broad-form question in one issue, at least in negligence cases, where there was a variance between pleading and proof.[283] Separate questions, regarding each pled and proven matter, were acknowledged to be a more appropriate method of submission.[284]

Two years later, in *Brown v. American Transfer & Storage Co.*,[285] the court clarified its previous holding by stating that its position in *Scott* had been misconstrued as a retreat from the revised Rule 277.[286] The court explained *Scott* only stood for the proposition that, where there was a case in which there was a wide variance between what plaintiff pleaded and what the evidence produced at trial, it was objectionable.[287] In *Brown*, the court suggested the variance problem could be corrected by coupling a broad question that contains the limitation within it to include only matters pled and proved;[288] in such cases, the court observed, objections had to be distinct and specific with the variance pointed out specifically.[289]

The clear support for the broad-form submission came in *Burk Royalty Co. v. Walls*, where the court overruled all of the cases that arose before the 1973 revisions, which followed the decision in *Fox*.[290] *Burk Royalty* was the decision that rejected narrow special issues in all of their many guises; broad-form questions were required. Later decisions, such as *Texas Department of Human Services v. E.B.*,[291] indicated, "[T]he rule unequivocally requires broad-form submission whenever feasible. Unless extraordinary circumstances exist, a court must submit such broad-form questions."[292]

With changes in the composition of the court came a swing away from the general broad-form special issue. The "turn around" began with the

281. Scott v. Atchison, Topeka & Santa Fe Ry. Co., 572 S.W.2d 273 (Tex. 1978).

282. *Id.* at 277.

283. *Id.* at 277–78.

284. *Id.* at 278.

285. Brown v. Am. Transfer & Storage Co., 601 S.W.2d 931 (Tex. 1980).

286. *Id.* at 937.

287. *Id.*

288. *Id.* at 938.

289. *Id.*

290. Burk Royalty Co. v. Walls, 616 S.W.2d 911, 924–25 (Tex. 1981).

291. Texas Dep't of Human Servs. v. E.B., 802 S.W.2d 647 (Tex. 1990).

292. *Id.* at 649; John J. Sampson, TDHS v. E.B., *The Coup de Grace for Special Issue*, 23 ST. MARY'S L.J. 221, 245 (1991).

decision in *H.E. Butt Grocery Co. v. Warner*,[293] which held the failure to grant the plaintiff's tendered proper broad-form question with appropriate instructions was error; but significantly, the error was held not harmful.[294] The court explained,

> Although submitted in granulated form, the jury questions contained the proper elements of a premises liability action. Because the charge fairly submitted to the jury the disputed issues of fact and because the charge incorporated a correct legal standard for the jury to apply, we hold that the trial court's refusal to submit Warner's tendered question and instructions did not amount to harmful error.[295]

So, the broad-form issue was required, but the use of narrow issues was not harmful error. Disjunctive submission was approved in *Mustang Pipeline Co. v. Driver Pipeline Co.*,[296] which slightly modified the strict broad-form concept.[297] Thereafter, *Crown Life Insurance Co. v. Casteel*[298] held broad-form issues might not always be feasible. As restated in *Harris County v. Smith*,[299]

> In *Casteel*, we ruled that when a single broad-form liability question commingles valid and invalid liability grounds and the appellant's objection is timely and specific, the error is harmful and a new trial is required when the appellate court cannot determine whether the jury based its verdict on an invalid theory.[300]

Earlier, during the Texas Supreme Court's liberal period, as part of the effort to simplify jury charges, the court had discouraged the use of "surplus" instructions.[301] In *Lone Star Gas Co. v. Lemond*,[302] it might have been error to include unnecessary instructions, such an error was harmless.[303] Continuing the turn away from the simple broad-form submission system, the court began to emphasize the need for instructions

293. H.E. Butt Grocery Co. v. Warner, 845 S.W.2d 258 (Tex. 1992).

294. *Id.* at 260.

295. *Id.*

296. Mustang Pipeline Co. v. Driver Pipeline Co., 134 S.W.3d 195 (Tex. 2004) (per curiam).

297. *Id.* at 200.

298. Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378 (Tex. 2000).

299. Harris Cty. v. Smith, 96 S.W.3d 230 (Tex. 2002).

300. *Id.* at 232–33.

301. Acord v. Gen. Motors Corp., 669 S.W.2d 111, 116 (Tex. 1984); Lemos v. Montez, 680 S.W.2d 798, 801 (Tex. 1984).

302. Lone Star Gas Co. v. Lemond, 897 S.W.2d 755 (Tex. 1995) (per curiam).

303. *Id.* at 756; A. Erin Dwyer et al., *Texas Civil Procedure*, 49 SMU L. REV. 1371, 1399–400 (1996).

to aid any broad questions submitted.[304] By 2009, the court, citing *Texas Workers' Compensation Insurance Fund v. Mandlbauer*,[305] had come to the view that "[a] trial court must, when feasible, submit a cause to the jury by broad-form questions."[306] It is also required to give "such instructions and definitions as shall be proper to enable the jury to render a verdict."[307] "An instruction is proper if it (1) assists the jury, (2) accurately states the law, and (3) finds support in the pleadings and evidence."[308] Thus, the court had earlier construed the rules to limit the use of instruction in connection with broad issues and then later re-construed the rules to require the use of instructions.

The broad-form commandment of Rule 277 required interpretation, but the wandering nature of the interpretations that have followed the 1973 change has created ambiguity, contradictions, burdens on parties and the court system in general and has left the jury charge system in a constant state of instability. It would be preferable to rewrite the rule, at least in part.

F. *Change the Interpretation (and, Thus, the Meaning of the Rule) Until a Later Court Changes It Back and Then Solidifies It into a Rule*

Of the eight routes to failure of a legal system constructed by Lon Fuller, at least seven are illustrated by the Texas Supreme Court's handling of the party investigative privilege. Particularly in personal injury litigation, the right to conduct an investigation of possible accidents or events had been protected as privileged.[309] But following the 1984 amendment to the Texas Rules of Civil Procedure,[310] the court issued a series of

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304. *Lemond*, 897 S.W.2d at 756.

305. Texas Workers' Comp. Ins. Fund v. Mandlbauer, 34 S.W.3d 909 (Tex. 2000) (per curiam).

306. Columbia Rio Grande Healthcare, LP v. Hawley, 284 S.W.3d 851, 855–56 (Tex. 2009) (quoting TEX. R. CIV. P. 277).

307. *Id.* (quoting TEX. R. CIV. P. 277).

308. *Id.* (citing *Mandlbauer*, 34 S.W.3d at 912).

309. "For thirty years the investigative privilege remained intact, providing absolute protection for defendants' post-accident investigations." Alex Wilson Albright, *The Texas Discovery Privileges: A Fool's Game?*, 70 TEX. L. REV. 781, 801 (1992). "Some of the most significant changes in Texas discovery practice in recent years have been in the area of claiming a privilege or exemption from discovery." Carol Collins Payne, *Managing Discovery Disputes: Defining "Appropriate Discovery Requests," and Determining the Need to Support Objections with Evidence Under Rule 166b(4)*, 44 BAYLOR L. REV. 869, 869 (1992).

310. For articles discussing the 1984 amendments, see generally Charles W. Barrow & Jay H. Henderson, *1984 Amendments to the Texas Rules of Civil Procedure Affecting Discovery*, 15 ST. MARY'S L.J. 713 (1984) and Ernest E. Figari, Jr., et al., *Annual Survey of Texas Law: Texas Civil Procedure*, 49 SMU L. REV. 1371 (1996).

opinions restricting the scope of the party investigative privilege.[311] Then, in 1989, following additional rule amendments, the court in *Flores v. Fourth Court of Appeals*[312] interpreted Rule 166b(3)[313] of the Texas Rules of Civil Procedure to establish a test for determining whether investigative documents were prepared in "anticipation of litigation,"[314] which determines whether the investigative documents are protected from pretrial discovery.

Under *Flores*, the investigative privilege documents would be considered prepared in "anticipation of litigation" for purposes of Rule 166b(3) if the documents were prepared "after there was good cause to believe suit would be filed or after the institution of a lawsuit."[315] The court explained, to determine "whether there is good cause to believe a suit will be filed,"[316] a two-prong analysis is required:

> The first prong requires an objective examination of the facts surrounding the investigation. Consideration should be given to outward manifestations, which indicate litigation is imminent. The second prong utilizes a subjective approach. Did the party opposing discovery have a good faith belief that litigation would ensue? There cannot be good cause to believe a suit will be filed unless elements of both prongs are present. Looking at the totality of the circumstances surrounding the investigation, the trial court must then determine if the investigation was done in anticipation of litigation.[317]

The decision in *Flores* allowed plaintiffs to discover what had, theretofore, been considered protected work product: post-accident investigations conducted by parties who were later sued as a result of the

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311. Turbodyne Corp. v. Heard 720 S.W.2d 802, 804 (Tex. 1986) (orig. proceeding) (per curiam); Stringer v. Eleventh Court of Appeals, 720 S.W.2d 801, 802 (Tex. 1986) (orig. proceeding) (per curiam); Robinson v. Harkins & Co., 711 S.W.2d 619, 621 (Tex. 1986) (per curiam); Terry v. Lawrence, 700 S.W.2d 912, 913–14 (Tex. 1985) (orig. proceeding); Robert Ammons, Comment, *Finders Keepers No Longer the Rule: Discovery of Investigative Materials Under the Texas and Federal Rules of Civil Procedure*, 39 BAYLOR L. REV. 271, 272 (1987).

312. Flores v. Fourth Court of Appeals, 777 S.W.2d 38 (Tex. 1989) (orig. proceeding).

313. This rule is now TEX. R. CIV. P. 192.5.

314. *Flores*, 777 S.W.2d at 39–41. For a discussion of the rule changes and decisions interpreting those rules, see William V. Dorsaneo, III, *The History of Texas Civil Procedure*, 65 BAYLOR L. REV. 713, 778 (2013).

315. *See Flores*, 777 S.W.2d at 40–41 (contemplating an objective and subjective measure for determining whether an investigation was conducted in anticipation of litigation). At the time of this decision, the rule in place was Rule 166b(3) of the Texas Rules of Civil Procedure, which was repealed in 1999 and its subject matter moved to Rule 192.5).

316. *Id.* at 40.

317. *Id.* at 40–41.

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accident.[318]

In *National Tank v. Brotherton*, the decision in *Flores* was modified:

> [I]nvestigative documents are prepared in "anticipation of litigation" . . . if (a)[the objective prong] a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and (b)[the subjective prong] the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.[319]

The court held the objective prong of *Flores* is satisfied whenever the circumstances surrounding the investigation would have indicated to a reasonable person that there was a substantial chance of litigation.[320] The confidentiality necessary for the adversary process is not defeated because a party, reasonably anticipating future litigation, conducts an investigation prior to the time that litigation is "imminent."[321] Thus, *Flores* was modified to the extent that it accorded protection only to investigations conducted when litigation is imminent.[322] The underlying inquiry is whether it was reasonable for the investigating party to anticipate litigation and prepare accordingly.[323] The second prong of the *Flores* test is subjective and plainly requires that the investigation actually be conducted for the purpose of preparing for an investigation.[324] As before, the court continues to recognize these privileges "may be overcome when the requesting party demonstrates a substantial need for the materials and undue hardship in obtaining the substantial equivalent of the materials by

318. *See* Scott v. Twelfth Court of Appeals, 843 S.W.2d 439, 439–40 (Tex. 1992) (orig. proceeding) (allowing discovery of the defendant's post-accident investigation materials); Boring & Tunneling Co. of Am. v. Salazar, 782 S.W.2d 284, 286–88 (Tex. App.—Houston [1st Dist.] 1989, orig. proceeding) (applying the *Flores* two-prong test); Tex. Dep't of Mental Health & Mental Retardation v. Davis, 775 S.W.2d 467, 472–75 (Tex. App.—Austin 1989, no writ) (following the *Flores* decision). For a discussion of *Scott* and *Salazar*, see Steve E. Couch, *Anticipation of Litigation After* National Tank Company v. Brotherton*: Are We Searching for the Truth in the Dark?*, 36 HOUS. LAW. 48, July–Aug. 1998. *But see* Toyota Motor Sales, U.S.A., Inc. v. Heard, 774 S.W.2d 316, 316–19 (Tex. App.—Houston [14th Dist.] 1989, no pet.) (per curiam) (providing insight into the appellate court's decision-making process days before the Texas Supreme Court's decision in *Flores*); *see also* Stringer v. Eleventh Court of Appeals, 720 S.W.2d 801, 801–02 (Tex. 1986) (orig. proceeding) (per curiam) (illustrating a court's analysis prior to *Flores*).

319. Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 195 (Tex. 1993) (orig. proceeding).

320. *Id.* at 204.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

other means."[325]

In 1998, effective in 1999, the court altered the rules of civil procedure to incorporate *Brotherton* into the rules.[326] Thus, in efforts to achieve perceived justice, the rules of procedure went through two changes declared by the courts in just four years. These changes were not originally evidenced in the rule but only in the court's opinions. Thus, without warning, the interpretation of the rules changed twice, even though the language of the rule remained the same. The swing in interpretation was finally put to rest by the 1998 rule change.

Under the Fuller test, the court failed items four (retroactive legislation), five (contradictions in the law), seven (unstable legislation), and eight (divergence between adjudication and legislation).

IV. DEALING WITH COURT-CREATED PROCEDURAL DEVISES: CASE LAW WITHOUT PROMULGATING A RULE[327]

Merriam Webster defines procedure as "a series of steps followed in a regular definite order."[328] Black's Law Dictionary defines procedure as "[t]he mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or defines the right."[329]

In some instances, the court chooses to proceed outside the realm of directing the proceeding and enters into an area of increasing or decreasing substantive (recoverable) rights of an individual. The court, in the instance to be discussed below, altered the civil litigation landscape by judicial decision-making without creating, altering, or "filtering" a rule through the committee process. These decisions, while common law in nature, nevertheless, have the full force and effect of rules of procedure, even if not contained in the rule book. This is the most dangerous and potentially political form of rulemaking. It could be called, as one writer mentioned in another context, "Open-Ended Common Law."[330] It illustrates the

325. *Id.* at 195.

326. *See generally*, Alexandra Wilson Albright, *The Texas Work Product Rule*, 27 ADVOC. (TEX.) 10 (2004) (describing the rule change).

327. With due apologies to John Austin.

328. *Procedure*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2009).

329. *Procedure*, BLACK'S LAW DICTIONARY (10th ed. 2014).

330. *See* David Peeples, *Lawsuit Shaping and Legal Sufficiency: The Accelerator and the Brakes of Civil Litigation*, 62 BAYLOR L. REV. 349, 349–50 (2010) ("Civil litigation . . . is not limited to statutory causes of action or those already recognized in existing case law . . . . [T]he common law is malleable and open-textured, the civil litigant can allege almost anything.").

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period when Texas followed the national trend in litigation.[331]

The "prejudgment interest" turbulence[332] of the mid-1980s illustrates this point.[333] In *Cavnar v. Quality Control Parking, Inc.*, a procedural change was made that aided plaintiffs in negligence cases,[334] allowing those "who won a judgment at trial to obtain prejudgment interest at an interest rate much higher than the rate of inflation."[335] The court developed new rules for the calculation of prejudgment interest and remanded the case to the lower court to assess the plaintiff's interest on accrued damages.[336]

Mrs. Cavnar, the plaintiffs' mother, was hit by a valet driver after leaving

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331. *See* John J. Farley, III, *Robin Hood Jurisprudence: The Triumph of Equity in American Tort Law*, 65 ST. JOHN'S L. REV. 997, 1015–16 (1991) (discussing the cry for insurance and tort reform and how the Texas Supreme Court's decisions altered the current rules).

332. *See generally* J. Caleb Rackley, *A Survey of Sea-Change on the Supreme Court of Texas and Its Turbulent Toll on Texas Tort Law*, 48 S. TEX. L. REV. 733 (2007) (discussing the turbulent effect of the Supreme Court of Texas on tort law in the 1980s). However, the "turbulence" was not confined to the issue of prejudgment interest or to the 1980s. *See* Phil Hardberger, *Juries Under Siege*, 30 ST. MARY'S L.J. 1, 4 (1998) ("By 1991, conservative, activist judges had a majority on the court; . . . [w]ith this new court, previous expansions of the law were stopped, then rolled backwards. Jury verdicts became highly suspect and were frequently overturned for a variety of ever-expanding reasons. Legal tools of 'no duty,' 'no proximate cause,' 'no evidence,' 'insufficient evidence,' 'unreliable experts,' 'unqualified experts,' and 'junk science' wiped out many jury verdicts.").

333. *See* Hardberger, *supra* note 332, at 3 (describing the era as one where "[t]he business community, manufacturers' associations, the interest groups representing health services and physicians, and the insurance industry were angry; they felt betrayed by juries and by the entire judicial process"); *see also* Anthony Champagne, *Judicial Reform in Texas*, 72 JUDICATURE 146, 146 (1988) (arguing for judicial reform in the 1980s); Craig Enoch, *Annual Survey of Texas Law: Foreword*, 48 SMU L. REV. 723, 723–24 (1995) ("By now the problem highlighted seven years ago in the 60 Minutes broadcast raising the question 'Justice for Sale?' is a familiar one to most. . . . The immediate focus of that story was the substantial contributions made to the presiding judge in the [*Texaco v. Pennzoil*] case, . . . [but] [t]he broader topic was the influence of money on judicial elections and judicial performance." (footnotes omitted) (citing Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768, 842 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.))); Lee Shidlofsky, *The Changing Face of First-Party Bad Faith Claims in Texas*, 50 SMU L. REV. 867, 867 (1997) ("[The] expression that 'everything is bigger in Texas' certainly holds true when it comes to insurance litigation. During the mid- to late-1980s, the judicial pendulum in Texas appeared to favor insureds, resulting in both a large quantity of claims and large recoveries for plaintiffs. In fact, the perceived 'pro-insured' tilt of the judicial pendulum nearly caused an insurance crisis in Texas as insurance companies contemplated their future existence in the Lone Star State.").

334. Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549 (Tex. 1985) ("We therefore reverse the judgment of the court of appeals only to the extent it denies recovery of prejudgment interest on the damages awarded by the jury . . . [o]ur holding in this case applies to all future cases as well as those still in the judicial process involving wrongful death, survival and personal injury actions."), *abrogated by* Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507, 556 (Tex. 1998).

335. ARIENS, *supra* note 56, at 261.

336. *Cavnar*, 696 S.W.2d at 556.

a nightclub with her daughter.[337] The driver hit Mrs. Cavnar, backed over her, and then ran over her a second time before fleeing the scene.[338] She received severe injuries that ultimately led to her death not long after.[339] The driver of the vehicle worked for Quality Control Parking, Inc.[340] The children of Mrs. Cavnar and the administrator of her estate brought suit against the nightclub, the driver, and Quality Control Parking, Inc.[341] The jury awarded the plaintiffs $175,000 for "loss of affection, comfort, companionship, society, emotional support and love in the past and which in reasonable probability they would have received in the future," and "$100,000 for past and future mental suffering."[342] Further damages were awarded to the children for loss of affection, mental anguish, and loss of services, advice, and counsel.[343]

The trial court refused to award the plaintiffs damages for loss of companionship and prejudgment interest.[344] The court of appeals reversed and allowed compensation for the children's loss of companionship and found the evidence was insufficient to support the finding of 5% negligence attributed to the deceased.[345]

The plaintiffs challenged the lower court's refusal to allow recovery of prejudgment interest on damages given to them by the jury.[346] The Texas Supreme Court speculated that the lower court had refused to award prejudgment interest based on dicta of another case.[347] Noting what it described as the erosion of this doctrine, the court concluded, "The time has come to revise the prejudgment interest rule to make injured parties whole and restore equity and symmetry to this area of the law. . . . To the extent other cases conflict with this holding, they are overruled."[348] The

337. *Id* at 550.

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.* at 551 ("The jury further found that Linda and Steve Cavnar had each sustained $75,000 in past and future damages for loss of affection, etc., and $50,000 in past and future damages for mental anguish, and that each of Mrs. Cavnar's children sustained $25,000 damages for past and future loss of services, advice, counsel and pecuniary contributions.").

344. *Id.*

345. *Id.*

346. Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 551 (Tex. 1985).

347. *See id.* at 552 (complaining the dicta of *Watkins v. Junker* drove the court's decision (citing Watkins v. Junker, 40 S.W. 11 (1897))), *abrogated by* Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507 (Tex. 1998).

348. *Id.* at 553–54.

main objective of awarding damages is to compensate an injured party not to punish a defendant.[349] The court formulated a revised rule concerning prejudgment interest that they believed would restore equity and make the plaintiffs whole.[350] It held a prevailing plaintiff "may recover prejudgment interest compounded daily (based on a 365-day year) on damages that have accrued by the time of the judgment."[351] Furthermore, the court determined when interest would accrue on particular actions. In wrongful death and non-death personal injury actions, interest would begin to accrue six months after the incident that gave rise to the suit.[352] In survival actions, interest would accrue as of the date of death of the decedent or six months after the incident occurred, whichever provides the largest award of interest.[353]

The court reasoned that the implementation of this new rule would present plaintiffs with the opportunity to achieve full compensation and that the award of prejudgment interest in personal injury suits would ensure the acceleration of settlements and trials.[354] The delay of trials by defendants would be avoided by extinguishing the motivation that might tempt such actions.[355] Furthermore, the court determined the accrual time periods would avoid difficulty in prejudgment interest calculations.[356]

The result of *Cavnar* was immediate and significant.[357] A personal injury judgment, accruing interest at 10%, compounded daily, became the best investment available.[358] *Cavnar* greatly added to the cost of personal injury litigation and altered the basis upon which pre-existing liability

349. *See id.* at 552 ("The primary objective of awarding damages in civil actions has always been to compensate the injured plaintiff, rather than to punish the defendant."). *See generally* Dean Richard, Note, *"An Award Fit for Alice in Wonderland"—Texas Allows Prejudgment Interest on Future Damages:* C & H Nationwide, Inc. v. Thompson, *37 Tex. Sup. Ct. J. 149 (Nov. 24, 1993)*, 25 TEX. TECH L. REV. 955 (1994) (arguing prejudgment interests are not compatible with the goal of compensation).

350. *Cavnar*, 696 S.W.2d at 553–54 ("The time has come to revise the prejudgment interest rule to make injured parties whole and restore equity and symmetry to this area of the law.").

351. *Id.* at 554.

352. *Id.* at 555.

353. *Id.*

354. *Id.* at 554.

355. *Id.*

356. *Id.* at 555.

357. *See* Don Wade Cloud, Jr., Note, Cavnar v. Quality Control Parking, Inc.: *Prejudgment Interest Is Now Recoverable in Personal Injury, Wrongful Death and Survival Action Cases*, 38 BAYLOR L. REV. 385, 385 n.3 (1986) (citing multiple cases awarding prejudgment interest at ten percent).

358. *See id.* (noting two cases, *Albright Inc. v. Pearson* and *Hughes Inc. v. Gibson*, both awarding prejudgment interest at ten percent compounded daily).

insurance policies had been calculated.[359] *Cavnar* was a rallying cry for those seeking a more conservative Texas Supreme Court.[360] Many perceived the *Cavnar* court as wrongfully supplanting legislative authority by establishing the six-month rule controlling interest accrual.[361] This led to a demand for legislative action to make clear any uncertainty following *Cavnar*.[362] Within two years, the Texas Legislature came up with a "tort-reform" package that modified the most severe aspects of *Cavnar*.[363] Thus, *Cavnar* failed virtually every element of the Fuller test.

In *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, the Supreme Court of Texas dealt with a case that had its beginning at the time the *Cavnar* decision applied and put an end to the *Cavnar* decision by conforming the common law rules of *Cavnar* to the subsequent legislation passed in the attempts to alter the *Cavnar* results: "Our common law prejudgment interest holding applies to all cases in which judgment is rendered on or after December 11, 1997, and to all other cases currently in the judicial process in which the issue has been preserved."[364]

As stated by Robert H. Pemberton,

> Regardless of the specific approach that policymakers might someday choose, they would be well-advised to heed the foregoing lessons from the history of Texas prejudgment interest law and avoid making "the right the enemy of the good" in pursuing an ideal system of prejudgment interest founded solely on economic principles or one that distinguishes between multiple categories of claims or damages. Those who ignore the mistakes of the past are doomed to repeat them.[365]

The court in *Cavnar*, assuming that what it did qualified as a rule of

359. *See id.* at 400–01 (discussing the effects of the *Cavnar* decision).

360. *See* Hardberger, *supra* note 332, at 3 (discussing the want for more conservative judges on the Texas Supreme Court).

361. *See* Cloud, *supra* note 357, at 408 (noting an overwhelming majority of jurisdiction think the legislature is the more appropriate body to decide if and in what amount any prejudgment interest should be awarded).

362. *Id.*

363. *See* ARIENS, *supra* note 56, at 272 ("In both the regular session and in a special session in 1987, the Texas Legislature adopted a number of provisions intended to produce tort reform in Texas."); Joseph Sanders & Craig Joyce, *"Off to the Races": The 1980s Tort Crisis and The Law Reform Process*, 27 HOUS. L. REV. 207, 210 (1990) ("Texas thereby joined the great majority of states, which enacted tort reform legislation between 1985 and 1988.").

364. Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507, 532 (Tex. 1988).

365. Robert H. Pemberton, *A Guide to Recent Changes and New Challenges in Texas Prejudgment Interest Law*, 30 TEX. TECH. L. REV. 71, 138 (1999).

procedure, violated each of the Fuller elements described above.

V. SUMMARY

A. *The Dilemmas Reviewed*

Up to this point, this Article has presented the proposition that the Texas Rules of Procedure should, in general, be interpreted as written and clarified over time by decisions that make the rules fair and functional. The rules, as they have been interpreted over time, provide great elasticity when a party, for example, fails to answer a citation and seeks to set aside a default judgment, is late in taking any action, or when a clerical error occurs. Yet, as illustrated, the application of certain rules does present dilemmas because literal application may result in perceived injustice. It has been the purpose of this Article to suggest ways of dealing with these dilemmas.

B. *Suggestions for Resolving the Dilemma of Rule Interpretation*

1. At the Trial Level

Trial courts should first inquire as to whether the problem involves jurisdiction. If it does not, the court is generally required to give the party an opportunity to correct the deficiency. If the problem is not subject to correction, after the court loses jurisdiction, the trial court has no choice but to dismiss the case. Even then, nunc pro tunc and bill of review procedures remain available to restart the trial court's jurisdiction. If the matter is not one of jurisdiction, the trial judge has great discretion to give the fairest interpretation possible and will only be reversed if that discretion is abused.

2. At the Appellate Level

At the appellate level, it is a different story. The litigants have had their day in court, subject to review for preserved or, the rare, fundamental error.

When faced with the dilemma of interpretation at the appellate level, the first inquiry should be whether it relates to the invocation or continuation of the appellate court's power; or, is it a matter of procedure that has effect on the determination of an issue.

If it is a matter of jurisdictional power, is the dilemma caused by extreme circumstances not anticipated by the rules—in effect, a lacuna in

the law, beyond the control of the party involved—or is it a correctable mistake missed by the party? In *Burkitt v. Glenney*, the existing law had not foreseen a possible statewide event (actually nationwide following the Kennedy assassination) that made the conventional courthouse physical filing of a jurisdictionally necessary document impossible. The dilemma was not caused by the party but by the event. To deny jurisdiction in this situation would have resulted in, what Lon Fuller refers to as, a "silly" interpretation of the existing law.[366] Thus, if the issue is one of jurisdiction and the dilemma is caused by internal factors attributable to the party, the courts should enforce the rules as written; but if the dilemma is caused by external events, it is more proper to "do justice."

If the matter relates to jurisdiction and the mistake is of a clerical nature, the party should be allowed to correct the error. Thus, the Texas Supreme Court has had no problem in the last thirty-plus years correcting obvious attorney/party mistakes that do not reflect a lack of intent to act. In *City of San Antonio v. Rodriguez*,[367] the appealing party placed the wrong cause number on the notice of appeal—all other information being correctly stated. While the court of appeals dismissed the appeal for want of jurisdiction, the Texas Supreme Court reinstated the appeal:

> We have held that a court of appeals has jurisdiction over an appeal when the appellant *files* an instrument that is "a bona fide attempt to invoke appellate court jurisdiction." More recently, we reaffirmed the policy that "the decisions of the courts of appeals [should] turn on substance rather than procedural technicality." Here, there can be no doubt that the City's attempt to perfect an appeal was "bona fide" because, but for the erroneous cause number, the City's notice of appeal complied with the provisions of Tex. R. App. P. 40(a) (2). We hold that the City's notation of the incorrect cause number on its notice of appeal does not defeat the jurisdiction of the court of appeals.[368]

This was akin to the correction of a clerical error (as opposed to

366. *See generally* FULLER, MORALITY OF LAW, *supra* note 73 (providing insight into Fuller's views); D'Amato, *supra* note 73 (examining Fuller's theories together with substantive natural law). *But see* Fuller, *Forms and Limits*, *supra* note 73, at 369 (describing the term adjudication in the broadest sense of the word, as well as the multiple forms); Moffat, *supra* note 73 at 296 (describing "the general methodological positions that Professor Fuller found it necessary to reject and to explore the reasons for his rejection of them"); *see also* Fuller, *supra* note 63, at 630 (rejecting Professor H.L.A.'s statutory interpretation theory).

367. City of San Antonio v. Rodriguez, 828 S.W.2d 417 (Tex. 1992) (per curiam).

368. *Id.* at 418 (citations omitted) (first alterations in original) (first quoting Grand Prairie Indep. Sch. Dist. v. S. Parts Imports, Inc., 813 S.W.2d 499, 500 (Tex. 1991) (per curiam); and then quoting Crown Life Ins. Co. v. Estate of Gonzales, 820 S.W.2d 121, 121 (Tex. 1991) (per curiam)).

judicial) in a final judgment, which may be made even after plenary power has otherwise expired.

When the dilemma is brought about by party mistake, the question becomes whether a procedural "safety net" (a means for the party to correct its own mistake) exists. If it does, that safety net should be the party's remedy. If the correction alters the result of the appeal in favor of the party creating the mistake, it is more egregious. In both ways the court in *Verburgt v. Dorner* exceeded its jurisdictional power and compounded that error by granting similar relief to all parties in the future, thus modifying the established rules. Here, it runs afoul of the modified-Fuller test. While there can be sympathy for the view that minor procedural mistakes should not control outcomes, when the mistake is not jurisdictional, there is no room for sympathy when the error relates to a court exceeding its power[369]—particularly if the correction alters the outcome of the appeal and, more so, if it is applied to all appealing parties, thus modifying the rule without altering the rule. Without the proper transfer of power from the trial courts to the courts of appeal and the courts of appeal to the Texas Supreme Court, there is no jurisdiction for the appellate courts to decide anything. The mistake in *Verburgt* cannot be classified as a clerical mistake as was the mistake in *Rodriguez*. Nor can it be considered a ministerial mistake, such as failing to pay a filing fee.[370]

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369. Masterson v. Diocese of Nw. Tex., 422 S.W.3d 594, 601 (Tex. 2014) (citing *In re* United Servs. Auto Ass'n, 307 S.W.3d 299, 309 (Tex. 2010) (orig. proceeding)).

370. *See* Tate v. E.I. DuPont de Nemours & Co., 934 S.W.2d 83, 83 (Tex. 1996) (per curiam) (finding the filing of a post-judgment motion without paying the filing fee results in the trial court's plenary power being extended, thus also extending the appellate timetable if filing fee is paid within the period of plenary power). "[T]he failure to pay the [filing] fee before the motion [for new trial] is overruled by operation of law may forfeit altogether the movant's opportunity to have the trial court consider the motion . . . ." *Id.* at 84. Regarding the failure to pay the filing fee, however, the court failed to express an opinion on whether the failure to pay retroactively invalidated the conditional filing for purposes of the appellate timetable. That was laid to rest, and properly so, in *Garza v. Garcia*; there, Garcia timely filed a motion for new trial but never paid the fee. *See* Garza v. Garcia 137 S.W.3d 36, 37 (Tex. 2004) (holding a motion for new trial extends appellate timetables even if the requisite filing fee is never paid). Further, the court noted it

> construe[s] the Rules of Appellate Procedure liberally, so that decisions turn on substance rather than procedural technicality; nothing in those rules requires a fee to accompany a motion for new trial, or that such a fee be paid at all. Moreover, once a motion for new trial is conditionally filed and timetables extended, all litigants benefit from knowing what timetables apply even if they do not know whether the requisite fee was paid. The alternative would breed uncertainty, as the deadlines might automatically jump forward when the fee is quietly paid or revert backwards if it is not.
>
> This is not to say filing fees are irrelevant. [The court has] held that 'absent emergency or

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Rather, the omission of the required motion was the failure to meet a condition precedent to a rule that allowed correction of a party mistake in missing a timetable.

In *Burkitt v. Glenney*, the action of the court, to disregard the jurisdictional error, did not alter the outcome of the litigation. In *Verburgt*, the court allowed the party to continue on with the appeal.

Sub-Inquiry: Is the dilemma due to the complexity of a rule, a lacuna in the rules, or is this a matter of political or jurisprudential concern?

If the problem is the result of the complexity of a rule, the courts have several means for dealing with various levels of complexity. In those situations, the rule should be corrected by amendment not interpretation. If a lacuna—as in the failure to foresee a problem—such as in *Akers v. Simpson*, the courts should apply the rule as written and amend the rule as quickly as possible. If a political matter, such as prejudgment interest, the Texas Supreme Court should not venture into the swamp of politics; to do so is to make the Texas Supreme Court appear to be something other than a judicial body. If a jurisprudential matter, the question becomes whether the problem is due to the court's own prior interpretations.

VI. CONCLUSION

A. *Proposal for Dealing with Dilemmas in Interpreting Rules—Elastic Formalism*

While a plain or formal interpretation of the rules of procedure should be the general rule, as in *Akers*, when outside forces produce a problem beyond the ability of a party to correct, there should be a possible remedy to correct the injustice. Silly results that are not the fault of the party should be subject to judicial correction. This includes recognition of clerical errors and the easy correction of those errors.

However, when the formal interpretation is predictable and within the language of the rule, the rule should be applied as written and amended to provide for relief in the future. This should be the general rule. The dilemmas are then the product of a party not knowing the law or employing an attorney who is not well trained in the law. It is not for the

> other rare circumstances' a motion for new trial should not be considered until the filing fee is paid. Here, Garcia's factual sufficiency complaint had to be raised in a motion for new trial, but because she never paid the $15 fee, the trial court was not required to review it. . . . [T]hus, [because no new trial fee was ever paid], the court of appeals correctly never addressed [Garcia's] factual sufficiency complaint, but correctly considered her venue complaint.

Id. at 38 (footnotes omitted).

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courts to save parties from their own mistakes.

Some rules are general and, by their nature, require a form of common law development by the courts. Rules that are complex but specific, however, should be followed until amended. The intrusion of political aims into procedural interpretation, such as interpreting prejudgment interest and the scope of the investigative privilege, invites a political response with the electorate choosing to change the composition of the court. This result is instability and uncertainty in the application of the rules. This is not proper.

If existing procedural rules are too complicated, they should be amended through the process for formal amendment. Attempts to simplify the rules by opinion have the potential to invite subsequent responses that result in a re-reading of the re-reading of the rules. This is not a proper way to handle rules.

As stated early in this Article, judging is not easy. Deciding a given case using a rule of procedure may appear to result in injustice. Judging will be easier if the rules are, or should be, written in a manner that is elastic and friendly, with that elasticity becoming more and more rigid as a party approaches a final judgment. After the entry of the judgment, the current procedural structure provides means for the correction of preserved errors.[371] Those "means for correction" become more rigid as the litigant progresses through the appellate process—down to the number of words that may be used in a petition for review.[372] Courts of appeal are given the power to review factual sufficiency.[373] After the review power passes to the Texas Supreme Court, that factual sufficiency review ends (or at least it is supposed to) and only legal sufficiency and law questions can be reviewed.[374] Such is the nature of the procedural pyramid.

It is important to remember the civil dispute system exists to resolve conflict. Once the parties bring their dispute, or disputes, to the courts for resolution, the pursuit is for a final judgment that ends the dispute. As the parties progress from the final judgment of one court to a review by another, the appellate courts must remember the goal of resolving disputes in a timely and orderly fashion; the end being a final enforceable judgment. There should be, and are, ways to deal with the dilemmas that face judges and courts. However, it is best left to the rules, leaving room for a small

371. TEX. R. CIV. P. 1.
372. TEX. R. APP. P. 9.4(h)(i)(2)(A).
373. *Id.* R. 38.2(b).
374. *Id.* R. 58.1.

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bit of judicial elasticity.

B. *Final Thoughts*

It is proposed that the Texas courts, particularly the Supreme Court of Texas, avoid ad hoc application of secondary rules, primarily Rule 1. Secondary rules should not be used to alter the direct language in primary rules except in the most extraordinary of circumstances that do not result from the fault of the party. The courts should openly (with full discussion in the appellate opinion) consider the eight factors drawn from Fuller's routes to the failure of a legal system whenever the problem of applying secondary rules to primary rules arises.

After applying the Fuller test to the situations described above, it can be seen that "justice" can be achieved in an orderly fashion if certain rules are observed.[375]

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375. As applied to interpreting rules, the Fuller test can be restated for this purpose as follows: The Elastic Rules for Resolving a Dilemma between a Stated Rule and "Achieving Justice."

(1) Lacuna: Is there a lacuna or vacancy in the law that justifies the resolution?
(2) Publication: Is this a single correction of the rule, or will this resolution be published to effect future litigation?
(3) Ambiguity: Will resolution of this dilemma be unclear and/or create an ambiguity in the law? If so, will this variations be published and made known as a Rule of Law?
(4) Retroactive: Is this retroactive legislation?
(5) Contradiction: Will this resolution create a contradiction between the published result and the rule?
(6) Too much: Will this resolution create unreasonable demands upon the litigants or the courts that is demands beyond the power of either litigations or the courts?
(7) Instability: Will this resolution create instability in the law?
(8) Divergence: Is this resolution a divergence between this resolution and the published rules?