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CRIMINAL TRESPASS AND THE EXCLUSIONARY RULE IN TEXAS

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I. INTRODUCTION

Recently in *State v. Hobbs*,[1] the Texas Fourth Court of Appeals held that a warrantless intrusion by police onto private property to obtain evidence constitutes criminal trespass under Section 30.05 of the Texas Penal Code.[2] The court also ruled that any evidence ob-

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1. 824 S.W.2d 317 (Tex. App.—San Antonio 1992, pet. ref'd).

2. *Hobbs*, 824 S.W.2d at 319. Section 30.05 of the Texas Penal Code provides:

(a) A person commits an offense if he enters or remains on property or in a building of another without effective consent and he:
(1) had notice that the entry was forbidden; or
(2) received notice to depart but failed to do so.
(b)For purposes of this section:
(1) "Entry" means the intrusion of the entire body.

tained from such an intrusion is inadmissible under the exclusionary rule.[3] Unlike all other cases considering similar problems, the *Hobbs* case approaches the issue from a statutory rather than constitutional path. As indicated in the opinion, this statutory approach made the *Hobbs* case a matter of first impression in Texas.[4]

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(2) "Notice" means:

(A) oral or written communication by the owner or someone with apparent authority to act for the owner;

(B) fencing or other enclosure obviously designed to exclude intruders or to contain livestock; or

(C) a sign or signs posted on the property or at the entrance to the building, reasonably likely to come to the attention of intruders, indicating that entry is forbidden.

. . . .

(c) It is a defense to prosecution under this section that the actor at the time of the offense was a fire fighter or emergency medical services personnel, as that term is defined by Section 773.003, Health and Safety Code, acting in the lawful discharge of an official duty under exigent circumstances.

(d) An offense under this section is a Class B misdemeanor unless it is committed in a habitation or a shelter center or unless the actor carries a deadly weapon on or about his person during the commission of the offense, in which event it is a Class A misdemeanor.

TEX. PENAL CODE ANN. § 30.05 (Vernon 1989 & Supp. 1992).

3. TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon Supp. 1992); *Hobbs*, 824 S.W.2d at 319. Using the familiar term "exclusionary rule" admittedly tends to mask the distinctions between the statutory rule of Texas and other similar rules in other jurisdictions. The Texas rule of course differs in scope, breadth, origin, and interpretation from the federal constitutional exclusionary rule and the rules in other states.

4. *Hobbs*, 824 S.W.2d at 318. Insofar as it involves application of the criminal trespass rule, that is correct. At the same time, it is very similar to *Gonzales v. State*, 131 Tex. Crim. 15, 95 S.W.2d 972 (1936). In *Gonzales*, long before trespass was a criminal offense, a sheriff had pressed his nose up against a window of defendant's residence, smelled marijuana, and used this information to get a warrant. *Gonzales*, 131 Tex. Crim. at 16, 95 S.W.2d at 973. The Commission of Appeals, in an opinion approved by the Texas Court of Criminal Appeals, held that (1) the sheriff's actions constituted a trespass, (2) the search under the warrant "was but a continuation of that which the officers had theretofore instituted without any warrant," and (3) the evidence could not be admitted under the exclusionary rule. *Id.* It is interesting to note that many years later, the Texas Court of Criminal Appeals explained why it allowed certain evidence to be admitted in another case by quoting *Texas Jurisprudence*: "Neither under the common law nor by virtue of any general statute, is a mere invasion of private property indictable in Texas." Giacona v. State, 372 S.W.2d 328, 331 (Tex. Crim. App. 1962) (quoting 41A TEX. JUR. 3D *Trespass* 30 § 44 (1993)), *cert. denied*, 375 U.S. 843 (1963). That, of course, is no longer true, and is why *Hobbs* is a case of first impression. In *Leal v. State*, where police obtained evidence as a result of a trespass, the Texas Court of Criminal Appeals held that "under the 'open fields' doctrine no violation of state or federal constitutions occurred when officers entered upon the ranch property . . . without a warrant." Leal v. State, 773 S.W.2d 296, 296 (Tex. Crim. App. 1989) (per curiam) (en banc). While in the court of appeals, one justice anticipated the *Hobbs* situation and dissented on the ground that, constitutional violations aside, the officers' entry upon the property constituted criminal trespass, a statutory violation that would require exclusion of the evidence. Leal v. State, 736 S.W.2d 907, 913 (Tex. App.—Corpus Christi, 1987) (Seerden, J., dissenting), *pet. dism'd*, 773 S.W.2d 296 (Tex. Crim.

The facts in *Hobbs* were undisputed. Officer B. L. Hierholzer received a tip that Hobbs was growing marijuana on his ranch. Hierholzer and two other officers drove out to the ranch which was surrounded by a livestock fence. Each gate to the ranch had a "No Trespassing" sign. The officers crossed a fence to enter Hobbs's ranch and traveled on foot about one-quarter mile looking for marijuana plants. They found marijuana plants concealed in such a manner that the contraband could not have been seen from adjacent property nor from the air.

The next morning, the officers returned to the ranch and began surveillance. According to Hierholzer, they "were trying to get enough information for a search and arrest warrant." Eventually, a warrant issued allowing the police to search Hobbs's ranch house. On the strength of that warrant, police not only searched Hobbs's residence, but also his vehicles and the outlying pasture where the police had previously found the contraband. Hierholzer seized forty-one marijuana plants from the pasture and marijuana seeds and stems from inside the house. The warrant served as the officers' sole authorization to enter the ranch.[5]

While on trial for possession of marijuana, Hobbs moved to suppress physical evidence under the Texas exclusionary statute,[6] claiming violations of (1) the Texas Criminal Trespass Statute,[7] (2) the Texas Constitution's prohibition against illegal searches and seizures,[8] and (3) the Fourth, Fifth, and Sixth Amendments to the United States Constitution. The trial court accepted Hobbs's statutory argument and granted his motion. As a result, the constitutional arguments were not before the Fourth Court when the State appealed.

App. 1989) (per curiam) (en banc). The Texas Court of Criminal Appeals, wishing to address that question, granted Leal's petition for discretionary review, but never reached it because Leal had not preserved the issue. *Leal*, 773 S.W.2d at 297.

5. *Hobbs*, 824 S.W.2d at 318.

6. TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 1992). The statute provides, in pertinent part:

> (a) No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the State of Texas . . . shall be admitted in evidence . . . .
>
> . . . .
>
> (b) It is an exception to the provisions of subsection (a) of this Article that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause.

Id.

7. TEX. PENAL CODE ANN. § 30.05 (Vernon 1989 & Supp. 1992).

8. TEX. CONST. art. I, § 9.

The court of appeals held that the Criminal Trespass Statute applies to warrantless police activity and resulting evidence falls within the exclusionary rule. The question this article considers is whether this protection, which goes beyond constitutional guarantees against unreasonable searches, is necessary or desirable. The operation of the Criminal Trespass Statute, in conjunction with the exclusionary rule, may work in a way the legislature did not intend.

The first part of this paper reviews existing federal and state constitutional protections against unreasonable searches. This review will uncover the inadequacy of the federal constitutional guarantee to protect the public from abuses of police authority. State constitutional protections should be greater, but the Court of Criminal Appeals has not interpreted the Texas Constitution to provide these greater protections. Next, the paper analyzes the history and purpose of criminal trespass and the exclusionary rule in Texas. Finally, the paper considers a question the court of appeals did not address in *Hobbs*: should evidence obtained as a result of a violation of the Texas Criminal Trespass Statute be excluded in all situations? The conclusion is in the negative.

II. CONSTITUTIONAL PROTECTIONS

Both the Fourth Amendment to the United States Constitution and Article I, Section 9 of the Texas Constitution guarantee protection against unreasonable searches and seizures by the state.[9] While historically these two guarantees have had nearly identical scope,[10] recent developments have prompted the Court of Criminal Appeals to depart from its longstanding practice of interpreting Article I, Section 9 in harmony with the United States Supreme Court's interpretation

9. U.S. CONST. amend. IV; TEX. CONST. art. I, § 9. The Fourth Amendment was first applied to the states in 1961. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

10. *See, e.g.*, Bower v. State, 769 S.W.2d 887, 903 (Tex. Crim. App.) (stating that Texas Constitution is no more restrictive with regard to its search and seizure provision than is United States Constitution), *cert. denied*, 492 U.S. 927 (1989); Brown v. State, 657 S.W.2d 797, 799 (Tex. Crim. App. 1983) (explaining court's reluctance to create disharmony between Texas Constitution and Fourth Amendment by imposing more stringent constitutional mandate); Kolb v. State, 532 S.W.2d 87, 89 (Tex. Crim. App. 1976) (discussing identical purpose of both Texas and United States Constitutions to "safeguard the privacy and security of individuals against arbitrary invasion of governmental officials" in response to appellant's contention that search of storage locker violated Texas Constitution in addition to United States Constitution).

of the Fourth Amendment.[11]

A. *Federal Guarantees Against Unreasonable Searches and Seizures*

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[12]

The United States Supreme Court's interpretation gives the Amendment effect when a person has demonstrated a reasonable expectation of privacy.[13] However, the Court has held that "an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers."[14] Although a fence line plastered with no-trespassing, keep-out, and do-not-enter signs would indicate an expectation of privacy to a reasonable person, the United States Supreme Court feels that this "subjective" analysis of a landowner's expectations of privacy would impose too high a burden on law enforcement personnel.[15] Writing for the Court in *Oliver v. United States*,[16] Justice Powell concluded that police cannot reasonably be expected to deduce whether an expectation of privacy is manifested in a given place.

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11. Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991). This newly-espoused independence is not necessarily new. *See* Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191, 204-53 (1981) (discussing Texas courts' decisions interpreting exclusionary rule more expansively). Other jurisdictions have taken a similar course as well. *See* Donald E. Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 437-43 (1974) (describing how state courts find additional protections under state constitutions); George R. Moore, Note, *Expanding Criminal Procedural Rights under State Constitutions*, 33 WASH. & LEE L. REV. 909, 915-17 (1976) (discussing various states whose constitutions have been determined to provide greater protection in searches and seizures).

12. U.S. CONST. amend. VI.

13. Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

14. Oliver v. United States, 466 U.S. 170, 181 (1984); *see* Hester v. United States, 265 U.S. 57, 59 (1924) (finding no Fourth Amendment protection of open field). Others believe differently. *See, e.g.*, State v. Dixon, 766 P.2d 1015, 1023-24 (Or. 1988) (stating that owners of large tracts of land may take steps creating reasonable expectation of privacy); State v. Kirchoff, 587 A.2d 988, 994-95 (Vt. 1991) (finding that possessor of land may obtain sufficient indicia of privacy over open land to afford protection from warrantless search).

15. *Oliver*, 466 U.S. at 178-82.

16. 466 U.S. 170 (1984).

"Open field" is a term of art signifying essentially undeveloped land.[17] Its meaning in modern constitutional jurisprudence reflects its genesis in the explicit language of the Fourth Amendment. The term first appeared in Justice Holmes's opinion in *Hester v. United States*[18] to point out that the text of the Amendment uses the term "houses" and therefore denies protection of open fields.[19] Justice Powell further elaborated in *Oliver* that "the term 'effects' is less inclusive than 'property'," which was the term suggested in James Madison's original draft of the Amendment.[20]

To explain why an individual does not possess a reasonable expectation of privacy in "open" fields that have been enclosed, Justice Powell's opinion in *Oliver* ridiculed Justice Marshall's dissent that "conceiv[ed] of open fields as bustling with private activity as diverse as lovers' trysts and worship services."[21] Justice Powell instead conjured up images of "the vast expanse of some western ranches or of the undeveloped woods of the Northwest . . . ."[22] The Justice failed satisfactorily to explain why it is impossible to demonstrate a reasonable expectation of privacy in either setting. Justice Powell relied on the facts that "[t]here is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields" and that "these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be."[23] Additionally, the Justice stated that a facts-and-circumstances analysis is too difficult because "police officers would have to guess before every search whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or lo-

17. *See id.* at 180 n.11 (explaining what constitutes open field).

18. 265 U.S. 57 (1924).

19. *Id.* at 59. The Court stated, "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to open fields. The distinction between the latter and the house is as old as the common law." *Id.*

20. *Oliver*, 466 U.S. at 177. For authority to support the meaning "effects" had to late eighteenth century colonists, Justice Powell cited to Blackstone's discussion of the law of burglary and to an 1814 English probate case. *Id.* at 177 n.7. For criticism of this reliance, see Neil C. McCabe, *State Constitutions and the "Open Fields" Doctrine: A Historical-Definitional Analysis of the Scope of Protection Against Warrantless Searches of "Possessions"*, 13 VT. L. REV. 179, 182-83 (1988) (attacking Justice Powell's sources as inadequate to support his definition of "effects").

21. *Oliver*, 466 U.S. at 179 n.10.

22. *Id.*

23. *Id.* at 179.

cated contraband in an area sufficiently secluded to establish a right of privacy."[24]

Justice Powell contended that a landowner cannot possibly demonstrate a "legitimate" expectation of privacy outside the curtilage:

> The test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.
>
> . . . .
>
> Certainly the Framers did not intend that the Fourth Amendment should shelter criminal activity wherever persons with criminal intent choose to erect barriers and post "No Trespassing" signs.[25]

However, Justice Marshall observed that "the Court's conclusion cannot withstand scrutiny."[26]

Based on *Oliver*, then, the federal constitution only guarantees protection against unreasonable searches of "persons, houses, papers, and effects."[27] The Supreme Court's recent narrowing of the protections provided by the Fourth Amendment has prompted the Texas Court of Criminal Appeals to depart from its former practice of "harmonious" interpretation of the Texas and United States Constitutions to ensure the more extensive protections of personal liberty guaranteed by the Texas document.

B. *State Guarantees Against Unreasonable Searches and Seizures*

The United States Supreme Court's change of direction in interpreting the Fourth Amendment from an expansive interpretation emphasizing individual liberty to a narrow textual one illustrates the need for constitutional protections beyond that Court's power. The Texas Court of Criminal Appeals has recognized this need and decided that henceforth the guarantees found in the Texas Constitution would no longer be interpreted in harmony with the Fourth Amendment.[28]

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24. *Id.* at 181.

25. *Oliver*, 466 U.S. at 182-83, 182 n.13.

26. *Id.* at 189 (Marshall, J., dissenting).

27. U.S. CONST. amend. IV.

28. *See* Heitman v. State, 815 S.W.2d 681, 681 (Tex. Crim. App. 1991) (stating that court "will not be bound by Supreme Court decisions addressing the comparable Fourth Amendment issue"). For the prior course of state constitutional protections against unreasonable search and seizure, see generally George E. Dix, *Independence in Texas Constitutional Self-*

Too little time has passed since the state court's departure from federal interpretation to notice much divergence between the two systems. Yet, inevitably the Texas Constitution's provision will accord greater rights to Texans than the United States Constitution requires.[29] As the Court of Criminal Appeals said in *Heitman*, "State constitutions cannot subtract from the rights guaranteed by the United States Constitution, but they can provide additional rights to their citizens."[30]

The language of the Texas provision differs only slightly from that of the Fourth Amendment but the recent decision of the Court of Criminal Appeals to "decline to blindly follow the Supreme Court's decisions interpreting the Fourth Amendment in addressing the issue under Art. I, [Section] 9"[31] makes the differences significant. The state constitution provides:

> The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.[32]

At the outset, one of the rationales used by the Supreme Court in holding that the Fourth Amendment does not protect open fields is mooted by the text of the Texas Constitution. While an open field may not be an "effect" (the Fourth Amendment's term), it is a "possession" (the state constitution's term), and so should be protected

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Incrimination & Search Law, 31 S. TEX. L. REV. 577, 603-46 (1990). The authors emphasize that the Court of Criminal Appeals has not held that it would read Article I, Section 9 more broadly than the Fourth Amendment. The court may only have intended to show a readiness to hear arguments for doing so. *See id.* (analyzing Texas courts' interpretation of Texas Constitution's provision concerning search and seizures). This uncertainty makes it important for the legislature to clarify its intended approach to the problem this article describes. *Id.*

29. *See* State v. Comeaux, 818 S.W.2d 46, 49-53 (Tex. Crim. App. 1991) (finding greater protection against search or seizure in state provision). The court found a reasonable expectation of privacy in a blood sample voluntarily given to a private medical facility for private purposes. *Id.* at 51-52. Under federal constitutional analysis, the taking of blood was not state action and therefore not subject to Fourth Amendment scrutiny. *Id.* at 50. The court held that Comeaux maintained a reasonable expectation of privacy in his blood sample even after he gave it to the medical facility for testing and the Texas Constitution prevented the state from acquiring it without a warrant. *Id.* at 53.

30. *Heitman*, 815 S.W.2d at 690.

31. *Id.*

32. TEX. CONST. art. I, § 9.

from unreasonable warrantless searches.[33] The language of Article I, Section 9, prohibiting warrants to search "*any* place," reinforces this interpretation.[34]

In a recent article, Matthew Paul and Jeffrey Van Horn compared the same two provisions and found no difference in meaning.[35] Their analysis was correct in that it does not matter where in the documents the provision appears,[36] and that there is no meaningful difference between the phrases "describing . . . as near as may

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33. WEBSTER'S 3D NEW INT'L DICTIONARY 724 (1981). The definition of "effects" includes "movable property" and the definition of "possession" includes "a piece of land." *Id.* at 1770. For an excellent and thorough historical review of the meaning of the term "possessions" in this context, see Neil C. McCabe, *State Constitutions and the "Open Fields" Doctrine: A Historical-Definitional Analysis of the Scope of Protection Against Warrantless Searches of "Possessions"*, 13 VT. L. REV. 179, 185-217 (1988) (noting definitions used in British, American, state, and federal court opinions). On the other hand, at least two states have interpreted "possessions" more narrowly. *See* State v. Pinder, 514 A.2d 1241, 1245-46 (N.H. 1986) (holding that term "possessions" within New Hampshire Constitution does not apply to open fields); Brent v. Commonwealth, 240 S.W. 45, 47-48 (Ky. 1922) (interpreting "possessions" to mean intimate items about one's person). There is no logical basis for *Pinder's* holding that "possessions" includes curtilage but does not include other real property. The *Brent* definition of "possessions" as "the intimate things about one's person" would illogically exclude possessions kept, for example, in a safe.

34. *See* Davis v. State, 145 Tex. Crim. 69, 70, 165 S.W.2d 732, 733 (1942) (distinguishing open field which was searched as separate from individual rights). In *Davis*, police had secured a warrant to search for contraband liquor in a filling station but discovered the sought-for goods in an open pasture some 200 yards away. *Id.* In response to Davis's objection that the warrant did not describe the place to be searched, the court said:

> This objection is apparently predicated upon the idea that the liquor was found as a result of a search under the warrant. . . . The liquor was discovered not by reason of the search warrant, but by reason of the officer's observation. The record fails to show to whom the "pasture" belonged. Appellant was in no position under the evidence to claim any invasion of his rights.

Id. This implies that if Davis had adduced evidence that he owned the pasture, he would have had standing to contest the search of the open field. Since under the open fields doctrine the United States Constitution would afford him no grounds to contest the search regardless of any standing issue, it may be that the court recognized the effects of the textual variances between the federal and state constitutions, but did not reach the question.

35. *See* Matthew W. Paul & Jeffrey L. Van Horn, Heitman v. State: *The Question Left Unanswered*, 23 ST. MARY'S L.J. 929, 935-40 (1992) (noting that no real evidence exists from texts of Texas and United States Constitutions to show different interests contemplated by "effects" and "possessions").

36. *Id.* at 937-39. In *Heitman*, the Texas Court of Criminal Appeals put some reliance on the feeble argument that a guarantee found in the first article of a constitution is inherently more significant to the constitution's framers than a guarantee that occurs as an afterthought. *Heitman*, 815 S.W.2d at 690. As Paul and Van Horn point out, the Bill of Rights was hardly an afterthought. Matthew W. Paul & Jeffrey L. Van Horn, Heitman v. State: *The Question Left Unanswered*, 23 ST. MARY'S L.J. 929, 937 (1992).

be" in the Texas Constitution and "particularly describe" in the United States Constitution.[37] However, Paul and Van Horn's conclusion[38] failed to consider the difference in meaning between "effects" and "possessions."[39] Since the meaning of the term "effects" is a significant ingredient in the United States Supreme Court's open fields doctrine, the fact that Texas uses a more expansive term ("possessions") belies Paul and Van Horn's conclusion that there is no difference between the protections guaranteed by the two documents.[40]

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37. Matthew W. Paul & Jeffrey L. Van Horn, Heitman v. State: *The Question Left Unanswered*, 23 ST. MARY'S L.J. 929, 940 (1992) (responding to Arvel (Rod) Ponton III, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93, 107-08 (1992)).

38. Paul and Van Horn say that "there is no evidence that [the Texas Constitution] embodies values discernibly different than those contained in the Fourth Amendment." Matthew W. Paul & Jeffrey L. Van Horn, Heitman v. State: *The Question Left Unanswered*, 23 ST. MARY'S L.J. 924, 935 (1992). This borders on truism. No one would seriously argue that the interests protected by the Texas Constitution are unprotected by the Fourth Amendment. The real question is the degree of protection the two documents afford. Paul and Van Horn's implicit but incorrect conclusion is that there is no justification to find that the Texas Constitution "embodies broader, or even different, individual protections than does the Fourth Amendment." *Id.*

39. *See* Matthew W. Paul & Jeffrey L. Van Horn, Heitman v. State: *The Question Left Unanswered*, 23 ST. MARY'S L.J. 929, 936 (1992) (using term "effects" and "possessions" synonymously). Paul and Van Horn wrote, "The security afforded by each provision extends to the same subject areas: persons, houses, papers, and effects (or possessions)." *Id.*

40. *See id.* at 937 (arguing that there is no difference between guarantee of individual liberty and limit on governmental authority). *But see* JAMES C. HARRINGTON, THE TEXAS BILL OF RIGHTS 22-23 (1987) (arguing that framers of Texas Constitution intended to grant broader protection than that provided in United States Constitution). Paul and Van Horn gloss over the many subtle ramifications of the fact that while one document guarantees individual liberties, the other limits the power of government. *See* Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 612-17 (1981) (discussing differences between United States and Texas Constitutions). Paul and Van Horn include a useful and historically accurate recitation of the development of the Texas Constitution. However, they proceed from the assumption that the Texas guarantee was modeled on the federal guarantee and by men familiar with the federal model. They conclude that the Texas provision is therefore the same guarantee, or maybe a poor photocopy. Matthew W. Paul & Jeffrey L. Van Horn, Heitman v. State: *The Question Left Unanswered*, 23 ST. MARY'S L.J. 929, 941-56 (1992). This may not be so. *See* Neil C. McCabe, *State Constitutions and the "Open Fields" Doctrine: A Historical-Definitional Analysis of the Scope of Protection Against Warrantless Searches of "Possessions"*, 13 VT. L. REV. 179, 190-91 (discussing terminology in state constitutions predating the Federal Bill of Rights). Some of the arguments advanced by Paul and Van Horn are fatuous, such as the implication that people who would impose what are now considered harsh criminal penalties can have no abstract love of liberty. Matthew W. Paul & Jeffrey L. Van Horn, Heitman v. State: *The Question Left Unanswered*, 23 ST. MARY'S L.J. 929, 943-45 (1992). Others are simply the authors' interpretation of events, such as the significance of the fact that the search and seizure provision was not amended during the 1845 state constitutional convention. *Id.* at 946-47. The discussion is also flawed throughout by the assumption that men generally famil-

The other basis for the United States Supreme Court's interpretation that there can be no legitimate expectation of privacy in any open field is irrational. Justice Powell may be correct in stating that "[t]he test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity,"[41] but *legitimacy* is irrelevant. Whether an open field, or any other place, is used for contraband, lovers' trysts, farming, or nothing at all is irrelevant to the liberty interest the constitution protects: the right of citizens to be free of unreasonable government intrusion.

The United States Supreme Court is content to speak in terms of open fields, and because the federal constitution protects "persons, houses, papers, and *effects*,"[42] that contentment may be reasonable. Arguably, open fields are outside the scope of that phrase. However, when applying the Texas Constitution and its different language, we must distinguish between an "open field" and a "closed field." The Texas Constitution applies to both because both are possessions.

Under the Texas Constitution, then, the validity of a warrantless search turns on its reasonableness. A truly open field—an unenclosed, undeveloped area or one not used as a residence or office, one where no expectation of privacy is manifest—would be subject to a warrantless search if it is reasonable to expect strangers to wander onto such a place. A vacant lot could constitute a truly open field. But a closed field—a fenced and posted ranch or farm—would be protected against a warrantless search if such searches are unreasonable, regardless of the legitimacy of what goes on in such places.

The United States and Texas Constitutions limit warrantless searches of fields, whether closed or open, to those which are reasonable.[43] Absent justification, such as hot pursuit, exigent circum-

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iar with values prevalent in the United States in 1836, 1845, 1861, 1866, 1869, or 1876 had the same intent as "the Northeastern framers . . . of the United States Constitution." *Id.* at 945.

41. Oliver v. United States, 466 U.S. 170, 182 (1983).

42. Matthew W. Paul & Jeffrey L. Van Horn, Heitman v. State: *The Question Left Unanswered*, 23 ST. MARY'S L.J. 929, 936 (1992).

43. *See* Chapa v. State, 729 S.W.2d 723, 727 (Tex. Crim. App. 1987) (en banc) (defining reasonable searches and seizures and citing Smith v. Maryland, 442 U.S. 735, 740-41 (1979)). The Texas Court of Criminal Appeals accepted the Supreme Court's test of what is reasonable as being (1) whether a person exhibits an actual subjective expectation of privacy, and (2) whether that subjective expectation is one that society is prepared to recognize as reasonable. *Id.* The Vermont Supreme Court, considering the scope of constitutional protections against warrantless searches, reached the same result. State v. Kirchoff, 587 A.2d 988, 996-97 (Vt. 1991). After that court compared Neil McCabe's historical analysis to a 1961 dictionary defi-

stances, or a valid search warrant, the Texas Constitution should prohibit searches when the owner of land has taken sufficient steps to demonstrate an intent to exclude other persons.[44]

The purpose of the guarantees within both the Texas and United States Constitutions is to protect the liberty interests of individuals. The statutory enactments addressed in *Hobbs* have a different purpose which may affect how the enactments interrelate and may call into question the holding in *Hobbs*.

III. THE TEXAS CRIMINAL TRESPASS STATUTE AND EXCLUSIONARY RULE: HISTORY AND PURPOSE

A. *The Texas Criminal Trespass Statute*

At common law, trespass laws were a shield against police intrusion through the use of a general warrant.[45] However, the Fourth Amendment and state constitutional counterparts put an end to the general warrant and, consequently, to the justification for applying trespass laws to police.

As the Supreme Court stated in *Oliver*:

> The common law of trespass furthers a range of interests that have nothing to do with privacy and that would not be served by applying

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nition and looked at the inconsistency among other state courts, it was not convinced of the terminological difference between "possessions" and "effects." *Id.* at 991-92. However, the court did recognize the doctrinal incoherence of the United States Supreme Court's holding that a person cannot have a reasonable expectation of privacy in an undeveloped area. *Id.* at 994-95. The Oregon Supreme Court found that the degree of protection for undeveloped land did not depend on how it was used, but on the degree of privacy evidenced by the landholder. State v. Dixson, 766 P.2d 1015, 1023-24 (Or. 1988).

44. By this analysis, the Texas Constitution would have protected Hobbs from the search that took place. The trial court analyzed the facts of the case under the United States Constitution but not the Texas Constitution, and Hobbs's attorney, of course, did not bring an appeal based on the Texas Constitution, having won at the trial level. Thus, it was not before the court of appeals, and in light of the court's statutory interpretation, it would not have been reached anyway.

45. *See* Entick v. Carrington, 95 Eng. Rep. 807, 808-09 (1763) (upholding jury finding of occurrence of trespass after illegal search). Lord Camden stated:

> . . . if this point should be determined in favor of the jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel.

Id.; *see* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.1, at 4 (1978) (quoting Lord Camden). How effective this shield was as a realistic remedy is questionable. A general warrant was an instrument that allowed the state official to search anywhere he chose and seize anything he thought worth seizing.

> the strictures of trespass law to public officers. Criminal laws against trespass are prophylactic: they protect against intruders who poach, steal livestock and crops, or vandalize property.[46]

That observation is true of the common law, but the Texas Legislature has now departed from the common law. Still, the Texas Criminal Trespass Statute is intended to protect property and security interests of individuals, rather than the liberty interests already protected by the United States Constitution.[47]

Prior to 1971, a person's remedy for simple trespass was purely civil. Earlier trespass laws carrying criminal penalties were aimed only at those individuals who hunted, camped, or fished on enclosed lands without the owner's consent.[48] With the passage of former Article 1377c in 1971, for the first time the state made it a criminal offense simply to be on posted land without permission.[49]

This enactment, now codified in the present Texas Criminal Trespass Statute,[50] has two purposes.[51] The first, aimed at "nuisance" trespasses—when the affront is to the owner's right to exclude others from property—includes the purpose of preventing poaching embodied in the earlier statutes. However, this prohibition against nuisance trespasses also criminalizes any unauthorized presence on another

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46. Oliver v. United States, 466 U.S. 170, 183 n.15 (1984).

47. *See, e.g., id.* at 183 (stating, "The law of trespass . . . forbids intrusions upon land that the Fourth Amendment would not proscribe. For trespass law extends to instances where the exercise of the right to exclude vindicates no legitimate privacy interest."); *id.* at 183 n.15 (finding that "the law of trespass recognizes the interest in possession and control of one's property, and for that reason permits exclusion of unwanted intruders. But it does not follow that the right to exclude conferred by trespass law embodies a privacy interest also protected by the Fourth Amendment.").

48. *See* Act of July 16, 1959, 56th Leg., 2d C.S., ch. 42, 1959 Tex. Gen. Laws 164 (amended 1963) (current version at TEX. PENAL CODE ANN. § 30.05 (Vernon 1989 & Supp. 1992)) (describing and prohibiting trespass to land).

49. *See* Act of May 5, 1971, 62d Leg., R.S., ch. 172, 1971 Tex. Gen. Laws 966, § 1 (amended 1973) (codified at TEX. PENAL CODE ANN. § 30.05 (Vernon 1989 & Supp. 1992)) (describing and prohibiting criminal trespass). The Act states:

> Whoever enters upon the land of another, after receiving, immediately before such entry, notice from the owner, or some person exercising possession for the owner, that such entry is forbidden, or remains upon the land of another, after receiving notice to depart from the owner, or some person exercising possession for the owner, shall be fined not exceeding $200.00.

Id.

50. TEX. PENAL CODE ANN. § 30.05 (Vernon 1989 & Supp. 1992).

51. Seth S. Searcy III & James R. Patterson, Practice Commentary, TEX. PENAL CODE ANN. § 30.05 (Vernon 1989).

person's land, regardless of justification. The second purpose, aimed at protecting the security of occupants and their belongings, prescribes harsher penalties when the criminal trespass is to a habitation.[52]

B. *The Texas Exclusionary Rule*

The federal exclusionary rule derives from the Fourth Amendment.[53] In *Welchek v. State*,[54] however, the Texas Court of Criminal Appeals held that the counterpart to the Fourth Amendment in the Texas Constitution does not require the exclusion of evidence obtained in violation of Article I, Section 9.[55] This holding did not sit well with the legislature,[56] which enacted a statutory exclusionary rule three years later.[57] At that time, reaction to *Welchek* was so strong that the same session of the legislature also enacted a statute imposing misdemeanor criminal penalties against state officials who conduct warrantless searches.[58] That, however, took matters a little too far and the misdemeanor statute was repealed after ruffled feath-

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52. TEX. PENAL CODE ANN. § 30.05(d) (Vernon Supp. 1992).

53. *See* Amos v. United States, 255 U.S. 313, 315-16 (1921) (holding that seizure of property without warrant is plain violation of Fourth Amendment); Weeks v. United States, 232 U.S. 383, 391-92 (1914) (stating that effect of Fourth Amendment is to secure people against searches and seizures conducted under guise of law).

54. 93 Tex. Crim. 271, 247 S.W. 524 (1922).

55. *Welchek*, 93 Tex. Crim. at 275, 247 S.W. at 529; *see* Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191, 195-96 (1981) (presenting interesting analysis of *Welchek* and its holding); *see also* Lee v. State, 95 Tex. Crim. 654, 656, 255 S.W. 425, 426 (1923) (holding that information obtained in unauthorized search can be introduced into evidence).

56. *See* Odenthal v. State, 106 Tex. Crim. 1, 3-4, 290 S.W. 743, 743-44 (1927) (citing Texas laws defining unlawful search and seizure which became effective June 17, 1925); Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 615 (1981) (declaring that Texas Legislature passed 1925 statute to reverse *Welchek*); George E. Dix, *Independence in Texas Constitutional Self-Incrimination and Search Law*, 31 S. TEX. L. REV. 577, 604 (1990) (stating that Texas Legislature enacted statutory exclusionary rule in response to judicial refusal to recognize such provision).

57. Act of Mar. 9, 1925, 39th Leg., R.S., ch. 49, 1925 Tex. Gen. Laws 186-87 (codified as an amendment to TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon Supp. 1992)).

58. Search and Seizure Act of Mar. 30, 1925, 39th Leg., R.S., ch. 149, § 2, 1925 Tex. Gen. Laws 357-58, *repealed by* Act of July 1, 1929, 41st Leg., 2d C.S., ch. 44, 1929 Tex. Gen. Laws 78-79; *see* Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 615-16 (1981) (outlining history of legislation after *Welchek*).

ers were smoothed.[59]

By its terms, the statutory exclusionary rule requires the exclusion of certain evidence obtained by police or anyone else.[60] Consequently, the Texas exclusionary rule goes much farther than the federal rule, which, because of its roots in the Bill of Rights, excludes only evidence obtained as a result of state action.[61] Whether derived from the Fourth Amendment or the state statute, the purpose of the federal and state exclusionary rules is the same: to deter illegal police activity which infringes upon the liberty interests of individuals.[62]

The exclusionary rule is now firmly established in the criminal jurisprudence of this state and its effect in promoting police compliance with warrant requirements cannot be questioned. But prior to *Hobbs*, the rule was never applied in conjunction with the comparatively new

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59. Search and Seizure Act of Mar. 30, 1925, 39th Leg., R.S., ch. 149, 1925 Tex. Gen. Laws 356-57, *repealed by* Act of July 1, 1929, 41st Leg., 2d C.S., ch. 44, 1929 Tex. Gen. Laws 78-79; Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 616 (1981).

60. TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 1992); ROY RAY, 1 TEXAS LAW OF EVIDENCE § 501 (2d ed. 1980); *see also* Flanary v. State, 134 Tex. Crim. 606, 607; 117 S.W.2d 71, 72 (1938) (per curiam) (excluding evidence obtained from search by liquor control agents when statute making agents "peace officers" not yet in effect). In 1987, the Texas Court of Criminal Appeals held that "[v]iolation of a State statute or constitutional provision in obtaining evidence *requires* suppression of that evidence under Art. 38.23 . . . ; a judge has no discretion in ruling on the exclusion of that evidence." Polk v. State, 738 S.W.2d 274, 276 (Tex. Crim. App. 1987) (emphasis added). Bubany and Cockerell engage in an interesting analysis of the rule's "or other person" language and argue that the legislature may have meant "other person" to apply to people like police. Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 622-31 (1981). That analysis is not convincing. The rule's language is clear and should be taken at face value.

61. Burdeau v. McDowell, 256 U.S. 465, 467 (1921). For an in-depth analysis of this distinction, see Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 615 (1981).

62. *See, e.g.*, United States v. Peltier, 422 U.S. 531, 536 (1975) (stating that "the Court has relied principally upon the deterrent purpose served by the exclusionary rule"); Lee v. Florida, 392 U.S. 378, 387 (1968) (noting that "nothing short of mandatory exclusion . . . will compel respect for federal law 'in the only effectively available way — by removing the incentive to disregard it' "); Boyd v. United States, 116 U.S. 616, 635 (1886) (reasoning that "the essence of the offense [of illegal search] . . . is the invasion of [a person's] indefeasible right of personal security, personal liberty and private property"); Drago v. State, 553 S.W.2d 375, 378 (Tex. Crim. App. 1977) (explaining that "[t]he primary purpose of the Exclusionary Rule is to deter police activity"). The court in *Drago* refered to a constitutional exclusionary rule but did not identify the source constitution or the particular purpose of the statutory exclusionary rule. It is conceivable that the legislature intended to make the results of illegal searches unavailable to prosecutors. However, it is likely that the legislature had a greater interest in the statute's deterrent effect to prevent the illegal search itself.

criminal trespass statute. The combined operation of these two statutes raised concerns about whether the legislature intended the result produced in *Hobbs* and the result that may be produced in hypothetical situations.

IV. Criminal Trespass and the Exclusionary Rule: Are They Right for Each Other?

In a footnote in *Leal v. State*,[63] the Court of Criminal Appeals wrote:

> The dissenting opinion [in the Corpus Christi Court of Appeals] reasons [that] the majority's conclusion that the officers' entry on the property was valid under the "open fields" doctrine only disposes of constitutional attacks; that the entry still amounted to trespass under § 30.05 [of the Texas Penal Code], and that any "evidence obtained" thereby would have been "in violation of . . . provisions of the . . . laws of the State of Texas," and hence excludable under 38.23 [of the Texas Penal Code]. . . . Taken to its extreme, such an argument might render inadmissible even evidence obtained under a lawful search warrant, if in executing that warrant officers also violated the letter of the criminal trespass statute. In view of our disposition of this petition, we need not address this thorny problem.[64]

This extreme situation is not so thorny. It has long been clear that entry onto land without the authority of a proper warrant is a trespass.[65] Courts have also held:

> The distinction between an arrest by an officer under a warrant legally issued and coming to his hands in a lawful manner, and one made without warrant . . . is clearly drawn. Under the former he can commit no trespass by executing it according to its command. . . . If, on the contrary, he seizes the person of another without warrant, . . . he commits a trespass. . . ."[66]

A property owner has no right to exclude police when the police

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63. 773 S.W.2d 296 (Tex. Crim. App. 1989).

64. *Leal*, 773 S.W.2d at 296 n.*.

65. *E.g.*, Weyer v. Wegner, 58 Tex. 539, 544-45 (1883); Reed v. Lucas, 42 Tex. 529, 532-33 (1875).

66. Hubbard v. Lord, 59 Tex. 384, 385 (1883). Much later, the language "without warrant" was interpreted more loosely as "a legal warrant or other lawful authority." Moody v. Kimball, 173 S.W.2d 270, 275 (Tex. Civ. App.—Texarkana 1943, no writ). In the federal common law, a trespass by an officer in performance of duty is "justifiable." Giacona v. United States, 257 F.2d 450, 456 (5th Cir.), *cert. denied*, 358 U.S. 873 (1958).

have a warrant, and the purpose of the criminal trespass statute would not be served in that instance. No number of warning signs, no lock, no door, and no fence of any height can serve to bar entry against a valid warrant. Also, since 1987 the exclusionary rule has been inapplicable when police act in objective good faith reliance on a valid warrant.[67]

Thorny problems may arise, however, in other scenarios as a result of the legislature's departure from the common law. The result in *Hobbs* seems intrinsically correct in the facts of that case. Even the most innocent and honest citizens do not want police officers skulking about on their private property without good reason.[68] If the police have good reason, they can apply for and presumably secure a valid search warrant.

Imagine, though, that a police officer has witnessed a crime. She pursues the perpetrator onto his posted private property and finds others also engaged in illegal activity. The officer arrests the perpetrator and the others and seizes evidence. Although her actions pass muster under federal constitutional analysis, and would pass muster under the analysis of the Texas Constitution advocated above, the evidence in this scenario was obtained in violation of Texas law and would be excluded.

The Texas Criminal Trespass Statute excepts "fire fighter or emergency medical services personnel . . . acting in the lawful discharge of an official duty under exigent circumstances from criminal trespass

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67. Act of Sept. 1, 1987, 70th Leg., R.S., ch. 546, § 1 (codified as TEX. CODE CRIM. PROC. ANN. art. 38.23(b) (Vernon Supp. 1992)). The article provides that "[I]t is an exception to the [exclusionary rule] that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant. . . ." *Id.*

68. *See* TEX. PARKS & WILD. CODE ANN. §§ 12.103, 12.104 (Vernon 1976) (authorizing warrantless searches in order to enforce fish and game laws). This statement is subject to some qualification. Some people do not mind having game wardens wandering around on our ranches, enforcing hunting laws. This prompts a scenario too complex for this article to play out. The Parks and Wildlife Code essentially authorizes game wardens to trespass "on any land or water where wild game or fish are known to range or stray." *Id.* at § 12.103. In *Gonzales v. State*, the court held on both state and federal constitutional grounds that the authorization contained in the Parks and Wildlife Code did not encompass the curtilage. *See* Gonzales v. State, 588 S.W.2d at 359, 359-60 (Tex. Crim. App. [Panel Op.] 1979) (holding that game warden's warrantless search of area immediately adjacent to dwelling unconstitutional). As was common prior to *Heitman*, the court made no genuine analysis of the state constitution's requirements. *See id.* at 360-61 (relying predominantly on cases interpreting United States Constitution).

liability."[69] No exception is made for police, even in exigent circumstances. It is difficult to imagine why police are not mentioned in this context. It is odd that the statute labels police in hot pursuit as trespassers when they follow a suspect onto posted private property. Under the ruling in *Hobbs*, any evidence obtained as a result of the trespass is excluded.

For whatever reason,[70] the legislature's failure to except law enforcement personnel from the criminal trespass statute evidences a legislative intent not to extend the justification of exigent circumstances to law enforcement officers. Thus, the defense of necessity[71] is unavailable in this circumstance.[72]

V. CONCLUSION

The purpose of the Texas criminal trespass statute is to protect private property as well as privacy. The purpose of the Texas exclusionary rule statute is to prevent abuse of police power. The interrelationship of the two statutes should not have effects that do not serve either of those goals. As it now stands, however, those unwelcome ramifications are a distinct possibility. Interpretation of Article I, Section 9 of the Texas Constitution as applied to searches in open fields protects reasonable expectations of privacy. Article I, Section 9 would also provide adequate safeguards for the interests now protected in Texas by the present criminal trespass statute. The fail-

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69. TEX. PENAL CODE ANN. § 30.05(c) (Vernon 1989 & Supp. 1992).

70. George Dix, professor at the University of Texas Law School, in correspondence with the authors, suggests that the legislature recognizes that the risk of abuse associated with excepting law enforcement personnel is greater than with firefighters and EMS personnel. Letters from George Dix, Professor of Law, to Paul Stone and Henry de la Garza (on file with *St. Mary's Law Journal*).

71. TEX. PENAL CODE ANN. § 9.22 (Vernon 1974). The defense of necessity is not available where a legislative purpose to exclude the justification plainly appears. TEX. PENAL CODE ANN. § 9.22(c) (Vernon 1974).

72. Also, the "necessity" of following a suspect onto posted private property extends to the crime previously observed. There would be no necessity as to the crime observed after the trespass has taken place. And if, as the Supreme Court asserted in *Oliver*, police officers are unable to make the subjective determination that an expectation of privacy is manifest, they would be even less able to make the more subtle necessity determination that "the desirability and urgency of avoiding the harm clearly outweigh . . . the harm sought to be prevented by the law prescribing the conduct." TEX. PENAL CODE ANN. § 9.22(2) (Vernon 1974). Finally, the criminal trespass statute and the ruling in *Hobbs* when explained to law enforcement personnel, will prevent them from using the defense of public duty under Section 9.21 of the Texas Penal Code. *See* TEX. PENAL CODE ANN. § 9.21 (Vernon 1974) (defining public duty defense).

ure of the criminal trespass statute to provide an exception for law enforcement officers in situations where their duty requires them to enter onto lands protected by the statute could frustrate what should be the law's objective.

The Texas Court of Criminal Appeals has not read Article I, Section 9 of the Texas Constitution appropriately. If it had, it would have avoided the particular problem described. If the court does not interpret the state constitution properly, the legislature can simply change the criminal trespass statute.

Law enforcement officers acting in lawful discharge of official duties under exigent circumstances should be exempted from the restrictions of the criminal trespass statute. The same exceptions to the constitutional warrant requirement should apply in a statutory analysis. Also, the same considerations should govern what is or is not "lawful discharge" or "exigent." There is no operative policy reason to impose more stringent restrictions on law enforcement activity than those imposed by the constitution. Police acting within the parameters of the constitution should not be stopped at the fence line.