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Texas's Statutory Exclusionary Rule: Analyzing the Inadequacies of the Current Application of Other Person(s) Pursuant to Article 38.23(a) of the Texas Code of Criminal Procedure.

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TEXAS'S STATUTORY EXCLUSIONARY RULE: ANALYZING THE INADEQUACIES OF THE CURRENT APPLICATION OF "OTHER PERSON(S)" PURSUANT TO ARTICLE 38.23(a) OF THE TEXAS CODE OF CRIMINAL PROCEDURE

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I. Introduction

Invoking the exclusionary rule is essentially an allegation that there has been a violation of one's reasonable right to privacy, and therefore, the evidence was illegally obtained and requires suppression. The Fourth

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Amendment to the United States Constitution is the backbone of the exclusionary rule, establishing that:

> 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.[1]

While the Fourth Amendment protects citizens from unreasonable searches and seizures, its protections apply solely to government action.[2] The legislative intent and history clearly indicate that it was intended as a limitation upon government action and not private individual conduct.[3]

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1. U.S. CONST. amend. IV.

2. Burdeau v. McDowell, 256 U.S. 465, 475 (1921). "The Fourth Amendment gives protection against unlawful searches and seizures . . . its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority. . . ." *Id.* at 475. Thus, courts have consistently held that state action is required for a Fourth Amendment violation to exist. United States v. Jacobsen, 466 U.S. 109, 113 (1984); Weeks v. United States, 232 U.S. 383, 391-92 (1914); United States v. Jarrett, 338 F.3d 339, 344 (4th Cir. 2003); United States v. Runyan, 275 F.3d 449, 457 (5th Cir. 2001); United States v. Bazan, 807 F.2d 1200, 1202 (5th Cir. 1986); Todd v. City of Natchitoches, 238 F. Supp. 2d 793, 802-03 (W.D. La. 2002); State v. Young, 216 S.E.2d 586, 588-89 (Ga. 1975); State v. Buswell, 460 N.W.2d 614, 617-18 (Minn. 1990); People v. Rodriguez, 581 N.Y.S.2d 964, 965 (N.Y. App. Div. 1992); People v. Williams, 281 N.Y.S.2d 251, 255 (N.Y. Crim. Ct. 1967); State v. Cook, 777 N.E.2d 882, 885 (Ohio Ct. App. 2002); Commonwealth v. Corley, 491 A.2d 829, 833 (Pa. 1985); Shoemaker v. State, 971 S.W.2d 178, 181 (Tex. App.—Beaumont 1998, no pet.); Dawson v. State, 868 S.W.2d 363, 369 (Tex. App.—Dallas 1994, pet. ref'd).

3. *See* United States v. Leon, 468 U.S. 897, 897-98 (1984) (deciding whether the exclusionary rule will appropriately protect Fourth Amendment rights via its deterrent result); Nix v. Williams, 467 U.S. 431, 432 (1984) (stating that the purpose of deterring illegal police conduct in procuring evidence in a way which violates constitutional and statutory protections is mandatory despite the high social cost of allowing guilty persons to go unpunished); Walter v. United States, 447 U.S. 649, 656 (1980) (holding that the wrongful seizure conducted by the individual does not invoke the Fourth Amendment and thus does not deprive the government of its use as evidence); State v. Young, 216 S.E.2d 586, 591 (Ga. 1975) (recognizing that there is no Fourth Amendment protection pursuant to a search or seizure performed by a private person); State v. Buswell, 460 N.W.2d 614, 617 (Minn. 1990) (indicating the Fourth Amendment acts as a restraint only upon the government); Commonwealth v. Corley, 491 A.2d 829, 834 (Pa. 1985) (expressing the aim of the federal exclusionary rule is only to prevent "official misconduct"). A second purpose of the exclusionary rule is to maintain judicial integrity, meaning a court should not be an accomplice to a constitutional violation by approving of the wrongful conduct and admitting the tainted evidence. WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.8 (3d ed. 1996).

It was not until 1961 that the Fourth Amendment was empowered upon the states via the Fourteenth Amendment.[4] While the states may not circumvent the protections the Fourth Amendment affords, they are free to enact laws that give greater protections than what the Fourth Amendment demands.[5] A specific example of this broadened protection, which is the subject of this Comment, is the Texas exclusionary rule, better known as Article 38.23(a) of the Texas Code of Criminal Procedure.[6] Article 38.23(a) provides:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
>
> In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.[7]

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4. *See* Mapp v. Ohio, 367 U.S. 643, 651 (1961) (indicating that the exclusionary rule is a necessary component of the Fourth Amendment, applicable to the states through the Due Process Clause of the Fourteenth Amendment). The common law admissibility rule, effective prior to the United States Supreme Court exclusionary rule decisions, prevailed in criminal trials and allowed for the admissibility of any relevant evidence regardless of procurement by unethical, wrongful, or illegal means. Paul G. Reiter, Annotation, *Admissibility, in Criminal Case, of Evidence Obtained by Search by Private Individual*, 36 A.L.R.3d 553, 557 (1971).

5. *See* Cooper v. California, 386 U.S. 58, 62 (1967) (noting the ability of a state to go beyond the protections of the federal constitution so long as protections are not subtracted from the minimum required); *see also* Thomas M. Melsheimer & David M. Finn, *Criminal Procedure: Confession, Search and Seizure*, 51 SMU L. REV. 839, 843 (1998) (representing the authority of states to enact statutes which go further than the protections of the United States Constitution, due to the fact that federal law is bound to violations of the Fourth Amendment which can not occur absent government involvement); Chuck Miller & David Coale, *Annual Survey of Texas Law*, 46 SMU L. REV. 1211, 1212-13 (1993) (providing that states may enlarge rather than shrink individual constitutional rights); Paul R. Stone & Henry De La Garza, *Criminal Trespass and the Exclusionary Rule in Texas*, 24 ST. MARY'S L.J. 443, 456 (1993) (indicating that the authority of the states to provide broader protections than what the federal law requires is due to the federal law being bound to its roots in the Bill of Rights which only applies to state action).

6. TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 2004).

7. *Id.* Article 38.23(b) expressly lists the only exception to the Texas exclusionary rule, reading, "[i]t 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." TEX. CODE CRIM. PROC. ANN. art. 38.23(b) (Vernon Supp. 2004).

Article 1, Section 9 of the Texas Constitution is a near equivalent of the Fourth Amendment;[8] however, the two together only supply the framework for the Texas exclusionary rule. Article 38.23 is the addition upon this framework that affords greater protections against unreasonable searches and seizures than what federal law requires.[9]

Texas recognized that the Fourth Amendment only protects individuals from government action,[10] yet in 1925 Texas broadened the exclusionary exception to include evidence obtained by police officers as well as by any "other persons."[11] The legislative intent behind this decision was to

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8. *See* Paul R. Stone & Henry De La Garza, *Criminal Trespass and the Exclusionary Rule in Texas*, 24 ST. MARY'S L.J. 443, 446-47 (1993) (indicating that Article I, Section 9 of the Texas Constitution and the Fourth Amendment of the United States Constitution have historically been interpreted as identical in scope despite some recent departures by the Texas Court of Criminal Appeals). *Compare* TEX. CONST. art. I, § 9 (guaranteeing Texas citizens' security "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"), *with* U.S. CONST. amend. IV (allowing protections amongst "their persons, houses, papers, and effects, against unreasonable searches and seizures . . . and no [w]arrants shall issue, but upon probable cause").

9. *See* Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 614-15 (1981) (noting that "[t]he Texas constitutional prohibition against unreasonable searches and seizures, which closely resembles the fourth amendment, is supplemented by a statutory rule of exclusion contained in article 38.23 of the Texas Code of Criminal Procedure").

10. *See* State v. Comeaux, 818 S.W.2d 46, 49 (Tex. Crim. App. 1991) (en banc) (citing to the Fourth Amendment and stating that its protections will not be provided in the absence of a state actor); Shoemaker v. State, 971 S.W.2d 178, 181 (Tex. App.—Beaumont 1998, no pet.) (stating that "[u]nder federal law, for a search to be illegal, the search must be the result of state action by and through state agents acting under governmental authority or under the color of authority. The Fourth Amendment . . . does not require the exclusion of . . . a search by private citizens."); Dawson v. State, 868 S.W.2d 363, 369 (Tex. App.—Dallas 1993, pet. ref'd) (indicating that unless the private citizen is acting as an agent of the state then his or her actions will not result in a violation of the Fourth Amendment, regardless of how the individual obtained the evidence).

11. Despite the minimum federal requirements applicable to the exclusionary rule and several amendments upon the Texas statutory exclusionary rule, the "officer or other person" language has been consistently retained. Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 616-17 (1981); *see also* State v. Johnson, 939 S.W.2d 586, 587 (Tex. Crim. App. 1996) (en banc) (justifying the interpretation of "other person" due to the fact that this language has been retained within the statute since its inception). *See generally* Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191 (1981) (providing a detailed review of the birth of the statutory exclusionary rule and its survival through several amendments).

help contain the influx of private individuals in concert with police officers performing illegal searches during the Prohibition era.[12]

Even after the Prohibition, Article 38.23 of the Texas Code of Criminal Procedure prohibits the admissibility of illegally obtained evidence, whether obtained by a police officer or a private individual.[13] Surveys of case law reinforce the terminology within the statute based upon a plain language interpretation.[14] However, interpreting the statute according to the plain language fails to recognize the legislative intent behind the statute.

Although the language of Article 38.23 has existed almost unamended for nearly eighty years,[15] the issue of whether "other person" applies as a

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12. *See Johnson*, 939 S.W.2d at 592-93 (McCormick, J., dissenting) (detailing the legislature's adoption of the exclusionary rule in order to prevent "private gentlemen" from performing illegal raids with law enforcement); Gillett v. State, 588 S.W.2d 361, 368 (Tex. Crim. App. 1979) (en banc) (Roberts, J., dissenting) (detailing the Texas experience with prohibitionist organizations vowing to secure testimonies and aid law enforcement to convict prohibition violators); Carroll v. State, 911 S.W.2d 210, 219 (Tex. App.—Austin 1995, no pet.) (describing Article 38.23 as an unusual Texas statute established during the Prohibition); *see also* Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191, 199 (1981) (noting that, from 1926 to 1928, the Texas Court of Criminal Appeals reversed thirty-four cases pursuant to the establishment of the statutory exclusionary rule). Thirty-two of these reversals were related to Prohibition-era searches and seizures. *Id.*

13. TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 2004); *see also* Johnson v. State, 939 S.W.2d 586, 587 (Tex. Crim. App. 1996) (en banc) (using a plain language approach and an English dictionary to establish that 38.23 prohibits the admission of evidence obtained unlawfully by law enforcement or any other person).

14. *See* Chavez v. State, 9 S.W.3d 817, 820 (Tex. Crim. App. 2000) (en banc) (acknowledging that the plain language of Article 38.23 regards state action and private action to be on equal footing); Phillips v. State, 109 S.W.3d 562, 568 (Tex. App.—Corpus Christi 2003, pet. granted) (expressing that the language of Article 38.23 is clear and unambiguous); McCuller v. State, 999 S.W.2d 801, 804 (Tex. App.—Tyler 1999, pet. ref'd) (holding that the private citizen in the present case is subject to Article 38.23 because the plain language prohibits unlawful actions of all persons, both government and private); Dunn v. State, 979 S.W.2d 403, 405-07 (Tex. App.—Amarillo 1998, pet. ref'd) (indicating that the private citizen's actions upon performing a citizen's arrest is subject to the plain language of Article 38.23, thus it was necessary to determine if the arrest violated any laws of the state); *see also* Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191, 226 (1981) (opining that "[t]he reference to an officer or other person has appeared in the statute since the original enactment in 1925 and always has been thought to mean what is says—that is, to include everybody within the scope of its exclusionary sanction"). *But see* Matthew W. Paul, *Surmounting the Thorns of Article 38.23: A Proposed Interpretive Guideline for the Texas Statutory Exclusionary Rule*, 46 BAYLOR L. REV. 309, 316 (1994) (contending that the plain language of Texas Constitution led to the Court of Criminal Appeals's rejection of the federal exclusionary rule in the first place).

15. TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 2004). *See generally* Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the*

"clean sweep"[16] to include any person or whether it applies some type of limitation is still debated.[17] This Comment examines the legislative history and intent of Article 38.23 of the Texas Code of Criminal Procedure and the different approaches to whom Article 38.23's "other person(s)" should apply. Part II supplies a basic background focusing on the federal history of the exclusionary rule and its relation to Article 38.23. Part III analyzes the different interpretational approaches applied to Article 38.23, particularly upon the current majority and minority judicial interpretations of "other person." Additionally, a new proposal is briefly suggested which better incorporates the state and federal constitutional objectives of the exclusionary rule while still going beyond the minimal requisite protections that the Fourth Amendment demands. Finally, Part V concludes by summing up the different approaches and reillustrating that a new proposal for Article 38.23 is overdue and necessary.

II. Background

The exclusionary rule is invoked when an accused in a criminal case is trying to suppress evidence that he or she alleges was illegally obtained.[18] In order for the accused to invoke the exclusionary rule, three requirements must be met.[19] Two of the requirements are virtually identical be-

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Texas Experience, 59 TEX. L. REV. 191, 196-204 (1981) (summarizing each minor amendment of Article 38.23 throughout its lifespan).

16. The clearly expressed language of Article 38.23 of the Code of Criminal Procedure "includes within its *sweep* both law enforcement officers and private citizens who violate the 'law' to obtain evidence." Phillips v. State, 109 S.W.3d 562, 568 (Tex. App.—Corpus Christi 2003, pet. granted) (emphasis added).

17. *See* Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191, 253 (1981) (describing Article 38.23's meaning as a mystery, due to narrow construction and a lack of guidance given as to the judicial philosophy applied to it by Texas courts). Another commentator recognized the lack of framework necessary to form a complete understanding of the phraseology of Article 38.23, yet emphasized that any future progress of interpreting the statute must be done in light of the statute's history and purpose. Matthew W. Paul, *Surmounting the Thorns of Article 38.23: A Proposed Interpretive Guideline for the Texas Statutory Exclusionary Rule*, 46 BAYLOR L. REV. 309, 352-53 (1994).

18. *See* BLACK'S LAW DICTIONARY 587 (7th Ed. 1999) (defining exclusionary rule in the context of criminal procedure as "[a] rule that excludes or suppresses evidence obtained in violation of an accused person's constitutional rights").

19. *See* Kleasen v. State, 560 S.W.2d 938, 941 (Tex. Crim. App. 1977) (emphasizing that it is necessary for a defendant to establish that he or she was a victim to a privacy invasions before the defendant may contest the legitimacy of the search or seizure). Professors Reamey and Bubany lay out the framework for a successful invocation of the exclusionary rule thusly:

> In order for the accused to successfully invoke the federal or Texas exclusionary rule, he must first negotiate several threshold hurdles. One of these is standing; that is, he

tween federal and Texas law;[20] however, a drastic distinction exists within the third requirement.[21] While the first requirement is sometimes referred to as the accused possessing the requisite level of standing,[22] the United States Supreme Court has addressed this requirement really as a substantive Fourth Amendment determination rather than a standing analysis.[23] Because many lawyers and courts still use the terminology of

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> must have the legal right to complain about the illegality practiced upon him. Another threshold requirement for successfully complaining about a search is one closely related to standing. It is that the government conduct abridged some expectation of privacy held by the defendant which society is prepared to recognize as reasonable. The third threshold inquiry is one which arguably applies only to the federal exclusionary rule, and not to the Texas version in Article 38.23(a) of the Code of Criminal Procedure. That inquiry is whether the search involved 'state action.' Once the threshold hurdles have been cleared, the accused may attack either the 'substance' of the search or the way in which it was executed.

GERALD S. REAMEY & CHARLES P. BUBANY, TEXAS CRIMINAL PROCEDURE 45 (6th ed. 2002).

20. *See generally* D. MARK ELLISTON, TEXAS PRACTICE GUIDE CRIMINAL PRACTICE & PROCEDURE §§ 10:27-28, 10:32-33 (2003) (tracing the similarities of standing requirements between federal and Texas law, as well as the causal connection needed subsequent to establishing standing).

21. *See* Shoemaker v. State, 971 S.W.2d 178, 181 (Tex. App.—Beaumont 1998, no pet.) (expressing that the Fourth Amendment does not require the exclusion of incriminating evidence obtained illegally through private citizen searches, but Texas law allows exclusion of such evidence illegally obtained, despite the absence of state action according to Article 38.23 of the Texas Code of Criminal Procedure); D. MARK ELLISTON, TEXAS PRACTICE GUIDE CRIMINAL PRACTICE & PROCEDURE § 10:34 (2003) (confirming the distinction that the federal government imposes the exclusionary rule upon evidence only when government action is involved while Texas allows for its statutory exclusionary rule to apply to both government or private actors); GERALD S. REAMEY & CHARLES P. BUBANY, TEXAS CRIMINAL PROCEDURE 45 (6th ed. 2002) (illustrating that "the extension of the exclusionary rule to private persons sharply distinguishes Texas law from federal law").

22. *See* Jones v. United States, 362 U.S. 257, 260 (1960) (citing standing as a necessary prerequisite to pursue a Fourth Amendment violation); Kleasen v. State, 560 S.W.2d 938, 941-42 (Tex. Crim. App. 1977) (concluding the defendant established standing pursuant to his possessory interest in the searched trailer home). Requisite standing in order to test the legality of a search can be established by showing lawful presence upon the premises at the time pursuant to the search, illustrating the defendant's possession of the seized item is in itself an element of the charge, or establishing that the defendant has a possessory interest among the object seized or the premises searched. *Id.* at 941.

23. Rakas v. Illinois, 439 U.S. 128, 140 (1978). The *Rakas* Court went into an analysis of past cases which have focused on courts which have approached the issue of Fourth Amendment applicability pursuant to the standing requirement with courts that focused upon the substantive Fourth Amendment law. *Id.* at 139 n.7. Despite the analysis, the Court stated that regardless of the inquiry, the result was much the same. *Id.* The Court chose the substantive approach because the "Court's long history of insistence that the Fourth Amendment rights are personal in nature has already answered many of these traditional standing inquiries, and we think that definition of those rights is more properly place within the purview of substantive Fourth Amendment law than within that of stand-

standing rather than substantive Fourth Amendment law terminology,[24] this Comment will retain the standing terminology for the first requirement to invoke the exclusionary rule.

The first requirement is that the accused must have standing.[25] Standing is defined as an interest particular to an individual beyond that as a member of the general public.[26] In other words, if no right of the accused has been violated, then he/she has no right to recover for injury. The second hurdle is that some expectation of privacy of the accused has been violated, and society is ready to recognize that expectation as reasonable.[27]

The final threshold necessary to invoke the exclusionary rule evidences the divestiture between federal and Texas law. Invoking the rule in a federal court involves a claim that a Fourth Amendment violation has occurred.[28] The Fourth Amendment provides persons protection against

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ing." *Id.* at 140. The Court, twenty years later, reinforced this substantive application holding that "a defendant must demonstrate that he personally has an expectation of privacy in the place searched. . . ." Minnesota v. Carter, 525 U.S. 83, 88 (1998).

24. *Rakas*, 439 U.S. at 139 n.7.

25. *See* Jones v. United States, 362 U.S. 257, 260 (1960) (citing standing as a necessary prerequisite to pursue a Fourth Amendment violation); Kleasen v. State, 560 S.W.2d 938, 941-42 (Tex. Crim. App. 1977) (concluding the defendant established standing pursuant to his possessory interest in the searched trailer home). Requisite standing in order to test the legality of a search can be established by showing lawful presence upon the premises at the time pursuant to the search, illustrating the defendant's possession of the seized item is in itself an element of the charge, or establishing that the defendant has a possessory interest among the object seized or the premises searched. *Id.* at 941.

26. Hunt v. Bass, 664 S.W.2d 323, 324 (Tex. 1984). The general rule for standing is that an interest peculiar to the individual, not one as just a member of the general public, must be present in order to maintain a suit. *Id.* at 324. Standing is defined as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." BLACK'S LAW DICTIONARY 1413 (7th ed. 1999).

27. *See* California v. Ciraolo, 476 U.S. 207, 211 (1986) (summarizing the Fourth Amendment as the touchstone for protecting reasonable expectations of privacy and examining such by a two part inquiry: "[F]irst, has the individual manifested a subjective expectation of privacy . . . [s]econd, is society willing to recognize that expectation as reasonable?"); Comeaux v. State, 818 S.W.2d 46, 51 (Tex. Crim. App. 1991) (en banc) (noting that the defendant's expectation of privacy is not protected by the confines of the Fourth Amendment unless society is willing to accept this expectation as reasonable). When determining whether an expectation is reasonable or not, the test is whether the state action has intruded upon personal and societal values that are protected within the Fourth Amendment, "not whether the individual chooses to conceal assertedly 'private' activity." *Ciraolo*, 476 U.S. at 212 (quoting Oliver v. United States, 466 U.S. 170, 181-83 (1984)).

28. *See, e.g.*, Walter v. United States, 447 U.S. 649, 649-50 (1980) (evaluating the defendants' claims of violations of their rights of privacy due to packages containing obscene materials being opened by a third party and subsequently delivered to the Federal Bureau of Investigation); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (discussing the de-

unreasonable searches and seizures.[29] Federal courts have firmly established that the Fourth Amendment protections will only apply to violations involving government action.[30] Subsequently, no protection is afforded in the federal courts when a private individual, free of government request or assistance, illegally seizes evidence.[31]

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fendant's desire to suppress the admission of illegally possessed checks because the police allegedly violated his Fourth Amendment right to be free from an unreasonable warrantless search); Mapp v. Ohio, 367 U.S. 643, 644 (1961) (showing the defendant's Fourth Amendment allegations after several officers forcibly entered defendant's home without a warrant); Burdeau v. McDowell, 256 U.S. 465, 470-71 (1921) (illustrating that the petitioner was claiming the papers were unlawfully seized and stolen from his office which resulted in a violation of his legal and constitutional rights); Weeks v. United States, 232 U.S. 383, 388-89 (1914) (detailing the defendant's claims to Fourth Amendment violations when certain letters were taken illegally by a U.S. marshal from the defendant's home); United States v. Jarrett, 338 F.3d 339, 340-41 (4th Cir. 2003) (acknowledging the defendant's claims as a result of an anonymous computer hacker illegally obtaining child pornography depictions from defendant's computer and turning over the materials to state authorities); United States v. Runyan, 275 F.3d 449, 453 (5th Cir. 2001) (evidencing a defendant's Fourth Amendment violation claims pursuant to his wife, along with others, entering upon his ranch after cutting the chain on his fence with bolt cutters); United States v. Bazan, 807 F.2d 1200, 1202 (5th Cir. 1986) (representing a defendant's claim to suppress evidence illegally seized from a neighbor who crawled under a barbed wire fence onto defendant's property).

29. U.S. Const. amend. IV.

30. *Burdeau*, 256 U.S. at 475. *But see* United States v. McGuire, 381 F.2d 306, 313-14 n.5 (2d Cir. 1967) (expressing the court's duty to follow the rule set out in Burdeau; however, the court stated that the United States Supreme Court could, with its supervisory power, determine that evidence stolen by private actors and relinquished to the government is inadmissible in criminal trial); People v. Williams, 281 N.Y.S.2d 251, 255 (N.Y. Crim. Ct. 1967) (opining that the court will follow precedent as to violations of private individuals acts not raising Fourth Amendment issues; however, the court "entertains doubt" as to the future of such a construction).

31. *See Walter*, 447 U.S. at 656 (holding that the illegal films were performed by a private actor, thus no Fourth Amendment protections against unreasonable searches and seizures will apply); *Burdeau*, 256 U.S. at 476 (showing that the illegally seized papers came into the hands of the government without any violation of petitioner's rights by government actors, thus no protections will be afforded to petitioner); *Jarrett*, 338 F.3d at 344-45 (negating the defendant's Fourth Amendment claims pursuant to an illegal seizure because the defendant could not prove that the anonymous computer hacker was an agent of the state; therefore, the hacker will be deemed a private citizen which allows for no Fourth Amendment violations); *Runyan*, 275 F.3d at 456-57 (declaring that the illegal search performed by defendant's wife and friends was clearly a private search for purposes of any Fourth Amendment claims); *Bazan*, 807 F.2d at 1202-04 (deciding that neighbor was a private actor not performing as a government agent, rendering the warrantless search outside the purview of the Fourth Amendment). Private persons who act "'under color' of law," in which they are jointly engaged with state actors when an illegal search or seizure is performed, bring the violation within the scope of the Fourth Amendment. United States v. Price, 383 U.S. 787, 794 (1966).

In Texas, the final requirement to invoke the exclusionary rule is what has afforded greater protections than the Fourth Amendment has established.[32] This protection is evident in Article 38.23(a) of the Texas Code of Criminal Procedure,[33] which applies the protections of unreasonable search and seizure evidence obtained by law enforcement or "other person(s)."[34] This terminology within the Texas statute is clearly distinct from federal law.[35] Consequently, Texas courts that have recently confronted the "other person" issue and determined that the plain language of Article 38.23 clearly states that illegal searches or seizures performed by government actors, as well as any private individuals, is within the reach of the Texas statute.[36]

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32. *See* Vega v. State, 32 S.W.3d 897, 900 (Tex. App.—Corpus Christi 2000), *rev'd on other grounds*, 84 S.W.3d 613 (Tex. Crim. App. 2002) (indicating the language of Article 38.23 allows the Texas statutory exclusionary rule to be very broad in nature); WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.8 (3d ed. 1996) (pointing out that the states are not obliged to limit their individual protections according to federal law because the Due Process Clause of the Fourteenth Amendment does not confine the scope of a state's own exclusionary rule); Thomas M. Melsheimer & David M. Finn, *Criminal Procedure: Confession, Search and Seizure*, 51 SMU L. REV. 839, 843 (1998) (illustrating Texas's extended protections of exclusion as compared to the Fourth Amendment due to the fact that federal law will not require exclusion absent government action unlike Article 38.23 of the Texas Code of Criminal Procedure); Paul R. Stone & Henry De La Garza, *Criminal Trespass and the Exclusionary Rule in Texas*, 24 ST. MARY'S L.J. 443, 450-51 (1993) (recognizing the need to provide protections beyond that of the United States Constitution, thus reflecting why the Texas Court of Criminal Appeals has refused, in some instances, to interpret the Texas Constitution in unison with the Fourth Amendment).

33. TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 2004).

34. *Id.*

35. *Compare* U.S. CONST. amend. IV (indicating the right of persons to be protected from unreasonable searches and seizures), *with* TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 2004) (extending protection against illegal searches and seizures to evidence seized by an "officer or other person").

36. *See, e.g.*, State v. Johnson, 939 S.W.2d 586, 586-87 (Tex. Crim. App. 1976) (en banc) (showing that the defendant tried to suppress evidence procured by decedent's sons because the evidence was removed in violation of a Texas law; and due to the fact that private individuals are within the reach of Article 38.23, the statute requires suppression); Phillips v. State, 109 S.W.3d 562, 564, 568 (Tex. App.—Corpus Christi 2003, pet. granted) (describing that a seventeen-year-old minor was asked by a Texas Alcoholic Beverages Commission officer, the minor's aunt, to enter a liquor establishment and attempt to purchase alcohol; as a result, the defendant argued that the minor was a trespasser and Article 38.23 demands suppression of the evidence obtained from the trespass).

A. *History of Exclusionary Rule and Article 38.23(a) of the Texas Code of Criminal Procedure*

1. Establishment of the Federal Exclusionary Rule

In 1914, *Weeks v. United States*[37] established the federal exclusionary rule.[38] In *Weeks*, the accused was charged with illegal use of the mails in violation of Section 213 of the Criminal Code.[39] The accused was arrested without a warrant after the police illegally entered his house pursuant to finding a hidden key.[40] The Court stressed that the fundamental purpose behind the Fourth Amendment lies in the maxim that a man's house is his castle and it should be protected from invasions by authority to search and seize his property.[41] In that regard, the Court reasoned that resistance to such police practices is established within the amendment,[42] and to allow such practices to continue would be inconsistent with its purpose.[43] Therefore, the *Weeks* Court judicially created the federal exclusionary rule.[44]

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37. 232 U.S. 383 (1914).

38. Weeks v. United States, 232 U.S. 383 (1914); *see also* Mapp v. Ohio, 367 U.S. 643, 648 (1961) (crediting *Weeks* for first establishing that the Fourth Amendment would preclude the use of illegally seized evidence in a criminal trial); State v. Young, 216 S.E.2d 586, 589 (Ga. 1975) (accrediting the birth of the federal exclusionary rule to *Weeks*).

39. *Id.* at 386.

40. *Id.*

41. *Id.* at 390.

42. *See id.* (stating that "[r]esistance to these practices had established the principle which was enacted into the fundamental law in the Fourth Amendment").

43. *See Weeks*, 232 U.S. at 392 (noting that "[t]he tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts"); *see also* Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (citing that "the purpose of the Fourth Amendment [was] to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property"); United States v. McGuire, 381 F.2d 306, 313 n.5 (2d Cir. 1967) (noting that "[t]he thrust of the Fourth Amendment is to assure protection from official, not private, intrusion"); State v. Young, 216 S.E.2d 586, 588-89 (Ga. 1975) (explaining how the United States Supreme Court honors the purpose of the Fourth Amendment in determining the reasonableness of a search or seizure); State v. Buswell, 460 N.W.2d 614, 617-18 (Minn. 1990) (asserting that the original intent behind the Fourth Amendment was to restrain governmental, not private, activity; consequently, a private search, regardless of reasonableness, will not invoke constitutional scrutiny); Commonwealth v. Corley, 491 A.2d 829, 834 (Pa. 1985) (arguing that "[b]ecause the exclusionary rule is designed 'to prevent, not to repair' and is aimed at 'official misconduct,' it would be a wholly improper extension to apply it here, as a remedy for private conduct").

44. Weeks v. United States, 232 U.S. 383, 398 (1914); *see also* Nix v. Williams, 467 U.S. 431, 432 (1984) (stating that the purpose behind the exclusionary rule is to act as a deterrent upon state actors in order to protect individual privacy rights from being invaded); Illinois v. Gates, 462 U.S. 213, 223 (1983) (indicating that the exclusionary rule is a judicially created remedy intended as a safeguard upon Fourth Amendment rights and not as a

In *Burdeau v. McDowell*,[45] seven years following the *Weeks* decision, the Court addressed the question of whether the exclusionary rule also applied to evidence taken by private individuals.[46] The *Burdeau* Court specifically refused to extend the rule to actions other than those performed by the government or agents of the government.[47] Furthermore, this decision was only applicable to the federal courts and was not bound upon the states until 1961.[48] *Mapp v. Ohio*[49] accomplished this imposition of the federal exclusionary rule due to the implicit right of privacy embedded within the Fourth Amendment and applied it to the states via the Due Process Clause of the Fourteenth Amendment.[50]

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personal right of an aggrieved party); State v. Young, 216 S.E.2d 586, 589-90 (Ga. 1975) (finding that "[t]here is nothing sacrosanct about the exclusionary rule; it is not embedded in the constitution and it is not a personal constitutional right . . ."); *Corley*, 491 A.2d at 834 (concluding that the exclusionary rule applies to thwart governmental misconduct); Drago v. State, 553 S.W.2d 375, 378 (Tex. Crim. App. 1977) (reasoning that the exclusionary rule was created "to deter police activity which could not have been reasonably believed to be lawful by the officers committing same"); WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.8 (3d ed. 2003) (citing the Supreme Court's expectation that the exclusionary rule would have a deterrent effect on illegal police behavior); George E. Dix, *Nonconstitutional Exclusionary Rules in Criminal Procedure*, 27 AM. CRIM. L. REV. 53, 55 (1989) (outlining the Supreme Court's initial confidence in the preventative nature of the exclusionary rule); Matthew W. Paul, *Surmounting the Thorns of Article 38.23: A Proposed Interpretive Guideline for the Texas Statutory Exclusionary Rule*, 46 BAYLOR L. REV. 309, 317 (1994) (discussing the influence that the judicial creation of the federal exclusionary rule had on Texas's legislative efforts to overrule *Welchek*); Paul R. Stone & Henry De La Garza, *Criminal Trespass and the Exclusionary Rule in Texas*, 24 ST. MARY'S L.J. 443, 457 (1993) (explaining that "the purpose of the federal and state exclusionary rules are the same: to deter illegal police activity which infringes upon the liberty interests of individuals"); Brian L. Williams, *Criminal Constitutional Law—An Attack on Fourth Amendment Protection: Security Guards and the "Private Search Doctrine,"* 18 WM. MITCHELL L. REV. 175, 176 (1992) (theorizing that the exclusionary rule originally existed "to uphold judicial integrity and constitutional mandates").

45. 256 U.S. 465 (1921).

46. Burdeau v. McDowell, 256 U.S. 465, 475-76 (1921).

47. *See id.* at 475 (failing to find a constitutional principle that requires the government to surrender evidence illegally acquired by a private individual when no individual rights of the person requesting suppression were violated by any government authority).

48. *See* Paul G. Reiter, Annotation, *Admissibility, In Criminal Case, of Evidence Obtained by Search by Private Individual*, 36 A.L.R.3d 553, 557 (1971) (identifying *Mapp* as the 1961 decision which bound the states to the Bill of Rights).

49. 367 U.S. 643 (1961).

50. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (reasoning that because "the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government"); *see also* Aguilar v. Texas, 378 U.S. 108, 110 (1964) (interpreting *Ker v. California* to mean that the standards for issuance of a search warrant are identical under the Fourth and Fourteenth Amendments); Ker v. California, 374 U.S. 23, 30 (1963) (reciting the holding in *Mapp* that the Fourth

Mapp was decided nearly fifty years after *Weeks* established the federal exclusionary rule, but by this time many states had already implemented their own version of the exclusionary rule.[51]

2. Establishment of the Texas Statutory Exclusionary Rule

Texas established its own exclusionary rule before *Mapp* was decided.[52] In 1922, *Welchek v. State*[53] directly rejected the federal exclusionary rule.[54] The facts of *Welchek* indicate that "other gentlemen" accompanied a sheriff and then illegally stopped and searched the defendant.[55] The court recognized that the evidence was illegally seized; nevertheless, the court refused to exclude this evidence from trial.[56] The court rejected the federal exclusionary rule out of the fear of not being able to incarcerate criminals due to law enforcement and judicial blunders.[57] The court's

Amendment is enforceable against the states by the same exclusionary rule used by the federal government); Wolf v. Colorado, 338 U.S. 25, 28 (1949) (noting that the *Weeks* decision was one of "judicial implication" that has been frequently applied); WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.8 (3d ed. 2003) (stating that "*Mapp* applied the Fourth Amendment to the states via the Fourteenth Amendment, which itself encompasses only state action"). *See generally* U.S. CONST. amend. XIV (providing that a State may not "deprive any person of life, liberty, or property, without due process of law").

51. *See, e.g.*, N.C. GEN. STAT. § 15A-974 (2003) (codifying the North Carolina exclusionary rule); TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 2004) (codifying the Texas exclusionary rule).

52. *See* Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191, 196-97 (1981) (describing Senate Bills 115 and 174 as attempts during the 1925 session to undo and overturn *Welchek*, although Senate Bill 115 was seemingly unrelated to *Welchek* when introduced).

53. 93 Tex. Crim. 271, 247 S.W. 524 (1922).

54. *See* Welchek v. State, 93 Tex. Crim. 271, 247 S.W. 524, 525-26 (1922) (stating that the court was unable to follow the *Weeks* decision due to its misapprehension of the purpose of the Fourth Amendment to the Constitution of the United States). The court indicated that it was not disregarding the precedent established by the Supreme Court of the United States, but rather it was choosing between two high court decisions. *Id.* at 526-28. The court decided not to follow Justice Day's *Weeks* analysis because it could not follow the distinction made by Justice Day and also found the facts in the instant case similarly related to the Supreme Court decision in *Adams v. New York*, 192 U.S. 585 (1904). *Id.* at 526-28.

55. *Id.* at 525-26.

56. *See id.* at 528 (noting that "the proper decision of the question before us rests on the fact that there is nothing in the constitutional provision inhibiting unreasonable searches and seizures which lays down any rule of evidence with respect to the evidential use of property seized under search without warrant").

57. *See id.* (stating that an important function of the government is to punish criminals and protect the lives, peace, and property of the law-abiding part of society). The theory of excluding illegally obtained evidence to result as a deterrent and a punishment to law enforcement is rather a hurt directly inflicted upon society as a whole. *Id.* at 529; *see also* Matthew W. Paul, *Surmounting the Thorns of Article 38.23: A Proposed Interpretive*

clear denial to adopt the exclusionary rule established in *Weeks* was quickly followed by an adverse legislative response.[58]

The legislature responded with Senate Bill 115[59] and Senate Bill 174.[60] Senate Bill 115 created the Texas exclusionary rule now known as Article 38.23(a) of the Texas Code of Criminal Procedure,[61] which was enacted then almost as it exists today.[62]

Bill 115 urged "no evidence obtained by any officer or person by the violation of any provision of the Constitution of the State of Texas, shall be admitted in evidence against the accused on the trial of any criminal case."[63] Additionally, Bill 174 adopted legislative disapproval of *Welchek* by making participation in certain warrantless searches a misdemeanor.[64]

Guideline for the Texas Statutory Exclusionary Rule, 46 BAYLOR L. REV. 309, 316 (1994) (explaining the Court of Criminal Appeals's rejection of the federal exclusionary rule based upon public policy and mainly upon the plain language of the Texas Constitution).

58. *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) (citing the several bills that quickly followed *Welchek* in order to undo its holding); Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191, 196 (1981) (describing the emergency clause listed in Senate Bill 174 as an "ambitious effort" to reverse the *Welchek* decision); Matthew W. Paul, *Surmounting the Thorns of Article 38.23: A Proposed Interpretive Guideline for the Texas Statutory Exclusionary Rule*, 46 BAYLOR L. REV. 309, 317 (1994) (writing that the legislature's clear purpose in establishing the statutory exclusionary rule was to overrule the *Welchek* decision); Paul R. Stone & Henry De La Garza, *Criminal Trespass and the Exclusionary Rule in Texas*, 24 ST. MARY'S L.J. 443, 456 (1993) (addressing the legislature's rapid response and drastic measures taken to reflect its disapproval with the *Welchek* holding).

59. S.J. OF TEX., 39th Leg., R.S. 109 (1925).

60. S.J. OF TEX., 39th Leg., R.S. 172 (1925).

61. TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 2004); *see also* Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191, 197-98 (1981) (illustrating the minor amendment made to Bill 115 on the senate floor and the subsequent passing without amendment on the house floor, thus demonstrating the overwhelming approval of the newly created statutory exclusionary rule).

62. *See* State v. Daugherty, 931 S.W.2d 268, 274 (Tex. Crim. App. 1996) (en banc) (Baird, J., concurring) (noting that "[w]hen the Legislature meets, after a particular statute has been judicially construed, without changing that statute, we presume the legislature intended the same construction should continue to be applied to that statute") (citing Marin v. State, 891 S.W.2d 267, 271-72 (Tex. Crim. App. 1994)). Additionally, Judge Baird illustrates that Article 38.23 has been amended several times; thus, the presumption is supported because the phrase "other person" has not been amended by the legislature. *Id.* at 274 n.1.

63. S.J. OF TEX., 39th Leg., R.S. 109 (1925).

64. S.J. OF TEX., 39th Leg., R.S. 172 (1925); *see also* Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191, 197-98 (1981) (showing that a third house floor amendment reduced the offense from a felony to a misdemeanor); Paul R. Stone & Henry De La Garza, *Criminal Trespass*

In 1925, the Texas Code of Criminal Procedure codified Bill 115 as 727a.[65] This soon became known as Article 38.23(a),[66] and Bill 174 was codified as Article 4, 4a, and 4b of the Texas Code of Criminal Procedure.[67]

B. *Application of Article 38.23 of the Texas Code of Criminal Procedure*

1. Historical Timeline

To determine the meaning of Article 38.23(a), it is necessary to look again at the history of the statute, plain language, and case law. The birth of Article 38.23 took place in the 1920s, during the Prohibition.[68] *Welchek*, the Texas case prompting the establishment of the exclusionary rule, involved "other gentlemen" accompanying a police officer in an ille-

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and the Exclusionary Rule in Texas, 24 ST. MARY'S L.J. 443, 456 (1993) (illustrating that the strong adverse reaction to *Welchek* was apparent from the imposition of misdemeanor criminal penalties against state actors who conducted illegal searches).

65. Act of Mar. 30, 1925, 39th Leg., R.S., ch. 149, 1925 Tex. Gen. Laws 357 (current version at TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 2004)); *see also* Chavez v. State, 9 S.W.3d 817, 822 (Tex. Crim. App. 2000) (en banc) (indicating the codification of Senate Bill 115 as Article 727a and effective on June 19, 1925); Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191, 198 (1981) (illustrating that Article 727a was codified and used almost immediately); Matthew W. Paul, *Surmounting the Thorns of Article 38.23: A Proposed Interpretive Guideline for the Texas Statutory Exclusionary Rule*, 46 BAYLOR L. REV. 309, 316-17 (1994) (detailing Article 727a as the ambitious predecessor of the current Article 38.23 of the Texas Code of Criminal Procedure).

66. *See* Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191, 204 (1981) (reporting that the present Code of Criminal Procedure was enacted in 1965, which reenacted Article 727a with relatively minimal change into Article 38.23).

67. *See id.* at 198 (indicating that the Code of Criminal Procedure codified the Senate Bills on June 19, 1925).

68. *See* Gillett v. State, 588 S.W.2d 361, 368 (Tex. Crim. App. 1979) (en banc) (illustrating the statutes birth coming subsequent to the statewide prohibition); Carroll v. State, 911 S.W.2d 210, 219 (Tex. App.—Austin 1995, no pet.) (indicating how the history of the statute's birth during the Prohibition made it an unusual statute); *see also* Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 614-15 (1981) (stating that the exclusionary rule had its genesis during the Prohibition, when private "gentlemen" assisted law enforcement in search of illegal whiskey); Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191, 199 (1981) (referring to the statutory birth leading to many of the prohibition cases' reversals); Matthew W. Paul, *Surmounting the Thorns of Article 38.23: A Proposed Interpretive Guideline for the Texas Statutory Exclusionary Rule*, 46 BAYLOR L. REV. 309, 317 (1994) (tracing the establishment of statutory exclusionary rule as a response to unlawful alcohol seizures by private citizens).

gal seizure.[69] The offending parties confiscated liquor from the defendant's car trunk.[70] As in many other seizures involving liquor,[71] the Texas Legislature created the exclusionary rule as a response to the problem of private "gentlemen" conducting illegal searches in concert with the police.[72] As such, the history of Article 38.23(a) indicates that it was a response to individuals of the Prohibition era acting in concert with law enforcement.

2. Plain Language of Article 38.23(a)

The plain language of Article 38.23(a) expressly includes "other person(s)."[73] Texas courts have held that the plain meaning of the statute clearly indicates "other person(s)" as any private individuals and not just those individuals acting as agents or in concert with law enforcement.[74]

A court interpreting a statute must do so according to the will of the legislature.[75] Judge Benavides of the Court of Criminal Appeals wrote:

> Our principal task in construing the statute is to discover its place in the Texas scheme of criminal jurisprudence. Because article 38.23 is an enactment of our legislature, it represents the democratic will of Texans, not merely an evidentiary adjustment made by the courts to remedy violations of the law. As always, in the case of legislation, courts may interpret, but they may not amend. . . . As jurists, we are obliged to implement the expressed will of our legislature, not the will it keeps to itself. The suggestion that some motive can reliably be inferred from the failure of a legislature to enact certain laws or to enact laws of a certain kind is not only tenuous, but dangerous, for it supplants orthodox democratic institutions with a judicial oligarchy. . . . Except under unusual circumstances, therefore, it is best to effec-

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69. Welchek v. State, 247 S.W. 524, 525 (Tex. Crim. App. 1922).

70. *Id.* at 526.

71. *See* Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191, 199-200 (1981) (indicating that a flood of reversals occurred pursuant to Article 727a, and the illegal seizure of liquor was the focus in nearly every one).

72. Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 614-15 (1981); Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191, 615 (1981).

73. TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 2003).

74. Chavez v. State, 9 S.W.3d 817, 819 (Tex. Crim. App. 2000) (en banc); State v. Johnson, 939 S.W.2d 586, 587 (Tex. Crim. App. 1976) (en banc); Phillips v. State, 109 S.W.3d 562, 569 (Tex. App.—Corpus Christi 2003, pet. granted). *But see Johnson*, 939 S.W.2d at 588-89 (McCormick, J., dissenting) (arguing that the majority's construction of "other person" is incorrect because it is inconsistent with the legislative intent).

75. Garcia v. State, 829 S.W.2d 796, 799 (Tex. Crim. App. 1992).

tuate the legislative intent evidenced by the plain language of statutes.[76]

Thus, the plain language of the statute, if present, dictates the interpretation.[77] Courts will assume that the statute's plain language correctly represents the legislature's intent.[78] The Court of Criminal Appeals determined the plain language includes illegal acts of all persons, not only government actors or those in concert with government actors.[79] As a result, the court has explicitly denied any state contention to the contrary.[80] This conclusion was attained pursuant to a direct definition of "other" according to a Merriam-Webster Dictionary.[81] The court noted

76. *Id.* at 798, 799-800.

77. State v. Daugherty, 931 S.W.2d 268, 270 (Tex. Crim. App. 1996) (en banc); Boykin v. State, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) (en banc).

78. *Daugherty*, 931 S.W.2d at 270; *Boykin*, 818 S.W.2d at 785.

79. *See Chavez*, 9 S.W.3d at 819-20 (illustrating that no absurd results follow the plain language interpretation of "other person"; therefore, its ordinary meaning should be given effect); *Johnson*, 939 S.W.2d at 587 (determining that the court must implement an all-inclusive rule as to "other person" in order to implement the will of the legislature); *see also* Phillips v. State, 109 S.W.3d 562, 568 (Tex. App.—Corpus Christi 2003, pet. granted) (illustrating a Texas Court of Appeals analysis that despite the statute's unambiguous language, the text has not been followed by some courts due to other factors that courts sometimes consider); McCuller v. State, 999 S.W.2d 801, 804 (Tex. App.—Tyler 1999, pet. ref'd) (stressing the plain language demands that "other person(s)" includes all persons, thus the photographs taken by the private citizens were done so illegally and fall within the ambit of Article 38.23); Dunn v. State, 979 S.W.2d 403, 407-08 (Tex. App—Amarillo 1998, pet. ref'd) (holding that a citizen's arrest occurred, therefore, it became necessary to determine whether it was a legal citizen's arrest because if not, the fruits of the arrest are inadmissible according to Article 38.23).

80. *See, e.g.*, Comeaux v. State, 818 S.W.2d 46, 53 (Tex. Crim. App. 1991) (en banc) (illustrating the state's same contention of agency or state action to be a requisite to suppression is not the correct analysis of Article 38.23); Gillett v. State, 588 S.W.2d 361, 369 (Tex. Crim. App. 1979) (en banc) (evidencing the intent of Article 38.23, despite the state's objections, is to apply the statute to all persons, whether officers or not); *Johnson*, 939 S.W.2d at 587 (arguing that: "Not only is the State's contention grammatically insupportable, but it also proposes that the 'other person[s]' are somehow *like* officers, a concept that contradicts the very definition of 'other', which serves to draw a *distinction*, albeit broad, between 'officer[s]' and 'other person[s]'.").

81. *See Johnson*, 939 S.W.2d at 587 (defining "other" as "being the ones distinct from those first mentioned"). *But see* Carroll v. State, 911 S.W.2d 210, 220 n.6 (Tex. App.—Austin 1995, no pet.) (noting Bubany and Cockerell's comment that "if the Legislature had intended article 38.23(a) to apply to everyone, it could have used the term 'any person' rather than 'officer or other person,' . . . rules of statutory construction and the legislative history of the statute support the conclusion that the statutory language used meant to limit the scope of the term 'other persons,' and that it is plausible that the term should be limited to an 'other person,' aiding the police or performing law enforcement functions").

that the only existing exception to the plain language interpretation of a statute occurs when the interpretation will lead to absurd results.[82]

3. Texas Cases

In *State v. Johnson*,[83] the defendant attempted to suppress evidence under Article 38.23(a).[84] The facts indicate that the decedent's sons seized evidence from the defendant's funeral home in an illegal manner.[85] This illegal manner allegedly constituted an action in burglary; therefore, the defendant claimed the evidence should be excluded pursuant to Article 38.23 because its procurement violated Texas law.[86] Even though pri-

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82. *Johnson*, 939 S.W.2d at 588; *Boykin*, 818 S.W.2d at 785. *But see Johnson*, 939 S.W.2d at 589 (McCormick, J., dissenting) (analyzing a hypothetical indicating that the majority's construction of "other person" will lead to "absurd" results in certain circumstances that are unintended by the legislature); *Boykin*, 818 S.W.2d at 788 (McCormick, J., dissenting) (describing "ludicrous consequences" of the majority's imposition of a condition upon a statute which surpasses even a literal reading of the statute). Additionally, the Court of Criminal Appeals listed another exception to a plain language reading: "if the language is not plain but rather ambiguous, then *and only then*, out of absolute necessity, is it constitutionally permissible for a court to consider, in arriving at a sensible interpretation, such *extra*textual factors as executive or administrative interpretations of the statute or legislative history." *Boykin*, 818 S.W.2d at 785-86.

83. 939 S.W.2d 586 (Tex. Crim. App. 1976) (en banc).

84. State v. Johnson, 939 S.W.2d 586, 586-87 (Tex. Crim. App. 1976) (en banc). Correspondingly, the Court of Criminal Appeals's decision in *Johnson* was firmly reinforced by subsequent decisions by the same court, as well as the Court of Appeals in Corpus Christi. Chavez v. State, 9 S.W.3d 817, 820 (Tex. Crim. App. 2000) (en banc); Phillips v. State, 109 S.W.3d 562, 568, 571 (Tex. App.—Corpus Christi 2003, pet. granted).

85. *Johnson*, 939 S.W.2d at 586.

86. *Id.* at 587. Texas Penal Code § 30.02 provides:

> (a) A person commits an offense if, without the effective consent of the owner, the person:
>
> (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or
>
> (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or
>
> (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

TEX. PENAL CODE § 30.02 (Vernon 2003). However, a violation of any law does not always invoke Article 38.23, the purpose of the law violated must relate to the deterrent purpose of the exclusionary rule. *See, e.g., Chavez*, 9 S.W.3d at 822-23 (positing that an extension of the exclusionary rule to violations of the law unrelated to the deterrent purpose "would lead to absurd results"); Pannell v. State, 666 S.W.2d 96, 97-98 (Tex. Crim. App. 1984) (en banc) (holding that the violation of a rule within the Code of Responsibility of the Texas State Bar will not awake the protections of the statutory exclusionary rule); Roy v. State, 608 S.W.2d 645, 651 (Tex. Crim. App. 1980) (declaring that a violation of the Assumed Name Statute by state actors does not require suppression pursuant to Article 38.23 because the purpose of the Assumed Name Statute is wholly unrelated to the deter-

vate citizens obtained the evidence, the defendant still argued it fell directly within the purview of Article 38.23(a) and required suppression of the evidence.[87] The court agreed with this analysis and held the evidence inadmissible.[88]

However, Justice McCormick, along with Justices White, Mansfield, and Keller, came to a different conclusion.[89] Their dissent stressed that Article 38.23's use of the term "other person" refers only to private individuals acting in concert with state actors,[90] and that the state's analysis correctly mirrors the legislative intent of Article 38.23(a).[91] The dissent claimed that the statute must be construed according to the state's analysis in order to give effect to the legislative intent.[92] Specifically, the dissent argued that other factors are also necessary to determine the correct interpretation including: (1) the objective sought to be attained, (2) the circumstances in which the statute was written, (3) the legislative history of the statute, and 4) the consequences of a particular statute.[93] Furthermore, Article 1.26 of the Code of Criminal Procedure demands the "[c]ourt to 'liberally' construe the Code, not 'strictly' construe it."[94]

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rent purpose of the exclusionary rule); Lane v. State, 951 S.W.2d 242, 243-44 (Tex. App.—Austin 1997, no pet.) (reporting that an officer's failure to provide the defendant with a written warning after completing a breath test violated the Transportation Code, but was totally unrelated to the purpose of the statutory exclusionary rule); Fisher v. State, 839 S.W.2d 463, 468 (Tex. App.—Dallas 1992, no pet.) (announcing that the Health & Safety Code violation was entirely unrelated to the primary purpose of Article 38.23); Stockton v. State, 756 S.W.2d 873, 874 (Tex. App.—Austin 1988, no pet.) (manifesting that Texas's exclusionary rule will not extend its protections to a violation of the Education Code).

87. *Johnson*, 939 S.W.2d at 586-87.

88. *Id.* at 588.

89. *See* Johnson v. State, 939 S.W.2d 586, 588-89 (Tex. Crim. App. 1996) (en banc) (McCormick, J., dissenting) (criticizing the majority's construction of "other person(s)" applying to any persons, not just those assisting law enforcement).

90. *Id.* at 588.

91. *See id.* at 590 (illustrating that the purpose of deterring illegal police activity is nonexistent when "other person" is construed to include private individuals not in concert with state actors). Additionally, the court provides a detailed chronology of the federal exclusionary rule and circumstances involving prohibition at the time of the statutory exclusionary rule's birth in Texas. *Id.* at 590-92. The court strongly disagreed with the majority conclusion that this history can only support an agency theory of "other person." *Id.* at 590-92.

92. *Id.* at 592.

93. TEX. GOV'T CODE § 311.023 (Vernon 1998). The *Johnson* dissent references this section of the Code and states that among certain statutes, the legislative intent cannot be apprehended when applying the plain language. *Johnson*, 939 S.W.2d at 589 (McCormick, J., dissenting). *But see* Boykin v. State, 818 S.W.2d 782, 785 n.4 (Tex. Crim. App. 1991) (en banc) (reasoning that this section of the code invites, but does not require, a court to consider the factors when the statute is ambiguous).

94. *Johnson*, 939 S.W.2d at 589.

Justice McCormick stated: "Sometimes this Court can only give effect to the legislative intent of a statute by not giving effect to the 'plain' or literal language of the statute when other factors such as those set out in Section 311.023 clearly show the Legislature intended that the statute be construed otherwise."[95]

Hence, the dissent argued that the Code's objective, deterring illegal searches by the police, disappears when private persons illegally obtain evidence.[96] Additionally, history and circumstances illustrate that the Code's adoption was an attempt to stop private individuals from interacting with officers due to the influx of illegal seizures during the Prohibition.[97] Specifically, Bills 115 and 174 were an attempt to stop vigilante-citizens from performing illegal liquor raids with law enforcement.[98] Finally, the dissent concocts a hypothetical to illustrate a resulting absurdity when the court construes the statute to also include evidence obtained by private individuals.[99]

In its most recent interpretation of "other person(s)," the Texas Court of Criminal Appeals has recognized and retained its clean sweep approach; however, it appears to provide a new exception for evidence illegally obtained by private persons when such evidence is turned over to law enforcement without delay.[100] In *Jenschke v. State*,[101] a young girl

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95. *Id.*

96. *Id.* at 590.

97. *Id.* at 593; *see also* Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191, 201-02 (1981) (surveying many cases throughout the 1920s and 1930s which illustrate the great number of illegal prohibition search and seizure cases invading the court rooms).

98. *See* Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 626-27 (1981) (finding "no doubt that in 1925 the legislators were primarily concerned with deterring arbitrary and capricious searches that were conducted in connection with supposed violations of the liquor laws"). "The inclusion of private law enforcers is not surprising. They were active in the enforcement of the prohibition laws, and the prohibition enforcement effort gave rise to the enactment of article 38.23." Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191, 226 (1981).

99. Johnson v. State, 939 S.W.2d 586, 589 (Tex. Crim. App. 1996) (en banc) (McCormick, J., dissenting). Justice McCormick's hypothetical illustrates the majority's construction of "other person" as applying as a clean sweep. *Id.* It can be seen when a man calls the police to report that his gun has been stolen. *Id.* The police soon recover the gun from the accused thief and subsequently learn that the man who reported the weapon stolen used it in a previous murder. *Id.* McCormick argues that the majority construction leads to an absurd result because it allows, in these circumstances, for the murderer to argue that Article 38.23 requires suppression of the weapon because it was obtained in violation of the law. *Id.*

100. Jenschke v. State, NO. 1677-03, 2004 WL 2347874, at *1 (Tex. Crim. App. Oct. 20, 2004).

was sexually assaulted by the defendant, a relative.[102] After the young girl informed her parents of the incident, they went to the defendant's residence and opened his truck with a hidden key, without his consent.[103] The parents found a used condom, which the parents removed from defendant's vehicle.[104] The evidence was not initially turned over to law enforcement due to the parents' religious beliefs and strong family ties.[105] Later, the parents' son also admitted to being sexually abused by the defendant, which prompted the parents to turn over the condom and the positive DNA analysis to district attorney (more than two years after discovering the condom).[106]

The *Jenschke* court stated that "Article 38.23(a) 'means what it says: that evidence illegally obtained by an officer or other person' ought to be suppressed."[107] The defendant stressed that burglary of a vehicle, the criminal offense, required suppression.[108] The court recognized its previous holding "that takings of property by persons who are not officers and are not acting as agents of officers, but who turn the property over to officers for investigation, are not theft."[109] Consequently, the *Jenschke* court referred to these situations as a theft taking; however, "the real question is whether . . . a private citizen should be treated the same as officers so that his exercise of control over the property was not unlawful because he was motivated by a desire to further law enforcement."[110] The evidence illustrated that the parents did not take the defendant's property with intent to relinquish it to law enforcement, and consequently, due to an exception now focused upon the intent of the one who seized the property, the court held that the evidence was inadmissible.[111]

Ultimately, *Jenschke* would provide for a different outcome in *Johnson*, where the defendant claimed and the court held that a burglary violation required suppression of the evidence that the "sons had taken from the

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101. 2004 WL 2347874 (Tex. Crim. App. Oct. 20, 2004).

102. Jenschke v. State, No. 1677-03, 2004 WL 2347874, at *1 (Tex. Crim. App. Oct. 20, 2004).

103. *Id.*

104. *Id.*

105. *Id.* at *3.

106. *Id.* at *4.

107. *Jenschke*, 2004 WL 2347874, at *2 (quoting *State v. Johnson*, 939 S.W.2d 586, (Tex. Crim. App. 1996) (en banc)).

108. *Id.* at *1.

109. *Id.* at *2; *see also* Cobb v. State, 85 S.W.3d 258, 271 (Tex. Crim. App. 2002) (determining that persons who are not acting as agents of the state and have no intent to deprive another of property when they turn the property over to the authorities for investigation are not committing theft).

110. Jenschke, 2004 WL 2347874, at *3.

111. *Id.* at *4.

funeral home and turned over to the police."[112] Regardless of the different outcome which would result in *Johnson*, *Jenschke* stated that Article 38.23(a) still means exactly what it says as per "other person(s)."[113]

Justice Meyers expressed disagreement "that there is a general exception to Article 38.23(a) when the intent is to turn the evidence over to the police."[114] Additionally, Justice Meyers stressed that the "good faith" exception is the only exception that has ever been applied to Article 38.23(a).[115] The dissent concludes that the majority's creation—an "intent to turn evidence over to the police" exception—will only encourage victims to disobey the law.[116]

In *Phillips v. State*,[117] the defendant was charged pursuant to Texas Alcohol & Beverages Code Section 106.03(a) for the sale of an alcoholic beverage to a minor.[118] The defendant argued for the suppression of any testimony of the minor because the minor was a trespasser,[119] and according to Article 38.23, no evidence "obtained" in violation of the laws of the state will be admissible.[120] After the court decided that the minor

112. *Johnson*, 939 S.W.2d at 586-87.

113. *Jenschke*, 2004 WL 2347874, at *2.

114. Jenschke v. State No. 1677-03, 2004 WL 2347874, at *5 (Tex. Crim. App. Oct., 20, 2004) (Meyers, J., dissenting).

115. *Id.* (citing Garcia v. State, 829 S.W.2d 796, 799 (Tex. Crim. App. 1992)).

116. *Id.*

117. 109 S.W.3d 562 (Tex. App.—Corpus Christi 2003, pet. granted).

118. Phillips v. State, 109 S.W.3d 562, 563 (Tex. App.—Corpus Christi 2003, pet. granted).

119. *Phillips*, 109 S.W.3d at 565; *see also* Paul R. Stone & Henry De La Garza, *Criminal Trespass and the Exclusionary Rule in Texas*, 24 ST. MARY'S L.J. 443, 460 (1993) (stating that "[T]he purpose of the Texas criminal trespass statute is to protect private property . . . [and] 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").

120. TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 2004).

was a trespasser,[121] it held that the private searcher's actions implicated the protections of Article 38.23.[122]

III. Interpretational Approaches

Before employing Article 38.23, it is necessary to establish to whom the term "other person" may apply. A categorical breakdown of "other person" may consist of three groups:[123] (1) private individuals acting in concert with or at the request of law enforcement,[124] (2) individuals acting

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121. Phillips v. State, 109 S.W.3d 562, 565 (Tex. App.—Corpus Christi 2003, pet. granted). The court determined whether the minor was a trespasser according to § 30.05 of the Texas Penal Code, which provides:

> (a) A person commits an offense if he enters or remains on property, including an aircraft, of another without effective consent or he enters or remains 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:
> . . .
> (2) "Notice" means: . . .
> . . .
> (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.

Tex. Penal Code § 30.05 (Vernon 2003). The bartender in the *Phillips* case testified that signs prohibiting the entrance of minors were posted the night the minor entered the establishment. *Phillips*, 109 S.W.3d at 564.

122. *Phillips*, 109 S.W.3d at 565; *see also* Carroll v. State, 911 S.W.2d 210, 221-22 (Tex. App.—Austin 1995, no pet.) (discussing the exclusionary rule's purpose in deterring unlawful actions which violate even the rights of criminal suspects and also analyzing that the purpose of the criminal trespass statute is also related to the rights of criminal suspects so any evidence obtained by the trespass triggers Article 38.23).

123. Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 Tex. Tech L. Rev. 611, 623 (1981).

124. *See, e.g.*, United States v. Price, 383 U.S. 787, 795 (1966) (introducing an agency issue due to the fact that state officials participated in the conspiracy); United States v. Jarrett, 338 F.3d 339, 344-45 (4th Cir. 2003) (acknowledging that government acquiescence to a private actor's search can transform that person into a government agent); United States v. Bazan, 807 F.2d 1200, 1204 (5th Cir. 1986) (holding that the private search was not done as an agent of the state because no compensation was paid to the informant, no state actor initiated the idea for the individual to perform a search, and the state actor lacked any knowledge that the informant was even going to conduct a search); Okunieff v. Rosenberg, 996 F. Supp. 343, 348-49 (S.D.N.Y. 1998) (indicating that the private search performed by a hospital physician required for involuntary commitment does not convert the private actions into government actions); State v. Cook, 777 N.E.2d 882, 885 (Ohio Ct. App. 2002) (determining whether the search and seizure of an envelope identifying the defendant's address was performed by a person acting as an agent of the state); Chaires v. State, 480 S.W.2d 196, 198 (Tex. Crim. App. 1972) (solving an agency question regarding airline officials' discovery of marijuana after a search of defendant's luggage); Dawson v. State, 868 S.W.2d 363, 366 (Tex. App.—Dallas 1993, pet. ref'd) (determining whether a

independent of law enforcement, but still for the purpose of obtaining evidence for criminal prosecution,[125] or (3) individuals acting for reasons other than obtaining evidence to advance criminal prosecutions.[126]

A. *Plain Language Interpretation*

Despite the article's near century of existence,[127] its interpretation of "other person" is still subject to debate.[128] In fact, some experts suggest that the long existing lack of clarity can be attributed partially to the Texas Court of Criminal Appeals's failure to properly address the issue of whether Article 38.23 applies to evidence illegally obtained by private

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manager of a night club acted as an agent to the state when he illegally searched the defendant's locker). Generally, a search conducted by a private actor at the request of police or done via agency will trigger the protections of Article 38.23. *See generally* Paul G. Reiter, Annotation, *Admissibility, In Criminal Case, of Evidence Obtained by Search by Private Individual*, 36 A.L.R.3d 553 (1971) (outlining the admissibility of evidence pursuant to police participation in a private individual's illegal search or seizure).

125. *See* Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 625-27 (1981) (recognizing certain statutes which give private persons the authority to perform citizens' arrests, searches, and seizures, literally clothing private citizens with the same authority as that of police officer). Such persons are obviously those seeking to enforce the law; however, they do so without police assistance. *Id.* Article 14.10 of the code of Criminal Procedure is one such statute, allowing that "[a] peace officer or any other person, may, without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the office is one classed as a felony or as an offense against the public peace." TEX. CODE CRIM. PROC. ANN. art. 14.01(a) (Vernon 1977).

126. *See, e.g.*, State v. Rodriguez, 581 N.Y.S.2d 964, 965 (N.Y. App. Div. 1992) (providing for an accidental search by a private individual when a package was delivered to the wrong apartment, and upon opening it the neighbor found drugs which he delivered to the police); Bodde v. State, 568 S.W.2d 344, 352-53 (Tex. Crim. App. 1978) (detailing a landlady's discovery of incriminating evidence after entering the defendant's apartment subsequent to his arrest to prepare the apartment for a new tenant as admissible evidence); Weaver v. State, 721 S.W.2d 495, 498 (Tex. App.—Houston [1st Dist.] 1986, pet. ref'd) (illustrating a blood sample taken by a hospital employee was taken for analysis prior to defendant's arrest and not at the state's request); Manos v. State, 659 S.W.2d 662, 667 (Tex. App.—Houston [14th Dist.] 1983, no pet.) (showing that evidence discovered as a result of a hotel manager's routine baggage check was admissible because the manager was not acting as an agent for law enforcement).

127. TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 2004).

128. *See generally* Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611 (1981) (reflecting upon the applicability of "other person(s)"); Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191 (1981) (providing for the lack of judicial clarity in interpreting Article 38.23, yet concluding with a proposal of using Article 1.06 of the Texas Code of Criminal Procedure to clear up the confusion).

persons.[129] Despite this suggestion, *State v. Johnson*,[130] *Chavez v. State*,[131] and *Jenschke v. State*[132] support a conclusion that the majority of Texas courts have adopted a plain language interpretation of Article 38.23.[133]

Despite the Texas Court of Criminal Appeals's acknowledgment that the plain language of Article 38.23 controls, the *Jenschke* opinion supports the proposition that a violation of a criminal law by a private individual not acting as an agent of the state, which typically requires suppression, may be admissible, so long as the evidence was given to law enforcement without delay.[134] Thus, *Jenschke* does provide a twist or exclusion in some instances to the plain language interpretation.

A plain language interpretation results in a "clean sweep," enabling Article 38.23 to exclude evidence unlawfully obtained by any person, whether an officer or not.[135] Additionally, a clean sweep will apply to any private individual, not just those acting as agents or in concert with law enforcement.[136] Thus, if the evidence were illegally obtained pursu-

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129. Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 617 (1981); Matthew W. Paul, *Surmounting the Thorns of Article 38.23: A Proposed Interpretive Guideline for the Texas Statutory Exclusionary Rule*, 46 BAYLOR L. REV. 309, 309 (1994). Other commentators cite examples of the court sidestepping these issues in Gillett v. State, 588 S.W.2d 361 (Tex. Crim. App. 1979) (en banc) and Bodde v. State, 568 S.W.2d 344 (Tex. Crim. App. 1978). Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 617-18 (1981). In *Gillett*, the issue was avoided by the majority's conclusion that no search was evident after looking at the facts that a sign existed indicating the dressing rooms were under surveillance, thus negating any expectation of privacy. *Id.* The *Bodde* court evaded the issue due to its inability to distinguish a person being rightful present and having the ability to observe and having the ability to confiscate. *Id.* at 618-19.

130. 939 S.W.2d 586 (Tex. Crim. App. 1996) (en banc).

131. 9 S.W.3d 817 (Tex. Crim. App. 2000) (en banc).

132. 2004 WL 2347874 (Tex. Crim. App. Oct. 20, 2004).

133. Chavez v. State, 9 S.W.3d 817, 819 (Tex. Crim. App. 2000) (en banc); *Johnson*, 939 S.W.2d at 587 (Tex. Crim. App. 1976) (en banc); State v. Daugherty, 931 S.W.2d 268, 270 (Tex. Crim. App. 1996) (en banc); McCuller v. State, 999 S.W.2d 801, 804 (Tex. App.—Tyler 1999, pet. ref'd); Dunn v. State, 979 S.W.2d 403, 407 (Tex. App—Amarillo 1998, pet. ref'd).

134. Jenschke v. State, No. 1677-03, 2004 WL 2347874, at *1 (Tex. Crim. App. Oct. 20, 2004).

135. Any person's illegal actions can be subject to suppression under Article 38.23. *See, e.g.*, McCuller v. State, 999 S.W.2d 801, 804 (Tex. App.—Tyler 1999, pet ref'd) (applying plain language to the actions of all persons, whether governmental or independent of state authority); Dunn v. State, 979 S.W.2d 403, 407 (Tex. App—Amarillo 1998, pet. ref'd) (citing *Johnson* and concluding that the plain language requires illegally obtained evidence to be suppressed whether it was taken from a private or government actor).

136. Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 620 (1981).

ant to Article 38.23, the plain language approach would consider all three categories ripe for suppression.[137]

Courts implementing the plain language approach frequently refer to *Boykin v. State*[138] and *State v. Daugherty*[139] for guidance.[140] The *Boykin* court expressed that the purpose of interpreting a statute is to effectuate the legislative intent.[141] In doing so, the judiciary remains consistent with its law-interpreting function, while rightfully leaving the law-making function in the hands of the legislature.[142] Thus, to remain consistent with its constitutional duties, the court must impose the will of the legislature.[143] The *Boykin* court clearly indicated that a statute with plain language will be interpreted as such.[144] However, the court noted that an exception exists if a plain language interpretation would lead to absurd results.[145]

The *Daugherty* court also confronted an interpretational issue of Article 38.23.[146] The *Daugherty* court cited *Boykin*, stating, "[i]n divining legislative intent, we look first to the language of the statute. When the meaning is plain, we look no further."[147]

The plain language approach yields several benefits, making it a reasonable approach.[148] Four particular benefits exist regarding the plain

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137. *Id.*

138. 818 S.W.2d 782 (Tex. Crim. App. 1991) (en banc).

139. 931 S.W.2d 268 (Tex. Crim. App. 1996) (en banc).

140. *See* State v. Johnson, 939 S.W.2d 586, 587 (Tex. Crim. App. 1976) (en banc) (relying on *Boykin* to support its interpretation of "other person" and *Daugherty* to justify ignoring the legislative intent because Article 38.23 is plain on its face).

141. Boykin v. State, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) (en banc). *But see* Camacho v. State, 765 S.W.2d 431, 433 (Tex. Crim. App. 1989) (en banc) (illustrating that the determination of a word's meaning is sometimes necessary to apply a broader or narrower meaning or insight into the legislative intent present during the statute's original drafting).

142. *Boykin*, 818 S.W.2d at 785.

143. Garcia v. State, 829 S.W.2d 796, 799 (Tex. Crim. App. 1992) (en banc).

144. *Boykin*, 818 S.W.2d at 785.

145. *Id.* The court explained that use of the exception is not an intrusion upon the lawmaking powers of the legislature, instead, it is a display of respect, illustrating the assumption that the legislature would not create laws to provide absurd results. *Id.*

146. *See* State v. Daugherty, 931 S.W.2d 268, 270 (Tex. Crim. App. 1996) (en banc). While the issue here was not "other person," the court also established that the court must look first to the plain language of the statute, and when the language is clear then the court should look no further unless it would lead to absurd results. *Id.* at 270.

147. *Id.* In this case, the court was not faced with a direct interpretation of "other person"; instead, it determined whether the inevitable discovery doctrine should apply to Article 38.23 despite not being mentioned explicitly within the statute. *Id.*

148. *See* Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 620 (1981) (indicating that the clean sweep is not unreasonable because it is an approach with several virtues).

language approach:[149] (1) it allows Texas to avoid the problem of drawing a line between private individuals and private individuals acting as agents or at the request of law enforcement;[150] (2) it deters law enforcement officers from using private individuals to obtain evidence that they cannot lawfully obtain themselves;[151] (3) its costs are not unreasonably high due to the small number of private searches;[152] and (4) it comports with fairness in view of the fact that the evidence is tainted, although not by the police, and this avoids an implicit authorization of illegal private conduct.[153]

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149. Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 620-21 (1981).

150. *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.8(a) (3d ed. 2003) (dedicating a discussion to the wide variety of issues associated with trying to distinguish between government and private actors); Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 620 (1981) (commenting on the difficulty in drawing a line between government and private conduct according to the *Burdeau* rule); Brian L. Williams, *Criminal Constitutional Law—An Attack on Fourth Amendment Protection: Security Guards and the "Private Search Doctrine,"* 18 WM. MITCHELL L. REV. 175, 175-80 (1992) (presenting an analysis of a leading Minnesota case and its decision to help provide a determination of where the line is to be drawn between state and private actions).

151. *See* Nix v. Williams, 467 U.S. 431, 432 (1984) (confirming the necessity of preventing law enforcement from unlawfully obtaining evidence at the expense of individual privacy despite the social cost of allowing some criminals to go unconvicted). Deterring law enforcement from trying to obtain evidence that they cannot acquire by themselves represents the core rationale and purpose behind the exclusionary rule. *Id.* This interpretation "would tend to discourage surreptitious attempts by the police to use private persons to obtain evidence that they could not procure themselves." Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 620 (1981).

152. *See* Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 620 (1981) (arguing that the low number of private invasions that occur keep the administrative costs associated with Article 38.23 reasonably low).

153. *See id.* at 620-21 (pointing out that "[a]lthough arguably inconsistent with the deterrence rationale of exclusion, suppression of evidence tainted by private wrongdoing comports with a basic sense of fairness and avoids even an indirect approval of such conduct"). However, one Pennsylvania court disputes this rationale:

> We first note that the theory described by the court whereby "ratification" of an individual's actions by police and prosecutors may support an inference of state action would, even if correct, apply to both searches and citizen's arrests. It cannot, therefore, be a basis for distinguishing between the two. Nor do we agree that the acts of an individual become imbued with the character of "state action" merely because they are in turn relied upon and used by the state in furtherance of state objectives. . . . The mere use by police and prosecutors of the results of an individual's actions does not serve to "ratify" those actions as conduct of the state.

State v. Corley, 491 A.2d 829, 832 (Pa. Commw. Ct. 1985).

Ultimately, the majority approach of applying a clean sweep would exclude evidence illegally obtained by all three categories of individuals.[154] Further analysis of each category is necessary to evaluate the overinclusive reach of this approach.

1. Private Individuals Acting in Concert with Government Authorities

The purpose behind both the Fourth Amendment and Article 1, Section 9 of the Texas Constitution is to restrict the use of evidence obtained illegally from government actors.[155] These restrictions exist to deter law enforcement from obtaining evidence illegally at the cost of individuals' reasonable expectations of privacy.[156] Therefore, suppression of evidence obtained by an individual citizen acting in concert with or at the request of law enforcement is a reasonable extension of this purpose.[157] The individual acting in concert is basically a law enforcer clothed with equal authority to that of law enforcement, and no absurd results are ap-

154. *See* Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 620, 623 (1981) (stating that Article 38.23 would apply to anyone as a "clean sweep" whether they are government actors, private investigators, or even thieves). *But see* Jenschke v. State, No. 1677-03, 2004 WL 2347874, at *1-3 (Tex. Crim. App. Oct. 20, 2004) (changing the ability of the state to introduce illegally obtained evidence taken from private individuals and turned over to the police).

155. *See* Comeaux v. State, 818 S.W.2d 46, 49 (Tex. Crim. App. 1991) (en banc) (quoting both the Fourth Amendment and Article 1, Section 9 of the Texas Constitution and stating that the constitutional protections within both exist to deter illegal searches and seizures by government actors); Matthew W. Paul, *Surmounting the Thorns of Article 38.23: A Proposed Interpretive Guideline for the Texas Statutory Exclusionary Rule*, 46 BAYLOR L. REV. 309, 339 (1994) (indicating that "the purposes of the two rules are virtually indistinguishable. Yet Article 38.23 is not simply a codification of the federal exclusionary rule, and does not incorporate the sum total of federal exclusionary doctrines. In short, the contours of the two rules are substantially congruent, but not perfectly identical."); Paul R. Stone & Henry De La Garza, *Criminal Trespass and the Exclusionary Rule in Texas*, 24 ST. MARY'S L.J. 443, 451-52 (1993) (examining some of the basic similarities between the Texas Constitution and Fourth Amendment).

156. *See* Chavez v. State, 9 S.W.3d 817, 822 (Tex. Crim. App. 2000) (en banc) (describing the theory behind the rule as one to protect individuals from the "overzealousness of others in obtaining evidence to use against them"); Phillips v. State, 109 S.W.3d 562, 569 (Tex. App.—Corpus Christi 2003, pet. granted) (holding that the rule is necessary to deter police from acting in a manner which "could not have been reasonably believed to be lawful by the officers"); Paul R. Stone & Henry De La Garza, *Criminal Trespass and the Exclusionary Rule in Texas*, 24 ST. MARY'S L.J. 443, 457 (1993) (advancing that the exclusionary rule's "effect in promoting police compliance with warrant requirements cannot be questioned").

157. Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 620, 622-23 (1981).

parent in limiting the ability of law enforcement to procure illegal evidence while simultaneously sidestepping the Fourth Amendment and the Texas Constitution.

Similarly, this exclusion is consistent with the legislative history of Article 38.23,[158] which began as a response to law enforcement being accompanied by "a number of other gentlemen" to perform warrantless searches and seizures.[159] Applying Article 38.23 to exclude evidence illegally obtained by individuals within this category is consistent with both the state and federal constitutions as well as with its legislative history.

Applying the protections of Article 38.23 to individuals of this category is constitutionally mandatory, because states may only provide greater protections than the constitutional minimum and cannot subtract from this guarantee.[160] Federal law has clearly stated that the Fourth Amendment may only be invoked pursuant to some governmental action.[161] While private actors are obviously not governmental authorities, federal case law has offered protections against private individuals by converting their behavior to state action. In essence, absent a constitutional amendment or authority to the contrary, the exclusionary rule in Texas must provide the remedy of suppression to victims of illegal searches and seizures performed by these individuals.

2. Private Individuals Acting Independent from Government Authority Still Seeking Criminal Prosecution

Both the federal and Texas constitutions aim to deter law enforcement practices which run afoul of Fourth Amendment protections;[162] however, it is arguable whether this aim also encompasses private citizens acting independently of law enforcement, while still seeking to collect evidence for criminal prosecution.[163]

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158. *Id.* at 624-25.

159. Welchek v. State, 93 Tex. Crim. 271, 247 S.W. 524, 525 (1922).

160. WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.8 (3d ed. 2003); Thomas M. Melsheimer & David M. Finn, *Criminal Procedure: Confession, Search and Seizure*, 51 SMU L. REV. 839, 843 (1998); Paul R. Stone & Henry De La Garza, *Criminal Trespass and the Exclusionary Rule in Texas*, 24 ST. MARY'S L.J. 443, 450 (1993).

161. Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

162. *See* Comeaux v. State, 818 S.W.2d 46, 49 (Tex. Crim. App. 1991) (en banc) (holding that the actions of the individual did not allow the protections of Article 1, Section 9 of the Texas Constitution to apply for the same reasons they would not apply under the Fourth Amendment); Paul R. Stone & Henry De La Garza, *Criminal Trespass and the Exclusionary Rule in Texas*, 24 ST. MARY'S L.J. 443, 447 (1993) (comparing the similarities between the Texas and federal constitutions; yet noting how recent developments have led the Court of Criminal Appeals to interpret the two constitutions differently).

163. *See* Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 620, 626-27

In recalling the categorical breakdown of the three groups to whom the term "other person" may apply, category one includes specific agents of law enforcement. Conversely, the individuals of category two execute illegal searches or seizures absent this government presence. While the end result in obtaining culpable evidence for criminal prosecution still benefits law enforcement and the objective sought by an individual of this category is arguably the same as if the officer had obtained the evidence himself,[164] the Constitution limits its protection to state actions or the actions of private individuals acting as agents for the state.[165] Including this category among Article 38.23 remains inconsistent with the deterrent objectives of the constitutions, because these individuals are not state authority or acting as agents of the state.

While the objectives sought by the state and federal constitutions and the legislative intent of the statute do not appear to be congruous with imposing Article 38.23 upon this category of independent individuals, it is necessary to decide in which category these individuals reside. These individuals do not include those persons acting with of for law enforcement;

(1981) (commenting that the statutes giving law-enforcement-like authority to private citizens may not be within the constitutional parameters of requiring state action; however, Bubany and Cockerell indicate that it is logical to deny evidence obtained illegally by these persons when they go beyond the statutes providing them with law-enforcement-like powers). *But see* Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191, 227 (1981) (representing that Chapter 14 of the Code of Criminal Procedure is not an encouragement, but rather a minimization of allowing private individuals to perform typical law enforcement duties due to the language with the chapter which specifically restricts the powers of private individuals to perform these duties only when certain circumstances apply). The only instances in which a nonofficer may perform a citizen's arrest are when a felony or breach of the public peace has been committed within his presence or view. TEX. CODE CRIM. PROC. ANN. art. 14.01(a) (Vernon 1977). However, an officer has the ability to arrest without a warrant when any offense is committed within his presence or view. TEX. CODE CRIM. PROC. ANN. art. 14.01(b) (Vernon 1977); *see also* Woods v. State, 152 Tex. Crim, 338, 213 S.W.2d 685, 687 (1948) (defining breach of the peace as "any act or conduct inciting to violence or tending to provoke or excite others to break the peace . . . or which, by causing consternation and alarm disturbs the peace and quiet of the community"); Rodriguez v. State, 146 Tex. Crim. 206, 172 S.W.2d 502, 504 (1943) (justifying that a warrantless arrest based upon a breach of the public peace must be made by a person who actually witnesses the act or the attempt, and that it must be done when the act is committed); Samino v. State, 83 Tex. Crim. 481, 204 S.W. 233, 234 (1918) (representing an early case establishing a breach of the peace due to the defendant "shooting, hollering, and cursing").

164. Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 620, 625-27 (1981). Because these persons are acting with authority directly conferred to them by the state, and the legislature was concerned with "other person(s)" joining or assisting police in their own independent fashion, it seems necessary to stop these individuals with the same intentions of the police in order to protect privacy and deter the conduct. *Id.* at 626-27.

165. Burdeau v. McDowell, 256 U.S. 465, 467 (1921).

nevertheless, they still seek a criminal prosecution. Such individuals may consist of those persons who are not licensed or commissioned officers that would fall within the definition of "peace officer."[166] Such examples include security guards, night watchmen, or individuals acting upon statutes supplying them with arresting authority.[167]

Certain statutes supplying the power of citizens' arrest and other primarily law enforcement capabilities appear to give individuals power somewhat equivalent to that of the state;[168] therefore, it is not unreasonable to suggest that illegal actions performed by these individuals would similarly be an impermissible extension of state power.

Another plausible reason for including this category among those ripe for suppression is that Article 38.23 reflects Texas law going beyond the minimal requirements that the United States Constitution demands.[169] Consequently, if decision-makers interpret the statute to include only those private individuals acting as agents of the state, then such a construction would be the equivalent of the federal exclusionary rule obvi-

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166. TEX. CODE CRIM. PROC. ANN. art. 2.12 (Vernon Supp. 2004) (indicating that peace officers include sheriffs and their deputies, constables, marshals or police officers, rangers, district attorneys, agents of the Alcoholic Beverages Commission, airport security personnel, and park rangers).

167. *See* Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 620, 622-23 (1981) (analyzing to whom Article 38.28 should apply).

168. *See id.* (indicating that it makes sense to exclude tainted evidence procured by private individuals pursuant to "statutorily-encouraged" activity clothed as individual police powers).

169. Gillett v. State, 588 S.W.2d 361, 367 (Tex. Crim. App. 1979) (en banc) (Roberts, J., dissenting) (determining that courts can and have established stricter standards than the Fourth Amendment requires); Whisenant v. State, 557 S.W.2d 102, 102-04 (Tex. Crim. App. 1977) (suggesting that due process rights afforded by the federal government are only a minimum standard); Milton v. State, 549 S.W.2d 190, 192 (Tex. Crim. App. 1977) (expounding that state legislatures are free to adopt greater restrictions than the federal government); Butler v. State, 493 S.W.2d 190, 193 (Tex. Crim. App. 1973) (providing an example of where Texas law is stricter than the federal constitution); Olson v. State, 484 S.W.2d 756, 762 (Tex. Crim. App. 1972) (allowing states to provide greater constitutional safeguards); Phillips v. State, 109 S.W.3d 562, 568 (Tex. App.—Corpus Christi 2003, pet. granted) (indicating that the Texas exclusionary rule provides greater protection than the federal constitution); Carroll v. State, 911 S.W.2d 210, 219 (Tex. App.—Austin 1995, no pet.) (stating that the Texas exclusionary rule provides greater protection than the federal constitution); WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.8 (3d ed. 2003) (discussing the ability of the states to broaden Fourth Amendment protections beyond those guaranteed in the federal constitution); Thomas M. Melsheimer & David M. Finn, *Criminal Procedure: Confession, Search and Seizure*, 51 SMU L. REV. 839, 843 (1998) (expounding that Texas provides greater rights than the Fourth Amendment requires in the exclusionary rule); Paul R. Stone & Henry De La Garza, *Criminal Trespass and the Exclusionary Rule in Texas*, 24 ST. MARY'S L.J. 443, 450 (1993) (observing the greater amount of rights afforded by the Texas Constitution).

ously providing no greater protections than what the Fourth Amendment requires.

3. Private Individuals Acting Independent from Government Authority for Purposes Other Than Criminal Prosecution

Individuals acting for reasons other than pursuing criminal conviction are not acting for, as, or with state authorities, and their individual intentions are entirely independent of seeking a criminal prosecution.[170] Although law enforcement would certainly benefit from such evidence, the procurement of such was in no way a result of their influence.[171] Because individuals among this category do not seek criminal prosecutions, suggesting that these persons would be deterred from conducting their illegal actions by making the evidence they procured inadmissible in a criminal trial is ill-founded.[172] Ultimately, inclusion of these individuals does not comport with the purpose of Article 38.23, the Fourth Amendment, or the Texas Constitution as a deterrent upon government authority.[173]

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170. *See* Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 626 (1981) (indicating that persons acting for, as, or with police officers have been regarded as "de facto officers"). Any person acting as a "de facto officer" has equal rights to an officer of the law when executing a citizens' arrest, search, or seizure under statutory authority. *Id.*

171. *See id.* at 628 (explaining the state's benefit despite its inaction). However, a difference is recognized between private individuals acting with statutory authority to perform a "public function" and those whose conduct involves a purely private interest. *Id.*

172. *See* Paul G. Reiter, Annotation, *Admissibility, In Criminal Case, of Evidence Obtained by Search by Private Individual*, 36 A.L.R.3d 553, 558 (1971) (stating that a "silver platter" argument is plausible, however, the deterrent rationale is not a valid argument for extending the exclusionary rule to individuals acting in a private capacity).

173. *See* Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 628 (1981) (suggesting that, "[c]onsidering the evil to which article 38.23 is directed, it is reasonable to conclude that it was not intended to take into account persons not able to claim the statutory privilege, due to the availability of alternative sanctions as to them"); *see also* Paul G. Reiter, Annotation, *Admissibility, In Criminal Case, of Evidence Obtained by Search by Private Individual*, 36 A.L.R.3d 553, 558 (1971) (illustrating that the deterrent purpose is nonexistent upon lawless private searches because private individuals are typically not familiar with the exclusionary rule and are also motivated for reasons separate from securing criminal convictions). The rationale that the deterrent purpose does not apply with private individuals is best witnessed when circumstances are such that a private search uncovered evidence accidentally or without regard to its evidentiary value. *Id.* However, it is certainly arguable that this rationale should be applied to private investigators or security officers who perform specifically to procure evidence to secure criminal convictions and usually do so with full knowledge of the law. *Id.* Although the *Zelinski* court was overruled, it also noted that private security guards have the ability to detain suspects, conduct investigations, and make arrests identical to those powers of the police, yet without the special privileges and protections afforded official officers. State v. Zelinski, 594 P.2d 1000, 1005 (Cal. 1979) (en banc). The court reasoned that the private security personnel should

Perhaps the only plausible reasons for including these individuals within the category is (1) to avoid drawing a line between government and private actors due to a fear that without such inclusion that it would allow for consistent liberty invasions, or (2) that it helps uphold judicial integrity because it results in judges disapproving of illegal means of procuring evidence by anyone.

B. *Minority Interpretation*

Although the Court of Criminal Appeals's plain language interpretation of Article 38.23's "other person" language controls, opposing viewpoints are still common.[174] The minority of judges on the Texas Court of Criminal Appeals interpreted Article 38.23 to only include those individuals who fall within the first category.[175] The *Johnson* dissent agreed that the state's analysis was correct in limiting "other person" to encompass only private individuals acting in concert with state actors.[176] Furthermore, the dissent advanced that the state's interpretation is the only interpretation that correctly reflects the legislative intent behind Article 38.23.[177] The dissent acknowledged the plain language approach described in *Boykin*; however, it also cited sections of the Texas Govern-

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be included within the constitutional constraints of Article 1, Section 13 of the California Constitution, which only excluded evidence pertaining to state action, because their actions were performing a public function of bringing violators to justice and were not actions of a purely private capacity. *Id.* at 1005-06. Justice Jefferson also recognized that *Zelinski* was distinguishing between those acting in the interests of the state rather than in an exclusively private capacity. *In re* Bryan S., 110 Cal. App. 3d 144, 153 (Cal. Ct. App. 1980) (Jefferson, J., dissenting). However, Justice Jefferson states, "the application of the exclusionary rule to the . . . instant case would promote the public interest by precluding the threat to privacy rights of all . . . and restrain abuses by law enforcement personnel and by private vigilante citizens acting as law enforcement personnel and with the same purpose." *Id.* at 153.

174. *See* State v. Johnson, 939 S.W.2d 586, 587 (Tex. Crim. App. 1996) (en banc) (McCormick, J., dissenting) (expressing an exact opposite view of the majority's construction of "other person"); Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 625-27 (1981) (providing a detailed analysis of the present interpretations of "other person(s)" and stating that a more rational view would certainly consider only individuals acting as agents of the government or those executing law-enforcement-like duties via statutory authority); Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191, 230 (1981) (supplying an analysis of the many interpretational issues among Article 38.23, and not just "other person(s)" language and suggesting a statutory approach which will avoid a constitutional judgment when a more conservative stance is available as well as giving a voice to the Legislature in taking a position as to whom "other person" should apply).

175. *Johnson*, 939 S.W.2d at 589 (McCormick, J., dissenting).

176. *Id.* at 588.

177. *Id.* at 589.

ment Code and the Code of Criminal Procedure representing a court's ability to consider other factors when construing a statute, even one with plain language.[178]

Ultimately, the clear purpose behind the existence of Article 38.23 arose during Prohibition in order to preclude private gentlemen assisting law enforcement.[179] Why would the Court of Criminal Appeals not interpret Article 38.23 according to its proper history? Remembering the court's implementation of the *Boykin* analysis,[180] are the issues really so plain on their face so as to exclude an analysis of its legislative history?

Article 1.26 of the Texas Code of Criminal Procedure states that the Criminal Code shall be liberally construed.[181] While the *Johnson* majority referred to a dictionary for a definition of "other,"[182] a definition of "liberal interpretation" and "shall" also seems appropriate. Black's Law Dictionary defines liberal interpretation as, "[i]nterpretation according to what the reader believes the author reasonably intended, even if, through inadvertence, the author failed to think of it."[183] Shall is defined as, "[h]as a duty to; more broadly, is required to."[184] As a result, Article 1.26 demands the court to construe the Criminal Code according to what it believes the legislature intended.[185] How, then, can the majority construction avoid an analysis of the legislative history of Article 38.23 when the Code calls for it when there is obvious ambiguity in the language?

The other factors also available for judicial consideration include the objective sought, the circumstances surrounding the statute's enactment, the legislative history, and the consequences of a particular construction.[186] In *Johnson*, Judge McCormick acknowledged the ability of the court to effectuate the legislature's intent when disregarding the plain language when the factors in Section 311.023 clearly illustrate the legislature's intentions that the statute be construed in a different manner.[187] Certainly the objective sought was to deter unreasonable searches; how-

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178. *Id.*

179. Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 626-27 (1981).

180. *See Johnson*, 939 S.W.2d at 587 (indicating that *Boykin* provides the court with an assumption that the legislature intended Article 38.23 apply to all persons due to is plain language); *see also* Boykin v. State, 818 S.W.2d 782, 785-86 (Tex. Crim. App. 1991) (using the plain language rule).

181. TEX. CODE CRIM. PROC. ANN. art. 1.26 (Vernon 1977).

182. State v. Johnson, 939 S.W.2d 586, 587 (Tex. Crim. App. 1996) (en banc).

183. BLACK'S LAW DICTIONARY 824 (7th ed. 1999).

184. BLACK'S LAW DICTIONARY 1379 (7th ed. 1999).

185. TEX. CODE CRIM. PROC. ANN. art. 1.26 (Vernon 1977).

186. TEX. GOV'T CODE ANN. § 311.023 (Vernon 1998).

187. State v. Johnson, 939 S.W.2d 586, 589 (Tex. Crim. App. 1996) (en banc) (McCormick, J., dissenting).

ever, the circumstances and history illustrate it was to deter private searchers acting as agents of the state performing to punish Prohibition violators.

C. *The New* Jenschke *Exception*

Jenschke v. State[188]contained a similar fact scenario and an identical "other person(s)" analysis to *Johnson*; however, the *Jenschke* court's conclusion would have provided *Johnson* with quite a different conclusion. In *Johnson*, the court specifically held that the conduct of burglary was illegal and thus required suppression of the information, despite having given the evidence directly to the police.[189] On the other hand, the *Jenschke* opinion stated that "when a person who is not an officer or an agent of an officer takes property that is evidence of crime, without the effective consent of the owner and with the intent to turn over the property to an officer, the conduct may be non-criminal even though the person has intent to deprive the owner."[190]

Justice Meyers's dissent characterized this holding as "creat[ing] an 'intent to turn evidence over to the police' exception."[191] In essence, the *Jenschke* court has provided an outlet for those individuals who fall in category two, basically those with the same prosecutorial intentions as the state. The *Jenschke* court has now provided an exception which takes cases among category two out of the suppressive reach of exclusionary rule. In that regard, this result will subtract from Texas's broader exclusions and appear more similar to the federal exclusionary rule.[192] Accordingly, the *Jenschke* decision deteriorates nearly a century of legislative and judicial approval of broader rights pursuant to continual approval of the language provided in Article 38.23(a).[193]

D. *New Proposal of "Other Person" Language in Article 38.23(a)*

A new interpretation of Article 38.23 is necessary due to the overinclusive reach of the majority approach, underinclusive reach of the minority approach, and due to the new "intent to turn evidence over the police exception." A satisfactory interpretation would comport with the objec-

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188. 2004 WL 2347874 (Tex. Crim. App. Oct. 20, 2004).

189. State v. Johnson, 939 S.W.2d 586, 589 (Tex. Crim. App. 1996) (en banc).

190. *Jenschke*, 2004 WL 2347874, at *3.

191. *Id.* at *5.

192. *See* U.S CONST. amend IV (providing the security of the people against unreasonable searches and seizures performed by state).

193. *See* Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191, 196-204 (1981) (providing for the Texas Legislature's acceptance of the language and the broader protections by leaving the wording virtually unamended).

tives of the federal and Texas constitutions, deterring law enforcement from performing unreasonable searches and seizures, while still allowing for Texas's broader protections than what is required by the Fourth Amendment of the United States Constitution. However, in attaining these objectives and retaining greater individual protections, it is impossible to reflect the suggested legislature's intent of establishing the statutory exclusionary rule as a restriction only upon private individuals acting as agents of state authority.[194]

A better analysis of "other person(s)," one which would compensate for the greater protections afforded citizens under the Texas Constitution and draw back the over inclusive reach of the present approach, would be to include within the grasps of the Article 38.23(a) exclusion, only those persons amongst categories one and two (only individuals acting as agents of government authority and/or individuals acting independent from government authority) yet still pursue the same goals of criminal prosecution. A better approach would allow for the third category of individuals to remain free from Article 38.23(a)'s reach.

The clean sweep approach is overinclusive, due to the fact that it encompasses those individuals within the third category who act for purposes other than criminal prosecutions. Including these individuals within the reach of Article 38.23 is inconsistent with the deterrent objectives of the federal and Texas constitutions, and it goes far beyond the legislative intentions to preclude those individuals acting as agents of law enforcement. A suggested benefit of implementing the plain language approach is that the cost of including all persons is not unreasonably high.[195] However, this cost must be properly evaluated. A plausible cost is that including the third category of private individuals would result in the allowing of the exclusionary rule to be applied when it neither furthers the objectives of the federal or state constitutions nor encompasses the legislative intent of the statute, thus allowing for criminals to go free due to the unnecessary reach of a clean sweep approach.[196] Such a cost is certainly unreasonable. Justice McCormick illustrated this "cost" within the hypothetical he provided in the *Johnson* dissent.[197] A plausible explanation of a "cost" is best explained as an absurd result. If a "cost" is in

194. *Id.*

195. *See* Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 620 (1981) (referencing that one advantage to the majority's "clean sweep" is that costs are not unreasonably high in light of the low number of private searches).

196. *See* Welchek v. State, 93 Tex. Crim. 271, 247 S.W. 524, 529 (1922) (rejecting the federal exclusionary rule because it would evade the law enforcement's primary efforts to place criminals where they ought to be).

197. *Johnson*, 939 S.W.2d at 589 (McCormick, J., dissenting).

fact an absurd result, then *Boykin* states that an exception exists to a plain language reading of a statute if doing so provides for absurd results.[198]

An additional benefit of the plain language approach, which is in direct contrast to the minority approach, is that no line needs to be drawn between private individuals and those acting as agents of law enforcement.[199] However, the proposed interpretation does not make it necessary to draw such a distinct line either. Rather, the issue will be one of intentions, mainly whether the private actor's intentions, at the time of the illegal procurement, were for the purpose of furthering a criminal prosecution or whether the intentions were for pursuing some other individual reasons.[200] Because "officer or other person" remains the statutory language of Article 38.23,[201] the only determination necessary will consist of a fact finding inquiry as to whether a private actor was seeking to further a criminal prosecution at the outset of his or her illegal actions. Thus, this approach may also enjoy the benefits of evading the confusion in drawing a line between private actors and private actors performing as agents of the state.[202]

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198. Boykin v. State, 818 S.W.2d 782, 785-86 (Tex. Crim. App. 1991) (en banc).

199. Okunieff v. Rosenberg, 996 F. Supp. 343, 348 (S.D.N.Y. 1998) (citing three possible tests for determining whether a persons private conduct qualifies as state action). The three tests are known as "(1) the state compulsion test, (2) the close nexus/joint action test, and (3) the public function test." *Id.* The state compulsion test defines a private action as state action if it is determined that the state has coerced or encouraged the individual's choice. *Id.* at 348-49 (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)). The second test requires a "sufficiently close nexus" between the private actor and the state. *Id.* at 349. The public function test equates the private activity to that of the state's when the individual performs a role that is normally the exclusive duty of the state. *Id.* Other courts have stressed that the determination of whether the requisite agency relationship exists between a private actor and the government is affected by two critical factors: (1) whether the government was aware of and assented to the illegal conduct, and (2) whether the private searcher acted with intent to support law enforcement or whether the search was dictated by other private interests. United States v. Jarrett, 338 F.3d 339, 344 (4th Cir. 2003); United States v. Bazan, 807 F.2d 1200, 1202-03 (5th Cir. 1986).

200. Some courts have recognized this distinction and are willing to establish a line based upon the interests of the private actor. *See Jarrett*, 338 F.3d at 344 (explaining that intent to assist law enforcement or the pursuit of independent motivations are primary factors in determining whether individual actions will be attributed to the state); *In re* Bryan S., 110 Cal. App. 3d 144, 150 (Cal. Ct. App. 1980) (Jefferson, J., dissenting) (arguing that when a private individual conducts a search or seizure in the interests of the state, the search constitutes an action invoking "the constitutional provisions against unreasonable searches and seizures").

201. TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 2004).

202. *See* Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 620 (1981) (com-

The Texas Court of Criminal Appeal's analysis in *Jenschke*, creating a new exception dependent upon a private individual's relinquishment of illegally obtained evidence to law enforcement, is not an adequate resolution of the "other person(s)" interpretation.[203] The *Jenschke* court merely provides an exception for individuals acting within the second category (of persons who act independent of government authority, yet with the same intention to secure evidence for criminal prosecution). By holding that the admission of illegally obtained evidence may be permissible provided that the evidence is turned over to law enforcement,[204] the court has eroded much of the reason why Texas has afforded the "other person(s)" language to survive—the ability of Texas to provide its citizens broader protections than that afforded by the United State Constitution.[205] While *Jenschke* may provide, in limited circumstances, some admissible evidence with respect to that obtained by persons in category three similar to the proposal of this Comment, the decision simultaneously destroys the broader protections provided by this state which are contrary to the proposal. Ultimately, *Jenschke* provides nothing more than additional confusion.

An argument against such a proposal may be that such an exception will still allow for liberty invasions by these private actors. Yet, as noted earlier, an advantage of the low "costs" of implementing the plain language approach was directly attributed to the low number of private searches.[206] Furthermore, the vast majority of states only allow the application of their exclusionary rule to parallel that of the federal constitution, and thus does not provide further individual protections.[207] It is

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menting on the advantage of avoiding this difficult task when the majority construction is applied).

203. *Id.* at *1, *4.

204. *Id.* at *1.

205. Thomas M. Melsheimer & David M. Finn, *Criminal Procedure: Confession, Search and Seizure*, 51 SMU L. REV. 839, 843 (1998) (describing the states' ability to provide greater protections than the Constitution); Chuck Miller & David Coale, *Annual Survey of Texas Law*, 46 SMU L. REV. 1211, 1212-13 (1993) (recognizing a state's authority to enlarge a citizen's rights beyond the confines of the Constitution). .

206. *Id.*

207. George E. Dix, *Nonconstitutional Exclusionary Rules in Criminal Procedure*, 27 AM. CRIM. L. REV. 53, 66-67 (1989) (citations omitted) (providing an extensive analysis of statutory exclusionary rules used by the states).

> American legislatures have, to some extent, explicitly provided exclusionary remedies for violation of nonconstitutional law requirements. It is useful to consider separately two types of such statutory provisions. Some are relatively broad and direct or authorize exclusion for all or many state law violations. Others are comparatively narrow, often providing an exclusionary remedy only for a particular statutory requirement or a single set of requirements. Both types of statutes, however, have provided significant problems in application. . . . Very few American jurisdictions have

reasonable to infer that if consistent liberty invasions were occurring among the states, exclusionary rules similar to the current clean sweep Texas statute would have been enacted. While the constitutional deterrent as to law enforcement is not present among individuals of the third category, a deterrent for these private individuals may exist in tort law or criminal law, such as conversion, theft, or criminal trespass.

Another possible argument against the proposal is that the evidence is still tainted, therefore allowing such evidence to be admissible is an implicit approval for illegal conduct. However, such an argument is without merit. Allowing such evidence, so long as the intentions of the private searcher were not to procure a criminal prosecution, is an explicit disap-

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> across-the-board statutory exclusionary rules. Since 1925, Texas statutory law has required exclusion of evidence obtained in violation of the laws or constitutions of either the United States or the State of Texas. North Carolina requires by statute the suppression of evidence obtained as a result of a "substantial violation" of its Criminal Procedure Act. . . . Legislatures have shown greater willingness to address exclusionary rule matters with regard to relatively narrow areas of statutory law. The primary example . . . is the federal electronic surveillance statute. . . .

Id. Montana is the only other court that provides its search and seizure provisions to government and private actors, and this is due to its establishment of the right to privacy within its constitution and the nature of the invasion is the determinative factor of admissibility, rather than the invader's purpose or identity. Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 621 (1981). Article 1, Section 9 of the Texas Constitution guarantees protection from unreasonable searches or seizures and has not been interpreted as establishing an independent privacy right, thus distinguishing Texas from Montana. *Id.* at 621-22; *see also* Fitzgerald v. State, 837 A.2d 989, 1035 n.4 (Md. Ct. Spec. App. 2003), *cert. granted*, 846 A.2d 401 (Md. 2004) (finding that "Maryland has no independent exclusionary rule . . . [and] has always been among the overwhelming majority of American states that have . . . opted against an exclusionary rule for search and seizure violations. The only extant exclusionary rule that the appellant can call upon is that imposed . . . by *Mapp v. Ohio*."). Texas and North Carolina are two of the only states that allow the broad operations of the exclusionary rule to apply as a clean sweep. George E. Dix, *Nonconstitutional Exclusionary Rules in Criminal Procedure*, 27 AM. CRIM. L. REV. 53, 65 (1989). North Carolina requires suppression of evidence if:

(1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or

(2) It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining whether a violation is substantial, the court must consider all the circumstances, including:

a. The importance of the particular interest violated;

b. The extent of the deviation from lawful conduct;

c. The extent to which the violation was willful;

d. The extent to which exclusion will tend to deter future violations of this Chapter.

N.C. GEN. STAT. § 15A-974 (2003).

proval for the conduct committed by the defendant on trial.[208] Such allowance would still leave open the avenues of criminal prosecution or tort allegations against the illegal procurer.[209]

The legislature has met many times since the inception of Article 38.23 and the article is certainly not devoid of analysis or criticism. Nevertheless, no amendment has changed the phrase "officer or other person."[210] An obvious implication that follows from the continued inclusion of the language is that the legislature has persisted in supplying greater protections against unreasonable searches and seizures than what the United States Constitution requires. This could mean that the legislature is perfectly content with the article the way it is or it is possible that the legislature has not found a more prominent solution to retain the broader protections while excluding individuals of the third category. This is certainly possible, considering that Texas is one of the rare states that applies the exclusionary rule to all persons. Nevertheless, an exception to Article 38.23 is needed to exclude such individuals from a rule that has needlessly included them.[211]

The new proposal may be accomplished in several ways. First the legislature obviously has the ability to enact a law. In this instance, Article 38.23 may be rewritten, or the legislature may add another exception to the exclusionary rule.[212] Second, the Texas Court of Criminal Appeals

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208. *See* Commonwealth v. Corley, 491 A.2d 829, 832 (Pa. 1985) (rejecting the claim that the use of evidence, procured illegally by a private individual, amounts to a ratification of the individuals conduct).

209. *See* Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 628 (1981) (contending that the exclusionary rule may be the only sanction available against police misconduct; however, private persons acting without statutory exemptions will be subject to alternative sanctions).

210. TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 2003).

211. A possible exclusion would be necessary due to Texas courts' firm stance that only express exceptions will be applied to Article 38.23; therefore enforcing only the good faith exception expressed in Article 38.23(b) of the Texas Code of Criminal Procedure and rejecting the independent source, attenuation of taint, and inevitable discovery exceptions applied by federal authorities. Garcia v. State, 829 S.W.2d 796, 798-99 (Tex. Crim. App. 1992) (en banc); Chuck Miller & David Coale, *Criminal Law*, 46 SMU L. REV. 1211, 1212 (1993).

212. *See Garcia*, 829 S.W.2d at 796, 799-800 (discussing that "courts may interpret, but they may not amend. For this reason, while we are at liberty to impose exceptions upon court made exclusionary rules, we may not create exceptions to statutory exclusionary rules. Unless a statute itself can fairly be read to include exceptions, no exceptions may be imported by judicial fiat."). Article 38.23 contains an exception only for an "officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause." TEX. CODE CRIM. PROC. ANN. art. 38.23(b) (Vernon Supp. 2003). "Article 38.23 does expressly contain an exception for good faith reliance of . . . officers . . . [but o]n its face . . . contains no others." *Garcia*, 829 S.W.2d at 796, 799.

still has the capability to change its interpretation of "other person(s)."[213] A court must only give adherence to the intent of the legislature when the statute's meaning is unambiguous.[214] Here, however, subsequent cases, scholars, and this Comment have illustrated that Article 38.23(a) is anything but clear. Thus, the court may interpret Texas's exclusionary rule to include only those individuals acting in concert with the government, and/or individuals acting free of government authority, but with the same pursuit of criminal conviction.

IV. CONCLUSION

The Texas exclusionary rule, Article 38.23 of the Texas Code of Criminal Procedure, is still unclear and its interpretation has been the topic of numerous debates, despite its lengthy existence. While the Texas courts have held the plain meaning "clean sweep" approach will apply to "other persons," there is no shortage of dissenting opinions or scholarly publications that have provided for alternative interpretations of "other person." A frequently argued justification is that for "other person" to stay consistent with the legislative history of Article 38.23, it should be applied only to those persons acting in concert or at the request of law enforcement.[215] While this argument honors the original intent behind Article 38.23 as a response to *Welchek*, it cannot withstand the fact that the language has been unamended by the legislature for seventy-eight years or that the presence of court decisions have supported a broadening of the protections of the Texas Constitution.

Interpreting Article 38.23 to exclude evidence of those individuals acting merely as agents is underinclusive in scope. It fails to include those individuals acting under statutory authority whose conduct and purpose mirrors that of law enforcement.[216] Therefore, the minority interpretation of Article 38.23 fails to provide any protections beyond that of the federal minimal requisite.

On the other hand, the majority approach encompasses all three categories of private actors, instead of only encompassing the agency category.[217] While advantages exist to such an approach, it is too far-sighted and excludes some evidence which does not comport with the constitu-

213. *Garcia*, 829 S.W.2d at 796, 799-800.

214. *Id.*

215. State v. Johnson, 939 S.W.2d 586, 588-89 (Tex. Crim. App. 1996) (en banc); *see also* Paul G. Reiter, Annotation, *Admissibility, In Criminal Case, of Evidence Obtained by Search by Private Individual*, 36 A.L.R.3d 553, 565 (1971) (exploring the possibility of arguing the silver platter doctrine).

216. Charles P. Bubany & Perry J. Cockerell, *Excluding Criminal Evidence Texas-Style: Can Private Searches Poison the Fruit?*, 12 TEX. TECH L. REV. 611, 626 (1981).

217. *Id.* at 620.

tional intentions or the legislative history, thus making the clean sweep too broad and sometimes unnecessary.

Article 38.23 will continue to be debated because its results are unsatisfactory. The leading interpretation is, at present, overbroad in scope, yet the leading dissent is underinclusive in nature. Neither approach will uphold both the purpose of the Texas Constitution and that of the Fourth Amendment. Nor will these approaches comply with the legislative intent of the statute while still excluding those individuals who do not intend to act within the purpose of either. While the new proposal cannot also obtain both the constitutional objectives and simultaneously exclude only private individuals acting as agents, it does reflect the heightened protections desired by the Texas courts and legislature, while surpassing the purpose of these protections.

The present approach of including private individuals who illegally obtain evidence without the intentions of furthering criminal prosecutions within the scope of Article 38.23 of the Texas Code of Criminal Procedure is an unnecessary inclusion because the exclusionary rule will not deter any future intrusions committed by these individuals. Rather, it facilitates the absurd result of preventing nothing while simultaneously allowing for criminals to go unpunished.