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ARRESTS IN TEXAS'S "SUSPICIOUS PLACES": A RULE IN SEARCH OF REASON

by Gerald S. Reamey[*]

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I. INTRODUCTION

Imagine the world of the 1850's in Texas. Especially, imagine the law of Texas in those decades even before "Judge" Roy Bean had proclaimed himself justice of the peace.[1] So remote is that time and setting, and so volatile is the law of criminal procedure, that it is hard to conceive of a statute from that age surviving the intervening century-and-a-half. Nevertheless, a current exception to Texas's arrest warrant requirement can be traced directly to a virtually identical statute from those pre-Civil War days when the Supreme Court of the United States sat in "dingy quarters" in the basement of the Capitol, and Chief Justice Roger Taney's Court produced the now-infamous decision in *Dred Scott v. Sandford*.[2]

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1. Roy Bean assumed the judicial title in 1882. The reference to "Judge" Bean is intended only to establish context, and not to suggest that Texas law in the nineteenth century was influenced significantly by this colorful figure.

2. BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 69 (1993); 60 U.S. 393, 454

When the language of the current article 14.03(a)(1) of the Texas Code of Criminal Procedure first appeared in Texas law, landmark decisions like *Terry v. Ohio* and *Miranda v. Arizona* were more than a century in the future.[3] The criminal procedure "revolution" of the Warren Court could not have been imagined by frontier Texas lawmakers.[4] It is a small wonder that today's courts find the statute confusing; and confusion, whether advertent or inadvertent, invites result-oriented, illogical, or unpersuasive judicial decisions.[5] Courts' attempts to make sense of article 14.03(a)(1) arguably have failed in each of these ways over the statute's long life.[6]

II. TEXAS'S ARREST WARRANT REQUIREMENT

To understand the current statute, one must consider not only its origins, but the framework of procedural rules in which it is set. It has been said that "Texas law's most pervasive requirement regarding detentions is its demand for an arrest warrant."[7] The preference in Texas law that arrests be made pursuant to a warrant is long-standing and strong.[8] This preference is just one of the ways in which Texas criminal procedure law differs from the Fourth

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(1856).

3. TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(1) (Vernon Supp. 2000); 392 U.S. 1, 30 (1968); 384 U.S. 436, 492 (1966).

4. *See* Bruce G. Burner, *Criminal Procedure in the Current Term*, 33 VAL. U.L. REV. 23, 24 (1998); Daniel Givelber, *Litigating State Capital Cases While Preserving Federal Questions: Can It Be Done Successfully?*, 29 ST. MARY'S L.J. 1009, 1021 (1998); Kermit L. Hall, *The Warren Court: Yesterday, Today, and Tomorrow*, 28 IND. L. REV. 309, 320 (1995); Margaret Raymond, *Rejecting Totalitarianism: Translating the Guarantees of Constitutional Criminal Procedure*, 76 N.C. L. REV. 1193, 1196 (1998); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2506 (1996). The *Warren Court* "revolution" describes a body of decisions by the Supreme Court of the United States under the leadership of Chief Justice Earl Warren that reshaped constitutional interpretation in many fields of public law, but perhaps most notably in constitutional criminal procedure. *See* Kermit L. Hall, *The Warren Court: Yesterday, Today, and Tomorrow*, 28 IND. L. REV. 309, 320 (1995). The term is used repeatedly, and with apparent wide-understanding, to characterize a dramatic shift toward recognition of individual rights. *See id.*

5. *See* Gerald S. Reamey, *Up in Smoke: Fourth Amendment Rights and the Burger Court*, 45 OKLA. L. REV. 57, 60-63 (1992) (explaining the strategic use of confusion in Fourth Amendment adjudication); Gerald S. Reamey, *When "Special Needs" Meet Probable Cause: Denying the Devil Benefit of Law*, 19 HASTINGS CONST. L.Q. 295, 322-26 (1992) (finding the deliberate use of "reasonableness" to diminish the scope and vitality of Fourth Amendment guarantees).

6. *See* sources cited *supra* note 5.

7. GEORGE E. DIX & ROBERT O. DAWSON, 40 TEXAS PRACTICE § 7.50 (1995 & Supp. 1999).

8. *See* Randall v. Texas, 656 S.W.2d 487, 490 (Tex. Crim. App. 1983) ("[A] police officer should always obtain an arrest warrant when possible"); Hardison v. Texas, 597 S.W.2d 355, 357 (Tex. Crim. App. 1980); Honeycutt v. Texas, 499 S.W.2d 662, 663-64 (Tex. Crim. App. 1973) (showing that the court begins with "the familiar constitutional precept" that peace officers should always obtain an arrest warrant); ROBERT R. BARTON, TEXAS SEARCH AND SEIZURE § 1.021 (2d. ed. Supp. 1999); Gerald S. Reamey & J. Daniel Harkins, *Warrantless Arrest Jurisdiction in Texas: An Analysis and a Proposal*, 19 ST. MARY'S L.J. 857, 860 (1988) (illustrating that courts in Texas begin with the premise that the Texas Constitution requires an arrest by warrant); DIX & DAWSON, *supra* note 7, § 7.50.

Amendment's requirements.[9] Whether the warrant requirement is mandated by the Texas Constitution or by statute has been subject to debate.[10] However, the proposition that a warrant is necessary in the absence of excusing circumstances was not questioned until 1998.[11]

III. NEW FEDERALISM

Riding the crest of "new federalism," the Texas Court of Criminal Appeals made clear in *Heitman v. Texas* that the Texas Constitution is an independent compact with the citizens of the state which may provide greater protections than the United States Constitution, even when the language of the two charters is virtually identical.[12] Arguably, new federalism and *Heitman*

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9. *See* GERALD S. REAMEY & CHARLES P. BUBANY, TEXAS CRIMINAL PROCEDURE 20-21 (5th ed. 1999). Stating this difference Reamey and Bubany said:

> Warrantless arrests are commonplace in Texas, as in other jurisdictions, despite the relatively strong preference that exists for arrest by warrant. The significance of this preference in Texas is illustrated by comparison of Texas law with the requirements of the Fourth Amendment, which ostensibly contains a similar preference. The federal constitution has been interpreted to permit a warrantless arrest in a "public place," even if the officer could easily have obtained a warrant. *United States v. Watson*, 423 U.S. 411 (1976). By contrast, in Texas arrest without warrant must be justified by the existence of explicit statutory authority. *Dejarnette v. Texas*, 732 S.W.2d 346, 349 (Tex. Crim. App. 1987). Warrantless arrests for many kinds of misdemeanor offenses are not generally permitted, and even for more serious crimes, Texas law requires more than just probable cause and finding the offender in a public place.

Id.

10. *See Honeycutt*, 499 S.W.2d at 663. The Texas Court of Criminal Appeals referred to the arrest warrant requirement as a "familiar constitutional precept," but did not explicate the basis in the Texas Constitution for this characterization. *Id.* However, the court did cite the United States Supreme Court's opinion in *Beck v. Ohio*, wherein the Court suggested that "an after-the-event justification" for an arrest would undermine "the protections of the Fourth Amendment" and subject citizens to the unbridled discretion of the police. *Id.* at 664 n.1 (citing 379 U.S. 89, 96-97 (1964)). Presumably, and for the same reasons, the guarantees contained in Article I, Section 9 of the Texas Constitution are jeopardized by avoiding prior judicial authorization. *See* Reamey & Harkins, *supra* note 8, at 860. Reliance on a strictly constitutional argument for requiring warrants, though, is not entirely satisfactory. *See id.* If either constitution requires an arrest warrant, then how can a court engraft exceptions on the rule, and what authorizes the Texas Legislature to give statutory permission for warrantless arrests? *See id.* Perhaps the answer is that both constitutions require "reasonableness" rather than warrants, and that a warrant is simply one way to demonstrate compliance with the reasonableness requirement. *See generally* Gerald S. Reamey, *When "Special Needs" Meet Probable Cause: Denying the Devil Benefit of Law*, 19 HASTINGS CONST. L.Q. 295, 300-01 (1992) (analyzing the Federal Constitution). Hence, there often is said to be a preference for warrants, rather than a requirement. *See id.* In any event, it seems clear from the substantial body of case law reiterating the warrant preference, as well as from the frequent employment of statutory exceptions to justify warrantless arrests, that at least a strong preference for warrants is firmly entrenched in Texas law. *See* DIX & DAWSON, *supra* note 7, § 7.50; Reamey & Harkins, *supra* note 8, at 860. This continuing debate over the source of the requirement or preference was altered rather dramatically in 1998 by the Texas Court of Criminal Appeals' decision that Article I, Section 9 of the Texas Constitution does not require warrants. *See* Hulit v. Texas, 982 S.W.2d 431, 436 (Tex. Crim. App. 1998); discussion *infra* Parts VI-X.

11. *See Hulit*, 982 S.W.2d at 431.

12. 815 S.W.2d 681 (Tex. Crim. App. 1991); *see* M. P. Duncan III, *Terminating the Guardianship: A New Role for State Courts*, 19 ST. MARY'S L.J. 809, 832-56 (1988). Writing for the *Heitman* court,

were responses to the so-called "counter-revolution"—counter to the criminal procedure "revolution" of the Warren Court—taking place in the increasingly conservative United States Supreme Court.[13] Whatever its genesis, the core principle of cases like *Heitman* was that the federal constitution is a floor rather than a ceiling, and that states are free to offer their citizens more, but not less, protection from the state than does the United States Constitution.[14]

Relatively little came of *Heitman*, perhaps because the elected Texas Court of Criminal Appeals itself took a conservative turn. However, there was no indication that the guiding principle of new federalism would not continue as a kind of "life preserver" to be used in case the diminution of privacy guarantees by the federal judiciary became intolerable. What was not foreseen was that the core principle of *Heitman* would be stood on its head by the Texas Court of Criminal Appeals only seven years later in a case styled *Hulit v. Texas*.[15]

IV. *HULIT V. TEXAS* AND THE "NEW" NEW FEDERALISM

Hulit presented an unusually "pure" claim that Article I, Section 9 of the Texas Constitution—the state analogue to the Fourth Amendment—had been violated.[16] Police officers were dispatched to investigate a report that a driver

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Judge Miller explained:

> This Court has repeatedly recognized that Art. I, § 9 of the Texas Constitution and the Fourth Amendment to the United States Constitution are the same in all material aspects. The two provisions serve to safeguard individuals' privacy and security against arbitrary invasion by governmental officials.
>
> Under our system of federalism, however, the states are free to reject federal holdings as long as state action does not fall below the minimum standards provided by federal constitutional protections. Likewise, a state is free as a matter of its own law to impose greater restrictions on police activity than those the Supreme Court holds to be necessary upon federal constitutional standards.

815 S.W.2d at 682-83 (citations omitted).

13. *See* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 62 (Vincent Blasi ed., 1983); Gene R. Nichol, Jr., *An Activism of Ambivalence*, 98 HARV. L. REV. 315 (1984); Gerald S. Reamey, *Up in Smoke: Fourth Amendment Rights and the Burger Court*, 45 OKLA. L. REV. 57, 60-63 (1992); *cf.* Duncan III, *supra* note 12, at 845 (determining that the public is not receptive to the idea of "new federalism" because of conservative reaction to Warren Court's expansion of civil liberties). Whether, and to what extent, there was a "counter-revolution" beginning with the chief justiceship of Warren Burger continues to be the subject of much debate.

14. *See Heitman*, 815 S.W.2d at 690 (citing LeCroy v. Hanlon, 713 S.W.2d 335, 338 (Tex. 1986) ("The federal constitution sets the floor for individual rights; state constitutions establish the ceiling. State constitutions cannot subtract from the rights guaranteed by the United States Constitution, but they can provide additional rights to their citizens.")); Duncan III, *supra* note 12, at 855 (stating "[The] Supreme Court merely sets the minimum standards with which the states must comply.").

15. 982 S.W.2d at 440. Judge Baird, writing for the dissent in *Hulit*, referred to the court's later decision as a kind of "new" New Federalism, subject to the same claims of judicial activism raised against *Heitman*. *Id.* at 449 (Baird, J., dissenting).

16. *See id.* at 433.

was possibly having a heart attack in a vehicle.[17] They found the defendant slumped over his steering wheel; and, after pounding on the windows and yelling, managed to rouse the man.[18] When the officers determined that the occupant of the vehicle was intoxicated, they arrested him for driving while intoxicated, a felony offense because of the defendant's prior convictions.[19]

Presumably because he thought he would fare better on his suppression issue under Texas law, Mr. Hulit withdrew a motion that had invoked both the Texas Constitution and United States Constitution, replacing it with a suppression motion based entirely on Texas law.[20] He went so far as to tell "the trial court that the Texas Constitution and law . . . are the only issues that are before the Court in this motion."[21]

On appeal, the court of criminal appeals noted its prior holding in *Heitman* to sidestep the appellant's reliance on an opinion from the United States Supreme Court.[22] The court then turned to its novel interpretation of the Texas Constitution.[23] For the first time, the court not only questioned the premise that a warrant requirement exists in Article I, Section 9, but actually found that there is no such requirement.[24]

The court's holding that the Texas Constitution does not require a warrant, or some exception to the warrant requirement, contradicts not only the express and implicit holding of numerous decisions, but also the principle that the Texas Constitution cannot subtract from rights guaranteed to Texas citizens by the United States Constitution.[25] The majority acknowledged as much.[26] However, it also reasoned that it was free to interpret the Texas

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17. *See id.* at 432.

18. *See id.*

19. *See id.* at 432-33.

20. *See id.* at 433; *cf. id.* at 442 (Price, J., concurring) (explaining that the defendant invoked the Texas Constitution because "he reasonably believed that he would get at least the same amount of protection as that granted by the federal constitution, and perhaps even more").

21. *Id.* at 433 (omission in original).

22. *See id.* at 434.

23. *See id.* at 449 (Baird, J., dissenting) (describing the court's decision as a kind of "new" New Federalism); *see also id.* at 441-42 (Price, J., concurring) (describing that Mr. Hulit relied on "case law of more than fifty years").

24. *See id.* at 436. Judge Womack, writing for five members of the court, concluded:

> It is our holding that Article I, Section 9 of the Texas Constitution contains no requirement that a seizure or search be authorized by a warrant, and that a seizure or search that is otherwise reasonable will not be found to be in violation of that section because it was not authorized by a warrant.

Id.

25. *See* Heitman v. Texas, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991). In a rather formalistic and literal sense, of course, the principle remains intact. Texas law neither subtracts from nor adds to the protections of the Fourth Amendment; it has an independent, and sometimes cumulative effect. *See id.* The substantive meaning of this principle had never before been viewed so narrowly as by the *Hulit* majority. *See id.* Texas courts prior to *Hulit*, including the court of criminal appeals, always announced the principle in a context suggesting that Article I, Section 9 contained at least the same protections as the Fourth Amendment and, as *Heitman* held, might contain more. *See id.*

26. *See Hulit*, 982 S.W.2d at 436-37. Judge Womack wrote, "We understand that our holding

Constitution in a manner entirely independent of its federal counterpart, even if that meant construing the state constitution as affording less protection.[27]

Taking the broader view, it seems that the *Hulit* court viewed constitutional protections as analogous to insurance policies. A policyholder with two policies enjoys the protections provided by either, or perhaps by both combined, depending on her election when filing a claim. If policy A provides no hail damage coverage, but policy B does, then the policyholder with hail damage who neglects to file a claim under policy B simply forfeits benefits because she has made a bad choice. Each policy may provide less coverage in some areas than the other because each represents a completely separate and independent relationship between the insurer and insured. So too, Texas is free to provide less "coverage" than the federal government, and if a Texas citizen chooses unwisely when making a claim, that is the price she pays for living in a federal system with dual sovereigns.[28]

However, constitutions differ significantly from insurance policies.[29]

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means that Section 9 of our Bill of Rights does not offer greater protection to the individual than the Fourth Amendment to the United States Constitution, and it may offer less protection." *Id.*

27. *See id.* Robert Hulit apparently is just another victim of the adversarial system. Because he understandably did not predict that the court would interpret the Texas Constitution as providing less protection, his election to litigate and appeal on Texas law grounds was a poor choice for which he paid a high price. Although he would have fared no better on a claim that the Fourth Amendment requires an arrest warrant in his situation, he at least must have known that a federal claim was futile, something he could not have guessed from researching Texas law. The Court of Criminal Appeals rejected the language of the Texas Supreme Court in *LeCroy v. Hanlon*, 713 S.W.2d 335, 338 (Tex. 1986), that state constitutions set the ceiling for individual rights, while the federal constitution sets the floor. *See id.* at 437. Judges Baird and Overstreet took a sharply different view of the meaning of federalism, arguing that "because the Fourth Amendment and United States Supreme Court are clear there is a warrant requirement, the Texas Constitution must *at least* require the same protection. . . . [W]e are free to interpret the Texas Constitution as bestowing *greater protection* than its federal counterpart, but we cannot interpret it as affording less protection." *Id.* at 444 (Baird, J., dissenting) (emphasis in original). Judge Price's concurrence also expressed reservations about this sudden shift in position, suggesting that doing so "may itself present some serious constitutional questions." *Id.* at 442 (Price, J., concurring).

28. *See Hulit*, 982 S.W.2d at 437 (holding that the Texas Constitution's "ceiling" may not reach the federal constitution's "floor" in some respects).

29. One way in which a constitution *should not* differ from an insurance policy is in providing reasonably clear understanding of what is promised and what is not. When an insurance policy does not provide the coverage that the insured expected, courts may be called upon to interpret the fair meaning of the policy's language. In this task, courts often consider the gloss that previously has been placed on the wording found in the policy. Because parties rely on these interpretations when entering into contracts, they often resort—and are sometimes criticized for doing so—to "boiler plate" language precisely because it is understood to have a certain meaning. Constitutions are like contracts between government and citizens in this respect, and the glacial pace at which interpretation of constitutions proceeds reflects the need to preserve consistency, clarity, and ultimately, fairness. To change the understanding of a fundamental concept without warning would not be tolerated by a court construing contract language, and is even more damaging when a constitutional *guarantee* is widely understood to exist. Imagine the surprise of Robert Hulit's lawyer to learn that no warrant is required by the Texas Constitution. *See generally Hulit*, 982 S.W.2d at 436 (stating that the Texas Constitution does not require search or seizure warrants). This concern was captured in the concurring opinion of Judge Price who stated:

> For more than fifty years now, this Court has repeatedly stated that the "search and seizure" provision of the Texas Constitution gives the citizens of Texas the same protection as the

The policyholder who has coverage under policy B, but who files a claim under policy A that is denied, may then file under policy B and recover her loss. The Texas Court of Criminal Appeals has made clear that this option is not available to citizens seeking the protection of the *wrong* constitution.[30] If, as in *Hulit*, a defendant relies exclusively on Texas law, then the Fourth Amendment plays no part in the decision and cannot be asserted at some later date when the error becomes apparent.[31] If instead, the defendant unsuccessfully invokes the Fourth Amendment, and then wants to assert Article I, Section 9, the Texas claim is precluded by her prior election.[32]

Apparently, the only way to avoid the dire consequences resulting from a poor choice is simultaneously, and at every opportunity, to claim violations of both constitutions. The defendant in *Hulit* would not have benefitted from this strategy because the Supreme Court's interpretation of the Fourth Amendment would not have required an arrest warrant in his situation.[33] As it turned out, the Texas Constitution requires no arrest warrant in any case.[34] At least in cases in which the issue is whether the police should have secured a warrant prior to arresting or searching, the implication in *Hulit* is that defendants need not bother to make claims based on the Texas Constitution; they should rely exclusively on the Fourth Amendment.[35]

The *Hulit* court addressed only two comments in a single, short

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> Fourth Amendment, and that it may give them greater protection. Clearly, appellant asked for protection only under the Texas Constitution because, relying on our case law of more than fifty years, he reasonably believed that he would get at least the same amount of protection as that granted by the federal constitution, and perhaps even more. To now "pull the rug out" from under appellant and say that he gets less protection than that granted by the federal constitution may itself present some serious constitutional questions.

Id. at 441-42 (Price, J., concurring) (emphasis in original) (citations omitted).

30. *See id.* at 440 (Keller, J., concurring).

31. *See id.* (stating that "Having requested protection only under Article I § 9, however, appellant forfeited any protections he was entitled to under the Fourth Amendment.")

32. *See* White v. Texas, 543 S.W.2d 366, 369-70 (Tex. Crim. App. 1976). In *White*, the Court of Criminal Appeals agreed with appellant's contention that the search of his car violated the Fourth Amendment. *Id.* at 367. However, the United States Supreme Court reversed, holding that the search was valid. *See id.* On remand, the appellant urged the court to find the search illegal under the Texas Constitution, but because appellant had not raised the Texas law claim at trial, the Court of Criminal Appeals refused to consider it. *See id.* at 369-70.

33. *See* United States v. Watson, 423 U.S. 411, 424-25 (1976) (determining that an arrest warrant is not required for a person found in a "public place"). Assuming there was probable cause to detain Robert Hulit, the Fourth Amendment would have been satisfied by the fact that he was found in a "public place." *See id.* at 422-24. If there was no probable cause for Mr. Hulit, and the State was operating solely on a "community caretaking function" theory, the defendant scarcely could have been encouraged by the considerable body of decisions from the United States Supreme Court approving warrantless "special needs" searches and seizures. *See* Reamey, *supra* note 10, at 307-17. On the other hand, the Texas Court of Criminal Appeals has not recognized the "community caretaking function" exception, or many of the other "special needs" approved by the Supreme Court. *See Hulit*, 982 S.W.2d at 433.

34. *See Hulit*, 982 S.W.2d at 436; *supra* text accompanying note 24.

35. *Hulit*, 982 S.W.2d at 436.

paragraph to the ramifications of its decision.[36] In the first of these, the court suggested that a warrant might count in the totality of circumstances toward whether an arrest or search is reasonable.[37]

However, it is a mere truism to say that the existence of a warrant counts in determining reasonableness.[38] Surely it does count, but the question is whether it is sufficient by itself to conclusively establish reasonableness.[39] In a "warrant required" regime, the answer clearly is that a properly issued warrant suffices.[40] Because the warrant requirement is not absolute, narrowly defined exceptions delineate the circumstances under which something less than a warrant will do.[41] To say that a warrant *may* be a factor in determining reasonableness hints that even a valid warrant may not suffice in some case.[42] Whether the court ultimately adopts this position or not, abandonment of the warrant requirement paradigm in favor of reasonableness invites dangerous ad hoc decision making by unguided trial courts and politically variable appellate benches.[43]

The second reference to life in a post-*Hulit* world is an obscure admonition that the holding "is not to say that statutes which require warrants for seizure or search may be ignored."[44] Implicit in this statement is recognition that the legislature may exercise its prerogative to establish a warrant requirement.[45] The implication is captured in the comment of two prominent Texas criminal procedure commentators who summarized the meaning of *Hulit* as follows:

> As a consequence of *Hulit*, the Texas law of arrest demanding—as a general rule—an arrest warrant is only a matter of statutory mandate. Statutory exceptions are not subject to attack on the ground that they exceed what is permissible under article I, section [9] [*sic*]. The legislature would be free to simply abandon the general requirement that arrests be made

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36. *Id.*
37. *See id.*
38. *See* Reamey, *supra* note 10, at 327-30.
39. *See id.*
40. *See id.*
41. *See id.*
42. *See id.*
43. *See id.*; *cf.* Hulit v. Texas, 982 S.W.2d 431, 438-39 (Tex. Crim. App. 1998) (Meyers, J., concurring) (stating that the court uses a "balancing test" rather than a "bright-line rule"); DIX & DAWSON, *supra* note 7, § 10.06 (noting that the *Hulit* decision does not explain what interests were at stake or how the court evaluated and balanced them).
44. *Hulit*, 982 S.W.2d at 436. Wording its adjuration in this way leaves the impression that the court was unwilling even to state unreservedly that any such statutes must be observed. *See id.* Whether it intended to leave open this eventuality or not, the court cited no statutes requiring an arrest warrant; and, perhaps because the proposition that warrants are required has been considered settled for so long, there appear currently to be none. *See id.*
45. *See* DIX & DAWSON, *supra* note 7, § 7.50.

pursuant to a valid arrest warrant.[46]

Also implicit in the way in which the court dealt with Robert Hulit's claim, and the interpretation of these commentators, is a recognition that no statute currently exists clearly requiring an arrest warrant.[47] That assumption, if it is one, does not address even obliquely the premise inherent within warrant exception statutes that generally a warrant is required.[48]

V. EXCEPTIONS WITHOUT A RULE

The existence of article 14.03(a)(1) and the other arrest warrant exception statutes raise an obvious question about the *Hulit* decision: how to square the court's holding that the Texas Constitution requires no arrest warrant with the legislature's apparent belief, buttressed by more than a century of interpretive court decisions, that statutory exceptions are necessary.[49] If there is no rule, why does Texas have exceptions to the rule?[50]

Hulit focused exclusively on whether the Texas Constitution, and specifically Article I, Section 9, requires arrest by warrant.[51] The court said nothing about the existence of common law or statutory authority for a warrant requirement, other than to acknowledge that a statutory requirement probably could not be ignored.[52]

In the absence of any statutory requirement that arrests be made pursuant to a warrant, Texas is left in the anomalous position of having statutory limits on warrantless arrests, without having a corresponding statutory or constitutional duty to obtain a warrant.[53] A peace officer contemplating an arrest apparently may choose to obtain a warrant or not, entirely free from any consequences or limitations if he chooses to forego the inconvenience of prior judicial approval.[54] For obvious reasons, this interpretation seriously diminishes the likelihood that Texas will enjoy the protection afforded by warrants.[55]

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46. *Id.*

47. *See Hulit*, 982 S.W.2d at 438; DIX & DAWSON, *supra* note 7, § 7.50.

48. *See Hulit*, 982 S.W.2d at 438; DIX & DAWSON, *supra* note 7, § 7.50.

49. *See* BARTON, *supra* note 8, § 1.021 (stating "[The] authority to arrest a suspect without a warrant is governed exclusively by statute").

50. *See Hulit*, 982 S.W.2d at 438.

51. *See id.* at 434-36.

52. *See id.* at 434-38. The only reference in the opinion to a statutory warrant requirement, or the effect of one, is a warning that the court's rejection of the constitutional argument is "not to say" that a statute requiring a warrant may be ignored. *See id.* at 436; *see also* DIX & DAWSON, *supra* note 7, § 7.50 (explaining that the *Hulit* court ruled "[w]ithout carefully examining the possibility that Texas tradition had accepted a warrant requirement at least for arrests:").

53. *See Hulit*, 982 S.W.2d at 434-38.

54. *See id.*

55. *See id.*

First and foremost, denigration of arrest warrants denigrates the right to be free from unreasonable seizures.[56] "A warrantless arrest bypasses the safeguards provided by the warrant procedure, including the review and objective determination of a detached magistrate of whether probable cause exists to justify the arrest."[57] While the advantages provided by the warrant procedure do not always trump the necessities justifying police action without prior judicial review, "courts should strictly construe each statutory exception to the warrant requirement, and maintain the state's burden to persuade that one of the exceptions applies."[58]

If it is the court's view that neither constitution nor statute requires an arrest warrant, have the long-standing statutory exceptions been rendered superfluous?[59] It may be that notwithstanding the court's position that the Texas Constitution is not a source for the warrant preference, there nevertheless exists a well-established common law preference that gives meaning to the exceptions.[60] Indeed there is considerable authority, both in case law and among commentators, to that effect.[61]

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56. *See* Honeycutt v. Texas, 499 S.W.2d 662, 664 n.1 (Tex. Crim. App. 1973). The *Honeycutt* court explained:

> An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment. . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects," only in the discretion of the police.

Id. (quoting Beck v. Ohio, 379 U.S. 89, 96-97 (1964)); *see* Reamey & Harkins, *supra* note 8, at 861 ("The overriding principle behind the courts' approach is that an arrest made without warrant threatens the constitutional right to be free from unreasonable searches and arrests.").

57. Reamey & Harkins, *supra* note 8, at 861.

58. *Id.* Among the most important of these is the avoidance of having judicial review only *after* an arrest has been made and, perhaps, incriminating evidence has been discovered. *See id.* The trial judge conducting this review knows that the consequences of a finding of no probable cause may include the factually guilty going free, the arresting officer being disciplined, prosecuted, or held civilly liable for damages, or all of these. *See id.* It is hardly an atmosphere conducive to detached, neutral decision making. *See id.*

59. *See* Hulit v. Texas, 982 S.W.2d 431, 436-38 (Tex. Crim. App. 1998).

60. *Cf.* DIX & DAWSON, *supra* note 7, § 7.50 (showing that the *Hulit* court decided "[w]ithout carefully examining the possibility that Texas tradition had accepted a warrant requirement at least for arrests.").

61. It must be noted that virtually none of this authority specifies Article I, Section 9, or for that matter, the Fourth Amendment as the source of the preference. *See, e.g.*, Randall v. Texas, 656 S.W.2d 487, 490 (Tex. Crim. App. 1983); Hogan v. Texas, 631 S.W.2d 159, 161 (Tex. Crim. App. 1982); Hardison v. Texas, 597 S.W.2d 355, 357 (Tex. Crim. App. 1980); *Honeycutt*, 499 S.W.2d at 663-64; Giacona v. Texas, 298 S.W.2d 587, 589 (Tex. Crim. App. 1957), *overruled on other grounds by* Tumlin v. Texas, 351 S.W.2d 242, 243 (Tex. Crim. App. 1961); DeLeon v. Texas, 201 S.W.2d 816 (Tex. Crim. App. 1947); Heath v. Boyd, 175 S.W.2d 214, 215 (Tex. 1943); Lacy v. Texas, 7 Tex. App. 403 (1879); 1 TEXAS CRIMINAL PRACTICE GUIDE § 10.03(1) (Matthew Bender & Co., ed., 1999) (discussing how "Any arrest of a person without a warrant is deemed to be an unreasonable seizure unless it is specifically authorized by statute."); 22 TEX. JUR. 3d *Criminal Law* § 2004 (1982) (stating "[T]he right to arrest without warrant is conferred only by statute"); ROBERT O. DAWSON & GEORGE E. DIX, TEXAS CRIMINAL PROCEDURE § 3.02 (1984) (discussing that a warrantless arrest is valid only if brought within one or more of statutory

While *Hulit* seems for the moment to have settled the question of whether the Texas Constitution is the source for the warrant preference, it is premature to conclude that the preference has been abandoned, or that it should be. The court would assume a super-legislative role if it were to hold that no arrest warrant preference exists even in Texas's common law. By adopting and maintaining the warrant exceptions in chapter 14 and article 18.16 of the Texas Code of Criminal Procedure, as well as an implied limitation on warrantless arrests in article 2.13, the Texas Legislature has declared its belief that exceptions are required.[62] For the court to hold otherwise is to render the Legislature's acts meaningless, and concurrently to reverse the court's own firmly rooted and often-reiterated position that warrants are essential.[63]

Abandonment of Texas's strong preference for warrants also would plunge the law of the state into the very kind of uncertainty Judge Womack cited in *Hulit* as reason for eschewing the United States Supreme Court's approach to the Fourth Amendment.[64] In a twinkling, Texas trial judges and peace officers would be left without meaningful guidance, trying to guess whether a particular arrest, made with or without a warrant, is "reasonable."[65] *Hulit* itself illustrates the danger in this approach. The court of criminal appeals refused to consider whether a "community care-taking exception"

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authorizations); DAVID M. HORTON & RYAN KELLUS TURNER, LONE STAR JUSTICE 171 (1999) (demonstrating, generally, that a warrantless arrest is unreasonable unless statutory warrant exception exists); BARTON, *supra* note 8, § 1.021 (explaining that Texas warrantless arrest authority governed exclusively by statute; warrantless arrest deemed unreasonable and unlawful in absence of authorizing statute); DIX & DAWSON, *supra* note 7, § 9.11(showing that Texas statutory law imposes an arrest warrant requirement); REAMEY & BUBANY, *supra* note 9, at 20-21 (justifying that warrantless arrests in Texas must be made by "explicit statutory authority"); Reamey & Harkins, *supra* note 8, at 860-61 (showing that arrests in Texas must be by warrant unless one of limited statutory exceptions to warrant requirement applies). The judges and authors merely state the rule with the sweep and confidence one would accord any principle about which there is no longer serious debate. *See* Reamey & Harkins, *supra* note 8, at 860-61. The Court of Criminal Appeals' opinion in *Hulit* completely ignored this body of law. *See generally Hulit*, 982 S.W.2d at 436-38 (noting the court's failure to rely on precedence).

62. TEX. CODE CRIM. PROC. ANN. arts. 2.13, 14.01-.06, 18.16 (Vernon 1977 & Supp. 2000). Article 2.13 describes the duties of a peace officer, including that the officer shall "arrest offenders without warrant in every case where the officer is authorized by law, in order that they may be taken before the proper magistrate or court and be tried." *Id.* art. 2.13. Were there no general arrest warrant requirement, it would be odd to limit arrests without warrant to those cases "authorized by law." *Id.* That phrase might mean only that warrantless arrests must satisfy constitutional standards, but that usage seems superfluous. However, it makes complete sense as an acknowledgment that in Texas there often will be cases in which a warrantless arrest is not authorized by law. The Texas Legislature amended article 14.03(g) of the Code of Criminal Procedure in 1999, well after the *Hulit* decision. *See* Act of May 24, 1999, 76th Leg., R.S., ch. 210, § 2, 1999 Tex. Gen. Laws 686-87. Had the Legislature believed that no warrant is required for an arrest in Texas, it surely would not have bothered to maintain provisions like article 14.03(g) providing exceptions to the warrant requirement.

63. *See Hulit*, 982 S.W.2d at 441-42 (Price, J., concurring).

64. *Id.* at 436 (stating that "By finding a general requirement of a warrant to which there are exceptions, the Supreme Court has created a jurisprudential mare's nest").

65. *See id.*

exists and held, without the slightest attempt at explanation, that the officers' actions were reasonable under Article I, Section 9.[66] That pronouncement provided no way for even the most careful officer or judge to discern whether the next, similar but slightly different, arrest or detention would be reasonable, too.[67]

Acknowledging and preserving the traditional analytical construct keeps intact and available the accumulated reasoning and education that participants in the criminal justice system use to make important decisions, and often on the spur of the moment.[68] As attractive as the *tabula rasa* may be to a court frustrated by seemingly insoluble interpretive problems, it is hard to imagine that wiping away decades of case law development will result in an improved condition.[69]

VI. STATUTES AUTHORIZING A WARRANTLESS ARREST

Texas's statutory arrest warrant exceptions "are founded in the law of necessity, that is, the necessity for prompt action in order to arrest or detain the offender so as to prevent his escape."[70] While exigency clearly forms the basis for some of the exception statutes, its application to others is less obvious.[71] What properly ties together these relatively few exceptions is the potential loss of important interests—primarily personal security and property interests—that could result from the delay necessary to acquire prior judicial authorization for an arrest.[72]

The most important exceptions are found in chapter 14 of the Texas Code of Criminal Procedure, and in article 18.16 of the same code.[73] Of these, the

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66. *Id.* at 438.

67. *See* Reamey, *supra* note 13, at 66-67 (arguing that basing decisions on reasonableness fails to provide guidance for those most affected).

68. *See id.*

69. *See id.* at 65. The use of reasonableness as the sole measure of constitutionality potentially can result in more nuanced and persuasive court decisions.

> Unfortunately, for all of the benefits to be gained by sophisticated, narrowly focused adjudication, the method also contains the potential to do great harm. Used unwisely or inexpertly, or with bad motive, the search for reasonableness can undermine public confidence in decision making; obscure, ignore, or chip away at sound principles; and promote unprincipled activism.

Id.

70. Honeycutt v. Texas, 499 S.W.2d 662, 664 n.2 (Tex. Crim. App. 1973) (quoting 6 TEX. JUR. 2d *Arrest* § 12 (1959)).

71. *Compare* TEX. CODE CRIM. PROC. ANN. art. 14.04 (Vernon 1977) (concerning a felony offender about to escape), *with* TEX. CODE CRIM. PROC. ANN. art. 14.01(b) (Vernon 1977) (concerning any offense committed in presence or view of peace officer).

72. *See* Reamey, *supra* note 13, at 65.

73. *See* TEX. CODE CRIM. PROC. ANN. arts. 14.01-.04, 18.16. In this context, "important" signifies those most often relied upon by officers, prosecutors, and courts to justify warrantless arrests. *See id.* For summaries of these provisions, see DIX & DAWSON, *supra* note 7, at Ch. 9, subch. B and Reamey & Harkins, *supra* note 8, at 863-73.

exception undoubtedly used more often than any other is for offenses committed in the "presence or . . . view" of the arresting officer.[74] Peace officers may arrest under this exception for "any offense," and "any other person" may arrest for a felony offense or an offense against the public peace.[75] The underlying assumption for this statute seems to be that a person offending in the presence or view of an officer is either a flight risk, or is particularly dangerous, or both. Delaying the arrest in such cases could be justified by a kind of exigency, although it is an exigency that is less obviously present than in some of the other exception cases.[76]

A similar provision is made for felonies and offenses against the public peace "committed in the presence or within the view of a magistrate."[77] The magistrate is authorized, in such cases, to "verbally order[ ] the arrest of the offender."[78] This occasionally may occur to quell a disturbance in a courtroom, but it is not an important provision in the law of warrantless arrest.

Article 14.03, which began rather simply as that short statute from pre-Civil War days, has expanded to include a number of entirely dissimilar exceptions of recent vintage.[79] Several of these, added to the section in piecemeal fashion, are based on reforms in domestic violence legislation.[80] They permit, and sometimes require, officers to arrest without warrant persons who have assaulted household members or violated the terms of a protective order.[81] Other provisions deal with the vexing problem of territorial jurisdiction and the authority of peace officers to arrest "away from home."[82]

Chapter 14 also contains an article allowing officers to arrest persons who are "about to escape" after committing a felony offense.[83] Article 14.04

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74. TEX. CODE CRIM. PROC. ANN. art. 14.01.

75. *Id.* art. 14.01(b). "Peace officer" is also statutorily defined. *See id.* arts. 2.12, 14.01(a),(b). Article 14.01 is the so-called "citizen's arrest" provision that allows "any person" to arrest without warrant for relatively serious offenses. *Id.* art. 14.01; *see* Reamey & Harkins, *supra* note 8, at 863-65. An interesting example of the interplay between "citizen's arrest" and the territorial arrest jurisdiction limitations on peace officers is *Romo v. Texas*, a case in which a peace officer outside his territorial jurisdiction arrested a driver for DWI. 577 S.W.2d 251, 252-53. (Tex. Crim. App. 1979). The arrest was upheld, not because the officer was a peace officer, but because "any person" could have arrested for the offense under article 14.01(a). *See id.* at 253. Offenses "against the public peace" are not well-defined. *See* Woods v. Texas, 213 S.W.2d 685 (Tex. Crim. App. 1948).

76. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 14.04 (concerning a felony offender about to escape).

77. *Id.* art. 14.02.

78. *Id.*

79. *Id.* art. 14.03.

80. *See id.* art. 14.03(a)(2)-(4),(b),(c).

81. *See id.* art. 14.03(a)(2)-(4),(b).

82. *See id.* art. 14.03(d), (g); BARTON, *supra* note 8, § 1.0136; Reamey & Harkins, *supra* note 8, at 857.

83. *See* TEX. CODE CRIM. PROC. ANN. art. 14.04. This provision is expressly limited to felonies, a fact that rather strongly illustrates the legislature's reluctance to authorize warrantless arrests more generally. *See generally id.* (noting the various requirements for a warrantless arrest). Indeed, it persuasively argues against reading Texas law as not including a preference, or requirement, for warrants.

does not use the words "probable cause," but its requirement of "satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed" has been interpreted as the equivalent of probable cause.[84] Finally, and maybe most confusingly, the statute expressly refers to there being "no time to procure a warrant."[85] This temporal exigency language led the Texas Court of Criminal Appeals in *Fry v. Texas* at first to hold that the requirement is an essential element to be proved by the State, but then on rehearing to decide that police need only have a representation from the "credible person" that circumstances exist which preclude the luxury of a warrant.[86] This resolution has not been entirely satisfactory, even to the courts.[87]

The principal exception outside chapter 14 deals exclusively with theft.[88] Like article 14.01(a), article 18.16 creates a limited citizen's arrest possibility.[89] "All persons" having a "reasonable ground" are permitted to seize property believed to be stolen, and to take it, along with the "supposed offender," before a magistrate.[90] The supposed offender also may be turned over to a peace officer.[91]

VII. ARTICLE 14.03(a)(1): THE "SUSPICIOUS PLACES" EXCEPTION

As recently as 1965, article 14.03 in its entirety read:

> The municipal authorities of towns and cities may establish rules authorizing the arrest, without warrant, of persons found in suspicious places, and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws.[92]

This language originated in the penal code of 1856, and most of it survives in

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See id.; *see also* Fry v. Texas, 639 S.W.2d 463 (Tex. Crim. App. 1982) (stating the elements of the exception); DIX & DAWSON, *supra* note 7, §§ 9.22-.23.

84. TEX. CODE CRIM. PROC. ANN. art. 14.04. None of these traditional exceptions uses the words *probable cause*, but all require, in differing language, that sufficient suspicion exist. *See id.* art. 14.03(a)(1) ("circumstances which reasonably show"); art. 14.04 ("satisfactory proof"); art. 18.16 ("reasonable ground to suppose"); Earley v. Texas, 635 S.W.2d 528, 531 (Tex. Crim. App. 1982).

85. TEX. CODE CRIM. PROC. ANN. art. 14.04.

86. 639 S.W.2d at 476.

87. *See* Dejarnette v. Texas, 732 S.W.2d 346, 352 (Tex. Crim. App. 1987); DIX & DAWSON, *supra* note 7, § 9.23.

88. *See* TEX. CODE CRIM. PROC. ANN. art. 18.16 (preventing consequences of theft); DIX & DAWSON, *supra* note 7, § 9.31.

89. *See* TEX. CODE CRIM. PROC. ANN. art. 18.16.

90. *Id.*

91. *See id.*

92. Act of Jan. 1, 1966, 59th Leg., R.S., ch. 722, 1965 Tex. Gen. Laws 317, 362 (amended 1999) (current version at TEX. CODE CRIM. PROC. ANN. art. 14.03 (Vernon Supp. 2000)).

the current version of the statute.[93] Texas's legislative history is remarkably sparse, and for a provision more than 140 years old, only speculation based on text and context can shed light on its original purpose.[94]

Professors Robert Dawson and George Dix believe that the statute "most likely was viewed as delegating to local authorities the power to provide by ordinance for law enforcement officers to preventively intervene when they encountered suspicious persons."[95] This guess may be correct, but it seems by contemporary standards to be a rather indirect way of providing for preventive detention.[96] Nevertheless, the reference to "municipal authorities . . . 'establish[ing] rules' authorizing 'the arrest . . . of persons found in suspicious places' " might have been intended to encourage the creation by local governments of minor substantive offenses designed to curb loitering and other suspicious behavior.[97]

Alternatively, the rules that municipal authorities were invited by the legislature to establish could have been intended to be strictly procedural.[98] "Authorizing the arrest, without warrant," modifies "rules" in the original statute, connoting perhaps that these municipal rules should authorize warrantless arrests rather than create substantive offenses for suspicious activity.[99] Either view is problematic at the end of the twentieth century.

If the legislature meant to urge cities to enact suspicious persons or loitering ordinances, these would be seen today as almost surely unconstitutional.[100] On the other hand, if the statute was intended to promote adoption of procedural ordinances authorizing warrantless arrests, it is even less clear why such rule making would be delegated to the lowest level of government.[101] It is especially important that this kind of arrest procedure rule be consistent throughout the state, and there is no special virtue in consulting varying community standards in the legislative consideration of such rules.[102]

It is not far-fetched to think that in the 1850s, or for that matter in the 1950s, the Texas Legislature might pass a law encouraging cities to punish

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93. *See* DIX & DAWSON, *supra* note 7, § 9.28.

94. *See id.*

95. *Id.*

96. *See id.*

97. *Id.* Professors Dawson and Dix seem to agree that the original motivation for the statute may have been more substantive than the current version would suggest. *See id.*

98. *See* TEX. CODE CRIM. PROC. ANN art. 14.03 (Vernon 1977 & Supp. 2000).

99. *Id.*

100. *See* DIX & DAWSON, *supra* note 7, § 9.28 (showing that ordinances authorized by statute "today would certainly be regarded as constitutionally offensive"); *see also* Howard v. Texas, 617 S.W.2d 191, 192 (Tex. Crim. App. 1979) (holding suspicious persons ordinance to be flagrantly unconstitutional for vagueness).

101. *See generally* DIX & DAWSON, *supra* note 7, § 9.28 (discussing the "suspicious place" requirement).

102. *See generally id.* § 9.28-.30 (discussing the "suspicious place" requirement).

loitering, lurking, congregating, vagrancy, or other suspicious behavior.[103] As recently as 1979, an Austin city ordinance provided:

> It shall be unlawful for any person within the city to be in the nighttime in or about public or private buildings or premises, where he has no right or permission to be, under suspicious circumstances, and without being able to give a satisfactory account of the same.[104]

An earlier, but virtually identical, version of the ordinance was challenged by a defendant in *Sims v. Texas*.[105] The Court of Criminal Appeals rejected the defendant's contention that the ordinance was unconstitutional as an unreasonable restraint on personal liberty and upheld his loitering conviction.[106]

Fourteen years later, the court heard another challenge to the same ordinance.[107] In *Howard v. Texas* the defendant, along with two female companions, was found after dark lying in some leaves behind a hardware store.[108] Responding to a police officer's question, the defendant said he was just drinking beer, and admitted that he had been arrested previously for burglary.[109] The officer arrested the three suspects for violating Austin's city ordinance, and in a search incident to arrest found marijuana in the defendant's sock.[110]

The court focused this time on the appellant's contention that the ordinance was constitutionally deficient for permitting conviction of persons found in suspicious circumstances " 'without being able to give a satisfactory account of the same.' "[111] Finding that "such a standard delegates unguided and unrestrained discretion to the arresting officer to decide what answers given by a potential arrestee are 'satisfactory account[s]' and which are not," the majority found that the ordinance "exhibits a vagueness obvious to 'any person of reasonable prudence.' "[112]

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103. *See* City of Chicago v. Morales, 527 U.S. 41, 54 (1999) (holding unconstitutional the latest iteration of loitering statutes, an ordinance aimed at congregation by gang members). Vagrancy laws were the favored way to authorize police to deal with "undesirables" until the Supreme Court struck down such an ordinance in 1972 as void for vagueness. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972). Soon after, the Texas Court of Criminal Appeals applied this reasoning to hold a Lubbock, Texas, vagrancy ordinance unconstitutional. *See* Baker v. Texas, 478 S.W.2d 445, 449 (Tex. Crim. App. 1972).

104. *Howard*, 617 S.W.2d at 192 (quoting Austin City Ordinance 23-9).

105. 391 S.W.2d 63 (Tex. Crim. App. 1965).

106. *See id.* at 64-65.

107. *See Howard*, 617 S.W.2d at 192.

108. *See id.* at 191.

109. *See id.* at 191-92.

110. *See id.* at 192.

111. *Id.* (quoting Sims v. Texas, 391 S.W.2d 63, 64 (Tex. Crim. App. 1965)).

112. *Id.* (alteration in original). On rehearing, the State conceded that the ordinance was "facially unconstitutional," but argued that it was not "so grossly and flagrantly unconstitutional" that the State should be deprived of the good faith rule of *Michigan v. DeFillippo*, 443 U.S. 31 (1979), that an officer

With respect to the legislature's intent in passing the original version of article 14.03, two possibilities emerge from this brief review of the constitutionality of suspicious persons ordinances. One is that the statute *could* have been meant to facilitate the passage of such ordinances.[113] The constitutional impediments that we virtually take for granted today would not have been apparent to the framers. So much is clear from the relatively recent lesson of *Howard*.[114]

It also is possible, as suggested previously, that the original statute was a delegation of arrest procedure rule making rather than an invitation to create new local offenses, or that it was a combination of the two.[115] There is some historical support for this view in the action of the 1967 Texas Legislature.[116] In that year, article 14.03 was amended on recommendation of the State Bar's Committee on Revision of the Code of Criminal Procedure, the Texas Attorney General, and the Texas Police Association.[117] The change was described in a report by the Committee as follows:

> The Committee further recommends that Article 14.03 be amended so as to extend to all peace officers the right to arrest without warrant persons found in suspicious places under circumstances where probable cause exists to show such person has committed or is about to commit an offense. This is a right which the statute presently extends only to city officers upon passage of appropriate city ordinances.[118]

If the authors of this passage were knowledgeable about the meaning of the original statute—and there is no reason to believe they were not—the last

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ordinarily may rely on the presumed constitutionality of statutes. *Id.* at 192-93. Relying exclusively on Article I, Section 9 of the Texas Constitution and the Texas exclusionary rule, the court denied the motion for rehearing and insulated its decision from review by the Supreme Court. *See id.* at 193-94.

113. *See id.*

114. *See id.* Texas is not the only place in which the constitutional deficiencies of loitering or suspicious persons ordinances are either unknown or ignored. *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 54 (1999) (holding a loitering ordinance unconstitutional). Some lawmakers apparently cannot resist the temptation to combat the problem of "undesirable" people in suspicious places by passing sweeping prohibitions giving law enforcement officers unfettered discretion. *See id.*

115. *See supra* notes 98-99 and accompanying text. Whatever the original purpose, the resulting statute bears language that could lead the superficial reader to believe it either authorizes suspicious persons ordinances, or that it actually recognizes that suspicious behavior is an offense. *See* TEX. CODE CRIM. PROC. ANN. art. 14.03 (Vernon 1977 & Supp. 2000). However, as noted elsewhere,

> While "suspicious circumstances" may help establish probable cause to arrest for some offense or justify a temporary investigative detention, or in Texas may provide grounds for arresting without a warrant, a person found in such circumstances is not, by that fact alone, guilty of an offense and subject to arrest.

REAMEY & BUBANY, *supra* note 9, at 30.

116. *See* W. A. Morrison & Jim D. Bowmer, *Recommended Changes Code of Criminal Procedure*, 29 TEX. B.J. 1003, 1054 (1966).

117. *See id.*

118. *Id.*

quoted sentence, while somewhat ambiguous, supports the view that the earlier version was a limitation on warrantless arrest jurisdiction applicable statewide.[119] However, there remained room to argue that the proposed change was seen as a way to extend to all peace officers the right to make warrantless arrests of persons in suspicious circumstances, presumably because some statewide suspicious persons law would supersede local ordinances.[120]

After passage of the amendment, Judge John Onion, Jr.—then a sitting judge on the court of criminal appeals, and later the author of some of the most significant decisions interpreting article 14.03—described the change in this way:

> Article 14.03 (1967) withdraws the authority of cities and towns to establish "suspicious persons ordinances," and in lieu thereof, makes the arrest of persons in suspicious circumstances part of our state law. . . . The effect of this amendment will allow courts to take judicial knowledge of such "suspicious persons" law, and will alleviate the necessity of proving up the city ordinance to show a valid arrest.[121]

Clearly, Judge Onion viewed the original statute as creating a right of cities to pass loitering or suspicious persons ordinances, a right he believed the amendment withdrew from cities and established as "part of our state law."[122] One reasonably might interpret his language as recognition that existing state law included a substantive component, joined by the amendment with a statewide warrantless arrest authorization.[123] If so, this confusion of substantive and procedural aspects in article 14.03 was not unique to Judge Onion, and it continues to infect the interpretive efforts of modern Texas courts.[124]

The actual 1967 amendment to article 14.03 substituted "[a]ny peace officer may arrest" for "[t]he municipal authorities of towns and cities may establish rules authorizing the arrest."[125] In its newer incarnation, the

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119. *See id.*

120. *See id.*

121. Judge John F. Onion, Jr. & Warren E. White, *Texas Code of Criminal Procedure—Its 1965 & 1967 Changes Affecting Corporation Courts and Police Practices*, 10 S. TEX. L.J. 92, 97-98 (1968).

122. *Id.* At least some cities passed such ordinances, and the Court of Criminal Appeals upheld arrests and searches pursuant to them. *See* Laube v. Texas 417 S.W.2d 288, 289 (Tex. Crim. App. 1967); Chambler v. Texas, 416 S.W.2d 826, 828 (Tex. Crim. App. 1967); Saldana v. Texas, 383 S.W.2d 599, 600 (Tex. Crim. App. 1964).

123. There does not seem to be any such statewide suspicious persons statute, either in the Penal Code or elsewhere. If one existed, it almost certainly would fall prey to the same kind of constitutional attack that succeeded in *Howard*. Howard v. Texas, 617 S.W.2d 191, 192-93 (Tex. Crim. App. 1979).

124. *See* Onion & White, *supra* note 121, at 97-98.

125. *Compare* Act of Aug. 28, 1967, 60th Leg., R.S., ch. 659, § 9, 1967 Tex. Gen. Laws 1735, *with* Act of Jan. 1, 1966, 59th Leg., R.S., ch. 722, 1965 Tex. Gen. Laws 317, 362 (authorizing more direct action by police).

placement of the statute in chapter 14 of the Texas Code of Criminal Procedure, "Arrest Without Warrant," seems entirely appropriate, notwithstanding the vestiges of language that might support a more substantive reading of the provision.[126] Whether Texas ever attempts to enact a statewide loitering or suspicious persons statute, or not, the language of the current version of article 14.03 does not support viewing it as creating by itself a substantive offense.[127]

Article 14.03(a)(1) was amended most recently in 1993 to include, in addition to felonies and breaches of the peace, authorization to arrest, without warrant, persons violating title 9, chapter 42, of the Penal Code or section 49.02 of the Penal Code.[128] Title 9 of chapter 42 deals with "offenses against public order and decency," and includes such offenses as disorderly conduct, riot, harassment, cruelty to animals, and obstructing a highway or other passageway.[129] In addition, section 49.02 prohibits public intoxication.[130] These offenses seem to share the character of crimes "against the public peace," and it may be that the legislature named them within article 14.03(a)(1) merely to make clear that they belong within that category. However, it is not this most recent modification of the statute that has caused problems for Texas courts.[131]

VIII. THE STRUGGLE TO APPLY AN OLD STATUTE IN A NEW WORLD

A quick, impressionistic reading of article 14.03(a)(1) reveals the root of the interpretive difficulty.[132] The statute hints: (1) that it creates, or at least recognizes, a suspicious persons offense; (2) that it authorizes a custodial warrantless arrest for suspicious behavior; (3) that it permits a temporary, investigative detention for crimes about to be committed; and/or (4) that it excuses a warrant for whatever kind of arrest law enforcement officers make in suspicious places.[133] None of these explanations is entirely satisfactory. For each, there remain questions that simply cannot be answered by the inherently inconsistent text.

The most significant early attempt to reconcile these contradictions is the court of criminal appeals' decision in *Lara v. Texas*, a case that amply

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126. *See generally* TEX. CODE CRIM. PROC. ANN. art. 14.03 (Vernon 1977 and Supp. 2000) (noting the language of the 1999 amended version).

127. *See id.* art. 14.03(a)(1); REAMEY & BUBANY, *supra* note 9, at 30 (arguing that a person found in suspicious circumstances "is not, by that fact alone, guilty of an offense").

128. *See* Act of Sept. 1, 1994, 73rd Leg., R.S., ch. 900, § 3.06, 1993 Tex. Gen. Laws 3715, 3715-16.

129. *See* TEX. PEN. CODE ANN. §§ 42.01, 42.02, 42.07, 42.09, 42.03 (Vernon 1994).

130. *See id.* § 49.02.

131. *See infra* Part VIII.

132. *See generally* TEX. CRIM. PROC. CODE ANN. art. 14.03(a)(1) (Vernon Supp. 2000) (describing four types of persons a peace officer may arrest without a warrant).

133. *See id.*

illustrates, and helps explain, why no coherent understanding of article 14.03(a)(1) has been achieved to date.[134] On a November afternoon in 1968, Officer P. R. Gonzales, an experienced police detective patrolling in a "location known to him as frequented by dope addicts," spotted a car parked with its motor running.[135] As Officer Gonzales watched, he saw "a suspicious person there coming from the area of some vacant shacks."[136]

Officer Gonzales contacted the man who had emerged from the shacks and requested identification.[137] After this exchange, the officer "noticed some suspicious persons" a short distance away, and he called for assistance.[138] When his backup, Officer Teran, arrived, the pair approached the shacks, "a 'lookout' yelled something," and "five or six persons [emerged,] running in different directions."[139]

Officer Teran chased and caught Isaias Lara and handcuffed him to a stop sign.[140] A quick search of Lara uncovered a pocket knife; then Officer Teran chased and caught other "subjects" who also were searched.[141] Without further explanation, the court of criminal appeals noted that, "[t]he heroin heretofore referred to was found on appellant. Officer Teran also testified that, in his opinion, appellant was under the influence of narcotics."[142]

At the suppression hearing, Officer Teran testified that the vacant shacks were known to be a place used by "dope addicts"; that the officers previously had made calls at the location; and that they "had received information from other people, reliable people that they had seen lot [*sic*] of subjects, dope addicts going to that location and into the shacks."[143] He also testified that he had made other arrests at the location, and that he had seen evidence inside the shacks that they were being used by people taking heroin.[144]

The entire analysis of the arrest issue by the court was as follows:

> We hold that under all the circumstances herein observed by the officers and the facts known by them, they had probable cause to be suspicious and the arrest was authorized under Art. 14.03 Vernon's Ann. C.C.P. . . .
>
> The arrest made under the provisions of Art. 14.03, supra, would authorize a search of appellant's person incident thereto and the fruits thereof were admissible in evidence. Appellant's complaint of the second search at

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134. 469 S.W.2d 177 (Tex. Crim. App. 1971).
135. *Id.*
136. *Id.*
137. *See id.*
138. *Id.*
139. *Id.* at 178-79.
140. *See id.* at 179.
141. *See id.*
142. *Id.*
143. *Id.*
144. *See id.*

the scene is without merit.[145]

No further explanation was offered for the finding that probable cause existed, or even for whether probable cause was required by a statute authorizing a warrantless seizure on "circumstances which reasonably show" guilt.[146] No attempt was made to decipher the opinion's curious finding that the officers had "probable cause to be suspicious."[147] Most importantly, the court failed to specify exactly what crime the defendant had committed that led to his warrantless arrest.[148]

Due perhaps to the paucity of its own analysis or to its realization that its original summarization of the facts was misleading, the court granted rehearing in *Lara* and offered a startlingly different explanation for its affirmance.[149] The court explained that Lara had been handcuffed to the stop sign, searched cursorily, then left alone while Officer Teran rounded up other suspects.[150] Eventually, the defendant and two other men were transported back to the shacks, given *Miranda* warnings, and searched.[151] It was then that the capsule of heroin "fell" from the defendant's clothing.[152]

Apparently troubled by the interval between Lara's initial detention and "second" search, Judge Onion characterized the intervening time and distance as "short," and all "part of one continuous happening."[153] The more significant issue was the justification for the defendant's initial detention, an issue only confused by the court's inadequate and vague explication in its opinion on

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145. *Id.* (citations omitted).

146. *Id.* (quoting the 1967 version of article 14.03). It would be hard to take seriously any claim that probable cause existed for the custodial arrest of Isaias Lara. *See id.* The opinion reflected no evidence known to either officer that Lara actually was involved in a crime. *See generally id.* at 178-79 (noting the absence of any mention of probable cause). Only his flight from a "high-crime" area made him suspicious. *See id.* What was known to the officers might have amounted to reasonable suspicion at most, but fell woefully short of probable cause. This conclusion was reflected in the court's initial reliance on article 14.03 and the "suspicious circumstances" under which Lara was found, rather than on article 14.01, which would have authorized a warrantless arrest merely because Lara was committing a crime in the presence or view of the officer. *See generally id.* at 179 (noting the court's reliance on article 14.03).

147. *Id.*

148. *See generally id.* (noting the court's omission as to what crime the defendant had committed).

149. *See id.* at 179-80 (opinion on reh'g). Judge Onion began the court's opinion on rehearing by explaining:

> On rehearing appellant contends we missed the point he sought to make on original submission. He points out, and correctly so, that the capsule of heroin was recovered as a result of the second search of his person. He contends that our original opinion left the impression it was recovered when he was first apprehended, and that the second search was not reasonable because it was not made contemporaneously with the arrest; that it was at another time and place.

Id. at 179.

150. *See id.* The court never used the word "frisk" to describe the cursory search. *See id.*

151. *See id.* at 179-80.

152. *See id.* at 180.

153. *Id.*

original submission.[154] Turning to that point, Judge Onion again cited article 14.03 as justifying the arrest.[155] However, this time, he explained that because Lara had been under the influence of a narcotic drug, which was a felony offense, and because that offense occurred in the presence or view of the arresting officer, "[t]he subsequent search would not necessarily be tied to Article 14.03, supra, but rather to the violation later discovered."[156] He concluded: "Thus another reason appears to justify the second or subsequent search."[157]

If Judge Onion sought to clarify the application of article 14.03 to the facts of *Lara*, he did not succeed. The upshot of the court's opinion on rehearing was that, for reasons never examined in the decision, article 14.03 mysteriously justified the initial seizure and detention of Lara, and that, once he was "lawfully" detained and seen to be under the influence of heroin, he could be arrested under authority of article 14.01, and searched incident to that custodial arrest.[158]

The implications of the opinions in *Lara* were as stunning as they were baffling. Was the court saying that article 14.03, independent of any substantive offense, created a right to arrest persons found in suspicious places? Is that what "probable cause to be suspicious" meant? If article 14.03 could be used to justify Lara's "arrest" and handcuffing, then why did not *that* statute authorize a search incident to arrest? Why was it necessary to rely on article 14.01? Recall that Judge Onion, the author of the court's opinion on rehearing, previously had expressed his view that the 1967 amendment of article 14.03 made "the arrest of persons in suspicious circumstances part of our state law."[159]

Rather than making sense of this remnant of Texas's frontier law, the *Lara* court hopelessly muddled the meaning of article 14.03.[160] If it intended to apply article 14.03 as a kind of codified version of *Terry v. Ohio*, authorizing temporary investigative detentions on reasonable suspicion, the court failed by not reconciling the statute's use of the word "arrest" with the

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154. *See id.*
155. *See id.*
156. *Id.*
157. *Id.*
158. *See id.*
159. Onion & White, *supra* note 121, at 97-98.
160. *See Lara*, 469 S.W.2d at 180. Describing the situation to law students more than a dozen years after the decision in *Lara*, Professors Dawson and Dix wrote:

> Perhaps the most troublesome of the exceptions to the warrant requirement is the apparent authorization in Article 14.03(a) for the "arrest" of persons found in "suspicious places" and "under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws . . . ." It is sometimes, however, invoked only to validate law enforcement conduct that might be regarded as an investigatory field detention rather than an arrest.

DAWSON & DIX, *supra* note 61, § 3.02[D].

Supreme Court's use of the term "detention."[161] If, on the other hand, the court believed that article 14.03 sanctioned a full-blown custodial arrest under the facts of *Lara*, it was obliged to explain what facts constituted probable cause, and why, in its opinion on rehearing, it implicitly repudiated its original statement that an arrest under article 14.03 would authorize a search incident to arrest.[162] Instead, the court invoked article 14.01 to justify the continued detention and search of the suspect.[163]

Clearly, *Lara* is a transitional decision. The opinion on original submission reflects the view that the 1967 version of article 14.03 allowed a warrantless arrest of persons found in suspicious places; that is, it was a kind of statewide "suspicious persons ordinance."[164] The opinion on rehearing, for the first time, reflects the court's discomfort in trying to explain how article 14.03 could authorize an arrest when no statute independently created a crime for being in a suspicious place.[165] That discomfort was not well articulated in the opinion on rehearing, but it is palpable in the explanation that "oh, by the way," other statutory authority justified a warrantless arrest.[166] The result of

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161. 392 U.S. 1, 27 (1968). An "arrest" is a "seizure" which must be based on probable cause. *See generally* U.S. CONST. amend. IV; *Terry*, 392 U.S. at 20 (citing cases that are subject to the Warrant Clause of the Fourth Amendment requiring "probable cause"). As I will argue, the two terms "arrest" and "detention"—can be reconciled, and without anything like the tortuous reasoning reflected in *Lara*. *Compare Lara*, 469 S.W.2d at 180, *with Terry*, 392 U.S. at 20 (discussing "arrest" requirements by article 14.03 and "seizure" requirements by the Fourth Amendment respectively).

The court previously had discussed *Terry* and relied on its holding, but avoided in an obvious way a finding that article 14.03 was the statutory version of *Terry*. *See* Baity v. Texas, 455 S.W.2d 305, 308-09 (Tex. Crim. App. 1970).

162. The court previously had taken this position, also without explanation, in a case in which Dallas officers arrested a suspicious person under authority of a city ordinance passed pursuant to the predecessor to article 14.03. *See* Laube v. Texas, 417 S.W.2d 288, 290 (Tex. Crim. App. 1967). In another case decided less than a year before *Lara*, the court relied exclusively on article 14.03 to support a search incident to arrest. *See Baity*, 455 S.W.2d at 309. Interestingly, the court cited *Terry* as authority for a temporary investigative detention, then introduced article 14.03 by writing, "[s]till further, attention is called to Article 14.03 . . . ." *Id.* at 307-09. No attempt was made to argue that article 14.03, rather than *Terry*, authorized the investigative detention. *See id.*

163. *See Lara*, 469 S.W.2d at 180 nn.1-2.

164. This reading would have been consistent with the court's view, expressed in previous cases, that municipal suspicious persons ordinances were passed and applied pursuant to article 214 of the 1925 Code of Criminal Procedure, the predecessor of article 14.03. *See Laube*, 417 S.W.2d at 290; Chambler v. Texas, 416 S.W.2d 826, 828 (Tex. Crim. App. 1967).

165. *See Lara*, 469 S.W.2d at 179.

166. *See id.* at 180. Judge Onion's opinion demonstrates this analytical "shell game" in the following paragraph:

> We further observe that the officers made a bona fide arrest of the appellant under the provisions of Article 14.03, V.A.C.C.P. Thereupon they discovered he was under the influence of a narcotic drug, a felony. Under such circumstances Article 14.01, V.A.C.C.P. would come into play authorizing appellant's arrest for that offense and authorizing a search incident to that arrest. The subsequent search would not necessarily be tied to Article 14.03, *supra*, but rather to the violation later discovered. Thus another reason appears to justify the second or subsequent search.

Id. (citations omitted).

this unexplained analysis was unsatisfactory in every respect.

The opinions by the Texas Court of Criminal Appeals interpreting article 14.03 in the years following *Lara* did nothing to clarify whether the statute was procedural or substantive, nor did the Court come to terms with the underlying constitutional issue.[167] The prosecution relied on article 14.03 in *Rodriguez v. Texas* to justify an officer's stop of a car leaving the parking lot of a closed business.[168] Based on no more than that, the court of criminal appeals upheld the warrantless arrest because the defendant "was trying to get away from the officers after they had seen him on a Sunday afternoon in a parking lot of a business establishment which was closed for the day."[169] No mention was made of probable cause other than the court's acknowledgment that "the record does not reflect that the appellant was speeding."[170]

By contrast, in *Hardinge v. Texas* the court rejected article 14.03 as a justification for the warrantless arrest of a man loitering near a radio station and looking through a window in the building.[171] Citing *Terry v. Ohio* and *Papachristou v. City of Jacksonville*, the court held that the officer "simply did not have probable cause to arrest appellant at the time in question."[172] The officers involved in the arrest testified that the defendant was "polite," that he was not committing a crime, and that there was no concern that he was going to commit one.[173]

Hardinge and *Rodriguez* illustrate the schizophrenic nature of the court's understanding of article 14.03 during this period.[174] In neither case was there probable cause to think the arrestee was committing a crime; both men were merely suspicious.[175] In one instance, the court upheld a warrantless arrest, and in the other the court ruled it illegal.[176]

A third post-*Lara* case was decided on an altogether different basis that foreshadowed many later cases.[177] Officers had probable cause to believe the defendant had committed a murder.[178] The officers obtained an arrest warrant and went to an apartment where they found and arrested the defendant.[179]

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167. *See infra* notes 168-76 and accompanying text.

168. 480 S.W.2d 631, 631-32 (Tex. Crim. App. 1972).

169. *Id.* at 633.

170. *Id.*

171. 500 S.W.2d 870, 872-73 (Tex. Crim. App. 1973).

172. *Id.* at 874 (citing Terry v Ohio, 392 U.S. 1 (1968) and Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)).

173. *See id.* at 873.

174. *Compare Rodriguez*, 480 S.W.2d at 632-33 (examining the warrantless arrest for possession of marijuana of persons found in suspicious places), *with Hardinge*, 500 S.W.2d at 872-73 (examining the discrepancies of the court's holdings regarding the issue of whether the officer had authority to arrest the defendant absent a warrant).

175. *See Hardinge*, 500 S.W.2d at 873; *Rodriguez*, 480 S.W.2d at 633.

176. *See supra* note 174 and accompanying text.

177. *See* Lowery v. Texas, 499 S.W.2d 160 (Tex. Crim. App. 1973).

178. *See id.* at 164.

179. *See id.* at 161-62.

Subsequently, the court of criminal appeals held the warrant affidavit insufficient and analyzed the arrest as a warrantless arrest for which statutory authority was required.[180] Finding that the apartment where the man was arrested was not a suspicious place, the court concluded that the warrantless arrest was unlawful.[181]

Two distinct ways of looking at article 14.03 arrests emerge from these cases.[182] The approach represented by *Rodriguez* might be called "substantive."[183] Despite the absence of probable cause, article 14.03 was used as authority for arrests, presumably on the unexpressed theory that it created a "suspicious persons" offense, or that such an offense existed in the common law of Texas.[184] The other, more procedural view, is represented by *Lowery v. Texas*, a case involving a murder arrest at the defendant's apartment.[185] Police had probable cause in *Lowery* but were prevented from effecting a valid warrantless arrest because the suspicious places requirement of article 14.03 was not met.[186] The turn toward a procedural interpretation seen in *Lowery* sharply contrasted with the more traditional view illustrated by the opinion on original submission in *Lara*.[187]

Viewing the statute as merely an exception to the arrest warrant requirement avoided two significant, and maybe even insurmountable, problems. First, article 14.03 was, and is, part of that chapter of the Texas Code of Criminal Procedure entitled, "Arrest Without Warrant."[188] While headings and titles in the code have no substantive meaning, it would be awkward to maintain that a provision set among warrant exception statutes

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180. *See id.* at 163-64.

181. *See id.* at 164-65. *Lowery* was not the first case to take seriously the "suspicious place" requirement. *See* Price v. Durdin, 207 S.W.2d 228, 229-30 (Tex. Civ. App.—Galveston 1947, no writ).

182. *See supra* note 174 and accompanying text.

183. *Rodriguez*, 480 S.W.2d at 633. This use of the provision was not unique. *See* Hamel v. Texas, 582 S.W.2d 424, 426-27 (Tex. Crim. App. 1979). In his concurring opinion in *Hamel*, Judge W.C. Davis expanded on the majority's use of article 14.03, arguing that the statute permitted both an investigative detention of the defendant and his arrest. *Id.* at 428-29 (Davis, J., concurring).

The court struggled with the illogic of this approach, though. Recall that in *Hardinge*, the absence of probable cause rendered the arrest illegal, even though the defendant acted suspiciously and might have been seen as being in a "suspicious place" when he was approached by the police. Hardinge v. Texas, 500 S.W.2d 870, 872-73 (Tex. Crim. App. 1973). The *Hamel* Court ignored this contradiction. *Hamel*, 582 S.W.2d at 427.

184. *Rodriguez*, 480 S.W.2d at 633. Common law crimes were codified in the penal code reform of 1973. *See* TEX. PEN. CODE ANN. § 1.03(a) (Vernon 1994). At least after 1974, courts had no basis for concluding that there existed a (commonlaw), statewide "suspicious persons" offense, even if those courts could have reconciled the constitutional problems inherent in such crimes. *See id.*

185. 499 S.W.2d 160 (Tex. Crim. App. 1973).

186. *Id.* at 165. The court wrote: "[T]here is no way to conclude the officers arrested appellant in a suspicious place or under suspicious circumstances apart from their well founded belief that he had committed a serious crime." *Id.* at 164-65.

187. *Compare Lowery*, 499 S.W.2d at 165 (illustrating the procedural interpretation of article 14.03), *with* Lara v. Texas, 469 S.W.2d 177, 178-79 (Tex. Crim. App. 1971) (illustrating the traditional interpretation of article 14.03).

188. *See* TEX. CODE CRIM. PROC. ANN. art. 14.03 (Vernon 1977 & Supp. 2000).

was actually intended to create a suspicious persons offense for Texas. If that were the case, surely the offense would be located within the Penal Code, not the Code of Criminal Procedure, and would contain language defining the elements of the crime and establishing a range of punishment.[189]

The second problem is one of constitutional dimension. The United States Supreme Court in *Michigan v. DeFillippo* considered a Detroit ordinance authorizing officers with "reasonable cause" to stop a person whose "behavior warrants further investigation for criminal activity" and demand that the person identify himself.[190] Although the court upheld the arrest in *DeFillippo* on the basis of good faith, it struck down the ordinance as being unconstitutionally vague.[191] The Texas Court of Criminal Appeals, citing *DeFillippo*, found the same constitutional infirmity in Austin's "suspicious persons ordinance," leaving no doubt that such ordinances almost always will be found unconstitutional.[192] Recently, the Supreme Court has added support to that premise.[193]

Alternatively, article 14.03 might be seen as a codification of *Terry v. Ohio*, thus justifying investigative detentions.[194] However, it is constitutionally impermissible to view article 14.03 as statutory approval of an arrest for which no probable cause exists.[195] Consequently, the easier course for the court of criminal appeals was to abandon any attempt to use the article to approve custodial arrests based on either reasonable suspicion or a belief that a person was suspicious. Instead the court read the law as authority to arrest without warrant persons found in "suspicious places."[196]

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189. As noted previously, Texas has no common law crimes. *See* TEX. PEN. CODE ANN. § 1.03(a) (Vernon 1994).

190. 443 U.S. 31, 33 (1979).

191. *Id.* at 40.

192. *See* Howard v. Texas, 617 S.W.2d 191, 192 (Tex. Crim. App. 1979).

193. *See* City of Chicago v. Morales, 572 U.S. 41, 54 (1999) (holding as unconstitutional an ordinance prohibiting loitering by gang members).

194. *See* DAWSON & DIX, *supra* note 61, § 3.02[D]. "[Article 14.03] is sometimes, however, invoked only to validate law enforcement conduct that might be regarded as an investigatory field detention rather than an arrest." *Id.*

195. *See* Reamey & Harkins, *supra* note 8, at 867 (illustrating that article 14.03 is "merely an exception to the warrant requirement; . . . and cannot constitutionally be, an exception to the probable cause requirement"); *see also* Marc H. Folladori, *Terry Revisited and the Law of Stop-and-Frisk in Texas*, 27 SW. L.J. 490, 494-95 (1973) (describing that the article 14.03 grant of authority to "arrest" on suspicion rather than probable cause violates the constitution).

However, it is possible to read the statute as authority for a lesser detention, a *Terry* stop, requiring a lower level of suspicion than probable cause. *See, e.g.*, Reamey & Harkins, *supra* note 8, at 868. The textual problem raised by that approach is that the statute speaks of an *arrest*, a higher level of seizure requiring probable cause. *See id.* Mixing these distinct levels of seizure creates added confusion in interpreting article 14.03. *See, e.g.*, Wilson v. Texas, 722 S.W.2d 3, 4-5 (Tex. App.—Dallas 1986) (finding of reasonable suspicion for "stop and frisk" based in part on location being a "suspicious place" under article 14.03); Faulk v. Texas, 574 S.W.2d 764, 766-67 (Tex. Crim. App. 1978) (eschewing the use of " 'inarticulate hunch' " as sufficient for "investigatory stop" on grounds that it would constitute "manipulation of the probable cause doctrine").

196. "Reasonable suspicion" is that degree of suspicion to which the Supreme Court referred in

IX. PLACES THAT ARE "SUSPICIOUS"

Defining suspicious place is sufficiently challenging in its own right.[197] Article 14.03(a)(1) provides no guidance to courts applying the term, and the confusing history of the statute is of no assistance. Early attempts by the courts of appeal mostly reflect an earnest effort to give meaning to this phrase at the statute's core.[198] The difficulty in doing so is captured by an often-quoted passage in which the court of criminal appeals observed that "few, if any, places are suspicious in and of themselves."[199]

Carey v. Texas exemplifies a court taking this point seriously without shedding much light on the suspicious place limitation.[200] The defendant first was contacted by police at the hospital where he had taken his fatally stabbed girlfriend.[201] Although Carey appeared unusually nervous, did not give a coherent explanation of the events, and appeared intoxicated, there was no probable cause to believe he had committed the offense.[202] Nevertheless, Carey was detained at the hospital, taken to the police station, and eventually charged.[203]

The court of appeals held that Carey effectively was arrested when he was placed in a police car at the hospital and transported to the police station.[204] Because probable cause did not develop until the defendant gave inconsistent statements at the station, the arrest was unlawful, and it was not validated retroactively by the evidence developed later.[205] Turning to the question of whether the hospital was a suspicious place, the court stated simply that "there is no characterization of the hospital as a suspicious

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Terry. 392 U.S. 1, 20-22 (1968). It is less than probable cause, and it supports a lesser intrusion—a temporary investigative detention—than that associated with custodial arrest. *See id.* The Texas Court of Criminal Appeals did continue to uphold investigative detentions based on reasonable suspicion, but not on authority of article 14.03. *See, e.g.*, Meeks v. Texas, 653 S.W.2d 6, 12-13 (Tex. Crim. App. 1983); Hamel v. Texas, 582 S.W.2d 424, 426-27 (Tex. Crim. App. 1979). Article 14.03 was used in those cases to justify the warrantless arrest of the suspect when a temporary detention resulted in the discovery of criminal evidence creating probable cause. *See id.* This usage has been noted by the court of criminal appeals: "In the past, Article 14.03(a) and its predecessor Article 14.03 have served as authorization for limited investigatory field detentions which occurred in a variety of places and as subsequent validation for warrantless arrests based upon probable cause." Johnson v. Texas, 722 S.W.2d 417, 421 (Tex. Crim. App. 1986).

197. *See* DIX & DAWSON, *supra* note 7, § 9.30 (explaining that the substance of "suspicious place" is "remarkably obscure").

198. *See* discussion *infra* Part IX.

199. *Johnson*, 722 S.W.2d at 421.

200. 695 S.W.2d 306 (Tex. App.—Amarillo 1985, no writ).

201. *See id.* at 308-09.

202. *See id.* at 311. Carey was not sufficiently intoxicated to pose a danger to himself or others. *See id.* at 311-12. Consequently, he was not subject to an "on-view" arrest for public intoxication. *See id.*

203. *See id.* at 309.

204. *See id.* at 310-11.

205. *See id.* at 312.

place."[206]

Carey is typical in its failure to define what constitutes a suspicious place. Evaluations of this most-important requirement share an "I know it when I see it" quality that impedes the thoughtful development essential to credible lawmaking.[207] The lack of definition also permits courts to assert that a warrantless arrest is or is not permitted, virtually without limitation.

The court of appeals in *Thomas v. Texas* at least explained which facts persuaded it that the public street on which the defendant was seen, along with two companions, carrying objects, constituted a suspicious place.[208] The explanation came in response to the appellant's contention, with which the court agreed, that " 'there is nothing inherently suspicious about members of a neighborhood walking down the street carrying something in broad daylight.' "[209] The court noted that police had received a call from a neighbor who thought one of the men was carrying a television set, that the men put the items in a house known to be abandoned, and that at least one house in the neighborhood recently had been burglarized.[210] These facts led the court to hold "that Appellant was in a suspicious place under circumstances which reasonably showed that he was guilty of some felony."[211]

Thomas provided more explanation than *Carey* of the meaning of suspicious place but, nevertheless, left questions unanswered. The court seemed to say that probable cause existed to arrest the defendant and his companions for theft or burglary at the time the suspects were seen on the street " 'toting something.' "[212] However, at that moment, the police knew only that some men had placed property in a vacant house.[213] There had been a burglary in the neighborhood recently, but there is no indication in the court's opinion that any evidence existed that the defendant was involved.[214] In short, and despite the court's finding that these circumstances "reasonably showed" the defendant had committed a felony, there was no apparent reason to believe that the property in his possession was stolen.[215] Even if there was

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206. *Id.*

207. *Cf.* DIX & DAWSON, *supra* note 7, § 9.30 (commenting that the court understates the situation in its determination of whether a place that is "suspicious" is "highly fact-specific" (quoting Holland v. Texas, 788 S.W.2d 112, 114 (Tex. App.–Dallas 1990, writ ref'd)).

208. 681 S.W.2d 672, 674, 676 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd).

209. *Id.* at 676 (quoting Thomas's argument).

210. *See id.*

211. *Id.*

212. *Id.* at 674. The defendant ultimately was convicted of burglary of a habitation. *See id.* at 673. The opinion focused on the time of the initial observation of the men rather than later, after they had been found by an officer and returned to the scene, the property had been located in the abandoned house, and identified by the owner whose home had been burglarized. *See id.* at 676.

213. *See id.* at 674. The house originally was described as "vacant," then as "abandoned" in that portion of the opinion in which the court defended its position that the warrantless arrest was supported by article 14.03. *See id.* at 674-76.

214. *See generally id.* (noting the opinion's failure to mention Thomas's link to the burglary).

215. *See id.* at 676.

reason to believe that the property was stolen, there was insufficient proof that the television was of sufficient value to constitute a felony, or that it had been taken in a burglary.[216]

Moreover, the officer located three men "in the neighborhood" matching the description he had been given by the neighbor who reported his suspicions.[217] "The officer and the three men proceeded" to the neighbor's house and the search that uncovered the stolen property ensued.[218] Nowhere in its opinion did the court pinpoint the moment of arrest, although doing so is critical in assessing whether the arrest occurred in a "suspicious place." If, as the court implied, the defendant was arrested "in the neighborhood" or on a public street, it is unclear why that was a suspicious place.[219]

There is a real danger in this inability to define "suspicious place" that courts will misconstrue the statute to permit the custodial arrest of "suspicious persons;" that is, persons engaged in suspicious activity, regardless of the character of the place in which that activity occurs. If suspicious place has no meaning because it has virtually every meaning, the statute is transformed into a mandate to arrest anytime and anyplace probable cause exists. This interpretation potentially would result in a warrantless arrest authority broader than that permitted by the *public place* exception in Fourth Amendment law.[220]

Douglas v. Texas illustrates how an expansive reading of suspicious place might have this effect.[221] An Irving officer, responding to a call that shots had been fired in the vicinity of a certain address, arrived to be told by a citizen who pointed to a house across the street, " 'he is in there.' "[222] The officer found a shooting victim lying in the front yard of the house.[223] She and other officers then entered the house and located Douglas, whom the officers handcuffed while they investigated.[224]

Police discovered that a witness had seen Douglas near the body, that he had put something in a parked car, and that he ran inside the house when he realized he had been seen by the witness.[225] Douglas was formally arrested

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216. *See id.*

217. *Id.* at 674.

218. *See id.*

219. *Id.*; *see generally id.* at 672-77 (noting the opinion's lack of mentioning where the arrest occurred). Actually, the appellant argued as if the arrest occurred when he was "walking down the street carrying something in broad daylight." *Id.* at 676. The court responded to that argument as if it agreed, but it was only later, after the men had been located "in the neighborhood" by the officer that they could have been taken into custody. *Id.* at 674.

220. *See* United States v. Watson, 423 U.S. 411, 414-24 (1976).

221. 679 S.W.2d 790 (Tex. App.—Fort Worth 1984, no writ).

222. *Id.*

223. *See id.*

224. *See id.*

225. *See id.*

and taken to the city jail where he was searched.[226] In his pocket, the arresting officer discovered a contact lens case containing methamphetamine for which Douglas was charged.[227]

The Fort Worth Court of Appeals held that Douglas's warrantless arrest in the house was valid pursuant to article 14.03.[228] In a remarkably unenlightening "analysis," the court observed merely that someone had been shot; that "witnesses referred the investigating officers to Douglas" by saying " 'there he is' "; and that Douglas was the only person present on the premises.[229] Therefore, the court concluded, "Douglas was found in a suspicious place and under circumstances which would reasonably show that such person had been guilty of some felony or breach of the peace."[230]

The court's opinion said nothing about whether Douglas lived in the house or whether the police knew if he was the occupant.[231] Supposing that Douglas did live there, surely the premises would not be a "suspicious place" as to him, or at least not a place inherently suspicious. The only characteristic of the premises that arguably could have made them suspicious was that a crime had occurred there.[232] The mere presence of the suspect presumably could not imbue the premises with suspicion, because to hold thus would read the limitation of article 14.03 out of existence.[233]

Support for the notion that every crime scene is a suspicious place, at least if the suspect is found there, also derives from the most significant case on this point, *Johnson v. Texas*.[234] Jerry Johnson was a maintenance man at an apartment complex where a burglary and stabbing occurred.[235] There was no sign of forced entry into the apartment where the victim lived, and a witness identified the assailant as a black man.[236] A key ring, hammer, one black glove, and a black undershirt were found in the apartment, along with a bloody kitchen knife.[237]

Johnson arrived at the apartment while police were conducting their

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226. *See id.*

227. *See id.* at 791. Douglas did not shoot the victim, as it turned out. *See id.*

228. *See id.*

229. *Id.*

230. *Id.*

231. *See generally id.* at 790-91 (noting the court's failure to mention where Douglas lived and whether the police knew of this fact).

232. *See* REAMEY & BUBANY, *supra* note 9, at 28 (questioning whether *Douglas* means that every crime scene is a "suspicious place").

233. It is a mere tautology to say that places in which a suspected criminal are found are suspicious in a way that justifies a warrantless arrest. If the power to arrest without warrant is grounded in necessity, it cannot extend to every place in which a suspect is found. "Suspicious place" is simply a redundancy if given this expansive meaning.

234. 722 S.W.2d 417 (Tex. Crim. App. 1986); *see* DIX & DAWSON, *supra* note 7, § 9.30 (explaining that *Johnson v. Texas* is "perhaps the leading case" on "suspicious place").

235. *See Johnson*, 722 S.W.2d at 418-19.

236. *See id.* at 418.

237. *See id.* at 419.

investigation.[238] He told the officers that he worked at the complex, and that he had been advised by the apartment answering service to go to the apartment when he had called them earlier in the morning.[239] Officers thought Johnson appeared nervous, and they considered it odd for him to show up at the apartment because two security guards already were on the scene.[240]

The physical evidence led police to suspect that the perpetrator was an employee of the complex.[241] When they noticed blood on Johnson's pants, and then when he admitted that the keys found in the apartment belonged to him, Johnson was handcuffed, taken to the station, and questioned.[242] After being charged with murder, Johnson moved to suppress evidence seized from him, claiming that he was arrested at the scene without a warrant, and that the warrantless arrest was not subject to any of the statutory warrant exceptions.[243]

The court of criminal appeals began its review of denial of Johnson's suppression motions by determining that he had been arrested when he was handcuffed at the apartment complex.[244] That arrest, the court concluded, was supported by probable cause derived from the evidence known to the officers at the scene.[245] Turning to the question of whether a warrant was required, the court cited article 14.03 and engaged in the most extensive discussion of the provision since *Lara v. Texas*.[246]

Judge McCormick, writing for the majority, explained that the statute's command that "circumstances . . . reasonably show" that the arrestee is guilty of an offense "is the functional equivalent of probable cause to believe that a particular person has committed a felony."[247] Because probable cause existed for Johnson's arrest, the issue was whether it occurred in a suspicious place.[248]

Facts known to an officer, together with reasonable inferences from those facts, might "arouse justifiable suspicion," but, according to the court, "14.03 should be applied to authorize warrantless arrests in only limited situations."[249] After reviewing the cases in which article 14.03 had been used to justify "limited investigatory field detentions" followed by arrests based on probable cause, Judge McCormick wrote, "We see no distinction between the detention cases and the situation at bar (where the officers' suspicions were justifiably aroused and probable cause to arrest arose contemporaneously) which would

238. *See id.*
239. *See id.*
240. *See id.*
241. *See id.*
242. *See id.*
243. *See id.* at 420.
244. *See id.* at 419-20.
245. *See id.*
246. *See id.* at 421.
247. *Id.*
248. *See id.*
249. *Id.* Judge McCormick noted in passing that "the obvious legislative intent of Chapter 14 [is the] protection of individual rights and furtherance of legitimate law enforcement." *Id.*

prevent the application of Article 14.03."[250] Noting that "the presence of appellant was not contrived by law enforcement officials to circumvent the procurement of a warrant," the court concluded cryptically, "nor did appellant's arrest occur in a place where he could claim a reasonable expectation of privacy."[251]

As in *Douglas*, and even considering the court's iteration that article 14.03 should be "applied to authorize warrantless arrests in only limited situations," the obvious inference is that a crime scene virtually always qualifies as a suspicious place.[252] The *Johnson* court did not base its decision on exigency, and there was no indication that the suspect was about to flee.[253] Indeed, he voluntarily returned to the scene of the stabbing.[254] The only plausible explanation for the court's holding that Johnson was arrested in a "suspicious place" is that he was found where the crime occurred.[255]

To hold that every crime scene is suspicious essentially strips from article 14.03 the added protection afforded by Texas's statutory warrant exception scheme.[256] The Fourth Amendment allows warrantless arrests on no more showing than probable cause and finding the suspect in a public place.[257] If the crime scene is, perhaps like *Douglas*, the place where the suspected perpetrator lives or some other place that is not public, then the court's position leaves Texans with less "protection of individual rights" than they receive from the Fourth Amendment.[258] What remained unclear after

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250. *Id.*

251. *Id.*

252. *Id.*; Douglas v. Texas, 679 S.W.2d 790, 791 (Tex. App.—Fort Worth 1984, no writ); *see also* DIX & DAWSON, *supra* note 7, § 9.30 (explaining that *Johnson* "involved an arrest at a crime scene"). In its descriptive recitation of cases applying article 14.03, the court characterized *Douglas* as holding "that a homicide *crime scene* was a suspicious place under the facts and circumstances available to the arresting officers and the warrantless arrest of the defendant was valid under Article 14.03(a)." *Johnson*, 722 S.W.2d at 421 (emphasis added).

253. *Johnson*, 722 S.W.2d at 420 (holding that exigent circumstances are found to be "constitutionally immaterial" to decision).

254. *See id.* at 419.

255. *Id.* In a similar, but significantly different case, a plurality of the Court of Criminal Appeals rejected the State's assertion that article 14.03 supported a warrantless arrest of a murder suspect from his room in the same apartment motel where the victim was living. *See* West v. Texas, 720 S.W.2d 511, 512-13 (Tex. Crim. App. 1986). Judge W.C. Davis, writing for the plurality, concluded, "It would require a conscious distortion of the concept of 'suspicious places' to find the arrest of appellant in the motel apartment occupied by his companion to be authorized under [Article 14.03] . . . ." *Id.* at 513. Apparently, the room from which the defendant was arrested was shared by a "companion" and the arrestee. *See id.* Inasmuch as he would have had a "reasonable expectation of privacy" in that room, the plurality may have been doing no more than expressing a strong preference for prior judicial approval of arrests from one's own apartment. *Id.* at 516-17. In any event, the fact that he was removed from the room where he was staying sufficiently distinguishes *West* from *Johnson*, even if one interprets "crime scene" to include an apartment removed from the one in which the murder took place. *Compare id., with Johnson*, 722 S.W.2d at 420-21 (discussing the limits of article 14.03).

256. *See West*, 720 S.W.2d at 513-14.

257. *See* U.S. v. Watson, 423 U.S. 411, 417 (1976).

258. *Johnson*, 722 S.W.2d at 421 (holding that protection of individual rights is part of the "obvious

Johnson was whether places other than crime scenes would be considered suspicious, and if so, on what basis.

While the *Johnson* court expanded the scope of "suspicious places," the opinion simultaneously suggested several important limitations on article 14.03:

> 1. Article 14.03's requirement that circumstances "reasonably show" actually means that probable cause must exist;[259]
> 2. "[L]imited investigatory field detentions" are authorized, perhaps by article 14.03, but "arrests" must be based on probable cause;[260]
> 3. Contrivance by law enforcement officers to circumvent the warrant requirement might lead to a different result;[261] and
> 4. An arrest in a place in which the arrestee "could claim a reasonable expectation of privacy" may not be subject to article 14.03.[262]

However, all of these limitations created substantial interpretive problems for courts.[263] If article 14.03 authorizes "limited investigatory field detentions" and validates subsequent warrantless arrests based on probable cause, are the two kinds of detentions separable?[264] On what basis did the court conclude that investigative detentions are part of a statute dealing with warrantless arrests?[265] By what standard would contrivance by law enforcement officers be judged, and would a finding of contrivance invalidate a warrantless arrest?[266] What did "reasonable expectation of privacy" have to do with whether a place is suspicious?[267] These and other questions are raised by the

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legislative intent of Chapter 14"); Douglas v. Texas, 679 S.W.2d 790 (Tex. App.—Fort Worth 1984, no writ) (discussing suspect arrested in house); *cf. West*, 720 S.W.2d at 512-13 (plurality opinion) (holding that a warrantless arrest of suspect from companion's motel apartment would "require a conscious distortion of the concept of 'suspicious places' "); REAMEY & BUBANY, *supra* note 9, at 28 n.3.

259. 722 S.W.2d at 421. "Circumstances within the knowledge of a peace officer which reasonably show that a particular person is guilty of a felony is the functional equivalent of probable cause to believe that a particular person has committed a felony." *Id.*

260. *Id.* (showing that article 14.03 has "served as authorization for limited investigatory field detentions which occurred in a variety of places and as subsequent validation for warrantless arrests based upon probable cause.").

261. *See id.* (stating that "[The] presence of appellant was not contrived by law enforcement officials to circumvent the procurement of a warrant"); DIX & DAWSON, *supra* note 7, § 9.30 (commenting that the *Johnson* court suggested that contrivance would render warrantless arrest impermissible).

262. *Johnson*, 722 S.W.2d at 421 ("[N]or did appellant's arrest occur in a place where he could claim a reasonable expectation of privacy"); *see* DIX & DAWSON, *supra* note 7, § 9.30.

263. *See* DIX & DAWSON, *supra* note 7, § 9.30.

264. *See id.*

265. *See id.*

266. *See id.*

267. *Id.* If, for instance, police have probable cause to believe that a shop owner is in the process of setting fire to his store in order to defraud his insurance company, would they be able to arrest him

court's opinion in *Johnson*, but they are not answered.[268]

In the years since *Johnson* was decided, the court of criminal appeals has had almost nothing more to say about "suspicious places."[269] The court resorted to article 14.03(a)(1) to uphold the warrantless arrest in *Muniz v. Texas*, a 1993 case, but the court's analysis was no more, and arguably less, revealing than in previous cases.[270] The evidence known to police provided probable cause to believe that the defendant, Pedro Muniz, raped and murdered his victim.[271] Officers went to the defendant's brother's house to search for the suspect.[272] Inside the house, the defendant's wife nodded toward a bedroom, and the "brother went directly to the closet in that room, opened the closet door, and motioned for [the defendant] to come out."[273] The defendant was arrested without a warrant.[274]

The court's entire analysis consisted of a conclusion that the defendant was "hiding in the closet" and "that [the] appellant was arrested upon probable cause in a suspicious place, under circumstances that reasonably show he had committed some felony."[275] Unlike *Johnson*, this arrest was not at the crime scene, and the court failed to explain why it considered the brother's house a suspicious place.[276] Further, the court failed to explain why the arrestee had no "reasonable expectation of privacy" in the house or closet.[277] The premises had no apparent connection with the offense other than being where the suspect was hiding.[278] If the court meant to imply that article 14.03(a)(1) permits a warrantless arrest in any place where the suspect is found, then *Muniz* eviscerated what little protection the statute afforded after the decision

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pursuant to article 14.03? Presumably, the owner has a reasonable expectation of privacy in his store, yet it is a "crime scene" and "suspicious." *See generally Johnson*, 722 S.W.2d at 421 (stating that a crime scene is a suspicious place). Does a reasonable expectation of privacy in a place trump the statutory exception?

268. *Johnson*, 722 S.W.2d at 420-22.

269. *See* Muniz v. Texas, 851 S.W.2d 238, 251 (Tex. Crim. App. 1993) (relying solely on "probable cause" and article 14.03).

270. *Id.*

271. *See id.*

272. *See id.*

273. *Id.*

274. *See id.*

275. *Id.*

276. *See id.*; Johnson v. Texas, 722 S.W.2d 417, 421 (Tex. Crim. App. 1986).

277. *Compare Muniz*, 851 S.W.2d at 251 (concluding that the suspect was arrested upon probable cause when found hiding in a suspicious place), *with Johnson*, 722 S.W.2d at 421 (suggesting that arrestee's reasonable expectation of privacy would disqualify premises for application of article 14.03); *see also* West v. Texas, 720 S.W.2d 511, 512-13 (Tex. Crim. App. 1986) (articulating that the apartment motel room rented to arrestee's companion and where arrestee was found were not "suspicious places").

278. *See Muniz*, 851 S.W.2d at 251. The San Antonio Court of Appeals interpreted *Muniz* as being premised on the suspect's "behavior." *See* Texas v. Parson, 988 S.W.2d 264, 269 (Tex. App.—San Antonio 1998, no pet.). Apparently the court of appeals believed, and perhaps correctly, that the court of criminal appeals viewed "hiding" in a closet as sufficiently suspicious behavior to render the premises on which it occurred a "suspicious place" as well. *See id.* at 268-69.

in *Johnson*.[279] Because the court of criminal appeals did not explain itself, it left the lower courts to continue to speculate, often in contradictory ways, about the meaning of suspicious place.

The court of appeals' cases can be divided into three groups: those involving an arrest at the arrestee's residence; those occurring at a vehicle accident scene; and those in which a vehicle was the "suspicious place."[280] In a few other cases, courts have left unanswered questions about whether a suspicious place was involved because an absence of probable cause for the arrest foreclosed the State's claim that it was justified by article 14.03(a)(1).[281]

The cases in which the arrestees were found on their own property illustrate how dissimilar the approaches of the courts of appeals can be.[282] In one case, the Dallas Court of Appeals found "no such clear indicia of suspicion" in the defendant's own apartment, the place where he was arrested.[283] The court noted that no evidence of the crime being investigated (terroristic threat) was found in the defendant's apartment, and no stolen property or contraband was seen.[284] The suspect "was agitated and smelled of alcohol, but neither of these constitute circumstances which would transform the site into a 'suspicious place.' "[285]

The Houston Court of Appeals reached the opposite result in *Crowley v.*

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279. *Muniz*, 851 S.W.2d at 251. Again, the court's holding in *Muniz* insinuates that, at least sometimes, Texans enjoy less protection from warrantless arrests by relying on statutory warrant exceptions than they would by invoking the scant protection of the Fourth Amendment. *Id.* If Muniz had argued that his Fourth Amendment rights were violated by his arrest in his brother's house, he might have fared better than by relying on the illusory protections in chapter 14. *See id.*

Muniz may be better understood as a court's reaction to a particularly brutal crime committed by a recidivist rapist. *Id.* In *Muniz*, probable cause existed, but the crime was not committed in the presence or view of the arresting officer, was not a theft, and there was no representation that the suspect might flee before a warrant could be procured. *Id.* at 250-51. Given the brother's consent to enter his house and cooperation with the police, the court might have based its approval of the warrantless arrest on article 14.04, the exception for persons who may flee, on the theory that they did not create the exigency that led to the discovery of the suspect, and that once discovered, he was bound to flee. *See* TEX. CODE CRIM. PROC. ANN. art. 14.04 (Vernon 1977). The fact that the subject was hiding in a closet reasonably would have supported such a conclusion and saved the court from its unfortunate choice of article 14.03(a)(1) to justify the arrest. *See Muniz*, 851 S.W.2d at 251. Ironically, the appellant argued on appeal that he was not "about to escape," but the court relied instead entirely on the "suspicious place" exception. *Id.* at 250.

280. *Compare Parson*, 988 S.W.2d at 266; Crowley v. Texas, 842 S.W.2d 701, 702-03 (Tex. App.—Houston [1st Dist.] 1992, no writ); *and* Holland v. Texas, 788 S.W.2d 112, 113 (Tex. App.—Dallas 1990, writ ref'd), *with* Cooper v. Texas, 961 S.W.2d 229, 231 (Tex. App.—Houston [1st Dist.] 1997, writ ref'd); Cornejo v. Texas, 917 S.W.2d 480, 482-83 (Tex. App.—Houston [14th Dist.] 1996, writ ref'd); Flores v. Texas, 895 S.W.2d 435, 438-39 (Tex. App.—San Antonio 1995, no writ); Aitch v. Texas, 879 S.W.2d 167, 170 (Tex. App.—Houston [14th Dist.] 1994, writ ref'd) *and* Segura v. Texas, 826 S.W.2d 178, 180-81 (Tex. App.—Dallas 1992, writ ref'd).

281. *See* Rosalez v. Texas, 875 S.W.2d 705, 719 (Tex. App.—Dallas 1993, writ ref'd); Mitchell v. Texas, 756 S.W.2d 71, 74 (Tex. App.—Texarkana 1988, no writ).

282. *See Crowley*, 842 S.W.2d at 701; *Holland*, 788 S.W.2d at 115.

283. *Holland*, 788 S.W.2d at 115.

284. *See id.*

285. *Id.*

Texas.[286] Instead of stopping at the scene of a traffic accident in which she had been involved, the defendant drove to her house, pulled into a detached garage, and closed the door.[287] An officer called to the scene ordered the defendant to come out of the garage.[288] She did so and subsequently was arrested for driving while intoxicated.[289]

Unlike its sister court in Dallas, the Houston court concluded that article 14.03(a)(1) authorized the warrantless arrest.[290] Observing that the officer had ample reason to believe the suspect had committed the offense of failing to stop and give information and was still inside the detached garage, the court summarily held that it was "proper to classify the garage as a 'suspicious place.' "[291]

The suspect in *Texas v. Parson* was found in his own front yard following a "hit and run" traffic accident.[292] A citizen, who was not a witness to the accident, told police that the suspect admitted to having "struck 'something' " while driving home.[293] Officers followed the informant to the suspect's house where they found him standing by his truck.[294] The condition of the truck, Parson's reaction, and his apparent intoxication provided probable cause for his warrantless arrest at the scene.[295]

The State relied on these same facts to characterize the front yard as a suspicious place.[296] Conceding that no witness connected the suspect or his front yard with the offense and that "no one believed that a crime had been committed in Parson's front yard," the court nevertheless viewed the premises as suspicious.[297] The court's holding was based on the suspect's behavior, the fact that the officers had been directed to the scene by an informant, and evidence found on the suspect's truck.[298]

All of this evidence merely supported the officers' belief that the suspect

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286. 842 S.W.2d at 701.
287. *See id.* at 702.
288. *See id.* at 703.
289. *See id.*
290. *See id.* at 703-04.
291. *Id.* at 703. The Court of Criminal Appeals previously had justified its holding in *Johnson* in part on the grounds that the suspect's arrest did not "occur in a place where he could claim a reasonable expectation of privacy." Johnson v. Texas, 722 S.W.2d 417, 421 (Tex. Crim. App. 1986). Nowhere in its opinion did Houston's First Court of Appeals explain either why the arrestee had no expectation of privacy in her garage, or why that fact played no part in deciding whether to apply article 14.03(a)(1). *See generally Crowley*, 842 S.W.2d at 703 (noting the absence of the court's explanation regarding why the defendant had no expectation of privacy in her garage and why article 14.03(a)(1) was applicable).
292. 988 S.W.2d 264, 266 (Tex. App.—San Antonio 1998, no pet.).
293. *Id.*
294. *See id.*
295. *See id.*
296. *See id.* at 268.
297. *Id.* at 269.
298. *See id.*

had committed an offense, a point the court of appeals seemed to admit.[299] While the same facts may establish both probable cause and that the place where the suspect is found is suspicious, this sort of "double dipping" risks reading the arrest exception out of existence. If, as in *Muniz*, *Crowley*, and now, *Parson*, the place where the suspect is found becomes "suspicious" merely because he is present and acting in a manner consistent with probable guilt, then only the rarest case will not support a warrantless arrest.[300]

Cases in which the suspect's vehicle, or the vehicle in which he is riding, is the suspicious place sometimes present the same problem.[301] *Aitch* is perhaps the clearest example of this.[302] The suspect was arrested from the car he was driving after he picked up two men who had committed a robbery earlier in a car rented by the suspect.[303] The Mercedes driven by the suspect was held to be a suspicious place merely because police had evidence connecting the suspect to criminal activity; or, in other words, because the police had probable cause.[304] The suspect had not used the Mercedes to commit the crime and was not at the crime scene committing a crime when he was arrested. Similarly, he was not "hiding" or behaving suspiciously.

At least some of the vehicle cases treat the suspicious place requirement seriously.[305] Where the suspect was seen driving "elusive[ly]" through a park after picking up a prostitute, the Austin Court of Appeals explained that the likelihood of imminent criminal activity transformed the park into a suspicious place.[306] In other cases in which shots were fired from vehicles, the location of the vehicles also were considered suspicious places, not unlike other crime scenes.[307]

Vehicle accident locations also might be viewed as "crime scenes" under some circumstances, although at least one court firmly rejected the argument that an accident scene was a suspicious place.[308] After acknowledging that

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299. *See id.* at 268. The court noted that the State's assertion that the front yard was a suspicious place was based on "basically the same factors that [the State] argued indicated probable cause." *Id.*

300. Muniz v. Texas, 851 S.W.2d 238, 251 (Tex. Crim. App. 1993); *Parson*, 988 S.W.2d at 264; Crowley v. Texas, 842 S.W.2d 701, 702-03 (Tex. App.—Houston [1st Dist.] 1992, no writ).

301. *See* Aitch v. Texas, 879 S.W.2d 167, 170 (Tex. App.—Houston [14th Dist.] 1994, writ ref'd).

302. *Id.*

303. *See id.* at 171.

304. *See id.*

305. *See* Acosta v. Texas, 868 S.W.2d 19, 21 (Tex. App.—Austin 1993, no writ).

306. *See id.*

307. *See* Cornejo v. Texas, 917 S.W.2d 480, 483-84 (Tex. App.—Houston [14th Dist.] 1996, writ ref'd) (describing that the automobile used in the drive-by shooting and found in the area of the shooting was a "suspicious place"); Flores v. Texas, 895 S.W.2d 435, 443 (Tex. App.—San Antonio 1995, no writ) (showing that the vehicle believed to be involved in the shooting and found in the park was in a "suspicious place"); *see also* Johnson v. Texas, 722 S.W.2d 417, 421 (Tex. Crim. App. 1986) (explaining that the suspect was arrested at the scene of an illegal entry and stabbing); Douglas v. Texas, 679 S.W.2d 790, 791 (Tex. App.—Fort Worth 1984, no writ) (showing that the shooting victim was found in the front yard of the house where the suspect was arrested).

308. *See* Segura v. Texas, 826 S.W.2d 178, 184 (Tex. App.—Dallas 1992, writ ref'd) (stating "There

"[t]he scene of an accident is not a suspicious place per se," another court of appeals upheld a warrantless arrest at an accident scene in the early morning hours in front of a bar.[309] The suspect had a cut on his chin and had been drinking, leading the court to hold that "[t]he trial court could have reasonably concluded that a parking lot in front of a bar in the wee hours of the morning with intoxicated, bleeding people walking around wrecked cars constituted a 'suspicious place.' "[310]

Taken together, these diverse cases interpret article 14.03(a)(1) in very different and potentially dangerous ways. One might conclude from surveying the efforts of Texas's appellate courts that a "suspicious place" warrantless arrest is valid: when the suspect is found at the scene of the crime;[311] when the suspect is behaving "suspiciously;"[312] or anytime probable cause exists to believe the suspect committed a felony or breach of the peace.[313]

The extent to which this understanding of the suspicious place limitation undermines the traditional Texas rule requiring arrest warrants cannot be overstated. Apparently, a court may resolve virtually any challenge to a warrantless arrest simply by characterizing the place in which it occurred as suspicious.[314] Whatever article 14.03(a)(1) originally was intended to mean, surely it was not intended to mean nothing.

X. AVOIDING THE ABSURD: A NEW UNDERSTANDING OF ARTICLE 14.03(a)(1)

The Texas Court of Criminal Appeals explained quite logically in another context that,

> [i]f a statute may reasonably be interpreted in two different ways, a court may consider the consequences of differing interpretations in deciding which interpretation to adopt. Moreover, if one reasonable interpretation of a statute yields absurd results and another interpretation yields no such

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is nothing in the record that would characterize the place of the accident as suspicious.").

309. Cooper v. Texas, 961 S.W.2d 229, 232 (Tex. App.—Houston [1st Dist.] 1997, writ ref'd).

310. *Id.*

311. *See Johnson*, 722 S.W.2d at 421 (discussing suspect arrested at the scene of an illegal entry); *Douglas*, 679 S.W.2d at 791 (describing suspect arrested in front yard of house where victim was found).

312. *See* Muniz v. Texas, 851 S.W.2d 238, 251 (Tex. Crim. App. 1993) (detailing suspect found hiding in closet).

313. *See* Texas v. Parson, 988 S.W.2d 264, 266 (Tex. App.—San Antonio 1998, no pet.) (stating suspect arrested in own front yard for "hit and run"); Aitch v. Texas, 879 S.W.2d 167, 170 (Tex. App.—Houston [14th Dist.] 1994, writ ref'd) (discussing suspect arrested from car he was driving, not at crime scene); Crowley v. Texas, 842 S.W.2d 701, 702-03 (Tex. App.—Houston [1st Dist.] 1992, no writ) (stating suspect arrested from her own garage for leaving scene of an accident).

314. *See infra* note 317 and accompanying text.

absurdities, the latter interpretation should be preferred.[315]

A *preferred* interpretation of article 14.03(a)(1), therefore, would avoid the absurd result to which "crime scene," "suspicious behavior," and other expansive readings of the suspicious place exception have led.

Courts today bring important new understandings to the task of reinterpretation that were unknown to their predecessors. The challenge is to reconcile history, constitutional limitations, and text in order to arrive at a workable consensus about the contemporary role of article 14.03(a)(1).

A. History, Constitutional Limits, and Text

The limited evidence of history is that the nineteenth-century drafters intended to promote local ordinances authorizing preventive detention.[316] The idea of preventive, or investigative, detention understandably stirs deep fears of police overreaching, but the practice today is widespread in at least one form, constitutionally sanctioned by no less a guardian of individual liberty than the Warren Court.[317]

As has been seen, vague and broad "suspicious person ordinances" are not sanctioned, nor are custodial arrests unsupported by probable cause, or investigative detentions grounded on nothing more than inarticulable hunches.[318] These "near-constitutional" laws and practices are understood in present-day legal parlance to fall below constitutional minimums.[319] As such, they comprise, not the constitutional floor for the protections afforded by article 14.03(a)(1), but rather the constitutional basement.

Applied to the current version of the statute, this premise means that

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315. *Muniz*, 851 S.W.2d at 244 (citation omitted).

316. *See* DIX & DAWSON, *supra* note 7, § 9.28.

317. *See* Terry v. Ohio, 392 U.S. 1, 11-12 (1968) (finding that field interrogation practices may substantially interfere with liberty and personal security; officers' judgement may be colored by the "competitive enterprise of ferreting out crime" (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)).

318. *See Terry*, 392 U.S. at 21-22. The Supreme Court has written in regard to the last of these concerns that:

> [I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?

Id. (citation omitted). The Court noted that "[t]his demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Id.* at 21 n.18.

319. *See id.* at 21-22.

when the language purports to authorize an arrest of a person who is "about to commit some offense against the laws," that wording cannot be given the effect contemporary officers, judges, and citizens ordinarily would give it.[320] A custodial arrest leading to prosecution is only for offenses that have been committed, or are being committed, and not for those about to be committed.[321] Similarly, a person who *threatens* to commit an offense cannot be arrested unless the threat itself constitutes a complete offense.[322] Otherwise, a threat is no more than a manifestation of culpability without the accompanying prohibited act that transforms it into a punishable offense.

B. Resolving the "Arrest" Conundrum

The drafters of the earliest version of article 14.03(a)(1) might have actually intended to promote the full, custodial arrest of persons who were "about to commit" an offense and who happened to be found in "suspicious places." Whatever their intent, no modern court can choose that interpretation of the original statutory language.[323] Instead, a court might ignore entirely the suspicious places and "about to commit language," at least to the extent that it purports to authorize something unconstitutional by our lights.[324] This approach essentially would reduce the suspicious places clause to a precedent

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320. TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(1) (Vernon Supp. 2000).

321. Lest there be any misunderstanding of this point, attempted offenses—those preparatory acts that have begun, but not yet completed the crime—are themselves complete offenses. *See* TEX. PEN. CODE ANN. § 15.01 (Vernon 1994); G. REAMEY, CRIMINAL OFFENSES AND DEFENSES IN TEXAS 28-35 (2d ed. 1993 and Supp. 1998). An officer who interrupts the perpetrator, in the example of a burglary, after acts amounting to "more than mere preparation" have been undertaken, but before the crime is complete, may well have probable cause to arrest, and may do so without a warrant because a crime (attempted burglary) "has been committed" in the presence or view of the officer. REAMEY, *supra* note 321, at 28-35.

In *Hoag v. Texas*, the court expressly rejected the State's contention that article 14.03(a)(1) authorizes a warrantless arrest for a crime that perhaps is about to be committed but has not been committed yet. 728 S.W.2d 375, 379-80 (Tex. Crim. App. 1987).

322. Some threats suffice to constitute an offense, while "threatening" to commit any offense generally is not, by itself, an offense. *See Hoag*, 728 S.W.2d at 379-80. Therefore, article 14.03(a)(1) cannot be read literally to authorize an arrest for every threat to commit some offense. *See* Johnson v. Texas, 722 S.W.2d 417, 421 (Tex. Crim. App. 1986). However, *Johnson* might be read to permit a warrantless arrest in those cases in which an offense involving a threat, like assault or terroristic threat, has been committed. *Id. Johnson* might also be stating that, as used in article 14.03(a)(1), "threaten" has a broader, less legalistic meaning, connoting any kind of incipient illegal action. *Id.* If this is the meaning assigned to the word by the courts, this meaning can only be applied to those situations like temporary, investigative detentions supported, at the least, by reasonable suspicion. *See id.* A real custodial arrest can follow only if probable cause is developed. *See* Beck v. Ohio, 379 U.S. 89, 91 (1964).

323. *See* Folladori, *supra* note 195, at 494-95.

> [S]erious questions must be raised concerning article 14.03's constitutional validity. First, the provision, read literally, gives Texas peace officers authority to arrest in circumstances which the Supreme Court in *Terry* had decreed would only be appropriate for an investigative stop. In other words, article 14.03 seems to grant authority to arrest on suspicion, thereby violating the requirement that probable cause exist in order for an arrest to be constitutionally valid.

Id.

324. *Cf. id.* at 495 (discussing how the vagueness of a rule can cause unconstitutional results).

condition used exclusively for a warrantless custodial arrest based on probable cause.[325] Alternatively, a court might give the words all of the force and effect that the Constitution will bear by viewing the language as authorizing a pre-arrest detention.[326]

A court adopting the latter position must be prepared to explain how a statute permitting arrest without warrant can apply to any seizure based on less than probable cause.[327] In fact, the narrow way in which the word "arrest" has been used makes it appear to be a significant obstacle.[328] This semantic difficulty was described decades ago by Professor Walter W. Steele, Jr.:

> One of our most basic conceptual problems is that we are so accustomed to the litany of arrest[s] as "custody for prosecution" that we lose sight of the all-too-frequent, non-prosecutorial uses of the arrest process. For example, drunks are sometimes arrested to be sobered up with no thought of prosecution. In that instance[,] arrest is used as a convenient substitute for more appropriate social services for intoxicated (sick) persons. Furthermore, there are numerous instances of persons legally taken into custody to be conveyed to the scene of a crime for investigation, rather than for prosecution. Apparently we are already willing to tolerate some temporary denial of liberty or freedom of movement for reasons other than prosecution. Therefore, from the standpoint of reality, "arrest" is defined too narrowly when its meaning is restricted to taking a person into custody for the singular purpose of prosecution. . . . The issue is not whether the act is something other than an arrest, but whether detention is legal in light of [F]ourth [A]mendment requirements.[329]

The court of criminal appeals apparently understands that *arrest* is not a monolithic concept.[330] In *Linnett v. Texas*, an automobile search case, the court differentiated between *custodial* arrests and other, presumably noncustodial, arrests.[331] Linnett was the driver of a car with an expired

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325. *Cf. id.* (discussing how the vagueness of a rule can cause unconstitutional results).

326. *See id.* at 494.

327. *See id.* The failure to clarify this point leads to the kind of confusion engendered by cases like *Lara v. Texas*. 469 S.W.2d 177, 178-79 (Tex. Crim. App. 1971). When the Court of Criminal Appeals in *Lara* held that the officers observing men running from deserted shacks "had probable cause to be suspicious," it hopelessly muddled the concept of investigative detention grounded in reasonable suspicion with that of custodial arrest based on probable cause. *See id.* at 179.

328. *See* Folladori, *supra* note 195, at 494; *supra* text accompanying note 327.

329. Walter W. Steele, Jr., *A Proposal to Legitimate Arrest for Investigation*, 27 SW. L.J. 415, 416-17 (1973) (citations omitted); *see* Gerald H. Abrams, *Constitutional Limitations on Detention for Investigation*, 52 IOWA L. REV. 1093, 1105 (1967).

330. *See* Linnett v. Texas, 647 S.W.2d 672, 674 (Tex. Crim. App. 1983).

331. *See id.* at 674-75. The court determined that the defendant's traffic "stop" was not a custodial arrest. *See id.* It did not use the term *noncustodial* arrest, but the most logical inference from the court's decision and reasoning is that a category of *noncustodial* arrests exists, and that the distinction between custodial and noncustodial arrests lies in whether the arrestee is transported to jail and booked. *See id.*

registration.[332] After stopping Linnett's vehicle and speaking with the driver, the patrol officer looked inside a canister found in the front seat and discovered hydromorphone pills.[333] Holding that the traffic stop was not a "custodial" arrest, the Texas Court of Criminal Appeals rejected the State's claim that the warrantless seizure was justified by the "search incident to arrest" exception.[334]

In a footnote to *Linnett*, the court observed that the Supreme Court in deciding *New York v. Belton* took note of testimony by a police instructor that a " 'full custody arrest' " involves transporting an arrestee " 'to a police facility for booking.' "[335] At least for purposes of a search incident to arrest, the court seemed to adopt this test for distinguishing a custodial arrest from a noncustodial arrest.[336]

A noncustodial arrest, one not involving transportation to a police facility for booking, is almost certainly the kind of temporary detention approved by the Supreme Court in *Terry v. Ohio*.[337] Just as no distinction was made in *Terry* between a "stop" and an "arrest," there is no need for Texas courts to construct a barrier between two equally reasonable forms of detention.[338] Seen in this way, the authority conferred in article 14.03(a)(1) to "arrest, without warrant" encompasses both custodial and noncustodial arrests.[339]

A noncustodial arrest, or *Terry* "stop," requires at least reasonable suspicion to believe that "criminal activity is afoot."[340] The kind of preemptive detention approved in *Terry* allows officers to act on objective reason to believe that a crime is *about* to be committed.[341] A temporary seizure allows peace officers to maintain the status quo while an investigation

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332. *See id.* at 673.

333. *See id.*

334. *See id.* at 675. The "search incident to arrest" exception is discussed in *New York v. Belton*, 453 U.S. 454, 457-58 (1981).

335. *Linnett*, 647 S.W.2d at 674 n.3.

336. *See id.*

337. 392 U.S. 1, 30 (1968).

338. *See id.* at 17 (rejecting "distinctions between a 'stop' and an 'arrest' "); *see also* Steele, Jr., *supra* note 329, at 417 (arguing that "[The] Supreme Court has consistently refused to allow basic issues to be avoided by . . . manipulating labels."). Of course, each form of "seizure" has its own characteristics. *See* Steele, Jr., *supra* note 329, at 417. A *Terry* "stop" is said to be temporary and for the purpose of investigation, while an arrest also serves important security interests and may be of much greater duration. *See id.* Nevertheless, each stop is regulated by the Fourth Amendment; each stop must be reasonable; yet, each stop involves a substantial interference with liberty. *See* DIX & DAWSON, *supra* note 7, § 10.03. Rather than being entirely dissimilar, they are just different varieties of the same species. *See id.*

339. TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(1) (Vernon Supp. 2000).

340. *See Terry*, 392 U.S. at 30. The term "reasonable suspicion" was not used by the Supreme Court in *Terry*. *See id.* However, it has become the shorthand way in which that level of suspicion, less than probable cause, justifying a brief investigative detention is described. *See id.*

341. *Id.* This is precisely what occurred in *Terry*. *Id.* at 5-7. Officer McFadden saw men who appeared to be "casing" a retail shop in preparation for a daylight robbery. *See id.* He approached the men, questioned them, and eventually frisked them before probable cause developed to believe they had committed any crime. *See id.*

is conducted and to "preserve the peace" by halting what the officer reasonably believes to be an incipient criminal act.[342] A custodial arrest, on the other hand, requires probable cause to believe a crime has been or is being committed, not that one is about to be committed.[343] Consequently, the arrest authority of article 14.03(a)(1) where "circumstances . . . *reasonably show* that such persons . . . threaten, or are about to commit some offense against the laws" is wholly consistent with the holding of *Terry* and supports both noncustodial and custodial arrests.[344]

Reading article 14.03(a)(1) to authorize both custodial and noncustodial arrests solves the problem of what to do with the "threaten, or are about to commit" language, a clause that Texas' appellate courts heretofore have avoided assiduously.[345] This reading also solves the persistent question of what provision of Texas law authorizes an investigative detention (noncustodial arrest).[346]

Perhaps serendipitously, the drafters of the original version of article 14.03(a)(1) created a "reasonably show" standard rather than relying on probable cause, a term that certainly was known to them.[347] Narrowly viewed as authority for warrantless custodial arrests only, "reasonably show" has been interpreted as the equivalent of probable cause.[348] This interpretation, while clearly necessary due to constitutional concerns, is a bit odd. Why use the

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342. TEX. CODE CRIM. PROC. ANN. art. 2.13 (Vernon 1977) (stating "It is the duty of every peace officer to preserve the peace within his jurisdiction.").

343. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 9.02(A) (2d ed. 1996); *see also* Hoag v. Texas, 728 S.W.2d 375, 379-80 (Tex. Crim. App. 1987) (finding that article 14.03(a)(1) does not support arrest where crime has not yet been committed).

344. TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(1) (emphasis added). Discussing the intent of the drafters of the 1856 version of article 14.03(a)(1), Professors Dawson and Dix seem to concur that giving "arrest" a more expansive reading is consistent with the statute's original purpose:

> Despite the use of the term "arrest," this [1856 statute] most likely was viewed as delegating to local authorities the power to provide by ordinance for law enforcement officers to preventively intervene when they encountered suspicious persons. . . . In any case, the statute seems originally to have been designed to legitimize what today are investigatory stops and perhaps formal proceedings under ordinances that today would certainly be regarded as constitutionally offensive.

DIX & DAWSON, *supra* note 7, § 9.28.

345. TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(1). No doubt courts have avoided discussing this clause because it is so clearly out of place in a provision that is read as authorizing a warrantless custodial arrest on probable cause. Opinions in which *Terry* stops developed into probable cause and custodial arrests, typically gloss over the "poor fit" of article 14.03(a)(1). *See* Meeks v. Texas, 653 S.W.2d 6, 12-13 (Tex. Crim. App. 1983); Hamel v. Texas, 582 S.W.2d 424, 426-27 (Tex. Crim. App. 1979); Sheffield v. Texas, 647 S.W.2d 413, 415 (Tex. App.—Austin 1983, writ ref'd).

346. *See* DIX & DAWSON, *supra* note 7, § 10.03 (stating "[*Terry*] detentions are not explicitly authorized by Texas statutory law.").

347. TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(1).

348. Johnson v. Texas, 722 S.W.2d 417, 421 (Tex. Crim. App. 1986). In *Johnson*, the Court of Criminal Appeals, after quoting article 14.03, stated clearly that "[c]ircumstances within the knowledge of a peace officer which reasonably show that a particular person is guilty of a felony is the functional equivalent of probable cause to believe that a particular person has committed a felony." *Id.*

term "reasonably show" instead of simply requiring probable cause, unless the term was chosen to serve a broader purpose?[349] In any event, interpreting the current article 14.03(a)(1) to authorize investigative detentions based on reasonable suspicion is facilitated, and not at all inhibited, by the broad requirement that "circumstances . . . reasonably show" a person is "about to commit some offense."[350]

History, text, and constitutional concerns all are satisfied, therefore, by explicit recognition of article 14.03(a)(1) as authority for noncustodial arrests or investigative detentions.[351] Even precedent stands on the side of this use.[352] What remains is to determine the way in which the suspicious places requirement properly limits the application of article 14.03(a)(1).[353]

C. "Suspicious Places" Revisited

The starting premise for any exception to a rule of law must be that the exception not swallow the rule.[354] Texas cases interpreting the suspicious places requirement come dangerously close to doing just that.[355] This is especially true in those cases upholding arrests merely because probable cause exists to believe the defendant committed an offense, or because the suspect is hiding or otherwise behaving suspiciously, but in a non-criminal way, at the place.[356] These cases threaten to eviscerate the strong, long-standing Texas tradition of requiring arrest by warrant in the absence of manifest necessity.[357]

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349. The term "reasonable suspicion" was unknown to the drafters; it first appeared more than a hundred years after the first version of article 14.03. Notwithstanding that the drafters would not have known the term, it is not inconceivable that they understood the sense of it. They might have avoided use of "probable cause" precisely because they intended to promote investigative detentions other than custodial arrests and deliberately chose a somewhat more expansive term to describe the required quantum of suspicion necessary for those detentions.

350. TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(1).

351. *See* discussion *supra* Part X.A, B.

352. *See Johnson*, 722 S.W.2d at 421. Citing numerous cases, the court of criminal appeals noted in *Johnson*, albeit without elaboration, "In the past, Article 14.03(a) and its predecessor Article 14.03 have served as authorization for limited investigatory field detentions which occurred in a variety of places and as subsequent validation for warrantless arrests based upon probable cause." *Id.*

353. *Id.* (arguing that "14.03 should be applied to authorize warrantless arrests in only limited situations"); DIX & DAWSON, *supra* note 7, § 9.30 (stating "The requirement of a 'suspicious place' . . . is the major limitation upon the coverage of the statute").

354. *See* DIX & DAWSON, *supra* note 7, § 9.30 (discussing how "Article 14.03(a)(1) obviously should not be so broadly construed as to overshadow the general rule that arrest warrants are required.").

355. *Id.*

356. *See, e.g.*, Muniz v. Texas, 851 S.W.2d 238, 251 (Tex. Crim. App. 1993) (suspect found hiding in closet); Texas v. Parson, 988 S.W.2d 264, 266 (Tex. App.—San Antonio 1998, no pet.) (suspect arrested in own front yard for "hit and run"); Aitch v. Texas, 879 S.W.2d 167, 170 (Tex. App.—Houston [14th Dist.] 1994, writ ref'd) (suspect arrested from car he was driving, not at crime scene); Crowley v. Texas, 842 S.W.2d 701, 702-08 (Tex. App.—Houston [1st Dist.] 1992, no writ) (suspect arrested from her own garage for leaving scene of an accident).

357. *See* Honeycutt v. Texas, 499 S.W.2d 662, 664 n.2 (Tex. Crim. App. 1973) (quoting 6 TEX. JUR. 2D *Arrest* § 12 (1959) and explaining that provisions for warrantless arrests are "founded in the law

If a warrant exception means anything, it must mean that excusing circumstances exist that overcome the benefits of the warrant process.[358] Stated differently, the strong presumption in favor of a warrant must be rebutted; reasonableness must be satisfied in some other manner.[359] With this guiding principle in mind, it is possible to discern features of suspicious places that do little or no violence to the interests a warrant requirement is designed to protect.

When one thinks about what makes a place suspicious, the court's often-repeated rubric that "few, if any, places are suspicious in and of themselves" quickly comes to mind.[360] Logically, a place is either inherently suspicious because of environmental characteristics or transiently suspicious due to activities on the site.[361] For purposes of construing article 14.03(a)(1), static environmental factors play no important role.

To illustrate this point, consider a high-crime neighborhood and a low-crime neighborhood. If one labels the former a suspicious place, and quite apart from the difficulty in deciding what constitutes "high-crime" or where the boundaries of such areas lie, then an arrest may always be executed without a warrant in that neighborhood. The blanket characterization of an entire area as suspicious would deprive persons living or working there of warrant protection merely because of their physical location. At the same time, warrantless arrests in the "low-crime" neighborhood would never be justified by the character of the neighborhood; they would depend, instead, on other situational factors excusing the warrant.

The court of criminal appeals probably had this distinction in mind when it observed that "additional facts available to an officer plus reasonable inferences from those facts in relation to a particular place may arouse justifiable suspicion."[362] If it is the activity in a place that makes it suspicious, rather than static characteristics, one can begin to define suspicious places by permitting warrantless arrests where criminal activity is occurring at the time law enforcement officers intervene.[363] Similarly, a noncustodial arrest might occur in a suspicious place where an officer reasonably suspects that a crime is about to occur.[364]

In each of these cases, society has an strong interest in stopping the

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of necessity").

358. *See* discussion *supra* Part V.

359. *See* discussion *supra* Part V.

360. Johnson v. Texas, 722 S.W.2d 417, 421 (Tex. Crim. App. 1986).

361. *Compare* Carey v. Texas, 695 S.W.2d 30, 308-09 (Tex. App.—Amarillo 1985, no writ) (holding that a hospital is not a suspicious place), *with* Thomas v. Texas, 681 S.W.2d 672, 674, 676 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd) (holding that a street, although not inherently suspicious, was a suspicious place under the circumstances).

362. *Johnson*, 722 S.W.2d at 421.

363. *See id.*

364. *See Carey*, 695 S.W.2d at 309-12.

criminal activity before persons are injured or property is stolen or damaged.[365] The danger is imminent, and the potential for harm is great.[366] It seems clear then, that a place is suspicious and a warrantless seizure should be allowed anywhere someone is actively engaged in crime.[367] However, this understanding of suspicious place provides only a starting point. It merely states the easiest and most obvious way in which the statutory exception operates.[368]

If an officer observes a crime being committed, he also may arrest without a warrant because the offense is in the officer's "presence or view," another exception to the warrant requirement.[369] For a crime *about* to be committed, and for reasons discussed previously, a noncustodial arrest could be effected pursuant to article 14.03(a)(1) if reasonable suspicion exists.[370]

The difficulty comes in defining a "suspicious place," *after* the offense is complete. While the court of criminal appeals could have read article 14.03(a)(1) to apply only in those cases in which a crime is being, or is about to be, committed, it did not choose that path, and it is late in the day to depart so radically from a position already taken.[371]

Necessity is the guiding principle in interpreting warrant exceptions.[372] Therefore, not every crime scene qualifies as a suspicious place excusing a warrant.[373] The correct question in crime scene cases is not whether an offense was committed at the place where the suspect is found, but whether some reason exists not to obtain prior judicial approval for the arrest.[374] A certain level of exigency usually accompanies the bringing together of a suspect, criminal evidence (which may be evanescent), and probable cause in

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365. *See* discussion *supra* Part VI.

366. *See* discussion *supra* Part VI.

367. *See* discussion *supra* Part VI.

368. *See* discussion *supra* Part VI.

369. TEX. CODE CRIM. PROC. ANN. art. 14.01 (Vernon 1977). Ultimately, the Texas Court of Criminal Appeals explained the warrantless arrest in *Lara v. Texas* by holding that the suspect was under the influence of a drug while in the officer's presence. 469 S.W.2d 177, 180 (Tex. Crim. App. 1971). The court instead might have validated the detention on the grounds that the officer had reasonable suspicion to believe the suspect had committed a crime. *See id.*

370. *See* discussion *supra* Part VI.

371. The court could interpret article 14.03(a)(1) to apply only to noncustodial arrests (*Terry* stops). If it did so, the difficulty in defining "suspicious places" would vanish, subsumed within the more general determination of whether "reasonable suspicion" existed to believe "criminal activity was afoot." *See* Terry v. Ohio, 392 U.S. 1, 21-22 (1968). In 1969, noted criminal defense lawyer Emmett Colvin, Jr., read the statute in just this way: "It would appear, therefore, that the Texas statute gives no particular power to an officer in addition to that he already possesses under *Terry*." Emmett Colvin, Jr., *Criminal Law and Procedure*, 23 SW. L.J. 223, 224-25 (1969). This eventuality today seems especially unlikely, given the court's long-standing application of the provision to custodial arrests.

372. *See* Honeycutt v. Texas, 499 S.W.2d 662, 664 n.2 (Tex. Crim. App. 1973) (quoting 6 TEX. JUR. 2d *Arrest* § 12 (1959) and explaining that provisions for warrantless arrests are "founded in the law of necessity").

373. *See id.*

374. *See* Johnson v. Texas, 722 S.W.2d 417, 420 (Tex. Crim. App. 1986).

the place where the offense occurred.[375]

Johnson v. Texas illustrates this point.[376] The suspect appeared on the crime scene wearing blood-stained clothing and reacting nervously.[377] His keys were found in the apartment where the murder victim was stabbed.[378] Had he been permitted to leave the scene while a warrant was obtained, Johnson could have disposed of his clothes, and might have fled to avoid apprehension. In short, the place where he was found took on a suspicious cast when the evidence came together in such a way that Johnson became the prime suspect, *and* there were good reasons to take the suspect into custody immediately.[379]

The obvious problem raised by this illustration, and most situations where a suspect is found at the crime scene, is that some flight risk always will be present. Flight is the quintessential exigent circumstance in the arrest context, and Texas law provides specifically for that factor in a warrant exception statute separate from article 14.03(a)(1).[380] The possibility of flight should not suffice, therefore, to transform a crime scene into a suspicious place, especially since article 14.03(a)(1) has a broader reach than the provision authorizing warrantless arrest of an offender "about to escape."[381] One warrant exception for flight seems quite enough.[382]

Johnson does not violate this analytical principle. Rather, it represents what might be called a "flight-plus" case. Not only was there reason to fear that Johnson would flee if not taken into custody immediately, but there also were evidentiary and security concerns that required quick police action.[383] Johnson was wearing trousers that appeared to be blood-stained and could be crucial evidence in the investigation.[384] He identified as his keys found inside

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375. *See Honeycutt*, 499 S.W.2d at 664-65.

376. 722 S.W.2d at 417.

377. *See id.* at 419.

378. *See id.*

379. *See id.* at 421. The level of suspicion regarding Johnson and his participation in the crime grew from nonexistent to probable cause in the space of a very short time. *See id.* at 419-20. Police had virtually no reason to think he was involved when he arrived at the crime scene. *See id.* His actions, a blood stain on his pants, identification of his keys, and the strong suspicion that the murder was an *inside job* coalesced to catapult Johnson into the forefront of the investigation. *See id.*

380. *See* TEX. CODE CRIM. PROC. ANN. art. 14.04 (Vernon 1977).

381. *Id.* arts. 14.03(a)(1), 14.04.

382. *See id.* Obviously, multiple standards accounting for the possibility of flight only confuse the issue. To avoid just such confusion, specific statutory provisions ordinarily are deemed to control over general ones. Because article 14.03(a)(1) addresses broad "places and circumstances" and applies to a wide range of felonies and misdemeanors, while article 14.04 deals specifically with flight to avoid capture and only in felony cases, principles of code construction militate against treating flight risk as the controlling factor in "suspicious places" cases. *See id.* In order to avoid confusion and redundancy, courts must construe article 14.03(a)(1) as permitting warrantless arrests in situations distinct from those contemplated by other warrant exceptions. *See id.*

383. *See Johnson*, 722 S.W.2d at 419-21.

384. *See id.* at 419.

the victim's apartment.[385] Also, the crime was a particularly violent and savage one, involving a break-in and brutal stabbing.[386] Evidence was collected and Johnson was arrested shortly after the offense had been committed, and there was considerable interest in quickly confirming or dispelling the strong suspicion that Johnson was the perpetrator.[387]

Characterizing every crime scene as a suspicious place does more than ignore the proper balancing of individual liberty interests against the government's interest in a speedy arrest. It creates two dangerous incentives for law enforcement officers. First, they may be inclined to rush to judgement in order to take advantage of the fleeting opportunity to arrest without warrant. A blanket crime scene exception exalts place over suspicion and rewards officers for acting quickly rather than thoroughly.[388] When this environment is created, innocent citizens will be arrested without adequate suspicion.[389]

Secondly, in order to arrest without a warrant, officers may be tempted to bring the suspect within the area of the crime scene, not for legitimate investigative purposes, but merely to create the required suspicious place.[390] The court of criminal appeals previously has rejected just this kind of create-an-exigency police work, holding that a warrantless arrest cannot be justified by a confrontation that is contrived to avoid the warrant requirement.[391]

As to places other than the crime scene—that is, places where no crime has occurred, is occurring, or is about to occur—courts must make clear that warrantless arrests are not permitted by article 14.03(a)(1).[392] Neither

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385. *See id.*

386. *See id.* at 418.

387. *See id.* at 419-20. Johnson was arrested within two hours of the stabbing. *See id.* at 420. If it turned out that Johnson had not committed the crime, the investigation could be redirected to discovering and apprehending the actual perpetrator. *See id.* On the other hand, if it could be determined by interrogation or further investigation that Johnson was the attacker, that would calm security concerns for the woman living in the apartment where the victim was stabbed, as well as for other residents of the apartment complex. *See id.*

388. *See* discussion *supra* Part IX.

389. *See* discussion *supra* Part X.A.

390. *See* Beasley v. Texas, 728 S.W.2d 353, 355 (Tex. Crim. App. 1987).

391. *See id.* The court held unlawful a warrantless arrest and explained that:

> The confrontation in the instant case is of the sort we suggest in *West v. Texas*, 720 S.W.2d 511 (Tex. Cr. App. 1986, decided September 17, 1986) would not satisfy the rule of that case that, where probable cause is established in a suspect's presence, *and the confrontations* [sic] *with the suspect is not contrived* in order to permit an otherwise improper warrantless arrest, under circumstances which make it likely the suspect will flee, a warrantless arrest is permissible.

Id. The court concluded that the warrantless arrest in *Beasley* was unlawful because the officers could have confirmed or dispelled their suspicions about the defendant's participation in the crime without confronting him and thereby creating a reason to believe he would flee. *Id.*; *compare id.*, *with* Johnson v. Texas, 722 S.W.2d 417, 421 (Tex. Crim. App. 1986) (noting that on the facts of the case "the presence of appellant was not contrived by law enforcement officials to circumvent the procurement of a warrant").

392. *See* Muniz v. Texas, 851 S.W.2d 238, 251 (Tex. Crim. App. 1993).

necessity nor common sense support the extension of the suspicious place exception to every location in which the arrestee might be found.[393] Whether the suspect is acting suspiciously by hiding makes no substantive difference in determining whether a warrant is required.[394] The relevant inquiry, and the one required by the text of article 14.03(a)(1), is whether the place where the suspect is arrested has been made suspicious by recent or incipient criminal activity.[395] Noncriminal behavior, no matter how curious or peculiar, lacks the aspect of exigency necessary to excuse a warrant.[396]

XI. CONCLUSION

A considerable legal superstructure is built on the premise that arrests in Texas must be by warrant unless a statutory exception exists.[397] Despite the Texas Court of Criminal Appeals' recent holding that the Texas Constitution is not the source of that premise, the Texas Legislature continues to act as if statutory warrant exceptions are required.[398] For so long as the Legislature and courts insist on warrants or some narrowly-defined alternative, provisions of the Texas Code of Criminal Procedure like article 14.03(a)(1) will continue to protect Texas citizens against the dangers of arrest powers administered without external supervision by officers "engaged in the often competitive enterprise of ferreting out crime."[399]

Not only is the warrant exception scheme an example of sound criminal justice policy, but it also symbolizes the strength of Texas's commitment to prior judicial approval of arrests.[400] As the Supreme Court of the United States said in *Beck v. Ohio*:

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393. *See id.* *Muniz*, the case in which the suspect was found hiding in a closet, is simply insupportable on grounds of text, precedent, or logic. *Id.* Its primary virtue as an opinion is to demonstrate how easily article 14.03(a)(1) can be transformed from a *limited* exception to a universal excuse for avoiding prior judicial approval of arrests. *See id.*

394. *See id.* at 250-51. To the extent that hiding gives police reason to believe that the offender is "about to escape," it is relevant for purposes of article 14.04, but not in creating the "suspicious places" required by article 14.03(a)(1). *See id.*

395. *See id.* at 250.

396. *See id.* at 250-51.

397. *See supra* Part II.

398. *See* Hulit v. Texas, 982 S.W.2d 431, 436 (Tex. Crim. App. 1998). Even after *Hulit* was decided, Texas's 76th Legislature amended article 14.03 of the Code of Criminal Procedure, modifying the circumstances under which warrantless arrests may be made. *See* TEX. CODE CRIM. PROC. ANN. art. 14.03 (Vernon Supp. 2000). There is no reason to believe the Legislature would continue to provide statutorily for warrant exceptions if it was persuaded that arrest warrants are not required in Texas law. *See id.* The Legislature may or may not agree that the Texas Constitution is not the source of the warrant requirement, but its acceptance of the requirement seems obvious. *See id.*

399. Johnson v. United States, 333 U.S. 10, 14 (1948).

400. *See supra* Parts V, VI.

> An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment. . . .
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> . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects," only in the discretion of the police.[401]

This sentiment is reflected in Texas's unusually strong and long-standing demand for arrest warrants, and in the serious way in which Texas courts usually have applied exceptions to the rule.[402] Indeed, the passage from *Beck* was quoted verbatim by the Texas Court of Criminal Appeals in striking down a warrantless arrest.[403]

In the final analysis, a rule/exception regime is only as good as the quality of analysis and dedication to purpose used in construing the exceptions. If the exceptions are not applied rigorously and with a strong sense of the principles that guide the rule, the rule itself becomes mere window-dressing.[404]

For several reasons, some apparent and some not, Texas courts have had varying degrees of success in interpreting article 14.03(a)(1).[405] An obvious difficulty is that the legislative intent behind passage of the 1856 statute has become obscured by time and, more importantly, by a significantly changed way of viewing constitutional constraints.[406] This has left modern courts in the precarious position of reading into the statute meanings it probably never was intended to have and simultaneously reading out of the statute meanings that almost certainly were intended.[407]

To the extent it is possible to discern what was intended originally, construing the current statute to permit investigative detentions based on reasonable suspicion does no violence to history and also is supported by precedent.[408] In order to resolve the question of whether, and how, article 14.03(a)(1) applies to detentions other than custodial arrests, the court of criminal appeals should explain carefully what it previously has hinted: arrests may be noncustodial as well as custodial.[409] Noncustodial arrests based

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401. 379 U.S. 89, 96-97 (1964).
402. *See supra* Parts VI, VII.
403. *See* Honeycutt v. Texas, 499 S.W.2d 662, 664 n.1 (Tex. Crim. App. 1973).
404. *See supra* Part VIII.
405. *See* discussion *supra* Part VII.
406. *See* discussion *supra* Part VIII.
407. *See supra* Part VIII.
408. *See* discussion *supra* Part X.
409. *See* discussion *supra* Part X. C.

on reasonable suspicion and "circumstances which reasonably show" that someone has committed or is "about to commit" some offense, are constitutionally sound and within the scope of article 14.03(a)(1).[410]

The court also must make clear that when the statute is used to justify a warrantless custodial arrest, probable cause is the appropriate standard.[411] Authority is not granted to intervene before an offense actually has been committed.[412] In custodial arrest situations, the suspicious places requirement must be confined strictly to conserve the purposes of the arrest warrant requirement.[413]

Arrests at a crime scene must be supported by more than the coincidence of probable cause and the presence of the suspect.[414] To do otherwise is to convert crime scene into a talisman before which the arrest warrant rule disappears.[415] An example of two situations typically confronting law enforcement officers illustrates the working of this "crime scene-plus" approach: If an officer arrives at the scene of a traffic accident and discovers that one of the drivers is intoxicated and poses a danger to himself, the officer should be able to arrest without a warrant.[416] Such an arrest is justified by article 14.01 because an offense, public intoxication, is occurring in the "presence or view" of the officer.[417] It also is justified by article 14.03(a)(1) because the suspect was arrested at the crime scene, the place where the suspect was driving while intoxicated shortly before the officer arrived.[418] Evanescent evidence (blood alcohol level) will be lost if arrest is delayed to obtain a warrant, and the intoxicated person may be injured if not taken into custody.[419] Moreover, the suspect is in a public place and not in the relative safety and privacy of his or her home.[420]

Contrast this situation to one in which neither driver is intoxicated, but

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410. TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(1) (Vernon Supp. 2000); *see* discussion *supra* Part X.

411. *See* BARTON, *supra* note 8, § 1.024 ("Article 14.03(a)(1) does not authorize a warrantless arrest upon mere 'suspicion.' ").

412. The Court of Criminal Appeals made this point on one occasion. *See* Hoag v. Texas, 728 S.W.2d 375, 379-80 (Tex. Crim. App. 1987).

413. *See* Johnson v. Texas, 722 S.W. 417, 419 (Tex. Crim. App. 1986).

414. *See id.*

415. *See* discussion *supra* Part X.B-C.

416. *See* Beard v. Texas, 5 S.W.3d 883, 886 (Tex. App.—Eastland 1999, no pet.).

417. TEX. CODE CRIM. PROC. ANN. art. 14.01(b) (Vernon 1977); *see* TEX. PEN. CODE ANN. § 49.02 (Vernon Supp. 2000).

418. *See* TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(1).

419. *See Beard*, 5 S.W.3d at 886.

420. *Cf.* Honeycutt v. Texas, 499 S.W.2d 662, 665 (Tex. Crim. App. 1973) (holding that warrantless arrest of DWI suspect in her home was not justified by exigency). It is unclear exactly what part privacy, or the reasonable expectation of privacy that a suspect might have in the "place," plays in the decision to arrest without warrant, but it may have some significance to the Texas Court of Criminal Appeals. *See id.*; Johnson v. Texas, 722 S.W.2d 417, 421 (Tex. Crim. App. 1986) (holding that suspect's arrest did not "occur in a place where he could claim a reasonable expectation of privacy").

one of them was driving with a suspended license. The place of the accident is just as much a crime scene, but no "plus" factors support arresting without a warrant. There are no safety concerns; there is no evanescent evidence. To call this crime scene a suspicious place effectively reduces that requirement to a showing that a suspect for whom probable cause existed was found in a public place.

A more purposive approach avoids the illogic sometimes seen in appellate courts' attempts to define suspicious places.[421] Analysis by broad categorization or by forming "bright-line rules" has a surface appeal but, ultimately, is unsatisfactory as a way to make decisions in cases that necessarily involve a wide variety of settings.[422] As Chief Justice Earl Warren wrote in *Terry v. Ohio*, "No judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us."[423]

A more nuanced analysis of suspicious places means that sometimes the suspect's own residence might be such a place, but often it will not.[424] An accident scene or other crime scene could qualify, but it will not necessarily.[425] Shots fired from a vehicle might make that place suspicious, while a vehicle not being used for criminal activity would not be suspicious. In each case, the appellate court must explain carefully and thoroughly which facts justify departure from the warrant procedure. When this degree of analysis becomes commonplace, decisions simultaneously will become more consistent and outcomes will become more predictable.[426] The law of 1856 will acquire an integrity and longevity that will insure its continued vitality well into the next millennium.

421. *See* discussion *supra* Part IX.
422. *See* Reamey, *supra* note 13, at 81-88.
423. 392 U.S. 1, 15 (1968).
424. *See Johnson*, 722 S.W.2d at 421.
425. *See* Douglas v. Texas, 679 S.W.2d 790, 792 (Tex. App.-Fort Worth 1984, no writ).
426. *See* discussion *supra* Part X.