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COMMENTS

THE STATUS OF PRIVATE SEARCHES UNDER THE LOUISIANA CONSTITUTION OF 1974

In *Burdeau v. McDowell*,¹ the United States Supreme Court held that the fourth amendment limits governmental action only and does not prohibit searches² by private persons. The court stated, “[The fourth amendment’s] origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies”³ Thus a private search, unless conducted because of government participation, instigation, or encouragement,⁴ does not constitute a “search” within the meaning of the fourth amendment.⁵

In interpreting the search and seizure provisions of their respective state constitutions, the courts of most states have followed *Burdeau*,⁶ and, until recently, it was clear that Louisiana followed this approach as well. As interpreted by the state’s courts, the Louisiana constitutions through the Constitution of 1921 did not prohibit private party searches.⁷

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1. 256 U.S. 465, 41 S. Ct. 574 (1921).
2. Search shall be used throughout this paper to refer to both search and seizures.
3. 256 U.S. at 475, 41 S. Ct. at 576.
4. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022 (1971); *United States v. Walther*, 652 F.2d 788 (9th Cir. 1981).
5. *United States v. Jacobsen*, 466 U.S. 109, 104 S. Ct. 1652 (1984).
6. 1 W. Lafave, *Search and Seizure, A Treatise on Search and Seizure* § 1.6, at 113.
7. A search and seizure provision first appeared in the Louisiana constitution in article 108 of the Louisiana Constitution of 1864. The provision, identical to the fourth amendment of the United States Constitution, remained unchanged until article I, section 5 of the Louisiana Constitution of 1974. See La. Const. Title I, art. 9 (1868); La. Const. art. 2 (1879); La. Const. art. 7 (1898); La. Const. art. 7 (1913); La. Const. art. I § 7 (1921) (slight rewording). In *State v. Renard*, 50 La. Ann. 662, 23 So. 894 (1898), an inmate gave an incriminating letter to a trustee who turned it over to authorities. The court rejected a fourth amendment claim. The court held: “[T]he trusty violated defendant’s confidence, by reading [the letter] and placing it in the possession of an officer of the law, who proposed to put it in evidence against him. That was simply the misfortune of the defendant, who was overconfident of the trustworthiness of his messenger. There is surely nothing unlawful in this” 50 La. Ann. at 655, 23 So. at 895. The court did not address the state constitution; however, it is fair to assume that since the two provisions

The same may not be true under the Constitution of 1974. The Louisiana Supreme Court has suggested, but has never clearly held, that private party searches are prohibited under article 1, section 5 of that constitution.⁸ The courts of appeal, on the other hand, have held that that article does not apply to such searches.⁹ The purpose of this comment is to review issues Louisiana courts have thus far treated as searches and seizures by private persons under article 1, section 5 and, further, to suggest how the supreme court should ultimately resolve this issue.

This article is divided into four sections. First, the text and legislative history of article 1, section 5 will be examined. Second, the jurisprudence interpreting article 1, section 5 will be explored. Third, an overview of the approaches that other jurisdictions have taken to the issue of the constitutionality of private searches will be presented. Finally, the merits of extending article 1, section 5 to private searches will be examined in light of the various policies that underlie the section and the social benefits and costs that such an extension is likely to entail.

In exploring whether article 1, section 5 applies to some particular class of actors such as private parties, one cannot avoid adverting to the difficult problem of the nature of the relationship between that section and the exclusionary rule. This rule is inevitably in the background of any debate that concerns whether to expand or contract the scope of search and seizure provisions. Determining precisely how the section and the exclusionary sanction are interrelated is, however, beyond the scope of this comment. For the purposes of this comment, it will be assumed that article 1, section 5 contains an implicit exclusionary rule and, further, that any evidence obtained in violation of the section must be excluded at trial. The exclusionary rule, of course, provides that evidence obtained in violation of a defendant's constitutional rights may not be admitted at trial. The exclusionary rule has come under great attack since its inception,¹⁰ but no effective alternative has been offered.¹¹ As the Supreme Court has stated, without this rule the fourth

were identical, the fourth amendment interpretation applied to the state constitution also. *State v. Mora*, 307 So. 2d 317, vacated, 423 U.S. 809, 96 S. Ct. 20 (1975), on remand, 330 So. 2d 900 (La. 1976) held that article I, section 7 of the Louisiana Constitution of 1921 did not prohibit private party searches.

8. *State v. Hutchinson*, 349 So. 2d 1252 (La. 1977).

9. *State v. Coleman*, 466 So. 2d 68 (La. App. 2d Cir.), writ denied, 467 So. 2d 542 (1985); *State v. Clark*, 454 So. 2d 232 (La. App. 3d Cir.), writ denied, 456 So. 2d 1012 (1984). See *infra* text accompanying notes 49-57.

10. W. LaFare, *supra* note 6, § 1.2, at 22.

11. *Id.* § 1.2, at 30-31. Suggestions for replacing the exclusionary rule include tort actions and administrative sanctions. See, e.g., *Bivens v. Six Unknown Named Agents*,

amendment would be no more than "a form of words."¹² This proposition applies with equal force to article 1, section 5. At any rate, the application of the exclusionary rule is not being considered here; rather, the focus of this comment is on the extent of the right to be free from unreasonable searches.

THE TEXT AND ITS LEGISLATIVE HISTORY

Article 1, section 5 reads as follows:

Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.¹³

The language of this section does not indicate that state action is a necessary condition for the application of the section's protections. The "invasions of privacy" clause in the first sentence, which makes no distinction based on the identity of the searcher, is the only part of the section that might support a prohibition of private party searches. The emphasis of the clause is on the privacy in general, not merely privacy vis-a-vis the government. The last sentence, which deals with standing and exclusion of evidence, does not include an "invasions of privacy" clause; it refers only to persons adversely affected by a "search or seizure." This phrase arguably implies police or government action, for one does not normally refer to intrusions by private actors as searches or seizures. Thus, this sentence may indicate that the section requires

403 U.S. 388, 91 S. Ct. 1999 (1971) (imposing tort liability for violations of the fourth amendment by federal agents). These have proved to be ineffective. Tort actions would allow the government to pay for violations of the right. The right is affirmative. Government should not be allowed to violate the right with public funds, W. LaFare, *supra* note 6, § 1.2, at 33. Additionally, bringing a tort action takes time and money. Many people do not have the necessary time or money; neither are they aware that the right exists. Officers' conduct in violating the Fourth Amendment will often be a violation of a criminal law. However, prosecutors are very reluctant to bring criminal charges against law enforcement officials. Administrative sanctions are notoriously ineffective. The police are not equipped to police themselves. Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 *Geo. L.J.* 1361, 1401 (1981).

12. *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341 (1914).

13. La. Const. art. 1, § 5.

exclusion of evidence only if that evidence is obtained through a search and seizure conducted by a state officer.¹⁴

The section provides that each person shall be secure against unreasonable searches, seizures, or invasions of privacy. If the section's primary purpose is to guarantee the right of the person to be secure, then the identity of the actor should be irrelevant. The literal wording of a constitutional provision, however, does not always reflect its true meaning. The fourth amendment is similarly worded,¹⁵ yet it does not prohibit private searches.¹⁶ In order to arrive at a proper interpretation of article 1, section 5, it is therefore necessary to examine the history of article 1, section 5, as reflected in the debates at the constitutional convention and in the subsequent writings of some of the participants in those debates.

In the only debate at the Constitutional Convention of 1973 addressing the issue of private party searches, Mr. Schmitt pointed out that, given the terminology of the section, it might protect a person from private as well as state action.¹⁷ He noted with apparent disapproval that under prior law the police could use incriminating evidence that had been illegally obtained by a private detective.¹⁸ Building upon Mr. Schmitt's comments, Professor Lee Hargrave, coordinator of legal research for the Convention, subsequently wrote, "Supporting this conclusion is the first sentence of the section which seems to provide an affirmative right of every individual and not just a check on state action."¹⁹ On the other hand, Professor Hargrave was careful to note that such a far-reaching change may not have been intended. The debate was not focused on this issue, and the committee representatives did not address this point.

Several years after the Convention, Representative Woody Jenkins, co-author of the Declaration of Rights, wrote, "The section is intended to apply solely to government action, in accord with the view of the

14. Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 *La. L. Rev.* 1, 23 (1974).

15. The fourth amendment reads:

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

U.S. Const. amend. IV.

16. See *supra* text accompanying notes 1-5.

17. *Records of the Louisiana Constitutional Convention of 1973: Transcripts*, Vol. VI, August 31, 1973 at 1076.

18. *Id.*

19. Hargrave, *supra* note 14, at 23.

committee that a bill of rights cannot reach private action."²⁰ Responding to Mr. Schmitt's assertion, Representative Jenkins stated that evidence obtained illegally by private persons does not result from a "search or seizure in violation of this section" because the section prohibits only state action.²¹ He also stated, however, that "[t]he use of such evidence by the state is prohibited because it makes citizens less secure in their persons, communications, papers, and effects."²² In other words, the section's guarantee that "[e]very person shall be secure" would be compromised if evidence obtained by otherwise illegal private searches could be admitted into evidence.²³ Thus while the section itself does not make private party searches illegal, it does prohibit the use of evidence obtained by private parties in violation of other laws.

As the above discussion reveals, neither the language of article 1, section 5 nor its history provides an answer to the question whether the section applies to searches by private parties. The text of article 1, section 5 permits, but does not require, such an interpretation. The delegates at the Constitutional Convention did not extensively debate this question and although several commentators who have written since the constitution's ratification have recognized the possibility of applying article 1, section 5 to private actors, they have not provided a definitive answer to the question. Because the text and history of the section are indeterminate, the courts have been left to their own devices in resolving the issue. As will be shown in the next section, the courts have reached contradictory results.

LOUISIANA JURISPRUDENCE

The Louisiana courts have treated private party searches inconsistently since the Constitutional Convention of 1973. Although the supreme court commented in several early decisions that article 1, section 5 prohibits private party searches, those statements were dicta; the court has never addressed the issue directly. At least one court of appeal, following this dicta, has held that private searches are unconstitutional. Recently, however, the courts of appeal have almost universally reached the opposite conclusion. This section will describe the various positions taken by the courts and will attempt to determine the current status of the law of private party searches in Louisiana.

20. Jenkins, *The Declaration of Rights*, 21 *Loy. L. Rev.* 9, 28 (1975).

21. *Id.* at 30.

22. *Id.*

23. *Id.*

Private Party Searches Held Reasonable

The issue of the applicability of article 1, section 5 to private searches was first raised in *State v. Hutchinson*.²⁴ A store owner whose premises had been robbed searched the exterior of the defendant's van after the police arrived, but without their permission. The defendant contended that the search was unreasonable and proscribed by the Louisiana constitution.²⁵ Writing for the majority, Justice Dennis²⁶ stated, "We are unwilling to hold that the rights safeguarded by article 1, section 5 of our constitution are merely coextensive with those protected by the Fourth Amendment to the federal constitution, or that private searches and seizure are not within the ambit of protection afforded by our state charter."²⁷ Because the store owner did not enter the interior of the van, however, the court found that the search was not unreasonable.

Since *Hutchinson*, a number of Louisiana courts have remarked that article 1, section 5 may prohibit unreasonable searches by private persons, but they have avoided deciding the issue by finding that the private searches at issue were reasonable.²⁸ This generalization applies to a number of supreme court opinions, the most recent of which is *State v. Gentry*.²⁹ Applying the principles developed in *Hutchinson*, the court found that the search in question, an examination of a shipped package by a common carrier, was reasonable. Since the search was reasonable, the court concluded, the carrier's actions did not violate the provisions of the Louisiana Constitution and the evidence was properly admitted.³⁰

Similar reasoning led the second circuit to uphold the private search at issue in *Allen v. Sears, Roebuck & Co.*³¹ There, a security guard conducted a search pursuant to Louisiana Code of Criminal Procedure

24. 349 So. 2d 1252 (La. 1977).

25. *Id.* at 1254.

26. As a delegate to the Louisiana Constitutional Convention of 1973, Justice Dennis would have been privy to any discussions of article 1, section 5 and the extent to which it should apply.

27. 349 So. 2d 1252, 1254.

28. *State v. Gentry*, 462 So. 2d 624 (La. 1985); *State v. McCabe*, 383 So. 2d 380 (La. 1980); *State v. Abram*, 353 So. 2d 1019 (La. 1977), cert. denied, 441 U.S. 934, 99 S. Ct. 2058 (1979); *State v. Sanchez*, 516 So. 2d 415 (La. App. 1st Cir. 1987), writ denied, 523 So. 2d 1334 (1988); *State v. Furino*, 451 So. 2d 1139 (La. App. 3d Cir.), writ denied, 456 So. 2d 1017 (La. 1984); *State v. Polk*, 482 So. 2d 21 (La. App. 4th Cir.), writ denied, 483 So. 2d 1023 (1986).

29. 462 So. 2d 624 (La. 1985).

30. *Id.* at 629.

31. 409 So. 2d 1268 (La. App. 2d Cir.), rev'd, 412 So. 2d 1095 (1982). The supreme court reversed for a new trial on the merits. In *Allen*, a customer activated the store detection system with a tag from another store. The customer sued for tort damages. The claim was that Louisiana Code of Criminal Procedure article 215 was unconstitutional in light of article 1, section 5, which prohibits private searches.

article 215.³² The person searched then brought a tort suit against the merchant. Issuing what may be the clearest judicial pronouncement regarding the private searches issue to date, the court, citing an earlier supreme court decision,³³ interpreted article 1, section 5 as prohibiting "unreasonable searches by anyone, whether private persons or police."³⁴ This statement, however, was pure dictum; like the supreme court in *Hutchinson* and *Gentry*, the court ultimately found the search reasonable.

Although the state's appellate courts, following the supreme court's lead, have found numerous private searches reasonable, none of the courts has given a great deal of attention to the standard for gauging the reasonableness of such searches. With some exceptions,³⁵ warrantless searches by police officers are presumed to be unreasonable;³⁶ this presumption may, of course, be rebutted. In determining whether private party searches are reasonable, the courts have relied on some of the same factors that they ordinarily use to determine whether warrantless police searches are reasonable. These factors include the defendant's subjective expectation of privacy, the reasonableness of that expectation, the reasonableness of the suspicion that provoked the initial search,³⁷ and whether the person conducting the search has a superior right.³⁸ Beyond mentioning these factors in a few of its discussions, the courts have offered little guidance in this area.

Private Party Searches Held to Violate Article 1, Section 5

*State v. Nelson*³⁹ represents the first case in which a Louisiana court found that a private search was unreasonable and violated article 1, section 5. Private security guards handcuffed, choked, and strip-searched a person they suspected of stealing a diamond ring. Although no ring

32. For the text of Louisiana Code of Criminal Procedure article 215, see *infra* note 40.

33. 409 So. 2d at 1274 (citing *State v. Nelson*, 354 So. 2d 540 (La. 1978)).

34. *Id.*

35. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041 (1973) (consent); *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405 (1984) (good faith exception); *Nix v. Williams*, 467 U.S. 431, 104 S. Ct. 2501 (1984) (inevitable discovery); *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643 (1971) (impeachment exception); *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826 (1966) (exigent circumstances); *Warden v. Hayden*, 387 U.S. 294, 87 S. Ct. 1642 (1967) (hot pursuit or emergency exception); *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034 (1969) (search incident to an arrest); *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280 (1925) (automobile exception).

36. *Payton v. New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 1380 (1980); *United States v. Spetz*, 721 F.2d 1457, 1465 (9th Cir. 1983).

37. *State v. Sanchez*, 516 So. 2d 415, 419 (La. App. 1st Cir. 1987), writ denied, 523 So. 2d 1334 (1988).

38. *State v. McCabe*, 383 So. 2d 380, 383 (La. 1980).

39. 354 So. 2d 540 (La. 1978).

was ever found, the defendant made an inculpatory statement in the course of the search. He then sought to suppress the statement arguing that it was the fruit of an illegal search. Because the security guards acted pursuant to Code of Criminal Procedure article 215,⁴⁰ which allows merchants to detain shoplifters, the court could have found that the search constituted state action and that the state action which resulted in the statement was unreasonable.⁴¹ The statement also could have been excluded on the ground that it was obtained by force and thus was involuntary; such inculpatory statements are inadmissible regardless of who obtains them.⁴² But Justice Tate, writing for the majority, stated, "We instead prefer to rest our ruling . . . on the unreasonableness of the [illegal] search by private persons."⁴³ The court based its conclusion on the fact that "[t]he introductory section of Article I, Declaration of Rights, declares that the rights enumerated by it (which include the prohibition against unreasonable searches) are 'inalienable by the state and shall be preserved inviolate by the state.'"⁴⁴

The supreme court followed *Nelson* in the later case of *State v. Longlois*.⁴⁵ In that case a wildlife agent made an arrest for possession of marijuana, a misdemeanor. Since a wildlife agent is not authorized to make arrests for possession of marijuana⁴⁶ and a citizen's arrest is not authorized for a misdemeanor,⁴⁷ the actions of the wildlife agent could only be considered those of a private person. The court nevertheless found the actions of the wildlife agent to be an unreasonable seizure for the purposes of article 1, section 5.⁴⁸ In support of this conclusion, the court cited the traditional rationale for the exclusionary rule, namely, the need to deter illegal conduct. Although the court treated the search in question as private, it was in reality an unauthorized search by an officer of the state. Given the tone of the opinion, it seems that the court was more concerned about state officers unreasonably exceeding

40. La. Code Crim. P. art. 215(A)(1) provides:

A peace officer, merchant, or a specifically authorized employee of a merchant, may use reasonable force to detain a person for questioning on the merchant's premises, for a length of time, not to exceed sixty minutes, unless it is reasonable under the circumstances that the person be detained longer

41. 354 So. 2d at 542.

42. *Id.*

43. *Id.*

44. *Id.* (quoting La. Const. art. I, § 1).

45. 374 So. 2d 1208 (La. 1979).

46. *Id.* at 1210 (citing La. R.S. 56:108, repealed by 1985 La. Acts No. 876, § 4, eff. July 23, 1985).

47. *Id.* (citing La. Code Crim. P. art. 214 which states, "A private person may make an arrest when the person arrested has committed a felony, whether in or out of his presence.").

48. *Id.* at 1211.

their lawful authority than about private intrusions upon individual privacy. The court's application of the exclusionary rule in *Longlois* evidently was aimed at deterring overreaching by such officers in the future.

Article 1, Section 5 Held Not to Prohibit Private Party Searches

While the supreme court has consistently refused to exclude evidence obtained by private party searches by finding the searches reasonable, the courts of appeal have gone a step further and have held that article 1, section 5 does not prohibit such searches. In *State v. Clark*,⁴⁹ the third circuit was faced with a private search that could not be found reasonable. A landowner stopped poachers on his neighbor's land and confiscated their weapons and the deer that they had illegally killed. Since the offense was only a misdemeanor, a citizen's arrest was not authorized.⁵⁰ Further, the landowner had no superior right to or interest in the land simply because it belonged to his neighbor. Noting that the deterrence of illegal conduct is the primary rationale of the exclusionary rule, the court reasoned that applying the exclusionary rule to private searches would not serve the purpose behind the rule; a private person, unlike a state law enforcement official, has no incentive to secure evidence for use in court. The court allowed the evidence to be admitted, saying, "It is our opinion that Article 1, section 5 does not create an exclusionary rule applicable to the conduct of private citizens."⁵¹ The court distinguished *Nelson* and *Longlois* on the ground that in those cases the challenged action was taken "under color of state law" and therefore constituted state action.

In *State v. Coleman*,⁵² the second circuit held that article 1, section 5 does not require the exclusion of evidence that is obtained with a search warrant where the warrant is issued on the basis of information discovered as a result of a search by a private person. A neighbor who was to take care of the defendant's house while the defendant was on vacation found pornographic materials in the defendant's bedroom closet. The neighbor went to the police, who then obtained a search warrant. According to the court, "LSA-Const. Art. 1, Sec. 5 permits use of evidence obtained from some purely private searches to procure an otherwise valid search warrant, even if the private search is found, or assumed, unreasonable."⁵³

49. 454 So. 2d 232 (La. App. 3d Cir.), writ denied, 456 So. 2d 1012 (1984).

50. *Id.* at 236. See *supra* note 47 for the text of La. Code Crim. P. art 214.

51. *Id.*

52. 466 So. 2d 68 (La. App. 2d Cir.), writ denied, 467 So. 2d 524 (1985).

53. *Id.* at 72. The second circuit reaffirmed this position in *State v. Cann*, 494 So. 2d 1263 (La. App. 2d Cir. 1986), writ denied, 501 So. 2d 228 (1987). There the court

The holding in *Coleman* is much more limited than that in *Clark*. *Coleman* is in many ways analogous to those decisions in which the supreme court has interpreted the "adversely affected" clause.⁵⁴ Under that clause, a defendant may complain if the police violated someone else's constitutional rights in obtaining evidence that will be used directly against the defendant.⁵⁵ However, he cannot raise the issue, if the police merely use such evidence to secure a search warrant.⁵⁶ In the latter situation, the warrant "cures" the original violation, which is considered to be too remote to justify the exclusionary sanction. Nevertheless, in the latter situation article 1, section 5 still operates to protect the person subjected to the original search, that is, the person whose rights were violated can object to the admission of the evidence obtained under the warrant should the state attempt to introduce it against him. Under the holding of *Coleman*, however, if the search was conducted by a private party rather than by the police, then the person is not protected even if the evidence obtained under the warrant is to be used directly against him.

The other courts of appeal have also held that private party searches are outside the scope of article 1, section 5.⁵⁷ Moreover, in at least one case, the supreme court itself has allowed the admission of evidence that was obtained by an unreasonable private party search. In *State v. McCabe*,⁵⁸ the defendant was drunk and creating a disturbance. A neighbor, fearing for the safety of his children, looked into the defendant's truck and, upon discovering a pistol and drugs, confiscated them. The

dismissed a claim that a private search was a violation of the exclusionary rule in one sentence. "We find that the trial court did not err in denying defendant's motion to suppress." 494 So. 2d at 1266 (citing *State v. Gentry*, 462 So. 2d 624 (La. 1985)).

54. The "adversely affected" clause of article 1, section 5 provides, "Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court."

55. *State v. Herbert*, 351 So. 2d 434 (La. 1977); *State v. Williams*, 489 So. 2d 286 (La. App. 4th Cir. 1986).

56. *State v. Culotta*, 343 So. 2d 977 (La. 1976).

57. In *State v. Jones*, 526 So. 2d 1374 (La. App. 1st Cir. 1988) the first circuit appears to have decided that private searches are not prohibited by article 1, section 5. The defendant displayed suspicious activity in a hotel room. The employees monitored defendant's activities, especially the number of phone calls. Based on this information as well as other information gained from surveillance, officers obtained a search warrant. Defendant claimed that the evidence should be suppressed because his privacy was invaded. The court dismissed this and went on to say in dicta that "the rule requiring the suppression of evidence illegally seized was intended to restrain governmental authorities, not private individuals." However, thereafter the court discusses the reasonableness of the employees activities. It should also be noted that the search was conducted pursuant to a search warrant. The private search, if any, led to the warrant. See *supra* note 53 and accompanying text.

58. 383 So. 2d 380 (La. 1980).

supreme court held that even though the search was unreasonable, evidence obtained by a private person is admissible where a superior right or interest attaches to the individual conducting the search at that time or place.⁵⁹ Because the neighbor's interest in protecting his children was superior to the defendant's privacy interest in the truck, the court reasoned, the evidence was properly admitted. Thus, if article 1, section 5 does prohibit private party searches, *McCabe* establishes that there is at least this one exception.

Summary

In *Hutchinson* the supreme court, after adverting to the possibility that article 1, section 5 prohibits private searches, nevertheless upheld the private search in question there by finding that it was reasonable. The supreme court has continued to treat private searches in this manner up through the *Gentry* case. If the court has not accepted the view that article 1, section 5 prohibits private party searches, then its discussion in the cases of the reasonableness of the searches was pointless. Although the courts generally avoid constitutional interpretation whenever possible, the number of cases in which the supreme court has taken pains to evaluate the reasonableness of private searches suggests more than a simple adherence to canons of constitutional interpretation. By discussing the reasonableness of the private search each time the issue presents itself, the court has tacitly affirmed that article 1, section 5 does prohibit unreasonable searches by private persons.⁶⁰

On the other hand, the fact that the supreme court has never found a private search unreasonable unless the person responsible was in some way acting under state authority may suggest that article 1, section 5 does not prohibit purely private searches, that is, searches conducted by actors who can in no way be considered state agents. A purely private setting may suggest that article 1, section 5 does not prohibit private searches. *Nelson* and *Longlois* are the only two cases which might be construed to be examples of the exclusion of evidence procured by a private search; however, both cases arguably involved state action. In *Longlois*, the state, through a law enforcement officer, conducted the search. *Nelson* involved security guards acting pursuant to a statute. The result in *Nelson* could also be justified on due process grounds. The kind of incredibly unreasonable search involved in that case "shocks

59. *Id.* at 383.

60. The supreme court has recognized that its decisions have not settled the issue. In *State v. Wilkerson*, 367 So. 2d 319 (La. 1979), the actions of an off-duty deputy sheriff were held to be state action. The court stated in dictum, "This court has yet to decide whether Article 1, section 5 of the Louisiana Constitution bans unreasonable searches by private citizens as well as police." 367 So. 2d at 321.

the conscience,"⁶¹ and arguably ought to be prohibited regardless of the identity of the actor.

The courts of appeal appear to have reached a tentative consensus that private searches are not prohibited by article 1, section 5. The second and third circuit courts of appeal have gone beyond the holdings of the supreme court to declare that article 1, section 5 does not apply to any private search, regardless of its unreasonableness.⁶² The first and fourth circuits, though somewhat more cautious, have also recently declared that the Louisiana Constitution does not proscribe private searches.⁶³ The implication of these appellate decisions is that evidence from purely private searches will be admitted as evidence except in those extreme cases that shock the conscience. These cases cite the supreme court's decision in *State v. Gentry* as authority. The court in *Gentry*, however, did not hold that the Louisiana Constitution does not prohibit private searches; rather, it found the private search to be reasonable. The courts of appeal have apparently interpreted the reluctance of the supreme court to find these searches unreasonable as meaning that private searches are not proscribed by the Louisiana Constitution.

Clearly, the rulings of the courts of appeal are in conflict with the dicta of the supreme court's decisions. Ultimately, the supreme court will have to face the issue squarely and put this conflict to rest. When the court chooses to do so, it may wish to consider how other states have resolved the question of the constitutionality of private party searches.

OTHER JURISDICTIONS

Twenty states have adopted state constitutional prohibitions against unreasonable search and seizure that track the wording of the fourth amendment of the United States Constitution.⁶⁴ In the constitutions of

61. *Rochin v. California*, 342 U.S. 162, 72 S. Ct. 205 (1952).

62. *State v. Cann*, 494 So. 2d 1263 (La. App. 2d Cir. 1986), writ denied, 501 So. 2d 228 (1987); *State v. Coleman*, 466 So. 2d 68 (La. App. 2d Cir.), writ denied, 467 So. 2d 524 (1985); and *State v. Clark*, 454 So. 2d 232 (La. App. 3d Cir.), writ denied, 456 So. 2d 1012 (1984).

63. *State v. Sanchez*, 516 So. 2d 415 (La. App. 1st Cir. 1987), writ denied, 523 So. 2d 1334 (1988) (holding search to be reasonable); *State v. Polk*, 482 So. 2d 21 (La. App. 4th Cir.), writ denied, 483 So. 2d 1023 (1986) (holding private search reasonable). The first and fourth circuits then followed the second and third circuits in holding that article 1, section 5 does not prohibit private searches. *Allen v. Louisiana State Board of Dentistry*, 531 So. 2d 787 (La. App. 4th Cir. 1988); *State v. Jones*, 526 So. 2d 1374 (La. App. 1st Cir. 1988).

64. Ark. Const. art. II, § 15; Cal. Const. art. I, § 13; Ga. Const. art. I, § 1, ¶13; Haw. Const. art. I, § 7; Idaho Const. art. I, § 17; Ind. Const. art. I, § 11; Iowa Const. art. I, § 8; Minn. Const. art. I, § 10; Miss. Const. art. III, § 23; Neb. Const. art. I, § 7; Nev. Const. art. I, § 18; N.J. Const. art. I, ¶7; N.Y. Const. art. I, § 12; N.D. Const. art. I, § 8; S.D. Const. art. VI, § 11; Utah Const. art. I, § 14; Wis. Const. art. I, § 11; Wyo. Const. art. I, § 4.

another sixteen states, the search and seizure provisions vary only superficially from the fourth amendment; one typical change is the substitution of "property" or "possessions" in the place of "effects."⁶⁵

Since most state constitutional provisions concerning unreasonable search and seizure are very close paraphrases of the fourth amendment, most state courts not surprisingly have concluded that their respective state provisions afford individuals no more protection than does the fourth amendment. Nevertheless, the courts of several states have ruled that their state prohibitions require the exclusion of evidence obtained by private security guards through unreasonable methods. Only Montana has experimented with extending its state search and seizure provision to evidence obtained by purely private searches.

Decisions Holding Private Searches Not Covered

Most state courts have concluded that the search and seizure provisions of their state constitutions are coextensive with the fourth amendment.⁶⁶ *State v. Watts*,⁶⁷ a case out of Utah, involved the actions of a police informant. The Utah Supreme Court held, "Article I, section 14 of the Utah Constitution reads nearly verbatim with the fourth amendment, and thus this Court has never drawn any distinctions between the protections afforded by the respective constitutional provisions."⁶⁸ In *State v. Killebrew*,⁶⁹ a Tennessee case, a relative gave incriminating letters to the police. As authority for rejecting defendant's claim that the search violated both the fourth amendment and the state constitutional provision, the Tennessee court cited *Burdeau v. McDowell*.⁷⁰

The courts of several other states have likewise concluded that their state search and seizure provisions duplicate the fourth amendment, but for different reasons. Instead of simply following the United States Supreme Court's interpretation of the fourth amendment, they have considered the policies behind search and seizure provisions and the exclusionary rule. In *State v. Smith*,⁷¹ the Kansas Supreme Court reached

65. Alaska Const. art. I, § 22; Colo. Const. art. II, § 7; Conn. Const. art. I, § 7; Del. Const. art. I, § 6; Fla. Const. art. I, § 12; Ill. Const. art. I, § 6; Kan. Bill of Rights § 15; Ky. Const. § 10; Me. Const. art. I, § 5; Mo. Const. art. I, § 15; Ohio Const. art. I, § 14; Okla. Const. art. II, § 30; Or. Const. art. I, § 9; Pa. Const. art. I, § 8; R.I. Const. art. I, § 6; S.C. Const. art. I, § 10; Tex. Const. art. I, § 9; W. Va. Const. art. III, § 6.

66. See Annotation, Admissibility in Criminal Cases of Evidence Obtained by Searches by Private Individuals, 36 A.L.R.3d 553 (1971).

67. 750 P.2d 1219 (Utah 1988).

68. *Id.* at 1221.

69. 760 S.W.2d 228 (Tenn. Crim. App. 1988).

70. 256 U.S. 465, 41 S. Ct. 574 (1921).

71. 763 P.2d 632 (Kan. 1988).

the same conclusion as the United States Supreme Court regarding private party searches, but grounded its reasoning in the policies underlying the exclusionary rule. There a trash collector who had entered a house through an open door to investigate an unusual hissing noise stumbled on marijuana while turning off a running faucet. The court held that section 15 of the Kansas Bill of Rights does not apply to private party searches. According to the court, the purpose of the state's exclusionary rule, which the court regarded as an integral component of section 15, is to deter official misconduct. Because applying the exclusionary rule to private persons would have no effect on private behavior, the court concluded that "the conduct of a private person acting independently and not under the authority or direction of the State is not included in the proscriptions of the Fourth Amendment of the United States Constitution or section 15 of the Kansas Bill of Rights."⁷²

The above decisions illustrate how most state courts have resolved the private party search issue. Many courts simply cite *Burdeau v. McDowell* as conclusive authority for the proposition that constitutional provisions governing search and seizure apply only to governmental actors. Further, of those that have considered whether the policies underlying the exclusionary rule would be promoted by applying the rule in the private search context, the majority of the courts have answered the question in the negative.

Exceptions for Private Law Enforcement Personnel

The courts of several jurisdictions have considered the issue of private searches in the narrow context of the actions of privately employed security guards. In *People v. Zelinski*,⁷³ the California Supreme Court held that evidence obtained through a search by a private security guard that exceeds statutorily authorized limits must be excluded from evidence. Although the court acknowledged that state action must be involved for the prohibition against unreasonable searches and seizures to apply, it found that the quasi-law enforcement activities of security guards constitute state action. The court stated:

[The search] was nevertheless an integral part of the exercise of sovereignty allowed by the state to private citizens. In arresting the offender, the store employees were utilizing the coercive power of the state to further a state interest. Had the security guards sought only the vindication of the merchant's private interest they would have simply exercised self-help and demanded the return of the merchandise. Upon satisfaction of the mer-

72. *Id.* at 638.

73. 24 Cal. 3d 357, 594 P.2d 1000, 155 Cal. Rptr. 575 (1979).

chant's interest, the offender would have been released. By searching her, they went beyond their employer's interest.⁷⁴

Because no state official was directly involved in the search at issue in *Zelinski*, the court's ruling in that case represents a significant leap from those of prior decisions in which the court had found state action. In making this leap, the court was apparently influenced by the threat posed to individual privacy posed by the increasing use of private security personnel. The court noted that the private security sector employs more people and is growing at a faster rate than public law enforcement.⁷⁵

The approach adopted by the California court in *Zelinski* is similar to that taken by the United States Supreme Court in *Lugar v. Edmunson Oil*.⁷⁶ In *Lugar*, the Court held that the actions of a private person who acts pursuant to a procedural scheme created by statute becomes state action. Similarly, since a California statute in *Zelinski* authorized the private security guards to act, those actions were converted into state action. Of course, if a search involves state action, then the issue is easy to resolve: all courts agree that the exclusionary rules which emanate from the search and seizure provisions of the state and federal constitutions prohibit the use of evidence obtained by unreasonable state searches.⁷⁷

After *Zelinski*, the California voters amended their constitution by referendum. The relevant section now reads, "Except as provided by statute hereafter enacted . . . relevant evidence shall not be excluded in any criminal proceeding. . . ."⁷⁸ The California courts have interpreted this amendment as overruling *Zelinski*.⁷⁹

Zelinski, though abandoned in the state of its origin, has had considerable influence in several other states. West Virginia is one example. In *State v. Muegge*,⁸⁰ a private security guard conducted a search of a shopper's pockets and found \$10.65 worth of stolen items. The West Virginia Supreme Court of Appeals held that because the security guard was acting pursuant to statutory authority,⁸¹ she should be considered an agent of the state and, as such, her powers were limited by the state constitution.⁸² The court cited the increasing role of private security forces in law enforcement in justification of its decision.

74. Id. at 367, 594 P.2d at 1006, 155 Cal. Rptr. at 581.

75. Id., 594 P.2d at 1005, 155 Cal. Rptr. at 580.

76. 334 U.S. 1, 68 S. Ct. 836 (1948).

77. This is the approach advocated by Representative Jenkins. See *supra* text accompanying notes 20-23.

78. Cal. Const. art. 1, § 28(d).

79. *People v. Geary*, 173 Cal. App. 3d 904, 219 Cal. Rptr. 557 (1985).

80. 360 S.E.2d 216 (W. Va. 1987).

81. West Virginia has a shoplifter detention statute similar to that of Louisiana. See W. Va. Code § 61-3A-4 (1984).

82. W. Va. Const. art. III, § 6.

The Montana Experiment

The Montana Constitution is relatively modern and in many ways similar to the Louisiana Constitution of 1974. In *State v. Helfrich*,⁸³ the Montana Supreme Court was called upon to determine whether the search and seizure provision of its constitution, article II, section 10,⁸⁴ prohibits the introduction of evidence obtained in an unreasonable private party search. In that case, a private citizen had entered her neighbor's garden and had taken some plants later identified as marijuana. The court concluded that article II, section 11 bars the admission of evidence obtained in any unreasonable or illegal search, regardless of the identity of the actor. In reaching this decision, the court relied on the wording of the state search and seizure provision (which does not expressly limit the scope of the prohibition to state conduct), the transcripts from the constitutional convention, and earlier Montana decisions in which the state's courts had excluded evidence obtained from private searches.⁸⁵ The court found particularly persuasive the comments of the delegate who had proposed the section. That delegate had argued rather strenuously that private searches should not be allowed by the constitution:

Certainly, back in 1776, 1789, when they developed our bill of rights, the search and seizure provisions were enough, when a man's home was his castle and the state could not intrude upon his home without the procuring of a search warrant with probable cause being stated before a magistrate and a search warrant being issued. No other protection was necessary and this certainly was the greatest amount of protection that any free society has given its individuals. In that type of society, of course, the neighbor was maybe three or four miles away. There was no real infringement upon the individual and his right of privacy. However, today we have observed an increasingly complex society and we know our area of privacy has decreased, decreased and decreased⁸⁶

Relying upon this statement, the court concluded that the drafters had intended to proscribe all unreasonable searches, whether conducted by the state or by private parties. Accordingly, the court held that "[t]he

83. 183 Mont. 484, 600 P.2d 816 (1979).

84. Mont. Const. art. II, § 10 provides:

The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.

85. 600 P.2d at 818.

86. *Id.* at 818 (quoting VII Tr. Mont. Const. Convention 5180-81).

right of individual privacy explicitly guaranteed by the State Constitution is inviolate and the search and seizure provisions of Montana law apply to private individuals as well as law enforcement officers"⁸⁷

Six years later, in *State v. Long*,⁸⁸ the Montana Supreme Court reversed its position, thereby bringing itself into line with the courts of the rest of the country. A landlord, after noting a sudden increase in his utility bills, entered his tenant's home and found 657 marijuana plants under a "grow light." He then promptly turned the plants over to the police. The court rejected the defendant's argument that the admission of this evidence violated article II, section 10. Explaining this result, the court stated, "Unless specifically provided otherwise, citizens' rights articulated in the Constitution proscribed only state action; therefore, if a private citizen invaded the privacy of another citizen, there was no violation of the Constitution itself."⁸⁹ The court further commented that "[s]ince we have held that the constitutional rights of the defendants have not been violated, the reason for applying the exclusionary rule fades."⁹⁰ According to the court, the exclusionary rule is a procedural device used to deter unlawful police activities and to preserve the integrity of the judiciary itself.⁹¹ For this reason, the court decided that the exclusionary rule was not an appropriate remedy for private searches. The court, however, pretermitted a consideration of whether the exclusionary rule should apply to evidence gathered as the result of felonious conduct.⁹² Montana is now aligned with the rest of the states in holding that the exclusionary rule is not applicable to private party searches.

Summary

The courts of the overwhelming majority of states have concluded that their respective state constitutional search and seizure provisions are coextensive with the fourth amendment, which allows private party

87. *Id.* at 819.

88. 216 Mont. 65, 700 P.2d 153 (1985).

89. *Id.* at 156.

90. *Id.* at 157.

91. *Id.*

92. *Id.* at 158. Texas has taken this type of approach. Article 38.23 of the Texas Code of Criminal Procedure provides, "No evidence obtained by an officer or any other person in violation of any provisions of the Constitution or the laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case." Tex. Code Crim. Proc. art. 38.23 (Supp. 1988). This approach has many advantages. Judicial integrity is maintained, and private law enforcement officials who have a desire to secure convictions are deterred. Evidence uncovered by accidental discoveries that do not break the law may be used. Law enforcement suffers only to the extent other laws are broken. The emphasis of this approach is on judicial integrity and not the privacy of the individual.

searches. Although the courts of several states did experiment with their state search and seizure provisions during the last decade by extending them to various types of private searches, most have now gone back to the fourth amendment position. Of those courts, the Supreme Court of Montana, which at one point declared all private party searches unconstitutional, is the most interesting example. Thus, with the exception of those few courts that recognize a distinction for searches conducted by private law enforcement personnel, no state court presently interprets its state search and seizure provision differently from the fourth amendment.

RESOLVING THE PRIVATE SEARCH PROBLEM

How should Louisiana treat private party searches? The text of article 1, section 5, its legislative history, and the jurisprudence interpreting it are inconclusive and indeterminate, and other jurisdictions have for the most part simply followed the federal approach. Thus, Louisiana's courts must look elsewhere in order to resolve the private search problem. The courts might proceed by examining the various purposes that search and seizure provisions and the exclusionary rule are designed to serve, asking whether these purposes would be advanced by applying article 1, section 5 to private party searches, and then balancing any benefits derivable from such an extension of the section against its costs. On the other hand, the courts might choose to "finesse" the issue by expanding the definition of "state" activity so that it embraces the acts of private parties who obtain evidence illegally and then hand it over to the police. If such acts constituted state action or could be attributed to the state in some way, then the evidence obtained would, under traditional search and seizure analysis, have to be excluded. By embracing this approach, the courts could avoid having to decide whether private searches as such fall within the ambit of article 1, section 5. In this section of the paper, both of these options will be addressed, beginning with the latter.

Finessing the Issue: Attributing Private Conduct to the State

The prevailing view of constitutions is that they are political documents between peoples and their governments; they are, in this view, not intended to regulate relationships between private persons. This view of the nature of constitutions has undoubtedly influenced those courts which have concluded that their state search and seizure provisions do not apply in the absence of state action. Even if one accepts this view of constitutions in general, and of search and seizure provisions in particular, one is not precluded from holding that evidence obtained through illegal and unreasonable searches by persons who are apparently non-governmental actors falls within the scope of those provisions. The

argument in support of this proposition may take one of two forms. First, one may argue that ostensibly private conduct which involves the gathering of evidence is in fact state action. Second, one may admit that such conduct is not state action in itself, but that state authorities who use the evidence should be held accountable for the private party's illegal conduct. These arguments will be presented in more detail below.

The first argument, which has been advanced by several commentators,⁹³ is that "private" parties who obtain evidence and then turn it over to the police are state actors because evidence gathering is a "public function." *Knoll Associates, Inc. v. F.T.C.*⁹⁴ employed this type of argument. There a private person stole incriminating evidence from his employer. While in the employer's office, the employee called the FTC to volunteer to testify. The court held that the commission "knowingly gave its approval" to the acts of the private person. "The utilization of the fruits of the misconduct of Prosser violated the rights of petitioner protected by the fourth amendment to the federal constitution."⁹⁵ When private persons act in the place of government officials, they arguably should be held to the same standard of conduct as are government officials. A person who obtains evidence to use against another is conducting a governmental function, and for that reason may be considered an agent of the government. By using the evidence, the government implicitly approves of the agency. Although this agency theory may be applied to any nongovernmental actor who uncovers evidence, it seems particularly appealing in those cases that involve private law enforcement officials; these "private" parties often act for the express purpose of uncovering evidence of crime.

With the single exception of *Knoll*, the federal courts, it should be noted, have steadfastly refused to incorporate the "public function"/"agency" theory into fourth amendment analysis. The federal position⁹⁶ is that the fourth amendment does not extend to searches in which there

93. 1 W. LaFare, *supra* note 6, § 1.6, at 127; Comment, *Seizures by Private Parties: Exclusion in Criminal Cases*, 19 *Stan L. Rev.* 608, 617 (1967); Burhoff, *Not So Private Searches and the Constitution*, 66 *Cornell L. Rev.* 627, 644 (1981).

94. 397 F.2d 530 (7th Cir. 1968).

95. *Id.* at 533. See *supra* notes 73-82 and accompanying text.

96. This also represents the position of the majority of state courts. *Staats v. State*, 717 P.2d 413 (Alaska Ct. App. 1986) is representative. There, a motel employee searched a hotel room after being notified by another tenant of contraband in the room. The court rejected the argument that the employee was performing a governmental function in searching the motel room. According to the court, the employee was acting within the capacity of an employee and the motel had a legitimate interest in discovering and removing the contraband, reporting the contraband to the police did not change the nature of the search.

is no direct governmental involvement.⁹⁷ The mere use of evidence by the prosecutor is not sufficient state action to invoke the protection of the fourth amendment. There should be some government participation in the search for the fourth amendment to apply.⁹⁸

The second argument for attributing illegal evidence gathering activity by private parties to the state rests upon an analogy to the United States Supreme Court's rejection of the now defunct "silver platter doctrine." According to that doctrine, evidence seized by state officers in violation of the fourth amendment could be furnished to federal officers, who could then use the evidence in federal court free of any taint of illegality. In *Elkins v. United States*,⁹⁹ the United States Supreme Court overturned the doctrine, holding that the fourth amendment requires the exclusion of evidence obtained in this manner. The Supreme Court's argument in *Elkins*, some commentators and judges have argued, should be extended to cases in which the state government attempts to use the fruits of illegal searches conducted by private parties. Just as the federal government becomes implicated in the wrongdoing of state governmental officials when it uses evidence obtained in illegal searches conducted by such actors, so the state government becomes implicated in the wrongdoing of private persons when it was evidence obtained in illegal searches by those actors.

Although this argument appears plausible on its face, it is in fact fundamentally flawed. The argument overlooks the fact that the *Elkins* court found the silver platter doctrine repugnant only because it allowed the use of evidence obtained through illegal acts by a government, namely, state government. According to the Court, "If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy."¹⁰⁰ Thus, the Court's focus was not upon the federal government's action in receiving

97. No case has followed *Knoll* on this point. In *United States v. Janis*, 428 U.S. 433, 456, 96 S. Ct. 3021, 3032 (1976), the United States Supreme Court distinguished *Knoll* and refused to exclude evidence where there was no government participation. *OKC Corp. v. Williams*, 461 F. Supp. 540 (N.D. Tex. 1978), held that if the government knows at the time of the occurrence that a private party search was to be conducted, the government is unconstitutionally involved. The court rejected *Knoll* which held that after-the-fact government approval of a private party search violated the fourth amendment. In *United States v. Marzano*, 537 F.2d 257 (7th Cir. 1976), the seventh circuit limited *Knoll*. "[A] mere purpose to assist the Government does not transform an otherwise private search into a Government search." Very little appears to be left of *Knoll*. *Id.* at 271.

98. See *supra* note 87 and accompanying text.

99. 364 U.S. 206, 80 S. Ct. 1437 (1960).

100. *Id.* at 223, 80 S. Ct. at 1447 (emphasis added).

and using the illegally obtained evidence, but rather upon the illegal evidence-gathering activities of state government.¹⁰¹ The actions of *private* persons in gathering and turning over evidence is fundamentally different from the *state* action condemned in *Elkins*. The state's mere acceptance of evidence obtained illegally by private parties is not the kind of governmental action required to claim the protection of the fourth amendment or any other search and seizure provision.¹⁰²

Facing the Issue: Evaluating Policies and Balancing Interests

As was demonstrated in the previous subsection, the arguments for expanding the effective reach of article 1, section 5 by making the state accountable in some fashion for the illegal acts of private party searches are unconvincing. Consequently, if Louisiana's courts are to resolve the private search problem, they must face the issue squarely and decide whether article 1, section 5 does indeed cover nongovernmental searches. For reasons that already have been explored, the answer to this question must be found in considerations of policy. The courts must determine what policies the section and its exclusionary rule serve and then consider whether extending the section to private parties would further those policies and whether the benefits of so extending the section would outweigh the costs.

Rationales for Search and Seizure Provisions and the Exclusionary Rule

Privacy

The fourth amendment of the United States Constitution was passed in response to the British use of writs of assistance and general search warrants.¹⁰³ As stated by the United States Supreme Court in *Camara v. Municipal Court*,¹⁰⁴ "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."¹⁰⁵ Thus, although the fourth amendment may be concerned only with governmental intrusions, it clearly serves the purpose of securing an inviolable "zone of privacy"¹⁰⁶ for the individual. Extending

101. *Id.* at 213-14, 80 S. Ct. at 1442. The court cited *Wolf v. Colorado*, 338 U.S. 25, 69 S. Ct. 1359 (1949) for the proposition that the fourth amendment prohibited unreasonable searches by the states even though the exclusionary rule was not then applied in state courts.

102. 1 W. Lafave, *supra* note 6, § 1.6, at 111-12.

103. *Boyd v. United States*, 116 U.S. 616, 626-627, 6 S. Ct. 524, 53 (1886).

104. 387 U.S. 523, 87 S. Ct. 1727 (1967).

105. *Id.* at 528, 87 S. Ct. at 1730.

106. *United States v. Miller*, 425 U.S. 435, 440, 96 S. Ct. 1619, 1622 (1976).

the amendment to private party searches would undoubtedly increase a person's privacy in some general sense.

Article 1, section 5, like the fourth amendment, also secures individuals against invasions of their privacy. In debate at the Constitutional Convention of 1973, Mr. Kendall Visk stated, "The key throughout . . . is every man's home is a castle."¹⁰⁷ Consequently, any decision concerning the scope of article 1, section 5 must be made with a view to the probable effects of the decision upon individual privacy that the section is to ensure.

Some commentators have argued that expanding the scope of the privacy interest protected by federal and state search and seizure provisions is of critical importance today because of dramatic changes that have occurred in American society over the last several decades. A delegate at the Montana Constitutional Convention of 1972 noted that more and more Americans are living in crowded cities today and, for that reason, face far more intrusions into their personal lives, both by governmental officials and private persons, than did Americans just a few generations ago.¹⁰⁸ Further, the development of new technologies for the gathering of information, technologies that can permit the undetected invasion of traditionally private realms such as the house and automobile by governmental and nongovernmental actors alike, pose dangers to individual autonomy and dignity that could scarcely have been imagined by the Founding Fathers.

These considerations, though persuasive, do not justify extending state search and seizure provisions to private activity. As originally contemplated, the fourth amendment was not to be applied to private persons.¹⁰⁹ Contemporary conditions call for the same interpretation. While it is true that urbanization has brought with it a loss of privacy, other recent sociological and economic forces have resulted in a sharp upturn in the incidence and frequency of crime. Thus the greater individual interest in maintaining privacy is counterbalanced, at least to some extent, by the greater necessity of convicting criminals. The cost of this exclusion would exceed its benefits. Further, although the policy of protecting privacy would indeed be furthered by extending search and seizure provisions to private search, further considerations militate against such an extension.¹¹⁰

Deterrence of Future Misconduct

As was suggested in the previous subsection, the primary, if not the only, justification for extending article 1, section 5 to private searches

107. Records of the Louisiana Constitutional Convention of 1973: Proceedings, Vol. VI, Aug. 31, 1973, at 1072.

108. *State v. Helfrich*, 183 Mont. 484, 600 P.2d 816 (1979). See *supra* notes 74-78.

109. See *supra* note 2.

110. See *infra* notes 118-128 and accompanying text.

is to enhance the individual citizen's "right to be let alone." Whether so extending the section would achieve this end, however, is in large part a function of the remedies that are available for "enforcing" the section. At present there is only one such remedy, namely, the exclusionary sanction. Although other remedies could certainly be devised, for example, an action for a "constitutional tort" against the violator of article 1, section 5, none of these remedies is currently in place and there has been no public clamoring to put them into effect. Thus, if extending article 1, section 5 to private searches is to achieve its intended effect—securing a greater measure of privacy for the individual—then the exclusionary section must be capable of bringing about this result. For reasons that will be presented below, extending article 1, section 5 to private persons and excluding evidence obtained by them in violation thereof would probably have no perceivable effect upon most classes of private actors. In other words, the exclusionary sanction, if applied to the fruits of private searches conducted in violation of article 1, section 5, would, with one limited exception noted below, not deter future violations of the section.

The fourth amendment exclusionary rule has been described as a prophylactic rule that is primarily designed to discourage improper and unconstitutional law enforcement activity.¹¹¹ The same policy underlies the exclusionary rule that is implicit in article 1, section 5. The rule functions by removing the incentive for misconduct in the gathering of evidence. For the rule to be effective, however, the searcher must be motivated by a desire to secure a criminal conviction and must engage in searches on a fairly regular basis.

Exclusion of evidence generally does not deter private misconduct. For the exclusionary rule to be effective, the searcher must engage in searches on a fairly regular basis.¹¹² Because a purely private person is not usually motivated by a desire to secure a conviction, the threat that evidence uncovered by him in an unreasonable search will be inadmissible is unlikely to affect his behavior. In those infrequent cases where the desire to secure a conviction motivates a private person, his lack of law enforcement training may mean that he is unaware of an exclusionary rule. Also, accidental discoveries, which account for a great number of private "searches," can never be prevented. Thus, the exclusionary rule does not serve a deterrent function when applied to purely private searches.

On the other hand, exclusion of evidence obtained from searches by private law enforcement personnel probably would deter their ac-

111. *Kaufman v. United States*, 394 U.S. 217, 224, 89 S. Ct. 1068, 1073 (1969); *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684 (1961).

112. Note, *supra* note 93, at 614-15.

tions.¹¹³ Such persons are interested in securing convictions for their employers.¹¹⁴ A security guard at a department store, for example, is not satisfied with merely recovering stolen merchandise when he apprehends a shoplifter. The merchant, and thus the security guard, is interested in getting professional shoplifters convicted so that others who may be tempted to shoplift will be discouraged from doing so. Further, private law enforcement personnel engage in searches on a sufficiently regular basis to be both affected by and aware of the exclusionary sanction. If evidence obtained by such personnel was subjected to the exclusionary rule, companies that employ them would no doubt ensure that they are properly trained in the constitutional restraints upon searches and interrogation. Thus, applying the exclusionary rule to private law enforcement personnel would have a definite effect on methods. Insuring that such actors show proper respect for citizens' rights would be a desirable result.

Judicial Integrity

One advocating the extension of article 1, section 5 to private searches might argue that this extension is necessary to preserve "judicial integrity." The policy connoted by this expression is that courts should not be a party to or give their stamp of approval to the conduct of persons conducting "illegal" searches.¹¹⁵ Arguing that the integrity of the courts is compromised by their use of evidence obtained through private party searches in violation of article 1, section 5, however, begs the question. The question here is whether article 1, section 5 ought to apply to private searches. If private searches are not prohibited by that section, then the integrity of the courts would not be impaired by the use of evidence obtained in those searches.

113. This is because of the great numbers of private law enforcement personnel. They conduct searches on a sufficiently regular basis to be aware of exclusionary rules. Private security guards outnumber police by 2 to 1, Private Security Advisory Council, A Report on the Regulation of Private Security Guard Services 1 (1976). \$21.7 billion was spent on private protection in 1980 as compared to \$13.8 billion on police protection in 1979. Private security resources, both expenditures and employment, will continue to increase as resources for public law enforcement stabilize. Cunningham and Taylor, *The Growing Role of Private Security*, Nat'l Inst. Just. Res. in Brief, Oct. 1984.

114. Twenty-four percent of all shoplifting cases are referred to police. R. Griffin, 25th Annual Report, *Shoplifting in Supermarkets* (1988).

115. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Olmstead v. United States, 277 U.S. 438, 485, 48 S. Ct. 564, 575 (1928)(Brandeis, J., dissenting).

Even if one were to assume that article 1, section 5 applies to private searches and that the courts' use of evidence obtained in private searches that violate the section impairs the courts' integrity, the matter would not be free of difficulty. For one thing, asking if use of the evidence will impair judicial integrity leaves out an important question, that is, will resolution of the case without the benefit of generally reliable evidence impair the court's integrity? The answer is obviously yes. If so, then the courts face a dilemma regarding how to maintain judicial integrity. One could argue that the greater threat to judicial integrity lies in the loss of evidence needed to aid the criminal courts in what is, in fact, their primary task, determining whether those accused have committed crimes and bringing the guilty to justice.

Further, and perhaps more importantly, the need to preserve judicial integrity has been rejected by both federal and state courts as a serious justification for the exclusionary rule. In *United States v. Janis*,¹¹⁶ the Supreme Court stated,

Judicial integrity does not mean that the courts must never admit evidence obtained in violation of the Fourth Amendment. . . . The primary meaning of "judicial integrity" in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution. In the Fourth Amendment area, however, . . . the violation is complete by the time the evidence reaches court. The focus therefore must be on the question whether the admission of the evidence encourages the violations of the Fourth Amendment rights.¹¹⁷

This reasoning applies with even greater force to the problem of private searches under article 1, section 5. By using evidence obtained through unreasonable private searches, searches that would violate article 1, section 5 if that norm applied to them, the court would not encourage future violations of the section. Because private parties have no ongoing stake in gathering evidence on a regular basis, the courts' use of such evidence would hardly embolden private parties to violate the section in the future.

For these reasons it is clear that the need to protect the integrity of the courts does not justify extending article 1, section 5, or its exclusionary rule, to private searches. As long as the courts do not "commit or encourage violations of the constitution," judicial integrity is maintained. By admitting the evidence from a private party search, the court is not encouraging a violation; the violation has already occurred. Further, admitting the evidence helps to preserve the integrity of the courts' factfinding function.

116. 428 U.S. 433, 96 S. Ct. 3021 (1976).

117. *Id.* at 458, 96 S. Ct. at 3034 n.35.

*Balancing the Benefits and Costs of the Rule**Purely Private Persons*

In order to determine whether article 1, section 5 should be applied to private party searches, the court should do more than simply consider whether this extension would further the policies that underlie the article and its exclusionary rule. The court should also balance the social benefits of this extension of the rule against its costs. As has been suggested, the principle benefit of extending the section is the preservation or expansion of the individual interest in privacy; the principle detriment of extending the rule is interference with the government's interest in detecting and punishing crime.¹¹⁸ The benefit-cost balance, it would seem, will vary depending upon whether the actors in question are purely private parties or private law enforcement personnel. The discussion below will be divided accordingly. In the case of a purely private person, one who is completely unconnected with public or private law enforcement, the cost of excluding the evidence may not be one that society is ready to pay.¹¹⁹ Many criminal prosecutions depend for their success upon leads and evidence offered by private persons.¹²⁰ Furthermore, as discussed above, the deterrent effect upon private persons of excluding evidence obtained in violation of article 1, section 5 is questionable. To eliminate a valuable source of information in exchange for a marginal, if not completely illusory, increase in security from invasions of privacy make little sense. The guarantee against unreasonable searches by the police necessarily limits law enforcement procedures; that is the nature of the right.¹²¹ There are, however, no justifiable grounds for extending the guarantee to the actions of private persons. For these reasons, the incremental costs of applying article 1, section 5 to purely private persons are not worth the incremental advantages.

Private Law Enforcement Officials

The benefits and costs of extending the coverage of article 1, section 5 to private law enforcement personnel are somewhat different from

118. *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405 (1984); *United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637 (1983); *Camara v. Municipal Ct.*, 387 U.S. 523, 87 S. Ct. 1727 (1967); *Pullin v. Louisiana St. Racing Comm'n*, 484 So. 2d 105 (La. 1986).

119. The California electorate amended the California Constitution by referendum in 1982 to constrict the exclusionary rule. The actions of private law enforcement officials are no longer state action in California. *Supra* note 85. See *People v. Geary*, 173 Cal. App. 3d 904, 219 Cal. Rptr. 557 (1985).

120. *United States v. Russell*, 411 U.S. 423, 432, 93 S. Ct. 1637, 1643 (1973); *Park, The Entrapment Controversy*, 60 Minn. L. Rev. 163, 231 (1976).

121. 1 W. Lafave, *supra* note 6, § 1.2, at 23.

those that would be entailed in extending coverage to purely private persons. Unlike purely private persons, private law enforcement personnel would probably be deterred from engaging in unconstitutional searches and seizures if the exclusionary rule were applied to evidence obtained by them. Thus, applying the section to such persons would further the individual interest in privacy. The question, however, is one of cost. Shoplifting is a major financial problem for retail merchants,¹²² and restricting the use of evidence obtained by security guards can only increase the problem.¹²³ Clearly, applying the exclusionary rule to such evidence would have some deleterious effect upon the effective enforcement of the laws. On the other hand, private law enforcement officials are involved in a government function, and the government licenses and regulates private law enforcement officials. Actions of police officers are obviously state action. Actions of undercover and off-duty police officers are treated as state action despite the appearance of private action.¹²⁴ The question is whether the line between off duty police officers and on duty, uniformed, state licensed and regulated security guards is justifiable.¹²⁵

Is the increased cost of applying article 1, section 5 to private security guards worth the benefit? While the issue is close, the exclu-

122. Losses from crimes against businesses have been estimated from \$23.6 billion (for example, in 1975) to as much as \$30 to \$40 billion per year. The consumer pays as much as 15% higher prices because of shoplifting. M. Caplan & J. Duncan, *Retail Security, A Selected Bibliography* (1980) (citing American Management Association, *American Management Association's Crimes Against Business Project—Background, Findings and Recommendations* (1977)). Shoplifting increased thirty-three percent between 1983 and 1987. Federal Bureau of Investigation, *Uniform Crime Reports for the United States* 34 (1987). The problem is particularly acute in small businesses which have a small profit margin that shoplifting can quickly destroy, A. Verrill, *Reducing Shoplifting Losses*, Small Business Association (1981). Because of the many people who proceed undetected or unreported these figures are necessarily conservative. An average shoplifting incident in a department store costs \$96, Federal Bureau of Investigation, *Uniform Crime Reports for the United States* 152 (1987). See also, S. Sklar, *Shoplifting: What You Need to Know About the Law* (1982), for a thorough discussion of the effects of shoplifting and how merchants seek to prevent it.

123. Eighty-percent of the stores responding to this study used security guards. Over fifty-percent of the security budget is for the payroll for security personnel. A. Young, *An Ounce of Prevention: The Seventh Annual Survey of Security and Loss Prevention in the Retail Industry* 29, 32 (1987). One study reported that twenty-four percent of shoplifters apprehended were reported to the police. Of the reported cases, thirty-six percent were prosecuted. R. Griffin, *25th Annual Report, Shoplifting in Supermarkets* 8 (1988). These prosecuted cases could be doomed to failure by the application of a rule excluding evidence obtained by private security personnel.

124. *State v. Wilkerson*, 367 So. 2d 319 (La. 1979).

125. The line is made even more obscure as some jurisdictions treat off-duty police officers as private persons, *United States v. McGreevy*, 652 F.2d 849 (9th Cir. 1981).

sionary rule is probably not the appropriate remedy.¹²⁶ This proposition draws support from the fact that the purported benefit of extending the coverage of the section in this way—securing privacy against unreasonable intrusions by private security personnel—can be achieved through various other legal institutions that do not take such a great toll upon law enforcement efforts. Statutory regulations, such as the Private Security Regulatory and Licensing Law,¹²⁷ are one example. The law authorizes the Private Security Examiners Board to adopt regulations for disciplining security personnel who engage in illegal or otherwise unreasonable searches. In cases involving severe violations of statutory regulations, the court may exclude the evidence as in *Nelson*. In the event of a violation of any of these regulations, the private law enforcement official could be reprimanded, be fined, lose his license, or even be imprisoned. These sanctions, once put into effect, might have an even greater deterrent effect on private law enforcement officials than would excluding the evidence.

In addition to this potential means of securing privacy against unreasonable invasions by private security personnel, there are several other means to this end that are already in place. One is criminal liability. Many searches that might be considered unreasonable under article 1, section 5 would also constitute crimes. For example, an unauthorized search of a customer's purse by a security guard might constitute a trespass. While prosecutors are reluctant to prosecute persons who provide them with valuable evidence, the possibility of prosecution has an undesirable deterrent effect.

Another remedy available to one whose privacy has been invaded by private security personnel is the private tort action.¹²⁸ The very real threat of a tort action should therefore deter them from engaging in outrageous conduct in the performance of their duties. Private law enforcement officials undoubtedly know of the possibility that personal judgments may be taken against them for tortious invasion of privacy. The problem with tort actions, however, is that they require both time and money to bring. In addition, an invasion of privacy may entitle the victim to only nominal damages.

126. For an equally strong argument that the exclusionary rule should be applied to private law enforcement personnel, see Burkoff, *supra* note 93.

127. La. R.S. 37:3270-98 (1988). Although the Private Security Examiners Board currently has no regulations regarding illegal actions by private security guards, the Board is authorized to make such rules. La. R.S. 37:3274(B)(1) (1988). This could be a very effective deterrence. Security guards are required to renew their license once a year. Upon reissuance, the Board could review the guard's record for violations of search provisions as prohibited by the Board rules. An aggrieved guard has the right to appeal a decision by the Board to the courts.

128. See, e.g., *Allen v. Sears, Roebuck & Co.*, 409 So. 2d 1268 (La. App. 2d Cir. 1982).

Taken individually, the threats posed by criminal prosecutions, tort actions, and administrative sanctions may not be sufficient to guarantee a person's privacy against unreasonable invasions by private law enforcement officials. Considered collectively, on the other hand, these sanctions do offer a sufficient deterrent to such intrusions. Because these legal institutions are sufficient for this end, adding the exclusionary rule to the battery of available sanctions would serve no purpose; any incremental deterrent effect that might be realized by extending the exclusionary sanction to the fruits of unreasonable searches by private security guards would at best be negligible. By the same token, extending the substantive prohibitions of article 1, section 5 to private security guards would do little to promote the individual interest in privacy. When one compares the benefits and costs of extending article 1, section 5 to private law enforcement officers, one can only conclude that the extension should not be made.

CONCLUSION

The Louisiana Supreme Court should resolve the private search issue once and for all by holding that private party searches do not fall within the ambit of article 1, section 5. For reasons that have been identified by the Louisiana courts of appeal and by the courts of other states, state constitutional search and seizure provisions, such as article 1, section 5, require government action. Private searches, even by private law enforcement officials, do not involve state action. The government's use of evidence obtained from a private search will not transform the search into state action. Furthermore, policy and a careful balancing of attendant costs and benefits weigh against extending the section to private searches. Exclusion of evidence will not deter private persons from conducting unreasonable searches. As for private law enforcement officials, any additional deterrent effect that might be gained by extending the section's exclusionary rule to evidence obtained through their searches would be light and not worth the cost to law enforcement. Private law enforcement officials can be effectively deterred from conducting unreasonable searches through the threat of administrative sanctions, criminal prosecutions, and tort actions. In light of the limited benefits and high costs of the extension of this provision to private party searches, the supreme court should definitively rule that these searches are not covered. This ruling would result in more efficient law enforcement, while minimizing intrusions upon individual privacy.

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