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State v. Nelson: Exclusion of Evidence Derived from a Private Search

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If the right to a jury trial was imposed, maintaining a separate juvenile court for delinquency proceedings might be unnecessary because a district court could hear a delinquency proceeding as a criminal case with the only difference being the dispositional alternatives available to the judge. However, such a move would be undesirable. Although the problems of the juvenile courts are serious, "the problems of the criminal courts, particularly those of the lower courts that would fall heir to much of the juvenile court jurisdiction, are even graver . . . ."[62] Furthermore, as delinquency proceedings become more akin to criminal proceedings, it becomes more likely that the attitude will develop that juvenile delinquents are no different from criminals.

Dino seems to represent a cautious step forward in the juvenile due process area; it represents no radical departure from current thought in the areas of public and jury trials.[63] *Dino* also seems to reflect a hesitance to deliver what could be the coup de grace to the juvenile court with respect to its delinquency jurisdiction without allowing time for evaluation of whether the due process requirements already in effect provide fundamental fairness to the juvenile making further erosion of the old ideals unnecessary.

Joseph G. Jarzabek

State v. Nelson: EXCLUSION OF EVIDENCE DERIVED FROM A PRIVATE SEARCH

Having reasonable cause to believe that the defendant had stolen a diamond ring, two department store security guards detained him under authority of Louisiana's "shoplifting statute."[1] During the detention, one guard, convinced that the de-

62. CHALLENGE, *supra* note 7, at 81.

63. RLR v. State, 487 P.2d 27 (Alaska 1971). In this case, the Alaska Supreme Court held that the statutory prohibition of jury trial and public trial for delinquents violated the Alaska Constitution. This is the only decision requiring a jury trial, absent a statutory mandate, since *McKeiver*. As to public trial, while the weight of authority may not be in favor of granting this right, adopting the right to public trial is not without support either. See notes 35-38, *supra*, and accompanying text.

1. LA. CODE CRIM. P. art. 215(A) states in pertinent part:

fendant had the ring in his mouth, grabbed his throat to keep him from swallowing it. While being choked, the defendant admitted possessing the ring, and this inculpatory statement was admitted at a trial which resulted in his conviction for theft. The Louisiana Supreme Court reversed and *held* that a statement resulting from an unreasonable search conducted by a private person acting under color of statutory authority is inadmissible under article I, sections 1 and 5, of the Louisiana Constitution.[2] *State v. Nelson,* 354 So. 2d 540 (La. 1978).

Under the exclusionary rule, no evidence obtained through a violation of a defendant's constitutional privileges can be admitted at trial. The rule is designed "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[3] Prior to 1961, this rule applied to evidence obtained in violation of fourth amendment protections against unreasonable search and seizure only when that evidence was offered in a federal trial. However, in 1961, *Mapp v. Ohio*[4] required the rule to be enforced in state courts as well.

Whether in state court or Federal court, the exclusionary remedy is available only when constitutional protections apply,

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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, when he has reasonable cause to believe that the person has committed theft of goods held for sale by the merchant, regardless of the actual value of the goods. The detention shall not constitute an arrest.

2. LA. CONST. art. I, section 1, states:

All government, of right, originates with the people, is founded on their will alone, and is instituted to protect the rights of the individual and for the good of the whole. Its only legitimate ends are to secure justice for all, preserve peace, protect the rights, and promote the happiness and general welfare of the people. The rights enumerated in this Article are inalienable by the state and shall be preserved inviolate by the state.

LA. CONST. art. I, section 5, states:

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 or reason 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.

3. Elkins v. United States, 364 U.S. 206, 217 (1960).

4. 367 U.S. 643 (1961).

and the United States Supreme Court has never reconsidered its 1921 holding that the fourth amendment does not apply to searches and seizures conducted by private persons. In *Burdeau v. McDowell,*[5] officers of the defendant's former employer searched the defendant's desk and found incriminating evidence, which later was turned over to federal officers and offered at trial. No governmental agent participated in the search or had any prior knowledge of it, so the Court found that the fourth amendment did not apply and refused to exclude the evidence.[6] To the Court, the "origin and history" of the fourth amendment clearly showed that "it was intended as a restraint upon the activities of the sovereign authority, and was not intended to be a limitation upon [anyone] other than governmental agencies."[7] Despite *Burdeau's* age, state and federal courts have refused to deviate from its rule requiring the presence of "state action" before application of fourth amendment standards.[8]

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5. 256 U.S. 465 (1921).

6. Because this case preceded *Mapp v. Ohio,* 367 U.S. 643 (1961), it originally applied only to the actions of federal governmental agents. Now, after *Mapp, Burdeau* applies to both state and federal officers.

7. Burdeau v. McDowell, 265 U.S. 465, 475 (1921). McDowell's company discharged him for alleged fraudulent business practices. After his discharge, officers of the company searched his office and seized certain incriminating papers from his desk and safe. These were turned over to federal prosecutors. The trial court excluded this evidence, but the Supreme Court reversed, finding that no governmental agent knew of or participated in the search. The Court stated:

> The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of the sovereign authority, and was not intended to be a limitation upon other governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seziure by process duly issued.

Id.

8. "It is hornbook law that a person is not secured by the Fourth Amendment against unreasonable searches and seizures conducted by private parties, unless those parties are operating in the service of some governmental investigation." United States v. Winstanley, 359 F. Supp. 146, 152 (E.D. La. 1973)(Evidence seized by airline employee during boarding search held admissible.) *See, e.g.,* United States v. Goldberg, 330 F.2d 30 (3d Cir.), *cert. denied,* 377 U.S. 953 (1964) (Records removed from the defendant's office without knowledge of federal officers and later turned over to authorities held admissible.); United States v. Coles, 302 F. Supp. 99 (N.D. Me. 1969) (Evidence seized from student at "Job Corps" center by administrator held admissi-

Under *Burdeau*, state action can be found only when governmental officers participate in or have prior knowledge of a search. Examples of such participation or prior knowledge include: direction by police officers to an express agent to remove suspected contraband drugs from a package;[9] employment by law enforcement authorities of an engineer who installed a hidden microphone;[10] instruction by police officers to a motel manager to seize suspected narcotics from a room;[11] and full time police employment of a part-time nightclub employee who searched an incoming customer.[12] In each of these cases, courts excluded the evidence obtained on fourth amendment grounds.

The inflexibility of the *Burdeau* rule arises from the refusal of courts to find state action in an indirect connection between the search and some governmental authority. For example, the defendant in *State v. McDaniel*[13] argued that state action was present when private security guards detained her pursuant to a state "shoplifting statute"[14] and searched her handbag. The

ble.); People v. Randazzo, 220 Cal. App. 2d 768, 34 Cal. Rptr. 65 (1963), *cert. denied*, 377 U.S. 1000 (1964) (store security guard's observation of the defendant in dressing room putting merchandise in her purse held admissible as evidence.); People v. Botts, 250 Cal. App. 2d 478, 58 Cal. Rptr. 412 (1967) (Observation by service station attendant of defendant using illegal narcotics in restroom held admissible.); People v. Horman, 22 N.Y.2d 378, 239 N.E. 625, 292 N.Y.S.2d 874, *cert. denied*, 393 U.S. 1057 (1968); State v. Bryan, 1 Or. App. 15, 457 P.2d 661 (1969) (In holding evidence obtained in private auto search admissible, the court noted that it had found no jurisdiction in the United States which did not follow the *Burdeau* rule.).

Although the *Burdeau* rule has been almost universally adhered to, it has not gone uncriticized. "Were the Supreme Court faced with the situation in *Burdeau* again, it might heed Mr. Justice Brandeis's admonition that 'Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play.". . . [B]ut, in the absence of such a pronouncement, we of course are bound by the rule in *Burdeau*." United States v. McGuire, 381 F.2d 306, 313-14 n.5 (2d Cir. 1967), *cert. denied*, 389 U.S. 1053 (1968) (*dictum*).

9. Williams v. State, 501 P.2d 841 (Okla. Crim. App. 1972).
10. People v. Tarantino, 45 Cal. 2d 590, 290 P.2d 505 (1955).
11. People v. Fierro, 236 Cal. App. 2d 344, 46 Cal. Rptr. 132 (3d Dist. 1965).
12. State v. Williams, 297 So. 2d 52 (Fla. App. 1974).
13. 44 Ohio App. 2d 163, 337 N.E.2d 173 (1975).
14. The Ohio statute provided:

> A merchant, or his employee or agent, who has probable cause for believing that items offered for sale by a mercantile establishment have been unlawfully taken by a person, may, in order to recover such items without search or undue restraint or in order to cause an arrest to be made by a police officer until a warrant can be obtained, detain such person in a reasonable manner for a

Ohio appellate court rejected the argument that a statute authorizing private security guards to detain suspected shoplifters constituted state action. Though conceding that the security guards had violated the defendant's reasonable expectation of privacy, the court nevertheless refused to exclude evidence derived from th search.[15]

Louisiana has adhered to the essence of the *Burdeau* rule that constitutional protections against unreasonable searches do not extend to searches by private persons. In *State v. Bryant,*[16] decided in 1975, the supreme court refused to exclude evidence taken by a service station operator from a car impounded by police and left at his station. The court found the operator to have been acting in his own interest, to prevent personal liability, rather than as an agent of law enforcement authorities.[17] In *State v. Hutchinson,*[18] a co-proprietor of a burglarized business searched the underside of the defendant's van, but the court found the unauthorized intrusion to have been a "private, not public" search and thus beyond the ambit of the fourth amendment.[19] Chief Justice Sanders, in concur-

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reasonable length of time within the said mercantile establishment or the immediate vicinity thereof . . . .

OHIO REV. CODE ANN. § 2935.041 (1969).

15. "The same reasoning necessarily applies to the identical contention made herein with respect to the constitutional prohibition against unreasonable searches and seizures. R. C. 2935.041 does not operate to make the action of a private citizen thereunder—that is, a merchant or employee—state action within the contemplation of constitutional prohibitions. 44 Ohio App. 2d 163, 173, 337 N.E.2d 173, 179 (1975).

One of the security guards in this case was a commissioned special deputy sheriff, but this was not found to constitute state action. 44 Ohio App. 2d at 173-175, 337 N.E.2d at 180.

See also City of University Heights v. Conley, 20 Ohio Misc. 112, 252 N.E.2d 198 (1969) ("[T]he store detective in this was acting as an individual, an agent of her employer, to protect their property from theft."); People v. Santiago, 53 N.Y. Misc. 2d 264, 278 N.Y.S.2d 260 (1967) (An argument that a shoplifting search took place under color of state authority was rejected despite detainment under a state shoplifting detention statute.).

Contra, Thacker v. Commonwealth, 310 Ky. 702, 221 S.W.2d 682 (1948). In *Thacker* the court stated that a private party arresting under a citizen's arrest statute was "acting for and on behalf of the sovereignty." However, this seems to be an aberration of the general rule and may have been *dictum* as the citizen arresters acted under police direction.

16. 325 So. 2d 255 (La. 1975).

17. *Id.* at 259.

18. 349 So. 2d 1252 (La. 1977).

19. *Id.* at 1254.

rence, found the search similarly beyond the ambit of Louisiana's counterpart to the fourth amendment, article I, section 5, of the constitution, which he argued does not extend to searches by private persons.[20]

Apparently, Louisiana has not been willing to accept the prior statutory authorization view of the scope of state action, which was advanced, but rejected, in *State v. McDaniel.*[21] In *State v. Kemp,*[22] two defendants sought to exclude evidence obtained from them by private parties during an arrest which seemed to fall within the ambit of the Louisiana citizen's arrest statute.[23] However, the court did not refer to this statute, nor did it discuss the possibility of excluding the evidence as the product of an unreasonable private action authorized by statute. Rather, rejecting the defendants' argument that the arrest had been an "official illegality," the court held that the arrest had been entirely private and that the evidence was admissible under *Burdeau.*[24] The failure to discuss the statute and the application of *Burdeau* are inconsistent with a belief that state action encompasses private acts authorized by statute. By admitting the evidence, the court seems to have indicated its adherence to the traditional view that statutory authorization is insufficient to bring private acts within the scope of state action.

State action does, however, include certain acts by state employees. By so holding, in *State v. Mora,*[25] the Louisiana

20. "If a drastic departure from long-established principles was intended, it would have been very easy for the drafters of the constitution to so indicate in the section. In my opinion, the language is not there." *Id.* at 1255 (Sanders, C.J., concurring).

21. See text at note 13, *supra.*

22. 251 La. 592, 205 So. 2d 411 (1967).

23. LA. CODE CRIM. P. art. 214 states: "A private person may make an arrest when the person arrested has committed a felony, whether in or out of his presence." The article was adopted, without substantive change, from Revised Statutes 15:61 which was in force at the time of the *Kemp* arrests.

24. "The position defendants have taken is based upon an erroneous premise. The arrests in question were made by private persons—not by officials. The rules established by the Federal Supreme Court upon which defendants rely to suppress the evidence do not apply to arrests made by private individuals, but, instead, they apply only to illegal arrests, searches and seizures made by officials." 251 La. 592, 603, 205 So. 2d 411, 415.

25. 307 So. 2d 317 (La. 1975), *vacated,* 423 U.S. 809 (1975), 330 So. 2d 900 (La. 1976), *cert. denied,* 429 U.S. 1004 (1976).

Supreme Court arguably expanded the traditional concept of who is considered an agent of the state. In *Mora,* a public school instructor's status as a state employee, his "strict accountability to the State," and his statutory "responsibility of implementing the policies of the State,"[26] were found sufficient to require exclusion, on fourth amendment grounds, of evidence seized by the instructor from the effects of a student. Justice Summers, dissenting on other grounds, agreed with the court that "the Fourth Amendment . . . protects the citizen against the State itself and all of its creatures—school boards and school officials not excepted."[27] *Mora* conflicts with *United States v. Coles,*[28] wherein a federal district court refused to exclude evidence obtained by a federally employed Job Corps administrator on the ground that the fourth amendment applied only to searches and seizures by law enforcement officers.[29] If *Mora* modified the *Burdeau* rule, it did so by expanding the class of persons considered "governmental agents"—something the *Coles* court refused to do. *Mora* showed the court's reluctance to limit the application of fourth amendment standards to actions of police officers only and perhaps foreshadowed broader application of fourth amendment-type standards. However, the *Mora* court did not

26. The Court viewed Revised Statutes 17:416 as the source of this responsibility. 307 So. 2d at 319. That statute states in part: "Every teacher is authorized to hold every pupil to a strict accountability for any disorderly conduct in school . . . or during intermission or recess. School principals may suspend from school any pupil who is guilty of willful disobedience; . . . or who commits any other serious offense . . . . LA. R.S. 17:416 (Supp. 1975).

The court stated on remand: "Our opinion reflects that we followed three steps in concluding that the trial court erred in failing to suppress the marijuana seized from the defendant. First, we determined that the instructor and the school principal who effected the search and seizure were functioning as governmental agents. This decision was reached solely by an analysis of Louisiana law." 330 So. 2d at 901. The fact that the statute was held to confer "governmental agent" status upon the instructor and the principal should be differentiated from the defendant's argument in *McDaniel* that the prior statutory authorization of a *private* action constituted state action.

27. 307 So. 2d at 322 (Summers, J., dissenting).

28. 302 F. Supp. 99 (N.D. Me. 1969).

29. "Nor has any court extended the rule of the *Weeks* case so far as to hold that the Fourth Amendment requires the exclusion of evidence obtained through a search in which there was no participation or instigation by a federal or state *law enforcement officer.*" United States v. Coles, 302 F. Supp. 99, 103 (N.D. Me. 1969) (Emphasis added).

attack the traditional participation or prior knowledge view of state action.

The instant case involved a search of the person and effects of a suspected shoplifter by department store security personnel acting pursuant to detention powers contained in article 215 of the Louisiana Code of Criminal Procedure. A sales clerk alleged that the defendant had failed to return a diamond ring shown to him, and the security guards removed the defendant to an upstairs room. A strip search failed to uncover the ring, but one guard, thinking the defendant's speech slurred, thought to look in his mouth where the guard thought he saw a gold object. When the defendant refused to spit it out, the guard began to choke him to prevent him from swallowing it. Thereupon, the defendant admitted possessing the ring and promised to produce it if left alone. No ring was found then or later.[30] The defendant sought to have the inculpatory statement excluded from trial, but the trial court refused.[31]

The supreme court initially indicated that the statement could be excluded as involuntary under Revised Statutes 15:451,[32] which applies to any inculpatory statement, whether or not made to a governmental official.[33] The court admitted that it could have rested its decision to exclude the statement on this ground, yet decided instead to base its ruling on the constitutional issue arising from "the unreasonableness of the (illegal) search by private persons."[34]

30. The guards never found the ring even though they subjected the defendant to a strip search (while he was handcuffed because of his resistance). Later x-rays and observation of the defendant's bowel movements failed to locate the ring. Without the ring, according to the court, the defendant's statement was the only direct evidence showing his possession of the ring. 354 So. 2d 540, 541.

31. *Id.*

32. "Before what purposes [purports] to be a confession can be introduced in evidence, it must be affirmatively shown that it was free and voluntary, and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises." LA. R.S. 15:451 (1950).

33. 354 So. 2d at 542. The court cited *State v. Glover*, 343 So. 2d 118 (La. 1976), in which the court had stated: "The provisions of Louisiana law establishing that only free and voluntary confessions and inculpatory statements are admissible draw no distinction between those made before and after the accused is taken into custody." 343 So. 2d at 120. In *Glover* an inculpatory statement was made by the defendant to his common law wife and was overheard electronically by police officers. Nevertheless, the court applied the voluntariness standard.

34. 354 So. 2d at 542.

The court emphasized that article 215 allows a storekeeper or his employee "to detain a person for *questioning*"[35] only. Furthermore, "not only must the storekeeper have probable cause to initiate any inquiry from a customer, but the method and extent of the inquiry must also be reasonable."[36] The court found the strip search, the handcuffing, and the choking of the defendant unreasonable.[37]

The *Nelson* court applied the constitutional standards of reasonable search and seizure found in article I, section 5, to the search of the defendant, but did not fully explain the reasoning behind this application. After quoting section 5, the court quoted the final sentence of section 1, which provides that the state must preserve "inviolate" the constitutional rights enumerated in later sections.[38] It then concluded: "The accused was subjected to an unreasonable search under the color of authority claimed by virtue of a statute that permitted private persons to use reasonable force to detain him." Since the inculpatory statement resulted directly from the guards' search, it was held inadmissible.[39]

The conclusion that section 5 standards applied to the private search in the instant case—where only article 215 detention authority connected search and State—indicates the court's acceptance of a state action doctrine much broader than the *Burdeau* prior knowledge or participation rule. The court's quotation of the final sentence of section 1 immediately prior to the statement of its conclusion indicates that it viewed that provision as the constitutional source of such a broad doctrine.

Such an interpretation of the final sentence of section 1 deserves much fuller explanation than the court provided.

35. *Id.* (Emphasis in the original.) For a fuller discussion of the limitations on a merchant's authority under the source provision of article 215, see Note, *Louisiana Merchant Detention Statute*, 25 LA. L. REV. 956 (1965).

36. 354 So. 2d at 542, *citing* Brasher v. Gibson's Products, Inc., 306 So. 2d 842 (La. App. 2d Cir. 1975). The court added that the guard's use of force might have been unreasonable even for a peace officer. It cited *State v. Tapp*, 353 So. 2d 265 (La. 1975), in which a police officer saw defendant put a tinfoil packet in his mouth and fought with him for fifteen minutes to prevent him from swallowing it. The search was found to be unreasonable under the fourth amendment. 354 So. 2d at 542.

37. 354 So. 2d at 542.

38. *Id.*

39. *Id.*

While the sentence is by no means clear,[40] it apparently stands only for the axiomatic notion that the state cannot directly interfere with citizens' constitutional rights. However, in the instant case the state did not participate *directly* in the violation of the defendant's right to be free from unreasonable search and seizure. The court itself found that article 215 conveys to storekeepers very limited authority since it does not allow a search of a suspected shoplifter.[41] Rather, the security guard, far exceeding his authority under article 215, acted alone in subjecting the defendant to an unreasonable search. Seemingly, the *Burdeau* rule, apparently firmly entrenched in Louisiana law,[42] should have applied to this private action.

Nevertheless, the *Nelson* court concluded that article 215 colored the search with state authority and therefore called for the application of constitutional standards—and hence the exclusionary rule—to the search. Possibly the court felt that article 215 *enhanced* the possibility that the private security guards, given the legal power to detain a suspected shoplifter, would be tempted to conduct an illegal search of the suspect. Commentators[43] have based a similar argument on *Elkins v. United States,*[44] which prohibited federal prosecutors from using evidence illegally obtained by state officers. The Supreme Court believed that to rule otherwise might ultimately lead federal officers to encourage their state counterparts to conduct illegal searches in hopes of obtaining evidence not subject to exclusion.[45] Perhaps the *Nelson* court similarly feared

40. Delegates who discussed this sentence in the 1973 Louisiana Constitutional Convention did not speak of its purpose, but rather were concerned only with whether it would allow waiver of rights, and it was for that reason that the words "by the state" were added. Louisiana Constitutional Records Commission, *Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts,* Vol. VI, Days' 26-42 proceedings (1977). *See also* Hargrave, *Declaration of Rights in the 1974 Louisiana Constitution,* 35 LA. L. REV. 1, 3 (1974).

41. See text at notes 37, 38, *supra.* It should be noted that article 215 was not itself subject to constitutional attack in the instant case.

42. See text at notes 16-29, *supra.*

43. M. BASSIOUNI, CITIZENS ARREST: THE LAW OF ARREST, SEARCH, AND SEIZURE FOR PRIVATE CITIZENS AND PRIVATE POLICE 72 (1977); Comment, *Sticky Fingers, Deep Pockets, and the Long Arm of the Law: Illegal Searches of Shoplifters by Private Merchant Security Personnel,* 55 ORE. L. REV. 279, 280 (1976).

44. 364 U.S. 206 (1960).

45. *Id.* at 221-22. The "exclusionary rule" had not yet been applied to searches by state officers, because this case preceded *Mapp v. Ohio.*

that a rule which allowed private security guards to detain suspected shoplifters, yet did not exclude products of unreasonable searches, would lead police[46] and storekeepers to encourage private guards to obtain evidence otherwise beyond police officers' reach.[47]

In *Reitman v. Mulkey*,[48] the United States Supreme Court recognized that an otherwise constitutional law can encourage unconstitutional actions by private persons. On its face, an amendment to the California Constitution simply allowed an individual "absolute discretion" in dealing with his real property. However, the California Supreme Court declared the amendment unconstitutional—and the United States Supreme Court affirmed—ruling that it encouraged racial discrimination by nullifying state statutes outlawing housing discrimination. The indirect constitutionalization of a "right to discriminate" was found to "significantly involve the State in private racial discrimination contrary to the Fourteenth Amendment."[49]

The instant case compromises between two current arguments in Louisiana concerning the application of constitutional standards to private searches. Chief Justice Sanders, in *Hutchinson*, urged that the new Louisiana Constitution does not deviate from the *Burdeau* rule.[50] Professor Hargrave argues

46. *See* Comment, *supra* note 43, at 280.

47. The court in *United States v. Goldberg*, 330 F.2d 30 (3d Cir. 1964), rejected an extension of *Elkins* to private search cases stating:

> [Elkins] reversed the trend of previous federal decisions by refusing to admit evidence offered as the result of an illegal search and seizure by state officials even where no participation was had by federal officers. However, here again the court was only concerned with state action and its ruling, in no wise, impaired Burdeau v. McDowell. While the appellant contends that "The imperative of judicial integrity", coined in this case, would be violated in principle, just as much by a private individual, it is paradoxical that the appellant here should invoke that doctrine when the material offered in evidence against him was the true and actual records of his corporation's sales, which were to be destroyed at his specific direction, and in the face of this fraudulent scheme, to give him the cloak of its protection would be most unseemly.

Id. at 35. *United States v. McGuire*, 381 F.2d 306 (2d Cir. 1967), and *People v. Randazzo*, 220 Cal. App. 3d 768, 34 Cal. Rptr. 65 (1963), *cert. denied*, 377 U.S. 1000 (1964), rejected arguments based on *Elkins* on the ground that the *Elkins* opinion indicated no intent to overrule *Burdeau*.

48. 387 U.S. 369 (1967).

49. *Id.* at 376.

50. See note 20, *supra*. In his dissent in the instant case, Chief Justice Sanders

convincingly to the contrary that section 5, with or without a broad construction of section 1, was intended by the drafters to encompass all private searches, and thus does not follow *Burdeau*.[51] By requiring that a private search be under color of statutory authority before constitutional standards will apply, the *Nelson* court has taken an intermediate position. For example, the *Hutchinson* and *Bryant* decisions should remain intact under *Nelson*, because the private persons in those cases did not act pursuant to statutory authorization. However, *Nelson* may disturb the apparent *Kemp* holding by inviting the argument that article 214's authorization of a citizen's arrest is sufficient state involvement in any unreasonable search incident to such an arrest to invoke the exclusionary rule.[52]

Perhaps the public needs constitutional protection from private security forces in stores. Certainly the present use of private security personnel presents the potential for abuse of

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advanced the same argument: "I have heretofore expressed the view that the rule excluding evidence from a criminal trial because of an illegal search does not apply to evidence secured by private persons." 354 So. 2d at 543 (Sanders, C.J., dissenting).

51. "Furthermore, the debate on the section supports a desire to go far beyond federal standards and to prevent the use of evidence obtained by private persons in violation of the guarantees of the section. Delegate Earl Schmitt said: . . . 'This change will allow the protection of the individual, not only from state action, but from the action of vigilante committees, from the action of other groups in our society, as an example, those who hire private detective firms to do what they know the police cannot do legally.'" Professor Hargrave also presented the opposing argument that "such a far-reaching departure from existing principles was not intended." This argument is based on the wording of section 5, which includes the broad "invasions of privacy" in the first sentence, but then reverts to the traditional "search and seizure" in the final sentence. Hargrave, *Declaration of Rights in the 1974 Louisiana Constitution*, 35 LA. L. REV. 1, 22-23 (1974). The Louisiana Supreme Court recently stated: "This court has yet to decide whether Article I, Section 5 of the Louisiana Constitution of 1974 bans unresonable searches by private citizens as well as police." State v. Wilkerson, No. 62,678 (Jan. 29, 1979).

52. In *Kemp*, both physical and verbal evidence was obtained during the arrest of the defendants by private persons. Although the court did not so state, presumably this was a citizen's arrest under LA. CODE CRIM. P. art. 214. Under *Nelson*, that prior statutory authorization may call for the application of constitutional standards. Certainly such an approach would be called for under the *Elkins* argument. See text at notes 43-47, *supra*. A police officer could encourage a private person acting under article 214 to conduct an illegal search as easily as he could encourage a merchant or security guard under article 215.

However, this argument might be rejected under *Reitman*. See text at notes 48-49, *supra*. The Supreme Court in *Reitman* allowed state courts to decide for themselves whether a law would encourage unconstitutional acts, 387 U.S. at 378-81, and a Louisiana court might decide that article 214 furnishes no such encouragement.

citizens' rights; guards receive little screening or training,[53] and frequently are unsure of the limits of their authority to detain suspects.[54] Furthermore, abuses of citizens' rights by private guards may not be isolated occurrences; in a 1971 national poll, 22 percent of the guards questioned responded that they had actually seen cases of excessive detentions of suspected shoplifters.[55]

However, while the application of exclusionary policy in the instant case may please one's sense of justice, the rule relied on by the Louisiana Supreme Court could have undesirable effects in future cases.[56] In *Nelson*, a security guard employed by a department store[57] conducted a highly offensive search which produced, according to the court, unreliable evidence.[58] However, the *Nelson* rule takes none of these egregious

53. J. KAKALIK & S. WILDHORN, PRIVATE POLICE IN THE UNITED STATES: FINDINGS AND RECOMMENDATIONS 30, 76-96 (1971). LA. R.S. 47:374 (1950) provides for a license fee for private detective agencies, but imposes no minimum standards or regulations.

54. The responses to certain questions are particularly revealing. When asked how well they thought they knew their legal powers to detain, arrest, search and use force, 18 percent stated they did not know their legal powers and an additional 23 percent were unsure of them—41 percent in all. In fact, less than 50 percent knew that their arrest powers were the same as any private citizen's, and only 22 percent knew under what conditions an arrest for a felony was legal. Few knew the difference between a felony and a misdemeanor, and some did not even know whether some actions were crimes or not. For example, 31 percent believed that it is a crime if someone calls them a "pig," and 41 percent believed that it is a crime for someone to drink on the job if it is contrary to company rules. J. KAKALIK & S. WILDHORN, THE PRIVATE POLICE INDUSTRY: ITS NATURE AND EXTENT 200 (1971).

55. J. KAKALIK & S. WILDHORN, *supra* note 54, at 223. The authors indicated that the percentage of those guards who have seen violations is probably higher than the results of the poll indicated. Some of the questionaires were reviewed by supervisors before being returned, and some guards may have answered falsely.

56. The court itself stated that the voluntariness standard was available for exclusion of the statement. 354 So. 2d at 542. See text at notes 32-34, *supra*. Although some conceptual difficulty arises in its application from the fact that the force applied by the guard was only intended to secure physical evidence, this should not prevent application of the standard. "Article I, section 16 of the Louisiana Constitution provides that 'No person shall be compelled to give evidence against himself.' This provision suggests that no form of compulsion, whether or not it was *intended* to coerce a confession, will be tolerated." State v. White, 329 So. 2d 738, 741 (La. 1976) (Emphasis in the original).

57. Commentators have argued that large private security forces have a quasi-public status because they routinely perform a public law enforcement function. M. BASSIOUNI, *supra* note 43, at 72; Comment, *supra* note 43, at 283.

58. 354 So. 2d at 542.

factors into account. Rather, the decision turns solely on the statutory authorization of the search and therefore may result in the exclusion of useful evidence in cases where aggravating factors are not present. For example, the *Nelson* rule should require exclusion of positive evidence of a crime obtained by a small store owner during an illegal, but inoffensive search.[59] Especially since other methods of preventing the abuse of constitutional rights are available,[60] and since businesses require protection from the mounting costs of shoplifting,[61] application of exclusionary policy may not always be justified.

A California court, in rejecting an argument for the exclusion of evidence derived from an illegal search in a store, stated that the "dirty business" of shoplifting is more dangerous to society than the "dirty business" of those trying to prevent it.[62] This blunt statement indicated the court's fear that exclusionary policy, designed to prevent future illegal searches, will not deter private security personnel, but rather will only hamper prosecutions. Another California court, in *People v. Botts*,[63] argued that the exclusion of illegally obtained evidence can serve to deter only law enforcement officers, because only they are subject to disciplinary systems which teach them that ille-

59. *Brasher v. Gibson's Products Co. Inc.*, 306 So. 2d 842 (La. App. 2d Cir. 1975), requires that a merchant have probable cause before he detains a suspected shoplifter. See note 36, *supra*, and accompanying text. What if the merchant acts upon something slightly less than probable cause, but nevertheless secures evidence of a theft?

60. A student commentator has demonstrated that Louisiana courts have fully enforced article 215 limitations, leaving much room for civil recovery against merchants. Note, *supra* note 35.

Possibly states could require background screening of guards, minimum educational levels, extensive training, experience levels, and bonding of guards. J. KAKALIK & S. WILDHORN, *supra* note 53, at 76-96.

61. As of 1971, an estimated $2-2.5 billion in merchandise was being lost to shoplifters each year. J. KAKALIK & S. WILDHORN, *supra* note 54, at 12.

62. Defendant also suggests that the May Company was engaged in "dirty business" in conducting this surveillance of her and therefore on grounds of public policy the courts should not permit evidence so acquired to be used. It is difficult to appreciate the justification for such a charge against May Company when, without violating any statute, it undertakes to protect its legitimate business against the thievery of a person who poses as a bona fide potential customer. It would seem more appropriate to say that the thief was engaged in "dirty business".

People v. Randazzo, 220 Cal. App. 2d 768, 776, 34 Cal. Rptr. 65, 70 (1963), *cert. denied*, 337 U.S. 1000 (1964).

63. 250 Cal. App. 2d 478, 58 Cal. Rptr. 412 (1967).

gal searches can reduce the chances of conviction.[64] The court concluded that: "The result of applying an exclusionary rule to cases such as the one at Bench would be to free a guilty man without any assurance that there would result any counterbalancing restraint on similar conduct in the future."[65] The *Nelson* court did not consider the question of the effectiveness of exclusionary policy in deterring private illegal searches—certainly if exclusion does not deter them, the *Nelson* rule will significantly handicap law enforcement while providing little additional protection for potential victims.

Certainly the *Nelson* rule is not designed simply to set guilty shoplifters free; rather the court has tried to strike a closer balance between the security requirements of merchants and the rights of their customers to be free from unreasonable searches.[66] The new rule does not encompass all private searches but instead applies only to those initiated by a private party acting under some statutory authorization. Louisiana courts in the future may choose to limit this rule to article 215 detention cases, or, still further, to actions by large security forces under article 215.[67] Nonetheless, while the size of the step has yet to be determined, the Louisiana Supreme Court has stepped away from the previously strict rule that the constitutional standards governing search and seizure do not apply to searches by private persons.

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MEDICAL MALPRACTICE IN LOUISIANA—THE REJECTION OF THE LOCALITY RULE AS APPLIED TO SPECIALISTS

The wife and children of the decedent sued his cardiovascular surgeon for wrongful death. Although the defendant had complied with local practices,[1] the testimony of a specialist

64. 250 Cal. App. 2d at 482-83, 58 Cal. Rptr. at 416. *See also* State v. Mora, 307 So. 2d 317 (La. 1975), wherein Justice Summers, in dissent, argued that exclusion does not deter private unconstitutional conduct.

65. People v. Botts, 250 Cal. App. 2d 778, 482-83, 58 Cal. Rptr. 412, 416 (1967).

66. Note, *supra* note 35, at 964.

67. See note 57, *supra*.

1. Ardoin v. Hartford Accident and Indem. Co., 360 So. 2d 1331, 1333 (La. 1978).