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THE EXCLUSION OF UNCONSTITUTIONALLY OBTAINED EVIDENCE AND WHY THE LOUISIANA SUPREME COURT SHOULD REJECT *UNITED STATES V. LEON* ON INDEPENDENT STATE GROUNDS

Although the Fourth Amendment of the United States Constitution says nothing about how it is to be enforced, the exclusionary rule¹ has existed in the federal criminal justice system for over seventy-five years and has been applicable to the states since 1961. Nevertheless, the exclusionary rule has been a source of much debate since its creation. The United States Supreme Court limited the effect of the rule in *United States v. Leon*² by announcing that evidence would not be excluded when the police acted in good faith reliance on a warrant issued by a detached and neutral magistrate but later found to have been issued without probable cause.

This comment suggests that by restricting the exclusionary rule the Supreme Court has lessened the fourth amendment protection against unreasonable searches and seizures, and that the Louisiana Supreme Court should reject *Leon* when construing article I, section 5 of the Louisiana constitution.³ By examining the language of Louisiana's Declaration of Rights, the intent of the framers of the 1974 constitution, the prior expansive interpretations by the Louisiana Supreme Court of article I, section 5, and the experience of other jurisdictions regarding the good faith exception, this comment will show why the Supreme Court of Louisiana should reject the good faith exception.

THE DEVELOPMENT OF THE EXCLUSIONARY RULE

Although the development of the exclusionary rule may be traced to *Boyd v. United States*,⁴ the Supreme Court first applied it in a

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1. *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341 (1914), stated for the first time that, in a federal prosecution, the fourth amendment bars the use of evidence obtained from an illegal search and seizure. *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, reh'g denied, 368 U.S. 871, 82 S. Ct. 23 (1961), made the exclusionary rule an essential part of the fourth amendment and accordingly, applicable to the states through the fourteenth amendment.

2. *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405 (1984).

3. All five Louisiana Circuit Courts of Appeal have adopted the *Leon* good faith exception to the exclusionary rule with virtually no consideration of art. I, § 5. See *infra* note 46. The Louisiana Supreme Court has not spoken on the issue. See *infra* text accompanying notes 46-48.

4. *Boyd v. United States*, 116 U.S. 616, 6 S. Ct. 524 (1886).

criminal case in *Weeks v. United States*.⁵ In reversing the conviction of the defendant, the Court concluded the fourth amendment barred the use of illegally seized evidence:

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, *the protection of the Fourth Amendment* declaring his right to be secure against such searches and seizures *is of no value, and . . . might as well be stricken from the Constitution*.⁶

Although the courts of many states followed *Weeks*, not until *Mapp v. Ohio*⁷ did the Supreme Court declare that the exclusionary rule was "an essential part of both the Fourth and Fourteenth Amendments."⁸ The Court addressed the question why the exclusionary rule should be incorporated into the due process clause of the fourteenth amendment and thus be applicable to state court proceedings:

Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be "a form of words", valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in 'the concept of ordered liberty.'"⁹

Since the Court's decision in *Mapp*, however, the exclusionary rule has come under constant attack, and the scope of its application has slowly and steadily eroded. Perhaps the most telling illustration of the narrowing of the exclusionary rule is in the Court's focus over the last twelve years on the question of standing to assert a fourth amendment claim.

In *Rakas v. Illinois*,¹⁰ the Court held that in order to raise a fourth amendment violation (with the consequence of an exclusion of evidence)

5. *Weeks*, 232 U.S. 383, 34 S. Ct. 341 (1914). In *Weeks*, the government tried and convicted the defendant for illegal gambling. He had requested the return of incriminating letters and records that had been seized by the government during the search of his home.

6. *Weeks v. United States*, 232 U.S. 383, 393-94, 34 S. Ct. 341, 344 (1914) (emphasis added).

7. *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684 (1961).

8. *Mapp*, 367 U.S. at 657, 81 S. Ct. at 1693.

9. *Id.* at 655, 81 S. Ct. at 1691. Following *Mapp*, the Supreme Court, virtually without question, assumed that the exclusionary rule applied to evidence obtained in violation of a defendant's fifth amendment privilege against self-incrimination. See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, reh'g denied, 385 U.S. 890, 87 S. Ct. 11 (1966).

10. *Rakas v. Illinois*, 439 U.S. 128, 99 S. Ct. 421 (1978), reh'g denied, 439 U.S. 1122, 99 S. Ct. 1035 (1979).

a person must have a legitimate expectation of privacy in the thing searched. In *Rawlings v. Kentucky*,¹¹ the Court amplified upon the doctrine of standing, stating that having a possessory interest, such as ownership, in the items seized does not necessarily authorize a person to challenge the constitutionality of their seizure. The Court signaled that it would recognize arguments only from a person with a legitimate expectation of privacy with respect to the things seized or place searched.¹²

With a force nearly equal to the outcry that met the Court's decision in *Mapp*, many have criticized the Court for limiting the application of the exclusionary rule, with some suggesting that certain members of the Court have sought to raise standing as a barrier because of their distaste for the rule.¹³ It has not gone without notice that Justice Rehnquist, the author of both *Rakas* and *Rawlings*, has indicated he feels *Mapp* should be overruled.¹⁴ Moreover, apart from the Court's gradual compression of the scope of the exclusionary rule, it is now clear that a majority of the Court believes that the exclusionary rule is not required by the Constitution.¹⁵ In *Leon*, the Court simply stated that the rule is a judicially created remedy designed to safeguard fourth amendment rights (through its deterrent effect); it is not a constitutional right to a person aggrieved.¹⁶

11. *Rawlings v. Kentucky*, 448 U.S. 98, 100 S. Ct. 2556 (1980).

12. Both Justices Brennan and Marshall dissented in *Rawlings*, stating that the fourth amendment was designed to protect property interests as well as privacy interests. *Rawlings*, 448 U.S. at 114-21, 100 S. Ct. at 2566-69. In *Rakas*, Justice White dissented, with whom Justices Brennan, Stevens, and Marshall joined, arguing that the Court's prior decisions had established that people other than those who hold title to the premises have a reasonable expectation of privacy. A person sharing possession of a premises with others, although with the understanding that his privacy is not absolute, is entitled to expect that he is sharing his privacy only with those persons, and that government officials will not intrude without consent or within compliance with the fourth amendment. *Rakas*, 439 U.S. at 161-66, 99 S. Ct. at 440-42.

13. See Simien, *The Interrelationship of the Scope of the Fourth Amendment and Standing to Object to Unreasonable Searches*, 41 Ark. L. Rev. 487, 493 (1988).

14. *Id.* at 527 n.168.

15. See *United States v. Leon*, 468 U.S. 897, 906, 104 S. Ct. 3405, 3411 (1984).

16. *Leon*, *id.*, 104 S. Ct. at 3412 (citing *United States v. Calandra*, 414 U.S. 338, 348, 94 S. Ct. 613, 620 (1974)). Departing from the jurisprudence, the Court in *Leon* stated the following: (i) the exclusionary rule is not required by the fourth amendment, rather, it is a judicially created remedy with the sole function of deterring improper police conduct; and (ii) the issue for determination is whether to allow the prosecution to use inherently trustworthy, tangible evidence obtained in reliance on a search warrant which was ultimately found to be defective yet issued by a detached and neutral magistrate. This should be resolved by weighing the costs and benefits of preventing the uses of such unconstitutional evidence. *Id.* at 897, 104 S. Ct. at 3405. In dissent, Justices Brennan and Marshall pointed out that (i) contrary to the claims that the rule leads to "release of countless guilty criminals" studies indicate that the federal and state prosecutors rarely drop cases because of potential search and seizure problems, (ii) because some guilty

Although the Court's carving of a good faith exception out of the exclusionary rule may not seem to be overly significant, the Court is likely to continue to chip away at the doctrine. For instance, in *Illinois v. Krull*,¹⁷ the Court extended the good faith exception to warrantless inspections authorized by a state statute later held to be invalid. Justice O'Connor, joined by Justices Brennan, Marshall, and Stevens, dissented, stressing the danger of extending the good faith exception to cases where the legislature has unreasonably authorized searches.¹⁸

In this regard, Professor LaFave has written:

Under the pre-*Leon* version of the exclusionary rule, police had finally come to learn that it was not enough that they had gotten a piece of paper called a warrant Consequently, there had developed in many localities the very sound practice of going through the warrant issuing process with the greatest care . . . but under *Leon* there is no reason to go through such cautious procedures and every reason not to . . . [t]here is thus no escaping the fact that, as the *Leon* dissenters put it, the "long run of that case unquestionably will be to undermine the integrity of the warrant process."¹⁹

Additionally, contrary to the basic text of the good faith exception, it may be argued forcefully that the exclusionary rule is found in the text of the fourth amendment:

The evil [addressed by the framers] was general; it was the creation of an administration of public justice that authorized the supported indiscriminate searching and seizing. . . . I do not think that the phraseology of the amendment . . . is accidental. "[T]he right of the people in securing their persons, houses, papers and effect, against unreasonable searches and seizures." The vice of a system of criminal justice that relies upon a professional and admits evidence they obtained by unreasonable searches and seizures is precisely that we are all thereby made

defendants go free is not a cost of the exclusionary rule but of the fourth amendment itself, (iii) deterrence was not a concern of the Court in the early cases, and (iv) the "reasonable mistakes" exception to the exclusionary rule places a premium on police ignorance of the law, with the long run effect of undermining the integrity of the warrant process itself. *Id.* at 928-60, 104 S. Ct. at 3430-45. Justice Stevens, also dissenting, noted that from a historical standpoint, the precise problem that the fourth amendment was intended to address was the reasonable issuance of warrants. He stated that the court's conclusion that such searches undertaken without probable cause can nevertheless "be reasonable" is totally without support in the jurisprudence. *Id.* at 970-72, 104 S. Ct. at 3451-52.

17. *Illinois v. Krull*, 480 U.S. 340, 107 S. Ct. 1160 (1987).

18. *Krull*, 480 U.S. at 366, 107 S. Ct. at 1175-76.

19. W. LaFave, *Search and Seizure*, § 1.2, at 20 (1986).

less secure in our person, house, papers, and effects against unreasonable searches and seizures.²⁰

The exclusionary rule promotes constitutional police behavior, not police ignorance. It promotes careful review by judges or magistrates who are aware that they may be overruled. It preserves judicial integrity by not allowing the courts to profit from or to continue to allow unconstitutional behavior. If not part and parcel of the right, the exclusionary rule at least provides an effective remedy for the violation of a fundamental right.

Regardless of whether the exclusionary rule is required by the fourth amendment, the Louisiana Supreme Court is not bound to follow *Leon's* restrictive interpretation of the right to be protected from unreasonable searches and seizures. The state constitution can provide authority for the existence of the exclusionary rule regardless of the interpretation of the federal document given by the current Supreme Court.

THE ROLE OF STATE CONSTITUTIONS IN A FEDERAL SYSTEM AND THE LOUISIANA DECLARATION OF RIGHTS, ARTICLE I, SECTION 5

In the area of civil liberties, many think only of the federal Bill of Rights. Most of the original state constitutions, however, contained provisions similar to those of the Bill of Rights. To a certain extent, the framers patterned the Bill of Rights upon the guarantees of states' charters.²¹

A "rediscovery" of state constitutional protection began in the 1970's when state courts began deciding cases based on state rather than on federal constitutional provisions.²² Indeed, the "[r]ediscovery by state supreme courts of the broader protection supported their own citizens by the state constitutions . . . is probably the most important development in constitutional jurisprudence of our times."²³ More and more state courts are construing state constitutional provisions to grant persons

20. A. Amsterdam, *Perspectives on the Fourth Amendment*, 302 at 367 (emphasis added).

21. R. Williams, *State Constitutional Law: Cases and Materials*, 68 (1988).

22. *Id.*

23. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 *Harv. L. Rev.* 489 (1977). Associate Judge Kaye of the New York Court of Appeals has also written of the rebirth of interest in state constitutional law:

Lately, of course, it is the state courts that have been expressing dissatisfaction with the Supreme Court's role in the enforcement of constitutional rights, increasingly turning to their own constitutions as the dispositive ground for their decisions, and the Supreme Court since at least 1983 has been issuing a clear invitation for them to do exactly that.

Kaye, *A Midpoint Perspective on Directions in State Constitutional Law*, 1 *Emerging Issues St. Const. L.* 17, 20-21 (1988).

greater protections than the federal courts have gleaned from the Bill of Rights, even when the state and federal provisions are worded identically.²⁴

Louisiana adopted a new constitution in 1974. It begins with the Declaration of Rights, the state counterpart to the Bill of Rights. Although the Declaration of Rights was perceived by many delegates to the Louisiana Constitutional Convention as a radical document making extreme innovations, the changes seem less significant when compared with the existing United States Supreme Court interpretations of the Bill of Rights.²⁵ The Louisiana constitution of 1974 afforded the Louisiana Supreme Court a means of expanding constitutional rights and civil liberties through its interpretation of the Declaration of Rights.²⁶ The Louisiana Supreme Court has made it clear that the Louisiana constitution offers wider protections than the Bill of Rights.²⁷ Literally, article I, section 5 of the Louisiana Declaration of Rights is broader than its federal counterpart. Section 5 provides:

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.²⁸

Among other reasons, the language is more inclusive than the fourth amendment because of the additional protection for *property* and *communications* against unreasonable *invasions of privacy*.

24. Nat'l L.J., special section at S-1 (Sept. 29, 1986).

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

26. For a very good analysis of the court's expansion of civil liberties vis-a-vis judicial interpretation of the Declaration of Rights, see Comment, *The Declaration of Rights of the Louisiana Constitution of 1974: The Louisiana Supreme Court and Civil Liberties*, 51 La. L. Rev. 787 (1991). The author explains that (i) the court interprets additional language than the state absent from the federal Constitution as granting additional rights, (ii) the court interprets language which is similar or identical under the federal provisions in an expanded manner, and (iii) the court sometimes expands rights by freezing the high water mark under federal jurisprudence.

27. See *Sibley v. Bd. of Sup'rs of Louisiana State Univ.*, 477 So. 2d 1094 (La. 1985) (equal protection, art. 1, § 3); *State v. Sepulvado*, 367 So. 2d 762 (La. 1979) (cruel, excessive, unusual punishment, art. 1, § 20); *State in re Dino*, 359 So. 2d 586, cert. denied, 439 U.S. 1047, 99 S. Ct. 722 (1978) (due process, art. 1, § 2) (rights of accused, art. 1, § 13); *State v. Amos*, 343 So. 2d 166 (La. 1977) (right to keep and bear arms, art. 1, § 11).

28. La. Const. art. 1, § 5.

Though the exclusionary rule is not explicitly stated in article I, section 5, the drafters considered it implicit.²⁹ The expanded standing provision found in the last sentence of section 5 grants standing to any person "adversely affected." This is a recognition of the broadening of the right to suppress evidence obtained in violation of the constitution regardless of the federal jurisprudence.³⁰ The phrase "any person adversely affected" has been explained to mean "anyone whose guilt [the improperly obtained evidence] would tend to prove The scope of the exclusionary rule is thus enlarged"³¹

Transcripts of the debate of article I, section 5 do not shed great light on the intent of the framers, but it is at least clear that the framers contemplated the exclusionary rule, as well as *Mapp*.

Mr. Burson . . . it is my understanding by the present state of the law that the protection of the Fourth Amendment against unreasonable searches and seizures, which gives the criminal defendant the right to suppress evidence that is illegally seized from him, has been applied through the *Mapp* decision to all states today . . . so, both the Louisiana Code of Criminal Procedure and the Federal Constitution require, today, that a person who has been the subject of an illegal search and seizure in his home can have that evidence suppressed in a criminal proceeding . . . and to his right criminally, there is no question that under the United States Supreme Court's decision in *Mapp* and under the Louisiana Code of Criminal Procedure, that the person whose home has been entered illegally, certainly can move to suppress that evidence in court.³²

The Louisiana Supreme Court has plainly stated that article I, section 5 is not a duplicate of the fourth amendment: "[i]t represents a conscious choice by the citizens of Louisiana to give a 'higher standard of individual liberty than that afforded by the jurisprudence interpreting the federal Constitution.'"³³ The following cases illustrate the court's contemporary interpretations.

29. Hargrave, *supra* note 25, at 22, citing State of Louisiana Constitutional Convention of 1973 Verbatim Transcripts, Sept. 1, 1973, at 22 [hereinafter Proceedings].

30. Hargrave, *supra* note 25, at 22, citing Proceedings, Sept. 1, at 15.

31. *Id.* at 23-24, citing Proceedings, Sept. 1, at 15, 22.

32. Proceedings, Aug. 31, at 1073. However, Staff Memorandum No. 37 to the Committee on the Bill of Rights and Elections, May 16, 1973, makes it clear that art. I, § 5 does not bolt down any present interpretation or methods of application (including *Mapp v. Ohio*). Documents Vol. 10 at 117.

33. *State v. Church*, 538 So. 2d 993, 996 (La. 1989) (citing *State v. Hernandez*, 410 So. 2d 1381, 1385 (La. 1982)).

In *State v. Hernandez*,³⁴ the court rejected the United States Supreme Court holding of *New York v. Belton*,³⁵ that a policeman, while making a lawful arrest, may contemporaneously search the passenger compartment of an automobile including the contents of any container therein. Justice Dennis, writing for the Court in *Hernandez*, stated that "[a]lthough the Belton case is distinguishable . . . it should be noted that we do not consider it to be a correct rule of police conduct under our state constitution."³⁶ Moreover, the court noted that it would not allow federal decisions to replace its independent judgment in construing the constitution adopted by the people of Louisiana.³⁷ Similarly, in *State v. Church*³⁸ the court said that even if DWI road blocks meet federal constitutional standards,³⁹ they would still violate article I, section 5 of the Louisiana constitution. Not all of the Justices of the Supreme Court of Louisiana, however, advocate the expansive reading of article I, section 5. Justice Cole, dissenting in *Church*, wrote:

As regards the question of whether the Louisiana Constitution is broader than the United States Constitution relative to Fourth Amendment principles, I concur in the conclusion of Justice Blanche in his dissent to *State v. Hernandez*: "However, if the Louisiana [constitution] is, in fact, broader than the United States Constitution on that issue, this writer feels that the [Louisiana] Constitution is due for an amendatory change in the opposite direction."⁴⁰

In *State v. Williams*,⁴¹ the court refused to extend the United States Supreme Court's ruling in *Pennsylvania v. Mimms*⁴²—that a police officer's direction to a driver to exit the car did not violate the fourth amendment, even though the officer had no probable cause nor reason to suspect foul play—to a passenger of an automobile. The court stated:

To give the police officer the discretion to order the passenger from the automobile without requiring any explanation of the officer's actions (other than a blanket concern for personal safety

34. *State v. Hernandez*, 410 So. 2d 1381 (La. 1982).

35. *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, reh'g denied, 453 U.S. 950, 102 S. Ct. 26 (1981).

36. *Hernandez*, 410 So. 2d at 1385.

37. *Id.*

38. *State v. Church*, 538 So. 2d 993 (La. 1989).

39. *Id.* at 996 (referring to *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391 (1979)).

40. *Id.* at 1001 (citation omitted). For other cases, holding that art. I, § 5 is broader than the fourth amendment, see *State v. Hutchinson*, 349 So. 2d 1252 (La. 1977) and *State v. Kinnemann*, 337 So. 2d 441 (La. 1976). Both cases involved searches of automobiles involving contraband.

41. *State v. Williams*, 366 So. 2d 1369 (La. 1978).

42. *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S. Ct. 330 (1977).

in all situations) is to abandon the requirement of individualized inquiry into the reasons for an intrusion of the right to privacy secured by Article I, § 5 of the Louisiana Constitution.⁴³

In *State v. Nelson*,⁴⁴ with Justice Tate writing for the majority, the court held that article I, section 5 prevented admittance of an inculpatory statement police obtained as a result of the use by private actors of unreasonable force in an unreasonable search.⁴⁵ The defendant in *Nelson* swallowed a ring in a jewelry store and the store's security guards attempted to choke it out of the defendant.

In the six years since *Leon*, every circuit court in Louisiana has adopted the good faith exception to the exclusionary rule.⁴⁶ In the same period of time, the Louisiana Supreme Court has addressed the good faith exception to the exclusionary rule in one case and then only in dicta. In *State v. Matthieu*,⁴⁷ the supreme court determined that a constitutional violation had not occurred when a search took place outside of the territorial jurisdiction of the court which issued the warrant. Nevertheless, with Justice Cole authoring the opinion, the court delved into an unusual analysis of *Leon*, borrowing "the balancing test" to apply to "constitutional conduct."⁴⁸ Justice Dennis, in a concurring opinion, reasoned that because there had been no constitutional violation, there was no need for discussion of the so-called good faith exception to the exclusionary rule and that *Leon* was not applicable.⁴⁹

43. *Williams*. 366 So. 2d at 1374.

44. *State v. Nelson*, 354 So. 2d 540 (La. 1978).

45. See also *State v. Longlois*, 374 So. 2d 1208 (La. 1979) (recognizing that the exclusionary rule extends to some unreasonable searches by private individuals).

46. *State v. Shannon*, 472 So. 2d 286 (La. App. 1st Cir.) writ denied, 476 So. 2d 349 (La. 1985); *State v. Wood*, 457 So. 2d 206 (La. App. 2d Cir. 1984); *State v. Martin*, 487 So. 2d 1295 (La. App. 3d Cir.), writ denied, 491 So. 2d 25 (La. 1986); *State v. Watkins*, 499 So. 2d 91 (La. App. 4th Cir. 1986); *State v. Shrader*, 514 So. 2d 213 (La. App. 5th Cir. 1987). None of the courts give any detailed analysis for their decision to adopt *Leon*.

47. *State v. Matthieu*, 506 So. 2d 1209 (La. 1987).

48. The *Matthieu* court said:

The Supreme Court in *Leon* required objective reasonableness to avoid suppression where the Fourth Amendment had been violated. No such violation occurred in the case under consideration. Consequently, we believe a less stringent standard is appropriate where we are not concerned with deterring unconstitutional conduct. Our law, both statutorily and jurisprudentially, stresses the importance of constitutional violations in cases involving the exclusionary rule. Code Crim. P. art. 703(A) provides a defendant adversely affected may move to suppress any evidence from use at trial on the ground it was unconstitutionally obtained.

Id. at 1212.

49. Id. at 1214. See also *State v. Byrd*, 568 So. 2d 554 (La. 1990). It is interesting that in *State v. Lehnen*, 403 So. 2d 683 (La. 1981), the court discussed the good faith

Recently, the Louisiana Supreme Court rendered two decisions that further expand the rights granted in article I, section 5 in non-criminal matters. In *Hondroulis v. Schuhmacher*,⁵⁰ the court held for the first time that the state's right of privacy includes and independently protects at least some sort of "autonomy" rights.⁵¹ Additionally, in *Moresi v. State of Louisiana, Department of Wildlife & Fisheries*,⁵² the court indicated that the protections of article I, section 5 extend beyond limiting state action and apply directly to limit invasions of privacy interests by private parties. The court also ruled for the first time that a violation of article I, section 5 may give rise to a private cause of action for damages.⁵³

THE LEAD FROM OTHER JURISDICTIONS

United States v. Leon has been strongly criticized by several state courts.⁵⁴ For example, *State v. Novembrino*,⁵⁵ a recent New Jersey Supreme Court decision, rejected *Leon* on independent state grounds. The court held that the exclusionary rule, unmodified by the good faith exception, is an integral element of the New Jersey constitutional guarantee that search warrants will not be issued without probable cause. It accepted the analysis Justice Brennan set forth in his *Leon* dissent, stating that "by admitting unlawfully seized evidence, the judiciary becomes a part of what is in fact a single government action prohibited

exception to the exclusionary rule which had been proposed by half of the judges of the Fifth Circuit Court of Appeals of the United States. Justices Dennis and Calogero rejected the majority's discussion or endorsement of the good faith exception, and stated that it was unnecessary. Justice Dennis, quoting *United States v. Williams*, 622 F.2d 830, 849-50 (1980) (Rubin, J., concurring), wrote that "[d]eterrence is an important reason for the rule. However, even the decision in *Weeks v. United States* did not consider it the only basis of the rule." *Id.* at 688 (citation omitted).

50. *Hondroulis v. Schuhmacher*, 553 So. 2d 398 (La. 1988).

51. See Devlin, *Louisiana Constitutional Law*, 51 La. L. Rev. 295, 297-306 (1990).

52. 567 So. 2d 1081 (1990).

53. *Id.* Although *Moresi* involved a search and seizure, the court held that no constitutional rights were violated. Nonetheless, the court recognized that the same facts which compelled the United States Supreme Court to recognize a qualified good faith immunity for state officers in the context of an action under 42 U.S.C. § 1983, required it to identify a similar immunity for an action arising from the state constitution. Justice Dennis made it clear in *Moresi* that this was not a criminal case where a defendant was trying to suppress evidence; therefore, even if constitutional rights were involved, the officers could invoke a qualified good faith immunity as a defense.

54. See N. McCabe & C. Burnett, *State Constitutional Procedure: Cases and Materials* 37 (2d ed. 1990).

55. 519 A.2d 820 (N.J. 1987). For a more recent decision rejecting the good faith exception on independent state grounds, see *Commonwealth v. Edmonds*, 586 A.2d 887 (Pa. 1991).

by the terms of the Amendment."⁵⁶ The court reasoned that the exclusionary rule's purpose is not solely "deterrence" and that application of the rule in individual cases should not depend on an empirical analysis which compares the "cost" and "benefits" of excluding illegally obtained evidence.⁵⁷ It quoted Justice Brennan:

I share the view, expressed by Justice Stewart for the Court in *Fareta v. California*, that "[p]ersonal liberties are not based on the law of averages." Rather than seeking to give effect to the liberties secured by the Fourth Amendment through guesswork about deterrence, the Court should restore to its proper place the principle framed 70 years ago in *Weeks* that an individual whose privacy has been invaded in violation of the Fourth Amendment has a right grounded in that Amendment to prevent the government from subsequently making use of any evidence so obtained.⁵⁸

The court noted that the exclusionary rule, by virtue of its application over the last quarter of a century had become an integral part of the New Jersey constitutional guarantee that search warrants should not be issued without probable cause. Not only does the exclusionary rule deter police misconduct, said the court, but it also serves as an indispensable and valuable mechanism for vindicating the right to be free from unreasonable searches.⁵⁹

In *State v. Marsala*,⁶⁰ the Connecticut Supreme Court rejected the good faith exception of *Leon* on state constitutional grounds. The search and seizure provision of the Connecticut constitution is textually identical to the fourth amendment. The court nevertheless rejected the exception. Some of the reasons include: the "costs" of the exclusionary rule do not outweigh the rule's "benefits"; the rule requires judges to take their roles seriously; the state due process clause compels the rule; other common law or statutory privileges exclude relevant evidence; the purpose of the privacy clause is to *prohibit* warrants without probable cause; exclusion is not a punishment but a method of teaching proper constitutional behavior that preserves the integrity of the warrant process.⁶¹ The court also stated that a good faith exception promotes police to seek out a lenient judge, allows magistrates to be careless with their

56. *Id.* at 848 (quoting *United States v. Leon*, 468 U.S. 897, 933, 104 S. Ct. 3405, 3432 (1984) (Brennan, J., dissenting)).

57. *Id.*

58. *Id.* (quoting *United States v. Leon*, 468 U.S. 897, 943, 104 S. Ct. 3405, 3438 (1984) (citations omitted) (Brennan, J., dissenting)).

59. *Id.* at 856.

60. 579 A.2d 58 (Conn. 1990).

61. *Id.*

reviewing, and takes the constitutional question away by allowing everything to turn on good faith.⁶²

CONCLUSION

Three years before the United States Supreme Court decided *Leon*, former Louisiana Supreme Court Chief Justice Dixon stated the following in *State v. Bickham*:⁶³

[I]t seems to me to be especially unfortunate for this court to indicate, when it is not an issue in the case . . . that the "good faith" of an officer is relevant to determine the legality of his actions. It is what the officer does or does not do, and not what he knows or how he feels about it, that is relevant. I dread to think of the day that motions to suppress in criminal trials will be further prolonged by litigating whether some hard-working policeman, trying to do his job, was in "good faith" or "bad faith" when he arrested the defendant.⁶⁴

Unfortunately, it appears that Chief Justice Dixon was an accurate prognosticator. *Leon* is unduly restrictive of the fourth amendment protections. The Louisiana Supreme Court has the authority to reject the good faith exception of *Leon* on the grounds of article I, section 5 of the Louisiana constitution. Even Justice Frankfurter, one of the most conservative members of the United States Supreme Court, once noted, "[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."⁶⁵

If the Louisiana Constitution does not compel the exclusionary rule, it is certainly still within the Louisiana Supreme Court's authority to insist upon the exclusionary rule to enforce our constitutional guarantees. It is the duty of the courts to safeguard the constitutional rights of its citizens against "any stealthy encroachments thereon."⁶⁶ Recently, several states, acting progressively, have adopted the exclusionary rule under the authority of state constitutional clauses that are textually identical to the federal document. Article I, section 5, through its expanded

62. *Id.* at 67. For other states rejecting *Leon* see *People v. Bigelow*, 488 N.E.2d 451 (N.Y. 1985); *State v. Carter*, 370 S.E.2d 553 (N.C. 1988); *People v. Sundling*, 395 N.W.2d 308 (Mich. Ct. App. 1986).

63. 404 So. 2d 929 (La. 1981).

64. *Id.* at 935 (Dixon, C.J., concurring).

65. *United States v. Rabinowitz*, 339 U.S. 56, 69, 70 S. Ct. 430, ____ (1950) (Frankfurter, J., dissenting).

66. *State v. Church*, 538 So. 2d 993, 997 (quoting *Boyd v. United States*, 116 U.S. 616, 653, 6 S. Ct. 524, 535 (1886)).

standing and broader protections, should compel or at least imply the existence and preservation of the exclusionary rule.

As Justice Clark stated in reference to *Mapp*, it is “[n]o use to have a Constitution—it’s pretty, got all sorts of nice fringes around it, but it doesn’t mean anything, just a piece of paper—unless you really live by it and enforce it.”⁶⁷

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67. Baier, Justice Clark, the Voice of the Past, and the Exclusionary Rule, 64 Tex. L. Rev. 415, 419 (1985).

