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## Louisiana Constitutional Law

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# Louisiana Constitutional Law

John Devlin\*

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## INDIVIDUAL RIGHTS

Except for the Louisiana Supreme Court's decision in *Moresi v. State of Louisiana, Department of Wildlife and Fisheries*,<sup>1</sup> noted in this symposium last year,<sup>2</sup> Louisiana appellate courts have during the past term issued few decisions significantly adding to previous interpretations of the individual rights elements of the Louisiana Declaration of Rights. Nevertheless, the Louisiana courts did issue several noteworthy decisions further articulating the relationship between the sometimes competing state constitutional rights of disclosure of public documents and individual privacy, and several other noteworthy cases involving other state constitutional rights.

### *Delineating the Boundary Between the Right of Privacy and the Public's Right to Know*

During the past year, Louisiana appellate courts continued to address a number of problems arising out of the state constitution's guarantee of the public's limited right to "examine public documents."<sup>3</sup>

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1. 567 So. 2d 1081 (La. 1990). In *Moresi*, the supreme court held that infringement of the guarantee of "privacy" in article I, section 5 of the Louisiana Constitution of 1974 may give rise to a cause of action for damages, similar to those direct constitutional tort actions recognized under the federal Constitution in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 999 (1971). In addition, the *Moresi* court also stated, in dictum, that the protections of section 5 go beyond limiting state action and apply directly to protect against invasions of privacy by at least some private, non-governmental infringers. 567 So. 2d at 1092-93.

2. Devlin, Louisiana Constitutional Law, Developments in the Law, 1989-1990, 51 La. L. Rev. 295, 305-06 (1990).

3. La. Const. art. XII, § 3 provides as follows:

#### *Right to Direct Participation*

No Person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law.

The courts construed both the Louisiana Constitution<sup>4</sup> and the Public Records Act,<sup>5</sup> the statute enacted to carry out the constitutional command, to expand the category of entities subject to disclosure and further define the statutory exceptions to disclosure.<sup>6</sup> Though each one is different in its specifics, each case required the court to balance, explicitly or implicitly, two competing constitutional values: the public's right to know and the individual's right of privacy. Taken together, they demonstrate the continuance and strengthening of two trends: first, expansion of the categories of entities subject to the Act and records subject to disclosure under the Act; and second, effective convergence of the statutory and state constitutional standards for exemption from disclosure on a single inquiry, *i.e.* the question of whether the subject of the disclosure has a "reasonable expectation of privacy" with respect to the information at issue.

*Expanding the Definition of Entities Subject to Disclosure:*  
*Guste v. Nicholls College Foundation*

The Nicholls College Foundation is a nonprofit corporation organized to foster and promote the welfare of Nicholls State University.

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4. La. Const. art. I, § 5 provides for an individual right of privacy, as follows:  
*Section 5. Right to Privacy*

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.

La. Const. art. XII, § 3 provides a right of access to public records, as follows:

*Sec. 3. Right to Direct Participation*

Section 3. No person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law.

5. La. R.S. 44:1 et seq. (1982).

6. One additional case, *Cummings v. Kempf*, 570 So. 2d 133 (La. App. 3d Cir. 1990), reaffirmed the impropriety of placing unnecessary financial or procedural restrictions on access to records. The case involved a title abstractor who wanted to install its own copy machine at the office of the parish clerk of court. The trial court granted the abstractor the right to install the machine, but only under onerous conditions, including having the work supervised by the clerk or one of her employees and paying \$.25 per page as a supervisory fee. Relying upon the supreme court's decision in *Title Research Corp. v. Rausch*, 450 So. 2d 933 (La. 1984), the court of appeal modified the trial court's order, eliminating both the requirement of direct supervision and the accompanying fee. Other conditions, including that the abstractor work only during normal office hours, that he purchase a \$300,000 insurance policy, and that he pay a small monthly fee for the electricity used, were upheld.

In *Guste v. Nicholls College Foundation*,<sup>7</sup> the state supreme court did not conclude whether the Foundation constituted a "public body" under the meaning of the Public Records Act,<sup>8</sup> but nonetheless found that the Foundation's books were "public records" partially subject to inspection under that Act. The court so found solely because the Foundation received money from the Nicholls State University Alumni Federation, an entity clearly subject to the Act.<sup>9</sup> The Court reasoned that because the Alumni Federation was a "public body" under the meaning of the Public Records Act,<sup>10</sup> money donated by the Alumni Federation to the Foundation therefore constituted "public funds" under the meaning of that Act.<sup>11</sup> Since the state constitution generally prohibits the donation of public funds to any other person or body,<sup>12</sup>

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7. 564 So. 2d 682 (La. 1990).

8. Id. at 687. The Public Records Law defines a "public body" to include "a public or quasi-public nonprofit corporation designated as an entity to perform a governmental or proprietary function." La. R.S. 44:1(A)(1) (1982).

9. In addition to authorizing inspection of government records per se, the Louisiana Public Records Act, La. R.S. 44:1 et seq., allows the inspection, reproduction or obtaining of reproductions of any "public record" in the hands of any party. Public records include all books and records: (a) used in the transaction of business "performed by or under the authority of the constitution or laws of this state, or by or under the authority of any ordinance, regulation, mandate, or order of any public body;" or (b) "concerning the receipt or payment of any money received or paid by or under the authority of the constitution or the laws of this state." La. R.S. 44:1(A)(2) (1982).

10. The supreme court held that the Alumni Federation was a "public body" because of its close relationship with the state-supported Nicholls State University. The Federation was staffed by state civil service employees, and paid only "nominal" rent for its office in a public building on campus. Its workers were paid through the university budget, and its stated purpose in its articles of incorporation is to "promote the University." The court concluded that the Federation was therefore a "'quasi-public' nonprofit corporation designated as an entity to perform a governmental or proprietary function," and subject to the Public Records Act. *Guste*, 564 So. 2d at 687, quoting La. R.S. 44:1(A)(1) (1982).

11. The Nicholls State University Alumni Federation received a portion of its funds from a "student self-assessment" fee of \$1.35 per semester, which all students were required to pay at registration. In 1984, the Board of Directors of the Alumni Federation decided to donate 10% of the student generated funds to the Foundation. *Guste*, 564 So. 2d at 684. The court concluded that these funds constituted "public funds" under the meaning of the Public Records Law because they were part of the mandatory tuition and fees collected from all students at Nicholls State University. See *Carter v. Fench*, 322 So. 2d 305 (La. App. 1 Cir. 1975), writ denied, 325 So. 2d 277 (1976) (holding that tuition fees paid to Southern University are public funds and that since a portion of the funds were allocated to the Student Government Association, the financial records of the S.G.A. were subject to public inspection). All recipients of such funds, "whether they be governmental, public or private bodies, are subject to the Public Records Law insofar as their financial records are concerned." *Guste*, 564 So. 2d at 687, quoting *Carter*, 322 So. 2d at 307.

12. La. Const. art. VII, § 14(A) provides, in pertinent part, as follows:

the Foundation's receipt of such funds from the Alumni Federation would be permissible only if the transfer of funds from the Alumni Federation to the Foundation was in furtherance of their shared purpose of promoting Nicholls State University.<sup>13</sup> Finding that the transfer of funds was properly made and received for the purpose of furthering public education, the court concluded that the money was therefore "given and accepted 'under the authority of the constitution and laws of the state' in furtherance of a governmental purpose" under the meaning of the Public Records Act,<sup>14</sup> and that the Foundation could therefore be required to open its books for inspection to the extent that those books reflected the receipt and expenditure of those funds.<sup>15</sup>

The Foundation argued that the court's holding would open to public scrutiny the books of all persons, organizations, or corporations who receive even small amounts of money from the state, and that this result would serve to discourage such cooperative ventures. While this prediction of dire consequences may be overstated, it does appear that the *Nicholls* decision will significantly increase the range of entities subject to disclosure under the Public Records Act. The supreme court appeared quite willing to accept this consequence, reaffirming once again that, except where countervailing rights of privacy are at issue,

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*Donation, Loan, or Pledge of Public Credit*

(A) Prohibited Usés. Except as otherwise provided by this constitution, the funds, credit, property or things of value of the state or of any political subdivision shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private.

13. The court drew a distinction between "donation" of public funds, an action which is prohibited by the state constitution, and the "transfer" of such funds from a public body to another body, when given and accepted for the purpose of furthering the transferor public body's designated functions, which is not prohibited. La. Const. art. VII, § 14(B) contains a list of "authorized uses" for which public funds can be donated, none of which appears to apply to the situation at Nicholls State University. The court's construction of the constitutional term "donation" as not including "transfers" in furtherance of shared purposes follows current developments in this and other states, the general tendency of which has been to loosen restraints on the mechanisms by which public bodies may use public funds for public purposes. See, e.g., L. Hargrave, *The Louisiana State Constitution: A Reference Guide* 130-31 (1991). Nonetheless, unless limited by future cases, this construction may create an expansive exception to the constitutional prohibition of La. Const. art. VII, § 14.

14. *Guste v. Nicholls College Foundation*, 564 So. 2d 682, 688 (La. 1990). Justice Cole dissented on this point, arguing that the Foundation had no legal or constitutional responsibility to do anything. *Id.* at 689.

15. The case came to the supreme court as an appeal from the grant of the Foundation's motion for a directed verdict. In reversing and remanding for further proceedings, the supreme court did not conclusively hold that the Attorney General had carried his burden of showing that the records at issue were subject to the Public Records Law. It did, however, go out of its way to indicate a view that the law and facts appeared to favor such a result. *Id.* at 689.

"the law favors a liberal construction of the public records law 'so as to enlarge rather than restrict access to public records by the public.'" <sup>16</sup> Moreover, because the right of inspection recognized in *Nicholls* extended only to the records of receipts and expenditures of public funds, an entity wishing to preserve its confidentiality need only maintain "separate and distinct books, accounts and records" in order to avoid disclosing nonpublic receipts and expenditures. <sup>17</sup>

*Drawing the Line Between Disclosure and Privacy: Treadway; Harrison; Hatfield; Marine Shale and the "Reasonable Expectation" Standard*

Given the breadth of the supreme court's definition of the entities subject to the Public Records Act and the even broader definition of "public records" contained within that Act, <sup>18</sup> it is clear that the real issue which will determine the effective limits of disclosure will continue to be the scope given to the exceptions to disclosure expressed in the Public Records Act <sup>19</sup> and implicit in the individual's countervailing right of privacy. <sup>20</sup> As articulated by the courts of appeal, analysis of these exceptions to disclosure purports to involve separate statutory and constitutional inquiries:

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16. *Guste*, 564 So. 2d at 686-87, citing *Lewis v. Spurney*, 456 So. 2d 206 (La. App. 4th Cir.), writ denied, 457 So. 2d 1183 (1984) and 458 So. 2d 488 (1984) (financial records of the Louisiana World Exposition subject to examination from the date it began to receive state funds); *Trahan v. Larivee*, 365 So. 2d 294 (La. App. 3d Cir.), writ denied, 366 So. 2d 564 (1979) (finding a privacy-based exception to the broad rule of disclosure to protect confidential job evaluations of government employees); and *Amoco Production Co. v. Landry*, 426 So. 2d 220 (La. App. 4th Cir.), writ denied, 433 So. 2d 164 (1983) (distinguishing *Trahan* and finding no right to privacy preventing disclosure of records of disciplinary hearings of the Board of Professional Engineers and Land Surveyors).

17. *Guste*, 564 So. 2d at 689.

18. La. R.S. 44:1 A(2) (1982) defines the "public records" subject to disclosure to include "[a]ll books, records, writings, accounts, letters . . . and papers."

19. The Public Records Act contains general provisions excepting certain records from disclosure even if they would otherwise fall within the broadly defined category of "public records." See, e.g., La. R.S. 44:2 (1982) (legislative investigations); La. R.S. 44:3 (1982) (records of prosecutive, investigatory and law enforcement agencies); La. R.S. 44:4 (1982) (tax returns and certain records pertaining to welfare payments, liquidation proceedings, banks, insurance ratings, licensing proceedings, oil and gas reserves, or the like); La. R.S. 44:5 (1982) (records in the hands of the governor); La. R.S. 44:7 (1982) (hospital records); La. R.S. 44:11 (1982) (certain personnel records); La. R.S. 44:12 (1982) (medical records of employees covered by State Employees Group Benefits Program); and La. R.S. 44:13 (Supp. 1991) (library records).

20. La. Const. art. I, § 5, quoted *supra* at note 4. The state constitutional right of "privacy" in this sense, as a guarantee against unwarranted disclosure of personal information, was recognized in *Trahan v. Larivee*, 365 So. 2d 294 (La. App. 3d Cir. 1978), writ denied, 366 So. 2d 564 (1979).

Initially, we must determine if the privacy exceptions set forth in La.R.S. 44:11 apply. If this statute applies, that is the end of the inquiry. [If not, the issue of constitutional privacy must be addressed.] First, it must be determined whether the public employee had a reasonable expectation of privacy against disclosure of the pertinent information. If there was no reasonable expectation of privacy, that is the end of the inquiry. If a reasonable expectation of privacy is found, we then must balance the public's right to disclosure against the . . . right to privacy.<sup>21</sup>

During the last term, the Louisiana courts of appeal continued to struggle with questions of how these standards should be applied in several differing factual settings.

In most cases the courts continued both to broadly define "public records" and to narrowly construe the statutory exceptions to public access, thus authorizing the broadest possible availability of information. Thus in *Treadway v. Jones*,<sup>22</sup> the fourth circuit ruled that proposals written for the purpose of obtaining contracts to manage housing projects for the Housing Authority of New Orleans constituted "public records" under the meaning of the statute,<sup>23</sup> that the parties who had submitted them had no "expectation of privacy" as to their content,<sup>24</sup> and that a mere recommendation by the federal Department of Housing and Urban Development that such proposals should remain confidential was not sufficient to preempt state law mandating disclosure.<sup>25</sup> Similarly, in *Hatfield v. Bush*,<sup>26</sup> the first circuit held that the

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21. *Hatfield v. Bush*, 572 So. 2d 588, 592-93 (La. App. 1st Cir. 1991), citing *Gannett River States Publishing v. Hussey*, 557 So. 2d 1154 (La. App. 2d Cir.), writ denied, 561 So. 2d 103 (1990).

22. 583 So. 2d 119 (La. App. 4th Cir. 1991). There was no dispute that HANO is a "public body," or that its records are therefore subject to disclosure unless protected by some constitutional right or statutory exemption. La. R.S. 44:1(A)(1) (1982).

23. *Treadway*, 583 So. 2d at 121, quoting the very broadly phrased definition of "public records" found in La. R.S. 44:32 D (1982).

24. *Treadway*, 583 So. 2d at 121. The court relied on *Gannett*, 557 So. 2d at 1154, which applied a balancing test resulting in the finding that individuals applying for appointment as the Fire Chief of Shreveport had "no legitimate expectation of privacy" which would prevent disclosure of records relating to the process by which the Fire Chief was selected.

25. The court examined whether that state public disclosure law was preempted by federal statutes or regulations, which had to be considered because HANO operates under the auspices of the U.S. Department of Housing and Urban Development (HUD). HANO cited no federal regulations or laws which ban disclosure of these management proposals; HUD officials had recommended that these proposals remain confidential. However, the court ruled that such a recommendation was not sufficient: "HANO's

leave records of a parish district attorney's employees were public records subject to disclosure,<sup>27</sup> that they did not fall within the category of "certain personnel records" specially exempted from disclosure by statute,<sup>28</sup> and that public employees have no reasonable expectation of privacy that would preclude disclosure of their names or the dates and reasons for their absences.<sup>29</sup> Additionally, in *Harrison v. Norris*,<sup>30</sup> the second circuit held that the statutory exemption from disclosure of "[r]ecords pertaining to pending criminal litigation . . ."<sup>31</sup> could not be invoked to prevent a convicted felon applying for post-conviction relief from examining the prosecution records on which the State relied in seeking his conviction.<sup>32</sup>

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desire to defer to HUD's preference does not justify HANO's refusal to produce the proposals." *Treadway*, 583 So. 2d at 122.

26. 572 So. 2d 588 (La. App. 1st Cir. 1991). The case involved the request of members of the news media to inspect the leave records of some of the employees of the District Attorney of East Baton Rouge Parish.

27. La. R.S. 44:1(A)(2) (1982) defines "public records" subject to disclosure broadly to include:

All records, . . . and papers, . . . having been used, . . . or prepared, possessed, or retained for use in the conduct, transaction, or performance of any business, transaction, work, duty or function which was conducted, transacted, or performed . . . by or under the authority of any . . . order of any public body . . . are "public records" . . . .

The court in *Hatfield* concluded that the leave records at issue fell within this definition because the district attorney is an instrumentality of the state government, and because the leave records were used in the conduct of state business in the district attorney's office. 572 So. 2d at 592.

28. La. R.S. 44:11 (1982). By its terms, the statute exempts only home telephone numbers of public employees.

29. As set out by the first circuit, the analysis is a two-step process. First the court must determine whether the public employee has a reasonable expectation of privacy with respect to the information sought. If not, the inquiry ends; if so, the court must balance the public's right to know against the individual's privacy interest. *Hatfield*, 572 So. 2d at 592-93, citing *Gannett*, 557 So. 2d at 1154. Applying these tests, the court held that employees had no reasonable expectation of privacy with respect to any of the information sought since the public has a right to know who is working for it, when they are at work, and whether absences are for annual leave or some other reason. *Hatfield*, 572 So. 2d at 593. In a dissenting opinion, Judge Edwards argued that the individual employees' privacy interests outweighed the public's right to know, and that the employee records therefore should not be disclosed. *Id.* at 594.

30. 569 So. 2d 585 (La. App. 2d Cir. 1990). Harrison, the petitioner in this case, was convicted of forgery and other crimes. *State v. Harrison*, 505 So. 2d 783 (La. App. 2d Cir. 1987). That conviction had become "final" according to La. Code Crim. P. art. 922, and plaintiff had begun serving his sentence. In an effort to secure post-conviction relief from that sentence, Harrison sought to inspect and copy the records compiled by the prosecution in his trial.

31. La. R.S. 44:3(A)(1) (1982).

32. The district attorney successfully argued before the trial court that his records



However, not all documents sought are subject to public access, nor will the courts always construe the statutory exceptions to disclosure so narrowly. In a case demonstrating the limits of disclosure, *Marine Shale Processors, Inc. v. State of Louisiana, Department of Health and Hospitals*,<sup>33</sup> the first circuit court of appeal refused a request by Marine Shale Processors for disclosure of the data underlying a study performed by the Louisiana Department of Health and Hospitals which examined the relationship between environmental conditions in St. Mary Parish and the high incidence of neuroblastoma, a rare type of childhood cancer, in that community. Marine Shale sought access to the data underlying that report, some of which was highly personal and might have revealed the identities of the subjects of the study,<sup>34</sup> in connection with pending litigation.<sup>35</sup> Relying on both Louisiana Revised Statutes 44:3(A)(7), which at the time exempted records relating to the

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were not subject to disclosure under the Public Records Act because his files pertained to "criminal litigation" that was "pending" or "reasonably anticipated" under the meaning of La. R.S. 44:3(A)(1) (1982). *Harrison*, 569 So. 2d at 586. The second circuit reversed, holding that an action for post-conviction relief was not "criminal litigation" under the meaning of that exception to the Public Records Act. The court noted that the Public Records Act must be interpreted liberally in favor of public access and that the exceptions to access to public records must be "specific" and "unequivocal." *Harrison*, 569 So. 2d at 587. Applying this standard, the court read La. R.S. 44:3(A)(1) (1982) strictly according to its terms to exempt from disclosure only those prosecution files which pertain "to pending criminal litigation or any criminal litigation which can be reasonably anticipated, until such litigation has been finally adjudicated or otherwise settled." *Harrison*, 564 So. 2d at 587 (emphasis in original). Because La. Code Crim. P. art. 992 makes clear that the criminal litigation in this case was "fully adjudicated" when *Harrison* exhausted all of his direct appeals and began serving his sentence, the District Attorney's file was susceptible to inspection as a public record from that time, for any purpose. Judge Sexton dissented, arguing that a convict's application for post conviction relief constitutes "anticipated criminal litigation" under the meaning of the Act.

As this article goes to press, the Louisiana Supreme Court has expressly approved the holding and reasoning of *Harrison*. *Lemmon v. Connick*, 590 So. 2d 574 (La. 1991).

33. 572 So. 2d 280 (La. App. 1st Cir. 1990).

34. The questions asked of the participants in the study included detailed inquiries about the families' financial affairs, medical history, sexual habits and consumption of drugs. *Marine Shale Processors, Inc. v. Louisiana Dept. of Health and Hospitals*, 572 So. 2d at 282 n.1. After review, the court concluded that the information not already released—such as the date of diagnosis, patient's age at diagnosis, sex, race, religion, family medical history and the like—would all tend to reveal the identities of the subjects of the study. *Id.* at 284.

35. *Marine Shale* brought these proceedings under La. Code Civ. P. art. 1429, which provides for perpetuation of evidence relevant to pending litigation. However, in light of its resolution of the issue of privilege, the court did not find it necessary to consider such procedural issues in any detail. *Marine Shale*, 572 So. 2d at 283.

identities of participants in public health studies from disclosure,<sup>36</sup> and the state constitutional right of disclosural privacy,<sup>37</sup> the court concluded that the statutory language "creates a reasonable expectation of privacy on the part of the participants in such a study that their identities will in no manner be disclosed to the public . . ." and that "the public's right to documents is outweighed by the public's interest in having these studies performed, and that the statute exemption appropriately compromises the former for the latter."<sup>38</sup>

While the results in these cases may not be surprising, they are noteworthy for the light they shed on the analytical process the courts have used to determine the boundary line between the competing constitutional values of public disclosure and personal privacy. Specifically, while the multi-step analysis quoted above contemplates separate and sequential analyses of the statutory and constitutional exceptions to disclosure, some of the cases appear to show a convergence of those two issues into a single one: whether the subject of the disclosure had a "reasonable expectation" of non-disclosure under the circumstances. For example, in *Hatfield v. Bush*, the court defined the operative scope of the statutory exemption of personnel records, set forth in Louisiana Revised Statutes 44:11, not by any appeal to the plain meaning or legislative history of the statute, but rather by deciding whether a public employee had any "reasonable expectation of privacy" in the particular items of information at issue.<sup>39</sup> Conversely, in *Marine Shale*, the court similarly held that it was the statutory exemption from disclosure of information tending to reveal the identities of participants in public health investigations that created their constitutional "reasonable expectation of privacy."<sup>40</sup> Such amalgamation of statutory and constitutional standards raises interesting questions, both as to the

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36. La. R.S. 44:3(A)(7) (1982) exempts disclosure of "records containing the identity of a subject of a public health disease investigation or study or records which would tend to reveal the identity of such a subject." This subsection was thereafter repealed in its entirety. 1990 La. Acts No. 59, § 3.

37. *Marine Shale*, 572 So. 2d at 284, citing *Trahan v. Larivee*, 365 So. 2d 294 (La. App. 3d Cir. 1978) (construing article I, section 5 of the Louisiana Constitution of 1974), writ denied, 366 So. 2d 564 (1979).

38. *Marine Shale*, 572 So. 2d at 284. The court's reliance on the state constitution as well as the statutory exception makes it appear that the court would have reached the same result even had no explicit exemption been applicable. The constitutional right of privacy, standing alone, apparently would have sufficed.

39. *Hatfield v. Bush*, 572 So. 2d 588, 593-94 (La. App. 1st Cir. 1990), concluding that public employees do not have such a reasonable expectation of privacy as to their names, the dates they are absent from work, and whether those absences were for annual leave, and that La. R.S. 44:11 therefore did not apply to those items of information. In contrast, the court held that employees may have an expectation of privacy as to whether absences were due to sick leave.

40. *Marine Shale*, 572 So. 2d at 280.

conceptual soundness of the tendency toward combination of the two inquiries and as to the real utility of the underlying concept of the "reasonable expectation of privacy."

First, the combination of statutory and constitutional questions is not logically compelled; the plain language of article XII, section 3 of the state constitution empowers the legislature to exempt from disclosure any information it wishes, regardless of whether that information implicates any "privacy" interests. But where the legislature has not been explicit, it is neither surprising nor inappropriate for the courts to rely to some extent on jurisprudence developed to explicate the constitutional right of privacy when interpreting the Public Records Act. Certainly statutes should always be interpreted, where possible, in such a way to avoid constitutional problems. *A fortiori* here, where the constitutional values of openness and privacy necessarily compete, the statute enacted to further one constitutional value must be interpreted in light of potentially conflicting values. However, the converse is not necessarily true; the fact that a particular piece of information does not raise constitutional privacy concerns does not necessarily mean that the legislature intended that it be disclosed. Thus, while the use made of the "reasonable expectation" standard appears to have been appropriate in both *Marine Shale* and *Hatfield v. Bush*, courts should be on guard against reductionism. The constitutional right of privacy is one limit on disclosure under the Public Records Act, but it is not the only limit that the legislature is entitled to impose.

A more fundamental problem is that the "reasonable expectation" standard is a less than satisfactory analytical tool even for the limited purpose of interpreting the state constitution. The standard was first articulated by Justice Harlan in *Katz v. United States*<sup>41</sup> as a guideline for interpreting the search and seizure guarantee of the federal fourth amendment, and thereafter was adopted as the standard for invoking the implied federal constitutional right of disclosural privacy.<sup>42</sup> In *Webb v. City of Shreveport*, the Louisiana courts adopted that standard as the measure of whether disclosures implicate the express state constitutional guarantee of privacy.<sup>43</sup> As articulated in *Katz* and adopted in

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41. 389 U.S. 347, 88 S. Ct. 507 (1967). The Court, in a very influential opinion, in which Justice Harlan concurred, held that a person has a protectable expectation that his conversations on a public telephone will be private, and that warrantless tapping of such conversations therefore violates the federal Fourth Amendment.

42. See, e.g., *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 457-58, 97 S. Ct. 2777, 2797-98 (1977), applying the *Katz* formulation to tentatively conclude that former President Nixon did have a legitimate expectation of privacy with respect to his official papers and tapes, which then was weighed against the public interest in disclosure of those materials.

43. 371 So. 2d 316, 319 (La. App. 2d Cir.), writ denied, 374 So. 2d 657 (1979).

*Webb*, an "expectation of privacy" must, in order to merit protection, meet both subjective and objective tests: "a person [must] have exhibited an actual (subjective) expectation of privacy and, second, that . . . expectation [must] be one that society is prepared to recognize as 'reasonable.'"<sup>44</sup> Regardless of any issue concerning the propriety of reliance on a standard developed by the federal courts to regulate searches and seizures to interpret the state constitution's express right of privacy, it is clear that this standard is both circular and conclusory. Certainly one's subjective "expectations" regarding one's privacy can be powerfully altered by the state of the law—if one knows that certain records are subject to disclosure under the Public Records Act, one will no longer "expect" those records to be private. If the same subjective expectation is then used to determine the application of the same law, the circularity is obvious. Moreover, the "objective" aspect of the test is conclusory; it tells nothing about how or why one might conclude that a particular expectation is one which society considers "reasonable."<sup>45</sup> And, as recent federal cases illustrate, the standard is subject to manipulation to limit the protections afforded privacy rights.<sup>46</sup>

Nonetheless, despite its weaknesses as an analytical tool, the "reasonable expectation" standard may be as good as any other form of words to describe the balancing process that courts must employ when constitutional interests in public disclosure and privacy come into conflict. The issue will be whether Louisiana courts can avoid the temptation to follow the federal courts in their increasingly narrow interpretations of that standard. Although the language of the test was adopted from federal law, Louisiana courts should continue their independent interpretations of the line between the right of access to public records and the right of privacy.

*Other Decisions on Individual Rights: Of Due Process; Physical Conditions; Privacy and Freedom of Speech*

Last term's remaining individual rights cases also reached results that were, if not surprising, at least noteworthy for their rejection of novel claims based on state constitutional rights guarantees and their reliance on federal law as a guide to interpretation of the state Declaration of Rights.

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44. *Katz*, 389 U.S. at 361, 88 S. Ct. at 516.

45. These criticisms have been frequently made with respect to federal law. See, e.g., Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 Minn. L. Rev. 583 (1989).

46. See, e.g., *California v. Greenwood*, 486 U.S. 35, 108 S. Ct. 1625 (1988); *Smith v. Maryland*, 442 U.S. 735, 99 S. Ct. 2577 (1979). See generally, Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 Sup. Ct. Rev. 133 (1968).

*Article I, Section 2: No Due Process Protection for Abortion Protestors*

In *State v. Aguillard*,<sup>47</sup> defendants convicted of criminal trespass after demonstrations at an abortion clinic alleged that the trial court erred by failing to credit their asserted defense of "justification in defense of others." Defendants based their claims on article I, section 2 of the Louisiana Constitution, guaranteeing that no "person" shall be deprived of life without due process;<sup>48</sup> on the Louisiana Criminal Code definition of "person" as "a human being from the moment of fertilization and implantation;"<sup>49</sup> and on the general criminal defenses of "justification" and "defense of others."<sup>50</sup> Not surprisingly, the fifth circuit court of appeal, like courts in other states confronted with similar claims,<sup>51</sup> rejected these arguments. The court noted that regardless of any expressions of legislative disfavor, abortions were and remain—at least under some circumstances—recognized as lawful under Louisiana law<sup>52</sup> and protected by the paramount law of the federal Constitution,<sup>53</sup> and concluded that prevention of lawful conduct cannot constitute justification for criminal acts.

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47. 567 So. 2d 674 (La. App. 5th Cir. 1990). The defendants were, in any event, punished very leniently. They received only minor fines, most of which were suspended, and six months of inactive probation.

48. La. Const. art. I, § 2.

*Section 2. Due Process of Law*

No person shall be deprived of life, liberty, or property, except by due process of law.

49. La. R.S. 14:2(7) (1986) defines "person" for purposes of the Criminal Code as follows:

(7) "Person" includes a human being from the moment of fertilization and implantation and also includes a body of persons, whether incorporated or not.

50. Codified at La. R.S. 14:18 and 14:22 (1986).

51. This issue was apparently *res nova* in Louisiana, but has been litigated in other states. See, e.g., *Allison v. City of Birmingham*, 580 So. 2d 1377 (Ala. Crim. App. 1991); *State v. Sahr*, 470 N.W.2d 185 (N.D. 1991); *State v. O'Brien*, 784 S.W.2d 187 (Mo. App. 1989) (cited in *Aguillard*); All courts considering arguments of the sort raised by the defendants in *Aguillard* have unanimously rejected them.

52. At the time when *Aguillard* was decided, abortions in Louisiana were regulated by statutes codified at La. R.S. 40:1299.31 (1977). As the *Aguillard* court noted, these statutes legalize abortions under some circumstances. *State v. Aguillard*, 567 So. 2d 674, 676 (La. App. 5th Cir. 1990). Even the anti-abortion bill passed by the legislature last summer would permit abortions in some cases involving rape, incest or danger to the life of the mother. 1991 La. Acts No. 26, § 87(B), amending La. R.S. 14:87.

53. *Aguillard*, 567 So. 2d at 677, noting that in its most recent full statement on the issue, *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S. Ct. 3040 (1989), the United States Supreme Court once again left undisturbed the basic holding of *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973).

Given its resolution, the court in *Aguillard* did not find it necessary to decide explicitly on the merits of the defendants' claim that a fetus should be considered a "person" under the meaning of section 2 of the Louisiana Declaration of Rights. Should that question come before the courts for resolution in the future, however, inquiry should focus on what the framers and ratifiers of the current state constitution meant by that term in 1974, not on retroactive application of any subsequent enactment by the legislature.

*Article I, Section 3: Alcoholism "as "Physical Condition"*

The year's most interesting equal protection case is chiefly noteworthy for what the court declined to decide. In *Shields v. City of Shreveport*,<sup>54</sup> the Louisiana Supreme Court upheld the dismissal of police officers found drinking alcohol while on voluntary extra duty. In doing so, the court's majority considered only whether the officers were discharged in violation of the federal Rehabilitation Act of 1973,<sup>55</sup> and thus avoided an opportunity to clarify the meaning of the state constitutional prohibition of arbitrary, capricious or unreasonable discrimination on the basis of "physical condition."<sup>56</sup> Justice Dennis,

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54. 579 So. 2d 961 (La. 1991).

55. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1985), prohibits any program or activity receiving federal financial assistance from discriminating against any individual on the basis of that individual's handicap. A person suffering from alcoholism is considered a "handicapped individual" under the meaning of the Act unless that person's "current use of alcohol . . . prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol . . . abuse, would constitute a direct threat to property or the safety of others." 29 U.S.C. § 706(7)(B) (1985). *Whitaker v. Board of Higher Education*, 461 F. Supp. 99, 106 n.7 (E.D. N.Y. 1978) and authorities cited therein. The *Shields* majority held that the Rehabilitation Act did not protect plaintiffs because they were fired as a consequence of specific infractions rather than their status as alcoholics, and because the Act protects only alcoholics whose problems are under control. 579 So. 2d at 966, citing *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575, 591 (9th Cir. 1988), rev'd on other grounds, *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 109 S. Ct. 1402.

56. La. Const. art. I, § 3:

*Section 3. Right to Individual Dignity*

No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, *physical condition* or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime. (emphasis added.)

The constitutional prohibition on discrimination based on "physical condition" was previously defined to include distinctions between individuals suffering relatively lesser and relatively greater degrees of injury in medical malpractice cases. *Sibley v. Board of Supervisors of Louisiana State University*, 477 So. 2d 1094, 1108-09 (La. 1985).

however, expressly considered the issue in dissent and concluded that alcoholism does indeed constitute a handicap falling within the concept of "physical condition" under the meaning of section 3. He concluded that the discharge of the officers was invalid because the action resulted from their alcoholism rather than because of any particular act, and because the state failed affirmatively to show that discharge of the offending officers—rather than rehabilitation or other possible sanctions—reasonably furthered a legitimate governmental purpose.<sup>57</sup>

In other decisions, courts in Louisiana upheld both Article 1732(6) of the Louisiana Code of Civil Procedure, which gives plaintiffs in maritime cases brought in state court sole power to decide whether trial will be before a judge or a jury,<sup>58</sup> and Louisiana Revised Statutes 9:5644, which extended the time to bring suits to recover for asbestos abatement work,<sup>59</sup> from challenges based upon the equal protection

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57. *Shields*, 579 So. 2d at 972-73. The requirement that the state bear the burden of showing the reasonableness of its classification follows from the inclusion of "physical condition" as an enumerated class in the third sentence of Section 3. *Sibley*, 477 So. 2d at 1107-08.

58. *Sons v. Inland Marine Serv., Inc.*, 577 So. 2d 225, 229 (La. App. 1st Cir. 1991), holding that since the statutory distinction between maritime and other cases did not classify individuals by any of the characteristics specified in section 3, the burden was on the challenger to demonstrate that it furthers no appropriate state interest. The court found that the asserted state interests in conforming state admiralty procedure to the processes of federal admiralty courts and in avoiding the costs of jury trials constituted adequate reasons for the statute. In response to additional arguments, the court reaffirmed its prior holding that "there is no due process right to a jury trial under the Louisiana Constitution of 1974," and held that the requirement of section 22 of the state Declaration of Rights that "courts be open" for the vindication of rights did not require the legislature to provide juries in those courts.

As this article goes to press, the Louisiana Supreme Court has limited the scope of Article 1732(6), holding on statutory "plain meaning" rather than constitutional grounds that the article does not apply when a plaintiff asserts Jones Act as well as other maritime claims. *Parker v. Rowan Cos.*, 591 So. 2d 349 (La. 1991).

59. *Security Homestead Ass'n v. W.R. Grace & Co.*, 743 F. Supp. 456 (E.D. La. 1990). While the court was undoubtedly correct in holding that the time extension violated neither the federal nor the state guarantees of equal protection, it erred in concluding that "Louisiana's equal protection guarantee is intended only as a restatement of the federal equal protection clause." As the Louisiana Supreme Court made clear in *Sibley*, the guarantees of section 3 of the state Bill of Rights go beyond and must be interpreted independently of the equal protection clause of the federal Fourteenth Amendment. *Sibley v. Board of Supervisors*, 477 So. 2d 1094, 1104-09 (La. 1985).

On a closely related question, the court also held that the asbestos abatement revival statute did not constitute a "special law" prohibited by La. Const. art. III, § 12, because the "class" of defendants disadvantaged by the statute was reasonable and proper based upon a valid legislative distinction between "immovable, contaminated real properties where people work and sleep—and which present the greatest risk of harmful exposure—and other types of transient personality which might be contaminated." *Security Homestead*, 743 F. Supp. at 458-59. Finally, with respect to state and

guarantee of section 3 of the Louisiana Declaration of Rights, as well as on other grounds.

*Article I, Section 5: Of Racetrack Workers, Obscenity Vendors and the Persuasive Authority of Federal Cases*

Regulations adopted by the Louisiana State Racing Commission require virtually all persons holding licenses from that commission—a broadly defined group that includes not only jockeys and trainers but also office personnel and others whose jobs are not directly related to actual horse racing—to submit to random suspicionless drug testing.<sup>60</sup> In *Holthus v. Louisiana State Racing Commission*,<sup>61</sup> the fourth circuit court of appeal sustained those regulations against challenges based on both the federal and Louisiana constitutions.<sup>62</sup> In reaching this conclusion with respect to the federal claims, the court relied on *Shoemaker v. Handel*,<sup>63</sup> a 1986 federal decision which held that because of the long tradition of pervasive government regulation of horse racing and the resulting “reduced . . . justifiable privacy expectations” on the part of those who directly participate in the sport, and because of the state’s legitimate interest in the integrity of the sport, New Jersey horse racing regulations requiring random drug testing of “every official, jockey, trainer and groom” did not violate the federal fourth amendment.<sup>64</sup> Turning to petitioner’s state claims, the *Holthus* court acknowledged that the right of privacy guaranteed by article I, section 5 of the Louisiana constitution is broader than its federal counterpart but concluded, without explanation, that the reasoning of *Shoemaker* applies to the state constitution as well.<sup>65</sup>

*Holthus* is suspect in both its reasoning and its result. The Louisiana regulation at issue in that case appears to be much broader in its coverage than was the New Jersey regulation upheld in *Shoemaker*,

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federal guarantees of due process, the court held that civil litigants have no fundamental or “natural” right to the shelter of a prescriptive period, and that legislatures therefore have full power to regulate when actions may be brought. *Id.* at 459-60.

60. The regulations are set forth at La. Admin. Code 35:1749 (1984), and quoted by the court in *Holthus v. Louisiana State Racing Commission*, 580 So. 2d 469 (La. App. 4th Cir. 1991).

61. 580 So. 2d 469 (La. App. 4th Cir. 1991).

62. The state constitutional challenge was based on La. Const. art. I, § 5, quoted at *supra* note 4.

63. 795 F.2d 1136 (3d Cir. 1986).

64. *Id.* at 1141-43. The applicable New Jersey regulations are quoted *id.* at 1138-39 n.2.

65. *Holthus*, 580 So. 2d at 471.



or similar regulations upheld in other cases.<sup>66</sup> Moreover, post-*Shoemaker* decisions by the United States Supreme Court in *Skinner v. National Railway Labor Executives' Association*<sup>67</sup> and *National Treasury Employees Union v. Von Raab*<sup>68</sup> indicate that such suspicionless testing regimes will be held to violate the fourth amendment unless the state demonstrates that testing those particular employees is necessary in order to protect the safety of the public or to promote some equally important public interest.<sup>69</sup> Judged by that standard, it is dif-

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66. In addition to *Shoemaker*, see, e.g., *Dimeo v. Griffin*, 943 F.2d 679 (7th Cir. 1991) (en banc, upholding against federal fourth amendment challenge an Illinois regulation requiring "jockeys and other participants in horse races" to submit to random drug testing) and *State v. Turcotte*, 239 N.J. Super. 285, 571 A.2d 305 (N.J. Super. Ct. App. Div. 1990) (upholding regulation authorizing administrative searches of off-track horse stabling facilities against fourth amendment challenge). Compare *Serpas v. Schmidt*, 827 F.2d 23 (7th Cir. 1987) (warrantless searches of dormitories occupied by racetrack "backstretchers" held to violate the fourth amendment); *Hansen v. Illinois Racing Board*, 179 Ill. App. 3d 353, 534 N.E.2d 658 (1989) (Racing Board rule purporting to permit warrantless searches at racetracks held to violate the fourth amendment because it failed to appropriately limit the discretion of the officers in deciding whether to conduct the search).

67. 489 U.S. 602, 109 S. Ct. 1402 (1989). In *Skinner*, the Court upheld federal railroad administration regulations which required drug and alcohol tests of railroad employees involved in serious railroad accidents, and otherwise authorized tests of an employee where a supervisor has "reasonable suspicion," based upon specified factors, that the particular employee is presently under the influence of drugs or alcohol on the job. *Id.* at 609-11, 109 S. Ct. at 1408-10. The Court acknowledged that warrantless searches are the exception rather than the rule, but noted that the railroad employees at issue in *Skinner* were engaged in safety-sensitive tasks, and that the pervasive government regulation of the railroad industry did result in a diminished expectation of privacy. Balancing the interests at stake, the Court held the regulations not unreasonable. *Id.* at 619-33, 109 S. Ct. at 1414-23.

68. 489 U.S. 656, 109 S. Ct. 1384 (1989). In *Von Raab*, the Court upheld regulations requiring drug tests of all treasury employees who were directly involved in drug enforcement and interdiction, who carried firearms, or who had access to classified information. Using the balancing analysis employed in *Skinner*, the Court upheld the regulations as they applied to the first two categories of employees, but remanded for further proof regarding employees with access to classified information. The Court was satisfied that the regulations were not so narrowly drawn as to affect only those employees who had real access to sensitive data.

69. The Supreme Court's analyses in *Skinner* and *Von Raab* have been criticized for placing insufficient emphasis on the narrow scope of the particular drug testing programs in those cases, and thus unnecessarily broadening the "administrative search" exception to the fourth amendment. See, e.g., Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 Sup. Ct. Rev. 87 (1989). Nevertheless, it is evident, both from the careful fact-specific balancing process that the Court employed in both cases, and in particular from the partial remand of the regulations at issue in *Von Raab* in order to narrow the range of employees on whom they would be imposed, that the fourth amendment does not permit suspicionless drug testing regimes to be imposed indiscriminately on employees who do not actually perform jobs that justify such an imposition.

ficult to see how the state could justify random testing of office personnel or others not directly involved in the races.

In any event, regardless of the propriety of the *Holthus* court's holding with respect to the fourth amendment, the assertion that *Shoemaker* also articulates the controlling standard under the Louisiana state constitution appears to be unwarranted. As the fourth circuit acknowledged, section 5 of the state Declaration of Rights provides protections for privacy interests that go beyond those provided by the federal Constitution.<sup>70</sup> While it is true that the state has a "vital interest in maintaining the integrity of the horse racing industry which requires close and constant supervision,"<sup>71</sup> that interest is certainly no greater than the public safety interest inherent in suppression of drunken driving that was held in *State v. Church*<sup>72</sup> to be insufficient under the state constitution to justify random suspicionless stops of drivers for the purpose of administering sobriety tests. Particularly in light of the apparent lack of proof of any close connection between drug testing of all licensees and the state's interests in the safety of participants and the integrity of the sport, the regulations at issue in *Holthus* appear to be too broadly applicable to satisfy the rigorous standards of section 5 as that section was interpreted in *Church*.<sup>73</sup>

In *State v. Honore*,<sup>74</sup> a separate decision also implicating section 5, the fifth circuit court of appeal upheld criminal prosecution of a clerk at a bookstore which sold obscene magazines against challenges based on the state constitutional guarantee of privacy, among other grounds.<sup>75</sup> Like the fourth circuit in *Holthus*, the fifth circuit in *Honore*

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70. *Holthus v. Louisiana State Racing Commission*, 580 So. 2d 469, 471 (La. App. 4th Cir. 1991).

71. *Id.* at 470, quoting *Pullin v. Louisiana State Racing Comm'n*, 484 So. 2d 105, 108 (La. 1986). *Pullin* upheld the suspension of a licensed owner and trainer of race horses for violation of a racing rule banning prohibited animal drugs. Although the court found that the search which produced the evidence of drug use was illegal, it held that the evidence could be considered in the administrative license revocation hearing.

72. 538 So. 2d 993 (La. 1989).

73. Compare *Horsemen's Benevolent and Protective Ass'n v. State Racing Comm'n*, 403 Mass. 692, 532 N.E.2d 644 (1989), explicitly rejecting the analysis and results of *Shoemaker* and holding that, regardless of what the federal Constitution might require, suspicionless random drug testing of racetrack personnel violates the Massachusetts state constitutional guarantee against unreasonable searches and seizures.

74. 564 So. 2d 345 (La. App. 5th Cir. 1990).

75. In addition to the state constitutional privacy arguments discussed here, the defendant in *Honore* also argued that she was the victim of selective prosecution, that the statute criminalizing obscenity, La. R.S. 14:106 (1986), was void for vagueness, and that the statute violated equal protection principles by providing an exception, in section 106(D), for "recognized and established" schools, churches, museums, and the like. The court had no trouble rejecting the first two of these arguments. *Honore*, 564 So.

relied entirely on federal precedent construing the federal Constitution—precedent which distinguishes between possession of obscene materials in the privacy of one's own home, which is protected against criminal prosecution on first amendment and privacy grounds,<sup>76</sup> and sale or donation of such materials to others, which is not<sup>77</sup>—to conclude that the conduct at issue was also not protected by the Louisiana Declaration of Rights.<sup>78</sup> Here too, however, such reliance on federal precedent may be unwarranted. While a thorough review of the drafting history and judicial construction of the state guarantees of free speech and privacy might show that the state constitution also embodies such a distinction,<sup>79</sup> such a conclusion is not inevitable and, particularly in light of the heightened protections available in this state by virtue of the state constitution's explicit guarantee of privacy, should not be presumed without independent analysis.<sup>80</sup>

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2d at 348-49, and at 350-52, relying on *State ex rel. Guste v. K-Mart Corp.*, 462 So. 2d 616, 620 (La. 1985); and *State v. Louisiana Toy Co.*, 483 So. 2d 1264 (La. App. 4th Cir.), writ denied, 488 So. 2d 686 (1986). As to the third argument, the court held, as had several courts before it, that the offending "exceptions" section was severable and that the remainder of the statute was enforceable. *Honore*, 564 So. 2d at 350, citing *State v. Luck*, 353 So. 2d 225 (La. 1977) and *State v. Freeman*, 544 So. 2d 22 (La. App. 4th Cir. 1989).

76. *Stanley v. Georgia*, 394 U.S. 557, 89 S. Ct. 1243 (1969).

77. *United States v. Twelve 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123, 126-28, 93 S. Ct. 2665, 2667-69 (1973).

78. *Honore*, 564 So. 2d at 349-50. The *Honore* court's entire analysis consisted of little more than a long quote from the United States Supreme Court's decision in *United States v. Twelve 200-Ft. Reels*, which the fifth circuit held to be "the controlling Louisiana law." Despite the differences in constitutional text—the Louisiana Declaration of Rights expressly protects "privacy;" the federal constitution does not—the court held that under the state constitution, as under the federal, "although one may have the right to possess and view obscene material in the privacy of his home, this right does not equate to a right to acquire the obscene material." *Honore*, 564 So. 2d at 350.

79. While a thorough review of the state constitutional materials is beyond the scope of this article, it is worthy of note that the crucial federal case distinguishing between the right to possess pornography and the right to obtain it, *United States v. Twelve 200-Ft. Reels*, was decided by the United States Supreme Court in June of 1973, while the Louisiana Constitutional Convention of 1973 was meeting and before the present Constitution was either finally adopted by the Convention or ratified by the voters. Thus, it could be argued that courts should at least presume, absent further evidence, that the concept of "privacy" which the Louisiana drafters and ratifiers intended to adopt in the state constitution included the rights articulated in *Stanley* and the limitations imposed by *United States v. Twelve 200-Ft. Reels*. Compare Devlin, *Privacy and Abortion Rights Under the Louisiana State Constitution: Could Roe v. Wade Be Alive and Well in the Bayou State?*, 51 La. L. Rev. 685, 709-14 (1991), making a similar argument with respect to abortion rights under the Louisiana State Constitution.

80. Other states confronted with similar questions have reached conflicting results.

*Article I, Section 7: Free Speech, Federal Law and Political Dismissals of Government Employees*

In *Finkelstein v. Barthelemy*,<sup>81</sup> the fourth circuit court of appeal dismissed claims brought by a former New Orleans Assistant City Attorney, who alleged that he had been fired from that job for purely political reasons.<sup>82</sup> In a prior federal action arising out of the same dispute, a federal district court had dismissed similar claims based on the first and fourteenth amendments to the federal Constitution.<sup>83</sup> The attorney then brought the present action in state court, alleging that the firing violated his rights under the Louisiana constitution.<sup>84</sup> As the state court noted, the question of whether political firings violate the

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Some have concluded that the right to "possess" obscene material would be empty without some correlative right to obtain it, and have therefore construed their respective state constitutions to provide some protection for that correlative right of an adult to obtain pornography. *State v. Kam*, 748 P.2d 372 (Hawaii 1988) (relying on state constitutional guarantee of privacy); *State v. Henry*, 302 Or. 510, 732 P.2d 9 (1987) (relying on state guarantee of free speech). Others have reached the opposite result, adopting a distinction similar to the one adopted by the United States Supreme Court. *Stall v. State*, 570 So. 2d 257 (Fla. 1990); *Commonwealth v. Stock*, 346 Pa. Super. 60, 499 A.2d 308, 315 (1985).

81. 565 So. 2d 1098 (La. App. 4th Cir. 1990).

82. The facts of the case are more fully set forth in the federal case. *Finkelstein* alleged that he was fired because he was a Republican (Mayor Barthelemy is a Democrat), because he refused to campaign for a tax proposal supported by the Mayor, and because the Mayor wanted to give *Finkelstein's* job to another person as a reward for past political support. *Finkelstein v. Barthelemy*, 678 F. Supp. 1255 (E.D. La. 1988).

In addition to the constitutional claims discussed here, plaintiff in the state action also raised a claim under La. R.S. 23:961 (1985), which generally precludes employers from interfering with the right of employees to engage in political activity. The fourth circuit dismissed the claim, noting that neither the Mayor nor the City Attorney of New Orleans was the "employer" of the plaintiff.

83. *Finkelstein v. Barthelemy*, 678 F. Supp. 1255 (E.D. La. 1988). The federal court held that the attorney occupied a confidential or "policymaking" position under the meaning of *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287 (1980) and *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673 (1976) and that his federal constitutional rights must therefore be balanced against and, in this case, subordinated to the local government's interest "as an employer in loyal, trustworthy and competent service." *Finkelstein*, 678 F. Supp. at 1259.

Although the plaintiff originally also raised his state constitutional claims in this action, the federal court declined to decide them. *Id.* at 1267.

84. Apparently, plaintiff did not, in the state case, specify which state constitutional provisions were at issue. The court considered whether political firings violated either section 7 or section 3 of article I of the Louisiana Constitution. Section 3 is set forth at supra note 56. Section 7 provides as follows:

*Sec. 7. Freedom of Expression*

No law shall curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish his sentiments on any subject, but is responsible for abuse of that freedom.

state guarantees of free expression or other rights was *res nova* in Louisiana. But noting that the state constitutional provisions at issue were "similar in nature" to their federal cognates, the fourth circuit looked for guidance to the same decisions that had undergirded the prior federal case.<sup>85</sup> Not surprisingly, it came to the same conclusion as had the federal court, holding that "the position of Assistant City Attorney falls within the *Elrod/Branti* exception as a policymaking position," that the legitimate interest of the Mayor and City Attorney "in promoting the efficiency of the services they perform for all citizens" requires restricting the post of Assistant City Attorney to those "who fully support the Administration's policies," and that such considerations "far outweigh the appointee's interests in his right of free speech."<sup>86</sup>

Although the outcome in the case may be unexceptional, the fourth circuit's assumption that the free speech provision of the state constitution is coterminous with the federal Bill of Rights in this context may, like the same court's decision in *Holthus*, be subject to debate. To be sure, the argument in favor of conforming the interpretation of the state constitution to current interpretations of the federal Constitution is stronger with respect to section 7 than it is with respect to section 5. The Louisiana Constitutional Convention of 1973 rejected the original committee draft of the state speech guarantee and substituted the present language in order to more closely follow the language and then-current interpretations of the federal first amendment,<sup>87</sup> and Delegate Burson, the proponent of the substitute language finally adopted, did state that he believed that the state constitutional guarantees of free speech and press were areas of the law that should "grow organically" by a process of case by case judicial decisionmaking similar to that used to interpret the federal guarantee.<sup>88</sup> Nevertheless, the fact remains that *Elrod v. Burns*<sup>89</sup>, the federal case which for the first time announced that the first amendment has any relevance to patronage issues, was not decided until 1976, two years after the Louisiana Constitution was adopted. Certainly nothing in the Convention debates on section 7 appears to indicate that the state con-

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85. *Finkelstein*, 565 So. 2d at 1101, citing *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673 (1976) and *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287 (1980).

86. *Finkelstein*, 565 So. 2d at 1101.

87. VI Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts, 1107-1117, recording the debate on and adoption of the amendment proposed by Delegate Burson. See generally, Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La. L. Rev. 1, 29 (1974).

88. VI Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts, 1108.

89. 427 U.S. 347, 96 S. Ct. 2673 (1976).

stitutional draftsmen anticipated that the federal first amendment would in the future be interpreted in such a fashion.<sup>90</sup> It may be that the state provision should be independently interpreted to confer rights against patronage dismissals. But once again, such a finding should be based on an independent analysis of the state constitution, not on the mere assumption that the meaning of the state guarantees either expands or contracts in "lock-step" with post-1974 changes in the interpretation of the federal Constitution.<sup>91</sup>

### CRIMINAL PROCEDURE AND PRISONERS' RIGHTS

During the previous term, the Louisiana appellate courts issued a number of noteworthy decisions regarding the state constitutional law of criminal procedure and prisoners' rights. In the area of "search and seizure" the courts upheld both warrantless questioning of children present at a psychiatrist's office while that office was being searched<sup>92</sup>

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90. VI Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts, 1105-1127. The debate focused on more clearly speech-related issues such as obscenity, defamation, and government licensing and control of certain mechanisms of dissemination of information.

In any event, it is unlikely that the delegates would have been very concerned with the problem of whether the state guarantee of free speech independently protects against patronage dismissals. As Professor Murchison pointed out in this space some years ago, the *Elrod/Branti* line of federal cases has always been of limited practical importance in Louisiana, as most non-policy making positions in the state government are already protected by the Civil Service provisions of the state constitution. Murchison, *Local Government Law, Developments in the Law*, 1979-80, 41 La. L. Rev. 483, 502-03 (1981). To be sure, Assistant City Attorneys such as Mr. Finkelstein are not protected by Civil Service. But the overall problem of patronage dismissals is one which the drafters of the 1974 constitution may well have thought they had already handled in a different way.

91. See generally, Devlin, *State Constitutional Autonomy Rights in an Age of Federal Retrenchment: Some Thoughts on the Interpretation of State Rights Derived From Federal Sources*, 3 *Emerg. Issues State Const. L.* 195, 234-37 (1990), discussing the problems inherent in interpreting state constitutional provisions in "lock-step" with cognate federal guarantees.

92. In *State v. Byrd*, 568 So. 2d 554 (La. 1990), police questioned two small boys who happened to be present at a psychiatrist's office when the police arrived to execute a valid search warrant for those premises. Reversing the lower courts, the Louisiana Supreme Court held that evidence obtained from the questioning of the boys was properly admitted in a criminal proceeding against the psychiatrist. Although article 1, section 5 of the Louisiana Constitution granted the defendant standing, as a "person adversely affected," to raise the issue of whether the questioning of the children violated their state constitutional rights, the court held on the merits that the questioning of the children was proper. Because the children were not unlawfully detained, their statements were not the product of an unlawful seizure. Moreover, questioning the children in the absence of their parents did not, under these circumstances, violate State ex. rel. *Dino*, 359 So. 2d 586 (La. 1977), cert. denied, 439 U.S. 1047, 99 S. Ct. 722

and strip searches of prisoners without probable cause.<sup>93</sup> In other areas, the last term featured noteworthy decisions squarely holding for the first time that a mistrial improperly granted over defendant's objection bars reprosecution under the double jeopardy clause of the state constitution,<sup>94</sup> holding that where the state waits too long before making a criminal sentence executory principles of fundamental fairness require relief from incarceration,<sup>95</sup> upholding the state's ability to compel handwriting exemplars,<sup>96</sup> reaffirming the right to retain out-of-state counsel,<sup>97</sup> and criticizing a system of assignment of judges that allowed prosecutors to "pick" judges in criminal cases.<sup>98</sup>

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(1978). "The rationale of *Dino* is to protect a youth from his own inexperience and lack of understanding in dealing with the police as a *suspect* in a crime, not to protect defendants who have chosen juveniles as victims." *Byrd*, 568 So. 2d at 563 (emphasis supplied).

93. In *Fulford v. Regel*, 582 So. 2d 981 (La. App. 1st Cir. 1991), the first circuit held that prisoner strip searches without probable cause do not violate prisoners' rights. Because the prisoners have a diminished expectation of privacy, and because there is a strong security interest at the penitentiary, reasonable strip searches are permissible, even when conducted without probable cause. The court based its finding of a diminished expectation of privacy for inmates on both federal and state precedents. *Bell v. Wolfish*, 441 U.S. 520, 545-46, 99 S. Ct. 1861, 1877-78 (1979); *State v. Patrick*, 381 So. 2d 501, 503 (La. 1980).

94. *State v. Encalarde*, 579 So. 2d 990 (La. App. 4th Cir. 1990). After deliberating for only slightly more than two hours, the jury hearing the case reported that it could not reach a verdict. Over the defendant's objection, the trial judge declared a mistrial. Since the mistrial was improperly granted, the double jeopardy provision of the Louisiana Constitution, art. I, § 15, barred reprosecution on the same charge. As the issue was apparently *res nova* in Louisiana, the court of appeal followed federal precedents. See *U.S. v. Wright*, 622 F.2d 792 (5th Cir. 1980); *Rogers v. United States*, 609 F.2d 1315 (9th Cir. 1979); and *Arnold v. McCarthy*, 566 F.2d 1377 (9th Cir. 1978).

95. *State v. Roberts*, 568 So. 2d 1017 (La. 1990). Here the state waited six years to make the defendant's jail sentence executory. The court held that "[d]ue process and fundamental fairness" required converting the remainder of the sentence to parole. *Id.* at 1019, relying on federal and state cases including *Johnson v. Williford*, 682 F.2d 868 (9th Cir. 1982); *United States v. Merritt*, 478 F. Supp. 804 (D.C. Cir. 1979); *Lanier v. Williams*, 361 F. Supp. 944 (E.D. N.C. 1973); and *State v. Kline*, 475 So. 2d 1093 (La. 1985).

96. *State v. Fowler*, 575 So. 2d 529 (La. App. 3d Cir. 1991), denying an application for a writ of certiorari. In dissent, Judge King argued that the Louisiana Constitution of 1974 prevents a criminal defendant from being required to give evidence against himself, and that a handwriting sample is testimonial or communicative in nature.

97. In *State v. Roberts*, 569 So. 2d 671 (La. App. 2d Cir. 1990), the defendant was arrested on a charge of possession of a large quantity of marijuana. At the time of arrest, the defendant was in Richland Parish en route to El Paso, Texas. At arraignment, the defendant was represented by local counsel from West Monroe; shortly thereafter, his attorney from El Paso filed a motion to enroll as counsel of record in association with local counsel, according to La. R.S. 37:214 (1988). After waiting for a year before ruling, the trial court ultimately declined to allow the Texas attorney to enroll as counsel of record, although it did allow him to sit at the counsel table and

Despite these varied cases, however, last term's most interesting and potentially disturbing decision in the area of criminal procedure, *State v. Cage*,<sup>99</sup> was one which did not directly involve the Louisiana State Constitution at all. Rather, in that case, the Louisiana Supreme Court applied federal standards regarding "harmless error" to affirm the conviction and capital sentence of a defendant despite deficient jury instructions on the issue of "reasonable doubt." In other cases, the Louisiana appellate courts continued to construe the provisions of the Louisiana Constitution relevant to criminal procedure and defendants' rights, with typically mixed results.

*State v. Cage: Applying "Harmless Error" Analysis to Erroneous Jury Instructions*

Tommy Cage was tried by a jury on a charge of first degree murder. He was convicted and sentenced to death. That conviction and sentence were upheld by the Supreme Court of Louisiana<sup>100</sup> but reversed by the United States Supreme Court, which held that the instructions given to Cage's jury misstated the standards for "reasonable doubt" in violation of the defendant's federal due process rights.<sup>101</sup> The case was remanded to the Supreme Court of Louisiana "for further proceedings not inconsistent with this opinion."<sup>102</sup> On remand, the Louisiana Supreme Court held, over vigorous dissents by Justices Dennis and Calogero, that the erroneous jury instructions were nonetheless

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consult with the defendant's local counsel. On appeal, the second circuit reversed, holding that because the *request* to enroll was not dilatory, the trial court's ruling was reversible error per se, under both article I, section 13 of the state constitution and La. R.S. 37:214 (1988). *Roberts*, 569 So. 2d at 674-76, also citing *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55 (1932).

98. In *State v. Kimmel*, 571 So. 2d 208 (La. App. 3d Cir. 1990), the court held that the system of assigning judges for criminal trials in Calcasieu Parish was improper. The system gave the prosecutor the ability to pick the judge who would be trying the case, thus violating *State v. Simpson*, 551 So. 2d 1303 (La. 1989) and *State v. Payne*, 556 So. 2d 47 (La. 1990). However, the court held the system was harmless error absent any finding of bias or prejudice on the part of the judge.

99. 583 So. 2d 1125 (La. 1991).

100. *State v. Cage*, 554 So. 2d 39 (La. 1989). Defendant argued, among other things, that the jury instructions on the issue of reasonable doubt were confusing and that they erroneously overstated the degree of uncertainty required to acquit. The Louisiana Supreme Court rejected these contentions, holding that, while certain phrases used by the judge may have had the effect complained of, the instructions as a whole would have been understandable. Justice Dennis concurred in part and dissented in part.

101. *Cage v. Louisiana*, 111 S. Ct. 328 (1990). The Court found that the instructions erred by defining "reasonable doubt" as "such doubt as would give rise to a grave uncertainty," "actual substantial doubt," and the absence of "moral certainty."

102. *Id.* at 330.



"harmless error," and once again affirmed the conviction and sentence.<sup>103</sup>

Justice Watson, writing for the majority, found that the jury instructions on reasonable doubt constituted harmless error under the analysis adopted by the United States Supreme Court in *Chapman v. California*<sup>104</sup> and recently substantially modified in *Arizona v. Fulminante*.<sup>105</sup> Applying the distinction drawn by Justice Rehnquist in *Fulminante*, the majority in *Cage* concluded that the erroneous jury instructions were not "structural defects in the constitution of the trial mechanism,"<sup>106</sup> which would result in automatic reversal, but were instead mere "'trial error'—error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt."<sup>107</sup> Applying this harmless error analysis, the court found that the evidence of the defendant's guilt was so overwhelming that the state met its burden of demonstrating that the error did not contribute to the defendant's conviction.<sup>108</sup> In separate dissents, Justices Calogero and

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103. *State v. Cage*, 583 So. 2d 1125 (La. 1991).

104. 386 U.S. 18, 87 S. Ct. 824 (1967). In *Chapman*, the California Supreme Court had held that a prosecutor's adverse comments on a defendant's failure to testify violated his fifth and fourteenth amendment rights against self incrimination, but that the error was harmless. The United States Supreme Court reversed, holding that trial errors involving violation of federal constitutional rights cannot be held harmless unless the reviewing court is satisfied "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24, 87 S. Ct. at 828.

105. 111 S. Ct. 1246 (1991). The defendant in *Fulminante* confessed to an informant, under duress, that he had abducted, brutalized, and killed a young girl. He was subsequently tried on murder charges, and the confession was introduced in evidence. On appeal, the United States Supreme Court held that admission of a coerced confession violated the defendant's rights under the fifth and fourteenth amendments, but that such a violation is a mere "trial error" subject to "harmless error" analysis. However, after applying that analysis, the Court concluded that the admission of the coerced confession was nonetheless reversible error in this particular case because the state failed to establish that the defendant would have been convicted absent the coerced confession, and that the error was therefore not "harmless."

106. *Fulminante*, 111 S. Ct. at 1264-65. Examples of such "structural defects" in criminal trials that would not be subject to harmless error analysis include "total" deprivation of the right to counsel, *Gideon v. Wainwright*, 372 U.S. 335, 88 S. Ct. 792 (1963) and judges who are not impartial, *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437 (1927).

107. *Fulminante*, 111 S. Ct. at 1264.

108. *State v. Cage*, 583 So. 2d 1125, 1128 (La. 1991). The majority also found that harmless error analysis was to be applied to the sentencing phase of the trial. The court concluded that there was significant evidence for the jury to conclude that at least one of the aggravating circumstances existed for imposition of the death penalty. *Id.* at 1129. Justice Lemmon, concurring, emphasized the heavy burden that the government must carry in order to show that an error is harmless, but concluded that the burden was carried in this case.

Dennis sharply criticized both the majority's holding that erroneous jury instructions are subject to harmless error analysis and its conclusion that the error was in fact harmless. Justice Calogero argued that the United States Supreme Court would not hold that erroneous jury instructions are subject to a *Chapman* analysis.<sup>109</sup> Justice Dennis's dissent argued that a reasonable doubt instruction could never be harmless,<sup>110</sup> and that an erroneous reasonable doubt instruction does not fit the "trial error" category enunciated in *Fulminante*.<sup>111</sup> Both dissenting justices also criticized the majority for, in effect, substituting its own judgment for that of the jury.<sup>112</sup>

No doubt the most immediately striking aspect of *Cage* is its surprising conclusion that a jury instruction that misstates an issue as fundamental as the meaning of "reasonable doubt" can ever be considered harmless.<sup>113</sup> Equally important, however, is the question of the potential impact of *Cage* on future application of the criminal rights guarantees of the Louisiana Constitution. Given the posture of the case, that impact is difficult to gauge. The underlying substantive error at issue in *Cage* violated only the federal Constitution; no substantive violation of the state constitution was at issue.<sup>114</sup> Thus, the court properly applied federal rather than state law regarding the issue of harmless error.<sup>115</sup> But the question remains whether the same analysis

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109. *Id.* at 1130.

110. Citing *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781 (1979); *Taylor v. Kentucky*, 436 U.S. 478, 98 S. Ct. 1930 (1978); *Cool v. United States*, 409 U.S. 100, 93 S. Ct. 354 (1972); *Rose v. Clark*, 478 U.S. 570, 106 S. Ct. 3101 (1986); and *Connecticut v. Johnson*, 460 U.S. 73, 103 S. Ct. 969 (1983).

111. As noted above, "trial error," according to Chief Justice Rehnquist, is an error which (a) occurred during the presentation of the case to the jury, and (b) may be evaluated quantitatively in the context of the other evidence presented. Justice Dennis argued that because a jury instruction is not a part of the presentation of the case to the jury, but rather is subsequent to the presentation of the case, an erroneous jury instruction cannot be a "trial error"; it must therefore be considered a "structural error." *Cage*, 583 So. 2d at 1134.

112. *Cage*, 583 So. 2d at 1130, 1135.

113. As all justices acknowledged, the Louisiana court in *Cage* went beyond the actual holdings of the applicable federal precedents; no decision by the United States Supreme Court has yet squarely held that an erroneous jury instruction on the issue of reasonable doubt can be considered harmless. Moreover, as Justice Dennis argued, there is some reason to doubt that the Court would do so. *Cage*, 583 So. 2d at 1130-35.

114. *Cage* argued on his direct appeal to the Louisiana Supreme Court that the jury instruction violated the substantive standards of the Louisiana as well as the federal Constitution. Insofar as it relied on state law, that contention was conclusively rejected by the Louisiana Supreme Court. *State v. Cage*, 554 So. 2d 39, 41 (La. 1989).

115. "In deciding whether an error involving the denial of a federal constitutional right can be held harmless in a state criminal case, the reviewing court must apply

of harmless error would apply if the jury instructions had violated the substantive standards of the Louisiana Declaration of Rights, or if some other state constitutional right had been violated.

If a substantive violation of the Louisiana Constitution had been found, there is little reason to think that the recently broadened concept of "harmless error," articulated by the Supreme Court in *Fulminante* and applied in *Cage*, ought to be incorporated into Louisiana constitutional law. First, as Justice Dennis pointed out in his dissent, pre-*Fulminante* decisions by the Louisiana courts have uniformly held that "harmless error" would be determined according to the stricter analysis set forth in *Chapman*, and that jury instructions which violated the substantive requirements of the state constitution would not be considered harmless error.<sup>116</sup> Moreover, as Justice Calogero pointed out in his dissent, the state constitutional guarantees of the right to trial by jury<sup>117</sup> and due process of law,<sup>118</sup> like the state's statutory provisions regarding jury instructions as to reasonable doubt,<sup>119</sup> provide an independent textual basis on which the state courts could rely to fashion a separate and more rights-protective doctrine of harmless error for Louisiana. The drafting history of the Louisiana Constitution of 1974 reinforces the conclusion that the state courts should not apply *Fulminante* to violations of the Louisiana Declaration of Rights. While it appears that the framers of the state constitution did not specifically discuss the question of harmless error during their debates on the state constitution, they did make it clear that the state constitutional guar-

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federal law rather than state law." *State v. Gibson*, 391 So. 2d 421, 426 (La. 1980), citing *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824 (1967).

Both Justices Calogero and Dennis, in their dissents, raised the question of whether the state constitution provides more protection in this context than does the federal Bill of Rights. As is argued below, the state constitution may well require a narrower interpretation of "harmless error" in cases where a substantive state right is violated. However where, as here, the only substantive right violated is a federal rather than a state right, the same result probably should not obtain. The two questions of how a criminal procedural right is substantively defined and whether a violation of that right is subject to harmless error analysis are not wholly independent variables. The more narrowly a right is defined — i.e., the more egregious the situations which will be construed to be violations of that right must be — the more reasonable it would seem to treat a violation of that right as always prejudicial, and vice versa. For these reasons it would seem a form of illegitimate "bootstrapping" for a criminal defendant to rely on one constitution to demonstrate that his rights have been violated, and on another constitution to show that the error requires automatic reversal.

116. *Cage*, 583 So. 2d at 1137-38, citing, among other cases, *State v. Vessell*, 450 So. 2d 938 (La. 1984); *State v. McDaniel*, 410 So. 2d 754 (La. 1982); *State v. Mack*, 403 So. 2d 8 (La. 1981).

117. La. Const. art. I, § 17.

118. La. Const. art. I, § 2.

119. La. Code Crim. P. art. 804.

antee of the right to a jury in criminal cases was intended to incorporate then-existing federal precedents.<sup>120</sup> Prior to the federal Court's recent reinterpretation in *Fulminante*, federal law was clear that neither a coerced confession nor an erroneous jury instruction would be subject to harmless error analysis.<sup>121</sup> As of 1974 the distinctions now drawn by Chief Justice Rehnquist were not part of federal or Louisiana law; rather, harmless error could only be found in accordance with the narrow standards of *Chapman*, when the reviewing court could find, beyond a reasonable doubt, that the error did not contribute to the verdict obtained.<sup>122</sup> No different standard should apply to the state constitution in the future.

#### STATE GOVERNMENT: STRUCTURE AND OPERATIONS

During the past term, the appellate courts of Louisiana rendered their normal quota of decisions regarding the staffing<sup>123</sup> and powers<sup>124</sup> of the state judiciary, review of administrative action,<sup>125</sup> and the due process rights of parties appearing before state administrative agen-

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120. VII Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts 1184 (1977), reflecting the intent of the drafters that the criminal jury guarantee of the state constitution track the substantive requirements of *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444 (1968), among other federal precedents.

121. *Arizona v. Fulminante*, 111 S. Ct. 1246, 1253-54 (1991) (White, J., dissenting in part), and cases cited therein.

122. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967).

123. *Williams v. Ragland*, 567 So. 2d 63 (La. 1990), holding that provisions of the state constitution exempting from mandatory retirement any judge "now sitting" who has not yet had 20 years of service, applies to any judge taking office under the Louisiana Constitution of 1974, not just to those who were already in office on January 1, 1975, when that constitution came into force; *Gamble v. White*, 566 So. 2d 171 (La. App. 2d Cir. 1990), holding that La. Const. art. V, § 24 which requires that a candidate for district judge "shall have been admitted to the practice of law in this state for at least five years prior to his election" was not satisfied by a candidate who had been suspended from the practice of law for two of the five years immediately preceding the election.

124. *Green v. Champion Ins. Co.*, 577 So. 2d 249 (La. App. 1st Cir. 1991), holding that the court need not defer to the executive branch but rather has inherent authority to appoint a liquidator ad hoc for an insolvent insurance company after the Insurance Commissioner recused himself; *Barbry v. Dauzat*, 576 So. 2d 1013 (La. App. 3d Cir. 1991), asserting jurisdiction over a custody battle even though one parent was a reservation Indian.

125. *Louisiana Chemical Ass'n v. Department of Environmental Quality*, 577 So. 2d 230 (La. App. 1st Cir. 1991), holding that district courts hearing challenges to the constitutionality of administrative regulations are normally confined to review of the record, and that such review is sufficient under La. Const. art. V, § 16.

cies.<sup>126</sup> More importantly, the Supreme Court of Louisiana rendered two decisions further clarifying the respective roles of courts and administrative adjudicators in the wake of *Moore v. Roemer*.<sup>127</sup> In *Magnolia Coal Terminal v. Phillips Oil Co.*,<sup>128</sup> the supreme court extended the analysis of *Moore*, holding that, despite the exclusive statutory authority given to the Commissioner of Conservation to order plugging and abandonment of and to regulate seepage from oil wells, a mineral lessor's action for damages from seepage is a civil matter under the meaning of *Moore*, as to which district courts must have exclusive original jurisdiction to find facts and award damages. Conversely, in *American Waste & Pollution Control Co. v. Department of Environmental Quality*,<sup>129</sup> the court limited the reach of *Moore*, upholding statutes vesting original jurisdiction to grant or deny waste disposal or water discharge permits in the Secretary of the Department of Environmental Quality, subject only to record review in the courts of appeal.

Of all these decisions, however, the one which raised the most basic issues of constitutional interpretation was the continuing battle between former Insurance Commissioner Doug Green and the state Board of Ethics for Elected Officials. In a revealing series of opinions extending over the last two terms, this case graphically demonstrated once again both the inherent difficulties confronting any court which

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126. See, e.g., *Gulf States Utilities v. Louisiana Public Serv. Comm'n*, 578 So. 2d 71 (La. 1991); *Alliance for Affordable Energy, Inc. v. Council of the City of New Orleans*, 578 So. 2d 949 (La. App. 4th Cir. 1991); *Benoit v. Louisiana State Racing Comm'n*, 576 So. 2d 578 (La. App. 4th Cir. 1991); and *Department of Public Safety & Corrections v. Savoie*, 569 So. 2d 139 (La. App. 1st Cir. 1990), all of which further elaborate the principles announced in *Allen v. State Board of Dentistry*, 543 So. 2d 908 (La. 1989), regarding the due process rights of parties appearing before administrative agencies.

127. 567 So. 2d 75 (La. 1990), holding that La. Const. art. V, § 16(A), which expressly mandates that "district court[s] shall have original jurisdiction of all civil . . . matters," precluded the legislature from depriving district courts of the power to initially determine workers' compensation claims and vesting that power in administrative hearing officers instead. That decision was discussed in this space last year. Devlin, *Louisiana Constitutional Law, Developments in the Law*, 51 La. L. Rev. 295, 314-19 (1990). Although the specific result of the *Moore* decision has since been overturned by constitutional amendment, the legal principle announced in that case — that the constitutional authority of the district courts places a limit on the ability of the legislature to vest adjudicative functions in administrative agencies — remains an important element in the law of the state.

128. 576 So. 2d 475 (La. 1991), upholding the district court's findings of fact and assessment of damages, despite prior contrary findings of fact by the Commissioner. On the issue of primary jurisdiction under state law, see generally Martin & Kramer, *Jurisdiction of Commission and Court: The Public Right/Private Right Distinction in Oklahoma Law*, 25 Tulsa L.J. 535 (1990).

129. 588 So. 2d 367 (La. 1991), reversing 580 So. 2d 392 (La. App. 1st Cir. 1991).

attempts to apply the classic doctrine of separation of powers to the complexities of modern governance, and the special problems that state courts face when they attempt to resolve such issues under state constitutions by relying on conceptual categories and arguments derived from federal cases construing the federal Constitution.

*Federal Precedent and Separation of Powers: the State Board of Ethics v. Green Cases*

Former Insurance Commissioner Green was investigated by the Louisiana Board of Ethics for Elected Officials. Although four of five members of the Board are legislative appointees,<sup>130</sup> the Board is part of the Louisiana Department of Civil Service and is clearly located within the state's executive branch. The Board, which also acts as the Supervisory Committee on Campaign Finance Disclosure, filed civil proceedings against Green to collect civil penalties authorized by statute for violations of the state Campaign Finance Disclosure Act.<sup>131</sup> Green resisted on the ground that the enforcement system established by the Act violated the state constitutional requirement of separation of powers by vesting the "executive" power to initiate prosecutions for violations of the Act in a Board composed of a majority of "legislative" appointees. In its first opinion in the series, the Louisiana Supreme Court relied on "formalist" federal precedents to affirm the lower court and hold, by a bare four to three majority, that the statute which authorized the Board to initiate civil proceedings was indeed unconstitutional.<sup>132</sup> That opinion was thereafter vacated and the court issued a second opinion, again by a bare majority, which relied on more recent "functionalist" federal precedents to conclude that the challenged Act did not violate the state constitution after all.<sup>133</sup> That

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130. La. R.S. 42:1132(B) (1990).

131. The Campaign Finance Disclosure Act is codified at La. R.S. 18:1481 (1979). Authorization for the Committee to file suit to collect penalties is found at La. R.S. 18:1511.5 (Supp. 1991).

132. *State Through Bd. of Ethics v. Green*, 545 So. 2d 1031, 1035-37 (La. 1989) (opinion of then Judge Pike Hall, sitting by designation in place of Justice Lemmon, joined by Justices Marcus, Watson, and Cole), extensively discussing *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612 (1976). Briefly, "formalist" approaches to separation of powers problems attempt to conceptually divide the functions of government according to whether they are inherently "executive," "legislative," or "judicial" in nature, and then assign that function exclusively to the appropriate branch. The *Green* opinion noted above was vacated and the case set for rehearing after the return of Justice Lemmon to active service. *State Through Bd. of Ethics v. Green*, 545 So. 2d 1031 (La. 1989).

133. *State Through Bd. of Ethics v. Green*, 566 So. 2d 623 (La. 1990) (opinion of Justice Lemmon, joined by Chief Justice Dixon and Justices Calogero and Dennis),

opinion was also vacated, only to be reinstated after the ascension of the Louisiana Supreme Court's newest member.<sup>134</sup>

Despite the language of article II of the Louisiana Constitution, which could be construed to mandate a formalist approach to separation of powers issues in the state,<sup>135</sup> the supreme court was doubtless correct in its conclusion that a less rigid, "functionalist" approach should be applied to cases such as *Green*, in which the sole issue is whether novel administrative arrangements may technically violate the conceptual distinctions between "executive" and "legislative" powers. As scholars have long noted, the reality of modern governance precludes too rigid an adherence to philosophical distinctions between legislative, executive and judicial powers; effective administration often requires that limited powers of more than one type be united in a single administrative entity.<sup>136</sup> The Louisiana Supreme Court has at least implicitly recognized this reality on several occasions, upholding institutional arrangements that appear to mix legislative and executive

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following the analysis of and citing *Morrison v. Olsen*, 487 U.S. 654, 108 S. Ct. 2597 (1988). Briefly, "functionalist" approaches to separation of powers issues proceed by emphasizing the inherently "mixed" nature of many government functions and the need to maintain a relative balance between the three constitutional branches. Administrative mechanisms mixing functions will ordinarily be ruled unconstitutional under this approach only if they threaten to "unbalance" that necessary balance among the constitutional branches. This second opinion in *Green* was vacated after the retirement of Chief Justice Dixon and the election of Judge Pike Hall, author of the original supreme court opinion in the case, to take Chief Justice Dixon's place. *State Through Bd. of Ethics v. Green*, 559 So. 2d 480 (La. 1990).

134. *State Through Bd. of Ethics v. Green*, 566 So. 2d 623 (La. 1990) (opinion of Justice Lemmon, joined by Chief Justice Calogero and Justices Dennis and Hall), denying rehearing and reinstating the opinion originally published at 559 So. 2d 480 (La. 1990), reversing 540 So. 2d 1185 (La. App. 1st Cir. 1989). Justice Hall's position on these issues apparently changed between the time he authored the court's original "formalist" opinion and his eventual joining in the court's final "functionalist" opinion.

135. Article II of the Louisiana Constitution of 1974 contains only two sections, which provide as follows:

*Section 1. Three Branches*

Section 1. The Powers of the government of the state are divided into three separate branches: legislative, executive, and judicial.

*Section 2. Limitations on Each Branch*

Section 2. Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others.

136. Most of the analysis in this area has been directed to federal administration. See, e.g., Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984); Pierce, *Morrison v. Olson, Separation of Powers, and the Structure of Government*, 1988 Sup. Ct. Rev. 1, 4-6 (1988). The point is, however, equally applicable to administration on the state level.

functions to some degree.<sup>137</sup> Certainly in a situation such as was present in *Green*, where the actual mechanism by which the members of the Board of Ethics for Elected Officials were appointed precluded any real concern that they would be subject to control by the legislators who appointed them,<sup>138</sup> there is little practical reason to elevate constitutional form over substance and insist on a hermetic separation of legislative and executive roles.

Beyond its results, however, the remarkable point about the *Green* case is the extent to which all opinions in the case rely on opposing *federal* constitutional precedents to support their opposing interpretations of the requirement of separation of powers under the *state* constitution. On one level, this reliance is understandable. The recent separation of powers decisions by the United States Supreme Court comprise an extensive and well developed, if somewhat self-contradictory, body of precedents which reach generally workable solutions to the very difficult problem of conforming Montesquieu's vision of separated powers to the real world complications of the administrative state. However, such reliance is suspect, for multiple reasons of constitutional theory, text and policy.

As a matter of basic theory it is noteworthy that, unlike the federal Constitution, state constitutions do not grant power, but rather merely allocate pre-existing sovereign powers.<sup>139</sup> Thus, unlike their federal counterparts, the branches of state government are not limited to any listing of enumerated powers. Moreover, the framers of the federal Constitution created the Presidency as a "unitary executive," making all executive-type powers responsive to a single will.<sup>140</sup> In contrast, the

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137. See, e.g., *Bruneau v. Edwards*, 517 So. 2d 818 (La. App. 1st Cir. 1987) (upholding legislation delegating to the governor the essentially "legislative" power to withhold and transfer appropriated funds); *State ex rel. Guste v. Legislative Budget Comm.*, 347 So. 2d 160 (La. 1977) (upholding arrangement which allowed the governor to appoint 24 out of 28 members of the powerful Legislative Budget Committee). These cases could be distinguished from *Green* on the ground that the prior cases arguably involved executive encroachment on legislative powers, while *Green* involved an alleged legislative encroachment of executive power. However, there does not appear to be anything in the doctrine of separation of powers that would justify such a unidirectional approach to its application.

138. As the *Green* court noted, the members of the Board are appointed for staggered six-year terms and can be removed only for cause. Legislators, legislative employees and other public employees are ineligible for appointment. *Green*, 566 So. 2d at 625-26.

139. The point has long been recognized as a basic distinction between state and federal constitutional law. See, e.g., T. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 10-11 (5th ed. 1883).

140. Article II, section 1 of the United States Constitution clearly provides that the entirety of the federal executive power "shall be vested in" the President and the President alone.



Louisiana Constitution provides for several independently elected state-wide executive officers,<sup>141</sup> thus diffusing executive power. With respect to texts, it is clear that while article II of the Louisiana Constitution contains much stronger language purporting to forbid commingling of powers than does the federal Constitution,<sup>142</sup> the state constitution also contains many provisions expressly authorizing far more overt mixing of executive and legislative powers than would be permitted under the federal Constitution.<sup>143</sup> Finally, on the level of public policy, it is clear that the pragmatic concerns underlying the doctrine of separation of powers are far different for state governments than for the national government. Separation of federal government powers serves as a useful and necessary safeguard against tyranny. However, in light of the much more limited coercive powers of state governments and the effective safeguards of liberty provided by federal law and institutions, such concerns are much less realistic and should be much less important with respect to individual states. On the contrary, when analyzing separation of powers issues under state constitutions, such pragmatic concerns as the desire for efficiency and reduction of the opportunities for corruption should probably be most salient.

Full development of a separation of powers analysis applicable to state constitutions is beyond the scope of this note. However, in light of the structural, textual, and policy differences between the federal Constitution and state constitutions with respect to the issue of separation of powers, federal precedents are of only dubious value in evaluating such claims.

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141. See, e.g., La. Const. art. IV, § 3(A) providing for separate statewide elections for the offices of Governor, Lieutenant Governor, Secretary of State, Attorney General, Treasurer, Commissioner of Agriculture, Commissioner of Insurance, Superintendent of Education, and Commissioner of Elections. Each of these constitutional officers is separately allocated specific and independent executive powers by the state constitution. La. Const. art. IV, §§ 5-12.

142. La. Const. art. II, quoted at *supra* note 135. While the federal Constitution contains language specifically allocating the federal legislative, executive, and judicial powers respectively in the federal Congress, President, and courts, U.S. Const. art I, § 1, art. II, § 1 and art. III, § 1, it contains no expressly prohibitory language like that is found in the Louisiana constitution.

143. See, e.g., La. Const. art. IV, § 5(G), granting the governor an item veto over appropriations bills.