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## Public Law: Louisiana Constitutional Law

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## LOUISIANA CONSTITUTIONAL LAW\*

*Lee Hargrave\*\**

## EXCESSIVE PUNISHMENT

The foundations are being laid, albeit slowly, for implementation of the state constitution's guarantee against excessive punishment. Article I, Section 20 replaced the former constitutional prohibition against "cruel and unusual punishment"<sup>1</sup> with a prohibition against "cruel, excessive or unusual punishment." The change was a deliberate enlargement of the guarantee, the committee comments indicating that "[t]he 1921 provision is revised to include 'excessive' as well as cruel and unusual punishments. . . ."<sup>2</sup> Additionally, Section 20 uses the disjunctive *or* to indicate that three separate prohibitions are involved—prohibition of punishment that is cruel, punishment that is unusual and punishment that is simply excessive. This is a change from the prior conjunctive reference to cruel *and* unusual punishment. The new formula, in the words of one of its drafters,

allows the courts to avoid strained interpretations of what is cruel and unusual punishment, in order to reach the sometimes more important question of whether the punishment does, in fact, fit the crime. For example, it is much easier to find that imposition of the death penalty is excessive as punishment for such crimes as rape and kidnapping than that it is cruel or unusual.<sup>3</sup>

Though the supreme court has yet to invoke Article I, Section 20 to alter a sentence on the grounds of excessiveness, a number of concurring opinions in the last term indicate a growing realization that the section does require alteration of a sentence, even if within the statutory penalties for a crime, if it is too severe in light of the circumstances surrounding the offense.<sup>4</sup> Justice Tate, concurring in *State v. Bryant*,<sup>5</sup> objected to the death

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\* This commentary omits discussion of *Edwards v. Parker*, 332 So. 2d 175 (La. 1976) (use of tidelands moneys), and *Williams v. Williams*, 331 So. 2d 438 (La. 1976) (alimony pendente lite not a denial of equal protection), as both cases are scheduled to be discussed in student notes appearing later in this volume.

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1. La. Const. art. I, § 12 (1921).

2. OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1973 OF THE STATE OF LOUISIANA, July 6, 1973 at 4 [hereinafter cited as JOURNAL].

3. Jenkins, *The Declaration of Rights*, 21 LOY. L. REV. 9, 39 (1975).

4. Review of the excessiveness of punishment is within the supreme court's jurisdiction under Article V, Section 5(C) for it is review of a "question of law"

penalty for aggravated rape in a case in which the defendant was a mentally disturbed Vietnam veteran; he had just had a violent quarrel with his wife; the penetration was brief and there was no emission and no brutality; the life of the victim was not endangered; no force was used; and no unusual psychological trauma was caused the victim.<sup>6</sup> Justice Dixon in *State v. Fisher*<sup>7</sup> and *State v. Pierce*<sup>8</sup> indicated that in a proper case with a proper record the court "must review excessiveness."<sup>9</sup> Justice Calogero in *State v. McClinton*,<sup>10</sup> *State v. Whitehurst*<sup>11</sup> and *State v. Victorian*<sup>12</sup> noted that "[t]he addition of the word 'excessive' possibly adds a new dimension to the constitutional prohibition."<sup>13</sup> However, Justice Marcus expressed the view that the addition of the term "excessive" in Section 20 does not change the constitutional guarantee.<sup>14</sup>

Any doubts that review of sentences is a proper role, indeed a required role, for the supreme court are removed by the 1976 capital punishment statutes which require the supreme court to "review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review."<sup>15</sup>

Review of sentences for excessiveness and consistency in capital cases may also be required by federal constitutional standards. A number of the opinions in the recent capital punishment cases indicate that state statutes providing for capital punishment were held constitutional in part because appellate review of sentences was required as a means of ensuring that capital punishment was applied in a uniform fashion instead of in a haphazard and inconsistent manner.<sup>16</sup>

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rather than a "question of fact." Article I, Section 20 itself makes excessiveness of a sentence a question of constitutional law requiring review of the circumstances of the offense and the character of the defendant to determine if the sentence is excessive. This is not a review as to whether a certain fact occurred or not, but review as to appropriateness of sentence based on unquestioned facts.

5. 325 So. 2d 255 (La. 1976) (Tate, J., concurring).

6. *Id.* at 266.

7. 321 So. 2d 519 (La. 1975).

8. 321 So. 2d 523 (La. 1975).

9. 321 So. 2d 519, 520 (La. 1975) (Dixon, J., concurring).

10. 329 So. 2d 676 (La. 1975).

11. 319 So. 2d 907 (La. 1975) (Calogero, J., concurring).

12. 332 So. 2d 220 (La. 1976).

13. *State v. McClinton*, 329 So. 2d 676, 677 (La. 1976).

14. *Id.* at 678 (Marcus, J., concurring).

15. La. Acts 1976, No. 694, adding LA. CODE CRIM. P. art. 905.9. See *The Work of the Louisiana Legislature for the 1976 Regular Session—Criminal Trial Procedure*, 37 LA. L. REV. 195, 197 (1976).

16. *Proffitt v. Florida*, 96 S. Ct. 2960, 2966 (1976), quoting *State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973); *Jurek v. Texas*, 96 S. Ct. 2950, 2959 (1976); *Gregg v. Georgia*, 96 S. Ct. 2909, 2923, 2937 (1976).

The review of death sentences apparently required by the United States Supreme Court and clearly required by state law is basically the same type of review that is required by Section 20 for all sentences. Standards for determining excessiveness can be formulated from the considerations in *Bryant* mentioned earlier, the new state legislation,<sup>17</sup> the Model Penal Code,<sup>18</sup> and the draft proposal for a federal criminal code.<sup>19</sup>

#### FREE SPEECH

*Economy Carpets Manufacturers & Distributors v. Better Business Bureau*<sup>20</sup> is an important and unanimous reaffirmation by the supreme court of the free speech guarantee of the state and federal constitutions. Plaintiff who had been the subject of reports published by the BBB critical of his advertising and his business methods, sued the bureau for treble damages alleging a conspiracy in restraint of trade and requested a jury trial. Before and after filing suit, plaintiff stationed portable signs critical of the bureau and of the judge at his place of business in suburban Baton Rouge and in the downtown area across the street from the bureau's office.<sup>21</sup> The district court ordered plaintiff "to cease and desist from using signs or any public advertisements to call attention to this litigation and prohibiting defendant from calling attention to this litigation by means of any public advertisements or private publications."<sup>22</sup> Relying on federal and state constitutional grounds, the supreme court held the protective order was improperly issued and ordered it annulled.

While *Cox v. Louisiana*<sup>23</sup> and *Adderley v. Florida*<sup>24</sup> permit controls

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In a petition for a rehearing, the state took the position that *Roberts v. Louisiana*, 96 S. Ct. 3001 (1976), holding the state's capital punishment regime unconstitutional, should be reconsidered in light of the 1974 constitution providing for appellate review of sentences in Article I, Section 20.

17. LA. CODE CRIM. P. arts. 905.4-.5 (added by La. Acts 1976, No. 694).

18. MODEL PENAL CODE §§ 7.01-05; 210.6 (Proposed Official Draft 1962).

19. Proposed Federal Criminal Code, Final Report of the National Commission on Reform of Federal Criminal Laws, Title 18, Sec. 3604; Title 28, Section 1291.

20. 330 So. 2d 301 (La. 1976).

21. The signs displayed the following pithy messages:

"CHARLIE TAPP OF CONSUMER PROTECTION IS A LIAR WHO SUCKS UP WITH THE B.B.B."; "THE BETTER BUSINESS BUREAU SHAFTS YOU & THE SMALL BUSINESSMAN TOO!"; "BILLY GUSTE DOESN'T HAVE THE BALLS TO INVESTIGATE HIS DARLINGS, CHARLIE TAPP & THE B.B.B.;" "THE BBB IS THE WORST BUNKO OPERATIONS OF THEM ALL;" "A VOTE FOR JUDGE SHORTESS IS A VOTE AGAINST FREEDOM OF SPEECH."

22. 330 So. 2d 301, 303 (La. 1976).

23. 379 U.S. 559 (1965).

24. 385 U.S. 39 (1966).

on demonstrations near a courthouse because of the threat to court operations, the instant case involved signs rather than demonstrations and the signs were not in the proximity of the courthouse. Though one might categorize the signs as "commercial speech," the supreme court has clearly abandoned the doctrine that commercial speech is entitled to less protection than non-commercial expression of ideas.<sup>25</sup>

Thus, the central issue was application of *Wood v. Georgia*<sup>26</sup> and its standard that prior restraint on expression is permitted only if the danger the expression poses to court proceedings is "an imminent, not merely a likely threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."<sup>27</sup> Focusing on what is essentially a factual evaluation of the hazard posed by the speech involved, the court determined that the circumstances were not sufficient to justify the prior restraint. That result is impelled by the federal standards in the area.

While statements in a number of decisions indicate that prior restraint might be justified in grave situations, such grave situations seem impossible to find. The refusal of the court to apply prior restraint in the Pentagon Papers case<sup>28</sup> involving a possible threat to national security is one recent indication that the burden of justification may be insurmountable. Subsequent to the instant case, the United States Supreme Court, in *Nebraska Press Ass'n. v. Stuart*,<sup>29</sup> held unconstitutional a pre-trial protective order restraining the press from reporting, with respect to an upcoming criminal trial, matters relating to the existence of a confession made by the accused or other facts "strongly implicative" of the accused. The lower court's justification for the order in *Stuart*, as in the instant case, was primarily to prevent publicity that might prevent the court from impaneling an impartial jury. But the Supreme Court pointed out that pretrial publicity does not inevitably lead to an unfair trial;<sup>30</sup> the impact of such publicity is necessarily speculative;<sup>31</sup> alternative measures short of prior restraint were available;<sup>32</sup> and the order was too vague and broad.<sup>33</sup> In fact, four members of the court

25. 370 U.S. 375, 385 (1962), quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947).

26. *Id.* at 375.

27. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 96 S. Ct. 1817 (1976) (drug price advertisements); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (abortion advertising).

28. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

29. 96 S. Ct. 2791 (1976).

30. *Id.* at 2800.

31. *Id.* at 2804.

32. *Id.* at 2805.

33. *Id.* at 2807.

in concurring opinions indicated that such orders may never be justifiable.<sup>34</sup>

The same considerations would apply to *Economy Carpets*; indeed the facts in that case are not as extreme as in *Stuart*. In a civil action, the sixth amendment impartial jury considerations are not as strong as in a criminal case. *Stuart* involved a brutal murder of six people in a rural town of 850 persons where the public interest was much greater than it would be in a civil action in a large city like Baton Rouge. Though the instant case involved expression by a litigant rather than by newspapers, the first amendment protection is the same for individuals as for the press;<sup>35</sup> *Wood v. Georgia* itself involved expression by a sheriff interested in a grand jury investigation rather than actions by disinterested third persons or reporters.<sup>36</sup>

Further, the instant case was concerned with prior restraint on expression, where the prohibitions of the first amendment are strongest. Some post-publication remedies might be proper under a strong factual showing that a party plaintiff engaged in conduct directed toward prejudicing the result of a trial or disrupting the legal process.<sup>37</sup> If, for example, the extreme actions of a litigant make it impossible to impanel an impartial jury, a judge trial might be ordered, the suit delayed, or a plaintiff's suit dismissed.<sup>38</sup>

#### DUE PROCESS AND EQUAL PROTECTION: STATE ACTION

In *Flint v. St. Augustine High School*,<sup>39</sup> two students contested their expulsion from a private high school for violating the school's smoking regulations. The district court enjoined the expulsions and ordered the students reinstated, on due process and equal protection grounds.<sup>40</sup> The

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34. *Id.* at 2808, 2809.

35. See *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972): "It has generally been held that the First Amendment does not guarantee the press a constitutional right to special access to information not available to the public generally."

36. In *Wood*, a judge of the superior court charged the grand jury to investigate "an inane and inexplicable pattern of Negro bloc voting." The charge was given during a local political campaign. The sheriff responded with a statement critical of the judge's actions saying among other things, "[i]f anyone in the community [should] be free of racial prejudice, it should be our Judges. It is shocking to find a Judge charging a Grand Jury in the style and language of a race baiting candidate for political office." The sheriff also delivered to the court bailiff who delivered to members of the grand jury an open letter to the grand jury.

37. *Cox v. Louisiana*, 379 U.S. 559, 584 (1965) (Black, J., concurring & dissenting): "But the history of the past 25 years if it shows nothing else shows that his group's constitutional and statutory rights have to be protected by the courts, which must be kept free from intimidation and coercive pressures of any kind."

38. See *In re Anderson*, 306 F. Supp. 712 (D.D.C. 1969).

39. 323 So. 2d 229 (La. App. 4th Cir. 1975), *cert. denied*, 325 So. 2d 271 (La. 1976).

40. *Id.* at 234: "it can hardly be said that the expulsion penalty for repeated

court of appeal reversed and allowed the expulsions to stand, resting its decision on the view that the procedures accompanying the expulsions did not offend due process.<sup>41</sup> The majority opinion is questionable in accepting the view that the due process guarantee applies to expulsion of students by private schools. The concurring opinion correctly points out that due process limitations apply only to state action and not to private action.

Clearly, the federal due process and equal protection guarantees protect only against government action and the expansion of the state action concept has not been extended to include private schools.<sup>42</sup> The prospect of expanding the concepts to private schools is unlikely, for the doctrine that private persons pursuing "public functions" constitutes state action has been checked,<sup>43</sup> as has the view that state licensing and regulation of a private activity makes that activity state action.<sup>44</sup>

The state due process guarantee is also a constraint on state action that does not apply to private conduct. Article I, Section 2 in providing, "No person shall be deprived of life, liberty, or property, except by due process of law," continues language from the 1921 Constitution which was understood to apply only to state action.<sup>45</sup> The committee debates on the section indicate the Bill of Rights Committee worked from the background of federal principles which apply the guarantee only to state action.<sup>46</sup> The reference to "due process of law" and the reference to "equal protection of the laws" emphasize the relationship to laws, which only government can

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smoking violations has been uniformly applied after due notice to the students of the intention on the part of the school to begin enforcing it."

"A written rule which, to the knowledge of students and faculty, has never been enforced over a period of many years is not a rule at all."

41. *Id.* at 235: "there were here present such necessary minimum safeguards as were required to take the actions of dismissal out of the ambit of being arbitrary or capricious or without probable cause."

42. See Note, 60 VA. L. REV. 840 (1974). *Goss v. Lopez*, 419 U.S. 565 (1975), dealt with suspension from a public school and did not reach the question of private action. Private school racial discrimination is prohibited by the thirteenth amendment, which by its terms reaches private conduct.

43. *Hudgens v. NLRB*, 96 S. Ct. 1029 (1976), *overruling* *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), and *limiting* *Marsh v. Alabama*, 326 U.S. 501 (1946); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (privately owned utility).

44. *Moose Lodge v. Irvis*, 407 U.S. 163 (1972).

45. See *Vangraff, Inc. v. McClearley*, 314 So. 2d 483, 485 (La. App. 1st Cir.), *cert. denied*, 320 So. 2d 549 (La. 1975): "Of course the above restrictions refer to state action as opposed to private or personal action."

46. Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 4 (1975). STATE OF LOUISIANA CONSTITUTIONAL CONVENTION OF 1973 VERBATIM TRANSCRIPTS Aug. 29, 1973 at 60 [hereinafter cited as PROCEEDINGS].

adopt. When private action was to be reached, as in Article I, Section 12, reference to the "laws" formula was clearly avoided. If action is to be taken to regulate student dismissals by private schools, it must come from legislation, for the constitution does not reach such activity.

#### DONATION OF STATE PROPERTY

*Morial v. Orleans Parish School Board*<sup>47</sup> sustained the payment of wages to a teacher for days she did not work because of illness<sup>48</sup> against an attack that such payment "of any salary without corresponding work is actually a gift from a state subdivision to a private person"<sup>49</sup> in violation of the 1921 Constitutional provision that the "funds, credit, property or things of value of . . . any political corporation . . . shall not be loaned, pledged or granted to or for any person. . . ."<sup>50</sup> *Givens Jewelers of Bossier, Inc. v. Rich*<sup>51</sup> sustained the action of a school board in allowing jewelry salesmen to sell class rings to students at the parish schools against a similar attack, the plaintiffs there arguing that use of school premises by salesmen was a loan or grant of governmental funds.

Both decisions are a common sense application of a provision that if strictly construed would prevent much of what a modern state is expected to do for its citizens. The 1974 Constitution continues language similar to that of the 1921 Constitution, but adds a further provision liberalizing the rule:

"For a public purpose, the state and its political subdivisions or political corporations may engage in cooperative endeavors with each other, with the United States or its agencies, or with any public or private association, corporation, or individual."<sup>52</sup>

Under the new provision, the question hinges on whether a grant or payment is for a "public purpose," a question "left to interpretation by the judiciary so that there is sufficient flexibility for a lasting and workable document."<sup>53</sup> The traditional construction of public purpose has of course been quite broad.

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47. 332 So. 2d 503 (La. App. 4th Cir. 1976).

48. The payment was provided for under LA. R.S. 17:1201-02 (1950).

49. 332 So. 2d at 505.

50. La. Const. art. IV, § 12 (1921).

51. 313 So. 2d 913 (La. App. 2d Cir. 1975).

52. LA. CONST. art. VII, § 14(c).

53. JOURNAL, July 6, 1973 at 47 (comments to the committee proposal). Though some changes were made in the committee proposal, the convention continued the language of the proposal which became subsection c. PROCEEDINGS, Dec. 17, 1973 at 79-82.

## PROHIBITIONS ON LOCAL GOVERNMENT

The supreme court determined in *State v. Suire*<sup>54</sup> that a municipality could define by ordinance the offense of aggravated battery and punish a violator for such conduct even though state criminal law contains an almost identical offense.<sup>55</sup> The court then held that a person convicted under such an ordinance could not be tried under the state aggravated battery statute for the same conduct in light of established double jeopardy principles.<sup>56</sup> The effect in the instant case was that a defendant sentenced to pay a \$50 fine and to a suspended 30-day jail term under the local conviction could not be tried for the state felony punishable by 10 years imprisonment at hard labor.

Though *Suire* is a routine application of the 1921 Constitution, it raises an important question as to the construction of Article VI, Section 9(A)(1) of the 1974 Constitution which introduces the new limitation that a local governmental subdivision cannot “*define and provide for punishment of a felony. . . .*” Concurring in *Suire*, Justice Tate pointed out that the new limitation is subject to two constructions: (1) “to limit the power of municipalities to impose punishment at hard labor”<sup>57</sup> or (2) “to exempt from local regulation any conduct which the state legislation punishes as a felony.”<sup>58</sup>

If one takes the first approach and concludes that Section 9 simply prohibits penalties at hard labor, thus allowing municipalities to prohibit any conduct, the result is the possibility, as in *Suire*, of local prosecutions effectively barring subsequent state prosecutions for the same conduct. This can frustrate the state’s policy of providing serious penalties for what the legislature has determined are the more serious crimes. The second approach would prohibit local governmental subdivisions from any punishment of conduct that state law defines as a felony.

The constitutional convention debate on Section 9 divulges little more than that the provision is “standard in this type of approach . . .,”<sup>59</sup> but the committee comments to the proposal indicate the sources of the limitation

54. 319 So. 2d 347 (La. 1975).

55. See LA. R.S. 14:34 (1950): “Aggravated battery is a battery committed with a dangerous weapon.”

56. Waller v. Florida, 397 U.S. 387 (1970). Cf. *State v. Didier*, 262 La. 364, 263 So. 2d 322 (1972); Note, 33 LA. L. REV. 474 (1973).

57. 319 So. 2d at 351.

58. *Id.*

59. Delegate Lanier speaking for the Committee on Local and Parochial Government said simply, “The prohibition against the defining and providing for the punishment of a felony is a standard in this type of approach. . . .” PROCEEDINGS, Sept. 26, 1973 at 51.

are the Model State Constitution and the Illinois Constitution.<sup>60</sup>

The exact language is found in the model constitution, and can be traced to Jefferson B. Fordham's 1953 draft of model provisions. Fordham's comment to the provision was, "[a] city should have the power to define and provide for the punishment of offenses within its governmental purview. It has been considered desirable to make it clear that this power stops short of serious offenses which fall in the felony category."<sup>61</sup> The reference to *serious offenses*, as opposed to serious punishments, focuses on the conduct or offense involved, rather than on the penalty, lending some weight to the view that the provision is directed to preventing cities from legislating at all against serious conduct which the state defines as felonious. If a city's "governmental purview" "stops short," it would seem that the city has no power to punish conduct even with a minor penalty when the state punishes with a serious penalty.

Identical language also appears in Article VII, Section 6(d) of the Illinois Constitution, which provides that a home rule unit cannot "define and provide for the punishment of a felony." The Illinois constitution goes further, and contains in Section 6(e) a prohibition the Louisiana constitution does not contain, a provision that a home rule unit cannot "punish by imprisonment for more than six months" absent a law empowering such action. Section 6(e) focuses on the type of punishment involved while Section 6(d) emphasizes the type of offense. It would seem that since Louisiana adopts Section 6(d) and not 6(e) that the choice was made to focus on the type of conduct rather than the type of penalty involved.

Both the source provisions would then indicate that the Louisiana provision should be construed to prohibit municipalities from penalizing conduct which the state defines as a felony. This is consistent with the word choice of the constitution. If the purpose were simply to prevent local governments from providing penalties of imprisonment at hard labor, one would have expected reference to punishment or a type of punishment. But the constitution does more than refer to punishment alone; it also refers to *defining a felony*. Since most municipal crimes are minor ones which are not state felonies, the ultimate impact on local government of the provision will be small.

The best argument to be made for the power of local government in this regard would be that the constitution must be construed in favor of local

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60. JOURNAL, July 6, 1973 at 23 where it is stated: "For a similar provision, see the Illinois Constitution art. VII, § 6(d) and Model State Constitutions (sic), Sixth Edition (Revised), art. VIII, § 8.02 (1968)."

61. J. FORDHAM, LOCAL GOVERNMENT LAW 82 (1975).

governmental powers. However, this approach conflicts with the convention's action defeating a proposal providing for such a liberal construction.<sup>62</sup>

Justice Tate in his concurrence in *Suire* suggested a legislative solution to the problem:

For instance, the legislature might either deny local governments the power to enact police regulations punishing conduct which the state punishes as a felony; or else it might confirm the concurrent police power of the state and local government in such instances. . . .<sup>63</sup>

The first legislative solution mentioned by Justice Tate would present no constitutional problems, for Article VI, Section 7 provides that local units may exercise any power "not denied by its charter or by general law. . . ." Legislation prohibiting municipalities from penalizing conduct which the state defines as a felony would be a general law denying that power to local governments. However, the second suggested solution would be unconstitutional if Section 9 were properly construed to prohibit municipalities from penalizing conduct that the state defines as a felony.

Perhaps the ultimate question must rest on the possibility of serious abuse of local prosecutions in light of the double jeopardy principles that prevent state trial for conduct which a local government unit has already punished. On the other hand, if municipalities are prohibited from penalizing conduct the state defines as a felony, this would be no great limitation on the action of municipalities and would not infringe greatly on local government prerogatives as they are currently exercised.

#### PARDON; VOTING RIGHTS: RESTORATION OF RIGHTS

The 1921 Constitution made a direct grant of the pardoning power to the governor,<sup>64</sup> including the power to commute sentences,<sup>65</sup> which was construed as a prohibition against the legislature limiting the chief executive's power to pardon.<sup>66</sup> Accordingly, statutes establishing mandatory criminal penalties without commutation of sentence were held to be unconstitutional.<sup>67</sup> However, since suspension of sentence, parole and

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62. JOURNAL, Sept. 25, 1973 at 4. The convention deleted from the committee proposal a section which provided, "Powers and functions of local governmental subdivisions shall be construed liberally in favor of such local governmental subdivisions."

63. 319 So. 2d 347, 351 (La. 1975).

64. La. Const. art. V, § 10 (1921).

65. See *State v. Rose*, 29 La. Ann. 755 (1877).

66. *State v. Lee*, 171 La. 744, 132 So. 219 (1931).

67. *State v. Ramsey*, 292 So. 2d 708 (La. 1974); *State v. Varice*, 292 So. 2d 703 (La. 1974).

probation are creatures of statute rather than constitution, mandatory sentences withholding those benefits were permissible.

The 1974 Constitution, Article IV, Section 5 continues the direct grant of the pardoning power to the governor:

The governor may grant reprieves to persons convicted of offenses against the state and, upon recommendation of the Board of Pardons, may commute sentences, pardon those convicted of offenses against the state, and remit fines and forfeitures for such offenses.

The Article does not otherwise limit his exercise of that power. In fact, the convention defeated two amendments that sought to subject the governor's power to limitations by law.<sup>68</sup> Thus, under the new constitution, the legislature cannot infringe on this direct grant of power and cannot provide for sentences without commutation or pardon. *State v. Smith*<sup>69</sup> and *State v. Chase*<sup>70</sup> take this view and continue the jurisprudence developed under the prior constitution.

An innovation of the 1974 constitution is the broadening of the right of convicted felons to vote. Article I, Section 10 establishes the right of every 18-year old citizen to vote, "except that this right may be suspended while a person is . . . under an order of imprisonment for conviction of a felony." *Fox v. Municipal Democratic Executive Committee*<sup>71</sup> applied the section in an action contesting the candidacy for mayor of Monroe of a man who had been convicted of attempted public contract fraud and sentenced to pay a fine and to serve ten months in the parish jail, the jail sentence being suspended and the defendant being placed on probation for one year. Fulfillment of the requirement that the candidate be a "qualified elector" hinged on the candidate's right to vote under Section 10. The court of appeal decided the candidate was eligible to vote and thus was qualified to be a candidate. The opinion reaches the correct result, but not by the strongest rationale.

The court emphasized the language, the right to vote *may* be suspended, determining that the phrase is "*permissive* and not *self-operative*, meaning that it must be implemented before it can operate to deprive one of his right to vote. . . ."<sup>72</sup> The legislature had not taken advantage of the grant of power to suspend the right since it had enacted no law to so provide since the adoption of the 1974 constitution. The court decided that the laws

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68. PROCEEDINGS, Aug. 3, 1973 at 106-23; *id.*, Aug. 4, 1973 at 8-19.

69. 327 So. 2d 355 (La. 1976).

70. 329 So. 2d 434 (La. 1976).

71. 328 So. 2d 171 (La. App. 2d Cir. 1976).

72. *Id.* at 174.

existing before the adoption of the new constitution which had totally disfranchised convicted felons<sup>73</sup> were invalidated by the 1974 constitution because of conflict with Article I, Section 10,<sup>74</sup> and thus, no law existed to suspend the right to vote while one is under an order of imprisonment. The court should have recognized that the prior statutes were invalidated only to the extent that they conflicted with the new constitution, and that to the extent they did not, they would remain effective. Those statutes could be applied in instances in which no conflict with Section 10 exists, *i.e.*, in those instances in which Section 10 does grant the power to suspend the right to vote.<sup>75</sup>

Even so, the decision reaches the correct result, for under Section 10, the legislative grant allows suspension of the right only during the time a person is "under an order of imprisonment for conviction of a felony." The defendant in *Fox* was not under an order of imprisonment, as required under Section 10,<sup>76</sup> for his sentence of imprisonment in the parish jail was suspended.

Though the 1976 legislature has acted to provide for suspension of the right to vote while a person "is under an order of imprisonment for conviction of a felony,"<sup>77</sup> the result in the instant case would remain the same, for the defendant was not imprisoned and would thus still have the right to vote.

In Article IV, Section 5(E), the constitution itself grants an automatic pardon upon completion of sentence to "a first offender never previously

73. LA. R.S. 18:42, 111 (1950). *Id.* 18:270.210 (1950), *as amended by* La. Acts 1970, No. 517, § 1.

74. La. Const. art. XIV, § 18 provides that prior laws not in conflict with the 1974 constitution "shall remain in effect," but that "[l]aws which are in conflict with this constitution shall cease upon its effective date."

75. 1974-75 LA. OP. ATT'Y GEN. 147, 149 (May 2, 1975).

76. *Declaration of Rights, supra* note 46, at 34. Attorney General opinion 75-131, note 75, *supra*, is to the same effect in determining that persons on probation or under a suspended sentence cannot be deprived of the right to vote. The opinion is on questionable grounds, however, when it determines that persons on parole can be deprived of the right. This aspect of the opinion reversed and recalled an earlier opinion to the contrary. The error of the opinion is its reliance on a non-related section, Article I, Section 20, which refers to rights of citizenship being restored upon termination of "supervision following conviction for any offense," and in its determination that a person on parole is under an order of imprisonment. The opinion argues that a person on parole is in the "legal custody" of the institution from which paroled and thus "under an order of imprisonment." If a person is released from prison, he is under no order of imprisonment; he is under an order of release. The fiction of "legal custody" is not in any sense imprisonment.

77. La. Acts 1976, No. 697, *adopting* LA. R.S. 18:102 (Supp. 1976).

convicted of a felony'' without the necessity of action by the Board of Pardons or by the governor. The effect of such an automatic pardon should be the same as that of a regular pardon by the governor. The constitution makes no distinction between the effects of the two; the debate discloses no difference in effect was contemplated;<sup>78</sup> the two are handled in the same subsection; and the automatic pardon is a continuation and extension of a 1968 constitutional amendment that recognized that a first offender would be "eligible for pardon automatically upon completion of his sentence without the aforementioned recommendation in writing"<sup>79</sup> without distinguishing the effect of such a pardon from a regular pardon.

The effect of a pardon, under prior jurisprudence, is to erase all consequences of a conviction; "it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. . . . If granted after conviction, it removes the penalties and disabilities, and restores to him all his civil rights; . . ."<sup>80</sup> It would follow that a person granted a pardon, automatic or otherwise, would not be disqualified from obtaining a liquor license because of conviction for an offense that was pardoned.<sup>81</sup>

But it was recognized in *Williams v. Louisiana Board of Alcoholic Beverages*<sup>82</sup> that the automatic pardon provision was inapplicable as to persons whose sentences were completed prior to the effective date of the

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78. PROCEEDINGS, Aug. 3, 1973 at 92-123; *id.*, Aug. 4, 1973 at 2-43.

79. La. Const. art. V, § 10 (1921) (as amended by Act 662 of 1968). Before the amendment, Section 10 simply provided a pardon procedure without distinguishing between first or multiple offenders by which the governor could not pardon without recommendation by the lieutenant governor, attorney general and presiding judge of the court in which the conviction was returned, or at least the recommendation of two of the officials. The 1968 amendment allowed the governor to pardon first offenders without recommendation of these officials. The 1974 constitution continues the process and grants the pardon without the necessity of gubernatorial action.

80. *State v. Lee*, 171 La. 744, 132 So. 219, 220 (1931), quoting from *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866); *Collins v. Lewis*, 111 La. 693, 35 So. 816, 817 (1904). See Miller, *The Declaration of Rights: Criminal Provisions*, 21 LOY. L. REV. 43, 49 (1975).

The state's position with respect to the broad effect of a pardon is the minority view and would seem subject to re-examination. The constitution itself does not provide the effect of any pardon, and the existing rule of the case law does not seem to be constitutionally impelled. See Miller, *supra*; see also the extensive discussion in Note, 23 VAND. L. REV. 939, 1143-54 (1970).

81. See 1974-75 LA. OP. ATT'Y GEN. 166 (April 4, 1975); 1952-54 LA. OP. ATT'Y GEN. 105 (December 17, 1952).

82. 317 So. 2d 247 (La. App. 3d Cir. 1975).

1974 constitution.<sup>83</sup> However, it will be applicable to sentences completed after December 31, 1974.<sup>84</sup>

*Williams* in dictum also construed Article I, Section 20 which restores to a convicted person, first offender or not, "full rights of citizenship" "upon termination of state and federal supervision following conviction for any offense." In determining that the section would not preclude denial of a liquor license to a convicted person, the court relied on the development of the provision in the constitutional convention, particularly the deliberate change from "full rights" to "full rights of citizenship" in a debate in which the author of the amendment proposing the change indicated that the section as changed would not prevent legislation restricting the issuance of liquor licenses to persons who had been convicted of an offense.<sup>85</sup>

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83. See LA. CONST. art. XIV, § 26.

84. *Id.* art. XIV, § 35.

85. PROCEEDINGS, Sept. 8, 1973 at 57-62.