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## Public Law: Louisiana Constitutional Law

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## LOUISIANA CONSTITUTIONAL LAW

Lee Hargrave\*

### EQUAL PROTECTION—SEX DISCRIMINATION

Under both the federal and state constitutions, discrimination based on sex is subject to lower scrutiny than discrimination based on race.<sup>1</sup> The United States Supreme Court nonetheless has found several instances of impermissible sex discrimination in recent years; however, the Louisiana Supreme Court has yet to uphold a major sex discrimination attack since the adoption of the 1974 constitution, which prohibits arbitrary, capricious or unreasonable discrimination based on sex. Particularly troublesome have been the alimony provisions of the Civil Code, alimony pendente lite under article 148 and alimony after divorce under article 160, both of which are available only to women and paid only by men. This discrimination against men has been upheld in two recent decisions.

Article 148 alimony was at issue in *Williams v. Williams*,<sup>2</sup> which produced three well-reasoned opinions. Justice Marcus' majority opinion recognizes the fact that most married couples have a community property regime which deprives the wife of control over community assets, putting her at a disadvantage in accumulating funds which could be used for her support pending the litigation. The wife's earnings become part of those community funds. Though her earnings while living apart are hers, she does not obtain control over her half of the community assets until rendition of a judgment of separation and effectuation of a partition. In this situation, a substantial compensation-for-lack-of-control-of-community-funds justification exists to support Justice Marcus' view that "it was reasonable for the legislature to seek to afford her special protection during the final (and often nonamicable) stage of the community's existence."<sup>3</sup>

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1. See generally Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 6 (1974).

2. 331 So. 2d 438 (La. 1976).

3. *Id.* at 441.

Justice Calogero's dissent, however, demonstrates that even granted this valid purpose, the statute is overbroad. The alimony pendente lite is available even if the couple did not have a community property regime; even if the community is insolvent; even if the wife has substantial separate property; even if the wife is currently earning funds over which she has control; and even past the rendition of a judgment of separation which terminates the community. Since the facts in *Williams* involved alimony pending a suit for separation (rather than after division of the community) between a couple subject to a community property regime, the majority's justification fits the situation before the court. However, Calogero's arguments are valid in instances in which the community property justification is not present. The result is that article 148 is not unconstitutional on its face, but that it cannot be constitutionally applied in some fact situations.

Additionally, the *Williams* majority's justification will have to be reexamined shortly in light of new legislation making the wife an equal manager, with the husband, of community property. No longer will it necessarily be accurate to conclude that article 148 alimony compensates for prior lack of control of community assets.

Justice Dennis' concurring opinion in *Williams* is the most intriguing. He cited *Kahn v. Shevin*,<sup>4</sup> which upheld granting a tax exemption to widows but not to widowers on the ground that favorable treatment for women was compensation for past economic discrimination against them. He then stated that the permissible object of article 148 is "the reduction of the disparity between the economic capabilities of a man and a woman—a disparity which is likely to be exacerbated for a wife during separation and divorce proceedings."<sup>5</sup> This approach is broader than that of the majority, for it does not depend on specific disabilities of the community property regime but rather emphasizes the general discrimination against women in job markets and salary levels. However, the *Bakke*<sup>6</sup> decision

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4. 416 U.S. 351 (1974). See *Califano v. Webster*, 430 U.S. 313 (1977).

5. 331 So. 2d at 442 (Dennis, J., concurring).

6. 98 S. Ct. 2733 (1978).

may weaken Justice Dennis' argument; the reluctance of the *Bakke* court to embrace designed discrimination against whites as a method of compensating blacks for prior discrimination may portend the erosion of the *Kahn* position in matters of sexual discrimination. Also weakening the *Kahn* rationale is the additional consideration that it involved taxation matters, a field in which the states have traditionally been given great leeway.

Article 160 permanent alimony presents more difficult problems, for it cannot rest on the rationale of compensating for lack of control over community assets; justification of its discrimination must rest on acceptance of the principle that the state has a strong interest in reverse discrimination to compensate for past discrimination against women generally. However, in his first hearing opinion in *Loyacano v. Loyacano*,<sup>7</sup> Justice Dennis did not apply the compensatory rationale; and he concluded that article 160 alimony was not reasonable discrimination. Though Chief Justice Sanders' rehearing opinion for three members of the court concludes that *Kahn v. Shevin's* rationale is adequate to support the discrimination, it appears that four members of the court thought otherwise.<sup>8</sup> The constitutionality of article 160 is further put in doubt by the debates surrounding the adoption of article I, section 3 of the Louisiana Constitution, which show rather clearly that the new provision would make such alimony unconstitutional.<sup>9</sup> Indeed, basis exists from the committee comments to article I, section 3 for the argument that the provision was meant to prohibit the use of the benign discrimination rationale: "Rather, this provision is intended both to prohibit forced segregation and to outlaw new

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7. 358 So. 2d 304 (La. 1978).

8. *Id.* at 317 (Dennis, J., concurring).

9. VI RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: CONVENTION TRANSCRIPTS 1016-1030. Delegate Perkins stated her opposition to the equal protection guarantee largely because she understood it as depriving women of protective legislation. She said: "Alimony after divorce would probably be eliminated totally because we would be putting a total mutual support provision in our constitution." *Id.* at 1019. Several of the lawyer-delegates debated the equal protection guarantee mentioning "Article 160" several times and indicating it would fall. *Id.* at 1016, 1022, 1024 (see especially the Roy-Juneau exchange).

forms of 'reverse discrimination' such as the imposition of quotas."<sup>10</sup>

*Loyacano*, however, does not invalidate article 160; the case is a complex one that eventually, after a rehearing and a total of eight opinions, upheld an alimony award against a former husband. The problems in the case, however, center on the relief to be provided when unreasonable discrimination is found.

On first hearing, the prevailing opinion by Justice Dennis reasoned that article 160 was unconstitutional, but that the court could remedy the defect by invoking article 21 of the Civil Code<sup>11</sup> to allow alimony to either needy spouse. Other members of the court objected to this approach as being improper judicial lawmaking and contended that article 21 could not be invoked because the text of the Code was clear.<sup>12</sup> It is submitted that the problem of relief for the unreasonable discrimination could have been approached more simply, without the need for the complicating conflicts over the proper role of article 21 of the Civil Code, or the injection of notions of improper judicial lawmaking.

A simpler approach issues from basic constitutional theory. The constitution itself is the authority for the court acting in a case such as this; when a law discriminates, the constitution demands that the discrimination cease. That demand, in most instances, can be met either by invalidating the statute or extending the benefit to the excluded class. Here, while denying alimony to both spouses would end the inequity, so would providing alimony to a needy spouse, regardless of sex. Nothing in the constitution compels one result over the other.<sup>13</sup> The fact that a litigant asks for one solution ought not

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10. See OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1973 at 3 (July 6, 1973). *But see* Hargrave, *supra* note 1, at 1, 10 n.40.

11. LA. CIV. CODE art. 21 states: "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."

12. 358 So. 2d at 312 (Marcus, J., concurring); *id.* (Sanders, C.J., dissenting); *id.* at 317 (Calogero, J., dissenting).

13. See *Stanton v. Stanton*, 421 U.S. 7 (1975), wherein different ages of majority in Utah—eighteen for females and twenty-one for males— were held improper by the

to bind the court, for the accidental and irrelevant matter of who reaches the courthouse first ought not to be decisive.

The court's decision as to which relief to provide ought to be consistent with general legislative purposes and policy. Here, it is rather clear that the legislative purpose is to have some alimony scheme in effect; the court would be effectuating that purpose by allowing payment to any needy spouse. It is no more disrespectful to the legislature to refuse to apply article 160 at all and grant no alimony than it would be to give the constitution effect by allowing alimony to needy ex-spouses of either sex; moreover, the latter would be more consistent with the legislative policy of preferring citizen responsibility to state responsibility for the care of such needy persons. The Maine Supreme Court recently took this approach in *Beal v. Beal*.<sup>14</sup>

In virtually all of the United States Supreme Court cases reversing legislative discrimination of this type, the approach has been to extend the benefits to the deprived class. In the cases in which denial of social security benefits was found to be unconstitutional because of sex discrimination, the Court did not abolish the benefit program involved, but instead extended it to the excluded class.<sup>15</sup> The normal relief in race discrimination cases is to extend the formerly denied benefit. In *Levy v. Louisiana*<sup>16</sup> the discrimination against illegitimates was ended by extending the benefits of the wrongful death statute to them. In the same way here, the affluent husband would have no claim to be relieved of alimony; but a needy ex-

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Supreme Court. Justice Blackmun noted that it was for the state courts to decide how to eliminate the inequality, by choosing either eighteen or twenty-one as the age of majority for both sexes, and the case was remanded. The trial court chose age twenty-one, but the Utah Supreme Court reversed and restored the original construct on the ground that only females were before the court. On a second appeal, the United States Supreme Court found that solution inconsistent with its 1975 decision and again remanded to allow the state courts to choose a uniform age of majority for both males and females. *Stanton v. Stanton*, 429 U.S. 501 (1977).

14. 47 U.S.L.W. 2041 (Me. 1978). See also *Orr v. Orr*, 46 U.S.L.W. 3621 (1978) (pending in United States Supreme Court); 351 So. 2d 906 (Ala. 1977); 351 So. 2d 904 (Ala. App. 1977). (*Orr v. Orr*, 99 S. Ct. 1102 (1979), was decided by the Supreme Court after this article was written.)

15. *Califano v. Goldfarb*, 430 U.S. 199 (1977). See also *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

16. 391 U.S. 68 (1968).

husband should still have the opportunity to assert his claim of discrimination if he is denied alimony from an affluent ex-wife. The possibility is still open after *Loyacano*.

Of course, the state legislature can always step in later and decide the matter the other way—so long as equality is maintained.<sup>17</sup> This ability should further lessen the court's concern with invading the legislative province.

Reform of the community property regime to remove the existing inequalities imposed on the wife has been provided by a statute that will be effective in 1980, lessening the pressures on the courts to remedy those inequalities. Even so, the supreme court in *Corpus Christi Credit Union v. Martin*<sup>18</sup> went to great lengths to avoid a determination of constitutional questions related to the husband's management powers over the community. Three dissenters argued that the inequality was unconstitutional. Suffice it here to say that when and if the question is decided, little doubt exists that the decision must be to hold many features of the system to be without rational bases.<sup>19</sup> It is also likely that the argument that the wife has voluntarily contracted the disabilities will not stand in all cases.<sup>20</sup> It is also true that the decision to recognize the uncon-

17. *Palmer v. Thompson*, 403 U.S. 217 (1971), allowed the city of Jackson, Mississippi to close its public swimming pools after they had been ordered desegregated. Justice Black's opinion found equal treatment for both races since neither had access to the public pools.

18. 358 So. 2d 295 (La. 1978).

19. See Bilbe, *Constitutionality of Sex-Based Differentiation in the Louisiana Community Property Regime*, 19 Loy. L. Rev. 373 (1973).

20. *Trimble v. Gordon*, 430 U.S. 762, 775 n.16 (1977):

Appellees characterize the Illinois intestate succession law as a "statutory will." Because intent is a central ingredient in the disposition of property by will, the theory that intestate succession laws are "statutory will" based on the "presumed intent" of the citizens of the State may have some superficial appeal. The theory proceeds from the initial premise that an individual could, if he wished, disinherit his illegitimate children in his will. Because the statute merely reflects the intent of those citizens who failed to make a will, discrimination against illegitimate children in intestate succession laws is said to be equally permissible. The term "statutory will," however, cannot blind us to the fact that intestate succession laws are acts of States, not of individuals. Under the Fourteenth Amendment this is a fundamental difference.

Even if one assumed that a majority of the citizens of the State preferred to discriminate against their illegitimate children, the sentiment hardly would be unanimous. With respect to any individual, the argument of knowledge and

stitutional nature of the scheme can be made prospective so as to minimize the disruptive effect of the statute.<sup>21</sup>

But that does not end the inquiry. *Martin* also raises basic issues with respect to the nature of the court's role in exercising judicial review of legislation. It must be remembered that the courts are not platonic guardians of constitutional values who make general declarations about the constitutionality of laws. They do not decide abstract issues in abstract cases. They decide on requests for specific relief from specific plaintiffs in specific fact situations. Indeed, even if the whole community property system were found to be without rational bases, the inquiry is not ended, for there are many couples who voluntarily and knowingly came under the community property regime after having decided not to enter into an antenuptial contract. These couples have effectively waived their rights to be treated equally. Even if a court would accept the general view that the community regime discriminates against women without rational bases, or that many features of the system are without rational basis, it would still have to inquire whether the specific litigant spouse knowingly waived his or her rights. Though the "contractual theory" does not take us as far as its proponents wish in all instances, it does require a recognition that many couples did knowingly accept the community system and cannot contest its application. And indeed, even absent this, some wives may have ratified, or may later ratify, the transactions to which they were not a party.

#### SUBSTANTIVE DUE PROCESS

Though substantive due process has ostensibly been abandoned by the United States Supreme Court as a tool for scrutinizing legislation, it never truly disappeared from the analyti-

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approval of the state law is sheer fiction. The issue therefore becomes where the burden of inertia in writing a will is to fall. At least when the disadvantaged group has been a frequent target of discrimination, as illegitimates have, we doubt that a State constitutionally may place the burden on that group by invoking the theory of "presumed intent." See *Eskra v. Morton*, 524 F.2d at 12-14 (Stevens, J.).

21. See 358 So. 2d at 302.

cal arsenal of the state supreme courts.<sup>22</sup> In Louisiana, as in other states, courts have been willing to hold statutes unconstitutional even in the absence of specific constitutional prohibitions if they determine the legislation to be "unreasonable."

It was not unusual for the Louisiana Supreme Court to decide in 1915 that regulating hours of workers was an unreasonable restriction of freedom of contract;<sup>23</sup> but in holding a junkyard fencing ordinance unconstitutional under the fourteenth amendment and state constitution due process clauses in 1939, the court departed from the federal trend. The ordinance, expressly designed to promote pedestrian safety on sidewalks and streets around junkyards, was ruled unnecessarily restrictive because it required the fence to be made of wood.<sup>24</sup> It was indeed a departure from the general view to decide in 1949 that a statute requiring a minimum markup on liquor sales was an unreasonable regulation of individual economic freedoms.<sup>25</sup> In recent years, the court has used substantive due process to overturn some spot zoning ordinances;<sup>26</sup> most recently, the court in *City of Shreveport v. Curry*<sup>27</sup> invalidated an ordinance prohibiting frog gigging<sup>28</sup> on Cross Lake for 11

22. See Linde, *Without "Due Process" Unconstitutional Law in Oregon*, 49 ORE. L. REV. 125 (1970); Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

23. *State v. Legendre*, 138 La. 154, 70 So. 70 (1915). See *State v. Barba*, 132 La. 768, 61 So. 784 (1914); *Lochner v. New York*, 198 U.S. 45 (1905).

24. *City of New Orleans v. Southern Auto Wreckers, Inc.*, 193 La. 895, 192 So. 523 (1939), wherein the court found no reason why a chain or any other fence would not also have promoted pedestrian safety around the junkyards. According to the court, a board fence does not "tend in any appreciable or appropriate manner toward the accomplishment of the object or purpose for which the city's police power was exercised." *Id.* at 907, 192 So. at 527.

25. *Schwegmann Bros. v. Louisiana Bd. of Alcoholic Beverage Control*, 216 La. 148, 43 So. 2d 248 (1949). See *Reynolds v. Louisiana Bd. of Alcoholic Beverage Control*, 249 La. 127, 185 So. 2d 794 (1965).

26. *Four States Realty Co., Inc., v. City of Baton Rouge*, 309 So. 2d 659 (La. 1975). See also *Trustees v. Westlake*, 357 So. 2d 1299 (La. App. 3d Cir. 1978); *Konrad v. Parish of Jefferson*, 352 So. 2d 361 (La. App. 4th Cir. 1977).

27. 357 So. 2d 1078 (La. 1978).

28. "Frog gigging is a method of taking frogs with a mechanical device, an activity accomplished, pertinent to the case under consideration, while in a boat close to the shore line. The device is essentially a grabber triggered by a spring lever. It grabs or 'gigs' the frog but does not puncture the frog's skin or redden its meat." *Id.* at 1079 n.1.

months of the year, characterizing the provision as one "which exceeds the bounds of reasonableness . . . ." <sup>29</sup>

The danger of a substantive due process analysis, of course, is that it can be subjective, leaving to the judges the determination of the "reasonableness" or "arbitrariness" of legislation without the guide of clear constitutional text. Idiosyncratic decisions are possible; a problem of unpredictability arises. One could well take the position of Hugo Black and argue with some force that courts ought not engage in such activities at all. <sup>30</sup> Black's view, however, is not the Louisiana tradition and not the view adopted by the 1974 constitution. Article I, section 2 was adopted with the understanding that it included substantive due process and article I, section 4 states that property rights are subject to "reasonable statutory restrictions and the reasonable exercise of the police power." <sup>31</sup>

The dangers of judicial subjectivity can be minimized if the courts will, overtly and openly, articulate their reasons for concluding that a statute is reasonable or not. Detailed and specific opinions are the best way to minimize subjective decisions and the "gut reaction" which results in lack of predictability and certainty. <sup>32</sup> The articulation needed involves determination of the individual interest abridged, analysis of the governmental interests in regulating the activity concerned, and a weighing of the two interests to determine which is more important. History, tradition, similar statutes, expressions of basic values from other statutes, alternative solutions, moral principles—these and many other considerations all contribute to the analysis.

Significant in *Curry* was the willingness to examine the governmental interest in some depth instead of relying on presumptions of rationality. The ordinance did not have a purpose related to conservation—the one month when frog gigging was allowed was not related to the biological cycle of frogs. In fact,

29. *Id.* at 1081.

30. See *Rochin v. California*, 342 U.S. 165 (1952) (Black, J., dissenting); *Adamson v. California*, 332 U.S. 46 (1947) (Black, J., concurring).

31. LA. CONST. art. I, § 4 (emphasis added). See Hargrave, *supra* note 1, at 4. *The Work of the Appellate Courts for the 1974-1975 Term—Louisiana Constitutional Law*, 36 LA. L. REV. 533, 534 (1976).

32. R. WASSERSTROM, *THE JUDICIAL DECISION* 28, 158 (1961).

not all frog hunting was prohibited; only the taking with mechanical devices was made an offense. The ordinance was not related to health concerns—the city water supply came from the lake, but the ordinance had no relation to keeping the water clean. If the aim was to prohibit the annoying of riparian residents, it was inconsistent with ordinances allowing waterskiing, fishing, and taking frogs until 10 p.m. Also weakening the local governmental interest was the possibility of state preemption. *Curry* is a good step in the direction of close analysis of interests and an overt, stated weighing of those interests. The *Curry* court placed great weight on the individual interest in frog gigging. While one might quarrel with the weight given this interest, the Louisiana tradition does place much importance on *laissez faire* economic notions<sup>33</sup> and indeed indicates an affinity to John Stuart Mill's notions on liberty.<sup>34</sup>

The court indicated that its inquiry was "whether there is a real and substantial relationship between the regulation imposed and the prevention of injury to the public or the promotion of the general welfare."<sup>35</sup> This may be seen by some as a *means* analysis, a determination of whether the regulation pro-

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33. See *Schwegmann Bros. v. Louisiana Bd. of Alcoholic Beverage Control*, 216 La. 148, 43 So. 2d 248 (1949).

34. The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He can not rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting with him any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

J. MILL, *THREE ESSAYS* 14-15 (Oxford Univ. Press 1975).

35. 357 So. 2d at 1081.

perly proceeds toward meeting a stated goal. It also includes, however, an *ends* analysis, determining the reasonableness of the governmental purpose. A statute establishing minimum markups on commodities would be an effective means of increasing the profits of sellers, for example, but such a purpose would be governmental interference with the pricing system.<sup>36</sup> The result in *Curry* seems to suggest, too, that the absence of rational governmental *ends* is grounds to allow a normally unimportant individual interest to predominate over the governmental enactment.

#### RIGHT TO PROPERTY—CONTRABAND

A triple-barreled attack in *State v. 1971 Green GMC Van*<sup>37</sup> succeeded in overturning the provisions allowing forfeiture of “[a]ll conveyances including aircraft, vehicles, or vessels which are used or intended for use, to transport, or in any manner to facilitate the transportation” of any controlled dangerous substance.<sup>38</sup>

Due process was violated because forfeiture was allowed without proof of conviction of the underlying drug offense, without proof of the legality of the search or seizure that uncovered the drugs, and without proof that the vehicle owner knew or should have known of the vehicle’s involvement in the offense. “Additionally and independently,”<sup>39</sup> the court held that the statute violated article I, section 4 of the 1974 constitution which permits the right to property to be subject only to “reasonable statutory restrictions” and “the reasonable exercise of the police power.” The court judged that the statute contained unreasonable restrictions.

Under these two rationales, it might be possible to devise a new forfeiture statute under which proper hearings are held, the heavier criminal burden of proof is required, a mental element is held necessary, and the like. Indeed, the legislature has

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36. See *Schwegmann Bros. v. Louisiana Bd. of Alcoholic Beverage Control*, 216 La. 148, 43 So. 2d 248 (1949).

37. 354 So. 2d 479 (La. 1977).

38. LA. R.S. 40:989(A)(4)(Supp. 1972).

39. 354 So. 2d at 486.

sought to do so.<sup>40</sup> However, this view fails to consider the third ground of support the court used in the instant case, the provisions of article I, section 4 that "[p]ersonal effects, other than contraband, shall never be taken." This provision prohibits forfeitures of vehicles, regardless of the procedure used, unless the vehicles themselves are contraband. The state sought to argue that vehicles, while not themselves contraband, were "derivative contraband" because of their relationship to criminal activity. The supreme court disagreed: "In short, these vehicles are not contraband . . . ."<sup>41</sup> This seems to settle the issue. Action by the court in *Baudoin v. Fonseca*<sup>42</sup> in remanding for reconsideration a court of appeal decision accepting the derivative contraband theory seems to reinforce that conclusion.

#### ENFORCEMENT OF JUDGMENTS AGAINST GOVERNMENTAL UNITS

Though the 1974 constitution ends sovereign immunity in contract and tort, it also provides that "[n]o judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid except from funds appropriated therefor by the legislature or by the political subdivision against which judgment is rendered."<sup>43</sup> The effect of this provision is that government property cannot be seized to satisfy a judgment, even if that property is part of the private domain of the governmental unit.<sup>44</sup> Since the decision to appropriate funds involves the highest of discretionary activities a government exercises,<sup>45</sup> it would be difficult to support a mandamus ordering the governmental unit to make the appropriation. *Fontenot v. State Department of Highways*<sup>46</sup> recognizes this principle.

The anomalous result of allowing suit and liability but

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40. 1978 La. Acts, No. 730, amending LA. R.S. 40:989 (Supp. 1972).

41. 354 So. 2d at 487.

42. 347 So. 2d 1246 (La. App. 1st Cir.), writ granted and case remanded, 350 So. 2d 904 (La. 1977).

43. LA. CONST. art. 12, § 10(C).

44. *Foreman v. Vermilion Par. Police Jury*, 336 So. 2d 986 (La. App. 3d Cir. 1976), noted in 37 LA. L. REV. 982 (1977).

45. See *National League of Cities v. Usery*, 426 U.S. 833 (1976).

46. 358 So. 2d 981 (La. App. 1st Cir. 1978). The appellate court held that a police

providing no coercive means to enforce judgments will remain until the legislature invokes its powers to “provide for the effect of a judgment”<sup>47</sup> against governmental units and devises a mechanism to force agencies and subdivisions of the state to comply with judgments against them.

However, in some instances, an unsatisfied judgment holder may secure relief for violation of due process or equal protection. Under the federal civil rights acts,<sup>48</sup> suits against individual members of a police jury or city council would be possible since their actions are considered state action. If, for example, judgments of local parish citizens were paid but other judgments were not, unreasonable discrimination based on residence would provide basis for recovery. If a city or a parish refused to pay when it had the funds to do so, the invasion of the individual interest would seem to be a substantial one, and the agency ought to be made to supply a rational basis for nonpayment; if none is forthcoming, it would appear that due process could be invoked.<sup>49</sup>

#### RESTORATION OF RIGHTS AND AUTOMATIC PARDONS

Article I, section 20 restores to all convicted persons “[f]ull rights of citizenship . . . upon termination of state and federal supervision following conviction for any offenses.” The constitutional convention debates on the section support the view that its restoration of rights after conviction of an offense

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jury against whom judgment had been rendered cannot be required to submit to a judgment-debtor rule. The supreme court ordered the judgment-debtor rule to proceed but without addressing the question of execution in any way. The matter was later compromised by the parties. 355 So. 2d 324 (La. 1978).

47. LA. CONST. art. 12, § 10(C).

48. See 42 U.S.C. § 1983 (1974). See also *Monell v. New York City Dept. of Social Services*, 98 S. Ct. 2018 (1978), which permits actions against municipal governments under § 1983:

Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers.

*Id.* at 2035-36. This decision overruled *Monroe v. Pape*, 365 U.S. 167 (1960).

49. See text at note 22, *supra*.

does not preclude use of that offense to support enhanced punishment under the habitual offender statute.<sup>50</sup> Using that legislative history, the supreme court clearly so held in *State v. Selmon*.<sup>51</sup>

More difficult, however, is the question of whether a felony for which a first offender has received an automatic pardon under article IV, section 5(E)(1) may be used to enhance punishment for a subsequent felony. Prior cases seem to hold that a gubernatorial pardon precludes use of an offense under the habitual offender statute;<sup>52</sup> since the constitution couples in one subsection the references to both the gubernatorial pardon and the automatic pardon without making a distinction between the effects of the two, it would seem they should have the same effect.<sup>53</sup> The debate furnishes no basis for different effects of the two pardons.<sup>54</sup> However, *State v. Adams*<sup>55</sup> takes the opposite view and holds that an automatically pardoned first offense felony can be considered in applying the habitual offender statute's enhanced punishment. The opinion also seems to assume continuation of the view that a gubernatorial pardon precludes an offense from being so used. The reasons for the court's decision are not totally clear.

The opinion in *Adams* states that a gubernatorial pardon based on the required recommendations of a pardon board "has presumably been given the careful consideration of several persons who have taken into account the circumstances surrounding the offense, and particular facts relating to the individual,"<sup>56</sup> while an automatic pardon does not involve such consid-

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50. *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Louisiana Constitutional Law*, 37 LA. L. REV. 480 (1977); Hargrave, *supra* note 1, at 63. VII RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: CONVENTION TRANSCRIPTS 1196-1203.

51. 343 So. 2d 720 (La. 1977).

52. *State v. Childers*, 197 La. 715, 2 So. 2d 189 (1941); *State v. Lee*, 171 La. 744, 132 So. 219 (1931).

53. *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Louisiana Constitutional Law*, 37 LA. L. REV. 430, 492 (1977).

54. V RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION 1973: CONVENTION TRANSCRIPTS 582, 589; VI RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: CONVENTION TRANSCRIPTS 591-601.

55. 355 So. 2d 917 (La. 1978).

56. *Id.* at 922.

eration. However, since the automatic pardon is available only to first offenders, it is just as rational to conclude that such screening is not necessary as to them. Indeed, it is just as reasonable to conclude that the automatic pardon should be given greater effect than the gubernatorial pardon because the former is confined to first offenders and the latter is necessary only for repeat offenders. The court's view frustrates the convention's policy of eliminating the necessity of first offenders hiring lawyers and having to expend sums of money to obtain the gubernatorial pardon.<sup>57</sup>

Citing old Louisiana cases, the court pointed out that a gubernatorial pardon has been considered as restoring the individual to the status of innocence of crime; that view is the basis for the jurisprudence precluding use of a pardoned offense from use in enhancing punishment. However, this basis reflects an older view of the use of the pardoning power that no longer holds. In modern times, pardons are given not so much as a recognition of innocence, or even expiation, but as devices to remove civil disabilities attached to conviction.<sup>58</sup> They are seldom granted as a means of vindicating a person wrongly convicted.

Perhaps the best way out of this morass is to abandon the old view, a minority view in the United States, that a gubernatorial pardon precludes application of the habitual offender statute. This abandonment would result in a more realistic view of the effect of a pardon.<sup>59</sup> Indeed, to the extent that the convention debates center on the subject, they show confusion as to the effects of a gubernatorial pardon, with some prominent delegates stating that a pardon by the governor does not preclude the application of the habitual offender law.<sup>60</sup> At the least, there is little support for the view that the constitution

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57. Hargrave, *supra* note 1, at 64.

58. See Comment, *Collateral Consequences of Conviction*, 23 VAND. L. REV. 929 (1970).

59. Miller, *Declaration of Rights: Criminal Provision*, 21 LOY. L. REV. 43 (1975).

60. See comments of Delegate Jack that a pardon precludes application of the multiple offender law, VII RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: CONVENTION TRANSCRIPTS 1197, 1199; and comments of Delegate Roy that a pardon does not. *Id.* at 1197. See also 355 So. 2d at 922 n.4 (discussion of art. I, sec. 21 reflecting these positions).

requires that an offense pardoned by the governor cannot be used; and, to the extent the court was swayed to hold as it did in *Adams* because of a change in the perceptions of pardons, it ought to extend that same policy to gubernatorial pardons not based on a person's innocence of the crime.

### FREE SPEECH

Though the political and policy concerns<sup>61</sup> underlying *Kidder v. Anderson*<sup>62</sup> are subject to debate, the legal issues involved in the case were quite simple, and the supreme court's decision was a straightforward application of existing first amendment principles. The issue involved was whether a reporter acted with "malice" in *New York Times v. Sullivan* terms—did he know the information was false or did he print the story with reckless disregard as to whether the information was true or not. The reporter had published accusations that an acting police chief had accepted payoffs from barroom proprietors and gamblers; that he had an interest, in the 1950's, in a house of prostitution; and that he had used the influence of his office for personal gain. The accusations came primarily from disgruntled police officers opposed to making the acting chief's appointment permanent and from gamblers and bar owners.

In light of *St. Amant v. Thompson*,<sup>63</sup> in which the United States Supreme Court reversed a Louisiana Supreme Court decision, it would seem clear that the reporter was justified in relying on those sources. In *St. Amant* a political candidate was protected in relying on the statements of a participant in a labor union controversy relating to the relationship between a

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61. In a speech on February 2, 1978, Governor Edwin W. Edwards strongly protested the *Kidder* decision stating that it was a "slap in the face to public officials."

"Elected officials don't give up their humanity because they are lucky enough to be elected and crazy enough to serve," he said.

Edwards asserted that public officials, as well as other citizens, are entitled to rights of due process of law. Without protection from defamation he feared that "only bums, incompetents and crooks" would seek public office in the future. *Baton Rouge Morning Advocate*, Feb. 3, 1978, § A, at 14, col. 1.

62. 354 So. 2d 1306 (La. 1978).

63. 390 U.S. 727 (1968).

union official and a sheriff's deputy. Little exists to distinguish that case from the *Kidder* facts. As Justice Tate pointed out:

That police officers were disgruntled and antagonistic to their proposed chief is not necessarily an indication of their unreliability as informants. In fact, some of these very police officers now attacked as unreliable have often appeared as witnesses in criminal prosecutions by the state, with their credibility vouched for by officers of the state.<sup>64</sup>

In more basic terms, the *Kidder* situation, in which a newspaper was reporting matters relating to the qualifications of a public official, fits almost perfectly the basic *New York Times* principle of commitment to open, robust public debate on public issues. Indeed, the surprising aspect of this litigation was that a simple disposition in favor of the reporter was not made in the district court or the court of appeal.<sup>65</sup>

In terms of reliance on statements "from gamblers and barmaids as to payoffs or bribes," Tate also pointed out:

Just as the state is rarely in a position to rely upon the testimony of church wardens and Sunday school teachers to prove criminally corrupt activities by public officials, so newspaper investigation of reports of corruption must often obtain firsthand corroboration from those present in the barrooms or gambling houses, rather than from citizens who spend their time only at home, in church, or at work in less colorful occupations.<sup>66</sup>

When a reporter confronts two persons who state two totally different facts, is he to ignore both because he cannot be sure of the truth? Or is he to report what each side says? The latter is certainly the first amendment's choice.

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64. 354 So. 2d at 1309.

65. Act 699 of 1977 amended LA. CODE CIV. P. art. 1810 to allow a motion for directed verdict, a procedural device not available at the trial of the case.

66. 354 So. 2d at 1309.

