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EQUAL PROTECTION—THE LOUISIANA EXPERIENCE IN DEPARTING FROM  
GENERALLY ACCEPTED FEDERAL ANALYSIS

In 1985, the Louisiana Supreme Court in *Sibley v. Board of Supervisors of Louisiana State University*<sup>1</sup> reinterpreted the Louisiana Constitution's individual dignity clause, our state's equal protection provision.<sup>2</sup> The federal three-tiered approach for determining whether a statute violates an individual's right to equal protection of the law, which had formerly been employed by Louisiana courts, was abandoned by the supreme court. The court recognized that the language and history of the individual dignity clause required that the individual enjoy broader protections under the clause than under the equal protection clause of the Fourteenth Amendment to the United States Constitution.<sup>3</sup> Likewise, the court, reflecting its own dissatisfaction with the federal analysis, acknowledged the criticisms often directed at that method.<sup>4</sup> The supreme court formulated a new approach that afforded the intended level of protection and avoided the pitfalls inherent in the federal approach.<sup>5</sup>

The purpose of this paper is to examine the use of the *Sibley* test by both the Louisiana Supreme Court and the lower appellate courts.

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1. 477 So. 2d 1094, rev'g 462 So. 2d 149 (La. 1985). *Sibley* in this paper refers to the case as decided on rehearing. When the paper discusses the original hearing opinion, it will be so noted.

2. La. Const. art. I, § 3, provides:

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.

3. 477 So. 2d at 1107. See Records of the Louisiana Constitutional Convention of 1973. Convention Transcripts Vol. VI, Aug. 29, 1973, p. 1017 and Aug. 30, 1973, p. 1029.

4. These criticisms included complaints of rigidity in deciding which "level of scrutiny" applied to a challenged law, and complaints that the law in question is often pigeonholed into a particular level of scrutiny, thereby precluding any substantive analysis. See B. Schwartz, *Constitutional Law* 374 (2d ed. 1979); Shaman, *Cracks in the Structure: The Coming Breakdown of Levels of Scrutiny*, 45 *Ohio St. L.J.* 161 (1984). See generally L. Tribe, *American Constitutional Law* § 16-2 (2d ed. 1988). Level of scrutiny refers to the federal three-tiered system wherein the court determines which level of review (minimal, strict or intermediate) it will use in considering the constitutionality of a statute. For an application of that test, see *Sibley*, 462 So. 2d 149 (La. 1985).

5. 477 So. 2d at 1108.

An effort is made to determine whether the new method has created any substantive change in Louisiana equal protection analysis, and whether the *Sibley* test has achieved the desired goal of protecting the individual more than the federal analysis had.<sup>6</sup>

#### EQUAL PROTECTION IN LOUISIANA BEFORE *SIBLEY*

##### *Before 1974*

Prior to the 1974 Constitution, Louisiana law contained no express guarantee of equal protection. Individuals with equal protection claims were protected only by the federal guarantee of equal protection found in the Fourteenth Amendment to the United States Constitution. Consequently, those claims were judged solely by the federal standard.

The hallmark of the federal model is the three-tiered system under which challenged laws are scrutinized.<sup>7</sup> The three levels generally are referred to as minimal, strict, and intermediate. A court begins its analysis of a challenged law by choosing the appropriate level of scrutiny based upon the unique characteristics of the law challenged.

*Strict scrutiny* is applied when the law<sup>8</sup> under review adversely affects

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6. This comment addresses almost exclusively the jurisprudence that has arisen under the auspices of the *Sibley* test; however, there is an even larger body of case law in which the courts have been completely unaware that *Sibley* is "on the books" and now controls in the equal protection arena. See, e.g., *Jones v. Thibodeaux*, 488 So. 2d 945 (La. 1986); *Succession of Davis*, 509 So. 2d 838 (La. App. 1st Cir.), writ denied, 513 So. 2d 821 (1987); *Jenkins v. Whitfield*, 505 So. 2d 83 (La. App. 4th Cir.), writ denied, 506 So. 2d 114 (1987); *Redding v. Essex Crane Rental Corp. of Alabama*, 500 So. 2d 880 (La. App. 1st Cir. 1986), writ denied, 501 So. 2d 774 (1987); *Central Louisiana Bank & Trust Co. v. Avoyelles Parish Police Jury*, 493 So. 2d 1249 (La. App. 3d Cir. 1986); *Maltby v. Gauthier*, 489 So. 2d 396 (La. App. 5th Cir. 1986), rev'd on other grounds, 506 So. 2d 1190 (1987); *Lor, Inc. v. Martin Exploration Co.*, 489 So. 2d 1326 (La. App. 1st Cir.), writ denied, 493 So. 2d 1217 (1986).

7. This system's origins can be traced to the United States Supreme Court's reaction to the "court packing" plan that President Roosevelt threatened to use when portions of his New Deal legislation were invalidated as unconstitutional. The Court greatly reduced its previous role of judicial activism by adopting a deferential attitude toward Congress' legislation, giving it a presumption of constitutionality. See generally *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 75 S. Ct. 461 (1955); *West Coast Hotel v. Parrish*, 300 U.S. 379, 57 S. Ct. 578 (1937). While a detailed discussion of the finer points and nuances of the Supreme Court's three tiered analysis might be desirable at this juncture, commentators have been known to devote chapters to the subject. See generally J. Nowak, R. Rotunda and J. Young, *Constitutional Law* § 14 (3d ed. 1986); B. Schwartz, *supra* note 4, ch. 9; L. Tribe, *supra* note 4, § 16 (2d ed. 1988). For the purposes of this comment, this rather cursory overview should suffice.

8. Of course, the governmental action attacked may be something other than a piece of legislation. For clarity and brevity, *law* will be used as shorthand for all forms of governmental action that could be subject to an equal protection attack.

a "fundamental right"<sup>9</sup> or creates a "suspect classification."<sup>10</sup> Under this standard, the court does not presume the constitutionality of the law and will uphold it only if the discrimination is necessarily related to a compelling state interest. Many commentators have noted that when a reviewing court employs strict scrutiny, the result nearly always is fatal to the law under attack.<sup>11</sup>

The courts have applied an *intermediate scrutiny* level in situations when a "quasi-suspect classification"<sup>12</sup> is recognized. Intermediate scrutiny requires a showing that the law is substantially related to an important governmental interest.

Finally, courts use *minimum scrutiny* to determine the constitutionality of laws that do not impact a "suspect classification,"<sup>13</sup> a "quasi-suspect classification,"<sup>14</sup> or infringe upon a "fundamental right."<sup>15</sup> This deferential level of scrutiny requires the reviewing court to inquire whether the law is rationally related to the legislature's goal in enacting it; any conceivable rational relation<sup>16</sup> sustains the constitutionality of the law.

9. "Fundamental rights" deserving strict scrutiny include the following: the right to freedom of speech and association, see, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 78 S. Ct. 1163 (1958); the right to interstate movement and travel, see, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322 (1969); the right to vote, see, e.g., *Harper v. Virginia Bd. of Election*, 383 U.S. 663, 86 S. Ct. 1079 (1966); the right to fairness in criminal adjudication, see, e.g., *Mayer v. Chicago*, 404 U.S. 189, 92 S. Ct. 410 (1971); the right to procreation, see, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 62 S. Ct. 1110 (1942). See generally *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780 (1971) (including the right to privacy and the right to equal opportunity to litigate); *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011 (1970).

10. "Suspect classifications" include: race, see, e.g., *Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193 (1944), and ancestry or alienage, see, e.g., *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 96 S. Ct. 2562 (1976). Other classifications have been proposed as candidates for similar strict scrutiny, see *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 61, 93 S. Ct. 1278, 1310 (1973) (Stewart, J. concurring) (indigency); cf. *Gomez v. Perez*, 409 U.S. 535, 93 S. Ct. 872 (1973) (illegitimacy).

11. Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 *Harv. L. Rev.* 1, 8 (1972). See, e.g., *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 319, 96 S. Ct. 2562, 2569 (1976) (Marshall, J., dissenting); J. Nowak, R. Rotunda, and J. Young, *supra* note 7, § 14.3; L. Tribe, *supra* note 4, § 16-6. The *Sibley* court also acknowledged those criticisms. 477 So. 2d at 1105-06.

Only once has the Supreme Court upheld clear racial discrimination. See *Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193 (1944).

12. The primary example of a "quasi-suspect classification" is discrimination based on gender. See *Craig v. Boren*, 429 U.S. 190, 97 S. Ct. 451 (1976); cf. *Frontiero v. Richardson*, 411 U.S. 677, 93 S. Ct. 1764 (1973).

13. See *supra* note 10.

14. See *supra* note 12.

15. See *supra* note 9.

16. See, e.g., J. Nowak, R. Rotunda and J. Young, *supra* note 7, § 14.3, at 350,

Not surprisingly, most laws pass this test. Thus, the complaint often arises that minimum scrutiny amounts to no scrutiny at all.<sup>17</sup>

*The 1974 Constitution—The Individual Dignity Clause*

Louisiana's equal protection law begins with the inclusion of the individual dignity clause, Louisiana's express equal protection provision, in the Constitution of 1974. The Declaration of Rights committee, which authored the individual dignity clause, enumerated categories of protected classes in an effort to avoid perceived abuses by the courts in not affording enough protection to the individual.<sup>18</sup> The drafters intended that when a law that classifies on the basis of birth, age, sex, culture, physical condition, or political ideas or affiliations is challenged under the individual dignity clause, the person seeking to have the law upheld must prove the constitutionality of the law.<sup>19</sup> In the drafters' view, laws

stating that "if a classification is of this type [classifications of persons in terms of general economic legislation] the Court will ask only whether it is conceivable that the classification bears a rational relationship to an end of government which is not prohibited by the Constitution."

17. See, e.g., *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 319, 96 S. Ct. 2562, 2569 (1976) (Marshall, J., dissenting) ("For that test [mere rationality], . . . when applied as articulated, leaves little doubt about the outcome; the challenged legislation is always upheld.") See also *Sibley*, 477 So. 2d at 1105; *Shaman*, supra note 4. Professor Tribe has characterized the Supreme Court, using rational basis scrutiny, as employing "near-absolute deference to legislative judgment." L. Tribe, supra note 4, § 16-3, at 1445.

Recently, the Supreme Court, in occasionally striking down economic legislation or zoning ordinances, has handed down decisions where use of what purports to be a rational basis scrutiny has nevertheless had a bit of a "bite" to it. See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S. Ct. 3249 (1985); *United States Dept. of Agric. v. Moreno*, 413 U.S. 528, 93 S. Ct. 2821 (1973). See also *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 105 S. Ct. 2862 (1985). Cf. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278 (1973) (education is *not* a fundamental right for equal protection purposes).

18. As Delegate Chris J. Roy, one of the clause's authors, observed on the floor of the Constitutional Convention,

We feel that we have to enumerate these various rights because we think that our citizens are entitled to have our court protect them in the future. It's been too many times that even the Supreme Court of the United States has dodged the issue with respect to equal protection. We want to make sure that our justices can clearly understand that when you're going to discriminate against a person for any one of these categories, then the state must show a reasonable basis for it. We consider that even for the physical condition . . . That's the reason why we consider those categories, we don't want the courts to be confused anymore.

Records of the Louisiana Constitutional Convention of 1973, supra note 3, at 1017.

19. Convention Delegate Chris J. Roy, a member of the committee charged with drafting the individual dignity clause, noted:

I just thought of the other reason why we enumerated . . . if you're going to

classifying on the basis of race, religious ideas, beliefs, or affiliations should be unconstitutional on that basis alone. The Constitution of 1974 incorporated section 3 of article 1, the individual dignity clause.

Eleven years elapsed from the adoption of that clause until the supreme court handed down the *Sibley* opinion. During that time no court acknowledged that the Louisiana Constitution provided a vehicle for expanding its citizens' right to equal protection. Louisiana courts still used the federal three-tiered model to analyze claims of unequal treatment.<sup>20</sup>

#### THE *SIBLEY* FRAMEWORK

The supreme court charted its new course for equal protection in *Sibley*,<sup>21</sup> decided in September, 1985. The case involved a young woman who, while a patient of the LSU Medical Center in Shreveport, "suffered permanent, devastating mental and physical injuries"<sup>22</sup> caused by the malpractice of the attending staff psychiatrist.<sup>23</sup> Louisiana law limited malpractice awards against the state to an amount that was significantly lower than Ms. Sibley's actual damages.<sup>24</sup> The trial court and court of appeal had held that the statutory limitation applied in this case, and both courts had limited the plaintiff's recovery to the statutory maximum. Ms. Sibley appealed to the Louisiana Supreme Court, arguing the medical malpractice damage award cap violated her right to equal protection

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just not state the category, then a person who claims discrimination on a basis of any one of these things later on, has the burden of showing that he is in a class that is being discriminated against without that class having been specifically named. Once we name the class, the burden is not on that individual to prove that he is of a class against whom discrimination is being applied, but he simply goes into court, says I am discriminated against, I do fit into this category, and it shifts the burden of proof to the state to show the reasonable basis for the discrimination.

Id. at 1018.

20. See, e.g., *Sibley v. Board of Supervisors of Louisiana State University*, 462 So. 2d 149, 155, rev'd, 477 So. 2d 1094 (La. 1985); *Bazley v. Tortorich*, 397 So. 2d 475, 483 (La. 1981); *Everett v. Goldman*, 359 So. 2d 1256 (La. 1978). See also *Succession of Robins*, 349 So. 2d 276 (La. 1977). *Succession of Robins* was one of the first pronouncements by the supreme court after the new constitution was adopted. The court, rather perfunctorily, took notice of the new equal protection language contained in the individual dignity clause and then returned to the traditional federal analysis.

21. 477 So. 2d 1094 (La. 1985).

22. Id. at 1098.

23. The psychiatrist attending her case misdiagnosed Ms. Sibley's depression as psychosis. Anti-psychotic drugs were administered over a period of weeks, culminating in cardio-pulmonary arrest and massive brain damage.

24. Damages awards in these cases are limited to \$500,000.00. La. R.S. 40:1299.39 (Supp. 1988).

under article I, section 3 of the Louisiana Constitution.<sup>25</sup> On original hearing,<sup>26</sup> the supreme court affirmed the lower courts' holdings, finding no violation of equal protection. On rehearing, however, the court extensively revised its equal protection analysis. The case was remanded for the trial court to determine the constitutionality of the statute in light of the new test.<sup>27</sup>

The *Sibley* court based its action on two grounds. First, in its opinion, the supreme court echoed many commentators' objections to the federal approach, including the perceived rigidity of the federal framework, its internal inconsistency, and its tendency to retard constitutional analysis by diverting thought away from the weighing of interests inherent in deciding an equal protection issue.<sup>28</sup> Second, the drafters of the individual dignity clause had contemplated a change in favor of broader protections for the individual. Hence, the federal model was flawed and its use in applying the individual dignity clause did not accord with the intention of the drafters of the Louisiana Constitution. So, the court concluded, "[t]he federal jurisprudence should not be used as a model for the interpretation or application of that part of the Louisiana Declaration of Rights dealing with individual dignity."<sup>29</sup> To alleviate the perceived problems with the federal model and to afford the increased protection the drafters had intended, the court formulated a new framework that closely follows the wording of article I, section 3 of the Louisiana Constitution of 1974.

The court arranged this new analytical framework into three parts.<sup>30</sup> First, laws that classify persons by race or religious beliefs are to be "repudiated completely" because these laws make use of "absolutely forbidden classifications."<sup>31</sup> Second, laws that group individuals under one of the enumerated classifications of the second sentence of the individual dignity clause are presumed unconstitutional "unless the state or other advocate of the classification shows that the classification has a reasonable basis."<sup>32</sup> The proponent's burden is to prove that "the

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25. For a discussion of the argument that there was a violation of equal protection, see *infra* note 32.

26. 462 So. 2d 149 (La. 1985).

27. On remand, there was no further action taken by the trial court, the suit apparently being settled by the parties. "Although officially not a part of this record, we were advised that a compromise agreement was reached and that the district court took no further action in *Sibley*." *Deegan v. Raymond Int'l Builders, Inc.*, 518 So. 2d 1082 n.1 (La. App. 5th Cir. 1987).

28. *Sibley*, 477 So. 2d 1094, 1105 (La. 1985).

29. *Id.* at 1107.

30. *Id.* at 1109.

31. *Id.* at 1108.

32. *Id.* at 1107. For a list of these classifications, see the text of the individual dignity

legislative classification substantially furthers a legitimate state purpose.”<sup>33</sup> The state or other advocate of the classification rebuts this presumption by proving that the law, despite its adverse effect on an enumerated class, “substantially furthers an appropriate state interest.”<sup>34</sup> Finally, laws that impact upon an individual by use of a classification other than those enumerated in the clause violate the individual dignity clause when a member of the disadvantaged class, now bearing the burden of proof, shows the law “does not suitably further any appropriate state interest.”<sup>35</sup>

#### SUBSEQUENT APPLICATION OF THE *SIBLEY* TEST

The question remaining is whether the *Sibley* test has, in fact, resulted in greater protection of the individual than under the federal framework. The ensuing three years have afforded the courts ample opportunity to employ *Sibley*. The courts have met the opportunity with varying degrees of success. While some courts have applied the *Sibley* analysis correctly, in many cases the new test has been either ignored or applied incorrectly.<sup>36</sup> As a result, the status of equal protection in Louisiana is unsettled, making it difficult to discern whether any true change has taken place.<sup>37</sup>

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clause at supra note 2.

Louisiana Revised Statutes 40:1299.39 (Supp. 1988), which limited Ms. Sibley's recovery to \$500,000 was found by the supreme court to group Ms. Sibley under the enumerated classification of physical condition. The court found that the statute created two classes of malpractice victims:

The law on its face is designed to impose different burdens on different classes of persons according to the magnitude of damage to their physical condition. The statute creates two classes: one, a group of malpractice victims each of whom has suffered damage that would oblige a defendant under our basic law to repair it by paying in excess of 500,000 dollars; another, a class consisting of victims whose damages would not require an award over this amount to make individual reparation . . . . Damage to the physical condition of each malpractice victim is the primary element of his damage and a primary cause of his being assigned to one of the two classes. Thus, the statutory classification disadvantages or discriminates against one class of individuals by reason of or because of their physical condition.

477 So. 2d at 1108-09. While this analysis may or may not seem persuasive, the court clearly articulated the standard of review it wished to use in Ms. Sibley's case. Thus, the standard of review to be employed by the trial court on remand was a presumption of unconstitutionality with the burden on the state to show that this classification substantially furthered a legitimate state purpose.

33. *Sibley*, 477 So. 2d at 1109.

34. *Id.* at 1107-08.

35. *Id.*

36. See supra note 6.

37. Most of the cases discussed in this paper have been decided in the past year and



*The Louisiana Supreme Court Settles on an Approach*

Since the *Sibley* decision, the supreme court has decided several equal protection cases. Following some vacillation on how best to approach such cases, the court has settled upon the *Sibley* test as the proper analysis. The initial stumble came in *In re Beychok*,<sup>38</sup> a case decided just months after *Sibley*. There the Louisiana Supreme Court failed to use its new equal protection test; relying instead on the recently rejected federal standard. The case involved a member of the LSU Board of Supervisors, Mr. Sheldon Beychok, who had transacted business with the University. The Commission on Ethics for Public Employees found that Mr. Beychok had violated certain provisions of the ethics code by such contracts.<sup>39</sup> Mr. Beychok appealed to the first circuit court of appeal,<sup>40</sup> which concluded that the commission had erred in finding a violation of the ethics code. The supreme court, however, concluded that the commission had not denied Mr. Beychok equal protection of the law, reversing the lower court's holding.

This otherwise fairly routine equal protection case is of significant interest because the supreme court temporarily abandoned the *Sibley* test and returned to the federal model of analysis.<sup>41</sup> Ironically, the court looked to the *original* hearing of *Sibley*,<sup>42</sup> which had used the federal analysis, not to the new *Sibley* analysis. Chief Justice Dixon, writing

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a half, the time period marking the beginning recognition by the courts and the bar that *Sibley* is the quintessential case on equal protection in Louisiana. See, e.g., *Williams v. Kushner*, 524 So. 2d 191 (La. App. 4th Cir.), writ granted, 526 So. 2d 785 (1988); *Deegan v. Raymond Int'l Builders, Inc.*, 518 So. 2d 1082 (La. App. 5th Cir. 1987), writ denied, 523 So. 2d 232 (1988); *Allen v. Burrow*, 505 So. 2d 880 (La. App. 2d Cir.), writ denied, 507 So. 2d 229 (1987).

38. 495 So. 2d 1278 (La. 1986).

39. Wolf Baking Company, where Mr. Beychok served as president, chief executive officer, and majority shareholder, had entered into a series of contracts with LSU over a four year period in which it sold bread and bakery products to the university. The Commission on Ethics for Public Employees issued an opinion, which Mr. Beychok had requested, in which it advised that Louisiana Revised Statutes 42:1111 C(2)(d), 1112 B(2)-(3); and 1113 B prohibit members of the Board of Supervisors from entering into contracts for the sale of goods and services to LSU. A public hearing was held where it was determined that Mr. Beychok and Wolf Baking Company had violated the above statutes.

40. 484 So. 2d 912 (La. App. 1st Cir. 1986).

41. 495 So. 2d at 1282-83. Cf. *State v. Barberousse*, 480 So. 2d 273 (La. 1985), where the Supreme Court acknowledged *Sibley* as authority on equal protection. It then found constitutional Louisiana Code of Criminal Procedure article 893.1, which provides for mandatory minimum sentences when a defendant is found to have used a firearm in the commission of a felony. The court, due to some imprecise language, gave the impression that it was employing federal standards when it found a "rational relation" between the law in question and a "valid governmental objective."

42. As explained previously, *Sibley* on original hearing, had employed traditional federal analysis to the equal protection claim. See supra note 1.

for the court, first decided that neither a fundamental right nor a suspect classification was involved. Accordingly, he used the minimum scrutiny test to find guidance for the correct application of the rational basis test. The opinion concluded, "[I]f a mere rational basis analysis is applicable, the United States Supreme Court has declared that the constitutional safeguard of equal protection is invoked only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective."<sup>43</sup>

For two reasons, *Beychok* is best regarded as an anomaly in Louisiana equal protection jurisprudence. First, the attorneys in the case never directed the court's attention to the new approach. Mr. Beychok's attorneys did not brief the court on *Sibley*, preferring to rest their equal protection argument on federal authority,<sup>44</sup> and opposing counsel erroneously cited the supreme court to the *original hearing* of *Sibley* rather than to the case on rehearing.<sup>45</sup> Second, the court returned to the *Sibley* analysis almost immediately. Two weeks after the *Beychok* opinion was handed down, the court decided *Crier v. Whitecloud*,<sup>46</sup> in which the equal protection claim was decided under the new *Sibley* analysis.

The *Crier* court, acknowledging that *Sibley* controlled the determination of equal protection claims, entrenched the *Sibley* analysis in Louisiana jurisprudence.<sup>47</sup> The *Crier* court concerned itself with the alleged unconstitutionality of a Louisiana statute<sup>48</sup> that imposes a three-year prescriptive period on medical malpractice actions with no possibility of invoking the judicial doctrine of *contra non valentem*.<sup>49</sup> The plaintiff argued that such a statute violated the individual dignity clause.

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43. 495 So. 2d at 1283 (citing *Sibley v. Board of Supervisors of Louisiana State University*, 462 So. 2d 149, 156 (La.), rev'd on reh'g, 477 So. 2d 1094 (1985)).

44. See Brief for Appellee at 27, In Re *Beychok*, 495 So. 2d 1278, 1278 (La. 1986) (No. 86-C-0523).

45. Brief for Appellant at 13, 24 & 30. *Beychok*, 495 So. 2d at 1278. However unfortunate the use of the wrong case is, such errors are not the sole province of the courts. See, e.g., Comment, The Louisiana Constitution's Declaration of Rights: Post-*Hardwick* Protection for Sexual Privacy?, 62 Tul. L. Rev. 767 (1988) (where the author conducted an equal protection analysis using the original hearing rather than the *Sibley* rehearing where the new framework for analysis was first introduced).

46. 496 So. 2d 305 (La. 1986).

47. However inauspicious its beginning, the *Sibley* test has been, and continues to be, the law of Louisiana. This writer has alluded to inconsistencies in the opinion on rehearing. See *supra* note 32. Nevertheless, for purposes of this comment, the test as promulgated in *Sibley* will be regarded as the proper framework for analysis of equal protection claims. See, e.g., *Parker v. Cappel*, 500 So. 2d 771 (La. 1987).

48. La. R.S. 9:5628 (1983). This statute was amended in 1987, to insert "psychologists" into the enumerated list of medical providers covered under the statute. The other minor grammatical changes should have no effect on the law.

49. *Contra non valentem agere nulla currit prescriptio* means: no prescription runs against a person unable to bring an action. Black's Law Dictionary 296 (5th ed. 1979).

Justice Marcus, writing for the court, acknowledged *Sibley* as the appropriate standard and resolved the question accordingly.<sup>50</sup> He began the analysis by determining that medical malpractice victims do not fall into any of the classifications enumerated in the individual dignity clause. Since they do not, the court presumed the constitutionality of the statute and placed the burden of proof that it did "not further an appropriate state interest" on the challenger. The court next noted that since the plaintiff had offered no evidence to meet her burden of proof she had not shown that the statute violated the individual dignity clause.<sup>51</sup>

So far, the *Crier* court had scrupulously followed the *Sibley* approach. But upon reaching the issue whether the case should be remanded, the court allowed strains of the federal analysis into its opinion. In the words of the court: "A remand to the district court to afford plaintiff the opportunity to present evidence to carry her burden would serve no useful purpose because of the minimal level of scrutiny involved and the apparent state interest furthered by the statute."<sup>52</sup>

The language used by the court in its denial of remand is seriously flawed.<sup>53</sup> As Justice Dennis pointed out in his dissent, the court's conclusion that a remand is useless "means that, because the minimal level of scrutiny is the same under the state constitution as under the federal, and because the lowest level of scrutiny is virtually nonexistent under current interpretation of the federal constitution, the plaintiff's complaint would receive no scrutiny whatever upon remand."<sup>54</sup> Clearly, the court's perception of the sufficiency of an *apparent* state interest being furthered renders the analysis equivalent to the federal test of minimum scrutiny. Upon such a finding under the federal analysis, the inquiry as to constitutionality is almost routinely resolved in favor of the statute.<sup>55</sup> Under *Sibley*, however, such minimal scrutiny is insufficient.

While the majority in *Crier* was taken to task by Justice Dennis for what he perceived, at best, as the court's lack of proficiency in using *Sibley*, there was accord nevertheless in the realization that *Sibley* is now the controlling jurisprudence in the area of equal protection despite intimations in *Beychok* to the contrary.

The incongruity between the *Crier* court's analysis of the equal protection issue and its resolution of the remand issue, when combined with the aberrant *Beychok* decision, may have raised a question about the vitality of the new approach to equal protection. The supreme court

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50. 496 So. 2d at 310.

51. *Id.* at 311.

52. *Id.*

53. *Id.* at 313.

54. *Id.* (Dennis, J., dissenting).

55. See sources cited *supra* note 17.

dispelled any such doubts in its recent *Kirk v. State*<sup>56</sup> decision. In that case, Mr. Kirk, who had been indicted in federal court on charges of mail fraud, wished to record confidential conversations for his defense. A Louisiana statute, however, prohibits recording confidential conversations without prior consent from all parties.<sup>57</sup> Because this statute excepts law enforcement agencies,<sup>58</sup> Kirk sought a judgment declaring that the statute violated the individual dignity clause of the Louisiana constitution.

In determining the issue, the *Kirk* court stated the *Sibley* test and applied it unwaveringly. The supreme court first held that the statute *did* establish a discriminatory classification, that of the criminally accused.<sup>59</sup> Citing *Sibley*, the court noted that “[t]he appropriate inquiry is whether there is an appropriate governmental interest suitably furthered by the classification created by the governmental action in question.”<sup>60</sup> Since the “the criminally accused” is an unenumerated classification, the court correctly placed the burden of proof on Mr. Kirk,<sup>61</sup> requiring him to show that the law was not suitably furthering any appropriate state interest. The court found that “no *apparent* governmental interest”<sup>62</sup> was being furthered, and accordingly struck down the statute.

It seems fairly obvious that there was a governmental interest being furthered, that of arming prosecutors with evidentiary weapons unequaled by the defendant. The opinion, thus, tacitly admits that there was a state interest being furthered, albeit an inappropriate one, and evidences the court’s inability to find an appropriate one.<sup>63</sup> Certainly, under the *Sibley* formula, a theoretically sounder holding would be that this was not an *appropriate* governmental interest. Regardless, the supreme court found that such fundamental unfairness could not be allowed. The statute was found unconstitutional as violating the criminally accused’s right to equal protection of the laws. Had the federal analysis been used, the law would have received minimum scrutiny, requiring the plaintiff to show that the law bears no rational relation to the legislature’s goals.

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56. 526 So. 2d 223 (La. 1988).

57. Louisiana Revised Statutes 14:322.1 A., as enacted by 1986 La. Acts No. 97, § 1, reads:

It shall be unlawful for any person, intentionally and without the consent of all parties to a confidential communication, to eavesdrop upon or record such confidential communication by means of any electronic amplifying or recording device, whether such communication is carried on among such parties in the presence of one another or by means of a telegraph, telephone or other device.

58. *Id.* at D(3).

59. 526 So. 2d at 226. See La. R.S. 14:322.1 C.

60. 526 So. 2d at 226-27.

61. *Id.*

62. 526 So. 2d at 227 (emphasis added).

63. See *infra* note 70.

Neither a fundamental right nor a suspect classification is implicated, thus strict scrutiny would be inappropriate.<sup>64</sup> Certainly, the law is rationally related to the legislature's effort to aid law enforcement's investigatory techniques. Under this minimum scrutiny, there is no need for any balancing of the state's interests against those of the adversely impacted individual.<sup>65</sup> Therefore, such a law undoubtedly would have been upheld under a federal analysis, while it was not under the *Sibley* analysis.

*The Sibley Test: Use of Classifications and Shifting Burdens of Proof*

The *Sibley* test is best viewed as a two-tiered model of inquiry. The first inquiry is whether the aggrieved person fits within a particular enumerated category. Laws that classify on the basis of "race or religious

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64. See *supra* notes 9 and 10.

65. The Pennsylvania Superior Court considered the constitutionality of a nearly identical statute in *Commonwealth v. Harvey*, 348 Pa. Super. 544, 502 A.2d 679 (1985). The defendant had been convicted of possession of a controlled substance with intent to deliver. On appeal he argued the unconstitutionality of Pennsylvania's "Wiretapping and Electronic Surveillance Control Act," 18 Pa. C.S. § 5704, which allows investigative or law enforcement officers and their agents to intercept and record confidential communications as long as one of the parties consents to the recording, yet denies the same right to the criminally accused. Initially, the court declined appellant's suggestion that it interpret Pennsylvania's state constitutional provisions as providing greater protection than the U.S. Constitution.

The appellant's argument rested primarily upon the Fourth Amendment, the recording, in his view, constituted an unreasonable search and seizure. The court's opinion is nonetheless significant for the breadth of the language used when discussing constitutional protections:

[The Fourth Amendment's] constitutional guarantee does not extend to or prevent a recording of the conversation in order to preserve the same for use in law enforcement activity. *Nothing in contemporary constitutional thinking suggests otherwise.*

Similarly, there is *no merit in appellant's argument that the statute creates a constitutionally impermissible balance* in favor of law enforcement officials by allowing them to record incriminating conversations of citizens while denying citizens the correlative right to record exculpatory statements. *There is no basis in law for the bald assertion that for every legislatively endorsed or created investigative technique for use by law enforcement officials there must be a correlative and offsetting right by which criminals can conceal their illegal activities.*

348 Pa. Super. at 555, 502 A.2d at 684 (emphasis added). The Louisiana Supreme Court obviously does not subscribe to this view. While the Pennsylvania court found no basis in law for such an argument, the *Kirk* court did. It was able to use the Louisiana Constitution's individual dignity clause to declare an identical law unconstitutional while the Pennsylvania Superior Court could not.

ideas, beliefs, or affiliations"<sup>66</sup> are banned completely by the individual dignity clause. Accordingly, a court should inquire no further once it determines that a law discriminates on the basis of race or religious beliefs.<sup>67</sup> Laws that classify according to "birth, age, sex, culture, physical condition, or political ideas or affiliations"<sup>68</sup> are not prohibited, but the state or other advocate of the law is burdened with proving the constitutionality of the law. Laws that create a classification, but not one of those enumerated in the individual dignity clause, are presumptively constitutional, that is, the burden shifts to the challenger to show that the law violates his or her right to equal protection of the laws. In short, the first step in the *Sibley* analysis, categorization, determines whether any proof of the law's constitutionality will be required and, if so, whether the burden shifts to the proponent of the law or instead remains on the challenging party.

The second inquiry, once it is determined which party bears the burden of proof, is whether the burden has been satisfied. If the aggrieved individual fits into one of the enumerated categories, the advocate of the law, most often the state, has the burden of proving both that the law *is* supported by an appropriate state interest and that this interest is being suitably furthered. Likewise, if the court determines that the disadvantaged individual is within a classification not enumerated in the clause, then *Sibley* mandates that the law "be rejected whenever a member of a disadvantaged class shows that it does not suitably further any appropriate state interest."<sup>69</sup> A challenger could attack the law in one of two ways. He can allege and attempt to show (1) the state interest is not appropriate; or (2) the law does not suitably further the interest.<sup>70</sup>

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66. La. Const. art. I, § 3. For the full text of this provision, see *supra* note 2. There has been an understandable lack of jurisprudence in this area; presumably the legislature occupies itself with more useful endeavors than passing *per se* unconstitutional laws.

It is acknowledged by many commentators that imposition of strict scrutiny in the federal analysis is nearly always fatal. See *supra* note 17. Thus, it is difficult to discern any difference between Louisiana and federal treatment of laws when race or religion are the basis for the discrimination.

67. *Sibley*, 477 So. 2d at 1107.

68. La. Const. art. I, § 3. For the full text of this provision, see *supra* note 2.

69. *Sibley*, 477 So. 2d at 1107-08.

70. Cf. *Allen v. Burrow*, 505 So. 2d 880 (La. App. 2d Cir.), writ denied, 507 So. 2d 229 (1987). The plaintiff in that case argued that Louisiana Civil Code article 2315 discriminated against the elderly by limiting the class of plaintiffs entitled to bring the survival action. The second circuit correctly stated the *Sibley* test and placed the burden of proof on the plaintiff. The court went on: "The approach is to focus on the specific merits of the individual case[,] which necessarily entails a balancing or comparative evaluation of governmental and individual interests." By "balancing and comparing these respective interests with individual interests," the court concluded that the plaintiff had

Obviously, there must be some examination of what the terms "appropriate state interest" and "suitably furthers" mean in order to gain an appreciation of what this inquiry entails.

### *Appropriate State Interest*

While a court hearing an equal protection argument may conclude that the law under attack suitably furthers the state's interests, it must also consider whether or not the asserted interest is an appropriate one.

There is a dearth of case law in Louisiana addressing what constitutes an inappropriate state interest.<sup>71</sup> Neither *Sibley*, *Crier*, nor *Kirk* articulated any particular rule, and scant other guidelines are available. The question is probably best left to the trier of fact, who can call upon his appreciation of what interests are appropriate. The trier of fact will be aided by either a presumption of appropriateness or of inappropriateness, depending on what kind of classification the law employs. For example, when the proponent of the law bears the burden of proof because the law in question uses one of the individual dignity clause's enumerated classifications, the presumption of unconstitutionality should include a presumption that the state's interest is inappropriate as well.<sup>72</sup>

### *Suitably Furthers*

In many of the post-*Sibley* decisions, courts have tended to revert to the pre-*Sibley* analysis in cases where the legislative classification is not one of those enumerated in article 1, section 3. The *Latona v. Department of State Civil Service*<sup>73</sup> decision presents an example of this tendency. In that case, the first circuit reverted completely to the min-

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not shown that the classification had failed to suitably further an appropriate interest. As more courts recognize and employ the *Sibley* test, this "balancing" approach may be further developed.

71. See *Kirk v. State*, 526 So. 2d 223 (La. 1988); *Deegan v. Raymond Int'l Builders*, 518 So. 2d 1082 (La. App. 5th Cir. 1987), writ denied, 523 So. 2d 232 (1988).

72. Compare this view with *Deegan*, 518 So. 2d 1082, wherein the court, while using the *Sibley* test, made the opposite presumption. The question before the court was whether an injured worker plaintiff who has not lost fifty percent or more use of a limb is denied equal protection by a law which requires fifty percent loss of use before the worker can recover under the workman's compensation statute, La. R.S. 23:1221(4)(q) (Supp. 1988). Judge Gaudin wrote for the court, "Presumably such statutory distinctions serve legitimate public interest." 518 So. 2d at 1085. Because the court had accepted the plaintiff's argument that he had been placed in a category according to physical condition, it should have noted that *Sibley* specifically does not allow presumptions of this kind. The burden is on the state to prove the constitutionality of its statute.

73. 492 So. 2d 27 (La. App. 1st Cir.), writ denied, 496 So. 2d 1043 (1986).

imum scrutiny test. At issue was a civil service plan<sup>74</sup> that grouped employees according to their experience. The court upheld the scheme because a "rational basis" existed for the rule, "and the basis is *reasonably related* to a valid governmental purpose."<sup>75</sup> Obviously this is the federal minimum scrutiny standard rejected in *Sibley*. Had the court applied *Sibley* correctly, Mr. Latona need only have proven that the state interest in the scheme was not being "suitably furthered." In *Stuart v. City of Morgan City*,<sup>76</sup> the first circuit distorted the *Sibley* analysis by creating a hybrid between the federal test and the *Sibley* test. The court addressed whether two Louisiana statutes granting limited tort immunity to certain landowners violated an injured person's right to equal protection.<sup>77</sup> Relying on the original hearing of *Sibley*,<sup>78</sup> which used the federal analysis, the court found that the plaintiff's right to sue in tort was not a "fundamental right."<sup>79</sup> Further, it found that the statutes in question "rationally further" a state purpose.<sup>80</sup> Finding that the "furthering" had been proved, the court held that there was no equal protection violation.<sup>81</sup> Perhaps the *Stuart* court sought to steer a middle course with this unusual splicing of the federal "rational relation" test with the *Sibley* "suitably furthers" criterion. Whatever the court's purpose, the test it used contradicts the pronouncements of the Louisiana Supreme Court, and hence this new hybrid test should be ignored.

While the first circuit in *Stuart* and *Latona* stated the test incorrectly, the fourth circuit, in *Williams v. Kushner*,<sup>82</sup> announced the right test but applied it incorrectly. The *Williams* court considered whether a

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74. The State Civil Service Commission determined that employees classified as State Engineer III's should be compensated at a higher rate than Engineering Specialist III's. Plaintiffs attacked the classification on equal protection grounds. The court, citing La. Const. art. X, § 10(A)(4), acknowledged that Civil Service rules have the force and effect of law in Louisiana, and conducted its analysis as it would for any other law. 492 So. 2d at 28.

75. *Id.* at 30 (emphasis added).

76. 504 So. 2d 934 (La. App. 1st Cir. 1987).

77. Louisiana Revised Statutes 9:2791 A (1965) and 2795 B (Supp. 1988) relieve a landowner of personal tort liability and preclude the victim from maintaining a cause of action whenever the landowner opens his land to the public for recreational use, unless the landowner is guilty of a willful or malicious failure to warn of a dangerous condition on the premises.

78. 462 So. 2d 149 (La. 1985).

79. *Stuart*, 504 So. 2d at 941. Under the *Sibley* test, there is no inquiry whether or not the right being adversely impacted is "fundamental." Only under the federal analysis does the court look to see whether a fundamental right is impacted such that strict scrutiny is warranted. See *supra* notes 9 and 11 and accompanying text.

80. 504 So. 2d at 941.

81. The court did not indicate whether the burden of proof had been placed on the state, the advocate of the law's constitutionality, or on Mr. Stuart, the challenger.

82. 524 So. 2d 191 (La. App. 4th Cir.), writ granted, 526 So. 2d 785 (1988).



Louisiana law<sup>83</sup> that limited recovery in medical malpractice cases denied a victim equal protection. The court identified which of the three classifications fit the plaintiff, deciding that "an injured medical malpractice claimant is an individual who has been discriminated against because of physical condition."<sup>84</sup> Having made that determination, the court chose the correct standard of review for enumerated classifications. "Apparently, the rationale [of *Sibley*] is that if there is good reason for the classification and if the classification substantially furthers a legitimate state purpose, then it is not arbitrary, capricious, or unreasonable."<sup>85</sup>

So far, the analysis had tracked *Sibley* fairly closely, but upon reaching the question whether the state's interest had been sufficiently advanced, the court badly misstated the test. The plaintiff urged the court to look at the effects of the law in making the "suitably furthers" determination. Ignoring the plaintiff's sound argument, the court held, "Whether the statute has in fact achieved its goals is not the question: the Individual Dignity clause is satisfied by our conclusion that the legislature *could* reasonably have decided that the statute *would* substantially further a legitimate state purpose; hence it did not act arbitrarily, capriciously or unreasonably."<sup>86</sup> Thus, while the *Williams* court acknowledged *Sibley* as the appropriate standard, it ignored the express wording of the case. In the process, the fourth circuit resurrected the federal analysis of minimum scrutiny, a test that is no longer appropriate in Louisiana. The *Williams* court would not consider what the law had actually done, but instead what the legislature could have believed it could do. The correct inquiry under *Sibley* is whether the law suitably *further*s an appropriate state interest, not whether the legislature could reasonably conclude that it would.

If the individual dignity clause is to accomplish its goal of affording more protection to the individual, "suitable further[ing]" of a state interest must be a more stringent standard than "rational relation" to a state interest. If courts are going to remain true to the *Sibley* case and the express language of the individual dignity clause, "suitably

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83. La. R.S. 40:1299.42(B)(1). This \$500,000 limitation is the same subject of Jane *Sibley's* appeal in 1985. While on remand to the district court, it appears that the case was settled before the trial court made any ruling as to the constitutionality of this limitation. See *Deegan v. Raymond Int'l Builders, Inc.*, 518 So. 2d 1082, 1085, n.1 (La. App. 5th Cir. 1987), writ denied, 523 So. 2d 232 (1988).

84. 524 So. 2d at 194.

85. *Id.*

86. *Id.* at 196 (emphasis added). The fourth circuit recently reiterated this view in *Whitnell v. Menville*, 525 So. 2d 361, 363 (La. App. 4th Cir. 1988), writ granted, 530 So. 2d 553 (1989), where it said, "We held in *Williams* that a statute need not have in fact achieved the intended purpose if the legislature reasonably believed that the enactment would further the intended purpose."

further[ed]" must require that the law in question actually accomplish an appropriate state interest. Certainly laws accomplish state goals with varying degrees of success. However, the courts should ensure as a threshold matter that the law under attack has accomplished, with at least a minimal amount of success, the state's goals. To be satisfied with anything less returns equal protection to the same "reasonably related to a valid governmental purpose" standard of federal analysis that *Sibley* rejected.

#### SUMMATION

*Sibley* was handed down in September, 1985. In the ensuing three years, the Louisiana courts have had substantial opportunity to make use of its wisdom. In large part, they have not done so. Some courts, by continuing to use the federal three-tiered analysis, have impeded the change the *Sibley* court sought. Other courts have used *Sibley* incorrectly, acknowledging presumptions of constitutionality where none ought to exist, or employing a minimum level of scrutiny where the Louisiana Constitution and *Sibley* clearly require more. Although the supreme court seems to have settled on the *Sibley* approach, it has sent out mixed signals.<sup>87</sup>

In Louisiana, the *Sibley* case has passed largely unnoticed through the legal community.<sup>88</sup> This is unfortunate because the goal of *Sibley* was to afford the increased protections mandated by the individual dignity clause of the Louisiana Constitution and to provide a more open, honest, and less rigid vehicle for ensuring equal protection of the laws. Somewhat belatedly, the courts are now beginning to take notice of *Sibley*.<sup>89</sup> Correct use of the *Sibley* test, however, has been rare. When the courts have used *Sibley* in the past, it usually has been with little accuracy and little appreciation for the test promulgated by the supreme court. Since *Sibley* is, as far as the Louisiana Supreme Court is concerned, settled law, lower courts should apply it more diligently and much more carefully.

*Michael Lester Berry, Jr.*

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87. See, e.g., *In Re Beychok*, 495 So. 2d 1278 (La. 1986). See supra text accompanying notes 38 through 44.

88. See supra note 36.

89. See supra note 37.

