The Declaration of Rights of the Louisiana Constitution of 1974: The Louisiana Supreme Court and Civil Liberties

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INTRODUCTION

Unlike the United States Constitution, the Louisiana Constitution of 1974 sets forth the rights of the people in the body of the document itself. This form illustrates the relationship of civil rights to the constitution and was best characterized by Francis Delperee when speaking of the Belgian Constitution of 1831:

[The Constitution] does not set out civil rights ... by a preamble, that sort of literary piece which comes before the constitutional text. No, it is in the very body of the constitution itself, among other maybe more technical articles, that Belgium [and Louisiana] declares the human rights it intends to protect.

Of course, this is not only a matter of form or of external presentation. By inscribing civil rights among its provisions, the constitution has double effect. First of all, it gives to human rights an unquestionable legal value. It is not literature, catechism, or a program of civics; it is law, good law, real law, law which creates legal duties for the citizens as well as for the government. Furthermore, the constitution brings its techniques and controls to the service of human rights; it appoints judges who will have to see to the protection of the rights that are proclaimed. The constitutional machine works at the service of human rights.1

The architecture of the Louisiana Constitution of 1974 is such that the Declaration of Rights is not merely one of many articles comprising the document. Indeed, the Declaration of Rights' place is one of prominence as the first article, article I. The principles of the Declaration, as well as its place in the overall design of the constitution, establish it as the very foundation of the constitutional system of our present state government. The Louisiana Supreme Court in interpreting the Declaration of Rights of the Constitution of 1974 has maintained a tradition of guaranteeing expanded rights and civil liberties to the citizens of Louis-

This tradition is of unparalleled significance in light of the increasingly conservative decisions echoing from the United States Supreme Court. In fact, since the 1974 constitution was adopted, Louisiana has experienced, along with numerous other states, an unprecedented expansion of civil liberties protected under its state constitution.

The Declaration of Rights of the Constitution of 1974 traces much of the language found in the United States Constitution’s Bill of Rights. Indeed, terms and concepts such as equal protection, due process, freedom of speech, establishment of religion, and assistance of counsel are found in both constitutions and are frequently interpreted similarly. Many guarantees of the Louisiana Declaration of Rights, however, have been construed by the Louisiana Supreme Court to extend greater protection to civil rights than the United States Constitution’s Bill of Rights. In *Guidry v. Roberts*, Justice Tate noted that:

As the plaintiff contends, the individual rights guaranteed by our state constitution’s declaration of individual rights (Article I) represent more specific protections of the individual against governmental power than those found in the federal constitution’s bill of rights, and they represent broader protection of the individual.

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2. This tradition is an old one as noted by Judge John Minor Wisdom in his remarks before the Louisiana Supreme Court on September 14, 1990:

Some of you may not know that in 1836 the Louisiana Supreme Court had before it substantially the same issue that the United States Supreme Court mishandled in *Dred Scott v. Sandford*, 60 U.S. 393 (1857)]. In *Marie Louise, Free Woman of Color v. Marot*, [9 La. 473 (1836)], the principal issue, oversimplifying it, was whether a slave who had been taken to a free country, France, on returning to her home in Louisiana, reverted to her status as a slave. Was she only property or was she a free citizen? George Mathews, author of the opinion, was the Presiding Judge of our Supreme Court. . . . His opinion starts out with a short and simple declarative sentence: "This is a suit for freedom." It concludes: "Being free for one moment in France, it was not in the power of her former owner to reduce her again to slavery."

Judge Wisdom’s remarks are published at 38 La. B.J. 238 (December 1990).

3. 335 So. 2d 438 (La. 1976).

4. Id. at 448. Justice Summers, long recognized as judicially conservative, in his dissenting opinion in *Guidry* specifically enumerated what he considered to be the expanded rights:

Rights secured to Louisiana citizens under the Constitution of 1974 are far broader and more definitely articulated than corresponding rights in the Federal Constitution. Examples of this are found in such guarantees as the secret ballot (Art. XI, § 2), the right to individual liberty (Art. 1, § 3), the right to property (Art. 1, § 4), the right to privacy (Art. 1, § 5), freedom of expression (Art. 1, § 7), and the right of assembly and petition (Art. 1, § 9). And the constitution commands the government to hold these rights inviolate. (Art. 1, § 1).

Id. at 452.
The very nature of a state constitution is a limitation on the powers of government. Unlike the grants of power found in the United States Constitution, state constitutions instead provide limitations on the otherwise plenary power of the people of a state exercised through its legislative body. Generally, notwithstanding any law enacted to enforce the guarantees of a constitution, the guarantees therein are self-executing.

In recognizing expanded rights under the Louisiana Constitution of 1974, the Louisiana Supreme Court has taken three approaches. The first and most obvious method is to construe language found in the Louisiana Constitution of 1974 but absent from the federal constitution as an intentional grant of greater rights. This is illustrated by decisions regarding the “invasion of privacy clause” of section 5 as applied in civil and criminal cases and the “excessive” punishments clause of section 20. The second method is to construe language which is similar or identical to federal provisions in a manner which expands civil liberty protections independently of federal jurisprudence. This method is used in certain decisions regarding the due process clause of section 2, and the equal protection clause of section 3. The final manner in which expanded rights are established under the Declaration of Rights is to recognize certain provisions therein as codifying, if you will, high watermarks under the federal jurisprudence in effect at the time of the drafting and ratification of the 1974 constitution. These high watermarks consist of expansive federal jurisprudence based upon the United States Constitution which is incorporated into the language and scope of these state constitutional provisions. Examples of these provisions include decisions involving section 13 governing the rights of the accused and Miranda warnings and those involving civil privacy rights under section 5 and Griswold v. Connecticut and its progeny.

5. State v. Franklin, 202 La. 439, 12 So. 2d 211 (1943).
12. In expanding rights under their constitutions, state supreme courts must be careful to insulate their decisions from review by the United States Supreme Court. While common sense and general principles of law recognize that a state supreme court is the final arbiter of state constitutional provisions, the United States Supreme Court has recognized that constitutionally it is barred from reviewing a decision of the state supreme court on
This article addresses the state of civil liberties under the Louisiana Constitution of 1974 as pronounced by the Louisiana Supreme Court. It also introduces expansive guarantees found in the state constitution which have remained vastly unexplored territories. In a rush to vindicate civil rights, attorneys sometimes rush their clients into federal court under the mistaken notion that somehow the state courts are inadequate to protect constitutional rights, or that the Civil Rights Act, 42 U.S.C. section 1983, is the only means of vindicating civil rights. This is simply not true. In fact, many times our state constitution provides broader rights that are generally not assertable in federal court.13 Failure of an attorney to consider and weigh prosecution of state civil liberties claims, in light of the increasingly conservative federal judiciary, may result in serious detriment to the client and exposure of the attorney to potential malpractice claims. With new emphasis being placed on state constitutional guarantees, it is critical to consider state constitutional provisions before entering the courtroom. The state constitutional provisions are set out in the order in which they appear.14

interpretations of state constitutional and statutory provisions. Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 67 S. Ct. 374 (1947); Hebert v. Louisiana, 272 U.S. 312, 47 S. Ct. 103 (1926). However, in insulating decisions from review, the Court requires that state supreme courts must articulate clearly that their decisions rest on state constitutional grounds. In Michigan v. Long, 463 U.S. 1032, 103 S. Ct. 3469 (1983), the Court reviewed a decision by the Michigan Supreme Court that a search and seizure was in violation of the fourth amendment to the United States Constitution and article 1, § 11 of the Michigan Constitution. Therein, the Court stated the rule by which review of decisions based on state constitutions would be precluded:

If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicated clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

Id. at 1041, 103 S. Ct. at 3476. As Justice Marshall explains in the opinion by the Court, this rule was adopted because of the "unsatisfactory and intrusive" practice of requesting clarifications from the state courts of the grounds upon which their decisions were made. Failure of the state courts to use the "plain statement" rule will result in review by the U.S. Supreme Court and undoubtedly more holdings similar to Michigan v. Long, where "[i]t appears . . . that the state court ‘felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did.’” Id. at 1044, 103 S. Ct. at 3478.


14. The following provisions of the Declaration of Rights are not covered herein:
La. Const. art. 1, § 6 (Freedom from Intrusion): This is the functional equivalent of the third amendment to the United States Constitution, and has never been interpreted
Section 2. No person shall be deprived of life, liberty, or property, except by due process of law.

Under the Warren Court, the due process clause of the United States Constitution, Amendment 14, was expanded to cover rights not solely procedural. Due process took on “substantive” characteristics as well. The Louisiana Supreme Court defined substantive due process as “the constitutional guaranty that no person shall be arbitrarily deprived of his life, liberty, or property. The essence of substantive due process is protection from arbitrary and unreasonable action.” The framers of the Louisiana Constitution of 1974 included as the first major enumerated right a due process clause modeled after the federal constitutional provision. Aware of developments in the jurisprudence under the Warren Court, the framers of the 1974 constitution sought to protect this new right against arbitrary and unreasonable deprivation of a person’s life, liberty, or property.

La. Const. art. 1, § 9 (Right of Assembly and Petition), § 12 (Freedom of Discrimination), § 16 (Right to a Fair Trial), § 17 (Jury Trial in Criminal Cases), § 19 (Right to Judicial Review), § 21 (Writ of Habeas Corpus), § 23 (Prohibited Laws): These provisions have all been basically subsumed in the corresponding federal guarantees and as such have little if any independent meaning.


La. Const. art. 1, § 14 (Right to Preliminary Examination), § 15 (Initiation of Prosecution), § 18 (Right to Bail): These provisions are basic criminal procedures which have been elevated to constitutional protection. The principles embraced by these provisions have generally been utilized in criminal procedure in Louisiana and while their elevation to constitutional status is new, their basic substance is not.

Finally, La. Const. art. 1, § 24 (Unenumerated Rights): This provision, similar to the ninth amendment of the United States Constitution, has not received much attention at all. Consider the following quote by the supreme court in State v. McCarroll, 70 So. 448 (La. 1915), as regards the source provision, article 15 of the Constitution of 1913: ‘‘This enumeration of rights shall not be construed to deny or impair other rights of the people not herein expressed.’ This article is meaningless, as the people of this state retain all rights the exercise of which is not prohibited by the Constitution of the state or of the United States.’’


16. Babineaux v. Judiciary Commission, 341 So. 2d 396, 400 (La. 1976). The court also defined procedural due process: ‘‘Procedural due process requires that all proceedings directed toward the deprivation of life, liberty, or property be conducted in a manner consistent with essential fairness. Among the requirements are notice of the proceeding and a fair opportunity to defend.’’ Id. Both of these definitions rested on federal interpretations of the federal due process.
expansion of due process into the substantive realm of civil liberties. The Louisiana Supreme Court has generally remained true to the intent of the framers. However, much of the analysis of due process under state law merely parrots federal due process interpretations. The problem arises now when federal jurisprudence begins to distinguish and even recede from the expansions of due process reached by the Warren Court.18

In three notable cases, however, Louisiana's due process analysis has diverged from federal due process analysis. In State In Interest of Dino,19 the supreme court held that the state constitutional guarantees of due process and equal protection "require that juveniles not be permitted to waive their constitutional rights on their own."20 This decision was clearly contrary to numerous other jurisdictions which allowed juveniles to waive the privilege against self-incrimination without running afoul of the federal due process guarantees.21 The court found that due to the large percentage of juveniles who are incapable of understanding or intelligently waiving their constitutional rights, coupled with the general policy of the laws of Louisiana to protect a minor from the consequences of his immaturity, the state due process clause, as well as section 13 (rights of the accused) mandated that a juvenile could not waive his constitutional rights without benefit of advice from counsel or an informed parent. The court also extended state due process to require a public trial when a juvenile is adjudicated a delinquent based upon acts that would constitute a crime if engaged in by an adult, holding then Louisiana Revised Statutes 13:1579(B) unconstitutional.22

At the time Dino was decided, the federal courts were not yet withdrawing from the requirements of Miranda and federal due process concerns.23 Additionally, no prior major decision by a Louisiana court

19. 359 So. 2d 586 (La. 1978).
20. Id. at 594. The court in fact relied upon § 2 (due process), § 3 (equal protection), § 13 (Rights of the Accused), and § 16 (Right Against Self-incrimination).
21. Id. at 593.
22. Repealed by 1978 La. Acts No. 172, § 5. The court stopped just short of declaring that the state due process clause required a trial by jury. Id. Justices Dennis, Calogero, and Dixon would have held that the state constitutional right to trial by jury and the prohibition against arbitrary age discrimination would have granted juveniles the right to a trial by jury. Id. at 602.
23. The prosecution argued that Oregon v. Mathiason, 429 U.S. 492, 97 S. Ct. 711 (1977), modified the rule in Miranda v. Arizona. While this proposition was rejected by the Louisiana Supreme Court, later U.S. Supreme Court opinions would definitely recede from the principles established in Miranda, e.g., Allen, 478 U.S. 364, 106 S. Ct. 2988, and Rawlings v. Kentucky, 448 U.S. 98, 100 S. Ct. 2556 (1980).
distinguished state from federal due process. However, Dino clearly does not rest on federal concerns, but on an intentional expansion of state due process and equal protection.24

In the case of Wilson v. City of New Orleans,25 the supreme court had an opportunity to discuss the due process clause as it applied to the practice of the New Orleans Police Department of immobilizing vehicles with numerous parking violations. The court, however, failed to significantly address due process concerns under the state constitution. Only once in the whole decision was the state constitutional provision noted: “Due process of law is guaranteed by both the Fourteenth Amendment to the United States Constitution and Art. 1, section 2 of the 1974 Louisiana Constitution.”26 Nevertheless, the court did embark on a thorough discussion of federal interpretations of the due process clause, but without indicating whether the decision rested on a violation of state constitutional guarantees. While the ultimate holding of the decision is that the city’s “booting” practice violated due process under both constitutions, the opinion linked state due process to federal due process, thus making it susceptible to review by the United States Supreme Court. Later supreme court opinions, however, cite Wilson for the departure of interpretation of the state due process clause from the federal one.27

In In re Adoption of B.G.S.,28 the supreme court was careful to render its decision squarely on state constitutional guarantees. In this case, the court had the opportunity to consider Louisiana Revised Statutes 9:422.13, “The Putative Father Statute”, and Louisiana Revised Statutes 9:422.8(B), concerning adoptions when the father’s name is not indicated on the birth certificate. The court held that the statute’s provisions authorizing singularly the mother of the illegitimate child (where the father’s name did not appear on the birth certificate) to place the child for adoption, thus terminating all parental rights “whatsoever,” including the rights of the unwed father, was an unconstitutional exercise of state power in setting the procedures for adoption. In holding the two statutes unconstitutional, the court relied on article 1, section 2 exclusively. As in Wilson, the court relied heavily upon federal interpretations of due process, but was careful to articulate its decision solely on state constitutional grounds:

In interpreting our own state constitution, of course, we are not bound by this balancing approach. This test was almost certainly

25. 479 So. 2d 891 (La. 1985).
26. Id. at 894.
27. See, e.g., In re B.G.S., 556 So. 2d 545 (La. 1990).
28. 556 So. 2d 545 (La. 1990).
not specifically intended by the framers who had drafted our constitution some three years before Mathews v. Eldridge . . . was decided, and there is no indication that the framers intended for our state's constitutional guarantees to fluctuate with the vicissitudes of federal constitutional interpretation. Nevertheless, we have employed this balancing test in deciding what procedure is due under the state due process clause, see Wilson v. City of New Orleans, supra, and we will continue to do so as long as its application promotes the goals of that safeguard.29

In rendering its decision solely on state law, the court was concerned with recent developments in the United States Supreme Court, especially Michael H. v. Gerald D.,30 where a plurality concluded a state could not be compelled under the due process clause to recognize the parent-child relationship between a biological father and a child even if there was a developed relationship, where the husband of the mother sought to raise the child in the traditional family unit. Under the facts of In re B.G.S., the Louisiana Supreme Court was concerned that because there was insufficient time for an established relationship to arise between the unwed father and the child, federal due process would require a developed relationship before the father would have a fundamental liberty interest in rearing his child.31 The court found that none was necessarily required, but refused to gamble their decision on a review by the increasingly conservative United States Supreme Court.

The supreme court's expansions of due process in Dino, Wilson, and In re B.G.S. represent differences not in the approach to due process analysis, but in the significance accorded the interests of the individual versus the state. State due process concerns, like the federal counterpart, are determined by a balancing approach whereby the rights of the individual are given greater weight than in federal due process determinations. Thus, the difference in what is considered arbitrary or unreasonable under the state and federal due process clauses depends upon the heightened expectations attributed to the individual as balanced against the competing goals of the state.32

29. Id. at 552.
31. While Michael H. v. Gerald D. was the most recent of the parental rights cases decided by the United States Supreme Court, the requirement of paternity plus a developed relationship between parent and child was established earlier. See, e.g., Caban v. Mohammed, 441 U.S. 380, 99 S. Ct. 1760 (1979).
32. See Hargrave, Louisiana Constitutional Law: Work of Appellate Courts for the 1977-1978 Term, Louisiana Constitutional Law, 39 La. L. Rev. 807, 813-17 (1979). Professor Hargrave notes several cases decided by the Louisiana Supreme Court finding a violation of substantive due process where the federal courts might not, and further discusses the possible abuses of subjective application of substantive due process, as is
In retrospect, the Louisiana Supreme Court generally has not given independent meaning to due process under the state constitution, resulting in section 2 being essentially a truism. Due process under the state constitution has no independent significance since only violations of federal due process result in violations of state due process. In many opinions, the court's declaration of violations of state due process are dicta, inasmuch as they are decided on federal due process grounds as well with no reference to state jurisprudence to support the supreme court's interpretations or standards reflected in section 2. The absence of state jurisprudence construing the state due process clause is especially disconcerting in light of the presence of a due process clause in Louisiana constitutions starting with the Constitution of 1898 to the present one. Whether Wilson and In re B.G.S. are the exceptions or the trend in expanded state due process analysis remains to be seen. The failure of the Louisiana Supreme Court otherwise to give section 2 any independent meaning will undoubtedly, as noted by Justice Dennis in the court's opinion in In re B.G.S., result in fluctuations of state due process analysis similar to that found in decisions regarding the federal due process clause. With the vast number of opinions relying upon due process analysis, a failure of the supreme court to continue the independent extensions of state due process under Dino, Wilson, and In re

found in current state and federal due process analysis. An interesting example of this is found in the pre-1974 Constitution case of Kennedy v. Item Co., Inc., 213 La. 347, 34 So. 2d 886 (1948), wherein the plaintiffs asserted an action for libel against a newspaper on the ground that their reputation had been damaged. The Louisiana Supreme Court found that our state constitution, then the Louisiana Constitution of 1921, protected an individual's reputation, equating it to a "liberty interest" necessary to our pursuit of happiness. The contrary result was reached by the United States Supreme Court in Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155 (1976), which held that federal due process does not protect an individual's reputation. It is likely that Kennedy will remain the law under the Louisiana Constitution of 1974, protected by the state due process clause of § 2.

33. See Connick v. Lucky Pierre's, 331 So. 2d 431, 434 (La. 1976) ("The fourteenth amendment of the United States Constitution, as well as article I, section 2 of the Louisiana Constitution of 1974, command that words and phrases used in statutes be not so vague and indefinite that any 'penalty' prescribed for their violation constitutes the taking of liberty or property without due process of law"); State v. Shreveport News Agency, Inc., 287 So. 2d 464, 470 (La. 1973) (Obscenity statute is overboard, too general, and not specific enough to "withstand the constitutional attack under the United States Constitution, First and Fourteenth Amendments, and our Constitution Article 1, Sections 2 and 3"); Theriot v. Terrebonne Parish Police Jury, 436 So. 2d 515, 520 (La. 1983) ("The substantive guarantee of due process in the federal and state constitutions requires only that the legislation have a rational relationship to a legitimate state interest"); State v. Griffin, 495 So. 2d 1306, 1310 (La. 1986) (In holding that La. R.S. 14:90.2, prohibiting gambling in public, was not constitutionally infirm, the court stated, "to suggest in this context that Louisiana's constitution may provide greater due process rights than the federal constitution appears completely erroneous" in light of prohibition of Art. 12, § 6 against gambling).
B.G.S. will undoubtedly result in due process rising and falling with the tide of the Court in Washington, not New Orleans.

**Equal Protection: Article I, § 3**

Section 3. 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.

Much like the due process clause of section 2, the equal protection guarantee of article 1, section 3 of the Louisiana Constitution of 1974 was generally interpreted by the Louisiana Supreme Court to be merely a restatement of the equal protection clause of the United States Constitution, amendment 14.34

Like state due process expansions, state equal protection under section 3 has taken on some independent meaning. As early as *Burmaster v. Gravity Drainage Dist. No. 2*, Justice Dennis in his concurrence questioned the reliance of the majority upon the proposition that the state equal protection clause was merely a mirror image of federal equal protection.36 Even Justice Summers noted in his dissent in *Guidry v. Roberts* that section 3 was one of the rights "far broader and more definitely articulated" than corresponding rights in the federal constitution.37

However, the most significant decision on state equal protection is *Sibley v. Board of Supervisors of Louisiana State University*,38 which involved an equal protection challenge to the statutory cap of $500,000.00 on medical malpractice awards.39 In deciding to remand the case on the issue of whether the state can demonstrate that the statute at issue substantially furthers a legitimate state objective, the supreme court abandoned traditional federal equal protection analysis, stating "the

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34. State v. Barton, 315 So. 2d 289 (La. 1975); Burmaster v. Gravity Drainage Dist. No. 2, 366 So. 2d 1381 (La. 1978), appeal after remand, 448 So. 2d 162 (La. App. 4th Cir. 1984); Succession of Brown, 388 So. 2d 1151 (La. 1980) (On challenge under state and federal equal protection, succession articles discriminating against illegitimates held violative of state and federal constitutions, using federal equal protection analysis).
35. 366 So. 2d 1381 (La. 1978).
36. Id. at 1388.
37. 335 So. 2d 438, 452 (La. 1976).
38. 477 So. 2d 1094 (La. 1985), on remand, 490 So. 2d 307 (La. App. 1st Cir.), writ denied, 496 So. 2d 325 (1986).
federal three level system is in disarray and has failed to provide a theoretically sound framework for constitutional adjudication.\footnote{Id. at 1107. Compare Chief Justice Rehnquist's dissent in Trimble v. Gordon, 430 U.S. 762, 777-78, 97 S. Ct. 1459, 1468-69 (1977), wherein Justice Rehnquist attacks the Court's application of equal protection analysis:

[The approach of the United States Supreme Court in interpreting equal protection has] produced a syndrome wherein this Court seems to regard the Equal Protection Clause as a cat-o'-nine-tails to be kept in the judicial closet as a threat to legislatures which may, in the view of the judiciary, get out of hand and pass "arbitrary," "illogical," or "unreasonable" laws. Except in the area of the law in which the Framers obviously meant it to apply—classifications based on race or on national origin, the first cousin of race—the Court's decisions can fairly be described as an endless tinkering with legislative judgments, a series of conclusions unsupported by any central guiding principle.

The Civil War Amendments did not make this Court into a council of revision, and they did not confer upon this Court any authority to nullify state laws which were merely felt to be inimical to the Court's notion of the public interest.}

Instead, the court found, when the classification is one of the enumerated classes against which section 3 prohibits discrimination, state equal protection guarantees mandate a different test:

We conclude that (1) the federal multilevel system is not an appropriate model for interpreting and applying the protection of equal laws pledged by our state constitution; (2) when a law classifying individuals on the basis of physical condition is attacked, the proponent of the legislation must show that the law does not arbitrarily, capriciously, or unreasonably discriminate against the disadvantaged class by demonstrating that the legislative classification substantially furthers a legitimate state objective.\footnote{477 So. 2d at 1104.}

Under the analysis in \textit{Sibley}, the strict scrutiny test would be abandoned in favor of an absolute ban on all laws relating to race and religious beliefs; the intermediate scrutiny test would give way to a requirement that the state prove that the law is not arbitrary, capricious or unreasonably related to a legitimate state objective; and minimal scrutiny, commonly referred to as "rational relationship," gives way to a requirement that the opponent of the legislation show that it does not suitably further any appropriate state interest. Other suspect classes and fundamental rights not enumerated will continue to be protected by the strict scrutiny test of the fourteenth amendment. Under the \textit{Sibley} test of equal protection, these persons and rights will be protected by an inquiry whether there is "an appropriate governmental interest suitably furthered" by the governmental action in question. . . .
Judicial attention would be focused on the merits of a case and not diverted toward abstract questions. By removing the blinders imposed by a priori categories, the court would naturally focus upon governmental and individual interests, resulting in a more precise and reliable evaluation of constitutional questions.\textsuperscript{42}

The continued expansion of a new and improved section 3, however, was short-lived. In \textit{Crier v. Whitecloud},\textsuperscript{43} the plaintiff challenged the three year preemptive period for medical malpractice, Louisiana Revised Statutes 9:5628. The court, in finding that the statute does not create an impermissible classification under section 3, held that, absent any showing by the plaintiff, the statute would withstand an equal protection challenge. In doing so, the court undercut its holding in \textit{Sibley}, under certain circumstances deferring for all practical purposes to whatever laws are passed by the legislature. The court noted that

\text{if a law classifies individuals on a basis outside the scope of art. 1, § 3, it will be upheld unless a member of the disadvantaged class shows that it does not suitably further any appropriate state interest. . . . 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.}\textsuperscript{44}

While the court in \textit{Crier} did not rely upon the federal jurisprudence in its holding, it interpreted the lowest level of \textit{Sibley} scrutiny to be the same “rational relationship” test articulated by the United States Supreme Court in cases such as \textit{City of New Orleans v. Dukes}.\textsuperscript{45} Justice Dennis, dissenting in \textit{Crier}, stated that this “judicial scrutiny is in reality non-existent.” Justice Dennis instead advocates an interpretation of our state equal protection clause with its own minimal standards:

\text{In \textit{Sibley} . . . this court recognized for the first time that Article 1, § 3 of the 1974 Constitution raises the threshold of equal protection and rejected the federal three level standard. In place of the minimal level of federal protection, under which judicial scrutiny is in reality non-existent, our constitution establishes its own minimal standard: when a law classifies individuals on any basis, it shall be rejected whenever a member of a disadvantaged class shows that it does not suitably further any appropriate state interest.}\textsuperscript{46}

\textsuperscript{42} Id. at 1107.
\textsuperscript{43} 496 So. 2d 305 (La. 1986).
\textsuperscript{44} Id. at 310-11.
\textsuperscript{45} 427 U.S. 297, 96 S. Ct. 2513 (1976).
\textsuperscript{46} 496 So. 2d at 313.
The confusion over the correct application of burdens of proof and levels of scrutiny in equal protection analysis has led to much conflict in the jurisprudence. In *Kirk v. State*, the court stepped back from the *Crier* application and apparently applied the *Sibley* analysis to declare Louisiana Revised Statutes 14:322.1 unconstitutional and violative of the equal protection rights of criminals. The court, finding Kirk did not fit into any enumerated class, applied the minimum level of scrutiny under *Sibley*. While there is obviously a "rational relationship" between the statute and the goal of arming prosecutors with evidentiary advantages, the court must have found no "appropriate" governmental interest, as the claim of the statute being fundamentally unfair is one of due process, not equal protection.

**RIGHT TO PROPERTY: ARTICLE I, § 4**

*Section 4. Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.*

*Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question. In every expropriation, a party has the right to trial by jury to determine compensation, and the owner shall be compensated to the full extent of his loss. No business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise. However, a municipality may expropriate a utility within its jurisdiction. Personal effects, other than contraband, shall never be taken.*

*[Personal effects shall never be taken. But the following property may be forfeited and disposed of in a civil proceeding, as provided by law: contraband drugs; property derived in whole

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47. 526 So. 2d 223 (La. 1988).
48. La. R.S. 14:322.1 (Supp. 1990) provides that no person can record confidential conversations without the consent of all parties. This statute was not applied to the state which had merely to seek the consent of one party to the conversation.
49. For further discussions of *Sibley* equal protection see Comment, Equal Protection—The Louisiana Experience in Departing from Generally Accepted Federal Analysis, 49 La. L. Rev. 903 (1989).
or in part from contraband drugs; property used in the distribution, transfer, sale, felony possession, manufacture, or transportation of contraband drugs; property furnished or intended to be furnished in exchange for contraband drugs; property used or intended to be used to facilitate any of the above conduct; or other property because the above described property has been rendered unavailable.\textsuperscript{50}

This Section shall not apply to appropriation of property necessary for levee and levee drainage purposes.

Unlike the guarantees of due process and equal protection, the court has traditionally had little problem finding that this section was intended to give "far-reaching new protection" to the right of citizens to own and control private property. In the federal Constitution, property is protected by virtue of the due process clauses of the fifth and fourteenth amendments. In Louisiana however, the constitutional right to private property extends further than mere due process guarantees against arbitrary deprivations of property; it protects the right to own property itself.\textsuperscript{51}

In \textit{State v. 1971 Green GMC Van},\textsuperscript{52} defendants in two consolidated cases sought to have the state seizure/forfeiture statute\textsuperscript{53} declared unconstitutional as a violation of state and federal due process. Both trial courts found the act unconstitutional under state and federal due process; in addition, one of the trial courts rendered its decision based upon the guarantee of a right to property under section 4. The supreme court found that due process was violated, but found as an independent ground that section 4 was violated as well:

Article I, section four of our Constitution was intended to give "far reaching new protection" to the right of citizens to own and control private property. [Citations omitted.] Its language goes beyond other state constitutions, including our 1921 Constitution, and the federal constitution in limiting the power of government to regulate private property.\textsuperscript{54}

\textsuperscript{50} La. Const. art. I, § 4. Paragraph 2 was added by Acts 1989, no. 840, § 1, approved Oct. 7, 1989, effective Nov. 6, 1989; it replaces the last sentence of paragraph two, which formerly read, "Personal effects, other than contraband, shall never be taken."

\textsuperscript{51} In the Constitution of 1921, the protection of property upon which this provision was modeled was a simple clause found in article 1, § 2: "No person shall be deprived of life, liberty or property, except by due process of law. Except as otherwise provided in this Constitution, private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid."

\textsuperscript{52} 354 So. 2d 479 (La. 1977).


\textsuperscript{54} 354 So. 2d at 486.
In holding the forfeiture statute constitutionally infirm, the court noted that section 4 required, at a minimum, a criminal conviction prior to forfeiture, and that the constitutional exception did not include derivative contraband.

The court revisited section 4 in *State v. Manual.* Therein, the court again addressed the constitutionality of the state forfeiture statute. The court in holding the forfeiture statute a valid exercise of state power withdrew from its requirement under section 4 that a conviction be had prior to forfeiture and extended the exception to derivative contraband. The court noted, however, that the proceeding was quasi-criminal in nature. Further, the court's opinion was based on cases from the federal Courts of Appeal, which had never construed a provision similar to that contained in section 4.

In an attempt to breathe life into *State v. 1971 GMC Green Van,* the court addressed this issue again in *State v. Spooner.* In this case, under a revamped forfeiture statute, the court once again based its decision on violations of due process and section 4. In chastising the lower court for relying almost entirely on federal jurisprudence, the court in a footnote stated:

The appellate court passed too quickly over *Manual* in its effort to derive a rule of law from federal jurisprudence...

Because we hold that the due process and private property protections embodied in the Louisiana Constitution forbid any approach which would relieve the state of the burden of proving the grounds which support forfeiture, we do not follow the federal approach, which essentially places the burden of proof on the claimant after a minimal showing by the government.

Justice Calogero, writing for the majority, rejected the reliance by *Manual* on federal jurisprudence, returning to the greater property rights of section 4 and *1971 Green Van.* However, the court did not recant its withdrawal from the requirement that there be a conviction prior to forfeiture, or the extension of the exception to derivative contraband.

This past year the people of Louisiana amended section 4 to provide:

Personal effects shall never be taken. But the following property may be forfeited and disposed of in a civil proceeding, as

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55. 426 So. 2d 140 (La. 1983).
57. 520 So. 2d 336 (La. 1988).
58. The statute in *Spooner,* La. R.S. 32:1550(A)(7)(c) (1983), provided a presumption that material found in close proximity to controlled dangerous substances or manufacturing or distributing paraphernalia is contraband, and this presumption can only be rebutted by clear and convincing evidence to the contrary.
59. 520 So. 2d at 345, 347 n.8.
provided by law: contraband drugs; property derived in whole or in part from contraband drugs; property used in the distribution, transfer, sale, felony possession, manufacture, or transportation of contraband drugs; property furnished or intended to be furnished in exchange for contraband drugs; property used or intended to be used to facilitate any of the above conduct; or other property because the above described property has been rendered unavailable.60

While the court has not had opportunity to consider this new amendment, this provision clearly intends to put to rest once and for all whether derivative contraband can be forfeited under section 4. Additionally, it overrules State v. Spooner and earlier cases to the extent that they declare forfeiture proceedings quasi-criminal in nature, and constitutionally preempts prior judicial interpretations to the contrary. By redefining the forfeiture proceeding as civil in nature, it allows the legislature to define the burden of proof and, at a minimum, reduce that burden to a preponderance of the evidence, as opposed to the clear and convincing evidentiary standard used under ordinary forfeiture proceedings. Of course, the courts may interpret the general policy behind section 4 to require the state to prove the applicability of the forfeiture statutes by a clear and convincing showing, even in a civil proceeding, due to the fact that forfeiture is an exception to the prohibition against taking property.61

RIGHT TO PRIVACY: ARTICLE I, § 5

Section 5. Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.


61. An example of other jurisprudentially created burdens of proof heightened for policy reasons include the requirement that the incapacity of a testator be proven by clear and convincing evidence. Succession of Lyons, 452 So. 2d 1161 (La. 1984). This standard may be reduced now in light of the repeal of La. Civ. Code art. 1492, allowing evidence of hatred, anger, suggestion, or captionation. See Spaht, The New Forced Heirship Legislation: A Regrettable "Revolution," 50 La. L. Rev. 409, 466-67 (1990). While the policy behind a heightened burden of proof for deprivation of property is constitutional in origin, the supreme court would in fact be hard pressed to find otherwise if the Legislature statutorily provides the burden of proof.
Section 5 is the state counterpart to the fourth amendment to the United States Constitution. Section 5 embraces not only guarantees against unreasonable criminal searches but extensions of civil privacy rights. This was a conscious choice on the part of the framers. But these expanded rights would mean nothing without the Louisiana Supreme Court upholding this distinction in its decisions. Not only has the court done so, but it has also used the grant of greater rights to extend constitutional rights in spite of United States Supreme Court decisions reducing the scope of the fourth amendment.

**State-Action Searches**

In a series of cases, the Louisiana Supreme Court has upheld the original intent of the framers of the Louisiana constitution to effect greater protection to Louisiana citizens, beginning with the case of *State v. Kinnemann*. In *Kinnemann*, the court held that because section 5 applied to "invasions of privacy," it made no difference if the searches were subsequent to an "arrest" or "in plain view"; either search must be made upon probable cause. While not laying out the parameters of the rights protected by section 5, the court noted that at a minimum it included the right discussed by Justice Brandeis in his dissent in *Olmstead v. United States*:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

In the pre-1974 constitution case of *State v. Roach*, in what amounted to no more than dicta, the court noted that had the acts which the defendant Roach sought to have suppressed occurred after the effective date of the Constitution of 1974, she would have been empowered under the standing clause of section 5 to challenge the evidence seized illegally. In analyzing the provisions of the 1974 constitution (which were found to be inapplicable to the *Roach* facts), the court stated, "This provision purposefully differs from the prevailing federal rule, which limited the

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63. 337 So. 2d 441 (La. 1976).
64. 277 U.S. 438, 478, 48 S. Ct. 564, 572 (1928).
65. 338 So. 2d 621 (La. 1976).
66. In the companion case of State v. Saia, 302 So. 2d 869 (La. 1974), Saia's arrest, which gave the officers probable cause to break into Roach's residence, was unconstitutional. The court, in upholding Roach's conviction, held that she didn't have standing to challenge the evidence illegally seized from Saia.
ability to assert the unconstitutionality of a search and seizure to the individual whose person or property was unlawfully searched."67

In State v. Williams,68 the court departed from the United States Supreme Court's decisions in Pennsylvania v. Mimms69 and Foley v. Connellie.70 Williams was a passenger in an automobile stopped for a traffic violation. The police officer ordered both the driver and Williams out of the vehicle. In doing so, the police officer was able to observe a sawed-off shotgun on the floor between the passenger's side of the front seat and the door. The prosecution argued that the recent United States Supreme Court decision in Mimms allowed such a stop as a reasonable search/seizure. In Mimms, the Court held that a policeman may order a driver to get out of his car incident to an ordinary traffic stop. The rationale was that the state's interest in the protection of the safety of the police officer was a legitimate and overriding justification, thus not unreasonable under the fourth amendment. The Williams court, Justice Dixon writing, questioned the application of Mimms to section 5 and the facts of Williams. Nonetheless, he held that, to the extent that Mimms might be held to apply, greater rights were afforded under section 5:

In addition, the treatment by the Supreme Court of the intrusion into the driver's personal liberty is not dispositive of the issue at hand. As the court noted, by stopping the automobile the police have decided that the driver will be detained. Such is not the case for the passenger, who has broken no law and who may walk away from the scene unless the police officer has some other legitimate reason to detain him. Certainly the passenger has a higher expectation of privacy than the driver, because the passenger plays no part in the routine traffic infraction and has reason to suppose that any exchange with the authorities will be conducted by the driver alone. To give the police officer the discretion to order the passenger from the automobile without requiring any explanation of the officer's actions (other than a blanket concern for personal safety in all situations) is to abandon the requirement of individualized inquiry into the reason for an intrusion of the right of privacy secured by Article 1, § 5 of the Louisiana Constitution.71

The court went on to hold that regardless of the relationship of Mimms to the guarantees of section 5, the Mimms rationale did not extend to

67. 338 So. 2d at 623.
68. 366 So. 2d 1369 (La. 1978).
71. 366 So. 2d at 1374.
passengers in the automobile. It further found that there are no grounds under the 1974 constitution for a rule that "would permit police to remove a passenger from an automobile on a routine traffic stop."  

The foremost pronouncement on the relationship between the fourth amendment and section 5 is State v. Hernandez. Once again the Louisiana Supreme Court departed from a United States Supreme Court holding; this time New York v. Belton. In Hernandez, the defendant was arrested for driving while intoxicated. The arrest, however, did not take place until the defendant had parked his car in his driveway. Upon being taken to the station, Hernandez left specific instructions that no one was to drive his car. The police towed the car anyway, alleging that it was office policy. In preparing the car to be towed, a police officer found contraband drugs, and Hernandez was subsequently charged with possession of illegal substances. The prosecution argued that Belton authorized the search of the automobile and any containers therein incident to the lawful arrest. In rejecting this, the Louisiana Supreme Court noted that once the vehicle was at the defendant's residence and was not a safety hazard, there could be no justification for its seizure incident to an arrest without some other legal basis doing so. Once again the court held that the United States Supreme Court rule was not applicable, but even if it was, section 5 granted greater rights:  

Furthermore, the search of the defendant's automobile, without probable cause, and in the absence of any of the circumstances which have been recognized by this court as justifying a narrow exception to the warrant requirement, plainly constituted an unreasonable search, seizure or invasion of privacy in violation of Article I, § 5 of the 1974 Constitution. Although the Belton case is distinguishable and therefore inapplicable here, it should be noted that we do not consider it to be a correct rule of police conduct under our state constitution. We, of course, give careful consideration to the United States Supreme court interpretation of relevant provisions of the federal constitution, but we cannot and should not allow those decisions to replace our independent judgment in construing the constitution adopted by the people of Louisiana. Our state constitution's declaration of the right to privacy contains an affirmative establishment of a right of privacy, explicit protections against unreasonable searches, seizures or invasions of property and communications, as well as houses, papers and effects, and gives standing to any person adversely affected by a violation of these safeguards to raise  

72. Id.  
73. 410 So. 2d 1381 (La. 1982).  
the illegality in the courts. . . . This constitutional declaration of right is not a duplicate of the Fourth Amendment or merely coextensive with it; it is one of the most conspicuous instances in which our citizens have chosen a higher standard of individual liberty than that afforded by the jurisprudence interpreting the federal constitution.75

In one of the bolder moves of judicial fiat, the court, in an opinion by Justice Blanche, reversed itself in State v. Reeves,76 holding on rehearing that warrantless consensual (by one party) electronic surveillance does not violate section 5. In doing so, Justice Blanche relied heavily upon the United States Supreme Court decision in Katz v. United States,77 thus returning to a dependence on federal jurisprudence. On original hearing, in an opinion by Justice Dennis, the court had held the exact opposite relying principally on convention transcripts, Justice Dennis' personal experience as a delegate of the constitutional convention, and ratifier's intent. In concurring in the rehearing opinion, Justice Lemmon instead deferred to the legislature's interpretation of the constitution:

The fact that the members of the legislative branch approved such procedure only six years after the adoption of the Constitution certainly indicated that those elected representatives of the people did not believe such action to be an unreasonable invasion of the privacy of a person's communications. In enacting Act 241 of 1980, the Legislature must have construed the Louisiana constitution protection as intended to be coextensive with the United States Supreme Court's assessment of Fourth Amendment protections clearly expressed in Katz and White, rather than as intended to be a rejection of White.78

Justice Dennis criticized the majority's opinion on rehearing as being an anomaly in the court's pronouncements thus far on section 5:

I am shocked by the methodology and the results of their opinion. . . .

Like a blindfolded Houdini, the majority opinion writer eludes uncontradicted convention history, wiggles

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75. 410 So. 2d at 1385.
76. 427 So. 2d 403 (La. 1982).
77. 389 U.S. 347, 88 S. Ct. 507 (1967)
78. 427 So. 2d at 419 (footnotes omitted). In all fairness, Justice Lemmon is referring to the fact that many of the legislators present in the Legislature at the time the statute was passed were also delegates to the Constitutional Convention of 1973. However, this author questions the amount of deference given to the whole of the Legislature. The Legislature cannot be equated with the drafters, nor do their actions reflect the intent of the ratifiers which is arguably more important.
free of plain words in the constitution and discovers a
gap in the document no other scholar knew existed, to
find, after all, that, whenever this court wishes, private
communications can be seized or intercepted without a
warrant and without probable cause supported by oath
or affirmation.79

In Kirk v. State,80 the court had an opportunity to reconsider State
v. Reeves. Plaintiff Kirk and his attorney successfully brought suit for
a declaratory judgment in the district court that Louisiana Revised
Statutes 14:322.1 which prohibited lay persons from recording confi-
dential communications with witnesses, while allowing the prosecution
to engage in this activity, was unconstitutional as violative of equal
protection. Since State v. Reeves had previously held that the prosecution
could record witnesses without violating section 5 and the right to
privacy, the propriety of that decision was again raised. However, instead
of finding that the statute was violative of privacy rights, the court
rested its decision solely on violations of state equal protection guarantees
inasmuch as the statute did not further any “appropriate” state interest.
Justice Dennis, in concurring, noted the inconsistency in the holding of
Kirk with that of Reeves, urging that while the majority reached the
correct conclusion it was for the wrong reasons. In chastising the majority
for not readdressing the issue in Reeves of section 5 privacy, Justice
Dennis remarked:

We now have taken several benighted steps down the totalitarian
road. Because of this court’s misinterpretation of the right to
privacy article in Reeves, we allow state officials to electronically
eavesdrop at will, without probable cause, and without warrants,
on our citizen’s private communications. At the same time, as
the present case demonstrates, we have created a situation in
which it is now impossible for the legislature to enact laws
protecting citizens from unlimited electronic surveillance by other
private citizens. Sadly and ironically, this Orwellian scenario is
happening in a state whose constitution is one of the few which
specifically purports to protect “communications” from unrea-
sonable searches, seizures, or invasions of privacy.81

The DWI roadblock cases also illustrate the departure of the Louisi-
ana Supreme Court from federal jurisprudence. In two cases, State v.
Parms,82 and State v. Church,83 the court struck down arbitrarily based

79. 427 So. 2d at 421, 427.
80. 526 So. 2d 223 (La. 1988).
81. 526 So. 2d at 227-28.
82. 538 So. 2d 1293 (La. 1988).
83. 538 So. 2d 993 (La. 1989).
DWI road blocks as a violation of section 5. In State v. Parms, the court, Justice Watson writing, found that discretionary roadblocks were violative of both the fourth amendment and section 5. In State v. Church, the court had opportunity to reconsider DWI roadblocks. Justice Watson, again writing for the majority, pretermitted the question of the validity of the stops under the federal constitution, and declared the roadblocks violative of section 5. He noted that the court in Parms relied on federal constitutional grounds to invalidate the roadblocks, and that the statement in Parms that the placement of roadblocks would not pass state constitutional muster was only dicta. In seeking to clarify the court's position, Justice Watson clearly established that Church's invalidation of roadblocks rested solely on state constitutional grounds. In contrast, shortly thereafter the United States Supreme Court, in Michigan Department of State Police v. Sitz, approved surprise sobriety checkpoints, thus holding that the fourth amendment of the federal constitution was not violated.

It is interesting to note that Justice Cole in his dissent to State v. Church questioned whether section 5 was actually any broader than the fourth amendment. In opposition to the holding of the court, Justice Cole noted:

As regards the question of whether the Louisiana Constitution is broader than the United States Constitution relative to Fourth Amendment principles, I concur in the conclusion of Justice Blanche in his dissent to State v. Hernandez...: “However, if the Louisiana [constitution] is, in fact, broader than the United States Constitution on that issue, this writer feels that the Constitution is due for an amendatory change in the opposite direction.85

The latest pronouncement by the court on the issue of violations of section 5 privacy rights occurred in Moresi v. State, Department of Wildlife.86 Plaintiffs were arrested by wildlife agents for failure to tag game properly. The agents subsequently posted a note on the door of plaintiffs' camp stating, “We missed you this time but look out next time!” The note was allegedly meant for another camp. Plaintiffs brought an action under 42 U.S.C. section 1983 for violation of their civil rights and an action under state law for money damages for violation of section 5. The court rejected the claims under section 1983, but found that money damages can be awarded for violations of the state constitution. While recognizing the action, however, the court adopted the

85. 538 So. 2d at 1001.
86. 567 So. 2d 1081 (La. 1990).
good faith defense that is available in section 1983 actions. The court, citing Butz v. Economou, noted that:

We consider here, as we did in Scheuer [v. Rhodes, 416 U.S. 232 (1974)] the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority. Yet Scheuer and other cases have recognized that it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established limits will not unduly interfere with the exercise of official judgment.

The court ultimately found the good faith defense to be applicable in Moresi.

It is interesting to note that the standing provision of section 5 to challenge unconstitutionally seized evidence is, by its very language, much broader than the federal jurisprudential requirements. The intricacies of the standing provisions are not jurisprudential creations of the Louisiana Supreme Court, and so are not treated herein. It should be noted, however, that one question left to be answered by the supreme court is whether there is implicit in section 5 an exclusionary rule or whether, like its federal counterpart, it is a creature of the courts subject to modification as needed.

**PRIVATE PARTY SEARCHES**

In State v. Hutchinson, the court considered section 5 in light of private actors. The court found that the defendant did have a constitutional right to privacy which was capable of being violated by third parties, though under the particular facts of this case no violation had occurred:

Defendant contends, however, that the inspection conducted by Duson was an unreasonable search proscribed by the Louisiana Constitution. We are unwilling to hold that the rights safe-

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91. 349 So. 2d 1252 (La. 1977). The case involved a motion to quash evidence which was found attached to the underside of the defendant’s vehicle by the victim of a robbery.
guarded by Article I, § 5 of our Constitution are merely co-extensive with those protected by the Fourth Amendment to the federal constitution, or that private searches and seizures are not within the ambit of protection afforded by our state charter.92

Chief Justice Sanders, concurring in the result, disagreed with Justice Dennis' statement that the right to privacy guaranteed in section 5 protected individuals from private actors. Indeed, Justice Sanders interprets the phrase "invasions of privacy" to be merely descriptive of the entirety of rights protected by section 5:

I find nothing in the language of this section extending the protection to searches by private citizens. In fact, the language is the same as that of the Fourth Amendment with the exception of the addition of the words "invasion of privacy" and the last sentence dealing with standing.

The reference to invasions of privacy does nothing more than make clear that the right protected is that of privacy. This right has long been recognized as the basis of the Fourth Amendment.93

In State v. Nelson,94 the supreme court again addressed private actors and section 5. In Nelson, the defendant allegedly swallowed a diamond ring shown to him by a store clerk. Private security guards were summoned who subsequently took the defendant to an upstairs room where he was strip searched, handcuffed, and choked to prevent his swallowing what the guards believed was the ring in his mouth. The court found that this was an unreasonable search which violated section 5. The court further noted that while the search as performed by private persons was unreasonable, the search was conducted pursuant to state law.95 This was also the result in State v. Longlois,96 where arrest of a defendant for simple possession of marijuana was made by a wildlife agent in violation of section 5 but under color of state law. However, it should be noted that both Nelson and Longlois involved searches where the private actors were acting under authority of state law, one as a security guard, the other as a wildlife agent. Since neither was acting solely in his capacity as a private citizen, these decisions do not compel a finding

92. Id. at 1254.
94. 354 So. 2d 540 (La. 1978).
95. La. Code Crim. P. art. 215 allows merchants to use reasonable force to detain for questioning suspected shoplifters, where there is reasonable cause to believe the person committed a theft of merchandise.
96. 374 So. 2d 1208 (La. 1979).
that section 5 applies to private actors, as the court could have found sufficient state action to otherwise invoke the protections of section 5. Inasmuch as these cases could have rested on violations of section 5 by state actors, they can be distinguished from the case of completely private actors.

However, State v. McCabe9 involved a search by a private party and not under authority of state law. In McCabe, the defendant, who was apparently intoxicated in a neighborhood with which he was unfamiliar, was cursing and engaging in altercations. A neighbor, whose children were playing in the yard near the home that the defendant was visiting and who was concerned about the defendant’s actions, looked inside the defendant’s truck and found a loaded pistol, whiskey, and contraband drugs. This evidence was subsequently used by the prosecution against the defendant. In failing to find a violation of section 5, the court noted an exception to suppression of evidence when a private party is involved:

We find this search was reasonable and that any privacy interest which defendant may have had was subordinated to Hall’s [the neighbor’s] concern for the safety and welfare of his children.

In support of this position, we find that courts have frequently held that evidence obtained by a private search is admissible where a superior right or interest attached to the individual conducting the search at that time or place.98

CIVIL PRIVACY RIGHTS

The Louisiana Supreme Court, in two notable cases, has recognized that the right to be free from invasions of privacy extends beyond criminal matters. In Arseneaux v. Arseneaux,99 a husband sued his wife for a divorce on the grounds that she had committed adultery, evidenced by an alleged abortion. The court found that the wife could not be compelled to disclose evidence of an abortion allegedly obtained by her during the existence of the marriage. In doing so, the court held that to force her to disclose this information would violate her right to privacy as recognized under the federal jurisprudence and the safeguards of section 5:

Not only is the trial court’s interpretation of the statute [the Physician-Patient Privilege, La. R.S. 13: 3734] correct, but there are strong constitutional considerations [article I, § 5] weighing against admission of this evidence. . . . Roe v. Wade, 410 U.S.

97. 383 So. 2d 380 (La. 1980).
98. Id. at 383.
113 . . . (1973) recognized a constitutional right to privacy concerning abortion in the early stages of pregnancy. Planned Parenthood of Cent. Mo. v. Danforth . . . held that a woman is protected from husbandly as well as governmental intrusion in deciding whether to terminate a pregnancy. This constitutional right to privacy is not absolute but can only yield to a compelling state interest. . . . No compelling state interest requires an invasion of the right to privacy here.100

In the context of informed consent, the supreme court in Hondroulis v. Schuhmaker101 further extended the right to be free from invasions of privacy beyond criminal matters. What started out as a simple medical malpractice—informed consent case, ended up being one of the more controversial decisions to come out of the court on privacy matters. The court on rehearing recognized a constitutional right based upon section 5 to obtain or reject medical treatment, including the right to be fully informed of all material risks:

Art. I, Section 5 of the 1974 Louisiana Constitution expressly guarantees that every person shall be secure in his person against unreasonable "invasions of privacy." This safeguard was intended to establish an affirmative right to privacy impacting non-criminal areas of law and establishing the principles of the supreme court decision in explicit statement instead of depending on analogical development.102

The opinion seems to indicate the court's willingness to subsume the federal guarantees of privacy emanating from the constitutional rationale of Roe v. Wade103 and progeny. The interesting part of this expansion is that while Roe was decided prior to the 1974 constitution, the principle case upon which the court relies is Carey v. Population Services International,104 which was not decided until 1977. In light of Webster v. Reproductive Services105 then pending before the United States Supreme Court, and the possibility of its abandoning the privacy rights established in Roe v. Wade and relied upon in Carey v. Populations Services, the supreme court may have attempted to cement the privacy rationale of Roe and its progeny into the law of Louisiana by virtue of section 5.106

100. Id. at 430.
101. 553 So. 2d 398 (La. 1989).
102. Id. at 415.
106. This author is careful to note that the privacy rights of Roe do not necessarily compel a finding of a right to abort. If the U.S. Supreme Court were to pull back from Roe, the Louisiana Supreme Court could very well find that the fetus is a person under
**Section 7. No law shall curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish his sentiments on any subject, but is responsible for abuse of that freedom.**

The guarantee of freedom of expression is widely interpreted in the federal jurisprudence, a fact widely recognized in the convention debates. As such, there has been little necessity by the Louisiana Supreme Court to interpret the 1974 constitution's guarantee more broadly. The inclination has generally been to find that the state constitutional guarantee protects the same types of expression that the federal constitution does. However, there seemed to be some concern by the convention delegates to preserve the federal high watermark in effect in 1974 as Louisiana's standard in section 7.

The supreme court in *Mashburn v. Collins* recognized that the guarantees of section 7 need not necessarily be limited to the minimal guarantees of the federal constitution. However, the court in *Mashburn* declined to extend the guarantees at that time, finding that the guarantees of both constitutions sufficiently protected the defendant. For purposes of obscenity, the court in *State v. Waldenbooks* made no distinction between federal and state constitutional guarantees of free press and expression. And, in the case of a journalist's constitutional privilege against compulsory disclosure of sources, the court in *In re Grand Jury Proceedings (Ridenhour)* found the state and federal guarantees to be equivalent: "For purposes of this issue, we will consider the two constitutions together. The information is either protected by both or not protected by either."
Section 8. No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof.

Section 8 tracks the language of the first part of the second sentence of article 1, section 4 of the Louisiana Constitution of 1921.113 The drafters of the Louisiana Constitution of 1974, however, were very careful to leave out the additional language of section 4, as well as certain prohibitions in the old constitution which forbade public funding of private and sectarian schools.114 Arguably, the Constitution of 1974 reduces state constitutional barriers between the church and state; however, very little litigation has arisen under new section 8 guaranteeing the right to free exercise of religion. The latest definitive pronouncement on the subject arose under the Constitution of 1921 in Seegers v. Parker.115 The court therein held that article 1, section 4 of the Louisiana Constitution of 1921 embodied the federal guarantees of freedom of religion found in the first amendment to the United States Constitution. The court further intimated that perhaps the inclusion of the federal guarantee, as it embodies the separation of church and state, was incorporated much more comprehensively, and certainly "in greater detail" than the federal guarantees found in the first amendment. The effects of section 8 on state assistance to private religious schools has not been demonstrated. However, as far as other non-educational concerns are involved, there is no reason to believe that Seegers will not be applied to the 1974 Constitution.

Right to Keep and Bear Arms: Article I, § 11

Section 11. The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person.

The provisions of section 11 are more expansive than the second amendment to the United States Constitution. Unlike the federal right,

113. Section 4 of the Louisiana Constitution of 1921 provides:
Every person has the natural right to worship God according to the dictates of his own conscience. No law shall be passed respecting an establishment of religion, nor prohibiting the free exercise thereof; nor shall any preference ever be given to, nor any discrimination made against, any church, sect or creed of religion, or of any form of religious faith or worship.

114. Article 12, § 13 of the Louisiana Constitution of 1921 provided in part: "No appropriation of public funds shall be made to any private or sectarian school."

which inures to the benefit of the state,\textsuperscript{116} the provisions of section 11 inure to the benefit of the individual citizens of Louisiana.\textsuperscript{117} There are, however, two definite limitations to section 11. In \textit{State v. Amos},\textsuperscript{118} the supreme court held that the right of each citizen to bear arms could be limited to exclude people convicted of certain crimes:

The right to keep and bear arms, like other rights guaranteed by our state constitution, is not absolute. We have recognized that such rights may be regulated in order to protect the public health, safety, morals, or general welfare so long as that regulation is a reasonable one. It is beyond question that the statute challenged in the instant case was passed in the interest of the public and as an exercise of the police power vested in the legislature. Its purpose is to limit the possession of firearms by persons who, by their past commission of certain specified serious felonies, have demonstrated a dangerous disregard for the law and present a potential threat of further or future criminal activity.\textsuperscript{119}

The second limitation involves federal preemption of this right. In an Attorney General opinion it was noted that this right may be preempted by the Omnibus Crime Control Act of 1970\textsuperscript{20} to the extent that the state provision might allow convicted felons the right to bear arms.\textsuperscript{121}

\textbf{RIGHTS OF ACCUSED: ARTICLE 1, § 13}

\textit{Section 13. When any person has been arrested or detained in connection with the investigation or commission of any offense, he shall be advised fully of the reason for his arrest or detention, his right to remain silent, his right against self incrimination, his right to the assistance of counsel and, if indigent, his right to court appointed counsel. In a criminal prosecution, an accused shall be informed of the nature and cause of the accusation against him. At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment. The legislature shall provide for a uniform system for securing and compensating qualified counsel for indigents.}

\textsuperscript{116} United States v. Cruikshank, 92 U.S. 542 (1875).
\textsuperscript{117} State v. Hamlin, 497 So. 2d 1369 (La. 1986).
\textsuperscript{118} 343 So. 2d 166 (La. 1977).
\textsuperscript{119} Id. at 168 (citations omitted).
The "rights of the accused" is a field dominated by federal jurisprudence, waxing in the United States Supreme Court's opinion in *Miranda v. Arizona*, the holding of which was adopted by the very language of section 13. The most notable decision on section 13 has been *State in Interest of Dino*. In *Dino*, the supreme court specifically held that adoption of section 13 in the 1974 constitution "enhanced and incorporated the prophylactic rules of *Miranda v. Arizona*." The prosecution argued that *Oregon v. Mathiason* modified *Miranda* and, in doing so, section 13. The court, addressing this concern, stated:

[If *Mathiason* represents a constriction of the *Miranda* definition of significant deprivation of freedom of action, its holding clearly does not govern our interpretation of Article I, § 13 of the 1974 Louisiana Constitution whose framers intended to adopt the *Miranda* edicts full-blown and unfettered. [Footnote omitted.] Finally, it appears that, in fact, there was an intention by the convention to go beyond *Miranda* and to require more of the State regarding the precise issue now under discussion.]

This is the best example of jurisprudential recognition that a federal high watermark was made the standard for Louisiana by the language of the Constitution of 1974, section 13, and it will serve to protect the rights of the criminally accused long after the United States Supreme Court has lessened the protections once thought to be afforded by the Bill of Rights.

**HUMANE TREATMENT: ARTICLE I, § 20**

*Section 20. No law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment. Full rights of citizenship shall be restored upon termination of state and federal supervision following conviction of any offense.*

In *State v. Sepulvado* the court construed the "excessive" provision of section 20 to provide greater protection than the eighth amendment to the United States Constitution. Justice Tate, writing for the majority, stated that:

The deliberate inclusion of a prohibition against "excessive" as well as "cruel and unusual" punishment adds an additional constitutional dimension to judicial imposition and review of

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123. 359 So. 2d 586 (La. 1978).
124. Id. at 589.
126. 359 So. 2d at 590. The issue to which Justice Dennis refers is the taking of statements from the accused without an attorney being present.
127. 367 So. 2d 762 (La. 1979).
The Eighth Amendment of the federal constitution prohibits "cruel and unusual" punishments. It was long ago held that excessiveness was a factor to be considered in determining whether a punishment was within the constitutional prohibition of that clause. *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910). However, later cases gradually subsumed the excessiveness element with the other, more literal tests for determining whether the "cruel and unusual" standard was violated, giving rise to a general rule against review for excessiveness per se.128

Justice Tate also noted that while federal Courts of Appeal had developed methods of reviewing the record for excessiveness of sentences, the federal jurisprudence has not incorporated excessiveness in the eighth amendment prohibition, nor extended the eighth amendment to the states through the fourteenth amendment.

In *State v. Thomas*,129 the court summed up the jurisprudence of what comprised excessive punishment:

> A sentence is unconstitutionally excessive when it is grossly out of proportion to the severity of the offense or inflicts unnecessary pain and suffering. *State v. Reed*, 409 So.2d 266 (La. 1982).

A sentence within the statutory range may be excessive when considered in light of the individual defendant and the circumstances of his crime. *State v. Quiebedeaux*, 424 So.2d 1009 (La. 1982); *State v. Grey*, 408 So.2d 1239 (La. 1982); *State v. Sepulvado*, supra.130

**ACCESS TO COURTS: ARTICLE 1, § 22**

*Section 22. All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonably delay, for injury to him in his person, property, reputation, or other rights.*

This section is particularly problematic. The majority of opinions rendered under this section have concentrated on the access to the courts.131 However, the opinions consistently found that the guarantee

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128. Id. at 764-65 (footnote omitted).
129. 447 So. 2d 1053 (La. 1984).
130. Id. at 1056.
131. Crier v. Whitecloud, 496 So. 2d 305 (La. 1986); Sibley v. Board of Supervisors, 477 So. 2d 1094 (La. 1985), on original hearing; and Bazley v. Tortorich, 397 So. 2d 475 (La. 1981).
of access to the courts was substantially the same right protected by the guarantees of procedural due process embodied in section 2. In a notable instance in which section 22 might actually have been violated, Justice Dennis intimated in his dissent in *Crier v. Whitecloud*\(^{132}\) that open access to the courts might be violated by very short preemptive periods such as the one established for medical malpractice, Louisiana Revised Statutes 9:5628.\(^{133}\)

Justice Dixon, also dissenting in *Crier*, noted a violation of section 22 inasmuch as a "statute which allows prescription to run before a tort victim knows or should know that he has been damaged, violated the 'adequate remedy' required by Art. I, § 22."\(^{134}\) However, it was in *Williams v. Kushner*\(^{135}\) that Chief Justice Dixon, again in a dissent, discussed section 22 and the requirement of "adequate remedy" extensively. In advocating the position that the medical malpractice cap was unconstitutional, he rejected prior jurisprudence which equated section 22 solely with due process. Accompanied by an analysis of the history and scope of section 22, especially the guarantee of an adequate remedy, Justice Dixon noted:

The history of Article 1, § 22 indicates that the protection afforded by this provision encompasses more than the mere right of access to the courts, as suggested in some of our prior decisions. [Footnote omitted.] "Adequate remedy" and "due process" do not mean the same thing; "adequate remedy" is more than "due process."\(^{136}\)

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132. 496 So. 2d at 314.
133. In addition, I have serious reservations regarding whether the statutory limitation period, as applied to minors, violates their access to courts. The Supreme Court of Missouri recently struck down such a statutory provision on this basis stating:

The statutory limitation period, as applied to minors, violates their right of access to our courts under Mo. Const. art. 1, § 14 and renders vacant the guarantee contained in this constitutional provision which declares in no uncertain terms "that the courts of justice shall be open to every person and certain remedy afforded for every injury to person...."

To the extent that it deprives minor medical malpractice claimants of the right to assert their own claims individually, makes them dependent on the actions of others to assert their claims, and works a forfeiture of those claims if not asserted within two years, the provisions of § 516.105 are too severe an interference with a minor's state constitutionally enumerated right of access to the courts to be justified by the state's interest in remedying a perceived medical malpractice crisis. *Strahler v. St. Luke's Hospital*, 706 S.W.2d 7, 11-12 (Mo. 1986) (footnote omitted).

In my opinion the Missouri Court's reasoning has a great deal of merit.

Id. at 314.
134. Id. at 313.
135. 549 So. 2d 294 (La. 1989).
136. Id. at 309.
This is the only substantial interpretation, however, offered by a member of the court which recognized any deviation of the guarantees of section 22 from section 2, due process.

CONCLUSION

The Louisiana Declaration of Rights is an extensive codex of liberties, not all of which are unique and independent. Very few times does one see a challenge under due process that does not also raise the issue of equal protection. Nor does one usually raise a right to property under section 4 without raising a correlative question of due process of law. All in all, the Louisiana Supreme Court cannot be faulted for its frequent reliance on federal jurisprudence. For many years, the most extensive guarantees of rights were those arising from the application of the Bill of Rights to the states. However, with the waning of civil liberties and waxing of judicial conservatism in the United States Supreme Court, the Louisiana Supreme Court is called upon to protect the civil rights of our citizens via the 1974 constitution. While the 1974 constitution was intended to be abbreviated, our Declaration of Rights is substantially longer than the Bill of Rights. In adopting the 1974 constitution the people of Louisiana sought to maintain for themselves those basic rights inalienable to all persons. The constitution mandates that "[t]he rights enumerated in this Article are inalienable by the state and shall be preserved inviolated by the state." Only through a continued trend of expansion of state constitutional guarantees can we weather the conservative storm in Washington.

The purpose of this article is best summed up by retired United States Supreme Court Justice William Brennan:

The essential point I am making, of course, is not that the United States Supreme Court is necessarily wrong in its interpretation of the federal Constitution, or that ultimate constitutional truths invariably come prepackaged in the dissents, including my own, from decisions of the Court. It is simply that the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them. Rather, state court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying spe-

cific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees. I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions. 138

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