The Declaration of Rights of the Louisiana Constitution of 1974

Lee Hargrave
THE DECLARATION OF RIGHTS OF THE LOUISIANA CONSTITUTION OF 1974

Lee Hargrave*

The Declaration of Rights of the Constitution of 1974 was viewed by many delegates to the Constitutional Convention as a radical document making extreme innovations. If one compares the new Bill of Rights with that of the 1921 Constitution, one can easily support that view. In comparison with the existing United States Supreme Court constructions of the Bill of Rights of the Constitution of the United States, however, the innovations in the new state document are minimal. In some areas, expansions beyond current decisions were made; in others, the federal standard is still the stricter one. Whereas most convention committees worked from the provisions of the 1921 Constitution in drafting new articles, and thus produced a document that evolved from current state law and experience, the Committee on the Bill of Rights and Elections worked from existing federal rights guarantees in drafting most of its proposals, and produced a document that has as its primary background the federal standards in the area.

The following commentary on each section of the new declaration of rights is not an exhaustive exposition; it is a selective catalogue of the major changes, accompanied by a discussion of the problems those changes may raise.

PREAMBLE

We, the people of Louisiana, grateful to Almighty God for the civil, political, economic, and religious liberties we enjoy, and desiring to protect individual rights to life, liberty, and property; afford opportunity for the fullest development of the individual; assure equality of rights; promote the health, safety, education, and welfare of the people; maintain a representative and orderly government; ensure domestic tranquility; provide for the common defense; and secure the blessings of freedom and justice to ourselves and our posterity, do ordain and establish this constitution.

*Associate Professor of Law, Louisiana State University; Co-ordinator of legal research for the Constitutional Convention of 1973, conducting research for the Committee on the Bill of Rights and Elections. While this article is based in part on the author's experiences in that position, it is not an official statement or commentary of the convention or of the committee. The opinions and statements are solely those of the author.
The preamble is but a preface, an introduction to the Constitution, and not a binding grant or limitation of power. It speaks in generalities about the hopes and aspirations of the Committee on Bill of Rights and Elections that drafted it, and of the convention that adopted it. During committee debates, it was referred to as "a homily—it's motherhood and apple pie and all those things," and an expression of aspiration.\(^1\) In presenting the preamble to the convention, Committee Chairman Alphonse Jackson called it "a philosophical sermon" and explained, "My statement was based on prior court decisions and this was discussed at length and fully in the committee. And based on the court decisions that we considered, we make the statement that no Preamble has the force of law."\(^3\)

In view of the limited effect of the preamble, it is surprising that the convention devoted so much time to it. However, it became involved in a preliminary skirmish to test the strength of opposing views that would clash more intensely in the debate on the more controversial sections of the declaration of rights. The preamble thus inspired a debate about political philosophy between those favoring greater protection of individual liberties and more government social action and the more traditional groups who wanted little expansion of the 1921 Bill of Rights and no reference to social aspirations.

The committee proposed a preamble, similar to that of the Illinois Constitution of 1970, which enlarged the simple preamble of the 1921 Constitution to include references to "individual rights to life, liberty and property," "fullest development of the individual," "equality of rights," and "the health, safety, education, and welfare of the people." As such, the proposal represented the aspirations of the more liberal forces. On the convention floor, supporters of the committee's preamble defeated three attempts to amend the proposal to delete some of the new statements and the preamble as proposed by the committee was adopted.\(^4\) This vote set the pattern

---

3. STATE OF LOUISIANA CONSTITUTIONAL CONVENTION OF 1973 VERBATIM TRANSCRIPTS Aug. 28, 1973 at 52 [hereinafter cited as PROCEEDINGS]. The reference to court decisions was to Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905), where the United States Supreme Court citing 1 J. Story, Commentaries on the Constitution of the United States 462 (1883), reasoned that the preamble of the United States Constitution "has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its departments."
4. OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1973 OF THE STATE OF LOUISIANA, Aug. 28, 1973 at 6, 7 [hereinafter cited as JOURNAL]. Defeat of an amendment to change the preamble in favor of a much shorter statement was also the beginning of the defeat of an attempt by a number of delegates to scrap
for final convention action—adoption of a Bill of Rights greatly expanding the rights of the individual.

ORIGIN AND PURPOSE OF GOVERNMENT

Section 1. All government, of right, originates with the people, is founded on their will alone, and is instituted to protect the rights of the individual and for the good of the whole. Its only legitimate ends are to secure justice for all, preserve peace, protect the rights, and promote the happiness and general welfare of the people. The rights enumerated in this Article are inalienable by the state and shall be preserved inviolate by the state.

Section 1 is basically a second preamble, a statement of political theory rather than of law. Elimination of the section would not diminish the enforceable rights of citizens. To provide that the government's legitimate ends concern justice, peace, rights, happiness and general welfare is to speak vaguely enough to authorize just about anything—which would be the case if the section were deleted, since states are units possessing general sovereignty and the power to do anything not forbidden by the constitution.

That the section is in the constitution is best explained by the fact that it is a continuation, with minor change, of the first section of the Constitution of 1921. One can expect the same dearth of litigation under the new section as under the prior section.

Among the additions to the 1921 provision suggested by the committee was the third sentence providing that the rights enumerated in the bill of rights are "inalienable and shall be preserved inviolate." To more clearly indicate that this new sentence would not prevent an individual from waiving his rights, an amendment was

the committee proposal and adopt a Bill of Rights that deviated little from the 1921 Bill of Rights. Delegate John Thistlethwaite had appeared before the committee to inform it that he and a group of delegates would propose floor amendments to replace its proposal with essentially the 1921 Bill of Rights with style changes. The amendment to change the preamble, the first step in the strategy, was defeated 46-58. See Baton Rouge State Times, Aug. 22, 1973, at 4-A, col. 1; JOURNAL, Aug. 28 at 6.

5. See Baton Rouge State Times, April 16, 1973, at 1-A, col. 7. Presenting the section to the delegates on behalf of the committee, Delegate Judy Dunlap pointed out the section is "designed to set the tune and tone of the entire Declaration of Rights." She added, "let's pass this section as is, and get onto something more juicy, namely, Section 3." PROCEEDINGS, August 29 at 2.

6. The prior provision was invoked by plaintiffs contesting the validity of the new constitution. As would be expected, the provision was not considered determinative by the Louisiana supreme court. Bates v. Edwards, 294 So. 2d 532, 536 (La. 1974).

adopted by the convention to provide that the rights "are inalienable by the state and shall be preserved inviolate by the state."\textsuperscript{8}

**DUE PROCESS OF LAW**

*Section 2. No person shall be deprived of life, liberty, or property, except by due process of law.*

The due process guarantee continues the language of the Fifth and Fourteenth Amendments to the United States Constitution and of Article I, § 2 of the 1921 Louisiana Constitution. It remains a flexible provision which gives the courts significant leeway in developing standards of reasonableness and fundamental fairness to check government action according to evolving conceptions of society. A separate Section 4 provides specific guarantees against expropriation.

In the evolution of the committee proposal and in the floor debate, the scope and nature of due process were understood not solely in terms of state jurisprudence under the prior due process clause, but also in light of much broader federal due process developments. What was sought to be continued—"the current status of the law"—was the case law as developed by both federal and state jurisprudence and the "fundamental fairness" analysis by which due process grows organically.

The aim of the committee proposal in protecting "other rights" in addition to life, liberty, and property, and in referring to "substantive and procedural due process" instead of simply to due process \textsuperscript{8} was to reflect court constructions of the classic language\textsuperscript{10} as well as to recast the provision in clearer language rather than solely in terms of art. Explaining the proposed section to the convention on behalf of the committee, Delegate Kendall Vick states, "We are doing nothing more than reflecting the current status of the law."\textsuperscript{11} His

\textsuperscript{8} PROCEEDINGS, Aug. 29 at 56.

\textsuperscript{9} Committee Proposal 25, § 2: "No person shall be deprived of life, liberty, property, or other rights without substantive and procedural due process of law."

\textsuperscript{10} Louisiana courts have included "other rights" in a broad construction of "property". See, e.g., La. State Bar Assn. v. Ehmig, 277 So. 2d 137 (La. 1973) (license to practice law); Mongogna v. O'Dwyer, 204 La. 829, 16 So. 2d 829 (1943) (business alleged to be gambling operation); National Acceptance Co. of America v. Wallace, 194 So. 2d 194 (La. App. 2d Cir. 1967) (rights of pledgee of promissory note). These cases dealt with procedural due process. For substantive due process, see, e.g., Schwegmann Bros. v. Louisiana Bd. of Alcoholic Bev. Control, 216 La. 148, 43 So. 2d 248 (1949). See also New Orleans v. Southern Auto Wreckers, 193 La. 885, 192 So. 523 (1939); State v. Legendre, 138 La. 154, 70 So. 70 (1915); Davis v. Department of Pub. Safety, 262 So. 2d 541 (La. App. 3d Cir. 1972).

\textsuperscript{11} PROCEEDINGS, Aug. 29 at 6. At that point, Delegate Moise Dennery said, "But
elaboration that the guarantee is one of "fundamental fairness" came from Justice Cardozo's classic formulation in *Palko v. Connecticut.*

The debate that followed did not question the nature of due process as fundamental fairness determined by the courts, but centered on a narrow discussion of the serious spring floods which had recently occurred and the fear of some delegates that "procedural due process" would hamper immediate relocation of levees in times of emergency. Explaining his amendment to delete the new phrases and to return to the prior language, Delegate Chalin Perez argued that "procedural due process" might require prior hearing before appropriation; thus, government might be unable to respond quickly in time of flood emergency. The amendment was adopted, thus returning to the prior formula for expressing the due process guarantee without reference to "other rights" and "substantive and procedural" due process. This action makes it clear that due process is not violated when land is appropriated without prior hearing in times of flood emergency. Otherwise, the section continues the terms of art with their federal and state judicial encrustations. Deletion of "other rights" in this section is of little consequence since Section 24 recognizes the existence of "other rights retained by the individual citizens of the state."

The committee proposal omitted the language of the prior constitution providing, "nor shall vested rights be divested, unless for purposes of public utility, and for just and adequate compensation previously paid." This was not a substantive change, for the "other rights" language in the proposed Section 2 and Section 24 encompassed vested rights. Deletion of "other rights" in Section 2 by the convention was done largely in the debate over the implications of "procedural due process" with little discussion about the "other rights" provision and with the purpose of keeping the law as it then existed. Since the existing law encompasses a broad construction of "life, liberty or property," under both federal and state constitutions, vested rights are included in that formula, as well as in Section 24.

I say if you have due process, that would automatically include substantive and procedural due process." *Id.*

13. The fear was probably not well founded. See, e.g., United States v. General Box Co., 224 F.2d 7 (5th Cir. 1955), aff'd, 351 U.S. 159 (1956).
17. *E.g.*, Angle v. Chicago, St. P. & Omaha Ry., 151 U.S. 1 (1894).
Convention action in strengthening the protection of private property in Section 4 also supports the view that the convention was not granting less protection to vested rights from governmental taking than currently exists.

RIGHT TO INDIVIDUAL DIGNITY

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.

Louisiana’s statement of the equal protection guarantee moves the state from a position of having no equal protection clause in its constitution to that of going beyond the decisional law construing the Fourteenth Amendment of the United States Constitution. In fact, the convention produced a stronger guarantee of equality with respect to race and religion than the Committee on the Bill of Rights and Elections proposed. As with Section 2, the committee and the convention worked from a background of federal equal protection developments rather than from the sparsely-developed state jurisprudence. The equal protection guarantee that emerged is a broad one and was intended to be so. Surely the breadth of the provision will produce far-reaching changes in the state, perhaps more than with any other provision of the constitution.

The equal protection guarantee is directed against governmental action. The reference is to “equal protection of the laws” and to “no law.” Private action is reached, however, by the slavery and involuntary servitude clause in the last sentence, as well as by Section 12. The provision is long, perhaps unnecessarily so, but the convention rejected the cleaner approach of paraphrasing the fourteenth amendment and providing simply that no person shall be denied

18. Though the 1921 Constitution had no equal protection clause, some measure of equal protection was required by virtue of substantive due process. See Simmons v. City of Shreveport, 221 La. 902, 60 So. 2d 867 (1952).
19. Committee Proposal 25, § 3 provided: “No person shall be denied the equal protection of the laws nor shall any law discriminate against a person in the exercise of rights on account of birth, race, age, sex, social origin, physical condition, or political or religious ideas. Slavery and involuntary servitude are prohibited, except in the latter case as a punishment for crime.”
20. See PROCEEDINGS, Aug. 29 at 60.
equal protection of the laws. Rather than leaving the development of the forbidden classifications solely to the courts, the choice was made to list a number of discriminatory bases which are prohibited: race; religious ideas, beliefs, or affiliations; birth; age; sex; culture; physical condition; political ideas or affiliations. This was done partly to firmly establish protection against discrimination on those grounds and partly based on political considerations, to ensure some minorities of protection by the use of clear language instead of depending on the legal construction of terms of art.

The decision to list specific grounds, however, does not mean the listing is exclusive, for the first sentence provides the general rule, “no person shall be denied the equal protection of the laws.” This paraphrase of the fourteenth amendment gives the courts the basis for developing the equal protection guarantee with respect to types of discrimination other than those listed. Had the grounds for discrimination in the second and third sentences been meant to be exclusive, those sentences would have stood alone, and the first sentence would have been superfluous.

As envisioned by the committee and explained on the convention floor, the proposal was susceptible of the equal protection analysis currently used by the United States Supreme Court— forbidding unreasonable classifications that do not have the support of a rational basis or, in some cases, a compelling state interest, but allowing

21. An amendment to substitute for the committee proposal the language “[n]o person shall be denied equal protection of the laws” was defeated 51-66. JOURNAL, August 29 at 5-6.

22. Committee spokesman Delegate Chris Roy explained, “It’s been too many times that even the Supreme Court of the United States had 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, when the state will discriminate against a person for any of these categories, then the state must show a reasonable basis for it. We consider that even for physical condition.” PROCEEDINGS, August 29 at 61.

23. Speaking against the amendment to omit the listing of grounds of discrimination, Delegate Camille Gravel said, “it doesn’t do a whole lot of good to go to people who have been disadvantaged over the years, by circumstance and by the operation of law, and say to them that we have got a great high sounding platitude here, the concept of equal protection of the laws that is going to take care of the problems that you are primarily concerned with. If we do nothing less, we have got to clearly, concisely and specifically state in this constitution that there shall be no discrimination against those who have been discriminated against; and if we don’t spell it out, if we try to gloss it over, if we try to generalize, then people are going to say, ‘the delegates to the constitutional convention are trying to play the same old games and are trying to fool us again.’ . . . [A] few more words . . . ‘is going to mean more to more people throughout the State of Louisiana than any other provision that is going to be adopted by this constitution.” PROCEEDINGS, Aug. 29 at 95.

24. PROCEEDINGS, Aug. 29 at 61.
classifications that are reasonable. The proposal as drafted by the committee would have applied this equal protection analysis to all types of discrimination. However, as amended and finally adopted, the provision does not allow the traditional analysis with respect to race and religion. The second sentence (which uses absolute language) in comparison with the third sentence (which employs the arbitrary, capricious or unreasonable formula) permits no discrimination whatsoever with respect to race or religion.

The amendment making the change resulted from an overnight compromise that was adopted after debate disclosed a fear that prohibition of age and sex discrimination might be too far-reaching. The compromise amendment sought to allay some of those fears and specifically added the arbitrary, capricious or unreasonable rubric to the grounds listed in the third sentence. The author made clear, however, that the prohibition of discrimination because of race or religious ideas, beliefs or affiliations was absolute.

Classifications based on birth, age, sex, culture, physical condition, or political ideas or affiliations are permissible if not arbitrary, capricious or unreasonable. The disjunctive "or" is used, indicating a more rigorous scrutiny than if the conjunctive "and" had been used. In speaking of this test, the author spoke primarily in terms of reasonableness, just as the earlier explanation of the equal protection analysis was phrased primarily in terms of reasonableness. This standard is probably best understood in light of the federal equal protection analysis which provided the background for the debate. It is also clear that the guarantee as applied to non-specific grounds of classification (e.g., wealth), under the first sentence would also be subject to the classic equal protection analysis. It would be better to use that same analysis for the listed grounds in the third sentence than to complicate matters with a different level of scrutiny for those grounds of discrimination. In any event, the burden of justifying a classification will be on the state, and discriminatory laws are deprived of a presumption of constitutionality.

25. See Id. at 58 where Delegate Chris Roy explained on behalf of the committee, "It does not mean that no law may be enacted which treats those categories equally [sic], but that all laws must be reasonable with respect to any discrimination imposed upon any person of this great state." See also id. at 64: "No, the Federal Constitution of equal protection is the same as this, only we have specified some of the categories."
26. PROCEEDINGS, Aug. 30 at 3.
27. Id.
28. See notes 4, 7 supra.
29. Id.
30. PROCEEDINGS, Aug. 29 at 58, 59, 62.
Some guidance as to discriminations that might be reasonable comes from the author's statements to the convention as to what he envisioned as reasonable: with respect to age—driver's license and retirement age requirements; sex—separate restrooms for females and males; culture—English as the official language; physical condition—driver's license and job requirements; political ideas—party primaries.

In any event, Louisiana has launched a long range inquiry into the rational state interests, the compelling state interests, and the reasonableness of all legislative classifications. In the future, evolving standards of society as developed by the courts of the state will have to be taken into account along with those applied in development of federal standards. The background of the provision indicates that a grudging application of the guarantee is not warranted. Rather, an expansive application independent of, and, in some instances, beyond the federal standards is suggested.

The reference to birth encompasses prohibition of discrimination against illegitimate children. Age discrimination will need to be tempered with the conception, supported by the debate, that the young and the old can be given preferential treatment. The mention of sex is clearly designed to establish equal rights for women, reflecting a subject that was of intense interest in committee. Culture is to be understood in terms of certain identifiable minority groups not being discriminated against because they choose, as Article XII, § 4 allows them, to "preserve, foster, and promote their respective historic, linguistic and cultural origins." Physical condition responds

31. Cf. LA. CONST. art. V, § 23(B) (mandatory retirement of judges).
32. PROCEEDINGS, Aug. 30 at 3.
33. Id., Aug. 29 at 58, where Delegate Roy stated: "First, the federal courts have failed to apply the Fourteenth Amendment to all of these classes. Thus, millions have been, are now, and will continue to be denied equal protection of our laws. Second, we believe that our great state should lead our own citizens to a body politic in which we recognize the sacredness of the individual without the necessity of federal intervention, and that our great courts should interpret our new ideals of equal protection."
34. Id. at 62-63.
35. Id. at 61, 63, 70.
37. The impetus for inclusion of culture was a group of Francophiles interested in protecting the Louisiana French heritage and the French language. The relationship of "culture" as used here to the specification of the cultural rights in Article XII, § 4 is indicated by the amendment changing the original language of the committee from "social origin" to "culture."
to a number of handicapped individuals who lobbied at the convention for assistance.38 Political ideas or affiliations refers to basic rights to freedom of beliefs and associations with respect to government.

The final provision of the section prohibiting slavery and involuntary servitude is new to the Louisiana Constitution, coming of course from the Thirteenth Amendment of the United States Constitution. As written, it does not prohibit forced labor as a punishment for crime. The provision comes from the federal law with its judicial constructions, which also forbids peonage laws.39 Involuntary servitude refers, of course, to forced labor services, not to the types of real rights of servitude provided for in the Civil Code which do not require such forced labor.

The last sentence is separate from the “no law” formula of the rest of the article; hence, the provision reaches private as well as government action. The “badges and incidents of slavery” are also prohibited. In addition to Section 12 which reaches private discrimination in public accommodations access, the final sentence prohibits the type of individual, as well as governmental, discrimination that exists as a vestige of the institution of slavery.40

**RIGHT TO PROPERTY**

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

---

38. PROCEEDINGS, Aug. 29 at 61.
40. See Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). Early in its deliberations, the committee accepted with little debate a proposal to include language that would have prevented racial and sexual quotas. Though this language was not incorporated in the final committee proposal, the comments indicated an intention to prohibit "forced segregation and to outlaw new forms of 'reverse discrimination' such as the imposition of quotas." JOURNAL, July 6 at 3; See Baton Rouge Sunday Advocate, June 10, 1973, at 2-A, col. 2.

At one point, it was envisioned that the convention would adopt official comments to the constitution, but this was not done. In some instances, the substance of the comments was referred to in the debates, adding to their authority. However, there was little debate on the convention floor on the subject of quotas. Further weakening the force of the comment is the fact that the committee proposal was changed by the convention and that the convention rejected a similar proviso to Section 12 that would have specified that the section should not be construed to prohibit freedom of association. See PROCEEDINGS, Sept. 14 at 8-11.
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.

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

Protection of property rights continues to be detailed at some length in an article apart from the guarantee against deprivation of property without due process.\textsuperscript{41} Section 4 resulted from an extended debate, resolved only toward the end of the consideration of the Bill of Rights, upon reconsideration and modification of a provision that had been adopted earlier in the debate.\textsuperscript{42}

Opening the section is a paragraph, changed little from the committee proposal,\textsuperscript{43} that serves as a general recognition of an individual's right to own property\textsuperscript{44} and an indication that ownership includes control, use, enjoyment, protection and disposition. Proponents of this statement thought the former constitution did not require a private property system with sufficient specificity and wanted to prevent laws that would eliminate the concept of private property. The author of the provision, Delegate Louis Jenkins, told the convention:

That means simply this. It does not mean that a person has

\textsuperscript{41} See La. Const., art. I, § 2; art. III, § 37; art. IV, § 15; art. VI, §§ 19, 19.1 (1921).

\textsuperscript{42} Initial adoption by one vote beyond the necessary 67 votes for adoption of a section followed consideration of 15 amendments and 10 roll call votes. \textit{Journal}, Aug. 30 at 2-12. The section was reconsidered and modified two weeks later. \textit{Id.}, Sept. 13 at 6.

\textsuperscript{43} The language of Committee Proposal 25, § 4 was: "Every person has the right to acquire by voluntary means, to own, to control, to enjoy, to protect, and to dispose of private property. This right is subject to the reasonable exercise of the police power and to the law of forced heirship."

\textsuperscript{44} Arguably, Section 3 (preventing deprivation of property) and Section 4 (prohibiting the taking or damaging of property) do not explicitly recognize the right of a person to acquire and to own property.
a right with regard to any given piece of property; to dispose of it, or own it, or enjoy it. But that he has that general right, that the right, say, to own property cannot be a right which is taken away from him.\textsuperscript{45}

The pedigree of the provision also displays its due process roots:

The first sentence of the section contains language paralleling that used by the U.S. Supreme Court in Lynch v. Household Finance Corp., \ldots in upholding a right to property by virtue of the due process clause of the Fourteenth Amendment to the U.S. Constitution. Similar provisions are contained in the California, Colorado, and Nevada Constitutions and the American Convention on Human Rights.\textsuperscript{48}

Thus, the language recognizes generally a right to property and functions as a due process clause of sorts, giving the courts flexibility in determining the scope of property rights with regard to matters not explicitly covered in the remaining parts of the section. This view is confirmed by the second sentence of the provision which states that the right is subject to “reasonable statutory restrictions and the reasonable exercise of the police power.”

The explicit statement that the right to property is subject to these reasonable restrictions was part of the original committee proposal\textsuperscript{46} and was adopted after objections from some who feared that the right to “acquire, own, control, use, enjoy, protect, and dispose of private property” might prohibit a large number of long-established limitations on the use of property, including zoning regulations, land use planning and the Civil Code obligations of good neighborhood. Such restrictions on the rights of property are permitted if they are “reasonable” as determined by the courts in the exercise of the judicial review power. The background of the provision indicates an understanding that the statutory limitations and police power regulations are to be given a broad ambit. The author of the provision, responding to a question as to whether land use regulation, environmental controls and zoning would be permitted, said: “This does not affect it at all. In fact, this specifically grants it, whereas it was never granted before specifically, because zoning is an exercise of the police power, and so is land use planning.”\textsuperscript{48} He described the

\textsuperscript{45} \textit{Proceedings}, Aug. 30 at 7.
\textsuperscript{47} \textit{See note 43 supra.}
\textsuperscript{48} \textit{Proceedings}, Aug. 20 at 12.
police power as "the authority of the state to do virtually anything in furtherance of the common welfare in the nature of regulation of property, so long as property rights are not denied entirely."\textsuperscript{49} The exception would seem to permit state regulation to prohibit discrimination in the sale and rental of property by individuals.\textsuperscript{50}

The committee proposal also specified that the right of property was subject to the laws of forced heirship.\textsuperscript{51} This language was deleted by amendment, primarily as a procedural device to allow for a full independent debate on forced heirship.\textsuperscript{52} That debate was resolved by the adoption of Article XII, § 5 which prohibits the abolition of forced heirship and thus not only permits, but requires, forced heirship as a limitation on the right to dispose of property.

The remainder of the section deals with expropriation in contrast to the first paragraph's concern with regulation. It limits expropriation more than the prior constitution, though it allows continuation, by virtue of the third paragraph, of the long-established doctrine of "appropriation" of riparian land for levee purposes without compensation, as established by the levee servitude of the Civil Code.\textsuperscript{53} The committee proposal had sought to abolish such appropriations without full compensation,\textsuperscript{54} but the convention quickly adopted an amendment to exempt appropriation for levees from the requirements of the section.\textsuperscript{55} The language of the exception makes the guarantees of the section inapplicable to "appropriation of property necessary for levee and levee drainage purposes." Use of "necessary" reflects existing jurisprudence:

Under the existing law and jurisprudence in order to exercise the riparian servitude, the use must be necessary to flood control along the banks so the word 'necessary' does not make any change in the existing jurisprudence.\textsuperscript{56}

\textsuperscript{49} Id. at 7.

\textsuperscript{50} Committee Proposal 25, § 7 contained a provision, ultimately rejected by the convention, that prohibited private discrimination "in the sale or rental of property." This was part of the same proposal which included the right to property as Section 4. Asked how these could co-exist, the author indicated that Section 7 was the more specific provision and would prevail, and further indicated that such regulation was a reasonable exercise of the police power. Proceedings, Aug. 30 at 10.

\textsuperscript{51} See note 43 supra.

\textsuperscript{52} Proceedings, Aug. 30 at 26.


\textsuperscript{54} Comments to Committee Proposal 2, § 4, in Journal, July 6 at 3.

\textsuperscript{55} Journal, Aug. 30 at 9.

\textsuperscript{56} Proceedings, Sept. 13 at 55. The quotation is of Delegate Walter Lanier, lead author of the final compromise proposal.
Omitted from the new constitution are the provisions of Article XVI, § 6 of the 1921 Constitution which granted compensation equal to the assessed value of land actually used or destroyed for levee purposes in the exercise of the levee servitude. However, until the legislature acts to provide otherwise, that section remains in effect as a statute by virtue of Article XIV, § 16(12). It is open for the legislature to adopt legislation providing no compensation, or whatever compensation it might see fit to grant. Nothing prohibits granting compensation to the full extent of the loss. Also open for legislative action would be procedures to regulate such appropriations. Debate on the due process section indicates, however, that it is not constitutionally required that a hearing prior to appropriation be held in cases of emergency.\footnote{57. See notes 14, 15 supra.}

In all expropriation proceedings, whether the taking is by a public agency or a private entity, either party has a right to a trial by jury to determine compensation due.\footnote{58. Jury trials were used in expropriation proceedings prior to 1948. See La. R.S. 19:4 (1950).} As proposed by the committee, it was the "owner" of the property being taken who had this right;\footnote{59. Committee Proposal 25, § 4 provided in part: "The owner shall be compensated to the full extent of his loss and has the right to a trial by jury to determine such compensation."} the final proposal, however, refers to "a party," meaning any party to the proceeding, necessarily including the expropriating entity. Since the right to a jury trial can be waived,\footnote{60. One concludes that the right can be waived because it is expressed as being granted to the parties rather than being a mandatory requirement and by virtue of amendments to Section 1 to clearly allow waiver of rights. See text accompanying notes 7-8 supra.} the initial committee proposal would have been to the advantage of the landowner in all cases, since he alone had the option to demand a jury trial or a judge trial depending on his evaluation of the circumstances. As finally adopted, the private landowner could be put at a disadvantage if the state demanded a jury trial in an expropriation for a popular public project in an area.\footnote{61. See the letter of June 6, 1973, by the East Baton Rouge Parish Attorney to the Committee on Bill of Rights and Elections, and attached memorandum which stated: "[T]he popularity of the project, as well as the popularity of the individual resisting an expropriation, will frequently be reflected in the amount of compensation awarded. This could operate either in favor of the project or in favor of the individual. The effect of an occasional large award in favor of the individual would not be nearly so damaging as a small award to an owner in an unpopular position. Perhaps the most damaging effect would be the increased costs of litigation—estimated to be somewhere between $1,000 and $1,500 per case."}
Jury awards of compensation, like all jury determinations, continue to be subject to appellate review of facts. The committee proposal to forbid appellate review of facts was defeated by the convention, which instead continued such review in civil cases.

The right to a jury applies in "every expropriation." It follows that the legislature may not establish either a minimum amount in controversy or other threshold requirements to preclude jury trial in some instances. The right is to a "trial by jury to determine compensation." Hence, the jury need not be granted the power to determine whether takings are for a public or necessary purpose. Legislation could leave this question, as well as others, to the judge alone.

The history of Section 4 reveals a desire to increase the level of compensation beyond that provided by existing state law. The change from the 1921 Constitution's language ("just and adequate compensation") to the new phrase ("compensated to the full extent of his loss") was deliberate, prompted by a belief on the part of the sponsors that inadequate awards have been provided under existing law. The new formula comes from the 1972 Montana Constitution, and was stated by the committee in comments as "intended to permit the owner whose property has been taken to remain in equivalent financial circumstances after the taking." This level of compensation applies "in every expropriation," whether by public agencies or private persons.

The change is far reaching. Explaining his proposal, Delegate Louis Jenkins indicated it would even extend to costs of litigation and attorney fees: "[A]nd even if you win, you are going to lose, because of the cost of going to court, hiring an attorney, which you'll have to pay. So this would attempt to take into account that fact." The author, too, was insistent on using the term "extent of his loss," rather the "the loss" to indicate that consideration be given to an

63. LA. Const. art. V, §§ 5(C), 10(B).
64. LA. Const. art. I, § 2; art. III, § 37; art. IV, § 15 (1921).
65. Though the term "just compensation" is used twice in the first two sentences of the second paragraph of the section, it is used there not to establish the level of compensation, but to indicate that it may be paid into the court for the owner's benefit in the case of expropriation by public agencies but not in case of expropriation by private entities. It is the third sentence which specifically establishes the amount of compensation to be paid, and it is there that the formula "full extent of his loss" is used.
68. Proceedings, Aug. 30 at 8.
owner's subjective intangible losses rather than only to objective determinations. The words, "[t]he full extent of his loss" were in the original committee proposal and were continued in the final compromise. Explaining the impact of the compromise, the author, Delegate Walter Lanier, indicated that the original breadth of the formula was to be continued. He referred also to "things which, perhaps, in the past may have been considered damnum absque injuria, such as the cost of removal and things like that . . . ." 69

The debate also indicates an understanding that the formula would cover moving costs and the cost of re-establishing a business whose premises had been taken. 70 At one point, the convention adopted an amendment requiring consideration of loss of aesthetic or historical values in locating public projects. 71 Though this provision was not included in the final compromise language, it again displays the breadth of the provision. Giving the people more rights in this regard certainly was the aim. 72 In any event, the convention debate tends to confirm the committee's concept of full compensation as putting one "in equivalent financial circumstances after the taking," including items not compensable under existing law. No doubt this provision will spawn much litigation, but it is clear that the level of expropriation awards must be expanded to include moving expenses, business losses because of change of location, and compensation for some intangible losses not covered under prior law. Acceptance of such a radical and expensive concept in the state's law may be partly explained by the experience of many of the delegates under recent federal legislation which had greatly increased the required payments in case of expropriations paid with federal funds. 73

Changing the justification for exercise of the eminent domain power from the existing constitutional language ("for public purposes" and "purposes of public utility") 74 to a higher standard ("a public and necessary purpose") provoked intense controversy. It was only resolved by the final compromise provision which applied the higher standard to takings by private entities 75 but continued the old standard to takings by public agencies. 76

69. Id., Sept. 13 at 56.
70. Id. at 57.
71. JOURNAL, Aug. 30 at 8.
72. PROCEEDINGS, Sept. 13 at 58.
74. La. Const. art. I, § 2; art. IV, § 15 (1921).
75. "This is intended to apply to private persons, to private corporations and to quasi-public corporations or persons such as public utilities." Delegate Walter Lanier explaining the final compromise proposal in PROCEEDINGS, Sept. 13 at 54.
76. "In other words, this is intended to apply to all state agencies and all political
As proposed by the committee, all expropriations would be allowed only for "a public and necessary purpose." The deliberate aim was to make expropriation more difficult, this intent being confirmed by the final sentence of the proposal which provided, "The issue of whether the contemplated purpose be public and necessary shall be a judicial question, and determined as such without regard to any legislative assertion." The aim of this last sentence was to leave the question to the courts to determine, without the aid of a presumption of constitutionality attached to a legislative assertion, that a certain purpose was public and necessary.

Early in the debate, the author explained "public and necessary purpose" by reference to Black's Law Dictionary: "The next sentence is most important, however. 'In eminent domain proceedings, it means land reasonably requisite and proper to accomplishing an end in view, not absolute necessity of particular location.' Reasonably requisite and proper, and that's what the word 'necessary' means here." Thus it seems that the new standard results in a test that, although not requiring absolute necessity, demands a higher standard of public interest in a project than the former test.

As stated, the new standard applies only to takings by private entities. The public purpose standard of the old constitution remains in effect with respect to takings by "the state or its political subdivisions." Also, only private entities are subject to the provision that "in such proceedings, whether the purpose is public and necessary shall be a judicial question." The old standard of review remains for public takings.

Statutes allowing "quick-taking" by public agencies are permit-
Quick-taking refers to an expropriation procedure by which ex parte orders prior to judgment transfer ownership provided that the taker deposit with the court funds equal to appraisals made by the taker. The ambit of such quick-takings may be increased since they no longer are limited to takings for highway purposes. Such statutes are not permissible for takings by private entities, however.

Quick-takings are permitted by virtue of the language, used with respect to governmental takings, that compensation be “paid to the owner or into court for his benefit.” In contrast, with respect to private entities the provision requires that compensation be “paid to the owner.” In this respect, the final provision is more stringent than the original proposal. Also, it is more internally consistent than the committee proposal; it would have caused difficulty to allow a quick-taking procedure by private entities and still apply the rule that whether the taking is for a public and necessary purpose is a judicial question.

Reference to “payment to the owner or into court for his benefit” was not meant to restrict the class of persons who could claim compensation to “owners” in a technical property law sense. The purpose was to give citizens more rights, and the term, as stated by the author of the final compromise, “is intended to be used in its broadest sense, in other words, a leasehold interest in land is a property right as you and I well know, and there's been some trouble over that in the past.” In fact, when one couples this intent with the requirement that compensation be to the full extent of one's loss, the purpose emerges of giving protection to a broader category of persons than was previously the case. It is also clear that by referring to property “taken or damaged” compensation must be given not only when ownership or a real right is taken, but also when property is damaged. This is, of course, but a continuation of the prior language.

The prohibition against taking “a business enterprise or any of

82. Id.
84. Also, the new constitution fails to continue the requirements of the 1921 Constitution which required no takings until “after just and adequate compensation is paid,” (Art. I, § 2); until “compensation be first paid,” (Art. III, § 37); and without “compensation previously paid,” (Art. IV, § 15) (Emphasis added.) See State v. Phares, 245 La. 534, 159 So. 2d 144 (1963).
85. PROCEEDINGS, Sept. 13 at 58.
86. Delegate Walter Lanier, Id. at 55-56.
its assets . . . for the purpose of operating that enterprise or halting competition with a government enterprise" is an innovation. As worded, the prohibition does not prevent regulation short of expropriation and does not prohibit expropriation of such enterprises or assets except for the purpose of operating them or halting competition with government enterprise. An exception allows a municipality to expropriate a utility within its jurisdiction for the purpose of operating it or halting competition with a government utility. As a municipality expands its geographic limits, the added area would be "within its jurisdiction," thus permitting expropriation of a utility or its assets in that area.

A final limitation is that "personal effects, other than contraband, shall never be taken," no matter how public or necessary the purpose. The choice of "personal effects" rather than the technical term "movables" was made partly to avoid importing into the constitution the complexities associated with movables that become immovables by destination. This choice was made in the context of past necessity to amend the constitution to allow control of billboards to comply with federal standards for obtaining federal funds for highway construction; such billboards should not be considered personal effects.

"Personal effects" was used with the knowledge that it was not a term of art and that it was a flexible concept open to court development. In answering a question about its meaning, the author of the final compromise compared the expression to the word negligence and its development on a case-by-case basis. The committee comments did not provide a definition; they simply gave examples: "Personal effects are intended to include money, stocks, bonds, objects of art, books, papers, essential tools of trade, and clothing." "Personal effects" as used in this section may be contrasted with use of "effects" in Section 5 protecting against unreasonable searches, seizures, or invasions of privacy. Use of the adjective "personal" would tend to create a narrower category.

Property considered as "contraband" is exempted from the requirement that personal effects not be taken. The record provides no

88. An early version of the committee comments to the section indicated, "It is intended that a business shall not be taken over for the purpose of operating it, although presumably a business could be terminated in an orderly manner." JOURNAL, July 6 at 3.
90. PROCEEDINGS, Sept. 13 at 56.
91. JOURNAL, July 6 at 3.
special definition of contraband. The term is used in the ordinary sense of property the possession of which is forbidden by law. The historical evolution of the term indicates that no compensation need be given when goods classed as contraband are taken. The government's power to classify items as contraband and to take them without compensation is of course limited by the provisions that the right to own property is subject to "reasonable" restrictions and that property cannot be taken without due process.

Read literally, this prohibition against taking personal effects would prevent taking such effects as evidence. Yet, Section 5 recognizes the power to seize "things" pursuant to a reasonable search and seizure. The history of the two sections fails to disclose a recognition of the apparent conflict, and thus sheds little light on its proper resolution. Perhaps Section 4 can be construed to govern generally in the sphere of expropriation, preventing the taking of the ownership of such items, while the more specific Section 5 could be construed as an exception permitting the temporary detention of things to be used as evidence in criminal proceedings, provided these things are returned to the owner after the proceedings are completed.

RIGHT TO PRIVACY

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.

The traditional guarantee against unreasonable searches and seizures is cemented and expanded by the section. Perhaps more significant is protection of privacy beyond the domain of criminal procedure; the section establishes an affirmative right to privacy which will also have an impact on non-criminal areas of the law. It accelerates the tentative steps of *Griswold v. Connecticut* and establishes


93. *Id.*

94. 381 U.S. 479 (1965). The Court reasoned that an underlying principle of the first, third, fourth, fifth and ninth amendments to the constitution was the protection
the principle of the case in explicit statement instead of depending on reasoning from other provisions for its establishment.

This affirmative aspect is indicated by the placement of the provision. It was deliberately placed apart from the other criminal procedure guarantees which are grouped together in Sections 13 through 21. The expression "no law shall" was not used, indicating that the protection goes beyond limiting state action. Rather, the statement is positive and general. Furthermore, to the language of the 1921 provision ("secure in their persons, houses, papers and effects against unreasonable searches and seizures . . .") is added protection of property and communications against unreasonable invasions of privacy. The ancestry of the latter phrase can be traced to Griswold's establishment of a right to privacy and to fear of unrestrained gathering and dissemination of information on individuals through use of computer data banks. The section will be a fertile ground for development in tort law as well as the non-criminal aspects of government operations.

The key element is that the invasions of privacy must be unreasonable to merit constitutional protection, and the courts are given flexibility to determine which invasions of privacy are supported by sufficient societal interests to be considered reasonable. In this inquiry, the courts are guided by the purpose of the convention in expanding the individual's protections in this area beyond the existing law.

An early committee draft prevented wiretapping and bugging with the statement that no law could permit the interception of inspection of any private communication or message. The final committee proposal omitted that language, and the section as adopted treats wiretapping and bugging as "communications" within the protection against unreasonable searches, seizures or invasions of privacy. The Court held unconstitutional a Connecticut statute which prevented use of contraceptive devices and thus interfered with marital privacy. See Roe v. Wade, 410 U.S. 113 (1973).

95. Committee Proposal 2 used a similar arrangement: Protection of privacy was in Section 5; the criminal procedure guarantees were Section 12 through 18. See Comment to Section 12, in JOURNAL, July 6 at 4.
96. Contrast Section 3's protection against discrimination from state action ("equal protection of the laws," "no law shall") with Section 12's protection against discrimination by private action. See also use of the "no law shall" formula in Sections 7, 8, 9.
98. E.g., PROCEEDINGS, Sept. 5 at 51.
vacy. Such activities are allowed if reasonable and also come under the requirements for a warrant.¹⁰⁰

Article I, § 7 of the 1921 Constitution which provided that "no such search or seizure shall be made except upon warrant" was not construed as written and the Louisiana supreme court allowed such searches and seizures without a warrant.¹⁰¹ The new provision which omits the prior language and instead paraphrases the federal guarantee is an implied recognition of the permissibility of warrantless searches and seizures (seizures of the person, or arrests, included) so long as they are reasonable.¹⁰²

Though the exclusionary rule is not explicitly stated it was considered implicit in the provision.¹⁰³ In fact, the last sentence of the section giving standing to persons who heretofore have been denied it in federal cases is an implicit recognition of the broadening of the right to suppress evidence obtained in violation of constitutional guarantees. Speaking against an amendment that would have deleted the last sentence, Delegate Jack Avant said:

If you take this last sentence out, you take away from the law enforcement agencies of this state the incentive that they have to comply with constitutional safeguards before they take such drastic measures as breaking into a private residence in the middle of the night to conduct a search and seizure because you take away the penalty; you take away the thing that they stand to lose; you take away the admissibility of that evidence and the ability to use that evidence to gain a conviction.¹⁰⁴

Furthermore, the debate on the section supports a desire to go far beyond federal standards and to prevent the use of evidence obtained by private persons in violation of the guarantees of the section. Delegate Earl Schmitt said:

Up until the present time, any individual could hire a private detective firm or by stealth, or other illegal activity . . . break into someone's business and steal records and turn these records

¹⁰². Delegate Kendall Vick, explaining the section on behalf of the committee, described the scope of a reasonable search incident to arrest by reference to Chimel v. California, 395 U.S. 752 (1969), which limited such searches to the area in the immediate control of an arrested person. PROCEEDINGS, Sept. 1 at 17.
¹⁰³. Id. at 15.
¹⁰⁴. Id. at 22.
over to the police and these records could then be used by the police and could not be kept out of the record. They could not be kept out on a motion to suppress. This is a very fundamental change. . . . This change will allow the protection of the individual, not only from state action, but from the action of vigilante committees, from the action of other groups in our society, as an example, those who hire private detective firms to do what they know the police cannot do legally.\textsuperscript{165}

Supporting this conclusion is the first sentence of the section which seems to provide an affirmative right of every individual and not just a check on state action.

On the other hand, one can argue that such a far-reaching departure from existing principles was not intended. The committee comments and the statements of committee representatives do not address this point. The convention debate shows little attention to the specific question of suppressing evidence obtained by private persons. Further, though the first sentence in the section contemplates reaching private persons by going beyond the old reference to “searches and seizures” and adding “invasions of privacy,” the last sentence of the section, the one more closely connected to suppression of evidence, refers to “a search or seizure conducted in violation of this Section” and does not include a reference to “invasions of privacy.”

An innovation is the expansion of the class of persons given standing to contest improper searches and seizures and to have evidence so secured excluded. The last sentence of the section abolishes the federally developed standing requirement by which a defendant asserting a fourth amendment objection was required to show that he was the “victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.”\textsuperscript{106} It provides that “any person adversely affected” has standing to raise the illegality.\textsuperscript{107} Thus, if evidence is obtained by an improper search or seizure, it cannot be used against anyone whose guilt it would tend to prove and thus practically cannot be used at all. The scope of the exclusionary rule

\textsuperscript{105} Id. at 25-26.


\textsuperscript{107} The committee comments made this clear: “in addition, persons protected against illegal searches and seizures include not only the person whose house or property has been illegally searched but also any other person adversely affected by the illegal search.” JOURNAL, July 6 at 3.
is thus enlarged, with the expectation that its deterrent effect will be increased.\textsuperscript{108}

An amendment to delete the standing provision was defeated on the convention floor by a 37-72 vote after a debate that clearly posed the issue.\textsuperscript{109} It is also clear that the statement is not limited to criminal proceedings, so that any person adversely affected has standing to bring a civil action to redress improper police conduct.

The requirement that warrants issue only with probable cause supported by oath or affirmation and describing with particularity the place to be searched and the person or things to be seized is a restatement of the federal standard in the area.\textsuperscript{110} These requirements, by their terms, apply to both search warrants and arrest warrants.

The innovation is the requirement that a warrant specify "the lawful purpose or reason for the search." This applies to search warrants, but not to arrest warrants, for the reference is to "search" and not to "seizure." However, a parallel provision in Section 13 requires that a person who is detained or arrested must "be advised fully of the reason for his arrest or detention." If this requirement of specifying the lawful purpose or reason for the search is not observed, the warrant is not in conformity with the requirements of the section, and any person adversely affected "by a search or seizure conducted in violation of this Section" has standing to contest it.

The policy objective is to require what the case law has not yet clearly required; that the person whose privacy is invaded by the state must be told of the state's proper basis for making that invasion. In this way, the subject of an invasion of privacy is less likely to resist it. It also gives the person information which may be helpful in later legal proceedings contesting the search.

The sources do not contain a definition of lawful reason or purpose. Certainly, any proper warrant would have behind it a "lawful" reason, so inquiry must center on the meaning of "reason" and "purpose." Presumably, it is not required that all the facts establishing probable cause be specified. Since the same sentence uses the expression "probable cause" in another sense, there must have been a deliberate choice not to use that same expression in this regard. In most cases, the permissible reason or purpose for a search would be to obtain a particularly described item because of its association with a particularly enumerated crime.\textsuperscript{111} Since the section also requires par-

\textsuperscript{108} See PROCEEDINGS, Sept. 1 at 15, 22.
\textsuperscript{109} Id. at 18-26.
\textsuperscript{110} Id. at 17.
ticularization of the item, it would seem that the additional requirement refers to particularization of the connection to some specific offense. The connection can be, in the terms of article 161 of the Code of Criminal Procedure, that the thing has been the subject of a theft, was intended for use or used as a means of committing an offense, or may constitute evidence tending to prove the commission of an offense. If possession of a certain item is itself a crime, that possession would certainly be a lawful reason or purpose for the search. Also, if a warrant is required for a health or building code inspection, that would be particularized as the reason or purpose.\footnote{112}

Though this requirement does not apply to warrantless searches, some fact situations may arise where it could be considered a part of the reasonableness requirement for warrantless searches.\footnote{112} In a search incident to arrest, however, the person arrested will have been told of the reason for arrest or detention as required by Section 13; hence, the incremental protection provided by incorporating the reason-for-the-search requirement in such a situation may be minimal and not significant enough to be incorporated in the reasonableness requirement.

Continuing the expression "search and seizure" and the reference to "persons or things to be seized" indicates that the ambit of this section includes not only searches of places and persons, but also arrests or other detaining of persons, since existing case law considers detention and arrest a type of seizure.\footnote{113} Thus this section establishes the probable cause standards for arrests or seizures of the person, and the standard of information required before arrest or detention. Section 13 then comes into play to govern what must be done once the arrest or detention is made.

**Freedom From Intrusion**

*Section 6. No person shall be quartered in any house without the consent of the owner or lawful occupant.*

Though this guarantee is one that has had little development and little impact, its continuation reflects an historical continuity with prior constitutions, the Third Amendment of the United States Constitution and the Declaration of Independence. The changes expand the protection to encompass protection against quartering of any person, not only a "soldier, sailor or marine" and prohibits such...
action at all times, not just "in time of peace." Consent of the lawful occupant is required, not just that of the owner, thus protecting lessees or other persons lawfully occupying any house.\footnote{115}{La. Const. art. XIX, § 7 (1921) provided: "No soldier, sailor or marine shall, in time of peace, be quartered in any house without the consent of the owner."}

Both the federal and state guarantees have been seldom applied. However, the federal provision has been used as an indication of the concern of the drafters of the Bill of Rights with individual privacy and to buttress the development of the right to privacy by the United States Supreme Court.\footnote{116}{E.g., Griswold v. Connecticut, 381 U.S. 479 (1965).} As this provision expands the right to privacy in Louisiana, it indicates the general thrust of the constitution to provide greater individual guarantees in the closely related Section 5 and confirms the policy objectives of that section.

**FREEDOM OF EXPRESSION**

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 complex and convoluted evolution of the freedom of expression guarantee, through the committee and floor debates, discloses a dispute over form rather than substance. The guarantee is a recast of the 1921 provision\footnote{117}{La. Const. art. I, § 3 (1921): "No law shall ever be passed to curtail or restrain the liberty of speech or of the press; any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."} with minor style changes, using traditional terms of art to reflect the existing state of the law under the First Amendment of the United States Constitution.

would have been particularized as freedom “to speak, write, publish, photograph, illustrate or broadcast on any subject or to gather, receive and transmit knowledge and information” with the provision that such activities shall not be “subject to censorship, licensure, registration, control or special taxation.” Since the absolute language of the First Amendment has been construed to permit regulation of obscenity and defamation, originally it was thought unnecessary to include the statement that one is “responsible for the abuse of that liberty.” However, several witnesses expressed concern that the proposal’s absolute wording would prohibit such regulation. To satisfy those objections the committee agreed to add an abuse clause that appeared in the final proposal of the committee.

On the convention floor, the committee struggled unsuccessfully to convince the delegates that its proposal was not an innovation but simply a restatement of existing principles developed from the first amendment by court construction. Many delegates, though accepting the substantive aim of continuing existing safeguards of speech and press, were wary of the possible uncertainty of the new wording. Delegate Jack Burson in explaining his amendment to replace the committee formula with a paraphrase of the first amendment, said:

We have worlds of jurisprudence; we have legions of cases defining what and how the freedom of speech or press should be defined; we will know what we are talking about. I am not sure that we will know what we are talking about if we adopt the committee proposal.

He indicated that his proposal would allow organic growth of the guarantee through court construction:

I don’t think there is any question but what the freedom of speech or press is an organically growing area just as all other

120. Id.
122. Committee Proposal 25, § 9 provided: “No law shall abridge the freedom of every person to speak, write, publish, photograph, illustrate, or broadcast on any subject or to gather, receive, or transmit knowledge or information, but each person shall be responsible for the abuse of that liberty; nor shall such activities ever be subject to censorship, licensure, registration, control, or special taxation”.
123. PROCEEDINGS, Sept. 5 at 42-45.
124. Id. at 47-52.
125. Id. at 47.
areas of constitutional law. But I think, like Justice Frankfurter, that they should be allowed to grow organically, to grow a little bit here, a little bit there, and to be defined as they grow and that we shouldn’t strike out statutorily—not statutorily, constitutionally—here and set some new language in here that we really don’t know what it means. Let’s let those areas continue to grow organically.\textsuperscript{126}

Newspaperman Delegate John Thistlethwaite supported this view, “We’ve got almost two centuries of jurisprudence behind the Burson amendment. It tracks very closely the first amendment of the Federal Constitution.”\textsuperscript{127} Also adding to the attractiveness of the Burson amendment was its shortness, an important consideration to a convention intent on reducing the length of Louisiana’s more than 250,000-word constitution.\textsuperscript{128}

Once adopted, however, the Burson amendment prompted the earlier fears that since the provision lacked an abuse clause, it might be considered as absolute, preventing regulation of obscenity or defamation. An amendment adding the abuse clause was then adopted.\textsuperscript{129}

By this point in debate, the proposal was a simple guarantee of freedom of press and speech with an abuse of responsibility clause, virtually what the 1921 Constitution provided. The convention then adopted with little debate an amendment by Delegate Harmon Drew that tracked the prior provision more closely.\textsuperscript{130} Finally, the convention rejected another committee attempt to particularize the guarantee,\textsuperscript{131} and also rejected an attempt to narrow the freedom of expression by establishing a right of reply to a person whose character was assailed by the press.\textsuperscript{132}

The result of this long debate is to continue the basic language of the prior law in form and to continue the substance of existing

\textsuperscript{126} Id. at 49.
\textsuperscript{127} Id., Sept. 6 at 12.
\textsuperscript{128} Delegate J. Burton Willis said: “I do not have a mind keen enough, or a tongue nimble enough to suggest all the consequences to which the verbosity of this article may lead. If brevity is the soul of wit, let me suggest we be brief.” Id. at 23. See also Id. at 25.
\textsuperscript{129} Id. at 26, 27, 29.
\textsuperscript{130} Id. at 30.
\textsuperscript{131} JOURNAL, Sept. 6 at 6. The amendment would have added the sentence, “Such activities shall never be subject to prior restraint, licensure, registration, or special taxation.”
\textsuperscript{132} Defeated by a 30-77 vote was the amendment by Delegate D’Gerolomo to add, “Any person whose character is assailed by reason of the exercise of any freedom herein granted shall be afforded an equal opportunity to reply, and the legislature shall enact laws to implement this provision and provide penalties for violations.” Id. at 5.
United States Supreme Court constructions of the guarantee. Delegate Burson's statement recommending that the convention allow the law "to grow organically, to grow a little bit here, a little bit there, and to be defined as they grow" seems to portend what the development of the guarantee will be.

**FREEDOM OF RELIGION**

Section 8. No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof.

The convention adopted this section repeating the guarantee of the First Amendment of the United States Constitution by a 104-0 vote after little debate and with no amendments submitted to the committee proposal. The standards developed by federal jurisprudence construing the article were expected to be continued.

The ease with which the section passed was somewhat surprising, for it was expected that the issue of aid to religious schools would be a controversial one in the convention, particularly in light of recent statutes providing such aid and court decisions prohibiting it on constitutional grounds. The provisions of the 1921 Constitution prohibiting aid to religious schools were quite specific and reiterated in three separate articles. All three provisions were relied on by the Louisiana supreme court in *Seegers v. Parker* which held unconstitutional legislation providing grants to teachers of secular subjects in church-owned schools. Still the overriding United States Supreme Court decisions in *Lemon v. Kurtzman* and *Tilton v. Richardson* were known and discussed and seemed to provide an acceptable solution to both sides of the issue, and the federal statement of the right which supported those decisions was adopted.

---


134. *Id.* at 54. The initial committee comments to *Committee Proposal* 2, § 10 were simply, "Modernization of language. No substantive change." *Journal*, July 6 at 3.


139. 403 U.S. 672 (1971).

140. Writing for the 4-3 majority in *Seegers v. Parker*, 256 La. 1039, 241 So. 2d 213 (1970), Justice Barham referred to Article I, § 4 of the 1921 Constitution as being quite similar to the first amendment provisions on the subject and said the court would be guided by United States Supreme Court decisions construing that amendment.
Delegate Gerald Weiss, in introducing the committee proposal, specifically referred to the standards of *Lemon* and *Tilton*:

> [T]he court applies two guidelines, it's my understanding, in dealing with religious and secular matters. First is, a law or program must have a secular purpose neither advancing nor inhibiting religion in making decisions in this regard. Second, it must not involve the government—federal, state or local governments—with excessive entanglement with religion. These are decisions that have been substantiated by both the Supreme, and as you pointed out, the Louisiana Supreme Court.¹⁴¹

The impact of the adoption of the proposal and the deletion of the more explicit sections of the prior constitution is to provide a more flexible standard with regard to government aid to religion than was provided in the old document. The courts and the legislature have some room to maneuver within the guidelines of having a secular purpose and avoiding excessive entanglement with religion. Also, such aid would have to meet the test of Article VII, § 10(D) that "No appropriation shall be made except for a public purpose."

**RIGHT OF ASSEMBLY AND PETITION**

Section 9. No law shall impair the right of any person to assemble peaceably or to petition government for a redress of grievances.

Paraphrasing the first amendment and Article I, § 5 of the former constitution,¹⁴² the section continues existing principles and the existing construction of the law established in a number of civil rights cases which protect peaceful assemblies and petitions for redress, but not those that are violent.¹⁴³ No significant dispute arose over this language in the convention, and presumably one can expect continuation of the decisions allowing governments to require reasonable permits for large gatherings as a means of keeping order, planning for police protection and preventing obstruction of traffic.

The convention deleted committee language that recognized the right "to travel freely within the state, and to enter and leave the

---

¹⁴¹ Proceedings, Sept. 6 at 54.
¹⁴² La. Const. art. 1, § 5 (1921): "The people have the right peaceably to assemble and apply to those vested with the powers of government for a redress of grievances by petition or remonstrance."
¹⁴³ See authorities cited in B. Schwartz, Constitutional Law 251-56 (1972). See also State v. Bulot, 175 La. 21, 142 So. 787 (1932).
The right to enter and leave the state, of course, is a federally protected right. Questions arose over the implications of the right to travel freely within the state; particularly whether the right was absolute or, as the committee conceived of it, subject to reasonable restriction. The committee had consented to the suggestion of witnesses to add the clause, "Nothing herein shall prohibit quarantines or restrict the authority of the state to supervise persons subject to parole or probation."

This language was not sufficient to allay fears of some delegates that the provision would hamper the law of arrest, mental health commitments, restricting travel during hurricane emergencies, preventing trespass, and the like. Some delegates were concerned that the enumeration of two exceptions in the proposal (for quarantines and parole supervision) would lead to the construction that the enumeration is exclusive, thus preventing other exceptions. In light of these implications, the convention voted to delete the reference to the right to travel.

Deletion of the specific reference to a right to travel, however, does not mean that such a right does not exist by virtue of other provisions that were adopted. The right to assemble and petition is an implicit recognition that travel is a necessary adjunct of assembling and petitioning. Other types of travel are a "liberty" which cannot be abridged without due process under Section 2.

**RIGHT TO VOTE**

Section 10. Every citizen of the state, upon reaching eighteen years of age, shall have the right to register and vote, except that this right may be suspended while a person is interdicted and judicially declared mentally incompetent or is under an order of imprisonment for conviction of a felony.

The acceptance of the expansion of voting rights following the

---

144. Committee Proposal 25, § 11 provided: "No law shall impair the right of every person to assemble peaceably, to petition government for a redress of grievances, to travel freely within the state, and to enter and leave the state. Nothing herein shall prohibit quarantines or restrict the authority of the state to supervise persons subject to parole or probation."


146. PROCEEDINGS, Sept. 6 at 55-67.

147. Id. at 55-57.

148. Id. at 67.

149. See note 145 supra.
Voting Rights Acts of 1965 and 1970\textsuperscript{150} and the twenty-sixth amend-
ment\textsuperscript{151} probably explains the lack of opposition to this section which
rejects the 1921 Constitution's limitations on suffrage\textsuperscript{152} and classifies
voting as a right rather than a privilege. Gone from the state’s law
are complex provisions that established residency requirements,
character and literacy tests, and a voting age of 21 years.

By the literal terms of the section, every citizen, upon reaching
the age of 18, has a right to register and vote. The legislature cannot
encumber the right to vote by establishing other qualifications. The
only times the right can be denied are enumerated in the sec-
tion—while a person is interdicted and judicially declared mentally
incompetent or is under an order of imprisonment for conviction of a
felony.

As proposed by the committee, the provision was phrased in the
negative, “No person eighteen years of age or older who is a citizen
and resident of the state shall be denied the right to register and to
vote. . . .”\textsuperscript{153} This was changed by amendment to read, “Every citi-
zen of the state, upon reaching eighteen years of age, shall have the
right to register and vote. . . .”\textsuperscript{154} The author’s purpose in making
the change was to prohibit the legislature from lowering the voting
age to less than 18.\textsuperscript{155} However, the normal meaning of the words does
not seem to comport with that explanation. The legislature could
lower the voting age to 16, it seems, without violating the requirement
that every 18 year old citizen have the right to register and vote. Some
delegates indicated they could not see a difference in the language
used by the committee and that of the amendment.\textsuperscript{156} It may well be
that the issue will not arise until the next generation when the con-
sensus of that society will be more persuasive than an uncertain
legislative history.

Establishing a right to register, as well as to vote, recognizes the
state’s power to require registration as a prerequisite to voting. In
fact, Article XI, § 1 requires that the legislature adopt an election
code which provides “for permanent registration of voters.”

In preparing its proposal, the committee was aware of the then-

\textsuperscript{151} “The right of citizens of the United States, who are eighteen years of age or
older, to vote shall not be denied or abridged by the United States or by any State on
account of age.”
\textsuperscript{152} La. Const. art. VIII, §§ 1-6 (1921).
\textsuperscript{153} Committee Proposal 25, § 19.
\textsuperscript{154} JOURNAL, Sept. 8 at 7, 8.
\textsuperscript{155} See PROCEEDINGS, Sept. 8 at 69.
\textsuperscript{156} Id. at 72, 73.
existing federal and constitutional statutory standards limiting dura-
tional residency requirements as a prerequisite to voting.\textsuperscript{157} Though
recognizing that the ambit of residency requirements was small, the
committee adopted the formula that restricted the vote to a “citizen
and resident of the state.” The Landry amendment\textsuperscript{158} omitted “resi-
dent” and the final proposal simply refers to a person who is a “citi-
zen of the state.” Thus, residency requirements as understood under
the prior constitution, particularly those which require residence in
the state for a specified time, are prohibited. A citizen of the state,
by the definition of the fourteenth amendment, is simply a citizen of
the United States who resides in Louisiana. Hence, residency in that
narrow sense remains a valid inquiry.\textsuperscript{159}

As a practical matter, it is possible for the legislature to require
registration a reasonably short time before an election is held. A
system of voter registration, which is mandated by the constitution,
assumes existence of a procedure for registering voters and preparing
lists of eligible voters for use at the election. Implicit in such a proce-
dure is the requirement of some time to prepare the needed docu-
ments, depending on the available technology.\textsuperscript{160} This short period is
not a residency requirement, but rather a time necessary to imple-
ment a system of voter registration.

The committee and the convention struggled to find a formula
for providing that mental incompetents could not vote. The unsatis-
factory final committee language was adopted by the convention
after a confused debate followed by several votes that were unable to
unite the delegates on a preferable wording.\textsuperscript{161} Simply providing for
suspension during interdiction was thought too harsh since interdiction
can be based on grounds other than mental incapacity. Simply
saying that persons committed to mental institutions would be de-
ned the right was opposed because of the feeling that commitment
is too simple a procedure. In any event, the provision requires an

\begin{footnotes}
\item[157.] Staff Memorandum No. 28, April 30, 1973, to the Committee on Bill of Rights
\item[158.] \textit{JOURNAL}, Sept. 8 at 7-8.
\item[159.] See Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872). See also Paulder v.
Paulder, 185 F.2d 901, 902 (5th Cir. 1951), \textit{cert. denied}, 341 U.S. 920 (1951), where the
court said: “We take it to be well established that plaintiff was at liberty to instantly
transfer her citizenship from Texas to Arkansas and this she might do without neces-
sity and simply from choice. She had a right to select her domicile for any reason that
seemed sufficient to her.”
\item[161.] \textit{See JOURNAL}, Sept. 8 at 8, 9.
\end{footnotes}
interdiction as provided in the Civil Code\textsuperscript{162} and a judicial declaration of mental incompetence\textsuperscript{163} before the right to vote can be suspended. These two requisites will hardly ever be met. The result is that some persons confined in mental institutions will have the right to vote. It is certainly arguable that the state cannot indirectly prevent them from voting by denying them access to the polls because they are not free to leave an institution. This is especially true for state mental institutions.\textsuperscript{164} The problem is solvable by allowing voting at the institution, granting some measure of temporary freedom to vote at regular polling places, or providing for absentee balloting.

A similar problem arises with the provision suspending the right to vote while a person "is under an order of imprisonment for conviction of a felony." The right is not suspended as to persons awaiting trial or imprisoned for a misdemeanor; hence, these people have the right to vote. Again, it is difficult to see how imprisoned persons can exercise this right unless they are allowed to vote in jail, vote by absentee ballot, or be granted temporary liberty to vote at a regular poll.\textsuperscript{165}

The word choice, "under an order of imprisonment," may seem unusual; "imprisoned" would be simpler and more direct. The reason for the choice was to overcome an objection that an escapee would not be "imprisoned" and thus not within the exception. That choice of words does not prevent a person on probation or parole from voting since such a person is not under an order of imprisonment. The language contrasts with Section 20's deliberate use of "termination of state and federal supervision following conviction for any offense," where it was intended that completion of probation or parole requirements be met before full rights of citizenship are restored. Though the general expression used in Section 20, "full rights of citizenship," normally encompasses voting rights, the more specific provision in this article providing for return of the right to vote when one is no longer under an order of imprisonment will prevail. In fact, under this section, the right to vote is never taken away. It is simply suspended while certain conditions are met. When those conditions no longer exist, the suspension automatically ends. There is no need for any kind of pardon or other formality before an offender regains his right to register and vote. The same applies to incompetents; once one is no longer under interdiction or no longer under a judicial declaration

\textsuperscript{165} Id.
of mental incompetence, the right to vote returns with no formality required.

Requirements of single-member districts for legislators recognizes the power to establish constituencies and to require that persons vote within those constituencies. The same reasoning flows from references to local government officials being elected within the parish. This leads to the further recognition of the power to enact legislation to restrict the right to vote to one place and to establish regulations to prevent multiple voting. This section also does not prohibit party primaries under a system that allows only party members to vote in such primaries. In the equal protection guarantee debate, it was clearly contemplated that such primaries are not an unreasonable discrimination because of political ideas or beliefs.

Finally, this section by its terms does not seem to prohibit limiting, within narrow federal standards, voting on certain propositions to landowners within special districts.

**RIGHT TO KEEP AND BEAR ARMS**

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.

A tentative committee draft of this section had continued the reference to the militia in defining the right to keep and bear arms, as in the United States Constitution and the 1921 Constitution. The final committee proposal omitted that reference and was adopted by the convention in this respect. Thus, it would seem that

---

166. LA. CONST. art. III, § 1; art. VI, § 1.
167. See text accompanying note 32 supra.
170. "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.
171. "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be abridged. This shall not prevent the passage of laws to punish those who carry weapons concealed." LA. CONST. Art. I, § 8 (1921).
172. Committee Proposal 25, § 20: "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 concealed weapons."
the right is established without the reference to a militia, a reference that could have indicated that the right could be limited to participation or service in a militia.\textsuperscript{7} Since it is a right of "each citizen," it is clearly not a reference to a right of a state to maintain its militia as the federal provision has been at times construed.\textsuperscript{172} Federal regulation in this area, of course, is pervasive and continues to establish strong gun controls.\textsuperscript{174}

An early committee draft added the sentence, "Nothing contained herein shall allow the confiscation or special taxation of arms."\textsuperscript{177} It was not incorporated in the final committee proposal,\textsuperscript{178} but an attempt was made to add by floor amendment that "No law shall require the licensing or registration or impose special taxation on the ownership or possession of firearms or ammunition."\textsuperscript{179} The amendment was rejected by a 37-64 vote following a debate which disclosed objections to forbidding registration and regulation of firearms.\textsuperscript{180} Particular objection came from some New Orleans delegates, on the ground the proposal would invalidate existing city ordinances.\textsuperscript{181} In light of this background, it seems that legislation taxing, licensing and registering arms is permitted. This is consistent with the general statement of the right since such legislation would not abridge the keeping or bearing of arms.

An early draft had also referred to the right to bear "arms and ammunition,"\textsuperscript{182} but the final committee proposal and the final section omit the reference to ammunition. It was thought unnecessary to add that reference, since "ammunition" would be implied from the right to bear arms.\textsuperscript{183} Beyond this, the record gives little definition of the scope of the "arms" that one has a right to keep and bear. It does indicate a knowledge of existing laws prohibiting sawed off shotguns and machine guns.\textsuperscript{184} Continuation of the wording of the 1921 provi

\textsuperscript{175} Stevens v. United States, 440 F.2d 144 (6th Cir. 1971).
\textsuperscript{176} See cases in note 174 supra. See also 18 U.S.C. §§ 921-28 (1968).
\textsuperscript{177} Baton Rouge State Times, April 20, 1973, at 10-C, col. 4.
\textsuperscript{178} See note 172 supra.
\textsuperscript{179} JOURNAL, Sept. 12 at 2.
\textsuperscript{180} PROCEEDINGS, Sept. 12 at 5-25.
\textsuperscript{181} Delegate Thomas Casey: "I rise to oppose this amendment and I do so principally because I am from a municipality that does have an ordinance establishing a handgun registration law. It has been helpful in our area to have an ordinance of this type, and the statistics do show it." \textit{Id.} at 12.
\textsuperscript{182} Committee Proposal 2, § 20.
\textsuperscript{183} PROCEEDINGS, Sept. 12 at 4.
sion in this respect with the knowledge of how it has been understood suggests that those statutes would not be overturned.

Considering prior court rulings, it was probably unnecessary to add in the 1879, 1898, 1913 and 1921 constitutions the provision, "This shall not prevent the passage of laws to punish those who carry weapons concealed." Such laws were permissible without that language. Still, the committee proposal continued the language and the convention adopted an amendment to refer to "weapons concealed on the person." The author conceived of his amendment as prohibiting statutes forbidding carrying of concealed weapons "in an automobile, or in a boat, or in an airplane" or anywhere else but on the person.

Section 20 provides "Full rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense." The reference to rights of citizenship, coupled with the right of each citizen to keep and bear arms supports an argument that bearing arms is a right of citizenship restored to a person who completes his sentence. However, debate on Section 11 contains a statement by a strong supporter of the right to keep and bear arms that carrying of weapons is not a right of citizenship.

**FREEDOM FROM DISCRIMINATION**

Section 12. In access to public areas, accommodations, and facilities, every person shall be free from discrimination based on race, religion, or national ancestry and from arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical condition.

A most hectic debate surrounded proposals going beyond the state action concept and prohibiting discrimination by private individuals as well as by government. The committee initially adopted

185. State v. Jumel, 13 La. Ann. 399 (1858); State v. Smith, 11 La. Ann. 633 (1856). In a time when Louisiana's constitution did not specify the right to keep and bear arms, the court held that the Second Amendment of the United States Constitution did not prevent passage of laws prohibiting the carrying of concealed weapons.

186. La. Const. art. VIII (1921); art. VIII (1913); art. VIII (1898); art. III (1879).

187. JOURNAL, Sept. 12 at 1, 2.

188. PROCEEDINGS, Sept. 12 at 6.

189. Delegate Jack Avant introduced amendments to prevent taxation or regulation of the possession of arms and to add the language "concealed on the person." In response to a question by Delegate Max Tobias as to whether Section 20 would "permit a former felon to carry firearms," Delegate Avant said, "I don't think so because the right to citizenship that is referred to in that section are the rights to vote and the restoration of civil liberties." Id. at 7.
this section by a 5-4 vote\textsuperscript{190} and finally submitted a proposal that reached private discrimination in access to public accommodations and in the sale or rental of property.\textsuperscript{191}

Early in its consideration of the proposal, the convention deleted the reference to sale or rental of property.\textsuperscript{192} Then, opponents of the whole concept in an attempt to produce an overall proposal that was too far-reaching to win final approval, joined some supporters in adding additional guarantees by amendment.\textsuperscript{193} In light of this strategy, the committee withdrew its own proposal from consideration with the aim of returning to the subject later.\textsuperscript{194} Several days later, following an off-the-floor lobbying effort, a compromise provision was adopted with little debate;\textsuperscript{195} the transcript of that debate occupies less than three pages in the transcript of proceedings.\textsuperscript{196}

The section prohibits discrimination "in access to public areas, accommodations, and facilities." This language will have to be defined in the course of case-by-case adjudication, but a significant indication of the breadth of the provision is the fact that it was inspired by the existing public accommodations sections of the federal Civil Rights Act\textsuperscript{197} and that it was adopted with an awareness of the scope of the federal law. Early in the debate, committee member Delegate Novyse Soniat contemplated a broad construction, "public accommodation is broadly defined to restaurants, taverns, barber shops, nursing homes, clinics, hospitals, and for this reason I would urge that all of you consider adopting this section."\textsuperscript{198}

In some respects, the section goes beyond the federal legislation.\textsuperscript{199} Whereas the latter consists of an enumeration of covered es-

\begin{itemize}
\item\textsuperscript{190} Baton Rouge State Times, April 17, 1973, at 1-A, col. 8.
\item\textsuperscript{191} Committee Proposal 25, § 7: "All persons shall be free from discrimination on the basis of race, color, creed, national ancestry, and sex in access to public accommodations or in the sale or rental of property by persons or agents who derive a substantial income from such business activity. Nothing herein shall be construed to impair freedom of association."
\item\textsuperscript{192} JOURNAL, Aug. 31 at 5.
\item\textsuperscript{193} Id. at 6.
\item\textsuperscript{194} Id., Sept. 5 at 4. At a quick committee meeting following adjournment of the convention, Chairman Alphonse Jackson pointed to the political problems: "They want to load it up and there's just no way anyone can vote for it." Delegate Chris Roy characterized the opposition's strategy as, "If you can't kill it, make it look ludicrous and kill it." Baton Rouge State Times, Sept. 5, 1973, at 1-B, col. 6.
\item\textsuperscript{195} JOURNAL, Sept. 13 at 8.
\item\textsuperscript{196} PROCEEDINGS, Sept. 13 at 69-71.
\item\textsuperscript{197} Civil Rights Act of 1964, tit. II, 42 U.S.C. § 2000a. See also PROCEEDINGS, Sept. 1 at 31; Sept. 13 at 71.
\item\textsuperscript{198} Id. at 29-30.
\item\textsuperscript{199} In committee, Delegate Anthony Guarisco was quoted as saying: "I'm against
tablishments, albeit broadly stated, this section makes a reference generally to public areas, accommodations and facilities. The coverage of the state provision, in light of the legislative history, includes not only the places of public accommodation enumerated in the federal statute, but also other establishments that are considered "public areas, accommodations, or facilities." Whereas "accommodations" might be limited to food, board, and entertainment establishments, the terms "areas" and "facilities" have a broader scope, extending for example to parks, playgrounds, bars, hospitals, etc. that provide services generally to the public but are not enumerated in the federal statute. Moreover, the provision makes no exceptions based on size of establishment and requires no showing of affecting interstate commerce as does the federal provision. Similar to the explicit federal provisions, the section implicitly excludes from its coverage institutions that are true private clubs since such private clubs are not areas, accommodations or facilities that offer services to the public.

Adoption of the amendment to delete the prohibition of discrimination in the sale or rental of property implicitly allows discrimination in that area. However, the section would apply to some types of rental transactions that constitute a denial of access to public areas, accommodations or facilities—for example, campsites and some apartments.

---

200. 42 U.S.C. § 2000a(b) (1964) mentions "any inn, hotel, motel, or other establishment which provides lodging to transient guests . . . any restaurant, cafeteria, lunchroom, lunch counter, soda fountain or other facility principally engaged in selling food for consumption on the premises . . . any gasoline station . . . any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment . . . any establishment . . . located within the premises of . . . a covered establishment."

201. Id. § 2000a(b)(1) exempts "an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence." See generally Id. § 2000a(b).

202. 42 U.S.C. § 2000a(e) (1964). "The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section."

203. Committee member Delegate Chris Roy indicated that private clubs are not covered. PROCEEDINGS, Sept. 1 at 32. The convention was made aware of the Supreme Court decision in Moose Lodge No. 147 v. Irvis, 407 U.S. 163 (1972). PROCEEDINGS, Sept. 13 at 77.

Borrowing from the formula of Section 3, the section establishes an absolute prohibition of discrimination based on race, religion, or national ancestry, leaving no room for rational bases or compelling interests to sustain the discrimination. Discrimination based on "age, sex, or physical condition," is permissible so long as it is not "arbitrary, capricious, or unreasonable." Here again, the constitution gives the courts freedom to determine reasonableness in these circumstances. For example, the record indicates that it was not envisioned that the provision require installation of special facilities to accommodate persons who are handicapped.\footnote{The record indicates the warnings would not be required to be given by private citizens detaining others. \textit{Id.}, Sept. 7 at 15.}

The last sentence of the committee proposal, "Nothing herein shall be construed to impair freedom of association," was deleted from the compromise amendment. The convention twice defeated attempts to restore that language, fearing that it would limit the applicability of the rights already provided for.\footnote{A policy choice was made to incorporate in the constitution once the standards of Section 5 requiring probable cause and reasonableness are met and a person is arrested or detained, the rights established in this section are activated to regulate police questioning.\footnote{Proceedings, Sept. 13 at 70.} A policy choice was made to incorporate in the constitution once the standards of Section 5 requiring probable cause and reasonableness are met and a person is arrested or detained, the rights established in this section are activated to regulate police questioning.\footnote{See id. at 72-77; \textit{Id.}, Sept. 14 at 8-12. Delegate Moise Dennery said, "by putting this last sentence on as the tag into this, you might be destroying the very provision that was adopted by this convention." Delegate Camille Gravel said, "For all practical purposes, if we are going to adopt . . . maintain the amendment and the intent of the amendment that was passed, we cannot let the amendment by Mr. Jenkins destroy what was just done. Might just as well not have anything." \textit{Id.}, Sept. 13 at 75.}}

**RIGHTS OF THE ACCUSED**

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.

Once the standards of Section 5 requiring probable cause and reasonableness are met and a person is arrested or detained, the rights established in this section are activated to regulate police questioning.
a system of warnings and cautions similar to those required by *Miranda v. Arizona.*

The cautions are triggered and must be given "when any person has been arrested or detained in connection with the investigation or commission of any offense." The original committee proposal provided more simply that the cautions are required "when a person has been detained." The committee used "detained" rather than "arrested" to prevent a narrow construction of the latter term and to reflect the analysis of *Terry v. Ohio* which indicates that the fourth amendment is invoked whenever "a police officer accosts an individual and restrains his freedom to walk away. . . ." Thus, in the committee draft, it appears that the cautions were to be triggered any time a person is detained in the sense of being deprived of his freedom to go as he pleases. Discussing this aspect of the problem, Delegate James Derbes raised questions about the warnings being required later in the criminal justice process, as when one is detained after a bail hearing or after conviction. Though the committee informed him the section would not then apply, he later introduced an amendment, largely aimed at other matters, which was adopted and which used the terms "arrested or detained," apparently intending to exclude such later detentions. This is not a substantial difference in wording; the original broad reference to "detained" is kept, and the narrower term "arrested" is added. From the terms used, it would seem that the committee's intended breadth was not narrowed.

While at one point Delegate Derbes responded to a question by indicating that the cautions might not be necessary in a stop and frisk situation under article 215.1 of the Code of Criminal Procedure, he soon thereafter said that the scope of his amendment was equivalent to the committee language and not more restrictive. The committee

---

210. 392 U.S. 1, 16 (1968).
214. *Id.* at 45.
215. *Id.* Mr. Lanier: "So would it be your intention, and this is for the purpose of the law enforcement people who would have to operate under this provision, is it your intention that this provision would not apply in a stop and frisk situation under Section 215.1?"

Mr. Derbes: "That's my intention but I'd also point out that the scope of the amendment, with respect to the circumstances of its administration, is equivalent to rather than more restrictive than the original committee proposal."

Later, Derbes said, "As I understand the original committee proposal it used the
language, of course, would require the cautions in those stop and frisk situations in which the individual is not free to walk away. If article 215.1 is invoked in a situation when an individual is free to go, then he is not detained, and the cautions are not required. However, if the article is construed to mean that a person being questioned cannot go away if he chooses to, then he is obviously being detained and the cautions are required.

Seeking simplicity, the committee proposal required that a person "be advised of his legal rights and the reason for his detention." The term "legal rights" was used to refer to rights established elsewhere which applied at this stage of the proceedings. Difficulty arose because of the vagueness of that expression, and the convention adopted an amendment by Delegate James Derbes to state explicitly that the cautions must consist of the reason for arrest or detention, the right to remain silent, the right against self-incrimination, the right to the assistance of counsel and, if one is indigent, the right to court appointed counsel. A result of this language choice is not only to require that the specific warnings be given, but also to establish those rights. Advising one of such rights would be a hollow formality if the rights did not exist; the necessary implication is that they do exist and that they can be exercised at that point. Thus, the right to counsel can be exercised at the point of arrest or detention. Considering the *Miranda* roots of the section, it becomes apparent that one cannot be questioned without his attorney being present if he chooses to exercise the right. This conclusion is fortified by the establishment of the right to remain silent. This right, more than simply guaranteeing that one need not incriminate himself, allows a person to be silent and refuse to answer questions that would not incriminate him. Again, the *Miranda* roots are apparent. Having this right to remain silent is also a basis, when construing Section 16's guarantee of a person's right not to be compelled to give evidence against him-

---

217. PROCEEDINGS, Sept. 7 at 45.
218. JOURNAL, Sept. 7 at 4.
219. Committee member Delegate Ford Stinson explained: "And I think that means that if a person says, 'I'd rather not talk to you until I have the opportunity to see a lawyer,' and they should explain to him before he answers any questions, and I believe that's federal and, also, state, that he has a right to an attorney to advise with him before he makes any statement. I think it's just a reenactment of what the present law is." PROCEEDINGS, Sept. 6 at 70.
self, for indicating the expected intent to continue existing jurisprudence that the defendant cannot be called as a witness by the state at trial.

The section also requires that the person arrested or detained "be advised fully of the reason for his arrest or detention." This applies to arrests with or without a warrant, and to detentions other than arrest. It constitutionalizes and expands the provisions of the Code of Criminal Procedure which require an officer "when making an arrest" to inform the arrestee of "the cause of the arrest."²²⁰ The "when making an arrest" formula for stating the time the information must be given comes from the American Law Institute Code of Criminal Procedure, whose source provision indicates that notice must be given before or simultaneously with the arrest.²²¹ The formula of Section 13, "when any person has been arrested or detained," indicates that notice need not be given before the arrest, since the past participle form of expression is used. It would be sufficient to give the information simultaneously with the arrest or detention, or right after that point when a person is in custody or is no longer free to go as he pleases. As the apparent policy objective is to inform a person why the law has intervened and why it is a proper intervention in order to decrease the likelihood of resistance, the notice ought to be given soon enough to accomplish that objective. A small amount of flexibility is present here, for the section as adopted omits the phrase, "immediately be advised" of the committee proposal, which might have mandated a more stringent standard.²²²

The requirement of notice of the reason for the arrest or detention seems to rest on a different policy base than the other cautions mentioned. Those from Miranda, counsel and silence, are designed to enable a person to exercise his right not to incriminate himself by removing the psychological coercion which might tend to lessen one's will not to answer police questions. The time for giving those warnings should be related to their purpose; thus, they should be given in time to allow a person to be less intimidated during interrogation. Since the requirement is enforced by exclusion of statements made without receiving proper warnings,²²³ it is essential that they be given before questioning. On the other hand, the policy for giving notice of the reason for arrest is related more to arrest law than to self-incrimination questioning matters. Thus, it ought to be given simul-

²²⁰ LA. CODE CRIM. P., art. 218. See also id. art. 217.
²²¹ Id. art. 218, comment (b).
²²² Committee Proposal 25, § 12.
²²³ See text following note 226 infra.
taneous with or soon after arrest or detention regardless of questioning.

The section does not contain the exceptions of the Code of Criminal Procedure that notice of the reason for arrest need not be given if the person "is then engaged in the commission of an offense, or is pursued immediately after its commission or after an escape, or flees or forcibly resists before the officer . . . has an opportunity to so inform him, or when the giving of the information would imperil the arrest." However, since the section implies that the notice need not be given before the arrest or detention is completed, and since little possibility exists that giving the information at that point could imperil the arrest or detention, that exception is hardly needed here. Moreover, if the arrested person refuses to listen and, for example, flees or forcibly resists, it seems implicit that the useless act of giving notice at that point may be dispensed with. Once the person is finally detained or arrested after resisting or escaping, the notice can be given. The section by its terms seems to require that notice be given following arrest even if the arrest is made when a person is engaged in the commission of an offense or has just escaped.

Though not in the committee proposal, the section as amended demands that a person be advised fully of the reason for arrest or detention and of the enumerated rights. The added language indicates the breadth of the requirement and comports with Miranda's demand that the warnings not be perfunctory but that they be given in a meaningful way so that a person can clearly understand them. It is also related to Miranda's waiver standard; the waiver must be a voluntary relinquishment of a known privilege based on full understanding of what is being waived.

It is not surprising that this section does not state the means of enforcing its requirements, as the entire declaration of rights catalogue numerous guarantees without providing specific means of enforcement for any of them. However, the convention's virtual incorporation of Miranda in the constitution assumes continuation of the exclusionary rule for enforcement of its provisions. This comports with that same understanding as to violations of Section 5 with respect to improper searches and seizures and invasions of privacy.

The section also treats the rights of the accused at points in the criminal justice process further removed from the arrest. It repeats the formula of Article I, § 10 of the 1921 Constitution in providing

224. LA. CODE CRIM. P. art. 218. See also id. art. 217.
226. Id.
that an accused shall be informed of the nature and cause of the accusation against him. The committee had proposed that the accused be precisely informed in a deliberate attempt to require more stringent standards and to overturn existing jurisprudence. Rejecting the committee language, the convention first changed it to "reasonably informed" and then ultimately voted to continue the existing language without an adjective. The effect is to continue existing jurisprudence in the area, particularly that approving the short-form indictment, and avoids a possible return to an older conception emphasizing the technicalities of indictment forms.

The section expands the rights of indigents to appointed counsel beyond the latest decisions of the United States Supreme Court. An indigent "charged with an offense punishable by imprisonment" is entitled to assistance of counsel "appointed by the court," regardless of the actual penalty imposed or whether it is imprisonment in the state penitentiary or parish jail. This goes beyond Argersinger v. Hamlin, which holds that no one may be imprisoned unless he was granted the right to counsel at his trial. Under that decision, counsel is not required if the ultimate sentence is only a fine, even if the offense is punishable by imprisonment. An effort to delete this far-reaching proposal was defeated in a debate which made clear that, with respect to imprisonment, "the mere fact that he might have that as a punishment entitles him to counsel."

In fact, one statement during the debate supports the view that an indigent ought to have appointed counsel for offenses punishable by fine if he can be imprisoned on default of paying the fine. This view is not necessarily compelled by the language used in the section, for "offense punishable by imprisonment" could refer simply to the...
penalty clause in the statement of an offense. However, the problem may be more apparent than real. If an offense is punishable by fine only, *Tate v. Short* applies and forbids, on equal protection grounds, imprisonment of indigents in default of paying the fine. Thus, this would not be an offense punishable by imprisonment and the section’s right to appointed counsel would not apply. If the offense is punishable by fine or imprisonment, the right to counsel for indigents clearly applies. Finally, if a person is not a indigent and thus outside the *Tate* rationale, even if he is imprisoned in default of paying a fine, he does not have the right to appointed counsel because he is not indigent.

The section recognizes the traditional right of a person to the services of retained counsel, referring to “assistance of counsel of his choice.” The right to counsel, both appointed and retained, must be granted “at each stage of the proceedings,” leading to the crucial determination of what qualifies as a stage of the proceedings. The language “each stage” may be contrasted with the “critical stage” analysis of the federal standard and with the narrower statement of the right in Article I, § 9 of the 1921 Constitution, which did not include that language.

The section provides that the stage at which the right attaches is the same for appointed and retained counsel. Equating these rights supports the view that the right of indigents to counsel applies quite early in the process, since the right to retained counsel has traditionally attached at the earliest stage. Certainly, arraignment would be such a stage. Since the right to a preliminary hearing, which is considered a crucial stage even under federal standards, is expanded in Section 14, the right to counsel should apply at that point. The incorporation of *Miranda* in the section clearly contemplates the right during police questioning. Even if there is no police questioning, having counsel who is able to exercise the right to a preliminary

---

236. Under the Code of Criminal Procedure, a separate article (884) establishes imprisonment in default of paying a fine.
240. For example, *La. Code Crim.* P. art. 229, in defining the duties of the booking officer includes informing the person booked “of his rights to communicate with and procure counsel.” Article 230 enumerates rights of a person arrested, including, “from the moment of his arrest, a right to procure and confer with counsel and to use a telephone or send a messenger for the purpose of communicating with his friends or with counsel.”
hearing and to fix bail seems implicit in having the right to a preliminary hearing and to bail. Hence, counsel ought to be made available immediately after arrest so those rights can be asserted. This conclusion seems especially warranted since such has traditionally been the case with respect to communicating with retained counsel. Further, the committee comments referred to "the early assistance of counsel."  

More far-reaching is the argument based on the fact that persons traditionally have been accorded the right to retained counsel at the appellate stage. Hence, making the right to appointed counsel equivalent to that of retained counsel would seem to impel an identical conclusion with respect to appointed counsel. The same is true for parole revocation hearings and post-conviction collateral proceedings. On the other hand, while this line of argument certainly seems applicable to proceedings before and during the trial, since "the provisions are arranged in the chronological order which the rights are exercised," and Section 13 forms part of the trial and pre-trial guarantees, the argument may be less persuasive as to appellate and post-conviction procedures, which are treated later in Sections 19, 20, and 21. The record of the debate contains virtually no references to the scope of the right after trial, and the emphasis in the comments is to pre-trial proceedings.  

The final sentence, mandating the legislature to "provide for a uniform system for securing and compensating qualified counsel for indigents," was added by floor amendment. The committee proposal concentrated on establishing judicially enforceable rights and did not generally concern itself with mandates to the legislature which do not lend themselves to enforcement through judicial proceedings. However, the convention, in an effort to encourage more state efforts in this regard, adopted the mandate by an overwhelming 99-11 vote. In any event, though no enforceable device exists to require the legislature to adopt a system for securing and compensating
counsel, the third sentence of the section is nevertheless enforceable by the courts so that no valid conviction can be obtained unless the right to counsel has been granted as required.

The terms of the mandate may not be clear in the reference to a "uniform system." The natural meaning of the word would seem to require one standard system for the whole state. However, the author of the amendment, Delegate Thomas Velazquez, agreed with Delegate Walter Lanier's appraisal of the provision that, "in other words, in Lafourche Parish if we wanted to have the indigent defense system we could have that, and in New Orleans if they wanted the public defender system they could have that providing there was uniform legislation establishing both systems." At the same time, other delegates questioned this construction and expressed the view that "uniform" means identical throughout the state. Another delegate saw the mandate as related to a public defender system. Still another view reflects the historical development in Louisiana which considers legislation as uniform if it treats all cities within certain population classes equally. This last construction of the uniformity requirement would correspond with Article VI, § 3, which allows the legislature to "classify parishes or municipalities according to population or on any other reasonable basis related to the purpose of the classification" and to limit legislation to any such class or classes.

Finally, though it is implicit in the right to counsel that effective assistance is demanded in the sense of meeting some standard of qualification and performance, the reference to securing qualified counsel makes that requirement more explicit.

**Right to Preliminary Examination**

Section 14. The right to a preliminary examination shall not be denied in felony cases except when the accused is indicted by a grand jury.

This section was not proposed by the committee, but was added by floor amendment. A first attempt to establish the right to a preliminary examination in all cases was defeated. A week later, however, the convention by an overwhelming 96-18 vote adopted the

251. PROCEEDINGS, Sept. 7 at 39.
252. Id. at 40.
253. Id. at 41.
254. Id. at 43.
256. JOURNAL, Sept. 7 at 6; PROCEEDINGS, Sept. 7 at 72-75.
An expressed goal of the provision was to change the statutory provision which made a preliminary hearing discretionary with the judge once a bill of information had been filed by a district attorney and to overrule court decisions which had narrowed the right further by holding that the filing of an information even after a preliminary examination had been ordered defeated the right to such an examination. In this respect, the language is clear. One has an absolute right to the preliminary examination in all felony cases except when an indictment has been returned by a grand jury, regardless of whether a bill of information has been filed by a district attorney. In fact, since the right exists "except when the accused is indicted by a grand jury," the fact that a grand jury is investigating a matter or is scheduled to do so does not defeat the right; it is only when one "is indicted" (i.e. once the indictment is returned) that the exception comes into play.

The contemplated purpose and scope of the preliminary examination is the traditional one of judicial intervention to determine whether probable cause exists to hold an individual instead of leaving that decision solely to the law enforcement agencies. The convention had before it and discussed the Fifth Circuit case of Pugh v. Rainwater, which reasoned that under the Federal Constitution a person has a right to a preliminary hearing in the absence of grand jury determination of probable cause to hold him for the offense. Also envisioned was the requirement that the state produce witnesses and the right of the defense to call witnesses. The preliminary examination should be held promptly to avoid incarceration for some time without the benefit of a judicial determination of probable cause. By the terms of the article, the right can also be exercised by a person who has not been arrested or incarcerated but who has been the

258. LA. CODE CRIM. P., art. 292; PROCEEDINGS, Sept. 14 at 20.
261. Id., Sept. 7 at 72, 74; Sept. 14 at 22, 23, 25. See LA. CODE CRIM. P. art. 296.
262. 483 F.2d 778 (5th Cir. 1973), cert. granted, sub nom, Gerstein v. Pugh, 414 U.S. 1062 (1973). Whatever the ultimate effect of the Supreme Court action in the case, the Fifth Circuit opinion handed down just a month before on August 15, 1973, was what was before the convention delegates when the section was adopted. See PROCEEDINGS, Sept. 14 at 25.
263. PROCEEDINGS, Sept. 14 at 20.
264. LA. CODE CRIM. P. art. 293.
subject of a bill of information commencing proceedings against him. In either case, the preliminary examination will also serve as a discovery device, at least to the extent the state is required to produce some evidence to establish probable cause.265

Before the right can be invoked, a felony case must be involved. Since Section 13 requires that a person arrested or detained be informed of the reason for curtailing of his freedom, which encompasses a naming of the offense involved, he will have available the information necessary to determine if he is charged with felony or misdemeanor and thus whether the right has been triggered. Of course, the section leaves the legislature free to act in defining the right to a preliminary examination with respect to misdemeanors.

INITIATION OF PROSECUTION

Section 15. Prosecution of a felony shall be initiated by indictment or information, but no person shall be held to answer for a capital crime or a crime punishable by life imprisonment except on indictment by a grand jury. No person shall be twice placed in jeopardy for the same offense, except on his application for a new trial, when a mistrial is declared, or when a motion in arrest of judgment is sustained.

The Committee on Bill of Rights and Elections sought to lessen district attorney discretion by enlarging the class of cases in which indictment is required and to give an accused more rights in grand jury proceedings.266 The committee proposal required indictment in all felonies necessarily punishable by hard labor267 and gave the accused the right to counsel while testifying before a grand jury, the right to compulsory process to present witnesses to the grand jury for interrogation and the right to the transcribed testimony of witnesses before the grand jury.268 These policy objectives were rejected by the convention,269 the final proposal containing no statement of rights of a person during grand jury investigation and making little change in the class of cases in which indictment is required.

The section as adopted requires a grand jury indictment "for a capital crime or a crime punishable by life imprisonment," while the prior provision required an indictment only for capital crimes.270 In

265. Id. arts. 294-97.
268. Id. § 14.
269. Journal, Sept. 7 at 5, 6, 7.
other felonies, prosecution can be instituted by information, meaning an accusation by a district attorney.\textsuperscript{271} The discretionary power of the district attorney in bringing accusations by information is increased by Article IV, § 8, which diminishes the supervision of district attorneys by the attorney general. The attorney general can institute, prosecute, or intervene in criminal actions or supercede a district attorney only “for cause, when authorized by the court which would have original jurisdiction and subject to judicial review.”\textsuperscript{272} However, Section 14 does provide some means of protecting an accused’s rights against unjust prosecution by providing for a right to a preliminary examination to determine if probable cause exists to hold a person.

The section requires no particular mechanism for initiation of prosecution for misdemeanors; the legislature is free to act in this regard. It was not necessary to continue the language of the prior provision that allowed prosecution of misdemeanors by affidavit,\textsuperscript{273} since the legislature has that power in any event. Article V, § 26 does make it clear, however, that the district attorney “shall have charge of every criminal prosecution by the state in his district.” The legislature is thus precluded from establishing a system that would deprive the district attorney of that power.\textsuperscript{274} That section refers to prosecution “by the state”; the district attorney does not have to be given charge of prosecutions by a city or a parish for violation of ordinances, which can be left with city prosecutors.

The section establishes the double jeopardy guarantee in virtually the same language used in Article I, § 9 of the 1921 Constitution; the minor style changes have no substantive effect.

The constitution fails to continue Article VII, § 41 of the 1921 Constitution providing that women would not be eligible for jury service unless they had previously registered with the clerk of court their desire to serve.

\textbf{RIGHT TO A FAIR TRIAL}

\textit{Section 16. Every person charged with a crime is presumed innocent until proven guilty and is entitled to a speedy, public, and impartial trial in the parish where the offense or an element of the offense occurred, unless venue is changed in accordance with law. No person shall be compelled to give evidence against}
himself. An accused is entitled to confront and cross-examine the witnesses against him, to compel the attendance of witnesses, to present a defense, and to testify in his own behalf.

The provisions proposed by the committee reiterating basic existing principle were adopted with little controversy, and with only one technical amendment. What caused much controversy was an amendment, ultimately rejected, that would have added the right of an accused to statements related to his case made by witnesses before a grand jury or before state officials. This was an attempt to incorporate part of Committee Proposal 25, Section 14 that had been deleted earlier. The convention thus failed to establish an absolute right to inspect prior statements of witnesses and leaves this and other aspects of discovery to be developed legislatively and through a case by case court development of the impartial trial and due process guarantees.

New to the constitution is the explicit requirement that a defendant be "presumed innocent until proven guilty." The statement incorporates both the presumption of innocence and the requirement that the state has the burden of proving the defendant's guilt, thereby constitutionalizing two principles that have long been basic assumptions of criminal procedure and due process. Little debate on the subject can be found in the records of the convention, so the contours of the rights will have to be fleshed out as part of the development of the concepts from their historical sources.

276. The reference to "take the stand in his own behalf" was replaced with "testify in his own behalf." JOURNAL, Sept. 7 at 8.
277. Id. It provided, "Prior to his trial, every defendant shall be furnished with the transcribed testimony or statement, for or against him, of any witness appearing before any official or employee of the state or any of its political subdivisions or any grand jury which participated in any investigation of the case for which he is being prosecuted." The amendment was rejected by a vote of 43-65.
278. JOURNAL, Sept. 7 at 7.
281. The principles can be traced to Roman Law. "Let all accusers understand that they are not to prefer charges unless they can be proven by proper witnesses or by conclusive documents, or by circumstantial evidence which amounts to indubitable proof and is clearer than day." CODE L. IV, T. XX, 1, 1.25.
Of some uncertainty is the scope of the presumption of innocence, particularly with regard to evidentiary presumptions that lessen the state's burden of proof, for example, the presumption "that the person in the unexplained possession of property recently stolen is the thief..." To the extent that such presumptions require or encourage the defendant to testify to overcome the presumptions, there is arguably an infringement of his right not to testify.

In this area, the United States Supreme Court has applied a flexible standard judging the reasonableness of presumptions: "a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience."

The guarantee of a "speedy, public, and impartial trial" basically continues the predecessor provision. However, since the modifying clause "in accordance with the provisions of this constitution" in the 1921 document has been deleted, the new formula would seem to make these guarantees less dependent on other provisions in the constitution. The unmodified requirement of an impartial trial furnishes independent grounds for court elaboration of additional requirements to ensure impartiality in the trial process.

The section continues the basic policy that an accused is to be tried in the parish in which the offense occurred. However, the manner of expressing the guarantee is changed; it is expressed as a right of an accused person rather than an absolute jurisdictional requirement. Thus, for example, a defendant could waive the require-

Delphidius: "Oh, illustrious Caesar! If it is sufficient to deny, what hereafter will become of the guilty?" Emperor Julian: "If it is sufficient to accuse, what will become of the innocent?"

RERUM GESTARIUM, L. XVIII, C.1.


283. The United States Supreme Court has rejected this argument. See Turner v. United States, 396 U.S. 398 (1970).


287. La. Const. art. I, § 9 (1921), as amended by La. Acts 1962, No. 528, adopted Nov. 6, 1962, provided in part: "All trials shall take place in the parish in which the offense was committed, unless the venue be changed; except that the Legislature may provide for the venue and prosecution of offenses when one of the acts constituting an
The change may also undermine the support for the rule that the state must prove proper venue beyond a reasonable doubt.\footnote{288}

To provide for offenses occurring in more than one parish or more than one state, the guarantee is phrased so as to continue the provision that trial may be had in any parish in which an element of the offense occurred. This rule applies "unless venue is changed in accordance with law."\footnote{289} The exception clause, since it is unmodified by a restrictive adjective limiting the legislature, gives the legislature great freedom to act in this area, encompassing not only change of venue because of prejudicial publicity and the like, but also authorizing legislation for special venues for problem situations that the former constitution had particularized.\footnote{290} Since the legislature can act in this regard, it was not necessary to continue the constitutional authority for establishing venue when the exact place of commission cannot be established or authority for providing for venue of offenses committed with 100 feet of a parish boundary.

These constitutional provisions for special problem situations were added by amendment in 1962 on recommendation of the Louisiana State Law Institute to overcome restrictive jurisprudence in the area and are the basis for the present articles 611 and 612 of the Code of Criminal Procedure.\footnote{291} The committee in simplifying language and shortening the provision did not seek to change substance or return to that restrictive jurisprudence; rather, the phrase "unless venue is changed in accordance with law" was conceived as granting the power to enact laws to handle these problems.\footnote{292} This allows the continued validity of articles 611-614.

\begin{footnotesize}
\item[288] The offense or an element of the offense occurs in a parish in this state and other acts or elements thereof occur out of the parish or state, or when an offense is committed in this state but the exact place of the commission of the offense in this state cannot be established. The Legislature may provide for the venue and prosecution of offenses committed within 100 feet of the boundary line of a parish.”

\item[289] See the discussion accompanying notes 7, 8 supra.

\item[290] To the extent that the rule that the state has the burden of proving proper venue beyond a reasonable doubt rests on the mandatory language of Article I, § 9 of the prior constitution, it no longer has that support by virtue of the change in language. See LA. CODE CRIM. P. art. 615 & comment (a)(2).

\item[291] The change from the prior language “unless the venue be changed” to “unless venue is changed in accordance with law” emphasizes the power of the legislature, consistent with the use throughout the constitution of the terms “as provided by law” and “in accordance with law” to so indicate.

\item[292] Explaining the provision on behalf of the committee, Delegate Ford Stinson said, “Now certainly I don’t see how there could be any objection to a statement of that type and naturally it follows too that the legislature in its wisdom will provide any additional change as to venue. . . .” PROCEEDINGS, Sept. 7 at 94.

\item[293] See LA. CODE CRIM. P., tit. XIX, Preliminary Statement.

\item[287] See note 287 supra.
\end{footnotesize}
The section provides simply, “No person shall be compelled to give evidence against himself.” Deleted is the prior language that specified that he need not do so “in a criminal case or in any proceeding that may subject him to criminal prosecution, except as otherwise provided in this Constitution.”\(^{294}\) Deletion of the reference “in any criminal case or in any proceeding . . .” indicates that the guarantee is to apply outside of trials or hearings and extends to police questioning. This is consistent with Section 13’s recognition of the right to remain silent and not to incriminate oneself during police interrogation. Since this guarantee is in a section dealing with criminal matters which itself is in a group of sections dealing with criminal matters, it is implicit that the protection is limited to information that would tend to prove guilt of a criminal offense. Even though the prior language “that may subject him to a criminal prosecution” is deleted, the guarantee is not applicable to evidence that would establish civil liability, so long as that evidence does not also implicate a person in a criminal offense. The existing law is continued in this respect.\(^{295}\) Also continued, apparently, is the existing rule that the prosecutor cannot comment on the fact that a defendant failed to testify.\(^{296}\) The record also fails to disclose an intent to overturn existing principles which allow immunity statutes to be enforced.

The section continues the right of an accused to confront the witnesses against him. It also adds language to specify that this includes cross-examination. Continued also is the provision that an accused has the right to compulsory process for obtaining witnesses in his favor and the right to present a defense. Added is the right to testify on one’s own behalf.

**Jury Trial in Criminal Cases**

Section 17. A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case in which the punishment may be confinement at

---

294. La. Const., art. I, § 11 (1921) provided in part: “No person shall be compelled to give evidence against himself in a criminal case or in any proceeding that may subject him to criminal prosecution, except as otherwise provided in this Constitution.”


296. *Proceedings*, Sept. 7 at 95, where Delegate Ford Stinson said, “the fact that he fails to do so can not be commented on by the prosecuting attorney. It is reversible error if he does.”
hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, five of whom must concur to render a verdict. The accused shall have the right to full voir dire examination of prospective jurors and to challenge jurors peremptorily. The number of challenges shall be fixed by law. Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury.

The section continues the provision that in capital cases the jury consists of 12 persons who must unanimously agree to render a verdict. In non-capital major felonies (punishment is necessarily confinement at hard labor), the jury continues to consist of 12 persons, but 10 must concur to render a verdict, instead of the 9 under current provisions. In the trial of relative felonies (punishment may be confinement at hard labor) and misdemeanors punishable by more than six months imprisonment, the jury consists of six persons, five of whom must concur to reach a verdict. This is a change from the bob-tailed jury of five with unanimous consent required. The provision was a compromise reached after opposition developed to the committee proposal to require a 12 person jury and unanimous consent in all cases involving a major felony in which no parole or probation is permitted.

In stating the jury trial guarantee as applying to offenses in which a sentence of more than six months imprisonment may be imposed, the provision fails to incorporate the implication of Duncan v. Louisiana that the right to a jury trial exists if the punishment may be a fine of $500.00 or more. In the case of misdemeanors not

297. The reference to capital cases is just that; it does not include life imprisonment. When life imprisonment was intended, it was expressed, as in Section 15. The convention is thus not proceeding on the classification system under which the class of capital cases under the prior law continued as a special class even after the implementation of death sentences was halted by Furman v. Georgia, 408 U.S. 238 (1972). See State v. Flood, 263 La. 700, 269 So.2d 212 (1972); State v. Holmes, 263 La. 685, 269 So. 2d 207 (1973), distinguished in State v. Washington, 294 So. 2d 793 (La. 1974). Compare PROCEEDINGS, Sept. 7 at 56, with Id., Sept. 7 at 81.


299. Id. See LA. CODE CRIM. P. art. 782. The less-than-unanimous verdict was upheld in Johnson v. Louisiana, 406 U.S. 356 (1972), and Apodaca v. Oregon, 406 U.S. 404 (1972).

300. La. Const. art. VII, § 41 (1921). A six-man jury was upheld in Williams v. Florida, 399 U.S. 78 (1970). If 75 per cent concurrence (9/12) was enough for a verdict as determined in Johnson v. Louisiana, 406 U.S. 356 (1972), then requiring 83 per cent concurrence (5/6) ought to be within the permissible limits of Johnson.


provided for in the section, the legislature is of course free to act to provide for trial by a judge or for various types of jury trials as it might desire.

Ostensibly, the use of the normally mandatory formula, "shall be tried . . ." would indicate that jury trial is mandatory. However, it is clear from the last sentence of the section that an accused, except in capital cases, may waive the right to trial by jury. The innovation here, however, is the requirement that the waiver be "knowingly and intelligently" made. The language is that of the federal standard for waivers.304

The language used—"a defendant may knowingly and intelligently waive"—as well as the failure to mention the state's right to waive reflects the assumption that the state does not have the right to a trial by jury.305 Fortifying this conclusion is the fact that the declaration of rights as a whole was conceived of as protecting individuals against abuse of state power and does not concern itself with the rights of the state or of a jury.306 Since the state does not have this right, one of the assumptions underlying the position that indicated that the directed verdict procedure was improper is removed.307

The new provision continues the prior guarantee of a right to challenge jurors peremptorily, the number of challenges to be fixed by law.308 The innovation in the jury selection process is the grant of the right "to full voir dire examination of prospective jurors" to an accused. The purpose of the provision is to continue the traditional Louisiana practice of allowing the defense to examine prospective jurors at some length, as indicated by the provision for a full examination.309 It prevents adoption of a jury selection procedure as used in the federal system where the defense's ability to examine prospective jurors can be substantially circumscribed by the judge.310

305. Compare the language in Section 4, where in expropriation proceedings, "a party" has the right to trial by jury to determine compensation, including both the private landowner and the expropriating entity.
307. See State v. Hudson, 253 La. 992, 221 So. 2d 484 (1969) as distinguished in State v. Douglas, 278 So. 2d 485 (La. 1973). In light of Douglas recognizing that directed verdicts were proper, it was unnecessary for the convention to adopt a specific provision on the matter of directed verdicts.
308. La. Const. art. I, § 10 (1921).
RIGHT TO BAIL

Section 18. Excessive bail shall not be required. Before and during a trial, a person shall be bailable by sufficient surety, except when he is charged with a capital offense and the proof is evident and the presumption of guilt is great. After conviction and before sentencing, a person shall be bailable if the maximum sentence which may be imposed is imprisonment for five years or less; and the judge may grant bail if the maximum sentence which may be imposed is imprisonment exceeding five years. After sentencing and until final judgment, a person shall be bailable if the sentence actually imposed is five years or less; and the judge may grant bail if the sentence actually imposed exceeds imprisonment for five years.

The guarantee against excessive bail repeats the language of the Eighth Amendment to the United States Constitution and of Article I, § 12 of the 1921 Constitution. Bail is permissible in an amount reasonably calculated to assure the appearance of the accused for judicial proceedings; it must not be excessive in the sense that the amount would be beyond what is necessary for that purpose.\(^3\) The policy is “to obtain reasonable assurance that the accused will appear for trial by a method that will not place an unnecessary burden on him.”\(^3\) From this guarantee alone, it is arguable that preventive detention is not permitted, either directly, or indirectly by fixing bail at an excessive amount. However, the article further establishes a right to bail in certain instances. In those instances the right cannot be denied, and thus preventive detention cannot be used.

A person “shall be bailable,” i.e., has a right to bail, before and during trial in all cases, unless charged with a capital offense in which the proof is evident and the presumption of guilt is great. This is basically a continuation of existing constitutional provisions.\(^3\) As under existing law, the judge does not have even the discretionary power to grant bail if the proof and presumptions exist in a capital case.\(^3\) This conclusion is confirmed by the failure to include in this first sentence the language used in the second and third sentences which makes bail discretionary in other instances. The stylistic change, from “presumption” to “presumption of guilt” was made by floor amendment to clarify meaning.\(^3\) The reference is somewhat

312. LA. CODE CRIM. P., tit. VIII, Preliminary Statement.
313. LA. Const. art. I, § 12 (1921).
314. LA. CODE CRIM. P. art. 313.
315. PROCEEDINGS, Sept. 8 at 11.
DECLARATION OF RIGHTS

anomalous in light of Section 16's constitutionalizing the presumption of innocence and the particular reference to a presumption of guilt with respect to bail thus must be considered an exception to the general presumption of innocence. Its use also reflects the conception of the presumption of innocence within its historical development as a flexible and not absolute provision.316

In the interim between conviction and imposition of sentence, one has a right to bail if the maximum sentence which may be imposed is imprisonment of five years or less; after sentencing and until final judgment, bail is a right if the actual sentence imposed is five years or less. In both these instances, bail may still be granted in the discretion of the judge.

The wording here is important. The phrase "shall be bailable" indicates that the accused has the right to bail which cannot be taken away by legislative act and must be granted by the judge in accordance with the requirement that excessive bail not be required. In other cases, the phrase used is "the judge may grant bail," thereby carving out an area of judicial discretion.317 Since this is a grant directly to the judge, it is not within the power of the legislature to govern the exercise of discretion by the judge. However, by virtue of Article V, § 5, the supreme court has general supervisory jurisdiction over all other courts, thus allowing it to oversee the exercise of discretion of lower court judges in bail matters.

As the section is written, the exception clause, which withdraws a right to bail in capital cases, applies to the second sentence—bail before and during trial. The third and fourth sentences which deal with bail after conviction and until final judgment do not contain the exception clause. Consequently the judge apparently has discretion to grant bail after a person is convicted of a capital offense and sentenced to death, until final judgment. The record is not helpful in this regard, and this problem may well have resulted from an oversight. Allowing even discretionary bail after conviction of a capital offense would seem to be inconsistent with forbidding it before trial if the proof was evident and the presumption of guilt great. Certainly, if one has been convicted, the proof ought to be evident and the presumption greater. After conviction there exists more policy justification for denial of bail, because a convicted person is more likely to flee than one who has not yet been tried. In any event, the language is there and seems to grant discretion to the judge; it is discretion that ought to be sparingly used. Room for such discretion

316. See the discussion accompanying note 282 supra.
317. PROCEEDINGS, Sept. 8 at 7-11.
may well exist, however, in cases where a person initially denied bail when accused of a capital offense is convicted of a lesser included offense and sentenced to a term of imprisonment. In those instances, the situation is within the policy conceptions of the article that allow the judge to grant bail.

**Right to Judicial Review**

Section 19. No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based. This right may be intelligently waived. The cost of transcribing the record shall be paid as provided by law.

Not part of the committee proposal, this section results from a floor amendment designed to cure what the author conceived as a hiatus in the previously adopted article on the judiciary. Under the judiciary article, a criminal defendant has a right of appeal to the Louisiana supreme court if "convicted of a felony" or if "a fine exceeding five hundred dollars or imprisonment exceeding six months actually has been imposed."318 In other criminal matters, no right of appeal to the supreme court is specified; the provision is simply that a defendant has "a right of appeal or review, as provided by law."319

The policy, in the case of minor offenses, was to give the legislature freedom to act, particularly with respect to review of convictions in courts of limited jurisdiction which traditionally had been subject to trial de novo in district court. The judiciary article did not constitutionalize trial de novo as the prior constitution had,320 but left it in the legislature's province to provide for trial de novo or some other type of review in minor cases. Delegate Jack Avant saw this as a deficiency:

So, the net results of what we have done so far in doing away with the trial de novo, and in adopting the provisions with respect to appellate jurisdiction in Article VII [sic] which we have adopted, is that it is not only possible, but it is inevitable . . . that a person can be sentenced to six months in jail, or at least five months and twenty-nine days in jail; he will have no right of appeal, and there will be no right of review based upon any kind of record.321

319. Id. § 5(E).
321. Proceedings, Sept. 6 at 72.
His solution was the amendment that became Section 19. The section does not explicitly require a right of appeal or a record. Rather, it employs a negative approach and states that no person can be "subjected to imprisonment or forfeiture of rights or property" without the right of judicial review based on a record. Thus, even if a right of review based on a record is not granted, the section is not violated so long as a person is not imprisoned or subjected to a forfeiture of rights or property. This peculiar language gives rise to the anomalous possibility that when the right of review based on a record is not available, and one is sentenced to imprisonment, the section will simply prevent subjecting a person to the sentence. It is a situation akin to Argersinger v. Hamlin, by which one does not clearly have the right to counsel at trial, but cannot be imprisoned if he does not have counsel at trial.

Determination of the scope of the protection here depends on the definition of "imprisonment or forfeiture of rights or property"; if one is not subjected to those, he can be punished even though no right of review based on a record is provided. Imprisonment certainly contemplates any slight imprisonment, whether it be in the state penitentiary or the parish jail. Forfeiture of rights or property was certainly conceived as encompassing loss of a driver's license. But it is not clear in the record whether payment of a fine would be considered forfeiture of property or rights. Ostensibly, one has to pay money, which is property, and the definition is satisfied. But, at one point in the debate, the author spoke of three categories of penalties:

And that is that a person may be sentenced to actual imprisonment up to six months; he may be fined—or certain rights or property of his may be declared forfeited in a court where there is no record made of the evidence. . . .

Of these categories, (1) imprisonment, (2) fine and (3) rights or property forfeited, only the first and third are mentioned in the text of the amendment, lending support to the conclusion that fines are not to be considered as within the scope of its language and can properly be levied even though there is no right of review based on the record.

In any event, the policy is to encourage the providing of a right of review based on a record. The standards provide a right of review, with no room for discretion. It could be review by a district court of

322. JOURNAL, Sept. 6 at 8-9.
324. PROCEEDINGS, Sept. 6 at 75, 77.
325. Id. at 72.
matters decided by courts of limited jurisdiction. When the case is originally in the district court, it must be reviewed by a higher court. Yet, it is "review"—a generic term—and not necessarily an "appeal" as the term of art is used in Article V, § 5. Even if no right of appeal were granted from a city court, the section's requirements would be met if the supreme court supplied review within its supervisory jurisdiction without full argument, so long as it is based on a record and is a matter of right.  

Since the provision requires that review be based on a "complete record of all evidence upon which the judgment is based," some kind of stenographic or sound recording of the testimony will be necessary. The section, of course, does not require that the record be transcribed in all cases; but a record must be available to one who might choose to take advantage of his right of review. If he makes a knowing and intelligent waiver of the right, the record need not be transcribed.

The provision that the cost of transcribing the record shall be as provided by law was not part of the original Avant amendment, but was added by subsequent amendment following an explanation by the author that assumed the implications of the equal protection provisions and indicated that there would be room for providing a free transcript to indigents. The amendment was adopted after rejection of an earlier amendment that provided that the transcript be without cost to the defendant in all cases.

RIGHT TO HUMANE TREATMENT

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 for any offense.

326. What Delegate Avant objected to was that with no right of appeal and no right to a trial de novo, "[t]he only thing that he has in the right to apply to the Supreme Court under the exercise of its supervisory jurisdiction for a writ of review. Now, the way you do that is you attach a copy of all the records in the lower court and send it to the Supreme Court. . . . The problem is that you are not going to have a record. There's not going to be any record." Id. The implication is that if there is a record to support an application to the supreme court in its supervisory jurisdiction, the requirements are met.

327. The cost of this procedure was recognized, but it was argued that the right being protected was more important than cost considerations. Id. at 78, 80-89.

328. JOURNAL, Sept. 7 at 3.

329. PROCEEDINGS, Sept. 7 at 28.

330. JOURNAL, Sept. 7 at 2.
The prohibition against cruel or unusual punishment is derived from the eighth amendment and Article I, § 12 of the 1921 Constitution. The new section, however, adds that no law shall subject any person to "excessive punishment," broadening the prior prohibition against "excessive fines." This gives the courts, in the exercise of their judicial review power, a basis for determining that sentences, whether fine, imprisonment or otherwise, though not cruel or unusual, are too severe as punishment for certain conduct and thus unconstitutional. It is a basis for extending the court's control over the entire sentencing process.

The prohibition against torture comes from the prior constitutional provision which prohibited subjecting any person under arrest to any treatment designed to compel a confession. As proposed by the committee, the section made that heritage clearer, for it also prohibited "cruel, unusual or excessive treatments." The convention deleted "treatments" from the proposal not because of any concern related to questioning procedures or punishment, but because of fear that it might be construed as preventing physicians from using novel or unusual methods.

An innovation is the provision, "No law shall subject any person to euthanasia." The definition of euthanasia referred to during the debate was a common one—the act or practice of killing individuals that are hopelessly sick or injured, for reasons of mercy. As proposed by the committee, the language was, "No person shall be subjected to euthanasia," but it was feared that this language might be construed to prevent a physician from halting extraordinary life-continuation treatments of a dying patient. A clarifying amendment was thus adopted to make clear that the prohibition is limited to laws requiring persons be subjected to euthanasia.

An important addition is the last sentence: "Full rights of citizenship shall be restored upon termination of state and federal supervision following conviction of any offense." The committee had
proposed that “full rights” be restored, but an amendment changed this to “full rights of citizenship.” The change followed a debate concerned with the applicability of multiple offender laws and their enhanced punishments to persons who had completed their sentences. The committee’s intent was that restoration of full rights would not automatically erase the fact of a conviction, and thus multiple offender legislation would be permitted under its proposal.

However, to clarify this position, Delegate James Derbes submitted the amendment to change the language to the more limited expression ultimately adopted and thus suggest that multiple offender laws would not be invalidated.

In fact, in Derbes’ view, his wording would not prevent adoption of legislation prohibiting the carrying of weapons by convicted felons or restricting the issuance of liquor licenses to persons who had been convicted of an offense. He explained that he had in mind restoration of basic rights of citizenship, such as the rights to vote, to work, to hold office and to be employed by the state.

The formula used is not a term of art and it gives the courts flexibility in defining the concept in light of the legislative background. Another indication of the rights referred to is the reference to rights being restored. To be restored, those rights must have been those taken away by the conviction.

LA. CONST. art. IV, § 5(E). However, in light of the later provision, pardons will seldom, if ever, be necessary.

--

338. See PROCEEDINGS, Sept. 8 at 22.
339. Id. at 57-62.
340. Id. at 44. Delegate and committee member Chris Roy said, “a pardon simply restores your rights to vote and to citizenship, but it doesn’t change something that is or was. It doesn’t change the fact that you’re white or you’re black or orange or red or whatever have you. It simply restores you to the rights that you had before. You didn’t have a right before to commit crime, so you still don’t have one in the future to commit it. It has absolutely nothing to do with the multiple offender law and Mr. Richardson, in his comments before our committee, never was able to show anything with respect to that.”

He also said, “Most poor, ignorant, honest . . . folk don’t know that their citizenship has been removed. They don’t know that they have to go to the governor for a pardon. Secondly, they don’t have the money to get a pardon, and thirdly, they don’t know a lawyer to go give them the money to get the pardon. Now, all we’re trying to do is to say that if we believe in rehabilitation and we believe that when a man has done his time and paid the state back for his crime, he should automatically get his citizenship restored, which means in certain cases, the right to hold certain types of jobs. There are certain jobs now that you can’t hold if you’ve ever been convicted of a crime without being pardoned. This simply provides that vehicle.”

341. PROCEEDINGS, Sept. 8 at 57-62.
342. Id. at 58.
343. Id. at 57.
Restoration of the right to vote, as provided for in the more specific Section 10, prevails over the more general Section 20. Section 10 allows one to vote after he is no longer under an order or imprisonment; it is not necessary to wait, as this section provides, until the termination of supervision incident to probation or parole. It is also clear that any disabilities under state law resulting from a conviction for violation of federal law would be removed upon completion of federal probation.

**Writ of Habeas Corpus**

**Section 21. The writ of habeas corpus shall not be suspended.**

The 1921 provision was revised to recognize the writ of habeas corpus as a right rather than a privilege. The exception which allowed suspension of the writ in case of rebellion or invasion if the public safety required was deleted. It was thought "that emergencies and other times of disorders are precisely the time when the writ is most needed by the citizens." In effect, the writ of habeas corpus exists as long as the courts are in operation to grant the writs.

The provision was passed with no amendments proposed.

**Access to Courts**

**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 unreasonable delay, for injury to him in his person, property, reputation, or other rights.**

The last sentence of the committee proposal abolished sovereign immunity. Since the convention had debated that subject earlier and reached a compromise that became Article XII, § 10, the last sentence was deleted.

What remains is basically a repetition of Article I, § 6 of the 1921 Constitution. The committee had taken the 1921 language "for injury done him" and recast it to read "for actual or threatened injury to him." The committee was not proposing a radical expansion, but was recasting the guarantee to encompass the existing state of the law.

---

345. PROCEEDINGS, Sept. 12 at 28.
346. Committee Proposal 25, § 22: "Neither the state, its political subdivisions, nor any private person shall be immune from suit and liability."
347. JOURNAL, Sept. 12 at 3.
which gives redress for threatened injury through declaratory judgments and injunctions. A number of delegates were unsure about the implications of the change and thought “[i]f it was intended not to create other causes of action . . . then definitely I think we ought to leave it out. It is excess verbiage if it does not create anything new.” An amendment to delete the words “actual or threatened” was then adopted. The impact of the amendment is to leave the jurisprudence concerning declaratory judgments and injunctions as it developed from the former provision.

A committee change, accepted by the convention, replaces “rights, lands, goods, person or reputation” with the new formula “injury to him and his person, property, reputation, or other rights.” The reference to other rights represents a broadening of the section’s protections.

PROHIBITED LAWS

Section 23. No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be enacted.

The traditional prohibition against ex post facto laws and laws impairing the obligation of contracts stems from Article IV, § 15 of the 1921 Constitution and from Article I, § 9 and 10 of the United States Constitution. The existing jurisprudence under those provisions is continued. New to the Louisiana Constitution is the prohibition of bills of attainder, incorporating into the state’s law the traditional federal guarantee against legislative acts inflicting punishment without judicial trial.

UNENUMERATED RIGHTS

Section 24. The enumeration in this constitution of certain rights shall not deny or disparage other rights retained by the individual citizens of the state.

Section 24 recasts Article I, § 15 of the 1921 Constitution to

348. PROCEEDINGS, Sept. 12 at 31-34.
349. Id. at 38.
351. PROCEEDINGS, Sept. 13 at 4.
353. “This enumeration of rights shall not be construed to deny or impair other rights of the people not herein expressed.”
more clearly indicate that the section refers to rights of individual citizens and not simply collective rights. The origin of the provision is the Ninth Amendment to the United States Constitution. To state that the enumeration of rights shall not deny or disparage other rights is to give the courts a mechanism, in addition to substantive due process, to expand individual rights through a case by case recognition of "other rights." The reference to "other rights" removes the possible implication of a narrowing of the due process guarantee by the deletion of that phrase in Section 2.

Though a section like this one is more appropriate to a government of enumerated powers, the convention record is clear that the section, like its predecessors, does not have the effect of limiting state government to enumerated powers. The state continues to have the power to legislate generally in all fields, except as limited by the state or federal constitutions or statutory provisions.

354. PROCEEDINGS, Sept. 13 at 12.
355. Id. at 10.
356. PROCEEDINGS, Aug. 29 at 24-50.
357. Id., Sept. 13 at 10-11.
358. Id. at 31.