LOUISIANA STATE LAW INSTITUTE
CONSTITUTIONAL LAWS COMMITTEE

2018 UNCONSTITUTIONAL STATUTES
BIENNIAL REPORT TO THE LEGISLATURE
IN ACCORDANCE WITH R.S. 24:204(A)(10)

Prepared for the
Louisiana Legislature on

March 13, 2018

Baton Rouge, Louisiana

LOUISIANA STATE LAW INSTITUTE
CONSTITUTIONAL LAWS COMMITTEE

March 13, 2018

To: Senator John A. Alario, Jr.
President of the Senate
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Speaker of the House of Representatives
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BIENNIAL REPORT TO THE LEGISLATURE IN ACCORDANCE WITH R.S. 24:204(A)(10) RELATIVE TO UNCONSTITUTIONAL STATUTES

Pursuant to Acts 2014, No. 598, which enacted R.S. 24:204(A)(10), it shall be the duty of the Louisiana State Law Institute "[t]o make recommendations to the legislature on a biennial basis for the repeal, removal or revision of provisions of law that have been declared unconstitutional by final and definitive court judgment." In light of this biennial reporting requirement, the Louisiana State Law Institute formed the Unconstitutional Statutes Committee, now called the Constitutional Laws Committee, which was placed under the direction of Mr. Charles S. Weems, III as Reporter and is comprised of the following members:

Charles S. Weems, III, Alexandria (Reporter)
Michael Coenen, Baton Rouge
L. David Cromwell, Shreveport
Cordell H. Haymon, Baton Rouge
Joseph W. Mengis, Baton Rouge
Sally Brown Richardson, New Orleans
James A. Stuckey, New Orleans
Mallory C. Waller, Louisiana State Law Institute (Staff Attorney)

The Committee submitted its initial report to the legislature in March of 2016 and has continued to consider provisions of Louisiana law that have been declared or recognized as unconstitutional but have nevertheless remained "on the books," either in the same form or in an amended form that may still be considered unconstitutional. The Committee's second biennial report to the legislature is divided into two categories: laws that were not included in the initial report, including provisions declared unconstitutional since its submission; and laws that were included in the initial report but have not yet been addressed by the legislature. Within each of these categories, the provisions are then organized by body of law: first, those provisions appearing in the Constitution; then, the articles of any Code; and finally, the Revised Statutes. The Committee also considered provisions of Louisiana law that have been declared or recognized as preempted by federal law, which appear after those that have been declared or recognized as unconstitutional.

In cases where a specific Paragraph or Section of law was declared unconstitutional, only that Paragraph or Section is provided, rather than the entire article or statute. In cases where a prior version of an article or statute was declared unconstitutional, and the provision was later amended, the differences between the prior and current versions of the article or statute are provided, as well as an indication as to whether the issue of unconstitutionality was resolved by the amendment. Although the majority of these provisions were declared unconstitutional directly by the Louisiana Supreme Court or the Supreme Court of the United States, there are some instances in which a lower court made the declaration of unconstitutionality. The Committee has noted those instances (where writs were denied or an appeal was never sought, for example) in this report.

In light of the court-declared or court-recognized unconstitutional or preempted nature of all of these provisions of Louisiana law, the Committee decided to present its recommendation to the legislature in varying forms. In some cases, the Committee felt confident in its ability to make a definitive recommendation to repeal, remove, or revise these provisions as provided in R.S. 24:204(A)(10). In other cases, the Committee concluded that a more in-depth, substantive study of the implications of such a recommendation would be required, and does not make a current recommendation pending that further study. Additionally, there were some provisions with respect to which the Committee decided it would be best to provide the legislature with two or more alternative recommendations.

Finally, for completeness and reference, the Committee decided to provide two appendices with its report. Appendix A compiles laws declared or recognized as unconstitutional that were not included in the Committee's initial report but that have been addressed by the legislature. Appendix B includes laws declared or recognized as unconstitutional that were included in the Committee's initial report and that subsequently have been addressed by the legislature.

The provisions of Louisiana law set forth on the following pages have been declared or recognized by court judgment either as unconstitutional or preempted, but have nevertheless remained "on the books" in their unconstitutional form or in a form that is not free from question. Also included below are the Committee's recommendations to the legislature with respect to each of these provisions.

INDEX TO 2018 UNCONSTITUTIONAL STATUTES BIENNIAL REPORT

PROVISIONS THAT WERE NOT INCLUDED IN THE LAW INSTITUTE'S INITIAL BIENNIAL REPORT

Constitution

Article I, Section 10. Right to Vote; Disqualification from Seeking or Holding an Elective Office

Section 10.(A) Right to Vote. 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.

(B) Disqualification. The following persons shall not be permitted to qualify as a candidate for elective public office or take public elective office or appointment of honor, trust, or profit in this state:

(1) A person who has been convicted within this state of a felony and who has exhausted all legal remedies, or who has been convicted under the laws of any other state or of the United States or of any foreign government or country of a crime which, if committed in this state, would be a felony and who has exhausted all legal remedies and has not afterwards been pardoned either by the governor of this state or by the officer of the state, nation, government or country having such authority to pardon in the place where the person was convicted and sentenced.

(2) A person actually under an order of imprisonment for conviction of a felony.

(C) Exception. Notwithstanding the provisions of Paragraph (B) of this Section, a person who desires to qualify as a candidate for or hold an elective office, who has been convicted of a felony and who has served his sentence, but has not been pardoned for such felony, shall be permitted to qualify as a candidate for or hold such office if the date of his qualifying for such office is more than fifteen years after the date of the completion of his original sentence.

Held unconstitutional in *Shepherd v. Schedler*, 209 So. 3d 752 (La. 2016): "For purposes of the present challenge, the parties stipulated that the bill the legislature passed as a Joint Resolution, Senate Bill No. 321, was not what was presented to the voters for ratification and adoption as an amendment to the constitution, as the Green amendment was omitted from the enrolled bill which became 1997 La. Acts 1492. Given this stipulation, the issue presented for this court's resolution is whether, in light of this discrepancy, the amendment conforms with La. Const. art. XIII, § 1, which delineates the procedural requirements for amending the constitution. . . . Pursuant to this provision "five elements are indispensable to give validity to a proposed constitutional amendment." These elements are: "The assent of two-thirds of the Legislature, the submission of only one amendment in each proposal, the designation by the Legislature of the date of the election at which the submission shall take place, the publication of the proposed amendment, and a majority of the popular vote." In the present case, compliance with one of those indispensable elements is called into question: the assent of two-thirds of the legislature. In declaring the 1998 amendment to La. Const. art. I, § 10 unconstitutional, the district court examined this essential

element of the amendment procedure in the context of the stipulated facts; *i.e.,* that the electors did not vote on the proposed amendment to La. Const. art. I, § 10 in the form or with the full language that was passed by the legislature because a lawfully adopted amendment (the Green amendment) to the joint resolution was erroneously dropped from that resolution in the process of enrolling the bill. Drawing on the provisions of La. Const. art. XIII, § 1, the district court reasoned as follows. . . . If the proposed amendment is presented to the voters in a form that is not coextensive with what the legislature intended, then the assent of two-thirds of the Legislature is lacking. In other words, to pass muster under La. Const. art. XIII, § 1, what the legislature passes and what is submitted to the voters for approval must be the same. Because, in this case, "the voters did not vote on what was passed by the Louisiana Legislature in 1997," the district court declared the 1998 amendment to Const. art. I, § 10 unconstitutional. . . . In this case, we have a clear and affirmative showing, in the form of a stipulation (which the parties appropriately made given the facts and circumstances), that the enactment process did not conform with the constitutional requirements for promulgation of an amendment to the Constitution. Under these circumstances, and for the foregoing reasons, we find the district court was correct in declaring the 1998 amendment to La. Const. art. I, § 10 null and void. . . . For the reasons assigned, therefore, we find that 1997 La. Acts 1492, which attempted to amend La. Const. art. I, § 10, is null and void because it was not constitutionally adopted, and we affirm the decision below."

The Green amendments provided as follows:

Article I, Section 10. Right to Vote; Disqualification from Seeking or Holding an Elective Office

* * *

(C) ~~**Exception.**~~ **Exceptions. (1)** Notwithstanding the provisions of Paragraph (B) of this Section, a person who desires to qualify as a candidate for or hold an elective office, who has been convicted of a felony **for which the person was incarcerated** and who has served his sentence, but has not been pardoned for such felony, shall be permitted to qualify as a candidate for or hold such office if the date of his qualifying for such office is more than fifteen years after the date of the completion of his original sentence.

(2) Notwithstanding the provisions of Paragraph (B) of this Section, a person who desires to qualify as a candidate for or hold an elective office, who has been convicted of a felony for which the person was not incarcerated but who received probation for such felony shall be permitted to qualify as a candidate for or hold such office after successful completion of the probation period.

Recommendation: It is recommended that the legislature submit to the voters a proposal to repeal existing Paragraphs B and C and to amend and reenact Article I, Section 10 of the Constitution of Louisiana to incorporate the language of both Acts 1997, No. 1492 and the Green amendments to read as follows:

Article I, Section 10. Right to Vote; Disqualification from Seeking or Holding an Elective Office

Section 10.**(A)** Right to Vote. 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.

(B) Disqualification. The following persons shall not be permitted to qualify as a candidate for elective public office or take public elective office or appointment of honor, trust, or profit in this state:

(1) A person who has been convicted within this state of a felony and who has exhausted all legal remedies, or who has been convicted under the laws of any other state or of the United States or of any foreign government or country of a crime which, if committed in this state, would be a felony and who has exhausted all legal remedies and has not afterwards been pardoned either by the governor of this state or by the officer of the state, nation, government or country having such authority to pardon in the place where the person was convicted and sentenced.

(2) A person actually under an order of imprisonment for conviction of a felony.

(C) Exception. (1) Notwithstanding the provisions of Paragraph (B) of this Section, a person who desires to qualify as a candidate for or hold an elective office, who has been convicted of a felony for which the person was incarcerated and who has served his sentence, but has not been pardoned for such felony, shall be permitted to qualify as a candidate for or hold such office if the date of his qualifying for such office is more than fifteen years after the date of the completion of his original sentence.

(2) Notwithstanding the provisions of Paragraph (B) of this Section, a person who desires to qualify as a candidate for or hold an elective office, who has been convicted of a felony for which the person was not incarcerated but who received probation for such felony shall be permitted to qualify as a candidate for or hold such office after successful completion of the probation period.

Code of Criminal Procedure

Article 795. Time for challenges; method; peremptory challenges based on race or gender; restrictions

* * *

C. No peremptory challenge made by the state or the defendant shall be based solely upon the race or gender of the juror. If an objection is made that the state or defense has excluded a juror solely on the basis of race or gender, and a prima facie case supporting that objection is made by the objecting party, the court may demand a satisfactory race or gender neutral reason for the exercise of the challenge, unless the court is satisfied that such reason is apparent from the voir dire examination of the juror. Such demand and disclosure, if required by the court, shall be made outside of the hearing of any juror or prospective juror.

* * *

Validity called into doubt by *State v. Crawford*, 218 So. 3d 13 (La. 2016): "Upon a *prima facie* showing by the opponent of a strike, Batson and its progeny require the proponent of a peremptory challenge to offer a race-neutral explanation for striking a potential juror. Louisiana C.Cr.P. art. 795(C) seems to afford the trial court discretion in this regard: "the court **may demand** a satisfactory race or gender neutral reason for the exercise of the challenge, **unless the court is satisfied that such reason is apparent from the voir dire examination of the juror**." (Emphasis added.) . . . Although defendant has not asked nor does this court here purport to decide the constitutionality of the last clause beginning with the word "unless" of La. C.Cr.P. art. 795(C) *per se*, the continued scrutiny given to that article should not go unnoticed by the bench and bar of this state. Speculation by a trial court as to what the state's reasons might have been for striking potential jurors, may, if the record is sufficiently clear on all three steps of the Batson test, be sufficient to satisfy the requirements of Batson**.** Elie was such a case. However, nothing in Elie counseled that having the trial court supply reasons for the prosecution's peremptory strikes was a sound practice. This practice does not conform with Batson and its progeny, which mandate that the state provide race-neutral reasons for the challenge even where those reasons are apparent from the *voir dire* examination. Clearly, the procedure outlined in La. C.Cr.P. art. 795(C) must yield to the demands of the Equal Protection Clause of the Constitution (as recognized in the evolving Batson jurisprudence). Therefore, the trial court's failure to call on the state in this case to provide race-neutral reasons upon its initial finding that a *prima facie* showing had been made resulted in a violation of defendant's and the potential jurors' equal protection rights and defendant's right to a fair trial."

Constitutionality also called into doubt by *Snyder v. Louisiana*, 552 U.S. 472 (2008): "Petitioner . . . asks us to review a decision of the Louisiana Supreme Court rejecting his claim that the prosecution exercised some of its peremptory jury challenges based on race, in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). We hold that the trial court committed clear error in its ruling on a *Batson* objection, and we therefore reverse. . . . As previously noted, the question presented at the third stage of the *Batson* inquiry is " 'whether the defendant has shown purposeful discrimination.' . . . As previously noted, the question presented

at the third stage of the *Batson* inquiry is " 'whether the defendant has shown purposeful discrimination.' . . . For present purposes, it is enough to recognize that a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained based on any lesser showing by the prosecution. . . . For present purposes, it is enough to recognize that a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained based on any lesser showing by the prosecution. . . . We therefore reverse the judgment of the Louisiana Supreme Court and remand the case for further proceedings not inconsistent with this opinion."

Recommendation: After review by the Law Institute's Criminal Code and Code of Criminal Procedure Committee, it is recommended that the legislature amend Article 795(C) to read as follows:

* * *

C. No peremptory challenge made by the state or the defendant shall be ~~**based solely upon**~~ **motivated in substantial part on the basis of** the race or gender of the juror. If an objection is made that ~~**the state or defense has excluded a juror solely**~~ **a challenge was motivated in substantial part** on the basis of race or gender, and a prima facie case supporting that objection is made by the objecting party, the court ~~**may**~~ **shall** demand a satisfactory race or gender neutral reason for the exercise of the challenge~~**, unless the court is satisfied that such reason is apparent from the voir dire examination of the juror**~~. Such demand and disclosure~~**, if required by the court,**~~ shall be made outside of the hearing of any juror or prospective juror. **The court shall then determine whether the challenge was motivated in substantial part on the basis of race or gender.**

* * *

The legislature may also wish to include information in the digest of the bill providing that the amendment to this Article is intended to be consistent with United States Supreme Court opinions on this subject, such as *Snyder v. Louisiana*, 552 U.S. 472 (2008), and *Foster v. Chatman*, 136 S. Ct. 1737 (2016), as well as Louisiana Supreme Court opinions, such as *State v. Elie*, 936 So. 2d 791 (2006), and *State v. Crawford*, 218 So. 3d 13 (2016).

Revised Statutes

R.S. 14:91.5. Unlawful use of a social networking website

A. The following shall constitute unlawful use of a social networking website:

(1) The intentional use of a social networking website by a person who is required to register as a sex offender and who was convicted of R.S. 14:81 (indecent behavior with juveniles), R.S. 14:81.1 (pornography involving juveniles), R.S. 14:81.3 (computer-aided solicitation of a

minor), or R.S. 14:283 (video voyeurism) or was convicted of a sex offense as defined in R.S. 15:541 in which the victim of the sex offense was a minor.

(2) The provisions of this Section shall also apply to any person convicted for an offense under the laws of another state, or military, territorial, foreign, tribal, or federal law which is equivalent to the offenses provided for in Paragraph (1) of this Subsection, unless the tribal court or foreign conviction was not obtained with sufficient safeguards for fundamental fairness and due process for the accused as provided by the federal guidelines adopted pursuant to the Adam Walsh Child Protection and Safety Act of 2006.

B. For purposes of this Section:

(1) "Minor" means a person under the age of eighteen years.

(2)(a) "Social networking website" means an Internet website, the primary purpose of which is facilitating social interaction with other users of the website and has all of the following capabilities:

(i) Allows users to create web pages or profiles about themselves that are available to the general public or to any other users.

(ii) Offers a mechanism for communication among users.

(b) "Social networking website" shall not include any of the following:

(i) An Internet website that provides only one of the following services: photo-sharing, electronic mail, or instant messenging.

(ii) An Internet website the primary purpose of which is the facilitation of commercial transactions involving goods or services between its members or visitors.

(iii) An Internet website the primary purpose of which is the dissemination of news.

(iv) An Internet website of a governmental entity.

(3) "Use" shall mean to create a profile on a social networking website or to contact or attempt to contact other users of the social networking website.

C.(1) Whoever commits the crime of unlawful use of a social networking website shall, upon a first conviction, be fined not more than ten thousand dollars and shall be imprisoned with hard labor for not more than ten years without benefit of parole, probation, or suspension of sentence.

(2) Whoever commits the crime of unlawful use of a social networking website, upon a second or subsequent conviction, shall be fined not more than twenty thousand dollars and shall

be imprisoned with hard labor for not less than five years nor more than twenty years without benefit of parole, probation, or suspension of sentence.

Prior version held unconstitutional by *Doe v. Jindal*, 853 F. Supp. 2d 596, 601, 607: "The issues presently before the Court are: (1) whether the Plaintiffs have standing to challenge the Act; (2) whether the Act is overbroad and, therefore, violates Plaintiffs' First Amendment rights; (3) whether the Act is void and unenforceable because it is unconstitutionally vague; and (4) if the Court finds that the Act violates Plaintiffs' First Amendment rights, whether the Act's constitutional deficiency is cured by the promulgation of a regulation intended to limit construction and applicability of the legislation. . . . Although the Act is intended to promote the legitimate and compelling state interest of protecting minors from internet predators, the near total ban on internet access imposed by the Act unreasonably restricts many ordinary activities that have become important to everyday life in today's world. The sweeping restrictions on the use of the internet for purposes completely unrelated to the activities sought to be banned by the Act impose severe and unwarranted restraints on constitutionally protected speech. More focused restrictions that are narrowly tailored to address the specific conduct sought to be proscribed should be pursued. For all of the foregoing reasons, the Court concludes that the Act is unconstitutionally overbroad and void for vagueness."

At the time this case was decided, R.S. 14:91.5 provided for the "unlawful use or access of social media," which included "the using or accessing of social networking websites, chat rooms, and peer-to-peer networks by a person who is required to register as a sex offender" and was drafted to specifically include offenders who were *previously* convicted of the crimes set forth under Paragraph (A)(1), including sex offenses in which the victim was a minor. The provision went on to provide that "[t]he use or access of social medial shall not be considered unlawful for purposes of this Section if the offender has permission to use or access social networking websites, chat rooms, or peer-to-peer networks from his probation or parole officer or the court of original jurisdiction." The provision also provided definitions for the terms "chat room," "peer-to-peer network," and "social networking website," which was defined as an internet website that has "*any* of the following capabilities (emphasis added)," including offering "a mechanism for communication among users, such as a forum, chat room, electronic mail, or instant messaging."

Immediately after this case was decided, during the 2012 Regular Session, the legislature amended R.S. 14:91.5 to remove both the reference to previous convictions and the exception concerning permission from probation or parole officers or from the court. The amended provision now provides for the "unlawful use of a social networking website," which requires "the intentional use of a social networking website." The amended provision also exempts certain websites from the definition of "social networking website" for its purposes and defines "use" as "to create a profile on a social networking website or to contact or attempt to contact other users of the social networking website."

Nevertheless, in *State v. Mabens*, No. 2016-K-0975 (La. App. 4 Cir. 2016), the Fourth Circuit granted a supervisory writ application and ultimately declared R.S. 14:91.5 unconstitutional. The Fourth Circuit explained that it had previously stayed this writ application in light of the United States Supreme Court's grant of certiorari in *Packingham v. North Carolina*, 2017 WL 2621313 (2017), wherein the Supreme Court ultimately held that a North Carolina statute similar to R.S.

14:91.5 was unconstitutional. After summarizing the Supreme Court's analysis in the *Packingham* case, including that the North Carolina statute was "a prohibition unprecedented in the scope of First Amendment speech it burdens" and that "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights," the Fourth Circuit provided as follows: "We see no material difference between the North Carolina statute at issue in *Packingham* and the statute at issue in this writ application, La. R.S. 14:95.1 [*sic*]. Accordingly, and pursuant to the clear language and rationale of the *Packingham* decision, we find La. R.S. 14:95.1 [*sic*] to be unconstitutional."

As cited by the Fourth Circuit in *Mabens*, the United States Supreme Court in *Packingham* provided that its opinion "should not be interpreted as barring a State from enacting more specific laws than the one at issue" and also that "[t]hough the issue is not before the Court, it can be assumed that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor."

Recommendation: After review by the Law Institute's Criminal Code and Code of Criminal Procedure Committee, it is recommended that the legislature repeal R.S. 14:91.5 in its entirety, unless it wishes to reenact a provision that specifically and narrowly prohibits a sex offender from engaging in conduct that often presages a sexual crime in accordance with the United States Supreme Court's decision in *Packingham v. North Carolina*.

R.S. 14:106. Obscenity

A. The crime of obscenity is the intentional:

* * *

(2)(a) Participation or engagement in, or management, operation, production, presentation, performance, promotion, exhibition, advertisement, sponsorship, electronic communication, or display of, hard core sexual conduct when the trier of fact determines that the average person applying contemporary community standards would find that the conduct, taken as a whole, appeals to the prurient interest; and the hard core sexual conduct, as specifically defined herein, is presented in a patently offensive way; and the conduct taken as a whole lacks serious literary, artistic, political, or scientific value.

(b) Hard core sexual conduct is the public portrayal, for its own sake, and for ensuing commercial gain of:

*** * ***

(iii) Sadomasochistic abuse, meaning actual, simulated or animated, flagellation, or torture by or upon a person who is nude or clad in undergarments or in a costume that reveals the pubic hair, anus, vulva, genitals, or female breast nipples, or in the condition of being fettered, bound, or otherwise physically restrained, on the part of one so clothed; or

*** * ***

(3)(a) Sale, allocation, consignment, distribution, dissemination, advertisement, exhibition, electronic communication, or display of obscene material, or the preparation, manufacture, publication, electronic communication, or printing of obscene material for sale, allocation, consignment, distribution, advertisement, exhibition, electronic communication, or display.

(b) Obscene material is any tangible work or thing which the trier of fact determines that the average person applying contemporary community standards would find, taken as a whole, appeals to the prurient interest, and which depicts or describes in a patently offensive way, hard core sexual conduct specifically defined in Paragraph (2) of this Subsection, and the work or thing taken as a whole lacks serious literary, artistic, political, or scientific value.

* * *

(6) Advertisement, exhibition, electronic communication, or display of sexually violent material. "Violent material" is any tangible work or thing which the trier of facts determines depicts actual or simulated patently offensive acts of violence, including but not limited to, acts depicting sadistic conduct, whippings, beatings, torture, and mutilation of the human body, as described in Item (2)(b)(iii) of this Subsection.

*** * ***

Held unconstitutional in *State v. Russland Enterprises*, 555 So. 2d 1365 (La. 1990): The state argues that *Miller* never intended to require the use of the term "contemporary community standards" in all obscenity statutes. While we agree the exact words "contemporary community standards" need not be used in the statute, we find the constitution requires at a minimum that obscene material be judged by a community standard. . . . In any event, we note that the legislature has in fact incorporated the term contemporary community standards, either explicitly or by reference, into every section of La.R.S. 14:106(A) except paragraphs 1 and 6. . . . The state's final argument is that La.R.S. 14:106(A)(6)'s reference to La.R.S. 14:106(A)(2)(b)(iii) somehow incorporates the contemporary community standards language found in La.R.S. 14:106(A)(2). . . . Although La.R.S. 14:106(A)(6)does make reference to sub-subparagraph (b)(iii) of La.R.S. 14:106(A)(2), its language clearly shows that the legislature intended only to incorporate the definition of sadomasochistic abuse contained in sub-subparagraph (b)(iii) and not the entirety of La.R.S. 14:106(A)(2). . . . We therefore hold that La.R.S. 14:106(A)(6)'s failure to mention contemporary community standards is fatal to its validity under *Miller, supra.* . . . The facial unconstitutionality La.R.S. 14:106(A)(6) does not necessarily render the entire obscenity statute unconstitutional. This court may strike only the offending portion and leave the remainder intact. In the present case, we find this test is satisfied. La.R.S. 14:106(A)(6) adds little, if anything, to the statute and its severance does no violence to the legislative intent in passing the statute. Clearly, any conduct regulated by La.R.S. 14:106(A)(6) is also regulated by La.R.S. 14:106(A)(3). Perhaps prior to *Johnson, supra,* the statute purported to regulate a broader scope of conduct. However, as a result of the post-*Johnson* amendments, there is little doubt that La.R.S. 14:106(A)(6) is simply surplusage to the rest of the statute. We therefore hold La.R.S. 14:106(A)(6) is severable."

Recommendation: It is recommended that the legislature do one of the following: (1) Repeal R.S. 14:106(A)(6) in its entirety and direct the Law Institute to redesignate the remaining Paragraphs of Subsection A accordingly; or (2) Amend R.S. 14:106(A)(6) to incorporate the requisite "contemporary community standards" language as follows:

> (6) Advertisement, exhibition, electronic communication, or display of sexually violent material. "Violent material" is any tangible work or thing which the trier of facts determines **that the average person applying contemporary community standards would find, taken as a whole, appeals to the prurient interest, and which** depicts actual or simulated patently offensive acts of violence, including but not limited to, acts depicting sadistic conduct, whippings, beatings, torture, and mutilation of the human body, as described in Item (2)(b)(iii) of this Subsection.

R.S. 14:359. Definitions

As used in R.S. 14:358-14:373:

* * *

(4) A "Communist Front Organization" is any organization other than a communist action organization which is directed, controlled or dominated by a communist action organization or is primarily operated for the purpose of giving aid and support to a communist action organization, a Communist foreign government, or the world Communist movement referred to in R.S. 14:358.

* * *

(8) A "Subversive Organization" is any organization which advocates the overthrow or destruction of the United States, the state of Louisiana, or any political subdivision thereof by revolution, force, violence or other unlawful means, and performs or carries out as a function of the organization, known, agreed to, or knowingly performed by any of the officers of the organization, any affirmative act, including abetting, materially assisting, advising or teaching such overthrow or destruction, with the intent to incite action rather than engage in the mere exposition of theory.

* * *

R.S. 14:368. Acts prohibited

It shall be a felony for any person knowingly and wilfully to:

1. Fail to register as required in R.S. 14:363, when required to so register by the terms of R.S. 14:358-14:373.

2. Fail as an officer of a communist action organization, a communist front organization, a communist infiltrated organization or a subversive organization to perform and carry out the obligations set forth and provided in R.S. 14:362.

3. File any false registration statement under the provisions of R.S. 14:362 and 14:363.

4. Violate the provisions of R.S. 14:367 in regard to the labeling and dissemination of propaganda material.

Prior versions held unconstitutional in *Dombrowski v. Pfister*, 380 U.S. 479, 493-98 (1965): "The statutory definition of 'a subversive organization' in s 359(5) incorporated in the offense created s 364(4), is substantially identical to that of the Washington statute which we considered in Baggett v. Bullitt. There the definition was used in a state statute requiring state employees to take an oath as a condition of employment. We held that the definition, as well as the oath based thereon, denied due process because it was unduly vague, uncertain and broad. . . . Since s 364(4) is so intimately bound up with a definition invalid under the reasoning of Baggett v. Bullitt, we hold that it is invalid for the same reasons. We also find the registration requirement of s 364(7) invalid. That section creates an offense of failure to register as a member of a Communist-front organization , and, under s 359(3), 'the fact that an organization has been officially cited or identified by the Attorney General of the United States, the Subversive Activities Control Board of the United States or any Committee or Subcommittee of the United States Congress as a * * * communist front organization * * * shall be considered presumptive evidence of the factual status of any such organization.' . . . It follows that s 364(7), resting on the invalid presumption, is unconstitutional on its face. . . . The record suffices, however, to permit this Court to hold that, without the benefit of limiting construction, the statutory provisions on which the indictments are founded are void on their face; until an acceptable limiting construction is obtained, the provisions cannot be applied to the activities of SCEF, whatever they may be. . . . The judgment of the District Court is reversed and the cause is remanded for further proceedings consistent with this opinion. These shall include prompt framing of a decree restraining prosecution of the pending indictments against the individual appellants, ordering immediate return of all papers and documents seized, and prohibiting further acts enforcing the sections of the Subversive Activities and Communist Control Law here found void on their face."

At the time this case was decided, R.S. 14:359(3) and (5) read as follows:

> (3) "Communist Front Organization" shall, for the purpose of this act include any communist action organization, communist front organization, communist infiltrated organization or communist controlled organization and the fact that an organization has been officially cited or identified by the Attorney General of the United States, the Subversive Activities Control Board of the United States or any Committee or Subcommittee of the United States Congress as a communist organization, a communist action organization, a communist front organization, a communist infiltrated organization or has been in any other way officially cited or identified by any of these aforementioned authorities as a communist controlled organization, shall be considered presumptive evidence of the factual status of any such organization.

(5) "Subversive organization" means any organization with engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy, or to assist in the overthrow or destruction of the constitutional form of the government of the state of Louisiana, or of any political subdivision thereof by revolution, force, violence or other unlawful means, or any other organization which seeks by unconstitutional or illegal means to overthrow or destroy the government of the state of Louisiana or any political subdivision thereof and to establish in place thereof any form of government not responsible to the people of the state of Louisiana under the Constitution of the state of Louisiana.

The provisions of R.S. 14:359 were amended by Acts 1965, No. 45, and the definitions of "communist front organization" and "subversive organization" are now provided in R.S. 14:359(4) and (8), respectively.

Additionally, at the time this case was decided, R.S. 14:364(4) and (7) read as follows:

It shall be a felony for any person knowingly and willfully to:

* * *

(4) Assist in the formation or participate in the management or to contribute to the support of any subversive organization or foreign subversive organization knowing said organization to be a subversive organization or a foreign subversive organization.

* * *

(7) Fail to register as required in R.S. 14:360 or to make any registration which contains any material false statement or omission.

The provisions of R.S. 14:364 were amended by Acts 1965, No. 45, and the substance of former R.S. 14:364(7) seems to now be contained in R.S. 14:368(1) and (3). However, the substance of former R.S. 14:364(4) does not seem to be included in current law.

Recommendation: After review by the Law Institute's Criminal Code and Code of Criminal Procedure Committee, it is recommended that the legislature repeal the Subversive Activities and Communist Control Law, R.S. 14:358 through 373, and the Communist Propaganda Control Law, R.S. 14:390 through 390.8, in their entirety.

R.S. 18:1505.2. Contributions; expenditures; certain prohibitions and limitations

* * *

K.(1) During any four year calendar period commencing January 1, 1991 and every fourth year thereafter, no person shall contribute more than one hundred thousand dollars to any political committee or any subsidiary committee of such political committee, other than the principal or any subsidiary committee of a candidate. Such limitation on a contribution shall not apply to any contribution from a national political committee to an affiliated regional or state political committee.

(2) During the time period provided for in Paragraph (1) of this Subsection, no political committee or subsidiary of such political committee, other than the principal or any subsidiary committee of a candidate, shall accept more than one hundred thousand dollars from any person.

(3) The provisions of this Subsection shall not apply to contributions made by a recognized political party or any committee thereof.

* * *

Held unconstitutional by *Fund for Louisiana's Future v. Louisiana Bd. of Ethics*, 17 F. Supp. 3d 562 (E.D. La. 2014): "Assuming that FFLF is an independent expenditure-only committee, regardless of which level of scrutiny applies, La.R.S. 18:1505.2(K)'s contribution limit as applied to it violates the First Amendment. Defendants' contrary arguments wholly fail. "By definition," independent expenditures are "political speech presented to the electorate that is not coordinated with a candidate" and, therefore, the State lacks any interest (anti-corruption or otherwise) in restricting contributions for independent expenditures. *See Citizens United*, 558 U.S. at 357, 360, 130 S.Ct. 876. Donors have an absolute, unfettered First Amendment interest in contributing money to be used for independent purposes in politics, and the State simply has no legitimate interest in restricting such contributions. *See SpeechNow.org*, 599 F.3d at 694–95. In short, independent expenditure committees are sacrosanct under the First Amendment. . . . FFLF has carried its burden to prove entitlement to a permanent injunction, as well as entitlement to a declaration that La.R.S. 18:1505.2(K) is unconstitutional as applied to it, so long as it engages only in independent expenditures. The Court hereby declares that, as applied to FFLF, an independent expenditure-only committee, the contribution limit contained in La. R.S. 18:1505.2(K) is unconstitutional."

Recommendation: It is recommended that the legislature direct the Law Institute to note the *Fund for Louisiana's Future* decision, which declared Subsection K unconstitutional as applied to independent expenditure-only committees pursuant to the United States Supreme Court's decisions in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), and its progeny, at R.S. 18:1505.2 to assure consistent reporting.

R.S. 33:1997. Penalty for violations

A. No official or executive officer of any fire department or municipal, parish or fire protection district officer or fire board member affected by this Sub-part shall permit any violation of the provisions of this Sub-part.

B. Whoever violates this Section shall be fined not less than one hundred dollars for each offense, or imprisoned not less than ten days, nor more than sixty days, or both. Each day the violation is permitted to occur constitutes a separate offense.

Held unconstitutional by *City of Natchitoches v. State*, 221 So. 2d 534 (La. App. 3 Cir. 1969), *writ denied* by 223 So. 2d 870 (La. 1969): "A statute defining a crime and providing a penalty for its violation will be held to be unconstitutional in that it denies due process of law, if the offense is defined in language which is so ambiguous, vague or indefinite that the line between criminal and non-criminal conduct is obscure. Such a statute will be held to be unconstitutional where the language employed is of such vague and indefinite import that it might embrace many acts which could not possibly have any criminal character, and leaves the discrimination between these and others to arbitrary judicial discretion. A criminal statute, in order to be valid and enforceable, must define the offense so specifically and exactly that a person having ordinary understanding and intelligence will be able to determine from the language used whether his conduct is or is not denounced as an offense against the law. . . . Our conclusion is that LSA-R.S. 33:1997 is so vague and indefinite that it does not plainly and adequately set out a crime and it is not susceptible to a reasonable interpretation. This section of the Revised Statutes thus is unconstitutional, null or void, in that it violates the requirements of due process of law, as provided in Article 1, Section 2, of the Louisiana Constitution, and the Fifth and Fourteenth Amendments of the United States Constitution."

R.S. 33:1997 is located in Subpart B of Part II of Chapter 4 of Title 33 dealing with minimum wages and maximum hours applicable to the fire department.

Recommendation: It is recommended that the legislature repeal R.S. 33:1997 in its entirety.

R.S. 37:831. Definitions

For purposes of this Chapter and implementation thereof, the following terms have the meaning as defined herein, unless the context clearly indicates otherwise:

* * *

(42) "Funeral directing" means the operation of a funeral home, or, by way of illustration and not limitation, any service whatsoever connected with the management of funerals, or the supervision of hearses or funeral cars, **the purchase of caskets or other funeral merchandise, and retail sale and display thereof,** the cleaning or dressing of dead human bodies for burial, and the performance or supervision of any service or act connected with the management of funerals

from time of death until the body or bodies are delivered to the cemetery, crematory, or other agent for the purpose of disposition.

* * *

Prior version held unconstitutional in *St. Joseph Abbey v. Castille*, 835 F. Supp. 2d 149 (E.D. La. 2011), *affirmed by* 712 F. 3d 215 (5th Cir. 2013): "Plaintiffs have demonstrated that there is no rational relationship between requiring persons selling caskets to become funeral directors and to sell caskets only from funeral establishments thus violating Plaintiffs' constitution [*sic*] rights to Due Process. The provisions of the Act as they relate to the retail sale of caskets by persons other than funeral directors do not protect consumers; the prohibition against Plaintiffs' selling caskets does not protect the public health and welfare. The provisions simply protect a well-organized industry that seeks to maintain a strict hold on this business. Likewise these laws violate of the Equal Protection Clause, since the Act in essence treats two distinct and different occupations as the same. The licensing scheme is not rationally related to public health and safety concerns. No other state in the Union continues this practice; it is detrimental to the welfare of the consumers and does not protect the health and safety of the public. Accordingly, . . . La. Rev. Stat. § 37:831(37) is unconstitutional on its fact to the extent that it includes the selling of caskets within the definition of 'funeral directing.'"

Holding of unconstitutionality affirmed by *St. Joseph Abbey v. Castille*, 712 F. 3d 215 (5th Cir. 2013), *writ denied* by 134 S. Ct. 423 (2013): "No provision mandates licensure requirements for casket retailers or insists that a casket retailer employ someone trained in the business of funeral direction. Rather, the licensure requirements and other restrictions imposed on prospective casket retailers create funeral industry control over intrastate casket sales. The scheme is built on the statute's interlocking definitions of "funeral establishment" and "funeral directing" . . . In other words, because a funeral establishment includes any "office or place for the practice of funeral directing," and "funeral directing" includes "the purchase of caskets or other funeral merchandise and the retail and display thereof," a casket retailer must comply with all the statutory requirements for funeral directors and funeral establishments. . . . Moreover, like the district court and consistent with its findings, we find that the challenged law is not rationally related to policing deceptive sales tactics. . . . Relatedly, we find that no rational relationship exists between public health and safety and restricting intrastate casket sales to funeral directors. Rather, this purported rationale for the challenged law elides the realties of Louisiana's regulation of caskets and burials. That Louisiana does not even require a casket for burial, does not impose requirements for their construction or design, does not require a casket to be sealed before burial, and does not require funeral directors to have any special expertise in caskets leads us to conclude that no rational relationship exists between public health and safety and limiting intrastate sales of caskets to funeral establishments. . . . The funeral directors have offered no rational basis for their challenged rule and, try as we are required to do, we can suppose none. We AFFIRM the judgment of the district court."

At the time this case was decided, the definition of "funeral directing" was contained in R.S. 37:831(37). The Law Institute later redesignated this definition as R.S. 37:831(42), but the substance of the provision has remained unchanged.

Recommendation: It is recommended that the legislature amend R.S. 37:831(42) to remove the offending language as follows:

(42) "Funeral directing" means the operation of a funeral home, or, by way of illustration and not limitation, any service whatsoever connected with the management of funerals, or the supervision of hearses or funeral cars, **~~the purchase of caskets or other funeral merchandise, and retail sale and display thereof,~~** the cleaning or dressing of dead human bodies for burial, and the performance or supervision of any service or act connected with the management of funerals from time of death until the body or bodies are delivered to the cemetery, crematory, or other agent for the purpose of disposition.

R.S. 47:301. Definitions

As used in this Chapter the following words, terms, and phrases have the meanings ascribed to them in this Section, unless the context clearly indicates a different meaning:

* * *

(14) "Sales of services" means and includes the following:

* * *

(g)(i)(aa) * * *

(bb)(I) For purposes of the sales and use tax levied by the state and by tax authorities in East Feliciana Parish, charges for the furnishing of repairs to tangible personal property shall be excluded from sales of services, as defined in this Subparagraph, when the repaired property is (1) delivered to a common carrier or to the United States Postal Service for transportation outside the state, or (2) delivered outside the state by use of the repair dealer's own vehicle or by use of an independent trucker. However, as to aircraft, delivery may be by the best available means. This exclusion shall not apply to sales and use taxes levied by any other parish, municipality or school board. However, any other parish, municipality or school board may apply the exclusion as defined in this Subparagraph to sales or use taxes levied by any such parish, municipality, or school board. Offshore areas shall not be considered another state for the purpose of this Subparagraph.

(II) For purposes of the sales and use tax levied by the tax authorities in Calcasieu Parish, charges for the furnishing of repairs to aircraft shall be excluded from sales of services, as defined in this Subparagraph, provided that the repairs are performed at an airport with a runway that is at least ten thousand feet long, one hundred sixty feet wide, and fourteen inches thick.

* * *

Prior version held unconstitutional in *Arrow Aviation Company, LLC v. St. Martin Parish School Board Tax Sales Dept.*, 218 So. 3d 1031 (La. 2016): "Under the Louisiana Constitution, Article

VI, Section 29(D) governs the legislature's power to enact tax exclusions. Section 29(D)(1) limits the legislature's authority to enacting tax exclusions that are "*uniformly applicable* to the taxes of all local governmental subdivisions, school boards, and other political subdivisions." But it does not require the tax exclusions to be *uniformly applied* by these local tax authorities. In 2013, the legislature amended the exclusion provided for in La. R.S. 47:301(14)(g)(i)(bb)—which was previously optional for all parishes, municipalities, and school boards—to make it mandatory for tax authorities in East Feliciana Parish. . . . We find the 2013–amendment does not treat all local governmental subdivisions, school boards, and other political subdivisions the same because tax authorities in all parishes are not able to apply the exclusion in the same form, manner, or degree. That the exclusion is mandatory for tax authorities in East Feliciana—but optional for tax authorities in all other parishes—is an example of non-uniformity prohibited by the constitution. Therefore, we, like the district court, hold that, under La. Const. art. VI, § 29(D)(1), the exclusion provided for in La. R.S. 47:301(14)(g)(i)(bb), as amended in 2013, is unconstitutional. . . . Here, the constitutionally offensive portion of the La. R.S. 47:301(14)(g)(i)(bb) (2013) is the portion mandating tax authorities in East Feliciana Parish apply the exclusion. We find that this portion of the exclusion is severable because the legislature's 2007 and 2011 versions of the exclusion did not mandate that tax authorities in East Feliciana Parish apply the exclusion. The purpose of the statute, therefore, is not dependent on the unconstitutional portion. *See World Trade Ctr. Taxing Dist.*, 908 So.2d at 638. Thus, the district court properly ordered the severing of the offending mandatory language of the exclusion applicable to tax authorities in East Feliciana Parish."

At the time this case was decided, R.S. 47:301(14)(g)(i)(bb) was not divided into Subsubitems. In 2015, the legislature amended R.S. 47:301(14)(g)(i)(bb) to add Subsubitem (II) relative to Calcasieu Parish and to redesignate Subitem (bb) as Subsubitem (bb)(I). The substance of this provision, however, has remained unchanged.

Recommendation: It is recommended that the legislature amend R.S. 47:301(14)(g)(i)(bb)(I) to remove the unconstitutional reference to East Feliciana Parish as follows:

> (bb)(I) For purposes of the sales and use tax levied by the state ~~**and by tax authorities in East Feliciana Parish**~~, charges for the furnishing of repairs to tangible personal property shall be excluded from sales of services, as defined in this Subparagraph, when the repaired property is (1) delivered to a common carrier or to the United States Postal Service for transportation outside the state, or (2) delivered outside the state by use of the repair dealer's own vehicle or by use of an independent trucker. However, as to aircraft, delivery may be by the best available means. This exclusion shall not apply to sales and use taxes levied by ~~**any other**~~ **a** parish, municipality or school board. However, any ~~**other**~~ parish, municipality or school board may apply the exclusion as defined in this Subparagraph to sales or use taxes levied by any such parish, municipality, or school board. Offshore areas shall not be considered another state for the purpose of this Subparagraph.

It is also recommended that the legislature amend R.S. 47:337.10(F) to remove the reference to East Feliciana Parish and to update cross-references as follows:

> **R.S. 47:337.10. Optional exclusions and exemptions**

* * *

F. As provided for in R.S. 47:301(14)(g)(i)(bb)**(I)**, any political subdivision**~~, other than a tax authority in East Feliciana Parish to which the exclusion already applies,~~** may apply the exclusion as defined in R.S. 47:301(14)(g)(i)(bb)**(I)** to sales or use taxes levied by any such political subdivision, so that a charge for the furnishing of repairs to tangible personal property shall be excluded from sales of services, as defined in R.S. 47:301(14)(g)(i), when the repaired property is (1) delivered to a common carrier or to the United States Post Office for transportation outside the state, or (2) delivered outside the state by use of the repair dealer's own vehicle or by use of an independent trucker. However, as to aircraft, delivery may be by the best available means. Offshore areas shall not be considered another state for the purpose of this Subsection and R.S. 47:301(14)(g)(i).

R.S. 56:1761 to 1766. Audubon Park Commission; creation; membership

A. The Audubon Park Commission is hereby created as a political subdivision of the state of Louisiana pursuant to Article VI, Section 19 of the Constitution. The commission shall exercise the powers and duties hereinafter set forth or otherwise provided by law.

B. The commission shall be composed of twenty-four members who shall be appointed by the governor. Each appointment by the governor shall be submitted to the Senate for confirmation. The commission shall be composed as follows:

(1) Seven members, who shall be residents of the city of New Orleans, appointed from a list of fifteen names eight of which shall be names submitted to the governor by the mayor of the city of New Orleans and seven of which shall be names submitted to the governor by the council of the city of New Orleans. Provided that one member shall be a resident of either the Eighth or Ninth Ward of Orleans Parish.

(2) Six members, who shall be residents of the city of New Orleans, appointed from a list comprised of two names submitted to the governor by each legislator who represents any portion of the city of New Orleans.

(3) Five members, who shall be residents of Jefferson Parish, appointed from a list comprised of two names submitted to the governor by each legislator who represents any portion of Jefferson Parish.

(4) Two members, who shall be residents of St. Bernard Parish, appointed from a list comprised of two names submitted to the governor by each legislator who represents any portion of St. Bernard Parish.

(5) One member, who shall be a resident of Plaquemines Parish, appointed from a list comprised of two names submitted to the governor by each legislator who represents any portion of Plaquemines Parish.

(6) Two members, who shall be residents of St. Charles Parish or St. John the Baptist Parish, appointed from a list comprised of two names submitted to the governor by each legislator who represents any portion of St. Charles Parish or St. John the Baptist Parish.

(7) One member, who shall be a resident of St. Tammany Parish, appointed from a list comprised of two names submitted to the governor by each legislator who represents any portion of St. Tammany Parish.

(8) Of the total number of members appointed from the city of New Orleans and Jefferson Parish, at least two shall be residents of the west bank of the Mississippi River. Provided further, one of these members shall be a resident of the west bank of Orleans Parish and one member shall be a resident of the west bank of Jefferson Parish.

(9) All initial nominations shall be made within twenty-one days of the date of signature by the governor, or if not signed by the governor, within twenty-one days of the expiration of the time for bills to become law without signature by the governor, as provided in Article III, Section 18 of the Constitution of Louisiana. All subsequent nominations shall be made no earlier than twenty-eight days prior to the expiration of the term of office nor later than fourteen days prior to the expiration of the term of office. If nominations are not made within the time specified, the governor shall make his appointments without the necessity of nominations.

C.(1) Appointed members shall serve four-year terms. Vacancies shall be filled for the remainder of the term by the Audubon Park Commission. Any person appointed by the commission to fill a vacancy shall be a resident of the same parish as the member he is appointed to replace.

(2) Notwithstanding the provisions of Paragraph (1) of this Subsection, the terms of the initial members of the commission appointed pursuant to R.S. 56:1761(B) shall expire on December 31 of the year designated below:

(a) The terms of the initial members appointed pursuant to R.S. 56:1761(B)(4), (5), (6), and (7) shall expire in 1984.

(b) The terms of the initial members appointed pursuant to R.S. 56:1761(B)(3) shall expire in 1985.

(c) The terms of the initial members appointed pursuant to R.S. 56:1761(B)(1) shall expire in 1986.

(d) The terms of the initial members appointed pursuant to R.S. 56:1761(B)(2) shall expire in 1987.

(3) The terms of the successors of the initial members shall expire on December 31 of the last year of their respective terms. Members shall serve until their successors are appointed and take office.

D. The commission shall meet and organize immediately after appointment of the members and shall elect from its membership a chairman and a vice chairman and such other officers as it may deem necessary. The commission shall prescribe the duties of its officers. The commission shall adopt rules for the transaction of its business and shall keep a record of its proceedings. Thirteen members shall constitute a quorum.

E. The commission shall meet at least once in each quarter of the fiscal year, or on call of the chairman or any five members.

F. Members of the commission shall receive no compensation for their services.

G. The commission shall be domiciled in New Orleans.

Held unconstitutional by *City of New Orleans v. State*, 443 So. 2d 562 (La. 1983): "Act 485 of 1983, in contest here, essentially reenacts Act 352 of 1982. It abolishes the Audubon Park Commission for the City of New Orleans and creates a new Audubon Park Commission as a political subdivision of the state of Louisiana with twenty-four members appointed by the governor. . . . The new Audubon Park Commission is named "the successor in every way to the Audubon Park Commission for the City of New Orleans created by Act 191 of the 1914 regular session". . . . In deciding the constitutionality of Act 485 of 1983, the following issues must be considered: (1) Does the City or the State own Audubon Park? (2) If the City owns Audubon Park, may the State take the property by legislative act? . . . The City of New Orleans and not the State owns the property occupied by the Audubon Park and Zoo, as well as the improvements upon that property. The state contends that the Audubon Park and Zoo are natural resources of the state and subject to the state's police power under Art. IX, § 1. . . . While the park contributes to the healthful, scenic and esthetic quality of the environment, the legislature cannot assume its ownership and regulation merely by declaring it a natural resource. The state contends that the park is public property, which is not protected by the constitutional provision against taking without just compensation. . . . A park, which is analogous to a public square, may belong to a political subdivision of the state, such as the City of New Orleans. It is, of course, a public thing, owned by the City for the benefit of all persons. . . . Article I, § 4, Louisiana Constitution of 1974 . . . prohibits the state from taking any property including public property owned by political subdivisions, except upon payment of just compensation. . . . The 1974 Louisiana Constitution does not allow the state to take without payment any public thing belonging to a municipality. On the contrary, the rights of local governmental entities are protected by Article VI, § 6. Since the City of New Orleans owns Audubon Park, Act 485 of 1983, which creates a new Audubon Park Commission as a political subdivision of the state of Louisiana, is an unconstitutional taking of the City's property without just compensation.LSA-Const.1974, Art. I, § 4. The City is entitled to injunctive relief against the irreparable injury which would be caused by the unconstitutional taking of its park property and zoo. For the foregoing reasons, the judgment of the trial court permanently enjoining implementation of Act 485 of 1983 is affirmed."

Recommendation: It is recommended that the legislature repeal R.S. 56:1761 through 1765 in their entirety.

PROVISIONS INCLUDED IN THE LAW INSTITUTE'S INITIAL BIENNIAL REPORT THAT HAVE NOT YET BEEN ADDRESSED BY THE LEGISLATURE

Constitution

Article XII, Section 15. Defense of Marriage*

Section 15. Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.

Held unconstitutional by *Robicheaux v. Caldwell*, 2015 WL 4090353 at *1 (E.D. La. 2015) (citing *Obergefell v. Hodges*, 135 S.Ct. 2584 (U.S. 2015): "IT IS FURTHER ORDERED that Article XII, Section 15 of the Louisiana Constitution, Article 89 of the Louisiana Civil Code, and laws enacted pursuant thereto, violate the Fourteenth Amendment to the United States Constitution and may not be enforced against the Plaintiffs or any other same-sex couple."

In *Obergefell v. Hodges*, the Supreme Court of the United States held that "[t]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them." 135 S.Ct. 2584, 2604-05. Because of its holding that "same-sex couples may exercise the fundamental right to marry in all States," the Supreme Court of the United States also held that "there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." *Id.* at 2607-08.

Further, the United States Supreme Court's decision in *Obergefell* was recognized by the Louisiana Supreme Court in *Costanza v. Caldwell*, 167 So. 3d 619 (La. 2015), which was an appeal from a district court judgment "declaring La. Const. Art. XII, § 15, La. Civ.Code art. 86, La. Civ.Code art. 89, La. Civ.Code art. 3520(B), and Revenue Information Bulletin No. 13–024 (9/13/13) to be unconstitutional." *Id.* at 620. The Louisiana Supreme Court also recognized the Eastern District of Louisiana's holding in *Robicheaux* that "La. Const. Art. XII, § 15, La. Civ. Code art. 89, and La. Civ. Code art. 3520(B) were in violation of the Fourteenth Amendment to the United States Constitution." *Id.* In that case, the Louisiana Supreme Court dismissed the appeal from the *Robicheaux* decision as moot, concluding that "[t]he United States Supreme Court's interpretation of the federal constitution is final and binding on this court" and that "*Obergefell* compels the conclusion that the State of Louisiana may not bar same-sex couples from the civil effects of marriage on the same terms accorded to opposite-sex couples." *Id.* at 621.

*First included in the 2016 biennial report.

Recommendation: It is recommended that the legislature do one of the following: (1) Direct the Law Institute to note the *Obergefell* decision at La. Const. Art. XII, Sec. 15; or (2) Direct the Law Institute to note the *Obergefell* decision at La. Const. Art. XII, Sec. 15 and submit to the voters a proposal to amend La. Const. Art. XII, Sec. 15 to replace "one man and one woman" with "two natural persons" as follows: "Marriage in the state of Louisiana shall consist only of the union of ~~one man and one woman~~ **two natural persons**. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of ~~one man and one woman~~ **two natural persons**. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of ~~one man and one woman~~ **two natural persons**."

Civil Code

Article 89. Impediment of same sex*

Persons of the same sex may not contract marriage with each other. A purported marriage between persons of the same sex contracted in another state shall be governed by the provisions of Title II of Book IV of the Civil Code.

Held unconstitutional by *Robicheaux v. Caldwell*, 2015 WL 4090353 at *1 (E.D. La. 2015) (citing *Obergefell v. Hodges*, 135 S. Ct. 2584 (U.S. 2015): "IT IS FURTHER ORDERED that Article XII, Section 15 of the Louisiana Constitution, Article 89 of the Louisiana Civil Code, and laws enacted pursuant thereto, violate the Fourteenth Amendment to the United States Constitution and may not be enforced against the Plaintiffs or any other same-sex couple."

In *Obergefell v. Hodges*, the Supreme Court of the United States held that "[t]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them." 135 S.Ct. 2584, 2604-05. Because of its holding that "same-sex couples may exercise the fundamental right to marry in all States," the Supreme Court of the United States also held that "there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." *Id.* at 2607-08.

Further, the United States Supreme Court's decision in *Obergefell* was recognized by the Louisiana Supreme Court in *Costanza v. Caldwell*, 167 So. 3d 619 (La. 2015), which was an appeal from a district court judgment "declaring La. Const. Art. XII, § 15, La. Civ.Code art. 86, La. Civ.Code art. 89, La. Civ.Code art. 3520(B), and Revenue Information Bulletin No. 13–024 (9/13/13) to be unconstitutional." *Id.* at 620. The Louisiana Supreme Court also recognized the Eastern District of Louisiana's holding in *Robicheaux* that "La. Const. Art. XII, § 15, La. Civ.

* First included in the 2016 biennial report.

Code art. 89, and La. Civ. Code art. 3520(B) were in violation of the Fourteenth Amendment to the United States Constitution." *Id.* In that case, the Louisiana Supreme Court dismissed the appeal from the *Robicheaux* decision as moot, concluding that "[t]he United States Supreme Court's interpretation of the federal constitution is final and binding on this court" and that "*Obergefell* compels the conclusion that the State of Louisiana may not bar same-sex couples from the civil effects of marriage on the same terms accorded to opposite-sex couples." *Id.* at 621.

Recommendation: It is recommended that the legislature do one of the following: (1) Direct the Law Institute to note the *Obergefell* decision at Civil Code Article 89; or (2) Repeal Civil Code Article 89 in its entirety.

Although the scope of the Unconstitutional Statutes Committee's biennial report to the legislature is limited by R.S. 24:204(A)(10) to those "provisions of law that have been declared unconstitutional by final and definitive court judgment," a comprehensive report on the issue of same sex marriage in light of *Obergefell* was submitted to the legislature in March of 2016. Additionally, the Law Institute's Marriage-Persons Committee proposed, and the Law Institute's Council adopted, a package of recommended amendments with respect to same-sex marriage in Louisiana. Those recommendations have been submitted to the legislature as Senate Bill No. 98 of the 2018 Regular Session.

Article 3520. Marriage[*]

*** * ***

B. A purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose, including the assertion of any right or claim as a result of the purported marriage.

Held unconstitutional by *Robicheaux v. Caldwell*, 2015 WL 4090353 at *1 (E.D. La. 2015) (citing *Obergefell v. Hodges*, 135 S. Ct. 2584 (U.S. 2015): "IT IS FURTHER ORDERED that Article XII, Section 15 of the Louisiana Constitution, Article 3520(B) of the Louisiana Civil Code, and laws enacted pursuant thereto, violate the Fourteenth Amendment to the United States Constitution and may not be enforced against the Plaintiffs or any other same-sex couple."

In *Obergefell v. Hodges*, the Supreme Court of the United States held that "[t]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them." 135 S.Ct. 2584, 2604-05. Because of its holding that "same-sex couples may exercise the fundamental right to marry in all States," the Supreme Court of the United States also held that "there is no lawful basis for a

[*] First included in the 2016 biennial report.

State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." *Id.* at 2607-08.

Further, the United States Supreme Court's decision in *Obergefell* was recognized by the Louisiana Supreme Court in *Costanza v. Caldwell*, 167 So. 3d 619 (La. 2015), which was an appeal from a district court judgment "declaring La. Const. Art. XII, § 15, La. Civ.Code art. 86, La. Civ.Code art. 89, La. Civ.Code art. 3520(B), and Revenue Information Bulletin No. 13–024 (9/13/13) to be unconstitutional." *Id.* at 620. The Louisiana Supreme Court also recognized the Eastern District of Louisiana's holding in *Robicheaux* that "La. Const. Art. XII, § 15, La. Civ. Code art. 89, and La. Civ. Code art. 3520(B) were in violation of the Fourteenth Amendment to the United States Constitution." *Id.* In that case, the Louisiana Supreme Court dismissed the appeal from the *Robicheaux* decision as moot, concluding that "[t]he United States Supreme Court's interpretation of the federal constitution is final and binding on this court" and that "*Obergefell* compels the conclusion that the State of Louisiana may not bar same-sex couples from the civil effects of marriage on the same terms accorded to opposite-sex couples." *Id.* at 621.

Recommendation: It is recommended that the legislature do one of the following: (1) Direct the Law Institute to note the *Obergefell* decision at Civil Code Article 3520(B); or (2) Repeal Civil Code Article 3520(B) in its entirety.

Although the scope of the Unconstitutional Statutes Committee's biennial report to the legislature is limited by R.S. 24:204(A)(10) to those "provisions of law that have been declared unconstitutional by final and definitive court judgment," a comprehensive report on the issue of same sex marriage in light of *Obergefell* was submitted to the legislature in March of 2016. Additionally, the Law Institute's Marriage-Persons Committee proposed, and the Law Institute's Council adopted, a package of recommended amendments with respect to same-sex marriage in Louisiana. Those recommendations have been submitted to the legislature as Senate Bill No. 98 of the 2018 Regular Session.

Code of Criminal Procedure

Article 800. Objection to ruling on challenge for cause*

A. A defendant may not assign as error a ruling refusing to sustain a challenge for cause made by him, unless an objection thereto is made at the time of the ruling. The nature of the objection and grounds therefor shall be stated at the time of objection.

B. The erroneous allowance to the state of a challenge for cause does not afford the defendant a ground for complaint, unless the effect of such ruling is the exercise by the state of more peremptory challenges than it is entitled to by law.

Validity called into doubt by *State v. Anderson*, 996 So. 2d 973, 997 (La. 2008): "*Witherspoon* [*v. Illinois*, 391 U.S. 510 (1968)] further dictates that a capital defendant's rights under the Sixth and

* First included in the 2016 biennial report.

Fourteenth Amendments to an impartial jury prohibits the exclusion of prospective jurors 'simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.' Moreover, notwithstanding LSA–C.Cr.P. art. 800(B), which states that a defendant cannot complain of an erroneous grant of a challenge to the State 'unless the effect of such a ruling is the exercise by the State of more peremptory challenges than it is entitled to by law,' the United States Supreme Court has consistently held that it is reversible error, not subject to harmless-error analysis, when a trial court erroneously excludes a potential juror who is *Witherspoon*-eligible, despite the fact that the state could have used a peremptory challenge to strike the potential juror."

Recommendation: After review by the Law Institute's Criminal Code and Code of Criminal Procedure Committee, it is recommended that the legislature direct the Law Institute to direct the printer to add a validity note following Code of Criminal Procedure Article 800 to read as follows:

> "The validity of Article 800(B), which precludes even a capital defendant from complaining of an erroneous grant of a challenge for cause to the state unless the effect of such grant is that the state exercised more peremptory challenges than it was entitled to by law, is called into doubt by *State v. Anderson*, 996 So. 2d 973 (La. 2008), *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Wainwright v. Witt*, 469 U.S. 412 (1985), all of which hold that in certain capital cases, the exclusion of a potential juror because they voiced general objections to or conscientious or religious scruples against the death penalty is reversible error and is not subject to harmless error analysis."

Revised Statutes

R.S. 13:3715.1. Medical or hospital records of a patient; subpoena duces tecum and court order to a health care provider; reimbursement for records produced*

A. As used in this Section, the following terms shall have the respective meanings ascribed thereto:

(1) Patient "records" shall not be deemed to include x-rays, electrocardiograms, and like graphic matter unless specifically referred to in the subpoena, summons, or court order.

(2) "Health care provider" shall mean a person, partnership, corporation, facility, or institution defined in R.S. 40:1299.41(A).

B. The exclusive method by which medical, hospital, or other records relating to a person's medical treatment, history, or condition may be obtained or disclosed by a health care provider, shall be pursuant to and in accordance with the provisions of R.S. 40:1299.96 or Code of Evidence Article 510, or a lawful subpoena or court order obtained in the following manner:

(1) A health care provider shall disclose records of a patient who is a party to litigation pursuant to a subpoena issued in that litigation, whether for purposes of deposition or for trial and

* First included in the 2016 biennial report.

whether issued in a civil, criminal, workers' compensation, or other proceeding, but only if: the health care provider has received an affidavit of the party or the party's attorney at whose request the subpoena has been issued that attests to the fact that such subpoena is for the records of a party to the litigation and that notice of the subpoena has been mailed by registered or certified mail to the patient whose records are sought, or, if represented, to his counsel of record, at least seven days prior to the issuance of the subpoena; and the subpoena is served on the health care provider at least seven days prior to the date on which the records are to be disclosed, and the health care provider has not received a copy of a petition or motion indicating that the patient has taken legal action to restrain the release of the records. If the requesting party is the patient or, if represented, the attorney for the patient, the affidavit shall state that the patient authorizes the release of the records pursuant to the subpoena. No such subpoena shall be issued by any clerk unless the required affidavit is included with the request.

(2) Any attorney requesting medical records of a patient, who is not a party to the litigation in which the records are being sought may obtain the records by written authorization of the patient whose records are being sought or if no such authorization is given, by court order, as provided in Paragraph (5) hereof.

(3) Any attorney requesting medical records of a patient who is deceased may obtain the records by subpoena, as provided in Paragraph (1) hereof, by written authorization of the person authorized under Louisiana Civil Code Article 2315.1 or the executor or administrator of the deceased's estate, or by court order, as provided in Paragraph (5) hereof.

(4) Any subpoena for medical records issued by the office of workers' compensation administration in the Louisiana Workforce Commission, or by a hearing officer or agent employed by such office, shall for all purposes be considered a subpoena within the meaning of this Section.

(5) A court shall issue an order for the production and disclosure of a patient's records, regardless of whether the patient is a party to the litigation, only: after a contradictory hearing with the patient, or, if represented, with his counsel of record, or, if deceased, with those persons identified in Paragraph (3) hereof, and after a finding by the court that the release of the requested information is proper; or with consent of the patient.

(6) Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance or alcohol abuse, education, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall be confidential and disclosed only for the purposes and under the circumstances expressly authorized in 42 CFR Part 2. Under this Section, said programs shall include but not be limited to any alcohol or substance abuse clinic or facility operated by the Department of Health and Hospitals. No subpoena or court order shall compel disclosure of any record or patient-identifying information of an individual who has applied for or been given diagnosis or treatment for alcohol or drug abuse in a federally assisted program, unless said court order or subpoena meets the criteria set forth in 42 CFR 2.61, 2.64, or 2.65. No health care provider, employee, or agent thereof shall be held civilly or criminally liable for refusing to disclose protected alcohol and substance abuse records or patient-identifying information unless first presented with a valid consent signed by the

individual, which complies with 42 CFR 2.31 or a court order and subpoena which complies with 42 CFR Part 2.

C. No health care provider, employee, or agent thereof shall be held civilly or criminally liable for disclosure of the records of a patient pursuant to the procedure set forth in this Section, R.S. 40:1299.96, or Code of Evidence Article 510, provided that the health care provider has not received a copy of the petition or motion indicating that legal action has been taken to restrain the release of the records.

D. Unless the subpoena or court order otherwise specifies, it shall be sufficient compliance therewith if the health care provider delivers by registered or certified mail, at least forty-eight hours prior to the date upon which production is due, or delivers by hand on the date upon which production is due a true and correct copy of all records described in such subpoena. However, no subpoena or court order shall require the production of original, nonreproducible materials and records unless accompanied by a court order or stipulation of the parties and the health care provider which specifies the person who will be responsible for the care of the items to be produced, the date and manner of the return to the provider of the items to be produced, and that the items to be produced are not to be destroyed or subject to destructive testing. Any subpoena duces tecum not timely served shall be quashed by the trial court without the necessity of an appearance by the hospital, health care facility, or medical physician.

E. The records shall be accompanied by the certificate of the health care provider or other qualified witness, stating in substance each of the following:

(1) That the copy is a true copy of all records described in the subpoena.

(2) That the records were prepared by the health care provider in the ordinary course of the business of the health care provider at or near the time of the act, condition, or event.

F. If the health care provider has none of the records described, or only part thereof, the health care provider shall so state in the certificate, and deliver the certificate and such records as are available.

G. The health care provider shall be reimbursed by the person causing the issuance of the subpoena, summons, or court order in accordance with the provisions of R.S. 40:1299.96.

H. Notwithstanding any other provision of law to the contrary, no health care provider, as defined in R.S. 40:1299.96, shall be required to grant access to or copying of photographs, or both, of any minor or part of a minor's body who is alleged to be the victim of child sexual abuse unless a court of competent jurisdiction, after a contradictory hearing at which the health care provider may but need not be present, orders the health care provider to grant access to or copying of said photographs to the moving party's counsel of record or experts qualified in the medical diagnosis of child sexual abuse, or to both. The court's order granting the access to or copying of said photographs shall be limited to the movant's counsel of record or the experts qualified in the medical diagnosis of child sexual abuse, or both; shall be limited solely to use of said photographs for the purposes of trial preparation; shall prohibit further copying, reproduction, or dissemination

of said photographs; and shall prohibit counsel of record or the experts qualified in the medical diagnosis of child sexual abuse from allowing any other person access to said photographs without court order and for good cause shown.

I. A coroner, deputy coroner, or other assistant, while acting in his official capacity relating to a physical or mental investigation and examination or an investigation into the cause and manner of a death, is exempt from complying with the provisions of this Section.

J. The Louisiana State Board of Medical Examiners, Louisiana State Board of Dentistry, Louisiana State Board of Psychologists, Louisiana State Board of Nursing, Louisiana Board of Pharmacy, Louisiana State Board of Social Work Examiners, Louisiana State Board of Physical Therapy Examiners, and the Louisiana State Board of Chiropractic Examiners, while acting in an official capacity relating to an investigation of an individual over whom such board has regulatory authority shall be exempt from complying with the notice provisions of this Section when the subpoena clearly states that no notice or affidavit is required. Notwithstanding any privilege of confidentiality recognized by law, no health care provider or health care institution with which such health care provider is affiliated shall, acting under any such privilege, fail or refuse to respond to a lawfully issued subpoena of such board for any medical information, testimony, records, data, reports or other documents, tangible items, or information relative to any patient treated by such individual under investigation; however, the identity of any patient identified in or by such records or information shall be maintained in confidence by such board and shall be deemed a privilege of confidentiality existing in favor of any such patient. For the purpose of maintaining such confidentiality of patient identity, such board shall cause any such medical records or the transcript of any such testimony to be altered so as to prevent the disclosure of the identity of the patient to whom such records or testimony relates.

K. Any attorney who causes the issuance of a subpoena or court order for medical, hospital, or other records relating to a person's medical treatment, history, or condition and who intentionally fails to provide notice to the patient or to the patient's counsel of record in accordance with the requirements of this Section shall be subject to sanction by the court.

L. No provision of this Section shall preclude a patient from personally receiving a copy or synopsis of his medical records as provided by law.

In *State v. Skinner*, 10 So. 3d 1212, 1218 (La. 2009), the court found: "Because we find a warrant was required for an investigative search of the defendant's prescription and medical records, the trial court erred in finding the remedy was for the State to comply with requirements of La.Code Crim Proc. art. 66 and La Rev. Stat. 13:3715.1, which the State had admittedly failed to comply with in obtaining the defendant's prescription and medical records, in order for these records to be admissible at trial. The trial court's ruling essentially permits the State to re-subpoena the prescription and medical records, allowing the State to introduce them at trial if the State has followed all the procedural requirements of La.Rev.Stat. 13:3715.1 and/or La.Code Crim. Proc. art. 66 in procuring these records a second time. However, because we find the Fourth Amendment and La. Const, art. I, § 5 require a search warrant before a search of prescription and medical records for **criminal investigative purposes** is permitted, the State cannot cure its warrantless search and seizure of the records by a second subpoena of these records. . . . The procedural

requirements of La.Rev.Stat. 13:3715.1 simply and clearly do not suffice to comply with the constitutional requirements of probable cause supported by a sworn affidavit for the issuance of a search warrant. Thus, it is irrelevant whether or not the State complied with the requirements of La.Rev.Stat. 13:3715.1, and any subsequent compliance with its procedural requirements is insufficient to permit the introduction of evidence that was illegally searched and seized. This evidence must be suppressed."

Also, a validity note following R.S. 13:3715.1 provides: "Procedural requirements of this section were found unconstitutional in *State v. Skinner, Sup.2009, 10 So.3d 1212, 2008-2522 (La. 5/5/09). See Notes of Decisions, post.*"

Recommendation: After review by the Law Institute's Criminal Code and Code of Criminal Procedure Committee, it is recommended that the legislature direct the Law Institute to direct the printer to revise the validity note following R.S. 13:3715.1 to read: "Procedural requirements of this section were found unconstitutional **'for criminal investigative purposes'** in State v. Skinner. . ."

R.S. 13:4210. Penalty for judge's violation of R.S. 13:4207 through R.S. 13:4209[*]

All judges mentioned in R.S. 13:4207 through 13:4209 who shall violate those provisions or requirements, relative to the time within which they shall render decisions as aforesaid, shall forfeit one quarter's salary for each violation. The clerk of court shall notify the auditor of any failure on the part of the judge to render a decision within the time prescribed herein. The auditor, upon receiving such notification from the clerk of the court, shall withhold from such judge the payment of one quarter's salary, which amounts shall be paid by the auditor into the general school fund.

Held unconstitutional by *Prejean v. Barousse*, 107 So. 3d 569, 573-74 (La. 2013): "This analysis convincingly demonstrates La. R.S. 13:4210 runs afoul of the constitutional mandate in La. Const. Art. V § 25(C), granting exclusive original jurisdiction over judicial discipline to this court. Additionally, we find La. R.S. 13:4210 conflicts with La. Const. Art. V, § 21, which provides '[t]he term of office, retirement benefits, and **compensation** of a judge shall not be **decreased** during the term for which he is elected.' . . . In the instant case, the effect of a partial forfeiture of a judge's salary would result in a decrease of compensation of the judge during the term for which he was elected, in violation of La. Const. Art. V, § 21. Under these circumstances, we determine La. R.S. 13:4210 is unconstitutional on its face, as no set of circumstances exists under which the statute would be valid."

Recommendation: It is recommended that the legislature repeal R.S. 13:4210 in its entirety.

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[*] First included in the 2016 biennial report.

R.S. 14:42. First degree rape[*]

A. First degree rape is a rape committed upon a person sixty-five years of age or older or where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:

* * *

(4) When the victim is under the age of thirteen years. Lack of knowledge of the victim's age shall not be a defense.

*** * ***

D. (1) Whoever commits the crime of first degree rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

(2) However, if the victim was under the age of thirteen years, as provided by Paragraph A(4) of this Section:

(a) And if the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury. The provisions of C.Cr.P. Art. 782 relative to cases in which punishment may be capital shall apply.

(b) And if the district attorney does not seek a capital verdict, the offender shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The provisions of Code of Criminal Procedure Art. 782 relative to cases in which punishment is necessarily confinement at hard labor shall apply.

* * *

Held unconstitutional by *Kennedy v. Louisiana*, 554 U.S. 407, 412 (2008): "This case presents the question whether the Constitution bars respondent from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim. We hold the Eighth Amendment prohibits the death penalty for this offense. The Louisiana statute is unconstitutional."

Recommendation: After review by the Law Institute's Criminal Code and Code of Criminal Procedure Committee, it is recommended that the legislature repeal R.S. 14:42(D)(2) in its entirety and direct the Law Institute to redesignate Paragraph (D)(1) as Subsection (D).

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[*] First included in the 2016 biennial report.

R.S. 14:47. Defamation[*]

Defamation is the malicious publication or expression in any manner, to anyone other than the party defamed, of anything which tends:

(1) To expose any person to hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence or social intercourse; or

(2) To expose the memory of one deceased to hatred, contempt, or ridicule; or

(3) To injure any person, corporation, or association of persons in his or their business or occupation.

Whoever commits the crime of defamation shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both.

Held unconstitutional by *State v. Defley*, 395 So. 2d 759, 761 (La. 1981): "LSA-R.S. 14:47 is unconstitutional insofar as it punishes public expression about public officials." In this case, the Louisiana Supreme Court also cited *State v. Snyder*, 277 So. 2d 660, 668 (La. 1972), *on rehearing*: "We hold R.S. 14:47, 48, and 49 to be unconstitutional insofar as they attempt to punish public expression and publication concerning public officials, public figures, and private individuals who are engaged in public affairs;" and *Garrison v. State of La.*, 379 U.S. 64, 77 (1964): "Applying the principles of the New York Times case, we hold that the Louisiana statute, as authoritatively interpreted by the Supreme Court of Louisiana, incorporates constitutionally invalid standards in the context of criticism of the official conduct of public officials."

Recommendation: After review by the Law Institute's Criminal Code and Code of Criminal Procedure Committee, it is recommended that the legislature direct the Law Institute to direct the printer to add a validity note following R.S. 14:47 to read as follows:

> "In *State v. Snyder*, 277 So. 2d 660, 668 (La. 1972), the Louisiana Supreme Court held that R.S. 14:47 is unconstitutional insofar as it attempts to punish public expression and publication concerning public officials, public figures, and private individuals who are engaged in public affairs. *See also State v. Defley*, 395 So. 2d 759, 761 (La. 1981) and *Garrison v. State of La.*, 379 U.S. 64, 77 (1964)."

R.S. 14:48. Presumption of malice[†]

Where a non-privileged defamatory publication or expression is false it is presumed to be malicious unless a justifiable motive for making it is shown.

[*] First included in the 2016 biennial report.
[†] First included in the 2016 biennial report.

Where such a publication or expression is true, actual malice must be proved in order to convict the offender.

Recognized as unconstitutional by *State v. Snyder*, 277 So. 2d 660, 668 (La. 1972), *on rehearing*: "We hold R.S. 14:47, 48, and 49 to be unconstitutional insofar as they attempt to punish public expression and publication concerning public officials, public figures, and private individuals who are engaged in public affairs."

Recommendation: After review by the Law Institute's Criminal Code and Code of Criminal Procedure Committee, it is recommended that the legislature direct the Law Institute to direct the printer to add a validity note following R.S. 14:48 to read as follows:

> "In *State v. Snyder*, 277 So. 2d 660, 668 (La. 1972), the Louisiana Supreme Court held that R.S. 14:48 is unconstitutional insofar as it attempts to punish public expression and publication concerning public officials, public figures, and private individuals who are engaged in public affairs."

R.S. 14:49. Qualified privilege[*]

A qualified privilege exists and actual malice must be proved, regardless of whether the publication is true or false, in the following situations:

(1) Where the publication or expression is a fair and true report of any judicial, legislative, or other public or official proceeding, or of any statement, speech, argument, or debate in the course of the same.

(2) Where the publication or expression is a comment made in the reasonable belief of its truth, upon,

(a) The conduct of a person in respect to public affairs; or

(b) A thing which the proprietor thereof offers or explains to the public.

(3) Where the publication or expression is made to a person interested in the communication, by one who is also interested or who stands in such a relation to the former as to afford a reasonable ground for supposing his motive innocent.

(4) Where the publication or expression is made by an attorney or party in a judicial proceeding.

Recognized as unconstitutional by *State v. Snyder*, 277 So. 2d 660, 668 (La. 1972), *on rehearing*: "We hold R.S. 14:47, 48, and 49 to be unconstitutional insofar as they attempt to punish public

[*] First included in the 2016 biennial report.

expression and publication concerning public officials, public figures, and private individuals who are engaged in public affairs."

Recommendation: After review by the Law Institute's Criminal Code and Code of Criminal Procedure Committee, it is recommended that the legislature direct the Law Institute to direct the printer to add a validity note following R.S. 14:49 to read as follows:

> "In *State v. Snyder*, 277 So. 2d 660, 668 (La. 1972), the Louisiana Supreme Court held that R.S. 14:49 is unconstitutional insofar as it attempts to punish public expression and publication concerning public officials, public figures, and private individuals who are engaged in public affairs."

R.S. 14:87. Abortion*

A.(1) Abortion is the performance of any of the following acts, with the specific intent of terminating a pregnancy:

(a) Administering or prescribing any drug, potion, medicine or any other substance to a female; or

(b) Using any instrument or external force whatsoever on a female.

(2) This Section shall not apply to the female who has an abortion.

B. It shall not be unlawful for a physician to perform any of the acts described in Subsection A of this Section if performed under the following circumstances:

(1) The physician terminates the pregnancy in order to preserve the life or health of the unborn child or to remove a stillborn child.

(2) The physician terminates a pregnancy for the express purpose of saving the life, preventing the permanent impairment of a life sustaining organ or organs, or to prevent a substantial risk of death of the mother.

(3) The physician terminates a pregnancy by performing a medical procedure necessary in reasonable medical judgment to prevent the death or substantial risk of death due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman.

C. As used in this Section, the following words and phrases are defined as follows:

(1) "Physician" means any person licensed to practice medicine in this state.

* First included in the 2016 biennial report.

(2) "Unborn child" means the unborn offspring of human beings from the moment of fertilization until birth.

D.(1) Whoever commits the crime of abortion shall be imprisoned at hard labor for not less than one nor more than ten years and shall be fined not less than ten thousand dollars nor more than one hundred thousand dollars.

(2) This penalty shall not apply to the female who has an abortion.

Prior version held unconstitutional by *Sojourner T v. Edwards*, 974 F.2d 27, 28-31 (5th Cir. 1992): "This suit challenges the Louisiana Abortion Statute, which criminalizes performing abortions except under very limited circumstances. . . . The Statute makes it a crime to 'administer [] or prescrib[e] any drug, potion, medicine, or any other substance to a female' or to 'us[e] any instrumental or external force whatsoever on a female' 'with the specific intent of terminating a pregnancy.' The Statute provides exceptions when: (1) the physician terminates the pregnancy in order to preserve the life or health of the unborn baby or to remove a dead unborn child; (2) the physician terminates the pregnancy to save the life of the mother . . . The Supreme Court recently reaffirmed the essential holding of *Roe v. Wade* in *Casey*. In *Casey*, the Court held that a woman has a right to choose to have an abortion before viability and that legislation restricting abortions before viability must not place an undue burden on that right. . . . The Court held that before viability, a State's interests are not strong enough to support a prohibition of abortion. Thus, the Louisiana statute is clearly unconstitutional under *Casey*. . . . In conclusion, we hold that the Louisiana statute, on its face, is plainly unconstitutional under *Casey* because the statute imposes an undue burden on women seeking an abortion before viability." Although *Sojourner T v. Edwards* is an appellate court decision, the Supreme Court of the United States denied writs in this case, 507 U.S. 872 (1993).

At the time this case was decided, the 1992 version of the statute provided exceptions to the crime of abortion when (1) the physician terminates the pregnancy in order to preserve the life or health of the unborn child or to remove a dead unborn child; (2) the physician terminates a pregnancy for the express purpose of saving the life of the mother; (3) the physician terminates a pregnancy which is the result of rape; or (4) the physician terminates a pregnancy which is the result of incest. In Acts 2006, No. 467, the legislature amended R.S. 14:87 to remove the exceptions for rape and incest, leaving the first two provisions and adding a third to prevent death or serious, permanent impairment of the mother as the only exceptions to the crime of abortion. As a result, some of the offensive portions of the statute that were held unconstitutional by the Fifth Circuit remain in the statute's current version.

Recommendation: It was recommended that the legislature direct the Law Institute to note the *Sojourner T v. Edwards* decision at R.S. 14:87 to assure consistent reporting. The validity note following R.S. 14:87 reads as follows:

> "This section, as amended and reenacted by Acts 1991, No. 26, was declared unconstitutional by Sojourner, T. et al. v. Roemer and Okpalobi v. State, 772 F.Supp. 930 (E.D.La.), Aug. 7, 1991), order affirmed by Sojourner T. v. Edwards, C.A.5 (La.) 1992,

974 F.2d 27, 61 U.S.L.W. 2167 (5th Cir., Sept. 22, 1992), certiorari denied 113 S.Ct. 1414. See Notes of Decisions"

R.S. 14:89. Crime against nature*

A. Crime against nature is either of the following:

(1) The unnatural carnal copulation by a human being with another of the same sex or opposite sex or with an animal, except that anal sexual intercourse between two human beings shall not be deemed as a crime against nature when done under any of the circumstances described in R.S. 14:41, 42, 42.1 or 43. Emission is not necessary; and, when committed by a human being with another, the use of the genital organ of one of the offenders of whatever sex is sufficient to constitute the crime.

(2) The marriage to, or sexual intercourse with, any ascendant or descendant, brother or sister, uncle or niece, aunt or nephew, with knowledge of their relationship. The relationship must be by consanguinity, but it is immaterial whether the parties to the act are related to one another by the whole or half blood. The provisions of this Paragraph shall not apply where one person, not a resident of this state at the time of the celebration of his marriage, contracted a marriage lawful at the place of celebration and thereafter removed to this state.

B.(1) Whoever commits the offense of crime against nature as defined by Paragraph (A)(1) of this Section shall be fined not more than two thousand dollars, imprisoned, with or without hard labor, for not more than five years, or both.

(2) Whoever commits the offense of crime against nature as defined by Paragraph (A)(1) of this Section with a person under the age of eighteen years shall be fined not more than fifty thousand dollars, imprisoned at hard labor for not less than fifteen years nor more than fifty years, or both.

(3) Whoever commits the offense of crime against nature as defined by Paragraph (A)(1) of this Section with a person under the age of fourteen years shall be fined not more than seventy-five thousand dollars, imprisoned at hard labor for not less than twenty-five years nor more than fifty years, or both.

(4) Whoever commits the offense of crime against nature as defined by Paragraph (A)(2) of this Section, where the crime is between an ascendant and descendant, or between brother and sister, shall be imprisoned at hard labor for not more than fifteen years.

(5) Whoever commits the offense of crime against nature as defined by Paragraph (A)(2) of this Section, where the crime is between uncle and niece, or aunt and nephew, shall be fined not more than one thousand dollars, or imprisoned, with or without hard labor, for not more than five years, or both.

* First included in the 2016 biennial report.

C.(1) It shall be an affirmative defense to prosecution for a violation of Paragraph (A)(1) of this Section that, during the time of the alleged commission of the offense, the defendant was a victim of trafficking of children for sexual purposes as provided in R.S. 14:46.3(E). Any child determined to be a victim pursuant to the provisions of this Paragraph shall be eligible for specialized services for sexually exploited children.

(2) It shall be an affirmative defense to prosecution for a violation of Paragraph (A)(1) of this Section that, during the time of the alleged commission of the offense, the defendant is determined to be a victim of human trafficking pursuant to the provisions of R.S. 14:46.2(F). Any person determined to be a victim pursuant to the provisions of this Paragraph shall be notified of any treatment or specialized services for sexually exploited persons to the extent that such services are available.

D. The provisions of Act No. 177 of the 2014 Regular Session and the provisions of the Act that originated as Senate Bill No. 333 of the 2014 Regular Session incorporate the elements of the crimes of incest (R.S. 14:78) and aggravated incest (R.S. 14:78.1), as they existed prior to their repeal by these Acts, into the provisions of the crimes of crime against nature (R.S. 14:89) and aggravated crime against nature (R.S. 14:89.1), respectively. For purposes of the provisions amended by Act No. 177 of the 2014 Regular Session and the Act that originated as Senate Bill No. 333 of the 2014 Regular Session, a conviction for a violation of R.S. 14:89(A)(2) shall be the same as a conviction for the crime of incest (R.S. 14:78) and a conviction for a violation of R.S. 14:89.1(A)(2) shall be the same as a conviction for the crime of aggravated incest (R.S. 14:78.1). Neither Act shall be construed to alleviate any person convicted or adjudicated delinquent of incest (R.S. 14:78) or aggravated incest (R.S. 14:78.1) from any requirement, obligation, or consequence imposed by law resulting from that conviction or adjudication including but not limited to any requirements regarding sex offender registration and notification, parental rights, probation, parole, sentencing, or any other requirement, obligation, or consequence imposed by law resulting from that conviction or adjudication.

Prior version held unconstitutional by *Louisiana Electorate of Gays and Lesbians, Inc. v. Connick,* 902 So. 2d 1090, 1094, 1096 (La. App. 5 Cir. 2005): "The court found La. R.S. 14:89(A)(1) unconstitutional in part in light of *Lawrence v. Texas* [539 U.S. 558 (2003)]. . . . The Court declares the following language in Louisiana Revised Statutes 14:89(A)(1) to be unconstitutional and therefore null and void: 'with another of the same sex or opposite sex or', ', except that anal sexual intercourse between two human beings shall not be deemed as a crime against nature when done under any of the circumstances described in R.S. 14:41, 14:42, 14:42.1 or 14:43' and '; and when committed by a human being with another, the use of the genital organ of one of the offenders of whatever sex is sufficient to constitute the crime.' The Court upholds and affirms the constitutional portions of Louisiana Revised Statutes 14:89(A)(1), which read: Crime against nature is: The unnatural carnal copulation by a human being with an animal. Emission is not necessary. . . .We find no error in the trial court's ruling on this point." Although *Louisiana Electorate v. Connick* is an appellate court decision, the Louisiana Supreme Court denied writs in this case, 916 So. 2d 1062 (La. 2005).

At the time this case was decided, R.S. 14:89(A)(1) read as follows:

R.S. 14:89. Crime against nature

A. Crime against nature is:

(1) The unnatural carnal copulation by a human being with another of the same sex or opposite sex or with an animal, except that anal sexual intercourse between two human beings shall not be deemed as a crime against nature when done under any of the circumstances described in R.S. 14:41, 14:42, 14:42.1, or 14:43. Emission is not necessary; and when committed by a human being with another, the use of the genital organ of one of the offenders of whatever sex is sufficient to constitute the crime.

* * *

Therefore, although the statute has undergone several amendments since the Fifth Circuit's decision in *Louisiana Electorate v. Connick*, the substance of the offending provision has remained the same.

Recommendation: After review by the Law Institute's Criminal Code and Code of Criminal Procedure Committee, it is recommended that the legislature do both of the following:

1. Amend R.S. 14:89(A)(1) to remove the offending language as follows:

(A)(1) The ~~**unnatural**~~ carnal copulation by a human being ~~**with another of the same sex or opposite sex or**~~ with an animal~~**, except that anal sexual intercourse between two human beings shall not be deemed as a crime against nature when done under any of the circumstances described in R.S. 14:41, 14:42, 14:42.1 or 14:43**~~. Emission is not necessary~~**; and, when committed by a human being with another, the use of the genital organ of one of the offenders of whatever sex is sufficient to constitute the crime**~~.

2. Repeal Paragraphs (B)(2) and (3) and direct the Law Institute to redesignate Paragraphs (B)(4) and (5) accordingly.

R.S. 15:902.1. Transfer of adjudicated juvenile delinquents[*]

Notwithstanding Title VIII of the Louisiana Children's Code or any other provision of law, the secretary of the department may promulgate rules and regulations to authorize the transfer of adjudicated juvenile delinquents to adult correctional facilities when the delinquents have attained the age of seventeen years, the age of full criminal responsibility.

Held unconstitutional by *In re C.B.*, 708 So. 2d 391, 395, 399-400 (La. 1998): "We hold that LSA-RS 15:902.1 is unconstitutional as applied by Regulation B-02-008 as it denies the juveniles their constitutional right to due process, and fundamental fairness inherent therein, guaranteed them by

[*] First included in the 2016 biennial report.

Article I, § 2 of the Louisiana constitution because they receive a *de facto* criminal sentence to hard labor without being afforded the right to trial by jury as is mandated by Article I, § 17 of our state constitution. . . . LSA-RS 15:902.1 as applied in conjunction with Regulation B-02-008, transfers juveniles to adult facilities where they are to be treated no differently than the adult felons with whom they are confined. . . . We therefore hold that the statute through its corresponding regulation has sufficiently tilted the scales away from a 'civil' proceeding, with its focus on rehabilitation, to one purely criminal. Due process and fundamental fairness therefore require that the juvenile who is going to be incarcerated at hard labor in an adult penal facility must have been convicted of a crime by a criminal jury, not simply adjudicated a delinquent by a juvenile court judge. To deprive the juvenile of such an important procedural safeguard upsets the quid pro quo under which the juvenile system must operate."

The Supreme Court's decision in *In re C.B.* held R.S. 15:902.1 unconstitutional *as applied by Regulation B-02-008*. A footnote in the opinion explains that "[t] he Department of Public Safety and Corrections published notice of its intent to formally adopt this rule, 23 *Louisiana Register* 22:335 (August, 1997); however, before it could do so, a second emergency rule was enacted on November 6, 1997. This second emergency rule is not properly before this Court for review as it was not in effect at the time of the challenged transfers."

Recommendation: It was recommended that the legislature direct the Law Institute to note the *In re C.B.* decision at R.S. 15:902.1 to assure consistent reporting. The validity note following R.S. 15:902.1 reads as follows:

> "The Louisiana Supreme Court declared R.S. 15:902.1, relating to the transfer of adjudicated juvenile delinquents to adult correctional facilities, as enacted by Acts 1997, No. 1063, § 1, unconstitutional as applied by Regulation B-02-008 in In re C.B., 708 So.2d 391 (La.), insofar as transferred juveniles were subject to hard labor in adult correctional facilities without being adjudicated as criminals. See Notes of Decisions"

R.S. 17:286.1 to 17:286.7. The Balanced Treatment for Creation-Science and Evolution-Science Act[*]

This Subpart shall be known as the "Balanced Treatment for Creation-Science and Evolution-Science Act."

Held unconstitutional by *Edwards v. Aguillard*, 482 U.S. 578, 596-97 (1987): "The Louisiana Creationism Act advances a religious doctrine by requiring either the banishment of the theory of evolution from public school classrooms or the presentation of a religious viewpoint that rejects evolution in its entirety. The Act violates the Establishment Clause of the First Amendment because it seeks to employ the symbolic and financial support of government to achieve a religious purpose."

[*] First included in the 2016 biennial report.

Recommendation: It is recommended that the legislature repeal R.S. 17:286.1 through 286.7 in their entirety.

R.S. 24:513. Powers and duties of legislative auditor; audit reports as public records; assistance and opinions of attorney general; frequency of audits; subpoena power[*]

*** * ***

(J)(4)(a) Notwithstanding any provision of this Section to the contrary, any entity which establishes scholastic rules which are the basis for the State Board of Elementary and Secondary Education's policy required by R.S. 17:176 to be adhered to by all high schools under the board's jurisdiction shall not be required to be audited by the legislative auditor but shall file an audit with the legislative auditor and the Legislative Audit Advisory Council which has been prepared by an auditing firm which has been approved by the legislative auditor. Such entity shall submit such audit to the legislative auditor and the Legislative Audit Advisory Council.

(b) The Legislative Audit Advisory Council may order an audit by the legislative auditor upon a finding of cause by the council.

* * *

Held unconstitutional by *Louisiana High School Athletics Association v. State*, 107 So. 3d 583, 608-09 (La. 2013): "Appellants fail to show, and we fail to see, how this statute is rationally related to a legitimate state end. Thus, we find La. R.S. 24:513(J)(4)(a) is unconstitutional under the Equal Protection Clause. Since we have found La. R.S. 24:513(J)(4)(a) unconstitutional, we must also find La. R.S. 24:513(J)(4)(b) unconstitutional, as it cannot stand alone. La. R.S. 24:513(J)(4)(b) provides, "[t]he Legislative Audit Advisory Council may order an audit by the legislative auditor upon a finding of cause by the council." This is in reference to the requirement in La. R.S. 24:513(J)(4)(a) that the entity file an audit with the LLA and the Legislative Audit Advisory Council. Thus, La. R.S. 24:513(J)(4)(b) applies only if La. R.S. 24:513(J)(4)(a) applies. We find La. R.S. 24:513(J)(4)(b) cannot be severed from La. R.S. 24:513(J)(4)(a) and must also be struck down as unconstitutional."

Recommendation: It is recommended that the legislature repeal R.S. 24:513(J)(4)(a) and (b) in their entirety.

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[*] First included in the 2016 biennial report.

R.S. 32:57. Penalties; alternatives to citation[*]

* * *

G.(1) Notwithstanding any provision of law to the contrary, any person who is found guilty, pleads guilty, or pleads nolo contendere to any motor vehicle offense when the citation was issued for a violation on the Huey P. Long Bridge or the Lake Pontchartrain Causeway Bridge or approaches to and from such bridges by police employed by the Greater New Orleans Expressway Commission shall pay an additional cost of five dollars.

(2) All proceeds generated by this additional cost shall be deposited into the state treasury.

* * *

Prior version held unconstitutional by *State v. Lanclos*, 980 So. 2d 643, 654 (La. 2008): "The issue presented in this case is whether the $5.00 fee assessed pursuant to La. R.S. 32:57(G) is a tax collected by the courts, and thus a violation of the separation of powers doctrine found in La. Const. art. II. . . .[T]he question that we must answer in this case is whether the fee imposed by La. R.S. 32:57(G) is sufficiently related to the administration of justice to pass constitutional muster. Once collected, the $5.00 assessment imposed by La. R.S. 32:57(G) is deposited in the state's general treasury. . . . We agree with the defendant that La. R.S. 32:57(G) is a charge that has as its primary purpose the raising of revenue, and is, therefore, a "tax." As provided in the statute, the $5.00 cost is collected for the purpose of supplementing police salaries and acquisition and maintenance of police equipment. Funding police salaries and the maintenance of police equipment are the responsibility of the local tax collection authorities, not the judiciary. Although a police department may be considered to be a 'link in the chain' of the criminal justice system, and there is some logical connection between a police department and the criminal justice system, we find that police salaries and uniform equipment maintenance is too far attenuated from the 'administration of justice,' to be considered a legitimate court cost. To hold otherwise would start us down a slippery slope, and we must draw the line at some point. Every expense incurred by the police department in its role in enforcing the laws of this state cannot be funded through "court costs." To do so would overly burden and unduly infringe on the court's administration of the judicial court system. Accordingly, we affirm the trial court's finding that the $5.00 assessment provided in La. R.S. 32:57(G) is a 'tax' funded through the judiciary in violation of the doctrine of separation of powers. For the above reasons, we affirm the judgment of the First Parish Court finding that R.S. 32:57(G) is unconstitutional."

At the time this case was decided, R.S. 32:57(G)(2) read as follows:

§57. Penalties; alternatives to citation

* * *

G. * * *

[*] First included in the 2016 biennial report.

(2) All proceeds generated by this additional cost shall be deposited into the state treasury. After compliance with the requirements of Article VII, Section 9(B) of the Constitution of Louisiana relative to the Bond Security and Redemption Fund, and prior to monies being placed in the state general fund, an amount equal to that deposited as required in this Subsection shall be credited to a special fund hereby created in the state treasury to be known as the Greater New Orleans Expressway Commission Additional Cost Fund. The monies in this fund shall be appropriated by the legislature to the Greater New Orleans Expressway Commission and shall be used by the commission to supplement the salaries of P.O.S.T. certified officers and for the acquisition or upkeep of police equipment. All unexpended and unencumbered monies in this fund at the end of the fiscal year shall remain in such fund. The monies in this fund shall be invested by the state treasurer in the same manner as monies in the state general fund and interest earned on the investment of monies shall be credited to this fund, again, following compliance with the requirements of Article VII, Section 9(B) of the Constitution, relative to the Bond Security and Redemption Fund. The monies appropriated by the legislature pursuant to this Paragraph shall not displace, replace, or supplant appropriations otherwise made from the general fund for the Greater New Orleans Expressway Commission.

* * *

After the Louisiana Supreme Court's decision, the legislature amended R.S. 37:57(G)(2) in Acts 2012, No. 834 to eliminate the Greater New Orleans Expressway Commission Additional Cost Fund, which remedied the unconstitutional attenuation between the collection of the five-dollar assessment and the purpose of funding police salaries and maintaining police equipment. However, this amendment did not address the issue of whether this five-dollar assessment is a tax collected by the courts in violation of the Louisiana Constitution's separation of powers doctrine. In fact, Paragraph (1) of R.S. 37:57(G) has remained the same throughout the revision, along with the first (and now only) sentence of Paragraph (2), which provides that the proceeds generated by this five-dollar assessment shall be deposited into the state treasury. As a result, it is likely that R.S. 32:57(G) as presently written remains unconstitutional under the *Lanclos* court's decision.

Recommendation: It is recommended that the legislature direct the Law Institute to note the *State v. Lanclos* decision in a validity note following R.S. 32:57.

R.S. 39:1951 to 39:1993. Louisiana Minority and Women's Business Enterprise Act[*]

A. The purpose and intent of this Chapter is to provide the maximum practical opportunity for increased participation by the broadest number of minority-owned businesses in public works and the increased participation by minority-owned businesses and women's business enterprises in the process by which goods and services are procured by state agencies and educational institutions from the private sector. This purpose will be accomplished by encouraging the full use

[*] First included in the 2016 biennial report.

of the broadest number of existing minority-owned businesses and women's business enterprises and the entry of new and diversified minority-owned businesses and women's business enterprises into the marketplace. This Chapter shall be applied and interpreted to promote this purpose.

B. This Chapter shall be known and may be cited as the "Louisiana Minority and Women's Business Enterprise Act".

Held unconstitutional by *Louisiana Associated General Contractors, Inc. v. State*, 669 So. 2d 1185, 1200-01 (La. 1996): "The Act on its face sets up a system whereby state agencies are mandated to meet 'annual goals for participation by certified minority business enterprises.'" The goals are to be met under the Act mainly through the use of set-asides and also through preferences in the awarding of public works and procurement contracts. Generally speaking, with regard to the set-asides, when a contract is designated as a minority set-aside project, only certified minority business enterprises may bid. As explained earlier, only members of certain races can obtain a minority business enterprise designation. Therefore, the set-aside provisions under the Act discriminate against members of those races which cannot obtain a minority business enterprise designation because they cannot bid on the set-aside project. The Act deprives certain citizens of the opportunity to compete for contracts which have been set aside solely on the basis of race, thereby creating an absolutely prohibited racial classification. . . . In sum, the Act provides to members of certain designated races and excludes from members of non-designated races the opportunity to bid on certain contracts and the opportunity to match the lowest bid made by a non-minority bidder and thereby obtain the contract on certain 22 other projects. The set-asides and preferences under the Act clearly discriminate against a person on the basis of race, and the Act, to that extent, is unconstitutional under La. Const. Art. I, Sec. 3."

Additionally, the Louisiana Supreme Court concluded that "the legislature would not have passed the Act without the presence of the minority business enterprise set-aside and preference features. The unconstitutional portions of the law having to do with these racially based set-asides and preferences are so interrelated with the remaining portions of the Act . . . that they cannot be separated without destroying the intent of the legislature in enacting the law. We find the remaining portions of the Act are not severable from the unconstitutional portions; therefore, the entire Act is unconstitutional." *Id.* at 1202.

Recommendation: It is recommended that the legislature repeal R.S. 39:1951 through 1993 in their entirety.

R.S. 39:1962. Construction of public works; two hundred thousand dollars or more[*]

A. When a contract for the construction of public works in an amount of two hundred thousand dollars or more is to be awarded by the facility planning and control section of the division of administration on the basis of competitive bidding under Chapter 10 of Title 38 or Chapter 17 of Title 39 of the Louisiana Revised Statutes of 1950, the award shall be made to a minority-owned business certified under the provisions of this Chapter when the price bid by such

[*] First included in the 2016 biennial report.

business is within five percent of the otherwise lowest responsive and responsible bidder whose bid meets the requirements and criteria set forth in the invitation for bids. However, the provisions of this Subsection shall apply only when the certified minority-owned business is the prime contractor.

B. If there is no certified minority-owned business whose bid is within the range established under Subsection A of this Section, the award shall go to the lowest responsive and responsible bidder whose bid meets the requirements and criteria set forth in the invitation for bids without regard to minority status.

C. In the event that the minority-owned business is awarded the contract by bidding within five percent of the lowest responsive and responsible bidder as provided in Subsections A and B of this Section, the minority-owned business shall adjust its bid to correspond to the bid of the otherwise lowest responsive or responsible bidder that would have been awarded the contract, but in no case shall the adjustment be by more than five percent.

D. The contracts awarded to minority-owned businesses pursuant to this Section shall not exceed ten percent of the total dollar amount of the contracts awarded by the facility planning and control section of the division of administration, and shall not exceed ten percent of the total dollar amount of the contracts awarded by the Department of Transportation and Development.

Held unconstitutional by *Louisiana Associated General Contractors, Inc. v. State*, 669 So. 2d 1185, 1201 (La. 1996): "Likewise, certain provisions under the Act, most specifically La. R.S. 39:1962, create a system of preferences which generally operate such that although members of all races can bid on the project, a certified minority business will receive the contract if his bid is within five percent of the lowest responsive and responsible bidder provided he agrees to adjust his bid to the amount of the original lowest bid. Preferences such as this also discriminate against non-minority business enterprises. . . . Therefore, with respect to preferences, the Act on its faces treats business enterprises differently solely because of the race of its owners and officers. . . . The . . . preferences under the Act clearly discriminate against a person on the basis of race, and the Act, to that extent, is unconstitutional under La. Const. Art. I, Sec. 3."

Recommendation: It is recommended that the legislature repeal R.S. 39:1962 in its entirety.

R.S. 42:39. Judges; ineligibility to become candidate for other elective office; conditions and exceptions[*]

A. After July 31, 1968, no person serving in or elected or appointed to the office of judge of any court, justices of the peace excepted, shall be eligible to hold or become a candidate for any national, state or local elective office of any kind whatsoever, including any national, state or local office in any political party organization, other than a candidate for the office of judge for the same or any other court.

[*] First included in the 2016 biennial report.

B. The provisions of Subsection (A) of this section shall not be construed as prohibiting any person from resigning from his office as judge of any court for the purpose of becoming a candidate for nomination or election to any national, state or local elective office for which he is qualified and eligible; provided, however, that the resignation of any such person shall be and is made not less than twenty-four hours prior to the date on which he qualifies as a candidate for nomination or election to the office to which he seeks nomination or election.

C. If any judge elected or appointed, justice of the peace excepted, qualifies for any other elective position, other than those allowed by the provisions of this section, without complying with the provisions of Subsection (B) set forth above, his qualification as a candidate for the other office shall ipso facto be null and void.

Exception for justices of the peace held unenforceable by *In re Freeman*, 995 So. 2d 1197, 1206-07 (La. 2008): "The exception for justices of the peace provided in La. R.S. 42:39 conflicts with the mandate in Canon 7(I) that all judges, including justices of the peace, shall resign their judicial offices when they become candidates for non-judicial offices. Therefore, we must determine whether justices of the peace who wish to become candidates for non-judicial offices are governed exclusively by the provisions of Canon 7(I) or whether the statutory exception of La. R.S. 42:39 has any impact in this situation. . . . The provisions of La. R.S. 42:39 were enacted prior to this court's adoption of the Code and prior to the legislature's recognition in La. R.S. 42:1167 that judges, as defined by the Code, shall be governed exclusively by the Code. While La. R.S. 42:39 was perhaps useful at one time, its exception for justices of the peace is now directly in conflict with La. R.S. 42:1167 and Canon 7(I) of the Code. . . . Because the Code, including its prohibition of judges becoming candidates for non-judicial offices prior to resigning their judicial offices, is the exclusive means by which judges' conduct is governed, the exception provided in La. R.S. 42:1167 [*sic, correct citation is La. R.S. 42:39*] cannot be relied upon or enforced. Canon 7(I), adopted pursuant to this court's constitutional authority, is controlling and cannot be made to yield to a legislative enactment that conflicts with this authority."

Recommendation: It is recommended that the legislature amend R.S. 42:39 to remove the exception for justices of the peace as follows:

> A. ~~**After July 31, 1968, n**~~**N**o person serving in or elected or appointed to the office of judge of any court~~**, justices of the peace excepted,**~~ shall be eligible to hold or become a candidate for any national, state or local elective office of any kind whatsoever, including any national, state or local office in any political party organization, other than a candidate for the office of judge for the same or any other court.
>
> B. The provisions of Subsection (A) of this section shall not be construed as prohibiting any person from resigning from his office as judge of any court for the purpose of becoming a candidate for nomination or election to any national, state or local elective office for which he is qualified and eligible; provided, however, that the resignation of any such person shall be and is made not less than twenty-four hours prior to the date on which he qualifies as a candidate for nomination or election to the office to which he seeks nomination or election.

C. If any judge elected or appointed~~**, justice of the peace excepted,**~~ qualifies for any other elective position, other than those allowed by the provisions of this section, without complying with the provisions of Subsection (B) set forth above, his qualification as a candidate for the other office shall ipso facto be null and void.

R.S. 42:1141.4. Notice and procedure[*]

* * *

L. (1) It shall be a misdemeanor, punishable by a fine of not more than two thousand dollars or imprisonment for not more than one year, or both, for any member of the Board of Ethics, its executive secretary, other employee, or **any other person**, other than the person who is subject to the investigation or complaint, to make public the testimony taken at a private investigation or private hearing of the Board of Ethics or to make any public statement or give out any information concerning a private investigation or private hearing of the Board of Ethics without the written request of the public servant or other person investigated.

* * *

Held unconstitutional by *King v. Caldewell ex rel. Louisiana*, 21 F. Supp. 3d 651, 656-57 (E.D. La. 2014): "Insofar as the statute makes it a crime for 'any other person,' besides the subject of an ethics investigation, 'to make any public statement or give out any information concerning a private investigation or private hearing of the Board of Ethics' absent the subject of the investigation's written request, the statute is impermissibly overbroad. . . . The Court hereby declares La. R.S. 42:1141.4(L)(1) invalid insofar as it prohibits 'any other person' from 'mak[ing] any public statement or giv[ing] out any information concerning a private investigation or private hearing of the Board of Ethics.'"

Recommendation: It is recommended that the legislature amend R.S. 42:1141.4(L)(1) to remove the "any other person" language as follows:

(L)(1) It shall be a misdemeanor, punishable by a fine of not more than two thousand dollars or imprisonment for not more than one year, or both, for any member of the Board of Ethics, its executive secretary, **or** other employee, ~~**or any other person,**~~ other than ~~**the**~~ **a** person who is **the** subject ~~**to**~~ **of** the investigation or complaint, to make public the testimony taken at a private investigation or private hearing of the Board of Ethics or to make any public statement or give out any information concerning a private investigation or private hearing of the Board of Ethics without the written request of the public servant or other person investigated.

The legislature may wish to consider whether any other categories of individuals can or should be prohibited from making a public statement or giving out information concerning a private investigation or private hearing of the Board of Ethics.

[*] First included in the 2016 biennial report.

R.S. 42:1451. Action overruled; attorneys' fees[*]

In any appeal under Article X, Section 8 of the constitution by an employee in the classified state civil service to overturn any action by the department or agency employing him in which the decision to take the action is overruled and such decision is found to be unreasonable, the Civil Service Commission shall order the department or agency to pay reasonable attorneys' fees incurred by the employee in the appealing action.

Held unconstitutional by *Appeal of Brisset*, 436 So. 2d 654, 658-59 (La. App. 1 Cir. 1983): "A fortiori, we now hold that the power vested in the commission under Art. X, Sec. 10(A) of the constitution is exclusive in nature with respect to all aspects to the classified service listed therein. This includes appeals from disciplinary action to the commission. As such, L.S.A.-R.S. 42:1451 infringes on the exclusive power granted to the commission by the Louisiana Constitution, Art. X, Sec. 10(A). Therefore, we hold this statute unconstitutional." Although *Appeal of Brisset* is an appellate court decision, the Louisiana Supreme Court denied writs in this case, 441 So. 2d 749 (La. 1983).

Also recognized as unconstitutional by *Ray v. Department of Labor*, 998 So. 2d 206, 211 (La. App. 1 Cir. 2008): "Thus, it is clear that a 'reasonable' attorney fee, as that fee is customarily determined by the courts, is not necessarily insured to attorneys representing state civil service employees challenging a disciplinary action, but rather the fee is limited to a maximum as set by civil service rule."

Recommendation: It is recommended that the legislature repeal R.S. 42:1451 in its entirety.

R.S. 47:301. Definitions[†]

As used in this Chapter, the following words, terms, and phrases have the meaning ascribed to them in this Section, unless the context clearly indicates a different meaning:

* * *

(3)(a) "Cost price" means the actual cost of the articles of tangible personal property without any deductions therefrom on account of the cost of materials used, labor, or service cost, except those service costs for installing the articles of tangible personal property if such cost is separately billed to the customer at the time of installation, **transportation charges**, or any other expenses whatsoever, or the reasonable market value of the tangible personal property at the time it becomes susceptible to the use tax, whichever is less.

* * *

[*] First included in the 2016 biennial report.
[†] First included in the 2016 biennial report.

(13)(a) "Sales price" means the total amount for which tangible personal property is sold, less the market value of any article traded in including any services, except services for financing, that are a part of the sale valued in money, whether paid in money or otherwise, and includes the cost of materials used, labor or service costs, except costs for financing which shall not exceed the legal interest rate and a service charge not to exceed six percent of the amount financed, and losses; provided that cash discounts allowed and taken on sales shall not be included, nor shall the sales price include the amount charged for labor or services rendered in installing, applying, remodeling, or repairing property sold.

* * *

Held unconstitutional by *Chicago Bridge & Iron Co. v. Cocreham*, 317 So. 2d 605, 613-15 (La. 1975): "Having found that transportation cost is an includable element (added value) in determining the use tax basis as applied to the out of state manufacturer-user, we turn now to the question of whether the tax as so applied is unenforceable because illegally discriminatory in violation of the protection guaranteed by the commerce clause of the United States Constitution. Neither the sales nor use tax is imposed upon the in-state manufacturer-user for comparable transportation costs. . . . [D]iscrimination is evident since the out of state purchaser pays use tax fully on the element of transportation cost from state boundary to job site (or plant) while the in-state purchaser pays no tax (sales or use) on transportation cost from in-state retail shop to plant (and/or job site). . . . We conclude that insofar as the use tax is imposed upon the element of transportation cost for shipping . . . from out of state plant to in-state job site, it is unconstitutional and unenforceable because in violation of the commerce clause of the United States Constitution." Also held unconstitutional by *Pensacola Const. Co. v. McNamara*, 558 So. 2d 231, 233-34 (La. 1990): "The purpose of a state sales/use tax scheme is to make all tangible property sold or used subject to a uniform tax burden regardless of whether it is acquired inside the state and subject to a sales tax or acquired outside the state and subject to a use tax. . . . The use tax imposed by LSA-R.S. 47:301(3)(a) on transportation or freight charges is unconstitutional because there is no parallel assessment of sales tax. The statute has not been amended since *Chicago Bridge* to correct the unconstitutional discrimination between out-of-state and in-state sales."

Recommendation: It is recommended that the legislature do one of the following: (1) Amend R.S. 47:301(3)(a) to remove the inclusion of "transportation charges" as follows, which would reflect current practice:

> (3)(a) "Cost price" means the actual cost of the articles of tangible personal property without any deductions therefrom on account of the cost of materials used, labor, or service cost, except those service costs for installing the articles of tangible personal property if such cost is separately billed to the customer at the time of installation, **~~transportation charges~~**, or any other expenses whatsoever, or the reasonable market value of the tangible personal property at the time it becomes susceptible to the use tax, whichever is less.

Or (2) Amend R.S. 47:301(13)(a) to include "transportation charges" as follows, which would result in a tax increase:

(13)(a) "Sales price" means the total amount for which tangible personal property is sold, less the market value of any article traded in including any services, except services for financing, that are a part of the sale valued in money, whether paid in money or otherwise, and includes the cost of materials used, labor or service costs, except costs for financing which shall not exceed the legal interest rate and a service charge not to exceed six percent of the amount financed, **transportation charges,** and losses; provided that cash discounts allowed and taken on sales shall not be included, nor shall the sales price include the amount charged for labor or services rendered in installing, applying, remodeling, or repairing property sold.

PROVISIONS OF LAW DECLARED OR RECOGNIZED AS PREEMPTED

Article X, Section 29. Retirement and Survivor's Benefits[*]

* * *

(E)(5) All assets, proceeds, or income of the state and statewide public retirement systems, and all contributions and payments made to the system to provide for retirement and related benefits shall be held, invested as authorized by law, or disbursed as in trust for the exclusive purpose of providing such benefits, refunds, and administrative expenses under the management of the boards of trustees and shall not be encumbered for or diverted to any other purpose. The accrued benefits of members of any state or statewide public retirement system shall not be diminished or impaired.

* * *

Prior version limited on preemption grounds by *U.S. v. DeCay*, 620 F.3d 534, 543 (La. App. 5 Cir. 2010): "The appellants assert that the United States lacks the authority to garnish DeCay's and Barre's pension benefits because Louisiana law precludes enforcement of a restitution order against pension benefits. *See* LA. CONST. art. X, § 29(E)(5)(a) (1974); La.Rev.Stat. § 11:2182 (1991). To the extent Louisiana law is inconsistent with the FDCPA and MVRA, Louisiana law is preempted. . . . In sum, the MVRA authorizes the United States to use its civil enforcement powers to garnish a defendant's retirement plan benefits, notwithstanding the fact that pension benefits are generally inalienable under federal and state law."

At the time this case was decided, the 2010 version of Const. Art. X, § 29(E)(5)(a) read as follows:

§29. Retirement and Survivor's Benefits

* * *

(E) Actuarial Soundness. * * *

[*] First included in the 2016 biennial report.

(5)(a) All assets, proceeds, or income of the state and statewide public retirement systems, and all contributions and payments made to the system to provide for retirement and related benefits shall be held, invested as authorized by law, or disbursed as in trust for the exclusive purpose of providing such benefits, refunds, and administrative expenses under the management of the boards of trustees and shall not be encumbered for or diverted to any other purpose. The accrued benefits of members of any state or statewide public retirement system shall not be diminished or impaired.

* * *

After the Fifth Circuit's decision, the legislature proposed a constitutional amendment in Acts 2010, No. 1048 to Article X, § 29(E)(5) to change Subparagraph (E)(5)(b) to Paragraph (F), thereby converting Subparagraph (E)(5)(a) to Paragraph (E)(5), effective November 2010. Nevertheless, the substance of the provision remained the same.

Recommendation: It is recommended that the legislature direct the Law Institute to note the *DeCay* decision in a validity note following La. Const. Art. X, Sec. 29.

R.S. 11:2182. Exemption from execution[*]

Any annuity, retirement allowance or benefits, or refund of contributions, or any optional benefit or any other benefit paid to any person under the provisions of the Sheriffs' Pension and Relief Fund is exempt from any state or municipal tax and is exempt from levy and sale, garnishment, attachment, or any other process whatsoever, except as provided in R.S. 11:292, and is unassignable.

Limited on preemption grounds by *U.S. v. DeCay*, 620 F.3d 534, 543 (5th Cir. 2010): "The appellants assert that the United States lacks the authority to garnish DeCay's and Barre's pension benefits because Louisiana law precludes enforcement of a restitution order against pension benefits. *See* LA. CONST. art. X, § 29(E)(5)(a) (1974); La.Rev.Stat. § 11:2182 (1991). To the extent Louisiana law is inconsistent with the FDCPA and MVRA, Louisiana law is preempted. . . In sum, the MVRA authorizes the United States to use its civil enforcement powers to garnish a defendant's retirement plan benefits, notwithstanding the fact that pension benefits are generally inalienable under federal and state law."

Recommendation: It is recommended that the legislature direct the Law Institute to note the *DeCay* decision in a validity note following R.S. 11:2182.

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[*] First included in the 2016 biennial report.

R.S. 14:100.13. Operating a vehicle without lawful presence in the United States[*]

A. No alien student or nonresident alien shall operate a motor vehicle in the state without documentation demonstrating that the person is lawfully present in the United States.

B. Upon arrest of a person for operating a vehicle without lawful presence in the United States, law enforcement officials shall seize the driver's license and immediately surrender such license to the office of motor vehicles for cancellation and shall immediately notify the INS of the name and location of the person.

C. Whoever commits the crime of driving without lawful presence in the United States shall be fined not more than one thousand dollars, imprisoned for not more than one year, with or without hard labor, or both.

Preempted by *State v. Sarrabea*, 126 So. 3d 453, 465 (La. 2013): "Because La. R.S. 14:100.13 operates in the field of alien registration as interpreted by the Supreme Court in *Arizona,* by regulating the circumstances under which non-citizens carry documentation establishing proof of lawful status, the statute is preempted under the Supremacy Clause of the U.S. Constitution, as interpreted by controlling federal jurisprudence."

Held unconstitutional by *State v. Gomez,* 115 So. 3d 1200, 1202-04 (La. App. 3rd Cir. 2013): "In *Arizona* [*v. United States*], 132 S.Ct. 2492 [(2012)], the United States Supreme Court reviewed the validity of four provisions of Arizona statute S.B. 1070, a statute enacted to address the issues relating to the large number of unlawful aliens in that state. . . . The Supreme Court held Section 3 was preempted by federal law. . . . We find that Louisiana's statute, La. R.S. 14:100.13(A), is similar to Section 3 of Arizona's statute. Both forbid the willful failure to carry documentation demonstrating a lawful presence in the United States. Both provide a penalty in excess of the penalty provided by federal law. . . . [W]e find that La. R.S. 14:100.13 is unconstitutional because it is field preempted. Like Arizona's statute, Louisiana requires aliens to carry registration documents. The Supreme Court has held in *Arizona,* 132 S.Ct. 2492, that such a requirement intrudes on the field of alien registration that federal law has already occupied. Accordingly, we hold that Louisiana's statute is field preempted. Further, we find that La. R.S. 14:100.13 is also conflict preempted. Louisiana's statute makes a felony of an offense federal law considers a misdemeanor. The Supreme Court found fault with a similar provision in Arizona's statute. Accordingly, we hold that La. R.S. 14:100.13 is unconstitutional." Although *State v. Gomez* is an appellate court decision, the Louisiana Supreme Court dismissed an appeal from the decision as moot, 133 So. 3d 669 (La. 2014) and also denied writs in this case, 133 So. 3d 671 (La. 2014).

Recommendation: It is recommended that the legislature repeal R.S. 14:100.13 in its entirety.

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[*] First included in the 2016 biennial report.

APPENDIX A: PROVISIONS NOT INCLUDED IN THE LAW INSTITUTE'S INITIAL BIENNIAL REPORT THAT HAVE BEEN ADDRESSED BY THE LEGISLATURE

Revised Statutes

R.S. 14:30. First degree murder

* * *

C. (1) If the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury. The provisions of Code of Criminal Procedure Article 782 relative to cases in which punishment may be capital shall apply.

(2) If the district attorney does not seek a capital verdict, the offender shall be punished by life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. The provisions of Code of Criminal Procedure Article 782 relative to cases in which punishment is necessarily confinement at hard labor shall apply.

* * *

R.S. 14:30.1. Second degree murder

* * *

B. Whoever commits the crime of second degree murder shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

Note to the Legislature

No recommendations with respect to R.S. 14:30(C) and 30.1(B) were included in the Law Institute's initial unconstitutional statutes biennial report to the legislature. However, it appeared that both of these provisions were limited on constitutional grounds by the United States Supreme Court's holding in *Miller v. Alabama*, 132 S. Ct. 2455, 2469, 2475 (2012):

> "We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. . . .*Graham, Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment."'

A prior version of R.S. 14:30.1 was also held unconstitutional as applied by the Second Circuit in *State v. Fletcher*, 112 So. 3d 1031 (La. App. 2 Cir. 2013), *writ denied* by 171 So. 3d 945 (La. 2015) and *certiorari denied* by 136 S. Ct. 254 (2015): "[C]onsidering the fact that the trial court imposed the mandatory sentence pursuant to La. R.S. 14:30.1, we find that we must vacate the defendant's sentence and remand this case . . . Relying on jurisprudence, we find that the defendant's mandatory sentence of two concurrent terms of life imprisonment at hard labor, without benefit of probation, parole, or suspension of sentence, violates *Graham, supra,* and *Miller, supra*."

At the time this case was decided, Paragraph B of R.S. 14:30.1 read exactly as it appears above. Acts 2015, No. 184 amended Paragraph (A)(2) of the provision in conjunction with amendments that designated the offenses of aggravated and forcible rape as first and second degree rape, respectively, but the provision's mandatory imposition of life imprisonment without the benefit of parole has not changed. Additionally, R.S. 15:574.4(E) had not yet been enacted by the legislature as of the rendition of this opinion. In fact, the *Fletcher* court recognized that although R.S. 15:574.4(D) applies to juvenile offenders who were sentenced to life imprisonment for the conviction of certain offenses, it "does not apply to juveniles serving a life sentence for a conviction of first degree or second degree murder." The court further noted that "[t]he State of Louisiana does not currently have a statute that would afford a juvenile offender convicted of first or second degree murder consideration for parole."

However, mere months after this opinion was rendered, in Acts 2013, No. 239, the legislature enacted both Code of Criminal Procedure Article 878.1 and R.S. 15:574.4(E), which prior to the 2017 Regular Session provided that a person who is serving a sentence of life imprisonment for first degree murder (R.S. 14:30) or second degree murder (R.S. 14:30.1) and who was under the age of eighteen years at the time of the commission of the offense "shall be eligible for parole consideration" provided that all of the conditions set forth in the provision are met and "a judicial determination has been made that the person is entitled to parole eligibility pursuant to Code of Criminal Procedure Article 878.1." Both of these provisions were enacted in response to the United States Supreme Court's decision in *Miller v. Alabama* and were being applied prospectively only until the Court's decision in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016).

In the *Montgomery* case, the United States Supreme Court concluded that "[b]ecause *Miller* determined that sentencing a child to life without parole is excessive for all but " 'the rare juvenile offender whose crime reflects irreparable corruption,' " 567 U.S., at ——, 132 S.Ct., at 2469 (quoting *Roper, supra,* at 573, 125 S.Ct. 1183), it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. *Penry,* 492 U.S., at 330, 109 S.Ct. 2934. As a result, *Miller* announced a substantive rule of constitutional law. Like other substantive rules, *Miller* is retroactive because it " 'necessarily carr[ies] a significant risk that a defendant' "—here, the vast majority of juvenile offenders—" 'faces a punishment that the law cannot impose upon him.' " *Schriro,* 542 U.S., at 352, 124 S.Ct. 2519 (quoting *Bousley v. United States,* 523 U.S. 614, 620, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998))."

Consequently, during the 2017 Regular Session, the legislature enacted a series of amendments in Acts 2017, No. 277 to R.S. 15:574.4 and Code of Criminal Procedure Article 878.1. R.S. 15:574.4(F) now provides that if a person was under the age of eighteen at the time of the commission of the offense of second degree murder (R.S. 14:30.1), for which he is serving a sentence of life imprisonment, and was indicted on or after August 1, 2017, the person "shall be eligible for parole consideration" provided that all of the conditions set forth in the provision are met. R.S. 15:574.4(E) provides the same with respect to first degree murder (R.S. 14:30) and further conditions eligibility for parole consideration upon whether a "judicial determination has been made that the person is entitled to parole eligibility pursuant to Code of Criminal Procedure Article 878.1(A)." One of these conditions, that the offender has served a certain number of years of the sentence imposed, was also amended by the Act to reduce this amount of time from thirty to twenty-five years. Additionally, Paragraph A of Article 878.1 now provides that if the juvenile offender was indicted for the offense of first degree murder on or after August 1, 2017, "the district attorney may file a notice of intent to seek a sentence of life imprisonment without possibility of parole within one hundred eighty days after the indictment," in which case "a hearing shall be conducted after conviction and prior to sentencing to determine whether the sentence shall be imposed with or without parole eligibility" pursuant to the provisions of R.S. 15:574.4(E).

Additionally, R.S. 15:574.4(G) provides that if a person was under the age of eighteen at the time of the commission of the offense of first degree murder (R.S. 14:30), or second degree murder (R.S. 14:30.1), for which he is serving a sentence of life imprisonment, and was indicted prior to August 1, 2017, the person "shall be eligible for parole consideration" provided that all of the conditions set forth in the provision are met and a "judicial determination has been made that the person is entitled to parole eligibility pursuant to Code of Criminal Procedure Article 878.1(B)." Paragraph B of Article 878.1 then provides that if the juvenile offender was indicted for the offense of first or second degree murder prior to August 1, 2017 and a hearing was not held pursuant to this Article, "the district attorney may file a notice of intent to seek a sentence of life imprisonment without possibility of parole within ninety days of August 1, 2017," in which case "a hearing shall be conducted to determine whether the sentence shall be imposed with or without parole eligibility" pursuant to the provisions of R.S. 15:574.4(G). However, if the district attorney fails to timely file the notice of intent, the juvenile offender will be eligible for parole pursuant to R.S. 15:574.4(E). And, if a hearing was held prior to August 1, 2017, the juvenile offender's parole eligibility pursuant to the provisions of R.S. 15:574.4(G) will be decided based on the court's determination at the hearing.

The Law Institute considered the recent enactments of R.S. 15:574.4(F) and (G) and amendments to R.S. 14:574.4(E) and Code of Criminal Procedure Article 878.1, as well as the appellate courts' decisions in *State v. Fletcher*, 149 So. 3d 934 (La. App. 2 Cir. 2014), *State v. Graham*, 171 So. 3d 372 (La. App. 1 Cir. 2015), *State v. Doise*, 185 So. 3d 335 (La. App. 3 Cir. 2016), *State v. Williams*, 186 So. 3d 242 (La. App. 4 Cir. 2016), and *State v. Ross*, 182 So. 3d 983 (La. App. 5 Cir. 2014), all of which either held or suggested that the legislature was not required to amend the substantive provisions themselves to provide for parole eligibility for juvenile offenders. Ultimately, the Law Institute determined that both of these provisions are likely no longer unconstitutional and, as a result, no recommendations with respect to them are made in this biennial report.

R.S. 14:42. First degree rape

A. First degree rape is a rape committed upon a person sixty-five years of age or older or where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:

* * *

(4) When the victim is under the age of thirteen years. Lack of knowledge of the victim's age shall not be a defense.

* * *

D. (1) Whoever commits the crime of first degree rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

(2) However, if the victim was under the age of thirteen years, as provided by Paragraph A(4) of this Section:

(a) And if the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury. The provisions of C.Cr.P. Art. 782 relative to cases in which punishment may be capital shall apply.

(b) And if the district attorney does not seek a capital verdict, the offender shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The provisions of Code of Criminal Procedure Art. 782 relative to cases in which punishment is necessarily confinement at hard labor shall apply.

* * *

R.S. 14:44. Aggravated kidnapping

Aggravated kidnapping is the doing of any of the following acts with the intent thereby to force the victim, or some other person, to give up anything of apparent present or prospective value, or to grant any advantage or immunity, in order to secure a release of the person under the offender's actual or apparent control:

(1) The forcible seizing and carrying of any person from one place to another; or

(2) The enticing or persuading of any person to go from one place to another; or

(3) The imprisoning or forcible secreting of any person.

Whoever commits the crime of aggravated kidnapping shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

* * *

R.S. 14:44.2. Aggravated kidnapping of a child

* * *

B.(1) Whoever commits the crime of aggravated kidnapping of a child shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

(2) Notwithstanding the provisions of Paragraph (1) of this Subsection, if the child is returned not physically injured or sexually abused, then the offender shall be punished in accordance with the provisions of R.S. 14:44.1.

* * *

R.S. 14:128.1. Terrorism

A. Terrorism is the commission of any of the acts enumerated in this Subsection, when the offender has the intent to intimidate or coerce the civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by intimidation or coercion:

(1) Intentional killing of a human being.

* * *

B.(1) Whoever commits the crime of terrorism as provided in Paragraph (A)(1) of this Section shall be punished by life imprisonment at hard labor, without benefit of probation, parole, or suspension of sentence.

* * *

Note to the Legislature

No recommendations with respect to R.S. 14:42(D)(1), 44, 44.2(B)(1), and 128.1(B)(1) were included in the Law Institute's initial unconstitutional statutes biennial report to the legislature. However, it appeared that the validity of these provisions may be called into doubt under the United States Supreme Court's holding in *Graham v. Florida*, 560 U.S. 48, 52-53; 74-75; 82 (2010):

> "The issue before the Court is whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime. The sentence was imposed by the State of Florida. Petitioner challenges the sentence

> under the Eighth Amendment's Cruel and Unusual Punishments Clause, made applicable to the States by the Due Process Clause of the Fourteenth Amendment. . . . In sum, penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders. This determination; the limited culpability of juvenile nonhomicide offenders; and the severity of life without parole sentences all lead to the conclusion that the sentencing practice under consideration is cruel and unusual. This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole. This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment. Because "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood," those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime. . . . The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society. . . . The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term."

Nevertheless, under R.S. 15:574.4(D), a person who was under the age of eighteen at the time of the commission of the offense for which he is serving a sentence of life imprisonment, with the exception of the offenses of first degree murder (R.S. 14:30) and second degree murder (R.S. 14:30.1), "shall be eligible for parole consideration" provided that all of the conditions set forth in the provision are met. One such condition, that the offender has served a certain number of years of the sentence imposed, was amended by Acts 2017, No. 277 to reduce this amount of time from thirty to twenty-five years.

The Law Institute considered the provisions of R.S. 15:574.4(D) as well as the appellate courts' decisions in *State v. Fletcher*, 149 So. 3d 934 (La. App. 2 Cir. 2014), *State v. Graham*, 171 So. 3d 372 (La. App. 1 Cir. 2015), *State v. Doise*, 185 So. 3d 335 (La. App. 3 Cir. 2016), *State v. Williams*, 186 So. 3d 242 (La. App. 4 Cir. 2016), and *State v. Ross*, 182 So. 3d 983 (La. App. 5 Cir. 2014), all of which either held or suggested that the legislature was not required to amend the substantive provisions themselves to provide for parole eligibility for juvenile offenders. Ultimately, the Law Institute determined that all of these provisions are likely no longer unconstitutional and, as a result, no recommendations with respect to them are made in this biennial report.

APPENDIX B: PROVISIONS INCLUDED IN THE LAW INSTITUTE'S INITIAL BIENNIAL REPORT THAT HAVE BEEN ADDRESSED BY THE LEGISLATURE

Code of Criminal Procedure

Article 412. Drawing grand jury venire and subpoena of veniremen; Orleans Parish

A. In Orleans Parish, upon order of the court, the commission shall draw the grand jury venire pursuant to the provisions of Code of Criminal Procedure Article 411(A).

B. The commission shall prepare and certify a list containing the names so drawn, and the list shall be delivered to the judge who ordered the drawing.

C. The court may direct the jury commission to prepare subpoenas directed to the persons on the grand jury venire, ordering their appearance in court on the date set by the court for the selection of the grand jury, and the jury commission shall then cause the subpoenas to be served in accordance with the provisions of Article 404.1(B) or R.S. 15:112, as directed by the court.

Prior version held unconstitutional by *State v. Dilosa*, 848 So. 2d 546, 551 (La. 2003): "Because the complained of statutes are local laws which concern the practice of the criminal courts in Orleans Parish, we conclude that they are unconstitutional. . . .With regard to Article 412, it is impossible to sever Paragraph A from the remainder of the statute without destroying the statute's intent. Article 412, then, as it was constituted at the time of defendants' indictment, is unconstitutional in its entirety."

At the time this case was decided, the 1999 version of Code of Criminal Procedure Article 412(A) read:

> **Article 412. Drawing grand jury venire and subpoena of veniremen; Orleans Parish**
>
> A. In Orleans Parish, upon order of the court, the commission shall draw indiscriminately and by lot from the general venire box the names of seventy-five qualified persons, who shall constitute the grand jury venire.
>
> * * *

Before the Louisiana Supreme Court's decision, in Acts 2001, No. 281, the legislature amended Article 412 with respect to procedures for drawing of grand jury venire in Orleans Parish. Because the legislature amended Paragraph (A) of Article 412, which the *Dilosa* court later declared unconstitutional, perhaps the current version of the statute is not unconstitutional or preempted. However, Paragraphs (B) and (C), which were also declared unconstitutional because of their relationship to Paragraph (A), have remained the same.

Recommendation: After review by the Law Institute's Criminal Code and Code of Criminal Procedure Committee, it is recommended that the legislature repeal Code of Criminal Procedure Art. 412 in its entirety.

Note to the Legislature

During the 2016 Regular Session, Code of Criminal Procedure Article 412 was repealed by Acts 2016, No. 389, § 3, as recommended by the Law Institute.

Article 413. Method of impaneling of grand jury; selection of foreman

A. The grand jury shall consist of twelve persons plus no fewer than two nor more than four alternates qualified to serve as jurors, selected or drawn from the grand jury venire.

B. The sheriff or his designee, or the clerk or a deputy clerk of court, or in Orleans Parish the jury commissioner shall draw indiscriminately and by lot from the envelope containing the remaining names on the grand jury venire a sufficient number of names to complete the grand jury. The envelope containing the remaining names shall be replaced into the grand jury box for use in filling vacancies as provided in Article 415. The court shall cause a random selection to be made of one person from the impaneled grand jury to serve as foreman of the grand jury.

C. The alternate grand jurors shall receive the charge as provided in Article 432 but shall not be sworn nor become members of the grand jury except as provided in Article 415.

Prior version limited on constitutional grounds by *State v. Dilosa*, 848 So. 2d 546, 551 (La. 2003): "Because the complained of statutes are local laws which concern the practice of the criminal courts in Orleans Parish, we conclude that they are unconstitutional. . . .The offending language in Article 413, as it read in 1999 . . . is severable, however. Considering Article 413, the introductory phrase of Paragraph B, as well as of Paragraph C, may be struck without damaging the intent of the legislature, which, as indicated by the title of the statute, was to provide a method of impaneling a grand jury and selecting its foreperson."

At the time this case was decided, the 1999 version of Code of Criminal Procedure Article 413 was still in effect, the introductory phrase of Paragraph (B) of which read: "In parishes other than Orleans . . ." and Paragraph (C) of which read: "In the parish of Orleans, the court shall select twelve persons plus a first and second alternate for a total of fourteen persons from the grand jury venire, who shall constitute the grand jury. The court shall thereupon select one of the jurors to serve as foreman." Before the Louisiana Supreme Court's decision, in Acts 2001, No. 281, the legislature amended Article 413(B) to remove its exception for Orleans Parish and repealed Article 413(C) in its entirety.

Recommendation: After review by the Law Institute's Criminal Code and Code of Criminal Procedure Committee, it is recommended that the legislature amend Code of Criminal Procedure Article 413(B) to remove the offending language as follows:

B. The sheriff or his designee, or the clerk or a deputy clerk of court, or ~~**in Orleans Parish**~~ the jury commissioner shall draw indiscriminately and by lot from the envelope containing the remaining names on the grand jury venire a sufficient number of names to complete the grand jury. The envelope containing the remaining names shall be replaced into the grand jury box for use in filling vacancies as provided in Article 415. The court shall cause a random selection to be made of one person from the impaneled grand jury to serve as foreman of the grand jury.

Note to the Legislature

During the 2016 Regular Session, Code of Criminal Procedure Article 413(B) was amended by Acts 2016, No. 389, § 1 to remove the "in Orleans Parish" language from the provision, as recommended by the Law Institute.

Article 414. Time for impaneling grand juries; period of service

* * *

B. In parishes other than Orleans, the court shall fix the time at which a grand jury shall be impaneled, but no grand jury shall be impaneled for more than eight months, nor less than four months, except in the parish of Cameron in which the grand jury may be impaneled for a year.

C. In Orleans Parish, a grand jury venire shall be drawn by the jury commission on the date set by the presiding judge. On the next legal day following the drawing, the jury commission shall submit the grand jury venire to the presiding judge, who shall impanel the grand jury. A grand jury in Orleans Parish shall be impaneled on the first Wednesday of March and September of each year.

* * *

Held unconstitutional by *State v. Dilosa*, 848 So. 2d 546, 551 (La. 2003): "Because the complained of statutes are local laws which concern the practice of the criminal courts in Orleans Parish, we conclude that they are unconstitutional. . . . The offending language . . . in Article 414 is severable, however. . . . Likewise, the introductory phrase of Paragraph B, as well as all of Paragraph C, may be struck without doing violence to the legislature's intent, which as to provide a time for impaneling grand juries and their terms of service."

Recommendation: After review by the Law Institute's Criminal Code and Code of Criminal Procedure Committee, it is recommended that the legislature do both of the following:

1. Amend Code of Criminal Procedure Art. 414(B) to remove the offending language as follows:

B. ~~**In parishes other than Orleans, t**~~**T**he court shall fix the time at which a grand jury shall be impaneled, but no grand jury shall be impaneled for more than eight months, nor less than four months, except in the parish of Cameron in which the grand jury may be impaneled for a year.

2. Repeal Code of Criminal Procedure Art. 414(C) in its entirety.

Note to the Legislature

During the 2016 Regular Session, Code of Criminal Procedure Article 414(B) was amended by Acts 2016, No. 389, § 1 to remove the "In parishes other than Orleans" language from the provision, and Article 414(C) was repealed by Acts 2016, No. 389, § 3, both as recommended by the Law Institute.

Revised Statutes

R.S. 11:62. Employee contribution rates established

Held unconstitutional by *Retired State Employees Ass'n v. State,* 119 So. 3d 568, 581 (La. 2013): "The district court declared that Act No. 483 of the 2012 Regular Session of the Louisiana Legislature was enacted in violation of the constitutional requirements found in Article X, Section 29(F) of the Louisiana Constitution. . . . Because the legislative auditor's actuarial note for HB 61 (Act 483) estimated an actuarial increase for the proposed cash balance plan over the current defined benefit plan, a vote of two-thirds of the elected members of the House was required pursuant to La. Const. art. X, § 29(F). Because it was stipulated that a two-thirds vote was not obtained in the House, the district court correctly found that Act 483 was enacted in violation of Article X, § 29(F)."

NOTE: Although the legislature's website no longer shows any of the amendments or enactments as provided by Acts 2012, No. 483, West continues to print such provisions as amended or enacted with a disclaimer that the cash balance retirement plan was held unconstitutional.

Recommendation: It is recommended that the legislature do one of the following: (1) Reenact R.S. 11:62 to exclude the language added by Acts 2012, No. 483; or (2) Pass a Resolution directing the Law Institute to direct the printer to stop printing the language added by Acts 2012, No. 483 as follows:

(4) Louisiana School Employees' Retirement System ~~**members in Tier 1**~~:

~~**(4.1) Louisiana School Employees' Retirement System members in the cash balance plan – 8%**~~

(5) Louisiana State Employees' Retirement System ~~**members in Tier 1**~~:

~~**(5.1) Louisiana State Employees' Retirement System members in the cash balance plan – 8%**~~

(11) Teachers' Retirement System of Louisiana ~~**members in Tier 1**~~:

~~**(11.1) Teachers' Retirement System of Louisiana members in the cash balance plan – 8%**~~

Note to the Legislature

During the 2017 Regular Session, the legislature passed House Concurrent Resolution No. 46, which directed the Law Institute to direct the printer to stop printing the language added by Acts 2012, No. 483 in R.S. 11:62(4), (5), and (11) and to stop printing R.S. 11:62(4.1), (5.1), and (11.1) as enacted by Acts 2012, No. 483 in their entirety, both as recommended by the Law Institute. The resolution also urged and requested the printer to "stop printing the headnote regarding *Retired State Employees Association v. State*, 119 So.3d 568 (La., 2013) that appears at R.S. 11:62, 102, 542, 883.1, and 1145.1."

R.S. 11:102. Employer contributions; determination; state systems

Held unconstitutional by *Retired State Employees Ass'n v. State,* 119 So. 3d 568, 581 (La. 2013): "The district court declared that Act No. 483 of the 2012 Regular Session of the Louisiana Legislature was enacted in violation o the constitutional requirements found in Article X, Section 29(F) of the Louisiana Constitution. . . . Because the legislative auditor's actuarial note for HB 61 (Act 483) estimated an actuarial increase for the proposed cash balance plan over the current defined benefit plan, a vote of two-thirds of the elected members of the House was required pursuant to La. Const. art. X, § 29(F). Because it was stipulated that a two-thirds vote was not obtained in the House, the district court correctly found that Act 483 was enacted in violation of Article X, § 29(F)."

NOTE: Although the legislature's website no longer shows any of the amendments or enactments as provided by Acts 2012, No. 483, West continues to print such provisions as amended or enacted with a disclaimer that the cash balance retirement plan was held unconstitutional.

Recommendation: It is recommended that the legislature do one of the following: (1) Reenact R.S. 11:102 to exclude the language added by Acts 2012, No. 483; or (2) Pass a Resolution directing the Law Institute to direct the printer to stop printing the language added by Acts 2012, No. 483 as follows:

(B)(1) Except as provided in Subsection C of this Section for the Louisiana State Employees' Retirement System and Subsection D of this Section for the Teachers' Retirement System of Louisiana and except as provided in R.S. 11:102.1, 102.2, and in Paragraph (5) of this Subsection, for each fiscal year, commencing with Fiscal Year 1989-

1990, for each of the public retirement systems referenced in Subsection A of this Section, the legislature shall set the required employer contribution rate equal to the actuarially required employer contribution, as determined under Paragraph (3) of this Subsection, divided by the total projected payroll of all active members ~~**including cash balance plan members**~~ of each particular system for the fiscal year. Each entity funding a portion of a member's salary shall also fund the employer's contribution on that portion of the member's salary at the employer contribution rate specified in this Subsection.

(B)(3)(a) The employer's normal cost for that fiscal year, computed as of the first of the fiscal year using the system's actuarial funding method as specified in R.S. 11:22 and taking into account the value of future accumulated employee contributions and interest thereon, such employer's normal cost rate multiplied by the total projected payroll for all active members ~~**including cash balance plan members**~~ to the middle of that fiscal year. For the Louisiana State Employees' Retirement System, effective for the June 30, 2010, system valuation and beginning with Fiscal Year 2011-2012, the normal cost shall be determined in accordance with Subsection C of this Section. For the Teachers' Retirement System of Louisiana, effective for the June 30, 2011, system valuation and beginning with Fiscal Year 2012-2013, the normal cost shall be determined in accordance with Subsection D of this Section.

~~**(C)(1)(m) Members in the cash balance plan.**~~

Note to the Legislature

During the 2016 Regular Session, R.S. 11:102(B)(1), (3)(a), and (C) were amended and reenacted by Acts 2016, No. 95, § 1 to exclude the language added by Acts 2012, No. 483, as recommended by the Law Institute.

R.S. 11:542. Experience account

Held unconstitutional by *Retired State Employees Ass'n v. State,* 119 So. 3d 568, 581 (La. 2013): "The district court declared that Act No. 483 of the 2012 Regular Session of the Louisiana Legislature was enacted in violation o the constitutional requirements found in Article X, Section 29(F) of the Louisiana Constitution. . . . Because the legislative auditor's actuarial note for HB 61 (Act 483) estimated an actuarial increase for the proposed cash balance plan over the current defined benefit plan, a vote of two-thirds of the elected members of the House was required pursuant to La. Const. art. X, § 29(F). Because it was stipulated that a two-thirds vote was not obtained in the House, the district court correctly found that Act 483 was enacted in violation of Article X, § 29(F)."

NOTE: Although the legislature's website no longer shows any of the amendments or enactments as provided by Acts 2012, No. 483, West continues to print such provisions as amended or enacted with a disclaimer that the cash balance retirement plan was held unconstitutional.

Recommendation: It is recommended that the legislature do one of the following: (1) Reenact R.S. 11:542 to exclude the language added by Acts 2012, No. 483; or (2) Pass a Resolution directing the Law Institute to direct the printer to stop printing the language added by Acts 2012, No. 483 as follows:

~~**(C)(4)(d)(iii) Shall be a member of Tier 1.**~~

~~**(C)(4)(e)(iii) If the benefits are based on Tier 1 service.**~~

Note to the Legislature

During the 2016 Regular Session, R.S. 11:542(C) was amended and reenacted by Acts 2016, No. 95, § 1 to exclude the language added by Acts 2012, No. 483, as recommended by the Law Institute.

R.S. 11:883.1. Experience account

Held unconstitutional by *Retired State Employees Ass'n v. State,* 119 So. 3d 568, 581 (La. 2013): "The district court declared that Act No. 483 of the 2012 Regular Session of the Louisiana Legislature was enacted in violation o the constitutional requirements found in Article X, Section 29(F) of the Louisiana Constitution. . . . Because the legislative auditor's actuarial note for HB 61 (Act 483) estimated an actuarial increase for the proposed cash balance plan over the current defined benefit plan, a vote of two-thirds of the elected members of the House was required pursuant to La. Const. art. X, § 29(F). Because it was stipulated that a two-thirds vote was not obtained in the House, the district court correctly found that Act 483 was enacted in violation of Article X, § 29(F)."

NOTE: Although the legislature's website no longer shows any of the amendments or enactments as provided by Acts 2012, No. 483, West continues to print such provisions as amended or enacted with a disclaimer that the cash balance retirement plan was held unconstitutional.

Recommendation: It is recommended that the legislature do one of the following: (1) Reenact R.S. 11:883.1 to exclude the language added by Acts 2012, No. 483; or (2) Pass a Resolution directing the Law Institute to direct the printer to stop printing the language added by Acts 2012, No. 483 as follows:

~~**(C)(4)(d)(iii) Shall be a member of Tier 1.**~~

~~**(C)(4)(e)(iii) If the benefits are based on a Tier 1 service.**~~

Note to the Legislature

During the 2016 Regular Session, R.S. 11:883.1(C) was amended and reenacted by Acts 2016, No. 95, § 1 to exclude the language added by Acts 2012, No. 483, as recommended by the Law Institute.

R.S. 11:1145.1. Employee Experience Account

Held unconstitutional by *Retired State Employees Ass'n v. State,* 119 So. 3d 568, 581 (La. 2013): "The district court declared that Act No. 483 of the 2012 Regular Session of the Louisiana Legislature was enacted in violation o the constitutional requirements found in Article X, Section 29(F) of the Louisiana Constitution. . . . Because the legislative auditor's actuarial note for HB 61 (Act 483) estimated an actuarial increase for the proposed cash balance plan over the current defined benefit plan, a vote of two-thirds of the elected members of the House was required pursuant to La. Const. art. X, § 29(F). Because it was stipulated that a two-thirds vote was not obtained in the House, the district court correctly found that Act 483 was enacted in violation of Article X, § 29(F)."

NOTE: Although the legislature's website no longer shows any of the amendments or enactments as provided by Acts 2012, No. 483, West continues to print such provisions as amended or enacted with a disclaimer that the cash balance retirement plan was held unconstitutional.

Recommendation: It is recommended that the legislature do one of the following: (1) Reenact R.S. 11:1145.1 to exclude the language added by Acts 2012, No. 483; or (2) Pass a Resolution directing the Law Institute to direct the printer to stop printing the language added by Acts 2012, No. 483 as follows:

> (C)(4)(a) Except as provided in Subparagraph (c) of this Paragraph, in order to be eligible for the cost-of-living adjustment, there shall be the funds available in the ~~**experience account**~~ **Employee Experience Account** to pay for such an adjustment, and a retiree:
>
> ~~**(C)(4)(a)(iii) Shall be a member of Tier 1.**~~
>
> ~~**(C)(4)(b)(iii) If benefits are based on Tier 1 service.**~~
>
> (E) Effective July 1, 2007, the balance in the ~~**experience account**~~ **Employee Experience Account** shall be zero.

Note to the Legislature

During the 2016 Regular Session, R.S. 11:1145.1(C) and (E) were amended and reenacted by Acts 2016, No. 95, § 1 to exclude the language added by Acts 2012, No. 483, as recommended by the Law Institute.

R.S. 11:1399.1 to 1399.7. Cash Balance Plan for State Retirement Systems

Held unconstitutional by *Retired State Employees Ass'n v. State,* 119 So. 3d 568, 581 (La. 2013): "The district court declared that Act No. 483 of the 2012 Regular Session of the Louisiana Legislature was enacted in violation of the constitutional requirements found in Article X, Section 29(F) of the Louisiana Constitution. . . . Because the legislative auditor's actuarial note for HB 61 (Act 483) estimated an actuarial increase for the proposed cash balance plan over the current defined benefit plan, a vote of two-thirds of the elected members of the House was required pursuant to La. Const. art. X, § 29(F). Because it was stipulated that a two-thirds vote was not obtained in the House, the district court correctly found that Act 483 was enacted in violation of Article X, § 29(F)."

NOTE: Although the legislature's website no longer shows any of the amendments or enactments as provided by Acts 2012, No. 483, West continues to print such provisions as amended or enacted with a disclaimer that the cash balance retirement plan was held unconstitutional.

Recommendation: It is recommended that the legislature pass a Resolution directing the Law Institute to direct the printer to stop printing R.S. 11:1399.1 through 1399.7 as enacted by Acts 2012, No. 483 in their entirety.

Note to the Legislature

During the 2017 Regular Session, the legislature passed House Concurrent Resolution No. 46, which directed the Law Institute to direct the printer to stop printing R.S. 11:1399.1 through 1399.7 as enacted by Acts 2012, No. 483 in their entirety, as recommended by the Law Institute.

R.S. 13:5105. Jury trial prohibited; demand for trial; costs

A. No suit against a political subdivision of the state shall be tried by jury. Except upon a demand for jury trial timely filed in accordance with law by the state or a state agency or the plaintiff in a lawsuit against the state or state agency, no suit against the state or a state agency shall be tried by jury.

* * *

C. Notwithstanding the provisions of Subsection A, except upon demand for jury trial timely filed in accordance with law by the city of Baton Rouge or the parish of East Baton Rouge or the plaintiff in a lawsuit against the city of Baton Rouge or the parish of East Baton Rouge, no suit against the city of Baton Rouge or the parish of East Baton Rouge shall be tried by jury. The rights to and limitations upon a jury trial shall be as provided in Code of Civil Procedure Articles 1731 and 1732.

* * *

Held unconstitutional by *Kimball v. Allstate Ins. Co.*, 712 So. 2d 46, 50, 52-53 (La. 1998): "The first issue presented for our determination is whether La. R.S. 13:5105(C) is unconstitutional under La. Const. Art. III, § 12(A). The legislature is prohibited from passing any local or special law which deals with any of the subjects enumerated in La. Const. Art. III, § 12(A). . . . Subsection (C) is, however, a special law. It singles out the City of Baton Rouge and the Parish of East Baton Rouge, to the exclusion of all other political subdivisions, for special treatment without any suggested or apparent justification for the disparate treatment, despite the fact that all political subdivisions possess the requisite characteristics of the class. . . . Subsection (C) does, however, concern civil actions. . . . Here, Subsection (C) concerns and affects not only an individual lawsuit, but, more egregiously, any and all lawsuits in which the City of Baton Rouge of the Parish of East Baton Rouge is made a defendant. Consequently, Subsection (C) is a special law which concerns civil actions and is unconstitutional under La. Const. Art. III, § 12(A)(3)."

Recommendation: It is recommended that the legislature repeal R.S. 13:5105(C) in its entirety.

Note to the Legislature

During the 2017 Regular Session, R.S. 13:5105(C) was repealed by Acts 2016, No. 341, § 1, as recommended by the Law Institute.

R.S. 14:95.4. Consent to search; alcoholic beverage outlet

A. Any person entering an alcoholic beverage outlet as defined herein, by the fact of such entering, shall be deemed to have consented to a reasonable search of his person for any firearm by a law enforcement officer or other person vested with police power, without the necessity of a warrant.

* * *

Held unconstitutional by *Ringe v. Romero*, 624 F. Supp. 417, 418-19, 425 (W.D. La. 1985): "Plaintiffs claim that the above statute and ordinance violate their right to be secure from unreasonable searches and seizures as protected by the Fourth Amendment of the United States Constitution. The fundamental purpose of the fourth amendment's prohibition against unreasonable searches and seizures 'is to safeguard the privacy and security of individuals against arbitrary invasions by government officials.' . . . The Supreme Court has consistently held that police must, whenever practicable, obtain advance judicial approval of a proposed search by obtaining a warrant based on probable cause. . . . Pursuant to the fourteenth amendment, the fourth amendment prohibition against unreasonable searches is applicable to state action. This court must therefore determine whether the warrantless searches authorized by the laws in the instant case fit within one of the few exceptions established by the Supreme Court to the warrant-based-on-probable cause requirement of the fourth amendment, or whether they violate the fourth

amendment prohibition against unreasonable searches. . . . As defendants offer no other basis for finding the searches authorized by these laws reasonable within the meaning of the fourth amendment, this court finds that the authorized searches are unreasonable and, hence, the statute and ordinance authorizing such searches are facially unconstitutional."

Recommendation: It is recommended that the legislature direct the Law Institute to note the federal district court judgment holding R.S. 14:95.4 unconstitutional.

Note to the Legislature

During the 2016 Regular Session, R.S. 14:95.4 was repealed by Acts 2016, No. 201, § 1.

R.S. 15:114. Parish of Orleans; rotation and selection of grand jury; control of grand jury

Each judge of the criminal district court for the parish of Orleans shall, in rotation, select the grand jury for the Parish of Orleans. The order of rotation among the judges in the selection of the grand jury prevailing at the time this Section goes into effect shall be preserved and continued. The judge of the section of the criminal district court who shall have appointed said grand jury shall have control and instruction over the grand jury, exclusive of all other judges of the criminal district court, and such grand jury shall make all findings and returns in open court to said judge; and in addition thereto may make reports and requests in open court as provided by law; provided that if the judge to whom the control of the grand jury shall belong shall not be from any cause in the actual discharge of his duties as judge, the judges of the criminal district court then present shall designate some other judge to impanel and instruct said grand jury, or to receive its returns and findings, as the case may be, and the judge so designated shall continue to act for the judge to whom the control of such grand jury shall belong until said last-mentioned judge shall return to the discharge of duties; provided, further, that the grand jury in office at the time of the adoption of this Section shall, until the expiration of that term of office, be under the control of the presiding judge of the section by whom it was selected and shall return all indictments and findings to said judge in open court.

Held unconstitutional by *State v. Dilosa*, 848 So. 2d 546, 551 (La. 2003): "Because the complained of statutes are local laws which concern the practice of the criminal courts in Orleans Parish, we conclude that they are unconstitutional. . . . Likewise, § 15:144 [*sic, correct citation is § 15:114*] is unconstitutional in its entirety."

Recommendation: After review by the Law Institute's Criminal Code and Code of Criminal Procedure Committee, it is recommended that the legislature repeal R.S. 15:114 in its entirety.

Note to the Legislature

During the 2016 Regular Session, R.S. 15:114 was repealed by Acts 2016, No. 389, § 2, as recommended by the Law Institute.

R.S. 17:1803. Parking violations on campuses of state owned colleges and universities; maximum fines

The fine which may be imposed for violation of any parking regulation established by the governing authority of any state supported college or university in this state, including Louisiana State University and Agricultural and Mechanical College, where the violation occurred upon the streets and roadways of such college or university, shall not exceed the sum of one dollar.

Held unconstitutional by *Student Government Association of Louisiana State University v. Board of Supervisors of Louisiana State University*, 264 So. 2d 916, 920 (La. 1972): "In the present case, we hold that the intent of Article XII, Section 7 was, upon ratification of the constitutional amendment, to grant to the university's Board of Supervisors exclusive administrative authority over operation of the university. . . . Especially in view of the specific intent underlying Section 7's adoption, we find that this constitutional provision unambiguously grants the Board of Supervisors full administrative control of the university. . . . The power to regulate student parking, and to enforce such reasonable parking regulations by administrative penalties (including fines), is clearly within this grant to the Board of Supervisors of exclusive administrative authority over students in their relationship with the university and in their use of the university campus. The legislative act seeking to limit the Board's administrative regulation of student parking is therefore invalid, since by it the legislature sought to interfere with the Board's exclusive administrative power over university affairs, granted to it by our constitution."

Recommendation: It is recommended that the legislature repeal R.S. 17:1803 in its entirety.

Note to the Legislature

During the 2016 Regular Session, R.S. 17:1803 was repealed by Acts 2016, No. 383, § 1, as recommended by the Law Institute.

R.S. 40:1788. Identification with number or other mark; obliteration or alteration of number or mark

* * *

B. No one shall obliterate, remove, change, or alter this number or mark. **Whenever, in a trial for a violation of this Sub-section, the defendant is shown to have or to have had possession of any firearm upon which the number or mark was obliterated, removed, changed, or altered, that possession is sufficient evidence to authorize conviction unless the defendant explains it to the satisfaction of the court.**

Held unconstitutional by *State v. Taylor*, 396 So. 2d 1278, 1281 (La. 1981): "For the reason that the second sentence of R.S. 17:1788(B) establishes a mandatory presumption that does not meet the 'beyond a reasonable doubt' standard, it literally throws the burden upon a defendant to

establish his innocence once the prosecution proves the evidentiary fact of possession. Therefore, it is unconstitutional. The unconstitutionality of one portion of a statute, however, does not necessarily render the entire statute unenforceable. . . . We find in the present case that the remainder of the statute can stand."

Recommendation: After review by the Law Institute's Criminal Code and Code of Criminal Procedure Committee, it is recommended that the legislature amend R.S. 40:1788(B) to remove the offending language as follows:

> B. No one shall obliterate, remove, change, or alter this number or mark. ~~**Whenever, in a trial for a violation of this Sub-section, the defendant is shown to have or to have had possession of any firearm upon which the number or mark was obliterated, removed, changed, or altered, that possession is sufficient evidence to authorize conviction unless the defendant explains it to the satisfaction of the court.**~~

Note to the Legislature

During the 2016 Regular Session, R.S. 40:1788(B) was amended by Acts 2016, No. 340, § 1 to remove the second sentence of the provision as recommended by the Law Institute.

R.S. 42:261. District attorneys; counsel for boards and commissions

* * *

E. (1) Any party who files suit against any duly elected or appointed public official of this state or of any of its agencies or political subdivisions for any matter arising out of the performance of the duties of his office other than matters pertaining to the collection and payment of taxes and those cases where the plaintiff is seeking to compel the defendant to comply with and apply the laws of this state relative to the registration of voters, and who is unsuccessful in his demands, shall be liable to said public official for all attorneys fees incurred by said public official in the defense of said lawsuit or lawsuits, which attorneys fees shall be fixed by the court.

(2) The defendant public official shall have the right, by rule, to require the plaintiff to furnish bond as in the case of bond for costs, to cover such attorneys fees before proceeding with the trial of said cause.

* * *

Held unconstitutional by *Detraz v. Fontana*, 416 So. 2d 1291, 1296-97 (La. 1982): "In the case before us, the instant statute also divides tortfeasors into two classes: governmental tortfeasors and private tortfeasors. Simultaneously two classes of victims are created: victims of governmental tortfeasors and victims of private tortfeasors. Only the first class of victims must suffer the additional burden of a bond for attorney's fees. No reasonable justification for this disparate treatment has been supplied. The statute violates the equal protection clauses of the state and

federal constitutions. The challenged provision is also defective because it deprives the plaintiff of due process and denies open access to the courts. . . . For these reasons, that portion of the judgment of the Court of Appeal upholding the constitutionality of R.S. 42:261 E is reversed, and R.S. 42:261 E is declared unconstitutional."

Recommendation: It is recommended that the legislature repeal R.S. 42:261(E) in its entirety and direct the Law Institute to redesignate R.S. 42:261(F) through (K) accordingly.

Note to the Legislature

During the 2016 Regular Session, R.S. 42:261(E) was repealed by Acts 2016, No. 168, § 2, and the Law Institute was directed to redesignate R.S. 42:261(F) through (K) as R.S. 42:261(E) through (J) by Acts 2016, No. 168, § 2, both as recommended by the Law Institute.