LOUISIANA STATE LAW INSTITUTE
CONSTITUTIONAL LAWS COMMITTEE

2022 UNCONSTITUTIONAL STATUTES
BIENNIAL REPORT TO THE LEGISLATURE
IN ACCORDANCE WITH R.S. 24:204(A)(10)

Prepared for the
Louisiana Legislature on

March 28, 2022

Baton Rouge, Louisiana

LOUISIANA STATE LAW INSTITUTE
CONSTITUTIONAL LAWS COMMITTEE

March 28, 2022

To: Senator Patrick Page Cortez
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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)
L. David Cromwell, Shreveport
Cordell H. Haymon, Baton Rouge
Ashley J. Heilprin, New Orleans
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 Law Institute submitted previous reports to the Legislature in March of 2016, 2018, and 2020. The Constitutional Laws Committee 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 Law Institute's fourth Biennial Report to the Legislature is divided into two categories: laws that were not included in previous reports, including provisions declared unconstitutional since the submission of these reports, and laws that were included in previous reports 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 has presented its recommendations 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 has provided an appendix with its report setting forth laws declared or recognized as unconstitutional that were included in the Law Institute's previous reports 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 Law Institute's recommendations to the Legislature with respect to each of these provisions.

INDEX TO 2022 UNCONSTITUTIONAL STATUTES BIENNIAL REPORT

PROVISIONS THAT WERE NOT INCLUDED IN PREVIOUS REPORTS

Children's Code

Article 305. Divestiture of juvenile court jurisdiction; original criminal court jurisdiction over children

* * *

B.(1) When a child is fifteen years of age or older at the time of the commission of any of the offenses listed in Subparagraph (2) of this Paragraph, he is subject to the exclusive jurisdiction of the juvenile court until whichever of the following occurs first:

(a) An indictment charging one of the offenses listed in Subparagraph (2) of this Paragraph is returned.

(b) The juvenile court holds a continued custody hearing and finds probable cause that the child has committed any of the offenses listed in Subparagraph (2) of this Paragraph and a bill of information charging any of the offenses listed in Subparagraph (2) of this Paragraph is filed. During this hearing, when the child is charged with forcible or second degree rape or second degree kidnapping, the court shall inform him that if convicted he shall register as a sex offender for life, pursuant to Chapter 3-B of Title 15 of the Louisiana Revised Statutes of 1950.

(2)(a) Attempted first degree murder.

(b) Attempted second degree murder.

(c) Manslaughter.

(d) Armed robbery.

(e) Aggravated burglary.

(f) Forcible or second degree rape.

(g) Simple or third degree rape.

(h) Second degree kidnapping.

(i) Repealed by Acts 2001, No. 301, §2.

(j) Aggravated battery committed with a firearm.

(k) A second or subsequent aggravated battery.

(l) A second or subsequent aggravated burglary.

(m) A second or subsequent offense of burglary of an inhabited dwelling.

(n) A second or subsequent felony-grade violation of Part X or X-B of Chapter 4 of Title 40 of the Louisiana Revised Statutes of 1950 involving the manufacture, distribution, or possession with intent to distribute controlled dangerous substances.

(3) The district attorney shall have the discretion to file a petition alleging any of the offenses listed in Subparagraph (2) of this Paragraph in the juvenile court or, alternatively, to obtain an indictment or file a bill of information. If the child is being held in detention, the district attorney shall make his election and file the indictment, bill of information, or petition in the appropriate court within thirty calendar days after the child's arrest, unless the child waives this right.

(4) If an indictment is returned or a bill of information is filed, the child is subject to the exclusive jurisdiction of the appropriate court exercising criminal jurisdiction for all subsequent procedures, including the review of bail applications, and the district court may order that the child be transferred to the appropriate adult facility for detention prior to his trial as an adult.

* * *

Article V, Section 19. Special Juvenile Procedures

Section 19. The determination of guilt or innocence, the detention, and the custody of a person who is alleged to have committed a crime prior to his seventeenth birthday shall be pursuant to special juvenile procedures which shall be provided by law. However, the legislature may (1) by a two-thirds vote of the elected members of each house provide that special juvenile procedures shall not apply to juveniles arrested for having committed first or second degree murder, manslaughter, aggravated rape, armed robbery, aggravated burglary, aggravated kidnapping, attempted first degree murder, attempted second degree murder, forcible rape, simple rape, second degree kidnapping, a second or subsequent aggravated battery, a second or subsequent aggravated burglary, a second or subsequent offense of burglary of an inhabited dwelling, or a second or subsequent felony-grade violation of Part X or X-B of Chapter 4 of Title 40 of the Louisiana Revised Statutes of 1950, involving the manufacture, distribution, or possession with intent to distribute controlled dangerous substances, and (2) by two-thirds vote of the elected members of each house lower the maximum ages of persons to whom juvenile procedures shall apply, and (3) by two-thirds vote of the elected members of each house establish a procedure by which the court of original jurisdiction may waive special juvenile procedures in order that adult procedures shall apply in individual cases. The legislature, by a majority of the elected members of each house, shall make special provisions for detention and custody of juveniles who are subject to the jurisdiction of the district court pending determination of guilt or innocence.

Held unconstitutional by *State in Interest of D.T.*, 2020 WL 1670730 (La. 2020): "Having found that La. Const. V, § 19 delineates the legislature's authority to create exceptions to the juvenile court's jurisdiction, we turn to the statute under review in this case, La. Ch.C. art. 305, which provides for a waiver of juvenile jurisdiction in certain circumstances. . . . Louisiana Children's Code Article 305 provides two means by which the juvenile court may be divested of jurisdiction. . . . Importantly, the combined list of enumerated crimes in Subsection A(1) and B(2)

of La. Ch.C. art. 305 track the enumerated crimes in La. Const. art. V, § 19 word for word, with the *lone exception* of the offense at issue in this case, 'aggravated battery committed with a firearm.' Furthermore, although both the statutory and the constitutional provisions allow for adult criminal jurisdiction when the juvenile is charged with *a second or subsequent* aggravated battery, here the juvenile is being charged with his *first* aggravated battery, a crime which this Court has previously noted is not enumerated in La. Const. art. V, § 19. . . . [T]he legislative and jurisprudential histories of La. Const. art. V, § 19 and La. Ch.C. art. 305 demonstrate that a constitutional amendment is required to expand the list of offenses which may be excepted from juvenile court jurisdiction. . . . Although the State correctly notes that there have at times been minor discrepancies between the offenses listed in La. Const. art. V, § 19 and La. Ch.C. art. 305, these discrepancies have been harmonized through subsequent amendment of these two provisions, with the lone remaining exception of La. Ch.C. art. 305(B)(2)(j), which was added to the Children's Code via 1995 La. Acts, Nos. 367 and 979. Thus, we agree with D.T. that the legislative history generally supports the juvenile court's interpretation of the enumerated crimes in La. Const. art. V, § 19 as constituting an exhaustive list of offenses which may be excepted from the juvenile court's jurisdiction. Accordingly, we find that the legislature overstepped its authority in enacting La. Ch.C. art. 305(B)(2)(j), as 'aggravated battery committed with a firearm' is not among the charges which are listed as permissible exceptions to the juvenile court's jurisdiction as prescribed in La. Const. art. V, § 19. We find that La. Ch.C. art. 305(B)(2)(j) is unconstitutional on its face"

Recommendation: It is recommended that the Legislature do one of the following: (1) Repeal Children's Code Article 305(B)(2)(j) in its entirety or (2) Submit to the voters a proposal to add "aggravated battery committed with a firearm" to the list of offenses in Article V, Section 19 of the Constitution of Louisiana.

Revised Statutes

R.S. 40:1321. Special identification cards; issuance; veteran designation; disabled veteran designation; university logo; "I'm a Cajun" designation; needs accommodation designation; fees; expiration and renewal; exceptions; promulgation of rules; promotion of use; persons less than twenty-one years of age; the Protect and Save our Children Program; Selective Service Registration

* * *

J.(1) Any person required to register as a sex offender with the Louisiana Bureau of Criminal Identification and Information, as required by R.S. 15:542 et seq., shall obtain a special identification card issued by the Department of Public Safety and Corrections which shall contain a restriction code declaring that the holder is a sex offender. This special identification card shall include the words "sex offender" in all capital letters which are orange in color and shall be valid for a period of one year from the date of issuance. This special identification card shall be carried on the person at all times by the individual required to register as a sex offender.

(2) Each person required to carry a special identification card pursuant to this Subsection shall personally appear, annually, at a field office of the office of motor vehicles to renew his or her special identification card but only after he or she has registered as an offender pursuant to R.S. 15:542 et seq. Reregistration shall include the submission of current information to the department and the verification of this information, which shall include the street address and telephone number of the registrant; the name, street address and telephone number of the registrant's employer, and any registration information that may need to be verified by the bureau. No special identification card shall be issued or renewed until the office of motor vehicles receives confirmation from the bureau, electronically or by other means, that the reregistration of the sex offender has been completed.

(3) The provisions of this Subsection shall apply to all sex offenders required to register pursuant to R.S. 15:542 et seq., regardless of the date of conviction.

(4) Whoever violates this Subsection shall be fined not less than one hundred dollars and not more than five hundred dollars, or imprisoned for not more than six months, or both.

R.S. 15:542.1.4. Failure to register and notify as a sex offender or child predator; penalties

* * *

C.(1) Any person who either fails to meet the requirements of R.S. 32:412(I) or R.S. 40:1321(J), who is in possession of any document required by R.S. 32:412(I) or R.S. 40:1321(J) that has been altered with the intent to defraud, or who is in possession of a counterfeit of any document required by R.S. 32:412(I) or R.S. 40:1321(J), shall, on a first conviction, be fined not more than one thousand dollars and imprisoned at hard labor for not less than two years nor more than ten years without benefit of parole, probation, or suspension of sentence.

(2) Upon a second or subsequent conviction for a violation of the provisions of this Subsection, the offender shall be fined three thousand dollars and imprisoned at hard labor for not less than five years nor more than twenty years without benefit of parole, probation, or suspension of sentence.

Held unconstitutional in *State v. Hill*, 2020 WL 6145294 (La. 2020): "The branded identification card is compelled speech, and it is a content-based regulation of speech that consequently must pass strict scrutiny. While the state certainly has a compelling interest in protecting the public and enabling law enforcement to identify a person as a sex offender, Louisiana has not adopted the least restrictive means of doing so. A symbol, code, or a letter designation would inform law enforcement that they are dealing with a sex offender and thereby reduce the unnecessary disclosure to others during everyday tasks. The sex offender registry and notification is available to those who have a need to seek out that information, while also not unnecessarily requiring disclosing that information to others via a branded identification. As Louisiana has not used the least restrictive means of advancing its otherwise compelling interest, the branded identification requirement is unconstitutional. . . . In conclusion, the district court did not err when it declared La. R.S. 40:1321(J) and La. R.S. 15:542.1.4(C) unconstitutional. The statute that defendant was charged under, La. R.S. 15:542.1.4(C), cannot be severed from La. R.S. 40:1321(J), because in order to prosecute defendant under La. R.S. 15:542.1.4(C), the state must first prove as an element of the crime that he is required by La. R.S. 40:1321(J) or La. R.S. 32:412(I) to carry an identification card branded with the word, "sex offender." Furthermore, the branded identification card is compelled speech. As a content-based regulation of speech, it must pass strict scrutiny. While the state certainly has a compelling interest in protecting the public and enabling law enforcement to identify a person as a sex offender, Louisiana has not adopted the least restrictive means of doing so. As Louisiana has not used the least restrictive means of advancing its otherwise compelling interest, the branded identification card requirement is unconstitutional. Nor does the inclusion of fraud as an element of La. R.S. 15:542.1.4(C) salvage the statute, as the statute's requirement that defendant carry the branded identification card cannot be severed from the remainder of the statute. . . . The district court's declaration that the statutes are unconstitutional and the district court's ruling granting defendant's motion to quash are affirmed."

Recommendation: It is recommended that the Legislature amend R.S. 40:1321(J) to remove the requirement that the special identification card "include the words 'sex offender' in all capital letters which are orange in color" and instead provide for some sort of "symbol, code, or a letter designation" as discussed by the Supreme Court in *State v. Hill*.

R.S. 45:1163. Power to regulate rates and service; exceptions

A.(1) The commission shall exercise all necessary power and authority over any street railway, gas, electric light, heat, power, waterworks, or other local public utility for the purpose of fixing and regulating the rates charged or to be charged by and service furnished by such public utilities.

(2) However, no aspect of direct sales of natural gas by natural gas producers, natural gas pipeline companies, natural gas distribution companies, or any other person engaging in the direct sale of natural gas to industrial users for fuel or for utilization in any manufacturing process, or to any person for use in vehicles capable of using compressed natural gas which when combusted results in comparably lower emissions of oxides of nitrogen, volatile organic compounds, carbon monoxide, or particulates or any combination thereof, shall be subject to such regulation by the commission.

(3) In addition, a schedule of rates of an electric cooperative shall not require approval of the commission if the schedule previously was approved by the board of directors of the electric cooperative and by the federal government or any agency thereof, nor shall the authority of the commission extend to the service rendered by electric cooperatives except to the extent provided in R.S. 45:123 and in orders of the commission promulgated to effectuate the purposes of R.S. 45:123.

B. The commission shall exercise all necessary power and authority over any electric cooperative, that, by a vote of its membership, has elected to be regulated by the commission, as provided in R.S. 12:426, for the purpose of fixing and regulating the rates charged or to be charged and services furnished by the cooperative.

C. To ensure that costs passed through to consumers are just and reasonable, the commission shall, no less frequently than every other year, audit the adjustment clause filings submitted by a public electric utility in this state, exercise its authorized review and determination of such filings, and exercise its control and rate-fixing authority to modify fuel adjustment charges of an electric utility as assessed by an electric utility to rate-paying consumers through operation of the utility's fuel adjustment clause.

Prior version held unconstitutional in *Cajun Electric Power Cooperative, Inc. v. Louisiana Public Service Commission*, 544 So. 2d 362 (La. 1989): "Rehearing was granted to reconsider whether article IV, § 21(B) of the state constitution, by explicitly granting to the commission the full authority over "all public utilities," removes the ability of the legislature to alter the commission's jurisdiction over any business defined as a public utility at the time the 1974 Constitution was adopted. We conclude that it does. Insofar as R.S. 45:1163 is inconsistent with this plenary authority, it is unconstitutional. Article IV, § 21(B) provides that the public service commission "shall regulate *all* common carriers and public utilities and have such other regulatory authority as provided by law." (Emphasis added). . . . Since the provision is unambiguous, this court ought not base its decision on words used in argument at the convention proceedings but should instead rely on the product that the convention ultimately produced. The language that the voters of this state adopted granted, in mandatory language, constitutional jurisdiction to the commission over all common carriers and public utilities. The legislature cannot by statute modify

that jurisdiction. If electric cooperatives are public utilities, then the commission has regulatory jurisdiction over them. In 1970, the legislature amended R.S. 45:121 to include electric cooperatives on the list of businesses classified as public utilities. Thus, at the time the 1974 constitution was drafted and adopted, electric cooperatives were statutorily defined as public utilities and were under the jurisdiction of the commission. Electric cooperatives remain statutorily defined as public utilities. . . . [N]either the plain language of this constitution nor the record of the framers' debates indicates that the commission's jurisdiction over electric cooperatives should be curtailed. As noted above, the legislature defined cooperatives as public utilities at the time of the drafting and the adoption of the 1974 Constitution. . . . In addition, the cooperatives' argument that they are not the kind of utilities intended to be subject to regulation is undercut by the very statute they seek to have upheld as constitutional. R.S. 45:1163(B) allows electric cooperatives to choose to have rates and services regulated by the commission under the provisions of R.S. 12:426. If the structure and function of these cooperatives were such that regulation were unnecessary, it would be illogical for the legislature to have exempted them from regulation in R.S. 45:1163(A) and yet provided for them to choose to be regulated in R.S. 45:1163(B) and R.S. 12:426."

At the time this case was decided, R.S. 45:1163 read as follows:

> A. The commission shall exercise all necessary power and authority over any street railway, gas, electric light, heat, power, waterworks, or other local public utility for the purpose of fixing and regulating the rates charged or to be charged by and service furnished by any such public utilities; however, no aspect of direct sales of natural gas by natural gas producers, natural gas pipeline companies, natural gas distribution companies, or any other person engaging in the direct sale of natural gas to industrial users for fuel or for utilization in any manufacturing process shall be subject to such regulation by the commission. In addition, a schedule of rates of an electric cooperative shall not require approval of the commission if the schedule previously was approved by the board of directors of the electric cooperative and by the federal government or any agency thereof, nor shall the authority of the commission extend to the service rendered by electric cooperatives except to the extent provided in R.S. 45:123 and in orders of the commission promulgated to effectuate the purpose of R.S. 45:123.
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> B. The commission shall exercise all necessary power and authority over any electric cooperative which by a vote of its membership, has elected to be regulated by the commission, as provided in R.S. 12:426, for the purpose of fixing and regulating the rates charged or to be charged and services furnished by the cooperative.

During the 1990 Regular Session, R.S. 45:1163(A) was amended as follows:

> A. The commission shall exercise all necessary power and authority over any street railway, gas, electric light, heat, power, waterworks, or other local public utility for the purpose of fixing and regulating the rates charged or to be charged by and service furnished by any such public utilities; however, no aspect of direct sales

> of natural gas by natural gas producers, natural gas pipeline companies, natural gas distribution companies, or any other person engaging in the direct sale of natural gas to industrial users for fuel or for utilization in any manufacturing process, or to any person for use in vehicles capable of using compressed natural gas which when combusted results in comparably lower emissions of oxides of nitrogen, volatile organic compounds, carbon monoxide, or particulates or any combination thereof, shall be subject to such regulation by the commission. In addition, a schedule of rates of an electric cooperative shall not require approval of the commission if the schedule previously was approved by the board of directors of the electric cooperative and by the federal government or any agency thereof, nor shall the authority of the commission extend to the service rendered by electric cooperatives except to the extent provided in R.S. 45:123 and in orders of the commission promulgated to effectuate the purpose of R.S. 45:123.

Additionally, during the 2016 Regular Session, the Legislature added Subsection C as reflected above, but the statute's language concerning electric cooperatives remains unchanged.

Recommendation: It is recommended that the Legislature direct the Law Institute to direct the printers to add a validity note citing the Louisiana Supreme Court's holding in *Cajun Electric* that R.S. 45:1163 is unconstitutional to the extent that it is inconsistent with Article IV, Section 21(B) of the Constitution of Louisiana.

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:

* * *

(10)(a)(i) * * *

* * *

(c)(i)(aa) The term "sale at retail" does not include sale of materials for further processing into articles of tangible personal property for sale at retail when all of the criteria in Subsubitem (I) of this Subitem are met.

(I)(aaa) The raw materials become a recognizable and identifiable component of the end product.

(bbb) The raw materials are beneficial to the end product.

(ccc) The raw materials are material for further processing, and as such, are purchased for the purpose of inclusion into the end product.

(II) For purposes of this Subitem, the term "sale at retail" shall not include the purchase of raw materials for the production of raw or processed agricultural, silvicultural, or aquacultural products.

(III)(aaa) If the materials are further processed into a byproduct for sale, such purchases of materials shall not be deemed to be sales for further processing and shall be taxable. For purposes of this Subitem, the term "byproduct" shall mean any incidental product that is sold for a sales price less than the cost of the materials.

(bbb) In the event a byproduct is sold at retail in this state for which a sales and use tax has been paid by the seller on the cost of the materials, which materials are used partially or fully in the manufacturing of the byproduct, a credit against the tax paid by the seller shall be allowed in an amount equal to the sales tax collected and remitted by the seller on the taxable retail sale of the byproduct.

* * *

Held unconstitutional in *Calcasieu Parish School Board Sales & Use Department v. Nelson Industrial Steam Company*, 2021 WL 5860861 (La. 2021): “This Court's interpretation of the pre-Act 3 further processing exclusion was clear: NISCO's limestone purchases were outside the scope of the pre-Act 3 sales tax regime, *ab initio*, regardless of the end product's relative profitability. In contrast, the Act 3 amendments to the further processing exclusion do include an economic

consideration, directing that materials further processed into a byproduct 'shall not be deemed to be sales for further processing and *shall be taxable*.' A byproduct is defined by the statute as 'any incidental product that is sold for a sales price less than the cost of the materials.' Reviewing these changes to La. R.S. 47:301(10)(c)(i)(aa), this Court in *NISCO II* determined that the same limestone purchases that were not taxable under the pre-Act 3 sales tax have been rendered taxable by Act 3. . . . *NISCO II* thus recognized that the very same transaction that was found not to be subject to taxation in *NISCO I* was subject to taxation pursuant to La. R.S. 47:301(10)(c)(i)(aa) *as amended by Act 3* because the amendments incorporated an economic test that the law previously did not recognize. In narrowing the further process exclusion to exclude purchases of materials that are further processed into a byproduct, the Act subjected NISCO's purchases of limestone, which were 'beyond the reach of tax' before Act 3, to a new tax. . . . Act 3 represents new substantive law passed under the guise of interpretative legislation. The amendments therein unquestionably legislatively overruled *NISCO I*'s interpretation of the further processing exclusion. Regardless of whether designated as 'interpretative,' a legislative enactment cannot abrogate this Court's interpretation of the tax code in order to increase tax liability without garnering sufficient support of the legislators pursuant to the Tax Limitation Clause. It matters not what the Legislature said, it matters what it did. And here, it imposed a new tax. In sum, Act 3 rendered taxable the very purchases of limestone deemed excluded from tax by *NISCO I*. Because it thus created a 'new tax' on these purchases, its failure to garner supermajority support violates the Tax Limitation Clause and renders the legislation unconstitutional thereunder. For the foregoing reasons, we find that Act 3 is a 'new tax' and therefore unconstitutional under the Tax Limitation Clause for failure to garner a two-thirds (*i.e.*, supermajority) vote in each house of the Legislature."

Recommendation: If the Legislature wishes to retain the substance of the prior amendment to R.S. 47:301(10)(c)(i)(aa), it is recommended that the Legislature amend and reenact this provision to obtain the necessary two-thirds vote in each house of the Legislature.

PROVISIONS THAT WERE INCLUDED IN PREVIOUS REPORTS AND HAVE NOT BEEN ADDRESSED BY THE LEGISLATURE

Constitution

Article I, Section 10. Right to Vote; Disqualification from Seeking or Holding an Elective Office
(Previously included in the 2018 and 2020 Biennial Reports)

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**
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> * * *
>
> (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.
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> **(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.**

The Law Institute's initial recommendation with respect to this provision was for the Legislature to 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. After the issuance of the Law Institute's 2018

Unconstitutional Statutes Biennial Report to the Legislature, a new provision of the Constitution – Article I, Section 10.1 – was enacted by Acts 2018, No. 719, approved by the voters, and reads as follows:

> **§10.1. Disqualification from Seeking or Holding an Elective Office or Appointment**
>
> Section 10.1.(A) Disqualification. The following persons shall not be permitted to qualify as a candidate for elective public office or hold elective public office or appointment of honor, trust, or profit in this state:
>
> (1) A person actually under an order of imprisonment for conviction of a felony.
>
> (2) 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.
>
> (B) Exception. The provisions of Paragraph (A) of this Section shall not prohibit a person convicted of a felony from qualifying as a candidate for elective public office or holding such elective public office or appointment of honor, trust, or profit if more than five years have elapsed since the completion of his original sentence for the conviction.
>
> (C) The provisions of Paragraph (A) of this Section shall not prohibit a person from being employed by the state or a political subdivision.

The following note also appears on the legislative website at Article I, Section 10 of the Constitution:

> "NOTE: Acts 1997, No. 1492, which proposed to amend Art. 1, §10 of the Constitution of Louisiana is null and void because it was not constitutionally adopted. See *Shepherd v. State of Louisiana* No. 2015-CA-1750 (La. 2016)"

The Law Institute reviewed this development and makes the following updated recommendation.

Recommendation: It is recommended that the Legislature pass a resolution directing the Law Institute to direct the printers to stop printing the unconstitutionally adopted language added by Acts 1997, No. 1492 as reflected below:

> **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.**~~

Article IX, Section 9. First Use Tax Trust Fund
(Previously included in the 2020 Biennial Report)

Section 9.(A)(1) Creation. The First Use Tax Trust Fund is hereby created and established in the state treasury as a special and irrevocable trust fund for the deposit of the proceeds, and interest derived therefrom, of the first use tax imposed by law in 1978 or thereafter and any other tax imposed by law which would have the effect of imposing any new or alternative tax on uses of those resources subject to the tax levied by the first use tax. The treasurer shall pay into the state general fund, from the total proceeds of the first use tax, as imposed by law in 1978 or thereafter such amounts as are necessary to fully reimburse the state general fund for tax credits granted in 1978 against that tax pursuant to Part I-B of Chapter 6 of Title 47 of the Louisiana Revised Statutes. The remainder of such tax proceeds shall be credited to the following accounts within the First Use Tax Trust Fund and shall not be deposited into the Bond Security and Redemption Fund or the general fund.

(2) Distribution; debt accounts. Seventy-five percent of the proceeds, and interest derived therefrom, shall be deposited into the following accounts:

(a) Initial Proceeds Account. From this portion of the initial proceeds of the tax, the sum of five hundred million dollars shall be maintained in an account within the First Use Tax Trust Fund in the state treasury to be known as the "Initial Proceeds Account". Monies in the Initial Proceeds Account shall be invested, and the investment earnings shall accrue to that account. Except for investment and except as provided in Paragraph (C), monies on deposit in the Initial Proceeds Account shall not be used. If the balance of the Initial Proceeds Account at any time is less than five hundred million dollars, then an amount from the next proceeds of the tax shall be credited to the Initial Proceeds Account until there is a balance therein of five hundred million dollars.

(b) Debt Retirement and Redemption Account. All proceeds of this portion of the tax over and above the amount required to be maintained in the Initial Proceeds Account shall be maintained in an account in the First Use Tax Trust Fund to be known as the "Debt Retirement and Redemption Account". Monies in the Debt Retirement and Redemption Account shall be invested and the investment earnings shall accrue to that account. Except for investment, monies on deposit in the Debt Retirement and Redemption Account shall be used only to purchase, in advance of maturity, on the open market any outstanding obligations of the state, or to call, pay or redeem in advance of maturity any outstanding bonds, notes or other evidence of state debt, or both. No purchase or redemption of state debt shall occur with the monies unless the purchase or redemption results in interest savings to the state. The methods used for retiring such future debt shall be determined by the state treasurer, with concurrence of two-thirds of the members of the State Bond Commission acting in open session.

(3) Distribution; conservation account. Twenty-five percent of the proceeds, and interest derived therefrom, shall be deposited into the following account:

(a) Barrier Islands Conservation Account. Twenty-five percent of the proceeds of the tax shall be maintained in an account in the First Use Tax Trust Fund to be known as the "Barrier Islands Conservation Account". Monies in the Barrier Islands Conservation Account shall be invested and the investment earnings shall accrue to that account. Except for investment, monies on deposit in the Barrier Islands Conservation Account shall be used exclusively to fund capital improvement projects designed to conserve, preserve and maintain the barrier islands, reefs, and shores of the coastline of Louisiana. Only such capital improvements contained in the comprehensive capital budget adopted by the legislature each year shall be funded.

(B) Investments. The state treasurer shall invest all monies on deposit in the accounts established under Paragraph (A) in accordance with the law governing the investment of idle funds of the state.

(C) Use of Investment Earnings of Initial Proceeds Account. If in the judgment of the state treasurer the best interest of the state would be served, and only if the Debt Retirement and Redemption Account is depleted or otherwise not funded, the treasurer may, with concurrence of two-thirds of the members of the State Bond Commission, acting in open session, expend the investment earnings which have accrued in excess of five hundred million dollars in the Initial Proceeds Account for any purpose for which the Debt Retirement and Redemption Account may be used.

(D) The funds deposited in the First Use Tax Trust Fund shall be considered escrowed and shall not be used for the purposes enumerated herein until the proceeds of the first use tax are determined to be available for such uses by the treasurer with concurrence of two-thirds of the members of the State Bond Commission, acting in open session. During the time these funds are escrowed such funds may be ordered remitted upon final action by a court of last resort, with the interest earned thereon, as provided by law, if the tax is held to be invalid as to any taxpayer who has paid the tax.

Louisiana's First Use Tax was held unconstitutional by the United States Supreme Court in *Maryland v. Louisiana*, 451 U.S. 725 (1981): "In this original action, several States, joined by the United States and a number of pipeline companies, challenge the constitutionality of Louisiana's "First-Use Tax" imposed on certain uses of natural gas brought into Louisiana, principally from the Outer Continental Shelf (OCS), as violative of the Supremacy Clause and the Commerce Clause of the United States Constitution. . . . On the merits, plaintiffs argue that the First-Use Tax violates the Supremacy Clause because it interferes with federal regulation of the transportation and sale of natural gas in interstate commerce. . . . Plaintiffs argue that § 1303 C of the Act violates the Natural Gas Act . . . The effect of § 1303 C is to interfere with the FERC's authority to regulate the determination of the proper allocation of costs associated with the sale of natural gas to consumers. . . . At the very least, there is an "imminent possibility of collision," *ibid*. The FERC need not adjust its rulings to accommodate the Louisiana statute. To the contrary, the State may not trespass on the authority of the federal agency. As we see it, plaintiffs are entitled to judgment on the pleadings that § 1303 C is invalid under the Supremacy Clause. . . . Plaintiffs also argue that the First-Use Tax violates the Commerce Clause of the United States Constitution which provides that "[t]he Congress shall have Power ... [t]o regulate Commerce ... among the several States...." . . . Initially, it is clear to us that the flow of gas from the OCS wells, through processing

plants in Louisiana, and through interstate pipelines to the ultimate consumers in over 30 States constitutes interstate commerce. . . . A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme. . . . In this case, the Louisiana First-Use Tax unquestionably discriminates against interstate commerce in favor of local interests as the necessary result of various tax credits and exclusions. . . . In our view, the First-Use Tax cannot be justified as a compensatory tax. . . . The common thread running through the cases upholding compensatory taxes is the equality of treatment between local and interstate commerce. As already demonstrated, however, the pattern of credits and exemptions allowed under the Louisiana statute undeniably violates this principle of equality. . . . It may be true that further hearings would be required to provide a precise determination of the extent of the discrimination in this case, but this is an insufficient reason for not now declaring the Tax unconstitutional and eliminating the discrimination. We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates. Accordingly, we grant plaintiffs' exception that the First-Use Tax is unconstitutional under the Commerce Clause because it unfairly discriminates against purchasers of gas moving through Louisiana in interstate commerce. In conclusion, we hold that § 1303 C violates the Supremacy Clause and that the First-Use Tax is unconstitutional under the Commerce Clause."

Recommendation: It is recommended that the Legislature direct the Law Institute to direct the printers to add a validity note following Article IX, Section 9 of the Louisiana Constitution noting the *Maryland v. Louisiana* decision and the subsequent repeal of the First Use Tax, R.S. 47:1301 et seq., by Acts 1998, No. 4.

Article XII, Section 15. Defense of Marriage
(Previously included in the 2016, 2018, and 2020 Biennial Reports)

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.

Recommendation: The Law Institute's initial recommendation was for the Legislature to do one of the following: (1) Direct the Law Institute to direct the printers to note the *Obergefell* decision at Article XII, Section 15 of the Constitution of Louisiana; or (2) Submit to the voters a proposal to amend Article XII, Section 15 of the Constitution of Louisiana to replace "one man and one woman" with "two natural persons" as follows:

> Section 15. 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**.

Subsequent to the Law Institute's initial recommendation, a validity note concerning the *Obergefell* decision was added to Article XII, Section 15 of the Constitution of Louisiana.

Civil Code

Civil Code Article 89. Impediment of same sex
(Previously included in the 2016, 2018, and 2020 Biennial Reports)

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. 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: The Law Institute's initial recommendation was for the Legislature to do one of the following: (1) Direct the Law Institute to direct the printers to note the *Obergefell* decision at Civil Code Article 89; or (2) Repeal Civil Code Article 89 in its entirety. Subsequent to the Law Institute's initial recommendation, a validity note concerning the *Obergefell* decision was added to Civil Code Article 89.

Although the scope of the Constitutional Laws 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 were submitted to the Legislature as Senate Bill No. 98 of the 2018 Regular Session, which ultimately failed to pass. Annual reports on same-sex marriage containing updated recommendations have been submitted to the Legislature each year since.

Civil Code Article 3520. Marriage
(Previously included in the 2016, 2018, and 2020 Biennial Reports)

* * *

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 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: The Law Institute's initial recommendation was for the Legislature to do one of the following: (1) Direct the Law Institute to direct the printers to note the *Obergefell* decision at Civil Code Article 3520(B); or (2) Repeal Civil Code Article 3520(B) in its entirety. Subsequent to the Law Institute's initial recommendation, a validity note concerning the *Obergefell* decision was added to Civil Code Article 3520.

Although the scope of the Constitutional Laws 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 were submitted to the Legislature as Senate Bill No. 98 of the 2018 Regular Session, which ultimately failed to pass. Annual reports on same-sex marriage containing updated recommendations have been submitted to the Legislature each year since.

Code of Civil Procedure Article 3662. Same; relief which may be granted successful plaintiff in judgment; appeal
(Previously included in the 2020 Biennial Report)

A. A judgment rendered for the plaintiff in a possessory action shall:

(1) Recognize his right to the possession of the immovable property or real right therein, and restore him to possession thereof if he has been evicted, or maintain him in possession thereof if the disturbance has not been an eviction;

(2) Order the defendant to assert his adverse claim of ownership of the immovable property or real right therein in a petitory action to be filed within a delay to be fixed by the court not to exceed sixty days after the date the judgment becomes executory, or be precluded thereafter from asserting the ownership thereof, if the plaintiff has prayed for such relief; and

(3) Award him the damages to which he is entitled and which he has prayed for.

B. A suspensive appeal from the judgment rendered in a possessory action may be taken within the delay provided in Article 2123, and a devolutive appeal may be taken from such judgment only within thirty days of the applicable date provided in Article 2087(A).

Prior version held unconstitutional as applied to the state in *Todd v. State*, 456 So. 2d 1340 (La. 1983): "With respect to the latter concern about the option available to the plaintiff in La.C.C.P. art. 3662(2), to have the judge set a deadline not to exceed sixty days within which the defendant/loser in a possessory action must bring his petitory action, there is constitutional and legal reason to bar application to the state of that provision. This reason is based partly on the public policy consideration attending the Constitution's prohibiting the loss of state lands by acquisition prescription. More pointedly, however, it is based on the constitutional proscription to the running of *liberative* prescription against the state, a provision which has been incorporated in our state constitutions since 1898. "Prescription shall not run against the state in any civil matter, unless otherwise provided in this constitution or expressly by law." La. Const. art. 12 § 13, La. Const. art. 19 § 16 (1921), La. Const. art. 193 (1913 and 1898). The sixty day period in La.C.C.P. art. 3662(2), within which the trial judge when asked must tell the loser in a possessory action to file a petitory action, fits indeed within the parameters of liberative prescription. This sixty (60) day period finds its source in the jactitory action, a jurisprudentially-created action which subsisted as a way of handling slander of title actions. In 1960 with the adoption of the Louisiana Code of Civil Procedure, the former jactitory action was merged with the former possessory action. That the sixty day period is a form of liberative prescription is evident from jurisprudential history of the jactitory action. To give effect to La.C.C.P. art. 3662(2) and the sixty day period when the state is the loser in a possessory action would impose on the state a form of liberative prescription, which is constitutionally impermissible under La. Const. art. 12 § 13. "Prescription shall not run against the stae [sic] in any civil matter, unless otherwise provided in the constitution or expressly by law." Nowhere in the constitution, nor expressly in La.C.C.P. art. 3662(2) or any other statute is there provision for the sixty day period to run against the state. Yet as we have indicated earlier in this opinion the possessory action, as jurisprudentially permitted against the sovereign, insofar as private property is concerned, fits

clearly within the codal scheme of the property articles of the Civil Code, and is consistent with our French tradition as well. Therefore, allowing a private litigant to maintain a possessory action against the state is statutorily, constitutionally and jurisprudentially supported; although the sixty day mandate in La.C.C.P. art. 3662(2) for bringing a petitory action, as applied to the state, is constitutionally impermissible. . . . Therefore, for all of the foregoing reasons, we find that a possessory action may be maintained against the state. We affirm its availability, except that the plaintiff's option in La.C.C.P. art. 3663(2) to ask the judge to require in the judgment that the defendant file a petitory action within a stated period not to exceed sixty days is not constitutionally permissible when the state is the loser in the possessory action. Additionally we add a caveat (acknowledging that the issue is not before us in this case) that we have not determined what the state's burden of proof will be, if and when, after losing a possessory action to a private litigant, the state seeks to assert its ownership in a petitory or other proceeding."

A year and a half later, the Supreme Court's original opinion was amended on reargument by *Todd v. State*, 474 So. 2d 430 (La. 1985), but the Court "reaffirm[ed] [its] determination in the original opinion that the state shall not be subject to the requirement of La.Code Civ.Pro. art. 3662(2) that it assert any adverse claim of ownership in a petitory action within 60 days of the judgment of possession."

At the time these cases were decided, Code of Civil Procedure Article 3662 read as follows:

> **Article 3662. Same; relief which may be granted successful plaintiff in judgment; appeal**
>
> A judgment rendered for the plaintiff in a possessory action shall:
>
> (1) Recognize his right to the possession of the immovable property or real right therein, and restore him to possession thereof if he has been evicted, or maintain him in possession thereof if the disturbance has not been an eviction;
>
> (2) Order the defendant to assert his adverse claim of ownership of the immovable property or real right therein in a petitory action to be filed within a delay to be fixed by the court not to exceed sixty days after the date the judgment becomes executory, or be precluded thereafter from asserting the ownership thereof, if the plaintiff has prayed for such relief; and
>
> (3) Award him the damages to which he is entitled and which he has prayed for.
>
> A suspensive appeal from the judgment rendered in a possessory action may be taken within the delay provided in Article 2123, and a devolutive appeal may be taken from such judgment only within thirty days of the applicable date provided in Article 2087(1)-(3).

During the 2010 Regular Session, this Article was amended on recommendation of the Law Institute by Acts 2010, No. 185 to add the Paragraph A and B designations and update the cross-reference to Article 2087, but the provision has otherwise remained unchanged.

Recommendation: The Law Institute is presently considering proposed legislation to address the constitutional infirmity recognized in *Todd v. State*. Until this proposed legislation can be adopted, it is recommended that the Legislature direct the Law Institute to direct the printers to add a validity note following Code of Civil Procedure Article 3662 noting the *Todd v. State* decision and the unconstitutionality of Article 3662(A)(2) as applied to the state.

Code of Criminal Procedure

Code of Criminal Procedure Article 800. Objection to ruling on challenge for cause
(Previously included in the 2016, 2018, and 2020 Biennial Reports)

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 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 printers 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."

Code of Criminal Procedure Article 843. Recording of proceedings
(Previously included in the 2020 Biennial Report)

In felony cases, in cases involving violation of an ordinance enacted pursuant to R.S. 14:143(B), and on motion of the court, the state, or the defendant in other misdemeanor cases tried in a district, parish, or city court, the clerk or court stenographer shall record all of the proceedings, including the examination of prospective jurors, the testimony of witnesses, statements, rulings, orders, and charges by the court, and objections, questions, statements, and arguments of counsel.

Prior version held unconstitutional by *State v. LeBlanc*, 367 So. 2d 335 (La. 1979): "In the present case the issue is whether the words "on motion of the court, the state, or the defendant" are unconstitutionally restrictive because Art. 1, s 19 of the 1974 Louisiana Constitution gives broader rights. . . . Our review of the verbatim transcripts and the clear words of Art. 1, s 19 indicate that no one in a misdemeanor case should have to make a motion before recording of the proceeding is made. Art. 1, s 19 grants the right of judicial review based on a complete record whenever a person is subject to imprisonment or forfeiture of rights or property. Therefore, the words "on motion of the court, the state, or the defendant" in C.Cr.P. 843 are an unconstitutional restriction on this constitutional right. **. . .** For the reasons assigned, petitioner's conviction is reversed and this case is remanded to the City Court for a new trial."

At the time this case was decided, Code of Criminal Procedure Article 843 read as follows:

> **Article 843. Recording of proceedings**
>
> In felony cases, and on motion of the court, the state, or the defendant in misdemeanor cases tried in a district, parish, or city court, the clerk or court stenographer shall record all of the proceedings, including the examination of prospective jurors, the testimony of witnesses, statements, rulings, orders, and charges by the court, and objections, questions, statements, and arguments of counsel.

The provision was amended during the 2001 Regular Session by Acts 2001, No. 944, §3 to include cases involving violations of certain ordinances and reference "other" misdemeanor cases, but the constitutionally offensive portion of the article remains unchanged.

Recommendation: It is recommended that the Legislature amend Code of Criminal Procedure Article 843 to remove the offending language as follows:

> In felony cases, in cases involving violation of an ordinance enacted pursuant to R.S. 14:143(B), and ~~**on motion of the court, the state, or the defendant**~~ in other misdemeanor cases tried in a district, parish, or city court, the clerk or court stenographer shall record all of the proceedings, including the examination of prospective jurors, the testimony of witnesses, statements, rulings, orders, and charges by the court, and objections, questions, statements, and arguments of counsel.

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
(Previously included in the 2016, 2018, and 2020 Biennial Reports)

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 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 printers 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
(Previously included in the 2016, 2018, and 2020 Biennial Reports)

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.

R.S. 14:42. First degree rape
(Previously included in the 2016, 2018, and 2020 Biennial Reports)

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.

R.S. 14:87. Abortion
(Previously included in the 2016, 2018, and 2020 Biennial Reports)

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.

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

D.(1) As used in this Subsection:

(a) “Abortion” means the specific intent to kill an unborn child consistent with the provisions and exceptions of R.S. 40:1061.

(b) “Gestational age” means the age of an unborn child as calculated from the first day of the last menstrual period of the pregnant woman, as determined by the use of standard medical practices and techniques.

(2) It shall be unlawful for a physician to perform any of the acts described in Subsection A of this Section after fifteen weeks gestational age.

E.(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.

F. The provisions of Subsection D of this Section shall become effective upon final decision of the United States Court of Appeals for the Fifth Circuit upholding the Act that originated as House Bill 1510 of the 2018 Regular Session of the Mississippi Legislature, which decision would thereby provide the authority for a state within the jurisdiction of that court of appeals to restrict abortion past fifteen weeks gestational age.

G. The provisions of Subsection D of this Section are hereby repealed, in favor of the provisions of R.S. 40:1061, immediately upon and to the extent that the United States Supreme Court upholds the authority of the states to prohibit elective abortions on demand or by the adoption of an amendment to the Constitution of the United States of America that would restore to the state of Louisiana the authority to prohibit elective abortions.

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.

The Law Institute's initial recommendation with respect to this provision was for the Legislature to direct the Law Institute to direct the printers 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"

After the issuance of the Law Institute's previous Unconstitutional Statutes Biennial Reports to the Legislature, R.S. 14:87 was again amended during the 2018 Regular Session to add the following provisions:

> D.(1) As used in this Subsection:
>
> (a) "Abortion" means the specific intent to kill an unborn child consistent with the provisions and exceptions of R.S. 40:1061.
>
> (b) "Gestational age" means the age of an unborn child as calculated from the first day of the last menstrual period of the pregnant woman, as determined by the use of standard medical practices and techniques.
>
> (2) It shall be unlawful for a physician to perform any of the acts described in Subsection A of this Section after fifteen weeks gestational age.
>
> * * *
>
> F. The provisions of Subsection D of this Section shall become effective upon final decision of the United States Court of Appeals for the Fifth Circuit upholding the Act that originated as House Bill 1510 of the 2018 Regular Session of the Mississippi Legislature, which decision would thereby provide the authority for a state within the jurisdiction of that court of appeals to restrict abortion past fifteen weeks gestational age.
>
> G. The provisions of Subsection D of this Section are hereby repealed, in favor of the provisions of R.S. 40:1061, immediately upon and to the extent that the United States Supreme Court upholds the authority of the states to prohibit elective abortions on demand or by the adoption of an amendment to the Constitution of the United States of America that would restore to the state of Louisiana the authority to prohibit elective abortions.

In *Jackson Women's Health Organization v. Dobbs*, 945 F.3d 265 (5th Cir. 2019), the United States Court of Appeals for the Fifth Circuit considered House Bill 1510, "a Mississippi law that prohibits abortions, with limited exceptions, after 15 weeks' gestational age" and considered "[t]he central question" of "whether this law is an unconstitutional ban on pre-viability abortions." The

Fifth Circuit explained that "[i]n an unbroken line dating to *Roe v. Wade*, the Supreme Court's abortion cases have established (and affirmed, and re-affirmed) a woman's right to choose an abortion before viability. States may *regulate* abortion procedures prior to viability so long as they do not impose an undue burden on the woman's right, but they may not ban abortions. The law at issue is a ban. Thus, we affirm the district court's invalidation of the law."

The Law Institute reviewed this development and makes the following updated recommendation with respect to R.S. 14:87.

Recommendation: It is recommended that the validity note concerning the *Sojourner T v. Edwards* decision be retained and that the Legislature direct the Law Institute to direct the printers to add an additional validity note concerning the effectiveness of R.S. 14:87(D) as follows:

> "In *Jackson Women's Health Organization v. Dobbs*, 945 F.3d 265, the United States Court of Appeals for the Fifth Circuit failed to uphold the Act that originated as House Bill 1510 of the 2018 Regular Session of the Mississippi Legislature, deciding instead that the law at issue is an unconstitutional ban on pre-viability abortions. As a result, the provisions of R.S. 14:87(D) have not become effective. The Supreme Court of the United States has granted certiorari in the *Jackson Women's Health Organization v. Dobbs* case."

R.S. 14:89. Crime against nature
(Previously included in the 2016, 2018, and 2020 Biennial Reports)

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, 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.

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.

E. Nothing in Act No. 485 of the 2018 Regular Session of the Legislature shall be construed to alleviate any person convicted or adjudicated delinquent of crime against nature (R.S. 14:89) 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.
>
> * * *

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.

The Law Institute's initial recommendation with respect to this provision was for the Legislature amend R.S. 14:89(A)(1) to remove the offending language so that the provision would read as follows: "The carnal copulation by a human being with an animal. Emission is not necessary." After the issuance of the Law Institute's previous Unconstitutional Statutes Biennial Reports to the Legislature, during the 2018 Regular Session, R.S. 14:89(A)(1) was amended as reflected below, and a new crime involving sexual abuse of an animal was enacted as R.S. 14:89.3.

> **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.
>
> * * *
>
> E. Nothing in Act No. 485 of the 2018 Regular Session of the Legislature shall be construed to alleviate any person convicted or adjudicated delinquent of crime against nature (R.S. 14:89) 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.

The Law Institute reviewed this development and makes the following updated recommendation.

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. 14:89(A)(1), (B)(1), (2), and (3), and (C) in their entirety.

R.S. 14:91.5. Unlawful use of a social networking website
(Previously included in the 2018 and 2020 Biennial Reports)

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 messaging.

(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
(Previously included in the 2018 and 2020 Biennial Reports)

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; 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
(Previously included in the 2018 and 2020 Biennial Reports)

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. 15:902.1. Transfer of adjudicated juvenile delinquents
(Previously included in the 2016, 2018, and 2020 Biennial Reports)

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 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 direct the printer 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 through 17:286.7. The Balanced Treatment for Creation-Science and Evolution-Science Act

(Previously included in the 2016, 2018, and 2020 Biennial Reports)

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."

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

R.S. 18:1505.2. Contributions; expenditures; certain prohibitions and limitations
(Previously included in the 2018 and 2020 Biennial Reports)

* * *

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 direct the printers 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. 24:513. Powers and duties of legislative auditor; audit reports as public records; assistance and opinions of attorney general; frequency of audits; subpoena power
(Previously included in the 2016, 2018, and 2020 Biennial Reports)

* * *

(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.

R.S. 32:57. Penalties; alternatives to citation
(Previously included in the 2016, 2018, and 2020 Biennial Reports)

* * *

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. * * *

> (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 repeal R.S. 32:57(G) in its entirety.

R.S. 33:1997. Penalty for violations
(Previously included in the 2018 and 2020 Biennial Reports)

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
(Previously included in the 2018 and 2020 Biennial Reports)

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. 39:1951 through 1993. Louisiana Minority and Women's Business Enterprise Act
(Previously included in the 2016, 2018, and 2020 Biennial Reports)

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 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
(Previously included in the 2016, 2018, and 2020 Biennial Reports)

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 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

(Previously included in the 2016, 2018, and 2020 Biennial Reports)

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.

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
(Previously included in the 2016, 2018, and 2020 Biennial Reports)

* * *

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.

R.S. 42:1451. Action overruled; attorneys' fees
(Previously included in the 2016, 2018, and 2020 Biennial Reports)

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. 47:33. Credit for taxes paid in other states
(Previously included in the 2020 Biennial Report)

A. Subject to the following conditions, resident individuals shall be allowed a credit against the taxes imposed by this Chapter for net income taxes imposed by and paid to another state on income taxable under this Chapter, provided that:

(1) The credit shall be allowed only for taxes paid to the other state on income which is taxable under its law irrespective of the residence or domicile of the recipient.

(2) If accrued taxes when paid differ from the amounts claimed as credits by the taxpayer, or if any tax paid is refunded in whole or in part, the taxpayer shall notify the secretary who shall redetermine the amount of the tax for the year or years affected, and the amount of tax due upon such redetermination, if any, shall be paid by the taxpayer upon notice and demand by the secretary, or the amount of tax overpaid, if any, shall be credited or refunded to the taxpayer in accordance with the provisions of R.S. 47:261 et seq. In the case of such tax accrued but not paid, the secretary as a condition precedent to the allowance of this credit may require the taxpayer to give a bond with sureties approved by the secretary in such sum as the secretary may require, conditioned upon the payment by the taxpayer of any amount of tax found due upon any such redetermination, and the bonds herein prescribed shall contain such further conditions as the secretary may require.

(3) The credits provided for in this Section shall be allowed only for the same taxable period as that for which the tax liability to the other state arose, irrespective of the method of accounting employed by the taxpayer. No deduction shall be allowed under R.S. 47:55 for any net income taxes paid to another state if any portion of such tax has been claimed as a credit under this Section.

(4) The credit shall be allowed only if the other state provides a similar credit for Louisiana income taxes paid on income derived from property located in, or from services rendered in, or from business transacted in Louisiana.

(5)(a) The credit shall be limited to the amount of Louisiana income tax that would have been imposed if the income earned in the other state had been earned in Louisiana.

(b) The credit shall not be allowed for tax paid on income that is not subject to tax in Louisiana. The amount of the credit shall not exceed the ratio which shall be determined by multiplying the taxpayer's Louisiana income tax liability before consideration of any credit described in this Section by a fraction, the numerator of which is the taxpayer's Louisiana tax table income attributable to other states to which net income taxes were paid by a resident individual, and the denominator of which is total Louisiana tax table income.

(6) The credit shall not be allowed for income taxes paid to a state that allows a nonresident a credit against the income taxes imposed by that state for taxes paid or payable to the state of residence.

(7)(a) For taxes paid on or after January 1, 2018, an individual partner, member, or shareholder that pays another state's entity-level tax that is based solely upon net income included in the entity's federal taxable income without any capital component shall be allowed a deduction equal to their proportionate share of the entity-level tax paid.

(b) The deduction pursuant to this Paragraph shall be allowed only to the extent that the proportionate share of the related income on the tax paid to the other state is included in the calculation of Louisiana taxable income that is reported on the Louisiana return of the individual partner or member.

B. Terminated July 1, 2000. See Acts 1998, No. 53.

Prior version held unconstitutional by *Smith v. Robinson*, 265 So. 3d 740 (La. 2018): "The United States Supreme Court established a four-part test to assess the validity of state taxes under the Commerce Clause in *Complete Auto Transit, Inc.*, 430 U.S. 274, 97 S.Ct. 1076 ("*Complete Auto*"). Under the *Complete Auto* test, a state tax on interstate commerce is upheld if the tax: (1) is applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and, (4) is fairly related to the services provided by the state. . . . Taxpayers argue that Act 109 violates the second and third prong of the *Complete Auto* test pertaining to the apportionment of the tax and discrimination against interstate commerce. . . . Taxpayers argue that Act 109 fails the fair apportionment test because its tax liability does not reasonably reflect how and where Taxpayers' income is generated. Act 109 fails to fairly apportion the tax according to each state's relation to the income. Since no credit is given with respect to the taxes paid on income earned from sources in Texas, Taxpayers maintain that Act 109 fails to apportion the out-of-state income in the first instance. Not only is it not apportioned, it creates the potential for multiple taxation of the same income. We agree with Taxpayers that Act 109 fails the external consistency test. The third prong of the *Complete Auto* test addresses whether the state tax discriminates against interstate commerce. . . . Taxpayers maintain that Act 109 discriminates against interstate commerce in two ways. First, the amended language of La.R.S. 47:33(A)(4) exposes one hundred percent of the interstate income of Louisiana residents to double taxation. By virtue of their ownership in the Pass-Through Entities, which earned income was derived from sources in Texas, Taxpayers paid taxes on income from Texas sources. Additionally, since Texas has no reciprocal credit provision, Act 109 does not allow a credit to Taxpayers on their Louisiana income taxes for the income taxes they paid on the revenue earned from Texas sources. Therefore, in this case, Taxpayers are paying income tax twice on their interstate income. However, on income earned in Louisiana, Taxpayers pay only the Louisiana income tax. Additionally, Taxpayers state that La.R.S. 47:33(A)(5) provides another provision for the double taxation of a portion of a Louisiana resident's interstate income. The amended language now provides that even if a state offers a reciprocal credit (thereby satisfying the requirement of La.R.S. 47:33(A)(4)), the amount of the credit is limited to the amount of Louisiana income tax a taxpayer would have paid if the income had been earned in Louisiana. Therefore, the effect is to discriminate against interstate commerce by twice taxing a portion of a taxpayer's out-of-state income. We agree with Taxpayers that Act 109 results in the double taxation of interstate income as compared with the taxation of intrastate income. This disparate treatment impermissibly discriminates against interstate commerce, and it fails the third prong of the *Complete Auto* test. . . . Act 109's failure to provide a credit results in the double taxation of income that is earned outside Louisiana, i.e., interstate commerce, but not intrastate income. Because the income, if earned in Louisiana, would

only be taxed once, Act 109 "creates an incentive for taxpayers to opt for intrastate rather than interstate economic activity" which, pursuant to *Wynne*, is violative of the dormant Commerce Clause. Louisiana residents who earn interstate income are forced into double taxation on all or a portion of their interstate income, whereas Louisiana residents with only intrastate income are not. This tax scheme impermissibly discriminates against interstate commerce and violates the dormant Commerce Clause of the United States Constitution. For the above reasons, we hold herein that Act 109 is unconstitutional."

On rehearing, the Louisiana Supreme Court clarified its original opinion: "This Court's opinion found that Act 109, taken as a whole, did in fact create an impermissible double taxation in that it impermissibly discriminated against interstate commerce in violation of the dormant Commerce Clause of the United States Constitution. The issue of severability of the various subparts of Act 109, vis-à-vis the constitutionality of the act as a whole, was neither raised nor addressed until this application for rehearing was filed. Upon this Court's review of the issue of severability within the act, we find that only La.R.S. 47:33(A)(4), and not any other part or portion of the act, creates the prohibited double taxation. Thus, we modify and amend this Court's original opinion to reflect an affirmation of the district court's finding of unconstitutionality of Act 109 as it pertains to La.R.S. 47:33(A)(4) only, and we do not rule upon the unaddressed issue of any other portions of the act, particularly, La.R.S. 47:33(A)(5) and (A)(6). . . . For the reasons stated herein, we affirm the district court judgment declaring 2015 La. Acts No. 109 unconstitutional only as to La.R.S. 47:33(A)(4) and no further."

Acts 2015, No. 109 amended R.S. 47:33 as follows, effective from July 1, 2015 to June 30, 2018:

> **§33. Credit for taxes paid in other states**
>
> A. Subject to the following conditions, resident individuals shall be allowed a credit against the taxes imposed by this Chapter for net income taxes imposed by and paid to another state on income taxable under this Chapter, provided that:
>
> (1) The credit shall be allowed only for taxes paid to the other state on income which is taxable under its law irrespective of the residence or domicile of the recipient.
>
> * * *
>
> <u>(4) The credit shall be allowed only if the other state provides a similar credit for Louisiana income taxes paid on income derived from property located in, or from services rendered in, or from business transacted in Louisiana.</u>
>
> <u>(5) The credit shall be limited to the amount of Louisiana income tax that would have been imposed if the income earned in the other state had been earned in Louisiana.</u>

(6) The credit shall not be allowed for income taxes paid to a state that allows a nonresident a credit against the income taxes imposed by that state for taxes paid or payable to the state of residence.

During the 2018 Second Extraordinary Session, the provision was again amended by Acts 20182ES, No. 6 to extend the termination date of Paragraphs (A)(4), (5), and (6) from June 30, 2018 to June 30, 2023 and to make further amendments as follows:

§33. Credit for taxes paid in other states

A. Subject to the following conditions, resident individuals shall be allowed a credit against the taxes imposed by this Chapter for net income taxes imposed by and paid to another state on income taxable under this Chapter, provided that:

* * *

(5)(a) The credit shall be limited to the amount of Louisiana income tax that would have been imposed if the income earned in the other state had been earned in Louisiana.

(b) The credit shall not be allowed for tax paid on income that is not subject to tax in Louisiana. The amount of the credit shall not exceed the ratio which shall be determined by multiplying the taxpayer's Louisiana income tax liability before consideration of any credit described in this Section by a fraction, the numerator of which is the taxpayer's Louisiana tax table income attributable to other states to which net income taxes were paid by a resident individual, and the denominator of which is total Louisiana tax table income.

* * *

(7)(a) For taxes paid on or after January 1, 2018, an individual partner, member, or shareholder that pays another state's entity-level tax that is based solely upon net income included in the entity's federal taxable income without any capital component shall be allowed a deduction equal to their proportionate share of the entity-level tax paid.

(b) The deduction pursuant to this Paragraph shall be allowed only to the extent that the proportionate share of the related income on the tax paid to the other state is included in the calculation of Louisiana taxable income that is reported on the Louisiana return of the individual partner or member.

The substance of Paragraph (A)(4) as enacted by Acts 2015, No. 109 has, however, remained unchanged.

Recommendation: It is recommended that the Legislature repeal R.S. 47:33(A)(4) in its entirety.

R.S. 47:301. Definitions
(Previously included in the 2016, 2018, and 2020 Biennial Reports)

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.

* * *

(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.

R.S. 47:301. Definitions
(Previously included in the 2018 and 2020 Biennial Reports)

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. 47:337.102. Louisiana Uniform Local Sales Tax Board; creation; membership; powers and duties

(Previously included in the 2020 Biennial Report)

A. Creation of the board. The Louisiana Uniform Local Sales Tax Board, hereinafter referred to in this Section as "board", is hereby created as a political subdivision of the state as such term is defined in the Constitution of Louisiana. The board shall be subject to all legal requirements applicable to a public body, including procurement, ethics, record retention, fiscal and budgetary controls, and legislative audit in the same manner as any local political subdivision. The domicile of the board shall be East Baton Rouge Parish. The board may meet and conduct business at other locations within the state of Louisiana.

* * *

I. Funding. (1) The board shall be funded through a dedication of a percentage of the total statewide collections of local sales and use tax on motor vehicles, in accordance with the limitations provided in this Paragraph and the budgetary policy as provided in Paragraph (2) of this Subsection. Monies shall be payable monthly from the current collections of the tax. The dedication shall be considered a cost of collection and shall be deducted by the state and disbursed to the board prior to distribution of tax collections to local taxing authorities. The dedication shall be in addition to any fee imposed by the office of motor vehicles for the collection of the local sales and use tax on motor vehicles. The amount to be disbursed to the board in any fiscal year shall not, under any circumstances and notwithstanding any budget adopted by the board, exceed the following:

(a) In Fiscal Year 2017-2018, one-fifth of one percent of the collections.

(b) In Fiscal Year 2018-2019, one-quarter of one percent of the collections.

(c) In Fiscal Year 2019-2020 and each fiscal year thereafter, three-tenths of one percent of the collections.

(2)(a) The actual amount to be disbursed to the board by the office of motor vehicles in any fiscal year shall be determined by the requirements of the annual budget adopted by the board for that year, subject to the limitations established in Subparagraphs (a) through (c) of Paragraph (1) of this Subsection. To accomplish this, by the first day of June each year the chairman of the board shall notify the commissioner of the office of motor vehicles regarding the amount to be disbursed to the board for the ensuing fiscal year, with the exception of Fiscal Year 2018, when the date for such notification shall be determined by agreement of the chairman and the commissioner.

(b) The board shall develop and adopt a budget as required by the Louisiana Local Government Budget Act, R.S. 39:1301, et seq. The board shall have the same fiscal year as the state. The adopted budget may be amended as deemed necessary by the board.

(3) If use tax collections pursuant to R.S. 47:302(K) yields insufficient revenue to fulfill the dedication made pursuant to R.S. 47:302(K)(7) for interagency transfers to the Department of State Civil Service, Board of Tax Appeals, Local Tax Division, the board shall pay any remaining

amount necessary to satisfy the dedication, which payment shall be made into the Local Tax Division Expense Fund within the first thirty days of the fiscal year. The board is authorized to enter into an agreement with the Department of State Civil Service, Board of Tax Appeals, Local Tax Division to pay an amount sufficient to compensate the Local Tax Division for workload increases.

* * *

Held unconstitutional by *West Feliciana Parish Government v. State*, 2019 WL 6765844 (La. 2019): "In this case, Plaintiffs assert that La.R.S. 47:337.102(I)'s funding mechanism violates both La.Const. art. VI, § 29 and La.Const. art. VII, § 3. As framed by Plaintiffs, the constitutional questions presented are: (1) whether the legislature may, constitutionally, redirect local sales and use taxes, the use of which were established in the ballot propositions that authorized the levy of those taxes; and, (2) whether the legislative rededication of local sales and use taxes as a mandatory funding mechanism for the Board infringes on the authority of the single local collector in each parish. . . . An examination of the remaining ballot propositions at issue herein readily reveals that the taxes passed by the voters were dedicated for the specific purposes identified therein. . . . Therefore, as dedicated taxes, absent the voters' approval to rededicate those local sales and use taxes to the Board, the legislature is not empowered to override the authority granted by the voters by enacting La.R.S. 47:337.102(I). . . . In reaching our conclusion herein, we emphasize that the intended purpose of the legislature for the use of the sales and use tax proceeds, i.e. the funding of the Board, is irrelevant. The relevant inquiry is whether the voters approved the legislature's assessment of the local tax. In this case, they did not. Absent the voters' approval to rededicate the local sales and use taxes to the Board, there is no constitutional directive granting the legislature the power to override the decision of the voters on the use of the local sales and use taxes. . . . For the foregoing reasons, we find that La.R.S. 47:337.102(I) violates La.Const. art. VI, § 29 in impermissibly rededicating local sales and use taxes to fund the Board. . . .We acknowledge that the unconstitutionality of one portion of a statute does not necessarily render the entire statute unenforceable. If the offending portion of the statute is severable from the remainder, this Court may strike only the offending portion and leave the remainder intact. But, where the purpose of the statute is defeated by the invalidity of the offending portion, the entire statute is void. In this case, the district court expressly found La.R.S. 47:337.102(I) was severable; thus, the remainder of the statute remained in full force and effect. Additionally, Plaintiffs' constitutional challenge to the statute is limited solely to the funding mechanism found in La.R.S. 47:337.102(I), and they do not urge any issue relative to severability before this Court. For these reasons, the district court's finding relative to severability is affirmed. . . . Plaintiffs also challenge the funding mechanism of the Board pursuant to La.R.S. 47:337.102(I) as an impermissible infringement on the authority and right of the single local collector in each parish to collect local sales and use taxes, thereby violating of La.Const. art. VII, § 3(B)(1) . . . Given our holding that the statute violates La.Const. art. VI, § 29, we pretermit a constitutional analysis of whether La.R.S. 47:337.102(I) also violates this second constitutional provision. After *de novo* review, we find that the funding mechanism for the Louisiana Uniform Local Sales Tax Board, as set forth in La.R.S. 47:337.102(I), is violative of La.Const. art. VI, § 29. For the reasons stated herein, the judgment of the district court declaring La.R.S. 47:337.102(I) unconstitutional and permanently enjoining the State of Louisiana, Department of Public Safety and Corrections, Office of Motor Vehicles from withholding locally levied sales and use taxes under the authority of La.R.S. 47:337.102(I) and

from disbursing any funds withheld to the Louisiana Uniform Local Sales Tax Board is hereby affirmed."

Recommendation: It is recommended that the Legislature repeal R.S. 47:337.102(I) in its entirety, unless the Legislature wishes to replace this provision with a funding mechanism that meets constitutional requirements.

R.S. 56:1761 through 1766. Audubon Park Commission; creation; membership
(Previously included in the 2018 and 2020 Biennial Reports)

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 OF LAW DECLARED OR RECOGNIZED AS PREEMPTED

Article X, Section 29. Retirement and Survivor's Benefits
(Previously included in the 2016, 2018, and 2020 Biennial Reports)

* * *

(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 Article X, Section 29(E)(5)(a) of the Constitution of Louisiana read as follows:

§29. Retirement and Survivor's Benefits

* * *

(E) Actuarial Soundness. * * *

(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 direct the printers to note the *DeCay* decision in a validity note following Article X, Section 29 of the Constitution of Louisiana.

R.S. 11:2182. Exemption from execution
(Previously included in the 2016, 2018, and 2020 Biennial Reports)

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 direct the printers to note the *DeCay* decision in a validity note following R.S. 11:2182.

R.S. 14:100.13. Operating a vehicle without lawful presence in the United States
(Previously included in the 2016, 2018, and 2020 Biennial Reports)

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.

APPENDIX: PROVISIONS THAT WERE INCLUDED IN PREVIOUS REPORTS AND HAVE BEEN ADDRESSED BY THE LEGISLATURE

Code of Criminal Procedure

Code of Criminal Procedure Article 412. Drawing grand jury venire and subpoena of veniremen; Orleans Parish
(Previously included in the 2016 and 2018 Biennial Reports)

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 Article 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.

Code of Criminal Procedure Article 413. Method of impaneling of grand jury; selection of foreman

(Previously included in the 2016 and 2018 Biennial Reports)

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.

Code of Criminal Procedure Article 414. Time for impaneling grand juries; period of service
(Previously included in the 2016 and 2018 Biennial Reports)

* * *

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 Article 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 Article 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.

Code of Criminal Procedure Article 795. Time for challenges; method; peremptory challenges based on race or gender; restrictions
(Previously included in the 2018 Biennial Report)

* * *

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).

Note to the Legislature

During the 2019 Regular Session, Code of Criminal Procedure Article 795(C) was amended by Acts 2019, No. 235, §1, as recommended by the Law Institute.

Revised Statutes

R.S. 9:2948. Bond for deed buyer deemed owner for purposes of homestead exemption
(Previously included in the 2020 Biennial Report)

Notwithstanding any other provisions of law to the contrary, the buyer under a bond for deed contract shall be deemed, for purposes of the homestead exemption only, to own any immovable property he has purchased and is occupying under bond for deed, and may be eligible for the homestead exemption provided in Article VII, Section 20(A) of the Constitution of Louisiana if otherwise qualified. The buyer under a bond for deed contract shall apply for the homestead exemption each year.

Held unconstitutional by *Wooden v. Louisiana Tax Commission*, 650 So. 2d 1157 (La. 1995): "Although La.Rev.Stat. 9:2948 does not contain the word "exemption," the words and form used legislatively in granting an exemption are not important if, in their essence, the Legislature creates an exemption. The Legislature perhaps could have redefined ownership in the Civil Code to include the status of a bond for deed buyer. *See* La.Civ.Code art. 477. However, the Legislature did not do so. Rather, the Legislature enacted a special statute defining ownership solely for the purpose of the homestead exemption, and thereby indirectly established an exemption from ad valorem taxes for bond for deed buyers. This indirect exemption violates La. Const. art. VII, §§ 20 and 21, which provide that property subject to the homestead exemption for property owners under Section 20 and property listed in Section 21, *and no other*, shall be exempt from ad valorem taxation. Immovable property subject to a bond for deed contract is not listed in Section 21, and that same section clearly denies the Legislature the power to enact any other exceptions from ad valorem taxation, directly or indirectly. The trial court correctly declared La.Rev.Stat. 9:2948 unconstitutional as violative of La. Const. art. VII, §§ 20 and 21. Accordingly, the judgment of the trial court declaring La.Rev.Stat. 9:2948 unconstitutional is affirmed."

During the 1995 Regular Session, the Legislature subsequently added a Paragraph B to Civil Code Article 477, the provision of the Civil Code on ownership, to provide as follows:

> "B. A buyer and occupant of a residence under a bond for deed contract is the owner of the thing for purposes of the homestead exemption granted to other property owners pursuant to Article VII, Section 20(A) of the Constitution of Louisiana. The buyer under a bond for deed contract shall apply for the homestead exemption each year."

Additionally, in 2004, an amendment to Article VII, Section 20(A) of the Louisiana Constitution was adopted, and Subparagraph (A)(7) now provides as follows:

> "(7) No homestead exemption shall be granted on bond for deed property. However, any homestead exemption granted prior to June 20, 2003 on any property occupied upon the effective date of this Paragraph* by a buyer under a bond for deed contract shall remain valid as long as the circumstances giving rise to the exemption at the time the exemption was granted remain applicable."

Recommendation: It is recommended that the Legislature repeal R.S. 9:2948 in its entirety. After review by the Law Institute's Property Committee, it is also recommended that the Legislature amend Civil Code Article 477 as follows:

> ~~**A.**~~ Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law.
>
> ~~**B. A buyer and occupant of a residence under a bond for deed contract is the owner of the thing for purposes of the homestead exemption granted to other property owners pursuant to Article VII, Section 20(A) of the Constitution of Louisiana. The buyer under a bond for deed contract shall apply for the homestead exemption each year.**~~

Note to the Legislature

During the 2020 Regular Session, R.S. 9:2948 was repealed by Acts 2020, No. 20, §2, and Civil Code Article 477 was amended by Acts 2020, No. 20, §1, both as recommended by the Law Institute.

R.S. 11:62. Employee contribution rates established
(Previously included in the 2016 and 2018 Biennial Reports)

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
(Previously included in the 2016 and 2018 Biennial Reports)

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
(Previously included in the 2016 and 2018 Biennial Reports)

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
(Previously included in the 2016 and 2018 Biennial Reports)

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
(Previously included in the 2016 and 2018 Biennial Reports)

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 through 1399.7. Cash Balance Plan for State Retirement Systems
(Previously included in the 2016 and 2018 Biennial Reports)

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
(Previously included in the 2016 and 2018 Biennial Reports)

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. 14:30. First degree murder
(Previously included in the 2018 Biennial Report)

* * *

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
(Previously included in the 2018 Biennial Report)

* * *

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."

Mere months after this opinion was rendered, however, the Legislature enacted in Acts 2013, No. 239 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 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 additional recommendations with respect to them have been made.

R.S. 14:42. First degree rape
(Previously included in the 2018 Biennial Report)

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
(Previously included in the 2018 Biennial Report)

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
(Previously included in the 2018 Biennial Report)

* * *

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
(Previously included in the 2018 Biennial Report)

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 additional recommendations with respect to them have been made.

R.S. 14:47. Defamation
(Previously included in the 2016, 2018, and 2020 Biennial Reports)

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 printers 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)."

Note to the Legislature

During the 2021 Regular Session, R.S. 14:47 was repealed by Acts 2021, No. 60, §1.

R.S. 14:48. Presumption of malice
(Previously included in the 2016, 2018, and 2020 Biennial Reports)

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.

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 printers 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."

Note to the Legislature

During the 2021 Regular Session, R.S. 14:48 was repealed by Acts 2021, No. 60, §1.

R.S. 14:49. Qualified privilege
(Previously included in the 2016, 2018, and 2020 Biennial Reports)

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 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 printers 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."

Note to the Legislature

During the 2021 Regular Session, R.S. 14:49 was repealed by Acts 2021, No. 60, §1.

R.S. 14:95.4. Consent to search; alcoholic beverage outlet
(Previously included in the 2016 and 2018 Biennial Reports)

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 direct the printer 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. 14:122. Public intimidation and retaliation
(Previously included in the 2020 Biennial Report)

A. Public intimidation is the use of violence, force, extortionate threats, or true threats upon any of the following persons, with the intent to influence his conduct in relation to his position, employment, or duty:

(1) Public officer or public employee.

(2) Grand or petit juror.

(3) Witness, or person about to be called as a witness upon a trial or other proceeding before any court, board or officer authorized to hear evidence or to take testimony.

(4) Voter or election official at any general, primary, or special election.

(5) School bus operator.

B. Retaliation against an elected official is the use of violence, force, extortionate threats, or true threats upon a person who is elected to public office, where:

(1) The violence, force, or threat is related to the duties of the elected official.

(2) Is in retaliation or retribution for actions taken by the elected official as part of his official duties.

C. For purposes of this Section:

(1) "Extortionate threats" occur when a person communicates an unlawful threat to harm another person with the intention to obtain anything of value or any acquittance, advantage, or immunity of any description and the person would not otherwise be able to lawfully secure such advantage willingly from the victim.

(2) "True threats" occur when a person communicates a serious expression of an intent to commit an unlawful act of violence upon a person or group of persons with the intent to place such persons in fear of bodily harm or death. The person need not actually intend to carry out the threat.

D. Whoever commits the crime of public intimidation or retaliation against an elected official shall be fined not more than one thousand dollars or imprisoned, with or without hard labor, for not more than five years, or both.

Prior version held unconstitutional by *Seals v. McBee*, 898 F. 3d 587 (U.S. 5th Cir. 2018): "Louisiana Revised Statutes § 14:122 criminalizes "the use of violence, force, or threats" on any public officer or employee with the intent to influence the officer's conduct in relation to his position. . . . Because the meaning of "threat" is broad enough to sweep in threats to take lawful, peaceful actions—such as threats to sue a police officer or challenge an incumbent officeholder—Section 14:122 is unconstitutionally overbroad. We affirm the judgment invalidating it. . . . [W]e can narrow Section 14:122 no further. According to the state, we should construe the statute to

apply only to true threats, i.e. "a serious expression of an intent to commit an act of unlawful violence" toward specific persons. There are several reasons why we cannot do so. First, the definition of "threat" is broader than true threats: any "statement of an intention to inflict pain, injury, *damage,* or *other hostile action* on someone in retribution for something done or not done." Second, the reporter's comments to Section 14:122 provide that the statute "should include threats of harm or injury to the character of the person threatened as well as actual or threatened physical violence." LA. R.S. § 14:122, cmt. Thus, the section is not "readily susceptible" to such a limiting construction. Finally, Louisiana's reliance on its caselaw proves to be a double-edged sword. As plaintiffs note, the Louisiana Court of Appeals has upheld the conviction of a defendant who violated Section 14:122 by threatening "to sue" an officer and "get [his] job" if the officer arrested him. *See State v. Mouton*, 129 So.3d 49, 54, 59 (La. App. 3d Cir. 2013). Plainly, such a threat suggests no violence—indeed, the threat appears to be a plan to take perfectly lawful actions. Accordingly, we cannot construe Section 14:122 to apply only to true threats of violence. It follows that, properly understood, Section 14:122 applies to any threat meant to influence a public official or employee, in the course of his duties, to obtain something the speaker is not entitled to as a matter of right. But so construed, the statute reaches both true threats—such as "don't arrest me or I'll hit you"—and threats to take wholly lawful actions—such as "don't arrest me or I'll sue you." In both those examples, the speaker may be legally subject to arrest and is trying to influence a police officer in the course of his duties. Thus, Section 14:122 makes both threats a criminal act. . . . Thus, insofar as it criminalizes "threats," Section 14:122 is unconstitutionally overbroad."

At the time this case was decided, the relevant portions of R.S. 14:122 read as follows:

> **R.S. 14:122. Public intimidation and retaliation**
>
> A. Public intimidation is the use of violence, force, or threats upon any of the following persons, with the intent to influence his conduct in relation to his position, employment, or duty:
>
> * * *
>
> B. Retaliation against an elected official is the use of violence, force, or threats upon a person who is elected to public office, where:
>
> * * *
>
> C. Whoever commits the crime of public intimidation or retaliation against an elected official shall be fined not more than one thousand dollars or imprisoned, with or without hard labor, for not more than five years, or both.

This provision was also recognized as unconstitutional by the Louisiana Fourth Circuit Court of Appeals in *State v. James*, 2019 WL 5791589 (La. App. 4 Cir. 2019), in which the court vacated the defendant's conviction in violation of R.S. 14:122 pursuant to a timely filed application for postconviction relief based on the U.S. Fifth Circuit's decision in *Seals* that R.S. 14:122 "is unconstitutionally overbroad", a decision that the Fourth Circuit held to be "retroactive in application."

Note to the Legislature

During the 2019 Regular Session, R.S. 14:122 was amended by Acts 2019, No. 311 to change "threats" to "extortionate threats or true threats" and to define both terms as reflected in Subsection C above. According to the author of the legislation, the intent of this amendment was to remedy the constitutional deficiency by using narrowing language that has been held to be acceptable in other jurisdictions. The constitutionality of the amendment has not been ruled upon by the courts, and no further recommendation with respect to R.S. 14:122 is being made by the Law Institute at this time.

R.S. 15:114. Parish of Orleans; rotation and selection of grand jury; control of grand jury
(Previously included in the 2016 and 2018 Biennial Reports)

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

(Previously included in the 2016 and 2018 Biennial Reports)

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
(Previously included in the 2016 and 2018 Biennial Reports)

* * *

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
(Previously included in the 2016 and 2018 Biennial Reports)

* * *

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.