# The Louisiana Supreme Court:

## Interpreting the Law or Making Policy?

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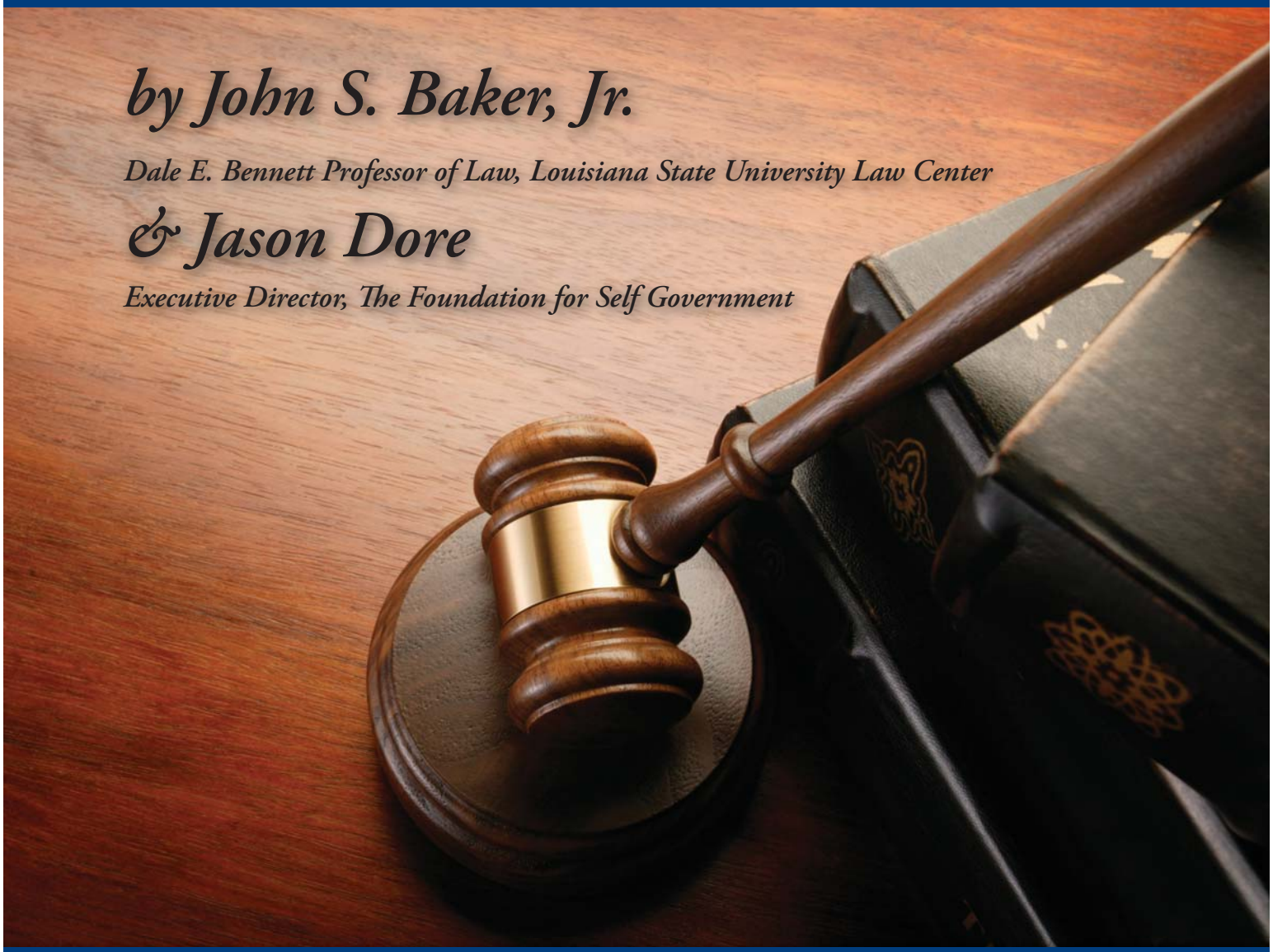
*by John S. Baker, Jr.*

*Dale E. Bennett Professor of Law, Louisiana State University Law Center*

*& Jason Dore*

*Executive Director, The Foundation for Self Government*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In anticipation of the elections this year for two seats on the Louisiana Supreme Court, the *Tulane Law Review* has published an article entitled, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*.[1] That article suggests that a relationship may exist between campaign contributions by litigants and the votes of particular justices in cases involving those contributors. Unsurprisingly, this article has generated controversy in Louisiana's legal circles and beyond. Both the *New Orleans Times-Picayune*[2] and the *New York Times*[3] published pieces detailing the claims of the law review article. Retiring Chief Justice Pascal F. Calogero, Jr. vigorously attacked the *Tulane* article and sought to defend the Court's reputation. The Chief Justice issued statements, wrote letters to the editor and used the official Louisiana Supreme Court website to promote articles rebutting and critiquing the *Tulane* article.[4] The controversy has become a campaign issue.[5]

This White Paper does not address the assertions made by the *Tulane Law Review* article. The controversy surrounding that article, however, does highlight the broader issue examined here, namely the role and the jurisprudence of the Louisiana Supreme Court within Louisiana's government of separated powers. Regardless of whether particular justices have decided cases on the basis of campaign contributions (which is unproven), is it not also improper for judges to reach results based not on their good-faith attempts to apply the law fairly as it exists, but on what they think the law should be?

** John S. Baker, Jr. is the Dale E. Bennett Professor of Law at the Louisiana State University Law Center. Jason Dore is Executive Director of the Foundation for Self-Government in Baton Rouge, Lousiana.* *The authors gratefully acknowledge the research assistance of Robert Abendroth and Celeste White.*

In the legislative sessions of 2008, the subject of ethics was front and center. Ultimately, it was left to the Louisiana Supreme Court to implement ethical reform within the judiciary.[6] If, however, the justices of the state supreme court misunderstand their roles within a system of separated powers, they may overlook the foundation of judicial integrity. The integrity of judges, and of a government of separated powers, is undermined not only by judges involved in bribery and conflicts of interest, but also by judges who do not engage in good-faith efforts to *apply the law*. This is not to say that the judicial enterprise should be a mechanical or formulaic process; interpretation requires judgment, and reasonable people can and will differ about whether a particular interpretation is the best one. But the judgment required by interpretation is fundamentally different than the process of making laws and policies. Interpretation is an effort to determine what other people—the legislature, the framers and ratifiers of constitutional provisions, and/or the judges who decided previous cases—did and what they meant by it. Policy-making is a decision about what the policy-maker himself or herself believes should be done in particular circumstances. The general rule in all legal systems is that laws and policies should be made by legislatures and, in some cases, by the executive or by those who are given the authority to make and amend constitutions; and that these laws and policies should be interpreted and applied by judges. This separation of powers and functions is even more fundamental to Louisiana's constitutional and legal system than in those of most other jurisdictions.

The system of separation of powers under Louisiana's Constitution differs in many important respects from that of the U.S. Constitution. Some of the differences are necessary and appropriate because the U.S. Constitution creates a government that is supposed to *be* one of limited and enumerated powers. For present purposes, differences in the relationship between the Louisiana Supreme Court and the Louisiana Legislature are most pertinent. Unlike the U.S. Constitution, Louisiana's Constitution does not make judges "independent" as that term has been employed since before the U.S. Constitution. The independence of federal judges is guaranteed primarily by: (1) a salary that cannot be reduced and (2) a term

of service under which a judge can be removed only by impeachment.[7] Unlike federal judges, Louisiana judges are not independent as that term has traditionally been understood because they are elected to serve for a term of years.[8] Like federal judges, however, Louisiana judges have the power of judicial review; that is, they sometimes declare that a statute or an executive action is unconstitutional.

With or without campaign contributions, judges in Louisiana are subject to popular influences from the voters that do not affect federal judges. That is not to say that federal judges are exempt from extraneous influences, but rather that such influences come from different sources.[9] Like the U.S. Supreme Court, the Louisiana Supreme Court is subject to having its interpretations of non-constitutional law changed as to future cases by the legislature. Legislative changes of non-constitutional interpretations, however, have been much more notable in Louisiana than at the federal level. Thus, for instance, the Louisiana legislature has reined in the Louisiana Supreme Court through tort reform legislation, including the Medical Malpractice Cap.[10] A number of other such instances—and the judicial overreaching that led to them—are discussed in the succeeding sections of this White Paper. [11]

Even more important, voters in Louisiana have the power to amend the state's constitution far more easily than citizens can amend the federal Constitution; Louisianans can thereby change or preempt judicial interpretations of the state Constitution. This aspect of Louisiana's system of separation of powers means that the interpretations of the Louisiana Supreme Court are more readily subject to change by popular reaction than are decisions of the U.S. Supreme Court. For instance, the voters adopted an amendment to the state constitution that provided a definition of marriage in an effort to preempt the possibility that the Louisiana Supreme Court might follow the example of a few other state supreme courts which had interpreted their laws to allow for homosexual unions.[12]

For some years now, the Louisiana Supreme Court's jurisdiction has been limited primarily to hearing cases it chooses to take.[13] As a result, the number of decided cases has been reduced considerably. In 2007, the court issued only 63 opinions, many fewer than it decided a few decades ago and fewer than the 76 cases decided in the 2007 term by the U.S. Supreme Court. Of course, both supreme courts devote considerable time reviewing the many cases which seek, but fail to obtain, full consideration and a decision on the issue(s) presented.

A smaller number of decided cases, however, can give greater importance to each decision actually rendered. Under the state supreme court's discretionary jurisdiction, it now only reviews cases of particular importance. This can have the unintended effect of encouraging whatever inclination individual justices might have toward making policy, rather than making good-faith efforts to apply the law. The succeeding sections of this White Paper suggest that this tendency has at times been evident in several important areas of the court's current jurisprudence.

In recent years, policy-making of the kind that occurred in the 1970s and 80s, particularly in the areas of torts and criminal procedure, has waned due to changes in the court's membership and, as already mentioned, reactions from the state legislature. Some would argue that policy-making continues in these same areas of law, but in the opposite direction or in favor of different interests. It is critical whether the Louisiana Supreme Court acts more like a super-legislature—regardless of which interests it favors—or adheres to an understanding of its role that is more consistent with Louisiana law and with the separation of powers,.

## I. PRIVATE AND COMMERCIAL LAW

This section covers Torts, Contracts, and Corporations. The first subject, Torts, generally involves individuals as plaintiffs versus one or more corporations as defendants. Contracts and Corporations are areas of business law that often involve only corporations, but sometimes also pit individuals against corporations. On issues where the interests of individuals collide with those of corporations, the plaintiffs' bar and the corporate associations not only lobby the legislature, but they attempt to elect as judges those which each group considers to be the right type of judge. Some cases suggest that some judges engage in policy-making to benefit particular interests.

### TORTS

Louisiana has a strong tradition of legislative supremacy, based on the command of Article 1 of the Louisiana Civil Code that the only sources of

law are legislation and custom.[14] That tradition has somewhat restrained the Louisiana Supreme Court from completely following the most aggressive policy-making courts in other states. Yet, in keeping with some recent trends in the tort law of other states, the Louisiana Supreme Court has sometimes assumed an overt policy-making approach in its tort jurisprudence.[15] For years, the supreme court tilted decidedly in favor of victim compensation; but when the legislature changed tort policy through legislative amendments in 1996, most of the justices resisted the argument of the Chief Justice whose interpretation of those amendments would have nullified the legislated policy-change.[16] Thus, the Louisiana Supreme Court has been more willing to accede to these legislative reversals than have the courts of some other states which have reacted to legislative oversight by quickly declaring changes in the tort law to be unconstitutional. For instance, while the issue is not finally resolved, the Louisiana Supreme Court did vacate a lower court judgment that declared unconstitutional the legislation establishing a cap for damages resulting from a medical malpractice claim.[17]

The most recent major reversal occurred in response to a 1986 opinion about manufacturer product liability, *Halphen v. Johns-Manville Sales Corporation*.[18] *Halphen* formulated a novel theory of strict product liability stated in terms of a "product unreasonably dangerous *per se*."[19] According to the court, "a manufacturer may be held liable for injuries caused by an unreasonably dangerous product, although the manufacturer did not know and reasonably could not know *of* the danger."[20] As the dissent states, "[t]he presumption that the manufacturer knew or should have known of the defects in its product is what distinguishes all strict liability cases (design, manufacture and warning) from negligence cases.…To impose liability on a manufacturer when the defects in its product were not discoverable under the state of the art would require a presumption that the manufacturer knew what it could not have known."[21]The case meant in effect that the danger posed by a manufacturer's product was to be judged by standards of safety and risk-abatement available to the manufacturer *at the time of trial*, not at the time the product was originally manufactured and marketed. As a result, manufacturers were unable to introduce "state of the art" evidence when, attempting to exonerate themselves by showing that, given the state of art at the time of manufacture, they could not have made the product any safer, even though it *could* have been made safer based on the state of the art as of the time of trial. Following the *Halphen* decision and the criticism both scholarly and political that it elicited, the Louisiana legislature enacted the Louisiana Products Liability Act of 1991, which was drafted, in part at least, to overrule *Halphen*'s "unreasonably dangerous per se" theory of strict liability.[22]

Another instance of legislative reversal occurred in 1996, when the Louisiana legislature enacted the civil justice reform package of Governor Murphy "Mike" Foster, which repealed and replaced a line of unique Louisiana "strict liability" jurisprudence that arose in the 1970s based on novel interpretations of various articles from the Code of 1825.[23] Articles 2317, 2321, and 2322 had been reinterpreted in the 1970s to provide for a unique Louisiana version of strict liability called "garde"[24] liability for damages caused by land, buildings, animals, and other property in the control of defendants. These articles were amended in 1996 to make it clear that plaintiffs still retained a cause of action for damages caused by things governed by these Articles, but that the standard of fault would thereafter be based in negligence rather than strict liability.

In keeping with Louisiana's civilian tradition of legislative supremacy, the legislature has, at times, effectively overruled the court by statutes promulgated to reverse lines of jurisprudence it regards as socially and economically unwise. Nevertheless, the Louisiana Supreme Court still engages in policy-making. A leading example is the 1999 decision in *Posecai v. Wal-Mart Stores*.[25] The plaintiff was robbed in a Sam's Club parking lot shortly after exiting the defendant's New Orleans store. Ms. Posecai alleged that the defendant negligently failed to provide adequate security in view of the high level of crime in the surrounding areas, and therefore was liable for her injuries. Although the supreme court ruled against Ms. Posecai, it used the case to impose a new duty on business owners.

The Louisiana Supreme Court stated, inaccurately, that Ms. Posecai's claim presented a question of first impression, namely "whether business owners owe a duty to protect their patrons from crimes perpetrated by third-parties."[26] The court answered the question by imposing a duty on merchants to "implement reasonable measures to protect their patrons from

criminal acts when those acts are foreseeable."[27] The court adopted a balancing test and then set out to explain when a crime is foreseeable, finding that the "most important factor to be considered is the existence, frequency and similarity of prior incidents of crime on the premises, but the location, nature and condition of the property should also be taken into account."[28] The record showed that in the some six years between the opening of the Sam's Club and the Posecai robbery, there had been only one comparable crime, and therefore the defendant did not "possess the requisite degree of foreseeability for the imposition of a duty to provide security patrols in its parking lot."[29] The court began with the premise that it "must make a policy decision," and that, in doing so, it was appropriate to "consider various moral, social, and economic factors."[30] It chose a balancing test, saying it was better than three other tests which were described as either too restrictive, arbitrary, or not sufficiently restrictive.[31] The issue is whether balancing tests are proper tests for the courts to adopt because they mimic legislative policy-making. To impose a duty of protection and prevention based on the *general* foreseeability of crime means, predictably, that duty-imposition will occur most frequently in high-crime areas.[32] Therefore, it follows that tort duty-imposition will also occur more frequently for inner-city merchants, leading to higher costs of doing business in those areas, both through more frequently successful tort claims and through the consequently higher business-insurance premiums. These higher costs will result in customers being faced with higher food and merchandise prices imposed by merchants to help defray those legally-engendered, higher costs of doing business. Thus, at the very time other parts of government are encouraging business development in poorer and blighted metropolitan areas through tax incentives and enterprise zones, the Louisiana judiciary is unwittingly promoting a contrary policy that will, on the margin, drive merchants to safer—and typically wealthier—parts of metropolitan areas.

Perhaps, the negative effect of this policy-making could have been avoided, not merely by more careful consideration of its remote but harmful consequences, but also simply by attending to legal fundamentals. Research shows that *Posecai* was not actually a case of first impression: in 1981, the Louisiana Supreme Court had addressed and established the merchant's duty *vis-à-vis* third-party criminal acts against customers in *Rodriguez v. NOPSI*.[33] This court did not address this precedent. As established by the *Rodriguez* court, a merchant owes but a *limited* duty to patrons facing criminal aggression on the premises, a duty only triggered when the attack is ongoing or immediately impending. Indeed, a post-*Posecai* appellate decision,[34] which at different points cites both *Posecai* and *Rodriguez*, relies on *Rodriguez* for the proposition that "[w]here a business owner owes a duty of reasonable care to protect patrons from criminal acts of third parties, that duty can be discharged by summoning the police at the time the proprietor knows or should reasonably anticipate that the third person poses a probable danger."[35] Hence, contrary to *Posecai*'s duty based on general foreseeability of crime, the *Rodriguez* duty centers on "specific foreseeability," which is far more consistent with the mainstream of Louisiana tort law. Without citing *Rodriguez, Posecai* rejects a test that appears to be similar to the *Rodriguez* test as "too restrictive."[36]

The court has imposed a duty of security on private businesses that it does not apply to police agencies responsible to provide security to the public. Like that of most states, Louisiana tort jurisprudence declines to impose a duty of crime prevention and deterrence even on professional crime-fighters, namely the police. Under the *Rodriguez* approach, the potential liability of merchants would be more closely and prudently tied to the idea of personal fault that underlies Louisiana Civil Code article 2315. As noted, it does not require merchants to expend resources on the sort of crime detection and prevention that even publicly-funded police departments are not required to undertake. It also requires merchants only to be reasonably alert to actual or imminent crime on their premises, a duty which, unlike the *Posecai* duty, will not impose prohibitive expenses on inner-city merchants. The merchant can establish his reasonable conduct under the limited *Rodriguez* duty either by warning patrons of "known dangers" or, in the event a criminal act is ongoing or impending, by summoning the police. Had the *Posecai* court discovered and applied its own *Rodriguez* precedent that governed the claim, Louisiana merchants would not be discouraged from setting up shop in high-crime areas by the prospect of higher tort-liability costs than they would face in suburbs and other relatively low-crime and high-wealth areas.

*Posecai* has not been and may not be addressed by the legislature. The issue may not rank high enough on the legislative priority list for business lobbyists. Moreover, the citizens paying higher prices in the affected areas and advocates for the poor may not realize that price differentials can be attributable to judicial policy-making. But, a properly presented case might prompt the state supreme court to return to the law as it pre-existed *Posecai.*

## CONTRACTS

A cornerstone of Louisiana's civil law, derived from even older but still flourishing European legal systems, is the notion that parties are free to contract as they see fit and that, accordingly, a contract freely entered into constitutes the law between the parties.[37] That the parties to a contract can define their respective rights and obligations—that they can literally make law for themselves—reflects, at the deepest level, the civil law's abiding regard for the individual citizen as a free and competent moral agent.[38] In addition, certainty and predictability enhance the economic value of commercial relations.

In the end, however, the benefits of contract depend directly upon a court's willingness to protect and enforce them. No Louisiana court deserves a perfect score in this regard. Courts all too frequently look beyond the language of the contract at issue and interpose the judges' own sense of justice into, and thereby abrogate, the parties' arrangements. At its best, the Louisiana Supreme Court operates as a check and a corrective against such inaccurate readings of contracts by lower courts. At times, the protection of contracts will go against strong popular opinion, as was the situation when the supreme court recently reversed a lower court decision and held that water damages from hurricane Katrina were not recoverable under an insurance policy containing a clear exclusion for flood damage.[39]

Two other examples will suffice to illustrate the dangers to be guarded against by the supreme court. In *Terrebonne Parish School Board v. Castex Energy, Inc.*,[40] a landowner, in this case a parish school board, sued a mineral lessee and the lessee's successors for restoration of the surface of coastal wetlands subject to the lease, although the lease itself "d[id] not contain any provision relative to restoration, much less one requiring [the] lessee to restore the surface to its pre-lease condition upon the cessation of operations."[41] The lessees submitted uncontested evidence that they had complied with all regulations of the Louisiana Commissioner of Conservation governing plugging and abandonment of oil and gas wells, closing oil field pits, and cleaning the areas around abandoned wells. The school board asserted that the canals dredged by defendants "altered the hydrology of the marsh and adversely affected its ecology by removing marsh terrain, creating spoil banks, and generally impairing the natural ebb and flow of tidal waters," and argued that "[e]ven in the absence of an express lease provision, the defendants have a duty to restore the surface, as near as practicable, to its original condition."[42]

After a trial on the merits, the trial court found defendants liable to the school board to restore the property and ordered defendants to deposit $1.1 million plus judicial interest into the registry of the court to be used for the restoration, which would be supervised by a special master. The First Circuit Court of Appeal affirmed this judgment, reasoning that article 122 of the Louisiana Mineral Code[43] "imposes upon mineral lessees certain implied covenants," including "the obligation to restore the surface as near as practical to its original condition on completion of operations."[44]

In reversing this decision, the Louisiana Supreme Court acknowledged the importance of this case for the issue of who should pay for coastal restoration. Nevertheless, the supreme court overruled the First Circuit, stating that there is no implied duty to restore the property to its pre-drilling status. Writing for the majority, Chief Justice Calogero observed:

> Although the temptation may be to thrust a great part of the solution to the problem of coastal restoration upon the oil and gas companies and other private parties, rather than the state and federal governments currently faced with underwriting the expense of restoration, we decline to do so out of respect for the terms of the mineral lease to which these parties agreed. Thus, we reverse the courts below and find that, where the mineral lease expressly grants the lessee the right to alter the surface in the manner it did, and is silent regarding restoration, article 122 [of the Louisiana Mineral Code] only imposes a duty to restore the surface to its original condition where there is evidence of unreasonable or excessive use.[45]

Similarly, in *Avenal v. State of Louisiana*,[46] oyster

fishermen holding oyster leases in the Breton Sound area brought a class action claiming that they suffered an unconstitutional taking as a result of the State of Louisiana's operation of the Caernarvon Freshwater Diversion Structure, which altered the salinity levels in the waters covering the leased oyster beds.[47] Prior to trial, plaintiffs moved to strike all evidence of hold harmless clauses contained in nearly all of the oyster lease agreements, whereby lessees agreed to hold the state harmless "from any claims for loss or damages to rights arising under this lease, from diversions of fresh water or sediment"[48] The state filed a motion for partial summary judgment dismissing claims of class members whose leases contained the hold harmless clauses.

The trial court granted the plantiffs' motion, "excluding all evidence relating to the hold harmless provisions contained in plaintiffs' leases" and deferred ruling on the state's motion until after the jury's findings.[49] The state filed a writ application with the Louisiana Fourth Circuit, which found no error in the trial court's having granted the plaintiffs' motion to exclude evidence but also held that the trial court erred in deferring ruling on the State's summary judgment motion. This ruling did not appear until the final day of the jury trial on the merits.[50]

After a trial lasting eight days, the jury returned a verdict in favor of plaintiffs and awarding over one billion dollars ($1,000,000,000) in damages as well as attorneys' fees and court costs.[51] On appeal, the Fourth Circuit affirmed, ruling that:

> [a]lthough the plaintiffs did not prove at trial the amount of oyster production on their leases before and after Caernarvon, and some leaseholders admitted that their leases had never produced oysters... 'so long as the plaintiffs proved generally that their leases were productive before [Caernarvon] came on line, and that they were not productive after [Caenarvon] came on line, and that [Caernarvon] caused the loss of oyster productivity…' the plaintiffs were entitled to recover.[52]

The Fourth Circuit ruled that the hold harmless clauses were invalid under a prior Supreme Court case, *Jurisich v. Jenkins*.[53] Finally, the Fourth Circuit also increased the award to the lead plaintiff from eight hundred twenty-six thousand dollars ($826,000) to over seventeen million dollars ($17,000,000).[54]

Granting writs to review the Fourth Circuit decision, the Supreme Court reversed, holding that the *Jurisich* decision on which the circuit court had relied "expressly did not address the validity of these [hold harmless] clauses,"[55] and thus those plaintiffs—that is, most of them—whose leases contained the clause had no valid takings claim.[56] As to those plaintiffs whose leases did not contain the hold harmless clause, the supreme court ruled that these claims were barred by a two-year statutory prescriptive period for claims for private property damaged for a public purpose.[57]

## CORPORATIONS

The Louisiana Supreme Court has yet to address directly the issue of "single business enterprise" which has sprouted, and may have taken root, in the state's appellate courts. "The 'single business enterprise' (or SBE) theory is a new form of corporate veil-piercing that affects the limited liability and other attributes of separate personality that normally exist among parent, subsidiary and other affiliated business entities—typically corporations and LLCs."[58] This theory, first adopted in Louisiana by the First Circuit Court of Appeals,[59] is, or at least at the time of the decision was, "recognized only by the lower courts of (not the supreme courts) of Louisiana, Texas and, perhaps, Indiana."[60] Other circuits have followed the lead of the First Circuit.[61] If allowed to become settled doctrine, this change in the understanding of corporations would harm business planning, affiliates' creditors, and contract interpretation[62] and would, therefore, affect economic development in Louisiana.

This new theory goes well beyond the traditional veil-piercing "caus[ing] some courts to relax the strong protection that Louisiana traditionally has provided to limited liability and other attributes of corporate personality."[63] As Professor Glenn Morris has written,

> The prevailing SBE test permits piercing based on a list of eighteen factors that is composed mainly of items that are common in parent-subsidiary settings. Indeed, many of the SBE cases recite with approval a rule that would eliminate limited liability between all parent and subsidiary companies based solely on the one factor—control—that, by definition, makes them parents and subsidiaries in the first place. According to this rule, 'If one corporation is wholly under the control of another, the fact that it is a separate entity does not relieve the latter from liability.'[64]

The SBE theory is inconsistent not only with traditional doctrine, but with recent dicta of the state supreme court in *Bujol v.Entergy Services, Inc.*[65] The supreme court there affirms traditional principles of inter-corporate liability:

> The law has long been clear that a corporation is a legal entity distinct from its shareholders and the shareholders of a corporation organized after January 1, 1929 shall not be personally liable for any debt or liability of the corporation. *The same principle applies where one corporation wholly owns another.* While generally a parent corporation, by virtue of its ownership interest, has the right, power, and ability to control its subsidiary, a parent corporation generally has no duty to control the actions of its subsidiary and thus no liability for a failure to control the actions of its subsidiary. The fundamental purpose of the corporate form is to promote capital by enabling investors to make capital contributions to corporations while insulating separate *corporate* and personal asset[s] from the risks inherent in business.[66]

This statement has apparently prompted some lower courts to retreat from the SBE theory, but has not altogether eliminated it.[67] It remains to be seen whether the state Supreme Court, when presented with the opportunity, will reject the theory as a necessary element of a case holding.

## II. PUBLIC LAW

Policy-making versus good-faith interpretation of the law is often a point of debate in matters of public law, notably on issues of constitutional law. This second section of the paper addresses criminal law and criminal procedure. While criminal law presents some constitutional law issues, it is the area of criminal procedure that more often involves such issues. This paper first addresses substantive criminal law and its interpretation, before considering constitutional issues of criminal law and then criminal procedure.

Constitutional disagreements in matters of criminal law and procedure often oversimplify the issues by use of contrasting labels like "tough" or "soft" on crime; "pro-police" or "pro-individual rights." Whatever relevance such labels may have for those in the political branches, they are entirely inappropriate in judicial interpretation. Policy-making is able to favor either the police or the individual defendant, depending on the preferences of the particular judges. Both biases are illegitimate. Whether or not good-faith interpretation favors police or the individual defendant is irrelevant. Both sides are governed and protected by the same law.

Crime became a hot political topic during the 1960s as crime rates rose and as the U.S. Supreme Court launched the rights revolution in criminal procedure, most notably with the landmark cases of *Mapp v. Ohio*[68] and *Miranda v. Arizona*.[69] During that decade the Supreme Court nationalized almost all the provisions of the Bill of Rights, meaning that federal courts claimed a constitutional jurisdiction to oversee state and local law enforcement procedures. The Supreme Court's claim that these decisions were grounded in the Constitution prevented state legislatures and Congress from changing many of the rules of criminal procedure without a constitutional amendment.[70]

Members of the political branches, who promised voters they would be "tough" on crime, responded with changes to the substantive criminal laws. As a result, a torrent of legislation creating and/or amending crimes at the federal and state levels has flowed ever since. At the federal level, the creation of new statutes has been particularly remarkable.[71] In Louisiana, much of the legislation has involved the enhancement of penalties both by amending existing statutes and by enacting new "feel-good" crimes such as "carjacking"[72] and "battery of a school teacher."[73] ("Feel good" legislation supposedly makes voters "feel good" about legislators who "fight for them," even though the new statute is entirely unnecessary and unlikely to be used by prosecutors because the conduct is already criminal under an existing statute.)

Despite new crimes, the substantive criminal law in Louisiana and other states has remained fairly constant because it is concerned with the fundamental ends for protecting society; criminal procedure is concerned with the means of enforcing the criminal law. Substantive law defines the crimes (including murder, rape, robbery, etc.) and their defenses, (such as self-defense and insanity); procedural law provides rules for the investigation and prosecution of crime. Procedural law—a combination of federal and state constitutional law and state statutory law—governs arrest, search and seizure, indictment and trial, and evidence at trial. The rules of criminal procedure, however, especially search-seizures and confessions, have been controversial in a way that the rules of substantive criminal law or even civil procedure have not. The U.S. Supreme

Court has nationalized only criminal procedure, not substantive criminal laws—except for laws involving obscenity, abortion, and sodomy. Constitutional review of substantive criminal law has basically been limited to questions regarding the punishment of crime (e.g., the death penalty) and the question of whether statutes give adequate notice of what acts have been made criminal.

## SUBSTANTIVE CRIMINAL LAW

Issues of guilt or innocence at the heart of state substantive criminal laws generally have not been—and should not be—politicized, even though they go through the political process. Everyone opposes and every state punishes murder, rape, theft, etc. Still each state in a federal system has the ability democratically to shape its political society by criminalizing some actions and not others. Thus, the basic decisions about whether to prohibit certain conduct (e.g., whether gambling should be a crime or not) and by what criminal penalty (if any, as opposed to a civil penalty) are properly legislative decisions and, therefore, necessarily political. Rarely do (and some would say never should) a court interfere with a legislative decisions about what conduct to prohibit or how to punish it.

For legislatures and courts, the really important issues in substantive criminal law are non-ideological; they concern the elements of crimes and they apply equally to all persons. Criminal statutes must clearly define the criminal conduct in order that citizens know what is prohibited and that no one is convicted without having committed the prohibited act with a properly stated "*mens rea*" (i.e., "guilty mind"). Difficulties in the interpretation of substantive criminal law derive mostly from poor drafting by the state legislature. The state supreme court, however, sometimes compounds the problems—not so much by policy-making, but by a failure simply to understand the proper way to interpret Louisiana's criminal law.

Since its purchase by the United States, Louisiana has maintained the policy that all crimes must be statutory. [74] In 1942, Louisiana became the first state to go further and to create an integrated criminal code. Unlike a collection of statutes, the criminal code was in form a coherent and integrated body of law which remained largely unchanged until the early 1970s, when—with the "war on crime" being waged—the legislature's *ad hoc* addition and amendment of criminal statutes decimated that coherence in its quest primarily to increase criminal penalties. As long as the Louisiana Criminal Code remained a coherent code, in the sense of having a civilian form, there was relatively little for judges to interpret. The Criminal Code's principle of "genuine construction"[75] minimized the role of judges by employing language intended to be understood by anyone "according to the fair import of their words, taken in their usual sense."[76]

Rules of interpretation have always been necessary to guide judges and to limit their discretion in interpretation. The common law principle of "strict construction" in criminal law has traditionally been used by judges to give ambiguous terms the narrower meaning where more than one interpretation of the language is reasonably possible. Louisiana's codification tradition as applied to criminal law rejected "strict construction," adopting instead the principle of "genuine construction." This different principle of construction was thought to be more appropriate to the language of a code which was designed to make crimes clearly understood by ordinary persons and to limit judicial discretion to modify laws through interpretation.

Although the legislature has codified the principle of "genuine construction," it often engages in such sloppy drafting that the words do not lend themselves to "genuine construction." The Louisiana Supreme Court, however, sometimes uses the genuine and sometimes strict construction, but follows one or the other without any explanation of why it is using the chosen method of construction. In doing so, it would be possible for the court to hide policy-making judgments. Still, poor legislative drafting which departs from the form of drafting appropriate for the Code often creates unnecessary issues of interpretation and ones that cannot be resolved via genuine construction. Under the Criminal Code, interpretation should be minimal and discretion in applying the law should be lodged largely in the jury.

## INTERPRETATION OF SUBSTANTIVE CRIMINAL LAW

In non-capital cases, the state supreme court generally chooses what to review. In analyzing the Louisiana Supreme Court's criminal opinions, the

challenge is determining whether the issue to be decided arises due to (a) poor legislative drafting, in a technical sense; (b) legislative drafting that, while technically sufficient, ignores basic principles of criminal law, in particular regarding a mens rea; (c) the justices' misunderstanding of basic principles of criminal law; (d) judicial over-reaching of some kind; or (e) some combination of the aforementioned. Of course, a judgment about the source of the challenge depends on a detailed analysis of all the relevant materials and arguments in the case.

*State v. Ritchie* arguably involves all these dimensions (a through e) to the problem of interpretation with regard to criminal laws.[77] The case involved a conviction for negligent homicide where the defendant drove his boat into another boat, killing three persons in the second boat. The evidence indicated that the defendant had some alcohol and marijuana residue in his body. The evidence would have been sufficient to uphold the conviction for negligent homicide, but the trial judge's interpretation of the necessary mental element was the cause for reversal.. The trial judge instructed the jury on the meaning of negligence in words that amounted to ordinary or tort negligence, rather than criminal negligence.

The first problem in the case is the poor legislative drafting in a technical sense. The particular statute, which was not actually in the Louisiana Criminal Code, has the same title as a statute in the Code: both were labeled "Negligent Homicide."[78] The two statutes, however, have very different penalties and use different terminology for the mental element. Neither statute is very clear, but the statute under which the defendant was indicted is the less clear on the issue of negligence ("careless, reckless, or negligent manner").[79] The statute also illustrates legislative drafting that ignores basic principles of criminal law. That is to say, the statute appears to disregard the normal rule of criminal law that a crime requires a criminal mental element; carelessness or ordinary, i.e., tort, negligence does not constitute criminal negligence—at least not in Louisiana. The state supreme court's original opinion upholds the conviction and the trial judge's interpretation of the statute. That opinion illustrates the third point, above, namely the justices' misunderstanding of basic principles of criminal law. Specifically, the original opinion looks to cases from other states in order to find support for the lesser standard of negligence sanctioned by the trial judge. The writer of that opinion seems unaware that (1) nationwide there has been a long-standing controversy over the meaning of negligence; (2) some other states have adopted a lesser standard than that applicable in the Louisiana Criminal Code; and (3) he should have paid attention to Louisiana Revised Statute 14:12 in the general part of the Louisiana Criminal Code and Louisiana Supreme Court cases construing those provisions. After a petition for rehearing by an *amicus*,[80] the supreme court reverses itself in an opinion that avoided the errors in interpretation committed in the original opinion.[81] The opinion on rehearing, however, goes further and arguably decides an unnecessary constitutional question by declaring that other language in the statute—not presented by the case, but which might be used on remand ("immoderate rate of speed")—was unconstitutionally vague.

In addition to clearly presented issues of mens rea, as in *Ritchie* less obvious ones can arise in the context of felony-murder and felony-manslaughter, where there is supposed to be a connection between mens rea and causation. One problem involves the situation where the defendant perpetrates a felony that results in the death of a person, but neither the defendant nor any accomplice actually inflicts the death-causing wound. The *Garner* rule, named after *State v. Garner*,[82] says that the defendant will not be guilty of felony-manslaughter (nor, by implication, felony-murder) when the "offender" (i.e., the defendant or an accomplice) does not inflict the death-causing injury. *State v. Kalathakis*[83] revisits the *Garner* rule under somewhat different facts, namely where police had killed the defendant's accomplice. The case affirms the *Garner* rule, but indicates that the court might be willing to modify the rule where it is proven that the defendant was the "legal cause" of the death. Much better than *Garner* itself, the opinion provides a good discussion of the relationship of mens rea and causation in the context of felony-murder.[84]

The supreme court again visits and re-affirms the *Garner* rule in *State v. Myers*,[85] as well as discussing, without distinguishing, *Kalathakis.* Nevertheless, the opinion misses the real causation issue. The court upholds one of the two manslaughter convictions on the basis that the defendant and his accomplice (who shot a police officer) were both engaged in the distribution of narcotics. The opinion fails to discuss whether there is in

fact "legal cause" under the facts; without discussion, it follows "the proximate-cause theory normally applicable to tort cases" rejected by *Kalathakis*.

These cases involve difficult issues of interpretation that are not of much interest to the ordinary layperson. Nevertheless, non-lawyers ought to appreciate the importance of having justices of sufficient intellect to engage in the subtleties of legal interpretation. Such interpretation is not only more difficult, but often more critical to questions of guilt or innocence than the "sexier" constitutional issues.

## CONSTITUTIONAL ISSUES IN SUBSTANTIVE CRIMINAL LAW

Judicial policy-making is often involved when justices of the state's supreme court declare a criminal statute unconstitutional under circumstances where the result is not clearly dictated by U.S. Supreme Court precedent. Policy-making is particularly likely when the declaration of unconstitutionality is based on the state constitution. A declaration of unconstitutionality means a court refuses to give effect to the statute (or part thereof). The only legitimate basis for such a refusal is that federal or state constitutional law so requires. A good example of such policy making is *State v. Brenan,*[86] which, over a dissent by Justice Traylor, takes an expansive view of "substantive due process" in declaring unconstitutional a statute banning the promotion of obscene devices (i.e., "sex toys"). The court identifies what it characterizes as a general right of privacy in the Louisiana Constitution, which language is part of a provision dealing with searches and seizures designed also to extend to electronic communications.[87] Although neither a U.S. Supreme Court nor U.S. Fifth Circuit precedent required the result, the court held that the statute violated the federal Fourteenth Amendment. It, thereby, adopted a notion of substantive due process more expansive than that of the U.S. Supreme Court.[88]

On the other hand, a decision of unconstitutionality in *State v. Muschkat*,[89] is much less open to a charge of policy-making. The U.S. Supreme Court has addressed the constitutionality of loitering ordinances[90] and, thereby, has established a framework for deciding similar cases. While the state supreme court's decision in *Muschkat*, declaring the traffic loitering statute unconstitutionally vague and overbroad may not have been compelled by supreme court precedent, the state supreme court follows the appropriate framework of analysis on each of the issues of vagueness and over-breadth, without dissent.

Judicial policy-making can also present itself when state supreme court justices decide that a statute violates the state, rather than the federal, constitution. It matters, however, whether the language of the state constitution does or does not differ from that of the federal constitution. *Manuel v. State,*[91] which upholds the raising of the state minimum drinking age to twenty-one, turns on state constitutional language against age discrimination which has no counterpart in the U.S. Constitution.[92] The language—"No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of… age"—means that only some forms of age discrimination are unconstitutional. Unless the legislature "arbitrarily, capriciously, or unreasonably" discriminates based on age, the legislation does not violate the state constitution. Contrary to the approach taken by the two dissenters, the pertinent constitutional language does not authorize the justices to decide whether they think the statutory policy is reasonable. In enacting policy into law, a legislature usually has multiple options that are all reasonable ones; but a court's more limited role in judicial review of this particular constitutional language is to judge whether the law adopted is unreasonable.

In matters pertaining to the death penalty, the federal constitutional jurisprudence allows, but tightly restricts, state legislation providing for sentences of death.[93] In 1976, the U.S. Supreme Court declared Louisiana's first degree murder statute unconstitutional because it provided for a mandatory sentence of death upon conviction for first degree murder.[94] Thereafter, the Louisiana legislature hastily adopted a series of new capital murder statutes that were found defective by the Louisiana Supreme Court.[95] Those decisions did not necessarily indicate that the justices disapproved of the death penalty or the legislature's prerogative to provide that punishment—although some of the justices clearly did oppose the death penalty. Rather, those statutes were simply so illogically drafted as to be incapable of implementation. After the legislature adopted a coherent death penalty framework in accord with U.S. Supreme court jurisprudence, state supreme court review of death penalty cases, which is

mandatory,[96] has focused on determining whether the death sentence is excessive.

Given the stringent federal restrictions, it is perhaps striking when state supreme court justices attempt to be even more restrictive of the death penalty. In two cases of note, the Louisiana Supreme Court addressed the constitutionality of death penalty issues where the U.S. Supreme Court had not at the time definitively resolved the matter. In *State v. Perry,*[97] a 1992 case, the Louisiana Supreme Court ruled that forcibly medicating an insane death-row inmate in order to make him sane for execution (because the insane cannot be executed)[98] violated a supposed general right of privacy in the state constitution. By basing the decision on the state—rather than the federal—constitution, the Louisiana Supreme Court insulated the judgment from being overturned by the U.S. Supreme Court. In 2007, the state supreme court addressed the death penalty for rape of an eight-year-old child in *State v. Kennedy.*[99] Only Chief Justice Calogero dissented. Those in the majority gave effect to the will of the legislature under circumstances where it was likely, but not certain, that the U.S. Supreme Court would declare the statute unconstitutional. Chief Justice Calogero's dissent accurately anticipated the result of the U.S. Supreme Court's decision in *Kennedy v. Louisiana*,[100] which reversed the Louisiana Supreme Court.

## CONSTITUTIONAL ISSUES IN CRIMINAL PROCEDURE

During the 1960s, the Warren Court radically changed state criminal procedures by reversing a number of its own precedents and deciding that most provisions in the Bill of Rights applied to the states. After Chief Justice Warren was replaced by Chief Justice Warren Burger, the U.S. Supreme Court did not repudiate the Warren court decisions; but the Court did slow down the expansion of rights for criminal defendants.[101] At that point, some lawyers and law professors urged state supreme courts to go beyond the Burger Court to expand rights for criminal arrestees and defendants. Many state courts did so despite the fact that language in their search and seizure provisions was no different than that of the U.S. Constitution's Fourth Amendment.

Louisiana's 1974 Constitution, however, does contain language that differs from the Fourth Amendment of the U.S. Constitution. The italicized language below*, excerpted from Article I, § 5 of the Louisiana Constitution,* does not appear in the Fourth Amendment.

> *Every person* shall be secure in his person, *property, communications,* houses, papers, and effects against unreasonable searches, seizures, *or invasions of privacy.* No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, *and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.* [102]

According to one draftsman, the language was adopted in order to expand the protection of privacy.[103] Specifically, some of the differences in language from the Fourth Amendment[104] incorporate the U.S. Supreme Court extensions of the Fourth Amendment to intercepted conversations based on the notion of a reasonable expectation of privacy in telephone conversations.[105]

Louisiana's search and seizure provision differs from that of the Fourth Amendment to U.S. Constitution in four primary ways: (1) it contains language guaranteeing security in property; (2) it contains language guaranteeing security in communications; (3) it offers legal standing for any defendant "adversely affected" by the search or seizure to challenge such in the appropriate court; and (4) it uses the language "invasions of privacy."[106] Notably, Louisiana's is the only state constitution with language expanding standing to persons "adversely affected."[107]

These differences in language have been interpreted as written and, by some justices, as the basis for judicial policy-making. Both the text and the context of the language about "privacy" relate to the security of "communications."[108] These two textual differences (nos. 2 and 4 above) from the text of the Fourth Amendment put into the state constitution protections regarding electronic communications already recognized by the U.S. Supreme Court.[109] Nevertheless, some members of the state supreme court have, at times, attempted to expand the language to reach results that go beyond U.S. Supreme Court jurisprudence on electronic communications.[110] Cases taking that direction

are generally two decades old.[111] Nevertheless, the language differences in Article I, § 5 of the Louisiana Constitution and a few cases provide justices, who are so inclined, a launching pad for policy-making in matters of search and seizure.

The one unmistakable difference between Article I § 5 of the state constitution and the Fourth Amendment of the federal Constitution (and for that matter the other 49 states search and seizure provisions) involves standing. The state constitution provides that "[a]ny person *adversely affected* by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court."[112] In federal criminal proceedings, a person must have standing in order to assert the violation of almost any constitutional right.[113] As to searches and seizures, the U.S. Supreme Court has, since the adoption of Louisiana's constitution, insisted on the importance of standing for purposes of a motion to suppress evidence seized through a breach of the Fourth Amendment. Thus, the U.S. Supreme Court has ruled that a defendant lacks standing to have evidence suppressed when law enforcement infringes the rights of a third party, but not those of the defendant.[114]

While acknowledging that the state constitution provides broad standing, *State v. Culotta*[115] reversed a lower court decision which it said gave too broad an interpretation to the term "adversely affected." *Culotta* held that the constitutional provision need not "exclude from the trial evidence otherwise untainted, secured through a search warrant, because part of the showing made in the affidavit used to secure the warrant is based on evidence illegally obtained from third persons and inadmissible, if objected to at trial, against either them or the accused."[116] Given the language "adversely affected," the supreme court acknowledged that the trial court had "not unreasonably" reached the opposite conclusion.[117] Whether or not one agrees with the expanded standing provided in Article I, § 5 of the Louisiana Constitution, the text clearly so provides. Reasonable minds can reach different conclusions about how broadly to interpret this broader standing. Such efforts in textual interpretation are quite different from positing that Article I, §5 creates a general right of privacy,[118] which includes, some argue, even a right to abortion.[119] Rather than interpretation, the latter represents pure policy-making.

On search and seizure issues which do not implicate any difference in language between Article I, §5 of Louisiana's Constitution and the Fourth Amendment, the state supreme court seems inclined to bring Louisiana's search and seizure protections in line with the decisions of the U.S. Supreme Court. That was the approach taken by the state supreme court in 2000, when it decided *State v. Jackson.*[120] The case involved police checkpoints of automobile to verify insurance coverage of the vehicle. The court had held that police checkpoints violate both the Louisiana and U.S. constitutions.[121] Subsequently, in *Mich. Dept. of State Police v. Sitz*,[122] the U.S. Supreme Court held police sobriety checkpoints to be constitutional. Recognizing that the U.S. Supreme Court had disagreed with its interpretation of the Fourth Amendment, *Jackson* also overruled its interpretation of the Louisiana Constitution as applied to checkpoints.[123] Without distinguishing between checkpoints to check sobriety (the situation in *Sitz*) and those to check for automobile insurance (the issue in *Jackson*), the court held the state "[c]onstitution does not prohibit the use of checkpoints as a valid law enforcement tool when conducted pursuant to neutral guidelines limiting the discretion of the field officer." [124]

Justice Traylor's opinion seems to take the view that, while the Louisiana Constitution affords greater protections regarding searches and seizures "in some circumstances," generally it follows the Fourth Amendment.[125] The extent of the differences between the state and federal provisions governing searches and seizures will continue to be an issue, however. The direction the state supreme court takes on searches and seizures will turn on whether the justices interpret the text in good faith—including recognizing differences that clearly exist—or whether they use the fact that Article I, § 5 differs in some respects from the Fourth Amendment to claim that it differs generally from the Fourth Amendment. It seems the text of Article I, § 5, together with the context of U.S. Supreme Court jurisprudence as it existed when the provision was drafted, offers an invitation to policy-making in two directions, favorable either to defendants or to prosecutors.

## CONCLUSION

The title of this White Paper poses the question of whether the Louisiana Supreme Court is engaged in interpreting the law or making policy. As a court

and as to the range of issues surveyed, the answer to the question is a mixed one. There is policy-making occurring, but it occurs much less often than it did two to three decades ago.

The section on Torts shows that the state supreme court has had an inclination towards policy-making, but that much of its most significant policy-making has been over-ruled by the legislature. The prospect of future over-rulings and the influence of judicial elections may have also dampened enthusiasm for strong policy-making in this area of the law. *Posecai v. Wal-Mart Stores,* however, illustrates that the court still engages in some policy-making. The Contracts section demonstrates that the supreme court has sometimes corrected lower court failures to respect the sanctity of contracts. The Corporations section suggests the court could impose similar discipline on the lower courts with respect to the issue of limited liability for corporations.

In matters of substantive criminal law, the primary problems of interpretation result from poor legislative drafting. Still, on the important issues of mens rea and causation, it appears that sometimes the justices lack the necessary understanding of criminal law principles to give a statute the proper interpretation. Policy-making is most noticeable on constitutional issues, both in substantive criminal law and criminal procedure. Moreover, justices inclined to policy-making sometimes rely on the language of Article I, §5, which covers searches and seizures, to reach a novel result.

The decrease in policy-making by the state supreme court is attributable largely to reactions by the legislature and the voters. In the final analysis, the direction of the court depends on the collective action of its members. As its membership changes, some changes in a supreme court's jurisprudence are inevitable. The rule of law, however, requires evenhandedness, steadiness, and predictability in order for citizens to conduct their affairs in an orderly fashion. Justices who consider themselves policy-makers, whether they are pro-plaintiff, pro-business, pro-prosecution, or pro-defendant, have no business being on the court. Whether the Louisiana Supreme Court will continue along a path generally characterized by interpreting the law, rather than making policy, remains to be seen.

**Endnotes**

1 Vernon Valentine Palmer & John Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 Tul. L. Rev. 1291 (2008).

2 Susan Finch, *Money talks, says study of justices; Donations taint La. top court, it finds*, New Orleans Times-Picayune, Feb. 1, 2008 at Metro 1.

3 Adam Liptak, *Looking Anew At Campaign Cash And Elected Judges*, New York Times, Jan. 29, 2008, at A14.

4 Susan Finch, *Angry chief justice disputes study of court; Campaign donor bias charge invalid, he says*, New Orleans Times-Picayune, July 11, 2008 at Metro 8.

5 Bill Lodge, *Forum hears high court candidates*, The Advocate, Aug. 14, 2008, at B1.

6 Joe Gyan Jr., *Judges to disclose finances*, The Advocate, Mar. 27, 2008, at A11.

7 The Federalist No. 78 (Alexander Hamilton).

8 *See* La. Const. Art. V (2008) The salary of judges, as with all officials, cannot be reduced during their term of office. La. Const. Art. X § 23 (2008).

9 As Federal Judge Laurence Silberman memorably noted some Supreme Court justices often fall prey to a trend he called the "Greenhouse Effect," which is named after New York Times Supreme Court correspondent Linda Greenhouse. According to Silberman, the "Greenhouse Effect" is the process by which some Supreme Court Justices gradually shift their legal thinking due to external influences. *See* Judge Laurence Silberman, *Address to the Federalist Society* (June 13, 1992), in Legal Times, June 22, 1992.

10 E.g. Louisiana Medical Malpractice Act, La. Rev. Stat. § 40:1299.41, *et seq.*

11 See text accompanying notes 16 through 23.

12 *See* La. Const. Art. 12§ 15 (2008) and Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003).

13 *See* La. Const. Art. V § 5 (2008) granting the court discretionary supervisory jurisdiction in all cases and mandatory review only in cases where a statute was declared unconstitutional or where a capital defendant was sentenced to death.

14 La. Civ. Code Art. I ("The sources of law are legislation and custom.).

15 *See* W. Page Keeton et al., Prosser and Keeton on Torts 15-16 (5th ed. 1984). *See also* Dumas v. State ex. Rel. Dept. of Culture, Recreation & Tourism, 828 So 2d 530, 538 (2002) ("'Regardless if stated in terms of proximate cause, legal cause, or duty, the scope of the duty inquiry is ultimately a question of policy.' *Roberts v. Benoit, 605 So 2d 1032, 1052 (1991) (on rehearing).*").

16 *See* Dumas, *supra* note 16. The court held that the 1996 legislative amendments to Articles 2323 and 2324(B) overruled the policies of *Weber v. Charity Hosp. of La. at New Orleans*, 475 So. 2d 1047 (La. 1985) and *Lambert v. United States Fidelity & Guar. Co.,* 629 so. 2d 328 (La. 1993) by eliminating solidarity liability in negligence cases and also the action for contribution among joint torfeasors.

> Prior to the enactment of the amendments, the policy behind Louisiana's tort law was ensuring that innocent victims received full compensation for their injuries. Now, however, Louisiana's policy is that each tortfeasor pays only for that portion of the damage he has caused and the tortfeasor shall not be solidarily liable with any other person for damages attributable to the fault of that other person. With the advent of this new policy, the right of contribution among solidary tortfeasors also disappeared since it is no longer necessary in light of the abolishment of solidarity.

Dumas, *supra* note 16, at 538.

17 *See* Taylor v. Clement, 947 So. 2d 721 (La. 2007)(vacating the lower court ruling because the constitutional issue had not been properly presented at the trial level and also refusing to exercise its discretionary jurisdiction).

18 Halphen v. Johns-Manville Sales Corporation, 484 So. 2d 110 (La. 1986) [on a certified question from the United States Fifth Circuit Court of Appeals].

19 *Id*. at 113.

20 *Id.* at 116.

21 *Id.* at 120, 121 (Marcus, J., dissenting).

22 *See* La. Rev. Stat. *§* 9:2800.52 (1988).

23 *See* Hero Lands Co. v. Texaco, Inc., 310 So. 2d 93 (La. 1975).

24 *See generally*, William Powers, Jr., *Some Observations on Strict Liability in the Louisiana Law of Garde*, 52 La. L. Rev. 365 (1991-1992)

> Although "garde" might technically refer only to liability for defective things under Article 2317, I will use it loosely also to apply to liability for keepers of domestic animals under article 2320 and liability for owners of buildings under 2322. As I will demonstrate, the analysis under theses sections is structurally similar, whatever terminology is used. *Id.* at 367, n.10.

25 Posecai v. Wal-Mart Stores*,* 752 So. 2d 762 (La. 1999).

26 *Id.* at 766.

27 *Id*.

28 *Id.* at 768.

29 *Id.* at 769.

30 *Id.* at 766.

31 *See id.* at 767-68.

32 Whether or not a duty exists, is a question of law. *See* Pinsonneault v. Merchants & Farmers Bank & Trust Co.*,* 816 So. 2d 270, 276 (2002). But the legal question of duty in this context turns on factual distinctions that are difficult in practice for courts to apply, as indicated by the following note in *Pinsonneault*:

> In *Posecai*, concerned that the lower courts were reading *Harris v. Pizza Hut of Louisiana*, 455 So. 2d 1364 (La. 1984), too broadly, we cautioned that a business does not assume a duty to protect its customers from the criminal attacks of third persons merely by undertaking some security measures. *Posecai*, 99-1222 at 10, 752 So 2d. at 769 n. 7. This case is factually distinguishable from both *Pizza Hut* and *Posecai* because rather than undertake *some* security measures, the Bank in this instance adopted a comprehensive security plan, a portion of which was clearly directed at providing security to customers.

*Id.* at 278, n. 4. (emphasis in original ). Even if, however, the lower courts were misinterpreting *Pizza Hut,* lawyers for businesses would have paid attention and advised their clients of the risks of implementing limited security measures. So businesses which, in reliance on the lower court readings of *Pizza Hut,* increased their security measures with a comprehensive plan and had reason to believe they would thereby reduce their liability now learn in *Pinsonneault* that they have actually increased their liability exposure.

33 Rodriguez v. NOPSI, 400 So. 2d 884 (La. 1981).

34 Mackey v. Jong's Super Value #2, 940 So 2d 118 (La. 2d Cir.2006), *writ denied*, 948 So. 2d 116 (La., 2007), *reconsideration denied* 949 So 2d 430 (La., 2007)

35 *Id.* at 121.

36 Posecai v. Wal-Mart Stores, 752 So. 762, 767.

37 *See* Louisiana Civil Code arts. 1971 & 1983.

38 *See generally,* S. Litvinoff, The Law of Obligations, §§ 1.6, 1.7, 1.10 (West 2001), S. Herman, et al., The Louisiana Civil Code: A Humanistic Appraisal32-35 (1981).

39 Sher v. Lafayette Ins. Co., 2008 WL 928486 (La. April 8, 2008). (The supreme court reversed the determination of the lower courts that the word "flood" in the insurance contract was ambiguous and should be construed against the insurer which would have nullified the "flood" exclusion.).

40 893 So.2d 789 (La., 2005), *reversing* Terrebone Parish School Board v. Castex Energy, Inc., 878 So.2d 522 (La. App. 1 Cir., 2004).

41 *Id.* at 792.

42 *Id.* at 793.

43 La. Rev. Stat. § 31:122.

44 893 So. 2d at 794.

45 *Id*. at 792.

46 886 So. 2d 1085 (La., 2004).

47 *Id*.

48 *Id*. at 1097.

49 *Id*.

50 *Id*.

51 *Id.* at 1094.

52 *Id.* quoting Avenal v. State, 858 So.2d 697, 704 (La. App. 4, 2003).

53 1999-0076 (La. Oct. 19, 1999); 749 So.2d 597.

54 886 So.2d at 1094.

55 *Id.* at 1099.

56 *Id.* at 1102-3.

57 *Id.* at 1104-09.

58 Glenn Morris, Reporter, *Single Business Enterprise Background Memorandum* (Louisiana Law Institute, 2004) (hereafter "Law Institute Memorandum") at 1 and footnote 1.Some states use the phrase "single business enterprise" for a different purpose, in connection with allocating income or assets under state corporate income or franchise tax law. *See, e.g.*, Automatic Data Processing, Inc. v. Illinois Dept. of Revenue, 313 Ill.App.3d 433, 729 N.E.2d 897 (Ill. App. 1 Dist. 2000); Wachovia Bank of North Carolina, N.A. v. Johnson, 26 S.W.3d 621 (Tenn. Ct. App. 2000); E.I. DuPont de Nemours & Co. v. State Tax Assessor, 675 A.2d 82 (Me. 1996). The phrase also is recited frequently as part of the jurisprudential definition of a "joint venture" as a narrow-purpose partnership-like entity formed for a "*single* business enterprise" (emphasis added), as distinguished from an ordinary partnership, which would be formed for more general business purposes. *See, e.g.,* Penn v. Burk, 152 So.2d 16, 26 (La. 1963); Byrd v. E.B.B. Farms, 796 N.E.2d 747, 753 (Ind. App. 2003); Stallings v. Owens, 646 N.W.2d 272, 277 (S.D. 2002).

59 Green v. Champion Ins. Co., 577 So. 2d 249 (La. App. 1.), *writ denied*, 580 So.2d 668 (1991).

60 *See generally* Law Institute Memorandum.

61 For a list of cases, see Glenn Morris & Wendell Holmes, Louisiana Civil Law Treatise, Vol. 8. Business Organizations 32.15 (St. Paul, West Group, 1999) (2008 Supp.) (Hereafter "Morris and Holmes, Business Organizations").

62 *See generally* Law Institute Memorandum.

63 *Id.*

64 *Id.* This statement originated in *Green v. Champion Ins. Co.*, 577 So.2d 249, 257 (La. App. 1st Cir.), *writ denied*, 580 So.2d 668 (1991). It has been quoted with approval in *Amoco Production Co. v. Texaco, Inc.*, 838 So.2d 821, 834 (La. App. 3rd Cir.), *writ denied*, 845 So.2d 1096 (2003); *R.B. Ammon and Associates, Inc.*, 778 So.2d 1, 14 (La. App. 1st Cir. 2000), *writ denied*, 782 So.2d 1026 & 1027 (2001); and *Hamilton v. AAI Ventures, L.L.C.*, 768 So.2d 298, 302 (La. App. 1st Cir. 2000).

65 922 So. 2d 1113 (La. 2004), *rehearing granted* (Oct. 29, 2004), *adhered to* on rehearing (Jan 19, 2006), *rehearing not considered* (Mar. 10, 2006).

66 *Id.* at 1127-28. (footnote and citations; emphasis and bracket added).

67 *See* Morris & Holmes, Business Organizations 32.15 (Supp. 2008).

68 Mapp v. Ohio, 367 U.S. 643 (1961) (exclusion of illegally seized evidence).

69 Miranda v. Arizona, 384 U.S. 436 (1966) (requiring police to tell persons taken into custody their rights).

70 Congress did attempt to overrule *Miranda* by enacting 18 U.S.C. Sec. 3501, but that statute was declared unconstitutional in *Dickerson v. United States*, 530 U.S. 428 (2000).

71 *See* John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, (Heritage Foundation, June 16, 2008) www.heritage.org/Research/LegalIssues/lm26.cfm; John Baker, *Federalist Society for Law and Public Policy*, Measuring the Explosive Growth of Federal Crime Legislation (2004).

72 La. Rev. Stat. §14: 64.2.

73 La. Rev. Stat. §14: 34.3.

74 Although all crimes have been statutory since 1805, Louisiana has generally adopted the common law definitions of crimes. Unlike the "common law" tradition of the other states which formerly allowed judges to "discover" new crimes, the civil law heritage of Louisiana has always insisted that only legislatures can create crimes.

75 La. Rev. Stat. §14: 3.

76 *Id.*

77 State v. Ritchie, 590 So. 2d 1139 (La. 1991).

78 Although the statute at issue in the case, La. Rev. Stat. 34:851.6, homicides by watercraft, the general statute, La. Rev. Stat.: 14: 32 applies to any homicide committed through criminal negligence.

79 Compare the definition of negligence in the Criminal Code, La. Rev. Stat. §14:12.

80 *Id*. at 1140.

81 *Id*. at 1146-1151.

82 State v. Garner, 115 So. 2d 855 (La. 1959).

83 State v. Kalathakis, 563 So. 2d 228 (La. 1990).

84 *See Id*. at 231, 232:The felony-murder doctrine originally applied to the intent element of a crime in that the doctrine allowed the mens rea of the underlying felony to provide the malice necessary to transform an unintended homicide into a murder…. On the other hand, the physical element of the defendant's act or conduct is not encompassed by the felony-murder doctrine, but involves a separate question of causation… It seems preferable, however, to impose liability only for homicides resulting from acts done in furtherance of the felony. A closer causal connection

between the felony and the killing than the proximate-cause theory normally applicable to tort cases should be required because of the extreme penalty attaching to a conviction for felony murder and the difference between the underlying rationales of criminal and tort law.

85 State v. Myers, 760 So. 2d 310 (La. 2000).

86 State v. Brenan, 772 So. 2d 64 (La. 2000).

87 La. Const. Art. I, sec. 5 in pertinent part provides:

> Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy.

88 After listing the limited list of U.S. Supreme Court decisions based on substantive due process, none of which fit the case before it, the state supreme court acknowledged that "the United States Supreme Court has always been reluctant to expand the concept of substantive due process." 772 So 2d at 71.

89 State v. Muschkat, 706 So. 2d 429 (La. 1998).

90 *See e.g.* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

91 Manuel v. State, 692 So. 2d 320 (La. 1996) (On Rehearing).

92 Federal age protection is statutory. *See* 29 U.S.C. § 621 et seq. (2008).

93 In 1976, the U.S. Supreme Court decided five cases on the constitutionality of the death penalty, which together indicated the kinds of statutes that were and were not constitutional. *See* Gregg v. Georgia, 428 U.S. 153 (1976) and companion cases.

94 Roberts v. Louisiana, 431 U.S. 633 (1977).

95 *See* State v. Willie, 360 So. 2d 813 (La. 1978); *see also State v. Payton,* 361 So. 2d 866 (La. 1978).

96 *See* La. C. Cr. Pro. 905.9 (2008).

97 610 So. 2d 746 (1992).

98 *See* Ford v. Wainwright, 477 U.S. 399 (1986)

99 Louisiana v. Kennedy, 957 So. 2d 757 (La. 2007).

100 Kennedy v. Louisiana, 128 S. Ct. 2641 (2008).

101 *See* Arenella, Peter, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies* 72 Georgetown L. J. 185 (December 1983).

102 La Const. Art. I § 5 (2008) (emphasis added).

103 *See* Hargrave, Lee, *The Declaration of Rights of the Louisiana Constitution of 1974* 35 La. L. Rev. 1 (1974).

104 *See* U.S. Const. Amend. IV (2008):

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

105 *See* Katz v. United States, 389 U.S. 347 (1967) (holding that the Fourth Amendment's search and seizures protections apply to the government's electronic interception of conversations where the intercepted party has a reasonable expectation of privacy.).

106 See La. Const. Art. I § 5 (2008) and U.S. Const. Amend. IV (2008).

107 The District of Columbia does have a similar provision in its Code. *See* D.C. Code 2001 Ed. Art. I § 6 (2008). to date no other state has standing language similar to Louisiana's in their constitutions.

108 *See* La. Const. Art. 1, § 5.

109 *See* Katz v. United States, 389 U.S. 347 (1967),.

110 See *State v. Reeves,* 427 So. 2d 403 (La. 1982), where the Louisiana Supreme Court initially interpreted the Louisiana Constitution to prevent an agent for the police from secretly recording a conversation to which he was a party without first obtaining a search warrant. The decision reached a different result than that of the U.S Supreme Court in *United States v. White*, 401 U.S. 745 (1971). On rehearing, *Reeves* reversed its holding and stated that the use of hidden surveillance equipment to record a party consenting to a conversation does not "invade the privacy" of that party for the purposes of the Louisiana Constitution.

111 *See* State v. Hernandez, 410 So. 2d 1381(La. 1982) (reversing a conviction for possession of marijuana due to an illegal search of an automobile despite the federal rule announced in *New York v. Belton*, 453 U.S. 454 (1981)).

> We, of course, give careful consideration to the United States Supreme Court interpretations of relevant provisions of the federal constitution, but we cannot and should not allow those decisions to replace our independent judgment in construing the constitution adopted by the people of Louisiana.

410 So. 2d at 1385.

112 La. Const. Art. I § 5 cl. 3 (emphasis added).

113 *See e.g.* Warth v. Seldin, 422 U.S. 490 (1975) ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Id.* at 498.).

114 Rakas v. Illinois, 439 U.S. 128, 135 (1978).

115 State v. Culotta, 343 So. 2d 977 (La. 1977), limited the application of the expanded standing provision. In *Culotta* the court allowed for use at trial evidence seized pursuant to execution of a facially valid search warrant. A portion of affidavit supporting the probable cause for issuance of the warrant came from information collected during an illegal arrest. The court found the rest of the affidavit, without the information gleaned from the illegal arrest, provided sufficient probable cause for the issuance of the warrant, therefore the warrant was otherwise valid, and the evidence seized pursuant to the warrant was not subject to exclusion.

116 343 So. 2d at 982.

117 *Id.*

118 State v. Brenan, 772 So. 2d 64 (La. 2000) cites Article I, section 5's "right of privacy" in an opinion holding that a ban on sex toys violates substantive due process under the Fourteenth Amendment.

119 *See* John Devlin, *Privacy and Abortion Rights Under the Louisiana State Constitution: Could Roe v. Wade be Alive and Well in the Bayou State?*. 51 La. L. Rev. 685 (1991).

120 764 So. 2d 64 (La. 2000).

121 *See* State v. Parms, 523 So. 2d 1293 (La. 1988); *see also* State v. Church, 538 So. 2d 993 (1989).

122 Mich. Dept. of State Police v. Sitz, 496 U.S. 444 (1990).

123 764 So. 2d at 72.

124 *Id.* at 73.

125 *See id.* at 71, n.11.

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