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While considerable attention has been paid of late to the constraints of the United States Constitution on punitive damages, the extent to which the Louisiana Constitution may provide its own constraints has been largely ignored. Indeed, there is only one reported case in which the effect of the Louisiana Constitution on punitive damages has even been addressed,[1] and it is respectfully submitted that while this opinion is to be applauded for addressing the subject, it is wrong in its method and arguably wrong in its result.

This article shows first that the courts must not only look to the Louisiana Constitution when considering an award of punitive damages under Louisiana law, but also that the Louisiana Constitution must be looked to *before* the federal Constitution is even reached. More particularly, both the United States and Louisiana Supreme Courts have expressly held that it is improper to consider an argument under the federal Constitution before all state law remedies have been exhausted, including any available argument under the Louisiana Constitution.[2] Indeed, the Louisiana Supreme Court has held that pursuant to the basic concept of federalism, it is state law—not federal law—which enjoys primacy in protecting individual rights.[3] Thus, in analyzing what protections should be afforded against a claim for punitive damages, the Louisiana Constitution must be looked to before the federal Constitution.

Second, this article shows that the Declaration of Rights in the Louisiana Constitution affords much greater protection from punitive damages than does the Bill of Rights, its federal counterpart. In the words of Justice Tate, "the individual rights guaranteed by our state constitution's declaration of individual rights (Article I) represent more specific protections of the individual against governmental power than those found in the federal Constitution's [B]ill of [R]ights, and they may represent broader protection of the individual."[4]

Finally, this article discusses how certain articles of the Louisiana Declaration of Rights may constrain claims of punitive damages. This discussion is by no means exhaustive, but includes protections such as the right to

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1. Galjour v. General Am. Tank Car Corp., 764 F. Supp. 1093 (E.D. La. 1991).
2. *State v. Perry*, 610 So. 2d 746 (La. 1992).
3. *Id.* at 750.
4. Guidry v. Roberts, 335 So. 2d 438, 448 (La. 1976).

bifurcated trials, the right to a heightened burden of proof, the right against excessive punishment, the right against double jeopardy, and the right against self-incrimination.

First, however, it is appropriate to place this entire discussion in context—a context which is characterized by heated controversy over the role that punitive damages should play under the law. Also, before discussing how the Louisiana Constitution should affect this controversy, this article briefly recapitulates how the United States Supreme Court has reacted to the controversy of punitive damages under the federal Constitution.

I. THE RECENT CONTROVERSY

"As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was $250,000. Since then, awards more than thirty times as high have been sustained on appeal."[5] Although it has already been over six years since these words were written, this passage describes the historical trend which, more than anything else, explains why punitive damages have become one of the most controversial issues on the legal scene. The issue has become so important that it has not only attracted widespread attention among lawyers,[6] but even among the public at large.[7]

As awards of punitive damages have escalated, commentators have sharply divided as to whether these awards advance or inhibit societal goals. The proponents of punitive damages argue that they allow private citizens to act as private attorneys general—in effect to deter reckless conduct which compensatory damages alone fail to deter. They point out that large punitive damages awards are relatively rare and that there are circumstances in which only such a large award has the power to change the attitudes of corporate America. The opponents of punitive damages argue that they have spiraled out control, are inconsistently applied, are unpredictable, and that there are virtually no checks and balances on the virtually unfettered discretion of the jury to decide whether and how much to award.

II. PUNITIVE DAMAGES IN LOUISIANA

The attention paid to punitive damages on a national level has at least been equaled by the attention paid to this subject in Louisiana. In 1995, an entire

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5. Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282, 109 S. Ct. 2909, 2923-24 (1989) (citations omitted).

6. The American Bar Association Section of Litigation saw fit to issue a special report on the subject in 1986. *See Punitive Damages: A Constructive Examination—Report of the Special Committee on Punitive Damages*, 1986 A. B. A. Sec. Litig.

7. *See, e.g.*, Andrea Sachs, *A Blow to Big Business: The Supreme Court Upholds a Punitive $1 Million Jury Verdict*, Time, Mar. 18, 1991, at 71; Mary W. Walsh, *Filing of Punitive Damages Claims is Focus of Increasing Controversy*, Wall St. J., Nov. 12, 1984, at 27.

issue of the Louisiana Bar Journal, the official journal of the Louisiana State Bar Association, was devoted to punitive damages.[8] This journal included a discussion of the pros and cons of punitive damages which closely parallels the debate on the national scene.[9] Furthermore, the debate in Louisiana has been more than academic; there were ten separate bills introduced in the Louisiana legislature in 1995 relating to punitive damages.[10]

Unlike many states, Louisiana permits punitive damage claims only where specifically provided for by statute.[11] There are numerous examples of Louisiana Revised Statutes which provide for punitive damages in Louisiana, ranging from violation of consumer credit laws,[12] to violation of the Dairy Stabilization Law,[13] to violation of the Insurance Code,[14] and many other examples in between. These provisions, however, provide only limited punitive damages, usually in the form of triple the actual damages.

The punitive damage provisions in the Louisiana Civil Code, on the other hand, provide for unlimited punitive damages. Until very recently, these unlimited punitive damages were provided for in three situations:

> (1) **Art. 2315.3. Additional damages, storage handling, and transportation of hazardous substances**
>
> *In addition to general and special damages, exemplary damages may be awarded, if it is proved that plaintiff's injuries were caused by the defendant's wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances. As used in this Article, the term hazardous or toxic substances shall not include electricity.*[15]
>
> (2) **Art. 2315.4. Additional damages; intoxicated defendant**
>
> *In addition to general and special damages, exemplary damages may be awarded upon proof that the injuries on which the action is based were caused by a wanton or reckless disregard for the rights and safety of others by a defendant whose intoxication while operating a motor vehicle was a cause in fact of the resulting injuries.*[16]

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8. *See* Daniel J. Shapiro, *Punitive Damages in Louisiana: A Year of Controversy*, 43 La. B.J. 253 (1995). Similarly, this article itself appears in a symposium devoted exclusively to the subject of punitive damages.

9. *Id.* at 256-63.

10. *Id.* at 269-70 (discussing La. R.S. 23:1032(A)(1)(a); S.B. No. 567; S.B. No. 580; S.B. No. 809; H.B. No. 1641; and H.B. No. 1641).

11. *See, e.g.*, Billiot v. British Petroleum Oil Co., 645 So. 2d 604, 612 (La. 1994); International Harvester Credit Corp. v. Seale, 518 So. 2d 1039, 1041 (La. 1988).

12. *See* La. R.S. 9:3552 (1991 & Supp. 1996).

13. *See* La. R.S. 3:4116 (1987).

14. *See* La. R.S. 22:657-658 (1995 & Supp. 1996).

15. La. Civ. Code art. 2315.3.

16. La. Civ. Code art. 2315.4.

(3) Art. 2315.7. Liability for damages caused by criminal sexual activity occurring during childhood

In addition to general and special damages, exemplary damages may be awarded upon proof that the injuries on which the action is based were caused by a wanton and reckless disregard for the rights and safety of the person through criminal sexual activity which occurred when the victim was seventeen years old or younger, regardless of whether the defendant was prosecuted for his or her acts. The provisions of this Article shall be applicable only to the perpetrator of the criminal sexual activity.[17]

In the 1996 Extraordinary Session, however, the legislature repealed Article 2315.3 providing for punitive damages in connection with the handling of hazardous substances.[18] Thus, at present, Louisiana law provides for unlimited punitive damages for drunk driving and criminal sexual activity against a minor. There are, however, still cases pending which seek unlimited punitive damages for the alleged reckless handling of hazardous substances.

III. THE RESPONSE UNDER THE FEDERAL CONSTITUTION

It is against the backdrop of controversy on a national level that the United States Supreme Court has taken up the issue of punitive damages. It is not the purpose of this article to analyze the Supreme Court's treatment of punitive damages under the federal Constitution; this has already been the subject of many other articles.[19] However, it is necessary to summarize here what the United States Supreme Court has done, if only to frame the same issue as it arises in the context of the Louisiana Constitution.

For years the Supreme Court acknowledged the controversy surrounding punitive damages, but declined to address whether punitive damages were in any way constrained by the federal Constitution. In making the case for the constitutional reform of punitive damages in 1983, Professor Malcolm Wheeler noted that while "several courts, including the United States Supreme Court, have expressly recognized the existence of arbitrariness and prejudice in many punitive damage awards,"[20] "[t]he Supreme Court has never determined whether or

17. La. Civ. Code art. 2315.7.

18. Act No. 2 of the 1996 First Extraordinary Session of the Louisiana Legislature.

19. *See, e.g.*, Janice Kemp, *The Continuing Appeal of Punitive Damages: An Analysis of Constitutional and Other Challenges to Punitive Damage, Post-*Haslip *and* Moriel, 26 Tex. Tech L. Rev. 1 (1995); Sandra L. Nunn, *The Due Process Ramifications of Punitive Damages, Continued:* TXO Production Corp. v. Alliance Resources Corp., *113 S. Ct. 2711 (1993)*, 63 U. Cin. L. Rev. 1029 (1995); William H. Volz & Michael C. Fayz, *Punitive Damages and the Due Process Clause: The Search for Constitutional Standards*, 69 U. Det. Mercy L. Rev. 459 (1992); David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 Vill. L. Rev. 363 (1994).

20. Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 271 (1983).

not the procedures used in private punitive damages actions satisfy due process."[21]

In *Bankers Life & Casualty Co. v. Crenshaw*,[22] the issue was put squarely before the Court when a health insurer argued that a punitive damage award violated its due process rights. The insurer had been ordered to pay $1.6 million by a Mississippi court for its bad-faith refusal to pay an insurance claim. Finding that the issue had not been adequately raised before the Mississippi courts, the Supreme Court declined to rule on the issue, since to do so "would short-circuit a number of less intrusive, and possibly more appropriate, resolutions."[23]

Justice O'Connor, however, wrote a separate concurring opinion in which she stated that the award "touched on a due process issue that I think is worthy of the Court's attention in an appropriate case."[24] Justice O'Connor was particularly troubled by the total lack of meaningful standards in Mississippi for determining the appropriate amount of punitive damages:

> As the Mississippi Supreme Court said, "the determination of the amount of punitive damages is a matter committed solely to the authority and discretion of the jury." This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process. . . . Nothing in Mississippi law warned appellant that by committing a tort that caused $20,000 of actual damages, it could expect to incur a $1.6 million punitive damages award.[25]

The following year, in *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*,[26] the Court ruled narrowly that awards of punitive damages to private plaintiffs are not constrained by the Excessive Fines Clause of the Eighth Amendment.[27] The majority recognized that "punitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law,"[28] but it held that the Eighth Amendment "does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."[29]

Although Justice O'Connor concurred in the holding, she was again compelled to write separately, this time to express her concern over the amount of the punitive damage award which "was 117 times the actual damages suffered

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21. *Id.* at 273.
22. 486 U.S. 71, 108 S. Ct. 1645 (1988).
23. *Id.* at 79-80, 108 S. Ct. at 1651.
24. *Id.* at 87, 108 S. Ct. at 1655.
25. *Id.* at 88, 108 S. Ct. at 1656 (citations omitted).
26. 492 U.S. 257, 280, 109 S. Ct. 2909, 2923 (1989).
27. *Id.*
28. *Id.* at 275, 109 S. Ct. at 2920.
29. *Id.* at 264, 109 S. Ct. at 2914.

by [plaintiff]."[30] Similarly, in a separate concurrence joined in by Justice Marshall, Justice Brennan suggested that "the Due Process Clause forbids damages awards that are 'grossly excessive,' or 'so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.'"[31] Justice Brennan reasoned:

> [T]he jury in this case was sent to the jury room with nothing more than the following terse instruction: "In determining the amount of punitive damages, . . . you may take into account the character of the defendants, their financial standing, and the nature of their acts." Guidance like this is scarcely better than no guidance at all. I do not suggest that the instruction itself was in error; indeed, it appears to have been a correct statement of Vermont law. The point is, rather, that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best.[32]

Then, in 1991, the watershed decision of *Pacific Mutual Life Insurance Company v. Haslip*[33] was handed down. As foreshadowed by the earlier concurring opinions of Justices O'Connor, Brennan and Marshall, the Court held that both the amount of and procedure for adjudicating punitive damages must not offend due process. After years of skirting the issue, the Court had finally made clear that punitive damages are, in fact, constrained by the United States Constitution.

The majority opinion, however, sheds little light on what does and does not meet due process. With respect to the amount of punitive damages that can be awarded, the *Haslip* majority stated only that it refused to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."[34] The court did note, however, that the punitive damage award of $840,000, four times the amount of actual damages, is "close to the line" of "constitutional impropriety."[35] The Court also implied that an award of punitive damages must bear a rational relation to the amount of actual damages, noting that the Alabama procedure at issue "ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages."[36]

With respect to the procedure for adjudicating punitive damages, the Court declined to set forth any specific procedural safeguards—such as a higher burden of proof, unanimous jury verdict, special jury instructions, bifurcated trial, or

30. *Id.* at 282, 109 S. Ct. at 2924.
31. *Id.* at 280-81, 109 S. Ct. at 2923 (citations omitted).
32. *Id.* at 281, 109 S. Ct. at 2923 (citations omitted).
33. 499 U.S. 1, 111 S. Ct. 1032 (1991).
34. *Id.* at 18, 111 S. Ct. at 1043.
35. *Id.* at 23-24, 111 S. Ct. at 1046.
36. *Id.* at 22, 111 S. Ct. at 1045.

anything else—that must be followed to ensure due process.[37] Instead, the Court concluded that due process was satisfied simply on the grounds that Alabama has in place a procedure of post-verdict review to ensure that there are objective safeguards against unfair punishment.[38]

In holding that the jury verdict satisfied due process on the basis of this post-verdict review, the *Haslip* majority let stand an award of punitive damages in which the jury received little more guidance than had the jury in *Browning-Ferris*. Not surprisingly, Justice O'Connor was again compelled to write separately, this time in a dissenting opinion. Justice O'Connor explained that the jury instructions practically invited "individual jurors to rely upon emotion, bias, and personal predilections of every sort."[39] She further stated that the instructions "did not suggest what relation, if any, should exist between the harm caused and the size of the award, nor how to measure the deterrent effect of a particular award."[40]

After *Haslip* was decided, many states reformed their punitive damage system to provide post-verdict review similar to the Alabama procedure cited approvingly in *Haslip*. One such state was West Virginia. Two years after *Haslip* was decided, this new West Virginia procedure was put to the test in *TXO Production Corp. v. Alliance Resources Corp.*[41]

TXO involved a ten million dollar punitive damage award that was imposed against petitioner, TXO Production, for committing a "slander of title" that resulted in $19,000 in actual damages to the respondent, Alliance Resources. TXO had, in essence, attempted to defraud Alliance Resources of oil and gas development rights in West Virginia. Even though the award of punitive damages was 526 times the award of actual damages, the West Virginia Supreme Court affirmed.[42] On application of certiorari to the United States Supreme Court, much of the debate centered on the sheer amount of the punitive damage award.

In a plurality opinion, the *TXO* majority affirmed the award. The Supreme Court stated that the punitive-to-actual ratio is only "one of several factors" in determining whether an award crosses the "line" of "constitutional permissibility."[43] The plurality opinion did not address the procedure employed to adjudicate punitive damages in any detail, but instead noted that the system had been reformed to comply with *Haslip*.[44] On this basis, the award was affirmed.

Again, Justice O'Connor dissented, this time joined by Justices White and Souter. Justice O'Connor wrote, "neither this award's size nor the procedures

37. *Id.* at 58 (O'Connor, J., dissenting).
38. *Id.*
39. *Id.* at 45, 111 S. Ct. at 1057.
40. *Id.* at 48, 111 S. Ct. at 1059.
41. 113 S. Ct. 2711 (1993).
42. *Id.* at 2717.
43. *Id.* at 2721.
44. *Id.* at 2724.

that produced it are consistent with the principles this Court articulated in *Haslip*."[45] Whether or not the award was consistent with *Haslip*, one thing that is clear is that the plurality opinion in *TXO* provides even less guidance than *Haslip* as to what constraints on punitive damages are mandated by the Due Process Clause.

Then, in 1994, the Supreme Court decided *Honda Motor Co. v. Oberg*.[46] Unlike *TXO*, in which the award was 526 times the amount of actual damages, the award in Oregon was only five times the amount of actual damages. Also unlike *TXO*, where the jury received little guidance, the *Oberg* jury received detailed jury instructions regarding punitive damages.[47] Nevertheless, where the *TXO* award had been affirmed, the *Oberg* award was remanded, primarily because the Oregon procedure at issue did not provide for the post-verdict review discussed first in *Haslip* and second in *TXO*.[48]

Most recently, the Supreme Court decided *BMW of North America, Inc. v. Gore* and for the first time actually reversed an award of punitive damages.[49] In a 5-4 opinion, the Court found that the $2 million awarded in punitive damages violated due process where the injury consisted wholly of property damage and where the actual damages were restricted to $4,000. The Supreme Court stated that its decision was supported by three factors: the reprehensibility of the defendant's conduct, the ratio of actual to punitive damages, and the difference between the punitive award and the sanctions, criminal or otherwise, that could be opposed for the same conduct.

Nevertheless, in reversing the punitive damage award, the Supreme Court failed to set forth meaningful guideposts as to whether an award of punitive damages violates due process. Indeed, in his dissent, Justice Scalia ridiculed the guideposts that were offered as marking a "road to nowhere."[50] Justice Scalia continued, "The Court has constructed a framework that does not genuinely constrain, that does not inform state legislatures and lower courts—that does nothing at all except confer an artificial air of doctrinal analysis upon its essentially ad hoc determination that this particular award of punitive damages was not fair."[51] Thus, *BMW* will undoubtedly be cited often by defendants as support for their argument that excessive punitive damages violate due process, but apart from the fact that this was the result on these particular facts, the opinion offers little guidance as to what does and does not comply with due process.

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45. *Id.* at 2728 (O'Connor, J., dissenting).

46. 114 S. Ct. 2331, 2335 (1994).

47. *Id.* at 2334.

48. *Id.* at 2338-42. Upon remand, the Oregon Supreme Court upheld the original punitive damage award.

49. BMW of North America v. Gore, 116 S. Ct. 1589 (1996).

50. *Id.*

51. *Id.*

IV. THE LACK OF RESPONSE UNDER THE LOUISIANA CONSTITUTION

There is only one reported decision that addresses any Louisiana law providing for punitive damages under either the federal or Louisiana Constitution. *Galjour v. General American Tank Car Corp.*[52] involved the explosion and fire of a railroad tank car. The plaintiffs, who claimed personal injury and property damage, sued defendants and included claims for punitive damages for alleged reckless handling or transportation of hazardous substances under Louisiana Civil Code article 2315.3. The defendants moved to dismiss the punitive damage claim, asserting that Article 2315.3 is unconstitutional on its face.

The defendants relied upon the Due Process Clause of the federal Constitution and the Equal Protection Clauses of both the Louisiana and federal Constitutions.[53] Significantly, however, the defendants did not assert any other protection under the Louisiana Constitution, and did not assert that Louisiana due process is any broader than federal due process. As noted by the court, "[t]here is no argument [by defendants] that the due process analysis under the Due Process Clause of Article I, Section 2 of the Louisiana State Constitution of 1974 is different from the federal analysis under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution."[54]

For this reason, the court elected to forego any analysis as to whether Article 2315.3 satisfies Louisiana due process or, for that matter, any other section of the Louisiana Declaration of Rights, other than equal protection set forth in Article I, Section 3. Similarly, the court did not analyze whether Louisiana equal protection is satisfied until after it analyzed whether federal equal protection is satisfied. Analyzing Article 2315.3 in this manner, the court found that the law was constitutional on its face.

While the result in *Galjour* is only arguably wrong, the court's methodology appears clearly wrong. As discussed below, due process under the Louisiana and federal Constitutions is not the same. Furthermore, there are other sections of the Louisiana Declaration of Rights that are also implicated by punitive damages. Finally, the Louisiana Constitution must be looked to before the federal Constitution is even reached.

It is understandable, however, why the defendants and the court in *Galjour* focused on the federal Constitution: the motion was filed soon after the concurring opinions in *Browning-Ferris Industries v. Kelco*,[55] and *Bankers Life & Casualty Co. v. Crenshaw*.[56] As previously discussed, these concurring opinions gave cause to believe that the United States Supreme Court would find in the future that punitive damages were greatly constrained by the Due Process Clause of the Fifth and Fourteenth Amendments of the federal Constitution. In

52. 764 F. Supp. 1093 (E.D. La. 1991).
53. *Id.* at 1096 n.1.
54. *Id.* at 1097 n.3.
55. *See supra* text accompanying notes 26-32.
56. *See supra* text accompanying notes 22-25.

fact, it was soon after defendants filed their motion in *Galjour* that the Supreme Court held in *Haslip* that punitive damages are constrained by due process.

As discussed above, however, *Haslip* failed to set forth any guidelines as to what due process does and does not require—other than some type of meaningful post-verdict review. It is not surprising, therefore, that while the *Galjour* court withheld its opinion until *Haslip* was released, it found nothing in *Haslip* which required it to alter its conclusion that Article 2315.3 satisfies federal due process.

V. THE LOUISIANA CONSTITUTION SHOULD BE LOOKED TO FIRST

The first flaw in *Galjour* is that it did not look first to the Louisiana Constitution in analyzing the constitutionality of Article 2315.3. As the jurisprudence makes clear, state law, including the state constitution, should be exhausted before resort is made to the federal Constitution.

This was the precise holding of *State v. Perry*.[57] In *Perry*, the Louisiana Supreme Court considered the question of whether the state of Louisiana could execute a death row prisoner who was insane, yet capable of understanding the link between his crime and punishment by taking anti-psychotic drugs. The trial court had ruled that the state could carry out the death sentence by forcing the prisoner to take the anti-psychotic drugs, thereby rendering him competent for execution. The Louisiana Supreme Court reversed the order, finding that it was improper for a prisoner to be forcibly medicated only to facilitate his execution.[58]

Of great significance here, the supreme court recognized that the issue in this case raised both federal and Louisiana constitutional issues, but it found that the Louisiana Constitution should be addressed first. The *Perry* court explained, "[b]oth the United States Supreme Court and this court adhere to the rule that the court will not pass upon a federal constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed."[59] The *Perry* court continued:

> Additionally, the Supreme Court has developed the Pullman doctrine, under which a federal court may decline to proceed though it has jurisdiction based on the federal constitution or statutes, in order to avoid decision of a federal constitutional question where the case may be disposed on questions of state law.[60]

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57. 610 So. 2d 746 (La. 1992).

58. *Id.*

59. *Id.* at 750 (citing Webster v. Reproduction Health Servs., 492 U.S. 490, 526, 109 S. Ct. 3040, 3060 (1989) (O'Connor, J., concurring); Ashwander v. TVA, 297 U.S. 288, 346-47, 56 S. Ct. 466, 482-83 (1936) (Brandeis, J., concurring); Benson & Gold Chevrolet, Inc. v. Louisiana Motor Vehicle Comm'n, 403 So. 2d 13 (La. 1981)).

60. *Perry*, 610 So. 2d at 750 (citing Texas v. Pullman, Co., 312 U.S. 496, 61 S. Ct. 643 (1941); Charles Alan Wright, Law of Federal Courts § 52 (1983); Louisiana Power & Light Co. v. City of Thibodeaux, 360 U.S. 25, 79 S. Ct. 1070 (1959); Leiter Minerals, Inc. v. United States, 352 U.S. 220, 77 S. Ct. 287 (1957)).

On these grounds, the *Perry* court concluded that it was mandatory to look at the Louisiana Constitution before looking to the federal Constitution.

Furthermore, the *Perry* court found that such an approach is rooted in the basic concept of federalism. The court explained that "[t]he very nature of our federal system and the vast differences between the federal and state constitutions and courts indicate that state law should be applied first. When the Founding Fathers assembled this nation, they recognized the primacy of the states in protecting individual rights."[61] Thus, the *Perry* court concluded that it would be improper to look to federal constitutional law before first seeing whether there was a remedy available under the Louisiana Constitution.

The court did not stop here, however. It went on to state that the Louisiana Declaration of Rights is more expansive than the federal Bill of Rights. The court noted that "because our state Declaration of Rights incorporates or expands most of the federal Bill of Rights standards, a decision by this court upholding an individual's state constitutional right rarely will call for further review by the Supreme Court."[62] Indeed, in the particular case before it, the court relied in part upon the Louisiana Excessive Punishment Clause, noting that it is broader in its protection than its federal counterpart in the Eighth Amendment of the United States Constitution.[63] The court explained, "[t]he framers of our state constitution clearly intended for this guarantee to go beyond the scope of the Eighth Amendment in some respects and to provide at least the same level of protection as the Bill of Rights and the Fourteenth Amendment in all others."[64] Accordingly, *Perry* and the jurisprudence it cites stand not only for the proposition that the Louisiana Constitution must be looked to first, but that it, in fact, provides greater protection than the federal Constitution.

Perry was followed in *State v. Hattaway*.[65] Citing *Perry*, the Louisiana Supreme Court explained that "[t]he defendant's appeal raises issues pertaining to the right to the assistance of counsel under both the Louisiana and federal constitutions. The appropriate procedure for deciding a case such as this is to analyze state law, including state constitutional provisions, before reaching a federal constitutional claim."[66] Furthermore, since *Perry* and *Hattaway* were decided, their author, Justice Dennis, made certain in two concurrences that their holdings are not forgotten. In *State v. Schirmer*,[67] Justice Dennis cited *Perry* and *Hattaway* for the same proposition. Similarly, in *A. Copeland Enterprises,*

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61. *Perry*, 610 So. 2d at 751 (citing Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 Tex. L. Rev. 1081, 1082 (1985) (citing The Federalist Nos. 14, 17, 32, 39 and 45)).

62. *Perry*, 610 So. 2d at 751.

63. *Id.* at 762.

64. *Id.* at 750 (citing State v. Sepulvado, 367 So. 2d 762 (La. 1979)); Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La. L. Rev. 1, 63 (1974).

65. 621 So. 2d 796 (La. 1993).

66. *Id.* at 800 (citations omitted).

67. 646 So. 2d 890, 904 (La. 1994) (Dennis, J., concurring), *cert. denied*, 116 S. Ct. 472 (1995).

Inc. v. Slidell Memorial Hospital,[68] Justice Dennis wrote, "[g]reater judicial efficiency and coherence are promoted when we address state law issues first."[69] Finally, Justice Calogero also ensured that this rule of law is not forgotten, noting in his concurring opinion in *City of Baton Rouge v. Ross*[70] that the court must look to the state Constitution before analyzing issues under the federal Constitution.

VI. APPLYING THE LOUISIANA CONSTITUTION TO PUNITIVE DAMAGES

At the outset, it should be noted that as the supreme court held in *Perry*, the Louisiana Declaration of Rights is more expansive than the federal Bill of Rights. In *Guidry v. Roberts*,[71] Justice Tate explained:

> As the plaintiff contends, the individual rights guaranteed by our state constitution's declaration of individual rights (Article I) represent more specific protections of the individual against governmental power than those found in the federal constitution's [B]ill of [R]ights, and they may represent broader protection of the individual.[72]

So expansive is the Louisiana Declaration of Rights that many of the protections afforded by it remain unexplored. As one author explained in introducing his article:

> This article addresses the state of civil liberties under the Louisiana Constitution of 1974 as pronounced by the Louisiana Supreme Court. It also introduces expansive guarantees found in the state constitution which have remained vastly unexplored territories. In a rush to vindicate civil rights, attorneys sometimes rush their clients into federal court under the mistaken notion that somehow the state courts are inadequate to protect constitutional rights, or that the Civil Rights Act, 42 U.S.C. section 1983, is the only means of vindicating civil rights. This is simply not true. In fact, many times our state constitution provides broader rights that are generally not assertable in federal court.[73]

There are several sections of the Louisiana Declaration of Rights that are clearly applicable to a claim for punitive damages. These include the right to

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68. 657 So. 2d 1292, 1302 (La. 1995) (Dennis, J., concurring).
69. *Id.* at 1303.
70. 654 So. 2d 1311, 1326, 1335 n.13 (La. 1995) (Calogero, J., concurring).
71. 335 So. 2d 438 (La. 1976).
72. *Id.* at 448.
73. Richard P. Bullock, Comment, *The Declaration of Rights of the Louisiana Constitution of 1974: The Louisiana Supreme Court and Civil Liberties*, 51 La. L. Rev. 787, 790 (1991).

due process,[74] the right to property,[75] and the right to equal protection.[76] These are discussed first.

There are other sections of the Louisiana Declaration of Rights that are applicable depending upon whether punitive damages are determined to be sufficiently quasi-criminal in nature so that these additional protections arise. These include the rights of accused,[77] the protection against double jeopardy,[78] and the protection against excessive punishment.[79] These sections are discussed second.

A. Due Process: Article I, Section 2

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

To the extent the United States Supreme Court has recognized any protection against claims of punitive damages under the federal Constitution, it has been under federal due process. Under the Louisiana Declaration of Rights, due process has been interpreted as providing even more expansive rights. Moreover, unlike the United States Constitution, which protects the right to property only through the right to due process, the Louisiana Declaration of Rights also sets forth a specific, separate right to property.[80]

The same protections which flow from Louisiana due process also flow from the right to property. These protections are that much stronger because they flow from both of these constitutional rights. For this reason, rather than discussing these protections separately, they are discussed together in the following section.

B. Right to Property—Article I, Section 4

> *Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.*
>
> *Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the*

74. La. Const. art. I, § 2.
75. La. Const. art. I, § 4.
76. La. Const. art. I, § 3.
77. La. Const. art. I, § 13.
78. La. Const. art. I, § 15.
79. La. Const. art. I, § 20.
80. La. Const. art. 1, § 4.

owner; in such proceedings, whether the purpose is public and necessary shall be a judicial questions. In every expropriation, a party has the right to trial by jury to determine compensation, and the owner shall be compensated to the full extent of his loss. No business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise. However, a municipality may expropriate a utility within its jurisdiction.

Personal effects shall never be taken. But the following property may be forfeited and disposed of in a civil proceeding, as provided by law: contraband drugs; property derived in whole or in part from contraband drugs; property used in the distribution, transfer, sale, felony possession, manufacture, or transportation of contraband drugs; property furnished or intended to be furnished in exchange for contraband drugs; property used or intended to be used to facilitate any of the above conduct; or other property because the above described property has been rendered unavailable.

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

Unlike the federal Constitution, Louisiana property rights are far broader than due process; they rise to the level of fundamental rights. As explained by the Louisiana Supreme Court, "[i]n the federal Constitution, property is protected by virtue of the due process clauses of the [F]ifth and [F]ourteenth [A]mendments. In Louisiana however, the constitutional right to private property extends further than mere due process guarantees against arbitrary deprivations of property; it protects the right to own property itself."[81]

This specific, far-reaching fundamental right yields enhanced protection to persons who own property at risk of being taken. This specific guarantee, combined with due process rights, requires enhanced protections to defendants against claims of punitive damages. Although there are arguably many such protections—detailed jury charges, a meaningful post-verdict review, a rational relationship between actual and punitive damages, etc.—this discussion focuses on two different protections—the right to a bifurcated trial and the right to a heightened burden of proof.

1. Separate Trials—Merits and Assessment of Punitive Damages

In a case of punitive damages, evidence which is ordinarily inadmissible becomes material and relevant in damage assessment. Wealth, for example, is a

81. *See* Bullock, *supra* note 73, at 800; State v. 1971 Green GMC Van, 354 So. 2d 479, 486 (La. 1977) ("Article I, section four of our Constitution was intended to give 'far reaching new protection' to the right of citizens to own and control private property. Its languge goes beyond other state constitutions . . . and the federal constitution in limiting the power of government to regulate private property." (citations omitted)).

factor for the jury to consider in determining how much money damages will effectively punish the bad actor.[82] A logical application of and corollary to this rule is that the amount of insurance coverage available to a defendant is admissible. Indeed, the argument goes, without it the fact finder would be unable to determine an adequate amount to award which would actually punish the defendant individually rather than his insurer. For example, the jury may wish to set damages at an amount in excess of his insurance coverage limits.

On the other hand, in an ordinary tort claim, the amount of insurance coverage is clearly inadmissible.[83] Other inconsistencies in admissibility of evidence between ordinary tort cases and claims for punitive damages include evidence of prior similar bad acts,[84] other lawsuits against defendant for the same conduct,[85] and prior punitive damage awards.

Similarly, defense strategy is necessarily different between an ordinary tort case and assessment of punitive damages. In the former, it is difficult to imagine a situation where a defendant would purposely introduce evidence of a prior award of punitive damages. Where the amount of punitive damages is being determined, on the other hand, a defendant who had been punished severely in prior cases would likely wish to introduce this evidence to minimize any potential additional award in the present case.[86] This conflict works a substantial unfairness on the defendant. He is unfairly forced to introduce otherwise damaging and inadmissible evidence. Admitting "wealth" evidence prior to a finding of liability poses a significant risk of tainting the jury on issues of liability, causation and compensatory damages.[87] Defendants' rights to a fair trial and an impartial jury are abridged.

In a criminal context, these basic protections are afforded defendants. In noncapital cases, for example, the trial judge handles sentencing. Accordingly, the jury should be unaware of inadmissible evidence such as defendant's character, propensity, and prior criminal convictions.[88] In capital cases, evidence of prior crimes, defendant's character, propensity, impact of the victim's death on others, and related matters are admissible only once guilt has been determined, and then in a separate phase of the trial.[89]

In a civil case in state court, however, the trial judge apparently lacks even the discretion to bifurcate the merits and punitive damage claims. Code of Civil

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82. *See* Angeron v. Martin, 649 So. 2d 40, 44 (La. App. 1st Cir. 1994); Demarest v. Progressive Am. Ins. Co., 552 So. 2d 1329, 1334 (La. App. 5th Cir. 1989); Levet v. Calais & Sons, Inc., 514 So. 2d 153, 159 n.5 (La. App. 5th Cir. 1987); *cf.* Galjour v. General Am. Tank Car Corp., 764 F. Supp. 1093, 1099 (E.D. La. 1991).

83. La. Code Evid. art. 411.

84. La. Code Evid. art. 404; Brannan v. Wyeth Labs., Inc., 516 So. 2d 157 (La. App 5th Cir. 1987), *aff'd in part, rev'd in part*, 526 So. 2d 1101 (1988).

85. La. Code Evid. arts. 404, 406.

86. This assumes *arguendo* that double jeopardy would not attach. *See infra* note 208 and accompanying text.

87. *See* Honda Motor Co. v. Oberg, 114 S. Ct. 2331 (1994).

88. *See* La. Code Crim. P. art. 871.

89. *See generally* La. Code Crim. P. art. 905.2.

Procedure article 1562(a) permits separate trials on liability, damages and other issues only with the consent of all parties.[90] This is precisely why this protection must be found to flow from the Louisiana Constitution. Pursuant to the basic rights provided by Louisiana due process and the right to property, bifurcation of the merits claim, on the one hand, and quantification of the claim for punitive damages, on the other hand, should be not only discretionary, but mandatory.

Although the United States Supreme Court declined to require bifurcation on federal grounds in *Haslip*, Justice O'Connor encouraged state legislatures to enact statutory bifurcation rules for punitive damage trials.[91] Some states have done so, either by statute or jurisprudential rule.[92] Many of the jurisdictions which segregate the assessment of punitive damages from the trial of the principal merits simply bifurcate punitive liability and damages from the remainder of the trial.[93] At least one state requires the trial judge to fix the amount of punitive damages, after the jury has determined punitive liability.[94] Another requires "trifurcation": liability and compensatory damages are tried in the first phase, liability for punitive damages in the second, and the amount of punitive damages in the third.[95] Still other states require a prima facie showing of entitlement to punitive damages prior to admitting otherwise inadmissible evidence, such as wealth of the defendant.[96]

None of these states afford any greater state constitutional protection to property owners than the right to property found in Article 1, Section 4 of the Louisiana Constitution. Because the prospect of having to try the underlying tort claim and assessment of punitive damages together is inherently unfair to the defendant, it is suggested here that the right to bifurcation must be found to flow under due process and the right to property.

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90. La. Code Civ. P. art. 1562(A). Article 1562 contrasts with Article 1631 which empowers courts "to control the proceedings at trial, so that justice is done." Article 1562 also contrasts with La. Code Civ. P. art. 593.1(c) which permits the trial judge to separate trials of various issues in cases where a class has been certified, regardless of the parties' consent.

91. *See* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 58, 111 S. Ct. 1032, 1084 (1991).

92. Cal. Civ. Code § 3295(d) (West Supp. 1996); Ga. Code Ann. § 51-12-5.1(d) (West Supp. 1995); Kan. Stat. Ann. § 60-3071(a), (b) (1993); Minn. Stat. Ann. § 549.20(4) (West Supp. 1996); Miss. 1993 Regular Session H.B. 1270 (effective July 1, 1993); Mo. Ann. Stat. § 510.263 (Vernon Supp. 1996); Mont. Code Ann. § 27-1-221(7) (1991); Nev. Rev. Stat. § 42.005(3) (1991); N.J. Stat. Ann. § 2A: 58C-5 (b) (West 1995); N.D. Cent. Code § 32-03.2-11(2)-(4) (1993); Simpson v. Pittsburg Corning Corp., 901 F.2d 277, 283 (2d Cir. 1990) (New York law); Rupert v. Sellers, 367 N.Y.S.2d 904, 912 (N.Y. App. Div. 1975); Hodges v. S. C. Toof & Co., 833 S.W.2d 896, 901-02 (Tenn. 1992); Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 30 n.28 (Tex. 1994); Utah Code Ann. § 78-18-1(2) (Supp. 1995); Campen v. Stone, 635 P.2d 1121, 1132 (Wyo. 1981). *See generally* Raymond B. Landry, *Punitive Damages and Jury Trials*, 43 La. B.J. 264 (1995) (discussion on separating the trials of liability/damages from punitive liability damages).

93. *See* Landry, *supra* note 92, at 267 n.31.

94. Ohio Rev. Code Ann. § 2315.21(C) (Baldwin 1993).

95. N.J. Stat. Ann. § 2A: 58C-5(b) (West 1995).

96. *See, e.g.*, Straus v. Biggs, 525 A.2d 992, 996 (Del. 1987); Harley Davidson Motor Co. v. Wisniewski, 437 A.2d 700 (Md. App. 1981).

2. Heightened Burden of Proof

Due process and the right to property would be at great risk if punitive damages were available upon proof by a simple preponderance of the evidence. The historical development of punitive damage awards, a consideration of why the legislature has authorized them, and an analysis of analogous Louisiana jurisprudence verifies that a heightened standard of proof should be required for recovery of punitive damages.

Ordinary civil cases require proof by preponderance of the evidence.[97] Cases where fundamental rights are jeopardized require a heightened standard of proof. Common examples are criminal cases, contempt and forfeiture proceedings, and defamation actions.

The burden of proof issue addressed in contempt proceedings is instructive here. These proceedings require proof beyond a reasonable doubt if deemed criminal whereas civil contempt proceedings require proof by a preponderance of the evidence. In *Estate of Graham v. Levy*,[98] the first circuit distinguished between the two. Civil contempt is "remedial or coercive," and criminal contempt is "punitive and intended to vindicate the authority of the Court."[99] A claim for punitive damages, which is also necessarily "punitive," is much more akin to criminal contempt than to civil contempt. Thus, a heightened burden of proof should also be required for a claim for punitive damages.

Similarly, in forfeiture actions, the right to property guaranteed by the Louisiana Constitution is jeopardized. The *GreenVan-Manuel-Spooner*[100] trilogy and the legislative response to those cases delineates enhanced burdens for forfeiture actions. To prove a right to forfeiture, the State bears the initial burden of proving the property is derivative contraband.[101] Once it meets this threshold, the State must next prove beyond a reasonable doubt the validity of grounds for forfeiture, conformity of the seizure to applicable law, and the elements of proof set forth in the forfeiture statute.[102] Moreover, forfeiture actions may be brought

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97. Lasha v. Olin Corp, 625 So. 2d 1002 (La. 1993); Jordan v. Travelers Ins. Co., 245 So. 2d 151 (La. 1971); Bacharach v. F. W. Woolworth Co., 212 F. Supp. 83 (E.D. La. 1963).

98. 636 So. 2d 287 (La. App. 1st Cir. 1993), *writ denied*, 639 So. 2d 1167 (1994).

99. *Graham*, 636 So. 2d at 290.

100. State v. 1971 Green GMC Van, 354 So. 2d 479 (La. 1977); State v. Manuel, 426 So. 2d 140 (La. 1983); State v. Spooner, 520 So. 2d 336 (La. 1988). In 1989, Article I, Section 4 of the Louisiana Constitution was amended to clarify that forfeitures of drugs and drug contraband are civil proceedings. Thus, there is at least an intention to qualify these forfeitures as "civil" so as to negate constitutional protections against multiple presentations, self-incrimination and excessive punishment. *See* State v. Johnson, 667 So. 2d 510 (La. 1996).

101. *Spooner*, 520 So. 2d at 336.

102. *Manuel*, 426 So. 2d at 147. *See also* State v. Davis, 580 So. 2d 1046 (La. App. 3d Cir. 1991). The four specific elements of proof are as follows: (1) valid grounds exist for forfeiture of the property under the statute which do not conflict with the constitution; (2) the seizure was in conformity with the constitution and the law and was made upon reasonable grounds to believe that it so conforms; (3) the owner of the conveyance was knowingly and intentionally a consenting party or privy to a violation of the controlled dangerous substances statute; and, (4) the value of the

even where the owner of the property sought to be forfeited is either acquitted of the charges or the charges are dismissed. Under those circumstances, however, the legislature has created a presumption that the property is not subject to forfeiture, which may be overcome by the State only by "demonstrating a compelling reason by clear and convincing evidence."[103]

In civil defamation actions, the standard of proof is by a preponderance of the evidence,[104] unless specifically guaranteed constitutional rights come into play. When free speech and free press rights guaranteed by the Fifth Amendment of the United States Constitution are at issue, the United States Supreme Court and Louisiana Supreme Court have set specific minimum requirements. Public figures must prove actual malice on the part of persons who make false statements about them in order to recover civil damages for defamation.[105] Actual malice must be proved with "convincing clarity."[106] Moreover, when claiming punitive damages, civil defamation litigants are required to prove their case with "clear and convincing evidence."[107] In *Kidder v. Anderson*,[108] the Louisiana Supreme Court recognized that holding a public figure to a lesser standard than clear and convincing evidence would have a chilling effect on protected free speech. The requirement of proof by clear and convincing evidence in punitive damage cases was the accommodation reached between competing interests of civil defamation law and freedom of speech and press.[109]

In response to *New York Times v. Sullivan* and *Gertz v. Robert Welsh, Inc.*, and at the prompting of the governor, the Louisiana legislature in 1976 created a cause of action for punitive damages in defamation cases.[110] That punitive damage statute did not specifically spell out the applicable standard of proof. However, due to the potential for impingement upon free speech rights, Louisiana courts required proof by clear and convincing evidence, thereby showing that where a constitutional right is at stake, a heightened burden of proof should be required.[111]

Twenty eight states, the District of Columbia, and the territory of the United States Virgin Islands require a higher standard of proof in punitive damage cases

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contraband was in excess of $500 or the contraband was intended for commercial sale. *Davis*, 580 So. 2d at 1049 (citing *Manuel*, 426 So. 2d at 147).

103. *See* La. R.S. 32:1550(C)(4) (1989); *see also Davis*, 580 So. 2d at 1049.

104. *See* Melancon v. Hyatt Corp., 589 So. 2d 1186 (La. App. 4th Cir. 1991), *writ denied*, 592 So. 2d 411 (1992).

105. New York Times v. Sullivan, 376 U.S. 254, 84 S. Ct. 710 (1964).

106. *Id.* at 285-86, 84 S. Ct. at 729.

107. Gertz v. Robert Welsh Inc., 418 U.S. 323, 342, 94 S. Ct. 2997, 3008 (1974).

108. 354 So. 2d 1306, 1308 (La. 1978).

109. *Gertz*, 418 U.S. at 325, 94 S. Ct. at 3000.

110. La. Civ. Code art. 2315.1, *repealed by* 1980 La. Acts No. 324, provided:

> In addition to general and special damages, the plaintiff who obtains a judgment because of having been defamed, libeled or slandered may be awarded punitive damages and reasonable attorneys fees, if it is proved that the defamatory, libelous or slanderous statement upon which the action is based was made with, knowledge of its falsity or with wreckless disregard of whether it was false or not.

111. *See Kidder*, 354 So. 2d at 1308.

than a preponderance of the evidence. Colorado requires proof beyond a reasonable doubt.[112] The others require some heightened standard, either clear and convincing evidence or some other similar standard.[113]

The only Louisiana case located which addresses whether a heightened burden of proof is required is *Galjour*. The district judge, in the course of his federal due process analysis, analyzed burden of proof. Noting that *Haslip* did not require a higher standard of proof under the United States Constitution, the court concluded that a heightened burden of proof is not required. However, no discussion was afforded the Louisiana right to property guaranteed by Article I, Section 4 of the Louisiana Declaration of Rights. No accommodation, therefore, was specifically discussed between the competing rights of punishing wrongdoers and the constitutional right to property. Instead, the *Galjour* court deferred to the Louisiana legislature.[114]

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112. Colo. Rev. Stat. § 13-25-127(2) (Supp. 1996).

113. The states requiring some version of clear and convincing evidence in punitive damage cases, and the corresponding statutory and jurisprudential authority are as follows:

Alabama: Ala. Code § 6-11-20(a) (1993);
Alaska: Alaska Stat. § 09.17.020 (Supp. 1986);
Arizona: Linithicum v. Nationwide Life Ins. Co., 723 P.2d 675 (1986);
California: Cal. Civ. Code § 3294(a) (West 1987);
District of Columbia: Raynor v. U.S. District Court, 643 F. Supp. 238 (D.D.C. 1986);
Florida: Fla. Stat. Ann. § 768.73(1)(b) (West 1988);
Georgia: Ga. Code Ann. § 51-12-5.1(b) (1987);
Hawaii: Masaki v. General Motors Corp., 780 P.2d 566, 574-75 (Haw. 1989);
Indiana: Ind. Code § 34-4-34.2 (1986);
Iowa: Iowa Code Ann. § 668A.1 (West 1986);
Kansas: Kan. Stat. Ann. § 60-3701(c); 7.1.88 (1995 Supp.);
Kentucky: Ky. Rev. Stat. Ann. § 411.184; 7.15.88 (1991);
Maine: Tuttle v. Raymond, 494 A.2d 1353 (Me. 1985);
Maryland: Owens-Illinois, Inc. v. Zenobia, 602 A.2d 1182 (Md. 1992);
Minnesota: Minn. Stat. § 549.20(1) (1996 Supp.);
Missouri: Joseph v. Elam, 709 S.W.2d 517 (Mo. App. 1986);
Mississippi: 1993 Regular Session H.B. 1270 (effective July 1, 1993);
Montana: Mont. Code Ann. § 27-1-221 (1996);
Nevada: Nev. Rev. Stat. Ann. § 42.005(1) (1995);
New York: Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1962);
North Dakota: N.D. Cent. Code § 32-03.2-11 (1995);
Ohio: Ohio Rev. Code Ann. § 2315.21(C)(3) (1995 Supp);
Oregon: Or. Rev. Stat. § 41.315 (1) 1987; repealed 1995, now: 18.535 (1995);
South Carolina: S.C. Code Ann. § 15-33-135 (Law. Co-op. 1995);
South Dakota: S.D. Codified Laws Ann. § 21-4.1 (1995);
Utah: Utah Code Ann. § 78-18-1 (1)(a) (1989) (does not apply in D.U.I. context);
Virginia: Great Coastal Express, Inc. v. Ellington, 334 S.E.2d 846 (Va. 1985);
U.S. Virgin Islands Territory: Acosta v. Honda Motor Co., 717 F.2d 828 (3d Cir. 1983); and V. I. Code Ann. Tit. 22 § 815(b));
West Virginia: Muzelak v. King Chevrolet, Inc., 368 S.E.2d 710, 715 (W. Va. 1988).

114. Galjour v. General Am. Tank Car Corp., 764 F. Supp. 1093, 1100-01 (E.D. La. 1991).

This is not a matter for the Louisiana legislature. Rather, the Louisiana Constitution mandates enhanced protection given the competing interests of the right to property and the legislature's desire to punish certain behavior with exemplary damages. As shown above, there is ample precedent for requiring a heightened burden of proof when a constitutional right is implicated. Accordingly, it is suggested here that pursuant to the Louisiana right to property as well as due process, a claim for punitive damages should require proof by at least clear and convincing evidence.

C. Equal Protection—Article I, Section 3

> *No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.*

The Louisiana equal protection clause was viewed for sometime as a restatement of federal Fourteenth Amendment equal protection.[115] As early as 1976, however, courts began to acknowledge that Article I, Section 3 has a wider ambit than federal equal protection. In *Guidry v. Roberts*,[116] Justice Summers, dissenting, observed that Louisiana equal protection rights appear "far broader and more definitely articulated" than those found in the Fourteenth Amendment.[117] Justice Dennis, concurring in *Burmaster*,[118] questioned the majority's finding that Louisiana equal protection duplicates federal constitutional standards.[119]

In *Sibley v. Board of Supervisors of Louisiana State University*,[120] a case involving a challenge to the $500,000 cap on medical malpractice claims,[121] the Louisiana Supreme Court formally rejected the federal three tier system for equal protection analysis. The court found that the federal system is "in disarray and has failed to provide a theoretically sound frame work for constitutional adjudication."[122] Instead, when a classification is based upon an enumerated class, or a

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115. Succession of Brown, 388 So. 2d 1151 (La. 1980); Burmaster v. Gravity Drainage Dist. No. 2, 366 So. 2d 1381 (La. 1976); State v. Barton, 315 So. 2d 289 (La. 1975).

116. 335 So. 2d 438 (La. 1976) (Summers, J., dissenting).

117. *Id.* at 452.

118. 366 So. 2d at 1388 (Dennis, J., concurring).

119. *Id.* at 1388; *See generally* Bullock, *supra* note 73, at 796-99; Michael Lester Berry, Jr., Comment, *Equal Protection—the Louisiana Experience in Departing From Generally Accepted Federal Analysis*, 49 La. L Rev. 903 (1989).

120. 477 So. 2d 1094 (La. 1985), *on remand*, 490 So. 2d 307 (La. App. 1st Cir.), *writ denied*, 496 So. 2d 325 (1986).

121. *See* La. R.S. 40:1299.39 (1992).

122. 477 So. 2d at 1107.

constitutionally guaranteed right is impinged, a heightened test must be applied. Specifically, under *Sibley* there is an absolute ban on all laws which discriminate on the basis of race or religious beliefs. For other enumerated classes, there must be a showing that no arbitrary, capricious or unreasonable discrimination is created by the classification, and that the statute substantially furthers a legitimate state's objective.[123] In this manner, "judicial attention would be focused on the merits of a case and not diverted toward abstract theories."[124]

The Louisiana Supreme Court seemed to retreat from this analysis in *Crier v. Whitecloud*.[125] *Crier* presented a challenge to the three year preemptive period on medical malpractice claims.[126] Holding that there was no impermissible classification under Article I, Section 3, the court applied a "minimal level of scrutiny."[127] Although the court did not specifically rely on federal jurisprudence, it appeared as though it was applying the federal rational relation standard. Justice Dennis dissented, observing that *Crier*'s application of the second layer in *Sibley* rendered it "in reality non existent."[128]

The court applied the heightened second level scrutiny set forth in *Sibley* two years after deciding *Crier* in *Kirk v. State*.[129] In *Kirk*, a challenge to the prohibition of nonconsensual recording of conversations was presented.[130] Under federal law, it is likely that the minimum scrutiny would have been applied. The *Kirk* court, however, applied *Sibley* scrutiny, holding the statute to the test of substantially furthering a legitimate state objective.[131] It did not pass muster.

Thus, it appears clear that the *Sibley* analysis should be employed when analyzing Louisiana equal protection, but it is by no means clear what this means for the constitutionality of punitive damages. It is clear that under federal equal protection analysis, most punitive damage schemes will withstand scrutiny. This is because under federal equal protection analysis, federal courts have refused to apply any form of heightened scrutiny for wealth based classifications.

Defender Industries, Inc. v. Northwestern Mutual Life Insurance Co.[132] illustrates the typical federal approach. Northwestern, who insured Defender,

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123. *Id.* at 1104.

124. *Id.*

125. 496 So. 2d 305 (La. 1986).

126. *Id.* at 306-07.

127. *Id.* at 311.

128. *Id.* at 313. Justice Dennis went on to observe that *Sibley* scrutiny was merited for any classification: "when a law classifies individuals on any basis, it shall be rejected whenever a member of a disadvantaged class shows that it does not *suitably further any appropriate states interest.*" *Id.* (emphasis added).

129. 526 So. 2d 223 (La. 1988).

130. La. R.S. 14:322.1 prohibited recording of confidential conversations without the consent of all parties, yet did not apply to the state, thus permitting prosecutors to use statements recorded with the consent of only one party. La. R.S. 14:322.1 (1990), *repealed by* 1991 La. Acts No. 795, § 3.

131. 526 So. 2d at 226-27.

132. 809 F. Supp. 400 (D.S.C. 1992).

fraudulently breached a promise to refund a portion of a group life insurance policy.[133] When Defender pressed for a partial return of the premium, Northwestern threatened to interfere with Defender's business relations with its largest customer. A jury found actual damages slightly in excess of $100,000, and awarded punitive damages of $5,000,000.[134] Northwestern, among other points, argued that South Carolina's punitive damage scheme improperly discriminated against the wealthy, thus violating the equal protection clause of the Fourteenth Amendment.[135]

The district judge began his equal protection analysis by questioning whether punitive damages in South Carolina "operate to the disadvantage of some suspect class or impinge upon a fundamental right explicitly or implicitly protected by the Constitution."[136] Under federal law, creating a suspect classification or impinging upon a fundamental right would require strict scrutiny analysis; in effect, the scheme would have to promote a compelling state interest.[137] Otherwise, the minimal rational relationship test would be employed.[138]

The *Defender* court addressed two cases cited by Northwestern in which discrimination based on monetary means was treated with a heightened level of scrutiny. In *Harper v. Virginia State Board of Electors*,[139] a poll tax was found to be unconstitutional. The *Defender* court observed that this monetary discrimination impinged upon the fundamental right to vote. Similarly, in *Griffin v. Illinois*,[140] an Illinois statute made it difficult for the poor to obtain appellate review. This monetary-based discrimination was an unconstitutional impingement on the right to a fair trial. The *Defender* court found that South Carolina's punitive damage scheme was different because the increased monetary punishment against wealthier defendants served to effect a proportionally equal deterrent among persons who behave egregiously. The equal deterrent, in turn, tended to reduce fraud, no matter what one's economic status. Thus, employing minimum scrutiny, the *Defender* court found the South Carolina's punitive damage law rationally related to the state's interest of deterring fraud.[141]

While *Defender* illustrates why punitive damage schemes will generally withstand attack under federal equal protection analysis, it is not nearly so clear that the same is true under Louisiana equal protection analysis. As previously noted, the only Louisiana case squarely addressing a Louisiana equal protection

133. *Id.* at 401.

134. *Id.*

135. *Id.* at 408.

136. *Id.* (quoting San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 17, 93 S. Ct. 1278, 1288 (1973) (emphasis added)).

137. 809 F. Supp. at 408 (citing Hernendez v. Texas, 347 U.S. 475, 74 S. Ct. 667 (1954)).

138. *Id.* at 408 (citing Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312, 96 S. Ct. 2562, 2566 (1976) (legislative scheme upheld if "rationally related to furthering a legitimate state interest")).

139. 383 U.S. 663, 86 S. Ct. 1079 (1966).

140. 351 U.S. 12, 76 S. Ct. 585 (1956).

141. *Defender*, 809 F. Supp. at 409.

attack on punitive damages, *Galjour v. General American Tank Corp.*,[142] rejected an attack on Louisiana Civil Code article 2315.3 under Louisiana equal protection, but it is at least arguable that *Galjour* did not correctly apply Louisiana equal protection analysis.

The *Galjour* court correctly recognized the *Sibley* rejection of the federal three-tier approach when interpreting Article I, Section 3 of the Louisiana Constitution. However, the *Galjour* court found Article 2315.3 to be a classification "based on a particular business or industry, [and] not a classification based on race or religion, nor on the basis of birth, age, sex, culture, physical condition, or political ideas or affiliation."[143] Thus, the court shifted the burden to defendants to show that the classification does not suitably further any appropriate state's interest.[144] Finding Louisiana's "legitimate state interest of protecting the public from injury from hazardous or toxic substances,"[145] the court rejected the equal protection challenge.

What the *Galjour* court failed to do was recognize the impingement on a specifically enumerated fundamental right under the Louisiana Constitution—specifically, the right to property guaranteed by Article 1, Section 4 of the Louisiana Declaration of Rights, a more specific and broader right than that found in the United States Constitution. When other fundamental rights have been impinged by an economically discriminatory statute, even the United States Supreme Court has placed the burden upon the state to show that the economic discrimination is necessary to promoting a compelling state interest. Louisiana's equal protection clause, even broader than the Fourteenth Amendment, certainly does not warrant a lesser degree of scrutiny. Thus, it is arguable that because punitive damages implicate the fundamental Louisiana right to property, the state should be held to the burden of showing that the article is necessary to fulfill a compelling state interest.

It is doubtful whether the state could make this showing, at least as punitive damages are currently being applied in Louisiana. In Louisiana, as in many other states, courts allow introduction of evidence of the wealth and economic fortitude of defendants who stand to be punished. This practice furthers, and indeed encourages, the argument that wealthier defendants must be punished with larger sums of money in order to further the stated goals of "teaching the defendant a lesson," deterring others, and providing an incentive to plaintiffs to pursue potentially limitless damages without regard to the actual compensatory damages incurred.[146] As long as this practice is employed, some defendants are subjected to the possibility of greater punishment simply because of their economic standing. Because this punishment directly implicates these defend-

142. 764 F. Supp. 1093 (E.D. La. 1991).
143. *Id.* at 1104.
144. *Id.*
145. *Id.*
146. *See* Billiot v. British Petroleum Oil Co., 645 So. 2d 604, 612-13 (La. 1994).

ants' fundamental right to property, it is questionable whether this practice complies with Louisiana equal protection.

D. Excessive Punishment—Article I, Section 20

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

Similar to the Eighth Amendment of the United States Constitution, the Louisiana Constitution guarantees humane treatment. Louisiana's protection, however, goes further, prohibiting excessive punishment. Not long after the enactment of the 1974 Constitution, the Louisiana Supreme Court recognized the new and important dimension added by Article I, Section 20. In *State v. Sepulvado*,[147] Justice Tate observed:

> The deliberate inclusion of a prohibition against "excessive" as well as "cruel and unusual" punishment adds an additional constitutional dimension to judicial imposition and review of sentences. . . The Eighth Amendment of the Federal Constitution prohibits "cruel and unusual" punishments. . . .[148]

Punishment which is so out of proportion to the severity of the offense that it inflicts unnecessary pain or suffering is unconstitutional.[149] Even punishments within a delineated statutory range may be excessive viewed in light of the individual defendant and the circumstances of the offense.[150] The codal punitive damage articles leave much to be desired in terms of guidance on permissible damage awards. Particularly, no range of damages is specified, no ceiling or floor is provided, no factors for a jury to consider in assessing quantum are identified, and otherwise no concrete guidance is offered for determination of the propriety of such awards.

As explained previously, the United States Supreme Court held in *Browning-Ferris* that the Eighth Amendment is not applicable to civil cases.[151] This holding was followed in *Galjour*, the only case which has considered the constitutionality of a Louisiana codal punitive damages article. *Galjour*, however, did not recognize

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147. 367 So. 2d 762 (La. 1979).

148. *Id.* at 764; *see also* Bullock, *supra* note 73, at 811-12; Hargrave, *supra* note 64, at 62-65.

149. State v. Reed, 409 So. 2d 266 (La. 1982).

150. *See* State v. Thomas, 447 So. 2d 1053, 1056 (La. 1984); State v. Quiebedeaux, 424 So. 2d 1009 (La. 1982); State v. Grey, 408 So. 2d 1239 (La. 1982); State v. Sepulvado, 367 So. 2d 762 (La. 1979).

151. Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 280, 109 S. Ct. 2909, 2983 (1989).

that the excessive punishment clause contained in the Louisiana Declaration of Rights at Article I, Section 20 is different in its scope and purpose.

Under the excessive punishment clause, unlike under the cruel and unusual punishment clause, labeling a punitive damage scheme "civil" should not be determinative of the inquiry whether it is actually criminal in its application. On the contrary, even a statute which is designated civil may implicate the excessive punishment clause if it is quasi-criminal in its scope and effect. Similarly, a statute sufficiently quasi-criminal in nature may implicate protection against double jeopardy and self-incrimination. In order to determine whether the Louisiana codal punitive damage articles are quasi-criminal in their scope and effect, this article addresses (1) the analysis of the parallel issue under the Eighth Amendment; (2) the history of punitive damages in general and in Louisiana in particular; and (3) present day application of punitive damages in Louisiana.

1. Federal Analysis

As noted above, the United States Supreme Court has held that punitive damages do not implicate the Cruel and Unusual Clause of the Eighth Amendment, but federal courts have recognized that the distinction between civil and criminal in a punitive damage context is not an easy one to assess. "The notion of punishment, as we commonly understand it, cuts across the division between civil and criminal law, . . ."[152] If the goal of punishment is served, a sanction labeled civil may in fact be criminal.[153] Punishment serves the twin aims of retribution and deterrence.[154] Neither retribution nor deterrence are legitimate "non-punitive" objectives.[155]

In the context of a civil punitive damage claim under Vermont law, the United States Supreme Court found in *Browning-Ferris*, that civil punitive damages generally do not qualify as quasi-criminal for the purpose of protection under the United States Constitution.[156] The Court conducted an exhaustive Eighth Amendment analysis of punitive damage claims among private parties when the government is not acting as prosecutor, and where the fine exacted was not to be shared by the state. The *Browning-Ferris* analysis traces the historical development of punitive damages in England, from pre-Magna Carta abuses through the 1689 English Bill of Rights and ultimately the Eighth Amendment of the United States Constitution.[157] The distinction between civil and criminal in English law, however, has little to do with Louisiana law. As shown below, those historical developments are unlike what was experienced in France.

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152. United States v. Halper, 490 U.S. 435, 447-48, 109 S. Ct. 1892, 1901 (1989).

153. *Id.*; *see also* Samuel v. Home Run, Inc., 784 F. Supp. 548 (S.D. Ind. 1992).

154. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S. Ct. 554 (1963).

155. Bell v. Wolfish, 441 U.S. 520, 539 n.20, 99 S. Ct. 1861, 1874 n.20 (1979).

156. Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 280, 109 S. Ct. 2909, 2923 (1989).

157. *Id.* at 268-80, 109 S. Ct. at 2916-21.

Browning-Ferris was not the first time a federal court had considered whether a statute exacting fines or pecuniary penalties is civil. Whether the penalty scheme is "essentially criminal" is the crux of this determination. For instance, in *Helvering v. Mitchell*,[158] Mr. Helvering attempted to invoke the double jeopardy clause in a secondary tax deficiency assessment proceeding. The Court observed:

> Remedial sanctions may be of varying types. One which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted.[159]

The Court went on to observe that a two-level analysis is required to determine whether a forfeiture statute is quasi-criminal. First, Congress' express or implied intentions should be determined. Second, a court must address whether the statutory scheme was "so punitive either in purpose or effect to negate" the intention to impose a civil penalty.[160]

Seven factors were presented in *Kennedy v. Mendoza-Martinez*[161] for analyzing whether a statute is essentially criminal, as opposed to regulatory or civil. In *Kennedy* the Court was presented consolidated cases against individuals whose citizenship rights were attacked as a result of failures to honor armed services obligations or commitments. The individuals whose citizenship rights were at risk argued that the statutory schemes at issue were, in effect, criminal punishments.[162] Justice Goldberg delineated seven factors to consider:

> 1) Whether the sanction involves an affirmative disability or restraint;
> 2) whether it has historically been regarded as a punishment;
> 3) whether it comes into play only on a finding of scienter;
> 4) whether its operation will promote the traditional aims of punishment—retribution and deterrence;
> 5) whether the behavior to which it applies is already a crime;
> 6) whether an alternative purpose to which it may rationally be connected is assignable to it; and
> 7) whether it appears excessive in relation to the alternative purpose assigned.[163]

A balancing of the *Kennedy* factors lean heavily towards a determination that even under this federal analysis, the codal punitive damage articles provide a quasi-criminal punishment rather than a civil sanction. This is because the conduct proscribed by each of the codal articles is largely criminal. Article 2315.7

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158. 303 U.S. 391, 58 S. Ct. 630 (1938).
159. *Id.* at 399-400, 58 S. Ct. at 633.
160. United States v. One Assortment of 89 Firearms, 465 U.S. 354, 362-63, 104 S. Ct. 1099, 1105 (1983) (quoting United States v. Ward, 448 U.S. 242, 248, 100 S. Ct. 2636, 2641 (1980)).
161. 372 U.S. 144, 83 S. Ct. 554 (1963).
162. *Id.* at 147-52, 83 S. Ct. at 556-59.
163. *Id.* at 168-69, 83 S. Ct. at 567-68.

sanctions "wanton and reckless activity" through criminal sexual activity.[164] By definition, criminal activity is required. Article 2315.4 punishes drunk driving, which is also criminal activity.[165] Recently repealed Article 2315.3 punishes those who "wantonly or recklessly" handle, store or transport hazardous materials. Most of the behavior punishable under Article 2315.3 is also criminal activity. For example, criminal penalties exist for those who handle hazardous materials in a manner that endangers or could endanger human life or health.[166] Similarly, one who handles hazardous waste in a careless or imprudent manner without regard for the hazards of the material or the circumstances of his actions commits a misdemeanor.[167] One who willfully or knowingly discharges certain hazardous materials in any way that endanger human life or health may be fined up to $1,000,000 or imprisoned.[168] Thus, Article 2315.3 was also designed to punish behavior which is largely criminal.

In essence, the only conduct subject to punitive damages in Louisiana is that which is also criminal in nature. Accordingly, under the controlling federal law, a persuasive argument can be made that even the Eighth Amendment should be found to constrain Louisiana punitive damages.

Irrespective, however, of whether the Eighth Amendment Cruel and Unusual Punishment Clause applies, there is even a more compelling argument, based on a historical analysis of the Louisiana scheme and its present day application, that the Louisiana Excessive Punishment Clause constrains punitive damages.

2. Historical Analysis

Louisiana's civil law derives from French law, which is inherently different from the English common law analyzed in *Browning-Ferris*. It is not the purpose of this article to analyze in detail the historical development of French law. However, a brief discussion of French law, and even earlier treatment of punitive damages is helpful.

Punishing a criminal wrongdoer with a monetary fine is a practice which dates to the earliest known Codes of law. The Code of Hammurabi, circa 2000 B.C.,[169] and the Code of Lipit-Ishtar,[170] dating from approximately 1968 B.C., are among the two earliest known codes. Both set forth monetary penalties for certain breaches of the public order.[171] Most other organized primitive

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164. La. Civ. Code art 2315.7.

165. 155 La. R.S. 14:98 (1986 & Supp. 1996).

166. La. R.S. 32:1518 (1989 & Supp. 1996).

167. La. R.S. 32:1520 (1989 & Supp. 1996).

168. La. R.S. 30:2025(F) (1989 & Supp. 1996).

169. Linda L. Schlueter and Kenneth R. Redden, Punitive Damages § 1.1 (3d ed. 1995) (citing Albert Kockourek & John H. Wigmore, 1 Sources of Ancient and Primitive Law (1915)).

170. *See* 52 Amer. J. of Archeology 425 (1948).

171. The Code of Hammurabi, for example, assessed a thirty fold penalty from a man stealing an ox, sheep, ass or pig from a Temple, or ten fold penalty for stealing one of these animals from a free man; a ten fold penalty to the shepherd who acts fraudulently, which payment was due directly

cultures had some system of criminal laws, which often provided for multiple money damages under certain circumstances. Among these are the Babylonian Empire (2000 to 1000 B.C.),[172] Hittite Law (circa 1400 B.C.),[173] early Hindu civilization (circa 200 B.C.),[174] early Greek codes,[175] Egyptian Law,[176] and Mosaic law.[177]

Under the *Lex Salica*, the earliest code of laws governing what is now France,[178] the concept of compromise, or "composition" was introduced. Families at private war as a result of wrongs done to one another were directed to resolve their dispute based on a schedule of monetary penalties, known as "weregeld." Weregeld, roughly translated as "man money," was a stipulated monetary fine, payable directly to the victim or his family for a breach of the public order. Gradations of weregeld existed, dependent upon the status and nationality of the victim, and public offensiveness of the act.[179]

Following the French Revolution, a Declaration of Rights was produced, declaring equality among men and before the law.[180] A criminal code was drafted in 1791. The *Code Pénal de 1791* sought to correct the harshness of the French monarchical period by limiting crimes to those things which actually harmed society, and reducing the severity of many punishments.[181]

During this time frame, the *Constituent Assembly* was formed for the purpose of drafting the French Constitution of 1791, among other things. That assembly expressed an intention to compile a general code of France. Despite

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to the owner of the sheep, among many other penalties. *See* Schlueter & Redden, *supra* note 169, at 2.

The Code of Lipit-Ishtar, Ruler of Isin from 1968 to 1957 b.c. exacted a monetary fine for various activities, including those which disrupted the agricultural society existing at that time. For example, stealing from anothers orchard resulted in a fine of ten shekles of silver, and cutting down the tree in the garden of another subjected the wrongdoer to a fine of one-half mina of silver, among various other sanctions for other types of activity. *See* 52 Amer. J. of Archeology 425 (1948).

172. Babylonian law provided for multiple damages in various instances, including which were conversion of goods or money by carrier or depositories. *See* Schlueter & Redden, *supra* note 169, at 2 n.2 (citing H.F. Jolowicz, The Assessment of Penalties in Primitive Law, Cambridge Legal Essays (1926)).

173. Schlueter & Redden, *supra* note 169, at 2 n.3 An example is offered of stealing of animals, which resulted in a gradiated system of repayment of multiple animals, the quality and age of which were specified.

174. *Id.* at 2 n.4. *See also* Sir Henry S. Maine, Ancient Law 17-18 (9th ed. 1863).

175. Schlueter & Redden, *supra* note 169, at 2 n.4 (citing Plato, Protagoras 342(b); Plato, Laws 9.85(b) and 9.93(a)).

176. *Id.* at § 1.2, at 3.

177. *Id.* (citing *Exodus* 22:1 and 22:9). *Exodus* 22:1 obliges one who steals an ox or sheep, and fails to return it, to restore the owner of the ox five fold, or the owner of sheep four fold. *Exodus* 22:9 provides a double damage penalty for trespass. *Id.*

178. *See* Katherine Sherman, The Birth of France (Random House 1987).

179. Jean Brissaud, *A History of French Public Law*, IX The Continental Legal History Series 111-12 (1915).

180. George W. Stumberg, Guide to the Law and Literature of France 168 (U.S.G.T.O. 1931).

181. *Id.*

this intention, politics and disagreement among scholars regarding how to compile French law slowed the process. In 1800 a plan for compiling a French Civil Code was agreed upon.[182] Ultimately, on March 21, 1804, the code *Civil de Francais* was promulgated.

Other codes of French laws were prepared during this immediate time frame, including two which addressed criminal law. Unique to French law was Article 3 of the original Code of Criminal Procedure. A proceeding known as *partie civille* was created, permitting a criminal victim to bring a civil action at the same time, and in the same court proceeding as the public prosecution.[183] This procedure carried forward the long-standing history of recognizing a crime victim's claim for damages as a component of exacting retribution for the offense. However, the concept of providing a monetary premium or added penalty directly to the victim was not carried over in Louisiana law.

On December 20, 1803, after periods of Spanish and French rule, the United States took possession of the Louisiana Territory.[184] Still, the Louisiana people were reluctant to embrace a common law system, and their opposition ultimately was successful.

On March 31, 1808, the Governor approved a Digest of Civil Law, which subsequently became the Louisiana Civil Code of 1808. The redactors followed as a model:

> preparatory works of the French Civil Code as well as the finished text of that Code. The 1808 Digest contained 2,160 articles. One thousand five hundred sixteen of these articles, about 70% of the whole, corresponded with, and were based upon, provisions of the French *Projet de Gouvernement* of 1800 or the Napoleanic Code.[185]

Louisiana's embrace of post-French Revolution French law took place partially in vacuum. Specifically, the Louisiana legislature did not embrace the ancient concept of composition or the more modern French *partie civille* action because Louisiana was already a state when these Codes were adopted. Louisiana's punitive damages articles, however, have a similar effect. Indeed, pursuant to these articles, private citizens are encouraged to act as private attorneys general by seeking redress for conduct which is criminal in nature. Accordingly, if any state's punitive damage scheme is quasi-punitive in nature, it is that of Louisiana—a state which traces its legal roots not to English common law, but rather to French civil law.

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182. *Id.* at 69.

183. *Id.* at 186 (citing Jean Henry Claude Mangin, Traité de L'action Publique et de L'action en Matiere Criminelle (3d ed.) (rev. by Albert Sorel) (Paris 1870), Vol. 2, § 31-13)).

184. La. Civ. Code, The Civil Codes of Louisiana, XXIX (West 1995 ed.).

185. *Id.* at XXI.

3. Present Day Application of Punitive Damages in Louisiana

Louisiana punitive damages have been held to serve three state's purposes:

- Penalize and punish defendants committing legislatively prohibited acts;
- Deter others;
- Provide an incentive or "bounty" to private parties to act as prosecutor of penal laws.[186]

In *Billiot v. British Petroleum Oil Company*, the plaintiff, a refinery laborer, was burned while working for his statutory employer.[187] While changing the filter in a pressurized vessel, he was sprayed and burned with a toxic chemical, but he was injured only because the chemical was hot.[188] He sought damages under Civil Code article 2315.3 against his employer and a co-employee. The trial court granted summary judgment in favor Billiot's employer on two bases: BP was immune under the worker's compensation law, and Billiot failed to meet the summary judgment standard for establishing that his injuries were caused by the toxic or hazardous nature of the substance.[189] The court analyzed in detail the purpose and policies of the exclusive remedy provision of the worker's compensation law *vis-a-vis* the nature and scope of Article 2315.3 punitive damages.

Rather than exacting dollar for dollar retribution for bad acts, the court noted that "[p]unitive damages are regarded as a fine or penalty for the protection of the public interest."[190] Additionally, the court stated that "teaching the defendant not to do it again,"[191] and deterring others from copying the punitive defendant's behavior are among the reasons for permitting punitive damages. As important to the court, however, was the effect which punitive damages have in encouraging plaintiffs to aggressively prosecute punitive damage cases:

> Another justification for the punitive or exemplary award is that it provides an incentive to the plaintiff to sue in cases where the public interest requires some action against the defendant, but, in the absence of a punitive award, the plaintiff might be insufficiently encouraged to bring

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186. Billiot v. British Petroleum Oil Co., 645 So. 2d 604, 612-13 (La. 1984).

187. *Id.* at 607.

188. *Id.* at 607.

189. *Id.* at 607.

190. *Id.* at 612 (citing Browning-Ferris Indus. v. Kelco Disposal Inc., 492 U.S. 257, 287, 297, 109 S. Ct. 2909, 2926-27, 2931-32 (1989) (O'Conner J., concurring and dissenting in part); International Bd. of Elec. Workers v. Foust, 442 U.S. 42, 48, 99 S. Ct. 2121, 2125-26 (1979) (quoting Gertz v. Welch, 418 U.S. 323, 350, 94 S. Ct. 2997, 3012 (1974); Thomas Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 La. L. Rev. 3, 30 (1990); John Calvin Jeffries, *A Comment On The Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 148 (1986); Prosser and Keeton On Torts 1-2 at 9 (5th ed. 1984); 1 Linda L. Schleuter and Kenneth Redden, Punitive Damages § 2.2 (A) (1) (2d ed. 1989)).

191. *Billiot*, 645 So. 2d at 612.

> a civil action or press criminal charges. The punitive award under this theory is viewed as a bounty, or as an incentive to the plaintiff to act as a kind of "private attorney general."[192]

Thus, the supreme court's description of punitive damages in *Billiot*, like the history of punitive damages discussed above, reveals a scheme which has as its primary purpose the punishment of defendants by private citizens who have been cloaked with governmental authority to protect the public interest. In short, the punitive damage scheme is quasi-criminal. Accordingly, this also supports affording the right against excessive punishment to these defendants, just as defendants are afforded this protection against more typical prosecution to protect the public interest.

Indeed, advocates for punitive damages acknowledge the interwoven nature of criminal sanctions and "civil" punitive damages. One recent commentator stated that, "egregous misbehavior deserves punishment. This is the fundamental premise of criminal law and exemplary damages."[193] That writer argued that neither the marketplace nor a publicly elected judiciary effectively regulate corporate America, and, accordingly, juries should be permitted to do so.[194] "Strict procedural safeguards" found in criminal cases such as proof beyond a reasonable doubt and other constitutional constraints were viewed by that writer as an impediment to "ascribing criminal responsibility to individuals within a corporation."[195] Cautioning that "America will be a less safe and less fair country in which to live"[196] with limits on punitive damage claims, that writer, oddly enough, seems to suggest that the ends of criminal punishment should be effected without constitutional safeguards. In codal punitive damages cases, private plaintiffs take on a public prosecutoral role. Public prosecutors, acting on behalf of the state, are bound by the constitutional guarantees of the Louisiana Constitution. Those who act as "bounty hunters" should be no less bound.

The Louisiana legislature has sought to address this deficiency in its punitive damage scheme. Senate Bill Number 580 would have capped punitive damages at five times general and special damages. Awards in excess of that amount would result in a remittitur to the highest awardable amount.[197] That proposal, along with a handful of others, was introduced in the wake of *Billiot*. Some remedial legislation made its way through the legislative process.[198] Other legislation, however, which would have assured a variety of basic constitutional protections was not passed.

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192. *Id.* (citing Dan B. Dobbs, Remedies § 3.9 (1973)).

193. Drew Ranier, *Pro: Exemplary Damages: Checks and Balances on Corporate America*, 43 La. B.J. 256 (1995).

194. *Id.* at 257-58.

195. *Id.* at 256.

196. *Id.* at 259.

197. 1995 S.B. no. 580.

198. *See* La. R.S. 23:1032(a)(1)(a).

Constitutional rights, however, are not dependent upon legislative whim from session to session. Indeed, our Constitution exists to afford basic protection against those whims. The current statutory language, particularly the lack of guidance on quantification of awards, presents a real and substantial risk of excessive punitive damages awards. Judicial recognition of existing rights under the Louisiana Constitution is needed, particularly the right to be protected against excessive punishment.

How much, then, is enough, or would be permissible? The question calls for some minimum bright line boundary. The requirement of a logical relationship between actual loss and extent of punishment predates the civil code. Most legal cultures have traditionally used a multiple of damages. Interests of consistency and predictability support a limit in the form of a multiple of actual damages. Whether a multiple or some other bright line boundary is adopted, the right against excessive punishment should be recognized.

E. Double Jeopardy—Article I, Section 15

> *No person shall be twice placed in jeopardy for the same offense, except on his application for new trial, when a mistrial is declared, or when a motion of arrest of judgment has been sustained.*[199]

This protection against multiple prosecutions also applies if the codal punitive damage articles are quasi-criminal. As discussed above, the codal articles are more criminal than civil in their scope and application. It is submitted, therefore, that this constitutional protection attaches.

Multiple prosecutions are prohibited by Article I, Section 15 of the Louisiana Constitution. Though similar to federal double jeopardy prohibition, the broader protection of property rights found in Louisiana Constitution enhances multiple prosecution protection in the context of punitive damages.

Three basic protections are afforded. First, persons are protected against a second prosecution once they have been acquitted on the same charge. Second, they are protected against a second prosecution once they have been convicted of that charge. Third, multiple prosecutions for the same offense are prohibited.[200] The concept of protecting persons from multiple prosecutions dates back to the Seventeenth Century. In its "Body of Liberties" the Colony of Massachusetts provided: "No man shall be twise sentenced by Civill Justice for one and the same crime, offense or Trespasse."[201]

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199. La. Const. art. I, § 15.

200. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076 (1969).

201. American Historic Documents 1000-1904, 43 Harvard Classics 66, 72 (C. Eliot ed. 1910), *quoted by* United States v. Halper, 490 U.S. 435, 440, 109 S. Ct. 1892, 1987 (1989).

The Framers of the United States Constitution embraced this guarantee.[202] The prohibition against punishments or prosecutions for the same offense has been considered well settled within the jurisprudence for over a century.[203] Federal courts have analyzed whether multiple punitive damage prosecutions may require double jeopardy protection under the United States Constitution.

Civil sanctions may operate as an additional criminal punishment in certain contexts. The United States Supreme Court recognized that, "[a] defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as deterrent or retribution."[204] Determination whether a civil punishment is a second prosecution, thus, turns on the effect of the civil sanction, whether intended or actual.

In *Halper*, a False Claims Act prosecution was found to be a second punishment in violation of the double jeopardy provision of the United States Constitution. The Court relied heavily on an earlier case, *U.S. ex rel Marcus v. Hess*,[205] which was a *qui tam* proceeding against electrical contractors for bid collusion and fraud. In *Hess*, the government stood to gain much more than full reparation for damages. *Qui tam* proceedings, however, have as a principal purpose restoration of the government to roughly its previously whole position. Thus, in *Hess*, that *qui tam* proceeding was found to violate double jeopardy protection.

The *Halper* Court refused to extend Fifth Amendment double jeopardy protection to private litigants.[206] Some federal courts have refused to extend double jeopardy protection to litigants in punitive damage cases, relying on *Halper*.[207] The broader double jeopardy protection found in the Louisiana Constitution, however, does not produce the same result.

Like the federal courts, Louisiana courts apply double jeopardy "only to actions intended to authorize criminal punishment to vindicate public justice."[208] In *Louisiana State Board of Mental Examiners v. Booth*, the first circuit held that some ostensibly "civil" actions subject defendant to jeopardy within the meaning of the double jeopardy clause.[209] Multiple revocation proceedings against a dentist were found to fall outside of double jeopardy protection in *Allen v. Louisiana State Board of Dentistry*.[210] Critical to this holding was the finding that the revocation proceedings in question were not "quasi criminal" proceedings.

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202. 1 Annals of Cong. 434 (1789-1791) (Joseph Gales, Sr. ed. 1834); *see also Halper*, 490 U.S. at 440.

203. *See Halper*, 490 U.S. 435, 109 S. Ct. 1892; *Ex Parte* Lange, 85 U.S. 163 (1874).

204. *Halper*, 490 U.S. at 448-49, 109 S. Ct. at 1902.

205. 317 U.S. 537, 63 S. Ct. 379 (1943) [hereinafter "*Hess*"].

206. *Halper*, 490 U.S. at 451, 109 S. Ct. at 1892.

207. *See, e.g.*, Leonen v. Johns-Manville Corp., 717 F. Supp. 272 (D.N.J. 1989).

208. Louisiana State Board of Medical Examiners v. Booth, 76 So. 2d 15, 19 (La. App. 1st Cir. 1954).

209. *Id.*

210. 603 So. 2d 238 (La. App. 4th Cir. 1992).

Unlike *Booth* or *Allen*, the essential bases for an award of damages under the codal punitive damages articles are to punish and deter. Because these proceedings are more criminal than civil in nature, double jeopardy protection attaches.

This is particularly important in cases where a defendant stands to be sued by many persons for the same conduct. Typical examples are multiple suits, often in multiple court venues, for a single toxic emission or a chain collision automobile accident caused by a drunk driver. Moreover, creative "bounty hunters," now encouraged by the hope of limitless punitive damages, are constantly seeking to extend the punitive damage articles beyond their intended scope. For example, ordinary motor oil was recently argued to be a hazardous substance under article 2315.3 to legitimate a claim for punitive damages in a plain vanilla automotive collision case.

In *Chutz v. J.B. Hunt Transport, Inc.*,[211] the supreme court rejected plaintiff's arguments that a truck hauling motor oil was hauling a hazardous substance.[212] While *Chutz* properly rejects a bizarre extension of article 2315.3, it illustrates the heightened interest demonstrated by the new age "bounty hunters" in extending the scope of punitive damages. Multiple prosecutions for one course of conduct is exactly what double jeopardy is intended to prohibit. Under the Louisiana Constitution that no more than one bite at the punitive damage apple for a single act should be permitted.

F. Self Incrimination Rights—Article I, Section 13

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

There are vast differences between the treatment of civil litigants and criminal defendants in terms of compelling their testimony. Under the Fifth Amendment of the United States Constitution and Article I, Section 13 of the Louisiana Constitution, a criminal defendant's right to remain silent, and to refuse to incriminate himself by sworn testimony is held inviolate. Civil litigants, however, are subject

211. 662 So. 2d 450 (La. 1995).

212. The court did not address the issue whether there must be a causal relationship between the injury claimed and the hazardous substance being hauled, stored or transported. *Id.* at 451.

to a vast array of discovery, often requiring sworn testimony or attestation of the truthfulness of discovery responses. Unless specifically charged with a crime, or subject to criminal charges on a specific issue, a civil litigant may be ordered to testify under penalty of contempt. Once testifying, that litigant is subject to the penalty of perjury.

Whether the right against self incrimination applies in codal punitive damage cases turns on whether these claims are criminal or civil. As addressed in detail above, the codal punitive damage articles appear to be quasi-criminal sanctions. Thus, there exists a good argument that the right against self incrimination should apply.

Article I, Section 13 provides rights potentially greater than those which flow from the United States Constitution Fifth Amendment. The 1974 Constitutional Convention embraced the then-existing federal Fifth Amendment case law into Louisiana's protection against self-incrimination. The high water mark federal jurisprudence sets the minimum standard for Louisiana. Specifically, "[t]here was an intention by the Convention to go beyond *Miranda* and to require more of the State regarding [the guarantee against self incrimination]."[213] In *State in the Interest of Dino*, the Louisiana Supreme Court considered the taking of a statement from a juvenile defendant without an attorney present.[214] Acknowledging a shift to the conservative right in federal interpretations of the Fifth Amendment,[215] the *Dino* court found that Article I, Section 13 "enhanced and incorporated prophylactic rules of *Miranda*."[216] *Dino* goes on to hold that any constriction or limitation of *Miranda* by the United States Supreme Court which results in "significant deprivation of freedom of action" does not restrict the rights afforded by Article I, Section 13 in a commensurate way.[217] Thus, as federal jurisprudential interpretations of the guarantee against self-incrimination ebb and flow to the right and back, Louisiana's minimum standard embraces the broad guarantees crafted by the Warren Court.

Fifth Amendment protection has been frequently extended by federal courts in forfeiture actions. Over a century ago, the Supreme Court extended the right of self-incrimination in quasi-criminal suits for penalties and forfeitures.[218] To the extent forfeiture actions are quasi-criminal, federal courts continue to extend Fifth Amendment protection.[219] If not quasi-criminal, however, Fifth Amendment protection is traditionally not extended.[220]

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213. State In the Interest of Dino, 359 So. 2d 586, 590 (La. 1978).

214. *Id.*

215. *See* Oregon v. Mathiason, 429 U.S. 492, 97 S. Ct. 711 (1977).

216. *Dino*, 359 So. 2d at 589.

217. *Id.* at 590.

218. *See* Boyd v. U.S., 116 U.S. 616, 6 S. Ct. 524 (1886).

219. *See* U.S. v. Mades, 787 F. Supp. 1446 (D.C. Cir. 1992) (Federal Fourth and Fifth Amendment protection afforded to quasi-criminal defendants, but no double jeopardy protection, as not a true criminal defendant); Gordon v. U.S., 634 F. Supp. 12 (Cir. 1986)).

220. *See* U.S. v. Ward, 448 U.S. 242, 100 S. Ct. 2636 (1980).

In a civil context, the Louisiana Fourth Circuit Court of Appeal recently acknowledged an Article I, Section 13 right to effective assistance of counsel. In *Jambois v. Jambois*,[221] a *pro se* litigant was in arrears on child support and alimony *pendente lite*. The trial judge ordered him to serve ninety days in jail. Plaintiff participated in most of the proceedings without an attorney, yet had court appointed counsel at a contempt hearing. The court found that the proceeding was essentially quasi-criminal and that "due process requirements of effective assistance of counsel should apply."[222]

No Louisiana cases were located in which a punitive damages defendant asserted his Article I, Section 13 rights against self-incrimination as to sworn testimony or pre-trial discovery. There exists a good argument, however, that these rights apply on this same basis. This is particularly true when it is remembered that exposure to punitive damages under the codal articles corresponds to criminal exposure. For example, a defendant confronting a claim for punitive damages under Article 2315.7 for alleged criminal sexual activity should not be compelled to testify against himself. Compelling testimony from this defendant would abridge his Article I, Section 13 rights. The same rationale would apply to a defendant confronting a claim for punitive damages under Article 2315.4 for drunk driving or under recently repealed Article 2315.3 for reckless handling of hazardous substances. Like the other rights discussed above, the Louisiana Constitution may very well guarantee this protection.

VII. CONCLUSION

At present, a defendant confronting a punitive damage claim in Louisiana is placed in an difficult situation. He will be subject to a finding of liability simply upon the jury concluding that it is more likely than not that he engaged in the proscribed conduct, as vaguely defined as this conduct may be. In state court, it will not matter that three of the twelve jurors feel that the defendant is not liable for anything. It also will not matter that the defendant may be exposed for criminal prosecution for this same conduct, or even that the defendant may have even already been tried in criminal court for the same conduct. Indeed, at least up to this point, no court will even afford the defendant the basic protection against self-incrimination or double jeopardy.

At the same time that the jury determines whether the defendant is liable for punitive damages, it will also go forward to assess these damages if liability is found. As a result, the defendant will be effectively foreclosed from presenting evidence which would mitigate against high punitive damages, such as previous awards, etc., because it would prejudice the jury against him on the merits. For the same reason, the plaintiff will, on the other hand, be allowed to introduce evidence which is routinely inadmissible, such as the degree of defendant's

221. 598 So. 2d 1237 (La. App. 4th Cir. 1992).
222. *Id.* at 1239.

wealth. Indeed, the jury will be told to consider awarding more punitive damages against the defendant if he is wealthy. Many of these problems would be alleviated simply by bifurcating liability and assessment of punitive damages, but at least up to this point, no court has found a constitutional right to do so.

If the jury does award punitive damages, it will be given virtually unfettered discretion to award whatever punitive damages it sees fit. The award might not be reversed even if it is over five hundred times the award of actual damages. In very real terms, the defendant who is alleged to have caused $10,000 of actual damages may be found liable for $5 million of punitive damages, enough to put even a thriving corporation out of business. Indeed, there will be no specific limit on the amount of punitive damages that may be awarded. It also will not matter that other defendants have received much less or much greater punishment for the same conduct.

This parade of horribles is not theoretical; it confronts many defendants as this article is written. These defendants routinely invoke their rights under the federal Constitution, arguing that such arbitrary punishment is impermissible. Up to this point, however, a divided United States Supreme Court has done little to clarify exactly how punitive damages are constrained by the federal Constitution.

As shown in this article, a defendant in Louisiana should not have to resort to the federal Constitution. On the contrary, the federal Constitution should not be reached until after the Louisiana Constitution is considered. Moreover, since it is clear that the Louisiana Declaration of Rights affords much greater protection than the federal Bill of Rights, it should never be necessary to reach the federal Constitution. Many of the inequities in the present system should be solved by applying this Declaration of Rights, thereby resulting in a system which provides ample deterrence against conduct which is contrary to the public welfare, but which does so without its cost being the wholesale deprivation of constitutional rights.