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ENTERING THE DOOR OPENED: AN EVOLUTION OF RIGHTS OF PUBLIC ACCESS TO GOVERNMENTAL DELIBERATIONS IN LOUISIANA AND A PLEA FOR REALISTIC REMEDIES

"For as long as any of us can remember, Louisiana has been dominated politically by the mediocre and the unprincipled . . . men who were colorful, but . . . whose public pronouncements have made the literate wince, the cynical laugh and the sensitive cry." Former Governor Edwin W. Edwards.¹

Section one of the first article of the Louisiana Constitution states that government, of right, not only originates with the people but is founded on their will alone.² Despite characterization of the section as "basically a second preamble, a statement of political theory rather than of law,"³ the values expressed constitute more than passing approval of political pluralism.⁴ From a legal perspec-

1. Speech of Dec. 18, 1970 in *Gris Gris*, Oct. 15-21 (1979), at 11.

2. LA. CONST. art. I, § 1 provides:

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

Recently, the United States Supreme Court has noted that the underlying principles of our government are premised upon the idea of a sovereign people. The Court reflected that:

Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. *See, e.g.*, *Federalist Papers*, No. 39 (Madison). In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature. . . . The reservation of such power is the basis for the town meeting, a tradition which continues to this day in some States as both a practical and symbolic part of our democratic processes.

City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 872-73 (1976) (citation omitted).

3. Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 3 (1974). Professor Hargrave is probably correct in reasoning that the legitimate ends of government enumerated—justice, peace, rights, happiness, and general welfare—are vague enough to authorize the same actions as "would be the case if the section were deleted." *Id.* Yet, it is submitted that the section is significant in that it sets the tone for the Declaration of Rights, *see* STATE OF LOUISIANA CONSTITUTIONAL CONVENTION OF 1973 VERBATIM TRANSCRIPTS, Aug. 29, 1973 at 2, and affirms the notion of representative republicanism.

4. Nearly a century and a half ago, de Tocqueville recognized the principle of sovereignty of the American people. He wrote:

Whenever the political laws of the United States are to be discussed, it is with the doctrine of the sovereignty of the people that we must begin. . . . In America,

tive the constitutional declaration's significance is best appreciated when associated with the concept of "political law,"⁵ a realm generally comprised of issues of great public concern dealt with by the state government or its political subdivisions.⁶ Arguably, no body of law is more essential to maintaining the principles of republicanism⁷ and to attaining local political access than is the state's open meetings legislation.⁸ This comment examines the fundamental policies underlying open meetings legislation and the evolution of Louisiana's constitutional and statutory right of public access to the deliberations of public bodies, identifies existing shortcomings, and proposes modifications that may facilitate the policies of a "government in the sunshine."⁹

Policies and Principles Arguing for Governmental Openness

Some may believe that public sentiment favoring governmental

the principle of the sovereignty of the people is not either barren or concealed, as it is with some other nations; it is . . . proclaimed by the laws; it spreads freely, and arrives without impediment at its most remote consequences. If there be a country in the world where the doctrine of sovereignty of the people can be fairly appreciated . . . that country is assuredly America.

A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 33 (A. Hacker ed. 1964). See note 2, *supra*.

5. Distinguishing between the "lawyer's law" of the quiet law libraries" and the "political law" of the bustling legislature of the strident street corners," Judge Tate has noted the importance of the differentiation in the context of the judge's lawmaking role in a civilian legal system. Tate, *The Law-Making Function of the Judge*, 28 LA. L. REV. 211, 213 (1968). The classification is also helpful in analyzing the basic policies favoring the public's right of access to the governmental structure.

6. LA. CONST. art. VI, § 44 provides in pertinent part:

(1) "Local governmental subdivision" means any parish or municipality. (2) "Political subdivision" means a parish, municipality, and any other unit of local government, including a school board and a special district, authorized by law to perform special functions. (3) "Municipality" means an incorporated city, town, or village. (4) "Governing authority" means the body which exercises the legislative functions of the political subdivision.

7. U.S. CONST. art. IV, § 4 states that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government"

8. See LA. R.S. 42:4.1 (Supp. 1976); 42:4.2 (Supp. 1979); 42:5 (Supp. 1976 & 1979); 42:6 (Supp. 1976 & 1979); 42:6.1 (Supp. 1976 & 1979); 42:7 (Supp. 1976 & 1979); 42:7.1 (Supp. 1976 & 1979); 42:8 (Supp. 1952 & 1972); 42:9 (Supp. 1976 & 1979); 42:10 (Supp. 1976 & 1979); 42:11 (Supp. 1979); 42:12 (Supp. 1979).

For a sampling of similar laws in other jurisdictions, see, e.g., ARK. STAT. ANN. § 12-2805 (1968); CAL. [GOV'T] CODE §§ 11120-31 (1967); COLO. REV. STAT. §§ 24-6-101-402 (1972); CONN. GEN. STAT. ANN. §§ 1-19 to 21A (1957); FLA. STAT. ANN. § 286.011 (1969 & 1978); IND. ANN. STAT. §§ 57-601-609 (1967); MICH. STAT. ANN. §§ 4.1800 (1-3) (1968); NEB. REV. STAT. §§ 84-1401-1405 (1967); N.J. REV. STAT. § 10:4-6 to 4-21 (Supp. 1975).

9. The Florida law opening the deliberations of state and local governments to the public, FLA. STAT. ANN. § 286.011 (1969 & 1978), is known as the "Government in the Sunshine Law." See Comment, *Government in the Sunshine: Promise or Placebo?*, 23 U. FLA. L. REV. 361 (1971).

openness is motivated by fear of political corruption and deceit.¹⁰ While such a position is perhaps justifiable in light of periodic exposure of official wrongdoing, this view is incomplete; other strong policies also favor a principle of openness. According to one writer, the public has been motivated to demand more openness by an "aversion to undue centralization and irresponsible government revealed . . . in . . . political issues"¹¹ The core objectives furthered by open meetings legislation appear most evident in relation to legal issues with which the public is familiar. Basically, open meetings statutes link the philosophical tradition of government by consent of the governed to day-to-day governmental activities. As the authority for democratic government rests on the participation of the governed, the public must be able to observe and evaluate public officials, public conduct, and public institutions—especially when individual members of the public often have an interest in the governmental action.¹² And "[t]o be well-informed, the public should have some access to the on-going process of decision making; not only to what is done, but also to *why* it is done and what alternatives are considered and rejected."¹³ In light of these salient arguments promoting the concept of governmental openness, it is appropriate that Louisiana law guarantees the public the right to observe the deliberations of public bodies and to examine public records.¹⁴

10. See Comment, *supra* note 9.

11. *Id.* Moreover, "[t]he increased impact of mass media on society [has] played an important role in directing public attention to [the] inadequacies and abuses of government." *Id.*

12. See Paul, *Public Benefits from Florida's Sunshine Laws*, PAR ANALYSIS 1, 1-2 (March, 1978). Mr. Paul further noted that "[t]he continued viability of democratic institutions in . . . society . . . has come increasingly to depend upon the development and implementation of 'government-in-the sunshine' laws." *Id.* at 1.

In his concurring opinion in *Reeves v. Orleans Parish School Bd.*, 281 So. 2d 719 (La. 1973), Justice Summers, articulating a similar view, stated:

Public meeting legislation is desirable for its educational effect, rather than its effect as a legal weapon. The statutes [Louisiana's open meetings law] should be viewed primarily as serving to exemplify a public attitude, a mandate to the office-holder that the people favor and insist upon open meetings.

281 So. 2d at 724 (Summers, J., concurring). See also H. CROSS, *THE PEOPLE'S RIGHT TO KNOW* 7-12 (1953); Wickham, *LET THE SUN SHINE IN! Open Meeting Legislation Can Be Our Key to Closed Doors in State and Local Government*, 68 NW. U.L. REV. 480, 481 (1973); Comment, *Access to Governmental Information in California*, 54 CALIF. L. REV. 1650, 1650-56 (1966); Comment, *supra* note 9, at 361; Note, *Open Meetings Statutes: The Press Fights for the "Right to Know,"* 75 HARV. L. REV. 1199 (1962); Note, *The Iowa Open Meetings Act: A Right Without a Remedy?*, 58 IOWA L. REV. 210, 210 (1972); Note, *Freedom of Information—Texas Open Meetings Act has Potentially Broad Coverage But Suffers From Inadequate Enforcement Provisions*, 49 TEX. L. REV. 764 (1971).

13. Wickham, *supra* note 12, at 481 (emphasis added).

14. See LA. CONST. art. XII, § 3; LA. R.S. 44:1 (1950 & Supp. 1978); 44:2 (1950 &

The Constitutional Text

No person shall be denied the right to observe the deliberations of public bodies . . . except in cases established by law.¹⁵

The succinct constitutional statement is significant in at least two respects. Louisiana's Constitution is the source of a guarantee which apparently vests in the public a right not found in the United States Supreme Court's interpretations of the Federal Constitution. Although the recent *Gannett Co., Inc. v. De Pasquale*¹⁶ decision was based on the sixth amendment right to a public trial, three members of the Court, specifically reserving judgment on the issue of a first and fourteenth amendment right of the public to attend criminal trial proceedings,¹⁷ offered their views on a federal constitutional

Supp. 1976); 44:5-6 (1950); 44:7 (1950 & Supp. 1978); 44:8 (Supp. 1966); 44:9 (Supp. 1970 & 1978); 44:10 (Supp. 1975); 44:31 (1950 & Supp. 1978); 44:32 (Supp. 1968 & 1978); 44:33-36 (1950 & Supp. 1978); 44:37-38 (1950); 44:39 (1950 & Supp. 1978); 44:40 (Supp. 1958 & 1978); 44:41 (Supp. 1970); 44:42 (Supp. 1977).

15. LA. CONST. art. XII, § 3.

16. 443 U.S. 368 (1979).

17. *Id.* at 392. During the past term, the Court concluded that the first and fourteenth amendments guarantee the public and the press a right to attend criminal trials. *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814 (1980). Writing the majority opinion, Mr. Chief Justice Burger traced the longstanding tradition in English and American law that a presumption of openness inheres in the very nature of a criminal trial under our system of justice. The Court recognized that people assemble in public places not only to speak or take action but also to listen and learn, subject to the usual time, place, and manner restrictions. *Id.* at 2828, citing *Cox v. Louisiana*, 379 U.S. 559 (1965); *Cox v. New Hampshire*, 312 U.S. 569 (1941). Specifically, *Richmond Newspapers* holds "that the right to attend criminal trials is implicit in the guarantees of the First Amendment . . ." *Id.* at 2829.

While the majority's phraseology portends only to speak of a constitutional right to attend criminal trials, other Court members manifested a view that the first amendment has a far greater reach. Mr. Justice Stevens categorized *Richmond Newspapers* as "a watershed case," unequivocally holding that arbitrary interference with access to important information abridges the freedoms of speech and press protected by the first and fourteenth amendments. 100 S. Ct. at 2830 (Stevens, J., concurring). Mr. Justice Brennan, with whom Mr. Justice Marshall joined, reflected that the instant decision may spell another look at the right of access to information issue, *see, e.g.*, *Houchins v. KQED*, 438 U.S. 1 (1978); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974), as the first amendment embodies more than a commitment to free expression and open communication for their "own sakes." The first amendment "has a structural role to play in securing and fostering our republican system of self-government." 100 S. Ct. at 2833 (Brennan, J., concurring) (emphasis in original). Mr. Justice Stewart and Mr. Justice Blackmun concurred in the judgment.

To the extent that *Richmond Newspapers'* reasoning is pushed beyond the criminal trial context, as is advocated in two concurring opinions, the soundness of the analysis is questionable. Certainly the historical argument, that criminal trials have always been thought to be open to the public, vanishes when referring to meetings of state

right of public access. Mr. Justice Blackmun noted that "this Court heretofore has not found and does not today find, any First Amendment right of access to judicial or other governmental proceedings."¹⁸ Mr. Justice Rehnquist reached a similar conclusion, writing in characteristic fashion that:

Despite the Court's seeming reservation of the question whether the First Amendment guarantees the public a right of access . . . it is clear that this Court repeatedly has held that there is no First Amendment right of access in the public or the press to governmental proceedings. . . . Thus, *this Court emphatically has rejected the proposition . . . that the First Amendment is some sort of constitutional "sunshine law" that requires notice . . . and substantial reasons before a governmental proceeding may be closed to the public and press.*¹⁹

Although Mr. Justice Powell was willing to address the first amendment right of access issue and to resolve it in favor of the guarantee,²⁰ the arguments of Mr. Justice Blackmun and Mr. Justice Rehnquist seem more consistent with past Court decisions.²¹ However, another line of contemporary Supreme Court decisions²²

and local governments. In addition, perplexing federalism problems might arise if the instant decision stands for the proposition that state and local governmental deliberations are required to be open to the public and the press, not because of a precise provision in the text of the Constitution, but under the fourteenth amendment's due process clause. *Cf. National League of Cities v. Usery*, 426 U.S. 883 (1976) (Congress may not exercise its power to regulate commerce by forcing states to choose as to how essential governmental decisions are to be made).

Ultimately, Mr. Justice Rehnquist's dissent may prove telling:

"The generalities of the Fourteenth Amendment are so indeterminate as to what state actions are forbidden that this Court has found it a ready instrument, in one field or another, to magnify federal, and incidentally its own, authority over the states."

However high minded the impulses which originally spawned this trend may have been . . . *it is basically unhealthy to have so much authority concentrated in a small group of lawyers who have been appointed to the Supreme Court and enjoy virtually life tenure.*

100 S. Ct. at 2843 (Rehnquist, J., dissenting), quoting *Brown v. Allen*, 344 U.S. at 534 (1953) (Jackson, J., concurring) (citation omitted) (emphasis added).

18. 443 U.S. at 411 (Blackmun, J., concurring in part and dissenting in part). Mr. Justice Brennan, Mr. Justice White, and Mr. Justice Marshall also joined in Mr. Justice Blackmun's separate opinion.

19. 443 U.S. at 404-05 (Rehnquist, J., concurring) (emphasis added).

20. 443 U.S. at 397 (Powell, J., concurring).

21. See e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974). See Note, *The Media, The Public and Government—Is There a Constitutional Right of Access?*, 39 LA. L. REV. 1005 (1979); Note, *Constitutional Law—Freedom of the Press—No Special Right of Press Access to Information*, 53 TUL. L. REV. 629 (1979).

22. See, e.g., *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Linmark Assoc.*,

strengthens the proposition that the Constitution does guarantee the public the right to be informed of the governmental process. In *Virginia Pharmacy Board v. Virginia Consumer Counsel*²³ the Court ruled that the public has a right to receive the pricing information a willing pharmacy desires to convey, holding a regulatory ban on advertisement of drug prices unconstitutional as offensive to the first amendment. *Virginia Pharmacy* includes language that "the First Amendment . . . is thought to be . . . an instrument to enlighten public decision making in democracy,"²⁴ thus implying that the Court may be willing to extend first amendment protection to include a public right to receive *information* about governmental deliberations. Yet, while the Court has employed the *Virginia Pharmacy* approach to rule that the first amendment prohibits bar regulations forbidding advertising prices for routine legal services²⁵ and forbids a municipality's banning "For Sale" or "Sold" signs on residential lawns,²⁶ it is unlikely that a public right to *observe* the deliberations of governmental bodies will be recognized.

The second significant aspect of Louisiana's constitutionalizing the principle of public access is apparent upon analysis of the section's precise wording and sparse legislative history. Developed in the Committee on Bill of Rights and Elections, the provision seemingly was adapted from a comparable declaration in the Montana Constitution.²⁷ Literally without debate, an overwhelming majority²⁸ of the constitutional convention's delegates approved the section's "presumption that public meetings . . . are open to the public unless a *specific* law denies access."²⁹ Only delegate Jenkins, explaining the proposal, spoke. He remarked that "[t]his won't change any of our statutes."³⁰ Despite limited consideration of the provision by the con-

Inc. v. Township of Willingboro, 431 U.S. 85 (1977); *Virginia Pharmacy Bd. v. Virginia Consumer Counsel*, 425 U.S. 748 (1976); Note, *The Traditional Ban on Advertising by Attorneys and the Expanding Scope of the First Amendment*, 38 LA. L. REV. 259 (1977); Note, *Commercial Speech: A Constitutional Protection for Advertising Sales of Residential Property*, 23 LOYOLA L. REV. 1038 (1977).

23. 425 U.S. 748 (1976).

24. *Id.* at 765.

25. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

26. *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977).

27. MONT. CONST. art. II, § 8 states that "[t]he public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law."

28. IX RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: CONVENTION TRANSCRIPTS, Jan. 3, 1974 at 3073. Final passage was by a 104 to 6 vote.

29. *Id.* (emphasis added).

30. *Id.* Delegate Jenkins also argued that:

Our statutes presently spell out which cases are denied, and really the relevance of this is to say that in cases where there is no law on the subject that if there has not

stitutional delegates,³¹ careful examination of the text in light of then-existing open meetings statutes³² helps define the functional role of the presumption of openness.

Because the *right* to observe the deliberations of public bodies is guaranteed, the provision seems self-executory; such a right is legally enforceable without legislative action.³³ Furthermore, the constitu-

been a specific denial of the right to public access, then access would be allowed . . . to the meeting . . . involved.

Id.

31. The recorded committee consideration of the section consists of a single memorandum. See Committee on Bill of Rights and Elections, Staff Memo No. 35, X RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: COMMITTEE DOCUMENTS 113. However, the memorandum properly identified both the statutory problems extant and the underlying openness policies. It stated:

Local and state public bodies in Louisiana have frequently met in executive session to thrash out controversial issues before their open public sessions begin. At the latter sessions, agreements reached in executive session are publicly approved often with little debate. The public is thus not involved in the final decision making process. . . . This, apparently, is the typical situation which this proposal seeks to change.

Id.

32. Since 1952 Louisiana law has required the meetings of public bodies to be open. See 1952 La. Acts, No. 484. As a statement of policy, statutory language provided that "[a]ll meetings of . . . governing bodies . . . shall be open to the public." LA. R.S. 42:5 (Supp. 1952) (as it appeared prior to 1976 La. Acts, No. 665). Additionally included was an exception of executive sessions, LA. R.S. 42:6 (Supp. 1952) (as it appeared prior to 1976 La. Acts, No. 665), and the requirement that regular meetings be fixed as to time and place. LA. R.S. 42:7 (Supp. 1952) (as it appeared prior to 1976 La. Acts, No. 665). In the event of change from the regular schedule or of the calling of special meetings, adequate notice was necessary. *Id.* Yet, probably due to the general language of the statutes, the scheme suffered from a lack of precision, when exactness was often needed. The statutes failed to supply a workable definition of a "meeting." Although section 5 of title 42 of the Revised Statutes was worded in terms of "[a]ll meetings," LA. R.S. 42:5 (Supp. 1952) (as it appeared prior to 1976 La. Acts, No. 665), the courts declined to construe "all meetings" in a strict grammatical sense. In *Reeves v. Orleans Parish School Bd.*, 281 So. 2d 719 (La. 1973), then Justice Tate wrote that gatherings concerning preliminary and administrative matters "which require . . . consideration but do not require official . . . action" were not within the statutory ambit. *Id.* at 721. The legislation also lacked procedural or substantive limitations on the availability of executive or closed sessions. See LA. R.S. 42:6 (Supp. 1952) (as it appeared prior to 1976 La. Acts, No. 665). Moreover, there existed a remedial void for sanctioning violations. See LA. R.S. 42:8 (Supp. 1952) (as it appeared prior to 1972 La. Acts, No. 669) which stated that "[i]t shall be unlawful for such councils, police juries, governing bodies, boards or authorities to hold meetings under any conditions contravening the provisions of R.S. 42:5 through R.S. 42:7." Professor Wickham reflects that it is not uncommon for open meetings legislation to lack remedial measures or enforcement devices. Wickham, *supra* note 12, at 487.

33. Professor Hargrave has summarized the reasons that constitutional statements and declarations, while often high-sounding, are in reality somewhat impotent. He wrote:

An ideal constitution would contain only self-executing provisions that are

tional text speaks in terms of the public's right to observe *deliberations* of public bodies, rather than to observe meetings.³⁴ The choice of the word *deliberations* is particularly important in view of previous confusion regarding the parameters of the statutory definition of a "meeting." In *Reeves v. Orleans Parish School Board*,³⁵ the Louisiana Supreme Court considered a mandamus action brought to compel the Orleans Parish School Board to open its conferences. The court identified "[t]he key to the problem . . . as the meaning of the word 'meetings'."³⁶ While rejecting a broad reading of "meeting,"³⁷ the court also refused a wooden and formalistic construction, reasoning that administrative "conference sessions" could not "be held without compliance with the Public Meetings law."³⁸ Perhaps because the fine gradations drawn in *Reeves* did not sufficiently advance the fundamental policies of governmental openness,³⁹ the constitutional delegates chose language expressing more forcefully a presumption of openness, absent statutory limitation.⁴⁰ Yet, as the constitutional right unqualifiedly applies to "public bodies," whether the provision will be effectively self-executing is uncertain. Undoubtedly, the principle was framed with the intent that the con-

judicially enforceable and that have a clear effect without the necessity for legislation to implement them. Real-life constitutions, however, are drafted by political persons working through a political process that often demands provisions which sound impressive but which have little effect. At times, the political process results in vague provisions that put off to another day the decisions about the exact contours of a rule *simply because the votes for the clear rule were not there.*

The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Louisiana Constitutional Law, 38 LA. L. REV. 438, 441 (1978) (emphasis added) [hereinafter cited as *1976-1977 Term*].

34. See LA. CONST. art. XII, § 3. Professor Hargrave has accurately pointed out the distinction:

Notice the word is "deliberations"—not "meetings." It is broader than simply "watching the meetings." No matter how a statute might classify meetings, . . . the constitutional reference is to "deliberations." . . . The right is with respect to deliberations, and the presumption is in favor of openness.

Hargrave, speech before 1978 PAR Annual Conference, *KNOW vs. NO, A Case for Open Meetings and Public Records* in PAR ANALYSIS 21, 22 (March, 1978).

35. 281 So. 2d 719 (La. 1973). See *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Administrative Regulation: Law and Procedure*, 35 LA. L. REV. 349, 357 (1975).

36. 281 So. 2d at 721.

37. The court reasoned that "[a] meeting may be simply a coming together or a gathering for business, social or other purposes We are satisfied the statutes intend no such crippling limitation." *Id.*

38. 281 So. 2d at 722.

39. See notes 10-14, *supra*, and accompanying text.

40. The constitutional provision is limited by the clause "except in cases established by law." LA. CONST. art. XII, § 3. See note 30, *supra*.

stitutional provision co-exist with a statutory scheme authorizing the public to observe governmental activity.⁴¹ Specifically, as the statement includes the proviso that it is inapplicable in cases established by law,⁴² legislation governing the public's right of access to and observation of governmental deliberations may remove the topics treated statutorily from the constitution's self-executing effect. The "except in cases established by law" clause apparently envisions this situation. Specific exemptions from the statutory open meetings regime pose a more difficult problem: If a legislative exemption from the statutes is a *case* established by law, the constitutional self-execution is negated; in addition, the statutory strictures do not apply. But if a subject legislatively exempted from statutory coverage is interpreted as *not* a case established by law, the constitutional rule should apply directly. Classification of the legislature itself illustrates this interpretive problem. Although the legislature is clearly a "public body," legislative deliberations have never been governed by the open meetings statutes.⁴³ Ostensibly, the exemption only removes legislative deliberations from statutory coverage and does not constitute a case established by law negating the constitutional provision.⁴⁴ If so, by removing itself from the open meetings

41. See note 30, *supra*.

42. See note 40, *supra*, and accompanying text.

43. See LA. R.S. 42:4.2(A)(2) (Supp. 1979); LA. R.S. 42:5 (Supp. 1952 & 1976) (as it appeared prior to 1979 La. Acts, No. 681).

44. This proposition is a matter of syllogistic reasoning rather than jurisprudential construction. In short, accepting the major premise, or universal, as the constitutional text's general principle that the public *has* the right to observe, the minor premise is that the universal governs absent statutory exception. Thus, if the statutes, which themselves provide the exception to the major premise, reserve from coverage a matter, the major premise controls. There is no statutory exception, but merely a statutory exclusion.

In essence, proper statutory interpretation in Louisiana should not differ greatly from Civil Code analysis. While the Revised Statutes by no means offer the conceptual unity provided in the Civil Code, a single body of legislation lends itself to similar examination. Professor Herman provides insights on the philosophical foundations of the code method that ostensibly apply to the Open Meetings Act. Discussing a simple example of finding facts and meshing governing law, he writes:

[A] hypothetical law student might conclude that the compartmentalization of reality into forms and particulars is tied to the way he should read the civil code. When he analyzes a specific transaction, he stamps upon the parties' acts and communications the presumably immutable forms dictated by the code. In a sense, the code provides fixed points by which he takes his bearings in history. And the dialectic between forms and particulars occurs whenever the general code provisions are stamped on specific facts.

Despite the superficial appeals of this description of code interpretation, it turns out upon examination to be simplistic and misleading for two reasons. First, code provisions do not automatically stamp themselves upon facts. It is probably more accurate (though more complicated) to say that the human mind mediates an

statutory regime, the legislature has necessarily placed beyond its reach the authority to conduct sessions closed to the public.⁴⁵ Consequently, regardless of the nature of floor discussions or of committee debates, deliberations may not be closed to the public, even when the State Senate confirms gubernatorial appointments. The legislature probably did not intend this result by exempting itself from statutory coverage.⁴⁶ And it is likely that, were the issue to be litigated, the legislature's exemption from the open meetings statutes would be found to be a case provided by law, on the grounds of the constitutional provision's broad invitation to legislation.⁴⁷ Thus, the legislature is probably subject to neither the self-executing provision of the constitution nor the open meetings statutes.⁴⁸ However, the terse statement that "[p]ublic body' shall not include the legislature"⁴⁹ is hardly a clear expression of legislative

interaction between facts and rules by sifting and weighing data and then by zeroing in on the proper meanings of the word in the code provisions. Fact finding and law interpretation are interdependent, intensely complex activities, a point highlighted by the contemporary methodological debate between the conceptualists and the teleologists.

Second, the image of forms stamping their qualities upon featureless wax assumes that there are immutable laws of human nature that dictate the automatic and natural recurrence of human actions. The metaphor of the stamp assumes that the world has a logical structure that is mirrored in a "logical" civil code.

Herman, *Legislative Management of History: Notes on the Philosophical Foundations of the Civil Code*, 53 TUL. L. REV. 380, 383-84 (1979). See also Levasseur, *On the Structure of a Civil Code*, 44 TUL. L. REV. 693 (1970). For excellent explorations into the mysteries of legal and analytical reasoning, see I. COPI, *INTRODUCTION TO LOGIC* (5th ed. 1978); G. GOTTLIEB, *THE LOGIC OF CHOICE* (1968); N. MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* (1978); S. TOULMIN, *THE USES OF ARGUMENT* (1958); A. WHITEHEAD & B. RUSSELL, *PRINCIPIA MATHEMATICA* (1910); L. WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* (C. Ogden & I. Richards trans. 1922).

45. Unlike the statutory open meetings regime, the constitutional language is unqualified in its applicability to public bodies. It can hardly be argued that the legislature is not a public body in the constitutional sense.

46. This writer is of the opinion that the intention of the legislature in excluding itself from the definition of a public body under the statutes, LA. R.S. 42:4.2(A)(2), was to evade both the constitutional and statutory limitations.

47. Cf. *Board of Elem. & Sec. Ed. v. Nix*, 347 So. 2d 147 (La. 1977). Discussing the meaning of constitutional language as "provided by law," the Louisiana Supreme Court, through then-Justice Tate, reasoned that as "'provided by law' means 'provided by legislation.'" *Id.* at 151. See *1976-1977 Term, supra* note 33, at 441-45. Similarly, a court may well conclude that a case established by law means any legislative expression, even an exemption. For "[l]aw is the solemn expression of Legislative will," LA. CIV. CODE art. 1, and a specific statutory exclusion is an expression of the legislature's will.

48. However, "[a]ction on any matter intended to have the effect of law shall be taken only in open, public meeting." LA. CONST. art. III, § 15. This provision does not prevent the actual deliberations from being conducted in secret.

49. LA. R.S. 42:4.2(A)(2) (Supp. 1979).

intent to create a case "established by law." If the legislature is to be exempt from the openness presumption, a more explicit statute is in order.

Direct application of the constitutional text may be a highly speculative issue, for the controversies regarding governmental openness usually focus on the scope of the open meetings statutes.⁵⁰ And the constitutional presumption of openness, coupled with the supreme court's identification of the legislative flaws in *Reeves*,⁵¹ made it painfully clear that the open meetings statutes were sadly in need of reform. That revision has come largely from two legislative acts, the first passed in 1976⁵² and the second in 1979.⁵³

Act 665 of 1976—A Model Fulfilling the Constitutional Mandate?

Following a year of silence on statutory rights of public access after the effective date of the 1974 constitution, the 1976 legislature enacted a considered and coherent open meetings law.⁵⁴ Similar to a model statute proposed by Professor Wickham,⁵⁵ Act 665 of 1976 contained a straightforward declaration of the policy of openness,⁵⁶ authorized closed meetings according to enumerated exceptions,⁵⁷ required fixing the date and place of regular meetings, in addition to providing notice of special or rescheduled meetings,⁵⁸ mandated

50. But, should the statutes be repealed or held unconstitutional, in whole or part, the self-executing effect of the constitutional provision would then be the subject of litigation. Such testing of the constitution is not that unlikely. See *State v. Guidry*, 364 So. 2d 589 (La. 1978) (supreme court's reversal of trial court's holding that the open meetings laws were unconstitutional).

51. *Reeves v. Orleans Parish School Bd.*, 281 So. 2d 719 (La. 1973).

52. 1976 La. Acts, No. 665.

53. 1979 La. Acts, No. 681.

54. 1976 La. Acts, No. 665. See *The Work of the Louisiana Legislature for the 1976 Regular Session—State and Local Government*, 37 LA. L. REV. 168, 170-71 (1976) [hereinafter cited as *State and Local Government*].

55. Wickham, *supra* note 12, at 499-501.

56. 1976 La. Acts, No. 665 adding LA. R.S. 42:4.1 provided:

It is essential to the maintenance of a democratic society that public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into making of public policy. Toward this end, *the provisions of R.S. 42:4.1 through R.S. 42:10 shall be construed liberally.*

(Emphasis added.) This fundamental statement of policy was not altered by 1977 La. Acts, No. 707, 1978 La. Acts, No. 456 or 1979 La. Acts, No. 681.

57. See 1976 La. Acts, No. 665 adding LA. R.S. 42:6.1. See also *State and Local Government*, *supra* note 54, at 170.

58. 1976 La. Acts, No. 665 amending LA. R.S. 42:7 (Supp. 1952). The creation of a duty upon public bodies to notify the public of their future deliberations is a significant accomplishment of open meetings legislation. Present Louisiana law provides that:

All public bodies, except the legislature, shall give written public notice of

keeping minutes of open meetings,⁵⁹ imposed penalties for non-compliance,⁶⁰ and established a method of enforcement.⁶¹ In the wake of the sweeping changes effected by Act 665, only the guarantee of the right to record the proceedings of the meetings of public bodies⁶² was not revamped.

Perhaps the most noteworthy achievement of Act 665 was its creation of a specific procedure⁶³ whereby, for enumerated reasons,⁶⁴ a public body could conduct a closed meeting. Unquestionably, artful drafting was demanded by the otherwise unlimited constitutional rule of openness.⁶⁵ Section 6 of title 42 of the Revised Statutes was amended to require "an affirmative vote . . . at an open meeting . . . of two-thirds of the public body's . . . voting members present"⁶⁶ for entry into executive session pursuant to a permitted exception. Allegations of misconduct,⁶⁷ the personal characteristics of an individual,⁶⁸

their regular meetings, if established by law, resolution, or ordinance, at the beginning of each . . . year. Such notice shall include the dates, times and places of such meetings. All public bodies . . . shall give written public notice of any regular, special, or rescheduled meeting no later than twenty-four hours before the meeting. Such notice shall include the agenda, date, time, and place of the meeting, provided that upon approval of two-thirds of the members present at a meeting of a public body the public body may not take up a matter on the agenda. In cases of extraordinary emergency, such notice shall not be required; however, the public body shall give such notice of the meeting as it deems appropriate and circumstances permit.

LA. R.S. 42:7 (Supp. 1976 & 1979).

59. 1976 La. Acts, No. 665 *adding* LA. R.S. 42:7.1.

60. 1976 La. Acts, No. 665 *amending* LA. R.S. 42:9 (Supp. 1972).

61. 1976 La. Acts, No. 665 *adding* LA. R.S. 42:10.

62. See LA. R.S. 42:8 (Supp. 1952 & 1972) which states that "[a]ll or any part of the proceedings in a public meeting may be recorded by any person in attendance by means of a tape recorder or any other means of sonic reproduction."

63. 1976 La. Acts, No. 665 *amending* LA. R.S. 42:6 (Supp. 1952).

64. 1976 La. Acts, No. 665 *adding* LA. R.S. 42:6.1.

65. See notes 33-50, *supra*, and accompanying text. By passing Act 665 of 1976, the legislature expanded the cases "established by law" necessary to limit the direct governance of the constitution.

66. 1976 La. Acts, No. 665 *amending* LA. R.S. 42:6 (Supp. 1952) further stated that "[a] meeting closed to the public shall be limited to matters allowed to be exempted from discussion at open meetings by R.S. 42:6.1."

67. 1976 La. Acts, No. 665 *adding* LA. R.S. 42:6.1(A)(4) was phrased in the language of "[i]nvestigative proceedings regarding allegations of misconduct."

68. 1976 La. Acts, No. 665 *adding* LA. R.S. 42:6.1(A)(1) provided that the "[d]iscussion of the character, the professional competence, or physical or mental health of a single individual" is a permissible subject for a closed session with the proviso that "such individual may require that such discussion be held at an open meeting." The proviso indicates that the interest to be protected by this exception from the general rule of openness is the individual's privacy. See note 127, *infra*, and accompanying text.

security matters,⁶⁹ litigation or collective bargaining strategy,⁷⁰ hearings of the State Mineral Board,⁷¹ or bona fide emergencies⁷² were recognized as proper *topics* for closed sessions.⁷³ But the policy of openness was reaffirmed by the provision that "[n]othing . . . shall be construed to require that any meeting be closed to the public."⁷⁴

Despite the laudable ambitions and accomplishments of Act 665, the statute treated unsatisfactorily several difficult areas. Determining what bodies fall within the ambit of open meetings laws is a common problem in their interpretation.⁷⁵ The term "public body," which appears throughout the provisions of Act 665, was not defined—with the predictable and unfortunate result of inconsistent judicial construction.

Following the mandate⁷⁶ to interpret the Act liberally,⁷⁷ *Seghers v. Community Advancement, Inc.*⁷⁸ held that a private corporation which was "organized to perform . . . a governmental function, the administration of the antipoverty program . . . [was] a public body or authority within the intendment of the statute."⁷⁹ The first circuit rejected as "too restrictive an interpretation"⁸⁰ the proposition that private status was determinative of the corporation's legal exemption. *Seghers'* analysis appears correct, given its factual setting; the agency performed a public function, drew support from and dispersed

69. 1976 La. Acts, No. 665 *adding* LA. R.S. 42:6.1(A)(3) listed the "[d]iscussion regarding the report, development, or course of action regarding security personnel, plans, or devices" as a proper topic for closed deliberations.

70. 1976 La. Acts, No. 665 *adding* LA. R.S. 42:6.1(A)(2). This exception applies only to instances in which public deliberations would have a detrimental effect on the bargaining or litigating position of the public body.

71. 1976 La. Acts, No. 665 *adding* LA. R.S. 42:6.1(A)(6).

72. 1976 La. Acts, No. 665 *adding* LA. R.S. 42:6.1(A)(5). Although the language of the permissible exception noted "other matters of similar magnitude" as justifying a closed session, reading the Act as a whole indicates that the "other matters" phrase was intended to be construed *in pari materiae* with the enumerated emergencies. See *State and Local Government*, *supra* note 54, at 170.

73. 1976 La. Acts, No. 665 authorized other public authorities to conduct their business in secret, not because of the subject matter of the deliberations, but as a function of their character, providing a statutory exemption. See 1976 La. Acts, No. 665 *amending* LA. R.S. 42:5 (Supp. 1952) (which declared "the legislature specifically exempted"); 1976 La. Acts, No. 665 *adding* LA. R.S. 42:6.1(B) (which stated that "[t]he provisions of R.S. 42:4.1 through R.S. 42:10 shall not apply to judicial proceedings.")

74. 1976 La. Acts, No. 665 *amending* LA. R.S. 42:6 (Supp. 1952).

75. See K. MURCHISON, LOCAL GOVERNMENT LAW—SUPPLEMENTARY CASES AND MATERIALS 196 (1979).

76. See LA. R.S. 42:4.1 (Supp. 1976). See note 56, *supra*.

77. See K. MURCHISON, *supra* note 75.

78. 357 So. 2d 626 (La. App. 1st Cir. 1978).

79. *Id.* at 627.

80. *Id.*

tax funds, and established the policies for distribution of public funds.⁸¹

By contrast, a district court reasoned that New Orleans' Mayor Morial could meet informally with the city council without violating the open meetings law.⁸² In *Morial v. Guste*⁸³ the fourth circuit affirmed the trial court's judgment solely on procedural grounds, noting that as "petitioners only pray for a declaratory judgment determining the legal status of Mayor Morial's proposed meeting in light of R.S. 42:5 . . . , the merits of the trial court's decision . . . [are] not before us."⁸⁴ As a consequence of the procedural disposition, questions such as what constitutes a "meeting"⁸⁵ or a "public

81. If this perspective is correct, numerous possibilities are evident for applying the law's requirements in new and, as yet, untried areas. For example, Professor Murchison notes that law students' exposure to open meetings legislation in other states has resulted in litigation seeking access to law faculty meetings. See K. MURCHISON, *supra* note 75. In the majority of instances, the students seeking the right of access have failed. See, e.g., *Student Bar Assoc. Bd. of Governors v. Byrd*, 293 N.C. 594, 239 S.E.2d 415, *rev'g*, 32 N.C. App. 538, 232 S.E.2d 855 (1977); *Fain v. Faculty of the College of Law of the Univ. of Tenn.*, 552 S.W.2d 752 (Tenn. Ct. App. 1977). *But see Cathcart v. Andersen*, 85 Wash. 2d 102, 530 P.2d 313 (1975). In Louisiana, if a court were to follow the *Seghers'* view of the statutory structure, faculty meetings at the Louisiana State University Paul M. Herbert Law Center would appear to fall within the legislation's parameters. Law faculty meetings certainly establish policy for degree requirements, course approval, admissions, and other administrative procedures at a branch of the state university system, thereby performing a governmental function. The Law Center and its faculty are financed by public funds appropriated by the state legislature. Finally, decisions made at law faculty meetings ultimately orchestrate the expenditure of public money. Of course, if the Law Center's faculty meetings are included within the statutory restrictions of the open meetings law, closed sessions would be permissible for the same reasons permitting any other body to close its deliberations to the public.

Additionally, this writer has posed, as a hypothetical question, whether the deliberations of the editorial board of this law review are subject to the open meetings statutes. The literal language of the definition of a "[p]ublic body," see note 119, *infra*, is not dispositive, but the approach of *Seghers* appears to render an affirmative answer. While this example may seem trivial, it illustrates the considerations to be weighed in determining the law's applicability to every bureaucratic and administrative office of state and local government in Louisiana.

82. *Morial v. Guste*, 365 So. 2d 289 (La. App. 4th Cir.), *cert. denied*, 365 So. 2d 1375 (La. 1978).

83. 365 So. 2d 289 (La. App. 4th Cir.), *cert. denied*, 365 So. 2d 1375 (La. 1978).

84. *Id.* at 291.

85. In light of the difficulties noted by the supreme court in *Reeves v. Orleans Parish School Bd.*, 281 So. 2d 719 (La. 1973), regarding the definition of "meeting" and the "deliberations" language of the constitution, see notes 34-40, *supra*, and accompanying text, it may be noted that Act 665 of 1976 failed to delineate adequately which gatherings of public bodies the statutes encompassed. Consequently, Act 665's provisions were unclear as to whether the legislation applied to all deliberations of a quorum of a public body, including preliminary/administrative conferences. Act 707 of

body"⁸⁶ were not examined.

Essentially, the differing judicial views represented in *Seghers* and *Morial* were occasioned by the legislature's failure to specify the types of "meetings" and kinds of "public bodies" subject to the statutory scheme. Such distinctions must be articulated, for a situation either covered by the statutes or expressly excluded⁸⁷ is the "case established by law" which negates the rule of openness.⁸⁸

As difficult and confusing as is determining the ambit of statutory coverage, Act 665's provisions for enforcement and remedies for violation are yet more troublesome. Section 9(B) of title 42 of the Revised Statutes added the sanction of criminal penalties,⁸⁹ which district attorneys were empowered to enforce through grand jury indictment.⁹⁰ At first glance, the imposition of criminal penalties seems an effective way to secure compliance with the open meetings law. However, legal and political considerations militate against using a penal method of enforcement. The instruction that "the provisions of R.S. 42:4.1 through R.S. 42:10 shall be construed liberally"⁹¹ is at odds with the longstanding principle that penal

1977 partially remedied this confusion by declaring that administrative conferences were within the coverage of the statutes. 1977 La. Acts, No. 707 amending LA. R.S. 42:5 (Supp. 1952). The Act limited the closing of administrative conferences to the same procedural and substantive requirements as apply to conducting executive meetings. 1977 La. Acts, No. 707 adding LA. R.S. 42:6(B). By defining "administrative conferences" very broadly, see LA. R.S. 42:5 (Supp. 1976 & 1978) (as it appeared prior to 1979 La. Acts, No. 681), the legislature probably intended the category to serve as a catchall for any assembly of a quorum of a public body. Yet, *Morial v. Guste*, 365 So. 2d 289 (La. App. 4th Cir.), cert. denied, 365 So. 2d 1375 (La. 1978), was decided after Act 707 was enacted. In view of Act 681 of 1979, the result in *Morial* is questionable. See LA. R.S. 42:4.2 (Supp. 1979).

86. Presumably, the statutes define the characteristics of a "public body" for all purposes, regardless of the reasons for its gathering. See LA. R.S. 42:4.2 (Supp. 1979); LA. R.S. 42:5 (Supp. 1952 & 1976) (as it appeared prior to 1979 La. Acts, No. 681). Except in the case of the legislature or of judicial proceedings, see note 68, *supra*, exemption from the statutory requirements depends upon the subject matter of discussion before the "public body."

87. See notes 43-45, *supra*, and accompanying text.

88. See note 25, *supra*, and accompanying text.

89. 1976 La. Acts, No. 665 amending LA. R.S. 42:9 (Supp. 1972). The penalty upon first conviction was a fine of not less than \$100 and not more than \$1000 or imprisonment for up to seven days. Recidivists faced a fine of not less than \$250 and not more than \$2000 or imprisonment for not more than 30 days, or both. See *State and Local Government*, *supra* note 54, at 171 n.2.

90. 1976 La. Acts, No. 665 adding LA. R.S. 42:10(A). Act 707 of 1977 amended the enforcement provision so as to allow "enforcement . . . through a grand jury indictment, or upon a complaint by a citizen who resides within the jurisdiction of the public body . . . or upon the initiative of the district attorney." 1977 La. Acts, No. 707 amending LA. R.S. 42:10 (Supp. 1976).

91. LA. R.S. 42:4.1 (Supp. 1976). See note 56, *supra*.

statutes are to be strictly construed.⁹² The statute did not require wrongful intent as an element of its violation and in effect created a strict liability crime, unless bad faith was implicitly necessary.⁹³ Moreover, as a practical matter, leaving the means of enforcement to the discretion of a district attorney from the same geo-political jurisdiction as a potential offender seems unlikely to foster an environment of openness.⁹⁴

On one occasion the state supreme court considered the validity of the criminal provisions of the open meetings law.⁹⁵ The constitutionality of the statute was raised in *State v. Guidry*;⁹⁶ three members of the Terrebonne Parish Policy Jury and of its Coastal Zone Management Committee had conferred with other police jury officials and with members of the regional planning commission.⁹⁷ Those present did not comprise a quorum of either public body.⁹⁸ The trial court held that the statute "involved"⁹⁹ was unconstitu-

92. See, e.g., *State v. Daniels*, 236 La. 998, 109 So. 2d 896 (1959). See Note, *Criminal Law—Strict Construction of Penal Statutes*, 20 LA. L. REV. 600 (1960), reprinted in L. HARGRAVE, *CASES AND MATERIALS ON LOUISIANA CRIMINAL LAW* 75 (1979).

93. Interpreting the Florida open meetings law, FLA. STAT. ANN. § 286.011 (1969 & 1978), the Florida Supreme Court has held that proof of scienter is necessary for criminal conviction. See *Board of Pub. Instr. v. Doran*, 224 So. 2d 693, 699 (Fla. 1969); Comment, *supra* note 9, at 370.

94. Professor Hargrave, in recognizing the flaws of enforcement through criminal sanctions, stated:

[W]e should not place too much reliance upon a criminal penalty as a means of enforcing this kind of public interest. It is a cumbersome penalty and is probably too expensive . . . for the benefit that is involved. It relies on political officers, district attorneys, who can prosecute or not according to their own discretion . . . It involves the enforcement of this kind of law with local political matters where, in some instances, there might be cooperation. It would probably be better to depend upon the private, aggrieved citizen as the one to enforce this right.

Hargrave, *supra* note 34, at 22. Professor Hargrave is not alone in his view that criminal penalties present an inappropriate enforcement device in this context. Another commentator has diagnosed three failings of efforts to remedy open meetings violations by criminal sanctions:

First, enforcement . . . hinges upon the prosecutorial zeal of politically sensitive . . . district attorneys, who are apt to be cautious in proceeding against often influential members of governing bodies. Secondly, intentional violations . . . [are] difficult to prove . . . Thirdly, even if prosecution is successful, the relatively slight financial penalty is unlikely to loom as a massive deterrent force.

Note, *Freedom of Information—Texas Open Meetings Act Has Potentially Broad Coverage But Suffers from Inadequate Enforcement Provisions*, 49 TEX. L. REV. 764, 773 (1971).

95. See *State v. Guidry*, 364 So. 2d 589 (La. 1978).

96. 364 So. 2d 589 (La. 1978).

97. *Id.* at 590.

98. *Id.*

99. The defendants were charged by grand jury indictment with having violated

tionally vague, violating the first amendment and the equal protection clause of the fourteenth amendment.¹⁰⁰ On appeal by the State, it was stipulated that a statutory violation had not been committed, as there had not been a quorum of any governing body or board present.¹⁰¹ The supreme court quashed the indictment without reaching the constitutional issues.¹⁰²

Act 665 of 1976 created another enforcement device for use by the aggrieved public unlawfully excluded from a public meeting.¹⁰³ Any citizen residing within the jurisdiction of the public body denying the right to observe was authorized to bring suit to require compliance with the law, to prevent statutory violations, or to determine the applicability of the statutes to the public body's discussions.¹⁰⁴ Additionally, successful litigants were guaranteed court costs.¹⁰⁵

Although the legislature has granted the judiciary broad authority to determine the applicability of the open meetings law to particular public bodies and to fashion actual or prophylactic remedies,¹⁰⁶ Louisiana's courts have declined to exercise their authority to the fullest. In *Buchanan v. State Civil Service Commission*,¹⁰⁷ the fourth circuit was petitioned for a temporary restraining order and a preliminary injunction to enjoin the State Civil Service Commission from holding a meeting claimed to be violative of the open meetings law.¹⁰⁸ The Commission moved to dismiss the suit

"the provisions of LA. R.S. 42:5 through 42:7.1 by holding and participating in a closed meeting contrary to the law." *Id.*

100. *Id.* at 591.

101. *Id.*

102. *Id.* In dissent, Justice Marcus wrote that he "would reach the issue involving the constitutionality of Louisiana's Open Meeting Law." 364 So. 2d at 594 (Marcus, J., dissenting).

103. 1976 La. Acts, No. 665 *adding* LA. R.S. 42:10.

104. Act 681 of 1979 removed two of the standing requirements previously demanded. No longer must the private individual bringing suit be a citizen or reside within the governmental subdivision served by the public body denying the observatory right. 1979 La. Acts, No. 681 *adding* LA. R.S. 42:10(C).

105. 1976 La. Acts, No. 665 *adding* LA. R.S. 42:10. Act 707 of 1977 expanded the successful litigant's recovery to include attorney's fees, as well as court costs. 1977 La. Acts, No. 707 *adding* LA. R.S. 42:10(B). However, the Act also stated that "[i]f the plaintiff is unsuccessful, he may be ordered to pay reasonable attorney fees as well as court costs if the court determines that the suit was of a frivolous nature with no substantial justification." *Id.* These provisions are continued without material change in the present legislative scheme. See 1979 La. Acts, No. 681 *adding* LA. R.S. 42:11(C).

106. See text at note 104, *supra*. However, judicial opinion, *see, e.g., Buchanan v. State Civil Service Comm'n*, 372 So. 2d 1065 (La. App. 4th Cir. 1979), has appeared hesitant to order remedies before the fact of a statutory violation. 1979 La. Acts, No. 681 *adding* LA. R.S. 42:10(C) seems to have adopted this view.

107. 372 So. 2d 1065 (La. App. 4th Cir. 1979).

108. *Id.*

alleging that, as any intention of holding a closed meeting had been abandoned, the question was moot; the court agreed.¹⁰⁹ The court noted that the only relief sought was a restraining order and a preliminary injunction¹¹⁰ and that the meeting had, in fact, been held in public.¹¹¹ Consequently, it was reasoned that "[a]ny ruling now by us relative to the legality of the proposed closed meeting would be purely advisory, a practice the courts have consistently declined to follow."¹¹² Although the result in *Buchanan* should not endanger governmental openness, the court's analytical method may be unsatisfactory. At the time *Buchanan* was decided, the statutory text arguably implied that a court might determine beforehand the applicability of the law to the deliberations of a public body.¹¹³ However, the *Buchanan* court did not explore this possibility. While it is true that a court should resist deciding purely hypothetical questions, the reflexive refusal to rule on the merits of the case upon mere recitation of the phrase "advisory opinion" is an undesirable means of enforcing a right statutorily and constitutionally guaranteed.

In brief, Act 665 of 1976 and later amendments in 1977¹¹⁴ and

109. *Id.* at 1066.

110. *Id.*

111. *Id.*

112. *Id.* Judge Sartain, writing for the court, further remarked, "[i]t is well settled that the courts will not rule on questions of law which become moot since its decree will serve no useful purpose and can give no practical relief." *Id.*, citing *State ex rel. Preston v. Henderson*, 283 So. 2d 230 (La. 1973).

The problem of providing a reasonable remedy is only exacerbated by the judicial hesitancy to breach the bounds of justiciability. As Professor Maraist has astutely observed,

a dispute is non-justiciable if its resolution has been committed to another branch of the government or to the people through the ballot box, or if the particular dispute is not presented in a manner that can be resolved through the judicial process although its resolution has been committed to the judiciary. . . . The rule also prohibits a court from rendering a declaratory judgment that does not have a sufficiently adverse effect upon the parties; when the requisite adverse effect is absent, the suit for declaratory judgment is said to be one seeking an advisory opinion, and the controversy is deemed non-justiciable.

The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Civil Procedure, 36 LA. L. REV. 556, 556 (1976). However, justiciability need not be a bogeyman. Proper interpretation and effectuation of the Open Meetings statutes may require a court to render an opinion that, in other circumstances, might be considered advisory. This does not mean that the parties have not vigorously briefed their positions, facilitating a full development of facts. Rather, to avoid a triumph of form over substance, the bench has the duty, in the context of public-interest litigation, to implement the legislature's policy statements. See Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

113. However, Act 681 of 1979 appears to have resolved any ambiguity in favor of the analytical method employed in *Buchanan*. See note 133, *infra*.

114. 1977 La. Acts, No. 707.

1978,¹¹⁵ by establishing a general principle of openness consonant with the constitution, took giant strides toward opening governmental doors too long closed to the public. A few significant flaws in the statutory scheme remained, however, that diminished its effectiveness, particularly with respect to enforcement.

Act 681 of 1979—The Model Reformed

In the sense that Act 665 of 1976 laid the statutory foundation for the public's right of access and observation, Act 681 of 1979 refined the scheme, correcting many problems. Act 681 articulated a clear definition of a "meeting" for the purposes of the open meetings law by eliminating the distinction between a meeting and an administrative/preliminary discussion.¹¹⁶ The exclusion regarding social gatherings of members of a public body was retained, however.¹¹⁷ This definition, particularly in the absence of a legislative effort to limit the *Seghers*¹¹⁸ analysis, means that any entity publicly funded and performing a governmental or administrative function is a "public body" within the intendment of the statutes.¹¹⁹ The implications of such a statutory scope are uncertain, and future judicial construction is necessary to clarify the breadth of statutory coverage. As before,¹²⁰ Act 681 continued to except the legislature.¹²¹ Act 681 made no material changes in the general principle of openness,¹²² nor in the procedure¹²³ and justifications for a public body's holding an executive session.¹²⁴ Authority for closed discussions among a school

115. 1978 La. Acts, No. 456.

116. 1979 La. Acts, No. 681 *adding* LA. R.S. 42:4.2(A)(1).

117. 1979 La. Acts, No. 681 *adding* LA. R.S. 42:4.2(B).

118. 357 So. 2d 626 (La. App. 1st Cir. 1978).

119. 1979 La. Acts, No. 681 *adding* LA. R.S. 42:4.2(A)(2) provides:

"Public body" means village, town, and city governing authorities; parish governing authorities; school boards, and boards of levee and port commissioners; boards of publicly operated utilities; planning, zoning and airport commissions; and any other state, parish, municipal, or special district boards, commissions, or authorities, and those of any political subdivision thereof, where such body possesses policy making, advisory, or administrative functions, including any committee or subcommittee of any of these bodies enumerated in this Paragraph. "Public body" shall not include the legislature.

120. See LA. R.S. 42:5 (Supp. 1952 & 1976) (as it appeared prior to 1979 La. Acts, No. 681). See note 43, *supra*, and accompanying text.

121. 1979 La. Acts, No. 681 *adding* LA. R.S. 42:4.2(A)(2). See note 119, *supra*.

122. 1979 La. Acts, No. 681 *amending* LA. R.S. 42:5 (Supp. 1952 & 1976). See LA. R.S. 42:5 (Supp. 1952 & 1976) (as it appeared prior to 1979 La. Acts, No. 681).

123. 1979 La. Acts, No. 681 *amending* LA. R.S. 42:6 (Supp. 1952 & 1976). See LA. R.S. 42:6 (Supp. 1952 & 1976) (as it appeared prior to 1979 La. Acts, No. 681).

124. 1979 La. Acts, No. 681 *amending* LA. R.S. 42:6.1 (Supp. 1976). See LA. R.S. 42:6.1 (Supp. 1976) (as it appeared prior to 1979 La. Acts, No. 681).

board, individual students, and their parents or tutors was specifically granted,¹²⁵ although it was perhaps unnecessary.¹²⁶ Since, however, the privacy interests¹²⁷ of students and parents or tutors are very strong, the legislature properly resolved any confusion in favor of privacy. Additionally, judicial proceedings continue to be excluded from statutory coverage.¹²⁸

Without question, the most dramatic changes wrought by Act 681 are its enforcement provisions. By abolishing the unworkable criminal penalties,¹²⁹ the legislature may have provided an effective means of enforcing the open meetings law. Under the new statutory scheme, three entities—the attorney general,¹³⁰ district attorneys,¹³¹ and any person¹³²—are authorized to institute enforcement pro-

In *Parent-Community Alliance For Quality Educ., Inc. v. The Orleans Parish School Bd.*, 385 So. 2d 33 (La. App. 4th Cir. 1980), the plaintiffs challenged the authority of the Orleans Parish School Board to conduct executive sessions for the purpose of narrowing the list of candidates to fill the vacant superintendent position. Interpreting R.S. 42:6.1(A)(1), the fourth circuit stated that the provision "simply prohibits discussion in executive session of the appointment of a person to fill a vacancy, and has nothing to do with the appointment of a superintendent who is *not* a member of the school board." *Id.* at 36 (emphasis in original). Moreover, the court reasoned that

R.S. 42:6.1 . . . permits discussion "of the character, professional competence, or physical or mental health of a person" in executive session. . . . In the final analysis it may be argued the Board could have found some ways in which to operate more openly, but their general procedure cannot be said to have constituted a violation of the law.

Id. at 39.

125. See 1979 La. Acts, No. 681 *amending* LA. R.S. 42:6.1(A)(7) (Supp. 1976).

126. The exception relating to the "[d]iscussion of the character, professional competence, or physical or mental health of a person" is broad enough to allow closed deliberations in this situation. See LA. R.S. 42:6.1(A)(1) (Supp. 1976). But, as the exceptions to the general policy of openness should be interpreted narrowly, redundancy is preferable to omission.

127. Louisiana's Constitution guarantees that "[e]very person shall be secure . . . against . . . invasions of privacy." LA. CONST. art. I, § 5 (emphasis added).

128. See LA. R.S. 42:6.1(B) (Supp. 1976 & 1979). See note 73, *supra* and accompanying text.

129. See *State v. Guidry*, 364 So. 2d 589 (La. 1978). See notes 95-102, *supra* and accompanying text.

130. 1979 La. Acts, No. 681 *amending* LA. R.S. 42:10(A) (Supp. 1976). The attorney general is empowered to enforce the law throughout the state. He "may institute enforcement proceedings on his own initiative and *shall* institute such proceedings upon a complaint filed with him by any person, unless written reasons are given as to why the suit should not be filed." *Id.* (emphasis added).

131. 1979 La. Acts, No. 681 *amending* LA. R.S. 42:10(B) (Supp. 1976). The statute requires the district attorney to institute enforcement proceedings upon a complaint filed by any person, absent written reasons why the suit should not be filed.

132. 1979 La. Acts, No. 681 *adding* LA. R.S. 42:10(C) states that "[a]ny person who *has been* denied any right conferred by the provisions of R.S. 42:4.1 through R.S. 42:8 or who has reason to believe that the provisions of R.S. 42:4.1 through R.S. 42:8 *have*

ceedings. The action is to be filed in the district court for the parish in which the meeting in question took place.¹³³ Furthermore, recognizing the need for speedy judicial determination of the coverage of the statutes to a particular meeting, the legislature has provided for decision by summary judgment, tried by preference.¹³⁴ Four forms of relief are presently afforded: (1) a writ of mandamus; (2) injunctive relief; (3) declaratory judgment; and (4) judgment rendering the action void as provided in section 9 of title 42 of the Revised Statutes;¹³⁵ a court may grant any or all.¹³⁶ Voidability is a type of relief that previously had been proposed¹³⁷ but defeated. Amending Revised Statutes 42:9, Act 681 expressed clearly the principle that "[a]ny action taken in violation of R.S. 42:4.1 through R.S. 42:8 shall be voidable by a court of competent jurisdiction."¹³⁸ A sixty-day preemptive¹³⁹ period is given within which suit to void the action of a public body must be commenced.¹⁴⁰

Although voidability, a method used elsewhere,¹⁴¹ is certainly an improvement over the remedial mechanisms previously in force, the actual effectiveness of the device is questionable. Although the sanction has been criticized as disproportionate to the evil sought to be

been violated may institute enforcement proceedings." (emphasis added). As the operative language of the statute is phrased in the past tense, courts apparently are not required to decide questions of future, potential violations. See notes 108-112, *supra*, and accompanying text.

133. 1979 La. Acts, No. 681 *adding* LA. R.S. 42:12(A).

134. 1979 La. Acts, No. 681 *adding* LA. R.S. 42:12(B) states:

Enforcement proceedings shall be tried by preference and in a summary manner. Any appellate court to which the proceeding is brought shall place it on its preferential docket, shall hear it without delay, and shall render a decision as soon as possible.

135. 1979 La. Acts, No. 681 *amending* LA. R.S. 42:9 (Supp. 1976).

136. 1979 La. Acts, No. 681 *adding* LA. R.S. 42:11(A).

137. *See State and Local Government, supra* note 54, at 171 n.25.

138. 1979 La. Acts, No. 681 *amending* LA. R.S. 42:9 (Supp. 1976).

139. In view of the statutory language that "[a] suit to void any action must be commenced within sixty days of the action," LA. R.S. 42:9 (Supp. 1976 & 1979), and the policy favoring speedy judicial decisions, LA. R.S. 42:12(B) (Supp. 1979), it seems that the sixty-day period is definitive and absolute, subject neither to suspension nor interruption. *See generally* Comment, *Legal Rights and the Passage of Time*, 41 LA. L. REV. 220 (1980).

140. 1979 La. Acts, No. 681 *amending* LA. R.S. 42:9 (Supp. 1976). See note 139, *supra*.

141. Professor Wickham notes that "[a] number of acts simply prohibit final action . . . in closed session and *imply* that any action taken in violation of the statute will be considered void. Some statutes go on to provide *expressly* that the prohibited actions will be void." Wickham, *supra* note 12, at 487. *See also* Comment, *supra* note 9, at 370; Note, *supra* note 94, at 775-76.

prohibited,¹⁴² voidability may prove a rather shallow and impotent sanction when applied to action of a public body adamant in its secrecy. The following situation illustrates the problem: Public body *X* convenes its regularly scheduled meeting in accordance with statutory requirements. However, while *X* is in open session, topic *Y* comes up for discussion. As topic *Y* involves a sensitive matter, the necessary number of members vote to go into executive or closed session even though topic *Y* is not one of the enumerated exceptions justifying a closed session.¹⁴³ The problem would be intensified if while in closed session *X* took final action on the issue after a lengthy, heated, and *secret* discussion. If a suit is commenced within sixty days of the unlawful vote to go into closed session, the final action taken by *X* will be voided by a district court. But, once the final action has been voided, nothing prevents *X* from meeting in open session, calling topic *Y* from the agenda, and instantly taking a perfunctory vote to reach the identical result as in the closed session. Moreover, public body *X* might not take final action on topic *Y* during the unlawful closed session; instead, *X*'s members merely may have *voiced* their feelings with respect to issue *Y* and thoroughly debated the subject, reserving their votes for a later open session. Though the "rerun" vote is a common problem,¹⁴⁴ Act 681 does not deal clearly with the matter. While the unlawful vote to go into closed session certainly violates the statutes, the final vote is not so clearly a violative action. The problem may be resolved through liberal construction of both statutory language and legislative intent. Additionally, while the statute states that "[a]ny noncompliance with the orders of the court may be punished as contempt of court,"¹⁴⁵ it is uncertain that a court could or would compel a legislative body to take evidence, to engage in discussion, *i.e.*, to deliberate.

The problems sketched above are not likely to be solved easily. One suggestion for approaching the problem of "rerun" voting is to view any vote taken subsequent to an action violative of the law as void *ab initio*.¹⁴⁶ Therefore, when the public body addresses or votes

142. Discussing *Dobrovolny v. Reinhardt*, 173 N.W.2d 837 (Iowa 1969), Professor Wickham has commented that "[n]ullification is a very drastic sanction . . . [possibly] out of proportion to the evil seen in the violation." Wickham, *supra* note 12, at 497.

143. See LA. R.S. 42:6.1(A) (Supp. 1976 & 1979). See notes 66-73 & 123-128, *supra*, and accompanying text.

144. Professor Wickham describes the "re-run" vote as a consequence of statutes that define "public access in terms of final action or votes . . ." Wickham, *supra* note 12, at 492. The vital discussions of the public body are conducted and matters resolved in private sessions. However, as the *official* "re-run" vote of the public body is taken in open session, the statutory requirements are satisfied.

145. See LA. R.S. 42:11(B) (Supp. 1979).

146. One writer, analyzing Florida's "Sunshine Law," see FLA. STAT. ANN. §

on a topic in open session, after previous final action or deliberation has been voided, the body is considering the question for the first time. A summary vote, other than on a routine matter, taken without the public body's hearing evidence or deliberating, would seem to be action without substantial supportive evidence¹⁴⁷ and subject to judicial review.¹⁴⁸ The public body's action would then be subject to judicial scrutiny, not because of a failure to comply with the strictures of the open meetings law, but because the limits of allowable legislative conduct had been traduced. While this methodological perspective is possible, the need to go beyond the sanctions and enforcement mechanism of the existing legislative model to compel compliance with the law reflects the inadequacy of the present regime, rather than providing a workable solution.¹⁴⁹

Some Suggestions for the Future

Suggestions for future legislative reform should rest upon a clear understanding of the public right at issue. The constitution speaks of the public's right to *observe* the deliberations of public

286.011 (Supp. 1969 & 1978), has suggested that "any action taken at or resulting from a meeting later declared in violation of the law is void *ab initio* and may be ignored . . ." Comment, *supra* note 9, at 369. This method of analysis seems applicable to Louisiana's voidability remedy as well.

147. Generally, municipal legislative acts are presumed valid; the burden is upon the attacking party to demonstrate that there existed no substantial evidence to support the determination. See, e.g., *Allen v. La Salle Parish School Bd.*, 341 So.2d 73 (La. App. 3d Cir. 1976), *cert. denied*, 343 So. 2d 203 (La. 1977); *Stewart v. East Baton Rouge Parish School Bd.*, 251 So. 2d 487 (La. App. 1st Cir. 1971); *Moffett v. Calcasieu Parish School Bd.*, 179 So. 2d 537 (La. App. 3d Cir. 1965). A court is not to interfere with the legislative or administrative fact-finding function unless it is obvious that the legislative body's action is so arbitrary as to be unreasonable. See, e.g., *Landry v. Parish of East Baton Rouge*, 352 So. 2d 656 (La. 1977); *Butaud v. Lake Charles*, 338 So. 2d 358 (La. App. 1st Cir. 1976).

148. *Landry v. Parish of East Baton Rouge*, 352 So. 2d 656 (La. 1977), provides a recent articulation of the limits of legislative discretion set in the special assessment context. The Louisiana Supreme Court concluded that legislative determinations of fact may not be upset absent a manifest abuse of power. *Id.* at 661. See Note, *Special Problems of Interpretation Arising Out of Procedure for Levying Special Assessments*, 38 LA. L. REV. 1073 (1978). The situation textually sketched above is just this type of manifest abuse that may trigger judicial review of legislative determinations. To permit a public body with a legislative function to derogate from the constitutional principle and the statutory rules of governmental openness by conducting "mere 're-run' votes after all the vital issues have been resolved in private sessions," Wickham, *supra* note 12, at 492, seems manifestly incorrect.

149. The solution should come from the legislature as creator of the open meetings statutes. Providing an adequate enforcement scheme is not a proper matter for the courts to resolve in an ad hoc fashion; in the sphere of "political law," judicial capacity to act is more constrained than in the sphere of private law. See *Tate*, *supra* note 5. *But see* *Chayes*, *supra* note 112.

bodies.¹⁵⁰ Neither Act 665 of 1976 nor Act 681 of 1979 enlarged this essentially passive right into an active, participatory one.¹⁵¹ This is as it should be, for the underlying objective of open meetings legislation is to create a system whereby the public may observe its government at work,¹⁵² and not to sanction interruptions of the political process by observers.¹⁵³ The characterization of the right as a passive guarantee is significant in determining whether the statutory plan is applicable only when a *quorum* of a public body convenes.¹⁵⁴ It has been suggested that the public's right to observe should extend to "the activity of two or more members of a public body gathered to conduct any executive, legislative or administrative business."¹⁵⁵ This proposition is correct. Much of the governmental process is conducted in conferences or at gatherings that do not fit within the definition of a "quorum of a public body,"¹⁵⁶ although

150. LA. CONST. art. XII, § 3. See notes 33-34, *supra*, and accompanying text.

151. See LA. R.S. 42:6.1(C) (Supp. 1976) which provides that "[t]he provisions of R.S. 42:4.1 through R.S. 42:12 shall not prohibit the removal of any person or persons who willfully disrupt a meeting to the extent that orderly conduct of the meeting is compromised."

152. Even the statutorily provided right to record the proceedings before a public body, LA. R.S. 42:8 (Supp. 1952 & 1972), is little more than a guarantee that observations may be preserved for posterity. Certainly it does not confer a participatory right.

153. Although it is uncertain what conduct is to be categorized as disruptive, analogy to United States Supreme Court decisions on the appropriateness of certain conduct, as protected by the first amendment, may prove helpful. In *Brown v. Louisiana*, 383 U.S. 137 (1966), the Court held a peaceful sit-in by blacks at a segregated public library constitutionally protected. Mr. Justice Fortas reasoned that first amendment rights "are not confined to verbal expression [but] embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest . . ." *Id.* at 142. Similarly, *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969), held that public school students were guaranteed the right to wear black armbands to class, in protest of the Vietnam conflict. Apparently, the issue in *Tinker* was one of balancing the students' exercise of constitutional rights against the regulations of school authorities. The standard adopted from *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966), is one that seems appropriate to the context of public meetings. Essentially, symbolic conduct cannot be prohibited unless it "'materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school.'" 393 U.S. at 509, *quoting* 363 F.2d at 749.

154. See LA. R.S. 42:4.2(A)(1) (Supp. 1979).

155. See Hargrave, *supra* note 34, at 23.

156. See LA. R.S. 42:4.2(A)(1) (Supp. 1979). The following example is illustrative: A public body is composed of nine members. On a given proposal, four members of the public body favor its approval. On the same issue, three members of the public body vehemently oppose passage. One remaining member is neutral or undecided and the other, though uncommitted, tends to disapprove of the proposal. In this situation much informal, but significant, discussion may take place without invoking the rules and strictures of the open meetings statutes, even though the topic of discussion is not a permissible reason for a closed meeting. For example, the three members holding the negative view may engage the member leaning in their direction in discussion and

the public's interest in observing is often quite strong. Of course, if the legislature were to extend the public's observation right to include the activity of two or more members of a public body gathered to conduct governmental business, a concomitant extension of authority to hold closed gatherings, in accord with the enumerated, permissible reasons, would be proper.¹⁵⁷ Moreover, purely social gatherings of two or more members of a public body would not trigger the statutory public right.¹⁵⁸

Also an exception to the principle of openness should be made for encompassing a public body's deliberations on acquiring real estate. Although eminent domain traditionally has been discussed in closed session, Louisiana's present law does not so permit. The advantage of allowing "closed" deliberations is illustrated by weighing the conflicting public interests involved. On the one hand, the public persuasively may claim that secret discussion of real estate acquisitions increases the risk that "inside" information will be channeled to persons who may use it for private gain and not to promote general public welfare.¹⁵⁹ On the other hand, the public, interested in observing property acquisition deliberations, is also comprised of taxpayers who bear the costs speculation adds to the price of public purchases. Speculation, inevitable when a public body resolves in open session to acquire real estate, will raise prices and hamper efficient purchasing.¹⁶⁰ Although the question is close, the certain harm to the public fisc occasioned by public deliberations about property acquisitions outweighs both the public's right to observe and the danger of favoritism to insiders. Thus property acquisition is a special case justifying a complete exemption from openness.¹⁶¹

debate wholly outside any statutory limitations, because no quorum of a public body is present. Similarly, the four members promoting the affirmative position could divide their efforts in recruiting others. For example, two members advocating passage of the issue could discuss the question with the undecided member, while the other two members favoring approval could attempt to convince the member inclined to disfavor passage without compliance with the open meetings law. The deliberative combinations not within the ambit of the statutes appear to be numerous. It could be argued that such are the inner workings of government. But that is precisely the point; Louisiana's constitution, with its emphasis on "deliberations," presumes that the public right to observe follows every decision-making process.

157. See LA. R.S. 42:6.1 (Supp. 1976 & 1979).

158. See LA. R.S. 42:4.2(B) (Supp. 1979).

159. See Wickham, *supra* note 12, at 485-86; Comment, *supra* note 9, at 370; Note, *supra* note 94, at 771-72.

160. But see Comment, *supra* note 9, at 371. That author writes:

On the other hand, it can be argued that abuse existed in the past because of the channeling of inside information to friends and relatives of those participating in the condemnation proceedings. In light of this . . . closed meetings for eminent domain proceedings do not seem imperative.

Id.

161. See Wickham, *supra* note 12, at 486.

Providing meaningful enforcement and realistic remedies is a hard task.¹⁶² Nevertheless, solutions to these problems are possible. At common law there was neither a public right to observe the governmental process,¹⁶³ nor a history of judicially-created enforcement devices for the modern rights of access. All enforcement methods and remedial measures are creatures of the statutes conferring the right. While Louisiana's existing¹⁶⁴ enforcement scheme may appear sound, the sanction and remedy of voidability may prove unworkable.¹⁶⁵

One remedy to the aggrieved, unlawfully excluded public, as yet untried in this state, is removing public officials from office for repeated violations of the open meetings law. Removal from office is a serious punishment, but has been adopted in other jurisdictions¹⁶⁶ and has been approvingly noted as "more closely related to the spirit of the offense"¹⁶⁷ Removal from office, like voidability, has superficial appeal, but closer analysis reveals several disturbing feasibility problems. As the removal procedure is applicable only to offenders who unlawfully meet in closed session on two or more occasions, the remedy implies that the initial violations are not very damaging to the public's interest; in fact, however, the same deprivation occurs.¹⁶⁸ Furthermore, another issue paralleling criminal penalties is the requirement of scienter. Whether a member of a public body should be removed from office although he acted in good faith is problematical.¹⁶⁹ The removal concept, it appears, is not a flawless punishment and may prove impracticable.

162. Incidentally, the problem of defining realistic remedies for recognized rights has long plagued legal thought. Cf. W. SHAKESPEARE, *THE MERCHANT OF VENICE*, act IV, sc. 1:

Portia. A pound of that same merchant's flesh is thine. The court awards it, and the law doth give it. . . . The words expressly are "a pound of flesh." Take then thy bond, take thou thy pound of flesh, but in cutting it if thou doist shed one drop of Christian blood thy lands and goods are, by the laws of Vencei, confiscate unto the State of Venice.

163. Wickham, *supra* note 12, at 487.

164. See notes 130-40, *supra*, and accompanying text.

165. See notes 141-49, *supra*, and accompanying text.

166. Professor Wickham cites four states—Florida, Kansas, Missouri, and Nebraska—as the only jurisdictions authorizing removal from office as a sanction for refusal to comply with statutory mandates. Wickham, *supra* note 12, at 499 n.99.

167. *Id.* at 499. Professor Hargrave suggests that a "statute [which] simply says that if a person violates the law twice, he is subject to removal from office on the petition of any citizen. . . . would probably be more effective than the normal kind of criminal proceeding." Hargrave, *supra* note 34, at 23.

168. Additionally, if, as with other "repeater" penalties, prior offenses are to be erased from the offender's record after a specified time has passed, the length of time will require determination. Presumably, the time should, in this instance, be rather lengthy.

169. Foreseeing the problem, Professor Wickham contends that "[b]y limiting

If criminal sanctions and voidability are too unwieldy to promote efficient statutory operation, legislative creation of "a realistic remedy to individuals who are aggrieved"¹⁷⁰ will be difficult. One remedy, directly compensating persons unlawfully excluded, has been uniformly overlooked;¹⁷¹ individuals deprived of their observatory right could be authorized to bring personal damage suits. An unauthorized exclusion from the deliberations of a public body should satisfy, under general tort principles, the necessary elements for breach of a statutory duty.¹⁷² But absent compensable injury, an action brought under the present statutory scheme would fail. The plaintiff in a tort action must prove his damages, and the injury an individual suffers from exclusion probably would result in only minor monetary injury. However, to promote the policy of governmental openness, the legislature could *stipulate* the damages that aggrieved individuals may recover in private actions. This remedy should not effect a windfall recovery for individuals; rather, the damage action would provide an incentive for individuals to sue, promoting openness and individual participation in government. Also, stipulated damages should serve to deter closed session deliberations in violation of the law.¹⁷³

removal to repeating violators and by giving them a right to a jury trial . . . there would be sufficient safeguards for officials who act in good faith." Wickham, *supra* note 12, at 499. Unfortunately, the implications of a jury trial "safeguard" notion are left undeveloped.

170. Hargrave, *supra* note 34, at 23.

171. See Wickham, *supra* note 12, at 487.

172. It is well established that Louisiana's tort law, employing the duty/risk analysis, draws analogical inferences from statutory requirements and prohibitions to fix a reasonable standard of care. See, e.g., *Boyer v. Johnson*, 360 So. 2d 1164 (La. 1978); *Weber v. Phoenix Assurance Co. of New York*, 273 So. 2d 30 (La. 1973); *Laird v. Travelers Ins. Co.*, 263 La. 199, 267 So. 2d 714 (1972); *Pierre v. Allstate Ins. Co.*, 257 La. 471, 242 So. 2d 821 (1970); *Dixie Drive It Yourself System v. American Beverage Co.*, 242 La. 471, 137 So. 2d 298 (1962). Commentators have articulated the analytical method. See, e.g., Chamallas, *Comparative Fault and Multiple Party Litigation in Louisiana: A Sampling of the Problems*, 40 LA. L. REV. 373 (1980); Johnson, *Comparative Negligence and the Duty/Risk Analysis*, 40 LA. L. REV. 319 (1980); Robertson, *Reason Versus Rule in Louisiana Tort Law: Dialogues on Hill v. Lundin and Associates, Inc.*, 34 LA. L. REV. 1 (1973); Malone, *Ruminations on Dixie Drive It Yourself versus American Beverage Company*, 30 LA. L. REV. 363 (1970); Note, *Abrogation of the Contributory Negligence Bar in Cases of Disparate Risks*, 39 LA. L. REV. 637 (1979).

173. Cf. 18 U.S.C. § 2520 (1970) providing that:

Any person whose [communication] is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or uses such communication, and (2) be entitled to recover from any such person—

(a) actual damages but not less than *liquidated* damages computed at the rate of \$100 a day for each day of violation or \$1000, whichever is higher;

Conclusion

Despite its shortcomings, the statutory scheme of Act 665 of 1976, substantially improved by Act 681 of 1979, is a definite step toward implementing the constitutional goal of openness and toward fostering the public interest in responsible government. Given clarification as to which groups are "public bodies," evaluation of the reasons justifying closed sessions, and development of realistic remedies and effective enforcement devices, Louisiana's open meetings law should ensure both better government and a more informed populace. The problems that exist are not insolvable and are well worth attention, in light of the statutes' social significance. As Louisiana now faces the last two decades of the century, state and local government will, hopefully, cease to be the bastion of secrecy and the refuge for the cynical.

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(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred

(Emphasis added).