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religious freedom. At one time such oaths had been instruments for the oppression of dissenters. Thus Article VI of the United States Constitution, prohibiting test oaths for federal officers in language identical to the first part of Section 4, betrays the origin of this section. All Texas bills of rights prior to 1876 repeated the guarantee against religious test oaths in identical form until, in 1875, the framers added the words of Section 4 after the semicolon.

Explanation

Very few cases refer to Section 4. Obviously public officials have not been required to take religious test oaths, hence there has been no ground for litigation. Section 4 has been cited, along with succeeding sections dealing with religion, in some child custody cases. Conceivably the award of child custody is a public trust within the meaning of this section but those seeking such awards are not required to take religious oaths. Indeed the courts steer clear of any inquiry into the applicant's religious beliefs.

When in 1876 Section 4 grew from a simple prohibition to include the proviso regarding belief in a Supreme Being, the guarantee was weakened. In fact, a bill was introduced in the Fifty-sixth Legislature requiring public school teachers to swear that they believed in a Supreme Being. The proviso seemed to authorize this mild test oath. While the bill was under consideration the United States Supreme Court handed down a decision declaring the Maryland test oath for public officers unconstitutional when it was applied to an atheist (*Torcaso v. Watkins*, 367 U.S. 488 (1961)). This and subsequent decisions indicate that the Supreme Being proviso violates the religious liberties guarantees embodied in the Fourteenth Amendment and is unconstitutional.

Comparative Analysis

A total of 26 states prohibit religious tests for public office. Only two states other than Texas contain the proviso that tests not be required so long as a belief in a Supreme Being is acknowledged. Recent constitutions have not included sections on these subjects.

Author's Comment

Protection against religious test oaths for public offices or public trusts is a basic protection which might be invaded by zealous pressure groups. Since the addendum of 1876 to Section 4 does seem to dilute the broad guarantee and presumably violates the United States Constitution, it should be deleted.

Sec. 5. WITNESSES NOT DISQUALIFIED BY RELIGIOUS BELIEFS; OATHS AND AFFIRMATIONS. No person shall be disqualified to give evidence in any of the Courts of this State on account of his religious opinions, or for the want of any religious belief, but all oaths or affirmations shall be administered in the mode most binding upon the conscience, and shall be taken subject to the pains and penalties of perjury.

History

The common law required a witness to take an oath which would bind him to tell the truth for fear of supernatural punishment. Hence persons without the requisite religious beliefs could not serve as witnesses. Section 5, which has no predecessor in previous Texas constitutions, permits such persons to testify and hence it represents a departure from the common law rule. Presumably "reference

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to the 'pains and penalties of perjury' was intended to allay any fear that abolition of the religious test for witnesses might result in the admission of untrustworthy evidence" (Fritz and Roberts, "The New Juvenile Delinquency Act," in Comments, 23 *Texas L. Rev.* 165, 171-72 (1945)).

Explanation

The right to testify is important to judicial protection of other rights; thus Section 5 furnishes religious protection of some significance. The section has been cited in an appreciable number of cases although it is certainly not one of the much litigated parts of the Bill of Rights. In several instances the court of criminal appeals had to correct clear violations of Section 5 by lower courts (*Riddles v. State*, 47 Tex. Crim. 69, 46 S.W. 1058 (1898); *Ramirez v. State*, 159 Tex. Crim. 410, 264 S.W.2d 99 (1953)). In other cases Section 5 was simply lumped together with Sections 4 and 6 to vindicate freedom of religion or separation of church and state. In fact, however, Section 5 is limited to judicial proceedings including the swearing of jurors and does not extend to other oaths or subjects (*Campbell v. State*, 43 Tex. Crim. 602, 68 S.W. 513 (1902)).

Judicial construction of Section 5 has had some unfortunate consequences. It requires that false oaths within its scope must be punishable as perjury. Thus, in 1904, the court of criminal appeals decided that a child of seven, even if otherwise qualified, could not testify because a statute exempted children of her age from punishment for perjury. (*Frazier v. State*, 47 Tex. Crim. 24, 84 S.W. 360 (1904)). Judge Brooks, dissenting, noted that children of this age had been permitted to testify at common law without being subject to the "pains and penalties of perjury." Narrow construction by the majority, he charged, had turned what was presumably intended to be an expansion of individual liberty into a requirement that a penalty be enforced against the weakest members of society. Short of a constitutional amendment, the legislature did what it could; it amended a humanitarian statute exempting children under nine from criminal prosecution to make them liable for perjury (*Moore v. State*, 49 Tex. Crim. 449, 96 S.W. 327 (1906); 23 *Texas L. Rev.* 165 (1945)). If young children are ineligible to testify, their helplessness regarding crimes committed against them increases. Nevertheless, narrow interpretation of Section 5 continued to hamper the state when it sought to deal with children under the Delinquent Child Act. In 1944 the court of criminal appeals declared unconstitutional a section of the act which provided, "nor shall any child be charged with or convicted of a crime in any court" because the law failed to make children punishable for perjury (*Santillian v. State*, 147 Tex. Crim. 554, 557, 182 S.W.2d 812, 815 (1944); *Head v. State*, 147 Tex. Crim. 594, 183 S.W.2d 570 (1944)).

Another legal tangle surrounded Section 5. The form of oath prescribed by the legislature for jurors ended with the words, "so help me God." In 1920 the court of criminal appeals set aside several guilty verdicts because the jurors involved had not used these words when being sworn. In 1972 this requirement was challenged on the ground that the prescribed form of oath violated Section 5 by disqualifying atheists and agnostics from jury service. The court of criminal appeals responded by overruling the earlier cases. The term "oath," it noted, referring to the Code of Criminal Procedure, is to be construed as including affirmation. The purpose of Section 5 was to permit affirmation and to rely upon the prospect of punishment for perjury as a sanction to enforce truthfulness instead of religious fears of future punishment alone. The challenged statutes, said the court, contained no requirement of an expressed belief in a Supreme Being (*Craig v. State*, 480 S.W.2d 680 (Tex. Crim. App. 1972)).

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Comparative Analysis

A total of 21 states provide that there shall be no religious tests for witnesses. Five specifically prescribe that testimony shall be by oath or affirmation.

Author's Comment

The religious protection in Section 5 is fairly narrow. Its construction has at times frustrated legitimate legislative objectives although it may also have saved some defendants from religious discrimination. However, the latter might presumably have been protected equally well under some other religious guarantee in the Texas Bill of Rights or under the Fourteenth Amendment.

Sec. 6. FREEDOM OF WORSHIP. All men have a natural and infeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.

History

The Constitution of 1836 contained a much shorter statement of religious freedom and of the separation of church and state. However, the present wording is found in the Constitution of 1845 and it was retained substantially unchanged in each succeeding constitution. This section had a special meaning for Texans. They shared not only the Anglo-American tradition of those struggles which resulted in the religious guarantees of state and national constitutions but in addition they had their own special religious problems as citizens of Mexico. As Justice Brown put it, "Prior to the Revolution of 1836, the Catholic was the established religion of the Republic of Mexico, and all citizens of Texas were required to conform to the teachings of that church. It was supported by the government, and, by taxation, the citizens were compelled to contribute thereto. One of the charges made against the Republic of Mexico in the Declaration of Independence was, 'it denies us the right of worshipping the Almighty according to the dictates of our own conscience by the support of a national religion, calculated to promote the temporal interest of its human functionaries rather than the glory of the true and living God . . .'" (*Church v. Bullock*, 104 Tex. 1, 6, 109 S.W. 115, 117 (1908)).

Explanation

Section 6 guarantees freedom of religion; prohibits religious discrimination, religious compulsion, or interference with the practice of religion; and enjoins the legislature to protect all religions. In the first interpretation of this section the supreme court upheld a Sunday closing ordinance, noting specifically the constitutional injunction to protect religion (*Gabel v. Houston*, 29 Tex. 336 (1867)). After considerable explanation, the supreme court later decided that Bible reading and recitation of the Lord's Prayer in public schools did not violate Section 6. Justice Brown explained as follows:

The primary purpose of that provision of the Constitution was to prevent the Legislature from in any way compelling the attendance of any person upon the worship

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of a particular church, or in any manner, by taxation or otherwise, cause any citizen to contribute to the support of "any place of worship." As used in the Constitution the phrase "place of worship" specifically means a place where a number of persons meet together for the purpose of worshipping God To hold the offerings of prayers, either by the repetition of the Lord's Prayer or otherwise, the singing of songs, whether devotional or not, and the reading of the Bible, make the place where such is done a place of worship, would produce intolerable results. The House of Representatives and the Senate of the state Legislature each elect a chaplain, who, during the session, daily offers prayers to Almighty God in behalf of the state, and in the most express manner invokes the supervision and oversight of God for the lawmakers. In the chapel of the State University building, a religious service; consisting of singing songs, reading portions of the Bible, with prayers and addresses by ministers and others, is held each day. The Young Men's Christian Association hold their services in that building each Lord's Day; and the Young Women's Christian Association has a like service in another public building. At the Blind Institute on each Lord's Day prayers are offered, songs are sung, Sunday School is taught, and addresses made to the children with regard to religious matters. Devout persons visit our prisons and offer prayers for those who are confined. An annual appropriation is made for a chaplain for the penitentiary; in fact, Christianity is so interwoven with the web and woof of the state government that to sustain the contention that the Constitution prohibits reading the Bible, offering prayers, or singing songs of a religious character in any public buildings of the government, would produce a condition bordering on moral anarchy (*Church v. Bullock*, 104 Tex. 1, 7, 109 S.W. 115, 118 (1908)).

Eventually the United States Supreme Court caught up with Justice Brown's decision regarding Bible reading and recitation of the Lord's Prayer as well as some of his reasoning. Recognizing the growing religious pluralism in our society and the increased willingness of religious minorities to challenge public religious practices offensive to them, the United States Supreme Court in *Abington School District v. Schemp* (374 U.S. 203 (1963)) struck down, as contrary to the establishment clause of the First Amendment, reading of the Bible or recitation of the Lord's Prayer as part of religious observances in the public schools. The implication of these cases was that while study about religion or of the Bible as literature is constitutional, any governmental support of religious observances is a violation of the constitutionally guaranteed separation of church and state. On the other hand Sunday closing laws are constitutional because even though they may originally have been enacted for religious purposes, they have in fact come to serve an overriding secular purpose, *i.e.*, providing a common day of rest (*McGowan v. Maryland*, 366 U.S. 420 (1961)).

Texas courts have construed Section 6 in relatively few cases. In two, the state police power survived religious objections to compulsory vaccination (*City of New Braunfels v. Waldschmidt*, 109 Tex. 302, 207 S.W. 303 (1918)) and to prohibition of the sale of liquor (*Sweeney v. Webb*, 97 Tex. 250, 76 S.W. 766 (1903)). By the time of the Jehovah's Witnesses cases, Texas courts were following the guidelines of the United States Supreme Court. Thus, in divorce and child custody cases, Texas courts disclaimed any right to refer to or take into account the religion of one party, though that of the other might be fanatical or highly unpopular, because "secular judges possess no religious powers and enforce no religious preferences." (*Bevan v. Bevan*, 283 S.W.2d 305, 310 (Tex. Civ. App.—San Antonio 1955, *writ ref'd n.r.e.*); *Salvaggio v. Barnett*, 248 S.W.2d 244 (Tex. Civ. App.—Galveston, *writ ref'd n.r.e.*) *cert. denied* 344 U.S. 879 (1952)). Thus, also, Texas courts have upheld the rights of religious groups to sell religious literature on city streets contrary to local vending ordinances (*Pool v. State*, 154 Tex. Crim. 270, 226 S.W.2d 868 (1950)), to take up religious collections on city streets (*Hoover v. State*, 161 Tex. Crim. 642, 279 S.W.2d 859 (1955)), and to enter private property in

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violation of a local ordinance (Ex parte *Luehr*, 159 Tex. Crim. 566, 266 S.W.2d 375 (1954)).

Some cases pit assertions of religious freedom against attempts to restrict the use of land. In *Congregation Committee v. City Council* (287 S.W.2d 700 (Tex. Civ. App.—Fort Worth 1956, *no writ*)), the city council, acting as a zoning board, had denied two Jehovah's Witnesses a permit to build a church on their land. The court upset the council's decision on the ground that the freedom of worship of Jehovah's Witnesses had outweighed minor traffic difficulties and inconvenience to neighbors. However, a general deed restriction limiting construction to single family houses and thus prohibiting the construction of churches withstood attack because it "applied equally to churches of all denominations and faiths" (*Ireland v. Bible Baptist Church*, 480 S.W.2d 467 (Tex. Civ. App.—Beaumont (1972) *cert. denied* 93 S. Ct. 1529 (1973))). The court went on to reject a contention based on the rationale of *Shelley v. Kraemer* (334 U.S. 1 (1948)), that by enforcing the private covenant the state court was violating religious freedom.

Comparative Analysis

All 50 states protect freedom of religion in their bills of rights but they do not necessarily use so many words to do so. The First Amendment of the United States Constitution provides that congress may not enact a law "respecting an establishment of religion, or prohibiting the free exercise thereof." The *Model State Constitution* uses the same wording.

Author's Comment

By consensus, religious guarantees are a fundamental part of the American heritage. The trend of decision making in the United States Supreme Court, reflecting presumably the growing pluralism of our society, has been to protect religious diversity and to discourage governmental intervention in any religious matters.

Sec. 7. APPROPRIATIONS FOR SECTARIAN PURPOSES. No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes.

History

Section 7 first appeared in the Constitution of 1876 and represents a victory for the advocates of public education, who had been very active in the constitutional convention. By this section, they sought to stop the previous practice of extending occasional state aid for sectarian education.

Explanation

Section 7 is a rare example of a state bill of right's provision that is stricter than the Bill of Rights of the United States Constitution. In a recent opinion the attorney general observed that Section 7 "is more restrictive than the federal charter . . . and will not tolerate, in our opinion, any aid to *sects* or sectarian schools." (Tex. Att'y Gen. Op. No. H-66 (1973). *Emphasis in original*. This opinion is discussed further below.) The reason for this is that whereas the First Amendment speaks to "establishment of religion" in a general sense, Section 7 zeroes in on appropriating public money.

Over the past 30 years the United States Supreme Court has struggled with the

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relationship between "establishment of religion" and public moneys. Within the past decade the number of cases has increased substantially. The reason for this is the increasing cost of education and the concomitant difficulty that faces religious denominations that maintain sectarian schools and colleges. Legislatures and congress have had to face not only the pleas for assistance but the prospect that the public cost of education goes up if private schools and colleges go under. The result has been a battle between the United States Supreme Court and various legislatures trying to see how far they can go in helping denominational schools and colleges without running afoul of the establishment prohibition.

An analysis of the state of a field of law can focus on what is and what is not permitted or on the reasoning behind the distinctions. An interesting aspect of the cases in this area is that the court has gone to considerable lengths to explain the reasoning behind its distinctions.

What is and is not permitted can be summarized quickly. A state may provide transportation to and from sectarian schools; may provide free the same textbooks used in public schools; may provide free lunches and public health services; and may grant money or credit for construction of buildings to be used solely for secular purposes. This last permission is limited to colleges and universities. A state may not provide teaching materials; may not supplement the pay of teachers; and may not make direct or indirect grants to parents to help pay the cost of sectarian elementary or secondary education.

There are three rules that, taken together, explain the distinctions drawn. First, the purpose must be secular. Second, the primary effect must neither advance nor inhibit religion. Third, the program must not get the government entangled with religion. This third rule is the key to the close distinctions drawn. (Most of the Supreme Court cases in this area are decided by close votes and all by divided votes.) What the court seeks to avoid is a continuing battle over whether the law is properly followed. For example, free textbooks do not involve an enforcement problem, but teaching materials and salary supplements do. The law may say that the publicly supplied materials may not be used for teaching religion, but a state might have to send inspectors around to check up on the use of the materials. A salary supplement restriction to teachers teaching only secular subjects could easily be evaded. (*Meek v. Pittenger*, 421 U.S. 412 (1975), and cases cited give the details summarized above.)

The attorney general opinion mentioned at the beginning of this *Explanation* concerned tuition equalization grants authorized by Article 2654h of the *Texas Revised Civil Statutes Annotated*. This permits grants to needy residents attending Texas private colleges and universities. (This is not to be confused with student loans authorized by Sec. 50b of Art. III.) After reviewing the United States Supreme Court cases, the attorney general concluded that, properly administered, Article 2654h would not run afoul the establishment clause. He noted, for example, that grants could not be made to students attending seminaries or divinity schools. He also stressed the significance of Section 7. Following the sentence quoted earlier, the opinion continued:

Denominational schools are not necessarily sectarian in that sense, and some schools with sectarian programs may be able to effectively separate their secular programs from the sectarian remainder so that the use of funds for the one does not have the effect of subsidizing or furthering the other. The dividing lines are delicate but must be sharply drawn so that public funds are not put to sectarian uses. (Tex. Att'y Gen. Op. No. H-66 (1973).)

It is fair to note that, strict as these rules may be, they are not absolutes. Any

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financial assistance, no matter how carefully restricted, “aids” religion. A free bus ride or free textbook eases the financial burden on a religion and its supporters. The line-drawing process under the three rules set out above retains an element of common sense. For example, in *Walz v. Tax Commission* (397 U.S. 664 (1970)), the court upheld the granting of tax exemptions for religious property. The court conceded that a tax exemption is an indirect subsidy but, on the basis of history and common sense, drew a line. Subsidies no, tax exemptions yes.

Comparative Analysis

Some 25 states specifically prohibit appropriations or expenditures for religious purposes. However, as the recent United States Supreme Court decisions show, such prohibitions may inhere in more general statements on the separation of church and state. Other state constitutions prohibit appropriations favoring a particular group or religious denomination.

Author's Comment

Despite the paucity of state litigation on the potential subject matter of Section 7, the section deals with a subject of considerable interest. This interest is reflected in the inquiries to the attorney general, answers to which, of course, do not finally settle the questions asked. The interest is demonstrated most convincingly by financially hard-pressed supporters of sectarian schools who have formed powerful lobbies in some states. In Texas, the thrust has been in higher education. A convention might wish to review present “tuition equalization grants” and to determine basic policy by clarifying Section 7. It would note the partial overlap of Section 7 with Article VII, Section 5, which commands that no part of the permanent or available school fund shall “ever be appropriated or used for the support of any sectarian school.”

Sec. 8. FREEDOM OF SPEECH AND PRESS; LIBEL. Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

History

Freedom of expression has been considered one of the most basic American freedoms. With the British heritage of struggle against licensing, the American states, led by Virginia in 1776, wrote guarantees of free expression into their early constitutions. The United States Bill of Rights opens with the words: “Congress shall make no law . . . abridging the freedom of speech or of the press.”

Beginning with the Fourth Section in the Declaration of Rights of the Texas Constitution of 1836, freedom of speech and the press have always been guaranteed by fundamental law in Texas. Subsequent constitutions expanded the language of Section 4 and divided it into two sections. They in turn were drawn together again to make the present Section 8.

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Explanation

Freedom of expression has often been considered the matrix of our other liberties. Without freedom of expression neither the people nor their representatives can play their roles in a functioning democracy. Indeed, well before democratic ideas were accepted, Englishmen and Americans were struggling to assert and protect this precious liberty.

Early and restricted views of free expression accepted a ban on censorship as the essence of this guarantee. Thus, Section 8 begins in these terms with words reminiscent of Blackstone, "Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; . . ." As Blackstone defined it, this responsibility was great, but the American constitutions opted for greater protection for the privilege. Hence the opening sentence quoted from Section 8 continues with the essential protection extended by the Texas Constitution: "and no law shall ever be passed curtailing the liberty of speech or of the press." This is the parallel of the federal guarantee. As Justice Garwood remarked in rebuffing an attempt to use the "responsibility" proviso to limit the legislative power to set up investigative bodies, "no decisions appear to have ever applied this particular language of the constitution" (Ex parte *Jimenez*, 159 Tex. 183, 189, 317 S.W.2d 189, 194 (1958)). Thus "responsibility" must be measured simply by the limits of guaranteed freedom of expression and the first part of the opening sentence of Section 8 adds no more than emphasis to the latter part of the sentence. This emphasis is upon the unconstitutionality of censorship.

In 1920 Chief Justice Phillips wrote eloquently upon prior restraint and the underlying rationale of Section 8. Officers of a union were enjoined from "vilifying, abusing or using opprobrious epithets to or concerning" certain persons. In rejecting this assertion of judicial power, the Chief Justice said:

Punishment for abuse of the right [of free expression], not prevention of its exercise, is what the provision contemplates. There can be no liberty in the individual to speak, without the unhindered right to speak. It cannot co-exist with a power to compel his silence or fashion the form of his speech. . . .

The theory of the provision is that no man or set of men are to be found, so infallible in mind and character as to be clothed with an absolute authority of determining what other men may think, speak, write or publish; that freedom of speech is essential to the nature of a free state; that the ills suffered from its abuse are less than would be those imposed by its suppression; and therefore that every person shall be left at liberty to speak his mind on all subjects, and for the abuse of the privilege to be responsible in civil damages and subject to the penalties of the criminal law

Equity will protect the exercise of natural and contractual rights from interference by attempts at intimidation or coercion. Verbal or written threats may assume that character. When they do, they amount to conduct, or threatened conduct, and for that reason may properly be restrained. Cases of that sort, or of analogous character are not to be confused with this one. (Ex parte *Tucker*, 110 Tex. 335, 337, 220 S.W. 75, 76, (1920).)

In 1937 the court of civil appeals in Galveston did uphold an injunction against the libel of a financial institution as "essential to the preservation of property interests" but this decision has not been followed (*Gibraltar Savings & Building Ass'n v. Isbell*, 101 S.W.2d 1029). Rather Ex parte *Tucker* remains the leading case in harmony with federal decisions. (See *Amalgamated Meat Cutters v. Carl's Meat and Provision Co.*, 475 S.W.2d 300 (Tex. Civ. App.—Beaumont 1971, writ *dism'd*).) As a recent picketing case put it, the state may regulate the time, place

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and manner of expression but it can do little about the content (*Geissler v. Coussoulis*, 424 S.W.2d 709 (Tex. Civ. App.—San Antonio 1967, *writ ref'd n.r.e.*)). Coercion, the United States Supreme Court has noted recently, cannot justify an injunction against peaceful distribution of handbills by an association which exposes a real estate broker's business practices in an effort to force him to abandon them (*Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971)). The "Austin" involved is a neighborhood in Chicago.)

Texas courts have recently distinguished situations involving the unauthorized practice of law and medicine. When a nonlawyer advertised and sold, together with a set of definitions, blank will forms to be filled in by the purchaser, the seller was engaged in the unauthorized practice of law and could be enjoined. Said the court, freedom to publish is not absolute and courts "are entitled to strike a balance between fundamental freedom and the state's interest in the welfare of its citizens." (*Palmer v. Unauthorized Practice Committee of State Bar*, 438 S.W.2d 374, 377 (Tex. Civ. App.—Houston (14th Dist.) 1969, *no writ*)). Two years before a New York court had found that it could not enjoin publication of a book *How to Avoid Probate* which, in addition to forms, contained some 55 pages of comment expressing in part views regarding the high cost of probate and other beliefs (*New York County Lawyers' Ass'n v. Dacey*, 21 N.Y.2d 694, 234 N.E.2d 459, 287 N.Y.S.2d 422 (1967)). When a Texas dentist began to practice medicine, he, too, published a book or pamphlet entitled "One Answer to Cancer." The court enjoined both the practice of medicine and the book, which was found to be a means used by the defendant to advertise himself and practice medicine. In answer to freedom of expression claims, the court asserted its right to balance fundamental freedoms in the "interest of the state and the welfare of its citizens" (*Kelley v. State Board of Medical Examiners*, 467 S.W.2d 539, 546 (Tex. Civ. App.—Fort Worth 1971, *writ ref'd n.r.e.*) *cert. denied* 405 U.S. 1073 (1972)).

As previously noted Texas developed important case law before federal case law regarding freedom of expression became controlling. Although *Gitlow v. New York* (268 U.S. 652 (1925)) decided that the First Amendment guarantees of free expression were a part of the fundamental liberty protected against state action in the Fourteenth Amendment, the Texas Supreme Court had already expressed itself in terms similar to those of the more advanced minority of the United States Supreme Court, Justices Holmes and Brandeis. Texas courts have continued to hear a large volume of cases under Section 8 but gradually federal standards have become decisive. This is hardly surprising considering the widespread "incorporation" into the Fourteenth Amendment of guarantees in the federal Bill of Rights. Furthermore, the United States Supreme Court has been continually preoccupied with First Amendment rights. Not only has it struggled with theories of clear and present danger, preferred rights, absolutes, and balancing but it has developed a great body of case law in broad and expanding areas of free expression. Thus, Texas state action has been found to fall short of federal guarantees in such instances as contempt of court proceedings against a newspaperman (*Craig v. Harney*, 331 U.S. 367 (1947)); a legislative loyalty oath which, by proscribing memberships in certain organizations without requiring specific intent to further the illegal aims of these organizations, enacted guilt by association (*Gilmore v. James*, 274 F. Supp. 76 (N.D. Tex. 1967)); and a Dallas ordinance too vaguely authorizing a Motion Picture Classification Board to classify films as "not suitable for young persons" and enjoining their exhibition except under prescribed restrictions (*Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968)). Similarly, a Texas statute which required labor organizers to obtain an organizer's card from the state before soliciting union membership violated free speech (*Thomas v. Collins*, 323 U.S. 516 (1945)).

Over the past 40 years the courts have come fairly close to making freedom of speech and the press absolute. This means that one can say, write, or print almost anything one wants to without fear of government interference. But note the qualifying "almost." It is still not permissible to shout "fire!" in a crowded theater when the shouter knows there is no fire. That is, one cannot use this "absolute" freedom as a shield to protect oneself from the consequences of the words used. In this context, freedom of speech and press can never be absolute. An editorial that suggested that Texas would be better off if the legislature never met is different from an editorial that called on the public to surround the Capitol to keep the legislature from meeting. And both editorials are vastly different from one that advocated assassinating all legislators to prevent their meeting. Yet even within this narrow area, the problem of line drawing will remain with us forever.

The law of libel is another area of line drawing that will remain with us forever. The problem here is principally the indirect effect of libel law on press freedom. (Technically, slander is the legal term in the case of speech; libel governs the printed word. For purposes of this discussion only "libel" will be used.) Neither the common law of libel nor any statute prevents a person from writing or publishing anything. But the threat of a suit for libel may deter someone from speaking or writing. Within the last decade the United States Supreme Court has struggled with the problem of the effect of libel laws on free speech and press. The initial approach was to focus on the person who was written or spoken about. Under most circumstances truth is a defense unless the true statement was made with malice. (Note the second sentence of Sec. 8. The sentence is related to criminal libel discussed below.) The Supreme Court has ruled that things said or written about public figures are not libelous even if false unless there is malice, deliberate lying, or a reckless disregard of the truth (*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). This differentiation was extended to people who are not "public figures" but who get involved in public events (*Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971)).

Recently the Supreme Court has tried a new tack. In the case of nonpublic figures who get involved with public events, the court has withdrawn the protection afforded false statements by the *Sullivan* case. In *Gertz v. Welch* (418 U.S. 323 (1974)), the court all but overruled the *Rosenbloom* case. The rule of *Gertz* is two-fold. First, a plaintiff must establish some degree of negligence in publishing a defamatory falsehood. (Traditionally, the fact of publication established liability for a defamatory statement, thus shifting the burden of proof to the publisher to establish the truth of the statement.) Second, the plaintiff has the burden of proving the monetary value of the effect on his reputation by negligent publication of a defamatory falsehood. (Traditionally, there was no significant limit on the amount of damages that a jury could award.)

Here, then, is an excellent example of the balancing act that courts engage in when dealing with fundamental freedoms. On the one hand, the First Amendment's protection of freedom of speech and press is "chilled," as they say, if the speaker or publisher has to worry too much about the eventual monetary consequences. (In *Gertz, supra*, two justices dissented because they thought that the new rule would still have a "chilling effect.") On the other hand, there is a need to protect nonpublic figures from irresponsible defamatory statements that cannot be shown to be malicious or uttered with reckless disregard for the truth. (Two members of the court dissented because they feared that the new rule went too far in restricting the common law of libel.)

There is one final point to be made about the libel part of Section 8. The last sentence is an historical anachronism of no significance today. Under the 18th century common law of criminal libel the only function of the jury was to decide

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the fact of publication of the alleged seditious statement. Whether the statement was seditious was a question of law for the judge. The last sentence of Section 8 was the device used to give the jury the opportunity to decide whether the statement was seditious. The assumption was that judges were likely to be part of the "establishment" but that the jury might be sympathetic to a pamphleteer who was fighting the "establishment." (See generally Levy, *Legacy of Suppression*, Cambridge: Harvard University Press, 1960. Incidentally, Professor Levy convincingly demonstrates that at the time of the adoption of the Bill of Rights, the general view was that freedom of speech and the press did not include the freedom to make seditious statements about the government. Today's theory—that one of the most important purposes of the First Amendment is to permit criticism of the government—developed slowly.) In any event, the last sentence of Section 8 does not mean that the jury takes over the usual function of a judge. As the court of criminal appeals put it, "The jury is required to take the law from the court and be bound thereby." (See *Aldridge v. State*, 170 Tex. Crim. 502, 507, 342 S.W.2d 104, 108 (1961).)

In one area, obscenity, the United States Supreme Court has struggled and struggled to draw lines but has gotten nowhere. That is, the court has been unable to find a line that is basically clear. Consider, for example, the court of criminal appeals' disposition of *West v. State* (514 S.W.2d 433 (Tex. Crim. App. 1974)) on remand from the United States Supreme Court. Upon reconsideration in the light of the latest Supreme Court decisions, the court of criminal appeals unanimously reaffirmed its original decision that West was properly convicted under a valid obscenity statute. On motion for rehearing, the original conclusion was adhered to but with a new analysis of the Supreme Court decisions. The author of the original analysis filed a concurring opinion asserting that the new analysis was erroneous. The result was a three-to-two decision on what the United States Supreme Court meant in its several five-to-four decisions.

The principal reason that the court has trouble with pornography and obscenity is that, instead of drawing lines based on a balancing of freedom of the press to publish pornography against some overriding "clear and present danger" to the public interest, the court holds that obscenity is not protected by the First Amendment. Thus, the line drawing exercise is definitional—that is, what is obscene?

The latest, and therefore current, definition is set forth in *Miller v. California* (413 U.S. 15 (1973)):

The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. (At p. 24.)

How long this definition will last is anybody's guess. At one time most of the justices took the definitional route. Today, three justices who formerly took that route now argue for the balancing route. It seems likely that the law will remain confused until a majority agrees that obscenity as such is not outside the pale and limits the power to regulate the publication and dissemination of obscene matter as in other First Amendment situations.

Comparative Analysis

All of the states seek to safeguard freedom of expression in one manner or another. Many are able to do so in briefer compass than Section 8.

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Author's Comment

The essence of Section 8 is found in the words "no law shall ever be passed curtailing the liberty of speech or of the press." Certainly this is one of the most basic ingredients of a free and democratic government. That the other words of Section 8 really add anything of current constitutional significance is doubtful. In any case, federal standards presently applicable to the states now define the practical boundaries of free expression.

Sec. 9. SEARCHES AND SEIZURES. The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

History

Section 9 tracks the Fourth Amendment to the United States Constitution. In 1959 the United States Supreme Court reexamined the historical origins of that amendment:

The history of the constitutional protection against official invasion of the citizen's home makes explicit the human concerns which it was meant to respect. In years prior to the Revolution leading voices in England and the Colonies protested against the ransacking by Crown officers of the homes of citizens in search of evidence of crime or of illegally imported goods. The vivid memory by the newly independent Americans of these abuses produced the Fourth Amendment as a safeguard against such arbitrary official action by officers of the new Union, as like provisions had already found their way into State Constitutions.

In 1765, in England, what is properly called the great case of *Entick v. Carrington*, 19 Howell's State Trials, col. 1029, announced the principle of English law which became part of the Bill of Rights and whose basic protection has become imbedded in the concept of due process of law. It was there decided that English law did not allow officers of the Crown to break into a citizen's home, under cover of a general executive warrant, to search for evidence of the utterance of libel. Among the reasons given for that decision were these:

It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty.' *Id.*, at col. 1073.

These were not novel pronouncements to the colonists. A few years earlier, in Boston, revenue officers had been authorized to use Writs of Assistance, empowering them to search suspected places, including private houses for smuggled goods. In 1761 the validity of the use of the Writs was contested in the historic proceedings in Boston. James Otis attacked the Writ of Assistance because its use placed 'the liberty of every man in the hands of every petty officer.' His powerful argument so impressed itself first on his audience and later on the people of all the Colonies that President Adams was in retrospect moved to say that 'American Independence was then and there born.' Many years later this Court, in *Boyd v. United States*, 116 U.S. 616, carefully reviewed this history and pointed out, as did Lord Camden in *Entick v. Carrington*, that

. . . the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against

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himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment.' 116 U.S., at 633.

Against this background two protections emerge from the broad constitutional proscription of official invasion. The first of these is the right to be secure from intrusion into personal privacy, the right to shut the door on officials of the state unless their entry is under proper authority of law. The second, and intimately related protection, is self-protection: the right to resist unauthorized entry which has as its design the securing of information to fortify the coercive power of the state against the individual, information which may be used to effect a further deprivation of life or liberty or property. . . .

. . . . While these concerns for individual rights were the historic impulses behind the Fourth Amendment and its analogues in state constitutions, the application of the Fourth Amendment and the extent to which the essential right of privacy is protected by the Due Process Clause of the Fourteenth Amendment are of course not restricted within these historic bounds. (*Frank v. Maryland*, 359 U.S. 360, 363-66 (1959) (footnotes omitted).)

The *Frank* case was overruled by *Camara v. Municipal Court*, 387 U.S. 523 (1967), but its historical interpretation of the Fourth Amendment remains authoritative.

Section 9 has appeared in substantially the same form in every Texas constitution.

Explanation

Most search and seizure litigation in Texas, as elsewhere, is factual: was the affidavit of probable cause sufficient, were the place to be searched and property to be seized specifically described, was the patdown of defendant's clothing reasonable? This has not spared the court of criminal appeals from deciding search and seizure cases—their digests currently fill 54 closely printed pages following Section 9 in the annotated Texas Constitution—but the broad outline of the section's guarantees was long ago settled in Texas and it remained only to apply the section to the myriad fact situations arising from the day-to-day operation of the criminal justice system.

Innovation in search and seizure law over the past decade and a half has come from the federal courts, spearheaded, of course, by the United States Supreme Court. In 1949 that court applied the protections of the Fourth Amendment against the states through the Fourteenth Amendment (*Wolf v. Colorado*, 338 U.S. 25 (1949)), and in 1961 held that the exclusionary rule, which bars illegally seized evidence from criminal trials, also applied to the states (*Mapp v. Ohio*, 367 U.S. 643 (1961)). (Interestingly, Texas has applied the exclusionary rule by statute, now Code of Criminal Procedure art. 38.23, since 1925.) Finally, in 1963 the Supreme Court imposed the federal standards of reasonableness on the states for deciding search and seizure questions (*Ker v. California*, 374 U.S. 23 (1963)). In practice this has equated Section 9 with the Fourth Amendment, although it is still open to Texas courts to define the guarantees of Section 9 more generously than the federal courts define those of the Fourth Amendment.

Federal search and seizure law is still evolving, which makes it hazardous to attempt a synthesis. All search and seizure law is heavily influenced by the factual setting in which it is applied, which increases the risk that a general description will be both incomplete and oversimplified. Despite these known hazards and risks, however, what follows is offered as a reasonably accurate statement of the present law of search and seizure. (For an excellent summing up of Fourth Amendment

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decision making by the Supreme Court, on which the following draws heavily, see Amsterdam, "Perspectives on the Fourth Amendment," the 1974 Oliver Wendell Holmes Lecture, 58 *Minn. L. Rev.* 349 (1974).

Search, Seizure. Search of a person includes any physical touching of the body or clothing that reveals hidden objects—for example, rummaging through pockets, extracting blood with a hypodermic needle, or patting down. It is not a search to look at an individual's observable characteristics, as in a police lineup, nor is it a search to compel by legal process the furnishing of handwriting specimens or voice exemplars. Search of a house or other private place includes any physical entry by a person or intrusion of a surveillance device into the house. Looking into premises, as through an open window, is not a search, but the use of a device to accomplish the observation or detection may now constitute a search, even though the device never physically intrudes into the premises. See, for example, *Katz v. United States* (389 U.S. 347 (1967)), in which the court held that electronic bugging of a telephone booth constituted a search. Search of papers and effects (possessions) includes opening or any handling that discloses their content or nature.

Arrest constitutes a *seizure* of the person, as does stop-and-frisk and any other detention against the person's will. Papers and effects are seized when gathered up or carried away.

Scope. Since *Katz*, the Fourth Amendment has been interpreted in terms of protecting individual privacy from governmental intrusion. An earlier interpretation read the amendment to apply to the flexible concept of "a constitutionally protected area"—for example, clothing as well as the person and apartments and garages as well as houses. The earlier formulation may still be applicable, however, because the court in *Katz* said the amendment's protections "often have nothing to do with privacy at all."

Reasonableness. It is only unreasonable searches and seizures that are forbidden. As a practical matter the Supreme Court has equated reasonableness with issuance of a specific warrant upon probable cause by a disinterested judicial officer. There are three categories of exception to this rule of thumb, and if a search or seizure fits any one of them it is legal despite the absence of a warrant. The first category is consent; if the suspect agrees to the search or seizure, it is lawful. The second exception category includes border searches, searches of premises licensed to sell liquor and firearms, and perhaps stopping vehicles for license and safety checks. The third exception category covers emergency situations—for example, search incident to lawful arrest, seizure of unwholesome food, search of a vehicle likely to be driven away, and the protective frisk. The reasonableness requirement is pervasive, however, and all searches and seizures, whether authorized by warrant or one of the three exception categories, must be carried out reasonably.

Exclusionary rule. The product of an illegal search and seizure is not admissible in evidence. This is known as the exclusionary rule and is designed to enforce the Fourth Amendment against the government by denying the use of illegally obtained evidence in a criminal trial. The exclusionary rule also bars derivative evidence—"the fruit of the poisonous tree"—that is, evidence tainted by the illegal search and seizure.

Comparative Analysis

All 50 state constitutions prohibit unreasonable searches and seizures, usually in the same language as the Fourth Amendment. The *Model State Constitution*

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includes the standard prohibition and adds a prohibition against wiretapping and electronic surveillance as well as the exclusionary rule.

Author's Comment

Judicial application of the search and seizure guarantees demonstrates the great strength of broad-gauged constitutional language. Vague terms like "search," "seizure," and "unreasonable" have been given concrete meaning over the years to implement the guarantees in a variety of everchanging factual contexts. Although written and adopted in response to governmental abuses of nearly two centuries ago, the Fourth Amendment today applies to electronic surveillance, a current manifestation of the general warrants so feared and hated by our colonial ancestors. One hopes the year 2000 will likewise find the courts manning this barrier against whatever form unreasonable governmental intrusion then takes.

Application of the search and seizure guarantees also highlights the permanent tension between individual liberty and collective security. The slogan "Must the criminal escape because the constable blundered?" captures this tension, and congressional efforts to permit no-knock searches and to repeal the exclusionary rule are simply its most recent manifestations.

It is also significant that much of our search and seizure law has emerged from attempts to detect victimless crime. When the policeman is the only complainant it is not surprising that he is tempted to kick in the door on a suspected pot party, tap a suspected gambler's telephone, and prowl around restrooms looking for homosexuals. It is expecting too much of the search and seizure guarantees to compensate for the overreach of our criminal law. And it is truly astonishing that the resulting tension has not yet destroyed the guarantees.

As for Section 9, it should remain as the important bulwark against unreasonable governmental intrusion that it is.

Sec. 10. RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS. In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both, shall be confronted by the witnesses against him and shall have compulsory process for obtaining witnesses in his favor, except that when the witness resides out of the State and the offense charged is a violation of any of the anti-trust laws of this State, the defendant and the State shall have the right to produce and have the evidence admitted by deposition, under such rules and laws as the Legislature may hereafter provide; and no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger.

History

Section 10 itemizes many of the rights extended to persons accused of crimes. As such they comprise the most basic of the traditional guarantees deemed necessary to ensure a fair trial. In part, they repeat the rights of Englishmen at common law but some represent considerably more favorable treatment than the common law allowed. However, these advances appeared earlier in the Fifth and Sixth Amendments to the United States Constitution. Indeed, the similarity between these amendments and Section 10 is striking. Thus, it is not surprising that most of the Section 10 rights have appeared in all Texas constitutions in substantially the same form.

There are, however, some variations among the sections as they appeared in the several constitutions. The most significant is the "right to demand the nature and cause of the accusation against him." This right was granted in the Constitution of the Republic, but was omitted from the Constitution of 1845 and all subsequent constitutions until 1875. Section 10, as presented to the convention, was the same as the present section less the 1918 amendment discussed below. This indicates that the Committee on the Bill of Rights went back to 1836 for its model. This indication is reinforced by the exception of impeachment from the requirement of an indictment, an exception included in the 1836 Constitution but dropped in 1845.

In all other matters of substance Section 10 was unchanged from 1836 to the Convention of 1875. Beyond these two additions taken from the Constitution of the Republic, the convention made one other change from prior constitutions. Beginning with the 1845 Constitution a charge could be made by "indictment or information." (The 1836 Constitution used "presentment" instead of "information.") The 1875 Convention limited the use of the information to cases "in which the punishment is by fine or imprisonment, other than in the penitentiary."

One of the few amendments to the Texas Bill of Rights was adopted in 1918 when the requirement of the physical presence of witnesses at the trial was relaxed in state prosecutions for violation of state antitrust laws. The amendment added the "except" clause to the first part of the last sentence. A search of historical records failed to turn up any clear reason for the amendment. The joint resolution as originally proposed in the house and reported out of committee cut down the defendant's right to compulsory process to the county of the alleged crime and the county in which trial was to take place. To offset this limitation the proposal provided for either the state or the defendant to obtain evidence by deposition from out-of-state witnesses and authorized the legislature to permit depositions from out-of-county witnesses and even in-county people who were ill or disabled. The proposal was amended on the floor of the house to limit depositions to out-of-state witnesses in criminal antitrust trials. The senate then proceeded to knock out the original limitation on the right to compulsory process, thus leaving only the antitrust exception now in the section.

Without this legislative history one would have assumed that the state had been stymied in some important antitrust case. This may have been the case, but the story of changes outlined above indicates that the original purpose was something else. One can only assume that various legislators recognized the serious curtailment of the rights to have compulsory process and to be confronted by witnesses against an accused embodied in the original proposal, but one is left puzzled by the appearance of the antitrust exception as the resolution moved through the legislature and even more puzzled that anyone thought that this limited exception was important enough to justify a constitutional amendment.

Explanation

Section 10 lists the major components of a fair criminal trial. They are copied, often verbatim, from the Fifth and Sixth Amendments to the United States Constitution, and all but two—grand jury indictment and impartial jury—have been incorporated into the Fourteenth Amendment and thus apply against the states under the same standards applied to the federal government. Each component is discussed separately in the following pages.

The list in Section 10 does not exhaust the components of a fair trial. Some are found in other sections of this article (*e.g.*, the jury trial guarantee in Sec. 15), but the bulk are found in the Due Process Clause of the Fourteenth Amendment. For

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example, the United States Supreme Court has held it violative of due process to try a mentally incompetent defendant (*Pate v. Robinson*, 383 U.S. 375 (1966)), to convict before a biased judge (*Tumey v. Ohio*, 273 U.S. 510 (1927)), for a prosecutor to suppress exculpatory evidence (*Brady v. Maryland*, 373 U.S. 83 (1963)), to deny a change of venue to permit the impartial trial of a misdemeanor (*Groppi v. Wisconsin*, 400 U.S. 505 (1971)), and to adjudicate juvenile delinquency under a proof burden of less than beyond a reasonable doubt (In re *Winship*, 397 U.S. 358 (1970).) Due process is a flexible concept (see the *Explanation* of Sec. 19) and it is likely that the Supreme Court, while insisting on the presence of the seven incorporated components, will also continue measuring state criminal proceedings against the evolving standards of that process which is the due of defendants in criminal trials.

Speedy trial. The right to a speedy criminal trial was recognized in the Magna Carta and appeared in the first American colonial bill of rights, that of Virginia of 1776. Although originally developed to protect the accused from an oppressive government, a speedy trial also benefits society by clearing crowded court dockets, deterring future criminality by the example of condemnation swiftly following offense, and moving the guilty defendant from unproductive pretrial confinement to rehabilitation in a penal institution. Not surprisingly the accused often does not want a speedy trial, preferring to remain at large on bail, hoping the prosecution's witnesses will forget or become unavailable. Nevertheless, the speedy trial right of the Sixth Amendment has been incorporated into the Fourteenth Amendment and thus binds the states as well as the federal government (*Klopfer v. North Carolina*, 386 U.S. 213 (1967)). For a comprehensive discussion of the values protected by this right, see *Barker v. Wingo* (407 U.S. 514 (1972)).

Following the lead of *Barker*, the Texas Court of Criminal Appeals examines four factors when faced with a claim of denial of a speedy trial: the length of the delay, the reason for it, whether the defendant demanded a speedy trial, and whether prejudice resulted from the delay. Thus a year's delay between indictment and trial was held acceptable, although defendant was in jail the entire period, because it was not shown to be intentional and defendant did not demand a speedy trial during the year (*Davison v. State*, 510 S.W.2d 316 (Tex. Crim. App. 1974)).

The ultimate sanction for violation of the accused's right to a speedy trial is dismissal of the charges. This is a harsh remedy and courts are naturally reluctant to exercise it. As an alternative the Texas Supreme Court has expressed willingness to order (by writ of mandamus) the immediate commencement of trial when defendant shows his entitlement to it (*Wilson v. Bowman*, 381 S.W.2d 320 (Tex. 1964)). Denial of a motion for speedy trial in the trial court is not appealable, however, until after trial and conviction (*Williams v. State*, 464 S.W.2d 842 (Tex. Crim. App. 1971)).

Because of the competing values that the speedy-trial right is intended to protect, and because the concept itself is ambiguous—trials must be deliberate as well as speedy—a few jurisdictions have enacted standards to guide the prosecution and courts in bringing the accused to trial with reasonable dispatch. The standards approach was pioneered by the American Bar Association's Minimum Standards for Criminal Justice, which recommend a tough minded try-or-dismiss approach. (See *Standards Relating to Speedy Trial* (1967).)

Public trial/impartial jury. Although minted by different processes, these rights are two sides of the same coin. A public criminal trial safeguards against use of the courts as instruments of persecution, educates the public on the quality of judicial performance, publicizes the condemnation of malefactors, and occasionally turns up unknown witnesses for both the accused and state. The distaste for secret trials,

with their connotation of the Spanish Inquisition and English Court of Star Chamber, is part of our heritage. If a criminal trial becomes too public, however, it ceases to be a trial, for, in Mr. Justice Black's words, "The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper" (*Bridges v. California*, 314 U.S. 252, 271 (1941)). Today these rights are seen in conflict, necessitating what Justice Black called in *Bridges* the "trying task" of choosing between a fair trial and a free press.

Texas courts in the last century recognized both rights and implemented them along traditional lines. The court of appeals discussed the public trial right in *Grimmett v. State* (22 Tex. Ct. App. 36, 2 S.W. 631 (1886)), noting that it is not absolute while upholding a trial judge's expulsion of rowdy spectators. (See also *Kugadt v. State*, 38 Tex. Crim. 681, 44 S.W. 989 (1898) (insufficient seats); *Price v. State*, 496 S.W.2d 103 (Tex. Crim. App. 1973) (embarrassing testimony by prosecutrix in rape case).) The conviction of a black man for raping a white woman was overturned in *Massey v. State* (31 Tex. Crim. 371, 20 S.W. 758 (1892)) because of the presence of a howling lynch mob outside the courtroom during the trial. On the other hand, a newspaperman's fine for contempt in publishing trial testimony contrary to the judge's restrictive order was set aside in *Ex parte McCormick* (129 Tex. Crim. 457, 88 S.W.2d 104 (1935)), as violative of the free press guarantee.

The United States Supreme Court categorized the public trial right as an element of due process in *In re Oliver* (333 U.S. 257 (1948)). In *Estes v. Texas* (381 U.S. 532 (1965)), Mr. Justice Clark writing for the court assumed *Oliver* had incorporated the Sixth Amendment guarantee of a public trial into the Fourteenth Amendment. Thirteen years after *Oliver* the court for the first time reversed a conviction because of prejudicial pretrial publicity (*Irvin v. Dowd*, 366 U.S. 717 (1961)). It was the trial of Dr. Sam Sheppard, however, that generated the clash of values, captured by the slogan fair trial versus free press, reverberating today.

Sheppard was convicted of murdering his pregnant wife during what one Ohio appellate court judge called a "Roman holiday" for-the news media. His conviction was ultimately reversed by a unanimous Supreme Court, and in the course of his opinion Mr. Justice Clark remarked, "From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent . . ." (*Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966).) The facts of *Sheppard* lent emphasis to the American Bar Association's Reardon Report, the product of a study begun in 1964 in response to the massive publicity following the assassination of President Kennedy. The Reardon committee's report identified the critical stages and participants in publicizing criminal trials, considered and found wanting traditional solutions such as *voir dire* examination of prospective jurors, change of venue and continuance, and sequestration of trial jurors, and recommended a series of specific remedies designed to accommodate the public's right to know with the defendant's right to an impartial trial. (American Bar Association Standards for Criminal Justice, *Fair Trial and Free Press* (1968).) Like most compromises this one failed to satisfy the extremists on either side, but most states nevertheless adopted the bulk of the recommendations.

Since *Sheppard* representatives of the news media have viewed with alarm the increasing restrictions (popularly called "gag orders") imposed on the reporting of criminal trials. The Reporters Committee for Freedom of the Press claims that, between 1966 and 1975, 174 such orders have been issued. Although usually directed at counsel and law enforcement, some have named newsmen, and at least one reporter has been jailed for contempt for violating a gag order.

The Supreme Court recently struck down a gag order entered in a sensational

mass-murder trial, the majority concluding “that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact.” (*Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976).)

Notice. The right of a defendant “to demand the nature and cause of the accusation against him, and to have a copy thereof,” serves several important objectives. It furnishes notice of the exact charge against him, thus permitting preparation of a specific defense. It protects him from prosecution under an unreasonably vague penal statute. And it helps implement the double jeopardy bar by fixing the identity of the offense to prevent subsequent prosecution for the same offense. (See the *Explanation* of double jeopardy under Sec. 14.) The right to notice is a clearly established principle of procedural due process under the Fourteenth Amendment (*Cole v. Arkansas*, 333 U.S. 196 (1948)), and later cases have treated this Sixth Amendment right as incorporated in the Fourteenth Amendment.

The wording of the Texas notice right—defendant must demand a copy of the accusation to get it—persuaded the court of criminal appeals in an early case that failure to make timely demand waived the right. (*Albrigo v. State*, 29 Tex. Crim. 143, 15 S.W. 408 (1890).) The current statute (C.C.P. ch. 25) reflects this holding, but as a practical matter counsel invariably obtains the necessary copy and litigation in this area involves the sufficiency of the indictment or information or the adequacy of preparation time allowed before trial and seldom whether defendant or his counsel received notice of the accusation.

A few Texas courts have cited the notice requirement as the basis for the void-for-vagueness doctrine. For example, the court in *Ex parte Meadows* (131 Tex. Crim. 592, 100 S.W. 702 (1937)) struck down as unconstitutionally vague a traffic ordinance punishing driving “in such a manner as to indicate a willful and wanton disregard for the safety of persons and property” The United States Supreme Court found similar support for the doctrine in the Sixth Amendment’s parallel phrase in *United States v. L. Cohen Grocery Co.* (255 U.S. 81 (1921)), but application of the void-for-vagueness doctrine against state law rests on the Due Process Clause of the Fourteenth Amendment. (See, e.g., *Winters v. New York*, 333 U.S. 507 (1948); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).)

Self-incrimination. Wigmore traces the origins of the self-incrimination privilege to “two distinct and parallel lines of development” in English history. The first was the jurisdictional struggle between ecclesiastical and common law courts, a struggle begun in the reign of William the Conqueror and illustrated by opposition to Elizabeth’s High Commission in Causes Ecclesiastical and Court of Star Chamber, both of which employed the *ex officio* oath procedure to compel an accused to incriminate himself. John Lilburn’s famous sedition trial before the Court of Star Chamber in 1637 focused Puritan opposition on the *ex officio* oath and led to the Long Parliament’s abolition of the Chamber in 1641. The second line of development—opposition to pretrial examination of the accused, usually in secret, by the prosecution in the common law courts—is harder to trace, but it did not begin until the middle of the 17th century, perhaps as a fallout from the *ex officio* oath opposition, and the self-incrimination privilege was not included in the English Declaration of Rights of 1689. (8 Wigmore, *Evidence* § 2250 (McNaughton rev., 1949).) The privilege did appear in the constitutions of seven American colonies before 1789, but this is explained as reaction to procedure in the royal prerogative courts of the colonies rather than as an inheritance from England (Pittman, “The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America,” 21 *Va. L. Rev.* 763 (1935)). The privilege against self-

incrimination was included in the Constitution of the Republic of Texas and has appeared in every constitution since.

Mr. Justice Goldberg, writing for the court in *Murphy et al v. Waterfront Commission of New York Harbor* (378 U.S. 52 (1964)), concluded that the privilege against self-incrimination was founded "on a complex of values." These include the frustration of anti-belief laws and the fishing expeditions and the third-degree methods often employed to enforce them—policies grounded in the privilege's history—together with a principal tenet of American political philosophy, traceable to John Locke and other 17th and 18th century thinkers, that government should leave the individual alone until there is good cause—not supplied by the individual, however—to intervene in his affairs.

Texas courts developed the case law of the self-incrimination privilege along traditional lines. The privilege is available to both accused and witness in both criminal and civil proceedings. It also extends to certain pretrial proceedings—the grand jury investigation, for example, *Ex parte Muncy* (72 Tex. Crim. 541, 163 S.W. 29 (1914))—and to legislative investigations, *Ferrantello v. State* (158 Tex. Crim. 471, 256 S.W.2d 587 (1952)). The privilege is personal to the claimant—it cannot be asserted by another in his behalf, *Duncan v. State* (40 Tex. Crim. 591, 51 S.W. 372 (1899))—and can be waived, *Pyland v. State* (33 Tex. Crim. 382, 26 S.W. 621 (1894)). The privilege is unavailable if immunity from prosecution has been granted, limitations bars prosecution, or if the claimant has been acquitted of the offense. (*Ex parte Copeland*, 91 Tex. Crim. 549, 240 S.W. 314 (1922); *Ex parte Muncy*, 72 Tex. Crim. 541, 163 S.W. 29 (1913).)

In 1964 the United States Supreme Court federalized the privilege against self-incrimination, holding in *Malloy v. Hogan* (378 U.S. 1) that the Fourteenth Amendment's Due Process Clause incorporated the Fifth Amendment privilege and applied it against the states. Since then federal rather than state judge-made law has defined the scope and application of the privilege. For example, although many states permitted their prosecutors to comment on a defendant's failure to take the stand and testify in his own defense, this had long been forbidden in federal courts and in *Griffin v. California* (380 U.S. 609 (1965)), the Supreme Court held it detrimental to exercise of the privilege in state courts. In a series of cases decided in 1966 and 1967 the court also made it clear that the privilege is testimonial only and does not prohibit compulsory extraction of physical evidence. (See *Schmerber v. California*, 384 U.S. 757 (1966) (blood sample); *United States v. Wade*, 388 U.S. 218 (1967) (voice exemplar); *Gilbert v. California*, 388 U.S. 263 (1967) (handwriting exemplar).)

The McCarthy congressional investigations of the 1950s seriously challenged the value of the self-incrimination privilege. (For a sturdy defense of the privilege in the face of this challenge, by Harvard Law School dean and later United States Solicitor General Erwin N. Griswold, see *The 5th Amendment Today* (Cambridge: Harvard Univ. Press, 1955).) The privilege survived, however, to be vindicated by the Supreme Court in *Miranda v. Arizona* (384 U.S. 436 (1966)), its high-water mark to date that imposed elaborate safeguards on custodial interrogation by the police. But the controversy continues as law enforcement in Texas, to cite a recent manifestation, seeks the free admissibility of oral confessions, admissibility long denied by statute to further that "complex of values" protected by the privilege against self-incrimination.

Counsel. "Representation by counsel is crucial to the effectuation of all the other procedural protections which the legal system offers to the defendant. If those protections are to be meaningful and not merely a sham, it is essential that each defendant have legal assistance to realize their intended benefits." (American

Bar Association Project on Minimum Standards for Criminal Justice, *Providing Defense Services*, p. 13 (1967).) Although this seems a truism today, counsel was not allowed (much less furnished) Englishmen in all felony trials until Parliament so provided by statute in 1836.

The plight of the indigent defendant unable to retain counsel led to the federalization and extensive elaboration of this right. The process began in *Powell v. Alabama* (287 U.S. 45 (1932)), in which the court held that failure to furnish counsel to the Scottsboro boys, young blacks accused of raping two white women, violated the Due Process Clause of the Fourteenth Amendment. It continued through the "special circumstances" test of *Betts v. Brady* (316 U.S. 455 (1942)) to the landmark decision in *Gideon v. Wainwright* (372 U.S. 335 (1963)), holding that the Sixth Amendment's right to counsel applied to the states through the Fourteenth Amendment and that counsel must be furnished indigents in all felony prosecutions. Most recently, in *Argersinger v. Hamlin* (407 U.S. 25 (1972)), the court extended the right to forbid imprisonment of an indigent defendant not furnished counsel in his misdemeanor trial. (The Texas right has been somewhat broadened by statute: if imprisonment is a permissible punishment, whether or not actually imposed, counsel must be furnished. Code of Criminal Procedure art. 26.04.)

In elaborating the right to counsel the United States Supreme Court has relied on three different constitutional bases. *Powell*, as noted, was bottomed on due process, while in *Gideon* the court incorporated the Sixth Amendment's express guarantee (originally applicable to the federal government alone) into the Fourteenth to apply it against the states. In *Douglas v. California* (372 U.S. 353 (1963)), the court read the Equal Protection Clause to require furnishing counsel to an indigent for his matter-of-right appeal from conviction; the court reasoned that since solvent defendants could retain counsel for their appeals the state, to avoid discriminating on the basis of wealth, had to furnish counsel for indigents. (The equal protection base has fallen into disuse in recent years. See *Ross v. Moffitt*, 417 U.S. 600 (1974).) The court has also used the right-to-counsel guarantee to vindicate other rights—for example, self-incrimination (*Miranda v. Arizona*, 384 U.S. 486 (1966)) and confrontation (*United States v. Wade*, 388 U.S. 218 (1967)).

In addition to the trial proper, the court has identified various "critical stages" of the criminal process at which counsel must be furnished the indigent. These include the initial appearance and preliminary hearing before a magistrate (*White v. Maryland*, 373 U.S. 59 (1963)); *Coleman v. Alabama*, 399 U.S. 1 (1970)), arraignment before the trial judge (*Hamilton v. Alabama*, 368 U.S. 52 (1961)), sentencing (*Mempa v. Rhay*, 389 U.S. 128 (1967)), and, as noted, the appeal of right (*Douglas v. California*). Finally, the court has continued its due process review of the counsel issue, requiring its furnishing when necessary to ensure fundamental fairness, as in parole and probation revocation hearings (*Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973)), and quasi-criminal proceedings like juvenile delinquency adjudications (In re *Gault*, 387 U.S. 1 (1967)).

Although the right to counsel may be waived, proof of waiver must be clear and convincing, and in fact there is a presumption against waiver. (See, e.g., *Johnson v. Zerbst*, 304 U.S. 458 (1938); Ex parte *Bird*, 457 S.W.2d 559 (Tex. Crim. App. 1970).) Curiously, the Texas Constitution is one of the few whose wording makes clear that a defendant is entitled to represent himself without counsel. The Supreme Court recently accorded this right of self-representation federal constitutional status, with the dissenters noting, not a little ironically, that the circle since *Powell v. Alabama* (287 U.S. 45 (1932)) has run full course (*Faretta v. California*, 422 U.S. 806 (1975)).

The right to counsel is the right to effective counsel, and the court of criminal appeals early held, for example, that allowing counsel inadequate time to prepare a defense violated this right (*Turner v. State*, 91 Tex. Crim. 627, 241 S.W. 162 (1922)). More recent litigation has questioned the competence of counsel in a particular case, with both state and federal courts on occasion reversing a conviction because of gross incompetence in representing the defendant. (See Craig, "Ineffective Counsel in Texas and the Federal Courts," 1 *Am. J. Crim. L.* 60 (1972).)

The obligation to furnish counsel for indigents in criminal prosecutions has considerably strained state and local government treasuries. Two systems presently compete: assigned counsel, in which lawyers are chosen from a roster, usually by the trial judge to defend or appeal a particular case, and compensated according to a fee schedule like Code of Criminal Procedure art. 26.05; and public defender, in which lawyers are employed full-time by state or local government, much as the district attorney and his assistants, but to defend rather than to prosecute. The Criminal Justice Act of 1964, an innovator in this area, mandated that each federal judicial district establish one or the other system and at present federal courts in Texas are opting for the public defender.

Confrontation and compulsory process. The right of a defendant to confront the witnesses against him was well established at common law. Stephen recounts the 1603 treason trial of Sir Walter Raleigh, in which the Crown's principal witness was not called to testify although he had earlier retracted the written accusation admitted in evidence, as an example of abuse leading to development of the right. (1 Sir James Stephen, *A History of the Criminal Law of England*, pp. 333-36 (London: Macmillan, 1883).) Texas courts recognized the common law origin of the right, *Garcia v. State* (151 Tex. Crim. 593, 210 S.W.2d 574 (1948)), several years before it was held specifically incorporated in the Fourteenth Amendment's Due Process Clause. (See *Pointer v. Texas*, 380 U.S. 400 (1965).)

The confrontation right includes by implication the right of the defendant to be present at the trial so he can observe the demeanor of and cross examine his accusers (*Cason v. State*, 52 Tex. Crim. 220, 106 S.W. 337 (1907); *Kemper v. State*, 63 Tex. Crim. 1, 138 S.W. 1025 (1911)). It follows therefore that the confrontation right is denied if defendant cannot understand the witness or is unconscious when the witness testifies (*Garcia v. State supra* (Spanish-speaking defendant); *Reid v. State*, 138 Tex. Crim. 34, 133 S.W.2d 979 (1939) (epileptic)). The right is not absolute, however, so that a trial judge's expulsion of a disruptive defendant after repeated warnings did not violate it (*Illinois v. Allen*, 397 U.S. 337 (1970)), and the well-recognized common law exceptions, such as those admitting dying and spontaneous declarations, are part of it. (See *Burrell v. State*, 18 Tex. 713 (1857); *Tezeno v. State*, 484 S.W.2d 374 (Tex. Crim. App. 1972); see also *Carver v. State*, 510 S.W.2d 349 (Tex. Crim. App. 1974).) The curious Texas exception for antitrust prosecutions, whose historical origins are the obscure, has never been litigated but is probably subject to federal constitutional objection under cases like *Pointer* and *Barber v. Page* (390 U.S. 719 (1968)).

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense." This right, set out in the Sixth Amendment, was held incorporated in the Fourteenth, and thus applicable against the states, in *Washington v. Texas* (388 U.S. 14, 19 (1967)), which struck down a state law barring a defendant's use of his coparty to testify in his defense. A defendant is entitled to have his witnesses appear in court, and an admission from the prosecution that they would testify as defendant asserts is no substitute for the effect of their presence before the jury (*DeWarren v. State*, 29

Tex. 465 (1867)). In fact, the court of criminal appeals has asserted (in dictum) that courts have inherent power to compel the attendance of witnesses to protect this right. (See *Bludworth v. State*, 168 Tex. Crim. 549, 330 S.W.2d 436, 4 (1959).) Most states, including Texas, have adopted the Uniform Act to Secure Attendance of Witnesses from Without State, and the legislature recently increased nonresident witness fees, with the state taking over their payment (C.C.P. arts. 24.28, 35.27).

Indictment by grand jury. Historians disagree about the precise origin of the grand jury. Maitland saw it as a Norman innovation, growing out of the frankpledge system introduced by William the Conqueror, under which lesser freemen were formed into groups of ten and made collectively responsible for one another's conduct. More recent studies have traced the grand jury to a Saxon institution, accusation by the 12 leading thanes (knights) of the county, codified in the Laws of Ethelred. All agree, however, that it was the Assize (Royal Ordinance) of Clarendon of 1166 that formalized the practice of choosing 12 representatives of each hundred (parish) in every county to "present" to the authorities all those suspected of committing offenses. (See Sir Geoffrey Cross and C. D. G. Hall, *The English Legal System*, pp. 34-37 (London: Butterworths, 4th ed., 1964).)

Although the right to grand jury indictment is detailed in the Fifth Amendment to the United States Constitution, the Constitution of the Texas Republic did not—uncharacteristically—copy its phraseology. Perhaps this was because the right was so well established at common law, a body of law the early Texans eagerly substituted for the many abuses they attributed to Spanish and Mexican law. Be that as it may, grand jury indictment for felonies was the invariable practice long before the present constitution detailed the right in its traditional wording and the court of appeals found the presentment of a valid indictment essential to the jurisdiction of the district court (*Rainey v. State*, 19 Tex. Ct. App. 479 (1885)).

Of all the fair trial components listed in Section 10 the grand jury has been most often and heavily criticized—as a dilatory anachronism surviving today merely as a publicity tool and rubber stamp of the prosecutor. Its defenders counter, on the other hand, that the grand jury stands between a potentially oppressive government and its citizens. Several states have abolished the grand jury (England did so in 1948), substituting an information presented by the prosecutor to commence a felony trial. (The Supreme Court held in *Hurtado v. California*, 110 U.S. 516 (1884), that grand jury indictment was not an element of the Fourteenth Amendment due process applicable to the states.) In response to the delay the grand jury process often entails, the Texas Legislature in 1971 enacted a statute permitting a waiver of indictment in noncapital felonies. (See C.C.P. art. 1.141.) This statute was upheld in *King v. State* (473 S.W.2d 43 (Tex. Crim. App. 1971)).

Comparative Analysis

Except for the grand jury indictment requirement, most state constitutions, and the *Model State Constitution*, duplicate the fair trial components listed in Section 10. A tabulation of state constitutional provisions matched to the components follows: Speedy trial—44; public trial—44; impartial jury—44; notice—47; self-incrimination—48; counsel—49; confrontation—49; compulsory process—47; grand jury indictment—25 (of which nine permit the legislature to limit the types of offenses to which it applies).

Author's Comment

Again with the exception of the grand jury indictment requirement, most agree that the fair trial components of this section, deeply rooted as they are in our

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political and legal heritage, are worth preserving. Perhaps a somewhat fewer number are content with the judiciary's (especially at the federal level) interpretation and application of the components in specific cases, but that process, too, is at the heart of our constitutional and federal system of government, with its inevitable tension between society's rights and those of the individual, and between the state and federal governments, and that tension is a price most people willingly pay to live in a free society.

The tension between fair trial and law and order (to use the current slogan) regularly changes focus and intensity. In the 1950s the self-incrimination privilege was under serious attack, to emerge stronger than ever as an incorporated component of Fourteenth Amendment due process. The following decade witnessed, through the instrument of the Warren court, a great intensification of interest in the procedural rights of criminal defendants. Today the focus has shifted to a confrontation between free press and fair trial. Certainly the future will produce new clashes between competing values. As a nation we can reflect with pride on our past resolution of these clashes. Anchored in this past we can tackle the challenges of the future with considerably more confidence.

Sec. 11. BAIL. All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident; but this provision shall not be so construed as to prevent bail after indictment found upon examination of the evidence, in such manner as may be prescribed by law.

Sec. 11a. MULTIPLE CONVICTIONS; DENIAL OF BAIL. Any person accused of a felony less than capital in this State, who has been theretofore twice convicted of a felony, the second conviction being subsequent to the first, both in point of time of commission of the offense and conviction therefor may, after a hearing, and upon evidence substantially showing the guilt of the accused, be denied bail pending trial, by any judge of a court of record or magistrate in this State; provided, however, that if the accused is not accorded a trial upon the accusation within sixty (60) days from the time of his incarceration upon such charge, the order denying bail shall be automatically set aside, unless a continuance is obtained upon the motion or request of the accused; provided, further, that the right of appeal to the Court of Criminal Appeals of this State is expressly accorded the accused for a review of any judgment or order made hereunder.

History

Section 11 enlarges common law provisions regarding bail. The Constitution of 1836 protected the right to bail with substantially the same exceptions as the present Section 11 and intervening variations are not of contemporary significance. Section 11a, adopted in 1956, serves as a limitation upon the right of the accused in the interest of protecting society.

Explanation

Bail in criminal cases is "delivery or bailment of a person to his sureties on their giving, together with himself, sufficient security for his appearance, he being supposed to continue in their friendly custody instead of going to jail," (8 *Corpus Juris Secundum* 48, relying on *Blackstone*). Bail serves two main purposes: (1) it prevents innocent persons from being jailed and thus in effect punished, for defendants are presumed innocent until proven guilty; (2) it secures the presence of the accused at the proceedings against him. To protect the right in Section 11, Section 13 prohibits excessive bail. The constitutional right to bail does not