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

extend to every situation. Section 11 itself states that bail may be denied in capital cases "when the proof is evident." The burden is upon the state to establish that proof, which is "that the accused, with cool and deliberate mind and formed design, maliciously killed the deceased and that, upon a hearing of the facts before the court, a dispassionate jury would, upon such evidence, not only convict but would assess the death penalty" (Ex parte *Colbert,* 452 S.W.2d 454, 455 (Tex. Crim. App. 1970)). Obviously, this dictum must be adjusted to the decision of the United States Supreme Court that the death penalty as it presently operates is unconstitutional (*Furman v. Georgia,* 408 U.S. 238 (1972)). The constitutional right to bail does not reach one held for extradition (Ex parte *Erwin,* 7 Tex. Crim. 288 (1879)); one who has been convicted and is appealing his case (Ex parte *Ezell,* 40 Tex. 451 (1874)); or one held for hearing on revocation of probation (*Valdez v. State,* 508 S.W.2d 842 (Tex. Crim. App. 1973)).

Section 11a responds to the fear that persons out on bail will continue to commit crimes while awaiting trial, and thus in the interest of society the section diminishes the individual's right to freedom. In the only reported case under Section 11a, the court of criminal appeals upheld a denial of bail to an accused with two felony convictions less than capital (Ex parte *Miles,* 474 S.W.2d 224 (Tex. Crim. App. 1971)). In response to the complaint that Section 11a discriminates and hence presumably violates equal protection, the court held the classification in Section 11a to be reasonable.

Comparative Analysis

Some 49 states prohibit excessive bail and 41 provide generally for bail in all but capital cases. The Eighth Amendment to the United States Constitution prohibits excessive bail, but it has never been settled whether this means that congress must authorize bail or only that if congress does authorize bail it may not be excessive. No other state has anything resembling Section 11a.

Author's Comment

The long established right to reasonable bail is an essential ingredient of our system of justice in which the individual is presumed innocent until proven guilty. Society may conclude that under certain circumstances it is so endangered by the freedom of a suspect that he cannot be released. Obviously such exceptions should be made with the greatest caution.

In recent years much dissatisfaction with the operation of bail systems has been expressed. This criticism is directed, it is submitted, not at the basic right to bail but at the way courts grant bail, the administration of the system, and the operations of bondsmen.

If there is any substance to the frequently made argument that constitutions should be drawn in general terms then Section 11a is a horror of horrors. The draftsmen faced the difficult task of making their point without undermining the rights of bail for ordinary defendants. This result suffers from statutory rigidity in the worst sense. Constitutions drawn like this cannot long endure.

Sec. 12. HABEAS CORPUS. The writ of habeas corpus is a writ of right, and shall never be suspended. The Legislature shall enact laws to render the remedy speedy and effectual.

History

The writ of habeas corpus has been said to antedate the Magna Carta. It was

strengthened against judicial qualification by the famous Habeas Corpus Act of 31 Car. II (1697). The United States Constitution recognized the writ and limited its suspension (Art. I, Sec. 9). Similarly, the Texas Constitution of 1836 stated that the "privilege of the writ of habeas corpus shall not be suspended except in cases of rebellion or invasion the public safety may require it." (Declaration of Rights, Tenth Section.) This guarantee appeared in substantially the same form until 1876 when the "privilege" became a "right" subject to no exceptions. The changes were a reaction to arbitrary denials of the writ by the Reconstruction government and to suspension of the writ as well. Thus in the Convention of 1875 members argued for no suspension. Mr. Stockdale said if the provision were not adopted, the writ of habeas corpus "would be suspended by arbitrary power as they had seen it in too many instances during the last fifteen years" (*Debates*, p. 237). Mr. DeMorse added,

> It was the only security remaining for the liberty of the citizen, and he hoped never again to see upon the continent of America such action as was taken during Mr. Lincoln's administration, when men were picked up from the streets and immured in dungeons without knowledge of the offense with which they were charged, and continued in prison without intimation to their families or their friends as to their whereabouts or the crime until released at the pleasure of the authorities (P. 294).

Explanation

The law of habeas corpus is essentially uncomplicated but, in the last three or four decades, has become controversial in the area of constitutional review of criminal convictions. In essence, the writ of habeas corpus is a command by a judge to someone holding a person in custody to produce that person in court in order to establish by what legal authority the person is held. Thus, the writ is available to prevent the sort of wholly unlawful detention discussed in the 1875 Convention. The writ is also a means for contesting denial of bail, excessive bail, the validity of an extradition warrant, and any wholly illegal action which brought about detention.

The writ is not the means for raising legal questions appropriately raised elsewhere. To take an extreme example, a person convicted in a regular trial cannot immediately obtain a writ of habeas corpus on the grounds that there were fatal errors in the trial. Rather, the convicted person must appeal to a higher court. In the technical terminology of the law, one cannot mount a collateral attack—here the writ—when a direct attack is available—here an appeal. A less extreme example is a claim of double jeopardy. A person who claims that he is in custody for an offense for which he has already been tried cannot rely on the writ; he must raise the point in defense in proceedings in the new case. (But note the exception discussed below.)

It is in the area of collateral versus direct attack that use of the writ has become controversial. The controversy arose because the United States Supreme Court began to allow the use of the writ in United States courts to attack convictions in state courts allegedly obtained unconstitutionally. This course could be followed even when, in the course of the direct attack by appeal, the convicted person had tried to get a hearing by the United States Supreme Court and had been turned down. There is nothing wrong with the theory; a person unconstitutionally held in custody is obviously entitled to release on a writ of habeas corpus. (A different theoretical question arises when a new rule of law is announced; are all those in custody entitled to release even if their cases were completed prior to the announcement of the new rule? For an extended discussion of the problem, see *Linkletter v. Walker*, 381 U.S. 618 (1965).) The practical problem is that persons in prisons have

flooded the courts, federal and state, with applications for writs of habeas corpus. The principal means of coping with this problem is to turn aside applications that are frivolous, no different from earlier applications, or otherwise without merit. (For a recent example, see Ex parte *Carr*, 511 S.W.2d 523 (Tex. Crim. App. 1974).) Nevertheless, the courts recognize the importance of the writ and are willing to cut through technicalities to do justice. In a recent case the court of criminal appeals held in favor of a prisoner who, representing himself, argued that one of his guilty pleas entered several years earlier should be set aside on grounds of double jeopardy (Ex parte *Scelles*, 511 S.W.2d 300 (Tex. Crim. App. 1974)).

Comparative Analysis

Nine other states absolutely prohibit suspension of the writ. All other states contain an exception that is the same as or similar to the exception contained in the United States Constitution. (See the preceding *History*.)

Author's Comment

The writ of habeas corpus, a basic writ of English liberty, may still occasionally serve as a shield against political oppression. At least the salutary history of its protective influence in the past is reassuring. Although many statutes and constitutional rules serve to protect the citizen from illegal detention, the writ of habeas corpus is still available to protect him from such detention whether through oversight or willful abuse of authority.

Sec. 13. EXCESSIVE BAIL OR FINES; CRUEL AND UNUSUAL PUNISHMENT; REMEDY BY DUE COURSE OF LAW. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

History

Except for a change of "or" to "nor" in 1845 and thereafter, the words of Section 13 have appeared unchanged in every Texas constitution. The first sentence of Section 13 almost exactly repeats the wording of the Eighth Amendment to the United States Constitution. (The Eighth Amendment says "cruel *and* unusual.") The second sentence may be traced to the Magna Carta.

Explanation

Section 13 sets out five guarantees: (1) freedom from excessive bail, (2) freedom from excessive fines, (3) freedom from cruel and unusual punishments, (4) the guarantee of open courts, and (5) the right to remedy by due course of law. The Fourteenth Amendment, it would seem, may extend federal protection in each of these categories, the first three through incorporation of the Eighth Amendment and the last two directly through the Due Process Clause.

(1) *Freedom from Excessive Bail.* If bail is excessive then the right to bail extended by Section 11 is effectively nullified. On principle, bail should be sufficient only to assure the appearance of the accused at his trial. To guide in meeting constitutional requirements, the legislature has enacted the following rules:

(1) The bail must be sufficiently high to give reasonable assurance that the undertaking will be complied with.

(2) The power to require bail is not to be so used as to make it an instrument of oppression.
(3) The nature of the offense and the circumstances under which it was committed are to be considered.
(4) The ability to make bail is to be considered, and proof may be taken upon this point. (C.C.P. art. 17.15)

The reasonableness of bail depends upon all of the circumstances. For an indigent, very little bail may be excessive. Thus the Code of Criminal Procedure provides that persons may be released upon their promise to appear at trial. For them, as on the issue of excessiveness generally, family and community ties and whether the individual has a job weigh heavily. The nature of the crime or crimes charged and the punishment that may be assessed affect the limit of reasonableness (Ex parte *Alba,* 469 S.W.2d 188 (Tex. Crim. App. 1971)). Hence the ability of the accused to make bail is not the sole criterion of setting the amount, although before he will be heard to apply for a reduction he must try to make bond at the original amount (Ex parte *De Leon,* 455 S.W.2d 260 (Tex. Crim. App. 1970); Ex parte *Roberts,* 468 S.W.2d 410 (Tex. Crim. App. 1971)).

(2) *Freedom from Excessive Fines.* This provision has seldom protected persons upon whom fines were levied. In ordinary criminal prosecutions the court is obviously limited by the maximum fine fixed by law but this is a matter of statutory authority and does not involve Section 13. The constitutional rule was stated by the supreme court: "Prescribing fines and other punishment which may be imposed upon violators of the law is a matter peculiarly within the power and discretion of the Legislature, and courts have no right to control or restrain that discretion, except in extraordinary cases, where it becomes so manifestly violative of the constitutional inhibition as to shock the sense of mankind" (*State v. Laredo Ice Co.,* 96 Tex. 461, 467, 73 S.W. 951, 953 (1903)). This proviso sounds like Justice Frankfurter's "shock the conscience" test for due process violations. (See *Rochin v. California,* 342 U.S. 165, 172 (1952).)

Apparently in no instance have fines imposed in ordinary criminal prosecutions been held constitutionally excessive. However, litigants, opposing statutory penalties attached to the violation of tax or regulatory acts, derived some comfort from several cases which applied Section 13 (*State v. Galveston H. & S. A. Ry. Co.,* 100 Tex. 153, 97 S.W. 71 (1906) (tax penalty); *Gulf Union Oil v. Isbell,* 205 S.W.2d 105 (Tex. Civ. App.—Austin 1947), *rev'd on other grounds* 209 S.W.2d 762 (Tex. 1948) (possible penalty payable before revival of a forfeited corporate charter)). Use of Section 13 to protect such private pecuniary interests rather than personal interests seems questionable. In any case judicial interest in this aspect of Section 13 was always slight and in recent years it seems to have faded away.

(3) *Freedom from Cruel or Unusual Punishment.* A study of English history reveals ample examples of cruel and unusual punishments. Most of these barbarous practices have long since been discontinued. The question today is what is cruel and unusual under current moral standards. An early Texas opinion cited Cooley's dictum with approval:

> Probably any punishment declared by statute for an offense which was punishable in the same way at common law could not be regarded as cruel or unusual, in the constitutional sense; and probably any new statutory offense may be punished to the extent and in the mode permitted by the common law for offenses of a similar nature. But those degrading punishments which in any state have become obsolete before its existing constitution was adopted, we think, may well be held forbidden by it, as cruel and unusual. (*Martin v. Johnston,* 33 S.W. 306, 309 (Tex. Civ. App. 1895, *no writ*)).

Until fairly recently claims of cruel or unusual punishment were unsuccessful. (The one exception was a 1910 case invalidating a Philippine statute prescribing 10 to 20 years imprisonment for making a false entry in a public record, a much harsher penalty than that imposed for other more serious crimes (*Weems v. United States*, 217 U.S. 349)). This is not surprising, since the general trend in society has been toward less harsh punishments. In Texas there was a period when juries imposed ridiculous terms of imprisonment under statutes setting no maximum limit. For example, the term imposed in *Rodriguez v. State* was 1500 years (509 S.W.2d 625 (Tex. Crim. App. 1974)). The opinion in that case noted that these sentences had always been upheld simply because a prisoner is eligible for parole after serving one-third of the sentence or 20 years, whichever comes first. Moreover, the court noted that this nonsense has been ended by the new Texas Penal Code, which limits terms to a maximum of 99 years (sec. 12.32).

The United States Supreme Court has led the way in finding cruel and unusual punishment in areas not covered by the traditional statement previously quoted. A harbinger of things to come was *Francis v. Resweber* (329 U.S. 459 (1947)), where the court held five-to-four that it was not cruel and unusual punishment to re-order electrocution after the first attempt failed through an accidental failure of the equipment. Since then the court has held that punishment for being a drug addict is cruel and unusual (*Robinson v. California*, 370 U.S. 660 (1962)), and that depriving a native-born citizen of citizenship as part of punishment for desertion in time of war is cruel and unusual (*Trop v. Dulles*, 356 U.S. 86 (1958)). And, of course, there were the capital punishment cases, *Furman v. Georgia* and *Branch v. Texas* (408 U.S. 238 (1972)), holding that, under the circumstances in those instances, execution would have been cruel and unusual punishment. Since the court divided five-to-four with nine separate opinions, the constitutional status of capital punishment remained unclear.

In those cases only three of the majority justices were prepared to outlaw capital punishment per se. Two of the majority argued that the system in question permitted arbitrary and capricious imposition of the death penalty. In the light of this "swing" vote, many states undertook revisions of criminal statutes in order to eliminate arbitrariness. One approach was to make the death penalty mandatory for certain crimes, thereby making it "impossible" for a jury or a judge to act arbitrarily or capriciously. Another approach was to separate determination of guilt from the determination of the penalty and to establish standards for deciding whether, under the circumstances, the death penalty is justified. Texas took the second approach. In *Jurek v. State*, the court of criminal appeals upheld the statute (522 S.W.2d 934 (1975)). Not surprisingly, the court had difficulty threading a path through the nine opinions in the *Furman* case and disagreed among themselves whether the Texas approach would satisfy the United States Supreme Court.

On July 2, 1976, that court settled the matter in a batch of cases from five states, including the *Jurek* case from Texas. (See *Gregg v. Georgia*, 428 U.S. 153; *Proffitt v. Florida*, 428 U.S. 242; *Jurek v. Texas*, 428 U.S. 262; *Woodson v. North Carolina*, 428 U.S. 280; and *Roberts v. Louisiana*, 428 U.S. 325.) Again, there was a plethora of opinions, but again essentially only three positions among the justices. Four members of the court were prepared to let the states pretty much make their own rules about capital punishment; two justices adhered to their earlier view that no form of capital punishment is permissible; and three justices controlled the results by holding that the discretionary approach adopted by Texas, and with variations by Georgia and Florida, is permissible but that the mandatory penalty, adopted by Louisiana and North Carolina, is not permissible.

It seems likely that capital punishment will continue to be litigated in one way

or another for a long time to come. It is an emotional issue, in some respects a racial issue, in some respects a rich-against-poor issue, and in all respects a judicial versus legislative power issue.

Notwithstanding these new developments under the United States Constitution, there is no indication that Texas courts intend to vary from the interpretation of Section 13 set forth in the quotation above. There has, however, been a successful invocation of the Eighth Amendment as incorporated in the Fourteenth Amendment in the case of juveniles confined in institutions of the Texas Youth Council. But this was a case in the U.S. district court; no mention was made of Section 13. (See *Morales v. Turman,* 364 F. Supp. 166 (E.D. Tex. 1973).) In passing, it should be noted that there is apparently no significance in the difference between Section 13's "cruel *or* unusual" and the Eighth Amendment's "cruel *and* unusual."

(4) *Open Courts.* The requirement that all courts be open is significant in two respects. In the first place, along with Section 24, it limits the governor respecting martial law. As Judge Hutcheson put it, "Martial law, the law of war, in territory where courts are open and civil processes run, is totally incompatible with . . . article I, Bill of Rights of the Texas Constitution" (*Constantin v. Smith,* 57 F. 2d 227, 237 (E. D. Tex. 1932)). He went on to observe that pertinent parts of the Constitution of 1876, as the English Bill of Rights of 1689, emerged from suppression when the needs for these guarantees were very real. In calling out the troops, the governor is a civil officer. He may not close the courts or interfere with their processes. As concerns the governor and militia, "Their powers and duties are derived from, they must be found in, the civil law. At no time and under no conditions are their actions above court inquiry or court review" (P. 238). The open court provision also requires the courts to be open to supply redress of grievances but in this respect is the same as the next requirement to be discussed.

(5) *Due Course of Law.* Both Sections 13 and 19 contain due course of law provisions. Although they are frequently coupled together and applied without discussion, their meaning seems to be different. Section 13 guarantees that the courts will be open so that the individual may seek a remedy according to due course of law. Section 19, on the other hand protects the individual from being treated by the state under any circumstances without due course of law. Both are "due process" clauses. Properly, however, Section 13 deals only with access to the courts and hence is the lesser due process provision while Section 19 roughly parallels the due process clauses in the Fifth and Fourteenth Amendments.

Statutes denying access to the courts to redress a grievance may violate Section 13 (*Clem v. Evans,* 291 S.W. 1871 (Tex. Comm'n App. 1927, *holding approved*)). "The right to a day in court and the privilege of being heard before judgment is a constitutional guaranty, the very essence of due process of law" (*Johnson v. Williams,* 109 S.W.2d 213, 214 (Tex. Civ. App.—Dallas 1937, *no writ*)). Thus "due course of law in a case tried in a District Court," said an early supreme court opinion, "means a trial according to the settled rules of law in that court . . ." (*Dillingham v. Putnam,* 109 Tex. 1, 3, 14 S.W. 303, 304 (1890)).

Although Section 13 denies a governmental right to close the courts to redress of any intentional wrong done to the person of a defendant, it does not create a vested right to the continuance of particular rules of law (*Middleton v. Texas Power & Light Co.*, 108 Tex. 96, 185 S.W. 556 (1916)). An ordinance which absolved the city from all damages arising from grading and public improvements violated Section 13 because it prohibits "legislative bodies from arbitrarily withdrawing all legal remedies from one having a cause of action well established and well defined in the common law" (*Lebohm v. City of Galveston,* 154 Tex. 192, 196,

275 S.W.2d 951, 954 (1955)). On the other hand substitution of new and different remedies for those at common law in workmen's compensation cases is constitutional (154 Tex. at 196, 275 S.W.2d at p. 954).

Comparative Analysis

Substantially all of the states prohibit excessive bail. Thirty-eight states require that civil courts be open to all persons and 45 states have due process clauses. "Cruel and unusual punishments" are prohibited by 47 states while 49 states prohibit excessive fines. It is unimportant but interesting to note that 21 states use "and," 19 states use "or," and six states only "cruel" punishments. The 1974 Louisiana Constitution prohibits "cruel, excessive or unusual punishments." The preceding Louisiana constitution belonged in the "and" category. The *Model State Constitution* is in the "or" category.

In 1972 the California Supreme Court held capital punishment unconstitutional under the state constitution (*People v. Anderson*, 6 Cal.3d 628, 493 P.2d 880, 100 Cal. Rptr. 162). Later that year an initiative constitutional amendment was adopted overruling the decision. This means that the California courts now cannot go beyond the rule laid down by the United States Supreme Court.

Author's Comment

The guarantees in Section 13 all represent the basic consensus in our society as to how government should act. Since they do reflect this agreement these provisions have not been extensively litigated. Questions may arise as to the extent of the rights listed and this has been particularly true in regard to cruel and unusual punishments where extension beyond traditional definitions has seemed possible.

Sec. 14. DOUBLE JEOPARDY. No person, for the same offense, shall be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction.

History

The guarantee against double jeopardy was a part of the common law of England long before the American revolution (*Benton v. Maryland*, 395 U.S. 784, 795 (1969)). It was recited in *Blackstone* and appeared in the Fifth Amendment to the United States Constitution. In substantially the same terms, the Texas Declaration of Rights of 1836 provides, "No person for the same offense, shall be twice put in jeopardy of life and limbs." The Constitution of 1845 repeated these words less the "s" on limbs and added "nor shall a person be again put upon trial for the same offense after a verdict of not guilty." The Constitution of 1869 omitted "limb" while that of 1876 inserted "or liberty" and added to the second clause the words "in a court of competent jurisdiction."

Explanation

Section 14 applies to three situations: (1) former acquittal, (2) former conviction, and (3) former jeopardy. A defendant, when put on trial, is in jeopardy considerably before he is properly acquitted or convicted and thus in a general sense the guarantee against former jeopardy includes the other two. Nevertheless the courts talk in terms of all three situations. The "underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing

state of anxiety and insecurity, as well as enhancing the possibilities that even though innocent he may be found guilty" (*Green v. United States,* 355 U.S. 184, 187-88 (1957)). The right is to be liberally construed; hence it extends to misdemeanors as well as felonies (*Grisham v. State,* 19 Tex. Ct. App. 504 (1885)), and to juveniles in delinquency proceedings (*State v. Marshall,* 503 S.W.2d 875 (Tex. Civ. App.—Houston (1st Dist.) 1973, *no writ*)).

When does jeopardy arise? An early case stated the traditional rule as follows: "A person is in legal jeopardy when he is put on trial before a court of competent jurisdiction upon an indictment or information sufficient in form and substance to sustain a conviction and a jury has been empaneled and sworn to try the case" (*Powell v. State,* 17 Tex. Ct. App. 345, 363 (1884)). This meaning was well established long before the adoption of the first Texas constitution (*Thomas v. State,* 40 Tex. 36 (1874)). Texas goes beyond the traditional rule, however, by requiring also that following swearing of the jury the accused enter his plea before jeopardy attaches (*Lockridge v. State,* 522 S.W.2d 526 (Tex. Crim. App. 1975); *Steen v. State,* 92 Tex. Crim. 99, 242 S.W. 1047 (1922); see *Steele,* "The Doctrine of Multiple Prosecution in Texas," 22 *Sw. L. J.* 567 (1968)). Jeopardy may cease "where the defendant, by a motion made, has claimed surprise and asked for a continuance, or where he has asked for and been granted a new trial, or has appealed the case and secured a reversal thereof, or in any instance where, on his motion, the case has been postponed and withdrawn from the consideration of the jury" (*Johnson v. State,* 73 Tex. Crim. 133, 136, 164 S.W. 833, 834 (1914)). To this list must be added sickness of the participants, acts of God, and a hung jury (*Powell v. State, supra; Murphy v. State,* 149 Tex. Crim. 624, 198 S.W.2d 98 (1946)).

Special problems arise in cases of previous acquittal or conviction for the same offense. In pleas of previous acquittal not only must the offense or transaction be the same but the evidence necessary for a conviction must also be the same. On the other hand, to sustain a plea of previous conviction, in theory only the transactions must be identical. Steele, whose article is referred to above, discusses both the difficulties in applying the rule of previous conviction and the liberality of Texas courts to the defendant in such cases.

In 1968 the United States Supreme Court first decided that the double jeopardy provision of the Fifth Amendment applied to the states (*Benton v. Maryland,* 395 U.S. 784). This means, the court noted, that federal rules regarding double jeopardy apply. It is still possible, however, for the federal and state governments each to prosecute a defendant for crimes arising out of the same transaction, as robbery of a federally insured bank. This is true because the same act constitutes separate offenses against two different sovereigns (*Bartkus v. Illinois,* 359 U.S. 121 (1959); *Breedlove v. State,* 470 S.W.2d 880 (Tex. Crim. App. 1971), *cert. denied* 405 U.S. 1074 (1972)). Of course this separate-sovereigns idea does not apply within a single state and hence a conviction in a municipal court must be accepted in a state court on a double jeopardy plea (*Waller v. Florida,* 397 U.S. 387 (1970)).

Comparative Analysis

Double jeopardy clauses appear in 45 state constitutions.

Author's Comment

Although not the oldest of the common law protections to appear in the federal and state bills of rights, the guarantee against double jeopardy is well established and universally enforced. It reflects the fear of oppression. The problem in modern criminal justice is that of apprehending wrongdoers and prosecuting them

promptly. The attack upon this problem will not be seriously embarrassed by the inability to try some offenders twice. It does not seem likely that the recent application of federal minimum standards to Texas will make much difference in this area. It may be of some interest that the federal courts have managed to find adequate protection against double jeopardy in the briefer and more quaintly worded clause in the Fifth Amendment. Texas courts do not seem to have made much use of the specific words found in Section 14 but rather seem to decide on the history and the general concept of double jeopardy.

Sec. 15. RIGHT OF TRIAL BY JURY. The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency. Provided, that the Legislature may provide for the temporary commitment, for observation and/or treatment, of mentally ill persons not charged with a criminal offense, for a period of time not to exceed ninety (90) days, by order of the County Court without the necessity of a trial by jury.

Sec. 15a. COMMITMENT OF PERSONS OF UNSOUND MIND. No person shall be committed as a person of unsound mind except on competent medical or psychiatric testimony. The Legislature may enact all laws necessary to provide for the trial, adjudication of insanity and commitment of persons of unsound mind and to provide for a method of appeal from judgments rendered in such cases. Such laws may provide for a waiver of trial by jury, in cases where the person under inquiry has not been charged with the commission of a criminal offense, by the concurrence of the person under inquiry, or his next of kin, and an attorney ad litem appointed by a judge of either the County or Probate Court of the county where the trial is being held, and shall provide for a method of service of notice of such trial upon the person under inquiry and of his right to demand a trial by jury.

History

Development of the jury reaches far back in English history. Gradually, through a process of differentiation, the grand-jury and the petit or trial jury emerged. Originally, jurors operated on their own knowledge of events; gradually, the system developed so that jurors acted only upon testimony presented to them. Acceptance of the jury system as an inalienable right was also gradual. Both the United States and Texas Declarations of Independence denounced the responsible authorities for denial or partial denial of the right to trial by jury. (Markham, "The Reception of the Common Law of England in Texas and the Judicial Attitude Toward that Reception, 1840-1859," 29 *Texas L. Rev.* 904 (1951).)

Actually the struggle for jury trial in Texas began before independence was won from Mexico and Section 192 of the Constitution of Coahuila and Texas provided for its gradual introduction. Thus Texas constitutions do not purport to create the right to trial by jury but only to recognize and safeguard the pre-existing right. Accordingly the opening sentence of Section 15, "the right to trial by jury shall remain inviolate," sufficed for all previous Texas constitutions. The present Section 15 adds a directive to the legislature that it pass laws for the regulation, purity, and efficiency of jury trial. To deal with problems involved in commitment of the mentally ill, the proviso was added to Section 15 in 1935 and a new Section 15a adopted in 1956.

Explanation

Sections 15 and 15a do not stand alone in guaranteeing a jury trial. As previously noted, Section 10 guarantees a jury trial in criminal cases. Article V

contains additional jury clauses. (See Secs. 10, 13, and 17 of Art. V. See also Sec. 19 of Art. XVI.) These sections overlap and their redundancy has led to some judicial confusion. Section 10 of Article I opens with the words, "In all criminal prosecutions the accused shall have a speedy trial by an impartial jury." One might assume then by a process of exclusion that Section 15 extends only to civil cases but in fact Section 15 is a blanket guarantee, coupled in previous constitutions with the guarantee against double jeopardy, which of course applies in criminal prosecutions only. At times the courts have said Sections 10 and 15 are to be read together (*Moore v. State,* 22 Tex. Ct. App. 117, 2 S.W. 634 (1886)). When Professor Whitney R. Harris analyzed judicial application of Article I, Section 15, and Article V, Section 10, in civil cases he encountered some confusion. "In most cases," he wrote, "consideration has not been given to the different scope and effect of these sections, which their terminology seems to require. Sometimes an exception has been justified on the ground that one does not apply, without regard to possible right of jury trial under the other section; sometimes both sections have been construed as one" (Harris, "Jury Trial in Civil Cases—A Problem in Constitutional Interpretation," 7 *Sw. L. J.* 1, 7 (1953)). In any case the Texas Constitution does guarantee jury trial in both civil and criminal cases on a very broad basis.

In explaining the provisions of the Texas Bill of Rights it has been noted again and again that the United States Constitution as interpreted by the United States Supreme Court is controlling and in many instances has clearly overridden the meaning that the Texas courts would probably give to the Texas counterpart. In the case of the right to trial by jury, the story is different. In several respects the right is broader than the United States Supreme Court requires under the Fourteenth Amendment. Yet, paradoxically, the strong Texas provision has spawned amendments to Section 15, discussed below, that would not have been necessary under the flexible rules recently laid down by the United States Supreme Court. And yet, doubly paradoxically, the right to a jury trial in cases of commitment of the mentally ill, the subject of the amendments, is vicariously in the current stream of thought on the necessity for protecting the allegedly mentally ill from what amounts to imprisonment. This mix of paradoxes is sorted out below.

The key words in Section 15 are "shall remain inviolate." This has always been construed by the Texas courts to mean that the jury system as it existed at the time of the adoption of the 1876 Bill of Rights cannot be changed by statute. (See *White v. White,* 108 Tex. 570, 196 S.W. 508 (1917), and cases cited. The *White* case is discussed below.) For many years the United States Supreme Court held a comparable view—that the right to a jury trial in criminal cases guaranteed by the Sixth Amendment and the right in civil cases guaranteed by the Seventh Amendment meant the jury system as it existed in the English common law at the time of the adoption of those amendments. But for many years this judicial view was applicable only to the federal judicial system.

Relatively recently the United States Supreme Court has altered its view at least in the context of "incorporation" of the Sixth Amendment into the Fourteenth Amendment. That is, the court does not require states to preserve the common law criminal jury trial as it existed in 1791. (See *Williams v. Florida,* 399 U.S. 78 (1970) (jury of fewer than 12); *Apodaca v. Oregon,* 406 U.S. 404 (1972) (less than unanimous verdict).) For Texas this means that Section 15 can be amended directly or indirectly to change the jury system but until that is done the words "shall remain inviolate" preserve the traditional system. Of course, the Texas Constitution already authorizes juries of fewer than 12 (Sec. 17 of Art. V) and less than unanimous verdicts (Sec. 13 of Art. V). It should be noted that the foregoing discussion is limited to criminal trials. The United States Supreme Court

has not "incorporated" the Seventh Amendment into the Fourteenth Amendment and, it seems fairly certain, never will do so. (It is also not clear how far the court will go in permitting congress to change the jury system in either criminal or civil trials in federal courts, but that is not a problem under the Texas Constitution.)

So far as criminal trials are concerned, the words "shall remain inviolate" guarantee a jury trial "in all criminal prosecutions." (The second quotation is from Sec. 10.) Except for trials in county courts, municipal courts, and justice courts, this means a jury of 12. The other juries have six persons. For county courts this is set by Section 17 of Article V; for justice courts, the size apparently predates 1876; and for municipal courts the size was apparently chosen by analogy to justice courts. (As for the requirement of unanimity, see the *Explanation* of Sec. 13 of Art. V.)

The general rule in criminal trials is that a jury finds the facts and the judge instructs the jury on the law upon the basis of which the jury is supposed to find a person guilty or not guilty of the offenses charged. In some states, including Texas, juries may be given some power to fix the punishment. This jury power is not, however, a part of the constitutional right to a jury trial (*Emerson v. State,* 476 S.W.2d 686 (Tex. Crim. App. 1972)). Likewise, the privilege of waiving one's right to a jury trial is not constitutionally protected. The state can insist that a jury determine guilt. At the present time Texas insists upon this only in capital cases (C.C.P. art. 1.13).

In criminal cases, the right is to trial by an "impartial" jury (Sec. 10). Section 15 does not refer to impartiality, but the right is equally a part of the jury system in civil cases. In practice, impartiality is assured by the process known as *voir dire* whereby jurors are questioned as to their biases, prejudices, relationship or close friendship with the parties and their lawyers, and the like. Following this the judge excuses some people, either on his own or because one side or the other challenges a person for cause. As a final step each side has a specified number of peremptory challenges, which helps each side get rid of people who might be partial to the other side or, paradoxically, permits each side to try to get less impartial jurors. In all this process there is little of constitutional stature except in the relatively rare instance when the judge does not carry out his duty to assure an adequate search for impartiality.

There are two issues related to jury trials that concen impartiality but are considered in a different constitutional context. One is the problem of racial discrimination in the drawing of jury panels. Although the basic issue is impartiality, the constitutional issue has traditionally been considered in terms of a denial of the equal protection of the laws. (See *Explanation* of Sec. 3.) The other problem is that of undue publicity in advance of a jury trial. Again, the basic issue is the ability of jurors to be impartial, but the constitutional issue has been cast in terms of the due process requirement of a fair trial. (See *Explanation* of Sec. 10.)

The words "shall remain inviolate" are much more significant in the case of civil trials than in criminal matters. This is in part the case because Section 10 guarantees a jury trial but principally because at common law there were many situations in which there was no right to a jury trial. Interestingly enough, Texas is not bound by the most significant dichotomy in the traditional common law system—the distinction between law and equity. In a suit at law a jury was normal; in a suit in equity there was no jury or at most a jury that advised the judge. But in Texas, beginning with the Constitution of 1845, a right to a jury trial was guaranteed in "all causes in equity." (See *History* of Sec. 10 of Art. V.) This, of course, grants a right that is much broader than the Seventh Amendment of the United States Constitution, which excludes equity bases from the right to a jury trial.

Even though the important category of equity is within the jury system, there

are matters which are not within the jury trial guarantee. Professor Harris listed the following as "illustrative categories of action" in which district courts denied jury trial: "(1) election contests; (2) contempt proceedings; (3) proceedings for child custody; (4) adoption proceedings; (5) review of administrative decisions" (7 *Sw. L. J.* at 8). Other lists of exceptions are available (*Walsh v. Spencer,* 275 S.W.2d 220, 233 (Tex. Civ. App.—San Antonio 1954, *no writ*)). Although Article V, Section 10, provides for jury trial in district courts in "all causes," the exceptions are apparently not causes within the meaning of that section. The interesting explanation in *Texas Jurisprudence* is that "although the proceeding is technically a cause, there is still no right to a jury trial unless such a trial was customarily had in a cause of the particular kind" (26 *Tex. Jur.* 577).

The oddest thing about "shall remain inviolate" is that Texas requires a jury trial under circumstances that are not considered worthy of a jury trial in most states. For example, a lawyer is entitled to a jury trial in a disbarment proceeding. (Only two other states, Georgia and North Carolina, give an accused lawyer the same right.) A reason given for the Texas practice is that a statute so provided at the time of the 1875 Convention and so "shall remain inviolate." This was forcefully answered some years ago:

> . . . it should be pointed out that the language used in the Constitution of 1876 is precisely the same as that found in the Constitution of 1845 and the modifications of that instrument made in 1861, 1866, and 1869. Article I, Section 12 of the first Constitution adopted by the State of Texas declares, as does that of 1876, that 'the right of trial by jury shall remain inviolate.'
>
> It seems quite unlikely that the makers of the Constitution of 1876 in copying these words from the earlier document meant anything different from what the fathers of 1845 meant by the same words. To assume that the fathers of 1876 consciously intended to include in the clause quoted something new and different requires a degree of credulity not usually possessed by lawyers and courts. And, then, to develop this assumption into a restriction upon the useful powers of the legislature, in direct disregard of the well established rule of constitutional construction that the legislature of a state may exercise all legislative powers not granted to the Federal government nor denied to it by either the Federal or the state constitution, is to make a fetter of our constitution and not a safeguard of the liberties of the people.
>
> In the opinion of the present writer, all that the fathers of 1845 and 1876 meant by the clause quoted was to perpetuate the 'system of trial by jury' in its large outlines as understood and applied generally in English-speaking countries. It was not sought to perpetuate any particular experimental use of it that might have been tried either in Texas or elsewhere. That this is the true meaning of the clause is indicated by the next sentence in the existing Constitution which declares that 'the Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency,' thus giving the legislature the power to supervise and adjust the system to the changing needs of the passing years. (Potts, "Trial by Jury in Disbarment Proceedings," 11 *Texas L. Rev.* 28, 50-51, (1932) (footnote omitted).)

Much the same argument can be made about *White v. White* (108 Tex. 570, 196 S.W. 508 (1917), the case that is responsible for the 1935 amendment of Section 15 and for Section 15a. Prior to 1876, the statutory scheme for commitment of the mentally ill required a jury finding that a person was of unsound mind. This was amended in 1913 to substitute a commission of six persons, some or all of whom could be physicians. (Since the proceeding was in county court, which, under Sec. 17 of Art. V, provides for a jury of six, that was the magic number.) The supreme court held the amended statute unconstitutional, relying in large part on "shall remain inviolate."

Apparently the state was able to get along for some time with the jury system of

committing the mentally ill, for the first change in the system did not come for almost 20 years. The 1935 amendment added the "non-sentence" that permitted the legislature to provide for a temporary commitment without the use of a jury. The basic requirement of a jury trial for a permanent commitment remained, however, and was severely criticized. (See Weihofen and Overholzer, "Commitment of the Mentally Ill," 24 *Texas L. Rev.* 307, 321-22 (1945). They pointed out at that time that only in Texas and Mississippi was a jury trial mandatory.)

Section 15a, added in 1956, did not take away the jury trial altogether. A careful reading of the section leads one to surmise that the Texas devotion to the jury was too great to permit a grant of complete freedom to the legislature. Yet, obviously, there was a recognition that something was wrong with the jury system. The first sentence of Section 15a expresses a belief that a lay jury is not competent to commit a person as mentally ill. That is, the jury must be presented with *competent* expert testimony. (The balance of Sec. 15a is probably unnecessary; even "shall remain inviolate" would not prevent any of the legislation authorized by these two sentences.)

In a way the Texas requirement for a jury trial in commitment cases, once attacked as not appropriate for what was considered essentially a medical problem, is in the latest "mainstream" of reaction to a procedure that seems to be overlooking the civil rights of the mentally ill. In the last few years the United States Supreme Court has been solicitous of the rights of people who were carted off to mental hospitals and, so to speak, forgotten. (See, for example, *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *McNeil v. Director, Patuxent Institution*, 407 U.S. 245 (1972); *Jackson v. Indiana*, 406 U.S. 715 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972).) It may be that a couple of generations ago a lay jury would ship off to the "insane asylum" any strange character and that the need then was for expert medical opinion to prevent injustices. Today, it may be that the experts are too quick to commit people and that a lay jury may serve a useful purpose in tempering the expert's certainty with a little doubt. If this is what happens, Sections 15 and 15a have become unusually strong protectors of civil rights.

Comparative Analysis

All states guarantee the right to jury trial in criminal cases. Almost without exception they guarantee the jury in civil cases as well.

Author's Comment

The jury has played an essential role in the American system of justice. Hardly anyone would suggest that the jury be abolished but the extent and manner of jury use is another question. Emotional appeals to tradition should not preclude examination of this question or consideration of a more flexible jury provision which would leave more leeway for experimentation. In the best scientific study of juries in operation, Kalven and Zeisel, *The American Jury* (Boston, 1966), found that juries worked pretty well, but their study was not designed to deal with other aspects of the problem. For example, as high as 90 percent of criminal cases are settled by plea bargaining and not by the theoretically standard jury trials. In civil cases, one suspects that jury trials are frequently requested not because this method of trial is preferred but as an element of delay to gain advantage in the bargaining which will lead to an ultimate settlement of the case even after a jury is empanelled. Much is sometimes made of the fact that jury service is one of the few instances where the ordinary layman may perform a public service and there is something to the argument. On the other hand the time of many laymen may be wasted in helping private parties settle a private issue through the courts. The jury right is the only

right which imposes a duty of service upon fellow citizens whose time and interests should also be weighed in the balance of utility and justice. Use of the jury, particularly in civil cases, has declined sharply in England, the country of its origin. A decision to preserve the Texas jury system exactly as it has existed in the past should not be made without considering the realities of the present and the prospects for reform in the settlement of litigation.

Incidentally, from the point of view of drafting, it is interesting to note that it takes six times as much space in the constitution to take care of commitment of the mentally ill as to deal with the jury rights of the rest of us.

Sec. 16. BILLS OF ATTAINDER; EX POST FACTO OR RETROACTIVE LAWS; IMPAIRING OBLIGATION OF CONTRACTS. No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.

History

The guarantees of Section 16 have appeared in substantially the same form but in different contexts in all Texas constitutions. After a sentence on treason, Section 16 of the Declaration of Rights of 1836 stated, "No retrospective or ex post facto law, or laws impairing the obligation of contract, shall be made." There was no statement regarding bills of attainder. In subsequent bills of rights, the section read exactly the same as the present Section 16 except that each of the earlier sections also contained a short version of the eminent domain provision now found in Section 17. The Constitution of 1869 added the further words "nor shall any law be passed depriving a party of any remedy for the enforcement of a contract, which existed when the contract was made." The 1875 Convention deleted these words and, of course, redid eminent domain.

Three prohibitions of Section 16, those regarding bills of attainder, ex post facto laws, and laws impairing the obligation of contract, are repetitions of prohibitions upon state action contained in Section 10 of Article I of the United States Constitution. The other provision in Section 16, the prohibition of "retroactive laws," is found neither in the United States Constitution nor in most of the state constitutions.

Attainder under English law was analogous to a bill of pains and penalties and was originally intended for those who fled from justice. In fact, attainder in its earliest form could only be used against fugitives from justice charged with felony because accused persons could not be tried in their absence. The final degradation of the process of attainder came through the work of Cromwell and the timid judges of Henry VII. But Cromwell was the first to perish by an act of attainder which was hurried through parliament and deprived him of a trial.

The federal prohibitions against ex post facto laws and laws impairing the obligation of contracts were probably influenced by certain very early acts of the state legislatures. For example, the dishonesty of the "pine-barren law" of South Carolina and the paper-money acts of Rhode Island probably affected the ex post facto provision. Long after the convention, Madison wrote that early acts of internal state administration explained the inclusion of the contract clause. He cited paper tender, installment laws, and unjust actions by the courts.

The other prohibition concerning "retroactive laws" seems to spring from a general suspicion regarding all retroactive laws of which the three mentioned were notorious examples. Early judicial restriction of the scope of ex post facto laws to retroactive criminal laws may have prompted a desire to re-establish the broader sweep, which the prohibition had in the minds of some people, by general condemnation of retroactive laws.

Explanation

Section 16, it has been noted. prohibits four things: (1) bills of attainder; (2) ex post facto laws; (3) laws impairing the obligation of contract; and (4) retroactive laws. Although the first two prohibitions deal with criminal law, the third with civil law, and the fourth potentially with both, a certain element of unity runs through them all. In a sense all deal with retroactivity. The first three prohibitions simply repeat specific limitations upon the states recited in Section 10 of Article I of the United States Constitution. State judges are bound by oath to enforce these federal prohibitions and the United States Supreme Court interpretation of them of course prevails. (Note, however, that a Texas court can invalidate a Texas law under Sec. 16 without regard to whether the United States Supreme Court would invalidate the law under Sec. 10 of Art. I.) No important and continuing conflicts between state and federal interpretation appear to have arisen. State judicial use of Section 16, once rather considerable, seems to have declined.

(1) A bill of attainder is a legislative conviction of a person or group of persons (usually for treason) without judicial trial. At times in English history such bills were used as notorious devices for dealing with political enemies. They were employed for the same purpose in America around the time of the Revolution. Bills of attainder were adopted according to no fixed rule of law and they might work corruption or attainder of the blood (Ex parte *Garland,* 71 U.S. (4 Wall.) 333 (1867)). Historically, bills of attainder resulted in capital punishment while bills of pains and penalties were used for lesser punishments but as used in the United States Constitution the term "bill of attainder" includes bills of pains and penalties.

Few federal cases have involved bills of attainder. After the Civil War the United States Supreme Court extended the concept to strike down test oaths disqualifying some persons from exercising their former professions (Ex parte *Garland, supra; Cummings v. Missouri,* 71 U.S. (4 Wall.) 277 (1867)). In more recent times, some of the justices, particularly Justice Black, sought, with limited success, to extend the prohibition to other legislative disqualifications of persons or groups. In *United States v. Lovett* (328 U.S. 303 (1946)), a congressional provision which denied three named public employees payment of salary was found to violate the prohibition. Later in *United States v. Brown* (381 U.S. 437 (1965)), the United States Supreme Court held unconstitutional a section of the Labor-Management Reporting and Disclosure Act of 1959 which made it a crime, with certain exceptions, for a member of the Communist Party to serve as an officer or employee of a labor union. This, said the court, singles out a particular group for criminal liability. The "Bill of Attainder Clause," continued Chief Justice Warren, "was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function or more simply—trial by legislature" (p. 442). It "reflected the Framer's belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons" (p. 445).

Although this case opens the door for a broad definition of bills of attainder, cases on the subject are so infrequent that it is difficult to predict what the United States Supreme Court might do under different circumstances at a different time. Apparently no Texas case has turned upon the bill of attainder provision although a few litigants have tried unsuccessfully to use it.

(2) An ex post facto law is a retroactive criminal law which operates to the detriment of the accused. In 1798 Justice Chase gave what has become the classic definition of the term. It consists of "1st. Every law that makes an action done

before the passing of the law; and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense in order to convict the offender" (*Calder v. Bull,* 3 U.S. (3 Dall.) 386, 390). This definition has been repeated almost verbatim by Texas courts (*Hill v. State,* 146 Tex. Crim. 334, 335, 171 S.W.2d 880, 883 (1943)).

Texas attorneys have made considerable use of the prohibition, sometimes with success. The legislature may change or mitigate the punishment for a crime without infringing upon the guarantee (Ex parte *Tate,* 471 S.W.2d 404 (Tex. Crim. App. 1971)). Enhancement statutes also are not prohibited ex post facto laws. Thus the legislature could constitutionally provide greater punishment for a criminal repeater even if the first offense was committed before the enhancement statute passed the legislature. The statute did not inflict greater punishment for the first offense but rather imposed a heavier penalty for repeated criminal conduct (*Vasquez v. State,* 477 S.W.2d 629 (Tex. Crim. App. 1972)).

Some state actions have constituted ex post facto laws. Thus, enforcement of an ordinance against "locating" a billboard was an ex post facto law for a defendant who had located his billboard before the ordinance was passed (*Cain v. State,* 105 Tex. Crim. 204, 287 S.W. 262 (1926)). A statute which lowered the rate for working off a fine from $1 to 50¢ a day after the defendant had begun serving was an ex post facto law (Ex parte *Hunt,* 28 Tex. Ct. App. 362, 13 S.W. 145 (1890)). A law accepting the uncorroborated testimony of purchasers of bootleg liquor while at the time of sale such evidence could not stand alone under the accomplices law was invalid because it authorized conviction on less evidence (*Plachy v. State,* 91 Tex. Crim. 405, 239 S.W. 979 (1922)). Further, a law which increased from 15 to 20 years the period before which a person serving a life term could be considered for parole was invalid for a defendant already serving. Said the court, the prohibition applies to "any change in the law, whether by legislative amendment, judicial construction, or administrative re-interpretation" (Ex parte *Alegria,* 464 S.W.2d 868, 874 (Tex. Crim. App. 1971)). "Any law is an ex post facto which inflicts a greater punishment than the law annexed to the crime when committed, or which alters the situation of the accused to his disadvantage" (p. 872).

(3) Laws impairing the obligation of contract may undermine the value of vested rights. The federal prohibition upon such state laws was a response to conditions in the period of the Articles of Confederation. Some state legislatures had tried to relieve debtors from the hardships of depression by reducing the burden of their debts. This could no longer be done.

In the early years of the Republic, when individuals sought federal court aid to protect their vested property interests from state action, their eyes fell upon the contract clause. The United States Supreme Court responded by broad construction in favor of creditors. Thus in *Fletcher v. Peck* (10 U.S. (6 Cranch) 87 (1810)), the court applied the prohibition in cases where the state itself was a party to the contract. Soon after, state charters granted to corporations were held to be protected contracts (*Trustees of Dartmouth College v. Woodward,* 17 U.S. (4 Wheat.) 518 (1819)). By the time of the Taney Court, however, the idea prevailed that the contract clause did not offer complete protection to vested rights but rather states might affect them through the exercise of their police power (*Charles River Bridge v. Warren Bridge,* 36 U.S. (11 Pet.) 420 (1837)). Furthermore, there were some basic powers which the state could not bargain away (*New Jersey v. Wilson,* 11 U.S. (7 Cranch) 164 (1812)). In any case, the contract clause, however

construed, was not a sufficiently broad shield to protect property interests on the scale which the United States Supreme Court for a time was willing to protect. Hence, as the concept of substantive due process of law emerged, use of the contract clause declined. It revived briefly during the great depression and then lapsed into relative disuse.

Texas courts have, in general, followed federal construction of the contract clause with one notable exception. In *Home Building and Loan Association v. Blaisdell* (290 U.S. 398 (1934)), the United States Supreme Court held in a 5-4 decision that the Minnesota mortgage moratorium law did not violate the contract clause. Minnesota had tried to protect mortgage debtors, caught by declining land values during the depression, from the strict letter of their obligations while also safeguarding creditors. In the same year, the Texas Supreme Court struck down a similar Texas mortgage moratorium law (*Traveler's Insurance Co. v. Marshall,* 124 Tex. 45, 76 S.W.2d 1007 (1934)). Accepting as it had to, the correctness of federal interpretation of Article I, Section 10, the court asserted that the Texas contract clause meant something else. Its meaning was fixed in 1876 when the constitution went into effect and that meaning was reenforced by the rule of Section 29. The court accepted federal case law to 1876 but not after. (See the *Explanation* of Sec. 29 of Art. I.)

Litigants, seeking to protect property, seem to have found other sections of the Bill of Rights more promising and thus there are few recent Texas cases which rely on the contract clause. Judicial response is no longer uncompromising. The courts recognize the right to regulate professions despite the contract clause because the effects of such regulation upon existing contracts are indirect (*Davalina v. Albert,* 409 S.W.2d 616 (Tex. Civ. App.—Amarillo 1966, *no writ*)). Zoning ordinances "are valid exercises of the police power, and no person can by voluntary act acquire any right which would impair the right of government to exercise such power" (*Biddle v. Board of Adjustment,* 316 S.W.2d 437, 441 (Tex. Civ. App.—Houston 1958, *writ ref'd n.r.e.*)). Furthermore, the limitation on contracts applies only to an act of the legislature and not to a decision by a court (*Amalgamated Transit Union, Local Div. 1338 v. Dallas Public Transit Bd.,* 430 S.W.2d 107 (Tex. Civ. App.—Dallas 1968, *writ ref'd n.r.e.*), *cert. denied* 396 U.S. 838 (1969)).

(4) The prohibition on retroactive laws in Section 16 raises difficult problems. Since the preceding prohibitions in the section also deal with retroactive laws, the term "retroactive," urged Justice Stayton in an early case, must mean something other than the preceding specific constitutional limitations (*Mellinger v. City of Houston,* 68 Tex. 37, 3 S.W. 249 (1887)). His argument excluded not only the specific guarantees of Section 16 but the due course of law limitation as well. Although he perceived the growing scope of due process of law at the time of his opinion, Justice Stayton could not have foreseen its remarkable subsequent development. The prohibition upon the passage of retroactive laws has been limited to civil laws and, contrary to Justice Stayton, it appearantly extends ony to those subjects covered by the contract and due process clauses. Thus, it has been said that laws are retroactive in the sense of Section 16 only when they contravene another specific prohibition of the Constitution (*Keith v. Guedry,* 114 S.W. 392, 396 (Tex. Civ. App. 1908), *rev'd on other grounds,* 103 Tex. 160, 122 S.W. 17 (1909)).

Although Section 16 seems to prohibit retroactive laws in unqualified terms, such laws are frequenlty both beneficial and constitutional. Thus, only when retroactive laws "destroy or impair" vested rights are they unconstitutional (*Deacon v. City of Euless,* 405 S.W.2d 59, 62 (Tex. 1966)). The legislature may alter remedies and procedures so long as these changes do not disturb vested rights (*City of Fort Worth v. Morrow,* 284 S.W. 275 (Tex. Civ. App.—Fort Worth 1926, *writ ref'd*)).

These general statements are deceptively simple and do not really explain the cases. In fact the statements have been contradicted at times in the cases and the main standby, "vested rights," represents little more than a conclusion: those rights which the court decides should be protected. Such were the views Bryant Smith expressed in two perceptive law review articles ("Retroactive Laws and Vested Rights," 5 *Texas L. Rev.* 231 (1927); 6 *Texas L. Rev.* 409 (1928)). Only a few states, he noted, prohibit retroactive laws in specific terms. In the others, the legal question remains basically the same: is the law so arbitrary that it violates the due process standard? The situations presented by retroactive laws are so diverse that cases which apply in one type of factual situation should not be cited as authority for others. Rather, urged Smith, the law should be worked out for each narrow category by "balancing and discrimination" among the arguments and not by mechanical use of decisions involving the same constitutional provision but other facts. He found the law to have been stated fairly well in regard to alteration of the statute of limitations and revival or limitation of claims.

Comparative Analysis

The score for state constitutions prohibiting ex post facto laws is 43; impairment of the obligation of contract, 37; and bills of attainder, 31. The number of states which specifically prohibit retroactive laws is negligible.

Author's Comment

Certainly public policy against bills of attainder, ex post facto laws, and laws impairing the obligation of contracts is well settled. One may, however, question the utility of repeating these prohibitions in the Texas Constitution when they are specifically detailed in the same words as limitations upon the states in Article I, Section 10, of the United States Constitution. Considering the historical record, there seems no danger that these prohibitions will be deleted from the United States Constitution. The situation is very different from recent applications of sections of the United States Bill of Rights to the states by the incorporation doctrine, for these federal guarantees are only as firm limitations upon the states as are the decisions of the United States Supreme Court. Texas judges are bound by oath to enforce Section 10 anyway. Of course, if Texas judges wish to diverge from federal interpretation, separate state provisions may help. However, in the instance where this happened under Section 16, the result was questionable in the light of subsequent history. Furthermore, the same independent course might have been taken anyway and based upon another section of the Texas Bill of Rights.

The prohibition on retroactive laws is difficult to defend. Apparently, as construed, it prohibits only what is prohibited by other sections of the Bill of Rights. Professor Smith found that it covered only due process questions. Then why not deal with these questions under a "due course of law" provision and eliminate this vague, redundant generality?

Sec. 17. TAKING, DAMAGING OR DESTROYING PROPERTY FOR PUBLIC USE; SPECIAL PRIVILEGES AND IMMUNITIES; CONTROL OF PRIVILEGES AND FRANCHISES. No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof.