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CIVIL RIGHTS

AND

LIBERTIES

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CIVIL RIGHTS AND LIBERTIES

Free men have well learned that their liberties evaporate rapidly in the presence of unchecked governmental power, for freedom has always and in every circumstance been a "hard bought thing." Its maintenance after the blood price of original purchase requires further and continuous expenditures of human effort and sacrifice. The Framers of the national Constitution were well aware that governmental forms and legal phraseology were not in themselves adequate barriers against those who would seek to destroy freedom. But they were wise enough to perceive that forms and words could lend support and make easier the task of a people whose spirit was bent on the retention of freedom.

The Constitution of the United States abounds with examples of the efforts of the Framers to insure that governmental power and authority should be limited in its scope, circumscribed by limitations which could be truly effective only with the support of a united people. The principles of separation of powers and checks and balances are manifestations of the desire to limit governmental authority. The principle of limited government, or constitutional government as it is frequently called, which

is so basic to democratic systems finds expression in the original Constitution and in the Bill of Rights which was so soon appended to the fundamental law after its adoption.¹

The state governments which were organized during and after the Revolutionary War were the products of antipathy to governmental authority. These governments, like the national authority established in 1787, were sharply limited in their powers. The limitation was particularly noticeable insofar as the executive authority was concerned. The constitutions of these state governments contained Bills of Rights in most cases.

The founders of the American state and national governments did not rely solely on their own experience and intelligence in drafting the Bills of Rights which they appended to their fundamental laws. Behind the pronouncements which were made in the constitutions were centuries of theory and practice--and struggle. Magna Carta (1215), the Petition of Rights (1632), and the English Bill of Rights (1689) were part of a great tradition. English history was a part of the American heritage and

¹ Hamilton, and others, felt that a Bill of Rights was an unnecessary and even dangerous appendage for the Constitution which had been written. He argued that the new government was one of delegated powers only; therefore it would not have the power to encroach or trespass in the areas that might be encompassed by a Bill of Rights. He argued, too, that bills of rights are necessary only for people who must force a grant of rights from a despot or tyrant; under the new government the people themselves were the rulers. The Federalist, Modern Library Edition, 558-61.

the men of the Revolutionary Era benefited from that heritage. They did not copy English history; they utilized it for the lesson which it could teach a young and struggling New World democracy.

Traditionally it is government and not the individual citizen which is limited by the Bills of Rights of the national and state constitutions. The protections afforded by the constitutions are protections against encroachment by government on spheres of citizen activity which are constitutionally declared to be "civil rights and liberties" and therefore beyond the purview of government.

Traditionally, too, bills of rights are negative and restrictive in character rather than positive. The citizens are not compelled to take certain courses of action by the Bills of Rights of constitutions. Obligations may be enjoined on the citizenry by the pressure of public opinion or even by legislative enactment, but seldom, if ever, is there a constitutional compulsion.

The Purpose of a Bill of Rights

Today, on the demand of the people expressed through their duly elected representatives, government on all levels has assumed a greater and greater variety of service functions and activities. Hence, bills of rights have assumed ever greater importance. At the same time, a number of the traditional rights protected under the original federal and state bills of

rights have become so deeply ingrained in the American governmental system and in American tradition that few citizens are conscious of the initial grievances that called them into being.

A bill of rights is, in a very real sense, an expression of political faith and ideals--it sets the bounds of political authority and reserves to the individual certain freedoms believed essential to human happiness. It guarantees protection for those areas of individual difference necessary for the operation of popular government and political democracy.

Few areas of public law form the basis for as many legal actions as do federal and state bills of rights. The very growth of governmental authority and activity has involved over the years an ever greater encroachment on the privileges and liberties enjoyed by individuals and their privately organized enterprises and institutions. Liberty is relative in that it cannot be so utilized that its exercise by one individual deprives another of his just freedoms. The courts of our land are ever called upon to delimit the boundaries of individual freedom as individual well-being comes into conflict with the well-being of society. Likewise they must decide in case after case at what point the long-run cause of free institutions assumes greater significance than an immediate and apparent social advantage or benefit. To a degree greater than in any other country, judges in the United States have the duty of

assuring that statutes and administrative action accord with the principles expressed in state and federal bills of rights.

There can be little question that the Alaskan Constitution must have a bill of rights. Protection of individual freedoms, tradition, and the expressed policies of the United States Congress in proposed enabling legislation all demand its inclusion. The basic question, therefore, is what should and should not be included in a bill of rights for the Alaskan Constitution.

Relationship Between the Federal Bill of Rights And State Bills of Rights

It is to be noted that from a legal standpoint the existence of the federal Bill of Rights has obviated to some extent the need to include certain specific provisions in state bills of rights. The federal Bill of Rights was for many years a limitation on the action of the federal government and was held to impose no limitations on the scope of state action.² However, after adoption of the Fourteenth Amendment to the federal constitution, a new relationship gradually emerged whereby a number of the prohibitions of the federal Bill of Rights were held to limit state authority as well as that of the national government.³ The major change in judicial interpretation came

² Barron v. Baltimore, 7 Pet. 243 (1833).

³ The new doctrine was slow to emerge. As late as 1922 the Supreme Court held that "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the states any restrictions about freedom of speech. (Prudential Insurance Co. v. Cheek, 259 U. S. 530).

in 1925 when the United States Supreme Court was considering the legality of a New York law designed to suppress seditious utterances. The court held that "For present purposes we may and do assume that freedom of speech and press--which are protected by the First Amendment from abridgement by Congress--are among the 'fundamental personal rights and liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."⁴ The dual character of the civil rights structure in the United States has now been partially bridged by judicial interpretation.

What rights and "liberties" of the first ten amendments to the federal constitution are included in the Fourteenth Amendment and therefore protected by the national constitution against state action? The fact of the matter is that the Supreme Court has not blanketed in all of the first ten amendments but only those that it has deemed "basic and fundamental" to a "scheme of ordered liberty." Consequently, even though a state Bill of Rights may contain many expressions of principle which, because of the bridging action of the Fourteenth Amendment, duplicate statements in the federal Bill of Rights, both literally and in legal force, a state cannot assume that all rights of its citizens are adequately and fully protected by the federal document. A state Bill of Rights covering the fundamental features of the federal Bill is generally regarded as desirable and necessary.

⁴ Gitlow v. New York, 268 U. S. 652.

Many states have gone far beyond the fundamental freedoms protected in the federal Bill of Rights and have added others reflecting particular attitudes and problems of the citizens of the state community. Viewed in retrospect, however, many of the "rights" included in some of the state Bills of Rights seem neither fundamental nor proper in a constitutional document. For instance, the agricultural state of Minnesota declared constitutionally that "any person may sell or peddle the products of the farm or garden occupied or cultivated by him without obtaining a license."⁵ California and Rhode Island, where fishing is important, have guaranteed in their Bills of Rights that their citizens shall "enjoy and freely exercise all the rights of fishing."⁶ Many other examples of a similar nature might be cited. Over the years it has become increasingly clear as our society has become more complex and the area of government action has been extended so that limitations on government authority related to particular local circumstances and times eventually become handicaps rather than benefits. If a so-called "right" is not so fundamental as to have almost universal applicability in times of normal political life, its inclusion in a Bill of Rights is of dubious merit.

⁵ Constitution of Minnesota, Article I, Section 18. When this provision was included, it is doubtful if anyone foresaw a federal agricultural policy involving production and marketing quotas and related measures.

⁶ Constitution of California, Article I, Section 25; Constitution of Rhode Island, Article I, Section 17.

The materials which follow survey the contents of the Bills of Rights of the various state constitutions, with some applicable comment on the reasons for their inclusion. The widely varying nature of the provisions makes classification difficult, and the major categories for discussion are therefore somewhat arbitrary. It should be recognized that the various rights discussed are at some points interrelated and often do not stand by themselves as the organization of the material might appear to indicate.

The provisions are classified generally under five headings: (1) provisions on popular sovereignty and safeguards to popular government; (2) provisions on the civil rights of persons; (3) provisions on the rights of persons accused of crime; (4) provisions on property rights; and (5) provisions on economic and social rights.

Provisions on Popular Sovereignty and Safeguards to Popular Government

Many states have incorporated into their constitutions verbal expressions of the principle of popular sovereignty, the concept that the people grant and control the exercise of governmental power. Government is not something imposed on the people but something which comes from the people.

Provisions on Popular Sovereignty

Only the State of New York has failed to include in its constitution a declaration of popular sovereignty. In the

Bills of Rights of the other 47 states, or Declarations of Rights as they are sometimes known, there are statements which express Abraham Lincoln's immortal "Government of the people, by the people, and for the people." Some of the statements are lengthy; some are short. The North Carolina Constitution, after speaking of the "great, general, and essential principles of liberty and free government" declares that

all political power is vested in, and derived from, the people; all government of right originates from the people, is founded upon their will only,⁷ and is instituted solely for the good of the whole.⁷

The California provision is equally simple:

All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right to alter or reform the same whenever the public good may require it.⁸

The California provision just quoted carries with it, in the last phrase, the concept that the people retain the right to change their form of government. This idea, whether expressed or unexpressed, is nevertheless an integral part of the idea of popular sovereignty.

Provisions on Safeguards to Popular Government

Provisions guaranteeing free and open elections are found in the constitutions of all states, but 24 of the states have seen fit to make such guarantees a part of their Bills of Rights.

⁷ Art. I, sec. 2.

⁸ Const., Art. I, sec. 2.

Nebraska specifies, for example, that

All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise.⁹

One might list as other safeguards to popular government the now somewhat archaic provisions which frequently appear in state constitutions dealing with such matters as prohibition of hereditary titles,¹⁰ and subordination of the military to civil power.¹¹ These were important items many years ago but the customs of the people have now firmly engrafted these prohibitions on our system of government and they have become so much a part of it that inclusion in a Bill of Rights is now merely form.

Provisions on the Civil Rights of Persons

Freedom of the Person

The 13th Amendment to the national Constitution, adopted as a direct result of the Civil War, prohibits any person or state from holding individuals in a condition of slavery or involuntary servitude. The prohibition is clear and no further statement is needed in any state Bill of Rights. Nevertheless, the southern states formerly in rebellion were required

⁹ Const., Art. I, sec. 22.

¹⁰ E. g., Maine Const., Art. I, sec. 23: "No title of nobility or hereditary distinction, privilege, honor or emolument, shall ever be granted or confirmed, nor shall any office be created, the appointment to which shall be for a longer time than during good behavior."

¹¹ E. G., Mississippi Const., Art. III, sec. 9: "The military shall be in strict subordination to the civil power."

to make it a part of their constitutions which were drafted after the Civil War.¹² Many of the other states admitted subsequent to the Civil War also made it a part of their fundamental law.¹³ As such, the provision merely reiterates the federal Bill of Rights.

Freedom of Dissent

No right is more fundamental to free and democratic government than that of freedom to dissent from the established order of things. The point is of importance in an age which places emphasis on uniformity of thought and speech in matters political, social, and economic. The expression of unorthodox opinions through speech and printed matter is one of the hallowed traditions upon which this nation was founded. It is not surprising, therefore, that even though the 14th Amendment has carried over the federal guarantees on speech to the protection of the individual against action by a state, expressions on freedom of speech and press are found in every state constitution. It is of some significance that even those constitutions which have been revised since the decisions of the Supreme Court have continued to carry the speech provisions.

¹² E. g., Mississippi Const., Art. III, sec. 15: "There shall be neither slavery nor involuntary servitude in this State, otherwise than in the punishment of crime, whereof the party shall have been duly convicted."

¹³ E. g., Nebraska Const., Art. I, sec. 2. The wording is identical to that of Mississippi.

The New Jersey Constitution of 1947 contains a typical provision:

Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.¹⁴

A number of states, such as Maine,¹⁵ also utilize this longer form. Some, however, express merely the basic policy, without such extended consideration of the question of libel. Idaho is an example:

Every person may freely speak, write or publish on all subjects, being responsible for the abuse of that liberty.¹⁶

Dissent to established policies can be expressed in ways other than individual speech or print; the right of assembly and the right to petition the government for the redress of grievances are part and parcel of freedom. Dictators call them mobs; democracy recognizes the group as an instrument of necessary protest. The common expression of the principle is similar to that of the Arizona Constitution which states simply:

¹⁴ Art. I, sec. 6.

¹⁵ Const., Art. I, sec. 4.

¹⁶ Const., Art. I, sec. 9.

The right of petition, and of the people peaceably to assemble for the common good, shall never be abridged.¹⁷

The Oregon version is a bit longer but expresses much the same concept:

No law shall be passed restraining any of the inhabitants of the state from assembling together in a peaceable manner to consult for their common good; nor from instructing their representatives; nor from applying to the legislature for redress of grievances.¹⁸

In these modern days, the right to petition for the redress of grievances in effect guarantees the right to lobby for or against particular pieces of legislation. "Lobbying" has become a word with an unpleasant connotation, but the right to do so, subject to reasonable regulation, is constitutionally protected not only in the national Constitution but in the state constitutions as well.¹⁹

Freedom of Religion

There is, for the most part, little quarrel today with the basic right of religious freedom--the right of man to worship or not to worship, to believe or not to believe, as his conscience dictates. The Bill of Rights of the federal Constitution was written in a period when American experience was antagonistic to the idea of the amalgamation of church and state, because Americans had had experience with such amalgamation in England. The 1st Amendment to the national Constitution

¹⁷ Art. I, sec. 5.

¹⁸ Const., Art. I, sec. 26.

¹⁹ The Georgia Constitution declares lobbying to be a crime, the only state which does so. Art. I, sec. 2, par. 5. Needless to say the provision has not reduced lobbying activity.

provides, therefore, that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."¹⁹

The state Bills of Rights have taken this idea and expanded upon it. The sections have usually been rather lengthy. Problems in the hotly disputed argument over the separation of church and state have, moreover, forced the amendment of this particular section in some instances. The present lengthy provisions in the Washington Constitution²⁰ reads as follows:

Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment.

To this point the section is the same today as it was in the original Constitution of 1889. The last sentence, however, raised difficulties and controversies. The following additional sentence was therefore inserted in 1904 at this point in the section:

Provided, however, That this article shall not be so construed as to prevent the employment by the state of a chaplain for the state penitentiary, and for such of the state reformatories as in the discretion of the legislature may seem justified.

²⁰ Art. I, sec. 11, as amended.

The remainder of the sections reads today as it did in 1889:

No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.

The Connecticut Constitution contains a much shorter statement on religion in its Bill of Rights:

The exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons in this State; provided that the right hereby declared and established, shall not be so construed as to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the State.

No preference shall be given by law to any Christian sect or mode of worship.²¹

The importance of religious thought in Connecticut is manifested, however, by the fact that the constitution's Article VII, a lengthy one, is devoted in entirety to religion!

Religious controversy has found its way to the United States Supreme Court in recent years. The use of public school facilities for religious instruction has been held to violate the 1st and 14th Amendments of the national Constitution;²² but "released time" programs, where students are given time from school to attend religious instruction held in churches

²¹ Art. I, secs. 3 and 4.

²² McCullum v. Board of Education, 333 U. S. 203 (1948).

and synagogues, have been held constitutional.²³ The use of public school buses for transportation of children to parochial schools has been held not to violate the 1st and 14th Amendments.²⁴

Provisions on the Bearing of Arms

The federal and 33 of the state constitutions declare that the right to keep and bear arms shall not be infringed.²⁵ In practical effect, the demands of modern day society have limited the sweeping language. Some state constitutions have stated, along with the general principle, that the carrying of concealed weapons may be punished or prohibited.²⁶ Many states have by statute provided for the registration of pistols, revolvers, and automatic weapons.

Provisions on the Rights of Persons Accused of Crime

We have become accustomed in recent years to an emphasis on civil rights--speech, press, assembly, religion, and petition. We tend to forget that the first freedoms which Englishmen asserted and won for themselves were in the field of criminal law. The barons at Runnymede wrung from King John in the Magna Carta a guarantee that "no free man shall be taken, or imprisoned, or disses'd or outlaw'd, or banished or any ways destroyed; nor . . . pass upon him, or commit him to prison, unless by the

²³ Zorach v. Clauson, 343 U. S. 306 (1952).

²⁴ Everson v. Board of Education, 330 U. S. 1 (1947).

²⁵ E. g., Alabama Const., Art. I, sec. 26; Wyoming Const., Art. I, sec. 24.

²⁶ E. g., Louisiana Const., Art. I, sec. 8; Colorado Const., Art. II, sec. 13.

"legal judgment of his peers, or by the law of the land."
The phrase "law of the land" is the progenitor of the famous "due process of law" concept. And due process of law meant, down until the latter part of the 19th Century, due process of criminal law--fairness of procedure in the process of conviction for an illegal action.

In the English and American traditions, a man is innocent until he has been proved guilty. A presumption of innocence follows him throughout the course of his arraignment and trial. Of considerable concern today are the non-legal but nevertheless real presumptions of guilt that have to be associated with accusations and interrogations made in the course of executive and legislative investigations concerning matters of subversive activity. Persons accused in such circumstances are generally not on trial, although if suspicion comes to rest upon them they may be deprived of employment in government or in certain industries. They may be subjected to social ostracism. Since they are not on trial, however, persons called as witnesses or accused of subversive associations frequently are denied many of the protections afforded common criminals, such as the right to face one's accuser and to cross-examine witnesses against him. The problem involved has become a subject of great controversy, and as yet no really satisfactory solution has been offered. There are cogent arguments why in matters of subversion witnesses should be kept secret and why more formal court procedures would in many cases defeat the efforts of

investigative agencies to identify and render harmless those whose loyalty to the United States is open to question. It is not here suggested that Alaskans in their constitutional deliberations attempt to resolve the problems involved in this issue. The problem is mentioned only to call attention to a fundamental matter related to the legal and investigative processes and long-standing presumptions of innocence in the face of the unusual pressures of modern political life.

Guarantees Against Usurpation of the Judicial Function

The writ of habeas corpus has been called the "most important single safeguard of the American judicial system." Blackstone extolled it as the "bulwark of the British constitution." The writ is an order issued by a court directed to any person detaining another and requiring him to bring the "body" of the prisoner before the court. The judge then determines whether legal cause exists to hold the prisoner further. Thus detention without speedy hearing is barred. Forty-one state constitutions, as well as the national Constitution, have incorporated this guarantee.

On the national level, the operation of the writ can be suspended only by Act of Congress, or at least under authority directly granted by Congress.²⁷ Some states allow the suspension

²⁷ Ex parte Milligan, 4 Wallace 2 (1866); Duncan v. Kahanamoku, 327 U. S. 304 (1946).

of the writ in cases of "rebellion or invasion,"²⁸ and some prohibit the suspension of the writ on any account.²⁹ The usurpation of the judicial function is secured in this manner against action by the executive branch of the government.

There is always the possibility that usurpation of the judicial function may be attempted by the legislature, especially in moments of popular passion. There are two especially obnoxious ways in which legislatures have acted in times past to prevent a fair trial: directly, through a bill of attainder;³⁰ or indirectly, through an ex post facto law.³¹ Both devices had been frequently used in English practice and even in early American colonial legislatures. The fathers of early American state

²⁸ E. g., Louisiana Const., Art. I, sec. 13: "The privilege of the writ of habeas corpus shall not be suspended, unless, when in case of rebellion, or invasion, the public safety may require it."

²⁹ E. g., Oklahoma Const., Art. II, sec. 10: "The privilege of the writ of habeas corpus shall never be suspended by the authorities of this State."

³⁰ A bill of attainder is a direct legislative condemnation, a law that finds a specified person guilty of a crime without a court trial. Sometimes the attainder extends only to the accused, sometimes it works an attainder of blood, or extends to the heirs.

³¹ An ex post facto law is a criminal statute that applies to an act committed before the passage of the law and operates to the disadvantage of the accused. An action cannot be changed to a crime if it was not so at the time the act was performed, nor can the penalty be increased retroactively, nor can the rules of evidence be changed to make conviction easier.

constitutions and the national Constitution took special pains to forbid the practice.

An express prohibition of these practices by the states is made in the federal Constitution.³² Because of the specific terminology, state provisions on the topic are not really necessary. Nevertheless, most state constitutions have added the declaration to their Bills of Rights.³³

Provisions Requiring Fair Trial

General Provisions. Even though the details of what constitutes a fair trial vary among the states and between the states and the federal government, the fundamentals of a fair trial are fairly easily established. All of the fundamentals are based on the idea of the presumption of innocence and together they add up to the Anglo-Saxon concept of "fair play." An individual accused of crime generally has a right: (1) to be informed of the nature and cause of the accusation made against him;³⁴ (2) to defend himself or, in capital cases and in many states other cases as well, to have the assistance of counsel in the preparation and the conduct of the defense; (3) to have the

³² Art. I, sec. 10.

³³ E. g., Oklahoma Const., Art. II, sec. 15: "No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts shall ever be passed. No conviction shall work a corruption of blood or forfeiture of estate: Provided, that this provision shall not prevent the imposition of pecuniary penalties."

³⁴ Indictment may be had either by grand jury or by information. Both methods meet the requirements of due process of law as laid down in the 14th Amendment. The general tendency in recent years has been to use the grand jury as a general investigative mechanism or for indictment in capital cases. The use of the information so far as less serious crimes is concerned is now well nigh universal on the state level. Prosecution for federal crimes, on the other hand, may be had only after indictment by grand jury.

assistance of court process in compelling witnesses on his behalf, and to confront his accusers in open court; (4) to have a speedy and public trial before an impartial judge; and (5) to have a trial before an unbiased and impartial jury.

These fundamentals are customarily contained in one omnibus section of the typical state Bill of Rights. All of the state constitutions contain provisions generally designed along the lines of the following example:

In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed, and shall be heard by himself, or counsel, or both, to demand the nature and cause of the accusation against him, to meet the witnesses against him face to face, and have compulsory process for the attendance of witnesses in his favor, and shall be furnished with a copy of his indictment against him.³⁵

To further buttress the protections of such a section, all but three of the states³⁶ have as a part of their Bills of Rights the famous due process clause: "No person shall be deprived of life, liberty, or property without due process of law." This clause "fills in the chinks" in the protective armor which has been erected around those accused of crime. When the Due Process clause of the 14th Amendment is added to these protections, the guarantees of fair trial are seen to be very substantial indeed.

Specific Provisions. In addition to the generally agreed upon fundamentals, there are at least two other elements of a

³⁵ Florida Const., Declaration of Rights, sec. 11.

³⁶ Florida, Kansas, and Kentucky.

fair trial which are somewhat more specific in nature. A trial would hardly be "fair" in the ordinarily accepted sense of the term, if the accused were compelled to give testimony against himself. Such has been the accepted tradition, though an occasional state is found which does allow a prosecuting attorney to comment unfavorably upon the defendant's past criminal record and to call attention to a refusal to testify.

The Louisiana Constitution may be used as an example on this point. The pertinent section reads:

No person shall be compelled to give evidence against himself in a criminal case or in any proceeding that may subject him to criminal prosecution, except as otherwise provided in this Constitution. No person under arrest shall be subjected to any treatment assigned by effect on body or mind to compell confession of crime, nor shall any confession be used against any person accused of crime unless freely or voluntarily made.³⁷

The last sentence is worthy of note, since by its terms "third-degree" methods are constitutionally prohibited. Again the basic importance of such a prohibition in terms of a genuinely fair trial is obvious.

Fairness of trial demands, also, that a person not be put twice in jeopardy for the same offense. A second trial, conducted after the accused has been freed at the first, could scarcely be said to be "fair." Most of the states, with the exception of Connecticut, have a double jeopardy clause in their constitution.

³⁷ Art. I, sec. 11. The Rhode Island Constitution states the principle more simply in its Art. I, sec. 13: "No man in a court of common law shall be compelled to give evidence against himself."

The omission in the case of Connecticut has proved important, for this is one of the instances where the United States Supreme Court suggests that double jeopardy may not be one of the rights of the first ten amendments which are protected by the due process of law clause.³⁸ States wishing to spell out this right more clearly have included it as a part of their Bill of Rights.

Guarantees Against Imprisonment for Debt

Imprisonment for debt is outlawed in roughly three-fourths of the states. New Hampshire is one of the states which has no such prohibition and as recently as 1953, a celebrated case of imprisonment for debt received wide newspaper coverage. The Missouri provision is a simple example which declares:

. . . no person shall be imprisoned for debt, except for nonpayment of fines and penalties imposed by law.³⁹

Other states add other limitations. Five states prohibit imprisonment for a militia fine in times of peace.⁴⁰ Seven states require the debtor to deliver up his estate before he can claim the protection.⁴¹ South Carolina and Wisconsin limit the protection to debts arising out of contract. Absconding debtors have no protection under the Oregon and Washington provisions.

³⁸ See Palko v. Connecticut, 302 U. S. 319 (1937).

³⁹ Const., Art. I, sec. 11.

⁴⁰ California, Iowa, Michigan, Nevada, and New Jersey.

⁴¹ Colorado, Illinois, Kentucky, Montana, North Dakota, Pennsylvania, and Rhode Island. Illinois also limits the protection where there is a presumption of fraud. Const., Art. II, sec. 12.

Provisions on Excessive Bail and Cruel and Unusual Punishment

Our imaginative ancestors devised some rather fiendish, as measured by present day standards, methods of inflicting punishment on those who had been adjudged guilty of crime. Burning at the stake, drawing and quartering, branding, and mutilation were accepted forms of punishment in English law. Use of the pillory and stocks were good Puritan customs. The traditional phrase barring such types of activity is a simple one and adds up to the fact that no person shall be subjected to "cruel or unusual punishment."⁴² Over three-fourths of the state constitutions contain such a provision, in addition to that found in the federal Constitution which has never been interpreted by the United States Supreme Court as being directly applicable against the states.⁴³

Prohibitions, too, against excessive bail and fines are also found in most state constitutions. Fairness requires that a man not be apprehended on some pretext for a minor crime and then held in custody under such high bail figures that he is unable to procure his release. Fairness, too, requires that the fine imposed for a minor crime bear some real relationship to the nature of

⁴² See e. g., Louisiana Const., Art. I, sec. 12.

⁴³ It is the writer's opinion that in a four-square case involving cruel and unusual punishment, the 14th Amendment would provide the necessary bridge and that this federal protection would be applicable.

the offense. A man should not be wiped out financially for some petty offense. Such procedures were favorite devices of English kings and have been used on occasion by petty local tyrants in the United States. The prohibition against excessive bail is usually coupled with that against cruel and unusual punishments and follows the wording of the 7th Amendment to the Constitution of the United States:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.⁴⁴

Provisions on Treason

Thirty states carefully define treason in their Bills of Rights and in doing so adhere to the language of the federal Constitution almost verbatim:

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the testimony of two Witnesses to the same overt Act, or on Confession in open Court. The Congress shall have Power to declare the Punishment of treason, but no Attainder of Treason shall work Corruption of Blood, or forfeiture except during the Life of the Person attainted.⁴⁵

A number of the remaining states define treason elsewhere in their constitutions. Such provisions are found in southern state constitutions promulgated after the Civil War.

⁴⁴ Bail need not be granted a person indicted for a capital offense. Persons indicted for crimes, where there is strong evidence of an intent to flee the jurisdiction to escape having to stand trial; need not be admitted to bail.

⁴⁵ Art. III, sec. 3.

Provisions on Property Rights

"No person," so the ancient formula runs, "shall be deprived of life, liberty, or property without due process of law." The emphasis in the preceding section of this Staff Paper has been on the use of the formula in its relationship to personal rights and rights of persons accused of crime, but it has an applicability for property rights as well. Property rights in this complex day and age are not the same as they were many centuries ago when the formula was first devised, primarily as a procedural yardstick in criminal cases. But the judicial interpretations of the second decade of the 19th Century gave vitality to due process as it related to rights of property. This use of due process is important today, even though changing conceptions of government have somewhat modified the categorical character of property rights.

The older guarantees relating to property, some found in Bills of Rights as well as in other parts of the state and federal constitutions, are well known. Private property, for example, cannot be taken without the payment of just compensation.⁴⁶ It

⁴⁶ "The property of no person shall be taken or damaged for public use without just compensation therefor." Nebraska Const., Art. I, sec. 21.

The usual procedure, where a purchase price cannot be agreed upon, is for the public body to institute condemnation proceedings; the amount of payment is then determined through judicial processes. A few states have written this latter provision into their Bills of Rights. Thus the Missouri Constitution provides: ". . . private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be provided by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of the land taken for railroad purposes without the consent of the owner thereof shall remain in such owner subject to the use for which it is taken." Art. I, sec. 26. The West Virginia Constitution, Art. III, sec. 9, has a somewhat similar provision.

See also the federal Constitution, 5th Amendment.

would be difficult to imagine a more basic guarantee against government confiscation. All but nine states have included, as a part of their Bills of Rights, a provision that legislatures shall make no laws impairing the obligations of contracts.⁴⁷

Traditionally, too, provision has been made, usually as a part of Bills of Rights, that persons and property are protected against the arbitrary and unreasonable searches and seizures;⁴⁸ the prohibition arose out of the practice followed by the British, in the period prior to the Revolution, of searching the homes of American colonists on any or no pretext. From Revolutionary memories, too, comes the frequently included provision against the quartering of soldiers in private homes.⁴⁹

⁴⁷ E. g., Missouri Const., Art. I, sec. 13; Nebraska Const., Art. I, sec. 16; Federal Constitution, Art. I, sec. 10.

⁴⁸ The language on the point generally tends to follow that of the federal Constitution. The Louisiana Constitution declares: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no such search or seizure shall be made except upon warrant therefor issued upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and persons and things to be seized." Art. I, sec. 7. The New York Constitution, reflecting the communications consciousness of the 20th Century society, prohibits wire-tapping except under generally defined situations, Art. I, sec. 12.

Judicial interpretation of the language, as between federal and state courts, has varied somewhat on the point of whether evidence illegally obtained may be introduced on a trial of the accused. The federal rule is quite clear that such evidence may not be used. Wiretap evidence could not, for example, be used to obtain the conviction of Judith Coplon. On the state level, however, the rule has been different in some states. See Wolff v. Colorado, 338 U. S. 25 (1949).

⁴⁹ Thirty states have such a provision usually worded somewhat along these lines: ". . . no soldier shall be quartered in any house without the consent of the owner in time of peace, nor in time of war, except as prescribed by law." Missouri Const., Art. I, sec. 24.

The prohibition is sometimes coupled with a phrase which places the military power in strict subordination to the civil power. Such is the case in the Missouri Constitution. Of the 18 states which do not include prohibitions against the quartering of soldiers in private homes, 12 have "military subordination" clauses.

Some of the later pronouncements on property rights in state Bills of Rights have tended to place limitations on property. It should be noted in this connection, too, that many such limitations on the free exercise of the rights of property are found in other portions of state constitutions, where they do, perhaps, fall more logically. Irrevocable grants of special privileges, perpetuities, immunities, or monopolies are prohibited in the Bills of Rights of 16 states;⁵⁰ Louisiana and some other states have such a provision but it is found elsewhere in the constitution.⁵¹ Many of these provisions grew out of the ferment of the Populist period and the excesses of Reconstruction days. They represent a late 19th and early 20th Century contribution to the thinking of the citizenry on the place of property in the scheme of society.

Provisions on Economic and Social Rights

The rights so far discussed in this paper relate essentially to the matters covered in the federal Bill of Rights, although they have been treated as they appear in state constitutions rather than in the federal document. The states have added to or reworded many of the federal guarantees, but it would be difficult to demonstrate that they have improved upon them appreciably.

⁵⁰ Arizona, Arkansas, California, Indiana, Kentucky, Maryland, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Utah, Washington, and Wyoming.

Some states, for example Nebraska, prohibit only some of these things and thus are not listed among the 16.

⁵¹ Art. IV, sec. 4; Art. XIII, secs. 5 and 7.

The great majority of rights which appear in various state Bills of Rights and in the federal Bill of Rights are directed primarily against the arbitrary actions of government and government officials. They are tangible and justiciable. When violated, action may be taken in a court of law. The extension of governmental activity has narrowed the meaning of some of these rights and guarantees, but they still stand as the bulwark protecting the freedom of the American people.

As government has assumed an ever greater role in the social and economic order, many people have favored the recognition of a new category of "rights." This category would not prohibit or restrict government action. Rather, it would guarantee active government protection or intervention on behalf of particular interests or individuals. In other cases it would guarantee to every individual certain material or social benefits.

Many states have launched forth into this new area of positive "rights." Where one group, such as organized labor, is favored by a so-called right, opposing groups seek embodiment in the constitution of a counter right. Thus guarantees of collective bargaining are answered in other states by guarantees of a right to work irrespective of membership in a labor organization. The New York Constitution is quite specific and detailed on the subject of labor:

Labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed. No laborer, workman or mechanic, in the employ of a contractor or subcontractor engaged in the performance of any public work, shall be permitted to work more than eight hours in any day or more than five days

in any week, except in cases of extraordinary emergency; nor shall he be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used.

Employees shall have the right to organize and to bargain collectively through representatives of their own choosing.

Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed and determinable sum; provided that all monies paid by an employer to his employee or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer.⁵²

The substance of the first paragraph, aside from the opening sentence which is fundamentally a statement of allegiance to a particular economic doctrine, is to set up standards to which private contractors performing state work must conform. The second paragraph is of general applicability, and is of considerable importance to organized labor generally. The third complicated paragraph falls only a little short of being an entire workmen's compensation act placed in a constitution.

⁵² Article I, Secs. 17 and 18. The second paragraph of the lengthy article has its counterpart elsewhere. Thus the Missouri Constitution makes the same provision in its Article I, Sec. 29.

A provision of the New Jersey Constitution reads:

Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing.⁵³

Organized labor has, of course, favored writing into the various state constitutions guarantees of collective bargaining. Unions have just as vigorously opposed so-called "right to work" provisions which have found their way into public controversy in recent years. An amendment to the Florida Constitution, adopted in 1944, is typical of the "right to work" provisions.

The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.⁵⁴

It is to be noted that declarations of this sort involve highly controversial matters. It cannot be said that they reflect a basic consensus about which there is general and universal agreement. Traditionally, Bills of Rights have protected individuals in their person and in their property. Newer provisions on industrial relations mark an effort to establish the preferred positions of one or another economic or social group in a constitutional document.

⁵³ Article I, Sec. 19.

⁵⁴ Declaration of Rights, Sec. 12. Nebraska adopted a similar amendment in 1946.

Some constitutions have recognized certain so-called "human rights." Thus the Puerto Rican Constitution originally provided in its Bill of Rights for recognition of the existence of:

The right of every person to receive free elementary and secondary education.

The right of every person to obtain work.

The right of every person to a standard of living adequate for the health and well-being of himself and of his family, and especially to food, clothing, housing and medical care and necessary social services.

The right of every person to social protection in the event of unemployment, sickness, old age or disability.

The right of motherhood and childhood to special care and assistance.⁵⁵

This provision, admittedly visionary and beyond realization in the present state of Puerto Rican economic development, produced strong objection in the United States Congress. The article had to be removed as a condition of congressional approval.

It is perhaps pertinent to note that the federal Constitution and the constitutions of most states have been effective and vigorous charters because they have been realistic documents consolidating fundamental ideas and principles concerning which there was general agreement and on the basis of which people could act and depend upon the courts to uphold them in their rights. Constitutions which outreach the fundamental freedoms and rights of the people framing them have become objects of little effect and frequently of ridicule. The Constitutions of France, Italy, and of many of the Latin American republics suffer from such defects.

⁵⁵ Article II, Sec. 20.

A bill of rights section of a constitution should be restricted to a statement of the inalienable and unassailable rights and freedoms which characterize democratic people. These rights and freedoms should be those symbolic truths which are not only universally accepted by school children as well as adults and by all social and economic groups, but which they are willing to defend at all costs.

To venture beyond the fundamental and universal rights in a bill of rights section of a constitution by including controversial assertions of economic privilege accomplishes little more than a derogation of democracy's self-evident truths.

Summary

The Constitutional Convention at College will of necessity include a Bill of Rights in the Constitution for the State of Alaska. This Bill of Rights will include, probably, statements of the basic and fundamental freedoms so much a part of the American heritage. The fact that "legally," statements on some of the subjects which will be included do not really need to be made (because they are protected under the 14th Amendment to the national Constitution) simply will be an additional manifestation of the importance of these principles to the Delegates.

The issues which will arise out of attempts to write in some of the newer "rights" will cause considerable difficulty. No satisfactory yardstick which will be determinative in each case on the point of whether or not a specific proposal should be included can be devised. In Staff Paper No. I, certain criteria

for constitutional drafting were set out. The third of these criteria dealt with the subject of civil rights and liberties and was thus stated: "The civil rights and liberties set out in the Bill of Rights should be stated concisely." Certainly the example of the New York Constitution, as it dealt with the subject of workmen's compensation, could hardly be said to meet this requirement. There is some possibility that many of the newer "rights" would require extensive statements, if incorporated into constitutional law, which might better be left to the legislature and future statutory action.

The Delegates may wish to consider, also, the idea that a Bill of Rights should be a relatively non-controversial standard to which the great majority of Alaskan citizens can repair. Perhaps the more controversial elements, particularly in the welfare field might be better left to legislative judgment or, if incorporated into fundamental law, should be placed in a portion of the Constitution other than the Bill of Rights. In this fashion the idea of the Bill of Rights as a basic statement of principles on which there is a substantial concensus of opinion can be preserved.