CONSTITUTIONAL STUDY COMMISSION

THE MINNESOTA BILL OF RIGHTS: AN OVERVIEW

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I. Introduction

A bill of rights in a state constitution, as in the United States Constitution, seeks to define rights and liberties so fundamental to a free society as to remain invulnerable or only partly subject to governmental authority. It was formerly thought that the federal Bill of Rights operated as a limitation only upon the powers of the federal government and not upon the powers of state government, whereas state bills of rights operate as limitations only upon the powers of state government. While this was the case through most of our constitutional history, United States Supreme Court decisional law, mostly within the past two decades, has held that many provisions of the federal Bill of Rights operate as limitations upon the power of state governments as a consequence of their "incorporation" into the due process clause of the Fourteenth Amendment of the Constitution of the United States which expressly prohibits states from enacting laws which deprive any person of life, liberty or property without due process of law. The consequences of this rule of incorporation have been momentous.

Important reasons, however, remain for the inclusion in state constitutions of limitations on state power for the protection of valued liberties. In its "Introductory Comment" on its Article I (Bill of Rights) the Model State Constitution (Sixth

Edition - Revised) observes:

> Among the reasons is the fact that not all of the United States Bill of Rights is applicable to state action through the Fourteenth Amendment so that, in certain matters...the state constitutional protections are the only ones available. While the Fourteenth Amendment operates to restrain the states from impairing personal and political rights, it does not expressly make the United States Bill of Rights applicable to the states:

Even in those areas where the guarantees of the Fourteenth Amendment are applicable to the states, the state bills of rights perform other important functions. The Model State Constitution, supra, says at 27:

> First, the 14th Amendment merely sets a floor under rights, i. e. it prescribes standards below which no state may fall. There is no reason, however, why states should not extend guarantees of personal and political freedom greater than the minimum required by the Fourteenth Amendment. There is also no reason why similar language in the federal and state constitutional bills of rights provisions cannot be construed more liberally by a state court in dealing with its own constitutional than the interpretation of similar language in the federal counterpart. (emphasis added). Second, whether or not state constitutional protections of rights are greater than their U. S. counterparts, it would be more in keeping with a sound functioning of the federal system for the people to look first to a state constitution and to the state courts for the vindication of personal liberties that may be challenged by state law or state action. They can have a reasonable expectation of such protection only if the state courts look upon the state bill of rights as a vital instrument for the defense and advancement of personal and political liberty.

II. The Federal Constitution - Incorporation Summary

The following provisions of the federal Bill of Rights have been made applicable to the states:

AMENDMENT	SUBJECT MATTER	ILLUSTRATIVE CASES DISCUSSING INCORPORATION
I	Freedom of Religion Establishment of Religion.	School District of Abington Township, Pa. v. Schempp 374 U. S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963))
I	Freedom of Speech and Press	Edwards v. South Carolina, 372 U. S. 229, 83 S. Ct. 680, 9 L. Ed. 2d 321 (1966)
I	Peaceful Assemblage	Elfbrandt v. Russell 384 U. S. 11, 86 S. Ct. 1238, 16 L. Ed. 2d 321 (1966)
II	Right to Bear Arms	Has not been incorporated. See, Eckert v. City of Philadelphia, 329 F. Supp. 845 (1971) holding that the right to bear arms is not a right conferred on people by the Federal Constitution, but rather that the federal constitution prevents the federal government and the federal government only, from infringing that right.
III	Soldiers denied quarters in home	Though not explicitly incorporated Katz v. U. S. 389 U. S 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) noted that this amendment's prohibition against unconsented peacetime quartering of soldiers protects one aspect privacy from governmental intrusion.
IV	Searches and Seizures	Mapp v. Ohio 367 U. S. 643, 81 S. Ct. 1684, L. Ed. 2d 1081 (1961)

AMENDMENT	SUBJECT MATTER	ILLUSTRATIVE CASES DISCUSSING INCORPORATION
V	Grand Jury Indictment for Capital Crimes or Infamous Crimes	Maxwell v. Dow, 176 U. S. 581 (1900) holding that grand jury requirements of this amendment are not binding on states through the Fourteenth Amendment. See, also, Martin v. Beto, C. A. Tex. 1968, 397 F. 2d 741, cert denied, 394 U. S. 906, 89 S. Ct. 1008, 22 L. Ed. 2d 216, holding that grand jury requirements of this amendment are not binding on states through Amendment 14.
V	Double Jeopardy	Benton v. Maryland, 395 U. S. 784, 89 S Ct. 2056, 23 L. Ed. 2d 707
V	Self-Incrimination	Spevack v. Klein, 385 U. S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967)
V	Just Compensation	Foster v. City of Detroit, Mich. 254 F. Supp. 655, affirmed 405 F. 2d. 138, motion denied 423 F. 2d 660
VI	Speedy Trial	Klopfer v. North Carolina, 386 U. S. 213 (1967)
VI	Right to Jury Trial (criminal)	Duncan v. State of Louisiana, 391 U. S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968) holding there is a right to jury trial in serious criminal cases which must be recognized by the states. But, See, Williams v. Florida, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d. 446 (1970) approving a 6-man jury in state prosecutions.
VI	Confrontation/Cross Examination of Witnesses	Goldberg v. Kelly, 397 U. S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d. 287 (1970)

AMENDMENT	SUBJECT MATTER	ILLUSTRATIVE CASES DISCUSSING INCORPORATION
VI	Right to Counsel	Gideon v. Wainwright, 372 U. S. 335 (1963), Douglas v. California, 353 (1963); U. S. v. Wade, 388 U. S. 218 (1967) (right to counsel). See, also, Kirby v. Illinois, 92 S. Ct. 1877 (1972)
VII	Trial by Jury (civil)	federal requirements of amendment VII have not been incorporated.
VIII	Excessive Bail, Excessive Fines	Pilkerton v. Circuit Ct. Of Howell Cty., Mo. C. A Mo. 1963, 324 F. 2d. 45
VIII	Cruel and Unusual Punishment	U. S. ex. rel Bryant v. Fay, D.C.N.Y. 1962, 211 F. Supp. 812 cert. den. 375 U S. 852, 84 S. Ct. 111, 11 L. Ed. 2d 79. See, also, Furman v. Georgia, 11 Cr. L. 3231, holding the death penalty, asapplied was unconstitutional.
IX	Construction of Enumerated Rights	uncertain whether incorporated, though insofar as the right to privacy has a basis in the 9th Amendment, it may be, See, Griswold v. Connecticut, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965)
X	Reserved Powers to States	Not really applicable

That felt needs change from generation to generation is so common a principle that it should not require reptition. But it does serve to make the point that it may be desirable to expressly add written statements limiting the power of government. An example of this contention is found in the Illinois Constitution of 1970, in which the language "....invasions of privacy or interceptions of communications by eavesdropping devices or other means..." is found. Guarantees of freedom from discrimination on the basis of race, color, creed, national ancestry, and sex in the hiring and promotion practices of an employer or in the sale or rental of property are also found.

III. The Minnesota Constitution

OBJECT OF GOVERNMENT, ARTICLE I, SECTION 1

HISTORY/EXPLANATION

This section is a general constitutional provision asserting that the government of the State of Minnesota was instituted to establish some order (i.e. security, benefit and protection) in the affairs of the people of the state. Also the right to change the government (i.e. alter, modify or reform) is recognized. In this connection, cross reference should be made to Article 14, Section 1, and Article 14, Section 2 (Amendments to Constitution) in essence setting out a procedure for change.

It is uncertain whether this provision has any independent standing as a rule of law. Many of the concerns to which it is directed are set forth

more specifically in other areas of the Constitution. Case law decision has cited this constitutional provision from time to time in more of a supportive function, rather than as an independent rule of law. See, e. g. Rhodes v. Walsh, 55 Minn. 542, 57 N. W. 212, 23 L. R. A. 632 (1894), where it was held a member of the legislature is not privileged from service of summons in civil action during a legislative session. The Rhodes decision in addition to citing Article 1, Section 1, cites Article 1, Section 8 (redress of injury or wrong) in a supportive role). This latter provision is also hortatory in nature.

MODEL STATE CONSTITUTION

The Model State Constitution wanted a document, "free from rhetoric and general declarations of principles concerning the rights of citizens and their relationship to government..." Consequently no general language as this is found in their draft.

RIGHTS AND PRIVILEGES, ARTICLE 1, SECTION 2

HISTORY/EXPLANATION

While the language is not direct to the point this provision has historically been interpreted as an equal protection clause in Minnesota . As recently as 1966 the Minnesota Supreme Court observed in Minneapolis Federation of Teachers Local 59, AFL-CIO v. Obermeyer, 275 Minn. 347, 147 N. W. 2d 358 (1966) that the standards of equality under the state constitution and of the equal protection clause of

the Fourteenth Amendment of the federal constitution are the same. In Wichelman v. Messner, 250 Minn. 88, 83 N. W. 2d 800, 71 A. L R. 2d 816 (1957) it was noted that the responsibility for statutory classification rests primarily with the legislature and will be held proper if the classification applies to and embraces all who are similarly situated with respect to condition.

Minnesota courts will clearly not invalidate legislation if it has a "reasonable basis". See, e. g. State v. Meyer, 228 Minn. 286, 37 N W. 2d. 3 (1949), George Benz Sons, Inc., v. Erickson, 227 Minn. 1, 34 N. W. 2d 725 (1949). In the field of equal rights for women the Minnesota high court has held in Anderson v. City of St. Paul, 226 Minn. 186, 32 N. W. 2d 538 (1948) that a distinction for purposes of legislative classification based on sex doesn't deny "equal protection of the laws" where it bears some reasonable relation to objects sought to be accomplished by the legislation. In Anderson, supra, the ordinance prohibited employment of women as bartenders in an establishment where intoxicating liquor is sold at retail for consumption on premises. This classification was held not to deny women equal protection of the laws. Arguably this decision would not stand today.

The issue today in the equal protection field, however, is not with police power regulation (i. e. regulation for the safety, health, well-being, etc. of the citizenry). Rather the issue is what can be

done in the way of affirmative action in the areas of race and sex to remedy past discrimination? For example, does a minority/female preference admission program to a state law or medical school violate the state equal protection provision or any pertinent statutes? To ensure that racial minorities are not discriminated against, and that the status of women is upgraded, language in the constitution allowing affirmative action programs, quota systems, etc. should be included.

Article 1, Section 2 also mandates: "There shall be neither slavery nor involuntary servitude in the state otherwise than the punishment of crime whereof the party shall have been dulyconvicted." The litigation has centered about the meaning of involuntary servitude/duly convicted. State v. Stevens, 247 Minn. 67, 75 N W. 2d 903 (1956) indicates that where a municipal ordinance authorizes imposition of a fine or workhouse terms upon conviction of drunken driving, a municipal court may impose a workhouse term without the alternative of paying the fine, and the constitutional provision declaring that involuntary servitude may only be imposed for punishment, of crime whereof the party shall have been duly convicted, does not preclude such non-alternative imprisonment.

The Report of the Constitutional Commission of Minnesota, at 16, of October 1, 1948 recommended the addition of a last sentence to the present article:

> The legislature shall not abridge the right of the people peaceably to assemble and to perition the government for redress of grievances.

The rationale for this recommendation was that the subjects were covered in the federal Constitution as well as in practically all other state constitutions.

MODEL STATE CONSTITUTION

The Model State Constitution makes no mention of slavery or involuntary servitude. Minnesota makes mention of this item perhaps because of the close proximity of the Civil War issue and the time the Constitution was prepared for adoption in 1857.

LIBERTY OF THE PRESS (including speech) ARTICLE 1, SECTION 3

HISTORY/EXPLANATION

By federal constitutional standards press in not limited to newspapers, but includes periodicals, pamphlets and every other sort of publication that affords a vehicle of information. Like all other rights, however, freedom of speech and press are not absolute. Courts have in the past wrestled with the problem of limitation by using such standards as not permitting limitation unless utterance or publication presents a "clear and present danger" to society (the classic Holmesian principle) or unless it is "shown likely to produce a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance, or unrest." Terminiello. v. Chicago, 337 U. S. 1, 4 (1949).

Near v. Minnesota, 283 U. S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931) invalidated a form of prior restraint applied to newspapers--- injunction to suppress as a nuisance the publication of newspapers devoted to defamatory, scandalous and scurrilous attacks upon public officials---was stricken as an infringement upon freedom of the press. The Near decision, however, was limited in Times Film Corporation v. City of Chicago, 365 U S 43 (1961) where the United States Supreme Court conceded the constitutional validity of prior restraint in upholding the Chicago motion picture censorship ordinance against a broadside attack which asserted a total absence of governmental power to require administrative approval as a condition to publication. Freedman v. Maryland, 380 U. S 51 (1965) set out standards, still valid apparently, which courts must use in assessing a valid prior restraint. Moreover, New York Times Company v. U. S. 91 S. Ct. 2140 (1971) (Pentagon Papers Case), indicates that even where there is an assertion of national security, barring a clear showing of potential or actual harm, the government's request for imposition of restraint on publication will not be accepted.

The last phrase of this section ("being responsible for the abuse of such right" suggests another limit to freedom: This clearly raises the issues of libel, slander and privacy.

Little, if any purpose, would be served by analyzing in great detail the Minnesota case law in this area. One reason is because of

the pre-eminence of federal case law; another is because of the close factual analysis necessary to weigh the concerns of each case.

Again it should be noted that while Minnesota must comport with federal standards in this area, under its own constitutional guarantee of free speech and press, it may choose to go farther in defining this concept.

MODEL STATE CONSTITUTION

The Model State Constitution guarantees freedom of speech and of the press in its first section(1.01). It includes with these guarantees freedom of Religion, Assembly and Petition. Interestingly, at no place does Minnesota's constitution guarantee the right to Assembly and Right of Petition, though perhaps by implication from other provisions of the Constitution and certainly through the federal constitution these rights are available.

TRIAL BY JURY, ARTICLE 1, SECTION 4

HISTORY/EXPLANATION

The clause of this section authorizing the legislature to provide that the agreement of five-sixth of any jury in any civil action or proceeding shall be a sufficient verdict, was added by the amendment of Nov. 4, 1890. The vote was 66,929 Yes, 41,341 No. This provision was not implemented by the legislature until passage of Chapter 63, Laws of 1913 (now M.S.A. 546.17). A five-sixths verdict is sufficient after six hours deliberation by the jury in civil cases as provided in

M.S.A. 546.17.

The trial by jury guarantee has long been considered a fundamental one. Eventhough it is a federal right, this has not prevented the legislature from devising and the courts from sustaining legal mechanisms for the trial and determination of facts by agencies other than juries, (e. g. judges, referees, agency hearing examiners, etc.). It is not, however, meant to suggest these mechanisms are unfair or unlawful.

MODEL STATE CONSTITUTION

Interestingly the Model State Constitution does not concern itself with trial by jury in civil cases as does the Minnesota Constitution in Article 1, Section 4. The federal constitution, however, in its Amendment VII guarantees this right in civil suits exceeding a value or $20.00 in controversy.

NO EXCESSIVE BAIL OR UNUSUAL PUNISHMENTS, ARTICLE 1, SECTION 5.

HISTORY/EXPLANATION

Both elements of Section 5 have counterparts in the federal constitution. See, U. S. Constitution, Amendment VIII. Minnesota courts have recognized that it is within the power of the legislature in the absence of constitutional definition or classification to create or define an offense and prescribe a punishment subject to the limits of this provision. See, e. g. State v. Kelly, 218 Minn. 247 15 N W. 2d 554 (1944); State v. Ives, 210 Minn. 141, 297 N. W. 563 (1941).

The standards for what is cruel and unusual may vary with the judge administering them. Query was is excessive? What is cruel, what is unusual? M.S.A. 614.46, for example, makes it a felony to unjustifiably expose or administer a poisonous substance to any animal with intent that it should be taken by an animal. This law was held as not unconstitutional as providing for cruel and unusual punishment. See, e. g. State v. Eich, 204 Minn. 134, 282 N. W. 810 (1938); See, also, Wenger v. Wenger, 200 Minn. 436, 274 N. W. 517 (1937) where the imposition of the maximum sentence was held not excessive. The maximum sentence authorized by statute as punishment for contempt was imposed on a husband for willfully failing to make payments required by divorce decree. The June 29, 1972 decision of the Supreme Court in Furman v. Georgia, 11 Cr. L. 3231 holding the death penalty invalid also gives some indication of the scope of the federal standard.

Though the United States Supreme Court has not squarely ruled on the question yet, the equal protection issue involved in laws providing for a jail term or fine will be decided in the near future. Requiring the individual (who happens to be indigent) to serve a jail term, but permitting the more alluent one to pay the fine and leave is arguably a violation of equal protection. The possible implications of any decision in this area will clearly influence its outcome. Some indications have been provided in recent decisions. In Williams v.

Illinois, 399 U. S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970) the Supreme Court held that while a state has considerable latitude in fixing the punishment for state crimes and may impose alternative sanctions, it may not under the Equal Protection Clause subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency.

In Tate v. Short, 401 U S. 395, 91 S. Ct. 668 (1971), though Texas law provided only for fines for traffic offenses, it did require that persons unable to pay their fines must be incarcerated for sufficient time to satisfy their fines at the rate of $5 per day which in petitioner's case meant an 85 day term. Here the petitioner was unable to pay his fines after convictions and was committed to the municipal prison farm. The Supreme Court held that requiring the petitioner who was unable to pay accumulated fines of $425 to serve the jail term denied equal protection because those who were able to pay received the limited punishment of a fine, but the fine was converted to imprisonment for those who are unable to pay it.

Brief recognition that the same general sort of equal protection issue is presented with requiring bail of the person who is indigent and unable to pay, as with the payment of fines issue discussed above. Whereas the more affluent person might bail out and be free to prepare for his trial, etc. the less affluent person remaining in jail cannot have this advantage.

It would certainly be undesirable to require all people to stay in jail because of any equal protection decision holding bail to be

unconstitutional. But clearly meany people can't afford bail or finding bail money puts a great or unreasonable burden on them or their families. Though release on personal recognizance is possibly a happy interim position between the two extremes, a problem would still exist with the poor person who does not have indicia predicting he will show up for trial, e. g. roots in the community.

Interesting law review commentary might be read in Silverstein, "Bail in various state courts, a Field Study and Report", 50 Minn. L. Rev.621 (1966). In this article, Mr. Silverstein indicates that constitutional questions such as Due Process, Right to Counsel, Due Process-Excessive Bail, and Equal Protection are being raised by the state systems. Furthermore, Mr. Silverstein suggests that a uniform system of bail administration be established in each state. Also of interest on this bail question,is Foote, "The Coming Constitutional Crisis in Bail: II", 113 Pa. L. Rev. 1125 (1965) wherein Mr. Foote suggests that the words "excessive bail" (in the federal Bill of Rights - Minnesota has this language also) must be given an interpretation consistent with the Griffin Rule as forbidding any financial discrimination against the accused. Griffin v. Illinois, 351 U. S 12 (1956) held that indigents could not be deprived of the benefits of a state's system of appellate review by a requirement that appellant's purchase and submit a transcript. Professor Foote in summarizing his position that the Griffin rule should be extended to bail, expresses the view at 1184 that the government's administration of criminal law is less likely to be harmed than benefited from the abolition of

pre-trial detention.

The harm to the government Professor Foote envisions are: that the government would be deprived of some advantages it now derives from pre-trial detention. For example, detention's contribution to the present high rate of guilty pleas, or the government's superior negotiating position in plea bargaining with jailed defendants are the advantages to which Professor Foote refers. Professor Foote regards such advantages as illegitimate and maintains they are exacted in a discriminatory fashion omly from the poor.

MODEL STATE CONSTITUTION

The Model State Constitution in Section 1.06(b) recommends the inclusion of the no excessive bail and cruel or unusual punishment provision. The disjunctive "cruel or unusual" punishment (Minnesota and Model State Constitution uses this language) provision is arguably a more liberal standard than the federal conjunctive one. Interestingly the Model State Constitution and federal constitution also adds that excessive fines shall not be imposed, whereas the Minnesota constitution only speaks of excessive bail.

RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS, ARTICLE I, SECTION 6

HISTORY/EXPLANATION

Arguably more than any other area of law the rights of the accused in criminal prosecutions has seen substantial change. A listing of many decisions is not necessary. Suffice it to say that in many

areas Minnesota must at least comport with federal law.

While State v. Everett, 14 Minn. 439 (1869) held that the jury contemplated by Article 1, Section 6 securing the right to jury trial in criminal cases is a body of twelve men, the U. S. Supreme Court does not necessarily require a 12-man jury in state criminal prosecutions. See, Williams v. Florida, 399 U S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970) which held that a Florida statute requiring a six-man jury in all except capital cases was not in violation of Sixth Amendment rights. It should be noted that Minnesota Statutes Annotated, 593.01, 546.09 and 546.10 (effective June 8, 1971) require 6 man juries in petty misdemeanors, but 12-man juries in gross misdemeanors and felonies.

Probable cause is the standard for issuing a warrant in Minnesota and has its basis in the Fourth Amendment of the U. S. Constitution. See, State ex. rel. Duhn. v. Tahash, 275 Minn. 377, 147 N. W. 2d 382 (1966). See, also, State v. Burch, 284 Minn. 300, 170 N W. 2d 543 (1969)(Warrant as basis for arrest for felony must be issued by magistrate who has had opportunity to determine whether probable cause for arrest has been established). See, also, Op. Atty. Gen., 306-B-10, Sept. 9, 1955 (indicating that in the case of a complaint for violation of an ordinance (a misdemeanor) essentially probable cause procedures must be complied with.

The provisions of Article 1, Section 6, like freedom of speech and press should not be regarded as absolute. For example, the right

to a speedy and public trial" is tempered by court delays and calendar backlogs. Similarly, trial by an impartial jury of the county or district wherein the crime shall have been committed" is disregarded when for some reason e. g. damaging pre-trial publicity, etc., it is better to venue the trial elsewhere.

The Minnesota Constitution additionally requires the assistance of counsel for accused parties in their defense efforts and representation at every stage of the criminal process. See, State v. Fagerstrum, 286 Minn. 295, 176 N. W 2d. 261 (1970) indicating that indigents (citing Gideon v. Wainwright, 372 U. S. 335 (1963)); that defendants at line-ups (citing U S. v. Wade 388 U. S. 263 (1967); that parties questioned by police (citing Miranda v. Arizona, 384 U. S. 436 (1966); are entitled to counsel. Moreover from Hamilton v. Alabama 368 U. S. 52 (1961) it is clear there is a right to counsel at the time of arraignment. Mempa v. Rhay, 389 U. S. 128 (1967) grants the right to counsel at probation hearings; In Re Gault, 387 U. S 1 (1967) requires counsel in juvenile proceedings.

MODEL STATE CONSTITUTION

The Model State Constitution in Section 1.06 includes the rights of the Minnesota Constitution (Section 6), but specifically adds that an accused enjoys the right "to the assignment of counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel." Where Minnesota has

has only reached this result by judicial construction in the Fagerstrum case, supra, the Model State Constitution's suggestion of inclusion would safeguard the right. The Model State Constitution also specifically recognizes the practice of change of venue where it is held an accused might not be able to secure a fair trial in the district where the offense is alleged to have been committed.

DUE PROCESS, PROSECUTIONS, SECOND JEOPARDY, SELF-INCRIMINATION, BAIL, HABEAS CORPUS, ARTICLE 1, SECTION 7.

HISTORY/EXPLANATION

As originally adopted, this section provided that no person shall be held to answer for a criminal offense "unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases cognizable by justices of the peace, or arising in the army or navy, or in the militia, when in actual service in time of war or public danger." The amendment of November 8, 1904 changed this requirement so as to provide that no person shall be held to answer for a criminal offense "without due process of law".

In effect this amendment eliminated the necessity of a grand jury indictment in certain criminal cases. (Total Vote 322,692;Yes, 164,055; No. 52,152). However, the adopted phrasing is certainly subject to the limits imposed by the federal courts, eventhough Hurtado v. California, 110 U. S. 516, 4 S. Ct. 111, 282 L. Ed. 232 (1884), held that in prosecutions by a state, presentment or indictment by a grand jury may give way to informations at the instance of a public officer.

In the area of self-incrimination perhaps some specific language either restricting or allowing lie detector tests and voice prints might be included. However, currently it seems to be the law that clearly lie detector tests are not allowed to be admitted into evidence, but that voice prints can be placed into evidence.

The balance of this Minneosta provision concerns itself with Double Jeopardy, Self-Incrimination, bail and the exception of bail for capital offenses, and the maintenance of habeas corpus unless in the case of rebellion or invasion the public safety may require otherwise.

MODEL STATE CONSTITUTION

In Section 1.02 the Model State Constitution has its due process and equal protection clauses. Interestingly the Minnesota Constitution has no equal protection clause. Arguably due process covers equal, but considering the frequent historical statement of equal protection, it seems odd that Minnesota's constitution does not use this language.

REDRESS OF INJURIES OR WRONGS, ARTICLE 1, SECTION 8

HISTORY/EXPLANATION

This section says that every person is entitled to a certain remedy in the laws for all injuries or wrongs. While the language is broad, interpretation has narrowed it somewhat.

For example, in Breimhorst, v. Beckman, 227 Minn. 409, 35 N.W. 2d 719 (1949) an employee received injuries which were compensable. However, her exclusive remedy for a disfigurement which did not affect

her employability, was under the Workmen's Compensation Act. It was held in Breimhorst that the Workmen's Compensation Act was not void as an infringement of this section in that a "certain remedy" for all injuries or wrongs" is not technically provided.

Interestingly, the new Illinois Constitution has a similar provision: Article II, Section 12. There was a proposal (ultimately defeated) to change the wording "ought to find a certain remedy in the laws" to "shall" (Minnesota's situation). See, The Illinois Constitution: An Annotated and Comparative Analysis, pp. 89-90. Such limiting factors as detailed above (i.e. Workmen's Compensation and perhaps sovereign immunity (where it is the law) apparently make the proposed change somewhat meaningless.

MODEL STATE CONSTITUTION

As indicated above, this is a very general provision. Though Illinois' new constitution (See, Art. II, Sec. 12) has such a hortatory provision, the Model State Constitution does not have a comparable one.

TREASON DEFINED, ARTICLE 1, SECTION 9

HISTORY/EXPLANATION

Article 1, Section 9 defines treason and cites cross references to Conviction, forfeiture of civil rights. Article 7, Section 2 indicates that no person who has been convicted of treason or any felony, unless restored to civil rights, shall be permitted to exercise the elective franchise. Article 5, Section 4 provides that the governor may call out the military and naval forces to suppress insurrection. Statutorily Minnesota codified its treason law in M.S.A. 609.385 (treason)

and M.S.A. 609.39 (Misprision of treason).

It is perhaps a question whether one can commit treason against a state. The argument is that treason is more something done against the nation as a whole, rather than one state alone. Apparently, however, this section must be regarded as having continuing viability for the state of Minnesota. The Advisory Committee Comment to M.S.A. 609.39 notes that the section is limited to acts against the state and comments that this will avoid the constitutional problem raised in Pennsylvania v. Nelson, 350 U. S. 497, 76 S Ct. 477, 100 L. Ed. 640 (1956), holding that the federal government has taken over the field within its domain (by enactment of the Smith Act, as amended, 18 U. S. C., Section 2385) and the State cannot therefore legislate on the same subject. In Pennsylvania v. Nelson, supra, the state of Pennsylvania attempted to use its sedition act (Pa. Penal Code Sec. 207, 18 Purdon's Pa. Stat. Ann. Section 4207) to proscribe sedition against either the government of the United States or the government of Pennsylvania. The Supreme Court sustained the Pennsylvania Supreme Court in its holding that only treason against the United States was involved, not against the state of Pennsylvania, and that the Smith Act superceded the Pennsylvania legislation.

While the 1948 Commission recommended no amendment of the section, it is difficult to conceptualize treason against the State of Minnesota. Maybe the section has no purpose.

MODEL STATE CONSTITUTION

No comparable provision.

RIGHT AGAINST UNREASONABLE SEARCHES, ARTICLE 1, SECTION 10

HISTORY/EXPLANATION

The 1948 Commission recommended the addition of the following sentence at the end of Section 10.

> Evidence obtained as a result of any improper search and seizure shall not be admissible as evidence in any criminal proceeding involving a person whose rights have been invaded by reason thereof.

Federal decisional law in Mapp. v. Ohio, 376 U S. 643 (1961) in effect made the terms of this provision applicable to the states and thus recognized a problem area. The 1948 Commission was attempting to remedy the problem of unlawful searches by suggesting this proposed amendment to the Minnesota Bill of Rights.

It deserves emphasis that the federal and Minnesota constitutions only prohibit "unreasonable" searches and seizures, and that a reasonable serach or seizure based upon a proper warrant, is constitutionally permissible. In most states, including Minnesota this principle has been construed as not abridging the common law power of search and seizure without warrant in cases where: 1) voluntary consent to a search of the person or premises is secured, and 2) where the search and seizure are incident to a valid arrest. But, see, Chimel v. California, 395 U. S 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969) limiting the scope of a search incident to a lawful arrest to: "the

arrestee's person, and the area "within his immediate control" --- construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

Ir also deserves emphasis that warrants must be issued by a judicial officer, tlhe interposition between the government and the individual of an impartial magistrate being central to a reasonable search and seizure.

The Search and seizure area within the last 15 years has had some new federal developments of great import to state and local governments: In Frank v. Maryland, 359 U. S. 360 (1959), a Baltimore City Code provision authorizing municipal health inspectors, without a warrant, to demand entry to any house, cellar or enclosure if they had cause to suspect that a nuisance existed. The ordinance was sustained against a Fourteenth amendment due process challenge. The Majority and Dissent, however, emphasized Fourth Amendment policy considerations.

In 1967 in Camara v. Municipal Court, 387 U. S. 523 (1967) the Court in a 6-3 decision reversed Frank, holding that warrantless periodic routing area health inspections of homes violated Fourth and Fourteenth Amendment prescriptions against unreasonable searches and seizures.

In See v. City of Seattle, 387 U. S. 541 (1967) a fire inspection ordinance authorizing the same kind of inspection for commercial and industrial buildings was invalidated on the basis of the Camara decision.

MODEL STATE CONSTITUTION

In its Section 1.03 the Model State Constitution has a standard Search and Seizure provision. Additionally, Subsections (b) specifically mandate that:

> unreasonable interception of telephone, telegraph and other electronic means of communication, and against unreasonable interception of oral and other communications by electric or electronic methods, shall not be violated.

Subsection (c) says:

> Evidence obtained in violation of this section shall not be admissible in any court against any person.

PROHIBITS EX POST FACTO LAWS, OR LAWS IMPAIRING CONTRACTS - ARTICLE 1, SECTION 11

HISTORY/EXPLANATION

This section deals with:

1. bills of attainder;
2. ex post facto laws, and;
3. laws impairing the obligation of contracts

It prohibits all of them, and consequently follows federal law.

Calder v. Bull, 3 U. S (3 Dall) 386 (1798) is an early case setting out standards for what is an ex post facto law. State of Minnesota v. Johnson, 12 Minn. 476, 93 Am. Dec. 241 (1866) is an early Minnesota decision accepting the validity of the Calder v. Bull construction of ex post facto laws.

The ex post facto principle applies only to criminal laws. See, Harisiades v. Shaughnessy, 342 U S. 580 (1952) where it was held that deportation, though a severe sanction, is a civil proceeding to which the ex post facto ban in inapplicable. The ex post facto law is not

always clear cut. Much depends on the circumstances. For example, in Starkweather v. Blair, 245 Minn. 371, 71 N W. 2d 869 (1955) it was asserted that the act of the legislature in failing to appropriate money for payment of the salary of an assistant director of the State Game and Fish Department was an ex post facto law. The decision, however, was that the legislation was not ex post facto.

That this principle depends on the circumstances is farther illustrated by State ex rel. Koalska, v. Swenson, 243 Minn. 46, 66 N. W. 2d 337 (1954) cert. denied and appeal dismissed 348 U. S. 908, 75 S. Ct. 308, 99 L. Ed. 712 (1954) where the Commissioner of Public Welfare promulgated a rule authorizing confinement of prisoner in special segregared section of prison for violationof prison regulations. It was held to be not an ex post facto act as applied to a prisoner who was sentenced by a court of competent jurisdiction, committed pursuant thereto and imprisoned prior to promulgation of the rule.

In the civil context the story of impairment of contract is much the same as with ex post facto laws in the criminal. Fletcher v. Peck, 10 U. S. (6 Cranch) 87 (1810) was the first U. S. Supreme Court invalidation of a state law for impairment of obligation of contract, construing the federal provision and State v.Krahner, 105 Minn. 422, 117 N. W. 78 (1908) is a similar Minnesota case.

Again as with ex post facto laws, a number of "impairment of

contract" have been legitimized by the courts. In Minnesota, for example, Willys Motors, Inc. v. Northwest Kaiser Willys, Inc. 142 F. Supp. 469 (1956) indicated that the economic interest of a state may justify the exercise of its protective power notwithstanding interference with contracts. On the federal court level Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398 (1934) might be cited for the same result.

Issues of vested rights, retroactivity of applicable and differences between laws affecting remedies only and those which affect the obligation of the contract to which the remedy relates, are also involved with the problem of contract impairment.

Bill of attainder is a legislative act which inflicts punishment without judicial trial. See, Starkweather v. Blair, 245 Minn. 371, 71 N. W. 2d 869 (1955). With bills of attainder, the same due process problems previously discussed are involved, so discussion here will not be pursued.

MODEL STATE CONSTITUTION

The Model State Constitution makes no mention of ex post facto laws, laws impairing contracts and bills of attainder.

IMPRISONMENT FOR DEBT, PROPERTY EXEMPTION, ARTICLE 1, SECTION 12

HISTORY/EXPLANATION

Article 1, Section 12 attempts to place limits on Imprisonment for Debt. A few points regarding this provision, however, are noteworthy:

1. If fraud is involved imprisonment is permitted.

2. The amount of exemption allowed (to be free from imprisonment) is to be determined by the legislature, thus permittin g a change in amount from time to time. M.S.A. 510.01-09, for example, deals with the question of Homestead Exemptions. Even there, however, M.S.A. 510.05 indicates that any mortgate lawfully obtained, any valid lien for taxes, or assessments, charge arising under the laws relating to laborers or materialmen's lien are not covered by the Homestead Exemption. Moreover, M.S.A. 550.37-39 lists other exempt property, as does M.S.A. 354.231.
3. Generally, Workmen's and materialmen's liens on property are still permitted, which arguably give the creditor some satisfaction.

Minnesota courts apparently view this protective provision with favor:

1. In O'Brien v. Johnson, 275 Minn. 305, 148 N. W. 2d 357 (1967) the Minnesota Supreme Court held that tort=feasors who sold their homestead in order to preserve their assets and remove them from reach of creditors, occupied as a dwelling other property (a warehouse) then owned by them having substantially greater value, did not thereby commit a fraud which deprived the second homestead (the warehouse) of its exempt status.

2. Non-payment of alimony interestingly is not considered a debt within the meaning of this provision. Therefore imprisonment has been allowed. See, Clausen, v. Clausen, 250 Minn. 293, 84 N. W. 2d 675 (1957).

MODEL STATE CONSTITUTION

The Model State Constitution makes no mention of imprisonment for debt and property exemptions.

PRIVATE PROPERTY FOR PUBLIC USE, ARTICLE 1, SECTION 13

HISTORY/EXPLANATION

This section was broadened by the amendment of Nov. 3, 1896 to include property "destroyed or damaged"for public use. Prior to such amendment it was limited to property "taken". Vote 101,188 yes; 56,839 no.

This section follows the federal law, and is even a clearer statement of it in utilizing the terms "destroyed or damaged". Dickerman v. City of Duluth, 88 Minn. 288, 92 N. W. 1119 (1903), for example, discussed the value of these amendatory words and observes that among other states Illinois in 1870 engrafted these words into its constitution.

Issues in this regard obviously revolve about what is the meaning of taken, destroyed or damaged in any given case. Regarding the amount of compensation a person should receive Op. Atty. Gen. 59-A-22 July 12, 1948 indicates that a landowner whose property is taken through exercise of power of eminent domain, is entitled to receive just compensation, which means the difference between the fair and reasonable value of the property immediately before and after the taking.

MODEL STATE CONSTITUTION

The Model State Constitution makes no mention of taking private property for public use.

MILITARY POWER SUBORDINATE, ARTICLE 1, SECTION 14

HISTORY/EXPLANATION

Annotations on this subject are quite sparse. Everyone of the 50 states has such a provision in its constitution. The Model State Constitution, however, is silent on the subject.

The only commentary in Minnesota on the subject is Lobb, "Civil Authority Versus Military", 3 Minn. L. Rev. 105 (1919). The Lobb Article emphasizes questions of martial and military law. The annotations indicate that litigation under this constitutional provision has been sparse.

Though involved with the question of executive authority, moreso that military and civil relationship, Strutwear Knitting Co. v. Olson, D. C. 1936, 13 F. Supp. 384 (1936) is instructive. In Strutwear, labor difficulties necessitated the calling out of the state militia which pursuant to the order of the governor of Minnesota and mayor of Minneapolis refused to allow the factory owner to continue work in his plant. It was held that the governor had no right to use the troops for the purpose of depriving the plaintiff of its right to possess its own property or to prevent it from using its property in the conduct of its lawful business.

Also of interest is the construction of the words "standing army" in Article 1, Section 14. State v. Wagener, 74 Minn. 518, 77 N W. 424, 42 L.R.A. 749, 73 A. St. Rep. 369 (1898) has held that the members of the national guard or active militia of the state employed in their usual civil avocations subject to call for military service when public exigencies required, are not a "standing army" within this section of the Minnesota Constitution, nor "troops" within the meaning

of U. S. Constitution, Art. 1, Sec. 10(3). If a militia or standing army were regarded as within either provision the state could have no military power whatever.

MODEL STATE CONSTITUTION

The Model State Constitution makes no mention of Military Powers.

LANDS DECLARED ALLODIAL, LEASES, WHEN VOID, ARTICLE 1, SECTION 15

HISTORY/EXPLANATION

The 1948 Commission's comment was: "This section serves no useful purpose and can be eliminated without adverse effect.

MODEL STATE CONSTITUTION

The Model State Constitution makes no mention of lands and its allodial or tenurial character.

FREEDOM OF CONSCIENCE, NO PREFERENCE TO BE GIVEN TO ANY RELIGIOUS ESTABLISHMENT OR MODE OR WORSHIP, ARTICLE 1, SECTION 16.

HISTORY/EXPLANATION

This provision is Minnesota's version of the federal Establishment Clause. Article 8, Section 2 (Prohibition as to aiding Sectarian Schools) is an added constitutional provision, buttressing the non religious establishment position.

While the aid to parochial schools is the provision first coming to mind under this multi-faceted section, it should be noted that the language of this constitutional provision as well as its construction, applies to other areas. For example, in Lundquist v. First Evangelical

Lutheran Church, 193 Minn. 474, 259 N. Y. 9 (1935) it was held that a will providing that the residuary legatees should pay a bequest of $2,000 to a church was not invalid as contrary to the provision in Article 1, Section 16 that no man shall be compelled to erect, support or maintain any religious order against his consent.

Interestingly in State v. Olson, 287 Minn. 300, 78 N. W. 2d 230 (1970) this section was used to bar a stranger who, during the reverential part of a religious service, imposed himself on a congregation in a way which gave the appearance of intentional obstruction of religious meditation by insulting remarks and bizarre behavior. It was held that the limits of free speech had been exceeded and infringement on the rights of others to worship according to the dictates of their conscience had taken place.

Moreover, this section (Article 1, Section 8) along with the statutory provision M.S.A. 325.91 et. seq. prohibiting Sunday sale of religious reasons refused to serve on a jury, was held exempt from this section and allowed to be discharged. In Re. Jenison, 267 Minn. 136, 125 N W. 2d 588, 2 A. L. R. 3d 1389 (1963).

The concerns of this section specifically relative to financial aid to parochial schools are numerous. Suffice it to say that the United States Supreme Court has most recently spoken in Lemon v. Kurtzman, 403 U. S 602 (1971) and Tilton v. Richardson, 403 U. S. 672 (1971). The Court set out three criteria to be employed in the

determination of the constitutionality under the establishment clause of public aid to church schools:

1. The statute must have a secular legislative purpose;
2. The principal or primary effect of the statute must be one that neither advances nor inhibits religion; and
3. The statute must not foster an excessive government entanglement with religion.

For detailed comment on this aid question, See, Haskell, "The Prospects for Public Aid to Parochial Schools," 56 Minn. L. Rev. 159 (1971). Additionally a Note, "Aid to Parochial Schools-4-Income Tax Credits", 56 Minn. L. Rev. 189 (1971) specifically analyses Minnesota law on this subject, with emphasis on the new income tax credit given to parents whose children attend parochial schools. Choper, "The Establishment Clause and Aid to Parochial Schools," 56 Calif. L. Rev. 260 (1968) is a work exploring in detail the issues involved in the Establishment question. Lastly, the Note in 56 Minn. L. Rev. 189 (1971) in summarizing Minnesota law observes that Minnesota, like many other states has attempted to formulate standards more rigorous than exist at the federal level.

MODEL STATE CONSTITUTION

In Section 1.01, the Model State Constitution guarantees freedom of religion and prohibits "establishment" of religion.

NO RELIGIOUS TEST OR PROPERTY QUALIFICATIONS TO BE REQUIRED (for voting or public office) - ARTICLE 1, SECTION 17

HISTORY/EXPLANATION

The provisions of this section seem clear. State v. Peterson, 167 Minn. 216, 208 N. W. 761 (1926) specifically indicates that a person may be a competent witness, though dissatisfied with government and its administration of justice and that a person may be a competent witnese though he does not believe in God. The Attorney General in Op. Atty. Gen. 12-a March 7, 1955 expressed the view that a provision in a city home rule charter requiring city assessor to be a freeholder contravened this section.

MODEL STATE CONSTITUTION

In its Section 1.07 the Model State Constitution mandates that no political test shall be required for any public office or employement, but unlike Minnesota does not specifically exclude religious tests or property qualification. In any event such qualifications would be void under other constitutional principles.

NO LICENSE TO PEDDLE - ARTICLE 1, SECTION18

HISTORY/EXPLANATION

An amendment approved November 6, 1906, added this section to guarantee the right of persons to sell produce from their farm or garden without obtaining a license. Total vote 284,366: Yes, 190-897, No, 34,094.

State v. Marcus, 210 Minn. 576, 299 N. W 241 (1941) expressed the view of this section as showing that the people of Minnesota by fundamental law recognized a classification in favor of the farmer in

licensing vendors of farm products.

This provision, however, has some boundaries. For example, Op. Atty, Gen. 290-J-9 Oct. 7, 1939 indicates that a city or village is not precluded from enacting reasonable rules and regulations governing those who sell products of the farm or garden and how much regulation can be imposed upon such seller is a question of fact. See, also, Op. Atty. Gen. 477-B-12, June 9, 1937 where it was ruled that a Village may adopt an ordinance prohibiting sale of fruits and begetables on village streets without a license.

MODEL STATE CONSTITUTION

The Model State Constitution does not have a comparable section.

IV. Concluding Remarks

The felt needs of the time warrant at least consideration of the following items for inclusion in the Minnesota Bill of Rights. It is again noted that legislation might cover these areas, but perhaps inclusion is warranted on the theory that some stronger protection of these "rights" is needed:

1. Equal Rights for Women
2. Provision permitting affirmative action programs for encouraging racial minorities and women to participate in the areas of society from which they have been historically excluded.
3. Right to Privacy, No Wiretapping by government or individuals, Right to Information Gathering.
4. The Rights of People in State Institutions - Prisons and Mental Facilities.
5. The Rights of Juveniles
6. Clause Prohibiting Capital Punishment

7. Provisions Providing rights for the Handicapped
8. Provisions guaranteeing rights to homosexuals
9. Provisions guaranteeing the right to proper housing and a guaranteed annual income.