

Spring 1973

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Elmer Gertz

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### Recommended Citation

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# HORTATORY LANGUAGE IN THE PREAMBLE AND BILL OF RIGHTS OF THE 1970 CONSTITUTION

*By* ELMER GERTZ\*

BLACK'S LAW DICTIONARY contains no definition of "hortatory," a word of the utmost use and abuse by the drafters of constitutions. This is probably indicative of the fact that the word, in a legal sense, is almost meaningless. But Webster, more given to popular usages, says the word means "hortative" or "exhortatory,"<sup>1</sup> another way of making a verbal somersault and arriving exactly where you started.

Those of us who were delegates to the Sixth Illinois Constitutional Convention knew the significance of the word better than the dictionary makers, legal or lay. When we felt that something had to be placed in the new constitution in order to placate those who are given to resounding phrases, even though legally inoperative, we excused ourselves on the ground that the words were merely hortatory, a constitutional sermon. We reasoned that because of their longevity and visibility such sermons are more effective than those delivered in churches. Windy phrases, no less than witticisms and wisdom, are more likely to survive if written down and printed. Even a platitude becomes monumental if it is part of a constitution.

There were purists at the convention who would have nothing to do with any constitutional provision that was not truly operative. There were others who would have been delighted if every article had the impress of Polonius, if not Shakespeare himself. There was a tug-of-war between them. Neither side was wholly victorious. Operative sections surely abound in the document that was written. When weighed with the hortatory sections, little more was added to the rhetoric than what was already in the 1870 Constitution and the balance between the operative and the hortatory remained almost undisturbed.

Saying that something is merely a constitutional sermon, hortatory in nature, does not mean that it is truly inoperative. Once words appear in a constitution, they are to be given meaning and effect — every word, phrase, clause, sentence and section.

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\* Ph.B., J.D., University of Chicago. Author of numerous books including *To LIFE* soon to be published by McGraw-Hill. Chairman of the Bill of Rights Committee at the 1970 Illinois Constitutional Convention. Instructor at The John Marshall Law School.

<sup>1</sup> Webster's Third New Int. Dictionary (Unabridged Ed. 1962).

Sometimes such sections have unexpected consequences.

It will be instructive to take up the hortatory language in the Preamble and Bill of Rights and to trace the history of such language as developed in the prior constitutional conventions of this State and in the proceedings of 1970. We will then be in a better position to determine if we have, in any instance, converted the hortatory into the operative. In any event, it will afford an inside view of the making of the basic charter.

A few words about the organization of the Sixth Illinois Constitutional Convention will throw some light on the subject. The convention created nine substantive committees of varying sizes<sup>2</sup> covering the subject matters of the constitution. To assure full concentration of the various component parts of the constitution, each member was permitted to serve on only one substantive committee. In addition, there were several procedural committees, the most important of which was the Committee on Style, Drafting and Submission, headed by Wayne Whalen. I was named chairman of the Bill of Rights Committee which included some of the most vital and diverse personalities in the entire convention.<sup>3</sup>

The Bill of Rights Committee, like the other substantive committees, had member proposals referred to it by the President of the convention, Samuel W. Witwer. These proposals, as well as existing provisions of the Bill of Rights, the Preamble, and proposals initiated during the course of committee deliberations, were mulled over by the committee. The majority decisions that were reached were incorporated in a report submitted to the convention acting as a committee of the whole. Minority reports were also submitted. These various recommendations for the Preamble and Bill of Rights were discussed and voted on three times — the so-called first, second and third readings. After the first and second readings, the various provisions went to the Style, Drafting, and Submission Committee in the form approved by the committee of the whole. This committee considered the proposals stylistically, but not substantively, and thereafter reported them back to the convention. For the third and final reading, the convention sat in plenary session and not merely as a committee of the whole. This procedure is somewhat like the legislative process. In theory at least, it insures

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<sup>2</sup> The substantive committees were: Bill of Rights, Education, Executive, General Government, Judiciary, Legislative, Local Government, Revenue and Finance, and Suffrage and Constitutional Amendment.

<sup>3</sup> I have told the story of my committee and its work in a book that has received some attention, *FOR THE FIRST HOURS OF TOMORROW: THE NEW ILLINOIS BILL OF RIGHTS*, published by the University of Illinois Press. I do not intend to repeat that story here. Instead, I shall concentrate on an aspect of our work not fully covered in my book.

that nothing will be considered or adopted in an offhand fashion.

The Bill of Rights and the Preamble were the products of considerable deliberation in our committee (where we had a rule permitting a second vote on each section) and by the convention as a whole. This was as true of the so-called hortatory provisions as of the operative ones.

The provisions as finally drafted and ratified can be fully understood only if one is aware of the process through which they matured. The record is preserved in seven huge volumes, totalling more than 8,000 double-columned pages, published by the secretary of state. These volumes include the member proposals, the committee reports or proposals, the journal (an abbreviated report of the proceedings) and a verbatim transcript of everything said on the floor of the convention.<sup>4</sup> I have relied heavily on the verbatim transcript for the purposes of the present inquiry and it should be noted that there exists no similar verbatim transcript for the proceedings of the Bill of Rights Committee.

Almost every constitution, national or state, has provisions that are designed to be hortatory in nature — gratuitous sermons to appease those unable to obtain operative provisions. The constitutions of Illinois have been no exception to this practice, which so greatly annoys the constitutional purists. Our inquiry deals only with the Preamble and Bill of Rights, although there are other hortatory provisions in the Illinois Constitution of 1970 and in the earlier versions of our basic law, the constitutions of 1818, 1848 and 1870. Particular reference will be made to sections 1, 12, 20 and 23 of article I, as well as to the Preamble.

Are these provisions without practical applicability? Are they truly non-operative? My answer — to state my conclusion first — is that they have more validity and effect than is generally recognized. It is my intention to trace the committee and convention discussion of these provisions and then, to the degree possible, to project their precise effects.

If our Bible at the Sixth Illinois Constitutional Convention was the 1870 Constitution, then our Talmud consisted of the literature gathered for our use by the Constitution Research Group and the Illinois Constitution Study Commission. We often resorted to the Model State Constitution, published by the National Municipal League in 1963, as well as other publications authored

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<sup>4</sup> See REC. OF PROC., SIXTH ILL. CONST. CONV., *Daily Journal, Verbatim Transcripts, Committee Proposals, Member Proposals*, Vols. I-VII (1969-70) [hereinafter cited as *Committee Proposals* and *Verbatim Transcripts*].

by individuals of authority and high repute on the subject of state constitutions.<sup>5</sup>

### THE PREAMBLE

When the Bill of Rights Committee considered what to do with the Preamble, we were mindful of what Messrs. Braden and Cohn had said in their book: "Preambles have never evoked much political controversy and, strictly speaking, are not operative parts of a constitution."<sup>6</sup> The learned authors had made the utterance without having to reckon with the contentious Bill of Rights Committee. The committee had a donnybrook when deciding whether to retain the 1870 Preamble or to change it in any respect, major or minor.

Four proposals urged retention of the existing 1870 Preamble<sup>7</sup> and a minority of the committee agreed. They felt that it was inappropriate, or worse, to change the familiar and time-honored phraseology. They certainly did not want to introduce new or revolutionary concepts in the Preamble. They were afraid that such novel ideas might be given operative effect when the new charter was construed by the courts. Other proposals urged us to retain all references to God and to opt as well for brotherhood under God. Some, not content to rely on God for human needs, urged that we stress the obligation to protect the young, the old, the weak and the poor, making certain that all would have access to adequate food, medicine, clothing, shelter and a clean environment.

The Constitution of 1818, under which Illinois had been admitted to the Union, started with an introductory paragraph that was a blend of a preamble and a statement of state boundaries. It incorporated a few phrases found in the Preamble to the United States Constitution with respect to establishing justice and promoting the general welfare. The 1848 Constitution had a separate preamble, making reference to God and adopting more fully the language of the Preamble of the Federal Consti-

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<sup>5</sup> By far the most elaborate and useful material was contained in the book by George D. Braden and Ruben G. Cohn entitled *THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS*, published in October of 1969 by the Institute of Government and Public Affairs of the University of Illinois.

After our deliberations were over and we produced the Illinois Constitution of 1970, ratified by the voters on December 15, 1970, the University of Illinois began the publication of a series of monographs on the new constitution. My own book, *FOR THE FIRST HOURS OF TOMORROW: THE NEW ILLINOIS BILL OF RIGHTS*, is most pertinent to the present inquiry. See note 3 *supra*.

<sup>6</sup> G. BRADEN & R. COHN, *THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS* at 1 (Urbana: Institute of Government and Public Affairs, University of Illinois Press, 1969).

<sup>7</sup> The member proposals urging retention were numbers 59, 62, 134 and 248.

tution. The 1870 Preamble is substantially like the 1848 Preamble, as was the Preamble of the defeated 1922 Constitution.<sup>8</sup>

Delegate Victor Arrigo presented the proposed new preamble to the convention.<sup>9</sup> This scholar and man of culture was even more eloquent and literary than usual in his throbbing defense of our committee's preamble. All that he and others said on that occasion deserves quotation in full,<sup>10</sup> but one paragraph in praise of the preamble is irresistible:

It serves the same function as a prelude to a powerful symphony of liberty, justice, and freedom, and, like all preludes, it conveys a powerful message as we listen to the strains of its theme as it occurs and reoccurs throughout the unfolding of the rest of the composition that follows. What does its melody tell us? What does its rhythm convey? It reaffirms our faith in God and supplicates his continuing intercession and blessing on our behalf. The first three words, "We, the people," emphatically set out the key of the authority and the emanation of power by which the state of Illinois is governed. It affirms, without equivocation or tremolo, the proposition that we Americans want to work together and live together with harmony and consideration for each other, to be able to defend ourselves, to assure ourselves that our daily existence will run smoothly, and what is most important, to perpetuate freedom and liberty for ourselves, our children, and their children after them, free from poverty and inequality and with the maximum in the attainment of justice for all and the hope that the individual will be able to attain the fullest development of his potential with the help of God.<sup>11</sup>

His utter seriousness was evinced in an exchange with delegate David Kenney:

MR. KENNEY: Mr. Arrigo, did the committee consider giving up the archaic spelling in line 3?

MR. ARRIGO: Are you referring to the word that follows the capitalized He?

MR. KENNEY: That's correct.

MR. ARRIGO: I think this is so much a part of the hortatory aspect of this, it is so much a part of our gratitude to Him, that I think it would be bold on our part to even consider changing it.

<sup>8</sup> Note 6 *supra*.

<sup>9</sup> REC. OF PROC., SIXTH ILL. CONST. CONV., *Verbatim Transcripts*, Vol. III:

We, the people of the state of Illinois, grateful to almighty God for the civil, political, and religious liberty which He *hath* so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors in order to provide for the health, safety, and welfare of the people; maintain a representative and orderly government; eliminate poverty and inequality; establish and assure legal, social, and economic justice; provide opportunity for the fullest development of the individual; insure domestic tranquility; provide for the common defense; and secure the blessings of freedom and liberty to ourselves and our posterity, do ordain and establish this constitution of the state of Illinois.

*Id.* at 1577-78 (emphasis added).

<sup>10</sup> *Id.* at 1577-81.

<sup>11</sup> *Id.* at 1578.

MR. KENNEY: Would it reduce our gratitude to the Almighty to change that spelling to h-a-s?

MR. ARRIGO: Well, Mr. Kenney, I don't think that when we're talking about our gratitude to God that we should even indulge in the possibility of jokes with reference to God.

MR. KENNEY: That wasn't a joke, Mr. Arrigo. It was a plain question.

MR. ARRIGO: Well, I am sure that God would truly understand if we misspelled a word, and I think possibly that He might even forgive us if we don't follow the rules of grammar and follow the custom and traditions that have existed for a long time.<sup>12</sup>

Mr. Kenney ended up supporting the proposed preamble.<sup>13</sup> There was a minority report which suggested a preamble largely in the language of the 1870 Preamble but with some modern overtones.

Lewis Wilson, one of the most level-headed and conservative of the delegates, made a persuasive argument for the majority preamble because, in his opinion, it addressed itself to the needs, goals and aspirations of the future.<sup>14</sup> Another highly conservative delegate, Joseph Meek, was of a similar persuasion:

Mr. President, I should like to sincerely compliment the authors of both of these documents. I think they are both superb. I think they are very well done. I would like to support the majority for the simple reason that I think it is a longer goal and a more proud goal and a more all-encompassing goal; and I think it's beautifully done, and I compliment both.<sup>15</sup>

Other conservatives, like Ray Garrison, Thomas C. Kelleghan, Henry Hendren, and Lester Buford, supported the minority preamble.<sup>16</sup> The majority report prevailed on first reading by a vote of 61 to 9.<sup>17</sup>

## SECTION 1

### INHERENT AND INALIENABLE RIGHTS

In presenting section 1, Delegate Virginia Macdonald declared: "The committee voted unanimously, with one member being absent, to retain the familiar and beautiful language from the Declaration of Independence . . . ." <sup>18</sup> The language, as presented on first reading, was as follows:

All men are by nature free and independent and have certain inherent and inalienable rights among these are life, liberty and the pursuit of happiness. To secure these rights and the protection of property, governments are instituted among men, deriving their

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<sup>12</sup> *Id.* at 1579.

<sup>13</sup> *Id.* at 1582.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 1583.

<sup>16</sup> *Id.* at 1583-85.

<sup>17</sup> *Id.* at 1587.

<sup>18</sup> *Id.* at 1370.

just powers from the consent of the governed.<sup>19</sup>

Mrs. Macdonald pointed out that one member proposal would have added the concept of "privacy" to "life, liberty and the pursuit of happiness."<sup>20</sup> She concluded by stating:

While we discussed the fact that this section is in a sense hortatory and has been said to have no operative legal effect, we did feel strongly that the basic principles expressed by its simplicity are essential to the fundamental concept of our form of government.

We have chosen to let this classic and revered language continue to stand untouched, thus serving as a beacon of reassurance of their inherent and inalienable rights to the people of Illinois.<sup>21</sup>

Delegate Victor Arrigo then made his characteristic speech, lengthy and literary, tracing the history of the hallowed language back to Filippo Mazzei, from whom Thomas Jefferson had taken it.<sup>22</sup>

Delegate George Lewis inquired if Mrs. Macdonald, as a woman, was content to leave the first two words of the section, "All men."<sup>23</sup> She replied:

I think the language is historic and I am not disturbed by it. I don't know how fourteen other women delegates of the Convention feel, but it is not at all offensive to me.<sup>24</sup>

With the slight alteration of the word "these" to the word "which," the proposed section was engrafted into the new charter.

## SECTION 12

### RIGHT TO REMEDY AND JUSTICE

As chairman of the Bill of Rights Committee, I presented what was then called section 19 and which became section 12 in the Constitution of 1970. As presented, it read:

Every person shall find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he shall obtain, by law, right and justice freely and without being obliged to purchase it, completely and without denial, promptly and without delay.<sup>25</sup>

With special care, I expressed to the Convention what we had in mind:

All we did in section 19 is to substitute for the words "ought to" the word "shall" with respect to the right of every person to find a certain remedy in the law for all injuries and wrongs. This is language, basically, which has been in the constitution for a long while. It isn't simply a constitutional sermon; the appellate court and the supreme court of Illinois on occasion have used the provi-

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* This was member proposal 275.

<sup>21</sup> *Id.* at 1371.

<sup>22</sup> *Id.* at 1371-72.

<sup>23</sup> *Id.* at 1372.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*, *Committee Proposals*, vol. VI at 11.



sion in its 1870 form to find remedies, even when the remedies aren't spelled out in statutes or really in the common law. That was true with respect to the right of privacy and was true when the supreme court declared unconstitutional the antiheartbalm legislation. And our feeling — and it is the feeling shared by the Chicago Bar Association and others — that the provision is strengthened when the rather awkward words "ought to" are removed and the word "shall" is substituted. And I think the net result is either the meaning is exactly the same or is made more emphatic. I think it is made more emphatic. It doesn't add any new element. It doesn't create any uncertainty. It makes simply a slight textual change in the public interest.<sup>26</sup>

Delegate Charles Shuman was not sure he understood our intention. This exchange took place between us:

MR. SHUMAN: I don't mean to belabor the deliberation of this Convention, but if I understand the meaning of the words "ought to" and the word "shall," it seems to me that there is some considerable difference, and I wonder if there might be a little further explanation of these two words.

MR. GERTZ: Yes. The cases interpret "ought to" to mean "shall." And so, what we've done is to put in the word "shall" instead of "ought to" because the cases give it that meaning, and I think stylistically it is a better phrase.

If we had had a Committee on Style and Drafting of the nature of our committee in 1870, I think that is the language that would have been used; that clearly was the intent, and we wanted to spell it out here.<sup>27</sup>

Matthew Hutmacher, a member of the Bill of Rights Committee, thought the change in language, however slight, "might increase the use"<sup>28</sup> of the section. He concluded:

However, since other states have not used similar language in this way, the greater likelihood is that substitution would not make any practical difference. So we have this to be considered as well as the statement that I think it was probably the intention of the committee that it be a little more emphatic.<sup>29</sup>

I assured him that he was correct.<sup>30</sup> Thereupon Mr. Shuman moved to amend the section by restoring the words "ought to" in place of "shall."

Leonard Foster, secretary of the Bill of Rights Committee and very frequently my foe, announced himself in support of the Shuman amendment. I spoke in opposition, reminding the delegates of our obligation to subject the constitution to review, the consideration already given the change by the Bill of Rights Committee, the support the substitution had received from the

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<sup>26</sup> *Id.*, *Verbatim Transcripts*, vol. III at 1490.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

Chicago Bar Association and the four member proposals which suggested it.<sup>31</sup>

Delegate Wendell Durr inquired:

The question that I have is, is it the intention of the committee that this mandatory language that we shall all find — we 'shall find a certain remedy for all injuries to our person' — would this include remedies for those injuries to our persons occasioned due to our own neglect or fault, in whole or in part?<sup>32</sup>

I answered:

As I understand the change, it does not extend the law at all. The supreme court has interpreted this provision. It has found occasion to justify an action that it takes by reason of it; on other occasions, it has not taken the section to sanction any particular action. I don't intend this to create any new rights or to limit any rights. It simply is to make explicit what I understand the cases to say.<sup>33</sup>

One of the gadflies of the Bill of Rights Committee, delegate Arthur Lennon, commented:

I recognize that changing 'ought' to 'shall' can be argued as creating another cause of action. I am satisfied that it is not going to create anything we can't find a way to create without making the change. It will make my chairman simply delighted to have the 'shall' go in, and for once in the Convention I want to assist him and make him happy.<sup>34</sup>

Mr. Shuman would not be appeased:

I hate to take away the pleasure of Mr. Gertz by suggesting that we take out this language, but I cannot support the change just for the sake of change. If the word does not make any substantive change, then I don't think it should be made; and if it is a substantive change, then I don't think we have had a full explanation of it, and I would urge you to support my amendment to go back to the original language of the constitution.<sup>35</sup>

Paul Elward, top spokesman for the Chicago Democrats

<sup>31</sup> *Id.* MR. GERTZ:

I would like to oppose the amendment. Of course many of us are temperamentally incapable of accepting any change, however slight, in any subject matter. I think it sometimes is a good thing to consider the possibility that the language ought to be changed. We're always revising things that we write. We are under an obligation to subject the constitution to review, and it doesn't necessarily mean we make basic changes; sometimes we make very slight changes. We approved earlier a change simply in a comma. It seems to me that this is not something off the cuff; there has been consideration of it. A great Bar Association suggested this change. Others who have reviewed it — there were several — this change was suggested by Proposals No. 217, 275, 433, and 526; and there were no other member proposals on the subject. It seems to me that it is indicated a kind of consensus on the matter.

I am sure the world won't come to an end whether we keep the old language or the new; and I don't think it takes any particular courage to make this slight change, and I think it serves a laudable purpose to make it.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1491.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

at the convention, asked for further clarification. He and I had this exchange:

MR. ELWARD: I had a question for Mr. Gertz, as to how we squared this section in its present form with the libel section that we have adopted, because this says, "all injuries to reputation." It doesn't exempt public officials or good motives or anything else.

MR. GERTZ: That's right. This is left in its original language and it hasn't previously affected the law of libel, or any other law. It hasn't been intended or used by the courts to create any limitations whatsoever.

MR. ELWARD: But my point is, isn't Mr. Shuman's point well taken, sir, that there is a great difference between "ought to" and "shall," and isn't the libel area one area where you're changing this thing?

MR. GERTZ: No. What I said earlier I will repeat. The courts have interpreted the words "ought to" as if they were the word "shall." In the cases on this matter the courts have used the phrase "ought to" as if it were the word "shall."<sup>36</sup>

Immediately thereafter, the Shuman amendment was defeated by a show of hands.<sup>37</sup>

At a later stage of the proceedings, Malcolm S. Kamin proposed that "privacy" be added to the rights protected by the proposed section:

Mr. President and ladies and gentlemen, I think this is a "merely" amendment. We have attempted to create a right of privacy earlier in the bill of rights. This is merely an attempt to point out — to clarify — that when we are referring to those remedies in section 17, that the right of privacy is included in those rights for which an individual should have a remedy when he has received a wrong as I understand it, it might seem that the right of privacy would be included under the word "person." However, it is clearly not included under the word "property." However, the distinction between "person" and "reputation" suggests that "person" is used in the technical tort sense of a physical harm to the person, and therefore for the sake of clarity — and I don't feel particularly strongly about this except that the right of privacy as we have dealt with it here is an important right and one which is worthy of all the protection and all of the dignity which we are able to give it, and so I would insert it in this section.<sup>38</sup>

I commented:

Mr. President, at one time the committee inserted the word "privacy" in another section of the bill of rights; and then when we passed the provision with respect to search and seizure, including unreasonable invasion of privacy and interceptions of communication by eavesdropping devices or other means, we felt that we had covered the area. Subsequently, Mr. Elward introduced a proposal on the floor of the Convention; and, as I recall, it was defeated. The committee has taken no stand except that in the general way

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*, vol. IV at 3652.

we feel strongly that we are in favor of every possible right of privacy, but whether or not in this context we favor it, I don't know. I personally see no harm in it, and I see a lot of good. Every strengthening of the right of privacy I would welcome.<sup>39</sup>

And the Kamin amendment, unlike the Shuman one, was passed. In its final form, the section now reads:

Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.<sup>40</sup>

## SECTION 20

### INDIVIDUAL DIGNITY

In one of the longest and most eloquent speeches delivered at the Sixth Illinois Constitutional Convention, Victor Arrigo urged the adoption of the provision on "Individual Dignity" which he sponsored.<sup>41</sup> The least that one can say is that there would have been no such section in the new constitution if Mr. Arrigo had not worked and spoken for it, in season and out. He was the most zealous proponent that this or any other constitutional convention had ever known. Those who desire an in-depth understanding of the provision should read his speech in full, as the report of the committee on the matter is much too brief — perfunctory even. He concluded his speech by saying:

The section that you are being asked to pass on — and I urge your acceptance of its passage, especially in view of the viewpoints and the opinions and the repugnance that was expressed on this floor yesterday against discrimination — is this provision:

To promote the dignity of the individual, communications that portray criminality, depravity, or lack of virtue in or that incite violence, hatred, abuse, or hostility toward any group of persons in this state by reason of or by reference to religious, racial, ethnic, or national affiliation are condemned.

This provision seeks to encourage moderation in the use of language that impairs the dignity of the individuals by disparaging groups to which they belong.

Again I want to reiterate, it in no way qualifies or modifies the constitutional rights of free speech and press. The provision creates no private right or cause of action, and it imposes no limitations on the powers of government. It is purely hortatory. Like a preamble, such a provision is not an operative part of the constitution. It is included to serve a teaching purpose, to state an ideal or principle, to guide the conduct of government and individual citizens.<sup>42</sup>

The irrepressible John Knuppel argued with the immovable Victor Arrigo as to whether it was really an individual rather

<sup>39</sup> *Id.*

<sup>40</sup> ILL. CONST. art. I, §12 (1970).

<sup>41</sup> *Id.*, vol. III at 1637-40.

<sup>42</sup> *Id.* at 1640.

than a group right that was being promulgated by his proposal.<sup>43</sup> Delegate Thomas Miller asked if the section would impair the playing of television programs like "The Untouchables."<sup>44</sup> Mr. Arrigo was more eloquent than explicit in his response, denouncing such programs.<sup>45</sup>

Mr. Miller cited various cartoon strips, "Will this section, if adopted, in any way begin that demise of Li'l Abner?"<sup>46</sup>

Mr. Arrigo was not daunted, as he replied that a small declaration of principle would not stop Li'l Abner.<sup>47</sup>

Mr. Miller expressed himself at some length and with picturesque details as being "greatly relieved."<sup>48</sup> Mr. Arrigo was not pleased with Mr. Miller's humor.<sup>49</sup> With characteristic oratory, he established both his sincerity and the gravity of the wrong sought to be remedied by the proposal. At the same time, he tried to reassure those who were afraid of the provision:

And at no time was it the purpose of the proponent of this proposal or of the people that appeared on its behalf before our committee that we were going to in any way infringe on freedom of speech and freedom of the press. What we wanted was a true recognition of Americans and of Mexicans and of Polish people who have been the subject of some horrible jokes.<sup>50</sup>

Gray haired, courtly, conservative Delegate Lewis Wilson, then presented the viewpoint of the minority of the Bill of Rights Committee:

<sup>43</sup> *Id.* at 1640-41.

<sup>44</sup> *Id.* at 1641.

<sup>45</sup> *Id.* MR. ARRIGO:

I think you are aware of the fact that that was a program that was a very sensitive thing to the 25,000,000 Americans of Italian descent that live in the United States. This did not depict the people that have given so much, not only to this country but to the world, indeed, Mr. Miller; and I think you are aware of the fact that because of the protests of many organizations made up of Americans of Italian descent that finally that program was abolished.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* MR. ARRIGO:

This in no way will effect any cartoon strip of any newspaper. I think if you've read the report it makes it quite clear this does not infringe on freedom of the press and freedom of speech; and I think one of the most noted cartoonists in the United States, and especially a man with the *Chicago Daily News* is a man by the name of John Fulsetti, and I am certain that in no way can this small declaration of principle stop Li'l Abner.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* MR. ARRIGO:

Mr. Miller, I am very pleased to know that that is the extent of your intellectual interests. (Laughter) Now if you wanted to discuss the philosophy of the music of Wagner and the music of Verdi, maybe I might be able to discuss it with you. If we wanted to go into the field of literature and discuss Monzoni and his relationship to Shakespeare, I'll do it; but I do not think that this is a joking matter, and if you will excuse me, I am very sincere about this.

<sup>50</sup> *Id.* at 1642.

I want to make it clear at the outset that the minority in no way condones or approves the kinds of statements that Mr. Arrigo has been talking about. We agree with him 100 percent. They are despicable. We want no part of them. Our differences are not at that point.<sup>51</sup>

Mr. Wilson went on to say that while the statements were deplorable, the existing laws of libel were a sufficient remedy to redress an individual who was wronged in this fashion.<sup>52</sup>

George Lewis inquired whether inclusion of the provision would enhance the saleability of the new constitution. Mr. Wilson did not know. Mr. Arrigo was sure that it would.<sup>53</sup>

Then delegate Ray Garrison, transplanted to the Chicago area from Kentucky, proposed that the section also protect regional groups from the abuse about which Mr. Arrigo complained. Like Mr. Arrigo, he was eloquent and protracted in his argument in favor of such amendment.<sup>54</sup> John Knuppel, never one to be silent, proposed his own substitute for the Arrigo section.<sup>55</sup> This led to a parliamentary hassle, summed up by Convention President Samuel Witwer, who ruled that Knuppel's was a substitute motion and permitted him to proceed.<sup>56</sup> Mr. Knup-

<sup>51</sup> *Id.*

<sup>52</sup> Mr. WILSON:

So, while we deplore these statements as strongly as we can — we want no part of them, we don't condone them; we simply feel that there has been no showing made for relief of a constitutional nature.

And he concluded:

As Mr. Arrigo has pointed out, the statement of his proposal is hortatory in nature. It does not create any rights in anybody. It's nothing on which anybody could sue. We have several hortatory statements in the constitution. It doesn't seem to us like they should be expanded to cover an entirely new subject; and along the lines of any particular person as distinguished from a group, any person who feels himself libeled or slandered has recourse under well-established and existing laws of libel.

*Id.* at 1642-43.

<sup>53</sup> *Id.* at 1643.

<sup>54</sup> *Id.* at 1643-44.

<sup>55</sup> The proposed substitution read:

To enhance peace and tranquility among men, to promote the common welfare, and to uplift the dignity of the individual, all communications and publications which portray criminality, depravity, or lack of virtue or which tend to incite violence, hatred, abuse, or hostility toward any person or group of persons in this state by reason of or reference to their sex, economic status, religious beliefs, physical appearance, mental or physical infirmity, lack of educational achievement, or racial, political, or ethnic affiliation are condemned.

*Id.* at 1645.

<sup>56</sup> PRESIDENT WITWER:

The ruling is that this is a substitute motion, and the minority proposal may still be heard and will be heard on what will be a motion to strike both this and the majority proposal; and I assume such a motion will be made by some signer of the minority proposal, but until we have acted on Mr. Knuppel's proposal, we are not in a position to clear the slate completely and prevent any further action differing from the majority proposal. We have to afford to those delegates who may not share your point of view, Mr. Thompson, that there are no alternatives. Actually there may be three or more.

*Id.* at 1646.

pel discoursed again on his proposed substitute.<sup>57</sup> Father Francis Lawlor was even more wordy than Mr. Knuppel in supporting the Knuppel amendment.<sup>58</sup> Mr. Arrigo, usually courteous, was unsparing in his denunciation of the Knuppel substitute.<sup>59</sup> Mr. Knuppel protested his good faith.<sup>60</sup> The debate went on and on. For a supposedly hortatory provision, it had more verbal coverage than almost anything proposed by the Bill of Rights Committee or any other committee of the convention. If there is ever occasion to inquire as to how the members of the convention felt about this section, there is more than enough reading matter to satisfy anyone. Many of the leaders of the convention felt called upon to speak out on the section. Generally, those who held the firmest views on civil liberties were most strongly opposed to it, protesting, at the same time, that they abhorred the kind of stereotyping that so enraged Mr. Arrigo and those who supported his viewpoint.

Among Mr. Arrigo's supporters, there was one who did not often praise anything new. Every word in the 1870 Constitution seemed sacred to delegate Thomas C. Kelleghan, but he had these interesting things to say in support of Mr. Arrigo's proposal:

I rise to support Mr. Arrigo's proposal and the committee proposal for another reason. This Convention is constantly troubled by what belongs in the constitution and what does not belong in the constitution. Now, I for one am very much impressed by Mr. Arrigo's vast learning. I have associated with him now since I came down here on a very close basis, and I don't hesitate to say that I think he is one of the finest delegates we have here; and if anyone can lead us to what belongs in the constitution, it's Victor Arrigo.

He is breaking fresh ground with this particular proposal, and

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 1647-48.

<sup>59</sup> MR. ARRIGO:

President and ladies and gentlemen of the Convention, if there is one thing that I am proud of in this Convention it is the fact that I am probably one of the few delegates that doesn't come to this Convention every time there is a proposal with numbers of amendments to water down the hard work of a committee. I have never entered any amendment. I have tried to support committee work.

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I urge the defeat of this amendment because this is an attempt — actually an almost undisguised attempt to water down a proposal that was adopted by the committee after serious consideration and study by one of the most distinguished consultants to any committee in this Convention.

I think if he would read the preamble, there are many things in his amendment that are covered in the preamble; and when he speaks of economic status, last Friday we had the preamble — it was my privilege to present the preamble to this Convention — we speak of poverty. I think all of his matters are covered in our preamble.

And, ladies and gentlemen, take the majority report as it was presented to you and amended by Mr. Garrison; but certainly this is not the majority report if this were adopted, and I urge its defeat.

*Id.* at 1648.

<sup>60</sup> *Id.*

I think we should all support it. This is something that will mean a real advance and will help every one of us and every one of our children in understanding how to treat and speak to other people. We need something like this. I urge you to support the Bill of Rights Committee and Mr. Arrigo.<sup>61</sup>

After many rounds of oratory, consuming hours of time, Mr. Arrigo's proposal was approved by an overwhelming hand vote on the so-called first reading. After the section was returned to the convention by the Style and Drafting Committee, the oratory started all over again on the second reading.<sup>62</sup> The forces arrayed against the Arrigo proposal were persistent but unsuccessful. I found Ronald Smith's argument in support of the motion to reject the Arrigo proposal of a high order of persuasiveness, but it was lost on the convention.<sup>63</sup>

In a roll call vote, the proposal to delete the Arrigo section was defeated 79 to 25, with some of the outstanding delegates on each side.<sup>64</sup>

### SECTION 23 FUNDAMENTAL PRINCIPLES

The section on "Fundamental Principles," submitted as section 20, precipitated far more discussion than might have been anticipated.<sup>65</sup> Delegate Virginia Macdonald briefly presented the rationale of the Bill of Rights Committee, largely as set forth in our report to the convention. The section then read:

A frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty.<sup>66</sup>

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<sup>61</sup> *Id.* at 1653.

<sup>62</sup> *Id.*, vol. IV at 3655-62.

<sup>63</sup> MR. R. SMITH:

I will speak briefly to explain my vote and my sponsorship of this amendment. I vote yes, of course. I don't believe in holding out false hopes to people. I don't believe in holding out words — mere words — when the problems that we face of racial inequality, of one man calling another man by the filthiest kind of language that can be used — words like "Nigger" and "Kike" — those are the real swear words. Those problems can't be solved by this. Those of you who live in the suburbs and who are voting for this, why aren't you living in the city with us? Why aren't you living with the problems, so that the little boy who is the Appalachian white can look down the street and see a lawyer who is an Appalachian white who made it? Why are you living in fancy neighborhoods? Come into the city. Solve the problem in a real way. You can't wash away your consciences with a hortatory statement. This holds out a false hope, and false hopes are more damaging than you can imagine. I vote yes to delete this language in spite of my great respect for the passion with which it has been presented by so many delegates here. Thank you.

*Id.* at 3661-62.

<sup>64</sup> *Id.* at 3662.

<sup>65</sup> *Id.*, vol. III at 1383-99. The original section 20 was approved by a vote of 68 to 0.

<sup>66</sup> *Id.* at 1383.



At this point Samuel W. Witwer, the president of the convention, made an interesting and possibly significant observation:

[T]his section was utilized by proponents of constitutional reform for the last fifty years very frequently, pointing out that we are mandated to have a frequent recurrence to the fundamental principles. It worked once at least, we know, for a Constitutional Convention . . . .<sup>67</sup>

Mr. Witwer had reference to the successful campaign to convene the Sixth Illinois Constitutional Convention.

Delegate Malcolm S. Kamin then inquired about the interconnection of sections 1 (Inherent and Inalienable Rights) and 20 (Fundamental Principles).<sup>68</sup> As chairman of the Bill of Rights Committee, it was incumbent on me to comment:

As I interpret Section 20 — and the president interprets it that way — it's a kind of sermon to the effect that we ought periodically to review the constitution of the state, not necessarily for the purpose of amending or changing it, but that we can give further thought to it; and I suspect that the Suffrage and Amending Committee had that in mind in the provision that we passed with respect to the twenty-year vote [on whether or not to convene a constitutional convention].<sup>69</sup>

In the course of the discussion on the section, Delegate Dwight P. Friedrich, one of the more conservative delegates who ultimately opposed the new constitution, moved the addition of a sentence which he had earlier proposed to the Bill of Rights Committee and which had failed because the vote was tied, 7 to 7, one member of the committee being absent.<sup>70</sup> His proposed amendment read:

These blessings [of liberty] cannot endure unless the people recognize their corresponding individual obligations and responsibilities.<sup>71</sup>

Another very conservative delegate, Ray H. Garrison, made a long speech in support of the Friedrich amendment,<sup>72</sup> citing, among others, Abraham, Moses and President Nixon, and referring, but not by name, to a case decided by the Illinois Supreme Court some sixty-seven years previously.<sup>73</sup> The case, he said, threw little light on the section.

One of the more verbal delegates, John L. Knuppel, served notice that he was going to move to strike the section in its entirety as being beautiful but unnecessary.<sup>74</sup> Meanwhile, he favored the temporary inclusion of the Friedrich amendment.

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<sup>67</sup> *Id.* at 1384.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 1396.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 1396-97.

<sup>73</sup> *Id.* at 1397. The case he was apparently referring to is *Wice v. Chicago & Northwestern Ry.*, 193 Ill. 351, 61 N.E. 1084 (1901).

<sup>74</sup> *Id.* at 1397.

Ronald C. Smith, my colleague from the 13th District, engaged in an interchange with Mr. Friedrich which served to pinpoint the lack of legal enforceability in the provision:

MR. R. SMITH: I have questions to address to the mover of the amendment. Mr. Friedrich, does this language create any legally enforceable rights or obligations?

MR. FRIEDRICH: I doubt that it does.

MR. R. SMITH: You are not sure?

MR. FRIEDRICH: I would say that it is, as been suggested, a sermon — a sermon that needs to be preached, incidentally, and I intend to cover that in summing up.

MR. R. SMITH: I take it, then, your answer is no, it is not your intention that this create any legally enforceable rights or obligations.

MR. FRIEDRICH: It is not my intention that it does.

MR. R. SMITH: Does it create any defenses, for example, in criminal or military cases?

MR. FRIEDRICH: I would not think it did.

MR. R. SMITH: If it is proper for me to speak at this time, Mr. Chairman —

PRESIDENT WITWER: Certainly it is.

MR. R. SMITH: It is my understanding of a bill of rights that the bill of rights carves out those areas where the state cannot interfere with an individual's rights.

This language does not strike me — either the language of the committee or the language as amended — as being appropriate to a bill of rights but more appropriate to a preamble, because a preamble is in a sense a sermon; and I would hope that we would strike this language from the bill of rights and move it into the preamble at a proper time. . . .<sup>75</sup>

Mr. Friedrich later declared that he would be glad to transfer the provision to the Preamble, but somehow it never got there. His motion to amend carried<sup>76</sup> and the amendment remained in the Bill of Rights, tacked on to the provision which was to become section 23.<sup>77</sup>

Mr. Knuppel's motion to strike the entire section, as amended, failed,<sup>78</sup> and the section was approved on first reading and sent to the Style and Drafting Committee to be placed in shape for second reading and, ultimately, for final passage.

### CONCLUSION

Here, then, is the history of each of the hortatory provisions at the Sixth Illinois Constitutional Convention. What does it add up to?

<sup>75</sup> *Id.* at 1398.

<sup>76</sup> *Id.* at 1399. The motion carried by a vote of 68 to 0.

<sup>77</sup> ILL. CONST., art. I, § 23 (1970).

<sup>78</sup> *Id.* at 1399.

I would say that the Preamble simply sets forth the goals of this State. If the courts can find no other reason to support any kind of legislation that may be enacted, they will find aid and comfort in the Preamble. It is our general welfare provision and will be interpreted as the exigencies of the situation may require.

Section 1 (Inherent and Inalienable Rights) will be a source for encouraging a devotion to historical rights. It will be as strong, or as weak, as the courts construe circumstances to dictate.

Section 12 (Right to Remedy and Justice) is no longer merely hortatory, if it ever was. It will be interpreted to provide remedies for legal wrongs.

While section 19 (No Discrimination Against the Handicapped), unlike section 17 (No Discrimination In Employment and the Sale or Rental of Property), has no express self-implementing language, I am convinced that by reason of section 12, it, too, is self-implementing.

Section 20 (Individual Dignity) creates no rights or duties, but will provide an umbrella for any enforcing legislation in that area which may be enacted.

And finally, section 23 (Fundamental Principles) will encourage a frequent re-examination of the basic charter of this State, but it will do far less in that respect than the operative article on constitutional revision, article XIV.

In short, words, whether in or out of a constitution, mean as much, or as little, as the legislature and the courts decree.