CONSTITUTIONAL LAW

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Only those cases thought to be the more significant or interesting ones have been selected for discussion, and the treatment of these is by no means exhaustive. Although many of the cases discussed below are in the criminal law area, those presenting search and seizure problems have been omitted in favor of their treatment in the criminal law article.

The equal protection argument advanced by an applicant for an alcoholic beverage license was rather summarily rejected in *Goldberg v. Mulherin*,[1] which affirmed, over the dissent of Mr. Justice Felton, the dismissal of a mandamus complaint on the ground that it failed to show that the applicant had a clear legal right to the license. Perhaps the applicant did not pursue the appropriate remedy or did not allege facts sufficient to show a denial of equal protection, but surely the constitutional right of the equal application of laws to all persons in the same situation does not exist only when one is asserting a "clear legal right." Mr. Justice Felton in his dissent relies upon *Niemotko v. Maryland*[2] as ruling out the exercise of arbitrary and unbridled discretion as to either rights or privileges. Of course *Niemotko* concerned rights that occupy a "preferred position" (religion and speech), but ever since *Yick Wo v. Hopkins*[3] it has been assumed that administering the law unequally among persons who are in the same category constitutes a denial of equal protection.

Equal protection arguments as to pin ball machines were unavailing in a case[4] that simply relied upon an earlier one[5] to the same effect. No arguments were set forth as to how equal protection was thought to have been denied, and it seems clear that a legislative body could validly conclude that pin ball machines are different from other games and from other machines, and thus are subject to separate treatment. Similarly, real property and intangible property are sufficiently different to justify different rates of taxation.[6]

Both white and Negro children were denied equal protection when they were refused admission to educational facilities that were being

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1. 226 Ga. 785, 177 S.E.2d 667 (1970).
2. 340 U.S. 268 (1951).
3. 118 U.S. 356 (1886).
4. Williams v. Mayor & Council of City of Athens, 122 Ga. App. 465, 177 S.E.2d 581 (1970).
5. Woodward v. City of Lithonia, 191 Ga. 234, 11 S.E.2d 476 (1940).
6. Miller v. Mitchell, 226 Ga. 892, 178 S.E.2d 175 (1970).

made available to white and Negro children similarly situated.[7]

In law as well as in common speech, bastards have traditionally been less favored than their legitimate brothers and sisters. The United States Supreme Court in 1968 greatly elevated the status of illegitimate children by holding that Louisiana denied them equal protection of the laws when it precluded their recovery for the wrongful death of their mother while permitting the legitimate children to recover.[8] Some readers of that opinion may have concluded that legitimacy had become a constitutionally impermissible basis for classification, and that an illegitimate could never be treated differently from his legitimate siblings. In *Pettiford v. Frazier*,[9] the Georgia Supreme Court found no constitutional objection to Ga. Code Ann. § 113-904 (Rev. 1959), which discriminates against the illegitimate child as to right of inheritance from a father who has not legitimated the child. The attitude of the court was that illegitimates had no rights at common law, and therefore anything given to them by statutes was the result of the state's generous exercise of discretion. Such a result may seem surprising in light of *Levy v. Louisiana* in which the court asked the rhetorical questions: "Why should the illegitimate child be denied rights merely because of his birth out of wedlock? , . . How under our constitutional regime can he be denied correlative rights which other citizens enjoy?"[10] Presiding Justice Mobley, writing for a unanimous court, did not even cite *Levy*, and in thus downgrading the importance of that holding was apparently correct, as the United States Supreme Court more recently allowed states much more latitude in dealing with illegitimates than a first reading of *Levy* would suggest: "Levy did not say and cannot fairly be read to say that a state can never treat an illegitimate child differently from the legitimate offspring."[11]

In another case based upon illegitimacy differentiation, the court of appeals seems to have been on less solid ground. *Walker v. Hall*[12] presented the question whether illegitimate children can recover for the wrongful death of their father. The court seems clearly correct as a matter of precedent and legislative history in its analysis of the original meaning and the effect of later amendments of the relevant statutes, and apparently the equal protection argument discussed above was not made to the court. In United States Supreme Court litigation, *Levy v.*

7. Barresi v. Browne, 226 Ga. 456, 175 S.E.2d 649 (1970).
8. Levy v. Louisiana, 391 U.S. 68 (1968).
9. 226 Ga. 438, 175 S.E.2d 549 (1970).
10. 391 U.S. at 71.
11. Labine v. Vincent, ___ U.S. ___, 91 S. Ct. 1017, 1019 (1971).
12. 122 Ga. App. 11, 176 S.E.2d 246 (1970).

Louisiana,[13] which upheld the rights of illegitimates, was a wrongful death case, and if *Labine v. Vincent*[14] in the United States Supreme Court, and *Pettiford v. Frazier* in the Georgia Supreme Court, both of which cases permitted the state to treat illegitimates less favorably than legitimates, are to be distinguished on the ground that they involved intestate succession, that distinction was not present in *Walker v. Hall*.

The Georgia General Assembly moved toward according greater equality among its citizens by proposing an amendment to the Georgia Constitution to let the General Assembly fix the durational requirement for voting, with a constitutional minimum of only thirty days.[15] The classification of voters on the basis of residence is a classification of new residents who have exercised the fundamental right to move in interstate commerce, and thus the state must justify its classification on the basis of some compelling state interest or else risk having the classification struck down completely as invidious discrimination, violative of equal protection.[16]

Another proposed constitutional amendment with equal protection overtones is the one[17] to modify the homestead exemption of persons 65 years of age and over by excluding federal old-age, survivor, or disability benefits from income for homestead exemption purposes, and relieving the recipient of this exemption from the necessity of applying for it each year, while requiring him to notify the tax commissioner if he is no longer eligible. The different treatment of persons aged 65 and older is clearly justifiable, and the broadening of the difference in treatment raises no serious constitutional question.

On the subject of age differentiation, mention may be made of the new Georgia statute making it a criminal offense to discriminate unjustifiably in regard to the employment of persons between the ages of 40 and 65 years solely because of age.[18]

The case of *Hawes v. National Service Industries, Inc.*[19] primarily involved a determination of legislative intent in respect to the Sales and Use Tax Act and its amendments,[20] and shows the court and the legislature eager to avoid the unconstitutional burden on interstate commerce that may result from multiple taxation. The court of appeals found no authority requiring Georgia to give credit for sales and use taxes that

13. 391 U.S. 68.
14. ___ U.S. ___, 91 S. Ct. 1017.
15. Ga. Laws, 1971, p. 938.
16. *See* Shapiro v. Thompson, 394 U.S. 618 (1969).
17. Ga. Laws, 1971, p. 947.
18. Ga. Laws, 1971, p. 384.
19. 121 Ga. App. 775, 175 S.E.2d 34 (1970).
20. GA. CODE ANN. § 92-3402a (b) (Supp. 1970).

might be imposed by the state of destination, even though Georgia gives credit for like taxes that have been imposed upon the goods before they are brought into Georgia.

The Appellate Practice Act's provision[21] authorizing a judge to grant extensions of time for filing a transcript of the evidence and proceedings without motion or notice to the other party was upheld over due process objections.[22]

Appellant in *Board of Tax Assessors v. Alexander Brothers Lumber Co.*[23] urged that his constitutional rights were violated by a statute passed after he requested arbitration and which gave a right of appeal from an arbitration decision that would have been final except for the new statute. The court of appeals held the litigant had no vested right in the litigation, and thus the new legislation could properly be given effect.

CRIMINAL

Is a defendant denied due process when his prior convictions are placed in the indictment and read to the trial jury before that jury has determined the question of his guilt or innocence? Relying upon the United States Supreme Court's holding in *Spencer v. Texas*,[24] the Supreme Court of Georgia held that no constitutional right had been denied to the habeas corpus petitioner.[25] In *Spencer*, the United States Supreme Court had pointed out that there are several situations in which evidence of prior offenses is admissible because of the weight of the validity of the state's purpose in permitting its introduction despite the possibility of prejudice. While the Court there viewed the use of such evidence in a one-stage recidivist trial as perhaps representing a state interest less cogent than when it is used for other purposes, the differences did not rise to constitutional level. Mr. Justice Felton dissented in *Landers*, on the basis that petitioner's state constitutional rights were violated, and although he expressed preference for the dissenting opinion in *Spencer*, he felt bound by the decision in that case on the issue of federal constitutional due process. The same issue was presented to the court of appeals in *Little v. State*,[26] where it was readily resolved on the basis of *Landers*. *Little v. State* also decided that recidivist statutes

21. GA. CODE ANN. § 6-804 (Supp. 1970).
22. Rogers v. McDonald, 226 Ga. 329, 175 S.E.2d 25 (1970).
23. 121 Ga. App. 800, 175 S.E.2d 919 (1970).
24. 385 U.S. 554 (1967).
25. Landers v. Smith, 226 Ga. 274, 174 S.E.2d 427 (1970).
26. 121 Ga. App. 792, 175 S.E.2d 922 (1970).

provide for punishment for future crimes and thus are not ex post facto laws.

A defendant, convicted of manslaughter after a murder trial in which he was represented by counsel and received the benefit of all rulings and all requests for instruction, was not denied the right to counsel on appeal by his lawyer's determination that there was no basis for an appeal, and thus denial of his petition for habeas corpus was proper.[27]

In *Boykin v. Alabama*,[28] the United States Supreme Court pointed out that three important federal constitutional rights—the privilege against self-incrimination, the right to a trial by jury, and the right to confront one's accusers—are involved in the waiver that takes place when a plea of guilty is entered, and a waiver of these three important rights cannot be presumed from a silent record. The court of appeals applied the rule of *Boykin* to reverse convictions and sentences consequent upon guilty pleas that defendant had sought to withdraw on the basis that they had been entered because of a misunderstanding.[29] The record was completely silent as to anything that may have occurred when the pleas were entered, and the court of appeals emphasized the importance of making a record affirmatively demonstrating that the plea was freely and voluntarily entered. Although *Boykin* was a capital case, the Georgia Court of Appeals wisely extended the rule to all crimes above the "petty offense" category.

The convictions of three rape defendants over the objection that they were not represented by counsel at a pre-trial lineup as required by *United States v. Wade*,[30] were upheld[31] where one defendant had waived his right to counsel and the other two had been identified to a police officer by the victim prior to their arrest and thus her in-court identification did not depend upon the lineup identification. In *Moye v. State*,[32] the court of appeals affirmed a conviction over the objection that the in-court identification of defendant denied due process as did the practice of having the same jury determine both the issue of guilt and the penalty to be imposed. The prosecution's witness had spent about five minutes with defendant when he was a customer in the store where she was a sales clerk, and she had seen him twice in the courtroom and recognized him when he was apparently not in custody, and prior to her identification

27. Blackmon v. Smith, 226 Ga. 849, 178 S.E.2d 176 (1970).
28. 395 U.S. 238 (1969).
29. Hamm v. State, 123 Ga. App. 10, 179 S.E.2d 272 (1970).
30. 388 U.S. 218 (1967).
31. Ford v. State, 227 Ga. 279, 180 S.E.2d 545 (1971).
32. 122 Ga. App. 14, 176 S.E.2d 180 (1970).

of him in the later trial. The identification was not suggested by the authorities, and there was no basis for saying due process was denied by not having defendant identified through the process of a pre-trial lineup. As for the other constitutional ground, the court felt bound by earlier state court decisions pending determination by the United States Supreme Court of the issue of having the same jury decide both guilt and penalty. That Court has now decided the issue adversely to defendant's position over the objection that "he could remain silent on the issue of guilt only at the cost of surrendering any chance to plead his case on the issue of punishment."[33]

The constitutional issue presented in *Thornton v. State*[34] and *Smith v. Hightower*[35] was whether the trial judge's instructions on the alibi defense had shifted the burden of proof from the state to the defendant so as to deny defendant due process of law. The court of appeals' decision in *Parham v. State,*[36] holding the Georgia rule unconstitutionally shifted the burden, was thought to have caused the death or at least the fall[37] of this instruction, and gave rise to some satisfaction and reassurance.[38] The reports of the death of the rule seem now to have been exaggerated or at least premature. In the *Thornton* case the instruction was: "The burden is on the accused to establish his alibi not beyond reasonable doubt but to the reasonable satisfaction that the defendant was elsewhere . . . ."[39] The Georgia Supreme Court held that this language, when considered with the remainder of the institutions, did not have the effect of shifting the burden to the defendant. The court distinguished this language from that disapproved by the Supreme Court of the United States in *Johnson v. Bennett.*[40] "The burden is upon the defendant to prove this defense by a preponderance of the evidence, that is, by the greater weight of superior evidence."[41] In *Smith v. Hightower*, the court also found that the instructions given did not shift the burden of proof. The language of the instruction there was: "An alibi, as a defense, must establish to the reasonable satisfaction of the jury. . . ."[42] In both cases the Georgia Supreme Court also said that the question

33. McGautha v. California, ___ U.S. ___, 91 S. Ct. 1454, 1469 (1971).
34. 226 Ga. 837, 178 S.E.2d 193 (1970).
35. 227 Ga. 144, 179 S.E.2d 242 (1971).
36. 120 Ga. App. 723, 171 S.E.2d 911 (1969).
37. *See* Brown, *Criminal Law, Annual Survey of Georgia Law*, 22 MERCER L. REV. 138 (1971).
38. 21 MERCER L. REV. 511, 516 (1970).
39. 226 Ga. at 839, 178 S.E.2d at 194.
40. 393 U.S. 253 (1968).
41. *Id.* at 254.
42. 227 Ga. at 144, 179 S.E.2d at 243.

could not, under the authority of *Shoemake v. Whitlock*,[43] be raised on habeas corpus.

Whether retroactive effect should be given to a United States Supreme Court decision applying new constitutional principles to matters of criminal law and procedure is often a difficult question, and the decisions may seem inconsistent. The problem facing the Georgia Supreme Court in *Gresham v. Smith*[44] was whether to apply the rule of *Whitus v. Georgia*,[45] a 1967 decision of the United States Supreme Court on proving racial discrimination in the selection of juries, to the 1960 conviction of a habeas corpus petitioner who had not challenged the array at his trial. In deciding not to apply *Whitus* retroactively, the Supreme Court of Georgia relied upon *Brawner v. Smith*,[46] which in turn had relied upon *Strauss v. Grimes*,[47] both of which had stressed the undesirable effect of retroactivity upon the state's system of justice, in that inaccessibility of witnesses and failing memories would cause hordes of criminals to be turned loose upon society. In *Strauss v. Grimes*, the alleged discrimination related only to the selection of the grand jury, while in *Brawner v. Smith* and in the instant case there were allegations of discrimination as to the trial jury, also. Racial discrimination in selecting a grand jury is sufficient to invalidate a conviction even when there is no discrimination in the selection of the trial jury that convicts the defendant,[48] but a distinction may logically be suggested between grand jury discrimination in selecting the trial jury, because the latter is the fact-finding body and the Supreme Court of the United States has pointed out that in determining whether a new constitutional rule should be given retroactive effect, the foremost factor is the purpose it is to serve.[49] If the purpose of the *Whitus* rule is simply to regulate officials in the method of selecting prospective members of the grand and petit jurors so that the state is neutral regarding the process, there is no need to apply it retroactively, but if the purpose is to assure a defendant that members of his race were not systematically excluded from the jury that determines his guilt or innocence, the argument for retroactivity is strong.

The *Witherspoon*[50] rule for examining prospective jurors as to their

43. 226 Ga. 771, 177 S.E.2d 677 (1970).
44. 226 Ga. 290, 174 S.E.2d 420 (1970), *cert. denied*, 400 U.S. 905 (1971).
45. 385 U.S. 545 (1967).
46. 225 Ga. 296, 167 S.E.2d 753 (1969), *cert. denied*, 396 U.S. 927 (1969).
47. 223 Ga. 834, 158 S.E.2d 404 (1967), *cert. denied*, 391 U.S. 903 (1968).
48. Cassell v. Texas, 339 U.S. 282 (1950).
49. Desist v. United States, 394 U.S. 244 (1969).
50. Witherspoon v. Illinois, 391 U.S. 510 (1968).

death-penalty attitude was contested in *Walker v. State*.[51] Under *Witherspoon*, a state denies due process to a defendant in a criminal case by depriving him of the impartial jury required by the sixth and fourteenth amendments when it excludes veniremen who have conscientious scruples against capital punishment or are opposed to it. In *Walker v. State*, four jurors were excused over defendant's objection when they answered affirmatively the question: "Have you already decided that should you and your fellow jurors find the defendant guilty of the capital offense charged, would you vote to return a recommendation of mercy so as to avoid the imposition of the death penalty without regard to the facts and circumstances that might emerge during the course of this trial?"[52] The Georgia Supreme Court affirmed the conviction, finding in effect that the quoted question complied with the *Witherspoon* requirement. Mr. Justice Felton in his dissent takes the position that this question is not proper because prospective jurors should be asked whether they would "never" vote to impose the death penalty, and the question asked here could have been interpreted or construed to apply just to preliminary ballots. It seems unlikely that a prospective juror answering the question as put would have in mind such a distinction. The question is predicated upon a previous finding of guilt, and the person hearing it would probably be thinking of the final conclusion on the penalty. On the other hand, in view of the serious consequence of a mistake, there is force in Justice Felton's position that with the *Witherspoon* rule so simple to follow, the risk involved in asking a different question should not be taken.

Little v. Stynchcombe[53] held that the constitutional right to a jury trial can be effectively waived by counsel. In this habeas corpus case petitioner was represented by able and experienced counsel who had represented petitioner previously and who explained to petitioner why it was preferable for him to be tried by the court instead of by a jury, and petitioner had not objected.

In *Dennis v. State*,[54] the Georgia Supreme Court expressly declined to follow the 1968 court of appeals case of *Sark v. State*,[55] and instead held that a motor vehicle operator who complied with a state employee's direction to drive his truck upon scales was properly convicted of operating an overweight vehicle over his objection that he was coerced into

51. 226 Ga. 292, 174 S.E.2d 440 (1970).
52. *Id.* at 296, 174 S.E.2d at 443.
53. 227 Ga. 311, 180 S.E.2d 541 (1971).
54. 226 Ga. 341, 175 S.E.2d 17 (1970).
55. 118 Ga. App. 529, 164 S.E.2d 266 (1968).

doing so by the statutory provision that to decline would result in suspension of his driver's license for a period of up to 90 days, and that he was unconstitutionally convicted because he did not receive warnings of his right to counsel. The provision for suspension of a noncooperative driver's license was held not to be a penalty, but simply the result of a breach of condition upon which the license was issued. Hence the procedure does not compel self-incrimination. Since the defendant was not in custody, he was not entitled to receive the *Escobedo* and *Miranda* warnings.

The principal constitutional questions in *Brown v. State*[56] were not fully explored because they had been waived.[57] Defendant availed himself of the *Miranda* warnings and decided not to answer questions without counsel. Later that night, after the victim had died and after two detectives who did not know of defendant's earlier decision for legal representation had cautioned and then questioned him, he confessed. The court of appeals held that any error in admitting the confession at defendant's trial was waived when he took the stand and in an unsworn statement reiterated the contents of the confession.

The United States Supreme Court in *Price v. Georgia*[58] struck down the Georgia practice of exposing a defendant who has been convicted of a lesser included offense to retrial on the greater offense when he has obtained reversal of the first conviction for error committed during the trial. Defendant had been indicted for murder, and was convicted of voluntary manslaughter. When his conviction was reversed for erroneous instruction, he was put on trial again for murder, was again convicted of voluntary manslaughter, and received a slightly lesser penalty than on his first conviction. The Supreme Court held that while the doctrine of continuing jeopardy permitted the retrial of defendant following the reversal of his first conviction, the double jeopardy limitation[59] forbade trying him again for an offense higher than the one of which he was convicted before; that is, his erroneous conviction of voluntary manslaughter was an acquittal of murder, and thus he could not again be constitutionally put in jeopardy of a murder conviction.

Defendant was acquitted of one charge of having used for other pur-

56. 122 Ga. App. 570, 177 S.E.2d 801 (1970).

57. The court also pointed out that there had been no showing of racial discrimination in the selection of jurors and thus disproportionate representation of Negroes was inconsequential, and veniremen who said they would never vote to impose the death penalty had been properly excused.

58. 398 U.S. 323 (1970).

59. Now applicable to the states through the fourteenth amendment consequent upon the overriding of Palko v. Connecticut, 302 U.S. 319 (1937).

poses money he obtained from the prosecution witness for the purpose of paying a creditor. He was subsequently to be tried on four other similar indictments, each of which alleged a creditor different from the one specified in the indictment on which he was first tried. He was unsuccessful in raising the defense of double jeopardy because the court of appeals concluded that the offenses were all different.[60]

Georgia's statutory rule[61] that the declarations of a conspirator during the criminal project are admissible against all conspirators, and which has been construed to include the period of concealment of the conspiracy, was upheld by the United States Supreme Court in *Dutton v. Evans*[62] over the constitutional objection that as there applied it violated the Confrontation Clause of the Bill of Rights, made applicable to the states by the due process clause of the fourteenth amendment. The habeas corpus petitioner was convicted of murder after a trial during which one Shaw testified that he had heard Williams, who was a conspirator with petitioner, say that if it had not have been for petitioner, they "would not be in this now."[63] Williams did not testify, and although Shaw was cross-examined, petitioner contends that Williams' absence makes the conviction invalid. The opinion of the Court, written by Mr. Justice Stewart and concurred in by the Chief Justice and Justices White and Blackmun, pointed out that the federal rule, which would have made the disputed testimony inadmissible in a federal court, is based upon the Court's supervisory power over lower federal courts, and is not an adjunct of the confrontation clause. The constitutional issue itself was decided adversely to petitioner on the not entirely convincing reasoning that it would not have benefited petitioner if he had been able to confront and cross-examine the speaker whose hearsay statement inculpated him. In a concurring opinion, in which the Chief Justice joined, Mr. Justice Blackmun emphasized his appraisal of the disputed testimony as insignificant. In another concurring opinion, Mr. Justice Harlan found the reasoning of the plurality opinion unconvincing, and felt the confrontation clause should be put aside when appropriateness of evidentiary rules must be weighed. He would apply the test of due process of law, which he believed had been granted here. The dissenting opinion by Mr. Justice Marshall, in which Justices Black, Brennan, and Douglas concurred, emphasizes the interests the confrontation clause is designed to serve and refers to several points at which the reasoning of the plurality opinion seems deficient.

60. Davis v. State, 122 Ga. App. 311, 176 S.E.2d 660 (1970).
61. GA. CODE ANN. § 38-306 (Rev. 1945).
62. 400 U.S. 74 (1970), *see* 22 MERCER L. REV. 791 (1971).
63. *Id.* at 74.

OBSCENITY

The most interesting constitutional question presented by *Gornto v. State*[64] was whether *Stanley v. Georgia*,[65] in recognizing the individual's constitutional right to possess obscene material in his home, thereby radiated a right on the part of others to supply it to him. The Georgia Supreme Court held that the right of a state to regulate distribution of obscenity is not affected by an individual's right to possess it for his own use, and Ga. Code Ann. § 26-2101 (Rev. 1969) is therefore not unconstitutional in establishing the crime of distributing obscene material. In reaching this result, which many readers of *Stanley* had not regarded as so clear, the Georgia court correctly anticipated the United States Supreme Court's holding in *United States v. Thirty-Seven Photographs*.[66] It may be pointed out that Mr. Justice Marshall, who wrote the Court's opinion in *Stanley*, dissented in *Thirty-Seven Photographs*.[67] Another interesting and potentially troublesome point in the *Gornto* case is the court's statement that obscenity is determined by "what is acceptable in the local community,"[68] and not in other jurisdictons. The United States Supreme Court has indicated that "the constitutional status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national Constitution we are expounding."[69]

Also related to the subject of obscenity is the statute[70] authorizing local authorities to enact ordinances to restrict "adult bookstores" and "adult movie houses" from operating within 200 yards of churches, parks, schools, residences, etc. An "adult bookstore" is defined to be one offering to sell publications depicting nudity or sexual conduct, and an "adult movie house" is one showing X-rated films or "adult films depicting sexual conduct" on a continuing basis. The statute defines "nudity" and "sexual conduct" in some detail.[71] The constitutional question suggested by such a statute is whether it operates so as to limit impermissibly the right of free expression guaranteed by the first amendment and protected against state interference by the due process clause of the fourteenth amendment. It is settled that motion pictures are, along with other modes of expression, protected by these constitutional guar-

64. 227 Ga. 46, 178 S.E.2d 894 (1970).
65. 394 U.S. 557 (1969).
66. ___ U.S. ___, 91 S. Ct. 1400 (1971).
67. *Id.* at ___, 91 S. Ct. at 1414.
68. 227 Ga. at 48, 178 S.E.2d at 896.
69. Jacobellis v. Ohio, 378 U.S. 184, 195 (1964).
70. Ga. Laws, 1971, p. 888.
71. *Id.* at 889.

antees.[72] Of course obscenity is not the sort of expression that comes within the Constitution's protection,[73] or at least this is true in respect to the power of the sovereign to regulate its distribution,[74] whatever may be one's personal and private right in his own home.[75] The question still exists, however, as to just what obscenity is. The three-factor test of *"Fanny Hill"*[76] still lives, and although the current members of the United States Supreme Court are badly divided on obscenity, and although some modifications of the present test may occur, it is unlikely that the broad reach of the new Georgia statute will be sustainable. The distribution of "obscene" motion pictures and books can be regulated or even forbidden under penalty of criminal sanctions. But if a communication is not "obscene" it cannot be suppressed or its distribution subjected to onerous restrictions based upon its content.

JUVENILES

Daniel v. State[77] reversed the murder conviction of a juvenile because of error in admitting into evidence an incriminating statement obtained while defendant was in custody and before formal arrest. Defendant was not told of his rights, and his parents were not notified. Apparently the juvenile had no one to counsel or assist him except for the presence for part of the time of his mother while she was intoxicated. *In re Gault*[78] extended basic constitutional guarantees to juveniles, and the Georgia Supreme Court found the letter and the spirit of that decision had been violated here.[79]

On the basis of a response by the Supreme Court of Georgia to a certified question,[80] the court of appeals, in *Robinson v. State*,[81] held that the sixth and fourteenth amendments do not require a state to provide a jury to try a juvenile charged as a delinquent in a juvenile court. Since the decisions in these cases were handed down, the Supreme Court of

72. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

73. Roth v. United States, 354 U.S. 476 (1957).

74. ___ U.S. ___, 91 S. Ct. 1400; United States v. Reidel, ___ U.S. ___, 91 S. Ct. 1410 (1971).

75. Stanley v. Georgia, 394 U.S. 557 (1969).

76. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413 (1966).

77. 226 Ga. 269, 174 S.E.2d 422 (1970).

78. 387 U.S. 1 (1967).

79. The police actions in this case are in Carr, *The Juvenile Court v. Due Process—A Comparison*, 8 GA. ST. B.J. 9, 17 (1971), likened to those of the Gestapo.

80. Robinson v. State, 227 Ga. 140, 179 S.E.2d 248 (1971).

81. 123 Ga. App. 243, 180 S.E.2d 258 (1971).

the United States has held the same way, saying that in spite of all the disappointments, failures, and shortcomings of the juvenile court program, "trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement."[82]

GEORGIA CONSTITUTION

Relying upon the Georgia constitutional provision[83] against impairing the obligation of contracts,[84] the Georgia Supreme Court in *Craig v. City of Lilburn*[85] reversed a judgment enjoining a trailer park development. The court found that the developers, proceeding with construction permitted by then-existing law, while the city with actual notice of the developer's intention did nothing, acquired a vested property right in their proposed use of the land. Thus the city could not retroactively change the rights of the developers by adopting regulations that in other respects were reasonable and valid.

Classification by population was found to violate the state constitutional restriction[86] against special laws on subjects covered by a general law in *Dougherty County v. Bush*.[87] At issue was the validity of a statute setting up a board of trustees for a county law library, for which purpose the court clerk was to collect a special cost item. The statute covered all counties having, by the 1960 or future census, a population between 70,000 and 110,000. On the basis that the classification by population had no reasonable relationship to the subject matter of the statute, the Georgia Supreme Court struck it down. The court felt that the need for adequate law library facilities was the same regardless of the size of the county, and the idea that the General Assembly had in mind the different financial resources of counties of different size was speculative and remote.

The constitutional provision against special laws was unsuccessfully involved in *Black v. Blanchard*,[88] a quo warranto proceeding attacking the "Grandfather" clause of a statute that raised the minimum qualifications of county school superintendents. The Supreme Court of Georgia held the statute to be general since it applied to all counties within the state, and not to deny equal protection, because the classification of

82. McKeiver v. Pennsylvania, ___ U.S. ___, 91 S. Ct. 1976, 1986 (1971).
83. GA. CONST. art. I, § 3(2) (1945), GA. CODE ANN. § 2-320 (Rev. 1948).
84. And not mentioning the federal limitation, U.S. CONST. art. I, § 10.
85. 226 Ga. 679, 177 S.E.2d 75 (1970).
86. GA. CONST. art. I, § 4(2) (1945), GA. CODE ANN. § 2-401 (Rev. 1948).
87. 227 Ga. 137, 179 S.E.2d 343 (1971).
88. 227 Ga. 167, 179 S.E.2d 228 (1971).

incumbent and experienced superintendents was not unreasonable.

Pye v. State Highway Department[89] involved several miscellaneous questions of state constitutional law, all of which were decided against the property owner who appealed from a condemnation proceeding judgment striking all of his pleadings except those relating to issues of value. The most significant and interesting question, and the one that divided the court, was whether a proposed constitutional amendment had been constitutionally adopted. The landowner contended that it had not, because the ballot on the amendment did not sufficiently apprise the voters of its contents. The ballot was in terms of providing "for the payment for taking or damaging private property for public road and street purposes."[90] The proposed amendment in fact altered the provision against taking private property until adequate compensation had first been paid so as to permit, in the case of a taking for road purposes, a taking before payment, which need not be made until finally determined by law. The relevant constitutional provision[91] required only that the legislature state the language to be used in submitting a proposed amendment, and that the proposal be published in full once a week for three weeks in each congressional district. The Georgia Supreme Court rejected the property owner's contention, essentially on the reasoning that from the ballot a voter could ascertain that the amendment referred to payment for taking property for road purposes, and this notice coupled with the full publication of the proposal three times was sufficient. The dissenters'[92] position was that as the ballot referred only generally to a subject that was already in the constitution, and did not give notice that the thrust of the amendment was actually to create an exception, voters could have been misled.

The contention in *Henderson v. Maddox*[93] was that since the Georgia constitution makes the governor ineligible to succeed himself, and since the lieutenant governor becomes governor upon the death, resignation, or disability of the governor, the governor is ineligible to become lieutenant governor at the expiration of his term as governor. The fault the Supreme Court of Georgia found in this reasoning is that the lieutenant governor does not become governor in such events, but simply has the executive power devolve upon him. And the language of the constitution is, in fact, that the lieutenant governor "shall exercise the executive

89. 226 Ga. 389, 175 S.E.2d 510 (1970).
90. *Id.* at 394, 175 S.E.2d at 517.
91. GA. CONST. art. XIII, § 1(1) (1968), GA. CODE ANN. § 2-8101 (Supp. 1969).
92. Justices Nichols, Hawes, and Felton.
93. 227 Ga. 195, 179 S.E.2d 770 (1971).

power" of the governor, not that he shall become governor.[94]

The protection of due process and equal protection guaranteed by the Constitution of Georgia[95] was found not to be violated by the statutory provision[96] providing for an appeal to the superior court from arbitrator's decision on tax assessments only when the differences between the arbitrator's valuation of the board of tax assessors exceeded $1,000.00.[97] The court pointed out that there is no absolute right of appeal, and the limitation here attacked applied equally to both parties.

CONSTITUTIONAL LITIGATION

During the survey period there were, as usual, many cases in which the incipient constitutional law question was left unresolved because of a variety of factors. Thus a motion to quash an indictment on the ground of unconstitutionality of the statute under which defendant is charged does not give the Georgia Supreme Court jurisdiction when the motion is oral or fails to state the constitutional provision claimed to be violated;[98] a trial court does not have jurisdiction under the Declaratory Judgment Act to declare a provision of state statute or constitution to be unconstitutional unless the record shows service upon the Attorney General of Georgia;[99] where the trial court correctly, on the ground that there is an adequate remedy at law, declines to enjoin enforcement of an ordinance contended to be unconstitutional, the issue of constitutionality is premature and should not be passed upon by the trial judge;[100] a motion to vacate a judgment is insufficient to raise for the first time the constitutionality of the procedure under which a wife by affidavit may obtain execution to collect past due alimony;[101] the constitutionality of a statute cannot be attacked for the first time in the Georgia Supreme Court;[102] the record in the supreme court must contain documentation of the constitutional attack in the trial court;[103] and an attack upon an annotated code section which has been incorporated into the official code does not attack the constitutionality of any law;[104] to mention some

94. GA. CONST. art. V, § 1(8) (1945), GA. CODE ANN. § 2-2608 (Rev. 1948).
95. GA. CONST. art. I, §§ 1(2) and (3) (1945), GA. CODE ANN. §§ 2-102, 2-103 (Rev. 1948).
96. GA. CODE ANN. § 92-6912 (Supp. 1970).
97. Hancock v. Board of Tax Assessors, 226 Ga. 570, 176 S.E.2d 102 (1970).
98. Waters v. State, 226 Ga. 278, 174 S.E.2d 420 (1970).
99. Board of Educ. v. Shirley, 226 Ga. 770, 177 S.E.2d 711 (1970).
100. Royal Peacock Social Club, Inc. v. City of Atlanta, 226 Ga. 817, 177 S.E.2d 664 (1970).
101. Stroud v. Stroud, 226 Ga. 769, 177 S.E.2d 574 (1970).
102. Robinson v. State, 226 Ga. 461, 175 S.E.2d 505 (1970). Mr. Justice Felton dissented.
103. Tant v. State, 226 Ga. 761, 177 S.E.2d 484 (1970). Mr. Justice Felton dissented.
104. Cooper v. State, 226 Ga. 722, 177 S.E.2d 228 (1970).

examples.[105]

The same attitude of reluctance to decide a constitutional issue was illustrated by the decision of the Supreme Court of the United States in *Sanks v. Georgia*,[106] which dismissed the appeal from a decision of the Supreme Court of Georgia[107] upholding the Georgia statutory eviction procedure[108] requiring a tenant to post a bond to raise his defenses and subjecting him to damages equal to double rent if he lost. When it became known at argument of the case that the situation of the parties had changed and that the statutory plan had been amended so as to leave out the bond and double rent provisions, the court dismissed the appeal on the ground that resolution of the original issues would be inappropriate.

105. *See also* Turk v. State Highway Dep't, 226 Ga. 245, 174 S.E.2d 791 (1970); Stith v. Hudson, 226 Ga. 364, 174 S.E.2d 892 (1970); Elinburg v. State, 227 Ga. 246, 179 S.E.2d 926 (1971).

106. ___ U.S. ___, 191 S. Ct. 593 (1971).

107. 225 Ga. 88, 166 S.E.2d 19 (1969).

108. GA. CODE ANN. §§ 61-301 *et. seq.* (Rev. 1966).