Constitutional Law

by W. Tarver Rountree, Jr.*

Even as this is being written in midsummer, 1981, plans are being made to offer a revised constitution to the General Assembly in a special session to be convened on August 24, 1981. This revision will be the work of a four year-old Select Committee on Constituional Revision. Presently that work is being reviewed by a legislative overview committee authorized during the last session of the general assembly.[1] Meager newspaper reports on the Select Committee's handiwork are not encouraging. Efforts to revise the 1945 Georgia Constitution, including a housekeeping revision in 1976, have been spurred by the general agreement that the constitution is unwieldy (about four million words). It is estimated that the Georgia Constitution has been amended more than a thousand times in the last thirty-six years. Apparently, one of the fundamental obstacles to revision is a deeply held distrust of the state legislature. This distrust results in a great deal of legislative matter being embedded in the constitution and many prohibitions, both substantive and procedural, against legislation. This in turn produces limitless amendments that bewilder the voters and present endless matters for interpretation. Georgia needs a trimmer, more efficient, modern constitution.

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1. 1981 Ga. Laws 1531. Ga. H.R. Res. 245 (1980) created the Legislative Overview Committee on Constitutional Revision. The committee is to be composed

> of 30 members of the House of Representatives to be appointed by the Speaker thereof, and 20 members of the Senate to be appointed by the President thereof. The committee shall, in conjunction with the Select Committee on Constitutional Revision, review the work and recommendations of the Article Committees which have revised Articles I through X of the 1976 Constitution. The committee shall complete its review process prior to the proposed convening date of a special session of the Georgia General Assembly anticipated during the 1981 calendar year for the purpose of considering, among other items, constitutional revision. The committee shall stand abolished upon the convening of the General Assembly in special session during 1981 or upon January 1, 1982, whichever date shall first occur.

Meanwhile, the courts of Georgia are bombarded with state and federa constitutional claims that, for the most part, are routinely made and pre dictably rejected. This is particularly true in civil and criminal procedura matters. In this survey article, these routine claims have been passed ove unless some novel interpretation has emerged. More attention is focuse on substantial claims that have reaffirmed or opened areas of curren interest.

I. EQUAL PROTECTION

Any litigant confronted with a state statute or its administration is nov apparently expected to mount an equal protection attack. In the pas two decades, equal protection has become the sharp cutting edge of th fourteenth amendment. It appears that the Georgia courts have been a deferential to essential classification as the United States Supreme Cour will permit.

State Farm Mutual Automobile Insurance Co. v. Five Transporatio Co.[2] is a case in point. The case turned on a statutory classification o rights of subrogation.[3] The relevant section of Georgia Code Ann provides:

> Insurers and self-insurers providing benefits without regard to fault described in sections 56-3403b and 56-3404b shall not be subrogated to the rights of the person for whom benefits are provided, except in those motor vehicle accidents involving two or more vehicles, at least one of which is a motor vehicle weighing more than 6,500 pounds unloaded.[4]

The trial court held that the classification was arbitrary and unreason able, and that it violated the equal protection and due process clauses o the state and federal constitutions. In reversing the trial court's decision the supreme court granted great deference to the Reparations Act's pur pose,[5] which is to eliminate wasteful litigation over moderate to smal claims.[6] The court conceded that a motor vehicle accident involvin lighter vehicles might well give rise to larger claims. Citing cases tha permit legislatures to make classifications lacking mathematical nicety, the court accepted an illogical and unscientific device as a permissibl

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2. 246 Ga. 447, 271 S.E.2d 844 (1980).

3. GA. CODE ANN. § 56-3405b(d)(1) (Supp. 1981).

4. *Id.*

5. Georgia Motor Vehicle Accident Reparations Act of 1974, GA. CODE ANN. ch. 56-34 (1977).

6. Cannon v. Georgia Farm Bureau Mut. Ins. Co., 240 Ga. 479, 482, 241 S.E.2d 238, 24 (1978).

7. 246 Ga. at 451, 271 S.E.2d at 848 (citing Lindsley v. Natural Carbonic Gas Co., 22 U.S. 61, 78 (1911)).

rough accommodation. This decision is consistent with the minimal rationality test now applied to the regulation of business and industry.[8] Moreover, the court exercised a low level of scrutiny of the legislature's justifications.

In a similar vein, although not in the business and industrial area, the supreme court sustained two classifications attacked as being arbitrary. In *Sutton v. Garmon*,[9] a defendant convicted of pimping sought to contest the differential treatment concerning "good time allowance" for misdemeanors of a high and aggravated nature. A person confined for such a crime is entitled to only four days per month good time allowance; persons confined for other misdemeanors and felonies are entitled to "earned time" allowances up to one-half the period of confinement.[10] The court defended the differential as being consistent with a rational basis. Classifications regarding punishment only require slight justification.[11]

Sims v. Sims[12] concerned a former husband's petition for a modification of a previous divorce and alimony decree that would relieve him of all obligations for alimony. A ground for this relief under the pertinent code section is that the former spouse is voluntarily cohabiting with a third party of the opposite sex in a meretricious relationship.[13] The wife contended that the statute creates a classification devoid of a rational basis. Her contention undoubtedly arose because alimony is an allowance out of one party's estate, made for the support of the other party when that party lives separate.[14] Remarriage in Georgia terminates alimony rights unless otherwise provided in the decree or agreement.[15] The court's justification for the classification was the state's interest in marriage. Cohabitation with another while receiving support from a previous spouse would discourage marriage to the new partner. Of course, if the allowance of alimony is based upon need for support, this meretricious relationship may not be relevant. The court, perhaps revealing the actual justification for its decision, expressed its outrage at the injustice of permitting the meretricious relationship to be subsidized by the former spouse. In view of recent concerns with personal autonomy, this may be a closer case. In both *Sutton*[16] and *Sims*[17] we have moved out of the fairly easy category of mere business regulation.

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8. *See* 246 Ga. at 450, 271 S.E.2d at 848.
9. 245 Ga. 685, 266 S.E.2d 497 (1980).
10. *Id.* at 685-86, 266 S.E.2d at 498.
11. McGinnis v. Royster, 410 U.S. 263, 270 (1973).
12. 245 Ga. 680, 266 S.E.2d 493 (1980).
13. GA. CODE ANN. § 30-220(b) (1980).
14. GA. CODE ANN. § 30-201 (1980).
15. GA. CODE ANN. § 30-209 (1980).
16. 245 Ga. 685, 266 S.E.2d 497 (1980).
17. 245 Ga. 680, 266 S.E.2d 493 (1980).

In another area, the Georgia courts are clearly aware of the equal protection shoals. Any statute dealing with gender, or with roles associated with gender, will receive more than minimum scrutiny if not strict scrutiny. Rights or duties assigned to husbands or wives, fathers or mothers or widowers or widows must pass careful examination.

The exception that proves the validity of the foregoing is found in *Perini v. State*.[18] Defendant was convicted of abandonment of his three month old illegitimate child. He attacked Georgia Code Ann. section 74-9902,[19] which provides in part that the father of an illegitimate child upon conviction of abandonment, shall be required to pay the reasonable medical expenses paid or incurred by the mother due to the birth of the child. This is a gender-based classification. The court found an important governmental objective served by the classification, and a substantial relation between the classification and the objective. While both parents have a duty to support a child, the only contribution the father can make to the birth itself is a monetary one. The mother, during the birth and shortly thereafter, is unable to earn money to pay the medical expenses. Of course, the father can work and is in a much better position to pay the expenses. The court did not discuss how this relates to financial ability to pay since it found this a reasonable gender-based classification. Arguably, the court reverted to role stereotyping since comparative financial ability of the spouses was not discussed.

The court has said that Georgia Code Ann. section 74-9902 applies to both mothers and fathers of illegitimate or legitimate children and that both parents are subject to criminal prosecution for failure to comply with the statute.[20] In *Carnegie v. State*,[21] the court conceded that two provisions of the statute may appear to be facially defective from an equal protection standpoint:

> (e) The accused father and the mother of the illegitimate child may enter into a written agreement providing for future support of the child by regular periodic payments to the mother until such child reaches age 18 years. . . .
> (f) Upon the trial of the accused father under this section, it shall be no defense that the accused father has never supported the child.[22]

However, defendant had no standing to raise the issue since he was not a party to such an agreement.

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18. 245 Ga. 160, 264 S.E.2d 172 (1980).

19. GA. CODE ANN. § 74-9902 (1981). The major portion of the statute is equally applicable to women and men. *See* Hudgins v. State, 243 Ga. 798, 256 S.E.2d 899 (1979).

20. 243 Ga. at 798, 256 S.E.2d at 899.

21. 246 Ga. 187, 269 S.E.2d 457 (1980).

22. GA. CODE ANN. § 74-9902(e) -(f) (1981).

An interesting defense to Georgia Code Ann. section 74-9902(a)[23] was made in *State v. Causey*.[24] In that case defendant alleged that the selective enforcement of abandonment cases against illegitimate fathers had resulted in denial of equal protection. The trial court agreed and entered orders quashing the accusations. The supreme court reversed,[25] but in so doing had to deal with an early forerunner of all equal protection claims, *Yick Wo v. Hopkins*.[26] That case concerned a complaint by Yick Wo that a municipal ordinance requiring a permit for the maintenance of a laundry in a building not made of brick or stone was being enforced selectively in an invidiously discriminatory manner. The court in *Causey* recognized that a division of authority exists on the question of whether the rationale of *Yick Wo* is applicable to cases concerning prosecutions for state penal offenses.[27] Georgia has not allowed failure to prosecute others as a defense.[28] Even in states that do, an intentional or purposeful discrimination deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification must be shown.[29] No one could remember when the mother of an illegitimate child had been prosecuted, but this did not prove purposeful discrimination. This challenge may have potential in the future.

In *Garren v. State*,[30] the court approved a classification that differentiated between abandoning parents who remain in the state and those wholeave Georgia subsequent to the abandonment. The former constitutes a misdemeanor, the latter a felony reducible to a misdemeanor.[31] Defendant, who left the state after being charged with abandoning his legitimate minor children, contended that this distinction denied him equal protection and unconstitutionally burdened his right of interstate travel. The court refused to accept either claim. It found that no constitutional right of interstate travel could be asserted, and that the state had a legitimate ground for the distinction since other states are more likely to extradite felons than misdemeanants. Defendant was charged with abandonment prior to his leaving the state, thereby forefeiting any claim to interstate travel.

In *Insurance Co. of North America v. Russell*,[32] the court resolved the rights of widows and widowers to benefits under the workers' compensa-

23. GA. CODE ANN. § 74-9902(a) (1981).
24. 246 Ga. 735, 273 S.E.2d 6 (1980).
25. *Id.*
26. 118 U.S. 356 (1886).
27. 246 Ga. at 736, 273 S.E.2d at 8. *See* Annot., 95 A.L.R.3d 280 (1979).
28. Cone v. State, 184 Ga. 316, 324, 191 S.E. 250, 255 (1937).
29. Oyler v. Boles, 368 U.S. 448, 456 (1962).
30. 245 Ga. 323, 264 S.E.2d 876 (1980).
31. GA. CODE ANN. § 74-9902(a) (1981).
32. 246 Ga. 269, 271 S.E.2d 178 (1980).

tion law. Widows enjoyed a conclusive presumption as to dependency widowers were required to prove dependency.[33] The decision was con trolled by the Supreme Court's holding in a similar Missouri case, *Wen gler v. Druggists Mutual Insurance Co.*[34] After striking the gender dis tinction, the Georgia court's remaining problem was to cure th discrimination since it refused to declare the entire workers' compensa tion act unconstitutional. The court excised the conclusive presumptio in favor of widows. The general assembly, however, may restore the con clusive presumption as to both widows and widowers if it chooses. Thi decision represented a very able interpretation of the probable intentio of the legislative scheme, considering the history of the legislation.

Georgia also had a veteran preference case, *Boykin v. Strickland.*[35] I that case, agents of the Alcohol and Tobacco Tax Unit complained whe their positions were terminated under a reduction-in-force plan. Al agreed that their predicament was due to their nonveteran status. The contended that the decision in *Personnel Administrator v. Feeney,*[3 which upheld a veterans' preference, applied to hiring but not termina tion. The court found the justifications for veterans' preferences in hirin to apply equally to layoffs.

Finally, in several cases criminal defendants have complained that thei probation was revoked as a result of their indigency. In *Simpson v State,*[37] defendant received probation conditioned on the payment o 20,000 dollars in fines at the rate of 1000 dollars per month. The cour affirmed the revocation of probation, and distinguished the *Williams Morris-Tate*[38] trilogy quite correctly. The Supreme Court in those case found that it was unconstitutionally discriminatory to make imprison ment dependent upon the ability to pay a fine, or to make the commuta tion of a fine dependent upon serving a certain number of days of impris onment. Payment of restitution as a condition of probation was treate similarly in a revocation in *Wilson v. State.*[39]

II. SUBSTANTIVE DUE PROCESS

In *Hubert Realty Co. v. Cobb County Board of Commissioners,*[40] a rea estate developer and two landowners requested rezoning of 12.484 acre

33. GA. CODE ANN. § 114-414(a) -(b) (1973).
34. ___ U.S. ___, 100 S. Ct. 1540 (1980).
35. 245 Ga. 294, 270 S.E.2d 50 (1980).
36. 442 U.S. 256 (1979).
37. 154 Ga. App. 775, 270 S.E.2d 50 (1980).
38. Tate v. Short, 401 U.S. 395 (1971); Morris v. Schoonfield, 399 U.S. 508 (1970); Wil liams v. Illinois, 399 U.S. 235 (1970).
39. 155 Ga. App. 825, 273 S.E.2d 210 (1980).
40. 245 Ga. 236, 264 S.E.2d 179 (1980).

from residential (R-20) to neighborhood shopping (NS). The denial was sustained by the superior court and the supreme court affirmed against a claim of a taking without just compensation. The court cited *Barrett v. Hamby*[41] as the controlling authority. The plaintiff has the burden of showing that the zoning under attack is so detrimental to him, and so insubstantially related to the public health, safety, morality, and welfare that it amounts to an arbitrary confiscation. The court went on to say that its function on appellate review in a zoning case is to consider all the facts and circumstances in reaching a decision on the merits of the ordinance's constitutionality.

The court found it easy to sustain the trial court because from the facts, the rezoning would have constituted "spot" zoning. It must be observed that the court, following *Hamby*, made an independent judgment of the circumstances. One could argue that, inasmuch as rezoning constitutes a legislative decision, the court could defer to legislative judgment based on facts upon which reasonable men could differ, and intervene only when the result is contrary to reason. It is sometimes difficult to characterize the intervention of the court. At least, this case did not turn only upon the economic deprivation of the petitioner. The land, as commercial property, was reported to be worth ten times more than it would have been as residential property. One assumes that if commercial development had been closer than one-half mile away, petitioner would have had a stronger claim.

A Marietta sign ordinance[42] was contested in *Thomas v. City of Marietta*.[43] The ordinance restricted the use of portable display signs to certain special times, for example, upon the opening or closing of a business for a period not to exceed thirty days; for special sale for fifteen days; for political campaigns and on other limited occasions. It was necessary to obtain a permit to use a portable sign. This beneficial legislation survived constitutional claims that it deprived appellants of their property without just compensation, that it infringed on their freedom of speech, and that it amounted to an impairment of contract. In *City of Doraville v. Turner Communications Corp.*,[44] the Supreme Court of Georgia had sustained municipal power to regulate the erection and maintenance of signs. Appellants in *Thomas* charged that police power was being used to regulate aesthetics. The court admitted that aesthetics alone would not support regulation. In *Thomas*, however, temporary signs presented safety problems and the limitations were not arbitrary or discriminatory. The court also found no infringement of free speech rights, probably on the

41. 235 Ga. 262, 219 S.E.2d 399 (1975).
42. Marietta, Ga., Ordinance 3315, *as amended*.
43. 245 Ga. 485, 265 S.E.2d 775, *cert. denied*, ___ U.S. ___, 101 S. Ct. 115 (1980).
44. 236 Ga. 385, 223 S.E.2d 798 (1976).

basis that the time, place, and manner of regulation were reasonable.

III. First Amendment—Freedom of Religion

The court reaffirmed, in *Gervin v. Reddick*,[45] the power of courts t enter into church disputes when property rights are involved and whe the suit is brought on behalf of a majority of the congregation. The firs amendment is not a bar, as in a dispute over a pastor's salary,[46] or when pastor holds over in the parsonage.[47] In *Gervin*, the majority of the con gregation wanted to regain control of the church assets before the unau thorized few who had assumed control could dissipate them. The cour did not sustain the trial court's appointment of a special master to oper ate the church. It appears that the special master's authority was in dero gation of the majority's authority. Georgia policy is not to interfere wit the internal affairs of a religious organization when no property rights ar involved.[48] This seems to be a reasonable restraint on state interventio in the church's affairs.

An unusual "free exercise of religion" case arose in *Jefferson v. Griffi Spalding County Hospital Authority*.[49] A mother exercising her religiou beliefs refused to submit to a Caesarean section delivery and blood trans fusions to save the life of her unborn child, despite unanimous medica opinion that vaginal delivery would result in certain death of the fetu and probable death of the mother. After a hearing, the Superior Court o Butts County ordered the mother to submit to whatever procedures wer necessary to assure the survival of the fetus. All the justices concurred i refusing to stay the order of the lower court. Justice Hill, in concurring admitted that the court could not ordinarily order a competent adult t submit to life saving procedures.[50] When confronted with the safety of live fetus, however, the state's interest outweighs the free exercise claim Justice Smith wrote further on the competing interests.[51] The exercise o religious beliefs is distinguishable from the exercise of religious practice that are detrimental to public health and welfare. Freedom to act is sub ject to regulation for the protection of society; however, the regulatio must be of the least restrictive kind.

Even though there was an atmosphere of emergency throughout th opinion, there was remarkable concern for the claim of the mother an

45. 246 Ga. 56, 268 S.E.2d 657 (1980).
46. Hickman v. Booker, 231 Ga. 129, 200 S.E.2d 279 (1973).
47. Sanders v. Edwards, 199 Ga. 266, 34 S.E.2d 167 (1945).
48. Carden v. LaGrone, 225 Ga. 365, 371, 169 S.E.2d 168, 172 (1969).
49. 247 Ga. 86, 274 S.E.2d 457 (1981).
50. *Id.* at 89, 274 S.E.2d at 460 (Hill, J., concurring).
51. *Id.* at 91, 274 S.E.2d at 461 (Smith, J., concurring).

father. Saving the life of another would appear to be the uncontestable justification for overriding a person's religious belief.

IV. First Amendment—Free Speech

Georgia's obscenity statute[52] survived no less than five major cases in which it was attacked either substantively or as it was administered. In *Playmate Cinema, Inc. v. State*,[53] the statute was attacked on a number of grounds. All were decided adversely to appellant. The statute is not vague or overbroad.[54] The statute is not an invasion of privacy in violation of the first, fourth, fifth, ninth, and fourteenth amendments.[55] Furthermore, the decision in *Stanley v. Georgia*[56] did not necessarily imply the right to purchase obscene material. The right to privacy in the home and the right to distribute materials are, therefore, distinguishable. A similar conclusion was reached in *Brown v. State*.[57] A conviction was also sustained in *Whisenhunt v. State*.[58]

Georgia's criminal solicitation statute[59] provides: "A person commits criminal solicitation when, with intent that another person engage in conduct constituting a felony he solicits, requests, commands, importunes or otherwise attempts to cause such other person to engage in such conduct."[60] The statute was enacted in 1978 and the court's first opportunity to interpret it arose in *State v. Davis*.[61] The court was dealing with an allegation of facial unconstitutionality. The legislature is presumed to enact a constitutional statute and is under a duty to support the United States Constitution.[62] All statutes are therefore enacted in reference to the United States Constitution. These premises were the basis for the court's conclusion in *Davis* that the legislature intended to narrow the statute within constitutionally permissible limits. These limits protect speech that advocates violation of law except when the advocacy is directed to inciting or producing imminent lawless action and is likely to

52. Ga. Code Ann. § 26-2101 (1977).
53. 154 Ga. App. 871, 269 S.E.2d 883 (1980).
54. Sewell v. State, 238 Ga. 495, 233 S.E.2d 187 (1977), *appeal dismissed*, 435 U.S. 982 (1978).
55. Jenkins v. State, 230 Ga. 726, 728, 199 S.E.2d 183, 185 (1973), *rev'd on other grounds*, 418 U.S. 153 (1974).
56. 394 U.S. 557 (1969).
57. 156 Ga. App. 201, 274 S.E.2d 572 (1980).
58. 156 Ga. App. 583, 275 S.E.2d 2 (1980).
59. Ga. Code Ann. § 26-1007 (1978).
60. *Id.*
61. 246 Ga. 761, 272 S.E.2d 721 (1980).
62. Buice v. Dixon, 223 Ga. 645, 157 S.E.2d 481 (1967).

incite or produce that action.[63]

The commission of a felony is clearly a substantive evil that the legisl ture has a right to prevent. The final construction of the statute prohibi only language that creates a "clear and present danger"[64] of a felony b ing committed. It should be noted that the "clear and present dang test" is not quite coextensive with the *Brandenburg* test. Enough h been said to limit the statute to its permissible constitutional reach.

The court in *Davis* was concerned with the possibility that vaguene might be found in the statutory language: "or otherwise attempts t cause such other person to engage in"[65] such conduct. The court appli *ejusdem generis* to limit these words to the nature of their predecesso The word felony was found not to be vague.

In this case, the court limited its analysis to the facial validity of t statute. Its application to defendant under this interpretation awaits t trial. The *Davis* case represents a superb example of the teaching role the United States Supreme Court. By working with protected speech f over sixty years, it has devised boundaries. The court in *Davis* respond to those guidelines, and with a careful administration of its applicati the solicitation statute should encounter no constitutional difficulties.

May a unit of government maintain an action for libel? This interestin question arose in *Cox Enterprises, Inc. v. Carroll City/County Hospit Authority*.[66] The Atlanta Journal published an article that charged t hospital with serious mismanagement and contained phrases such "fear for the [patient's] safety," "doctors losing faith," and "earmarks [financial] disaster."[67] The ensuing libel action charged the newspap with "false and malicious defamation."[68] Plaintiff further contended th the article was published "willfully and maliciously and without true r gard to the facts"[69] and that the newspaper had refused to retract t article. Plaintiff sought general and punitive damages totaling 500,0 dollars. The matter came before the court on a motion for summary jud ment, which was granted.

The court's opinion follows the form of a syllogism, the premises which are almost indisputable and perhaps clearly sustained by prec dent. First, governmental entities cannot maintain an action for libel.[70]

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63. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

64. The "clear and present danger" test was first enunciated in the subversive advoca case of Schenck v. United States, 249 U.S. 47, 52 (1919).

65. GA. CODE ANN. § 26-1007 (1978).

66. 247 Ga. 39, 273 S.E.2d 841 (1981).

67. *Id.*

68. *Id.*, 273 S.E.2d at 842.

69. *Id.*

70. "[N]o court of last resort in this country has ever held, or even suggested, that pros cutions for libel on government have any place in the American system of jurisprudence.

Second, the Hospital Authority is a governmental entity. Therefore, this hospital authority could not maintain its action. This conclusion can be supported by an analysis of the self-evident purposes of the first amendment.

Surprisingly, the first premise is not that clearly established. The United States Supreme Court has not addressed this precise issue. The Court has indicated that a police department could not sue for libel.[71] Most cases in lower federal courts and other jurisdictions concern typical municipal corporations. Therefore, what appears to be self-evident in the first premise is less certain than one would like.

The second premise occupies a good part of the *Cox* opinion and very thoroughly demonstrates that the hospital is a governmental entity exercising the power of government with accompanying privileges, exemptions, and responsibilities. If it is an important distinction, as it may be, the operation of a hospital is probably a governmental function rather than a proprietary one.[72]

With such a defense apparent, what can be said for the hospital's position? The hospital conceded the major and minor premises but contended that its role and function distinguished it from other governmental entities. It argued that it might be "quasi-governmental,"[73] and an "independent corporation,"[74] more like a person and, therefore, with defensible interests. Perhaps its strongest point was that, whatever might be true of other governmental enterprises, it needed the confidence of the public and its constituency in order to fulfill its mission. Its charitable work and its nonprofit status required general public support. In spite of its identity with other governmental entities, it should be accorded some protection of its reputation. It is important to note that the hospital desired only that an "actual malice" standard be applied.[75]

It is easy to agree with the Georgia court's assessment of the first amendment values in this situation. If there can be any quarrel with the opinion, it may be that the court did not consider the possibility of transcending rather obvious categories and resolving the issue by balancing the interests of the state and the public's need to be informed. This approach would allow courts to make distinctions among governmental enti-

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New York Times Co. v. Sullivan, 376 U.S. 254, 291 (1964) (quoting City of Chicago v. Tribune Co., 307 Ill. 595, 601, 139 N.E. 86, 88 (1923)).

71. *Cf.* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (Police commissioner must prove "actual malice" in order to recover damages for a defamatory falsehood relating to his official conduct. *Id.* at 264).

72. 247 Ga. at 45, 273 S.E.2d at 846.

73. *Id.* at 41, 273 S.E.2d at 843.

74. *Id.*

75. *See* New York Times Co. v. Sullivan, 376 U.S. at 279-80.

ties and to accord some, but not others, protection by enabling them t institute libel suits. Without predicting what result this balancing woul produce in this case, *Cox* does appear to present a strong argument fo this type of analysis. Does the state have an interest in the viability o some of its entities, such as a public hospital, that outweighs a claim fo criticism, no matter how irresponsible? Such questions as whether a hos pital does require the confidence of its constituency in a peculiar way an whether a hospital has the time or resources to set the record straight, i addition to the public's concern and fear over adequate health care deliv ery, make the hospital an easy target for irresponsible but profitable jour nalism. In view of the rigor of the *New York Times* standard, the burde placed on the press might arguably be justified. Commitment to firs amendment values justifies the *Cox* opinion. If the question reaches th United States Supreme Court, it may encounter an analysis less depen dent on the easy syllogism offered in this case.

The Mickey Mouse Club, a televised program on February 28, 1978 produced by Walt Disney Productions, Inc., invoked the grandeur of th first amendment in both the Georgia Court of Appeals and the Georgi Supreme Court. In short, actors on the program demonstrated sound ef fects by placing a BB in an inflated balloon. There was no warning of an danger about using the BB in a balloon. Plaintiff performed the sam demonstration at home and, when the balloon burst, he received an injur to his eye, causing partial blindness. In *Shannon v. Walt Disney Produc tions,*[76] a negligence action, the trial court granted defendant's motion fo summary judgment. It held that the negligence claim could not be sus tained as a matter of law, and that the first amendment was an absolut defense to the action. The court of appeals reversed.[77] As to the negli gence claim, the court was not convinced that there was no issue of fact Upon considering the first amendment claim, the court found no prece dent for granting a privilege as an absolute defense to the alleged negli gence because the result was achieved by word and not by act.

The Georgia Supreme Court granted certiorari in *Walt Disney Produc tions, Inc. v. Shannon.*[78] In addressing the first amendment issue, th court quite correctly held libel cases and the malice standards inappo site.[79] The court assumed, however, that because the evidence of the tort if any, was speech delivered through the medium of television, the firs amendment was inevitably involved. The court proceeded on the theor that the duty fell upon the plaintiff to show that this was not protecte speech. Obviously the words were not "fighting words," nor "obscene,'

76. 156 Ga. App. 545, 275 S.E.2d 580 (1981).
77. *Id.*
78. 247 Ga. 402, 276 S.E.2d 580 (1981).
79. *Id.* at 403, 276 S.E.2d at 582.

nor "libelous."[80] Reasoning, then, that all other speech is protected, the only exception remaining was speech producing a "clear and present danger"[81] of a substantive evil that Congress has a right to prevent.[82] The court then opined that the substantive evil which the tort law seeks to redress is the infliction of personal injury. The court, therefore, sustained the motion for summary judgment "because it cannot be said that the statements uttered during the course of this television program gave rise to a clear and present danger of personal injury to the plaintiff."[83]

Apparently, the court overlooked the inviting option of treating the performance on television as conduct and not speech, or at least as conduct combined with speech. Tort liability often arises from spoken or written words. Indeed, the test devised in this case, borrowed from the unrelated field of seditious conduct, raises more problems that it solves and seems to have remote applicability to the tort area.

The court did seem concerned about the exposure of television and its vulnerability to suits of this kind. This vulnerability may, indeed, have a chilling effect, but it is hard to believe that what was claimed in *Shannon* has anything to do with the first amendment. The resolution of the issue should belong to tort law, under which other societal interests may be balanced and evlauted.

V. VAGUENESS

In reading current appellate cases, it is obvious that litigants are relying upon vagueness and overbreadth as standard constitutional challenges. During the past year, there was not a single successful challenge on these grounds, and probably for good reason. Overbreadth is a very special analysis that should be used only to attack statutes relating to first amendment claims. It is an exceptional analysis because it enables one guilty of the proscribed conduct to exonerate himself because the statute could possibly be applied unconstitutionally to another. This extraordinary departure from accepted constitutional dogma concerning standing to sue was designed to prevent the "chilling" effect of the overbroad statute. This challenge is out of place when any other type of statute is concerned.

Vagueness is a genuine due process objection, although it rarely succeeds because of the necessary generality of legislation. True vagueness offends due process because even if the defendant knew the language of the statute he would not know what was required of him or what was

80. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
81. *See* Schenck v. United States, 249 U.S. 47, 52 (1919).
82. 247 Ga. at 404, 276 S.E.2d at 582.
83. *Id.*

forbidden to him. As has been indicated, most statutes must use general, sometimes even vague language. This arises from the nature of language. However, since statutes generally arise in a certain context, their meaning becomes clear. Occasionally, by inadvertence, a statute may contradict itself or be cancelled out when read with other statutes. This, of course, would offend due process, but these are rare situations.

For example, in *Hall v. Chastain*,[84] defendant argued that Columbus City Code section 20-9.18 was unconstitutionally vague. The ordinance provides that "the operator of a motor vehicle at all times shall operate the vehicle in a manner which is safe for the condition on the highways, streets, alleys, driveways, bridges, viaducts, or underpasses, so they do not collide with stationary objects legally on or adjacent to the right of way."[85] The court rejected the challenge, finding that the ordinance is not greatly different from the rule of ordinary care that would apply in the absence of a statute.

In *State v. Hudson*,[86] defendant contended that Georgia Code Ann. section 26-1808.1[87] was unconstitutionally vague. It provides:

> Any architect, landscape architect, engineer, contractor, subcontractor, or other person who, with intent to defraud, shall use the proceeds of any payment made to him on account of improving certain real property for any other purpose then [sic] to pay for labor or service performed on, or materials furnished by his order for this specific improvement, while any amount for which he may be or become liable for such labor, services, or materials remains unpaid shall be guilty of a felony . . . , or upon the recommendation of the jury, or in the discretion of the trial judge, punished for a misdemeanor. . . . A failure to pay for material or labor furnished for such property improvements shall be prima facie evidence of intent to defraud.[88]

Concededly, this is not model drafting, but the court refused to declare it unconstitutionally vague on its face. "It is well established that vagueness challenges to statutes must be examined in the light of the facts of the case at hand."[89]

In *Baker v. State*,[90] defendant challenged a section of the Georgia Criminal Code as unconstitutionally vague when it prohibited maliciously causing bodily harm to another "by seriously disfiguring his body."[91] The

84. 246 Ga. 782, 273 S.E.2d 12 (1980).
85. COLUMBUS, GA., CODE § 20-9.18 (1971).
86. 247 Ga. 136, 273 S.E.2d 616 (1981).
87. GA. CODE ANN. § 26-1808.1 (1977).
88. *Id.*
89. United States v. Magurie, 419 U.S. 544, 550 (1975).
90. 246 Ga. 317, 271 S.E.2d 360 (1980).
91. GA. CODE ANN. § 26-1305 (1977).

evidence showed that defendant hit his mother-in-law, breaking her nose, and causing injuries which required twenty-five stitches. The court rejected the vagueness challenge because the statute gave defendant due notice that it prohibited the acts for which he had been convicted.

In *Mayor of Hapeville v. Anderson*,[92] plaintiff attacked a city ordinance that limited alcoholic beverage licenses to one for each one thousand persons residing in the City of Hapeville. The trial court found that the ordinance "is not susceptible to interpretation"[93] because there was no precise standard as to how the population of Hapeville could be measured. Therefore, the ordinance was held void for vagueness.

The supreme court reversed the trial court and held that the population of a municipality is a finite and definite number. The court cited the use of the United States Decennial Census in many state statutes. The census is a rational, logical, and consistent means of determining population when the word is used in a statute or ordinance.[94]

Another section of the state criminal code was challenged on vagueness grounds in *Byrdsong v. State*.[95] The statute reads:

> A person commits a misdemeanor when he carries to or while at a public gathering any explosive compound, firearm, or knife designed for the purpose of offense and defense. For the purpose of this section, "public gathering" shall include, but shall not be limited to . . . establishments at which alcholic beverages are sold for consumption on the premises. . . .[96]

The defendant asserted that the statute failed to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute and there are no standards provided so that one might easily understand what is meant by "public gathering." The fact that the statute did not define all sorts of public gatherings did not render it unconstitutionally vague.

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92. 246 Ga. 786, 272 S.E.2d 713 (1980).
93. *Id.* at 786, 272 S.E.2d at 714.
94. *Id.* at 787-88, 272 S.E.2d at 715.
95. 245 Ga. 336, 265 S.E.2d 15 (1980).
96. GA. CODE ANN. § 26-2902 (1977).