

IN THE SUPREME COURT OF THE STATE OF GEORGIA

In re: J.M., a child	)	
under 17 years of age,	)	
Appellant,	)	
v.	)	APPEAL CASE NO.
	)	
THE STATE OF GEORGIA,	)	S-02-A-1432
	)	
Appellee.	)	
_____	)	

BRIEF OF APPELLANT J.M.

Comes now J.M., Appellant, convicted and sentenced for the crime of fornication for engaging in consensual, private sexual activity, and files this his Brief in Support of his Appeal as follows:

I. JURISDICTION

The central issue in this case is whether the United States and Georgia Constitutions' rights of privacy, freedom of intimate association and equal protection shield non-married citizens who have reached the age of consent from criminal prosecution for engaging in private, consensual, non-commercial acts of sexual intimacy. Oral argument is requested.

This case involves a challenge to the constitutionality of a statute of the State of Georgia, O.C.G.A. § 16-6-18 (2002) ("fornication"), and will require construction of both the Constitutions of the United States and the State of Georgia. As

such, the Supreme Court of the State of Georgia has jurisdiction of this case. Ga. Const., Art. VI, § IV, ¶2.

II. ORDER APPEALED AND DATE ENTERED

Appellant was charged, by accusation, with the offense of fornication in the State Court of Fayette County. R - 22, 26. He filed a motion to dismiss the accusation on November 05, 2001 challenging the constitutionality of Georgia's fornication statute in the Juvenile Court of Fayette County. R - 16-21. The Order Denying Motion to Dismiss was entered December 3, 2001, whereupon a Certificate of Immediate Review was entered which the State did not oppose. R - 9,10. The Supreme Court of Georgia entered a Remittitur on January 10, 2002 due to untimely filing. R - 8. A trial was held March 15, 2002, in which Appellant was convicted of fornication in violation of O.C.G.A. § 16-6-18. R - 7. The Juvenile Court of Fayette County entered an Order of Transfer for Disposition on April 4, 2002. Id.

III. ENUMERATIONS OF ERROR/ISSUES PRESENTED

A. Whether Georgia's fornication statute (O.C.G.A. § 16-6-18) infringes upon the privacy rights of Georgia citizens in violation of the Georgia Constitution to the extent it criminalizes private, consensual, non-commercial acts of sexual intimacy.

B. Whether Georgia's fornication statute (O.C.G.A. § 16-6-18) infringes upon the right to freedom of association in violation of the United States Constitution or the Georgia State Constitution

to the extent it regulates activity within the protected realm of intimate associations.

C. Whether Georgia's fornication statute (O.C.G.A. §16-6-18) infringes upon the equal protection guarantee of Georgia citizens in violation of the United States or Georgia Constitutions to the extent it criminalizes private, consensual sexual behavior between non-married persons that is legal for married persons.

D. Whether the actions of the probation officer in filing the initial complaint and reading the juvenile his rights in the action violated Georgia law and the rule against probation officer acting as prosecutor.

IV. STATEMENT OF THE CASE

Appellant, seventeen year old J.M., resides in Georgia. His girlfriend, J.D., also lives in Georgia, and he has visited her in her home on several occasions. He was never told that he was unwelcome in her home. T - 16:1-10. Sixteen year old J.D. invited her boyfriend, also 16 at the time, over to her house and into her bedroom on or about September 16, 2001. T - 6:8-19. She closed her bedroom door, a place she considered private, and placed a stool in front of her door in order to further ensure her privacy. T - 8:12-13.

Both parties decided to engage in consensual sexual intimacy inside J.D.'s private bedroom. T - 9:1-4. J.D.'s mother burst into her room unexpectedly, and found the couple undressed and involved

in a consensual act of intimacy and affection. No money or other consideration was involved or exchanged. T - 8:5-25.

Although J.D.'s parents chose not to initiate state action against J.M., J.D.'s Probation Officer, Opal McCraney, took it upon herself to pursue charges against him. R - 22, 26. She filed the complaint and advised J.M. of his rights in connection with the charge. R - 25. Appellant was adjudicated delinquent. The Order denying the constitutional challenge was entered December 3, 2001. R - 10. This appeal followed.

V. ARGUMENT

A. INTRODUCTION.

J.M. challenges the constitutionality of Georgia's fornication statute¹ under the United States and Georgia Constitutions. This challenge is limited to the ability of citizens over the age of consent² to engage in private, consensual, non-commercial acts of sexual intimacy.

J.M's first challenge is based on Georgia's right to privacy. Georgia was the first state to recognize the right to privacy, and

¹ "An unmarried person commits the offense of fornication when he voluntarily has sexual intercourse with another person...". O.C.G.A. §16-6-18 (2002).

² "(a) A person commits the offense of statutory rape when he or she engages in sexual intercourse with any person under the age of 16 years and not his or her spouse, provided that no conviction shall be had for this offense on the unsupported testimony of the victim." O.C.G.A. § 19-3-2 (2001).

Georgia's right is both broader and richer than its federal counterpart. The right to privacy prohibits Georgia from making it a crime for citizens, over the age of consent, to engage in private, consensual, non-commercial acts of sexual intimacy.

J.M.'s second challenge is founded in the First Amendment of the United States and Georgia Constitutions' guarantee of freedom of association. The freedom to associate includes the fundamental right to intimate association, which is protected against unwarranted governmental interference. The State can offer no interest that would justify regulating the intimate affairs of couples above the age of consent who engage in affectional and sexual intimacy in private settings.

The third basis for challenging the constitutionality of this statute is grounded in the United States' and Georgia's right to equal protection. Georgia's fornication statute differentiates between similarly situated persons without an important, or even rational, basis in that it criminalizes non-married persons while condoning the same conduct between married persons. Finally, J.M. challenges the propriety of the probation officer unlawfully acting as prosecutor.

B. THE FORNICATION STATUTE VIOLATES GEORGIA'S RIGHT TO PRIVACY TO THE EXTENT IT CRIMINALIZES PRIVATE, NON-COMMERCIAL ACTS OF SEXUAL INTIMACY BETWEEN CITIZENS LEGALLY ABLE TO CONSENT.

1. Nature of the Privacy Right.

At the outset, J.M. seeks to define the scope and basis of his privacy claim:³ First, the privacy claim before this Court focuses solely upon the Georgia Constitution's protection of privacy rights under the due process clause of the Georgia Constitution. Georgia's privacy protection pre-dates the recognition of such a right under the United States Constitution by over fifty years. Pavesich v. New England Life Ins. Co., 122 Ga. 190, 197 (1905); Compare Bowers v. Hardwick, 478 U.S. 186 (1986).

Second, the Georgia Constitutional privacy claim before this Court deals solely with the right of citizens, legally able to consent, to engage in unforced, non-commercial acts of sexual intimacy in the privacy of their own home or other private place.

Finally, this Court's decision in Powell v. State, 270 Ga. 327 (1998), controls the outcome here, where the government seeks to punish J.M., a person legally capable of consenting to sexual acts, for engaging in consensual, noncommercial sexual intercourse with

³ For the reasons set forth in this brief, J.M. has standing to, and does, assert that the statute violates the right to privacy and intimate association of all Georgia citizens. The latest Census data found 145,743 unmarried-partner households in Georgia. Bureau of the Census, U.S. Dept. of Commerce, Census 2000 (visited June 17, 2002) (available at <http://factfinder.census.gov/servlet/DTable?_ts+42395647030>).

his girlfriend in a private home. In Powell, this Court squarely held unconstitutional "governmental interference [with] a non-commercial sexual act that occurs without force in a private home between persons legally capable of consenting to the act." Powell, 270 Ga. at 332.

2. Foundations of Georgia's Privacy Right.

Beginning with the 1905 decision in Pavesich, where this Court announced that Georgia citizens have a "liberty of privacy," the wisdom of Georgia courts have consistently found privacy an important and fundamental right. 122 Ga. at 197. In Pavesich, this Court held that the right of privacy is guaranteed to persons in this state by our Constitution. Id. See also Gouldman-Taber Pontiac, Inc. v. Zerbst, 213 Ga. 682, 682 (1957) ("Pavesich. . . was the first recognition of this [privacy] right by any court of last resort in this country"). Our State's recognition of a constitutional right to privacy pre-dates that under the United States Constitution by over fifty years. Griswold v. Connecticut, 381 U.S. 479 (1965); Multimedia WMAZ, Inc. v. Kubach, 212 Ga. App. 707, 717 (1994) (Beasley, J., concurring) ("Pavesich did not describe the right as being scattered in penumbras throughout the guarantees of the bill of rights, as did Griswold"); See also Williams v. State, 145 Ga. App. 81, 84 (1978) (Deen, J., dissenting) ("Georgia is the early pioneer in identifying fundamental, inherent, and inalienable rights such as the 'right of

privacy.'") (citing Pavesich, 122 Ga. 190 (1905)).

Georgia's right to privacy derives from both "natural law"⁴ and Roman law.⁵ This right finds constitutional protection in the Georgia Constitution's "decl[aration] that no person shall be deprived of liberty except by due process of law." Pavesich 122 Ga. at 197. See also State v. McAfee, 259 Ga. 579, 580 (1989) (noting Georgia's "constitutional right to privacy" under our due process clause).

3. Extent of the Right to Privacy in Georgia.

In Powell, this Court held that the sodomy statute was unconstitutional "insofar as it criminalizes the performance of private, unforced, non-commercial acts of sexual intimacy between persons legally able to consent." 270 Ga. at 336 (emphasis added). This Court's holding was consistent with rulings from sister states. The holdings in these cases, as well as other recent decisions, evince judicial acknowledgment that regulation of

⁴ "Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private and there are matters public so far as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law." Pavesich, 122 Ga. at 194 (emphasis added).

⁵ "[T]he ancient law recognized that a person had a legal right 'to be let alone,' so long as he was not interfering with the rights of other individuals of the public." Pavesich, 122 Ga. at 197 (emphasis added).

noncommercial, private sexual conduct between persons above the age of consent violates fundamental guarantees of individual privacy. Id. at 332 n. 3. See, e.g., Gryczan v. State, 942 P.2d 112 (Mont. 1997) ("Montana's constitutional right of privacy--this right of personal autonomy and right to be let alone--includes the right of consenting adults, regardless of gender, to engage in non-commercial, private, sexual relations free of governmental interference, intrusion and condemnation"); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. App. 1996) ("[W]e conclude that our citizens' fundamental right to privacy encompasses the right of the plaintiffs to engage in consensual, private, non-commercial, sexual conduct, because that activity 'involv[es] intimate questions of personal and family concern'"); Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992) (Kentucky's sodomy law unconstitutionally infringes on rights of privacy and equal protection); State v. Saunders, 381 A.2d 333 (N.J. 1977) ("We conclude that the conduct statutorily defined as fornication involves, by its very nature, a fundamental personal choice"); People v. Onofre, 415 N.E.2d 936, 940-41 (N.Y. 1980) ("individual decisions as to indulgence in acts of sexual intimacy by unmarried persons" are protected by the right of privacy); Doe v. Ventura, 2001 WL 543734 (Minn. Co. May 15, 2001) (Minnesota's sodomy law unconstitutionally violates the right to privacy).

The Powell decision is grounded in this state's extensive jurisprudence regarding Georgia's constitutional right to privacy. 270 Ga. at 329-332. After careful scrutiny, this Court squarely answered the question it is called upon to decide today, whether the state may criminalize consensual, non-commercial acts of sexual intimacy between persons legally able to consent to such acts:

[w]e cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity. . .[w]e conclude that such activity is at the heart of the Georgia Constitution's protection of the right of privacy. Powell, 270 Ga. at 332.

The privacy right announced in Powell has been limited to the parameters of its holding. 270 Ga. at 336. Thus, the privacy right does not extend to sexual activity where no consent is possible, and where no expectation of privacy exists. In re: C.P., 274 Ga. 599, 600 (2001) (holding that a stall in a public restroom is not a private place when used for any purpose other than its intended use); Ray v. State, 259 Ga. 868, 869 (1990) (Constitutional challenge without merit where a participant in the sexual activity was not legally able to consent because of his age); Richardson v. State, 256 Ga. 746, 747 (1987) (no constitutional right of privacy for a charge under Georgia's incest and sodomy statutes because the sexual activity was committed forcibly upon his step-daughter); See also Elmore v. Atlantic Zayre, 178 Ga. App. 25, 26 (1986) (no invasion of privacy when store's bathroom stall was used for sexual

activity); Stover v. State, 256 Ga. 515 (1986) (same); Wyllie v. State, 164 Ga. App. 174 (1982) (same).

The facts of this case offer the State no shelter in justifying their regulation of activities that this Court has found constitutionally protected. Both parties were legally able to consent, and did consent, to engage in noncommercial acts of sexual intimacy in a private home.

1. J.M. Possessed a Reasonable Expectation of Privacy When Undressed in his Girlfriend's Bedroom.

While the state will likely argue that minors do not enjoy a right to privacy as against the government in their parents' homes, this position is wholly unsupported by the law, particularly when applied to the facts of this case where the appellant had reached the age of consent as specifically defined by the Georgia Legislature. Powell rejected the State's position and specifically extended the right to privacy to any "non-commercial sexual act that occurs without force in a private home" and expressly reserved the right for "persons legally capable of consenting to the act." Powell, 270 Ga. at 332 (emphasis added).

The Georgia Legislature has determined that persons over 16 years of age are adults for decisions concerning intimate sexual activity, procreation and family. See e.g. O.C.G.A. § 19-3-2 (2001) (legally able to contract to marry at 16 years of age); O.C.G.A. § 16-6-3 (2001) (sexual intercourse with person over the

age of 16 years not statutory rape). See also Kelley v. State, 233 Ga. App. 244, 247 n. 1 (Ga. App. 1998) (finding a 16 year-old, naked in her bedroom, possessed a privacy right by pointing to Georgia laws allowing 16 year olds to enter into contracts, consent to sexual intercourse, and draft wills). Both partners in this case had reached the age the Georgia Legislature has determined grants them adult status for consenting to private sexual acts.

J.M. was engaged in an act of consensual sexual intimacy inside the private bedroom of his girlfriend. Our bedrooms are amongst our most private of places. Davis v. State, 262 Ga. 578, 581 n.3 (Ga. 1992) ("no expectation of privacy is more reasonable than that which one has in one's bedroom. From there, one may exclude the whole world, including one's children, and especially the government"). A minor too enjoys a heightened expectation of privacy within the bedroom, or bathroom, of a home. Snider v. State, 238 Ga. App. 55, 57 (1999) (nude minor in bathroom possessed privacy right); Kelley, 233 Ga. App. at 249 (nude minor in bedroom possessed privacy right).

Turning to the case at bar, this Court should have no trouble finding a privacy right existed. First, the appropriate inquiry ends at a determination that the conduct at issue was legally consensual and took place in a private setting. Powell, supra 270 Ga. at 332; Stover, 256 Ga. 515; Snider, 238 Ga. App. at 57; Kelley, 233 Ga. App. at 244. Second, J.M. was invited into the

home and was in a state of undress, with the occupant of the room, in the privacy of his girlfriend's bedroom, a place established as constitutionally protected. Third, even if J.M.'s girlfriend's parents may forbid certain behaviors inside her bedroom, the state has no authority to place criminal sanction on those behaviors. Indeed, here, neither family sought prosecution against either child under this statute. R - 22, 26. Therefore, privacy protection extends to the appellant - who has the legal capacity to consent as defined by the Georgia General Assembly.

2. The State Does Not Have a Compelling Interest to Justify Infringing on Its Citizens' Fundamental Right to Privacy.

When the privacy right is implicated, the government must present a narrowly tailored and "compelling interest" for prosecuting such persons. Powell, 270 Ga. at 333 ("a government-imposed limitation on the right to privacy will pass constitutional muster if the limitation is shown to serve a compelling state interest and to be narrowly tailored to effectuate only that compelling interest") (citing Phagan v. State, 268 Ga. 272 (1) (1997); Zant v. Prevatte, 248 Ga. at 833-34; Fleming v. Zant, 248 Ga. 832, 833-34 (1982); Ambles v. State, 259 Ga. 406, 408, (1989) ([privacy is] "recognized as having a value so essential to individual liberty in our society that [its] infringement merits careful scrutiny by the courts"))).

Under Georgia's right to privacy, if a citizen's private activities do not interfere with the rights of others or the public at large, the State presumptively has no right to regulate such activity. Powell 270 Ga. at 336; Pavesich, 122 Ga. at 197 ("legal right 'to be let alone' so long as [one is] not interfering with the rights of other individuals or the public"). In no area is the presumption of privacy stronger than in the realm of private, consensual, intimate activity. See Stover, 256 Ga. at 516 (sodomy law may impact privacy concerns "in private sexual activity"); See also Macon-Bibb County Water & Sewage Auth. v. Reynolds, 165 Ga. App. 348, 350 (1983) ("The right of privacy has been described as not one of a right to secrecy, but as the right to define one's circle of intimacy"). Georgia's fornication law intrudes upon an individual's most intimate and personal sexual privacy - the right to express sexuality with a consenting partner in a private setting. Loving, committed, monogamous couples, who, for a variety of personal reasons choose not to marry, are exposed to criminal sanctions when they express their affection through sexual acts in private. Hundreds of thousands of Georgians live together as couples, either in contemplation of marriage or in lieu of it.⁶ Many thousands more, who choose not to live together, engage in sexual intimacy prior to marriage as well.

⁶ Supra n. 3.

A state's morality justification fails for three reasons. First, the right of privacy, as this Court defined it in Pavesich, does not condone state intrusion into matters purely private based on notions of majority morality, but based only on the need to prevent tangible harm to others or the public at large. Second, if the morality of the majority suffices to justify infringement of a constitutional right, that cherished right - the essence of which is its protection of the individual as against the state and the public at large - is eviscerated. Third, this Court has consistently refused to hold that a far stronger governmental interest - the state's interest in preserving human life - can outweigh the individual's right of privacy where the individual's choice imposes no harm on others. Powell 270 Ga. at 339; Accord Zant, 248 Ga. at 833-34 (where this Court held that a prisoner's "constitutional right to privacy" permits him to sustain a hunger strike in the face of the state's claim of a "compelling state interest to preserve human life"); McAfee, 259 Ga. at 580 ("The state concedes that its interest in preserving life does not outweigh Mr. McAfee's right to refuse medical treatment").

The right of privacy, as this Court articulated as early as 1905 in Pavesich, and reiterated as recently as 1998 in Powell, simply does not recognize the desire of the majority to impose its morality on the individual as a legitimate ground for state intrusion into "matters purely private." Pavesich, 122 Ga. at 194;

Powell, 170 Ga. at 335; See also Gryczan, 942 P.2d at 125 ("it does not follow . . . that simply because the legislature has enacted a law that may be a moral choice of the majority, the courts are, thereafter, bound to simply acquiesce. Our Constitution does not protect morality; it does however, guarantee to all persons, whether in the majority or in a minority, those certain basic freedoms and rights...not the least of which is the right of individual privacy").

The United States Supreme Court has likewise acknowledged the role of the judiciary in protecting the fundamental rights of those in the minority, even as against the moral views of the majority. See Wisconsin v. Yoder, 406 U.S. 205 (1972) ("a way of life that is odd or even erratic, but interferes with no rights or interest of others is not to be condemned [by the State] because it is different"); Roe v. Wade, 410 U.S. 113 (1973) (where the Court acknowledged that the right of privacy included abortion, reasoning that the Constitution "is made for people of fundamentally differing views").⁷

⁷ See also Onofre, 415 N.E.2d at 941 ("There is a distinction between public and private morality and the private morality of an individual is not synonymous with nor necessarily will have effect on what is known as public morality"); Stover, 256 Ga. at 516 n.1 (drawing a similar distinction); Wasson, 842 S.W.2d at 496 ("The clear implication is that immorality in private which does not 'operate to the detriment of others,' is placed beyond the reach of state action").

"Liberty includes the right to live as one will, so long as that will does not interfere with the rights of another or of the public. . . ". Pavesich, 122 Ga. at 196. Because this Court has so clearly expressed the line of demarcation as harm to others, the Court's recognition of the right of privacy in the circumstances of this case will absolutely not call into question the legitimacy of state prosecution of incest and other sexual crimes where there are palpable harms to others.⁸ See generally Bowers 486 U.S. at 195-96.

Incest becomes a matter of public concern because there is often a question of capacity to consent (see, e.g., Richardson v. State, 256 Ga. 746 (1987) (stepfather convicted of incest for sexual exploitation of minor stepdaughter)), and there are clear health consequences to others and the public at large from procreation among persons within certain degrees of consanguinity. Likewise, sexual acts in public cross the line drawn in Pavesich between matters of private and public concern.⁹ By contrast, this case

⁸ The state's interests in preventing sexual assault and protecting the public from sexual acts are sufficiently served through the enactment of criminal statutes prohibiting such conduct. The Georgia legislature has announced that 16 year-olds may legally consent to engage in sexual activity, thus no claim to protect these persons can be sustained.

⁹ See O.C.G.A. §16-6-2 thru §16-6-22 (2001) (proscribing, for example, child molestation, aggravating sodomy, statutory rape, aggravated child molestation, enticing a child for indecent purposes, bestiality, sexual assault of a dead human being, public indecency, prostitution, pimping and pandering, incest, sexual battery and aggravated sexual battery); See also Powell, 270 Ga. at 333 ("[t]he State fulfills its role in preventing sexual assaults and shielding and protecting the

deals solely with unforced, private, noncommercial acts of sexual intimacy between citizens legally able to consent to sexual activity.

Private, consensual, noncommercial acts of sexual intimacy pose no tangible harm. This law clearly violates the right to individual privacy by making it a crime for legally consenting citizens to engage in private, consensual, non-commercial sexual activity.

____ C. **THE FORNICATION LAW VIOLATES FUNDAMENTAL RIGHT OF INTIMATE ASSOCIATION.**

The freedom of intimate association is largely coextensive with the right of privacy, as both describe that body of rights that protect intimate human relationships from unwarranted intrusion or interference by the state. See Griswold, 381 U.S. at 483-84; Linder, Freedom of Association After Roberts v. United States Jaycees, 82 Mich. L. Rev. 1878, 1884- 85 & n. 38 (1985). See generally Karst, The Freedom of Intimate Association, 89 Yale L.J. 624 (1980).

The Supreme Court has recognized two types of associational rights: intimate and expressive. Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984). Expressive associational rights are those involving the ability to meet with others to pursue free speech, religion, etc. At issue most directly in the regulation of private,

public from sexual acts by the enactment of criminal statutes prohibiting such conduct").

consensual, noncommercial acts of sexual intimacy context, however, are intimate association rights:

In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against government intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. Id. at 617-18.

The touchstones of an intimate association right are generally "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." Id. at 620. See also id. ("deep attachments and commitments to the necessarily few other individuals with whom one shares . . . distinctly personal aspects of one's life").

The right of intimate association includes the right to meet with others socially on the street. Sawyer v. Sandstrom, 615 F.2d 311 (5th Cir. 1980). It also includes intimate social associations, such as dating. Wilson v. Taylor, 733 F.2d 1539 (11th Cir. 1984). The right of intimate association has been found to include couples who live together. Marcum v. Catron, 70 F.Supp.2d 728, 736 (E.D. Ky., 1999). Relationships borne of sexual conduct are protected by intimate association rights. Thorne v. City of El Segundo, 726 F.2d. 459, 471 (1984); Fleisher v. City of Signal

Hill, 829 F.2d 1491, 1499 (9th Cir. 1987). See also Marshall v. Allen, 984 F.2d 787, 799 (7th Cir. 1993) ([t]he constitutionally protected right to freedom of association consists of ... the freedom to maintain certain intimate human relations, such as marriage, [and] procreation,...); Burns v. Burns, 253 Ga. App. 600 (2001)(reiterating "the right to privacy of intimacy between persons legally able to consent").

In Wilson, a Florida police officer was fired for dating the daughter of a convicted felon. The Eleventh Circuit recognized that the "first amendment right of association applies ... to purely social and personal associations." 733 F.2d at 1543-44. ("If, indeed, the right of freedom of association applies to individuals meeting on public streets, it must also apply to a man and a woman who are dating"). See also Briggs v. North Muskogee Police Dept., 563 F.Supp. 585, aff'd mem., 746 F.2d 1475 (6th Cir. 1984), cert. denied, 473 U.S. 909 (1985) (adulterous cohabitation not grounds for firing); Shuman v. City of Philadelphia, 470 F.Supp. 449 (E.D. Pa. 1979) (adulterous relationship with 18-year old not grounds for termination). Similarly, in Thorne, the court found that refusal to hire an individual based on sexual history and sexual conduct violated both her rights of privacy and freedom of association. 726 F.2d at 471. See also Fleisher, 829 F.2d at 1499 (right of intimate association protects officer from termination based on sexual relations with a minor).

Roberts and its progeny thus teach that the right of intimate association - the freedom to enter into and maintain certain intimate human relationships - is protected from undue governmental intrusion as a fundamental aspect of personal liberty. Although most intimate association cases involve the public employment context, the right is even more powerful when the state's punishment is a criminal sanction. See Noto v. United States, 367 U.S. 290 (1961). Criminal laws which burden fundamental rights require greater scrutiny than government employer actions. See Houston v. Hill, 482 U.S. 415, 459 (1987); Winters v. New York, 333 U.S. 507, 515 (1948).

The right of intimate association provided by the First and Fourteenth Amendments broadly extends to intimate relationships that include dating partners, engaged couples, cohabiting couples, sexual partners and extra-familial relationships. It prevents the government from invading the sanctity of homes and the private bedrooms of Georgians who chose to engage in sexual acts of intimacy, and who do so without force or commercial exchange. The crime of fornication - punishing the most private and intimate of human interactions - cannot stand.

D. THE FORNICATION STATUTE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL AND STATE CONSTITUTIONS.

The statute at issue also violates the Equal Protection Clause of the United States and Georgia Constitutions by treating

similarly situated persons differently without a corresponding compelling, important, or rational state interest. U.S. Const., amend. XIV, § I; Ga. Const., art. I, § I, par. II.

Under equal protection analysis, a statute is subject to strict scrutiny review if it infringes on a fundamental right or if it involves a suspect class. Ambles v. State, 259 Ga. 406, 407 (Ga. 1989). In order to pass strict scrutiny review, the statute must serve a compelling state interest, and the statute must be narrowly tailored to serve this interest. Id. If the statute does not involve a suspect class or a fundamental right, then the statute must bear a rational relationship to a legitimate state interest. Id. See also Woodard v. State, 269 Ga. 317, 321-322 (1998).

The Supreme Court struck down a statute regulating the distribution of contraceptives facially discriminatory because it drew a distinction between similarly situated married and unmarried persons. Eisenstadt v. Baird, 405 U.S. 438, 442 (1972). Thereafter, the Supreme Court of New York, citing Eisenstadt, struck down as an equal protection violation a sodomy law that treated married and unmarried persons differently by criminalizing the same activity only for unmarried persons. Onofre 51 N.Y.2d at 492. Various state courts have also found equal protection violations when criminal statutes treat married and unmarried persons, who engage in similar sexual activity, differently. In the

Matter of P., 400 N.Y.S.2d 455, 465 (Family Court of New York 1977) (where statute held an unconstitutional violation of equal protection because it prohibited sodomy only between unmarried couples); Commonwealth v. Bonadio, 415 A.2d 47, 50 (Pa. 1980) (statute prohibiting deviate sexual intercourse only between unmarried persons struck down); Onofre, 415 N.E.2d at 942 (statute prohibiting consensual sodomy among unmarried persons held facially discriminatory).¹⁰

While J.M. submits that the compelling interest standard should apply, the government has shown no rational or compelling state interest served by the statute in order to justify the distinctions made between married and unmarried persons. R - 12-15. When the statute fails to pass the more lenient equal protection standard of review, it is not necessary to assess the statute under a strict scrutiny review. Eisenstadt, 405 U.S. at 447 n. 7.

At least one Georgia court has found government action which

¹⁰ Georgia has yet to rule on the constitutionality of criminal laws that treat similarly situated married and unmarried individuals differently on the basis of marital status. See Jones v. Jones, 184 Ga. App. 709, 712 (1987) (spousal immunity statute challenge on equal protection grounds, married persons versus single persons, not ripe for appellate consideration); Blanton v. Moshev, 262 Ga. 254 (1992) ("we do not reach Mrs. Blanton's contention that the statute violates equal protection in its differentiation between those parents who are married and living together and those who are not").

treats married and unmarried persons differently unconstitutionally violative of equal protection. Houston v. Prosser, 361 F. Supp. 295, 296 (N.D. Ga. 1973). In Houston, the court invalidated application of a policy which required married students to pay for books and tuition but exempted unmarried students because the policy lacked a legitimate state interest. Id.

While it is urged upon this Court that the compelling interest standard should apply¹¹ even under legitimate interest standard the State cannot justify criminalizing identical conduct by married and unmarried citizens. Many unmarried couples live together in loving, committed, monogamous relationships, yet the State places criminal sanctions on their most intimate expressions, while identical conduct by separated, feuding, and unloving, married partners, is not made criminal. The State has no rational or

¹¹ Federal and Georgia statutes routinely classify marital status along with suspect classes. See, e.g., 12 U.S.C. § 3106a(1)(b) (foreign banks must conduct operations in compliance with laws prohibiting discrimination on the basis of race, national origin, marital status); 5 U.S.C. § 7204(b) ("...[D]iscrimination because of race, color, creed, sex, or marital status is prohibited with respect to an individual or a position held by an individual"); 15 U.S.C. § 1691(a)(1) (unlawful for creditor to discriminate on the basis of sex, race, religion, national origin, or marital status); 20 U.S.C. § 1087tt(c) (unlawful to discriminate in loaning money on basis of sex, race, religion, national origin, or marital status); 20 U.S.C. § 1071(a)(2) (same, for credit or insurance); O.C.G.A. § 7-6-2 (providing a cause of action for persons denied credit or a loan on the basis of race, national origin, marital status); O.C.G.A. § 7-6-1(a) ("No bank . . . may discriminate on basis sex, race, religion, national origin, or marital status").

compelling reason for legislating in this arena, and it violates the equal protection guarantee to do so.

E. THE JUVENILE PROBATION OFFICER IMPROPERLY INITIATED A COMPLAINT IN CONTRAVENTION TO STATE LAW AND WITHOUT REQUEST BY THE FAMILIES.

Finally, the Complaint on which this prosecution was based was improperly brought by a juvenile probation officer, who also advised J.M. of his rights in connection with the charge, in direct contravention of Georgia law and public policy. R - 25-26.

Rule 2.4 of the Uniform Rules of the Juvenile Courts of Georgia states, in relevant part:

A probation or nonjudicial intake officer shall not conduct an accusatory proceeding against any child. For purposes of this rule, an accusatory proceeding is any hearing or court proceeding in which the child stands accused of violating the law or an order of the court and is subject to court sanctions as a result thereof. Probation or nonjudicial intake officers shall not participate in such a proceeding either as the trier of facts or in a prosecutorial role, but may give testimony as to any violation of a valid order of probation or supervision of which he or she has personal knowledge. Uniform Juvenile Court Rule 2.4 (2001)

Moreover, by statute, "[a] probation officer may not conduct accusatory proceedings against a child who is or may be under his care or supervision ...". O.C.G.A. § 15-11-8(5).

The policy behind this Rule is to prevent juveniles from feeling as if the probation officer assigned to assist and guide them is trying to persecute or punish them. "It is clear that the

official whose statutory responsibilities include the supervision and assisting of juveniles can best serve that remedial function if, insofar as possible, he remains an objective and unbiased figure in the eyes of those juveniles whom he supervises and assists. In re P.L.S., 170 Ga. App. 74, 76 (1984). This policy is degraded even further when the person advising the child as to his rights is the same person who filed the complaint and is the same person who might eventually supervise him. It is certainly difficult to imagine a less objective and unbiased position than that of complainant.

In this case, the probation officer, not the families involved, filed the complaint against J.M. in a prosecutorial role, in violation of Georgia policy and Georgia law.

VI. CONCLUSION

For all the above reasons, J.M. asks this Court to reverse because Georgia's fornication statute is unconstitutional as applied to legally consensual, private acts of sexual intimacy.

This ____ day of June, 2002.

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