IN THE SUPREME COURT
OF THE STATE OF GEORGIA

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

BRIEF OF AMICUS CURIAE
THE DKT LIBERTY PROJECT

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SUPREME COURT OF GEORGIA

STATEMENT OF INTEREST

"Government is not reason, it is not eloquence, it is force; like fire, a troublesome servant and a fearful master. Never for a moment should it be left to irresponsible action." These words may be more forceful now than they were when George Washington uttered them when beginning this country's government. Aware of the risks of an unwatched government, the DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. This not-for-profit organization advocates vigilance over regulation of all kinds, especially regulation effected by use of penal laws. It has also been particularly involved in defending the right to privacy that is inherent in liberty.

This case implicates each of these concerns and requires the Court to determine the constitutional framework governing government attempts to trump them. Because of the DKT Liberty Project's strong interest in privacy, and in protection of citizens from government overreaching, it is well situated to provide this Court with additional insight into the issues presented in this case.

ARGUMENT

Appellant urges forcefully that, as a minor who is legally old enough to engage in a consensual sexual relationship, he is entitled to Georgia's constitutional privacy and equal protection guarantees. *Amicus curiae* joins this argument. And the significance of these constitutional protections is heightened by the fact that the statute prohibiting fornication is, by common consent, no longer enforced and obsolete. Because the fornication statute in Georgia is

obsolete and violates Georgia's assurances of privacy, appellant's adjudication of delinquency based on that statute should be reversed.

A. The Fornication Statute Has Fallen Into Disuse.

The statutory offence of fornication flowed from what was, at common law, not a legal crime, but an ecclesiastical offence. *Cox v. Lanier*, 133 Ga. 682 (1909). At that time, fornication was not a crime unless it was "public," and then only when it was so public as to be a "public nuisance." *Id.* at 682. However, in 1817, the Georgia legislature adopted the statute which made fornication – whether private or public – a criminal offense. *See* O.G.C.A. 16-6-18 (2002).

Though enforcement of the statute was not unknown in the early 1800's, since property, sex, and marriage were so intertwined, it has declined dramatically in the more modern era. In the past 50 years, there have been only seven reported cases on charges of fornication besides this one. Of those, only three occurred within the last 30 years. Two of those involved adjudications of juvenile delinquency – one involving a 12-year-old girl – and a third involved child molestation charges as well. *In re C.P.*, 274 Ga. 599 (2001) (14-year-old adjudicated delinquent for fornication in school restroom stall); *In re N.A.*, 246 Ga. App. 204 (2000) (case involved 12-year-old girl); *Flowers v. State,* 220 Ga. App. 814 (1996) (convictions for fornication, sexual battery and aggravated child molestation for conduct with a 10-year-old stepdaughter over several years) overruled on other grounds by *Strickland v. State*, 223 Ga. App. 772 (1997). In 1992, Attorney General of Georgia Michael Bowers stated on record that although he knew fornication was illegal, he did not know of anyone ever having been charged with it. Betty Parham and Gerrie Ferris, *Q&A on the News*, Atlanta J. & Const., March 16, 1992, at A2.

Georgia is not alone in its lack of enthusiasm for prosecuting fornication. Only thirteen

states and the District of Columbia have statutes criminalizing fornication, and many of those statutes have been held unconstitutional.[1] And as the Commentary to the Alabama Code noted when its fornication statute was repealed, "Fornication is not a crime in England nor, generally, the rest of the world. Many states have never made it a crime, and in those which have, courts have narrowed its coverage considerably. The trend of recent criminal code codifications elsewhere to omit this offense reinforces this judgement." Ala. Code 13A-13-2, Cmt. And even where, as in Georgia, the statutes remain on the books, they are rarely, if ever, enforced, because of privacy concerns. For example, a prosecutor from the Cook County State's Attorneys' office in Illinois stated, "Fornication is a charge we have not used a lot. It is a charge that could conceivably be leveled against people in the privacy of their own homes. Public indecency speaks for itself." Philip Franchine, *Pair Charged With Having Sex in Car*, Chic. Sun-Times, July 18, 1997, at 14.[2]

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[1]Note, *Prosecuting Teenage Parents Under Fornication Statutes: A Constitutionally Suspect Legal Solution to the Social Problem of Teen Pregnancy*, 5 Cardozo Women's L.J. 121, 128 (1998). Virginia, New Jersey, and Florida are among those states finding their fornication statutes unconstitutional. *See Doe v. Duling*, 603 F. Supp. 960, 966-67 (E.D. Va. 1985), *rev'd on other grounds*, 782 F.2d 1202 (4th Cir. 1986) (constitutional privacy right covers single adult decision whether to engage in sexual intercourse); *State v. Saunders*, 381 A.2d 333, 339 (N.J. Sup. Ct. 1977) (fornication statute invalid as it infringes on privacy right); *Purvis v. State*, 377 So. 2d 674, 676-77 (Fla. 1979) (fornication statute invalid because it violates the equal protection clause).

[2] Other law enforcement officers agree. The District Attorney for Salt Lake City has reiterated that his office had no plans to enforce the anti-fornication and sodomy statutes: "If we did that it would take all of our time." Michael Vigh, *Mystery Plaintiffs Bring Lawsuit Against Utah's Ban on Fornication; Suit Seeks to Rid Utah of Sodomy, Fornication Laws*, Salt Lake Trib., March 12, 2001 at A1. Nor is this a new trend. Nearly twenty years ago, Utah prosecutors described their long-held policy as "aggressive non-enforcement" of such charges. *Judge Upholds Dismissal of Fornication and Adultery Charges,* Associated Press, May 28, 1986. And in Virginia, the administrator of the state's Commonwealth Attorneys' Services Council has commented, "Fornication is not going to be a major item on any prosecutor's plate. . . . People

Courts have also noticed the lack of enforcement:

> [T]he crimes of fornication, adultery, and lewd and lascivious cohabitation are never, or substantially never, made the subject of prosecution. We are not speaking here of a condition of merely sporadic enforcement, explainable, perhaps, by limited police resources or difficulties in securing evidence. *We are speaking of an apparent consensus among law enforcement officials that such behavior is best not proceeded against criminally*."

Fort v. Fort, 425 N.E.2d 754, 758 (Mass. App. Ct. 1981) (emphasis added). *See also, Purvis v. State*, 377 So. 2d 674, 676-77 (Fla. 1979) (holding that complete lack of fornication prosecutions of parents of illegitimate children undercut state's argument that government objective of statute was to prevent illegitimate births); *In re Agerter*, 353 N.W.2d 908, 914-15 (Minn. 1984) (noting prosecutors and police alike generally have considered fornication statutes "unenforceable").

This widespread failure to enforce the fornication laws, especially over the last fifty years, cannot be attributed to law enforcement not knowing that fornication is occurring in Georgia.

> Except for traffic offenses, it is difficult to think of any crimes of which evidence comes to the attention of law enforcement officials with greater regularity, whether through divorce actions which are based on, or otherwise concern, marital infidelities; paternity suits; prosecutions for rape (in the traditional sense), where the defendant asserts consent; public assistance programs which aid unmarried mothers; publicly administered child protection and adoption programs; publicly funded abortions; or tort actions for alienation of affections or criminal conversation. Despite widespread official knowledge of such violations, prosecutions by law enforcement officials are essentially nonexistent.

Fort, 425 N.E.2d at 758 (citations and footnotes omitted). Moreover, as appellants aptly demonstrated, many unmarried people in Georgia are quite openly involved in sexual relationships with other unmarried persons. Nearly 146,000 unmarried couples in Georgia reported themselves publicly to the United States Census that way. *See* Appellant's Brief at 6,

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live together all the time now." David Lerman, *Fornication Still Illegal in Virginia*, Daily Press, July 16, 1996, at A2.

n.3. Thus, despite almost certain knowledge of rampant and numerous violations, neither prosecutors nor police are enforcing the law.

B. Statutes That Have Fallen Into Long Disuse May Be Declared Obsolete.

This intentional and well-nigh universal failure to enforce the law in the face of many and open violations of the law is of more than historical interest. Especially when the issue relates to a privacy right, as it does here, such a failure bespeaks a common acceptance of that privacy right, and a reluctance to interfere with it. Indeed, it demonstrates a "deeply-rooted societal perception" that people should not be punished for such behavior. *Roberts v. United States*, 445 U.S. 552, 565 n.3 (1980) (dissenting opinion) (noting that the ancient offense of misprision of a felony had fallen into "virtually complete disuse, a development that reflects a deeply rooted social perception that the general citizenry should not be forced to participate in the enterprise of crime detection").

As Professor Robert Bork has cogently observed of long-unenforced laws:

> There is a problem with laws like these. They are kept in the code books as precatory statements, affirmations of moral principle. It is quite arguable that this is an improper use of law, most particularly of criminal law, that statutes should not be on the books if no one intends to enforce them. It has been suggested that if anyone tried to enforce a law that had moldered in disuse for many years, the statute should be declared void by reason of desuetude or that the defendant should go free because the law had not provided fair warning.

R. Bork, *The Tempting of America*, 96 (New York: The Free Press 1990). *See also* G. Calabresi, *A Common Law in the Age of Statutes* (Cambridge, Mass.: Harvard University Press 1982); A. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 Iowa L. Rev. 389 (1963); Cf. L. and W. Rodgers, *Desuetude as a Defense*, 52 Iowa L. Rev. 1 (1966).

Courts have long recognized that continuing disuse of a statute reflects the expectations

of the society which has allowed it to fall into disuse. Indeed, the notion originated in Roman Law: "'Accordingly, it is absolutely right to accept the point that statutes may be repealed not only by vote of the legislature but also by the silent agreement of everyone expressed through desuetude.'" *Committee on Legal Ethics of the West Virginia Star Bar v. Printz*, 416 S.E.2d 720, 725 n.3 (W. Va. 1992) (quoting translation from Book One of The Digest of Justinian 32). The Supreme Court of Iowa held, "[W]e pronounce it contrary to the spirit of that Anglo-Saxon liberty which we inherit, to revive, without notice, an obsolete statute, one in relation to which long disuse and a contrary policy had induced a reasonable belief that it was no longer in force." *Hill v. Smith*, 1840 Iowa Sup. LEXIS 18, *19 (Iowa 1840); *see also Dan Dugan Transport Co. v. Worth County*, 243 N.W.2d 655, 657 (Iowa 1976) (recognizing the ordinary presumption against repeal by implication is weakened where the statute arguably repealed is an "obscure and generally forgotten statute," and finding 43 years of disuse made statute "forgotten") (citation omitted). The United States Supreme Court has also recognized that long-term lack of enforcement reflects the expectations of society:

> The undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis. What was said in another context is relevant here. "Deeply embedded traditional ways of carrying out state policy . . ." -- or not carrying it out -- "are often tougher and truer law than the dead words of the written text." *Nashville, C. & St. L. R. Co. v. Browning*, 310 U.S. 362, 369.

Poe v. Ullman, 367 U.S. 497, 501-02 (1961).

Georgia courts have long recognized this principle. In the unsavory context of awarding damages to an owner for the murder of a slave, the 1851 Georgia Supreme Court noted:

> it seems to me that [the law requiring a person to be charged criminally for killing a slave before an owner can recover damages] ought to be regarded as obsolete. This word is

> applied to such laws as have become inoperative by disuse, without being repealed. Courts of Justice will not, with facility, declare any law obsolete, more particularly a Statute. Disuse is evidence of the popular sentiment that a law is inexpedient, and ought not to be enforced. Long disuse is a presumption of repeal, but in case of a Statute, is rebutted by the fact, generally susceptible of demonstration, that it has not been repealed. The Courts, however, have gone so far as to hold Statutes obsolete, where the objects upon which they were intended to take effect, and the purposes for which they were enacted have, for a length of time, ceased to exist. . . . It is a familiar principle, that the reason of the law ceasing, the law itself ceases.

Neal v. Farmer, 9 Ga. 555, 565 (1851).

The principle surfaced more recently in *Franklin v. Hill*, 264 Ga. 302 (1994), in which this Court invalidated the Georgia seduction statute on the grounds that it violated the equal protection provisions of the Georgia and United States Constitutions. Concurring with that view, Justice Sears also proposed that the statute could be invalidated because it was obsolete. Recognizing that the power to declare statutes obsolete should be used sparingly, Justice Sears urged that the power was justified in rare instances. Because the constitutionality of the statute was doubtful, because the statute was "woefully out of step with current legal and societal standards, and where the statute has rarely been used, the court should not hesitate to declare the statute void so as to give our General Assembly the opportunity to reexamine the statute in its entirety." *Id.* at 306 (Justice Sears-Collins, dissenting). Thus, because the seduction statute was based on the now-unacceptable notion that fathers had a property interest in the bodies of their daughters, and because the statute had been used only twice in the past 60 years, Justice Sears would have found the statute obsolete.

C. <u>This Court Should Invalidate This Obsolete Statute Because It Is Harmful.</u>

It might appear that because such statutes *are* no longer directly enforced, there is little

harm in allowing them to remain on the books. But the fact that such laws can be suddenly revived – especially criminal laws – poses particular dangers. King Henry VII recognized the potential of these laws when he found the coffers of the English kingdom empty. Looking for creative ways to raise money, he tasked two minister (who were lawyers) to strictly enforce all penal laws "and no difference was made, whether the statute were beneficial or hurtful, recent or obsolete, possible or impossible to be executed. The sole end of the king and his ministers was to amass money . . . ." Hume, History of England from the Invasion of Julius Caesar to the Abdication of James the Second 1699, Vol. III 61-63 (1792-93).

While increasing revenue seems an unlikely outcome in this age, there are other serious harms that unenforced laws can accomplish. First, disused statutes can be used collaterally to justify other legal decisions, such as custody, benefits, or conditions of probation. In numerous child custody cases, Georgia courts, especially trial courts, have used the fact that fornication is a "crime" to deny custody to a single parent who has a sexual relationship with another person. *See, e.g., Gibson v. Pierce*, 176 Ga. App. 287 (1985); *Bridges v. Bridges*, 197 Ga. App. 608 (1990). Thus, despite the fact that law enforcement no longer regards the behavior as criminally prosecutable, its technical status as a "crime" is still used against people. *Cf. Fort v. Fort*, 425 N.E.2d at 759 (where mother argued that father should be denied custody based on fornication, court noted, "Evaluated in terms of practical effect, a criminal statute which is wholly ignored is the same as no statute at all. It follows that it is immaterial that the husband's behavior violates those criminal statutes."). Similarly, the Georgia Court of Appeals has relied on the "criminal" nature of fornication to deny workers' compensation benefits to the survivor of a couple who had lived together without marriage for many years. *Williams v. Corbett*, 195 Ga. App. 85 (1990),

aff'd, 260 Ga. 668 (1990). *See also, Long v. Adams*, 175 Ga. App. 538 (1985) (though reversed on appeal, trial court ruled that unmarried woman who contracted herpes was barred from seeking tort damages against the man who infected her since fornication was a crime).

Second, long-disused statutes can also be used not to actually punish or deter prohibited conduct, but to accomplish punishment or deterrence for *other* offenses whose violations are hard to prove. Thus, prosecutors may use the fornication statute to entice a plea when they suspect, but cannot prove a more serious offense, or to try to justify a search or an arrest. For example, in *Johnson v. State*, 111 Ga. App. 298 (1965), when a search warrant for illegal drugs was declared invalid, the police tried to argue that the offense of "adultryfornication" [sic] had been committed in their presence when they entered a private room at 1:30 a.m. and found two unmarried persons sleeping in the same bed. (The Appellate Court wisely rejected this effort.) Elsewhere, police have arrested people on charges of fornication or "lewd and lacivious cohabitation," when they suspected drug violations but were unable to find enough evidence for drug charges. Sharon LaFraniere, *2 Va. Laws on Illicit Sex Upset; Unwed Couple's Privacy Upheld*, Wash. Post, Feb. 28, 1995, at C1.[3] Further, the threat of a prosecution under the statute can be used for wholly improper purposes, like the prosecutor who made out a bill of indictment against a defense witness *during his direct testimony* and then announced to the witness and the

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[3] Likewise, where Minnesota police had arrested a man for drunk driving when he was found intoxicated in his parked car and having sex, the prosecutor dropped the drunk driving charge because it was "unprosecutable," and entered a fornication charge instead, with the agreement of the defendant. *Man Says He Pleaded Guilty to Fornication to Avoid Drunk Driving Charge*, Associated Press, Dec. 4, 1984. And in North Carolina, a judge who was obviously frustrated with a former police officer's financee's refusal to give evidence in an abuse case against him, but who testified that she and he lived "as fiancees," ordered the prosecutor to charge both the former police officer and his fiancee with fornication. *Judge Wants Couple Charged Under Unmarried-Sex Law,* Associated Press, Oct. 1, 1996.

jury that he would prosecute the witness for fornication. *Lewis v. State*, 89 Ga. 396 (1892).

Third, long-disused statutes are tempting targets for selective prosecution, in which prosecutors enforce the statute only against a specific groups of persons, or at the behest of some persons, usually to obtain a result which is not the aim of the statute. For example, a local prosecutor in Idaho used the long-dormant fornication statute to start his own campaign against welfare. Thus, over a dozen teen-aged girls who got pregnant and who applied for welfare benefits were prosecuted under the fornication statutes. Alex Tizon, *Idaho County Fights Teen Sex Using Old Fornication Law – Unwed Mothers, Boyfriends Key Targets*, Seattle Times, July 15, 1996, at A1. Selective prosecution of long-disused Sunday Blue Laws was sharply criticized in *State v. Anonymous*, 364 A.2d 244 (Conn. 1980) and in *People v. Acme Markets, Inc.*, 334 N.E. 2d 555 (N.Y. 1979), where the laws were not enforced except upon complaint by a competitor. The Connecticut court quoted the New York court:

> The principal issue . . . is whether, *with a history of disuse* and absent a policy of general enforcement, prosecution at the instance of an interest group for its private purposes constitutes discrimination violative of the equal protection clauses of the Federal and State Constitutions. We think so and, accordingly, would reverse [the appellants'] convictions on that ground alone.

Anonymous, 364 A.2d at 246 (emphasis added) (citation omitted). Indeed, this case itself raises issues of selective prosecution: the state quite openly admits it has pursued teenagers, but not adults, although the statute plainly covers adults. In these circumstances, whatever legislative policy originally animated the statute is reduced to an individual prosecutor's need for leverage and the element of surprise.

D. <u>This Court Should Declare the Fornication Statute Obsolete and Reverse the Conviction.</u>

Prosecutions of long-disused and obsolete statutes violate principles of fair notice guaranteed under equal protection and due process provisions. Of course, disuse for a set amount of years, standing alone, is not sufficient to declare a statute obsolete. As the West Virgina court noted, "For instance, if no one had been prosecuted under an obscure statute prohibiting ax murders since Lizzie Borden was acquitted, we would still allow prosecution under that statute today. Even though no one has been prosecuted for an ax murder for 50 years, we all still understand that it is inappropriate to resort to garden tools to settle family quarrels." *Committee on Legal Ethics*, 416 S.E. 2d at 726. Instead, each statute must be evaluated to determine whether, given the disuse and the nature of the statute, a defendant had fair notice he could be prosecuted under the statute. As the concurrence in *Franklin* noted, such notice is missing where the statute is rarely used, of doubtful constitutionality, and no longer reflects current legal or societal standards.

As demonstrated above, the fornication statute has long been unenforced in Georgia, as in the rest of the country. Given the increase in numbers of persons who engage in unmarried sex, and the general acceptance of that development as the private business of the persons involved, the lack of prosecutions seems unremarkable. The rare prosecutions under the statute serve only to emphasize this public perception of private matters, as they are inevitably prosecutions for some reason *other* than expressing community outrage at unmarried people over the age of consent having private sexual relations. As noted above, in the only three reported cases of fornication prosecutions in Georgia in the past 30 years, two were juvenile delinquency

adjudications involving a 12-year-old girl and a 14-year-old girl – both under the age of consent. The third case involved a 10-year-old victim included charges that were fully prosecutable – and fully prosecuted – under other statutes designed specifically to protect children, such as the child molestation statutes. Thus, whatever state interests that these few fornication prosecutions serve can easily, and more honestly, be served by proceeding under different charges.

Second, as the Appellant's brief convincingly demonstrates, the fornication statute violates the privacy protections in the Georgia Constitution which prevents governmental interference with "private, unforced, non-commercial acts of sexual intimacy between persons legally able to consent." *Powell v. State*, 270 Ga. 327, 336 (2001). Because minors are legally able to consent, they are entitled to the same constitutional protections as adults. Additionally, the statute is of doubtful constitutionality because it does not extend equal protection of Georgia's privacy provisions to married and unmarried persons.

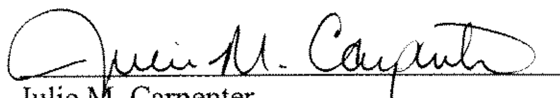
Finally, as demonstrated by the fact that hundreds of thousands of unmarried Georgians engage in sexual relationships every day, the statute is woefully out of step with current societal standards. In these circumstances, Georgia citizens – 16-year-olds or adults – do not have fair notice that engaging in unmarried sex can result in criminal penalties.

CONCLUSION

The Georgia fornication statute has not been enforced in any serious way for more than 50 years. This lack of enforcement is not surprising given Georgia's constitutional protection of privacy and the legislature's determination that 16-year-old people can legally consent to a

sexual relationship. And the lack of enforcement demonstrates that because of the developing sense of privacy, the statute no longer expresses the social sense that it did at its enactment nearly 200 years ago: that unmarried persons having private, consensual sex is harmful to the community. For all these reasons, this Court should find the fornication statute obsolete and reverse the adjudication of delinquency.

Respectfully submitted,
THE DKT LIBERTY PROJECT



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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the following with a true and correct copy of the foregoing Brief of Amicus Curiae by United States mail.

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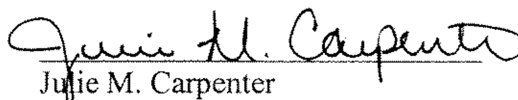

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