Punishing Adultery in Virginia

A Cheating Husband's Guilty Plea Is A Reminder Of the Continued Relevance of Adultery Statutes

By JOANNA GROSSMAN
lawjlg@hofstra.edu

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According to a report in the *Washington Post*, a man in Luray, Virginia recently pled guilty to adultery, a crime for which the maximum penalty is a $250 fine. Ironically, it wasn't his wife who complained; it was apparently his lover. (He reportedly has reconciled with his wife.)

This case is a potent reminder--particularly for the man charged--that adultery is in fact a crime in more than twenty states. Though the laws are seldom enforced, their existence still affects the way people behave.

The Three Areas of Law Relevant to Adultery

Laws against adultery are a natural outgrowth of laws and customs insisting that marriages be monogamous. In every society premised on monogamous relationships, adultery has been seen as a wrong.

In the United States, the rules relating to adultery arose--and to varying degrees persist--in three distinct areas: marriage law, criminal law, and civil tort law.

The Role of Marriage Law in Regulating Adultery: "Fault-Based" Divorce and Property Division

The law of husband and wife, borrowed virtually wholesale from English common law, has always included a duty of fidelity for both parties to a marriage. Marital duties are primarily enforced at the time of divorce or separation, however, and thus infidelities were alleged and proven primarily in the context of divorce. Adultery was a ground for divorce in every jurisdiction, once states began to permit judicial divorce.

In some states, such as New York, adultery was the only ground for divorce, reflecting a biblical principle that adultery is the only thing that could justify terminating a valid marriage prior to the death of either party. In the nineteenth and early twentieth centuries, other states offered other grounds for divorce too -- such as neglect, abandonment, and cruelty. But throughout that period, twenty-five percent of divorces nationwide were still premised on adultery.

Although most states today offer no-fault divorces, many retain fault grounds as well, which gives the filing spouse the option of pursuing either a fault or no-fault divorce. In such states, adultery remains a viable basis for divorce or separation.

Even in states that do not offer fault divorce as an option, or in cases in which the filing spouse does not pursue that option, adultery may affect divorce proceedings. In non-community property states, judges are given the power to equitably divide marital property upon divorce.

The equitable distribution process is guided by factors like need and fairness. But in a majority of states, judges may also consider marital fault in deciding how to equitably divide property or deciding whether to award alimony.

In most cases, judges take fault into account only when the fault resulted in some tangible economic consequence--for example, if a husband's physical cruelty toward his wife rendered her unable to work, he might be required to pay greater alimony.

But at least a few jurisdictions permit consideration of any form of marital fault--including adultery--in determining marital property division and alimony. Though this is probably inconsistent with the modern theory of marriage--as a partnership that can be dissolved with consent of the parties--adultery can thus pose an obstacle to an easy escape.

The Role of Tort Law in Regulating Adultery: The "Heart Balm" Torts

Historically, adulterous behavior has also been the concern of civil tort law. Many American states once recognized torts like "criminal conversation" (the commission of adultery with another's spouse), "alienation of affections" (diversion by a third party of a person's affections from someone who has rights to them), and "enticement" (when someone persuaded a man's wife to leave him).

Today, however, most states have abolished all of these torts -- collectively referred to as "heart-balm" actions. (Other heart-balm actions like wrongful seduction and breach of promise to marry involved transgressions of the unmarried.)

The "heart balm" torts involving marriage were all rooted in the notion that a spouse (often only a husband) had a property interest in the other spouse's chastity or affections. Cases were routinely brought alleging these forms of interference with marriage, and juries were inclined to award damages.

It was in the mid-Twentieth Century that States moved to abolish these torts. They were prompted by a concern that they were being used to extort settlements from defendants who could not afford the attendant publicity, and a concern that plaintiffs would fabricate claims to avoid consequences for their own voluntary sexual indiscretions.

A few "heart balm" torts persist, however, and occasionally surface in modern cases. (For instance, in an earlier column, I discussed a modern wrongful seduction case.)

The Role of Criminal Law in Regulating Adultery

Criminal law has also played a role in regulating adulterous conduct. Adultery was not a criminal offense at early common law. But it became one during the Progressive Era, and reached its height during the 1920s and 1930s.

Many states were swayed by anti-vice movements, and enacted statutes to protect morality. Thus, laws criminalizing acts like adultery, spousal or parental abandonment, bastardy, prostitution, and fornication appeared.

Prosecution of Crimes Against Morality In a Sample Jurisdiction

Unlike today, crimes against morality then occupied a significant portion of the average county criminal docket. In 1922 Dane County, Wisconsin, for example, offenses against property were most frequently charged, followed by offenses against chastity, morality and decency (as they were termed by the criminal code). Fewer persons were charged with crimes against the person (assault, murder, etc.) than with crimes against morality like fornication, spousal abandonment, and lewd conduct, and a greater percentage of defendants charged with crimes against morality were convicted or plead guilty compared with other defendants.

Most of the offenses against morality on the 1922 docket were resolved by guilty plea (as were most other offenses), and the sentences reflected the state's desire to coerce moral conduct--rather than punish immoral conduct. A man charged with abandonment, for example, would be ordered to return home or pay support. A man charged with bastardy (fathering an unwed child) might be ordered to marry the child's mother, or to enter into a private child support agreement.

Before the same handful of judges in Dane County, fornication charges were often dropped if the parties agreed to marry in front of the sentencing judge, and those that refused were given probation terminable "upon production of a marriage certification." Most sentences of probation insisted that the defendant have no contact with the "co-perpetrator."

Adultery in Wisconsin was in theory punishable by three years in prison, though in that one year, there were no charges brought.

Criminal Courts and Adultery Law

In the early part of the Twentieth Century, it was commonplace for criminal courts to enforce public morality. The ratification of Prohibition, through the Eighteenth Amendment--prohibiting the manufacture, sale, or transportation of liquor--and the federal Volstead Act--making possession of liquor a crime--fortified this role for courts.

To return to the example of Wisconsin, there, courts approached liquor offenses much as they did other morality crimes. They imposed sentences of probation with very restriction conditions, to coerce more moral behavior with the threat of imprisonment for failure to comply.

The laws to which this era gave birth, and which this era enforced, remain on the books in several jurisdictions. Though criminal courts no longer play an active role in regulating family relations--outside, perhaps, of the domestic violence arena--the laws themselves persist and, in theory, still can be invoked.

Across various jurisdictions, the punishment for adultery ranges from a small fine (as in Virginia) to five years in prison.

The Future of Adultery Laws

Although Virginia's punishment for adultery is quite minor, its decision to enforce its criminal adultery law is quite remarkable. Other states are actively working to remove their criminal adultery laws from the books. The District of Columbia, for example, has enacted a law to eliminate "outdated crimes," including adultery.

Some states were prompted to review their laws criminalizing consensual sexual activity in the wake of the Supreme Court's June ruling in *Lawrence v. Texas*. There, the Court struck down Texas' ban on homosexual sodomy. (In a prior column, I discussed in detail the possible implications of *Lawrence* for other so-called morals offenses.)

One reading of Justice Kennedy's opinion in *Lawrence* is that states may not constitutionally burden any private, consensual sexual activity between adults. Such a reading would throw laws against fornication, adultery, and even adult incest into question.

But, as I explained in detail in the prior column, such a reading is probably too simplistic, since it discounts the continued role of tradition in defining those rights so fundamental that states cannot deny them. Although homosexual sodomy was not traditionally protected, nor were laws against it enforced.

To the contrary, as detailed above, states, in differing contexts have a long history of regulating marital fidelity and punishing--both civilly and criminally--offenders. Though recent history has been

different, the tradition has been to enforce bans on adultery in one forum or another.

And states have always acted strongly to preserve a monogamous tradition. Federal and state laws against bigamy and polygamy reflect that tradition. Moreover, concerns about an orderly system for assigning the burdens and benefits of marriage and for determining inheritance might justify continued efforts in that vein.

But, constitutionally, it is too soon to tell the fate of adultery laws. Other marriage bans (for instance, bans on same-sex marriage) are more likely to be challenged based on *Lawrence*, and also more likely to fall because of it. So the Virginia man's case with which this column began may, in the end, simply stand as a reminder of the power of forgotten laws.

Joanna Grossman, a FindLaw columnist, is an associate professor of law at Hofstra University. Her other columns, including columns on family law, may be found in the archive of her columns on this site.