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VIRGINIA IS FOR LOVERS… IF THEY TAKE THE FIFTH

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The United States Supreme Court's 2003 landmark decision in *Lawrence v. Texas* launched a windstorm of debate about the breadth of the rights of individuals to conduct their personal private lives, with regard to sexual activities, without State involvement or censure. Much of the debate has centered upon a perceived acknowledgment and advancement of homosexual rights in America. However, as some scholars have noted, the rationale of the case may reach further than homosexual rights, permeating the boundaries of the Domestic Relations field. *See, e.g.,* Major Steve Cullen, *Prosecuting Indecent Conduct in the Military: Honey, Should We Get a Legal Review First*? 179 Mil. L. Rev. 128, 158 (2004). An analysis of *Lawrence* from this standpoint indicates that the Court may strike down laws proscribing adult consensual, noncommercial, private sexual activity as unconstitutionally violating the individual's "protected zone of privacy" *See id.* at 158. Under this view, *Lawrence* raises significant questions regarding the continuing validity of adultery laws. These questions will likely have a tremendous impact on a married person's right against self-incrimination under the Fifth Amendment and on the defense and prosecution of adultery claims made in divorce cases in Virginia.

In *Lawrence*, the United States Supreme Court overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), and struck down a Texas statute banning homosexual sodomy under the Fourteenth Amendment's Due Process protection of personal liberty. *Lawrence*, 539 U.S. at 577-78. The majority opinion in *Lawrence* clearly states that decisions adults make regarding their private, consensual sexual practices are an aspect of liberty which is protected by the Due Process Clause of the Fourteenth Amendment. *Id.* However, the Court goes on to distinguish the circumstances in *Lawrence*, involving the sexual practice of two consenting adults, from circumstances involving minors, the coerced, prostitution, and recognition of same sex marriage. *Id.* at 578. These limitations on its holding suggest that *Lawrence* allows room for the States to regulate these behaviors, and that in so doing a State does not violate an individual's liberty interest by proscribing such conduct.

Justice O'Connor and Justice Scalia differed in their assessment of the impact the *Lawrence* decision would have on seemingly related statutes that regulate the personal life of an individual. O'Connor concurred in invalidating the Texas statute (based on Equal Protection grounds rather than Due Process), but held that other laws which differentiate between heterosexuals and homosexuals based upon legitimate State interests, such as

"preserving the traditional institution of marriage," would withstand a rational-basis review and not violate the Equal Protection Clause. Alternatively, Justice Scalia's dissent asserts that the majority's rationale that "the Texas statute furthers no legitimate State interest which can justify its intrusion into the personal and private life of the individual," compels the conclusion that promotion of morality is not a legitimate State interest. According to Justice Scalia, the majority's rejection of a State's ability to regulate based on the notions of morality undermines a vast array of State laws and destroys their ability to pass the rational-basis review promoted by the majority, such as regulation against same-sex marriage, incest, prostitution, fornication and adultery. *Id.*

The wake of the *Lawrence* decision causes waves of criminal statutes to crash on the shores of questionable constitutionality. If commission of those crimes is no longer viable, the basis for asserting one's Fifth Amendment right against self-incrimination no longer exists. Consistent with Justice Scalia's prediction, the Virginia Supreme Court recently addressed the constitutionality of Virginia's statute criminalizing fornication (Va. Code Ann. 18.2-344). In *Martin v. Ziherl*, 607 S.E.2d 367 (Va. 2005), the plaintiff and defendant were an unmarried couple who were engaged in a sexual relationship. *Id.* at 368. The plaintiff brought a tort action for injuries allegedly inflicted by the transmission of herpes during sexual intercourse. *Id.* Relying on *Zysk v. Zysk* 387 S.E.2d 466 (Va. 1990), the trial court found that the plaintiff had not stated a claim upon which judgment could be granted because the resulting injury was caused by the plaintiff's participation in the illegal act of fornication. *Martin*, 607 S.E.2d at 368.

Relying on the rationale of *Lawrence*, the Virginia Supreme Court overruled the trial court, finding no fundamental difference between Va. Code Ann. § 18.2-344 outlawing fornication and the Texas statute invalidated in *Lawrence*. *Id.* at 370. Effectively decriminalizing fornication, the Court ruled that § 18.2-344 was unconstitutional in invading the liberty interests of adults concerning their sexual relations. *Id.* Significantly, the Court held that under *Lawrence*, "decisions by married or unmarried persons regarding their physical relationship are elements of their personal relationships that are entitled to due process protection." *Id.* If the Court meant what it said then the State might well *not* have the ability to proscribe as criminal the act of adultery as it is the product of a physical relationship between a married person and one with whom that person is not married.

While the Court's holding in *Martin* applied to private consensual conduct between adults, the Court was careful to note that the holding did not affect a State's power to regulate prostitution, situations involving minors, or public fornication, In fact, the Court has specifically held that *Lawrence* does not apply to public activity. In *Singson v. Commonwealth of Virginia*, the defendant was arrested and prosecuted under Va. Code Ann. § 18.2-361 (crimes against nature) and 18.2-29 when he proposed to perform an act of sodomy in a men's public restroom. 46 Va. App. 724, 621 SE 2d 682 (2005). The defendant argued that under *Lawrence*, § 18.2-361 is unconstitutional because it prohibits consensual acts of sodomy. *Id.* at 2. The Court rejected the defendant's claim and held that application of the sodomy statute to conduct in a public location does not implicate the

defendant's constitutionally protected right to engage in private, consensual acts of sodomy. *Id*. at 16. The Court declined to rule whether the crimes-against-nature statute was unconstitutional as it applied to private acts, holding that the defendant had no standing to challenge on this issue when his act occurred in a public place. ("as a general rule, if there is no constitutional defect in the application of the statute to the litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations.") *Id*. at 8-9.

Courts in Virginia have clearly drawn the line of constitutional protection to include private fornication and sodomy but not public sexual conduct. However, given the language used to justify these decisions, adultery statutes at best lie in a metaphorical no man's land of constitutional protection. *Martin* establishes that due process protects elements of personal relationships that include decisions by married or unmarried persons regarding their intimate physical relations, but never expressly holds that the decision of a married person to engage in an intimate physical act outside the marriage falls within this definition of constitutional protection. Interestingly in *Martin*, the Court did not carve out or mention as an exception to this rule a State's right to regulate behavior in aid of "preserving the traditional institution of marriage" as was suggested by Justice O'Connor's concurrence to be constitutional. The Virginia Supreme Court's express exceptions are only those situations that "involve minors, non-consensual activity, prostitution, or public activity." *Martin*, 269 Va. at 43. Similarly in *Lawrence*, the Supreme Court expressly held that "individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of liberty protected by the Due Process Clause of the Fourteenth Amendment." *Lawrence*, 539 U.S. at 578 (citing Justice Stevens's dissent in *Bowers v. Hardwick*, 478 U.S.186, 216 (1986)). The Supreme Court went on to explicitly list circumstances that these decisions do not involve (minors, prostitution, public activity, or formal recognition by the government of a homosexual relationship). The exclusion of adultery from these lists further suggests that even adulterous decisions concerning intimate personal relationships are protected by the Constitution.

While the decision to engage in an adulterous relationship is inarguably an individual decision concerning a private, consensual, and intimate relationship, adultery possesses several aspects not reached by those statutes already invalidated. For example, by definition, adultery adversely affects the institution of marriage. An individual's decision to commit adultery involves a third person, the spouse of the adulterer, who most likely does not consent to the individual's decision regarding this personal relationship. Furthermore, this adverse impact on marriage and family raises adultery to a greater level of perceived immorality. Again, this new level results from the impact of the adulterous relationship on parties who do not contribute to the decision, such as a spouse and offspring.

However, while protecting the institution of marriage is – or has been – inarguably a State interest, *Martin* asserts that *Lawrence*'s holding "sweeps within it all manner of

State's interests and finds them insufficient when measured against the intrusion upon a person's liberty interest…in the form of private, consensual sexual conduct between adults." Moreover, Courts have continually held that the fact that a majority has traditionally held something immoral is not sufficient to uphold a law prohibiting the practice. *Lawrence* 539 U.S. at 578; *Martin*, 269 at 41; *State v. Limon*, 280 Kan. 275, 294 (2005). If the grounds of morality crumble under the weight of an individual's right to engage in a private homosexual act, courts will be hard pressed to uphold adultery statutes on any moral grounds.

Hearing the news, adulterers relax,
and even celebrate.

While indirect case authority in *Lawrence* and *Martin* lacks a concrete standard for constitutional protection of adulterous relationships, direct, pre *Lawrence* case authority is equally inconclusive. *Marcum v. McWhorter*, decided by the Sixth Circuit in September of 2002, involved a wrongful termination action by a sheriff who was fired because of his cohabitation with a married woman. 308 F.3d 635, 637. (2002). The Sheriff maintained that his exclusive, sexually intimate relationship with the married woman was protected by the Constitution. *Id*. at 638. The court rejected this claim, holding that "the adulterous nature of the relationship does not portray a relationship of the most intimate variety afforded protection under the Constitution." *Id*. at 640.

While *Marcum* seems directly on point, the court relied heavily on the now-overruled *Bowers* decision in concluding that an adulterous relationship does not warrant due process protection. *See Id*. at 641 ("The fact that the Court was addressing another fundamental liberty interest…does not prevent this court from relying on *Bowers*…when determining whether an adulterous relationship between two consenting adults is constitutionally protected as a fundamental element of personal liberty…"). The court in *Marcum* goes on to compare the adultery issue to the sodomy issue in *Bowers*, finding the situations factually analogous in that both evaluate a consensual sexual relationship between two adults. *Id*. Finally, the court relies on the comparable "ancient roots" of the proscriptions against both sodomy and adultery. *Id*. at 642.

Since *Lawrence* was decided in 2003, explicitly overruling *Bowers*, some courts have considered where *Marcum's* adultery holding stands. However, no court has reached a concrete conclusion that effectively characterizes the position of adultery statutes in constitutionally protected relationships. In *Beecham v. Henderson County*, an attorney practicing in the Henderson County Court House, married to a court clerk, entered into a romantic relationship with the Plaintiff, another court clerk who worked on the same floor as his wife. 422 F.3d 372, 373-374 (6th Cir. 2005). When the Clerk's office fired the Plaintiff because of the office tension caused by her relationship with the attorney, Plaintiff brought an action for wrongful termination based on her constitutional right to engage in such private intimate relationships. *Id*. 373. The court declined to determine whether

Marcum was overruled by *Lawrence*, and assumed that adulterous relationships were constitutionally protected for the purpose of the court's rational basis review. *Id*. at 378. The court ultimately found that even if the adulterous relationship between the Plaintiff and the attorney was constitutionally protected, termination of her employment survived a rational basis analysis because it did not "substantially interfere with the right of such an association." *Id*. at 376-377.

In *Cawood v. Haggard*, the Plaintiff, a divorce attorney, was indicted for promoting prostitution when he offered his client discounts on her legal bill in return for sexual favors. 327 F.Supp. 2d 863, 865 (E.D. Tenn, 2004). The Plaintiff brought this action against the Sheriff's department, alleging that they violated his constitutional due process right to privacy when, unbeknownst to the Plaintiff, the department recorded the sexual act between the Plaintiff and his client. *Id*. The court held that through the client's complaint of possible criminal activity, she invited the State's intrusion on the alleged private relationship. *Id*. at 879. The court further found that this invitation, along with the adulterous and short-lived nature of the relationship, placed the relationship outside the realm of Constitutional protection. *Id*. However, the court based its conclusion on the unusual facts of the case and specifically declined to "resolve the debate as to the scope or intent of the Supreme Court's opinion in *Lawrence*." *Id*. at 878.

Though the waters seem murky, the power of a State to regulate adultery after *Lawrence* is important to the practice of domestic relations law in several respects. When divorce proceedings address the issue of adultery, either to establish grounds for divorce or to assert a bar to spousal support, the parties alleged to have committed adultery and their paramours routinely invoke the Fifth Amendment's protection against self-incrimination when they are called to testify. *See Watts v. Watts*, 40 Va. App. 685 (2003); *Fickett v. Fickett*, 2001 Va. App. LEXIS 120; *Legat v. Legat*, 1999 Va. App. LEXIS 497; *Romero v. Colbow*, 27 Va. App. 88 (1998). Invocation of the Fifth Amendment right against self-incrimination must be based on the invoking party's "fear" of prosecution under Virginia's statute criminalizing adultery. Va. Code § 18.2-365. Although prosecution under this statute may be infrequent and highly unlikely, Virginia courts often provide Fifth Amendment protection to a witness when he or she is questioned about alleged adulterous activity.

Advised by counsel, adulterers
discuss the Fifth Amendment.

Another interesting anomaly under the post-*Lawrence* regime is that a consensual private act of sodomy between a married and an unmarried person, previously a felony, would no longer be criminal under *Lawrence* and thus would not be subject to the protections available under the Fifth Amendment. However, an act of adultery, a misdemeanor, between the same people at the same location and at about the same time, would arguably still be a crime and thus the protections under the Fifth Amendment would still remain.

"Hey, what's the big deal?"

The Sixth Circuit's holding in *Marcum* that an adulterous relationship is not constitutionally protected becomes questionable in a post-*Lawrence* light. If Virginia appellate courts construe the rationale of *Lawrence* to apply to private, consensual adulterous acts, as they did with fornication, adultery might no longer constitute a crime. Therefore, testimony concerning adultery would not be subject to Fifth-Amendment protection and adultery would arguably become easier to show as grounds for divorce under § 20-91(1) of the Virginia Code.

Another interesting question is that of the standard of proof on an adultery claim if the behavior is declared to be constitutionally protected and thus no longer criminal. Previously the standard of proof to establish adultery, sodomy and buggery has been held to be clear and convincing evidence. *See Haskins v. Haskins*, 188 Va. 525, 530-31 (1948); *Painter v. Painter*, 215 Va. 418, 420 (1975); *Dooley v. Dooley*, 222 Va. 240, 246 (1981). The rationale for that standard was that the charges of adultery, sodomy or buggery were criminal offenses and uniquely damaging to the reputation of the party charged, and therefore the general presumption of innocence should apply. *Haskins*, 188 Va. at 530-31. So in the case where adultery and sodomy were alleged to have occurred during the same interlude the burden of proof for sodomy would now likely be a mere preponderance of the evidence while the adultery would be subject to the higher clear and convincing standard. Is such a result one which can survive a constitutional attack? The policy rationale for the statutory bar comes in to question. As sodomy and buggery are no longer criminal, can the justification for the alimony bar arising from that offense remain valid? Can the adultery bar survive a rational basis attack under the Due Process or Equal Protections clauses if the sodomy and buggery bars fail?

Prior to 1988, the commission of any marital fault (adultery, sodomy, buggery, cruelty, desertion, etc.) was by statute a bar to an alimony award. After 1988, the only alimony bar was adultery, sodomy and buggery, subject to a "manifest injustice" exception.

The above analysis regarding Fifth Amendment effects assumes that courts will stop at simply invalidating the adultery statute. While decriminalization presents the most obvious form of protecting private adulterous relationships under *Lawrence*, providing adultery as grounds for divorce and a bar to spousal support also involves a State action. The State is in fact regulating "individual decisions by married persons, concerning the intimacies of their physical relationship" by establishing through statute that that decision creates a grounds for divorce and a presumption against awarding spousal support to the guilty party.

While Justice Scalia emphatically stated that State laws of this nature are open to a Due Process attack under the rationale of the majority in *Lawrence*, it is highly likely that the Virginia courts will attempt to distinguish the result in *Lawrence* and *Martin* from the case of adultery. Language in the majority opinion distinguished the facts of *Lawrence* from other cases where the State could regulate liberties of individuals, such as in the case of prostitution or same-sex marriage. *See Lawrence*, 539 S.E.2d at 578. This language implies that the State still has powers to regulate the liberty of individuals without violating the Due Process Clause. This conclusion is supported by the recently decided *Singson* case, where

the Virginia courts explicitly rejected *Lawrence*'s application to consensual acts of sodomy that occur in a public location. In Justice O'Connor's concurrence, she reasons that the State still has a legitimate interest in preserving the "traditional institution of marriage." *See Lawrence,* 539 S.E.2d at 585. Under Va. Code Ann. 20-45.2, Virginia has rejected recognizing under the Full Faith and Credit clause of the Constitution same-sex marriages, created in other States. Because the Supreme Court has long recognized a public policy exception to the Full Faith and Credit clause, Virginia adheres to the principle that a marriage valid where celebrated is not valid when against a State's public policy. *See Andrews v. Andrews*, 188 U.S. 14 (1903) *Toler v. Oakwood Smokeless Coal Corp.*, 173 Va. 425, 429 (1939). Virginia's protection of the institution of marriage in the area of same-sex marriage recognition suggests the State may similarly exercise its power to regulate personal liberty by criminalizing adultery. Therefore, while Justice Scalia's dissent correctly predicted that the majority's idea of personal liberty will result in State's invaliding statutes such as criminalizing fornication, as in *Martin*, it does not necessarily follow that adultery statutes are next on the chopping block. Furthermore, the State frequently intervenes in individual decisions when these decisions are contrary to Virginia's strong public policy in support of marriage.

While Virginia courts have clearly held that the State retains some power to regulate liberty interests in the personal sexual area as illustrated in the *Singson* decision regarding sodomy in public, *Martin* holds that *Lawrence* "sweeps within it all manner of State's interests and finds them insufficient when measured against the intrusion upon a person's liberty interest … in the form of private, consensual sexual conduct between adults." Therefore, the State's interest in protecting marriage might not be sufficient, when "measured against" private consensual adulterous conduct between adults, to justify its continued criminality and concomitant civil domestic relations law effects. The Virginia Supreme Court has not yet ruled on this issue, although the argument was raised concerning the constitutionality of the adultery statute in a trial in Fairfax County Circuit Court. "First, Fornication, Then Adultery?" *Virginia Lawyers Weekly*, May 23, 2005. There the Court declined to declare the statute unconstitutional. *Id*. However, competing forces of individual rights and public policy leave adultery regulation walking the tightrope between invalid fornication statutes and valid public sodomy statutes. Given the potential dramatic changes in the role of adultery in divorce cases, every domestic relations attorney should give thought to which side of the rope Virginia will fall on.

Va. Code Ann. 18.2-29 is Virginia's statute against Criminal Solicitation.

Va. Code Ann. § 20-91(1), Grounds for Divorce from Bonds of Matrimony

See Lawrence, 539 U.S. at 578.

The Federal Defense of Marriage Act, signed into law by Bill Clinton in 1996, enunciates this principle in allowing a state to deny the efficacy of any marriage between persons of the same sex that has been recognized in another state.