

Va. Adultery Case Roils Divorce Industry

Conviction Draws Attention to Little-Used Law

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When John Raymond Bushey Jr. became the first person in as long as anyone can remember to be convicted of adultery in Virginia, several things happened:

- He resigned his position as attorney for the Shenandoah Valley town of Luray, Va., a job he'd held for 32 years.
- People who heard of his situation scratched their heads and said, "You mean, adultery is actually a crime?"
- And those who waded into the messy aftermath of alleged infidelity -- divorce lawyers and private investigators -- started pondering what impact the ruling would have on their jobs.

As for the folks in Luray, they're just curious about what the snowy-haired Bushey -- 65 years old, married for 18 years to the town clerk and the very model of a courtly Southern lawyer -- was up to.

"You always hear gossip, but you never know what to put any credence to," said a woman who works on Luray's Main Street. Like virtually everyone else interviewed in the town of 4,500, she spoke on the condition that her name not be used when commenting on the Bushey case.

Because the charges were filed in Virginia's lowest court, there are no records that reveal exactly what Bushey did, with whom he did it or why prosecutors would pluck such a rarely used statute from Virginia's criminal code and apply it to him. Bushey declined to be interviewed about the case. And the prosecutor wouldn't give many details of Bushey's Oct. 23 guilty plea, the result of a plea agreement.

"There's nobody peeping in a window saying, 'Mr. Bushey did this,' " said Assistant Commonwealth's Attorney Glenn R. Williamson, when asked how authorities found out about the indiscretion. The complainant, he said, was the woman involved with Bushey. She has not been charged.

Although he pleaded guilty in District Court, Bushey is allowed to appeal to Circuit Court. On Halloween, that's what he did. More details might come out when the case goes before a judge Jan. 27. Until then, Williamson isn't discussing the case, beyond saying, "I think that the state has an interest in protecting the sanctity of marriage.

Like other Class 4 misdemeanors in Virginia, adultery carries a maximum penalty of a \$250 fine. Bushey paid half that, plus \$36 in court costs. Adultery is also against the law in Maryland, where the penalty is a fine of \$10, about the cost of a pecan bar and two large caramel macchiatos at Starbucks. The District will soon join about half of the states in the country by repealing its adultery statute.



John Raymond Bushey Jr. resigned his position as attorney for the town of Luray, Va., after he was convicted of the seldom-prosecuted crime of adultery. (Dawn Schauer -- Page News And Courier)

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"We're going to see a dip in our sales as people are more cautious," Aylward said. "Absolutely. People are going to be very, very good. But I've got to tell you, this industry is cyclical."

Prosecutors in the Washington area couldn't recall the last time anyone around here had been charged with adultery. Many laws seen as holdovers from an earlier morality have been repealed in periodic overhauls of state statutes. The U.S. Supreme Court's ruling in June striking down Texas's anti-sodomy statute has prompted many states, including Virginia, to scrutinize laws concerning private acts between consenting adults.

The Virginia State Crime Commission has spent the past three years studying the state's criminal code and next month will recommend repealing its sodomy statute and the fornication statute, which prohibits sexual intercourse between unmarried people.

Also recommended for repeal: "Conspiring to cause a spouse to commit adultery," a leftover from the wild days of fault divorce, when a wife might hire a woman of questionable virtue to seduce her husband and a camera-toting private investigator to kick down the door of their love nest. Adultery, though, has held on, even though the commission staff said the Supreme Court's ruling in *Lawrence v. Texas* could be interpreted to suggest that Virginia's anti-adultery statute is unconstitutional.

Maryland isn't tossing out its adultery statute any time soon either.

"You can imagine what would happen if you tried to take adultery off the books at this point," said Joseph F. Murphy Jr., chief judge of Maryland's Court of Special Appeals and chairman of a committee that has been examining that state's statutes. "You would have a large group of people who would complain bitterly about it as another example of the state losing its moral compass."

The District had no such qualms. On Tuesday, Mayor Anthony A. Williams (D) signed the Elimination of Outdated Crimes Amendment Act of 2003. If Congress doesn't act within 30 days, adultery will become legal in Washington.

As for the disparity between the District's law and those in Maryland and Virginia, D.C. Council member Kathy Patterson (Ward 3), chair of the judiciary committee, said, "Well, once again we're out in front."

There's another reason it's useful to have on the books a law that is seldom prosecuted, said those who follow philandering: It allows individuals in civil divorce cases to assert their Fifth Amendment right against self-incrimination when asked about their extramarital exploits. If adultery were not a crime, spouses involved in divorces would have no legal protection when presented with such questions as, "What were your secretary's pantyhose doing in your glove compartment?" or "Why is the pool boy always smiling?"

With adultery a crime that conceivably could be prosecuted, "a lot of this kind of dime-store novel testimony just doesn't get presented," Murphy said.

But some judges in civil cases do compel bickering spouses to testify, arguing that the crime of adultery is never prosecuted. Bushey has ensured that's no longer the case.

"That's going to have an impact on future cases because I think while in the past the argument was that nobody ever's been convicted [of adultery] so it's not really a risk, this is saying something differently," said Carol Schrier-Polak, a family law lawyer with the Arlington firm Bean, Kinney & Korman.

Sanford K. Ain of Sherman, Meehan, Curtin & Ain in the District agreed: "The decision may have some very significant consequences," he said.

As for the District's repeal of the adultery statute, Ain said a savvy lawyer still could cut off a dangerous line of questioning on the grounds that it might lead to evidence that hanky-panky had taken place in Maryland or Virginia, states where the laws remain on the books.

The infidelity industry has changed over the years, as the role adultery plays in court cases has evolved. The rise of no-fault divorce meant that establishing adultery was no longer as important as it once was. But in Virginia it still is a factor when a judge divides assets, sets alimony and makes custody decisions.

Private investigators in Virginia pore over such court rulings as *Coe v. Coe* and *Watts v. Watts*, cases that establish just what constitutes "clear and convincing" proof of adultery. Public displays of affection caught on videotape are a start, said Caren Chancey of Background Brokers in Bristow. Courts also look favorably on videotape of an adulterous couple entering a motel room in the middle of the day and spending at least two hours inside with no one else present. If a private investigator can document the sex act -- in a vehicle or through open vertical blinds -- so much the better.

Chancey said most tapes are never shown to a judge. Their existence often is enough to force the cheating spouse to a settlement.

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And that means the Seventh Commandment will continue to be broken.

Bushey, who guffawed loudly when his secretary announced the arrival of a reporter from The Washington Post at his office recently, declined to talk about the case.

In a brief telephone interview, Bushey's wife of 18 years, Cindy Bushey, chose not to comment on her husband's legal problems beyond saying, "We're going to stay together."