

SEX AND VIRGINIA LAW

By William Nicoson

Any person, not being married, who voluntarily shall have sexual intercourse with any other person, shall be guilty of fornication, punishable as a Class 4 misdemeanor. § 18.2-344, Code of Virginia

What? You say you never knew you were guilty of a crime? Well, my guess is that a vast number of Virginia adults have been guilty of the same conduct without suspecting that the Virginia Code branded them as criminals.

The Virginia House of Delegates in its 2004 session passed a bill which would have repealed this section of the Code, but the Senate never took it up.

Then, last month, the Supreme Court of Virginia came to our rescue. In an opinion by Justice Elizabeth B. Lacy, the court ruled that Section 18.2-344 violated the due process clause of the Fourteenth Amendment of the U.S. Constitution.

“We find no principled way to conclude that the specific act of intercourse is not an element of a personal relationship between unmarried persons or that the Virginia statute criminalizing intercourse between unmarried persons does not improperly abridge a personal relationship that is within the liberty interest of persons to choose.” Martin v. Zihler, 8, Jan. 14, 2005.

The trial court had held that Section 18.2-344 withstood constitutional scrutiny because “valid public reasons for the law exist,” specifically protection of public health and encouragement that children be born within the institution of marriage. Justice Lacy disagreed, relying strongly on the 2003 opinion of the U.S. Supreme Court in Lawrence v. Texas which struck down a similar penal statute in Texas.

In Lawrence, the court held that the constitution protects liberty interests of persons maintaining a personal relationship “in the confines of their homes and their own private lives” including “intimate conduct.” The opinion has far-reaching implications since the personal relationship in the case was between two adult men. To reach this result, the court was obliged to overrule a 1983 case to the contrary.

Thus the U.S. Supreme Court has not only inspired the Virginia Supreme Court to protect consensual sex between unmarried persons from state criminal prosecution but has also held that consensual sodomy by persons of the same sex deserves the same protection. The Washington Times, in a long 2003 article headlined: Gay Marriages Ahead, noted that the Lawrence decision overturned homosexual sodomy prohibitions not only in Texas but effectively in 12 other states, including Virginia.

Former Virginia Delegate L. Karen Darner throughout the 1990s introduced bills to repeal Virginia's criminal prohibition of consensual sodomy (whether by persons of the same or of different sex). In 2000 the House of Delegates, by a vote of 50 to 49, agreed to reduce the crime from a felony to a misdemeanor. It took the U.S. Supreme Court to deliver the message that our liberty (valued so highly by President George W. Bush in his inaugural address last month) prevents government from restricting the joys and pleasures of our amatory lives.

It's been a long time in coming, but Virginians have finally gotten government out of their bedrooms.

William Nicoson is a member of the District of Columbia Bar.