

Bill as Introduced

HB 1402 - AS INTRODUCED

2010 SESSION

10-2510
08/01

HOUSE BILL **1402**

AN ACT repealing the crime of adultery.

SPONSORS: Rep. McGuire, Merr 8; Rep. Horrigan, Straf 7

COMMITTEE: Criminal Justice and Public Safety

ANALYSIS

This bill repeals the crime of adultery.

Explanation: Matter added to current law appears in ***bold italics***.
Matter removed from current law appears ~~(in brackets and struck through.)~~
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Ten

AN ACT repealing the crime of adultery.

Be it Enacted by the Senate and House of Representatives in General Court convened:

- 1 1 Repeal. RSA 645:3, relative to the crime of adultery, is repealed.
- 2 2 Effective Date. This act shall take effect January 1, 2011.

Speakers

Hearing Minutes

HOUSE COMMITTEE ON CRIMINAL JUSTICE AND PUBLIC SAFETY

PUBLIC HEARING ON HB 1402

BILL TITLE: repealing the crime of adultery.

DATE: January 12, 2010

LOB ROOM: 204 Time Public Hearing Called to Order: 10:00 a.m.

Time Adjourned: 10:30 a.m.

(please circle if present)

Committee Members: Reps. Shurtleff, Pantelakos, Berube, Robertson, Movsesian, Burrige, Cushing, Rodd, Chandley, B. McCarthy, M. Ryder, Welch, Charron, Fesh, Weare, Stevens, Villeneuve, Gagne, Swinford and Willette.

Bill Sponsors: Rep. McGuire, Merr 8; Rep. Horrigan, Straf 7

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

Rep. McGuire - Prime sponsor.

- Submitted because it is never prosecuted.
- Can't find a single prosecution in the last 50 years.
- Having an unenforced statute does not make sense.
- Should be resolved.

*Rep. Horrigan - Co-sponsor.

- Provided copy of testimony.
- Has hand-out of Supreme Court decisions (civil)

Rep. Vallincourt - In favor.

- Should get rid of unenforceable laws.

Kevin Smith - Cornerstone Action (No position)

- If not enforced should be taken off books.
- Will it affect civil cases - if so this would be bad.
- Civil law protects individual.

*Richard Tomasso - Libertarian (Supports)

- Has copies of testimony.

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*Jeremy Olson

(Supports)

- Has copy of testimony.

Claire Ebel - NH Civil Liberties Union

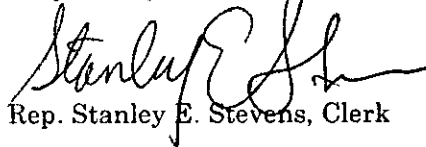
(Supports)

- Agrees with former speakers.

Jerome Holden - Representing self.

- "We need to get antiquated laws off the books. (Supports)

Respectfully Submitted,



Rep. Stanley E. Stevens, Clerk

HOUSE COMMITTEE ON CRIMINAL JUSTICE AND PUBLIC SAFETY

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HB 1402

12 Jan 2010

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Finish : 1030

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(2)

• civil law protects individual

Richard Tomasso Libertarian

(supports)

• has copies of testimony.

Jeremy Olson

(supports)

• has copy of testimony

Claire Ebel NH Civil Liberties Union

(supports)

• agrees with former speakers.

Testimony

Written testimony in favor of HB1402

"AN ACT repealing the crime of adultery"

Rep. Timothy Horrigan; Strafford County #7; January 12, 2010

I promised the committee in advance that my testimony would be brief, although it is turning out to be less brief than I originally hoped. I would like to begin by saying that I think marriage is a good thing. Love and sex are good things: dangerous, but also good. Divorce is something to be avoided, but a good divorce is better than a bad marriage. And finally, I think adultery should continue to be cause for divorce.

This bill would have been controversial anyway, but we can thank Tiger Woods for making it even more controversial. He was being very stupid, but nothing he did was a crime aside from driving over a fire hydrant. Stupidity is not a crime. And even though RSA 645:3 is still part of New Hampshire's Public Indecency law, adultery should not be a crime either.

I value marriage very highly: in fact I began the new year of 2010 at a marriage ceremony in front of the State House. I don't condone casually cheating on your spouse, which is in most cases a hurtful and dangerous thing to do. But, not everything which might be hurtful or dangerous needs to be a crime. RSA 645:3 is a bad law which does not need to be in the RSAs.

I urge the House Judiciary committee, and the entire General Court, to pass HB1402, an act repealing RSA 645:3, the law which makes adultery a class B misdemeanor. This is an archaic law which is rarely if ever enforced. That fact that RSA 645:3 is never enforced is reason enough to repeal it; but there are other reasons why it is bad law.

Firstly, it is very hard to prove that RSA 645:3 was violated. Unless there are eyewitnesses, or a video recording exists, there is no way to prove that a couple actually had sexual intercourse. There is also some confusion about what exactly is or is not sexual intercourse. A 2003 state Supreme Court ruling in the fault divorce case of Blanchflower vs. Blanchflower stated that extramarital sex acts can be adulterous only if (paraphrasing the opinion itself) one person inserts his penis into another person's

vagina. (This ruling was made before same-sex marriage was made legal in New Hampshire.)

RSA 645:3 is one of those laws which punishes you because of who you are rather than because of what you do. Consensual sex between adults is not normally illegal (unless it is incest, public lewdness and/or prostitution.) I will repeat one of the cliches we hear a lot around the State House: this law turns law abiding citizens into criminals.

Class B misdemeanors have a relatively small penalty attached to them: according to RSA 651:2 the penalties can be “conditional or unconditional discharge, a fine, or other sanctions, which shall not include incarceration or probation but may include monitoring by the department of corrections if deemed necessary and appropriate.” This seems minimal compared to the penalties for other classes of crime, but those are still significant penalties. Moreover, even a Class B misdemeanor is still a criminal conviction, which has many negative consequences beyond the sentence itself. Theoretically, an adulterer could even end up on the sex offenders' registry. RSA 645:3 is not specifically enumerated in the list of offenses in RSA 651B— but there is a catchall provision to the effect that an offender can be added if he or she “committed the offense as a result of sexual compulsion or for purposes of sexual gratification.”

Finally, RSA 645:3 as written complicates divorce law. The threat of criminal prosecution can greatly complicate what are already very difficult negotiations, especially in the current climate where we have criminalized normal family problems. That threat also encourages estranged partners to lie to each other and even to perjure themselves in court. This criminal law gives estranged partners another tool they can use to intimidate each other. The committee, along with myself and Rep. McGuire, received an email from an opponent of this bill which ironically demonstrates why this bill is a good idea. The gentleman said, in the middle of an impassioned plea:

I did not want my divorce. I was powerless to stop it. My wife committed adultery, wanted to continue to be with the man she committed adultery with, and filed for divorce. On the advice of two lawyers I have not pursued criminal charges against either my wife or her lover. I was discouraged from doing so because it could have an adverse affect on the civil divorce proceedings as far as custody and/or property distribution is concerned. My lawyers were concerned pursuing criminal charges might paint me as some sort of extremist.

This is an example of a very common pattern in divorce proceedings, especially when child custody is involved.

Adultery is currently one of the grounds for a “fault” divorce. In my opinion, rightly so. The definition in *Blanchflower v. Blanchflower* seems much too limited: there are all sorts of ways human beings can be unfaithful to their partners without a penis being inserted into a vagina. The reason *Blanchflower v. Blanchflower* ended up in the Supreme Court was because Mrs. Blanchflower's lover was a woman who did not wish to be a party to the divorce case. (Mr. Blanchflower was the plaintiff, and he wanted his wife to be found at fault.)

Fault divorces are rare: roughly 98% of the divorces in New Hampshire are “no fault” divorces on the grounds of “irreconcilable differences.” Typically, there are about 5000 no-fault divorces and about 50 fault divorces per year, including roughly 25 divorces on the grounds of adultery. Even the fault divorces almost always end up being mediated, and it is virtually unheard of for a married person to be forced to continue being married against his or her will. It would be pointless to deny a fault divorce anyway: one or both parties could simply file for a no-fault divorce. (The Children & Family Law Committee is currently considering HB 1510, which would eliminate no-fault divorce for most couples, but that bill is currently just a bill— and it is unlikely to pass. Even if HB1510 becomes law, married people can circumvent the law by moving out of state and/or agreeing to let one spouse volunteer to be the defendant.)

With only one or two possible exceptions, the grounds for a fault divorce are not criminal offenses. The complete list from RSA 458:7 is:

- I. Impotency of either party.
- II. Adultery of either party.
- III. Extreme cruelty of either party to the other.
- IV. Conviction of either party, in any state or federal district, of a crime punishable with imprisonment for more than one year and actual imprisonment under such conviction.
- V. When either party has so treated the other as seriously to injure health or endanger reason.
- VI. When either party has been absent 2 years together, and has not been heard of.
- VII. When either party is an habitual drunkard, and has been such for 2 years together.
- VIII. When either party has joined any religious sect or society which professes to believe the relation of husband and wife unlawful, and has refused to cohabit with the other for 6 months together.
- IX. When either party, without sufficient cause, and without the consent of the other, has abandoned and refused, for 2 years together, to cohabit with the other.

This bill would eliminate the only statute where adultery is specifically defined. However, the fault divorce laws stand on their own without RSA 645:3: “adultery” and “sexual intercourse” are terms which are defined in common law. The majority opinion in *Blanchflower vs. Blanchflower* actually manages to define adultery without using RSA 645:3, although the existence of this statute was mentioned. The definition established by the “Blanchflower opinion” may be questionable, but it is not unclear. The minority opinion defines adultery sensibly as: “a spouse's intimate extramarital activity with another.” The General Court does of course have the option of using HB1402 as a vehicle to clarify the definition of “adultery” and/or “sexual intercourse” although I personally favor passing HB1402 as is.

I mentioned incest, public lewdness and prostitution as crimes which involve sex between consulting adults. Those sex acts clearly harm society as a whole. (However, the incest laws actually predate the discovery of recessive genes and apply even when there is no risk of pregnancy.) There are some who say adultery should be banned because it undermines marriage and leads to divorce. However, extramarital sex acts per se are not harmful to society as a whole: extramarital sexual conduct is merely a symptom of problems with a marital relationship which are beyond the scope of this law. There even are a few situations (for example, when partners begin dating other people before a divorce is finalized) where extramarital sex does not undermine the marriage at all. In any case, not all divorces are bad: a good divorce is better than a bad marriage.

I have been serving on an ad-hoc caucus which has been investigating the family law system. We have heard some horrifying stories of divorce proceedings and other family court cases gone bad— very bad. The common thread in these stories was that the system tried to turn family issues into criminal cases. The current adultery law, even though it is never enforced, contributes to the poisonous atmosphere which exists in our current family law system. Even if the adultery law is repealed, adulterers will still be subject to severe social and economic sanctions. I think those sanctions are sufficient.

Rep. Timothy Horrigan
(Strafford County #7)
7A Faculty Rd; Durham, NH 03824
ph: 603-868-3342
email: TimothyHorrigan@mac.com

Testimony on HB1402

I am here to speak in favor of HB1402, which repeals the criminal misdemeanor of adultery, which has gone unenforced for years if not decades in this state.

This bill is refreshingly simple in application. The fact that this is a long-standing unenforced statute should be enough for the committee to recommend OTP.

For concerns about the impact on a marriage, this bill doesn't touch any of the statutes covering adultery in the context of divorce. Indeed, if you have broken your marriage contract with adultery, a fine from the state is likely the *least* of your worries.

We believe the government should have no role in consensual interpersonal relationships, be it marriage or otherwise. Neither the state, nor society, is harmed by an individual act of adultery and so it should never have risen to the level of a criminal offense. The state of NH can remove itself partly from this entangling alliance by quick passage of this measure.

For these and the many other reason likely heard today, I urge the committee to recommend OTP and clean up our books of this unneeded statute.

Thank you,
Rich Tomasso
Libertarian Party

OTP on HB1402

An act repealing the crime of adultery

This is a good bill. It is simple, direct, and to the point.

Similar bills were proposed in 1987 and 1989, both of which passed the House but unfortunately died in the Senate. Hopefully, this time, this bill can pass all the way.

RSA 645:3 has gone unenforced for quite some time. No criminal prosecutions have been brought under this statute in years, if not decades. An Epping police officer told me that his superiors conveyed to him that they, as a matter of policy, refuse to investigate complaints made under this statute.

Unenforced statutes should not be on our books. It makes the law uncertain, and if people realize some laws are enforced, but some are not, it encourages disrespect for the law in general.

Since this statute has gone unenforced for so long, the vast majority of people most likely have no understanding that if they commit adultery, they are technically committing a *criminal misdemeanor*, which is punishable by up to a \$1,200 fine. Married people probably think this is a civil matter. Unmarried people probably believe there is no penalty at all.

Now, importantly, this bill makes *no change* whatsoever to adultery law with respect to divorce, which is contained within RSA 458:7, II and RSA 458:11. Adultery is still a cause for divorce. Married individuals who commit adultery can still be held fully at fault in a divorce proceeding when financial settlements and alimony are decided. This bill merely repeals the *criminal misdemeanor* of adultery.

Technical issues

There are two technical issues with this bill that I discovered that may have to be addressed. Currently RSA 328-C:9 and RSA 457:41 make reference to adultery in a criminal context. So that our statutes do not become inconsistent upon the passage of this bill, these two RSAs should perhaps be amended. I have provided a suggested amendment to the bill below.

RSA 328-C:9, III(d) should be amended as follows:

(d) The marital mediator has received information about a felony or misdemeanor~~[-excepting adultery]~~ that has been or is about to be committed.

RSA 457:41 should be amended as follows:

457:41 In Criminal Cases. – In actions for criminal conversation, and in indictments for ~~[adultery]~~ bigamy, and the like, there must be proof of a marriage in fact.

If any further work is needed to address issues with this bill, I would be willing to work with the committee.

RSA 645:3 should be repealed.
Please vote OTP on HB1402.

Jeremy J. Olson
 Grafton, New Hampshire
 (Graf 10)

NOTICE: This opinion is subject to motions for rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Reporter, Supreme Court of New Hampshire, One Noble Drive, Concord, New Hampshire 03301, of any editorial errors in order that corrections may be made before the opinion goes to press. Errors may be reported by E-mail at the following address: reporter@courts.state.nh.us. Opinions are available on the Internet by 9:00 a.m. on the morning of their release. The direct address of the court's home page is: <http://www.courts.state.nh.us/supreme>.

THE SUPREME COURT OF NEW HAMPSHIRE

Lebanon Family Division

No. 2003-050

IN THE MATTER OF DAVID G. BLANCHFLOWER AND SIAN E. BLANCHFLOWER

Argued: July 16, 2003

Opinion Issued: November 7, 2003

McLane, Graf, Raulerson & Middleton, P.A., of Manchester (Jeanmarie Papelian and Margaret R. Crabb on the brief, and Ms. Papelian orally), for the petitioner.

Witkus and Wilson, P.C., of Newport (Lanea A. Witkus on the brief and orally), for the respondent.

Robin Mayer, by brief and orally, pro se.

Law Office of Marlene A. Lein, of Manchester (Marlene A. Lein on the brief) and Jennifer L. Levi, of Boston, Massachusetts, by brief, for Gay & Lesbian Advocates & Defenders, as amicus curiae.

NADEAU, J. Robin Mayer, co-respondent in the divorce proceedings of the petitioner, David G. Blanchflower, and the respondent, Sian E. Blanchflower, challenges an order of the Lebanon Family Division (Cyr, J.) denying her motion to dismiss the petitioner's amended ground for divorce of adultery. See RSA 458:7, II (Supp. 2002). We accepted this matter as an interlocutory appeal under Supreme Court Rule 8, and now reverse and remand.

The record supports the following facts. The petitioner filed for divorce from the respondent on grounds of irreconcilable differences. He subsequently moved to amend the petition to assert the fault ground of adultery under RSA 458:7, II. Specifically, the petitioner alleged that the respondent has been involved in a "continuing adulterous affair" with the co-respondent, a woman, resulting in the irremediable breakdown of the parties' marriage. The co-respondent sought to dismiss the amended petition, contending that a homosexual relationship between two people, one of whom is married, does not constitute adultery under RSA 458:7, II. The trial court disagreed, and the co-respondent brought this appeal.

Before addressing the merits, we note this appeal is not about the status of homosexual relationships in our society or the formal recognition of homosexual unions. The narrow question before us is whether a homosexual sexual relationship between a married person and another constitutes adultery within the meaning of RSA 458:7, II.

RSA 458:7 provides, in part: "A divorce from the bonds of matrimony shall be decreed in favor of the innocent party for any of the following causes:

. . . II. Adultery of either party." The statute does not define adultery. *Id.* Accordingly, we must discern its meaning according to our rules of statutory construction.

"In matters of statutory interpretation, this court is the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole." *Wegner v. Prudential Prop. & Cas. Ins. Co.*, 148 N.H. 107, 108 (2002) (quotation omitted). We first look to the language of the statute itself and, where terms are not defined therein, "we ascribe to them their plain and ordinary meanings." *Id.*

The plain and ordinary meaning of adultery is "voluntary sexual intercourse between a married man and someone other than his wife or between a married woman and someone other than her husband." *Webster's Third New International Dictionary* 30 (unabridged ed. 1961). Although the definition does not specifically state that the "someone" with whom one commits adultery must be of the opposite gender, it does require sexual intercourse.

The plain and ordinary meaning of sexual intercourse is "sexual connection esp. between humans: COITUS, COPULATION." *Webster's Third New International Dictionary* 2082. Coitus is defined to require "insertion of the penis in the vagina[]," *Webster's Third New International Dictionary* 441, which clearly can only take place between persons of the opposite gender.

We also note that "[a] law means what it meant to its framers and its mere repassage does not alter that meaning." *Appeal of Naswa Motor Inn*, 144 N.H. 89, 91 (1999) (quotation omitted). The statutory compilation in which the provision now codified as RSA 458:7 first appeared is the Revised Statutes of 1842. *See* RS 148:3 (1842). No definition of adultery was contained in that statute. *See id.* Our cases from that approximate time period, however, support the inference that adultery meant intercourse. *See Adams v. Adams*, 20 N.H. 299, 301 (1850); *Burns v. Burns*, 68 N.H. 33, 34 (1894).

Cases from this period also indicate that adultery as a ground for divorce was equated with the crime of adultery and was alleged as such in libels for divorce. *See, e.g., Sheafe v. Sheafe*, 24 N.H. 564, 564 (1852); *White v. White*, 45 N.H. 121, 121 (1863). Although the criminal adultery statute in the 1842 compilation also did not define adultery, *see* RS 219:1 (1842), roughly contemporaneous case law is instructive: "Adultery is committed whenever there is an intercourse from which spurious issue may arise . . ." *State v. Wallace*, 9 N.H. 515, 517 (1838); *see also State v. Taylor*, 58 N.H. 331, 331 (1878) (same). As "spurious issue" can only arise from intercourse between a man and a woman, criminal adultery could only be committed with a person of the opposite gender.

We note that the current criminal adultery statute still requires sexual intercourse: "A person is guilty of a class B misdemeanor if, being a married person, he engages in sexual intercourse with another not his spouse or, being unmarried, engages in sexual intercourse with another known by him to be married." RSA 645:3 (1996). Based upon the foregoing, we conclude that adultery under RSA 458:7, II does not include homosexual relationships.

We reject the petitioner's argument that an interpretation of adultery that excludes homosexual conduct subjects homosexuals and heterosexuals to unequal treatment, "contrary to New Hampshire's public policy of equality and prohibition of discrimination based on sex and sexual orientation." Homosexuals and heterosexuals engaging in the same acts are treated the same because our interpretation of the term "adultery" excludes all non-coital sex acts, whether between persons of the same or opposite gender. The only distinction is that persons of the same gender cannot, by definition, engage in the one act that constitutes adultery under the statute.

The petitioner also argues that "[p]ublic policy would be well served by applying the same law to a cheating spouse, whether the promiscuous spouse chooses a paramour of the same sex or the opposite sex."

This argument is tied to the premise, as argued by the petitioner, that "[t]he purpose underlying [the adultery] fault ground is based upon the fundamental concept of marital loyalty and public policy's disfavor of one spouse's violation of the marriage contract with another."

We have not, however, seen any such purpose expressed by the legislature. As noted above, the concept of adultery was premised upon a specific act. To include in that concept other acts of a sexual nature, whether between heterosexuals or homosexuals, would change beyond recognition this well-established ground for divorce and likely lead to countless new marital cases alleging adultery, for strategic purposes. In any event, "it is not the function of the judiciary to provide for present needs by an extension of past legislation." Naswa Motor Inn, 144 N.H. at 92 (quotation and brackets omitted). Similarly, "we will not undertake the extraordinary step of creating legislation where none exists. Rather, matters of public policy are reserved for the legislature." In the Matter of Plaisted & Plaisted, 149 N.H. 522, 526 (2003).

The dissent defines adultery not as a specific act of intercourse, but as "extramarital intimate sexual activity with another." This standard would permit a hundred different judges and masters to decide just what individual acts are so sexually intimate as to meet the definition. The dilemma faced by Justice Stewart and his fellow justices applying their personal standards to the issue of pornography in movies demonstrates the value of a clear objective definition of adultery in marital cases. See Jacobellis v. Ohio, 378 U.S. 184 (1964).

We are also unpersuaded by the dissent's contention that "[i]t is improbable that the legislature intended to require an innocent spouse in a divorce action to prove the specific intimate sexual acts in which the guilty spouse engaged." Citing Jeanson v. Jeanson, 96 N.H. 308, 309 (1950), the dissent notes that adultery usually has no eyewitnesses and therefore "ordinarily must be proved by circumstantial evidence." While this is true, it does not support the dissent's point. For over a hundred and fifty years judges, lawyers and clients have understood that adultery meant intercourse as we have defined it. It is an act determined not by the subjective test of an individual justice but by an objective determination based upon the facts. What must be proved to establish adultery and what evidence may be used to prove it are separate issues. Adultery cases have always required proof of the specific sexual act engaged in, namely, sexual intercourse. That circumstantial evidence may be used to establish the act does not negate or undermine the requirement of proof that the act actually occurred. "Jeanson is no authority for the proposition that evidence justifying nothing more than suspicion will suffice to prove the adultery suspected." Yergeau v. Yergeau, 132 N.H. 659, 663 (1990).

Finally the petitioner contends that this appeal is procedurally improper because it was based upon the trial court's denial of an interlocutory appeal and lacked the trial court's signature. On January 24, 2003, we invited the parties to file memoranda addressing whether the trial court's denial of the co-respondent's motion for interlocutory appeal should be reversed and the case accepted for appellate review. The petitioner submitted a memorandum, as did the other parties. After considering the parties' submissions, we issued an order waiving the formal requirements of New Hampshire Supreme Court Rule 8 and treating the co-respondent's motion to dismiss amended petition as an interlocutory appeal pursuant to Rule 8. We have thus already ruled on the issue the petitioner now asserts and we decline to reconsider it.

Reversed and remanded.

DALIANIS and DUGGAN, JJ., concurred; BROCK, C.J., and BRODERICK, J., dissented.

BROCK, C.J., and BRODERICK, J., dissenting. We agree with the majority that this appeal is "not about the status of homosexual relationships in our society or the formal recognition of homosexual unions." These issues are not remotely before us. We respectfully dissent because we believe that the majority's narrow construction of the word "adultery" contravenes the legislature's intended purpose in sanctioning fault-based divorce for the protection of the injured spouse. See Appeal of Mikell, 145 N.H. 435, 439-40 (2000).

To strictly adhere to the primary definition of adultery in the 1961 edition of Webster's Third New International Dictionary and a corollary definition of sexual intercourse, which on its face does not require coitus, is to avert one's eyes from the sexual realities of our world. While we recognize that "we first look to the plain and ordinary meaning of words to interpret our statutes[,] . . . it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish." Appeal of Ashland Elec. Dept., 141 N.H. 336, 341 (1996) (citations and quotation omitted).

New Hampshire permits both fault-based and no-fault divorces. No-fault divorces are governed by RSA 458:7-a (Supp. 2002), which permits divorce "irrespective of the fault of either party, on the ground of irreconcilable differences which have caused the irremediable breakdown of the marriage." RSA 458:7 (Supp. 2002) governs fault-based divorce. Unlike no-fault divorces, a fault-based divorce presumes that there is an innocent and a guilty spouse, and permits divorce "in favor of the innocent party" for any of nine possible causes, including impotency, adultery, extreme cruelty, felony conviction for which a party has been imprisoned, habitual drunkenness, and abandonment. RSA 458:7, I-IV, VII, IX. Under our fault-based law, the innocent spouse is entitled to a divorce because the guilty spouse has breached a marital covenant, such as the covenant to be sexually faithful. Cf. 3 C. Douglas, New Hampshire Practice, Family Law § 2.14, at 46 (3d ed. 2002).

The purpose of permitting fault-based divorces is to provide some measure of relief to an innocent spouse for the offending conduct of a guilty spouse. See Robinson v. Robinson, 66 N.H. 600, 610 (1891). The law allows the court to consider fault in assessing the equitable division of the marital assets, see RSA 458:16-a, II(1) (1992), and in so doing, as in the case of adultery, seeks to justly resolve the unseemly dissolution of a confidential and trusting relationship. We should therefore view the purpose and fabric of our divorce law in a meaningful context, as the legislature presumably intended, and not so narrow our focus as to undermine its public goals. See S.B. v. S.J.B., 609 A.2d 124, 126 (N.J. Super. Ct. Ch. Div. 1992).

From the perspective of the injured spouse, the very party fault-based divorce law is designed to protect, "[a]n extramarital relationship . . . is just as devastating . . . irrespective of the specific sexual act performed by the promiscuous spouse or the sex of the new paramour." Id. Indeed, to some, a homosexual betrayal may be more devastating. Accordingly, consistent with the overall purpose of New Hampshire's fault-based divorce law, we would interpret the word "adultery" in RSA 458:7, II to mean a spouse's extramarital intimate sexual activity with another, regardless of the specific intimate sexual acts performed, the marital status, or the gender of the third party. See id. at 127.

The majority intimates that to construe adultery to include homosexual conduct invades the exclusive province of the legislature to establish public policy. We recognize that questions of public policy are reserved for the legislature. See Minuteman, LLC v. Microsoft Corp., 147 N.H. 634, 641-42 (2002). Questions of statutory interpretation are our domain, however. See Cross v. Brown, 148 N.H. 485, 486 (2002). We do not intend to add a new cause of action for divorce, which is a purely legislative responsibility. See S.B., 609 A.2d at 126.

Defining the word "adultery" to include intimate extramarital homosexual sexual activity by a spouse is consonant with the decisions of other courts that have considered this issue. See Patin v. Patin, 371 So. 2d 682, 683 (Fla. Dist. Ct. App. 1979); Owens v. Owens, 274 S.E.2d 484, 485-86 (Ga. 1981); S.B., 609 A.2d at 126-27; RGM v. DEM, 410 S.E.2d 564, 566-67 (S.C. 1991). In Patin, 371 So. 2d at 683, for instance, the court ruled that there was "no substantial distinction" between homosexual extramarital sexual activity and heterosexual extramarital sexual activity "because both involve extra-marital sex and therefore marital misconduct." Similarly, in S.B., 609 A.2d at 127, the court concluded that sexual intimacy with another, regardless of whether the intimacy is with a person of one's own or a different gender, constitutes adultery.

The decision in RGM is particularly instructive. The law at issue there, like the divorce law at issue in this case, included adultery as a ground for divorce, but did not define it. South Carolina followed "the common-law concept of adultery as illicit intercourse between two persons, at least one of whom is married to someone other than the sexual partner." RGM, 410 S.E.2d at 566. This concept is similar to the New

Hampshire Criminal Code definition of adultery. The appellant in RGM argued that her lesbian conduct was not adulterous because it was homosexual. See id. at 566-67. The court rejected this argument "as unduly narrow and overly dependent upon the term sexual intercourse." Id. at 567. The court ruled that explicit extramarital sexual activity constituted adultery, regardless of whether it is of a homosexual or heterosexual nature. We find this reasoning persuasive.

The majority suggests that to define "adultery" so as to include intimate extramarital homosexual sexual activity by a spouse is to propose a test so vague as to be unworkable. Apparently, a similar test has been adopted in the three jurisdictions previously cited and remains good law. Further, while such a definition is more inclusive than one reliant solely upon heterosexual sexual intercourse, we do not believe that "intimate extramarital sexual activity" either requires a more explicit description or would be subject to such a widely varying judicial view. As Justice Stewart stated with regard to defining the term "hard-core pornography,"

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it

Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

We believe that the majority's interpretation of the word "adultery" is overly narrow in scope. It is improbable that our legislature intended to require an innocent spouse in a divorce action to prove the specific intimate sexual acts in which the guilty spouse engaged. There are usually no eyewitnesses to adultery. See Jeanson v. Jeanson, 96 N.H. 308, 309 (1950). It ordinarily must be proved by circumstantial evidence. See id. Nor does it seem reasonable that the legislature intended to allow a guilty spouse to defend against an adultery charge by arguing that, while he or she engaged in intimate sexual activity with another, the relationship was not adulterous because it did not involve coitus. It is hard to comprehend how the legislature could have intended to exonerate a sexually unfaithful or even promiscuous spouse who engaged in all manner of sexual intimacy, with members of the opposite sex, except sexual intercourse, from a charge of adultery. Sexual infidelity should not be so narrowly proscribed.

It is much more likely that our legislature intended the innocent spouse to establish adultery through circumstantial evidence showing, by a preponderance of the evidence, that the guilty spouse had engaged in intimate sexual activity outside of the marriage, regardless of the specific sexual acts involved or the gender of the guilty spouse's lover. Under our fault-based divorce law, a relationship is adulterous because it occurs outside of marriage and involves intimate sexual activity, not because it involves only one particular sexual act. Accordingly, we respectfully dissent.

Smith Amendment

Proposed amendment to HB1402

Repeal the current statute and replace it with:

“The repeal of this statute shall in no way be construed as the state's endorsement or encouragement of adultery, nor shall it be construed as encouraging the repeal the state's civil laws governing adultery. To the contrary, the state has a vested interest in the promotion of healthy marital relationships as they contribute to the overall betterment of society.”

Voting Sheets

HOUSE COMMITTEE ON CRIMINAL JUSTICE AND PUBLIC SAFETY

EXECUTIVE SESSION on HB 1402

BILL TITLE: repealing the crime of adultery.

DATE: January 27, 2010

LOB ROOM: 204

Amendments:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep. Laura A. Pantelakos

Seconded by Rep. Lori A. Movsesian

Vote: 15-2 (Please attach record of roll call vote.)

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep.

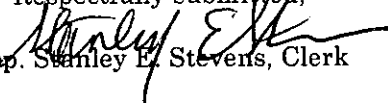
Seconded by Rep.

Vote: (Please attach record of roll call vote.)

CONSENT CALENDAR VOTE: NO

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep. Stanley E. Stevens, Clerk

HOUSE COMMITTEE ON CRIMINAL JUSTICE AND PUBLIC SAFETY

EXECUTIVE SESSION on HB 1402

BILL TITLE: repealing the crime of adultery.

DATE: 1-21-10

LOB ROOM: 204

Amendments:

Sponsor: Rep.

OLS Document #:

Sponsor: Rep.

OLS Document #:

Sponsor: Rep.

OLS Document #:

Motions: OTP OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep. *Pantelakas*

Seconded by Rep. *Movsesian*

Vote: 15-2 (Please attach record of roll call vote.)

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote: (Please attach record of roll call vote.)

CONSENT CALENDAR VOTE:

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep. Stanley E. Stevens, Clerk

CRIMINAL JUSTICE AND PUBLIC SAFETY

Bill #: HB 1402 Title: Repealing the crime of adultery.

PH Date: 01/12/2010

Exec Session Date: 1/27/10

Motion: OTP

Amendment #: _____

MEMBER	YEAS	NAYS
Shurtleff, Stephen J, Chairman	✓	
Pantelakos, Laura C, V Chairman	✓	
Berube, Roger R	✓	
Robertson, Timothy N	✓	
Movsesian, Lori A	✓	
Burridge, Delmar D	✓	
Cushing, Robert R		
Rodd, Beth		
Chandley, Shannon E	✓	
McCarthy, Barbara A	✓	
Ryder, Mark R		
Welch, David A	✓	
Charron, Gene P	✓	
Fesh, Robert M	✓	
Weare, Everett A	✓	
Stevens, Stanley E, Clerk		✓
Villeneuve, Moe	✓	
Gagne, Larry G	✓	
Swinford, Elaine B	✓	✓
Willette, Robert F	✓	
	15	2

TOTAL VOTE:

Printed: 12/18/2009

Committee Report

REGULAR CALENDAR

January 28, 2010

HOUSE OF REPRESENTATIVES

REPORT OF COMMITTEE

The Committee on CRIMINAL JUSTICE AND PUBLIC SAFETY to which was referred HB1402,

AN ACT repealing the crime of adultery. Having considered the same, report the same with the recommendation that the bill OUGHT TO PASS.

Rep. Laura C Pantelakos

FOR THE COMMITTEE

COMMITTEE REPORT

Committee:	CRIMINAL JUSTICE AND PUBLIC SAFETY
Bill Number:	HB1402
Title:	repealing the crime of adultery.
Date:	January 28, 2010
Consent Calendar:	NO
Recommendation:	OUGHT TO PASS

STATEMENT OF INTENT

This bill would remove adultery as a misdemeanor offense under criminal law. It would still be grounds for divorce under civil law

Vote 15-2.

Rep. Laura C Pantelakos
FOR THE COMMITTEE

Original: House Clerk
Cc: Committee Bill File

REGULAR CALENDAR

CRIMINAL JUSTICE AND PUBLIC SAFETY

HB1402, repealing the crime of adultery. **OUGHT TO PASS.**

Rep. Laura C Pantelakos for **CRIMINAL JUSTICE AND PUBLIC SAFETY**. This bill would remove adultery as a misdemeanor offense under criminal law. It would still be grounds for divorce under civil law **Vote 15-2.**

Original: House Clerk

Cc: Committee Bill File

HB 1402 repealing the crime of adultery.

This bill would remove adultery as a misdemeanor offense under criminal law. It would still be grounds for divorce under civil law.

**Rep. Laura A. Pantelakos
For the Committee**

**15-2 OTP
RC**



HB 1402 repealing the crime of adultery.

Bill would
This ~~would~~ remove adultery ~~from the~~ criminal law. It would still be grounds *as a misdemeanor offense under*
~~in the civil law for divorces.~~ *For Divorce under Civil ~~Law~~ Law.*

~~For~~

Rep. Laura A. Pantelakos
For the Committee

15-2 OTP
RC

COMMITTEE REPORT

COMMITTEE: Criminal Justice and Public Safety

BILL NUMBER: HB 1402

TITLE: Repealing the crime of adultery.

DATE: Jan 27, 2010 CONSENT CALENDAR YES NO

OUGHT TO PASS

OUGHT TO PASS WITH AMENDMENT

INEXPEDIENT TO LEGISLATE

RE-REFER

REFER TO COMMITTEE FOR INTERIM STUDY
(Available only in second year of biennium.)

**STATEMENT OF INTENT
(Include Committee Vote)**

This would remove adultery
from the criminal law. It would
still be in the civil law for divorce.

Vote. 17-2 15-2

Rep. Pantidakos
FOR THE COMMITTEE

Original: House Clerk
cc: Committee Bill file



USE ANOTHER REPORT FOR MINORITY REPORT