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 struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

HB 1402 – AS INTRODUCED

10-2510
08/01

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 Repeal. RSA 645:3, relative to the crime of adultery, is repealed.

2 Effective Date. This act shall take effect January 1, 2011.

Committee Minutes

Printed: 04/07/2010 at 12:29 pm

SENATE CALENDAR NOTICE
JUDICIARY

Senator Deborah Reynolds Chairman
Senator Bette Lasky V Chairman
Senator Matthew Houde
Senator Sheila Roberge
Senator Robert Letourneau

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☐ Docket
☐ Calendar
Proof: ☐ Calendar ☐ Bill Status

Date: April 7, 2010

HEARINGS

Wednesday **4/14/2010**

(Name of Committee)	(Place)	(Time)
JUDICIARY	SH 103	2:00 PM

EXECUTIVE SESSION MAY FOLLOW

Comments: HB 1420 AND HB 1491 WILL BE OPENED AND COMMITTEE WILL TAKE TESTIMONY ON BOTH BILLS AT THE SAME TIME.

2:00 PM	HB1156	relative to the determination of parental rights and responsibilities.
2:15 PM	HB1213	relative to notice to the department of health and human services of the allocation of spousal income and relative to estate planning by guardians.
~~2:30 PM~~ 2:30	HB1402	repealing the crime of adultery.
2:45 PM	HB1420	relative to the calculation of child support.
2:47 PM	HB1491	(New Title) relative to the child support calculation in cases of shared parenting.

Sponsors:

HB1156
Rep. Jayne Spaulding — Sen. Sheila Roberge — Rep. Jane Johnson

HB1213
Rep. Janet Wall

HB1402
Rep. Carol McGuire — ~~Rep.~~ Sen. Timothy Horrigan

HB1420
Rep. David Bickford — Rep. George Katsakiores

HB1491
Rep. Carolyn Gargasz — Rep. Barbara Richardson

Gail Brown 271-3076

Sen. Deborah Reynolds
Chairman

Judiciary Committee
Hearing Report

TO: Members of the Senate

FROM: Susan Duncan, *Senior Legislative Aide*

RE: Hearing report on **HB 1402** – *AN ACT repealing the crime of adultery.*

HEARING DATE: April 14, 2010

MEMBERS OF THE COMMITTEE PRESENT: Senators Reynolds, Lasky, Roberge, Letourneau and Houde

MEMBERS OF THE COMMITTEE ABSENT: No one

Sponsor(s): Representative McGuire; Representative Horrigan

What the bill does: This bill repeals the crime of adultery.

Who supports the bill: Representative Horrigan;

Who opposes the bill: Daniel Joseph Hammond;

Summary of testimony received:

- Representative Horrigan introduced the legislation and explained that the bill passed the House on a voice vote.
- He went on to talk of the recent indiscretions of Tiger Woods and how he may have behaved stupidly, but his behavior was not a crime. He explained that while he does not condone adultery he does not feel that it is a criminal act. His distributed testimony told of family court cases that turned family issues into criminal cases because of this statute.
- In his request to House Research, they had been unable to turn up a single time when this law was enforced.
- He did distribute copies of Blanchflower v. Blanchflower, a NH Supreme Court Case from 2003.
- He said that illegal sexual acts such as incest, public lewdness and prostitution should remain illegal – and for protection, are so defined as criminal activities. Adultery is a Class B misdemeanor – if one were convicted of it, it carries a small fine, but it is still a criminal act. He said that there are nine things for which one can obtain a fault divorce, and most of these are not crimes – and neither should this be.

- He said that Blanchflower refers to adultery without referring to it as a crime.
- He said that it is not necessary to keep the law on the books "just to send a message" – as sending a message is not the purpose of criminal law.
- He said that this legislation merely deletes a rarely enforced criminal law.
- Mr. Hammond testified in opposition and explained that he had exchanged a number of e-mails with Representative Horrigan.
- He spoke of another NH Supreme Court case in 1999 (State v. Elwin Moses) which viewed adultery completely differently than Blanchflower.
- He said that his own divorce was finalized on March 4th of this year and that he was faced with excruciating pressure not to proceed and that the far greater danger was the possibility of losing his children. It was his opinion that RSA 645:3 is an important part of protection of families. He asked that the Committee members please read the minority report in Blanchflower.
- Senator Reynolds commented that what we are talking about here is a civil versus a criminal justice system and that adultery would remain as a ground for divorce.

Fiscal Impact: Not applicable.

Future Action: The Committee took the bill under advisement.

sfd
[file: HB 1402]
Date: April 16, 2010

LHB

Date: April 14, 2010
Time: 2:50 p.m.
Room: State House Room 103

The Senate Committee on Judiciary held a hearing on the following:

HB 1402 requiring police officers receiving notice of a motor vehicle accident to respond to the scene of the accident.

Members of Committee present:
Senator Reynolds
Senator Lasky
Senator Houde
Senator Roberge
Senator Letourneau

The Chair, Senator Deborah R. Reynolds, opened the hearing on HB 1402 and in the absence of the prime sponsor, invited Representative Timothy Horrigan, to introduce the legislation.

Representative Horrigan: Just for the record again, my name is Timothy Horrigan. I represent Strafford County District 7, which is Durham, Lee and Madbury. I am co-sponsor, along with Representative Carol McGuire of HB 1402, an act repealing the crime of adultery. This bill passed the House pretty easily by a voice vote. We are two members of the committee who just want to send a message that there is importance to this message that all of us have gotten. I think marriage is pretty important. I know there are a lot of related issues. The controversy outside the walls of the state house. I do have two handouts there. I won't read the whole ten pages of stuff that I have given you. Six pages of it is just a ...(inaudible)...

Senator Deborah R. Reynolds, D. 2: Okay. Go right ahead.

Representative Horrigan: Ironically, this is in my testimony, but I did make this last fall before the House considered the bill. I think it may be unpopular with spouses whose spouses ...(inaudible)... Ironically, they seem to be mostly men whose wives have left them. Perhaps it comes as more of a shock to a man if someone else is interested in his wife than the wife who has someone else interested in her husband.

If we had been enforcing this law, then the spouse would have left, but I don't think that is usually the case. I certainly don't condone cheating on your spouse. It is a hurtful and dangerous thing to do. But, of course, not everything that is hurtful or dangerous needs to be a crime. It is an archaic and unnecessary law which is rarely if ever enforced. As far as I can tell, nobody for the last half century has been actually prosecuted for it.

Anecdotally, I'm not sure of the exact detail of it. Even the House researchers weren't able to dig it up. Apparently it was a man somewhere in Merrimack or some place in central New Hampshire who tried to have an arrest of his wife and the police refused to arrest her. So, first it is very hard to prove if you violate this law unless there is eye witnesses or a video recording exists which I guess these days is more likely than in the past. You can't really prove that the couple actually had sexual intercourse. There is also some confusion in the law what is or is not sexual intercourse.

Those are issues in no fault divorce, there is a no fault divorce, and there is a fault divorce case from 2003 Blanchflower v. Blanchflower that got a six-page Supreme Court decision on that which stated that only straight heterosexual intercourse is the only extramarital sex act which can be adulterous. Even in 2003 there was a lot of public commentary about that that it seemed ridiculous even back then. Of course, in January 1, 2010, we have gay marriage, so now that seems even more nonsensical. That is the definition, at least for the purpose of a fault divorce.

Nobody has every prosecuted. I guess there isn't much case law to know exactly what is or is not prosecutable under the law. In any case, prosecutes because of who you are rather than what you have done. Consensual sex between adults is usually legal unless it is incest, public lewdness, or prostitution.

I will repeat one more of my favorite clichés around the state house. This law turns law abiding citizens into criminals. Class B misdemeanors, I know the Committee knows even better than I do, have a relatively small penalty. Just a fine or probation. However, that is still criminal probation, which has negative consequences beyond the sin itself, even theoretically on the sex offenders' registry. It is specifically excluded from the offenses that have to go on the sex offenders' registry, but there is a catchall provision that says you can put any offense that is committed as a result of sexual compulsion or for purposes of sexual gratification. So, in the unlikely event a prosecutor or county attorney who actually wanted to prosecute somebody or if they want to be really aggressive about it, they could threaten somebody with the sexual offender registry.

Also, great complication of divorce law even though they prosecute threats, even people know it is very difficult negotiations, especially in the current climate as we have seen in one of the earlier bills at where family problems often become somewhat criminalized and legalized. Also, it says threat encourages people to lie to each other. Like at sone point, sometimes even refer to yourself in court. Can also intimidate each other. Certainly the average persons whose marriage is breaking up may not know these law is rarely enforced.

So, if there is a husband or wife who says I know what you did is a crime, that could poison the atmosphere. In fault divorces, about 98% of divorces are no-fault divorces on the grounds of irreconcilable differences. Only about fifty fault divorces a year, twenty-five are on the grounds of adultery. That's a very small percentage, although it is happening. Obviously, if you are one of the couples that is getting it, that is obviously a lot. Even fault divorces usually are being mediated. They rarely recognize fault divorces as the other party could file for a fault divorce. One thing about fault divorce is, once again you probably already know this already, so I won't beleaguer the point, but there is nine things that can be grounds for a fault divorce and most of them are not crimes. So, adulterers. We don't have to keep adultery as a crime in order to still have the ground for a fault divorce.

In the case of Blanchflower v. Blanchflower, which I have some issues, I think it was a rather straight decision, but it does manage to define adultery without actually referring to the criminal law, although they do refer to the fact that there is such a law. The questionable definition is certainly not very clear as the minority opinion defines adultery simply as a spouse's intimate extramarital activity with another. I guess the argument against this bill is that adultery should be banned because it undermines marriage and ...(inaudible)... Sex acts of partners gave somebody other than their spouse; I don't think that's usually what causes the marriage to break up. I think that is usually a symptom of the problems with the marital relationship within the scope of the law. Of course, no matter how specifically we tie this to sexual acts that would be adulterous, it is unclear. People will still find ways to be unfaithful to their husband or wife without actually committing those acts which are forbidden. Perceive in future situations, but the least controversial one is with ...(inaudible)... You are still finalizing your divorce and you start dating other people where extramarital sex doesn't undermine the marriage at all and I think also not all divorces are bad. I don't think we really have a social interest in keeping people in bad marriages.

I guess I worked on the ad hoc caucus in the House to address bills in the family law system and heard some horrifying tales, even worse than the one, as bad as the one that we heard from an earlier bill gone bad. At lot of times

emotional family become criminal issues. I think this law, even if it is not enforced, kind of feeds into the atmosphere. I guess there are a lot of economic sanctions to divorce any way. I think criminal sanctions, especially ones that are never used, I think are just unnecessary. As I said, I think keeping this law doesn't just send a message. I don't think it is criminal law to send a message. In fact, a criminal law that is never enforced and doesn't have a particularly strong penalty is not always binding that it sends a bad message in and of itself.

Finally, I mention that people who are committing the adultery are usually in an excited frame of mind. As much as we're supposed to deplore it, you should deplore it, usually there is real ...(inaudible)... at least to some extent between the adulterers that may actually, in many cases, make that quite willing to risk being prosecuted and may even think that makes it seem more romantic and exciting. No matter whether they are willing to risk it, I don't think we should, I don't think we should have a law that could potentially, you know, put otherwise law abiding people in the risk of prosecution. I think I guess, still as I said, what makes a criminal penalty, there's plenty of other...(inaudible)... spouse is still in a lot of trouble anyway and I think this law is counterproductive and unnecessary.

As I said, the House voted to repeal, to take this law off the books by a voice vote and I certainly urge the Senate to do the same. Of course, I'm happy to take any questions.

Please see Attachment #1 - Representative Horrigan's prepared testimony and attachment.

Senator Deborah R. Reynolds, D. 2: Thank you very much, Representative. Any questions? Seeing none, thank you for your testimony. The next person signed in relative to HB 1402 is Daniel Hammond. Is Mr. Hammond here? Come forward, sir. Welcome. Please state your full name for the record.

Daniel Hammond: Hello. My name is Daniel Joseph Hammond.

Senator Deborah R. Reynolds, D. 2: Okay. Go right ahead and testify, sir.

Mr. Hammond: This is the first time I have ever done anything like this, so I am rather nervous.

Senator Deborah R. Reynolds, D. 2: Take your time. We're glad you're here. Okay?

Mr. Hammond: I fear I am a lot more eloquent in my e-mail exchanges with Representative Horrigan, which I have had several. Unfortunately, I failed to change his mind. Hopefully I will have better luck with the body before me.

I take a couple of exceptions to what he had to say. Adultery isn't particularly that hard to prove under New Hampshire laws. You don't need to have dirty pictures. Opportunity and motivation are enough and that is established in quite an old Supreme Court case approximately 1891. The name of that one escapes me. I do want to point out a New Hampshire Supreme Court case that was quite important to me when I discovered it as I was going through my process. It is State of New Hampshire v. Elwin Moses of March, 1999. That is hardly the dark ages. I don't think, what's the fancy word, morays? Social morays haven't changed significantly since 1999. In that decision, the New Hampshire Supreme Court described adultery as a disfavored, immoral and illegal. Well, this was trying to determine whether it is illegal, but the disfavored and immoral still stand, at least in the eyes of the New Hampshire Supreme Court.

I can tell you from my personal experience, my divorce was finalized March 12th. The protections that...

Senator Deborah R. Reynolds, D. 2: Mr. Hammond, what year was that? This year?

Mr. Hammond: Yeah, this year. Sorry.

Senator Deborah R. Reynolds, D. 2: That's okay. Go ahead.

Mr. Hammond: The protections in the Family Court, what Representative describes is one partner intimidating the other through the use simply doesn't exist. I faced overwhelming excruciating pressure not to proceed with my charges of adultery against my spouse. The Court does not want to handle this with a ten-foot pole. I'm sorry.

Senator Deborah R. Reynolds, D. 2: Take your time.

Mr. Hammond: I faced overwhelming pressure not to proceed. I was in fear of the greater danger of losing my children, but I had to stand up for what I knew was right. I just finally threw in the towel. I reject the notion that all the people before the divorce is resolved with some sort of negotiation. All I wanted was the truth. I knew what the truth was. It was admitted on the stand at the trial and yet the Court somehow found that the adultery existed and they did not find that it broke down the marriage. That absolutely

baffled me. RSA 645:3 is an important part of the protection of families. I urge you to keep it in place. The arguments against this seem to me to be arguing at both ends. It is no minor, it should be ignored and then when you go and try to... I'm sorry.

Senator Deborah R. Reynolds, D. 2: You're doing a great job.

Mr. Hammond: Thank you. Adultery by itself is a betrayal and to have that compounded by the state turning its back on you is nearly overwhelming. Statutes do embody the moral values of our society and it is important that we hold to what we know is right.

I encourage you to read the minority pages of the decision in Blanchflower v. Blanchflower. The Supreme Court justices were quite eloquent in what they thought the statute was designed to protect and I happen to agree with that. The minority opinion clearly isn't binding because it was defeated, but it was never refuted by the majority.

The majority, as Representative Horrigan described, Blanchflower rested on what determines sexual intercourse, the technical stuff. The minority opinion described what the law was intended to uphold and I urge you to keep the law in place so those things can continue to be upheld. Thank you very much.

Senator Deborah R. Reynolds, D. 2: Thank you very, very much, Mr. Hammond. I just have a quick question for you if you will take a question.

Mr. Hammond: Yes.

Senator Deborah R. Reynolds, D. 2: This case is a case about adultery in the civil context. Okay? Family law. The statute that Representative Horrigan was talking about repealing is a criminal law where the standard of proof is beyond a reasonable doubt. I guess... I know this has been very painful for you and I so appreciate you being here, but could you speak to that? I mean, there is one thing, not to repeal adultery as a cause for divorce and I hear you on that. But, what I think Representative Horrigan is talking about is the criminal justice system and a crime of adultery. I guess I would just ask you to speak to that.

Mr. Hammond: Yes. What I found is, it is supposed to be, the standard is lower in the criminal case. We are holding onto it in the civil case when, in reality, that's smoke and mirrors. That doesn't exist in the civil case. They do not want to handle adultery. If it is important to our society to take a stand against adultery, you can't legitimately claim, having been through it,

you can't claim that the protection is there in the civil court system. It is not. If you think this is an important issue, I urge you to retain the criminal penalty. Thank you.

Senator Deborah R. Reynolds, D. 2: Thank you very, very much. Any questions for Mr. Hammond? Seeing none, thank you for coming today. We appreciate it so much.

I don't see anybody else signed in relative to 1402. Is there anybody else here who wanted to testify on HB 1402? Seeing none, I am going to close the hearing. Thank you.

Hearing concluded at 3:10 p.m.

Respectfully submitted,

L. Gail Brown
Senate Secretarial Supervisor
8/24/10

1 Attachment

Attachment #1

Written testimony in favor of HB1402

"AN ACT repealing the crime of adultery"

Rep. Timothy Horrigan; Strafford County #7; April 14, 2010

This bill was controversial outside the walls of the State House, although it passed the House by a voice vote.

It was even more controversial a few months ago thanks to a certain professional golfer named Tiger Woods. Happily, Woods finally returned to the PGA Tour. He played pretty well at the Masters, albeit not quite good enough to win. We can now start forgetting about his transgressions. He may have been stupid, but nothing he did was a crime aside from hitting a fire hydrant with his car. 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 don't condone casually cheating on your spouse, which is a hurtful and dangerous thing to do. But, not everything which might be hurtful or dangerous needs to be a crime.

I urge the Senate 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 and unnecessary 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 heterosexual vaginal intercourse is the only extramarital sex act which can be adulterous. That was, needless to say, not a universally accepted definition. (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.

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 besides "straight" intercourse for human beings to be sexually unfaithful to their partners. 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.

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 understood 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 majority "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."

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: RSA 645:3's rarely if ever used criminal sanctions are not needed.

Some will say that we need this law to send a message. I say that merely sending a message is not the purpose of criminal law. Some will say we need to keep the law on the books as a deterrent. A law which is never enforced is not much of a deterrent. And in the case of adultery, the people committing the offense are often in an excited frame of mind where the threat of criminal prosecution may seem unimportant. Adulterers are taking a huge risk anyway, and even the most law-abiding adulterers may find themselves in a state of mind where they are quite willing to risk prosecution. One of the reasons no one is ever prosecuted for adultery is because the authorities recognize that it is counterproductive to prosecute a basically harmless individual— no matter how willing that person may be to risk being prosecuted— merely for having a sexual relationship with a married person other than his or her own spouse..

Rep. Timothy Horrigan
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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(l) (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.

Speakers

SENATE JUDICIARY COMMITTEE

Date: 4/~~22~~14/10 **Time:** 2:30 p.m. **Public Hearing on** HB 1402

HB 1402 – repealing the crime of adultery.

Please check box(es) that apply:

SPEAKING	FAVOR	OPPOSED	NAME (Please print)	REPRESENTING
✓	☒	☒	Rep. Timothy Horrigan (cosponsor)	Stafford #7
X	☒	☐	Daniel J. Hammond	
☐	☐	☐		
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Voting Sheets

Senate Judiciary Committee

EXECUTIVE SESSION

Bill # HB 1402

Hearing date: 4/14/10

Executive session date: 4/20/10

Motion of: OTP w/drawn **VOTE:**

Made by Senator:	Reynolds	☐	**Seconded by Senator:**	Reynolds	☑	**Reported by Senator:**	Reynolds	☐
	Lasky	☑		Lasky	☐		Lasky	☐
	Houde	☐		Houde	☐		Houde	☐
	Letourneau	☐		Letourneau	☐		Letourneau	☐
	Roberge	☐		Roberge	☐		Roberge	☐

Motion of: ITL **VOTE:** 5-0

Made by Senator:	Reynolds	☐	**Seconded by Senator:**	Reynolds	☐	**Reported by Senator:**	Reynolds	☐
	Lasky	☑		Lasky	☐		Lasky	☑
	Houde	☐		Houde	☐		Houde	☐
	Letourneau	☐		Letourneau	☑		Letourneau	☐
	Roberge	☐		Roberge	☐		Roberge	☐

Committee Member	*Present*	Yes	No	*Reported out by*
Senator Reynolds, Chairman	☑	☐	☐	☐
Senator Lasky, Vice-Chair	☑	☐	☐	☐
Senator Houde	☑	☐	☐	☐
Senator Letourneau	☑	☐	☐	☐
Senator Roberge	☑	☐	☐	☐

***Amendments:**

Notes:

Committee Report

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE

Date: April 21, 2010

THE COMMITTEE ON Judiciary

to which was referred House Bill 1402

AN ACT repealing the crime of adultery.

Having considered the same, the committee recommends that the Bill:

IS INEXPEDIENT TO LEGISLATE

BY A VOTE OF: 5-0

AMENDMENT # s

Senator Bette R. Lasky
For the Committee

L. Gail Brown 271-3076

New Hampshire General Court - Bill Status System

Docket of HB1402

Docket Abbreviations

Bill Title: repealing the crime of adultery.

Official Docket of **HB1402**:

Date	Body	Description
01/06/2010	H	Introduced and Referred to Criminal Justice and Public Safety; **HJ 6**, PG.239
01/06/2010	H	Public Hearing: 1/12/2010 10:00 AM LOB 204
01/20/2010	H	Executive Session: 1/27/2010 10:00 AM LOB 204
01/28/2010	H	Committee Report: Ought to Pass for Feb 3 RC (vote 15-2); **HC 11**, PG.468
02/03/2010	H	Ought to Pass: MA VV; **HJ 15**, PG.679
03/03/2010	S	Introduced and Referred to Judiciary
04/07/2010	S	Hearing: April 14, 2010, Room 103, State House, 2:30 p.m.; **SC15**
04/21/2010	S	Committee Report: Inexpedient to Legislate 4/28/10; **SC17**
04/28/2010	S	Inexpedient to Legislate, MA, VV === BILL KILLED ===; **SJ 16**, Pg.349

Other Referrals

COMMITTEE REPORT FILE INVENTORY

HB1402 ORIGINAL REFERRAL _____ RE-REFERRAL

1. THIS INVENTORY IS TO BE SIGNED AND DATED BY THE COMMITTEE SECRETARY AND PLACED INSIDE THE FOLDER AS THE FIRST ITEM IN THE COMMITTEE FILE.
2. PLACE ALL DOCUMENTS IN THE FOLDER FOLLOWING THE INVENTORY IN THE ORDER LISTED.
3. THE DOCUMENTS WHICH HAVE AN "X" BESIDE THEM ARE CONFIRMED AS BEING IN THE FOLDER.
4. THE COMPLETED FILE IS THEN DELIVERED TO THE CALENDAR CLERK.

✓ **DOCKET (Submit only the latest docket found in Bill Status)**

✓ **COMMITTEE REPORT**

✓ **CALENDAR NOTICE on which you have taken attendance**

✓ **HEARING REPORT (written summary of hearing testimony)**

✓ **HEARING TRANSCRIPT (verbatim transcript of hearing)**
List attachments (testimony and submissions which are part of the transcript) by number [1 thru 4 or 1, 2, 3, 4] here: /

✓ **SIGN-UP SHEET**

ALL AMENDMENTS (passed or not) CONSIDERED BY COMMITTEE:

____ - AMENDMENT # _____ ____ - AMENDMENT # _____
____ - AMENDMENT # _____ ____ - AMENDMENT # _____

ALL AVAILABLE VERSIONS OF THE BILL:

✓ AS INTRODUCED ____ AS AMENDED BY THE HOUSE
____ FINAL VERSION ____ AS AMENDED BY THE SENATE

____ **PREPARED TESTIMONY AND OTHER SUBMISSIONS (Which are not part of the transcript)**
List by letter [a thru g or a, b, c, d] here: _____

✓ **EXECUTIVE SESSION REPORT**

____ **OTHER (Anything else deemed important but not listed above, such as amended fiscal notes):**

IF YOU HAVE A RE-REFERRED BILL, YOU ARE GOING TO MAKE UP A DUPLICATE FILE FOLDER

DATE DELIVERED TO SENATE CLERK 9/20/10 Gail Brown
COMMITTEE SECRETARY