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Bethany Catron
University of Dayton

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If You Don't Think This Is Adultery, Go Ask Your Spouse: The New Hampshire Supreme Court's Faulty Interpretation of Adultery in *In re Blanchflower*, 834 A.2d 1010(2003) – Grounds for a Fault Based Divorce

Cover Page Footnote

The author would like to thank her husband, Ronnie, for his loving encouragement and support throughout law school; her Notes & Comments Editor, Adam Armstrong, for his assistance and dedication to excellence; and Professor Cooley Howarth for his infinite wisdom and guidance.

**IF YOU DON'T THINK THIS IS ADULTERY, GO
ASK YOUR SPOUSE:
THE NEW HAMPSHIRE SUPREME COURT'S
FAULTY INTERPRETATION OF ADULTERY IN *IN
RE BLANCHFLOWER*, 834 A.2d 1010 (2003) –
GROUNDS FOR A FAULT BASED DIVORCE**

*Bethany Catron**

I. INTRODUCTION

For those who are not married, try for a moment to imagine that you are. One night, while out drinking with friends, you meet someone you are attracted to and end up leaving the establishment together. This one night stand is extremely intimate and sexual in nature. You do not have sex because somehow you convinced yourself that if you abstain you are not really cheating. You are willing, however, to engage in other acts that are sexually pleasing to you. Because you are convinced that you have not committed adultery, you tell your spouse about the encounter.

A few weeks later your spouse files for divorce on the grounds of adultery. You are shocked. In your mind, it is not adultery because you did not have intercourse. In New Hampshire, this belief would be correct. According to the Supreme Court of New Hampshire, while adultery is grounds for a fault-based divorce, in your case, your spouse would have to amend the petition for dissolution on grounds other than adultery. The recent decision in *In Re Blanchflower*¹ is an open invitation for anyone to go outside of the marriage bed to find sexual pleasure, just as long as there is no vaginal penetration by a real penis.²

The issue in *Blanchflower* is whether a same-sex sexual

* Staff Writer, 2004-05, University of Dayton Law Review. J. D. expected May 2005, University of Dayton School of Law; B.S., 2002, Illinois State University. The author would like to thank her husband Ronnie for his loving encouragement and support throughout law school, her Notes & Comments Editor, Adam Armstrong, for his assistance and dedication to excellence, and Professor Cooley Howarth for his infinite wisdom and guidance.

¹ *In re Blanchflower*, 834 A.2d 1010 (2003).

² *Appeal of Ashland Elec. Dept.*, 682 A.2d 710, 715 (1996).

relationship between a married person and another constitutes adultery within the meaning of RSA 458:7 (“the Act”).³ The narrow-minded decision of the *Blanchflower* court frustrated the underlying purpose of New Hampshire’s fault-based divorce statute by determining that one, and only one, sexual act constitutes adultery.⁴

This note will argue that the *Blanchflower* court failed to utilize the appropriate method of statutory interpretation in deciding this case.⁵ Part II outlines the background of this case, including the arguments presented by both parties, and details the court’s reasoning behind its holding.⁶ Part III analyzes the method of interpretation used by the court in reaching its decision in *Blanchflower* and demonstrates that the correct method of statutory interpretation would have allowed the petitioner in this case to obtain a fault-based divorce on the grounds of adultery.⁷ Part IV will further demonstrate that the *Blanchflower* court’s definition of adultery and its decision do not represent today’s understanding of adultery and sets a precedent that will have a negative effect on society, and more specifically, on someone with a legitimate petition for dissolution on the ground of adultery.

II. BACKGROUND

A. *The Facts of In re Blanchflower*

David G. Blanchflower filed a petition for dissolution of marriage and sought a divorce from respondent wife, Sian E. Blanchflower, on grounds of irreconcilable differences.⁸ David then moved to amend his petition to assert adultery as grounds for divorce.⁹ David alleged that Ms. Blanchflower had been involved in an adulterous affair with co-respondent, Robin Mayer, a woman, which resulted in the breakdown of the parties’ marriage.¹⁰ Ms. Blanchflower and her lover filed a motion to dismiss

³ “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.” N.H. Rev. Stat. Ann. § 458:7(II) (Supp. 2003).

⁴ *Blanchflower*, 834 A.2d at 1011.

⁵ There are three types of approaches to statutory interpretation. William N. Eskridge, Jr., Phillip P. Frickey, & Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 670 (3d ed., West 2001). First, there is “textualism” whereby the plain meaning of the statute is sought. *Id.* “Textualism” sets forth inferences that are usually drawn from the drafter’s choice of words and their relationship to other parts of the whole statute. *Id.* The second is “intentionalism” where the interpreter identifies and follows the original intent of the statute’s drafters. *Id.* The third approach is “purposivism” where the best interpretation will be most effective in carrying out the statute’s purpose. *Id.*

⁶ See *infra* pt. II and accompanying text.

⁷ See *infra* pt. III and accompanying text.

⁸ *Blanchflower*, 834 A.2d at 1010.

⁹ *Id.*

¹⁰ *Id.* at 1011.

David's amended petition.¹¹ The trial court found in favor of David and denied Ms. Mayer's motion to dismiss; Ms. Mayer appealed that finding.¹²

B. *Holding of the Supreme Court of New Hampshire*

1. The Majority Opinion

The issue on appeal was whether the homosexual relationship between a married person and another constituted adultery within the meaning of RSA 458:7.¹³ The issue was not the status of homosexual relationships in our society or the recognition of homosexual unions. The co-respondents, Mrs. Blanchflower and Ms. Mayer, argued that a homosexual relationship between two people, one of whom was married, does not constitute adultery under RSA 458:7.¹⁴ The court agreed. In support of its holding, the court discerned the plain and ordinary meaning of "adultery" as used in RSA 458:7.¹⁵ The court utilized Webster's Third New International Dictionary¹⁶ to define the word "adultery."¹⁷ It held that while this term did not define the "someone" with whom one commits adultery, adultery required sexual intercourse.¹⁸

Moreover, the court discerned the plain and ordinary meaning of "sexual intercourse"¹⁹ and "coitus."²⁰ The court again relied on Webster's Third New International Dictionary²¹ to define these terms. It stated that coitus could "clearly . . . only take place between persons of the opposite gender."²² After it defined these three terms, the court noted that RSA 458:7 was originally passed in 1842 and that simply because the law was re-passed it did not alter the intent of the original framers.²³

The original statute²⁴ did not define the term adultery. Instead, the court relied on case law from the 19th century to support its finding that "adultery" meant having intercourse.²⁵ Additionally, the court also relied

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* See *supra* n. 3.

¹⁴ *Blanchflower*, 834 A.2d at 1011.

¹⁵ *Id.* See *supra* n. 3.

¹⁶ *Blanchflower*, 834 A.2d at 1011. The court used a 1961 edition. *Id.*

¹⁷ "[V]oluntary sexual intercourse between a married man and someone other than his wife or between a married woman and someone other than her husband." *Id.*

¹⁸ *Id.*

¹⁹ "[S]exual connection esp. between humans: [c]oitus, [c]opulation." *Id.*

²⁰ "[I]nsertion of the penis into the vagina." *Id.*

²¹ *Id.* (using the same 1961 edition).

²² *Id.*

²³ *Id.*

²⁴ See *supra* n. 3.

²⁵ See *supra* n. 3. The court cites two cases in support of this premise: *Adams v. Adams*, 20 N.H. 299, 301 (1863) (stating that "[a]dultery afterwards in October would tend to show that the intercourse before

on cases from that same period which held that “adultery as a ground for divorce was equated with the crime of adultery.”²⁶ The current criminal statute of New Hampshire, RSA 645:3, requires sexual intercourse.²⁷

On appeal, David Blanchflower argued 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.”²⁸ The court rejected that argument and stated that “[h]omosexuals 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.”²⁹ Additionally, it explained that “[t]he only distinction is that persons of the same gender cannot, by definition, engage in the one act that constitutes adultery under the statute.”³⁰

Mr. Blanchflower further argued that public policy would be well served by applying the same law to a cheating spouse, whether the

was adulterous”) and *Burns v. Burns*, 68 N.H. 33, 34 (1894) (stating that “the precise terms of the record relating to the times of the alleged adulterous intercourse, if they are matters of record, may be material”).

²⁶ *Blanchflower*, 834 A.2d at 1011-1012. See *supra* n. 3. The *Blanchflower* court cites two cases supporting this premise: *Sheafe v. Sheafe*, 24 N.H. 564, 567 (1852) (stating that “[i]t was not the intention of the statute, nor is it consistent with justice, that the husband should be charged out of his own estate with the support of a woman who has been conclusively declared by a decree of this court to be an adulteress”) and *White v. White*, 45 N.H. 121, 121 (1863) (finding that the wife committed the crime of adultery). *Blanchflower*, 834 A.2d at 1011-1012.

It should be noted, however, that the *Blanchflower* court failed to mention that the *Sheafe* court also found that Mr. Sheafe “has treated [Mrs. Sheafe] with cruelty; attempted to persuade her to commit adultery; offered her money to keep still while he obtained a divorce; offered to release her from her marriage obligations; and has been for years laying plans to obtain circumstantial evidence against her.” *Sheafe*, 24 N.H. at 564. “Sheafe had been for a series of years manufacturing a cause for divorce.” *Id.*

The *Blanchflower* court notes that “[a]lthough 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.’” *Blanchflower*, 834 A.2d at 1011-1012 (citing *State v. Wallace*, 9 N.H. 515, 517 (1838)); see also *State v. Taylor*, 58 N.H. 331, 331 (1978) (holding the same). The court then concluded that because “‘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.” *Blanchflower*, 834 A.2d at 1012.

If spurious issue must arise before adultery is deemed to have been committed, what would the court make of the situation in which a woman’s lover was impotent?

²⁷ “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.” N.H. Rev. Stat. § 645:3 (1996).

²⁸ *Blanchflower*, 834 A.2d 1011-1012.

²⁹ *Id.*

³⁰ *Id.*

promiscuous spouse chose a paramour of the same sex or the opposite sex.³¹ The majority held that this argument was tied to the premise that the purpose for the fault based statute “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.”³² The court in turn dismissed this argument because it had “not . . . seen any such purpose expressed by the legislature.”³³ The “concept of adultery was premised upon a specific act” and “[t]o 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.”³⁴

2. The Dissent

The dissent by Justice Brock, joined by Justice Broderick, raised one objection – 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.”³⁵ Justice Brock criticized the majority for strictly adhering 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.”³⁶ Justice Brock stated that while the first step was to look for the plain and ordinary meaning of words to interpret 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.”³⁷

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 adultery.³⁸ The innocent spouse is entitled to a divorce because the guilty spouse breached a marital covenant, such as the covenant to be sexually faithful.³⁹ The purpose for permitting fault-based divorces is “to provide some measure of relief to an innocent spouse for the offending conduct of a guilty spouse.”⁴⁰ The dissent, however,

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 229.

³⁵ *Id.* at 1013. Justice Brock cited *Appeal of Mikell*, 145 N.H. 435, 439-440 (2000) (finding that “[w]hile there may be more than one way to construe this language, ‘we reject any strictly literal construction if it contravenes the legislature’s intended purpose’”).

³⁶ *Blanchflower*, 834 A.2d at 1013.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 1014.

⁴⁰ *Id.*

suggested that the purpose of the fault-based divorce statute is also to protect against an extramarital relationship irrespective of the specific sexual act performed by the promiscuous spouse or the sex of the new paramour.⁴¹

III. ANALYSIS

The *Blanchflower* court failed to assign the proper meaning to the term “adultery” as contained in the Act.⁴² Therefore, it left unprotected the very party the Act was intended to benefit – the innocent spouse. First, and in the absence of a statutory definition for “adultery,” the court undertook a bizarre textualist approach when it set out to find the plain and ordinary meaning of the term. Second, while the court asserted that it must find the plain and ordinary meaning of “adultery,” it instead attempted to find the 1842 drafters' intent in enacting the statute by engaging in imaginative reconstruction. In doing so, it combined the term’s 20th century dictionary definition with 19th century New Hampshire case precedent. Finally, the court neither recognized nor furthered the Act’s⁴³ purpose. Instead, it severely limited the ability of the innocent and wronged spouse to use adultery as a legal basis for divorce. As a result of these three errors, the *Blanchflower* court has simultaneously narrowed the basis for the innocent spouse’s claim for adultery while permitting the way-ward spouse a wide range of sexual peccadilloes that fall outside the court’s unreasonably narrow definition. How far is too far? Would the New Hampshire Supreme Court actually tell a man whose wife had anal sex with another man or performed oral sex upon another man that those sexual acts are not adultery?

A. *The Blanchflower Court's Application of the Textualist Approach was Defective*

Adultery should be defined as any sexual act committed outside of the marriage.⁴⁴ However, the *Blanchflower* court refused to assign this meaning and, therefore, failed miserably in its attempt to define the term, “adultery.” Reading the statute carefully is the starting point to interpreting a statute.⁴⁵ The Act does not define the term “adultery.”⁴⁶ Therefore, in the

⁴¹ *Id.*

⁴² *See supra* n. 3.

⁴³ *See supra* n. 3.

⁴⁴ *See* Patrick Lee & Robert P. George, *Sex, Law and the Sacred Precincts of the Marital Bedroom*, 42 *Am. J. Juris.* 135 (1997); Mark Strasser, *Marital Acts, Morality, and the Right to Privacy*, 30 *N.M. L.Rev.* 43 (2000); and Carolyn B. Ramsey, Student Author, *Sex and Social Order: The Selective Enforcement of Colonial American Adultery Laws in the English Context*, 10 *Yale J.L. & Human* 191 (1998).

⁴⁵ Eskridge, *supra* n. 5 and accompanying text (explaining the methods of statutory interpretation).

⁴⁶ *See supra* n. 3.

absence of a statutorily defined term and in order to determine the plain and ordinary meaning of words, interpreters may consult dictionaries.⁴⁷ The court suggested it was giving the term “adultery” its plain and ordinary meaning, but in reality it did nothing more than search for a convenient dictionary definition. That search ended with the 1961 dictionary meaning, a meaning the court desperately needed to justify its far-fetched holding.⁴⁸

1. The Court’s Suggestion of the Plain and Ordinary Meaning of Adultery

While the *Blanchflower* court gave no reason for doing so, it relied on a 1961 edition of Webster’s Third New International Dictionary to determine the plain and ordinary meaning of “adultery” even though the statute was enacted in 1842. The primary definition of adultery in 1961 was “voluntary sexual intercourse between a married man and *someone* other than his wife or between a married woman and *someone* other than her husband.”⁴⁹ Most dictionaries today still attribute this meaning to the term “adultery.”⁵⁰ Because this definition did not specifically eliminate all sexual acts and left room for “*someone*” to include members of the opposite sex, the court was not satisfied.⁵¹ The *Blanchflower* court nonetheless concluded that because the definition required sexual intercourse, that “*someone*” must be of the opposite gender.⁵² Contrary to the court’s conclusion, the definition of sexual intercourse does not require “*someone*” to be a member of the opposite gender.

Next, solely as a matter of convenience and using the same 1961 dictionary, the court defined sexual intercourse⁵³ and then coitus⁵⁴ so as to make the definition fit the conclusion the court had made in advance – that

⁴⁷ Eskridge, *supra* n. 5 at 820.

⁴⁸ *Blanchflower*, 834 A.2d at 1011.

⁴⁹ *Webster’s Third New Intl. Dictionary* 2082 (G. & C. Merriam Co. 1961) (emphasis added).

⁵⁰ See *infra* n. 105 and accompanying text (providing several definitions inapposite to the definition the *Blanchflower* court gave the term “adultery”).

⁵¹ While the *Blanchflower* court insists that the appeal was not about “the status of homosexual relationships in our society or the formal recognition of homosexual unions,” the ridiculous process through which the court maneuvered to define “adultery” indicates otherwise. *Blanchflower*, 834 A.2d at 1011. It is not rational nor is it plausible that “adultery” bears the meaning this court has given it – penetration of the vagina by the penis. As evidenced by the following excerpt, many agree that while the court announced the issue was not the status of homosexual relationships, that, in fact, was the underlying issue: “The justices didn’t mention the churning controversy over same-sex marriage in their brief opinion. But the implication of their ruling ought to be clear to other courts – like the Supreme Judicial Court of Massachusetts – that are considering the issue.” Jeff Jacoby, *The Timeless Meaning of Marriage*, *The Boston Globe* H11 (Nov. 16, 2003). Moreover, Jacoby suggested that the New Hampshire court “[i]ndirectly . . . underscores the weakness of one of the same-sex marriage lobby’s favorite arguments: that it is as wrong to deny marriage to gay and lesbian couples today as it was to bar interracial couples from marrying in the Jim Crow South.” *Id.*

⁵² *Blanchflower*, 834 A.2d at 1011.

⁵³ “[S]exual connection esp. between humans.” *Id.*

⁵⁴ “[I]nsertion of the penis in the vagina.” *Id.*

adultery could only be committed by members of the opposite sex.⁵⁵ This is the problem. The court defined sexual intercourse to exclude every other sexual act from the meaning of adultery and strictly limited it to include only heterosexual intercourse.⁵⁶

After *Blanchflower*, in New Hampshire, anal sex and oral sex are not considered adultery when a married individual engages in those acts with someone other than his or her spouse. These sexual acts, when committed outside the marriage, are permissible between members of the same sex and members of the opposite sex without retribution and, therefore, the innocent spouse is left without adultery as grounds for a divorce.⁵⁷ Rather than considering context and the purpose of the statute, the court simply made a fortress of the dictionary.⁵⁸

However, the court failed to mention that a later edition of the same dictionary it relied on to define the term “sexual intercourse” has a second meaning.⁵⁹ The second meaning states that “intercourse involving genital contact between individuals *other than penetration of the vagina by the penis*” constitutes sexual intercourse.⁶⁰ If the court had assigned this meaning to “sexual intercourse” there would have been a completely different outcome in this case. David Blanchflower would have been permitted to obtain a fault-based divorce on the ground of adultery. The issue is not whether the sexual contact was homosexual or heterosexual in nature. It is about a married individual engaging in sexual contact with another individual who is not his or her spouse – sexual contact just like that in which Sian Blanchflower and her lover were engaged.

The court was not committed to following a textualist approach, otherwise it would have used a dictionary with a complete definition of the relevant terms. The definition the court gave the term “adultery” was needed in order to dictate the outcome of this case. Instead of using a more current edition of Webster’s Third New International Dictionary, the court

⁵⁵ *Id.* at 1011-1012.

⁵⁶ *Id.* This definition clearly excludes homosexual sex. Only heterosexuals can engage in coitus – penetration of the vagina by the penis. It should also be noted that this definition excludes bestiality as well.

⁵⁷ *Id.* “[O]ur interpretation of the term ‘adultery’ excludes all non-coital sex acts, whether between persons of the same or opposite gender.” *Blanchflower*, 834 A.2d at 1012.

⁵⁸ “It is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary.” Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries*, 47 *Buff. L. Rev.* 227, 227 (1999).

⁵⁹ *Webster’s Third New Intl. Dictionary*, 2082 (G. C. Merriam Co. 1993). This definition has not changed pursuant to the latest edition of Webster’s Third New Internal Dictionary. See *Webster’s Third New Intl. Dictionary* (G.C. Merriam Co. 2002).

⁶⁰ *Id.* (emphasis added).

found a dictionary that fell in line with its perceived definition.⁶¹ Therefore, because the *Blanchflower* court refused to assign the term “adultery” a modern meaning, David Blanchflower was denied a divorce based on the grounds of adultery.

2. Plain Meaning is Not the Equivalent of the Dictionary Meaning

To determine the plain meaning of a term, the dictionary should not represent the end point in the Court's analytic process.⁶² Although the dictionary can provide guidance as to what a term may mean, there are more reliable sources other than the dictionary to aid in the process of determining that meaning.⁶³ Those sources, among others, include context and legislative purpose.⁶⁴ The second definition for the term “sexual intercourse” varies significantly from that given by the court, and even the slightest definitional variations can have a significant impact on how a case is decided.⁶⁵ Thus, in American legal jurisprudence, the dictionary can help the court to begin the definitional process, but it should not be the end point in determining plain meaning.⁶⁶

Moreover, citizens should be able to read the statutes and find out what the law requires of them.⁶⁷ The plain meaning of a word is that which an ordinary speaker of the English language would attribute to a word in the context in which it is used.⁶⁸ This is merely the equivalent of the common law's reasonable person standard.⁶⁹ In other words, the plain meaning of adultery is that which a person in 2003, a person like David Blanchflower in a pending marital dissolution, would have attributed to the meaning – any sexual act committed outside the marriage.⁷⁰

⁶¹ In determining how to construe a statute long after its enactment, dictionaries published at or close to the time the facts giving rise to litigation arise should be consulted. Thumma, 47 *Buff. L. Rev.* at 268-269.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See *infra* pt. III (C) (discussing the purpose of the Act).

⁶⁵ *Supra* n. 61 at 264.

⁶⁶ *Supra* n. 61 at 332.

⁶⁷ Eskridge, *supra* n. 5 at 756.

⁶⁸ *Id.* See e.g. *Chisom v. Roemer*, 501 U.S. 380, 410 (1991) (stating that “[o]ur job is not to scavenge the world of English usage to discover whether there is any possible meaning of ‘representatives’ which suits our preconception that the statute includes judges; our job is to determine whether the *ordinary* meaning includes them, and if it does not, to ask whether there is any solid indication in the text or structure of the statute that something other than ordinary meaning was intended”) (Scalia, J., dissenting).

⁶⁹ *Id.* See e.g., Stephen G. Gilles, Symposium: *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 *Vand. L. Rev.* 812, 822 (2001) (stating that with respect to negligence American courts have defined reasonable conduct as that in which a reasonable person would not have engaged).

⁷⁰ See *infra* nn. 105-106 and accompanying text (explaining that people in today's society would attribute a meaning to “adultery” that would include any sexual act committed outside marriage).

B. *While the Court Said It was in Search of the Plain and Ordinary Meaning of “Adultery,” in Reality It was Merely in Search of the Intent of the 1842 Legislature.*

While the *Blanchflower* court indicated that its goal was to determine the plain and ordinary meaning of “adultery,” it did nothing more than attempt to discover the subjective intent of the 1842 legislature. An intentionalist approach requires first and foremost evidence of the specific intent of the enacting legislature regarding what the statute meant in the context in which it was considered.⁷¹ When evidence exists, it should be followed.⁷² In this instance, the legislature’s specific intent did not exist. The *Blanchflower* court engaged in imaginative reconstruction and, therefore, erred in ruling that homosexual conduct outside of the marriage did not constitute adultery.

1. Imaginative Reconstruction

Because evidence of legislative intent is often non-existent, as is the case with this statute, interpreters must engage in a second best inquiry – imaginative reconstruction of legislative intent.⁷³ The interpreter is required to put himself or herself in the position of the enacting legislature and consider the historical background and assumptions about the legislature.⁷⁴ Stated differently, imaginative reconstruction is nothing more than the court’s interpretation of the legislature’s intent from another time and place - unlike anything we know today. It is inherently untrustworthy and defies belief that the 1842 drafters of the Act intended to protect the sexual misconduct of Mrs. Blanchflower. The *Blanchflower* court appeared to suggest that members of the enacting legislature would have been content to know that his wife had engaged in a lesbian affair rather than an affair with another man. It is ridiculous to think that a man in 1842 would have been content if his wife engaged in a homosexual affair. The betrayal is the same. The *Blanchflower* court concluded that Mrs. Blanchflower did not commit adultery simply because she engaged in a sexual affair with a woman rather than a man. That conclusion is a slap in the face to individuals who are betrayed by their spouses who break the marital vow to be sexually faithful and engage in homosexual affairs.⁷⁵

⁷¹ See Richard Posner, *The Federal Courts: Crises and Reform*, 52 Chi. L.Rev. 1146, 1286-1293 (1985).

⁷² *Id.*

⁷³ Eskridge, *supra* n. 5 at 684.

⁷⁴ Eskridge, *supra* n. 5 at 684.

⁷⁵ For a discussion of the institution of marriage and the covenants contained therein, see *infra* pt. III(C)(1).

a. The Court Relied on 19th Century Case Law to Facilitate Its Imagination

The court relied on two 19th century cases to support its decision that adultery did not include homosexual acts or heterosexual, non-coital acts. However, there is a problem that the court seemed to ignore. Neither the *Adams*⁷⁶ nor the *Burns*⁷⁷ cases relied on by the *Blanchflower* court defined “adultery” or “sexual intercourse.” Those courts simply held that the wayward spouse had sexual intercourse with someone other than his or her spouse.⁷⁸ In essence, these cases prove nothing more than the fact that “adultery” includes heterosexual sex. They do not support the *Blanchflower* court’s conclusion that homosexual conduct engaged in outside of the marriage is not adultery.

The court also relied on what 19th century criminal courts found constituted adultery under the New Hampshire Criminal Code.⁷⁹ Because the criminal statute failed to define “adultery,” but did require sexual intercourse with *another*,⁸⁰ the *Blanchflower* court inferred that “another” meant someone of the opposite sex because sexual intercourse was required.⁸¹ This inference was drawn from two 19th century cases, *Sheafe*⁸² and *White*,⁸³ cases that the court suggested were “instructive.”⁸⁴ The *Blanchflower* court was wrong and merely drew an inference upon an inference. These cases held that when a spouse engages in sexual intercourse with “someone” other than their spouse, they have committed the crime of adultery.⁸⁵ Here the *Blanchflower* court engaged in imaginative reconstruction by building an inference from 19th century cases. Those cases dealt with a criminal statute, therefore the court inferred that its drafters gave “adultery” the same meaning as the drafters of the act.

Because the court was interested in indulging its imagination, it should have considered this question: whether Hester Prynne, from the

⁷⁶ This case was concerned with the time the adultery was committed. For the specific holding, see *supra* n. 25 and accompanying text.

⁷⁷ This case also had to do with the timing of the adultery committed. For the specific holding of this case, see *supra* n. 25.

⁷⁸ See *Adams*, 20 N.H. at 301; *Burns*, 68 N.H. at 44.

⁷⁹ For the language of the New Hampshire criminal code, see *supra* n. 27 and accompanying text.

⁸⁰ *Blanchflower*, 834 A.2d at 1011-1012.

⁸¹ *Id.*

⁸² *Id.* This court merely held that because the wife engaged in intercourse with someone other than her husband, she had committed the crime of adultery. *Sheafe*, 24 N.H. at 564.

⁸³ *Id.* The *White* court found that the wife had committed adultery and was therefore guilty of a crime; however, it did not determine that only heterosexual affairs constituted criminal activity. *White*, 45 N.H. at 121.

⁸⁴ *Blanchflower*, 834 A.2d at 1011-1012.

⁸⁵ See *supra* nn. 82-83.

literary classic *The Scarlet Letter*,⁸⁶ would still have been forced to wear the “A” even if her sultry affair had been with Ms. Dimmesdale rather than Minister Arthur Dimmesdale.⁸⁷ It would be absurd to conclude that Mrs. Prynne would not have been required to wear the “A.” It was equally absurd, therefore, for the *Blanchflower* court to conclude that “someone” is the exclusive equivalent of “male.”

C. *The Blanchflower Court Erred by Failing to Apply a Purposivist Approach to Interpret the Domestic Relations Statute*

The first step in interpreting a statute is to determine the meaning of the words held by today’s society.⁸⁸ However, in doing so, a court should be careful not to give words meanings they cannot bear.⁸⁹ Rather, the court should interpret the words of a statute so as to carry out its purpose.⁹⁰ The definition given to “adultery” by the *Blanchflower* court does not bear this meaning – voluntary sexual intercourse, with someone other than your spouse that consists of one act – penetration of the vagina by the penis.⁹¹

⁸⁶ Nathaniel Hawthorne, *The Scarlet Letter* (Bantam Press 1850).

⁸⁷ *Id.* Hester Prynne and Arthur Dimmesdale are the two main characters in the classic literary novel written in 1850 by Nathaniel Hawthorne. Hester, married to Rodger Chillingsworth, and Arthur Dimmesdale, a Boston community minister, engaged in a sinful love affair. Rodger Chillingsworth, mostly absent exploring the western wilderness, resurfaced and learned of his wife’s adultery. She had born child in her husband’s long absence. Pearl was the illegitimate child of Hester, a result of her affair with Dimmesdale. Hester was tried and convicted for adultery by Boston Puritan leaders and was condemned to wear a bright red “A” over her breast wherever she went. *Id.*

“Hester Prynne is considered one of the great heroines of literature.” Awerty Notes, *The Scarlet Letter*, <http://www.awerty.com/scarlet2.html> (last accessed Nov. 20, 2004) (discussing Harry Levin, *Power of Blackness: Hawthorne, Poe, Melville* (Ohio U. Press 1980)). “Though Hawthorne never condones her crime, he is . . . ‘concerned to show that fundamental morality is not so much a series of rigorous laws to be enforced by a meddling community as it is an insight to be attained through continuous exertion on the part of the individual conscience.’” *Id.*

Moreover, while lesbianism, for the average woman, was not a publicly accepted lifestyle in the 19th century it was nonetheless a lifestyle that women engaged albeit in secrecy. Patricia Duncker, *In the Victorian Closet*, <http://www.afr.com/articles/2003/12/11/1071125585665.html> (last accessed Nov. 20, 2004) (discussing Graham Robb, *Strangers: Homosexual Love in the 19th Century*, (W.W. Norton & Co. 2004).) The term “lesbian” was first used in the late 16th century. Purplebus, *Lesbianism*, <http://www.purplebus.co.uk/> (last accessed Nov. 20, 2004). It was the capitalized adjectival term that referred to the Greek island of Lesbos. *Id.* It wasn’t until the 19th century that the connotation of “female homosexuality” was added. *Id.* This association was made due to the “tender and often passionate poetry written by Lesbian poet Sappho (c. 610–c. 580 BC) to and about other women in her female coterie.” *Id.* However, lesbian aristocrats in the 19th century were tolerated and their domestic arrangements were regarded as a lifestyle of choice. Duncker, at <http://www.afr.com/articles/2003/12/11/1071125585665.html>. Because of the restricted lives of women in the 19th century to a societal role, the “blunt truth is that lesbians were more likely to be married.” *Id.*

⁸⁸ Eskridge, *supra* n. 5 at 696.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ The court ignores the fact that lesbians involved in a sexual relationship have a wide variety of sexual devices that may be utilized for penetration of one partner by the other.

Therefore, the *Blanchflower* court deliberately refused to acknowledge the purpose of the act and severely limited the ability of the innocent and wronged spouse to use adultery as a legal basis for divorce.⁹²

1. The Purpose of the New Hampshire Domestic Relations Act

The purpose of the Act is twofold: first, based upon the concept of marital loyalty the betrayed spouse must be granted a way out of the marriage and second, to punish the offending spouse.⁹³ Once a marriage is formed, state law enforces the obligations and liabilities of the parties.⁹⁴ Marriage requires the mutual assent of both parties.⁹⁵ Not only is it a status, but marriage is also a contract or a covenant wherein the parties promise to live together for life and to be bound by the duties imposed upon them by law.⁹⁶ One of those promises is to be sexually faithful during the term of the marriage.⁹⁷ Unfortunately, as was the case with David Blanchflower, many of the covenants made within marriages are broken for a variety of reasons. Permission, however, must still be obtained from a court before one can lawfully exit the marital contract.⁹⁸

In New Hampshire, once a marital covenant has been broken, and if the betrayed spouse so chooses, he or she may seek to exit the marriage via the act, a fault-based divorce statute.⁹⁹ Divorce is granted after a determination is made whether the offending spouse's conduct was the

⁹² See *infra*, pt. III (C)(1) (discussing the purpose of the act).

⁹³ One purpose of the statute is to punish the offending spouse. See e.g., Ira M. Ellman, *The Place of Fault in a Modern Divorce Law*, 28 *Ariz. St. L.J.* 773 (1996) (discussing methods of property division in states having fault-based divorce statutes). This fact is evidenced by N.H. Rev. Stat. Ann. § 458:19, IV (1992) which governs alimony and explicitly allows the court to consider "the fault of either party as defined in RSA 458:16-a, II(1)." This is the section that governs property division. Ellman, 28 *Ariz. St. L.J.* at 827. This provision is "applicable to both alimony and property division [and] allows consideration of fault where it caused the breakdown of the marriage." *Id.* *Yergeau v. Yergeau*, 569 A.2d 237, 240 (N.H. 1990) (finding that H's adultery properly considered in fixing alimony award to W); Ellman, 28 *Ariz. St. L.J.* at 827 (stating that "[f]ault is excluded from consideration in property division if the divorce is granted on no-fault grounds." And where, however, grounds such as adultery are alleged by one party, "the master must grant the divorce on the ground which was the 'primary cause of the marital breakdown.'" (citing *Boucher v. Boucher*, 553 A.2d 313, 315 (N.H. 1988))). Therefore, because fault may be considered, courts must grant the divorce based upon the offending spouse's conduct and then determine the division of the marital property.

⁹⁴ Charles G. Douglas, III, *New Hampshire Practice, Family Law*, §2.14 (2002).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Blanchflower*, 834 A.2d at 1014 (Brock, J., dissenting).

⁹⁸ See Douglas, *supra* n. 94. The United States Supreme Court has held that while various forms of contracts "may be modified, restricted, or enlarged, or entirely released upon consent of the parties" the same is not true for marriage contracts. *Maynard v. Hill*, 125 U.S. 190, 211 (1888). Marriage is "an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress." *Id.*

⁹⁹ See *supra* n. 3 and accompanying text.

primary cause of the marital breakdown.¹⁰⁰ If so, then the betrayed spouse may seek a favorable distribution of the marital assets in combination with maintenance, punishment to the offending spouse.¹⁰¹ This punishment, although financial in nature, is meant to serve as a deterrent from such offending conduct and to reinforce the underlying purpose of the Act, to protect those who suffer from wrongdoing.¹⁰² The *Blanchflower* court insisted that no evidence existed to support this purpose.¹⁰³ Statutes, however, always have a purpose or objective to accomplish.¹⁰⁴ Yet, the court offered no suggestions as to any other plausible purpose of the statute.

Contrary to the court's assertion, there is ample evidence to support the underlying purpose of the statute, protecting the innocent spouse. First, the court should have utilized a current edition of Webster's Third New International dictionary or any other current dictionary. If it had, the court would have discovered that the current meaning of adultery includes all sexual acts beyond heterosexual sex.¹⁰⁵ The court failed to acknowledge that language is an institution that belongs to society, not the legislature.¹⁰⁶

¹⁰⁰ See *supra* n. 93 (explaining that this determination should be made prior to the division of the marital property and any award for alimony).

¹⁰¹ *Supra* n. 93.

¹⁰² *Blanchflower*, 834 A.2d at 1014.

¹⁰³ *Id.* at 1011-1012. This is simply untrue. This purpose was recognized in *Yergeau*, 569 A.2d at 240. The *Yergeau* opinion was authored by Supreme Court Justice David Souter during his term on the New Hampshire Supreme Court. *Id.* Justice Souter held that courts must determine the cause for the breakdown of the marriage, and then determine the division of marital property. *Id.* In *Yergeau*, the breakdown of the marriage was due to adultery committed by the husband. *Id.* Justice Souter further held that considering adultery was proper in fixing the alimony award to Mrs. Yergeau. *Id.* Therefore, because Justice Souter and the New Hampshire court recognized this purpose in *Yergeau*, the *Blanchflower* court cannot now deny this purpose unless, of course, it is making homosexual relations a deciding factor in denying David Blanchflower's divorce.

¹⁰⁴ *Appeal of Ashland Elec. Dept.*, 682 A.2d 710, 715 (N.H. 1996).

¹⁰⁵ See *supra* n. 61 (explaining that when interpreting a statute courts would be wise to consult dictionaries published close to the time of the facts giving rise to the litigation). Sexual intercourse involving genital contact between individuals other than penetration of the vagina by the penis." *Merriam-Webster's Collegiate Dictionary* 1071 (Tenth Ed., Merriam Webster Inc. 2000). Sexual intercourse - "coitus, making love, the sexual act, going to bed with someone; see copulation, fornication." *Webster's New World Roget's A-Z Thesaurus* 1065 (Charlton Laird ed., MacMillan 1999). Moreover, the definition of adultery should not be restricted to only heterosexual coitus, but to sexual acts in general. Alan Soble, *Sexual Investigations*, 137 (N.Y.U. Press 1996). Along with vaginal intercourse there exists anal intercourse as well as other sexual acts which include oral sex on a man or oral sex on a woman. *Id.*

¹⁰⁶ Eskridge, *supra* n. 5 at 697. There is no evidence that the enacting legislature attempted to define the term adultery in 1842 (the date the statute was enacted). If the enacting legislature had used a dictionary the meaning it gave to adultery then is certainly different than the meaning adultery may have had in 1961 and yet a different meaning as understood by today's society.

Because language is a societal institution, it is important to know what people in today's society believe constitutes adultery. In a poll conducted by CNN during the Bill Clinton/Monica Lewinsky scandal, several questions were asked. The questions, however, did not focus on the particular relationship of Clinton and Lewinsky:

Are You Cheating on Your Spouse if You:

“A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.”¹⁰⁷ The meanings of words change from generation to generation.¹⁰⁸

Additionally, the court could have advanced the purpose of the statute if it had sought guidance from other states. There are several states whose statutes also failed to define the term adultery.¹⁰⁹ Those states, however, refused to frustrate the purpose of their fault based statutes and refused to narrowly define “adultery” by relying solely on the dictionary meaning.¹¹⁰ In New Jersey for example, “[a]ll laws dealing with the

	Yes	No
Kiss Someone Else	67%	28%
Phone Sex	66%	32%
Sex Chat on Internet	64%	33%
Is Adultery Morally Wrong	86%	16%

CNN, *How Do Americans View Adultery?* <http://www.AllPoliticsCNN.com> (conducted 1998).

Furthermore, the issue of adultery being committed online is an issue in society. “It’s the matter of the heart and the matter of the soul that really does matter. . . . It’s about not being faithful to your partner in giving your heart, your feelings, your emotions to somebody else. Whether or not that’s done physically is, in some ways, of small consequence.” Dave Clark, *Can Adultery Be Committed Online?* The Parsonage, <http://www.family.org/pastor/family/a0012236.cfm> (last accessed Nov. 20, 2004) (quoting Glen Stanton).

Additionally, “[a] sexual relationship, whether heterosexual or homosexual . . . is ‘exactly an equivalent betrayal.’” World Net Daily, *Law of the Land Court: Homosexual Sex Not Adultery*, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=35496 (last accessed Nov. 8, 2003). “That, I think, is the ordinary meaning most people would give” the term adultery. *Id.*

Finally, the term “adultery” should be defined in the context that would lead to a “I know it when it see it” result. Laura W. Morgan, *What Constitutes Adultery?* www.famlawconsult.com/archive/reader200312.html (last accessed Nov. 20, 2004). “No married person thinks that his or her spouse is adhering to the marriage vows when he or she engages in intimate sexual acts such as oral or anal sex with another person.” *Id.*

¹⁰⁷ *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.).

¹⁰⁸ See generally, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985); Bouvier’s Law Dictionary 431 (Rawles 3d Rev. 1914) which defined “cat” as a whip sometimes used for whipping criminals but not referring to a feline,” and stating that, “as the sole entry for ‘diet’: ‘[a] general assembly is sometimes so called on the continent of Europe’”).

A person in 1996 who says “we all know what sex is,” and someone who uttered the same words in 1896, or expressed the same thought in 296, in Latin, do not know exactly the same thing.” Soble, *supra* n. 105, 137. The boundaries and concept of the sex change. *Id.* “[S]ome of what is accepted, done, believed, and discussed about sex today is different from what was accepted, done, believed and discussed in 296 or 1896.” Changes in sexual behavior and beliefs contribute to and, in turn, are influenced by changes in sexual concepts.” *Id.*

¹⁰⁹ See *infra* n. 110 and accompanying text (providing various states’ definitions of the term “adultery”).

¹¹⁰ See *Alphonso v. Alphonso*, 422 So. 2d 210 (La. Ct. App. 4th Cir. 1982) (holding that homosexuality could be a ground for divorce under an adultery statute); *Bales v. Hack*, 509 N.E.2d 95 (Ohio App. 2d Dist. 1986) (holding that homosexuality may constitute adultery to the other spouse, thereby furnishing grounds for divorce); *Owens v. Owens*, 274 S.E.2d 484, 485-486 (Ga. 1981) (holding “[a] person

termination of a marriage must first be looked at through the eyes of the injured spouse.”¹¹¹ An extramarital relationship, when viewed from the perspective of the injured spouse, is extremely devastating regardless of the nature of the sexual act engaged in by the adulterous spouse.¹¹² Furthermore, adultery is the rejection of the innocent spouse by the adulterous spouse by going outside of the marriage and engaging in intimate sexual activities with another person.¹¹³ Relieving the innocent spouse of the suffering due to that rejection and betrayal is the purpose of the act. It is beyond belief that a married individual, today, would not believe that his or her spouse committed adultery if he or she engaged in anal sex, oral sex or any other sexual act with another man or woman (or even beast), unless of course this conduct was consented to. The purpose of the act is to punish the wayward spouse and protect the innocent spouse – purposes the *Blanchflower* court refused to acknowledge. Therefore, Mrs. Blanchflower’s behavior was rewarded and David Blanchflower was punished, a result completely inapposite to the legislature’s intent.

IV. CONCLUSION

The *Blanchflower* court should have moved beyond the plain and ordinary meaning of the term “adultery” and assigned a modern meaning, the meaning which today’s society would attribute to it. If it had done so, it would have furthered the purpose of the Domestic Relations Act.¹¹⁴ Moreover, because no evidence of the enacting legislature’s specific intent existed, the court erred when it engaged in imaginative reconstruction. The meaning attributed to “adultery” in 1842 is not the meaning attributed to it in 1961 nor is it the same meaning attributed to it in 2003. The court did nothing more than indulge its imagination.

There are two purposes of the Domestic Relations Act.¹¹⁵ First, based upon the concept of marital loyalty, the betrayed spouse must be

commits adultery when he or she has sexual intercourse with a person other than his or her spouse” and that “extramarital homosexual, as well as heterosexual, relations constitute adultery”); *S.B. v. S.J.B.*, 609 A.2d 124, 127 (N.J. 1992) (holding that “adultery exists when one spouse rejects the other by entering into a personal intimate sexual relationship with any other person, irrespective of the specific sexual acts performed”); *RGM v. DEM*, 410 S.E.2d 564, 567 (S.C. 1991) (holding adultery constitutes “explicit extra-marital sexual activity . . . regardless of whether it is of a homosexual or heterosexual character”) and *Rera v. Rera*, 420 N.Y.S. 2d 127 (1979) (stating that a husband’s convictions for sodomy committed during the term of the marriage established that he committed adultery).

¹¹¹ *S.B.*, 609 A.2d at 126. While the perspective of the injured spouse is considered when dealing with the laws of marital termination, including adultery, in New Jersey, society’s perspective on adultery can prove to be just as important. For example, in August 2004, New Jersey Governor Jim McGreevey, announced his plans to resign the governorship after his involvement in an “adulterous homosexual affair” was publicly disclosed. *American Morning*, (CNN Aug. 16, 2004) (TV broadcast).

¹¹² *S.B.*, 609 A.2d. at 126.

¹¹³ *Id.* at 157.

¹¹⁴ See *supra*, pt. III (C)(1) discussing the purposes of the Domestic Relations Act.

¹¹⁵ *Id.*

protected and granted permission to exit the marriage on fault-based grounds.¹¹⁶ The second purpose is to punish the way-ward spouse by granting the innocent spouse a favorable distribution of the marital assets.¹¹⁷

A modern definition, one that includes any sexual act committed or performed outside the marriage, better effectuates this purpose as opposed to a 1961 definition coupled with an inference drawn from case law from the 19th century. This modern definition is only one example of the evidence the *Blanchflower* court insisted did not exist. Additionally, Mr. Blanchflower's perspective of the betrayal committed in this case is but another example of evidence that furthers the Act's purpose. Finally, other states have defined the term adultery to include any sexual act committed outside the marriage.¹¹⁸ This definition supports the notion of the Act's purposes.¹¹⁹ Therefore, because the court refused to move beyond the plain and ordinary meaning of the term "adultery" thereby ignoring the Act's purpose, it has set a precedent that will have negative effects on society, and more specifically, on persons with legitimate petitions of dissolution on the ground of adultery.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *See supra* n. 110.

¹¹⁹ *See supra*, pt. III (C)(1) discussing the purpose of the Domestic Relations Act.