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# Housekeeping Ain't No Joke: How Maine's Child Support Guidelines Can Be Biased Against Mothers

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# HOUSEKEEPING AIN'T NO JOKE:[1] HOW MAINE'S CHILD SUPPORT GUIDELINES CAN BE BIASED AGAINST MOTHERS

*James A. McKenna*[2]

## *1. John and Ann in Rumford, ME*

Whether all towns and all who live in them
Are more or less the same, I leave it to you.

- Tasker Norcross

This Essay is about John and Ann, who used to be married, and their dispute over child support for their children, Billy and Sarah. They are both sitting in Rumford District Court, accompanied by their lawyers, awaiting their hearing. The law that will provide the framework for the trial's proceedings is the Maine Child Support Guidelines.[3] This law is biased against Ann, who has primary custody of the children.

John has hired private counsel and, as he waits, he is acutely aware of how much money this proceeding will cost. Ann has signed a non-welfare contract with the Department of Human Services (DHS).[4] For a total of $136 she will be represented by an Assistant Attorney General in her Motion to Amend her divorce decree. The lawyers have exchanged discovery and prepared pre-trial briefs.

Ann and John are fictional. Consequently, in this Essay, the issues generated by Ann's Motion to Amend will be fully debated. Child support, however, is not always so carefully deliberated. Indeed, on some family trial days when the court has ordered several uncontested divorces, granted one or two protection orders, declared five or six men to be the fathers of adrift children, and decided a few Motions to Modify Child Support, it can begin to appear to a lawyer that his briefcase, his suit, his paycheck, the judge, the courthouse, the copy of Title 19 he always carries, and all other Maine laws, indeed all of civilization, can be traced to a first John and Ann and one night of sweet, heedless love and conception.

On such court days "Law" can seem stripped of theory and philosophy. It is not formal or determinate, or property rights or community needs or any other modern conception. Law is sex.

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1. LOUISA MAY ALCOTT, LITTLE WOMEN 107 (Alfred A. Knopf 1988) (1868).
2. Assistant Attorney General, 6 State House Station, Augusta, ME 04333-0006, (207) 626-8800.
3. ME. REV. STAT. ANN. tit. 19, §§ 311-20 (West Pamph. 1996-1997).
4. *See id.* § 448-A.

### 2. *Their Marriage and Divorce*

> And I thought well as well him as another and then I asked him with my eyes to ask again yes and then he asked me would I yes to say yes my mountain flower and first I put my arms around him yes and drew him down to me so he could feel my breasts all perfume yes and his heart was going like mad and yes I said yes I will Yes.
>
> - James Joyce, *Ulysses*[5]

John and Ann met in Portland when he was twenty-one years old, a senior in college, and she was just eighteen. They began to date. Eventually John graduated from the University of Southern Maine with a four-year business degree. It was then that Ann told him she was pregnant. At that time Ann was waitressing during the day and taking night courses at Andover College. She was planning to earn a two-year associate's degree.

Once Ann became pregnant they decided to marry and she dropped out of college. After three years of marriage they had two children: Billy, age three, and Sarah, age one. But their marriage was troubled. A divorce seemed the only answer. It was uncontested.

Ann received property worth $3,600 and a lump sum alimony settlement of $2,000. At the time of their divorce John was earning $26,500 annually in the business office of a Maine shoe manufacturer. He was paying $1,248 in health insurance premiums, which covered the two children. Ann was also working full-time as a waitress and earning roughly the minimum wage, which, with tips, amounted to $8,008 per year.[6] Usually she took jobs at night, so John could help take care of the children. However, they still had to pay $50 a week in child care costs. Based on these figures their combined annual gross income was $33,260 and John's share of this income was 76%. Applying the Maine Child Support Guidelines, the proper support amount was presumed to be $128 a week, plus $50 per week in child care costs, for a total support obligation of $178. John's 76% share of this figure was $135.

On the day they were divorced, only Ann and her attorney attended the hearing. Her attorney asked her a rapid series of questions, as if written by a dour James Joyce in a black parody of his Molly Bloom soliloquy:

> You were married in 1985?
> Yes.
> And you've divided your personal property?
> Yes.
> And he will take the Ford Escort?

5. JAMES JOYCE, ULYSSES 783 (Modern Library Edition 1992) (1914).
6. *See* ME. REV. STAT. ANN. tit. 26, § 664 (West Supp. 1996-1997).

Yes.
And you will receive a lump sum payment of $3,600?
Yes.
And you will make a $200 lump sum payment toward a Visa Card debt?
Yes.
And this marriage must end due to irreconcilable differences?
Yes.

And their divorce was granted.

It has now been six years since their divorce and Ann has filed a Motion to Modify the Child Support under the Divorce Decree.

### *3. John Is A Good Father*

John's career as a business manager has progressed. He is now earning $35,000 per year. Shortly after his divorce John inherited from his parents the house where he now lives.

Since his divorce John has remarried and has a one-year-old daughter, Libby. John's new wife works part-time for a temp agency and earns $7,000 per year. But primarily she takes care of Libby (and Billy and Sarah on weekends).

John is an energetic, pleasant man who has great plans for his future. He has enrolled in a night course that will lead to an accounting degree and, he hopes, a C.P.A. license. But his tuition expenses are significant and he is still paying off his college loans. Nonetheless, John is never late with his child support payments of $135.28 a week.[7] John believes the Maine shoe industry is declining and that his long-term prospects with his company are not favorable. An accounting degree will provide valuable security for his young family.

John is a good father, not only to Libby but also to Billy and Sarah. Each Friday afternoon, he drives to Rumford, where Ann lives, picks up Billy and Sarah, and returns to Portland for the weekend. Early Monday morning he wakes them and drives them back to their school in Rumford. Going and coming John treats his children to a meal at a restaurant. The children also spend with him a total of three weeks vacation. John's inherited house is a pleasant three-story home on a street off of Forest Avenue. Billy and Sarah are usually glad to visit John on the weekends. They know they are

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7. Ann is fortunate:

> Of the 10 million women living with children under 21 years of age whose father is [sic] not living in the household, only 58% were awarded child support payments. Slightly more than half of these women received the full amount of payments due. In 1991, 35.6% of single mothers fell below the poverty line.

Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2211 n.74 (1995) (citations omitted).

loved and his house is a definite improvement over their small apartment in Rumford.

John finds his visitation schedule to be difficult and expensive. It usually requires him to take three hours off from work (two on Friday and one on Monday), which he makes up by working late during the week. But John feels such hardships are worth it. He wants Billy and Sarah to grow up knowing his new family is also theirs.

In replying to Ann's Motion to Modify their Divorce Decree, John's lawyer has requested a *downward* deviation from the Guidelines amount. John states that his expenses are so high (visitation, tuition, etc.) he will be forced to see his children less.

### *4. Ann Is A Good Mother*

> There are four things a woman needs to know.
> She needs to know how to look like a girl, act like a lady, think like a man and work like a dog.
>
> - Caroline K. Simon,
> Secretary of State
> for New York[8]

It has been six years since their divorce and Ann, now twenty-eight years old, believes John should be paying more child support than he was ordered to pay when they divorced. Ann lives in a small apartment in Rumford, which is where she grew up and moved back to when they separated. Ann is a good parent who spends time with her children and works hard to support them. She works as a waitress at a downtown restaurant but is only earning an average of $5.15 per hour. Her gross income this past year was $10,712.[9]

Ann's mother lives nearby and often watches Billy and Sarah while their mother is working. Still, Ann must pay an average of $70 a week in child care. Often, Billy wakes up at night from a nightmare and cries out for his mother or for John. Because of this, Ann prefers not to accept evening jobs. But after a few slow weeks she feels forced to. She receives her biggest tips serving dinner. Also, her mother is more often available at night to baby-sit.

Billy recently began playing hockey in a peewee league. He loves this sport, but it is quite expensive. In addition to paying his court-ordered child support, John has been giving Ann extra money for

8. Caroline K. Simon, N.Y. TIMES, Nov. 9, 1959, at 33.

9. Ann, without John's child support payments, would fall below the 1997 poverty level for a family of three. The federal poverty level for 1997 is $12,984. The most recent federal poverty levels can be obtained by contacting the Maine Department of Human Services, Bureau of Family Independence.

hockey equipment. But this does not cover the entire cost of $300 for the season and Ann has been reluctant to ask for more.[10]

Ann is a tall, attractive woman, with a naturally friendly personality. Because of her demeanor and energy she receives good tips. While she seems quite poised, she often wonders just how competent she is. When she was a teenager in high school, she was a clerk in a Pay Less Shoe Source. After she graduated she started waitressing. This is the extent of her job experience.

Ann has a boyfriend who is very good to her children. He often buys them clothes and takes them out to meals. One or two times a week he spends the night.

### 5. *Ann's Motion To Amend Their Divorce Decree*

Ann has now filed for an increase in child support, claiming John's increased salary represented a substantial change in circumstances from those that existed at the time of the original divorce decree.[11] She signed a non-welfare contract with DHS and an Assistant Attorney General was assigned to represent her.[12] Ann appreciates how good a father John has been but believes he should be paying more. Given John's current salary of $35,000 (and Ann's current salary of $10,712), the Child Support Guidelines[13] indicate that he should be paying $22.72 more each week in child support, or $158 as opposed to $135.28.

In John's answer to Ann's Motion to Amend, he did not contest that he should be paying increased child support. However, he asked the court to order a downward deviation from the amount the Guidelines indicated he now should pay. When Ann received John's counter motion, she met with her attorney. They carefully considered John's reasons for seeking a downward deviation. But the more they discussed it, the more distressed Ann became. They decided to amend their motion. Now Ann would be seeking not only the Guidelines amount but also an additional upward deviation.

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10. Unfortunately, Ann just misses being eligible for food stamps. *See* 7 U.S.C. § 2014 (1994). When John's 1996 child support of $8,112 is added to Ann's earnings of $10,712, her total income is $18,824 and the 1996 limit for food stamps for a family of three is $17,268.

11. *See* ME. REV. STAT. ANN. tit. 19, § 319(2) (West Pamph. 1996-1997). Ann believes that if the Guidelines were applied to her and John's most recent income, the child support order would be at least 15% higher and therefore the court must conclude there has been a "substantial change of circumstances." *Id. See also id.* § 752(12); Finn v. Finn, 534 A.2d 966, 968 (Me. 1987) (moving party must show by a preponderance of the evidence that a material change in circumstances warranted modification of child support). But even if there has been a substantial change, the court still has discretion whether to order increased child support.

12. DHS can only represent Ann on child support issues. *See* ME. REV. STAT. ANN. tit. 19, § 319(1) (West Pamph. 1996-1997).

13. *See id.* §§ 311-320.

### 6. *Maine's Postmodern Child Support Guidelines*

> Then the Lord came down upon Mount Sinai, on the top of the mountain; and the Lord called Moses to the top of the mountain; and Moses went up.
>
> - The Book of Exodus[14]

As the judge takes her chair and picks up John and Ann's file, an observer might assume she is overwhelmed by this case. In part, this is because of the Rumford court room. The judge, sitting behind a large, tall bench, seems both small and distant. Further, looming over her is an enormous, magnificent mural, painted in 1902 and entitled "The Birth of Law." It shows a fearsome Moses, his red robes flowing, descending from Mount Sinai. He is grasping two stone tablets and his eyes are cast back at a storming, lightening-bolted cloud. Any judge might seem puny and indecisive beneath this mural.

The judge is about to grapple with a statute best described as postmodern. When the Maine Legislature enacted the Child Support Guidelines, it seemed to abandon any pretense that this statute would set forth clear rules to be imposed by disinterested judges.[15] Instead, the Guidelines grant a judge extraordinary discretion in determining the amount of child support and then present her with a grab-bag of sometimes conflicting rules and standards. Indeed, the Guidelines are almost the opposite, philosophically and practically, of Moses's Ten Commandments and their apparent formal, unyielding directives.

What does it mean to call a statute postmodern? Such a statute overtly confirms the radical claim that *any* law can be shown to be inherently indeterminate,[16] a jumble of differing directives. The postmodern statute will set forth, without apology or subterfuge, a particular law's competing principles. It is purposefully left to the litigants and, ultimately, the court to resolve those contradictions.

The Guidelines will allow the judge great discretion in deciding this case and she will need it. This is because both John and Ann's arguments will be persuasive—not only legally, but emotionally.

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14. *Exodus* 19:20 (New King James).

15. *See generally* Carl E. Schneider, *The Tension Between Rules and Discretion in Family Law: A Report and Reflection*, 27 FAM. L.Q. 229 (1993) (discussing the tension, in family law, between the appropriate application of legal "rules" on the one hand and judicial "discretion" on the other).

16. An indeterminate law is a law that embodies rules or standards that can be read as contradictory. *See generally* Mark Kelman, A GUIDE TO CRITICAL LEGAL STUDIES 15-63 (1987).

### 7. *The Maine Child Support Guidelines*

> The family has been for centuries the fundamental unit of society. The modern family, however, is far different in structure, status and internal social and legal relationship than the family of ancient times.
>
> - *Rozell v. Rozell*[17]

The Maine Child Support Guidelines reflect the fact that the modern family has been slowly "casting off its ancient past."[18] The Guidelines seem to embrace both the modern contractual view of marriage—that the parties are equal, autonomous partners, as much business associates as lovers[19]—and the older traditional view of the family as a hierarchical organization of clearly defined roles and responsibilities. Therefore, the child support calculation does not simply involve the addition of income and the subtraction of expenses. The emotional needs of father, mother, and child can also figure in the calculation.[20] And, unfortunately, adding and subtracting both dollars and love is a calculus few lawyers or judges have learned.

Section 315 of the Guidelines[21] establishes a rebuttable presumption that the parental support obligation derived from section 316's Support Guidelines must be paid.[22] Section 317 allows the court to "deviate" from the Guidelines for seventeen separate reasons.[23]

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17. 22 N.E.2d 254, 255 (N.Y. 1939).

18. *See* Janet L. Dolgin, *The Family in Transition: From* Griswold *to* Eisensteadt *and Beyond*, 82 GEO. L.J. 1519, 1519 (1994) (discussing changes in the family since the Industrial Revolution and its effect on the development of law).

19. *See generally id.* at 1534.

20. For example, section 317(3)(G) allows a deviation from the Guidelines based on the "physical and emotional conditions of the child or children." ME. REV. STAT. ANN. tit. 19, § 317(3)(G) (West Pamph. 1996-1997).

21. These guidelines were adopted as emergency legislation by Public Law 1989, Chapter 834 Part A, which became effective April 17, 1990. They replace the short-lived judicial child support guidelines, which were effective October 12, 1989. *See* Moore v. Moore, 586 A.2d 1235, 1235-36 n.2 (Me. 1991). Maine's Guidelines have not been updated since their adoption. There is reason to believe that the self-support reserve for the non-custodial parent should be increased from $6,000 to the current federal poverty guidelines for one person, $7,740. *See supra* note 9.

22. ME. REV. STAT. ANN. tit. 19, § 315 (West Pamph. 1996-1997).

23. *See id.* § 317. This section has been in effect since April 17, 1990. It reads as follows:

> § 317. Deviation from child support guidelines
>
> 1. Rebutting presumption. If the court or hearing officer finds that a child support order based on the support guidelines would be inequitable or unjust due to one or more of the considerations listed under subsection 3, that finding is sufficient to rebut the presumption established in section 315.
>
> 2. Proposed findings. A party in a court action proposing deviation from the application of the support guidelines shall provide the court with written proposed findings showing that the application of the presumptive amount would be inequitable or unjust.

Not only must the court identify specific grounds for ordering a

3. Criteria for deviating from support guidelines. Criteria that may justify deviation from the support guidelines are as follows.

A. The nonprimary residential care provider is in fact providing primary residential care for more than 30% of the time on an annual basis;

B. The number of children for whom support is being determined is greater than 6;

C. The interrelation of the total support obligation established under the support guidelines for child support, the division of property and any award of spousal support made in the same proceeding for which a parental support obligation is being determined;

D. The financial resources of the child or children;

E. The financial resources and needs of a party, including nonrecurring income not included in the definition of gross income;

F. The standard of living the child or children would have enjoyed had the marital relationship continued;

G. The physical and emotional conditions of the child or children;

H. The educational needs of the child or children;

I. Inflation with relation to the cost of living;

J. Available income and financial contributions of the domestic associate or current spouse of each party;

K. The existence of other persons who are actually financially dependent on either party, including, but not limited to, elderly, disabled or infirm relatives, or adult children pursuing post-secondary education. If the primary care provider is legally responsible for other minor children who reside in the household and if the computation of a theoretical support obligation on behalf of the primary care provider would result in a significantly greater parental support obligation on the part of the nonprimary care provider, that factor may be considered;

L. The tax consequences of a support award, including the substantial monetary benefit that a party may derive from any federal tax credit for child care expenses;

M. The fact that the incremental cost of health insurance premiums required to be paid by a party, notwithstanding the deduction of these premiums from gross income, exceeds 15% of that party's share of the total support obligation;

N. The fact that income at a reasonable rate of return may be imputed to nonincome-producing assets with an aggregate fair market value of $10,000 or more, other than an ordinary residence or other asset from which the children derive a substantial benefit;

O. The existence of special circumstances regarding a child 12 years of age or over that, for the child's best interest, requires that the primary residential care provider continue to provide for employment-related day care;

P. An obligor party's substantial financial obligation regarding the costs of transportation of the child or children for purposes of parent and child contact. To be considered substantial, the transportation costs must exceed 15% of the yearly support obligation; and

Q. A finding by the court or hearing officer that the application of the support guidelines would be unjust, inappropriate or not in the child's best interest.

deviation, it must also find that it would be "inequitable or unjust" to apply the Guidelines.[24]

One way to look at these laws is to see the mathematics-based Guidelines, set forth at section 316, as reflecting the modern view of marriage as a contract between independent persons. The section 317 deviations would then represent the older view of the family, reflecting the fact that mothers, fathers, and children are bound to each other by loyalty and love as well as financial needs. It is section 317 that recognizes the possibility that child support based only on income and expenses might be "inequitable" or "unjust" or "inappropriate" or "not in the child's best interest."[25]

The section 316 Guidelines are straightforward. A "[t]otal support obligation" is calculated by adding the parents' combined annual gross income along with "child care costs" and "extraordinary medical expenses."[26] The total support obligation must then be divided between the parties in proportion to their respective gross incomes.[27]

Section 316(4)(A)-(E) describes five "[s]pecial circumstances" that can affect the above calculation.[28] The one that directly concerns John and Ann is found at paragraph A, which allows John to calculate a theoretical support obligation for his child, Libby, who he now supports in his second family.[29] He then subtracts this obligation from his annual gross income.[30]

While the section 316 Guidelines are inflexible, the section 317 deviations are not. Section 317 allows the court to overcome the Guidelines' presumption and deviate if the court concludes the amount ordered would be "inequitable or unjust"[31] due to one of seventeen specific considerations.[32] It is hard to imagine that any parent could not, in good faith, go through the seventeen considerations—inflation, the child's physical or emotional or educational needs, etc.—and not find one that might justify deviating from the section 316 Guidelines.

But perhaps the most inviting ground for deviation is the final, open-ended claim found at section 317(3)(Q): "A finding by the

24. *See* Ouellette v. Ouellette, 687 A.2d 242, 293 (Me. 1996).

25. ME. REV. STAT. ANN. tit. 19, §§ 317(2), (3)(Q) (West Pamph. 1996-1997) (general standards for deviation).

26. *Id.* §§ 316(1),(2).

27. *See id.* § 316(3).

28. *Id.* § 316(4)(A)-(E).

29. *See id.* § 316(4)(A).

30. Section 316(4)(A) requires that this calculation be made in all cases, "except that it is not applied when the result would be a reduction in a [child support] award previously established." *Id.* If Ann were to have another child, she would *not* receive this deduction.

31. *Id.* § 317(2).

32. *See id.* § 317(3).

court or hearing officer that the application of the support guidelines would be unjust, inappropriate or not in the child's best interest."[33] This is not only open-ended, but it is also surprising. Apparently a court could conclude that the Guidelines set child support at an amount that was in a child's best interests, but nonetheless find the amount to be "unjust" or "inappropriate."

With the hearing now at hand, both John and Ann and their lawyers are ready to argue vigorously for section 317 deviations from the Guidelines. Given the nature of the child support statute, each will have powerful arguments: John for a downward deviation; Ann, upward.

### *8. Pragmatism and the Postmodern Statute*

The law is not the same at morning and at night.

- Proverb

Lawyers who employ a postmodern statute such as the Child Support Guidelines will need to be pragmatic. Theories of law or maxims of interpretation, if resonant in a particular case, will certainly play a part. But the day will often be carried by careful attention to the facts and "practical reasoning."[34] To an important extent, the differences between John and Ann's lives and aspirations[35] will dictate the "plain meaning" of the Guidelines.[36] This also means that the lawyers representing John and Ann must cast aside any biases they might have concerning the proper roles of fathers and mothers.[37] Otherwise, their interpretations of the Guidelines—the applications of this open-ended law to their client's circumstances—might well end up being narrow and unpersuasive.

William N. Eskridge, Jr. describes the type of pragmatic statutory interpretation that will be used by the lawyers representing John

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33. *Id.* § 317(3)(Q).

34. For Judge Richard Posner, "[p]ractical reason 'is a grab bag that includes anecdote, introspection, imagination, common sense, empathy, imputation of motives, speaker's authority, metaphor, analogy, precedent, custom, memory, 'experience.'" STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH 203 (1994) (quoting RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 73 (1990)).

35. *See* Daniel A. Faber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 814 (1993) (suggesting that women may "emphasize different aspects of the law than men").

36. In Maine, when interpreting statutes, a court will first try to search out a statute's "plain meaning." Jordan v. Sears, Roebuck & Co., 651 A.2d 358, 360 (Me. 1994). This is an extremely slippery slope when dealing with the overtly indeterminate Child Support Guidelines. Only if they are not successful will the court attempt to divine the Legislature's intent. *See id.*

37. This is a harder task than might be imagined. As John Maynard Keynes stated in 1936, "Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economists." JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY 353 (1939).

and Ann. Eskridge calls his theory "dynamic" statutory interpretation[38] and it is admittedly postmodern. When a law is indeterminate, there is more than one "plain meaning." Eskridge believes that the facts of each specific case will illuminate the legislature's intent and purpose.[39] This can force lawyers and judges to become pragmatic champions for numerous and changing perspectives when interpreting the statute.

Eskridge is admittedly controversial: dynamic statutory interpretation may result in a conclusion that "is not necessarily the one which the original legislature would have endorsed . . . ."[40] In the case of John and Ann, the perspectives that the lawyers and judges might use could include—expressly stated or not—theories of liberalism, feminism, law and economics, law and literature, and others. A "dynamic" interpretation of the Guidelines will not always be consistent: "[A]s social context changes, as new interpreters grapple with the statute, and as the political context changes; the story of a statute becomes a small part of the larger web of institutions and practices in a society."[41] In other words, the "plain meaning" of the Guidelines may be constantly shifting, depending on the parents, the economy, the place, the children's personalities, and numerous other considerations.

Of course, this does not mean that lawyers can make any argument they wish or that judges are super-legislatures able to "repeal" a statute through reckless interpretations. But in the case of a postmodern statute such as the Child Support Guidelines it is hard not to conclude that the Legislature itself was inviting a dynamic interpretation of its statute. Sections 316 and 317 can be harmonized in different cases but each song might be different.[42] An entirely reasonable reading of the Legislature's intent was that the

38. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).

39. *See id.* at 48.

40. *Id.* at 5. A recent comment by Maine District Court Judge John Sheldon supports this idea. In his essay *How to Try A Divorce*, 12 ME. B.J. 10, 11-18 (1997), Judge Sheldon argues that the Maine alimony statute "*doesn't mean anything.*" He then offers the following advice:

> Take alimony, for example. There are almost as many different theories of alimony as there are judges. At a recent CLE [Continuing Legal Education] seminar, three different judges ascribed to three different theories: need (Ron Russell), breach of contract (Jessie Gunther), and unjust enrichment (me). With me, you'll get about as far on a need-based alimony argument as you will with an argument that the earth is flat. On the other hand, if you argue unjust enrichment to a traditionalist like Jessie Gunther all you're likely to win is the judicial version of a Bronx cheer. If you're not sure what theory the judge in your case believes in, ask in advance.

*Id.* at 10.

41. *See* ESKRIDGE, *supra* note 38, at 199 (internal references omitted).

42. *See* Daniels v. Tew Mac Aero Servs., Inc., 675 A.2d 984, 987 (Me. 1996) ("We first examine the plain meaning of the statutory language, seeking to give effect to

Guidelines should be followed, unless it resulted in an "unfair" child support order. Who determines what is "unfair"? The Legislature does not; rather, it is the presiding judge. Both John and Ann's lawyers will argue that their "dynamic" interpretation of the statute will justify a section 317 deviation from the Child Support Guidelines.

*9. Ann's Argument for an Upward Deviation*

> Considering that Mary Carmichael was no genius, but an unknown girl writing her first novel in a bed-sitting-room, without enough of those desirable things, time, money, and idleness, she did not do so badly, I thought.
>
> Give her another hundred years, I concluded . . . give her a room of her own and five hundred a year, let her speak her mind . . . and she will write a better book one of these days. She will be a poet.
>
> - Virginia Woolf, 1929[43]

The parties do not dispute that there has been a "substantial change in circumstances" since John and Ann were divorced in 1990. Based on the parties' current income, a child support order would now total $158, as opposed to the $135 order when they were divorced. This just satisfies the standard in title 19, section 319(2) that if the new child support order varies more than fifteen percent from the old, then the court shall "consider the variation a substantial change of circumstances."[44]

With the parties in agreement on each other's income, Ann's attorney begins by briefly describing to the judge the upward deviation her client seeks. Ann then takes the stand and begins discussing the six separate grounds she believes justify an upward deviation from the $158 Guidelines amount.

*A. Section 317(3)(E): The financial resources and needs of a party, including nonrecurring income not included in the definition of gross income*

Ann readily admits that her children spend a good deal of time with their father. However, the great majority of their days are spent in Rumford living on her limited income. Though Ann is usually able to work forty hours each week, her annual salary of $10,712 is well below the poverty level for 1996, which is currently set at $12,980 for a family of three.[45] Further, in order to save on child care costs, Ann often works at night when her mother is more readily available to baby-sit. Without her mother's assistance and John's

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the legislative intent. In so doing, we remain mindful of the whole statutory scheme . . . so that a harmonious result may be achieved.") (citations omitted).

43. VIRGINIA WOOLF, A ROOM OF ONE'S OWN 98, 164 (1957).

44. ME. REV. STAT. ANN. tit. 19, § 319(2) (West Pamph. 1996-1997).

45. The federal poverty standard for a family of three is now $13,300. *See* 62 Fed. Reg. 10,856; 10,859.

child support, Ann and her children would barely survive. John, on the other hand, now earns $35,000, more than 300% more than Ann earns.

*B. Section 317(3)(F): The standard of living the child or children would have enjoyed had the marital relationship continued*

Ann would like to return to school as John has, finish her education, and find a better job. But it seems impossible. She is resigned to working as a waitress for the foreseeable future. She sees little hope that her children will ever be able to afford the kind of activities and experiences that she and John could have provided them had they not divorced.[46] Ann spends some time discussing Billy's newfound love of hockey and the fact that he had to quit the peewee league because of the expense. If she and John had stayed married, such activities could easily have been afforded; and the children would have been spared the many hours of child care.

*C. Section 317(3)(I): Inflation with relation to the cost of living*

Ann enters into evidence the inflation rates for the last six years. Not only has John's salary increased at a faster rate than Ann's, but inflation has made the effective gap even greater.

*D. Section 317(3)(N): The fact that income at a reasonable rate of return may be imputed to nonincome-producing assets with an aggregate fair market value of $10,000 or more, other than an ordinary residence or other asset from which the children derive a substantial benefit*

Ann believes that because John inherited his home from his father, his lack of mortgage expense should be grounds for increased child support. She realizes that his house is a "residence" and that the children receive a "substantial benefit" when visiting the home; however, it is simply not fair that John's significant mortgage savings should not somehow be reflected in his ability to pay child support. After all, if he had received a trust fund from his father, the proceeds would have been included in his gross income, pursuant to title 19, section 311(5)(A).

*E. Section 317(3)(J): Available income and financial contributions of the domestic associate or current spouse of each party*

John's new wife earned $7,000 last year. And while it is true that John also has a new, one-year-old daughter, it does not seem fair to Ann that John's family income, less child support, figured at current incomes would be $25,880.24 while hers, including John's child support, would total only $19,831.76. And she has custody of their two

46. *See* Marilyn Ray Smith, *Grounds for Deviation*, 10 FAM. ADVOC. 22, 24 (Spring 1988) (asserting that if parents with two children divorce, the custodial parent needs 77% of the pre-divorce income to maintain the children's pre-divorce standard of living; the non-custodial parent needs 38%). *See also* Cochran v. Cochran, 419 S.E.2d 419, 421 (Va. Ct. App. 1992) (recognizing that the judge should consider the standard of living established during marriage).

children while John has custody of only one. What is more, pursuant to the title 19, section 316(4)(A) "special circumstances," John is allowed to subtract from his gross income $4,420, the "support" he pays to raise his one-year-old child, Libby. If Ann had a new child with another man, she would not be granted this benefit.

"There's one thing you have to understand," says Ann. "It all comes down to me—job, clothing, food, caring for them. I'm the only one. I need help."

*F. Section 317(3)(Q): A finding by the court or hearing officer that the application of the support guidelines would be unjust, inappropriate*[47] *or not in the child's best interests*

Finally, Ann appeals to the broadest of the criteria for a deviation: She argues that following the Guidelines amount would not be in Billy and Sarah's best interests. At this point, Ann finally becomes emotional. She knows how her children are growing up. Most afternoons nine-year-old Billy takes care of Sarah for a few hours. There is little supervision. At night, they are often at their grandmother's apartment, merely marking time until their mother gets off of work. And when Ann has time to spend with them, she invariably finds herself cleaning or cooking or doing other household duties. She is doing everything she can to make sure they receive a good education and experience the benefits enjoyed by other children. But she is fearful that her children are marching in a kind

47. An "inappropriate" child support order might be one in which the custodial parent's actual expenses in raising the child differed markedly from the expenses calculated by Thomas Epenshade based on 1972-73 data and adopted by Dr. Robert Williams of the Federal Guidelines Advisory Panel (which became one of the bases for Maine's Guidelines). For this reason, some commentators suggest that counsel arguing for a deviation should familiarize themselves with Epenshade's (and consequently the Maine Guideline's) assumptions as to the cost of raising a child. For example, Epenshade calculated a family spent $284.74 each month on two children for transportation costs. But what if the custodial parent had no car and low transportation costs? This might argue for an upward deviation. *See* Laura W. Morgan, *Deviation From State Child Support Guidelines*, 7 DIVORCE LITIG. 118, 122 (1995). Here is Morgan's summary of Epenshade's expense findings based on a two-parent, two-child family of medium socioeconomic status, where the wife works part-time:

FAMILY FUNDS SPENT ON CHILDREN

| ITEM | PERCENT | TWO CHILDREN |
|---|---|---|
| Transportation | 25.1 | $248.74 |
| Food | 18.0 | 178.38 |
| Household Goods | 10.3 | 102.07 |
| Recreation | 9.6 | 95.14 |
| Shelter | 9.1 | 90.18 |
| Clothing | 7.3 | 72.34 |
| Health Care | 5.7 | 56.49 |
| Miscellaneous | 5.6 | 55.50 |
| Fuel & Utilities | 4.7 | 46.48 |
| Food Away from Home | 4.5 | 45.90 |

*Id.* at 131.

of lockstep with the many other poor children in her run-down neighborhood. They will graduate from high school. They will find low-paying jobs. They will do the best they can, but without increased child support their horizons may never be higher than that. Describing her fears, Ann suddenly stops and looks at the judge: "You're a woman. Do you have children? Do you know what I mean?"

### *10. John's Argument for a Downward Deviation*

Who drags the fiery artist down?
What keeps the pioneer in town?
Who hates to let the seaman roam?
It is the wife, it is the home.

- Clarence Day[48]

John's argument for a downward deviation in his child support is based on both the expense of being an active father to Billy and Sarah and his career plan to become an accountant. He has identified three grounds for a deviation.[49]

*A. Section 317(3)(A): The nonprimary residential care provider is in fact providing primary residential care for more than 30% of the time on an annual basis*

John believes the children's weekly visits with him comprise more than 30% of the week. They are with him six hours on Friday, all of Saturday and Sunday, and seven hours on Monday for a total of sixty-one hours out of a possible 168. This equals 36% of the week. In addition, the kids spend three weeks of their school vacation with John. Given his increased expenses during the time Billy and Sarah are with him—gas, food, entertainment—John believes a deviation should be granted.

*B. Section 317(3)(P): An obligor party's substantial financial obligation regarding the costs of transportation of the child or children for purposes of parent and child contact. To be con-*

48. Clarence Day, *Wife and Home*, *in* THE NORTON BOOK OF LIGHT VERSE 288 (Russel Baker ed., 1986).

49. One possible ground for a deviation that John did *not* claim was section 317(3)(L), the tax consequences of their divorce decree's support award. This is because John had received from Ann the right to claim the $2,500 deduction from taxable income for both Billy and Sarah. *See* I.R.C. §§ 63(a), 151, 152 (1994). He was paying more than 50% of their support and Ann did not have to pay income taxes, due to the fact she was eligible for the Earned Income Credit. *See* CCH INCORPORATED, 1996 U.S. MASTER TAX GUIDE 71, 91 (7th ed. 1996). Thus, Ann had no need to claim a tax credit for her child care costs. Nonetheless, the tax consequences of a support order can be a commonly claimed ground for a deviation. *See* Matthew Dyer, *Child Support*, 107-08, a presentation by Matthew Dyer, Esquire at the November 17, 1995 Maine State Bar Association Seminar, "Practical Skills For the Family Lawyer."

*sidered substantial, the transportation costs must exceed 15% of the yearly support obligation*

John also argues that he should be entitled to a deviation because it is very expensive for him to pick up and take back his children each weekend. He outlines for the judge the following expenses:

(1) two hours of missed work on Friday, $28;

(2) one hour of missed work on Monday, $14;

(3) one hundred miles of travel each way, every weekend at twenty-two cents a mile, $88; and

(4) one meal each way, $10.

These expenses total $150 a week versus his weekly child support obligation of $174. As his visitation costs clearly exceed 15% of his child support obligation, John believes that this is also grounds for a deviation. He further argues that if a deviation is not granted, he may be forced to see his children less often. As he says this, John is looking directly at the judge and she seems receptive. After all, every day she sees broken families and parents and children growing ever further apart. At this point, John's lawyer offers in evidence a study from the 1987-88 National Survey of Families and Households, which shows "that a third of the separated and divorced fathers whose children were born within a marriage saw those children no more than once a year, and over half saw them no more than a few times a year."[50]

*C. Section 317(3)(Q): A finding by the court or hearing officer that the application of the support guidelines would be unjust, inappropriate or not in the child's best interests*

John's final argument is based on economics. He is spending over $2,000 each year in order to earn an accounting degree. Add this to his child support obligation and the extra expenses incident to Billy and Sarah's frequent visits, and he feels he is at a breaking point. Something must give. If the court will not decrease his child support, he may have to drop out of his accounting classes. And this would unfairly diminish the future of both his new family and Billy and Sarah's future. To do so would be "unjust," "inappropriate," and most certainly not in his children's best interests.[51]

John describes the declining shoe manufacturing industry in Maine. Shoe employment in Maine is on a long, steady slide. The Maine Department of Labor has estimated that today about 8,000

50. Robert G. Williams & David A. Price, Analysis of Selected Factors Relating To Child Support Guidelines 17 (Jan. 19, 1993) (on file with the Office of Child Support Enforcement, Ohio Department of Human Services) (citing Judith A. Seltzer, *Relationships Between Fathers and Children Who Live Apart: The Father's Role after Separation,* 53 J. MARRIAGE & FAM. 79 (1991)).

51. True v. True, 615 A.2d 252, 253 (Me. 1992) (explaining that deviation from child support guidelines is not an abuse of discretion if an order based on Guidelines would be inequitable or unjust).

persons are employed in the Maine footwear industry, compared to more than 20,000 two decades ago.[52] First, Maine lost business to the South, then to foreign companies. In order for the court to better understand the shoe business, John offers into evidence a *Portland Press Herald* article:

> Part of the reason the Maine shoe industry is unlikely to experience a long-term resurgence is that even Maine-based companies are looking overseas for their production needs. Bass, which employs about 1,500 people in Maine, has production plants in Puerto Rico, the Dominican Republic, and Taiwan.
>
> Uppers are made in one plant, bottoms in another, and Maine primarily is known for hand sewing and finishing. "It's all part of modern manufacturing . . . ."[53]

Accounting, John argues, will be a career that grows with the economy. Shoe manufacturing will not. It is true he has done well to date. Even so, his company has been steadily downsizing its business office. He can see his family sliding into the ranks of the near poor in the not too distant future. If this happens, his new family, and Billy and Sarah, will lead difficult lives with limited opportunities.

To this point John has been calm and factual. He has only one final point to make, and as he does so he becomes exasperated:

> My family, and that includes Billy and Sarah, is the reason I work so hard. You are hurting them if you stop me from bettering myself. If I were to become an accountant, I would prosper, my family would prosper, and Billy and Sarah, as my income increases, will prosper. Isn't that the goal of the free market: to encourage and reward productivity? Yet the Child Support Guidelines accomplish the opposite. It is simply not right.

Without knowing it, John's final argument enforces the view that the roles of husbands and wives (and ex-husbands and ex-wives) have evolved dramatically over the last century. John and Ann are no longer primarily defined by their role as father and mother.[54] Rather, what is most important today is their role in the economy.

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52. Jeff Smith, *Stepping Out*, PORTLAND PRESS HERALD, Sept. 20, 1992, at 1F; *see also* DEIRDRE MAGEEAN, MAINE CTR. FOR ECON. POL'Y, WELFARE REFORM—WHAT CAN WORK IN MAINE 9-10 (1994) (from 1989-92, Maine lost 40,000 jobs; 70% of these were in industries that paid higher than average wages and offered full-time employment and benefits).

53. Smith, *supra* note 52.

54. *See* Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U.L. REV. 1 (1996). The first half of the nineteenth century saw the appearance of a "cult of domesticity":

> The market was understood as cold, competitive, male, and aggressively self-interested, while the family was understood as a haven for altruism, affection, higher moral calling, and refuge from the market world. The

If the judge listening to John were a proponent of the Law and Economics school, then John's final words would carry much weight. John wants to be more productive in his career. Law and Economics considers productivity to be a moral virtue and wealth maximization to be a morally defensible goal.[55]

John has thought carefully of what his final words should be:

> I want to go into business for myself. Think of me as a small corporation. And my children—all of them—as the stockholders. If they were allowed to vote on whether their corporation should slowly diminish and die or grow and become more productive, how do you think they would vote? They would vote for the future, not the past. I'm asking you to reduce my child support so I can become an accountant. It's my only hope, and we all, even Ann, will benefit.

### *11. The Judge And Legal Theory*

> It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account.
>
> - Oliver Wendell Holmes, Jr.[56]

The judge knew about this case for some time. Even before the hearing, she recognized John and Ann's plight as one that raised many troubling issues. She resolved to use this case as an opportunity to research both the child support statutes and the economic theories on which they were based. At the pre-trial hearing, the lawyers had agreed to submit briefs on how the Guidelines were to be interpreted.

The judge is by no means a radical. She is aware of the claims by critical legal scholars, radical feminists, critical race theorists, and other skeptics that many legal rules are less than objective and simply reflect political biases. For example, she could imagine Ann's lawyer arguing that the Maine Child Support Guidelines expressed the prejudices of prosperous male legislators[57] and emphasizing the fact that John and other non-custodial parents (almost always men)

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> idea that women serve an essential moral and spiritual role developed, but it accompanied the idea that women were economic dependents without cash. Their emotional role was praised, but their material labor was obscured.

*Id.* at 23-24 (citations omitted).

55. *See* Richard A. Posner, *Wealth Maximization Revisted*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 85, 97-99 (1985).

56. Adkins v. Children's Hosp., 261 U.S. 525, 569-70 (1923) (Holmes, J., dissenting).

57. *See* Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453, 454 (1996); *see also* Sylvia A. Law & Patricia Hennessey, *Is the Law Male?: The Case of Family Law*, 69 CHI.-KENT L. REV. 345 (1993).

receive a reduction if they remarry and have additional children but custodial parents (mothers) do not.[58] The judge believes such theories can be wildly overstated; however, she is sensitive to how malleable many laws are and how great a judge's discretion can be. For example, she knows she must be particularly careful with section 317's broad standards for a deviation from the Guidelines. Over the years, she consciously adopted the stance of a pragmatic realist and took as her guides the cold but beautiful writings of Justice Holmes and the decisions of California Supreme Court Justice Roger Traynor.

She agrees with Holmes that judges are not simply positivists, using logic to apply clear rules to specific facts (especially when dealing with a statute like the Maine Child Support Guidelines). Or, as Holmes states in his famous aphorism: "The life of the law has not been logic: it has been experience."[59] Holmes further believed that when judges apply "rules" to cases, they are in fact responding to the "'felt necessities of the time,'" which often consist of "a bedrock of examined and unexamined belief, prejudice, and intuition, rather than the demands of logical entailment."[60]

In order to combat this inevitable threat to her objectivity, the judge takes special pains in her decisions in which discretion plays a part to do as much empirical research as time allows and to clearly articulate reasons for her decision. As a pragmatist, she tries to remain open to the numerous arguments our legal culture offers[61]—case precedents, legal doctrines, rules of interpretation, dry statistical claims or cries of emotion, and others. Yet, at the same time she is always trying to imagine the practical effect her decision might have on each party's future. To her, this is the most difficult task for a judge.

Her guide for drafting such opinions is Justice Roger Traynor, whom she first encountered in law school in G. Edward White's *The American Judicial Tradition*.[62]

Here is how Professor White described Justice Traynor's method:

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> In short, the law is male because the substance of its rules systematically favors men and disfavors women. . . . [T]he law is male in that its principles—justice, abstract rules, predictability, autonomy—apply to the public (male) worlds of market and politics, while premodern customary expectations of care and concern apply in the private (female) worlds of home and family.

*Id.* at 345-46.

58. *See* ME. REV. STAT. ANN. tit. 19, § 316(4)(A) (West Pamph. 1996-1997).

59. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1938).

60. Christian Zapf & Eben Moglen, *Linguistic Indeterminacy And The Rule of Law: On the Perils of Misunderstanding Wittgenstein*, 84 GEO. L.J. 485, 512 (1996) (quoting HOLMES, *supra* note 59, at 1).

61. *See* FISH, *supra* note 34, at 218 (explaining the many resources utilized by a pragmatist when practicing law).

62. G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION (1988).

> Traynor's theory of judging, in short, blended a belief that empirical observation, personal disinterestedness, and intellectual integrity could insure that . . . decisions were grounded in rationality . . . . "Well-tempered" judges could "stabilize the explosive forces of the day," do "everything within their power of reasoning to make each day in court lead constructively to the next one and to set an example approaching what a civilized day could be."[63]

Further, our judge has one other stay against the danger that her own feelings and prejudices might distort her pragmatic judgment. This is a quotation she keeps taped just below the screen of her PowerBook. It is by Stendhal, from *De l'amour*:

> I am making every possible effort to be *dry*. I want to impose silence on my heart, which thinks it has a lot to say. I am continually fearful that I have written only a sigh of longing, when I think that I have set down a truth.[64]

### *12. The Judge's Research: The Maine Child Support Guidelines are Biased*

> Indeed, the old inequalities that defined women and children . . . as essentially inferior to men, are being eroded. In their place other inequalities emerge. The law and the larger society increasingly view people within families as equal, autonomous individuals who can choose their partners and the terms of their relationships. But as a history of the marketplace in the past century and a half testifies, that view does not guarantee the equality it assumes as a matter of moral belief.
>
> - Janet L. Dolgin[65]

The Maine Child Support Guidelines appeared at the judge's first glance to be unbiased. They are based on the principle that because each parent bears the social and legal responsibility to support his or her children, "each should share the economic responsibility in proportion to the parent's income."[66]

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63. *Id.* at 306-07. Professor John W. Poulos analyzed Traynor's approach in a similar fashion in *The Judicial Philosophy of Roger Traynor*, 46 HASTINGS L.J. 1643 (1995).

64. Martha Nussbaum, *Only Grey Matter? Richard Posner's Cost Benefit Analysis of Sex*, 59 U. CHI. L. REV. 1689, 1689 (1993) (quoting STENDHAL, DE L'AMOUR 40 (1969).

65. Dolgin, *supra* note 18, at 1519.

66. Harriet P. Henry, *Child Support Guidelines Now Mandatory in Judicial Proceedings*, 4 ME. B.J. 356, 357 (1989). DHS first adopted Guidelines in the fall of 1986, using information in Robert Williams's 1985 Interim Report (U.S. Department of Health and Human Services, Office of Child Support Enforcement) and his Income Shares model, tailored to take into account Maine's tax structure. The Income Shares model is based on the following premises:

> 1. There is a relationship between the combined income of parents and expenditures by them for their children;

Nonetheless, the judge knew from her many divorce cases that a low-income custodial parent who divorces a higher-income spouse will often do worse when the Maine Guidelines are applied. And in the great majority of cases the custodial parent is the mother. For example, the previous year the judge had dealt with the divorce of a mother with two children (ages seven and five) who was on AFDC and whose husband had a gross annual income of $15,000. Pursuant to the Guidelines, the father was required to pay child support of $3,848 per year. This left him with a gross income of $11,152. The mother's income, consisting entirely of AFDC, totaled $8,016.[67] Even when the mother's food stamp benefits were included, the Guidelines resulted in the single father having more money than the mother who must raise their two children.[68]

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2. Expenditures for children increase with increase of gross family income, but decrease as a percentage of gross family income;

3. Each parent bears the social and legal responsibility for supporting their children; each should share the economic responsibility in proportion to the parent's income.

4. Child support must cover a child's basic needs as a first priority. To the extent that a parent's income exceeds a self support reserve necessary to provide the parent with a subsistence level standard of living, the child is entitled to share the benefits of such additional income.

*Id.* at 357.

67. This included the following monthly payments: $435 in AFDC, a $183 Gap payment (42 U.S.C. § 602(a) (1994)) and $50 for Pass Through (42 U.S.C. § 657(b)(1) (1994)). Gap payments are not "true" AFDC payments as they are not comprised of the mixture of federal and state funds which make up the standard AFDC payment. Rather, Gap payments are known as "supplemental AFDC payments" because they are treated like AFDC payments for accounting and due process purposes. *See* 45 C.F.R. §§ 232.21(b)(1), (c).

68. *See generally* Marianne Takas, *Improving Child Support Guidelines: Can Simple Formulas Address Complex Families?*, 26 FAM. L.Q. 171 (1992). Ms. Takas describes a simple test for calculating the disparate impact of child support guidelines:

> Finally, we divided that after-payment income for each household by the U.S. poverty level for a household of that size. This allowed us to assess the impact of the presumptive support amount upon each household's relation to poverty level. For example, consider a case in which the custodial parent earns $800 net, and lives with the two children whose support is being determined.
>
> The noncustodial parent lives alone and earns $1,200 net. Under a given state guideline, the presumptive support amount is $300. After support is paid, the custodial household will have a total income of $1,100 ($800 net earnings plus the $300 support), and will live at 119 percent of poverty level (determined by dividing $1,100 by $928, the poverty level for a family of three). The noncustodial household will have a post-payment income of $900 ($1,200 net earnings minus the $300 support paid), which is 163 percent of poverty level ($900 divided by $552, the poverty level for a family of one). So, given the support amount determined by that particular guideline, the custodial household will live at 119 percent of poverty, while the noncustodial household will live at 163 percent of poverty.

*Id.* at 174-75 (citation omitted).

Maine and thirty-one other states base their Child Support Guidelines on the Income Shares model.[69] If each parent's contribution is based on his or her share of their combined incomes, why then does it so often favor the non-custodial parent?

Or to ask in another way: Why can a Maine mother who has received custody of her children often expect a more than twenty percent drop in standard of living after divorce, while the former husband's standard will actually improve?[70] One reason is that the Income Shares model fails to account for the indirect costs of caring for children:

> The cost of providing care to children, whether measured by the value of services provided or the value of the income that caretakers forego, was not included in the economic analyses relied on by guideline developers. Guidelines generally treat the enormous number of hours custodial parents spend on child care and child-related housework and the resulting lost earnings as if they were insignificant—both economically and as a matter of policy.
>
> The indirect cost of caring for children is hardly insignificant. Indeed, many economists believe this implicit cost may be larger than the explicit costs that are included in the studies of expenditures on children. The failure to include these costs is a major reason that the child support guidelines this study analyzed do not produce better or more equitable living standards for children.

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69. The states using some variation of the Income Shares formula are Alabama, Arizona, Colorado, Connecticut, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, and Washington, as well as the territory of Guam. *See* David Betson et al., *Trade-Offs Implicit In Child-Support Guidelines*, 11 J. POL'Y ANALYSIS & MGMT. 1, 5 n.8 (1992). Three states, Delaware, West Virginia, and Hawaii, use a variation of Income Shares called the Melson formula. *See id.* at 6. The remaining states base child support on a percentage of the income of the non-custodial father. The National Center for State Courts has compiled all the state guidelines into a reference book. *See* NATIONAL CENTER FOR STATE COURTS, CHILD SUPPORT GUIDELINES: A COMPENDIUM (1990).

70. *See* G. Diane Dodson, *Children's Standards of Living Under Child Support Guidelines: Women's Legal Defense Fund Report Card On State Child Support Guidelines Executive Summary*, *in* CHILD SUPPORT GUIDELINES: THE NEXT GENERATION 95 (Margaret Campbell Haynes ed., 1994):

> Nor did the guidelines perform well in ensuring equitable living standards between the children's and the noncustodian's households. Even under child support guidelines, children continued to bear a disproportionate share of the economic impact if their parents lived separately. In the dozen typical families in the study, on average, children's living standards declined by 26 percent and the noncustodians' living standards rose by 34 percent, when parents lived apart. These comparisons of living standards were made using the Bureau of Labor Statistics Revised Equivalence Scale.

*Id.* at 98 (citation omitted).

> In general, current child support guidelines require both parents to provide financial support to their children at a level roughly determined by their incomes. However, most or all responsibility for child care and related housework is left to the custodial parent. Numerous studies show that single custodial mothers—both homemakers and those who are employed—devote many hours to child care and homemaking. Homemaker mothers spend from 53 to 72 hours per week on household chores and child care when they have preschoolers at home, and 48 to 65 hours per week when their children are school age. Mothers who are employed part-time spend 40 to 44 hours per week on household chores and child care, depending upon the age of their children. All employed mothers, on average, spend between 33 and 59 hours per week on child care and household chores.
>
> To provide this care, custodial parents must forego opportunities to increase their earnings. There is strong evidence that single mothers' child care responsibilities cause them to stay out of the labor force, be unemployed, or work fewer hours.[71]

The judge was not necessarily distressed by the fact that the Maine Guidelines often seemed tilted in favor of the non-custodial parent. Certainly, the Guidelines appeared an improvement over prior child support laws. Further, she realized that no single law could correct all social ills. For example, child support Guidelines could not improve women's wages or job opportunities. Nor could they change the fact that women often receive too little credit for caring for children.[72] Also, when divorcing, women have the right to petition the court for alimony to equalize their standards of living

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71. DIANE DODSON & JOAN ENTMACHER, REPORT CARD ON STATE CHILD SUPPORT GUIDELINES 43-44 (Women's Legal Defense Fund 1994) (citations omitted). *See* Marilyn Ray Smith, *Guidelines and Periodic Review and Adjustment*, *in* CHILD SUPPORT GUIDELINES: THE NEXT GENERATION, *supra* note 70, at 72:

> However, several studies of the impact of child support guidelines on the economic well-being of children in single parent households suggest that these children continue to suffer a significant decline in standard of living. Even though developers of child support guidelines examined economic studies on the cost of children in an effort to ensure that children received the same proportion of parental income as if the parents had stayed together, this approach did not take into account the increased cost of maintaining two households. Moreover, often the percentages of parental income suggested by economic data on the cost of children were lowered through political compromise. In fact, in most states, guidelines did not stray far from pre-existing practice, and in some instances, actually resulted in lower amounts.

*Id.* at 73. *See also* NANCY S. ERICKSON, CHILD SUPPORT MANUAL FOR ATTORNEYS AND ADVOCATES 265 (1992) ("In the typical divorce situation, the custodial parent provides very substantial non-monetary contributions to the child, while the non-custodial provides relatively little.").

72. *See, e.g.*, Axtell v. Axtell, 482 A.2d 1261, 1264 (Me. 1984) (finding no abuse of discretion even though the divorce decree seemed to rate more highly the husband's contribution as wage earner over wife's contribution as homemaker).

with those of their former husbands. Nonetheless, the judge found the inherent biases in Maine's Child Support Guidelines to be disturbing, especially when they were expressed in terms of the ideal of "distributive justice":

> The Income Shares and Melson[73] formulae scarcely limit the economic harm divorce may do to children. If parents' incomes are very different, these two formulae severely penalize children for being in the custody of a parent who has less income and reward them for living with the parent who has more. . . .
>
> . . . .
>
> It is striking that the formulae actually in use are so different from those based on notions of distributive justice. While the very existence of legally mandated child-support payments demonstrates our society's belief that children have a right to their parents' economic support, this right is tempered in current formulae, which give a wage earner the primary claim on his or her income. . . . To privilege the claim of the wage earner on earnings, we weaken children's claim on their parents' aid, and put the provider of income ahead of the provider of care.[74]

Of course, the judge well understood two reasons the Maine Guidelines had a particularly harsh impact on Maine women. First, the great majority of custodial parents are women.[75] Second, a

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73. The Melson formula is a variation of the Income Shares formula. It is used in Delaware, Hawaii, and West Virginia. *See* Betson et al., *supra* note 69, at 6. Nancy Erickson reports that at least one expert believes the Melson formula tends to produce less extreme differences in standards of living whenever one parent has very low income and the other, though not well-off, has a significantly higher income. *See* Nancy S. Erickson, *Obtaining Adequate Support For Children: Preventing Downward Deviations from the Presumptive Guidelines Amount*, 26 CLEARINGHOUSE REV. 530, 532 (Sept. 1992).

74. Betson et al., *supra* note 69, at 8-19. The authors leave little doubt as to the bias inherent in the Income Shares Formula:

> In sum, the impact of the Income Shares formula on children's economic well-being depends on whether they are in the custody of the higher- or lower-earning parent and, to a lesser extent, on the number of children. How the children's economic well-being compares to that of their absent parent depends on the ratio between their parents' incomes. If the custodial parent's income is much lower or nonexistent, as is commonly the case for women who have spent extended periods out of the work force and for the mothers of very young children, the children fare much worse than their absent parent. Only in the less common case that the custodial parent earns as much as the absent parent is the children's standard of living comparable to that of their absent parent . . . . In practice, then, the well-being of children under the Income Shares formula is likely to be well below that of the absent parent.

*Id.* at 14. *See also* James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce For Women and Children*, 21 FAM. L.Q. 351 (1987).

75. *See* STEPHANIE SEGUINO, LIVING ON THE EDGE: WOMEN WORKING AND PROVIDING FOR FAMILIES IN THE MAINE ECONOMY 1979-1993, at viii (1995).

mother's earnings in Maine are relatively low compared to the father's.[76] She had just finished reading a recently published study entitled, *Living on the Edge: Working Women and Providing for Families in the Maine Economy, 1979-1993.* This is how *Living on the Edge* explained the plight of low-income women living in Maine:

> Women's earnings in Maine are low for two important reasons. First, women face discrimination in the labor market, as evidenced by the earnings differentials between women and men with the same educational attainment. In addition, women are segregated into occupations that pay low hourly wages. Even within those occupations, women earn less than men. Further, women are concentrated in jobs that have high rates of unemployment and involuntary part-time employment, factors that reduce women's labor market time in a way that is beyond their control. Second, women also earn less than men because they spend less time in paid labor, primarily due to the fact that women still have primary responsibility for taking care of the household and children. These two factors combined go some way to explaining why women are so much more likely than men to be poor and why women with children in particular have such high poverty rates in Maine.[77]

Given Maine's adoption of the Income Shares model and the relative poverty of many Maine women compared to men, it came as no

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76. *See id.* at 55.

77. *See id. See also* MAINE DEVELOPMENT FOUNDATION, MEASURES OF GROWTH 63 (February, 1996) ("In 1990, the average annual earnings of women compared to the average of men, on average in similar job classifications, was 53.6%."); Jay D. Teachman & Kathleen M. Paasch, *Financial Impact of Divorce on Children And Their Families*, THE FUTURE OF CHILDREN: CHILDREN AND DIVORCE, Spring 1994, at 63, 79 ("Currently, women earn about 70% of what men make."); Paula G. Roberts, *Child Support Orders: Problems With Enforcement*, THE FUTURE OF CHILDREN: CHILDREN AND DIVORCE, Spring 1994, at 101:

> Children living in a two-parent family have a much greater chance of avoiding poverty than children living in a single-parent family. In 1990, 70.5% of children in the United States lived in two-parent households, consisting of children living either with both biological parents, in step-families, or with adoptive parents . . . . In 1991 the poverty rate for married-couple families with children under age 18 was 8.3%. In contrast, approximately one quarter of the children lived in single-parent households, 9.5% with a divorced parent, 7.7% with a never-married parent, and 7.6% with a separated or widowed parent. In 1991 the poverty rate for single-parent families headed by fathers was 19.6%; for single-parent families headed by mothers, it was 47.1%.
>
> Financially speaking, the families of greatest concern are those headed by females. Children living in single-parent families headed by mothers (constituting 84% of single-parent families) are more than twice as likely to be poor as children living in single-parent families headed by fathers. Although it is very important that all children who are due awards receive them, children living in families headed by mothers are of special concern because of their increased likelihood of being poor.

*Id.* at 101 (footnotes omitted).

surprise to the judge that the Women's Legal Defense Fund had given Maine an unusually harsh grade in evaluating the Maine Child Support Guidelines: Maine received a "D" grade in the category "Ensuring Children A Minimum Decent Living Standard" and a "C+" for "Achieving Equity Between Households"; Maine's combined grade of "D+" placed it in the lower third of all states.[78]

### *13. The Judge's Decision*

> In the end, the pragmatists tell us,
> what matters is our loyalty to other human
> beings clinging together against the dark,
> not our hope of getting things right.
>
> - Richard Rorty[79]

Now that the judge better understood the mechanics of the Guidelines and their often harsh impact on women who, like Ann, earn considerably less than their former husbands, she began to plan her decision.

*A. The Judge Picks The Form Of Her Decision*

The great majority of the judge's decisions adhered to a standard, dry form: (1) the relevant law; (2) material facts; and (3) the court's reasoning. However, for her more difficult cases—those in which each party was able to buttress their arguments by significant legal precedents and persuasive facts—the judge had devised a decision form modeled on her great love, the English (Shakespearean) sonnet.[80]

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78. DODSON & ENTMACHER, *supra* note 71, at 18-19.

79. RICHARD RORTY, CONSEQUENCES OF PRAGMATISM 166 (1982), *cited in* FISH, *supra* note 34, at 216. Fish further explains what he considers to be Rorty's overly romantic inclinations:

> It is Rorty's hope—ungrounded, as it must be given his (anti)principles—that if "pragmatism were taken seriously"—if we conceived of ourselves as creatures clinging together in a foundationless world rather than as philosophers in search of a foundation—we might cease experiencing life as a fight and we would be less likely to confront one another across firmly drawn lines of battle.

*Id.* at 218 (footnote omitted).

80. The importance of adopting a specific aesthetic form for the different kinds of judicial decisions was emphasized by Cardozo in *Law and Literature*:

> Form is not something added to substance as a mere protuberant adornment. The two are fused into a unity. Not long ago I ran across a paragraph in the letters of Henry James in which he blurts out his impatience of these attempts to divide the indivisible. He is writing to Hugh Walpole, now a novelist of assured position, but then comparatively unknown. "Don't let anyone persuade you . . . that strenuous selection and comparison are not the very essence of art, and that Form *is* not substance to that degree that there is absolutely no substance without it. Form alone *takes*, and holds and preserves substance, saves it from the welter of helpless verbiage that we swim in as in a sea of tasteless tepid pudding." This is my own faith.

The sonnet is made up of three quatrains of four lines each and a concluding two line couplet. This sonnet form allows the writer to closely examine three different aspects of a problem and then, in the concluding couplet, to either resolve or declare insolvable that problem. For example, consider William Shakespeare's wonderful Sonnet XXX.[81] For three quatrains the writer is assaulted by the regrets, lost loves, and sad grievances of the past. It is only in the final rhymed couplet, that a friendship of the present brings him solace:

> But if the while I think on thee (dear friend)
> All losses are restored, and sorrows end.[82]

No matter how she ruled in this case, the judge knew either John or Ann would believe the decision was unjust. She hoped to use the conclusion of her decision—the final couplet—to try to limit the disappointment and to point the parties towards the future.

*B. The First Quatrain: The Standard of Review and the Relevant Law*

The judge was determined not to hide behind the great discretion granted to the court in such matters.[83] She decided to specifically set forth her conclusion that the Maine Child Support Guidelines were biased against the custodial parent whenever that parent's income was significantly lower than the non-custodial parent's income. If this case were appealed, she wanted a full review of not

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BENJAMIN N. CARDOZO, LAW AND LITERATURE 5-6 (1931).

81. When to the sessions of sweet silent thought
I summon up remembrance of things past,
I sigh the lack of many a thing I sought,
And with old woes new wail my dear time's waste:
Then can I drown an eye (unused to flow)
For precious friends hid in death's dateless night,
And weep afresh love's long since cancelled woe,
And moan the expense of many a vanished sight.
Then can I grieve at grievances foregone,
And heavily from woe to woe tell o'er
The sad account of fore-bemoaned moan,
Which I new pay as if not paid before.
But if the while I think on thee (dear friend)
All losses are restored, and sorrows end.

William Shakespeare, *Sonnet XXX*, *in* KATHARINE M. WILSON, SHAKESPEARE'S SUGARED SONNETS 190 (1974).

82. *Id.*

83. *See* Harvey v. Robinson, 665 A.2d 215 (Me. 1995). The *Harvey* court stated that a trial court's child support decision would be overturned "only if it results in a plain and unmistakable injustice, so apparent that it is instantly visible without argument." *Id.* at 217 (quoting Tardiff v. Cutchin, 617 A.2d 1032, 1033 (Me. 1992)). Because the Guidelines are a jumble of sometime inconsistent rules, a judge would have to act in a very loose haphazard manner to be found to have acted "arbitrarily and unreasonably, without reference to any guiding rules and principles." Sanchez v. Sanchez, 915 S.W.2d 99, 102 (Tex. App. 1996) (holding that the trial court did not abuse its discretion in setting child support).

only her decision but the Guidelines law itself. Here are the points she planned to make in support of this conclusion:

(1) Ann and John's relative positions, six years after their divorce, matched the well-accepted findings that a woman who receives custody of the children upon divorce will suffer a significant decline in her standard of living, while the non-custodial husband will experience an increase in his standard of living.[84]

(2) Because Maine's Guidelines disregard the non-monetary costs of child rearing, such as time, services, and the value of foregone earning opportunities, a low-income mother such as Ann is often condemned to a standard of living significantly lower than that of the non-custodial household.

(3) She decided to quote the Women's Legal Defense Fund's recognition of the financial impact of non-monetary costs of child-rearing on the custodial household:

> The cost of providing care to children, whether measured by the value of services provided or the value of the income that caretakers forego, was not included in the economic analyses relied on by guideline developers. Guidelines generally treat the enormous number of hours custodial parents spend on child care and child-related housework and the resulting loss earnings as if they were insignificant,—both economically and as a matter of policy.[85]

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84. Indeed, the judge had just read in *The Boston Globe* that even though errors had been found in one famous study, Lenore Weitzman's *The Divorce Revolution*, the corrected results were still dramatic: in general, the woman's household suffered a 27% decline in post-divorce standard of living while a man's household experienced a 10% increase in the standard of living. *See Influential Study on Divorce Erred on Statistics*, THE BOSTON GLOBE, May 17, 1996, at 21; *see also* Martha Albertson Fineman, *The Neutered Mother*, 46 U. MIAMI L. REV. 653, 661 (1992) (discussing how the modern image of women as the independent and economic equals of men operates to the disadvantage of many women undergoing a divorce).

85. DODSON & ENTMACHER, *supra* note 71, at 43-44 (footnote omitted). *See also* Silbaugh, *supra* note 54:

> Women's unpaid domestic labor produces tremendous economic value. In the United States, women spend more of their productive work hours in unpaid labor than in paid labor, and the credible estimates of the economic value of unpaid labor range from the equivalent of 24% to 60% of the U.S. Gross Domestic Product ("GDP").

*Id.* at 3. *See also* Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001 (1996):

> Despite the dramatic increase in women's labor market participation in recent decades, women continue to perform a disproportionate share of "family labor," or the unpaid work of caring for children and other family members. Feminists have long been concerned that the gendered division of family labor reduces women's wages, contributes to the high and disproportionate rate of poverty among single mothers, limits married women's autonomy within the marital household, and circumscribes women's life choices and social and economic power.

*Id.* at 2002-03 (footnotes omitted).

(4) Given the current economic prospects of single mothers[86] and the fact that the Guidelines can be biased against the custodial mother when her income is low compared to the father's, the judge also planned to quote Attorney Nancy Erickson's conclusion that:

> [A] deviation downward is almost always contrary to the best interests of the child. The reason for this is to be found in the very structure of child support orders. By their nature they limit the non-custodial parent's obligation while leaving the custodial parent's obligation open-ended. Thus, if the non-custodial parent pays less, either the custodial parent pays more or the child goes without.[87]

### C. *The Second Quatrain: Denying John's Request For A Downward Deviation*

In arguing for a downward deviation, John's burden is significant. He must show that the Guidelines amount is either "inequitable or unjust."[88] Further, federal law requires that state deviation criteria must "take into consideration the best interests of the child."[89] In support of this, the U.S. Department of Health and Human Services has stated:

> Taken as a whole, the grounds for the rebuttal [of the Guidelines amount] may not be inconsistent with the best interests of the child. This will ensure that the child's best interests are a *primary consideration* in any decision to deviate from the

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86. *See* Diane E. Lewis, *Tight Low-Skill Job Market Seen Hurting Single Mothers*, THE BOSTON GLOBE, Nov. 19, 1996, at C15. Lewis describes several factors that harm job-seeking single mothers:

> Increased competition for low-skilled jobs in New England is taking its toll on women and children according to Paul Harrington, associate director of the Center for Labor Market Studies at Northeastern University.
>
> "There are very few jobs at the lower end of the New England labor market, and it is having a devastating impact on low-skilled single women with children, especially racial and ethnic minorities," Harrington said yesterday.
>
> The Study of New England households found that, although per capita income is up in the region and unemployment is down, poverty rates for female-headed households have increased substantially. In 1989, one single mother out of five was officially classified as living in poverty. Today, one out of three is poor.
>
> Harrington cites a variety of factors—among them, an influx of new immigrants into the labor force—as increasing competition for a limited number of low-wage jobs. Those least likely to win the ongoing battle for work are low-skilled single mothers.
>
> "Oftentimes, these are women with limited work experience, fewer years of schooling, no transportation and no one to care for their children while they work," Harrington said. "They are less likely to get the jobs they need to change their circumstances and there are fewer jobs out there to go around."

87. ERICKSON, *supra* note 71, at 233 (footnote omitted).

88. ME. REV. STAT. ANN. tit. 19, § 317(1) (West Pamph. 1996-197).

89. 45 C.F.R. § 302.56(g) (1996).

> guidelines amount, while allowing for other valid factors to be considered.[90]

With a feeling of regret, the judge concludes that she must deny John's request for a downward deviation. In doing so, she balances John's legitimate statutory claims for a deviation against the very real needs of his growing children.[91]

Admittedly, John does appear to be providing primary residential care for more than thirty percent of the year. But the judge still decides to deny a Section 317(3)(A) deviation.[92] Her research indicates that the thirty percent statutory requirement is not as straightforward as it might seem. Two factors must always be considered: (1) The Child Support Guidelines are premised on the fact that the child is *currently* spending thirty percent of his time with the non-custodial parent.[93] (2) Even though the children are spending a large amount of their time with their father, this does not necessarily mean that Ann's expenses are significantly reduced. Attorney Erickson suggests:

> [T]he only expenses that the custodial parent may save if the child is with the non-custodial parent for an increased amount of time are perhaps some food and entertainment costs. The custodial parent's expenses will not appreciably decrease, and may even increase because of the costs related to the visitation, such as transportation costs. The non-custodial parent's expenses may increase,[94] but the custodial parent's expenses will not decrease concomitantly.[95]

John is also requesting a section 317(3)(P) deviation due to the fact that his transportation costs for child visitation exceed fifteen percent of his yearly support obligation.[96] The judge agrees with John's mathematics and is greatly concerned that her failure to grant a deviation will result in John's decision to visit his children less fre-

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90. 56 Fed. Reg. 22,346 (1991) (emphasis added).

91. *See* SEGUINO, *supra* note 75, at 42. Seguino calculated that in 1993, a "basic needs" budget for a family of one parent and two children under age six totaled $23,693 annually (including housing, transportation, child care, health care insurance, out of pocket expenses, clothing, and food). *Id.* Without any upward deviation Ann's 1996 total income (including John's child support) would amount to $18,824. *See supra* note 10.

92. *See* ME. REV. STAT. ANN. tit. 19, § 317(3)(A) (West Pamph. 1996-1997).

93. *See* Henry, *supra* note 66, at 358:

> The *Child Support Tables* presume a 70%/30% split of time with the primary custodian. Deviation from the guidelines should be considered in cases of shared custody or when the non-primary custodian spends *more* or *less* than 30% of time with the children. A simple mathematical calculation reflecting these variations, however, is not appropriate or advisable.

94. The judge did not give much weight to John's increased entertainment expenses. The Guidelines are meant to supply basic needs, not discretionary expenses.

95. *See* ERICKSON, *supra* note 71, at 285.

96. *See* ME. REV. STAT. ANN. tit. 19, § 317(3)(P) (West Pamph. 1996-1997).

quently.[97] Nonetheless, she cannot shake from her memory Ann's quiet, almost fatalistic, comments that her low-income children seem stuck in low-income ruts as they progress through the school system and into the world of jobs and families. Weekends in a love-filled home do not outweigh weekdays in mediocrity. She decides not to grant a deviation for transportation costs.[98]

For this same reason, the judge decides to deny John's request for a section 317(3)(Q) catch-all deviation,[99] despite John's assertion that such a deviation would enable him to finance his education and begin a more promising career as an accountant.

She had carefully reviewed the recent Maine case of *Harvey v. Robinson*[100] in which the court had refused Mr. Harvey's request for a downward deviation so that he could go to medical school.[101] The court concluded that a deviation could not be justified because Mr. Harvey would not finish medical school until after his youngest child had become an adult, and, therefore, the children would not benefit from his medical degree. John's lawyer had argued vigorously that *Harvey v. Robinson* supported his client's request because John would become an accountant while his children were still quite young.

But the judge disagreed. Ironically, it was an argument made *on behalf of* Mr. Harvey at his trial and repeated in the decision that had caught her eye and led her to rule against John's plea to improve himself. This was Mr. Harvey's argument:

> This [focus on money] fails completely to consider that children may actually suffer through watching parents stay in bad jobs; the children may suffer if maintaining a certain job keeps the parent from spending time with his/her children; and the children may indeed suffer if they are taught at an early age that having children absolutely bars a parent from continuing his/her education. Certainly more than just money must be

97. *See* ERICKSON, *supra* note 71, at 375.

98. *See generally* Canning v. Juskalian, 597 N.E.2d 1074, 1076 (Mass. App. Ct. 1992) (holding that extraordinary travel expenses justified a deviation).

99. *See* ME. REV. STAT. ANN. tit. 19, § 317(3)(Q) (West Pamph. 1996-1997). Section 317(3)(Q) allows a deviation if applying the Guidelines would be "unjust, inappropriate, or not in the child's best interest." *Id.*

100. 665 A.2d 215 (Me. 1995).

101. *See id.* at 218 (denying deviation because father would not complete medical school before his youngest child had become an adult and no longer needed child support); *see also* Rowland v. Kingman, 629 A.2d 613 (Me. 1993), *cert. denied*, 510 U.S. 1074 (1994) (granting deviation because mother had closed her medical practice only temporarily so she could move to a new state); Rich v. Narofsky, 624 A.2d 937 (Me. 1993) (noting that child support award can be based on the mother's earning capacity when the mother testified that she could handle a part-time job even though she was going to school full-time).

> considered when ascertaining the best interests of the children.[102]

Mr. Harvey made this point to support his request for a deviation to finance a new career. But when the judge read it, she could only see Ann's fate in Rumford, trapped in a poor-paying job as a waitress while her children were growing up without many of the benefits other children enjoy. The judge recognized that the children were watching *their mother* "stay in a bad job"; they were learning the difficulty that single mothers confront when trying to improve themselves. If John were granted a deviation, these depressing lessons would only be pounded home with greater authority.

In short, while the judge sympathized with John's effort to improve his economic lot, she concluded that the downward deviation to pay for his education would not be in the children's "best interests."[103] If John wanted to continue his education, he could not rely on reduced child support payments. Instead, he might have to accept a lower standard of living.[104]

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102. *See* Harvey v. Robinson, 665 A.2d at 218.

103. *See* Pugil v. Cogar, 811 P.2d 1062, 1067 (Alaska 1991) (concluding that trial court did not abuse its discretion by finding that child support obligor's unilateral decision to go to school and decrease employment should not affect his child support); *In re* Marriage of McNeely, 815 P.2d 1125, 1129 (Kan. Ct. App. 1991) (observing that if non-custodial parent entered law school and lowered income, court could properly impute income); Olson v. Olson, 473 N.W.2d 772, 773 (Mich. Ct. App. 1991) (holding that trial court properly entered a child support order based on parent's unexercised ability to earn income). *But see* Coons v. Wilder, 416 N.E.2d 785, 791 (Ill. App. Ct. 1981), *quoted in* Harvey v. Robinson, 655 A.2d at 219 (Dana and Roberts, JJ., dissenting). The *Coons* court reasoned:

> Child support obligations may be modified if the circumstances fairly warrant alteration, and the judgment of what is possible and fair must necessarily include consideration of the children's welfare in light of the father's abilities. Ordinarily a man makes an investment or changes his occupation with the hope of improving his prospects for the future, including raising his own standard of living as well as that of his children. Following dissolution of marriage, the custodial parent and children cannot be allowed to freeze the other parent in his employment or otherwise preclude him from seeking economic improvement for himself and his famiy. So long as his employment, educational or investment decisions are undertaken in good faith and not deliberately designed to avoid responsibilty for those dependent on him, he should be permitted to attempt to enhance his economic fortunes without penalty.

Coons v. Wilder, 416 N.E.2d at 791 (citations omitted).

104. *See* ERICKSON *supra* note 71, at 280. Ms. Erickson confronts this dilemma in a straightforward manner:

> The law should view the non-custodial parent's debts as his own concern, to be paid out of the income left over after payment of his child support obligation. This may mean that he will have to reduce his standard of living. As one New York Family Court judge recently put it, in denying a request for a downward deviation from the guidelines amount: "Indeed, most parents reduce their standards of living in order to support their children." The means by which the non-custodial parent chooses to manage

### D. *The Third Quatrain: Granting Ann's Request for an Upward Deviation*

At first the judge was not inclined to grant Ann an upward deviation. Despite Ann's lawyer's fervent arguments and claims of six separate grounds for an upward deviation, the judge was not convinced that Ann's situation (as regrettable as it was) was so far removed from the norm in Maine that a deviation could be justified.

Yes, Ann's former husband earned a good salary, and she did not. But according to *Living on the Edge*, this was not an unexpected occurrence.[105] Yes, Ann's career choices were limited by her need to be home with her children. But this also was common. Perhaps the Legislature intended deviations only for more extreme cases.[106] For example, section 317(3)(F) allowed a deviation when the children's standard of living was significantly below the standard they would have enjoyed had the divorce not taken place.[107] But the judge's research on the Income Shares model had shown that that was almost always the result when the wife received custody and there was a significant disparity in the parents' income.[108] Section 317(3)(F) alone probably would not justify overturning the Legislature's presumption that the Guidelines amount was correct.[109]

Indeed, the judge was not convinced Ann's lawyer really believed in all her claims for an upward deviation. For example, the judge had been moved by Ann's description of how musical Billy seemed to be, yet Ann could not afford to rent a flute so that Billy could join the school band. But this did not seem to be the grounds for a

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his money is up to him except that the guidelines are intended to make sure that he does not balance his budget by reducing support for his child.

*Id.* (footnote omitted).

105. *See* SEGUINO, *supra* note 75.

106. Federal regulations require that the total number of deviations in child support orders be "limited." *See* 45 C.F.R. § 302.56(h) (1996). Deviation is one of the issues Maine is required to consider when it conducts its quadrennial review of its Guidelines, as required by 45 C.F.R. § 302.56(e).

107. ME. REV. STAT. ANN. tit. 19, § 317(3)(F) (West Pamph. 1996-1997). The reason for this deviation is not simply that children suffer from an absolute decline in their living standard—that would seem inevitable in most divorces. There are other considerations: "The radically different standards of living in the parents' two households are unfair to the children, are likely to appear cruel to them, and may result in damage to the relationship of the children with either or both parents." Barbara R. Bergmann & Sherry Wetchler, *Child Support Awards: State Guidelines vs. Public Opinion*, 29 FAM. L.Q. 483, 487 (1995) (footnote omitted). *See also* Rebowe v. Rebowe, 561 So. 2d 916, 917 (La. Ct. App. 1990) (stating that children are entitled to a lifestyle similar to the quality of life they enjoyed when they lived with both parents).

108. *See* Sally F. Goldfarb, *What Every Lawyer Should Know About Child Support Guidelines*, 13 FAM. L. REP. 3031, 3037 (Sept. 29, 1987).

109. *See* 45 C.F.R. § 302.56(g) (1996); ME. REV. STAT. ANN. tit. 19, § 315 (West Pamph. 1996-1997) (deviations should occur only in a limited number of cases and then only when the court can justify them).

deviation envisioned by section 317(3)(H), the "educational needs" of a child.[110] It was possible the lawyer's barrage of six justifications for an upward deviation was primarily intended to counter John's demand for a downward deviation.

This struck the judge as a perfectly acceptable strategy by Ann's lawyer.[111] But she was not convinced that, in addition to a child support increase due to John's increased salary, Ann should also receive an upward deviation. There just did not seem sufficient grounds to grant a deviation.

Nonetheless, her attention kept returning to an exhibit submitted by Ann's attorney charting the annual percentage change in the consumer price index since Ann and John had been divorced:

1990 - 6.1% increase
1991 - 3.1% increase
1992 - 2.9% increase
1993 - 2.7% increase
1994 - 2.7% increase
1995 - 2.5% increase[112]

Since 1990, the CPI-U had increased 22.7%. When the judge began contemplating the impact of this inflation on Ann's very moderate income, she could not escape the feeling that Ann was falling farther and farther behind her former husband,[113] even considering the Guidelines increase Ann was about to receive due to her Motion

110. *See* Smith v. Smith, 845 S.W.2d 25, 26 (Ky. Ct. App. 1992) (holding that music lessons for talented child not an extraordinary need).

111. *See* ERICKSON, *supra* note 71, at 261-62:

> If the non-custodial parent was urging a downward deviation . . . and if the court determined that his request was compelling, his downward deviation could be balanced against the custodial parent's upward deviation (to rectify the standard of living disparity). Sometimes the two deviations would cancel each other out and sometimes not. The court should always keep in mind, however, that a downward deviation will increase any already existing standard of living disparity.

112. The above table presents the December to December changes in the U.S. City Average Consumer Price Index for All Urban Consumers (CPI-U). Memorandum from Ray A. Fongemie, Director, Maine Department of Labor, Labor Market Information Services (Feb. 23, 1996) (on file with Author). This is the most widely publicized index, representing purchases made by about eighty percent of the United States population. *See id.* It differs from the U.S. City Average Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W), which is most often used for cost-of-living adjustments in collective bargaining agreements, Social Security, and retirement plans, and represents the purchasing habits of about forty percent of the population. *See id.*

113. Ann's minimum wage salary ($5.15/hour) is 14% below the real value of the 1979 minimum wage. Maine economist John Fitzgerald believes that the declining value of the minimum wage "may explain most of the rise in inequality between the median worker and those in the bottom 10% over the 1979-1995 period." JOHN FITZGERALD, MAINE CTR. FOR ECON. POLICY, WORKING HARD FALLING BEHIND: A REPORT ON THE MAINE WORKING POOR PARENTS SURVEY 29 (1997).

to Amend their Divorce Decree. Since section 319(3)(I) specifically allowed a deviation due to the increase in the cost of living, the judge decided to further research this issue before making a final decision.

It became clear to her that expressing child support awards as a fixed amount allows inflation to erode the purchasing power of child support.[114] Professor Sarah Funke had suggested that if support awards are not periodically updated then even a low inflation rate can seriously undermine the real value of an award, destroying any adequacy it possessed when it was originally established:

> Without regular adjustments, the full brunt of the effects of rising costs on the value of a support award will fall upon the custodial parent. Thus, in addition to bearing the burden of inflation on her own portion of the support obligation directly, she will be forced to endure as well the burden on the father's portion, as inflation slowly but steadily chips away at the value of his unadjusted support obligation.[115]

The judge realized that the Law Court in *Absher v. LaCombe*,[116] had decided in a pre-Guidelines case that four years' inflation was not a sufficient material change to warrant an increase in support payments. This decision, however, was based on an absence of credible evidence demonstrating that the existing child support payments were inadequate.[117] The judge believed that Ann had produced more than enough credible evidence as to her financial resources and the needs of her children to suggest that the current Guidelines amount was not adequate. Further, she remained convinced that the statutory Guidelines were biased against single women of low income. Indeed, the 1995 *Living on the Edge* study had one conclusion that almost matched exactly Ann's situation: The average female hourly wage in Maine is only sixty-eight percent of

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114. *See* J. Thomas Oldham, *Abating the Feminization of Poverty: Changing the Rules Governing Post-Decree Modification of Child Support Obligations*, 1994 BYU L. REV. 841, 849 (1994).

115. Sarah K. Funke, *Preserving the Purchasing Power of Child Support Awards: Can the Use of Escalator Clauses Be Justified After the Family Support Act?*, 69 IND. L.J. 921, 927 (1994) (footnote omitted). *See also* Vore v. Vore, 573 N.E.2d 397 (Ind. 1991) (inflation from 1978-1988 a factor in increasing child support); *In re* Marriage of Stutsman, 311 N.W.2d 73, 76 (Iowa 1981) (support payments increased where inflation had stripped the support dollar of about one-third of its purchasing power, where the husband's salary had increased, and where the child had started school); *In re* Marriage of Barber, 830 P.2d 97, 99 (Mont. 1992) (increase in child support may be based on inflation and increased ages of children); Kieffer v. Kieffer, 590 S.W.2d 915, 917 (Mo. 1979) (increased cost of child care resulting from inflation and the child's attaining school age constituted a sufficient change of circumstance to warrant an increase in the husband's level of child support payments).

116. 432 A.2d 1241, 1242 (Me. 1981).

117. *Cf.* Daigle v. Daigle, 609 A.2d 1153, 1154-55 (Me. 1992) (mother's earnings and child's physical and emotional needs justified child support deviation).

the hourly wage required to meet the basic needs budget of a single parent household with two children under six.[118]

Even when you added in John's weekly child support of $158, based on his current gross income of $35,000, Ann's total income was only $18,824. Yet John, even after subtracting his child support, would still have $26,888 in income. And he was not the parent with custody of their children.[119] Further, John's income had increased thirty-two percent since his divorce (from $26,500 to $35,000), yet the Guidelines would increase child support by only fifteen percent (from $135 to $158).[120] A deviation for the impact of inflation of the last six years would be a way to somewhat address the imbalance between the two parents' households.

The judge finally decided that the effect of six years of inflation, combined with the five other grounds for deviation raised by Ann, were sufficient to overturn the presumption that the Guidelines amount was correct.

Therefore, the judge decided to order an eleven percent increase (roughly half of the inflation rate of the previous six years) over child support required by John's current income. After paying child support, John would have $25,880.24 in gross income. Ann, who had custody of their two children, would have $19,831.76. This at least approached a reasonable child support standard:

> The principle that children should not be worse off than their noncustodial parent . . . is a fair principle, one that does not seek to protect the child against all economic loss when parents live separately, but only to insure that the loss is equally shared.[121]

In some ways, this decision to grant Ann an upward deviation based primarily on the effect of inflation was the easier part of her decision. She must now somehow try to explain to John why this was in the best interest of his children.

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118. *See* SEGUINO, *supra* note 75, at 43.

119. Of course, John must also support his and his new wife's child, Libby. But he has received a $4,004 deduction from his state income tax for Libby's support in accordance with ME. REV. STAT. tit. 19, § 316(4)(A) (West Pamph. 1996-1997). John's wife can also seek additional employment hours.

120. One reason the child support increase did not keep pace with John's income increase is that the section 316(4)(A) "Special circumstances" allows John to subtract from his gross income $4,420, an adjustment reflecting the cost to John of raising his new child, Libby. But even if John had not started a new family, the strict Guidelines increase in child support ($135 to $173) would still represent a smaller (percentage) increase (22%) than the increase in John's salary (24%).

121. DODSON & ENTMACHER, *supra* note 71, at 76.

### *14. The Concluding Couplet*

How small, of all that human hearts endure,
That part which laws or kings can cause or cure.

- Samuel Johnson (1709-1784)

The judge struggled in writing her "concluding couplet." She was searching for a metaphor[122] that would persuade John that it was right and just that he should pay Ann more child support than the amount presumed by the Guidelines. She knew that her metaphor must emphasize the idea of the family as a partnership that continues even after divorce, as opposed to the increasingly modern idea that parents are individual actors, more bound by modern contract law than the familial obligations of past generations. John's attention must be turned from his poor prospects in Maine's changing economy to the plight of his children.

The judge remembered that the landscape of childhood seemed to be without horizons. Children rarely peered into their future. Their concerns were daily. Will I be able to afford this shirt, this hockey stick, these music lessons? The future is not really their concern. Perhaps this is because growing up takes such concentrated energy. Children are so hard pressed to solve their many daily problems they have little energy left to contemplate future choices. And perhaps this is the way it should be. Child support should pay for the here and now, the daily costs of raising strong, intelligent children filled with good cheer. Worrying about the future is for later.

In other words, John's first concern about child support should not be his future career but rather the present needs of his children. For a while, the judge thought she might be able to express this through the metaphor of the family dinner. John and Ann should bring to the table enough dishes to make sure that their children, that night, would not go hungry. They should not scrimp today in order that years from now the children could enjoy a magnificent feast. But this metaphor seemed hollow. Ann and John were divorced. Yes, they were still the parents of their children. But likely they would never again sit at the same dinner table.

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122. In an interesting dialogue created by Professor Jan G. Duetsch, the idea is proposed that an *effective* legal decision—one with precedential value—must act as a dramatic metaphor. It must represent daily life, described in terms of law:

> Q. [Y]ou further argue that precedents can be defined as constituting moral injunctions persuasive because of the factual descriptions from which they are derived. If I understand you correctly, you have the burden of explaining to me what makes those descriptions and those injunctions compelling.
>
> A. I submit that the answer to your question is that a judicial opinion works the way a metaphor works.

Jan G. Deutsch, *Law As Metaphor: A Structural Analysis of Legal Process*, 66 GEO. L.J. 1339, 1346 (1978).

The judge was writing this decision in winter. By chance, the girls basketball team of the local high school was playing for a statewide championship. Even though she had no children on the team, she attended the final game. Looking over the crowd, she realized that many of the team members were from families whose parents were divorced. As the parents cheered and cheered for their children on the court, she saw several former husbands and wives. They were not sitting next to each other but were joined in cheering on their children. And she saw relatives of these parents, the daughters' grandparents and uncles and cousins, united, at least for that night, as the girls did their best to win a championship.

It struck her then that this is how child support should be considered. Each parent, although divorced and possibly even estranged, should be united in supporting their children. After all, children are not young for long. A girl's championship game, or a boy's hobby, or a child's wish to learn piano, or whatever, would be over and done with all too soon. Yes, John's economic future is important to his children's future. But for now it must take second priority to the daily needs of his growing children. He must find some other way to pay for his new career.

That night, still flushed with the excitement of her town's victory, the judge finished writing her decision. She hoped her metaphor likening two divorced parents to a town united in cheering on its children would prove persuasive. She ended her discussion of child support deviations, both denied and granted, by acknowledging to both parents just how difficult her decision had been. She concluded with a favorite comment by her mentor, Justice Holmes:

> Life is painting a picture, not doing a sum.[123]

### *15. The Next Case*

> Given these consequences of a conception of housework as exclusively an expression of affection, houseworkers would benefit from a fuller conception of housework, one that shows its significant similarities to wage labor.
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> - Katherine Silbaugh[124]

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123. Oliver Wendell Holmes, Address to the Fiftieth Anniversary of the Harvard Graduating Class of 1861 (June 28, 1911), *in* THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 160, 161 (Mark D. Howe ed., 1962).

124. Silbaugh, *supra* note 54, at 83. *See also* DAVID VAIL & MICHAEL HILLARD, TAKING THE HIGH ROAD: HUMAN RESOURCES AND SUSTAINABLE RURAL DEVELOPMENT IN MAINE (1977):

> On average, female single-parents work the longest hours of any adults. Despite their enormous effort, many are cut off from access to a livable income: women are generally paid lower wages; childrearing and the lack of affordable child care limit the amount of time at work; AFDC payments

Perhaps the Judge's deliberations in future cases would be easier if section 317 allowed deviations that more directly reflected the actual plight of single parents. For example, section 317(3) could encourage an upward deviation for the low-income single parent forced to work full-time. A court could consider the following as grounds for a deviation:

> The monetary value of housework if the custodial parent is single, is employed 30 or more hours a week, and does not pay for domestic help.[125]

Housework. It is a curious term. When a marriage is intact, housework can be an expression of love and affection and the minor burdens of a common enterprise. But when a marriage is broken into pieces, under the glare of our divorce laws, housework should be recognized in dollars and cents. Housework is no longer minor. It is important.

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leave single mothers and their children far below the poverty line; and only a minority receive full child support payments from fathers.

*Id.* at 35.

125. When deciding the issue of alimony, Maine courts must consider the following factor: "The contributions of either party as homemaker." ME. REV. STAT. ANN. tit. 19, § 721(1)(K) (West Pamph. 1996-1997).