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Five Degrees of Separation: A Response to Judge Sheldon's The Sleepwalker's Tour of Divorce Law

Laurie C. Kadoch
University of Maine School of Law

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 RESPONSE TO JUDGE SHELDON'S
*THE SLEEPWALKER'S TOUR OF
 DIVORCE LAW*

Laurie C. Kadoch

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FIVE DEGREES OF SEPARATION: A RESPONSE TO JUDGE SHELDON'S *THE SLEEPWALKER'S TOUR OF DIVORCE LAW*

Laurie C. Kadoch*

"[B]y our doing and our ways of knowing we make ourselves what we are."¹

I. INTRODUCTION

In a recent edition of this Law Review, Judge John C. Sheldon blames both Maine's highest court and its Legislature for causing a somnambular development of divorce law.² Judge Sheldon's article is premised on two beliefs: that marriage and the nuclear family are dead or dying ideals that should not be revived, and that law should be formed to comport with the current behavior of people.³ Based on these beliefs, Judge Sheldon proposes a radical change in Maine divorce law: the abolishment of the need for court involvement of any kind in uncontested divorces by the elimination of required filings and hearings in all uncontested cases.⁴ In support of his proposals, Judge Sheldon suggests that court involvement in uncontested divorces is a meaningless waste of judicial time.⁵ He further suggests that courts, rather than legislatures, are the appropriate vehicles for effecting needed change in family law.⁶ Judge Sheldon lays blame for the problems facing the development of family law on antiquated, traditional notions of marriage and family.⁷

* Assistant Professor of Legal Writing, Vermont Law School; Visiting Professor, Roger Williams Law School, 1995-1997; B.A., Boston University, 1970; M.A., University of Southern Maine, 1988; J.D., University of Maine School of Law, 1988. The Author was formerly an associate with Verrill & Dana in Portland, Maine, where she specialized in family law.

I am indebted to Roger Williams Law School for its support and especially to my research assistant, Bridgette McMaster, for her excellent research assistance and to Karen Sherman, whose good spirit and ability to read my handwriting were invaluable. I also thank David Kadoch who thoughtfully listened to my ideas throughout the formation of this Article.

1. MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 140 (1987) (paraphrasing an Aristotelian insight).

2. John C. Sheldon, *The Sleepwalker's Tour of Divorce Law*, 48 ME. L. REV. 7 (1996). Sheldon is a Maine District Court Judge.

3. *See id.* at 25, 48.

4. *See id.* at 9, 16.

5. *See id.* at 13.

6. *See id.* at 48.

7. *See id.* at 9, 44.

His thesis is that "fear of change"⁸ is at the root of the problems with divorce law today and that courts simply use "circular reasoning" to continue to sustain antiquated and empty rules.⁹

At the time I came across Judge Sheldon's article, I was doing research for an article about divorce settlement agreements in which I was contemplating the changing legal landscape of family law, and the causes and negative effects of a growing trend toward privatization on the development of family law.¹⁰ Judge Sheldon's article epitomized for me the advocacy position in favor of the privatization of divorce law with absolutely no consideration or analysis of the long-range and broad effects of such a proposal on individuals, families, society, or the forming of substantive family law.

Judge Sheldon's ideas and proposals concerning Maine's divorce law invited a dialogue for the contemplation of the changing legal landscape of family law that I could not resist. I have long held the opinion that Maine is one of the last bastions in which people carefully consider change—this is particularly true in realms of industry and commerce, but the approach carries over into other areas of societal decision-making as well. It is not that people from Maine are afraid of change; in fact, they tend to be quite progressive. It is rather that they are cautious about change, weighing carefully the long-range and broader effects before jumping too quickly onto the bandwagon. This outlook made a strong impression upon me during my formative years and may explain, even though I am now "from away,"¹¹ my need to respond to Judge Sheldon's proposed changes and to promulgate my own approach. I borrow my approach from Oliver Wendell Holmes, who suggested that in order to understand the law we must ask about "the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the

8. *Id.* at 43.

9. *See id.* at 9-10.

10. I have been immersed for some time in the research and contemplation of the current phenomenon in the law where emphasis is on process rather than substance. I have been concerned with the effects of this trend on substantive family law. I agree with Mary Ann Glendon that "[t]he present legal ordering of the family is composed of the accumulated accidents and inventions of the past" and that "[w]e are now in the process of adding a layer that will reflect the circumstances of our own time and whatever intelligence we are able to bring to bear." GLENDON, *supra* note 1, at 141. By emphasis on process I refer to the rapid changes in the process of divorce that focus on a privatized contractual model progressively more separated from legal process and substantive family law. My fear is that with process setting the course, little or no thought is going into where we are headed, and when we next pause to look back, we may find unanticipated and unwelcome results.

11. Actually, this is Maine idiom for anyone not born in Maine. I use it here to signify that I now live outside of Maine.

price."¹² In his article, Judge Sheldon cavalierly announces that the "ends" of current divorce laws are untenable and the "reasons" for these "ends" are anachronistic. He proposes dramatic changes without consideration of the "costs" that these changes might produce.

My thesis is that the forming of family law, which is currently being driven by a focus on process rather than substance, should instead be substantively driven by carefully considered answers to Holmes's questions. The process-driven development of divorce law is manifest in the push for privatization of domestic relations law, as evidenced by Judge Sheldon's proposed changes. Furthermore, underlying my general thesis is the sub-thesis that isolated and disconnected segments of society are failing to communicate and reach a consensus about the substantive values family law should embody, and that it is this failure to communicate and not "fear of change" that is creating the somnambular development of divorce law. I view these unconnected segments of society as five degrees of separation: individual from individual, individual from community, community from legislature, legislature from the courts, and law from other disciplines.¹³

In this Article, I suggest that Judge Sheldon's analysis of divorce law, as well as his proposals for change, are endemic of the real root of the problem facing the development of family law in the United States today—a failure to address Holmes's questions before embracing the process-driven privatization of domestic relations law. Furthermore, I suggest that Judge Sheldon's proposed changes for Maine divorce law exacerbate each of the five degrees of separation creating further impediments to the meaningful communication necessary for consensus building.

Part II of the Article examines Judge Sheldon's proposed changes to Maine divorce law—the abolition of filings and hearings in uncontested divorce cases and his pronouncement that it is "fear of change" that perpetuates what he considers meaningless and wasteful use of the legal system.¹⁴ I suggest that in the advocacy of his privatized model of divorce, Judge Sheldon fails to consider adequately the critical questions raised by Holmes. By rapidly dismissing hearings in uncontested cases on the grounds that they are not required by statute, rule, or common sense, Judge Sheldon overlooks both statutory law and case law that suggest otherwise. Furthermore, he fails to consider a number of common-sense reasons for the rules. Finally, Judge Sheldon fails to consider the costs of abolishing filings and hearings in uncontested divorces.

12. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897).

13. The law has become insulated from other disciplines such as sociology, anthropology, psychology, and history.

14. See Sheldon, *supra* note 2, at 43.

Court review of uncontested cases is expected under Maine law, and hearings for the purpose of meaningful court review do serve important and necessary needs, both ritualistic and substantive. This section examines the importance of ritual and symbol embodied in the rules of divorce, as well as the substantive necessity for those rules, especially the prophylactic effect of early court intervention in the divorce process. By its nature, this process involves varied and complex legal issues that, if not properly addressed at the time of divorce, may exacerbate post-divorce disputes.

We must consider the costs society will pay if, in the absence of a public consensus on the path family law should follow, we allow the private ordering of divorce arrangements to drive the development of the law. A privatized model of divorce will further impede society's contemplation of Holmes's questions by exacerbating the five degrees of separation. Privatized divorce individualizes issues of divorce, separating individual from individual and individual from community. It impedes a normative review and monitoring of patterns of divorce and its effects on parties, particularly women and children. The elimination of normative regulation and review hinders response to, and reform of, the rules of divorce. A reformation of the current uncontested hearing process is needed in order to create and sustain "ends" that are more substantive and responsive than mere efficiency of process.

Part III addresses Judge Sheldon's criticism of the court and Legislature's lawmaking and his belief that Maine's alimony statute is useless and "vacuous."¹⁵ Judge Sheldon believes that Maine's alimony statute, like the rules regulating uncontested divorce, is anachronistic and untenable.¹⁶ He states that "need" is a pivotal criterion for alimony in Maine case law and statute.¹⁷ He then dismisses need as a proper purpose for alimony and thereby arrives at the conclusion that the statute is useless.¹⁸

I suggest that the statute,¹⁹ which was dramatically revised in 1989, provides a useful tool, as well as a societal directive, for the court to fashion responsive divorce resolutions in which the individual aspects of a couple's marriage and current economic situation can be taken into account to fashion a just result. In this way, the statute embodies a broader purpose for alimony than need—to fashion a just result when the parties' current economic situation, as indicated by income and/or property, would otherwise cause an unjust resolution. I discuss the usefulness of the statute's "ends" in this regard and conclude that any problems with the alimony statute are

15. *See id.* at 44.

16. *See id.* at 9.

17. *See id.* at 29.

18. *See id.*

19. ME. REV. STAT. ANN. tit. 19, § 721 (West Supp. 1996-1997).

not the result of empty legislation but rather of improper application. A narrative example²⁰ illustrates improper application and demonstrates that an expanded legislative mandate for judicial adherence to statutes at the trial level and more meaningful review at the appellate level are necessary to ensure that the statute's ends are achieved.

Part IV of this Article examines the framework of Judge Sheldon's article, which is based on his reading of Arthur Koestler's book, *The Sleepwalkers: A History of Man's Changing Vision of the Universe*.²¹ Judge Sheldon misses the real usefulness of Koestler's book as an analogous view of the development of divorce law, and instead separates the narrow ideas of "fear of change" and "circular reasoning" from the broader thesis of Koestler's story. Koestler's broader historical vision of the development of cosmology—which integrates past, present, and future—is more analogous to Holmes's suggested framework for understanding the law.

Finally, I suggest that Koestler is concerned with my sub-thesis: the effects of separations in society on our ability to answer the kinds of questions posed by Holmes. Koestler believes that the problems facing society have been caused by separations—in the case of his story, separations between scientific views of the world and the more esoteric religious and moral views—and that the key to resolution of these problems lies with a reintegration of man's schizophrenic view of the world.²² Only a co-joining of our separate and distinct disciplines or bodies of knowledge will provide us with the reconciled view of the world²³ needed to determine our broad goals and to be sure that what we give up in the process is worth the price. Koestler warns of the dangers of an "ends-justifies-the-means" approach to existence and advocates for a broader lens view of science, spirituality, art, and human knowledge in general to determine how we move forward from our "present predicament."²⁴

20. See, e.g., Carol Weisbrod, *Divorce Stories: Readings, Comments and Questions on Law and Narrative*, 1991 BYU L. REV. 143 (1991) (discussing the growing importance of narrative in family law scholarship).

21. ARTHUR KOESTLER, *THE SLEEPWALKERS: A HISTORY OF MAN'S CHANGING VISION OF THE UNIVERSE* (MacMillan Co. 1968) (1959). In researching this Article, the Author used a different publication of Koestler's book than Judge Sheldon did in writing his article.

22. See *id.* at 517, 541-42.

23. See *id.* at 14 & 547 n.2, 15, 50, 514, 518, 541-42 (citing ARTHUR KOESTLER, *INSIGHT AND OUTLOOK, AN INQUIRY INTO THE COMMON FOUNDATIONS OF SCIENCE, ART AND SOCIAL ETHICS* (1949)). Koestler understands that the science of a given time is a reflection of a world view and that by studying science, we are in fact studying the evolution of thought. One of the main topics of Koestler's book is the crooked path of science. For an interesting discussion of the process of law within the context of depth psychology, see Ellen Kandoian, *Law from the Perspective of Depth Psychology: A Jungian View*, 24 U. TOL. L. REV. 515 (1993).

24. See KOESTLER, *supra* note 21, at 541.

Part V addresses the separations in society today that are impeding our ability to discuss and reach consensus on the answers to Holmes's questions in the realm of family law. It discusses problems with, and causes of, separations in American society. Further, it presents statistics on the decline of community involvement in America²⁵ and the ramifications of that decline on family law. This section also explains how Judge Sheldon's proposed changes to the process of divorce would widen the separation of individual, community, legislature, and court, and hinder meaningful discussion and consensus on the substantive level.²⁶ Judge Sheldon supports his privatized model of uncontested divorce separate from the legal system by stating that the role of law is interpretive²⁷—that law should mirror behavior.²⁸ I suggest that Judge Sheldon's approach ignores the importance of law's ability to shape behavior—its constitutive role.²⁹

Judge Sheldon's privatized model undermines both law's interpretive and constitutive nature by taking the formation of much of family law out of the hands of the Legislature and the courts and placing it in the hands of individual couples. Law provides a means for communal expression. Through that expression the law provides the means to shape social attitude. By relegating family law to an isolated private realm, Judge Sheldon supports his attitude that marriage and the nuclear family are dead or dying ideals.³⁰ By keeping family law off the public agenda through changes in process, the discussion of shared public values with respect to family behavior, essential to addressing Holmes's questions, is impeded, and messages concerning the lack of importance of family are sent. The silence of the law can be loudly expressive.

While there is nothing inherently wrong with private ordering for the dissolution of marriage, it is not the most appropriate vehicle for the formation of law that shapes the core unit of society—the family. Through the rules of divorce, the law presents its views of mar-

25. See Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, J. DEMOCRACY, Jan. 1995, at 65, 68-70.

26. See generally Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985) (identifying a transfer of moral decisions from the law to the people the law once regulated).

27. See GLENDON, *supra* note 1, at 9 ("Law is interpretive when it is engaged in converting social facts into legal data and systematically summarizing them in legal language."). The danger with law that is formed entirely by its interpretive nature is aptly expressed by Clifford Geertz: "Whatever law is after, it is not the whole story." *Id.* at 9 & 160 n.20 (quoting CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 175 (1983)).

28. See Sheldon, *supra* note 2, at 25.

29. See GLENDON, *supra* note 1, at 9. ("Law is constitutive when legal language and legal concepts begin to affect ordinary language and to influence the manner in which we perceive reality.").

30. See Sheldon, *supra* note 2, at 48.

riage and family. We therefore must view the formation of divorce law in a broad context that considers the family's historical roots in the law, the value of an interdisciplinary approach to the family institution, and the benefits of an integrated approach to forming law. This view should encompass what we perceive as our highest aspirations for society so that we can form law for families based on aspirations higher than efficiency and conformity to present reality. The key to the problems facing divorce law is not our ability to shake off a "fear of change," as Judge Sheldon suggests, but rather our ability to come together and bring to bear all of our varied disciplines as we answer Holmes's questions to responsibly form family law. While this Article addresses comments and suggestions by Judge Sheldon on Maine divorce law, the issues and arguments that I raise are applicable to the status of family law throughout the fifty states.

II. "SEPARATION PART ONE": UNCONTESTED DIVORCE

A. Background

Currently there are divorce hearings before a judge in all uncontested cases in Maine. Procedurally, a divorce case is commenced with the filing of a divorce action, a civil suit. If the parties are successful, as the majority are, in reaching a negotiated or mediated agreement, the case proceeds on an uncontested basis. The parties' agreement is memorialized in a written agreement drafted³¹ by an attorney, a mediator, or the parties and is executed by the parties. An uncontested hearing is scheduled. Only one of the parties need appear at the hearing if both are represented by counsel. Through a series of leading questions posed by the attorney³² for one of the parties, the attending party presents the main points of the agreement to the court along with the cause of the divorce and a request that a divorce be granted. The judge routinely accepts the agreement³³ and signs the divorce judgment without any inquiry or review of the agreement beyond the standard leading questions presented by the one attorney. The entire process for an uncontested hearing takes a matter of minutes to complete.

B. Judge Sheldon on Canon Copernicus and Uncontested Divorce

Judge Sheldon suggests the abolishment of filings and hearings in all uncontested divorces. He believes that filings and hearings in

31. There are virtually no regulations concerning the drafting of settlement agreements. Therefore, they can be drafted by someone completely ignorant of the panoply of legal issues surrounding divorce.

32. See Sheldon, *supra* note 2, at 11-12. Judge Sheldon presents an accurate picture of uncontested divorce hearings.

33. In the case of pro se parties, the judge normally asks the questions and drafts the judgment necessitating the presence of both parties.

uncontested cases are a waste of time,³⁴ and that but for the interest of the Legislature in tradition (its "fear of change"), we could dispense with them. Judge Sheldon begins his analysis with Canon Copernicus, the sixteenth century churchman who discovered that the sun, rather than the earth, lies at the center of the solar system. Judge Sheldon suggests that from Copernicus we can learn not to be afraid of change.³⁵

Copernicus never set out to discover the center of the universe.³⁶ Rather, he attempted to comport Ptolemy's view of the solar system with Aristotle's belief that the universe operated on a system of perfect circles.³⁷ He had no desire to upset Aristotle's teachings; he was tied to tradition. Copernicus waited thirty years to publish his theory because he feared proving it to "ignorants" and "experts."³⁸ The "experts" who created this fear of change in Copernicus's time were the authorities of the Church.³⁹

Judge Sheldon suggests that, like Copernicus, we hold the key to dramatic change.⁴⁰ He believes that we must set aside our traditional biases and "fear of change," the only impediments to moving forward. He says that the "experts" impeding change today are elected representatives in state legislatures.⁴¹ It is for this reason that he suggests that the courts rather than legislatures are more efficient vehicles of change.

Judge Sheldon, unlike Copernicus, is not afraid of change and is not afraid to publish his ideas.⁴² In his article, he makes three points concerning uncontested divorce:

1. Hearings in uncontested divorces are a "time consuming and meaningless formality."⁴³ He suggests that a hearing is merely a worthless ritual in which the judge simply rubber stamps the agreement by signing the judgment.⁴⁴
2. Hearings in uncontested cases are not mandated by statute or rule and are therefore unnecessary;⁴⁵ hearings are not needed to end civil lawsuits.⁴⁶
3. It is not necessary to require divorcing couples to file suit if there is no dispute.⁴⁷ Divorce, like every other civil is-

34. See Sheldon, *supra* note 2, at 9.

35. See *id.* at 11.

36. See *id.* at 10.

37. See *id.*

38. See *id.* at 18.

39. See *id.* at 19.

40. See *id.* at 11.

41. See *id.* at 19.

42. See *id.*

43. *Id.* at 9.

44. See *id.* at 13.

45. See *id.* at 16.

46. See *id.*

47. See *id.*

sue, should play out in court only if there is a disagreement between the parties.⁴⁸

Judge Sheldon presents and dismisses four reasons that he says are often cited for holding hearings in uncontested divorces:⁴⁹

1. To comply with Maine statute requiring the court to determine that the parties have adequate grounds. *Judge Sheldon says there is no such statutory requirement.*⁵⁰
2. To prevent fraud.⁵¹ *Judge Sheldon says testimony is not necessary to prevent fraud.*
3. To comport with the "best interests of the child" standard, which suggests that courts should inspect parents' arrangements for their children. *Judge Sheldon says the statute does not impose such a requirement.*⁵²
4. To protect people. *Judge Sheldon says we do not need testimony to do this.*⁵³ *Rather, a sensitive judge can find unfairness without testimony, and we simply do not have time to do this in all cases; so why bother in uncontested divorces?*

Judge Sheldon and I agree that the current model for the uncontested divorce hearing is functionally purposeless. We disagree, however, as to the existence of legal mandates for uncontested hearings, their essential usefulness and purpose, and the proper solution to the problem with the current model of uncontested hearings. Because he recognizes no purpose for hearings, Judge Sheldon suggests they should be abolished. Because I believe that hearings are necessary and can serve essential purposes, I suggest a reformed model.

C. *A Response to Judge Sheldon's Stance on Uncontested Divorce*

For some time in Maine there has been mandatory court mediation, both pre- and post-divorce, in all domestic relations cases involving minor children.⁵⁴ It appears under Maine law that the mandate that sanctions this private ordering of divorce issues also mandates a continuing and meaningful role for the courts. The mediation statute expressly requires that "[a]ny agreement reached by the parties through mediation on any issues must be reduced to writing, signed by the parties and *presented to the court for approval* as a court order."⁵⁵

Private ordering in the form of marital settlement agreements is differentiated from general contracts by a heightened public interest

48. *See id.* at 9.

49. *See id.* at 14-15.

50. *See id.* at 14.

51. *See id.*

52. *See id.* at 14-15.

53. *See id.* at 15.

54. *See* ME. REV. STAT. ANN. tit. 19, § 581(4) (West Supp. 1996-1997).

55. *Id.* (emphasis added).

in the issues involved in the dissolution of marriage.⁵⁶ There must have been fair dealing and no violation of public policy for such an agreement to be valid. The freedom to contract afforded under the Constitution⁵⁷ is subordinated to the policies embodied in title 19 of the Maine Revised Statutes. In cases involving minor children, it is further subjugated by the *parens patriae* powers of the state.⁵⁸ Courts, therefore, as an arm of the state, have authority to review and supervise the majority of settlement agreements. This authority has been in place in Maine since 1874.⁵⁹ Furthermore, the statute mandates court review and the court has supported the mandate through case law.⁶⁰ Case law supports the position that the court's authority is not limited to questions involving minor children,⁶¹ but also extends to every aspect of the marital relation, including issues of property both marital and non-marital, responsibility for debts, and alimony.⁶² Review of agreements within the context of uncontested divorces is mandated by policy and law, thus necessitating uncontested hearings. Furthermore, it makes sense for other reasons, including efficiency and economy.

The majority of all divorces are settled by agreement of the parties and finalized in uncontested hearings.⁶³ The twofold reason for this is driven by considerations related to process. First, there simply are not enough judges or courtrooms to accommodate the growing procession of civil and criminal cases needing to be heard.⁶⁴

56. JON D. LEVY, MAINE FAMILY LAW § 10.2 at 10-3-10-3.0 (1996).

57. *Id.* (citing U.S. CONST. art. 1, § 10).

58. See *Greenwood v. Greenwood*, 113 Me. 226, 229, 93 A. 360, 361 (1915).

59. See *Burnett v. Paine*, 62 Me. 122 (1874); see also *Tapman v. Tapman*, 544 A.2d 1265 (Me. 1988).

60. See *Tapman v. Tapman*, 544 A.2d at 1267; *Wardwell v. Wardwell*, 458 A.2d 750, 752 (Me. 1983) ("It is the divorce court that must, in every instance, determine that the property settlement is fair and equitable after considering all relevant factors."); *Bagley v. Bagley*, 415 A.2d 1080 (Me. 1980); *Lindsley v. Lindsley*, 374 A.2d 311, 316 (Me. 1977); *Coe v. Coe*, 145 Me. 71, 71 A.2d 514, 515 (1950).

61. See *supra* note 60.

62. See *supra* note 60.

63. See 2 HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 408 (2d ed. 1987). Professor Clark notes that 90% of all divorces are uncontested and estimates quite conservatively that well over 50% are disposed of by separation agreements. These agreements are alternatively referred to as settlement, separation, or pre-nuptial agreements.

64. See BRIAN J. OSTROM & NEAL B. KAUDER, *COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS 1993*, at 3 (1995). Ostrom and Kauder state:

To many judges, court administrators, and others who have more frequent contact with the courts, the critical dimension of caseload is not so much the volume, but how volume is changing over time. And in state courts, the direction of change is up. Civil, criminal, domestic relations, and juvenile caseloads have all shown substantial growth since 1984. Ten-year growth rates of 30 percent (civil and criminal), 40 percent (juvenile), and 60 percent (domestic relations) mean that cases are increasing at least four times

Courts, therefore, are constantly looking for ways to control their dockets by moving the civil calendar.⁶⁵ Second, domestic relations cases have been particularly vulnerable to this focus on process. It has been estimated that domestic relations cases comprise thirty-eight percent of the civil dockets in this country,⁶⁶ and make up the fastest growing segment of state court civil case loads.⁶⁷ Evolving views of domestic relations and models of resolution have made domestic relations cases the particular target of either a move to reduce the civil docket or to reach amicable private settlements.⁶⁸ The divorce settlement agreement has become the vehicle of choice to resolve divorce issues.⁶⁹ The focus on process over substance suggests that the aim of current divorce law, as Judge Sheldon advocates, is the efficient termination of unhappy marriages.

Divorce cases make up the largest portion of the domestic relations case load; however, statistics indicate that the percentage growth in post-divorce case filings far exceeds that of original divorce filings.⁷⁰ Such statistics suggest that while private ordering of divorce cases may be efficient in the short-term, it may not bode well for the long-term unless more thoughtful attention to the substantive effects of private ordering is factored into the process.

Because the percentage of post-divorce filings far exceeds divorce filings and the vast majority of divorces are finalized on an uncontested basis,⁷¹ this Article proceeds on the premise that the current use of settlement agreements is neither eliminating nor reducing post-divorce filings and may in fact be causing their increase. In

faster than the national population. Given that the resources necessary to process cases in a timely fashion, such as judges, court support staff, and automation, seldom keep pace, courts must constantly search for more efficient ways to conduct business.

Id. at 3.

65. *See id.*

66. *See* Putnam, *supra* note 25, at 65, 68-70.

67. *See id.* at 3.

68. *See, e.g.*, UNIF. MARRIAGE AND DIVORCE ACT § 306, 9A U.L.A. 216-17 (1987) (promoting "amicable settlement"); *Wife, B.T.L. v. Husband, H.A.L.*, 287 A.2d 413, 415 (Del. 1972); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 991-92 (1979) ("[u]ndisputed divorce cases clog the family law system.").

69. *See, e.g.*, CLARK, *supra* note 63, at 408-09. *But see* JOAN BLADES, FAMILY MEDIATION: COOPERATIVE DIVORCE SETTLEMENT 10-11 (1985) (suggesting that Clark's figures are conservative). Blades observes: "The overall trial rate for domestic relations cases is 16.8% with states reporting rates as high as 35.7% (California) and as low as .3% (New Jersey)." *Id.* With such a high percentage of divorces being settled by agreement, the potential effect of such private agreements on the formation of substantive family law is staggering.

70. OSTROM & KAUDER, *supra* note 64, at 29 (showing that between 1988 and 1993 divorce filings increased six percent while support and custody filings increased 38%).

71. *See* BLADES, *supra* note 69; CLARK, *supra* note 63.

other words, we need to re-think the ends sought by the current process and consider the costs incurred.

One factor contributing to this situation appears to be the emphasis on settlement agreements as the speedy vehicle of process. This focus diverts attention away from the *effects* of that process on the substantive divorce law in post-divorce actions or on the further development of substantive divorce law. That lack of attention or thought is evident in the way in which attorneys use or fail to use the settlement agreement in post-divorce actions⁷² and in the confused body of case law involving settlement agreements in post-divorce actions.⁷³ The scope of this Article does not allow a complete discussion of this point. It is important to note, however, because it is this atmosphere that sets the context for the discussion of a second point—the diminished attention to uncontested divorce hearings.

As Judge Sheldon points out, in his courtroom, as in the majority of others, judges routinely rubber stamp settlement agreements in a process that lasts several minutes and does not require the appearance of both parties. One cause of the problem is that there are no guidelines for judges. Such a short “ritual” does not allow the judge the opportunity to review the agreement for internal ambiguities or for inconsistencies with respect to the substantive law, nor does it provide time to assure that the agreement is consistent with the divorce judgment. Compounding the problem is the ever-expanding broad spectrum of legal issues potentially addressed in settlement agreements such as asset protection,⁷⁴ trusts and estates,⁷⁵ tax,⁷⁶ tort,⁷⁷

72. See, e.g., *In re Marriage of Lurie*, 33 Cal. App. 4th 658 (Cal. Ct. App. 1995). In *Lurie*, the custodial parent brought an action to enforce and modify a New York order in California under the Uniform Reciprocal Enforcement of Support Act (hereinafter URESA), rather than through an action to enforce the parties' agreement (stipulation). Under URESA the California court applied California law and eliminated support for one of the children.

73. See, e.g., Doris Del Tosto Brogan, *Divorce Settlement Agreements: The Problem of Merger or Incorporation and the Status of the Agreement in Relation to the Decree*, 67 NEB. L. REV. 235 (1988); Sally Burnett Sharp, *Semantics as Jurisprudence: The Elevation of Form Over Substance in the Treatment of Separation Agreements in North Carolina*, 69 N.C. L. REV. 319 (1991) (discussing the inconsistent approaches and conclusions that the courts have applied to this issue).

74. See e.g., *In re Marriage of Madden*, 683 P.2d 493 (Mont. 1984).

75. See, e.g., *In re Estate of Hereford*, 250 S.E.2d 45 (W. Va. 1978).

76. See generally *Hawkins v. Commissioner*, 86 F.3d 982, 993-94 (10th Cir. 1996) (holding that the marital settlement agreement satisfied requirements of qualified domestic relations order, reversing tax court, and concluding that wife must carry tax burden of one million dollar distribution from former husband's pension plan); *Calmes v. United States*, 926 F. Supp. 582, 588 (N.D. Tex. 1996) (concluding that Internal Revenue Service bound by taxpayers' pre-nuptial agreement to opt out of community property regime); *Hayes v. Commissioner*, 101 T.C. 593 (1993) (reviewing agreement to determine status of stocks disposed in separation agreement for tax purposes); Steven L. Severin & Stephen R. Corrick, *Are Post-Marriage Payments Alimony?*, 81 J. TAX'N 184 (1994) (discussing factors that court might weigh in the characterization as alimony of post-remarriage payments).

bankruptcy,⁷⁸ employment, pension,⁷⁹ insurance, welfare, and social security. This partial list does not include issues of contract law,⁸⁰ constitutional law,⁸¹ rules of procedure,⁸² or malpractice.⁸³ The po-

77. One of the most dramatic changes in divorce law is the abolition of interspousal tort immunity. See generally Barbara Glesnar Fines, *Joinder of Tort Claims and Divorce Actions*, 12 J. AM. ACAD. MATRIM. LAW. 285 (1994). The issues raised in the Fines article involve the extent to which a spouse may or must join in the divorce action any tort claims he or she may have against the other spouse. This issue must be considered when the divorce is resolved via a settlement agreement. Additionally, most agreements routinely contain general tort claim waiver language. See also Seymour Benson & Leigh Kniskern, *Interspousal Tort Liability: Abrogation of Interspousal Immunity: Part I*, FLA. B.J., Mar. 1994, at 83; Barbara H. Young, *Interspousal Torts and Divorce: Problems, Policies, Procedures*, 27 J. FAM. L. 489 (1988-89).

78. See, e.g., *Farrey v. Sanderfoot* (*In re Sanderfoot*), 111 S. Ct. 1825, 1831 (1991) (holding that Bankruptcy Code section 522(f)(1) "requires a debtor to have possessed an interest to a lien attached, before it attached, to avoid the fixing of the lien in that interest."); *Finalco, Inc. v. Roosevelt* (*In re Roosevelt*), 87 F.3d 311, 313, 319 (9th Cir. 1996) (holding husband's transfer to wife of his interest in jointly held home was "made" when they signed marital agreement for purposes of the Bankruptcy Code); *Engram v. MacDonald* (*In re MacDonald*), 194 B.R. 283 (Bankr. N.D. Ga. 1996) (involving interpretation of agreement to determine dischargeability of alimony obligation in bankruptcy); James H. Gold, *The Dischargeability of Divorce Obligations Under the Bankruptcy Code: Five Faulty Premises in the Application of Section 523(a)(5)*, 39 CASE W. RES. L. REV. 455, 457 n.8 (1988-89) ("In the overwhelming majority of cases arising under [section] 523(a)(5), the bankruptcy debtor is a male who is seeking to discharge divorce obligations to his former wife."); William A. Reppy, Jr., *Discharge in Bankruptcy of Awards of Money or Property at Divorce: Analyzing the Risk and Some Steps to Avoid It*, COMMUNITY PROP. J., July 1988, at 1.

79. See, e.g., *McMillian v. Parrott*, 913 F.2d 310 (6th Cir. 1990); *Trustees of Iron Workers Local 451 Annuity Fund v. O'Brien*, 937 F. Supp. 346 (D. Del. 1996). In both cases, the divorce settlements' release of claims did not waive beneficiary rights in a pension, and the courts applied the federal common law requirement that a former spouse's waiver of beneficiary rights in an ERISA governed pension must be specific. See also *Mohamed v. Kerr*, 53 F.3d 911 (8th Cir. 1995), cert. denied, 116 S. Ct. 185 (1995) (involving separation agreement's divestiture of beneficiary status in qualified ERISA plan).

80. See *Rockwell v. Rockwell*, 681 A.2d 1017 (Del. 1996) (applying contract principles of reformation, rescission, and modification to alimony agreement); *Frizzell v. Bartley*, 372 So. 2d 1371 (Fla. 1979) (holding that the section of a statute which gives trial courts authority to modify alimony and support agreements does not violate the state and federal constitutional prohibition against impairment of contractual obligations); *In re Marriage of Kloster*, 469 N.E.2d 381, 383 (Ill. App. 1984) (refusing to set aside amicably agreed property settlements "absent proof of fraud, duress, or variance with public policy").

81. See *Fournier v. Fournier*, 376 A.2d 100 (Me. 1977). The *Fournier* court held that title 19, section 722-A of the Maine Revised Statutes, Maine's divorce property statute, was not unconstitutionally vague. In dicta the court recognized the discretionary nature of the statute, but also noted the requirements of the statute.

In enacting § 722-A, the Legislature obviously recognized the need to afford the trial court sufficient flexibility to fashion orders concerning the division of marital property which are appropriate to each individual case.

On the other hand, the Legislature also sought to guide the exercise of judi-

tential list of issues for litigation is extensive⁸⁴ and has not even begun to be explored by the legal community.⁸⁵

With so many opportunities for uncertainty, the courts already are causing and experiencing considerable litigation.⁸⁶ Once lawyers begin to use their ingenuity to recognize unanticipated uses for settlement agreements, the floodgates of litigation could be opened wider. In the meantime, unsuspecting couples are signing settlement agreements without fully understanding possible future ramifications of the terms of their contract on future action by the court. Therefore, the costs associated with abolishing uncontested hearings are potentially great and could affect individuals, the community, and substantive family law.

cial discretion by *requiring* that the court consider at least three specified factors in arriving at its decision.

Id. at 103 (emphasis added). *See generally* Frizzell v. Bartley, 372 So. 2d at 1371; Shoosmith v. Scott, 232 S.E.2d 787 (Va. 1977).

82. Wiseman v. Wiseman, No. 94-CA-002996-MR, 1996 WL 185046 (Ky. App. 1996) (opinion now unpublished). The court held that a party's non-disclosure of income earned during marriage was not extrinsic fraud that would justify reopening divorce decree. The parties entered into a different agreement incident to the divorce. The non-disclosure would have been more successful if the attorney had filed a contract action. *See also* Henry v. Edwards, No. 15205, 1996 WL 220385, at *4 (Ohio Ct. App. May 3, 1996) (holding that a decree-incorporated agreement may be modified only if entire divorce decree is vacated, which was not possible because petitioner had remarried); Buys v. Buys, 924 S.W.2d 369 (Tex. 1996) (finding that the 1990 amendment to USFSPA which bars the reopening of pre-McCarty decrees does not bar the woman from enforcing clause of 1920 settlement agreement).

83. *See* McWhirt v. Heavey, 550 N.W.2d 327 (Neb. 1996) (holding that a client's acceptance of a divorce settlement does not bar later malpractice action).

84. One of the areas of law that has been affected by the use of settlement agreements is child support. *See, e.g.,* Adam v. Adam, 624 A.2d 1093, 1098 (R.I. 1993) (holding that because agreement merged with divorce decree, statutory authority precluded the court from ordering support beyond a child's eighteenth birthday); Spagnolo v. Spagnolo, 460 S.E.2d 616, 620 (Va. 1995) (holding that a judge, in making a child support award, could properly follow parties' agreement or statutory guidelines, but not both; the judge must choose between the agreement and the guidelines); Sean T. Goguen, Note, *Merger Precludes Family Court from Ordering Support After Child Reaches Majority*—Adam v. Adam, 28 SUFFOLK U.L. REV. 545 (1994).

85. In the majority of cases reviewed by this Author, attorneys brought post-divorce actions on behalf of their clients under divorce decrees rather than under agreements regardless of the post-divorce status of the agreements and seemingly unaware that their clients might have fared better under a contract action. *See, e.g.,* Marino v. Lurie (*In re* Marriage of Lurie), 39 Cal. Rptr. 2d 835 (Cal. 1995). Additionally, many agreements are now being drafted by mediators operating in an atmosphere of "evolving anti-law bias." *See* Ellen Waldman, *The Role of Legal Norms in Divorce Mediation: An Argument for Inclusion*, 1 VA. J. SOC. POL'Y & L. 87, 90-91 (1993) (expressing concern about the alienation of the divorce mediation process from the legal system and resulting unfairness of settlements).

86. The courts have taken inconsistent and varied approaches to the issue of merger. *See generally* Brogan, *supra* note 73; Sharp, *supra* note 73.

An uncontested hearing at which both parties are present that involves purposeful regulation and review of the settlement agreement could provide benefits at all levels of lawmaking as well as accommodate the needs of the family. Initially, guidelines drafted by the Legislature would need to be drafted to provide focus and assistance for judges. The formation of guidelines would require contemplation of society's aspirations for families and family members, requiring a social dialogue. Such dialogue would necessitate the integration of ideas about legal procedure with ideas about the direction substantive law should follow, in turn forcing consideration of the constitutive nature of law. The guidelines would provide direction for divorcing parties as well as attorneys and mediators,⁸⁷ taking lawmaking out of the hands of private ordering and restoring it to a more integrated process of development.⁸⁸

For the parties and families, the purposeful uncontested hearing would fulfill law's important ritual and symbolic role in keeping with its essential constitutive nature.⁸⁹ It would announce that the dissolution of a marriage and the resulting disjunction of family is of significant interest to society.⁹⁰ It would remind attorneys, mediators, and parties that fair dealing and other public policy concerns must play an integral part in private ordering.⁹¹ For the parties it could provide, in part, a ritual "closing" to marriage that is currently absent. For the courts it would be a reminder that everything they do has important repercussions for individuals and society and that they are part of an integrated process that involves community sentiment and legislative mandate as well as legal precedent.⁹²

87. Mediation could become particularly problematic if conducted outside of the law with no judicial oversight. Many states do not regulate mediation. For background information on mediation in general, see Joel M. Douglas & Lynn J. Maier, *Bringing the Parties Apart*, 49 DISP. RESOL. J. 29 (1994).

88. See, e.g., BLADES, *supra* note 69.

89. See P.S. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 IOWA L. REV. 1249, 1272 (1980) (describing the law's "hortatory" function and questioning whether we have "gone too far in discounting the efficacy of the hortatory function of the law"); Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991, 994 n.14 (1989) ("[N]o small part of the law's function is to make men good.") (quoting Justice Brandeis).

90. Likewise, an abolition of the uncontested hearing, which Judge Sheldon advocates, could send the opposite message. This result seems to comport with his premise that we must accept the death of marriage and the nuclear family.

91. See *supra* note 82. See generally *Kolmosky v. Kolmosky*, 631 A.2d 419, 421-22 (Me. 1993) ("[M.E. R. Civ. P. 60(b)] does not preclude an independent action attacking a divorce judgment based on fraud or misrepresentation.").

92. If Judge Sheldon's sentiments are representative of those of trial judges in Maine, there is a need for a reminder that trial courts are but a small part of a broader interrelated process of forming law whose function extends beyond efficiency of process.

Finally, and most practically, the purposeful uncontested hearing could cut down on the proliferation of post-divorce filings,⁹³ which would reduce the monetary, temporal, and emotional costs of prolonged discord. The hearing could mandate fair dealings between parties, encourage better drafting of settlements, and prevent ambiguities and inconsistencies of language in agreements (as well as between agreement and judgment). It also could provide sanctions and costs for parties or counsel who impede the process.

The "costs" of more complex and confused post-divorce litigation that would result from the suggested abolition of filings and hearings in uncontested cases in favor of private contractual arrangements are high. Potentially greater "costs," however, lie in the disregard for the expressive or symbolic purposes of law and legal ritual embodied in the cavalier suggestion to abolish court involvement in the majority of divorces. Because it is through the rules and ritual of divorce that the law most loudly expresses its views of marriage and family, the symbolic purpose of all filings and hearings in all divorces is significant. The current move toward privatization of divorce is already sending messages to society. Because law provides a means of shaping social attitudes and behaviors, the messages it sends should be carefully considered. A complete elimination of filings and hearings in uncontested cases, which make up the vast majority of divorces, would send a loud expression of the law's disregard of family and marriage. We must consider the benefits and purposes of ritual and symbol in family law.

D. *The Significance of Ritual*

Evidence of the importance of family, community, and ritual in the life of man dates to prehistoric times.⁹⁴ Although the mother-child and clan relationships were more important earlier on, for various reasons, than the relationships between men and women, the importance of an integrated community and family in the raising of children and in the forming of society were highly regarded values that we should not be so quick to dismiss. We continue to cherish many old rituals and create new ones. In addition to the celebrated ritual of marriage, we still come together, family, friends, and often community, as we have since the earliest days of humankind, to share and memorialize both joys and sorrows.

Divorce, unlike any other momentous occasion in our culture, is presently without ritual.⁹⁵ It is also often the most isolated and iso-

93. See *supra* note 68.

94. See, e.g., JOHN E. PFEIFFER, *THE EMERGENCE OF SOCIETY: A PREHISTORY OF THE ESTABLISHMENT* (1977); G. RENARD, *LIFE AND WORK IN PREHISTORIC TIMES* (R. T. Clark trans., 1968).

95. Divorce is not without ritual in all cultures and religions. The "get" is the Jewish religious divorce process or ritual. See Alan Reed, *Transnational Non-Judi-*

lating.⁹⁶ The effects of divorce are far-reaching. The lives of family members, friends, and even the community are affected by the divorce. Children are the most obviously affected; everything in their world is disrupted and the ramifications are lifelong.⁹⁷ Extended family members and friends of the divorcing family are often asked to choose between one party or the other. School communities, associations, and organizations are affected by divorce. Families often uproot and leave a community entirely. The psychological, sociological, and economic ramifications are enduring.⁹⁸

After a death, the Jewish religion observes a period called "shivah" during which the immediate family members sit in mourning for seven days following the funeral.⁹⁹ Each evening at sundown prayers are said. During the seven days, family members, friends, and people from the community come to visit and sit with the immediate family for a short time. People reminisce; they laugh; they cry. After the seven days, the immediate family members resume their ordinary activities but there is a recognized one-year extended period of mourning.

cial Divorces: A Comparative Analysis of Recognition Under English and U.S. Jurisprudence, 18 LOY. L.A. INT'L & COMP. L.J. 311 (1996), which presents a clear description of the "get":

The get is a written document and cannot be pronounced orally. A trained scribe takes three hours or longer to complete the get, in Hebrew and Aramaic. The get is executed in the Beth Din (house of law) in the presence of three dayans, judges, expert in family law matters. Two competent witnesses, specifically appointed for that particular purpose, sign the document. The wife must receive the get in person. The crucial legal act that dissolves the marital ties is handing the get to the wife.

Id. at 327-28, (citing Berkovits v. Grinberg, 2 All. E.R. 681 (Fam. 1995); CODE OF MAIMONIDES BOOK FOUR, THE BOOK OF WOMEN 166 (Isaac Klein trans., 1972)).

96. Common practice requires only one party to be present at the uncontested hearing. The other party is usually at home. Divorce often separates divorcing parties from former family members, friends, and even the community. Additionally, the pain and emotional disruption is experienced in private by each separate member of the divorcing family.

97. The statistics concerning fatherless children are grim. See, e.g., Judith S. Walenstein, *Children of Divorce: Preliminary Report of a Ten-Year Follow-Up of Older Children and Adolescents*, 24 J. AM. ACAD. CHILD PSYCHIATRY 545 (1985).

98. See generally Ann Lacquer Estin, *Economics and the Problem of Divorce*, 2 U.L. CHI. SCH. ROUND TABLE 517 (1995); Elizabeth Gleick, *Hell Hath No Fury*, TIME, Oct. 7, 1996, at 80 (discussing the movie *The First Wives Club* and the consequences of divorce on women and children); Saul D. Hoffman, *Divorce and Economic Well-Being: The Effects on Men, Women and Children*, DEL. LAW. 1987, at 18; Martha Minow, *Consider the Consequences*, 84 MICH. L. REV. 900 (1986); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9 (1990); Lynne D. Wardle, *Divorce Violence and the No-Fault Divorce Culture*, 1994 UTAH L. REV. 741; Weisbrod, *supra* note 89.

99. See 10 THE NEW ENCYCLOPEDIA BRITANNICA: MICROPAEDIA READY REFERENCE 752 (Robert McHenry ed., 15th ed. 1993). "Shivah" means "seven" in Hebrew. See *id.*

I have occasionally "conjured up" a ritual of divorce where, following the completion of settlement or hearing and a solemn formalization of the divorce, a period like shivah would be observed.¹⁰⁰ People could come together to recognize the end of the marriage and the need to heal, to laugh, to cry, to prepare to move on. There could be united support for the parties and the children, from family and friends, in recognition of the pain of divorce. A one-year healing period would be observed during which the focus would be on rebuilding stability. Parties would not remarry or cohabitate during that year.¹⁰¹

Admittedly, such a ritual is farfetched.¹⁰² We would need to come a long way in our civility toward one another before we could even contemplate such an idea, let alone carry it off. Furthermore, it is not the role of law to create such ritual. But the idea of the need for *some* ritual in uncontested divorce is not so farfetched.

Under our current system, the formal ceremony of divorce (as unceremonious as it is) is conducted in either a contested or uncontested hearing. Following the conclusion of a contested hearing, the parties await the judge's decision, often for a number of months. What they ultimately receive is a document purporting to end the marriage and settle the issues. If no appeal is filed, the divorce is final thirty days after the entering of the judgment.¹⁰³ The parties wake up on that morning no longer married. For most people there is a ring of unreality, an anti-climax. There usually is no real clo-

100. This fantasy stems in large part from the comments of clients who, following hard fought or simply settled cases often asked me: "Is that all there is?" Certainly a sense of solemnity and ritual can help clients experience the divorce. *See supra* note 95 (discussing the ritual of the "get").

101. Such a rule would probably reduce the likelihood of second (or third) marriages followed by second divorces—certainly a litigation-saving measure. Additionally, parents could be directed to focus attention on children who suffer from all of the tension of the divorce process itself and need time to reunite with each parent. Strong proponents of individual rights might argue that this would be an intrusion into rights of privacy, and perhaps it might be. However, we seem to have no problem treating children as adult criminals, creating fatherless homes, and increasing the likelihood of crime. Do we value individuality over children?

102. American jurisprudence is based on the idea of the "rugged individual." *See generally* FREDERICK JACKSON TURNER, *THE FRONTIER IN AMERICAN HISTORY* (1962). Alexis de Tocqueville recognized the importance of the relationship between the individual and the community. *See Putnam, supra* note 25, at 65-66. Law has formed in various patterns affected by, among other things, locale and geography. At a recent presentation, Professor Bernhard Grossfeld discussed a comparative study of the formation of law. By way of example, Professor Grossfeld pointed out major differences between Chinese and American jurisprudence suggesting that the Chinese system, in fashioning remedies, considers the need for individuals to continue interacting in close proximity within the community after resolution of conflict. *See* Professor Bernhard Grossfeld, *The Invisible Hand: Patterns of Order in Comparative Law*, Address to Faculty at Roger Williams University School of Law (Sept. 30, 1996).

103. *See* ME. R. Crv. P. 76.

sure; life just goes on. The uncontested hearing, perhaps, creates an air even more separated from reality because there is no opportunity for the parties to be heard or to express their feelings, and usually only one party is present in the courtroom. The parties' settlement agreement is presented to the court in a rote presentation.¹⁰⁴ The judge signs the divorce judgment, and the divorce is finalized on the spot if the parties have signed waivers of appeal. What was begun with a blood test, licenses, and much ceremony is ended with a signature on a judgment that the parties receive in the mail.

Judge Sheldon and others would probably argue that courts are not the place for ritual, nor do they have the time or resources to foster it. Besides, ritual is an even more worthless reason for holding uncontested hearings than the four cited by Judge Sheldon's article.¹⁰⁵ I would have to agree that uncontested hearings in their present form serve little purpose, ritualistic or otherwise. However, it would be a mistake to abolish uncontested hearings for three reasons. First, to do so would send a symbolic message diminishing recognition of the seriousness of the impact of divorce on people's lives and diminishing the institution of marriage itself. Second, the more we encourage private ordering in the area of family law, the more divorced the individual becomes from the community. We often forget these days that the recognition of the individual and individual rights in the United States' doctrine presupposes the individual as being a part of, and as caring about, the good of the greater community.¹⁰⁶ The more divorced we allow people to become from the community, the less able we will be to understand where we are in the development of our laws and society and where we want to go.¹⁰⁷ Third, from a legal and economic perspective,

104. See Sheldon, *supra* note 2, at 11-13.

105. Judge Sheldon recites four reasons for testimony in uncontested divorces, none of which he finds convincing: (1) the divorce statute requires the court to confirm adequate grounds for divorce; (2) it is necessary to prevent fraud; (3) courts need to supervise parents' plans for their children; and (4) we need "to protect people, especially women, from overbearing." Sheldon, *supra* note 2, at 14-15.

106. See, e.g., GLENDON, *supra* note 1, at 114-19. Professor Glendon discusses Tocqueville and points out the tension between individualism and community. She notes that Americans place great value in the concept of individualism, but that they are less aware of the dangers pointed out by Tocqueville of *over-valuing* individualism. See *id.* "What can even public opinion do when not even a score of people are held together by any common bond, when there is no man, no family, no body, no class, and no free association which can represent, public opinion and set it in motion." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA II* at 314 (J. Mayer trans., Doubleday Anchor 1969) (1840).

107. See Putnam, *supra* note 25. Professor Putnam discusses the decline of community and social interaction in America. Such a decline does not bode well for the law of the family and has ominous implications. See also GLENDON, *supra* note 1. Glendon observes:

improving and maintaining the uncontested divorce hearing is simply cost-effective in the long run.

My fantasy ritual is clearly just the stuff of imaginative wanderings, perhaps the other extreme to Judge Sheldon's proposals. However, there is a workable middle ground that should be considered. Trial courts are not conducting purposeful review of agreements. Additionally, recent case law suggests that in practice the court is moving away from the stance that the primacy of court authority in divorce cases to review agreements supersedes the rights of contract as expressed in the Constitution.¹⁰⁸ This direction will exacerbate the already confused body of law surrounding divorce settlement agreements and post-divorce litigation. I therefore reject Judge Sheldon's approach and make the following proposal for meaningful hearings in uncontested cases.

E. A Proposed Working Model for Meaningful Hearings

First, prior to the scheduling of all uncontested hearings, all parties desiring to proceed to divorce on an uncontested basis would be required to submit to the court, in addition to a request for hearing, the following documents: individual verified property lists and verified statements of income along with supporting documentation, a proposed settlement agreement, and a proposed judgment. There would be an accompanying form provided by the court that would provide a checklist and a list of questions to be completed separately by both parties. The questions, which would be aimed at ascertaining fair dealing, competence, understanding, and complete treatment of all the issues, could ask the following: Who drafted the agreement? Were the parties represented by counsel, and if so, what are the attorneys' names? Do the parties desire the agreement to be incorporated into the judgment and merged? This would be written in plain English. The checklist would include a list of all possible issues that should be covered by a settlement agreement, and the parties would indicate whether the item is relevant or not relevant, and whether it has been addressed in the agreement. The form would be signed and notarized.

What prepares men for totalitarian domination in the non-totalitarian world is the fact that loneliness, once a borderline experience usually suffered in certain marginal social conditions like old age, has become an everyday experience of evergrowing masses of our century. The merciless process into which totalitarianism drives and organizes the masses looks like a suicidal escape from this reality. The "ice cold reasoning" and the "mighty tentacle" of dialectics which "seizes you as in a vise" appears like a last support in a world where nobody is reliable and nothing can be relied upon.

Id. at 186 n.23 (citing HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 478 (1973)).

108. LEVY, *supra* note 56.

Second, prior to the scheduling of the uncontested hearing by the clerk of the court, a judge (or possibly an appointed master) would review all the documentation to make certain that all items were covered and in order. That process would include filling out a checklist that would itemize all required documents. This list would be identical to the one filled out by the parties, but would include a space to note missing documents or questionable items as well as to ask questions. The reviewer would note internal inconsistencies and ambiguities in the agreement, as well as inconsistencies and ambiguities between the proposed agreement and the proposed judgment.¹⁰⁹ A copy of the form would be returned to the parties, and they would be required to act in accordance with the directives of the judge or master.

Third, once the parties had complied with all directives, an uncontested hearing would be scheduled at which both parties would be required to appear. Any ambiguities that needed to be addressed by the court would be dealt with at the hearing. The parties would sign an exit form. The judge would make a brief statement,¹¹⁰ and all documentation would become part of the record in the case.

Fourth, there would be mandated sanctions for parties and attorneys who were later found to have acted in bad faith or inconsistently with the public policies being promoted. Such actions would allow innocent parties to sue both the opposing party and either of the attorneys.¹¹¹ Additionally, the agreement and/or the judgment could be altered by the court without disturbing the parties' divorce status.¹¹²

109. In cases involving pro se parties, no judgment would be required; however, the judge or master who would be required to draft the judgment could not draft it until all issues on the form had been resolved.

110. Especially when children are involved in a case, it is incumbent upon the judge to remind the parties of the interests and powers the state has in the well-being of their children. The judge could also state that all children suffer from divorce and that meaningful involvement with the children by both parents is essential to healthy development of children. The parties could be directed to community services if available. See generally MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 41 n.127 (1981) (citing MAX RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE, AND THE LAW* 127 n.1 (1972) (discussing Swedish matrimonial ceremony language).

111. See, e.g., *Kolmosky v. Kolmosky*, 631 A.2d 419 (Me. 1993) (finding that attorney acted in bad faith where attorney structured unfair agreement in such a way that client could not sue). Because the parties would be required to provide financial information as part of the record of the case, any misrepresentation would be a fraud upon the court.

112. See, e.g., *Henry v. Edwards*, No. 15205, 1996 WL 220885, at *4 (Ohio App. 2 Dist. May 3, 1996). In *Henry*, the Ohio court explained that a decree-incorporated agreement may be modified only if the entire divorce decree is vacated. Therefore, although the alimony agreement was "unfair," the agreement could not be modified because the petitioner had remarried. See *id.*

Such a model for uncontested hearings would ensure fair dealings in accordance with public policy. Change is also needed for fair resolution of contested cases, which would require integrated efforts on the part of the court, the community, and the legislature.

III. "SEPARATION PART TWO": THE LAW OF ALIMONY—RULE VERSUS DISCRETION

A. Background

Maine's first alimony statute was enacted in 1821.¹¹³ In essence, it provided that in cases of marital separation and divorce in which the husband was at fault, the court had the authority to grant alimony to provide the wife with "reasonable and comfortable support."¹¹⁴ Beyond that mandate, the court was afforded expansive discretionary powers. In 1847 when the legislature revised Maine's statutes, no changes were made in the alimony statute.¹¹⁵ In the 1857 revision, alimony was broadened to include payment of a "specific sum."¹¹⁶ In this revision no specific reference to purpose was made. The discretionary manner in which alimony could be awarded was expanded.

In 1971 the statute was amended to eliminate fault as a consideration.¹¹⁷ Prior to the amendment, marital fault on the part of the husband was a prerequisite to the award of alimony. In 1977 the statute was again revised, this time to make allowance of an award of alimony to either spouse.¹¹⁸ This broadened the discretionary power of the court further. In all of the revisions since 1821, no mention has been made of the purpose of alimony; therefore, it can be assumed the purpose was left entirely to the discretion of the court. Appellate courts furthered this open-ended standard by deferring to the discretion of the trial court in the absence of an abuse of discretion, which was rarely found.

In 1989 the legislature dramatically revised the statute, adding fourteen specific factors a court must consider when determining an award of alimony. The statute became effective January 1, 1990. It provides as follows:

§ 721. Alimony

113. See Sheldon, *supra* note 2, at 22 (referring to P.L. 1821, ch. LXXI, § 5).

114. See *id.*

115. See *id.* at 30 (referring to P.L. 1847, ch. XIII, § 2).

116. See *id.* (referring to P.L. 1857, ch. 60, § 6).

117. See generally LEVY, *supra* note 56, at 8-3 (referring to P.L. 1971, ch. 399, § 21).

118. See Sheldon, *supra* note 2, at 30 (referring to P.L. 1977, ch. 564, § 86).

1. *Factors.* The court shall¹¹⁹ consider the following factors when determining an award of alimony:
 - A. The length of the marriage;
 - B. The ability of each party to pay;
 - C. The age of each party;
 - D. The employment history and employment potential of each party;
 - E. The income history and income potential of each party;
 - F. The education and training of each party;
 - G. The provisions for retirement and health insurance benefits of each party;
 - H. The tax consequences of the division of marital property, including the tax consequences of the sale of the marital home, if applicable;
 - I. The health and disabilities of each party;
 - J. The tax consequences of an alimony award;
 - K. The contributions of either party as homemaker;
 - L. The contributions of either party to the education or earning potential of the other party;
 - M. Economic misconduct by either party resulting in the diminution of marital property or income;
 - N. The standard of living of the parties during the marriage; and
 - O. Any other factors the court considers appropriate.
2. *Costs and attorney's fees.* The court may order either party to pay the costs and attorney's fees of the other party in the defense or prosecution of a divorce.
3. *Real estate.* The court may order any part of the obligated party's real estate and, if necessary, the rents and profits from that real estate to be assigned and set out to the other party for life.
4. *Alternative to alimony.* Instead of alimony, the court may order either party to pay a specific sum to the other party, as the court may direct.
5. *Modification.* The court, at any time, may alter or amend a decree for alimony or specific sum when it appears that justice requires it, except that a court shall not increase the alimony if the original decree prohibits an increase. In making any alteration or amendment, the court shall consider the factors listed in subsection 1.
6. *Enforcement.* The court may use all necessary legal provisions to enforce its decrees.
7. *Limitations.* This section does not limit the court, by full or partial agreement of the parties or otherwise, from awarding alimony for a limited period, from awarding alimony which may not be increased regardless of subse-

119. "Shall" is defined as follows: "To express simple futurity in the first person and determination, compulsion, obligation, or necessity in the second and third persons." WEBSTER'S NEW WORLD DICTIONARY 1307 (David B. Guralnik ed., 1986).

quent events or conditions or otherwise limiting or conditioning the alimony award in any manner or term that the court considers just.¹²⁰

B. Judge Sheldon on Johannes Kepler and Maine Alimony Law

Judge Sheldon suggests that Maine's alimony statute is "vacuous,"¹²¹ and he blames the Law Court and the legislature for what he views as the key to the problems facing domestic relations law: irrational ties to traditionalism and "fear of change." Judge Sheldon believes that the Legislature's "fear of change" is causing the passage of useless statutes and points to Maine's alimony statute as a prime example.¹²² He believes that the Law Court's "fear of change" creates circularly reasoned opinions¹²³ that preserve antiquated traditional views and prevent the sweeping changes that are necessary.¹²⁴ He begins his analysis of the law of alimony with Johannes Kepler, the early seventeenth century mathematician whose discoveries of planetary motion formed the foundation of modern cosmology. Judge Sheldon suggests that from Kepler we can learn to recognize and avoid circular reasoning.¹²⁵

Johannes Kepler set out to prove that the universe was built around geometric figures.¹²⁶ In attempting to prove this nonsensical theory, he unwittingly discovered three laws of planetary motion.¹²⁷ Judge Sheldon focuses on what he believes caused Kepler to search for his geometric universe—circular reasoning. Judge Sheldon suggests that the proof of Kepler's ideas "consist[ed], roughly, in the deduction that God could only create a perfect world, and since only five symmetrical solids exist, they are obviously meant to be placed between the six planetary orbits 'where they fit in perfectly'.[sic]"¹²⁸ According to Judge Sheldon, Kepler "was sure that he was right because he was sure that he was right. '[Y]oung Kepler succeed[ed] in proving everything that he believe[d] and in believing everything that he prove[d].'"¹²⁹

Judge Sheldon uses the idea of circular reasoning to attack the Law Court with regard to its approach to the law of alimony. He suggests that the court is using circular reasoning to remain tied to

120. ME. REV. STAT. ANN. tit. 19, § 721 (West Supp. 1996-1997).

121. See Sheldon, *supra* note 2, at 44.

122. See *id.* at 44.

123. See *id.* at 21, 26, 41-43.

124. See *id.*

125. See *id.* at 43.

126. See *id.* at 19.

127. See *id.*

128. *Id.* at 21 (quoting ARTHUR KOESTLER, *THE SLEEPWALKERS: A HISTORY OF MAN'S CHANGING VISION OF THE UNIVERSE* 256 (Arkana Penguin Books 1989) (1959)).

129. *Id.* (quoting KOESTLER, *supra* note 128, at 257).

“pre-historic” ideas about alimony and marriage because the court has a “fear of change.” He believes the court should wake up and begin to form law in accordance with reality.¹³⁰

In his article, Judge Sheldon makes a number of points concerning the current law of alimony in Maine. He begins with the underlying premise that “need” is not an adequate basis for alimony,¹³¹ and that ideas about need-based alimony should be changed because ideas about other things have changed.¹³² He contends that the Law Court is stubbornly holding on to antiquated precedent in its articulation of need as the purpose of alimony¹³³—Maine’s alimony statute¹³⁴ mistakenly confirms the pre-historic view of need as an important factor in the award of alimony.¹³⁵ Judge Sheldon further states that because need is not an adequate basis for alimony, the statute has no theoretical anchor.¹³⁶ Judge Sheldon concludes the statute is vacuous, that it means nothing, because it does not articulate a purpose acceptable to him. Arriving at this conclusion, he suggests that as long as trial judges believe what Law Court precedent says about alimony, they will believe that the statute offers them guidance.¹³⁷ Instead, judges should recognize the statute as a useless guide and should not be obliged to give it consideration.¹³⁸ Any consideration is as meaningless a ritual as trying to see the emperor’s new clothes.¹³⁹ Judge Sheldon believes the court should break with precedent and stop saying the purpose of alimony is need.

Judge Sheldon argues that the court and the Legislature must change not only their ideas about need-based alimony; they must also change their ideas about marriage.¹⁴⁰ According to Judge Sheldon, developing law should not perpetuate the ideals of marriage, but rather should reflect human behavior.¹⁴¹ Furthermore, the courts should retain principal authority for change,¹⁴² as reflected in the forming of family law, because they are better able than the leg-

130. *See id.* at 48.

131. *See id.* at 29.

132. *See id.* at 25.

133. *See id.* at 29.

134. ME. REV. STAT. ANN. tit. 19, § 721 (West Supp. 1996-1997).

135. Sheldon, *supra* note 2, at 29.

136. *See id.*

137. *See id.*

138. *See id.* at 32.

139. *See id.* (referring to HANS CHRISTIAN ANDERSEN, *THE EMPEROR’S NEW CLOTHES* (1959)).

140. *See id.* at 48.

141. *See id.* at 25.

142. *See id.* at 48.

islature to accept the death of marriage and the nuclear family and to formulate law to reflect human behavior.¹⁴³

Judge Sheldon and I disagree about the express and implied purposes of the statute. We also disagree on its usefulness. Maine's alimony statute does embody a purpose broader than need; in fact, it is not only a useful tool for courts but is also a useful and essential expression of community sentiment. The problems with the statute are being caused by misapplication.

*C. A Response to Judge Sheldon's Criticism of the
Alimony Statute*

The alimony statute expands the purposes for which a court can award alimony from "need," as expressed in the statute of 1821 and thereafter expressed in case law, to an overall equitable resolution that broadly considers the realistic post-divorce economic situation of both parties. It also reduces the discretion of the trial court in the award of alimony. As indicated in the statement of fact that accompanied the statute's amendment, a court must consider all fourteen factors.¹⁴⁴ No longer is it within the sole discretion of a trial court to determine whether and why alimony should be awarded. Following the enactment of title 19, section 721 of the Maine Revised Statutes Annotated, a trial court is required to consider fourteen factors prior to applying any additional factors that it considers appropriate. Furthermore, it is important to note that the legislature attaches the discretionary component of the statute to the fourteen mandated factors with the word "*and*."¹⁴⁵ Therefore, following enactment of the statute, the trial judge may not choose which factors will be considered; rather, all must be considered.

Although the fundamental rules of marriage and divorce have been from the beginning, and remain today, primarily statutory, judges have traditionally wielded broader discretion in divorce cases

143. Judge Sheldon fails to see the inconsistency of his suggestion that hearings and filings in uncontested cases should be abolished with his suggestion that the courts should have principal authority in forming family law. *See supra* note 69 (pointing out how few cases actually go to trial).

144. *See Sheldon, supra* note 2, at 31 n.72. The fact statement accompanying the amendment reads: "This bill enumerates the factors a court must consider when determining an alimony award." *Id.* (quoting L.D. 656, Statement of Fact (114th Legis. 1989)). Judge Sheldon suggests that the statute was the sole result of a response to a single individual divorce case. He writes: "[T]he local community funneled its indignation [about the outcome of the case] into a proposal to amend the alimony statute. The legislature acquiesced by producing a statute that reminds judges what they're supposed to 'consider' when they award alimony." *Id.* In suggesting that the entire driving force for the statute was *one* case and by saying the legislature *acquiesced*, Judge Sheldon ignores what the forming of law is about.

145. ME. REV. STAT. ANN. tit. 19, § 721(1)(N) (West Supp. 1996-1997) (emphasis added).

than in any other field of private law.¹⁴⁶ This is particularly true in the realm of alimony. The interplay between discretion and rules is unique in divorce law, and is a source of continuing debate.¹⁴⁷ Discretion in divorce law derives from the concept of the English courts of equity.¹⁴⁸ The concept grew in American jurisprudence and became particularly prevalent in the area of family law. We are reticent to relinquish its strong hold.

During the past two decades, the law of divorce has grown significantly. This is evidenced by the volumes of case law and legislative output.¹⁴⁹ Judicial discretion in divorce cases has also expanded during this period.¹⁵⁰ The progression of the law that has developed is an odd series of moves from fixed rules to fairly broad discretion, and finally to attempts to provide guidance through normative guidelines in such areas as "the best interest of the child," child support, and alimony. The proliferation of legislation during the past decades has perpetuated rather than curbed the persistent hold of discretion on family law. With the exception of the development of child support guidelines, which are fairly uniformly applied by the courts, most statutory enactments have been either written or interpreted simply as suggested guidelines rather than bright-line rules.¹⁵¹ This is true of Maine's most recently enacted alimony statute: On its face, the statute appears to reduce the discretion of the court, but in practice its seemingly objective standards have succumbed to the discretion of the trial judge.¹⁵²

This Article proceeds on the premise that Maine's alimony statute as presently enacted is intended to limit the discretion of the trial judge and that both the legislature and the courts should take action to restore the proper balance between discretion and rule.

Because a divorce court's authority derives solely from statute,¹⁵³ one might expect that the enactment of section 721 would have

146. See generally Henry J. Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787 (1963); Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401 (1996) (discussing empirical study of the role of discretion in New York divorce cases over a ten-year period); Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. REV. 209 (1991) (favoring fixed rules).

147. See *supra* note 146.

148. See Murphy, *supra* note 146, at 212 (stating that equity puts the spirit of the law above the letter of the law).

149. Homer H. Clark, Jr., *The Role of Court and Legislature in the Growth of Family Law*, 22 U.C. DAVIS L. REV. 699, 700 (1989).

150. See generally Garrison, *supra* note 146.

151. See *id.* at 403.

152. See, e.g., *Bayley v. Bayley*, 611 A.2d 570 (Me. 1992); *Bayley v. Bayley*, 602 A.2d 1152 (Me. 1992). This Author was the attorney for Janice Bayley at trial and on appeal, and thus has intimate knowledge of the facts, the transcript, the appellate briefs, and the attitude of the trial judge.

153. See LEVY, *supra* note 56, at 8-1.

changed the treatment of alimony across the board at both the trial and appellate levels. Surprisingly, this has not occurred. Many trial judges, while paying lip service to the statute, totally ignore it in practice, continuing to apply their individualized brand of discretion. Even more disturbing is the appellate court's failure to give effect to the Legislature's mandate when reviewing alimony awards under the "abuse of discretion" standard. The Legislature, recognizing that each divorce case is different and requires special consideration, provided in section 721 for the application of the trial court's discretion on a number of issues. It is clear through the statement of fact and the statutory language, however, that the intent of the statute is to dramatically curtail individualized discretion. Thus, although it is incumbent upon the trial judge to consider each case individually in the awarding of alimony, he or she must do so within the context of the statute and after having fully considered all of the enumerated factors. A reviewing court should consider failure to follow this mandate to be an abuse of discretion.

The failure of the Law Court to properly apply the statute has resulted in a perpetuation of unprincipled decisions, which when upheld on appeal create an inconsistent body of case law that undermines the purpose of the statute and increases the likelihood of litigation. The 1992 case of *Bayley v. Bayley*¹⁵⁴ is illustrative of the courts' persistent disregard for the normative guidelines of the statute. *Bayley* was the perfect vehicle for the Law Court to clearly articulate and apply the mandates of section 721, but it missed the opportunity. Although almost every factor of the statute indicated the appropriateness of an award of alimony, the trial court completely ignored the statute and denied alimony. So sure of his discretionary powers, the trial judge, following an appeal and remand, continued to ignore the mandates of the statute, necessitating a second appeal.

Bayley v. Bayley

Bill and Janice Bayley were twenty-five and twenty-eight years old, respectively, when they married. Their assets at the time of marriage consisted of a used car and approximately \$2000 in cash. Janice became pregnant immediately with their only child, a daughter. During their twenty-five-year marriage, Janice and Bill's lives revolved around Bayley's Lobster Pound and related enterprises that they acquired during their marriage. All of their efforts and investments were put into the business, which they looked to as their only retirement account. Janice assumed the duties and role of the traditional homemaker and mother. Additionally, she worked in the business and was responsible for all aspects of their personal lives. Bill and Janice maintained these roles until the time of di-

154. See *Bayley v. Bayley*, 611 A.2d 570; *Bayley v. Bayley*, 602 A.2d 1152.

voiced, when Bill would no longer allow Janice to be involved in the business.

At the time of their divorce, the Bayleys had been married twenty-five years and were in their early fifties. In addition to the business, the chief marital asset was real estate personally owned by the parties in joint tenancy. All of the property, including the marital residence, was in close proximity to the business. At the time of the divorce, the marital residence was listed for sale pursuant to an order of the superior court. The order was issued following a hearing on Janice's motion to order the sale. Testimony at the divorce hearing indicated that neither party desired to remain in the marital residence. At the time of divorce, Janice was living in the residence. Bill was living in a newly furnished apartment that he had recently built at the business. During the period of separation pursuant to a consent order, Bill paid Janice \$725 per week for support. He paid this money out of the business as payroll. At the time of the divorce, Janice was working in a dental office. She earned a gross salary of approximately \$20,000 and netted \$14,000 after taxes. Unrefuted testimony at the divorce hearing indicated that Janice's basic monthly expenses to remain in the marital residence were \$4000. Bill's actual monthly expenses as determined at trial were approximately \$1150.

Several months after the lengthy hearing, the trial judge issued his judgment.¹⁵⁵ He divided the marital assets disproportionately, with Bill receiving over twenty-five percent more than Janice. Bill was awarded the business and all of the parties' real estate, which included income property. Janice was awarded the marital residence. Almost one-third of the property distributed to Janice consisted of *unsecured* payments from Bill of \$100,000 over a ten-year period. Alimony and legal fees were denied. The judgment was two and one-half pages in its entirety and provided no rationale for the judge's decision. It consisted primarily of a list of the marital assets with applied values and a designation of which property was to be set aside for which party. With regard to alimony, the court decreed: "It is further ORDERED that no award of alimony or attorney's fees is made to either party."¹⁵⁶ There was no mention of the statute, no findings of fact (other than applied values to property), and no conclusions of law.

Janice first filed a motion with the court in accordance with Rule 52(a) of the Maine Rules of Civil Procedure,¹⁵⁷ requesting the court to make specific findings of fact and to state separately its conclusions of law on a number of issues including the denial of alimony.

155. *Bayley v. Bayley*, No. CV-88-1226 (Me. Sup. Ct. Jan. 17, 1991).

156. *Id.*

157. ME. R. CIV. P. 52(a).

The trial court denied Janice's motion for further findings, and Janice's first appeal followed.

On appeal, the Law Court perpetuated the trial judge's failure to even pay lip service to the alimony statute (although it did remand, finding that the trial judge had abused his discretion by failing to make specific findings of fact upon request pursuant to Rule 52(a)).¹⁵⁸ In this case, the reviewing court had before it a transcript that amply supported an award of alimony under the statute and indicated an abuse of discretion. *Bayley* provided all the facts and circumstances for the court to articulate the responsibilities of a trial judge under the revised statute. Nevertheless, the court chose to pay deference to what it viewed as the broad discretion of the trial judge.

The evidence may well support the court's decision and, had Janice not requested specific findings of fact, it could have been assumed that the appropriate findings had been made. However, where a party has moved for specific findings of fact the divorce court is obliged to do more than recite the relevant criteria and state a conclusion.¹⁵⁹

On remand, the trial judge obviously had confidence in his broad discretionary powers because, except for making a minor correction on one minor issue, he ignored even the Law Court's mandate to provide findings. A second appeal followed.¹⁶⁰ Apparently annoyed with the trial judge, the Law Court remanded the case again, this time to a different judge. Even in *Bayley II*, however, the court missed the opportunity to chastise the trial judge with regard to his application of the alimony statute.¹⁶¹ Once again it passed up the opportunity to remind trial judges generally that they must consider the fourteen factors of the statute when considering an award of alimony.¹⁶² To its credit, the Law Court did include the statute in the decision; however, the statute was mentioned in the context of possible inequities in the property distribution, and the discussion was aimed at the replacement judge.

The *Bayley* case is indicative of the unreasonable hold discretion has in divorce cases. Although the statute clearly changed the delineation of discretion at the trial level, the Law Court chooses to perpetuate discretion and to inadvertently encourage costly, prolonged, and unnecessary litigation.¹⁶³

158. See *Bayley v. Bayley*, 602 A.2d at 1153-54.

159. *Id.* at 1154.

160. See *Bayley v. Bayley*, 611 A.2d 570 (Me. 1992).

161. The Law Court seemed far more disturbed by the failure of the trial judge to adhere to its mandate than by his failure to apply the statute properly. The court had ample facts in the transcript to which to apply the law.

162. See ME. REV. STAT. ANN. tit. 19, § 721 (West Supp. 1996-1997).

163. Ultimately, after excessive costs and unnecessarily prolonged litigation (including two appeals and two remands), Janice Bayley received everything that she

D. A Proposed Solution

I propose that proper application of the statute could be obtained through an expanded legislative mandate for judicial adherence to statutes at the trial level and more meaningful review at the appellate level. The Law Court must reduce the role discretion plays in divorce cases in instances where statute or common sense mandates. Mere lip service to normative statutes is not sufficient. The Law Court should adjust the application of the abuse of discretion standard. Although the court has the authority to adjust the application of normative statutes through case law, it appears unlikely that it will be so moved in the near future. Therefore, I propose that concerned parties and attorneys expand their efforts beyond appeals. Interested parties' energies might be better spent garnering community support and lobbying the Legislature to clarify the mandatory nature of application of the alimony statute. I suggest that the Legislature require trial courts to clearly and specifically apply the alimony statute and other statutes to the facts of cases.¹⁶⁴

I further propose that where specific statutory guidelines exist, parties should not be burdened with requesting findings in order to protect themselves on appeal. Moreover, the Legislature should require the Law Court to consider the specific factors of the statute upon review.¹⁶⁵ Lawyers can also help the process by "trying cases

had asked for: alimony as well as a number of adjustments to property distribution. Had the statute been properly applied, two years of litigation could have been avoided. In the end, both Janice and the statute were vindicated.

164. Title 19, section 721 of the Maine Revised Statutes should be amended to provide for mandatory application by trial judges supported by specific findings in the divorce judgment. Additionally, a failure to apply properly the 14 factors to the facts of a case should be deemed an abuse of discretion.

165. See ME. REV. STAT. ANN. tit. 19, § 721 (West Supp. 1996-1997); see also, e.g., *Rodrigue v. Brewer*, 667 A.2d 605 (Me. 1995). The *Rodrigue* case was an appeal from divorce proceedings on the issue of child custody. The child in question, who was two and one-half years old at the time of the divorce, was conceived in the first months of the marriage. The parents separated shortly after the conception. They reunited for a short period of time after the birth. During the divorce proceedings the parents expressed their desire to have joint or shared physical custody and control of the child. The parents refused to talk or agree about anything. The mother was a high school graduate, and the father was a dual doctoral candidate pursuing degrees from schools in southern Maine and Canada. He planned to be in Canada for 18 months following the divorce. See *id.* at 606.

At trial, experts testified that the intense conflict between the mother and father substantially impaired their ability to cooperate in parenting the child. See *id.* at 608. Nevertheless, the trial judge awarded shared physical custody, ordering the child to spend alternating weeks with each parent—without concern for the geographical difficulties. See *id.* at 606. He awarded the mother sole control of the child's religious upbringing and gave the father decision-making control over the child's education. See *id.*

The mother appealed from the district court to the superior court, where the judgment was affirmed. See *id.* She then appealed to the Law Court where the judgment was again affirmed and no abuse of discretion was found. In a strong dissenting

to the statute"—that is, by getting evidence on the record for each relevant factor and making clear when the evidence is refuted. By providing the appellate court with a clear record on appeal¹⁶⁶ to which a meaningful standard of review can be applied, unnecessary litigation can be avoided and an internally consistent body of case law can be developed.

This process is dependent on our ability to reintegrate our ways of doing and knowing. Commentators such as Carl Schneider suggest that the perpetuation of discretion in family law is due, at least in part, to the failure of society to reflect upon and articulate the goals of family law.¹⁶⁷ Such comments support the underlying premise of this Article that separations at all levels of the lawmaking process are impeding the development of a consistent, responsive body of law. The development of divorce law must be guided by a thoughtful and continuing social dialogue in which the community, the legislature, and the courts take part.

IV. "INTEGRATION PART ONE": THE HISTORICAL PERSPECTIVE

Arthur Koestler's book, *The Sleepwalkers*,¹⁶⁸ provides insight into the separate "ways of knowing" that arose over time and shaped

opinion, Justice Rudman questioned the appropriate meaning of "abuse of discretion":

I have no quarrel with the District Court's findings of fact in this case. On the basis of those undisputed findings, however, the court must act within the bounds of its discretion in assigning parental rights and responsibilities. We review the court's assignment of parental rights for an abuse of the court's discretion in determining the consequences of its factual findings. . . . Discretion is not an absolute standard. The discretion accorded a trial court varies according to the principles identified as controlling a particular discretionary determination. When we say we review the court's determination for abuse of discretion we mean we have the responsibility to determine whether the court acted within the principles identified as bounding that discretionary determination. If the court acts within its principled bounds, its determination is entitled to deference. If, however, as here, the court's determination strays from these principles, that determination constitutes an abuse of the court's discretion.

Id. at 607-08.

166. For an example of the efficiency of a clear record, see *Gray v. Gray*, 609 A.2d 694 (Me. 1992), another of this Author's cases which went up on appeal on a number of issues, including the awarding of alimony. This Author represented Mary Ann Gray, whose husband appealed after she was awarded alimony. The trial judge wrote a detailed judgment applying the statute to detailed evidence presented at trial as well as to a detailed trial brief. For contrasting examples, see, e.g., *Jacob v. Jacob*, 507 A.2d 596 (Me. 1986) (parties' failure to request further findings deterred appeal); *Cushman v. Cushman*, 495 A.2d 330 (Me. 1985) (failure of the parties to present sufficient evidence, failure of the court to draft a specific order, and failure of the parties to request further findings made appeal difficult); *Baker v. Baker*, 444 A.2d 982 (Me. 1982) (no transcript and unclear judgment).

167. See generally Schneider, *supra* note 26, at 1824-25.

168. KOESTLER, *supra* note 21.

ways of thinking and doing. Koestler's views concerning separation of the various disciplines and the continuing development of scientific endeavor are helpful in understanding the problems facing the development of family and divorce law today. I am grateful to Judge Sheldon for selecting Koestler's book as the framework for his article, although he chose to pull only two threads—fear of change and circular reasoning—from the rich fabric of Koestler's story. Perhaps he subconsciously recognized *The Sleepwalkers'* true relevance.

A. Koestler's Sleepwalkers

The Sleepwalkers is the story of the development of the branch of physical science known as cosmology. In telling his story of the cosmologers, including Canon Nicholas Copernicus and Johannes Kepler, Koestler recognizes that he is actually telling the story of man's spiritual quest for an understanding of nature and of man's place in the universe.¹⁶⁹ He understands that these men, who were the fathers of what we view as the "Scientific Revolution," were really in search of a new philosophy to help them find the true nature of man's situation.¹⁷⁰ Copernicus, Kepler, and others wanted to understand nature, not conquer it.¹⁷¹ They were on a spiritual quest.

Koestler, placing the cosmologers and the new bodies of knowledge they unwittingly discovered in a broad theoretical and historical context, presents not only their discoveries, but also the evolution of their thoughts.¹⁷² He considers the psychology of discovery and change,¹⁷³ and explores the development of new bodies of knowledge, the splitting off of various disciplines, and the consequent behavior of man. Koestler considers what effects the subsequent conquest of nature had on more spiritual inquiries and explores the impact of science on the humanities.¹⁷⁴ He considers the interrelated yet separated threads of science and religion¹⁷⁵ and understands that although science is commonly regarded as logical and rational, it has developed along an irregular course, not the expected ascending line.¹⁷⁶

Koestler recognizes that the history and development of science reflect the unconscious prejudice, as well as the philosophical and

169. *See id.* at 13.

170. *See id.*

171. *See id.*

172. *See id.*

173. *See id.* at 14 n.2 (citing KOESTLER, *supra* note 21).

174. *See id.* at 14.

175. *See id.*

176. *See id.* at 15, 50. One of the main topics of Koestler's book is the crooked path of science. For an interesting discussion of the process of law within the context of depth psychology, see generally Kandoian, *supra* note 23.

political biases, of their authors.¹⁷⁷ In other words, he recognizes that science, like all other disciplines (law included), has been detrimentally affected by the splitting off or separation of the various branches of man's knowledge. He concludes that all disciplines will more successfully serve man if they operate in an atmosphere of integrated ideas and inquiries. Furthermore, he suggests that man's salvation here on earth is dependent upon his ability to reintegrate his ways of knowing.¹⁷⁸ In short, Koestler's *Sleepwalkers* is a story about separation and integration:

I believe, nevertheless, that the story outlined in this book will be recognized as a story of the splitting-off, and subsequent isolated development, of various branches of knowledge and endeavor—sky-geometry, terrestrial physics, Platonic and scholastic theology—each leading to rigid orthodoxies, one-sided specializations, collective obsessions, whose mutual incompatibility was reflected in the symptoms of double-think and “controlled schizophrenia.” But it is also a story of unexpected reconciliations and new syntheses emerging from apparently hopeless fragmentation. Can we derive some positive hints from the conditions under which these apparently spontaneous cures occur?¹⁷⁹

Indeed, Koestler anticipated that his thesis might be misunderstood.

B. Judge Sheldon's Use and Misuse of Koestler's *Sleepwalkers*

Judge Sheldon's article is framed by what he views as Koestler's thesis: that biases impede change and cause sleepwalking development.¹⁸⁰ He quotes from *The Sleepwalkers*:

[A]ll cosmological systems, from the Pythagoreans to Copernicus, Descartes, and Eddington, reflect the unconscious prejudices, the philosophical or even political bias of their authors; and from physics to physiology, no branch of Science, ancient or modern, can boast freedom from metaphysical bias of one kind or another. . . . The history of cosmic theories, in particular, may without exaggeration be called a history of collective obsessions and controlled schizophrenias; and the manner in which some of the most important individual discoveries were arrived at reminds one more of a sleepwalker's performance than an electronic brain's.¹⁸¹

Judge Sheldon extracts his ideas of the “sleepwalking” development of divorce law from this passage. His article concludes that

177. See KOESTLER, *supra* note 21, at 514. Koestler understands that the science of a given time is a reflection of a world view and that by studying science, we are in fact studying the evolution of thought.

178. See *id.* at 541-42.

179. *Id.* at 518.

180. See Sheldon, *supra* note 2, at 8.

181. *Id.* (quoting KOESTLER, *supra* note 128, at 11) (alteration in original).

"we can learn a lot, and save a lot of embarrassment, by studying Koestler's thesis."¹⁸²

Although Judge Sheldon gains an interesting and appropriate title for his article from Koestler's book, he misses the broader context of Koestler's thesis. He extracts only the ideas of "fear of change" and circular reasoning, thereby narrowing his view of the issues he presents. Koestler's broader context would have provided a more appropriate forum for his analysis of divorce law. In the final analysis, Judge Sheldon reaches faulty conclusions because he uses a tunnel vision similar to those of the sleepwalkers he describes. It is ironic that he uses Koestler's book, which in reality has such a relevant message,¹⁸³ to arrive at such insular conclusions.

C. *The Advantages of Broad Historical Perspective*

History is supposed to provide a knowledge of the larger context within which our lives take place. History is not just the evolution of technology; it is the evolution of thought. By understanding the reality of the people who came before us, we can see why we look at the world the way we do, and what our contribution is toward further progress. We can pinpoint where we come in, so to speak, in the longer development of Civilization, and that gives us a sense of where we are going.¹⁸⁴

It is worthwhile to pause and understand the nature of the spiritual quest on which Koestler's cosmologers embarked¹⁸⁵ because it provides a useful lens through which to view the current state of family law¹⁸⁶ and to set a course for its development.¹⁸⁷ It is important to remember that during the Middle Ages reality was defined by the Church,¹⁸⁸ which placed man at the center of the universe. The Church taught that life was a spiritual test and winning or losing salvation¹⁸⁹ depended upon the choice between the two opposing

182. *Id.*

183. *See generally infra* part III(C).

184. JAMES REDFIELD, *THE CELESTINE PROPHECY* 20 (1993).

185. *See id.* at 20-29.

186. *See generally* GLENDON, *supra* note 1 (describing and explaining the direction of family law in industrialized western societies in historical and sociological terms); Frances E. Olsen, *The Family and The Market: A Study of Ideology and Legal Reform*, 96 *HARV. L. REV.* 1497 (1983); Scott, *supra* note 98.

187. *See* REDFIELD, *supra* note 184, at 22. This view of history is borrowed from Redfield's view, which mirrors Koestler's book in many ways and which reunites spirituality with the scientific revolution. *See generally* Carl E. Schneider, *The Next Step: Definition, Generalization, and Theory in American Family Law*, 18 *U. MICH. J.L. REFORM* 1039 (1985) (suggesting the need for more generalization in family law scholarship).

188. *See* REDFIELD, *supra* note 184, at 22.

189. *See id.*

forces in the universe: the force of God and the destructive forces of the devil.¹⁹⁰

Another important layer to this reality was the belief that man was not equipped to undergo this spiritual test alone. The Church provided interpretation, direction, and a means of communication with God.¹⁹¹ A failure to follow the Church's teachings meant certain damnation and excommunication. For men of this medieval world everything was explained in spiritual terms.¹⁹²

During the fourteenth and fifteenth centuries, cracks in this world view began to develop. Certain improprieties by churchmen caused the Church to lose its credibility with segments of society. There was a growing idea that no middleman was necessary to interpret the scriptures; new churches formed. The very reality of the populace was shaken. There was no longer a clear consensus about the universe and man's purpose.¹⁹³ Not surprisingly, Copernicus and Kepler, religious men, sought a "new philosophy" to explain their traditional view of reality. Their world was in upheaval, and they therefore sought a new stabilizing view of man's purpose in nature.

As Koestler points out, the time must be ripe for the adoption of a new idea.¹⁹⁴ With the world in upheaval, society may not have been ready for the full realization of scientific discoveries such as those of Copernicus and Kepler. By the 1600s when astronomers had openly proven that the earth was not the center of the universe, but rather was a very minor player, mankind had lost its place at the center of God's universe—an earth-shattering discovery.

The scientific revolution, therefore, began as nothing more or less than an attempt to build a new "way of knowing" the nature and purpose of existence.¹⁹⁵ It gained, however, a new focus bent on conquering the world, on making life more comfortable and secure. Somewhere along the way the spiritual aspect of the quest was lost, and the new focus became a means to an end.¹⁹⁶

In the epilogue of his book, Koestler suggests that an "ends-justifies-the-means" philosophy may lead to "our undoing."¹⁹⁷ He discusses the divorce of faith and science and implies that man's salvation rests in our ability to rejoin the two.¹⁹⁸ Koestler views the

190. *See id.* at 22-23.

191. *See id.* at 23.

192. *See id.*

193. *See id.* at 23-24.

194. *See* KOESTLER, *supra* note 21, at 519.

195. *See* REDFIELD, *supra* note 184, at 25-26.

196. *See id.* at 26.

197. KOESTLER, *supra* note 21, at 542.

198. *See id.* at 528-42.

spirituality that existed in men such as Kepler and Copernicus to be a good thing.¹⁹⁹ Judge Sheldon seems unaware of its existence.²⁰⁰

What does all this have to do with divorce law? It suggests that our cost-effective, process-oriented approach to life has served a purpose, but that it should not be a means to an end as Judge Sheldon seems to suggest. As Koestler concludes, such an end could be disastrous. Now that we have the ability to meet the world's basic material needs, it is incumbent upon us to reconsider our values and ideals, how they will be articulated, and how they will draw us forward.²⁰¹ We must not make sweeping changes as Judge Sheldon suggests before first fully considering the potential effects of those changes.²⁰² We must keep in mind that law is both interpretive and constitutive when we analyze where we are about to go in family and divorce law and that the analysis must be prefaced by an ongoing social dialogue. We must reintegrate our ways of knowing to meet these challenges.

V. "INTEGRATION PART TWO": THE FUTURE OUTLOOK

An integrated process involving the court, the community, and the legislature is critical in the forming of law, especially the law of the family, which is so dependent on the law's constitutive nature. The ability of these three players to come together to reach sufficient consensus to develop law that is responsive to the needs of society—present and future—is dependent on our ability to engage in social dialogue. Judge Sheldon's approach to the forming (and unforming) of the law of the family impedes, or perhaps altogether halts, the means for social dialogue by eliminating the role of the

199. See *id.* at 542. "Spirituality" is used here to mean the search for an understanding of the nature of man and of man's place in the universe.

200. See Sheldon, *supra* note 2, at 20-21. Judge Sheldon is "astonished" at Kepler's behavior because he ignores Kepler's spirituality.

201. See, e.g., KOESTLER, *supra* note 21, at 122. Again, Koestler offers insight: "The reformation of religion and the renaissance of science were related processes of breaking up petrified patterns of development, and going back to their sources to discover where things had gone wrong." *Id.* Because Judge Sheldon approaches the issues with a predisposition for radical change, when he goes back to analyze court and legislative actions he sees only "fear of change." If Judge Sheldon is going to break the "sleepwalking" trend, he must consider the broader aspects of social changes and their effects.

202. Perhaps Oliver Wendell Holmes could persuade Judge Sheldon to look more broadly to interdisciplinary sources:

The way to gain a liberal view of your subject is . . . to get to the bottom of the subject itself. The means of doing that are, in the first place, to follow the existing body of dogma into its highest generalizations by the help of jurisprudence; next, to discover from history how it has come to be what it is; and, finally, so far as you can to consider the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price.

Holmes, *supra* note 12, at 476.

Legislature, criticizing the court for failure to make dramatic changes, suggesting private ordering of the dissolution of marriage apart from the law and the legal system, and operating on the fallacy that law has only an interpretive role and should conform to behavior. Judge Sheldon creates separations at all levels of the forming of law, and in so doing he ignores and impedes the reintegration that is essential for not only the survival of meaningful family law, but also for the survival of man.

A. *Social Dialogue of Legislatures and Courts*

The legislative and judicial branches of government are effective only when they operate in concert.²⁰³ It is legislative purpose, if not always practice, to reflect community values. Therefore, the legislature has the ability to encourage social dialogue. Furthermore, the legislative process, operating in accordance with the plans of our founding fathers, requires the involvement of the citizenry. The legislature fulfills a function separate from that of the courts, a fact Judge Sheldon seems to ignore. The entire community can bring issues directly to the attention of the legislature,²⁰⁴ whereas citizens may only address the court when they have a conflict that meets jurisdictional and other requirements. Even then, the court is only permitted to address the issues of a particular case. In contrast to the courts, the legislature operates relatively unfettered and is therefore able to implement a rapid response to societal needs.²⁰⁵ Also contributing to the legislature's greater flexibility is the fact that, unlike the courts, it may enact statutes without regard to precedent. It has been successful in providing normative guidelines,²⁰⁶ if not always successful in reducing discretion. On both the state and national level, the legislature has been able to respond to the needs of society in a number of areas relating to family law.²⁰⁷

203. See generally Clark, *supra* note 149; Friendly, *supra* note 146.

204. See generally Friendly, *supra* note 146.

205. See *id.*

206. See, e.g., M.E. REV. STAT. ANN. tit. 19, § 311(3) (West Supp. 1996-1997) (child support guidelines).

207. See e.g., Clark, *supra* note 149; see also UNIF. MARRIAGE AND DIVORCE ACT, 9A U.L.A. 147 (1987) (providing a useful drafting model for legislatures wishing to implement new policies that is now used by 33 states to implement one ground for divorce); UNIF. SERVICES FORMER SPOUSES' PROTECTION ACT OF 1982, Pub. L. No. 97-252, 96 Stat. 730 (codified as amended in scattered sections of 10 U.S.C.) (authorizing military pensions to be included as marital property); Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of titles 5, 18, 26, 29, 31, & 42 U.S.C.) (dealing with treatment of private pensions upon divorce and implementing the use of Qualified Domestic Relations Orders); UNIF. CHILD CUSTODY JURISDICTION ACT (UCCJA), 9 U.L.A. 115 (1988); Parental Kidnapping Prevention Act of 1980 (PKPA), Pub. L. No. 96-611, § 8(a), 94 Stat. 3569-74 (codified as amended in scattered sections of 28 U.S.C. § 1738A).

The courts are ill-suited to effectuate rapid change.²⁰⁸ For courts, ample precedent is often a prerequisite to change and the goal, if not the result, of case law is to produce a consistent body of law. Therefore, the courts move forward in small steps, attempting to appear consistent, even when they are not, always afraid of the slippery slope.²⁰⁹ Fear of the slippery slope serves a useful, if not always appreciated, purpose. It acts as a form of social dialogue with the community²¹⁰ about the direction the law should take. It slows the process to enable change to be conscious and to prevent unintended results. Like the legislature, courts are more likely to help produce change when they have support from the community, political elites, administrators, officials, and citizens. Courts, in responding to individual cases, are better able to recognize and make evident inconsistencies, gaps, omissions, and inequities of statutes in practice.

Courts can test the effectiveness and responsiveness of statutes, and statutes, in turn, can help the courts produce responsive law. Together, courts and legislatures can reduce litigation by creating predictability and by balancing discretion and rules. They can create and implement fair-handed public policy. The courts and the legislature must work together, however. Legislatures must produce clearly articulated statutes, and they must remain active in the process. They must be alert to misapplication as well as unanticipated consequences of statutes, and they must adjust statutes accordingly. The formation of domestic relations law must involve social dialogue, and the development of law, especially through the formation of legal precedent, can serve as a form of social dialogue.

B. *Social Dialogue in the Community*

As Koestler demonstrates so well, the separation of disparate and one-sided disciplines with which man attempts to interact with his world is causing far-reaching problems. Separation is rampant in today's society. We experience it on many levels. Within the realm of family law it is felt acutely. Not only are families separating, but they are splintering in such a way that they often become alienated from their community. Society is experiencing broad-based problems involving children separated from parents for various reasons and in various ways.²¹¹ Judge Sheldon suggests separating families further from the community by removing the dissolution of

208. See generally Friendly, *supra* note 146.

209. See, e.g., Rodrigue v. Brewer, 667 A.2d 605 (Me. 1995). Justice Dana of the Maine Supreme Judicial Court graciously discussed with me some of the issues I was researching for this Article. He expressed fear of the proverbial slippery slope as a problem in the *Rodrigue* case.

210. See, e.g., Kandoian, *supra* note 23, at 560-61.

211. A recent NBC Nightly News broadcast with Tom Brokaw presented a story on the social ills in America that are getting worse—all involve and affect children:

families from community purview to private directive. In making this suggestion, he advocates a purely interpretive approach to family law development that mirrors his view of marriage and the nuclear family, but that may not be representative of community sentiment.²¹² Judge Sheldon dismisses entirely other voices sug-

an increase in child abuse, an increase in teen suicide, an increase in drug abuse, an increase in the school dropout rate, and a widening gap between rich and poor.

The issue of fatherless children is on the national agenda. The focus directed at the March on Washington is a prime example. Nineteen million children live apart from their fathers for various reasons. See, e.g., Leslie Taylor, *Fatherhood Issue 'More Intense'; Initiative Leader Working Toward Igniting Debate on 'Crisis of Fatherlessness,'* ROANOKE TIMES & WORLD NEWS, Oct. 11, 1995, at C3 (discussing some discouraging statistics concerning fatherless children: fatherless children are five times more likely to live in poverty; are twice as likely to drop out of school; and are more likely to resort to violence and delinquent behavior). We must consider this social reality when forming law for the family.

212. See, e.g., Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996). This Act seeks to protect the institution of traditional heterosexual marriage and to protect the right of states to formulate their own laws regarding the legal recognition of same-sex unions. It was signed into law by President Clinton on September 21, 1996. Without getting into any substantive discussion of the Act, its title alone signifies that marriage as it has been known in the traditional sense is considered worth protecting.

Another example of community support and interest in marriage is the Partners Program sponsored by the American Bar Association. This program, initiated in the public school system, teaches children about marriage in an attempt to help them eventually make better choices concerning marriage.

The continuing centrality of marriage in our culture belies Judge Sheldon's sentiment that marriage is dying and that we should not revive the ideals. In fact, a flourishing industry has grown around marriage and weddings. We have bridal showers, bridal magazines, and bridal shops. We have wedding chapels, wedding halls, wedding caterers, and wedding photographers.

Most Sunday newspapers have a special bridal section. The celebration of marriage continues long after the wedding. We memorialize anniversaries giving special symbolic meaning to milestone dates such as the silver and golden wedding anniversaries. We display wedding albums and photographs in our homes and continue to share them with family and friends. The celebration surrounding marriage is even greater than that surrounding the birth of a child.

Indeed, the pomp and ceremony surrounding weddings continues to be a much loved and joyous tradition throughout the various cultures of the world. On any given Saturday in America, small town or urban metropolis, when we hear the ringing of church bells, we turn to catch a glimpse of the bride and groom and we smile. Weddings bring together families, friends, and even the community in a shared moment of joy. Weddings are steeped in tradition, hope, and spirituality whether set in a church, a synagogue, a home, or under the stars. Weddings symbolize our connection to one another, to family, to community, and to an even greater cosmos. Marriage is still an important cornerstone in our culture as is the family. We should not be so quick to dismiss its ideals.

According to the U.S. Bureau of the Census, in 1970, 95 million people in the United States were married; in 1980, 104.6 million were married; in 1990, 112.6 million were married; and in 1992, 113.3 million were married. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 53 (113th ed. 1993). These figures represent a decline of approximately 10% of the total population over 18 years of age who were married in 1992 compared with 1970. In 1992, 8.8% of the

gesting that family law should incorporate what the community perceives as the highest aspirations for society and that it should not merely conform to current societal behavior.²¹³

The failure of society to consider or reach a consensus on aspirations for the future of family law is endemic of a more pervasive problem—a decline in social capital. In *Bowling Alone*,²¹⁴ commentator Robert Putnam sheds light on why we are experiencing such difficulty. Putnam presents statistics that suggest that Americans' direct engagement in politics, government, and community activities generally (for example, membership in church-related groups, labor unions, the PTA, Boy Scouts, and fraternal organizations) has steadily declined during the past several decades.²¹⁵ Putnam defines the term "social capital" as those features of social organization such as networks, norms, and social trust that facilitate coordination and cooperation for mutual benefit.²¹⁶

The decline of social capital is particularly pertinent to the development of family law. Research in a broad range of disciplines, including education, urban poverty, unemployment, crime control, drug use, and health, has revealed that successful outcomes are more likely in civically engaged communities.²¹⁷ Putnam suggests that networks of civic solidarity are pre-conditions for socioeconomic development. This really is not such a novel discovery. In the 1830s when Alexis de Tocqueville visited the United States, he recognized civic association as the key to America's ability to make democracy work.²¹⁸

population was divorced. *See id.* These statistics suggest that although there has been an increase in the incidence of divorce, marriage is still a desired status. In fact, a recent article in *Time Magazine* suggests that about 75% of all divorced people remarry. *See* Gleick, *supra* note 98, at 83.

213. If we begin to consider children "as they really are, . . . end points in evolution that lead us forward," REDFIELD, *supra* note 184, at 184, and we consider the statistics concerning fatherless children, we might be persuaded to raise our aspirations for marriage and the nuclear family. *See, e.g.*, Kandoian, *supra* note 23, at 524 ("If the legal system is officially unaware of the thoughts and impulses motivating the society and itself, it lends to rigidity, lack of contact with human concerns and even irrationality.").

214. Putnam, *supra* note 25.

215. *See id.* at 68-69.

216. *See id.* at 67.

217. *See id.* at 66. Putnam discovered in a "quasi-experimental study of subnational governments in different regions of Italy" that "the quality of governance was determined by longstanding traditions of civic engagement (or its absence). Voter turnout, newspaper readership, membership in choral societies and football clubs—these were the hallmarks of a successful region." *Id.*

218. *See id.* at 65-66. Putnam quotes Tocqueville:

Americans of all ages, all stations in life, and all types of disposition are forever forming associations. There are not only commercial and industrial associations in which all take part, but others of a thousand different types—religious, moral, serious, futile, very general and very limited, im-

The title of Putnam's article—*Bowling Alone*—is suggestive of the current behaviors of Americans. The title derives from statistics that show that while the number of Americans bowling has steadily increased, their membership in leagues has steadily declined.²¹⁹ Putnam points out a curious countertrend: the growth of mass-membership organizations.²²⁰ These organizations differ greatly from those with declining membership. The vast majority of "members" in the mass-membership organizations rarely attend meetings. Their membership for the most part consists of paying dues and occasionally reading a newsletter.²²¹ It appears that Americans still have a hunger to belong, but not the time. Therefore, even their associational connections consist of solitary, individual activity. Likewise, Americans still seem to have a hunger for talk, as evident in the proliferation of television and radio "talk shows." However, similar to their solitary associational memberships, most Americans now even "talk" alone.

Putnam points out that in some instances well-meaning public policy has resulted in an unanticipated decline in social capital. He points to examples of American slum clearance and consolidation of country post offices and small school districts into larger, more efficient administrative units.²²² Because the concept of social capital was either forgotten or simply not considered a valuable ideal, it played no role in the policy decisions.²²³

C. *Social Dialogue for Integration*

The isolation discussed in *Bowling Alone* brings us full circle to the efficiency-minded, process-driven development of divorce law. Putnam's article demonstrates that unanticipated problems result

mensely large and very minute. . . . Nothing, in my view, deserves more attention than the intellectual and moral associations in America.

Id.

219. *See id.* at 70. Although more Americans are bowling today than ever before, bowling in organized leagues has decreased by 40%. Putnam notes that 80 million Americans bowled at least once during 1993, one third more than voted in the 1994 congressional elections. *See id.* These statistics, although trivial with respect to their subject matter, support the proposition that Americans are leading progressively more insular lives.

220. *See id.* at 70-71. Examples include the Sierra Club and the National Organization of Women (both of which have hundreds of thousands of dues-paying members); and the American Association of Retired Persons, which grew from 400,000 members in 1960 to 33 million in 1993. *See id.*

221. *See id.* at 71.

222. Such actions are similar to the destroying of entire ecosystems by unconsciously or thoughtlessly killing a particular organism in the chain without considering its purpose or value in an attempt to implement policy. Putnam points out an example of law being used in its constitutive role: a recent proposal in San Luis Obispo, California, would require all new houses to have front porches (thereby encouraging social capital). *See id.* at 77.

223. *See id.*

from narrow, one-sided views of the law, or of any other social construct or issue. We must synthesize our ways of knowing.²²⁴ Public policy in the form of law shaped by narrow ideology, such as economic efficiency, may appear to solve problems; in fact, it masks underlying issues and delays or impedes purposeful solutions. It is not too late to turn back, but there is an urgent need for the community to reach a consensus with regard to the values and ideals integral to family law.

We are all rushing, but where are we going? Without direction we are sleepwalking. We must slow our lives down and remember the important ideals upon which our society was formed. The family remains the focal point of the structure of society, as well as the primary nurturer of our children—who “should be viewed [and valued] . . . as end points in evolution that lead us forward.”²²⁵ Family law, unlike any other branch of the law, has a far-ranging impact on the forming of society, both present and future. We have the ability to encourage or discourage social capital²²⁶ and in turn to strengthen or weaken our ability to come together to form law which meets our highest aspirations.

224. Various scholars applying different models are beginning to discuss the need for synthesis of ideas and ways of knowing. See, e.g., Carol J. Greenhouse, *Constructive Approaches to Law, Culture, and Identity*, 28 L. & Soc'y Rev. 1231 (1994) (anthropology and family law); Kandoian, *supra* note 23, at 560-61 (psychology and law). Kandoian observes:

Failure to consider the unconscious dimension of our collective life can facilitate those naïve legal responses to a problem that ignore the society's and the law's “shadow.” It can permit an easy rallying around an apparently rational solution to a problem and leave powerful unconscious forces neglected and free to subvert the society. At present, few are satisfied that our legal systems fully serve our collective best interests. As we move forward in pursuit of responses to the great critiques of law in our time, we would do well to remember that the relation of law to the human psyche is a powerful one and that we cannot address one without addressing the other.

Id. at 560-61. Mary Ann Glendon notes a similar point:

At most, the preliminary analysis attempted here may suggest a useful way to synthesize many seemingly unrelated phenomena, and serve, as a step in the current process of reopening the conversation, that has too long lapsed, between law and the other social sciences.

MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 8 (1981).

225. REDFIELD, *supra* note 184, at 184.

226. I believe Maine has an advantage with regard to the encouragement of social dialogue. My guess is that statistics on social involvement in Maine may not be as discouraging as national averages suggest. “Mainiacs” have a tradition of community involvement. As a family law practitioner in Maine, I found the community of people involved with divorcing families particularly well-integrated. In fact, I belonged to an organization that is still active in southern Maine—Resources for Divorced Families, made up of practitioners, mental health professionals, and consumers, all involved in helping divorcing families. This bodes well for the further development of social dialogue concerning the forming of family law in Maine.

VI. CONCLUSION

"The future will depend on what we do in the present."

Ghandi

It is possible that between the lines Judge Sheldon and I are telling the same story. The stories, however, have different endings. We both recognize the purposeless "sleepwalking" development of current domestic relations law, and we both recognize the need to consider the behaviors of society. It is at this point that our stories diverge. Judge Sheldon, thinking that he takes the road "less traveled,"²²⁷ suggests a process-driven, interpretive approach to the problem that will create far-reaching and unimagined repercussions in the future. I view Judge Sheldon's approach to Koestler's book, and the attitude he presents in his article, as pessimistic and defeatist. I choose a different road.

My aspirations for this Article are similar to the aspirations Koestler expressed for his history of cosmology—to highlight and view the current problems with divorce law as a story about separation and integration. And, like Koestler, I am hopeful that "a new synthesis can [emerge] from apparently hopeless fragmentation."²²⁸ We can "derive some positive hints" from Koestler's book.²²⁹ The separation of various branches of knowledge and endeavor, and the resulting isolated development of one-sided specializations and rigid views, must be recognized and reconciled. I have attempted to point out that our current emphasis on process in family law is resulting in an interpretive approach to law that splits our ways of doing and our ways of knowing. Like Koestler, I suggest that salvation lies in our ability to reintegrate at all levels beginning with a reintegration of social capital into our culture.

227. Robert Frost, *The Road Not Taken*, in AN INTRODUCTION TO ROBERT FROST 271 (Louis Untermeyer ed., 1951).

228. KOESTLER, *supra* note 21, at 518.

229. *See id.*

