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THE SLEEPWALKER'S TOUR OF DIVORCE LAW

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I. INTRODUCTION

It's amazing what you can learn about modern divorce law from Nicholas Copernicus and Johannes Kepler. Copernicus was the 16th century churchman who dared to suggest that the sun, not the earth, lies at the center of the solar system. Kepler was the early-17th century mathematician whose three laws of planetary motion provided the foundation for modern cosmology. Neither of these pioneers had a clue what he was doing.

Arthur Koestler wrote a book about these remarkable people and their wondrous bumbling: *The Sleepwalkers*. His thesis:

> [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.[1]

A study of recent procedures, decisions, and statutes in Maine divorce law suggests that nothing has changed since Copernicus. Koestler could have written the same book just by attending a divorce hearing in any Maine court or reading *Skelton v. Skelton*.[2] We bumble along without a clue where our divorce law is headed and only later—sometimes a long time later—do we turn around and realize what we've done. That's my thesis: that we can learn a lot, and save a lot of embarrassment, by studying Koestler's thesis.

I start with a description of that eminent sleepwalker, the timid Canon Copernicus. Copernicus never wanted to overturn the Ptolemaic theory of the universe—the idea that the sun, all the planets and all the stars revolve around the earth. Rather, he wanted to improve on it. In order to simulate better the ancient Greek theory that the universe must operate on a system of perfect circles and

1. ARTHUR KOESTLER, THE SLEEPWALKERS: A HISTORY OF MAN'S CHANGING VISION OF THE UNIVERSE 11 (Arkana Penguin Books 1989) (1959). Those portions of THE SLEEPWALKERS that appear in this Article are reprinted by permission of the Peters Fraser & Dunlop Group Ltd.

2. 490 A.2d 1204 (Me. 1985).

uniform motion, he proposed that the earth revolves around the sun. He would have been horrified to think that his simple suggestion is now deemed the death knell of the ancient cosmological assumption that humankind is the exclusive focus of Universal Intent. I make no pretense of originality in this or any other section of the article in which I cite Koestler extensively; I simply present Koestler's point of view because I want the reader to understand how confused the purported giants of cosmology really were.

I then turn for comparison to the common practice of Maine courts to require testimony at all divorce hearings. It's a small point: We regularly engage in a time-consuming and meaningless formality for which there's no sensible justification. But it introduces my larger theme: family law in Maine is encrusted with anachronistic and purposeless formalisms to which we obediently adhere because, to all appearances, we aren't conscious of what we're doing. Like Copernicus, we revere the rituals of the past, no matter how flawed.

While on the subject of rituals, I broaden the inquiry to ask why we even *need* lawsuits in divorce. Divorce is the only field of civil law I know of that requires litigation to resolve a non-dispute. Given the facts that more and more people are avoiding divorce by never getting married at all, and that litigation and budgetary pressures are rendering judge time ever more precious, it seems both futile and inefficient to require those people who do get married to file a ritualistic lawsuit to end their relationship. As with any contract, partnership, and multiple ownership of real estate, the dissolution of a marriage shouldn't require litigation unless the parties disagree about the result.

I turn next to alimony, a pillar of divorce law that is saturated with anachronism. Our Law Court's most recent description of the purpose of alimony adopts a view of the law from the virtually prehistoric period when women lacked fundamental liberties and slavery was constitutional. The methodology the court employed to reach this conclusion was identical to that which Johannes Kepler used when, ignoring his own recent discovery of the laws of planetary motion, he persisted in trying to impose a frivolous geometric aesthetic on the universe. Not to be outdone, our legislature got into the act by passing an alimony statute that is as useless a guide to alimony as geometry is to the solar system.

Finally, I address the overriding question of our time for divorce law: Why do we offer some people remedies that we withhold from others for the sole reason that they never married? The "ideal family" is a sociological dinosaur; marriage isn't a preeminent norm anymore. So why do we continue to discuss and develop rules of law that apply to a decreasing number of our citizens? If we would only wake up to the realities around us, we wouldn't.

Well, I say "wouldn't" but I suppose that's unrealistic. I ought to say "shouldn't," because if history proves anything, it proves that in divorce, as in astronomy, we stubbornly resist change. We will continue to repeat the same threadbare rituals because we don't, or can't, reflect on what we do. We're sleepwalkers.

II. THE CANON COPERNICUS

Nicholas Copernicus realized that Ptolemy's view of the solar system didn't work very well:

> [I]t did not fulfil the basic demand of [Aristotle] that each planet should move with uniform speed in a perfect circle. Ptolemy's planets move in circles, but not with uniform velocity. "Having become aware of these defects, I often considered whether there could perhaps be found a more reasonable arrangement of circles . . . in which everything would move uniformly about its proper centre, as the rule of absolute motion requires."[3]

So he proposed a different arrangement that "solves 'this very difficult and almost insoluble problem' in a manner much simpler than Ptolemy's . . .:"[4]

> 1. That the heavenly bodies do not all move round the same centre;
> 2. That the earth is not the centre of the universe, only of the moon's orbit and of terrestrial gravity;
> 3. That the sun is the centre of the planetary system and therefore of the universe;
> 4. That, compared to the distance of the fixed stars, the earth's distance from the sun is negligibly small;
> 5. That the apparent daily revolution of the firmament is due to the earth's rotation on its own axis;
> 6. That the apparent annual motion of the sun is due to the fact that the earth, like the other planets, revolves around the sun . . . .[5]

Copernicus had no idea that he was being revolutionary, not a suspicion that he was deflating Aristotle. His object was to improve on Ptolemy, to move the solar system closer to the Aristotelian concept of perfection than Ptolemy had been able to do. In other words, Copernicus was trying to be *more* Aristotelian than Ptolemy. "If Aristotle had stated that God created only birds, Canon Koppernigk would have described *homo sapiens* as a bird without feathers and wings who hatches his eggs before laying them."[6]

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3. KOESTLER, *supra* note 1, at 148 (citation omitted).
4. *Id.*
5. *Id.*
6. *Id.* at 215.

The Aristotelian belief that the universe operated on a system of perfect circles and uniform motion with the earth at its center was nonsense. It was a prerequisite to mankind's appreciation of that fact that mankind had to be willing to move the earth off the center of the solar system. Copernicus held the key to that discovery in his hand, but he was so anchored to the past that he couldn't use it. So was everyone else. It took another century for anyone but a handful of non-astronomers to understand the implication of Copernicus's idea.[7]

How much like Copernicus are we? Do we hold keys to dramatic change without realizing it? Do our traditional biases blind us to present reality? That's the inquiry of this article.

A. Divorce Hearings

Rule 80 of the Maine Rules of Civil Procedure, which controls procedure in all actions for divorce and the determination of parental rights and responsibilities, provides that "[n]o judgment . . . shall be entered in an action under this rule except after hearing. . . ."[8] Most judges in this state interpret that as requiring sworn testimony. Although some sort of factual presentation is necessary in most *pro se* cases, because the court has to prepare the judgment in most such cases and has to know what to put in it, most judges don't distinguish *pro se* divorces from counselled ones. The result in uncontested, counselled cases is testimony by attorney: one of the lawyers presents the grounds for divorce and the settlement terms with leading questions to which the client provides predictable answers. It goes like this:

> "You've filed for a divorce from your husband on the ground of irreconcilable differences, right?"
>
> "Yes."
>
> "And you believe that your differences with your husband are irreconcilable, that there's no hope of rebuilding your marital relationship, and that a divorce is best for both of you, right?"
>
> "Yes."
>
> "And there are no children of the marriage, right?"
>
> "Yes."
>
> "And you and your husband have reached an agreement about the settlement of all of your affairs, which you have reduced to writing, correct?"
>
> "Yes."
>
> "And the terms of this agreement are to be included in the judgment that the court issues but the agreement itself is not to be merged with that judgment, right?"

7. *Id.* at 217.
8. M.R. Civ. P. 80(f).

"I guess so."

"The answer is 'yes.' "

"Okay: yes."

"But there's no collusion between you and your husband to obtain a divorce, is there?"

"We've agreed to it, if that's what you mean."

"The answer is 'no.' "

"Okay: no."

"Now, you've agreed that he's getting the BMW and in return he's agreed that you're getting the Mercedes station wagon, right?"

"Yes."

"He's getting the Augusta National life membership and you're getting the condo at Hilton Head, right?"

"Yes."

"And each spouse is to claim exclusive ownership of the pension that that spouse has been earning at his or her employment, right?"

"Uh, I don't know—is that what we agreed to?"

"Yes it is."

"Okay."

"So is the answer to the previous question, 'Yes'?"

"Yes: yes."

"And all of the rest of your personal property goes to the person now in possession or control of it, right?"

"Yes."

I kid you not. Complicated divorce settlements (especially those with minor children) can take time to present; several such hearings in a row can take *lots* of time.

Nothing in Rule 80, or in any other rule of civil procedure, requires such a time-consuming process. Rule 80 requires a "hearing," not a "testimonial hearing." Nothing in any of the other civil rules says that a hearing has to be testimonial. Only "trials" require "the testimony of witnesses [to be] taken orally in open court. . . ."[9] Nothing in the rules calls a "hearing" a "trial."[10] The testimonial divorce hearing in a counselled, uncontested case, in fact, conveys

9. M.R. CIV. P. 43(a); *see also* M.R. CIV. P. 77(b).

10. There is abundant case law that states that a "hearing" is an evidentiary proceeding. *See* 19 WORDS AND PHRASES 243 (1970). However, under the Rules of Civil Procedure the term "hearing" contemplates proceedings that are not evidentiary. See M.R. CIV. P. 12(d):

> (d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be *heard* and determined before trial on application of any party, unless the court orders that the *hearing* and determination thereof be deferred until the trial.

Id. (emphasis added).

little or no information to the presiding judge; the judge patiently awaits the conclusion of the testimony in order to sign the judgment that the attorneys have prepared and agreed to present. It's a mere ceremony, a ritual that consumes time.

So why do judges insist on this time consuming ritual? Because it's time-*honored.* This continued practice derives from the 1959 Law Court decision in *Dionne v. Dionne.*[11] In that case the parties sought to introduce as evidence of the grounds for divorce (cruel and abusive treatment) a transcript of testimony from a previous trial that described how the husband had hit the wife with his fist. The trial court granted the divorce on the ground of cruel and abusive treatment, but the Law Court reversed because the manner of proof of the ground for the divorce was inadequate:

> A divorce can be granted only upon the causes authorized by law and upon satisfactory proof. Because of the interest of the state in maintaining and preserving the marriage relation, it virtually becomes a third party in all divorce proceedings. "The State having a most important interest in the marriage relation is a party to the divorce proceeding just as much as the parties themselves, and, not like other contracts, the contract of marriage cannot be dissolved by the mere consent and agreement of the parties. . . ."
>
> . . . .
>
> Furthermore . . . there is always some danger that continued practice along the lines followed in this case might in some case lead to collusion or omission or concealment of pertinent facts.[12]

There: we hold testimonial hearings in all divorce cases because, in 1996, the State has as much of an interest in every single marriage as the parties do themselves and because we need to stand resolute guard against the peril of collusion. Either that, or it's because we haven't bothered to think about why we do what we do since Elvis was in the Army.[13]

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11. 155 Me. 377, 156 A.2d 3931 (1959).

12. *Id.* at 378-79, 156 A.2d at 394 (citations omitted).

13. *See, e.g.*, Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423, 2424-25 (1994) (footnotes omitted):

> [W]hile the fault-based divorce system emphasized the importance of preserving the marital unit, the no-fault system focused on effectuating the desire of one or both spouses to end their marriage. Without a societally imposed duty to continue the marriage, justifying financial obligations that survived divorce became problematic.

Maine adopted no-fault divorce in 1973 with the addition to ME. REV. STAT. ANN. tit. 19, § 691 (West 1981) of divorce for irreconcilable differences. If Professor Singer is correct, it has been over 20 years since Maine abandoned the idea that the State has an interest in preserving marriages.

I've heard of four reasons why we should have testimony in uncontested divorces, none convincing. First, it is said that the divorce statute requires the court to confirm that the parties have adequate grounds for divorce. It doesn't: it only states what the grounds are.[14] Second, it is said that we need to prevent fraud. But testimony isn't necessary to prevent fraud: unsworn falsification by anyone is a crime,[15] fraud on the court by anyone is punishable by contempt,[16] and fraud by an attorney carries additional sanctions through the Board of Overseers of the Bar.[17] Third, I am told that, because of the surpassing duty of the courts to oversee the best interests of children, courts should always take testimony to find out what divorcing parents have planned for their kids. If so, the controlling statute doesn't say so: it expressly permits the parties to agree about their children out of court, and requires evidence only

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14. ME. REV. STAT. ANN. tit. 19, § 691(1) (West 1981) states:

1. Grounds. A divorce may be decreed for one of the following causes:

A. Adultery;

B. Impotence;

C. Extreme cruelty;

D. Utter desertion continued for 3 consecutive years prior to the commencement of the action;

E. Gross and confirmed habits of intoxication from the use of liquor or drugs;

F. Nonsupport, where one spouse being of sufficient ability to provide for the other spouse, grossly or wantonly or cruelly refuses or neglects to provide suitable maintenance for the complaining spouse;

G. Cruel and abusive treatment;

H. Irreconcilable marital differences; and

I. Mental illness requiring confinement in a mental institution for at least 7 consecutive years prior to the commencement of the action.

15. ME. REV. STAT. ANN. tit. 17-A, § 453 (West 1983) states, in pertinent part:

1. A person is guilty of unsworn falsification if:

. . . .

B. With the intent to deceive a public servant in the performance of his official duties, he

(1) makes any written false statement which he does not believe to be true . . . ;

. . . .

2. Unsworn falsification is a Class D crime.

Sworn affidavits must be filed regarding children and child support; unsworn statements of assets, liabilities, income and expenses, indicating marital and nonmarital property, are required in all divorce cases in which a division of property or an award of spousal support is sought. M.R. CIV. P. 80(b) and (c).

16. *See, e.g.*, United States v. Thoreen, 653 F.2d 1332, 1340-41 (9th Cir. 1981) ("Making [unsworn] misrepresentations to the fact finder is inherently obstructive because it frustrates the rational search for truth.") (criminal contempt); United States v. Griffin, 641 F. Supp. 1556 (D.D.C. 1986) (civil contempt).

17. The Board of Overseers of the Bar is the entity that enforces Maine's Code of Professional Responsibility. Me. Bar R. 4. In pertinent part, the Code states that, during litigation, "[a] lawyer shall not knowingly make a false statement . . . ." Me. Bar R. 3.7(b).

when the court considers rejecting the parties' agreement to share parental rights and responsibilities.[18]

Fourth, and most important, we need to protect people, especially women, from overbearing. The argument is best presented by an illustration: a woman, sick of her domineering husband and scared of his retaliation if she resists him, might agree to forgo alimony and her share of the marital property just to end her relationship with him. If she gives up her marital property and alimony, that's unjust, and we should prevent injustice. Requiring the parties to attend a hearing in court helps do that, because the judge who presides over the hearing can intercede if it looks like bad stuff might happen.

Assuming for the moment that we *should* prevent such injustice in all divorces, we don't need testimony in *every* case to do it; a sensitive judge can ferret out such unfairness without testimony. Nor does it seem a wise use of increasingly scarce judge time to guard against that exceptional case by establishing a rule that requires judges always to listen to fully-counselled divorce clients testify in the manner described above.

But most importantly, *if* we're going to use the courts to prevent injustice in divorce, we have to broaden our horizons, because divorce itself is becoming a decreasingly available remedy. These days fewer people marry; more merely cohabit without marriage. If injustice is our quarry, we will have to hold testimonial hearings whenever couples decide to end their cohabitation, wedded or otherwise. To return to our previous example, if the woman decides to leave after a five-year cohabitation rather than a five-year marriage, she's giving up half of the remedies that she'd have if she were a wife: alimony isn't available to her but she could still lay claim to her interest in the parties' property if she came to court to fight it out (in a suit in which the court does not have "a most important interest").[19] If she brings suit, she goes to trial unless she can settle; but if she settles we don't require any hearing (let alone testimony) to protect her from injustice. We just enter the stipulated judgment, or the dismissal, as requested.

Should we extend to her the protection of a mandatory, testimonial hearing? Of course not. We recognize that (1) we don't have the time for the explosion of hearings that would occur if we did,

18. 19 ME. REV. STAT. ANN. tit. 19, § 752(6) (West Supp. 1994-1995): "Where the parents *have agreed* to an award of shared parental rights and responsibilities or so agree in open court, the court shall make that award unless there is substantial evidence that it should not be ordered." *Id.* (emphasis added).

19. *See* 59A AM. JUR.2D *Partition* § 11 (1987):

> Although partition is sometimes defined in terms of the partition of real property, it is now the well-settled rule that a cotenant of personal property has a right to have it partitioned . . . if partition is possible, and, if not, to a regulation of its use equivalent to partition, or to a sale.

Id. (footnotes omitted).

and (2) given the nature of the hearing, with leading questions and predictable answers, it's a waste of time. Why then should things be different in divorce? Why in divorce, unlike *any* other kind of civil lawsuit, do we need in-court testimony to resolve a *settled* case?

Because we always have.

Which brings me to three points of conclusion. The first is the narrowest and, I hope, the most obvious: testimony in all such cases is a time-consuming charade, mandated not by statute, not by rule, and not by common sense.

The second is that we don't need hearings at all in divorce cases unless there's a dispute. The fact is that divorce is a civil lawsuit, and you don't have to hold hearings to end civil lawsuits. We know that; that's a key to change and we hold it in our hand right now. All we have to do is use it: amend Rule 80 to drop the need for a hearing in uncontested divorces.[20] If we don't, we ape Copernicus: anchored to tradition, we ignore the realities that are staring us in the face.

Once we recognize that, my third point is only inches away: we don't need to require people even to file for divorce unless a dispute is anticipated. We've reached a fork in the road: because unwedded cohabitation is becoming as common as wedded, we need to establish a consistent policy. Do we treat unmarried couples as business partners, who can settle their affairs privately, or as cotenants to real estate, who can end their cotenancy by filing a deed and don't have to sue for partition unless they can't agree? Or do we treat them as husband and wife and require suit before they can end their relationship? I prefer the former (not only for the reasons discussed above but also because requiring suit to end cohabitation is unadministratable[21]), which means that as unmarried cohabitation increases, the practice of requiring suit for divorcing couples only is becoming anomalous. There's no *reason* to require suit in divorce cases unless the parties fail to agree. Divorce, like every other civil issue, should come to court only because the parties are in dispute.

Does it make sense to limit court proceedings to the resolution of disputes? Well, of course it does: that's what court proceedings are for. So why do we still make an exception for divorce? Is it because we need to preserve marriages? Surely *Dionne v. Dionne*[22] deserves less respect than it does formaldehyde. Is it because we need to preserve *families* and because making the dissolution of relationships arduous helps do so? If so, we're wasting our time. "Families"

20. ME. R. CIV. P. 80(j)(2) already provides that the parties may avoid a hearing on a motion to amend a divorce judgment if they "under oath certify to the court that there is a stipulated judgment or amendment and no hearing is necessary."

21. We lack a statute like ME. REV. STAT. ANN. tit. 17-A, § 551 (West 1983), which renders bigamy a crime, to provide an incentive to register the termination of the relationship.

22. 155 Me. 377, 156 A.2d 393 (1959).

are parents and children, but the parents are not necessarily married: "Today the term 'family' is no longer attached exclusively to conjugal or nuclear families comprising a husband, wife, and their dependent children. It is applied to almost any grouping of two or more people domiciled together."[23] A fact of life in the 1990s is that the 20th century concept of the ideal family—"the nuclear family"—has passed:

> Lasting for only a little more than a century, this family form emphasized the male as "good provider," the female as "good wife and mother," and the paramount importance of the family for child rearing . . . .
>
> . . . .
>
> In the 1960s, however, four major social trends emerged to signal a widespread "flight" from both the ideal and the reality of the traditional nuclear family: rapid fertility decline, the sexual revolution, the movement of mothers into the labor force, and the divorce revolution.[24]

When we talk about preserving "the family," we mean preserving an ideal that was disappearing thirty years ago. Nowadays we don't even try to "preserve" all families; only families with married parents have to engage in the divorce process before the parents can start relationships with different partners (and, as long as they never

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23. STEVEN MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE xiii-xiv (1988).

24. David Popenoe, *The Family Is in Decline, in* THE FAMILY IN AMERICA (David L. Bender et al. eds., 1992). *See also* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 880-81 (1984) (footnotes omitted):

> Although the premise of the nuclear family underlies the legal norm of parental autonomy, an increasing number of children do not live in traditional nuclear families. In 1982, twenty-five percent of children under the age of eighteen in the United States—over fifteen and a half million children—did not live with both natural parents. One authority estimates that by 1990 this figure will grow to forty percent. The reasons for this phenomenon are familiar. More and more parents obtain divorces, resulting in single parent families or, as divorced parents remarry, step-families. An increasing number of parents never marry. Some parents abandon their children; others give their children to temporary caretakers; and still others are judged unfit to raise their children, who are then placed in foster homes.

Id.

In a recent book entitled BARREN IN THE PROMISED LAND, Elaine Tyler May discusses why so many alternatives to the heterosexual nuclear family have recently emerged. Those alternatives include lesbian motherhood and married and unmarried childlessness. A confluence of changing social trends and expanding medical technology has permitted individuals to define reproductive happiness on an individual basis, splintering the homogeneous family ideal of the post-World-War-II-era. ELAINE TYLER MAY, BARREN IN THE PROMISED LAND (1995).

try to remarry, nothing requires even that[25]). Parents who have not married, however, need not come to court unless they can't agree about what to do with the kids. So preserving families or the family tradition cannot really be our goal.

Do we make an exception to the normal no-dispute-no-litigation rule for divorce because the courts, as the traditional protectors of children, must always oversee the termination of relationships involving minor children?[26] If so, we fail badly. We limit our oversight to divorces. If we are to be true to our public duty, we must extend mandatory oversight to all families, unless, of course, that concept of public duty is obsolete.

Do we do it because there's no alternative way to record the end of marriages? Assuming that we need to,[27] we could make one: the same town office that issues marriage licenses could register divorces. But that would require the cooperation of the legislature.

Do we do it to avoid inflaming the legislature? Now, there's the rub.

Copernicus wrote a book in which he explained his theory of the solar system.[28] He refused to publish it for about thirty years, however, "because he was torn by doubt regarding his system, and knew that he could neither prove it to the ignorant, nor defend it against criticism by the experts."[29] Ironically, the ignorants and the experts whom Copernicus feared were, according to Koestler, intellectual allies:

> The inertia of the human mind and its resistance to innovation are most clearly demonstrated not, as one might expect, by the ignorant mass—which is easily swayed once its imagination is caught—but by professionals with a vested interest in tradition and in the monopoly of learning. Innovation . . . evokes

25. Maine's statutes prohibiting adultery (ME. REV. STAT. ANN. tit. 17, § 101 (West 1983)) and fornication (ME. REV. STAT. ANN. tit. 17, § 1551 (West 1983)) were repealed by P.L. 1975, c. 499, § 5 (effective May 1, 1976) and P.L. 1975, c. 499, § 7 (effective May 1, 1976), respectively.

26. *See* Pendexter v. Pendexter, 363 A.2d 743, 748 (Me. 1976) (DuFresne, C.J., concurring):

> Public policy is of prime consideration in all procedures relating to divorce and it is most important that the judicial process within delegated legislative authority be given such flexibility as will allow implementation of the State's role of parens patriae in promoting the best interests and welfare of minor children, especially after the family unit has been severed through divorce of the parents.

27. *We* don't need to in Maine—all we need to do is not require proof of divorce upon application for a marriage license. But other states might not follow our lead, so a person from Maine who seeks a marriage license in another state might need proof of his or her Maine divorce.

28. NICOLAUS COPERNICUS, COPERNICUS: ON THE REVOLUTIONS OF THE HEAVENLY SPHERES (A.M. Duncan trans., 1976).

29. KOESTLER, *supra* note 1, at 156.

> the deeper fear that their whole, laboriously constructed intellectual edifice might collapse.[30]

The "experts" in Copernicus's era were the authorities of the Catholic Church. Their "expert" counterparts in this era are the elected representatives in the state legislature, who lack the churchmen's "monopoly of learning" but many of whom share an unmistakable interest in tradition. During the last presidential election, we were reminded virtually *ad nauseam* about "family values." My simple suggestion that we treat divorce in the courts like any other civil matter may evoke a wail of protest from the traditionalists in the legislature. So maybe my idea is presently doomed. But, unlike Copernicus, at least I published it.

III. JOHANNES KEPLER AND THE GEOMETRIC UNIVERSE

On July 9, 1595, at the age of twenty-four, Johannes Kepler suddenly realized what his life's work was going to be: he was going to prove that the universe is built around geometric figures. He was an aspiring theologist and knew almost nothing about astronomy, but that never slowed him down. Kepler believed that there are six planets and he knew that there are five perfect solids, so there had to be a relationship. He knew it.

The relationship was this: suppose that the orbit of Mercury, the innermost planet, is a perfect circle (all of the orbits in this exercise are perfect circles). Make the circle into a sphere whose diameter is that of the circle. That sphere now fits exactly inside an enormous tetrahedron (a pyramid the four faces of which are all equilateral triangles) without an inch to spare. (You can't see either the sphere or the tetrahedron any more than Kepler could—you have to imagine them.) Now imagine an even-bigger sphere with the diameter of the orbit of Venus, the second planet. The points where the edges of the pyramid meet *just* touch the inner surface of the Venus sphere. The Venus sphere *just* fits into a gargantuan cube, which itself just fits into an Earth sphere—and so forth until each of the planets and each of the perfect solids is accounted for.[31]

What's fascinating about Kepler is that it was in an effort to prove this fantastic idea that he discovered his three laws of planetary motion,[32] which provided Newton with the foundation for the theory of

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30. *Id.* at 433.

31. The remaining planets were Mars, Jupiter, and Saturn; the remaining solids, in the order in which Kepler assigned them to their respective planets, were the octahedron, the dodecahedron, and the icosahedron. These solids are "perfect" because all of the faces are identical. For example, the tetrahedron is constructed of four equilateral triangles, the cube of six squares, the icosahedron of twenty equilateral triangles. *Id.* at 251.

32. The laws are:

> 1. The planets travel around the sun in elliptical orbits, and one focus of each ellipse is the sun;

gravity. Kepler was a successful alchemist, turning a leaden idea into gold: in pursuit of nonsense, he discovered truth. And then he didn't realize what he'd discovered. He hated and initially rejected the idea that the planets' orbits are elliptical—they are, but ellipses aren't *perfect*, and he scoffed at his oval-orbit idea as "only a single cart-full of dung."[33] "Kepler set out to prove that the solar system was built like a perfect crystal around the five divine solids, and discovered, to his chagrin, that it was dominated by lopsided and undistinguished curves."[34]

He never got over his disappointment. Twenty-five years after he first published his theory of the geometric universe he was *still* touting the idea: he had already discovered his three laws of planetary motion, had fired the *coup de grâce* into the Ptolemaic universe, and had established the foundations of modern cosmology, when he wrote:

> Nearly twenty-five years have passed since I published the present little book. . . . It would be mistaken to regard it as a pure invention of my mind (far be any presumption from my intent, and any exaggerated admiration from the reader's, when we touch the seven-stringed harp of the Creator's wisdom). For as if a heavenly oracle had dictated it to me, the published booklet was in all its parts immediately recognized as excellent and true throughout (as it is the rule with obvious acts of God).[35]

Most astonishing of all, he still didn't understand what he had discovered: in the notes he wrote for this second edition of his book he *never* mentioned his first and second laws of planetary motion. "[I]t was as if Einstein, in his old age, had been discussing his work without mentioning relativity."[36]

What concerns us at this point is not how Kepler, in beating the bushes for the fountain of youth, managed to stumble upon the genetic cure for aging. We'll get to that later. Of greater interest here is how Kepler induced himself to believe that the fountain of youth even existed, thus justifying the search. What made him so sure that his idea of the geometric universe was even worth pursuing?

The answer is Kepler's a priori reasoning, his belief that because his idea sounded so good it had to be true. The proof of his idea

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2. the planets don't move at a constant rate of speed, but "in such a manner that a line drawn from the planet to the sun always sweeps over equal areas in equal times."

3. "the squares of the periods of evolution of any two planets are as the cubes of their mean distances from the sun."

Id. at 317 (first two laws), 399 (third law).

33. *Id.* at 334.

34. *Id.* at 267.

35. *Id.* at 254.

36. *Id.* at 267.

"consists, 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]"[37] Kepler described his confidence this way:

> Why waste words? Geometry existed before the Creation, is co-eternal with the mind of God, *is God himself* (what exists in God that is not God himself?); geometry provided God with a model for the Creation and was implanted into man, together with God's own likeness—and not merely conveyed to his mind through the eyes.[38]

Kepler knew that he had observed "the Creator's secret thoughts"[39] because only the Creator could have an idea as perfect as this one. He 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]."[40]

A. Turning Lead into Lead

The same a priori reasoning (less the theological component) led the Law Court to discover that the purpose of alimony is to provide for an ex-spouse's post-divorce need. The proof that this was so was the fact that the court had always believed that it was so.

The decision was called *Skelton v. Skelton*,[41] and a unanimous court offered this statement of the purpose of alimony:

> Is alimony properly awarded to compensate a divorcing spouse for her "years of service" in the past, or does it look to the future, acting as a substitute for the loss of support enjoyed during the preceding years, awarded in as large an amount and for as long a term as circumstances make necessary? The answer is clearly the latter.
>
> A review of our decisions [from 1867 through 1980] shows that while some of the factors relevant to the award have changed, the essential purpose of alimony has remained the "maintenance and support" of the payee spouse. . . . Alimony is intended to fill the needs of the future, not to compensate for the deeds of the past.[42]

Alimony, in 1985, was need-based. Why? For the *sole* reason that Law Court case law since the Civil War had said so.

I have no doubt that Law Court case law did say so, but I wonder at the fact that the court's analysis ended there. Did it concern the

37. *Id.* at 256.
38. *Id.* at 264 (quoting *Harmonice Mundi*, Lib. IV, Cap. I.G.W., Vol. VI).
39. *Id.* at 256.
40. *Id.* at 257.
41. 490 A.2d 1204 (Me. 1985).
42. *Id.* at 1207 (citations omitted).

Justices that, after analyzing the history of Maine's family law, they announced a theory of alimony that was identical to that held by Maine's first legislators, over 160 years earlier? Here's what Maine's first divorce statute said about alimony, in 1821:

> [I]f the personal estate or money which the Court are by this Act authorized to assign to the [divorced] woman . . . together with her dower in her husband's real estate, should be insufficient for her reasonable and comfortable support, then the Court may allow her reasonable alimony out of her husband's estate, so long as she shall remain unmarried, in the same manner as alimony may be allowed to a woman divorced from bed and board . . . regard to be had, in making such allowance, to the character, circumstances and property of the husband, and the character and situation of the wife. . . . [W]henever a decree of divorce from bed and board shall be made because of the cruelty of the husband or of his utterly deserting his wife, or grossly or wantonly and cruelly neglecting or refusing to provide suitable maintenance for her, being of sufficient ability thereto, the wife . . . shall be allowed out of his personal estate such alimony as the Court shall think reasonable, having regard to the personal property that came to the husband by the marriage, and to his ability; but if there be issue living at the time of the divorce, then the Court, with respect to . . . granting alimony as aforesaid, may do as they shall judge the circumstances of the case may require; and upon application from either party, may from time to time, make such alterations therein as may be necessary.[43]

(Divorce from bed and board, the precursor to legal separation, was the preferred form of divorce because it didn't terminate the marriage.) The purpose of alimony in 1821, then, was to provide the ex-wife (or, in the case of divorce from bed and board, the estranged wife) with "reasonable and comfortable support." As *Skelton* noted, "[S]ome of the factors relevant to the award" have changed since then—notably the elimination of the husband's fault as a prerequisite—but "the essential purpose" has remained, in the court's view, constant and ever unchanged.[44]

Skelton thus imposed on late-20th century society an early-19th century concept of divorce law. The danger of doing that is illustrated by the fact that there is scarcely any other subject on which sensible people would choose to do likewise. Consider the following:

- Cosmology: In 1821 people believed that God, a male, had made man in His own image and had set him in Eden in the year 4004 B.C.[45]

43. P.L. 1821, ch. LXXI, § 5.

44. Skelton v. Skelton, 490 A.2d at 1207.

45. *See* JOHN N. WILFORD, THE RIDDLE OF THE DINOSAUR (1985):

- Science: Our first legislators were 100 years early for Harlow Shapley's discovery that the solar system isn't at the center of the universe[46] and Edwin Hubble's that the center of the universe may not be definable.[47]

Nearly all of earth's history remained unknown and largely inconceivable at the beginning of the nineteenth century. Science had long since discredited the pre-Copernican idea of a small, earth-centered universe, thereby freeing people to think of the heavens in virtually limitless dimensions. Chemistry, physics, and physiology were being pursued with fewer restraints imposed by dogma. The way things were seemed fit for rigorous, objective inquiry, but not the way things had come to be—not earth's history. Its study had yet to be liberated from the inhibiting influence of traditional belief. Its study, with a few as yet unappreciated exceptions, was constrained by a concept of time woefully deficient in time.

. . . .

. . . The Englishman who eventually made the first dinosaur discoveries, and even the great Darwin, grew up with the firm belief that God had created the earth and man and all the other species in the year 4004 B.C.

. . . .

. . . Those who wished to be more exact about such an important event heeded John Lightfoot's refinement . . . that, to be more precise, God had created the earth at nine o'clock on the morning of Sunday the twenty-third of October in the year 4004 B.C.

Id. at 35-38.

46. *See* ISAAC ASIMOV, THE UNIVERSE: FROM FLAT EARTH TO QUASAR (1966):

[Harlow] Shapley . . . determine[d] the actual distances of the various globular clusters and then [went] on to calculate the distance of the center of the sphere over which they were distributed. The center of this sphere he assumed to be the center of the Galaxy, and according to his figures it was 50,000 light-years (15,500 parsecs) from the Sun.

By 1920, then, the position of man in the Universe had again been altered, drastically, and once again in the direction of increased humility. Copernicus had shown that the Earth was not the center of the Universe, but he had been certain that the Sun was, as part of the order of nature. . . . Now Shapley showed, quite convincingly, that this was not so, that the Sun was far on the outskirts of the Galaxy.

In place of Ptolemy's geocentric Universe and Copernicus' heliocentric Universe, we now had Shapley's "eccentric Universe", [sic] one in which the Sun was "away from the center" . . . .

Id. at 84.

47. *See* ALAN LIGHTMAN & ROBERTA BRAWER, ORIGINS: THE LIVES AND WORLDS OF MODERN COSMOLOGISTS, Harvard University Press (1990):

In 1929 [Edwin] Hubble made what was perhaps the most important discovery of modern cosmology: the universe is expanding. . . .

. . . .

. . . Galaxies are moving away from us because space is stretching uniformly in all directions, carrying the galaxies along with it. Hubble's discovery . . . gave strong observational support for cosmological models in which the universe is uniformly expanding—but without a center to the expansion.

Id. at 5, 9.

- Politics: In 1821 women would be denied the right to vote for another 100 years.[48]
- Sociology: In 1821 women were esteemed principally for their ability to bear children.[49]
- Religion: Religious beliefs of the early 1800s justified the destruction of the Native American tribes.[50]
- Ecology: Americans had not yet learned that it was both possible and undesirable for humans to cause the extinction of animal species.[51]
- Law: In 1821 slavery was constitutional.

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48. The 19th Amendment to the United States Constitution, granting suffrage to women, was ratified in 1920.

49. WILL DURANT, THE MANSIONS OF PHILOSOPHY (1929):

> How profound a change the childless woman, or the mother of one child, represents as compared with the woman of the past, stands out impressively if we recall the horror with which both men and women once viewed sterility. Until our century the respect in which a woman was held varied in close correlation with the number of children she had borne.

Id. at 200.

50. *See* ROBERT M. UTLEY, THE LANCE AND THE SHIELD (1993). Utley writes:

> White attitudes toward Indians in the time of Andrew Jackson and the infant Sitting Bull centered on the idea of progress, a conception rooted in the Renaissance and the Enlightenment but given a distinctively American cast by the westward movement. Progress demanded the conquest of the wilderness, an imperative fortified by God's command to "be fruitful and multiply, and fill the earth and subdue it. . . ."
>
> Conquest of the wilderness meant destruction of the Indians. About the means of destruction, however, there was disagreement. They could be either destroyed outright by killing or, consistent with the tenets of progress, elevated from savagery to civilization. In either event, since the generic Indian (like savagery and civilization) was a white conception, they ceased to exist.

Id. at 42.

51. *See* EVAN S. CONNELL, SON OF THE MORNING STAR (Harper Perennial) (1984). Connell writes:

> Two [buffalo] herds, each so vast that no reasonable estimate was possible, had darkened the plains, one above and one below the Platte. Frémont, who traveled through this region in 1842, found himself surrounded—the herd extending for several miles behind him and forward as far as he could see.
>
> . . . .
>
> Then came the gun-bearing palefaces.
>
> . . . .
>
> Eight million—give or take a million or so—were shot for their hides during a period of three years. Col. Dodge wrote that a land which used to vibrate with life had become a putrid desert. The high plains stank with rotten meat. By 1874 he saw more hunters than animals: "Every approach of the herd to water was met by rifle bullets. . . ."
>
> . . . .
>
> It is said that at the beginning of the twentieth century one buffalo wandered across the prairie not far from a small town in Wyoming. The townspeople hitched up their wagons and rode out to have a look. They drove around the creature and stopped, the wagons forming a circle with

Is it possible that the law of divorce should have changed since 1864 when Joel Bishop wrote:

> The doctrine of alimony springs up necessarily out of the soil of our law, by reason of the peculiar property relation which it establishes between husband and wife. Upon the marriage, the husband has vested in him all the present available means of the wife, together with the right to claim her future earnings and acquisitions. At the same time, the law casts upon him the duty suitably to maintain his wife, according to his ability and condition in life. . . . The husband cannot abandon his duty to support his wife; therefore, when the law in any case judges that she may live apart from him, . . . it must also judge that he shall maintain her while so living.[52]

Divorce law like that *ought* to be little more than an antique curiosity. Not according to the court in *Skelton*: one of the precedents the Justices cited—unabashedly—to illustrate the history of need-based alimony in Law Court case law was a decision from 1867, a decision that was contemporaneous with the quotation above,[53] a decision that preceded Darwin's theory of human evolution.[54]

I think it is fair to conclude that, as a statement of the modern purpose of alimony, *Skelton* is useless. If the law is supposed to regulate human behavior, it ought, at least, to reflect human behavior. Relying on the social tenets of the early 19th century as a basis for divorce law at the threshold of the 21st century is as hopeless—and, to those of us who employ divorce law regularly, as frustrating—as citing Thomas Jefferson as an authority on modern race relations.[55] That should be obvious, but the Law Court did it anyway. Assuming that the Law Court may be treated as a chronological singularity, it did it because it fell into the same trap as Johannes Kepler:

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the buffalo inside. For a long time they stared at this legendary animal. Then, because they could not imagine what else to do, somebody shot it.

Id. at 135-36.

52. JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE § 369, at 295-96 (Boston, Little, Brown and Co. 1864) (footnotes omitted).

53. Chase v. Chase, 55 Me. 21 (1867). The relevance of this decision to the modern world may be measured by the following portion of the decision:

> Perhaps the fact that impotence is a matter which ordinarily would be discovered immediately after marriage, and the party aggrieved would be able at once to annul the marriage, may have had some influence on the legislation on this subject. But however this may be, we are satisfied that alimony could not be legally decreed in this case.

Id. at 24.

54. CHARLES DARWIN, THE DESCENT OF MAN AND SELECTION IN RELATION TO SEX (New York, D. Appleton and Co. 1871).

55. *See* Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L. J. 2227 (1994). In Jefferson's time the husband had the right to all of the income of the property because of the theory of coverture, which gave him the right to claim all of the family's property. *Id.* at 2229-30. The Law Court's reliance on its own precedent extends coverture to the atomic age.

The Law Court believed what it had proved and therefore proved what it had believed. The court's closed system of logic blinded it to the broader implications of its decision.

There would be no reason to criticize if the Law Court simply admitted, "We aren't sure what the purpose of alimony is and we're struggling to figure it out." A quick review of the literature on alimony reveals a furious, nation-wide debate on the subject,[56] so such an admission would hardly undercut the court's credibility. However, the court refuses to admit anything of the kind and instead continues to treat *Skelton* as definitive.[57] Sadly, absolutely *none* of the literature that the alimony debate has generated advocates the rudimentary 19th century concept of alimony[58] to which the Law Court has affixed itself. In view of that overwhelming evidence of change, the court's stubborn traditionalism is breathtaking.[59] Just like Johannes Kepler's.

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56. *See* Jed H. Abraham, *"The Divorce Revolution" Revisited: A Counter-Revolutionary Critique*, 9 N. ILL. U. L. REV. 251 (1989); June Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463 (1990); Ira M. Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989); Sally F. Goldfarb, *Marital Partnership and the Case for Permanent Alimony*, 27 J. FAM. L. 351 (1988-89); Herma H. Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1 (1987); Joan M. Krauskopf, *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery*, 23 FAM. L. Q. 253 (1989); Twila L. Perry, *Alimony: Race, Privilege, and Dependency in the Search for Theory*, 82 GEO. L.J. 2481 (1994); Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827 (1988); Jane Rutheford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539 (1990); John C. Sheldon & Nancy D. Mills, *In Search of a Theory of Alimony*, 45 ME. L. REV. 283 (1993); Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423 (1994); Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103 (1989); Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, *in* DIVORCE REFORM AT THE CROSSROADS 130 (Stephen D. Sugarman & Herma H. Kay eds., 1990); Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227 (1994).

For a brief but comprehensive history of the development of the debate about alimony, see Singer, *supra* note 13, at 2424-28.

57. *See infra* text accompanying note 77 which discusses Noyes v. Noyes.

58. To say that alimony is based purely on need grossly understates the complexity of the problem of alimony in the modern world:

> Although the legal basis of alimony has always been somewhat murky, the move to articulate a theory of alimony has become more urgent in light of recent developments such as no-fault divorce, increased opportunities for women in the workplace, and decreased governmental involvement in family relationships. These developments have tended to undermine the traditional need and fault justifications for alimony. Scholars, in struggling with the problem of creating a new theory of alimony, have explored the problem from a number of perspectives, including those of contract law, partnership law, law and economics, human capital theory, and tort law.

Perry, *supra* note 56, at 2781-82 (citations omitted).

59. There is this explanation for the Law Court's loyalty to *Skelton*: If the court acknowledges that it doesn't know what the purpose of alimony is, it loses authority

B. *Turning Lead into Gold*

The problem with Kepler's geometric model of the universe was that it didn't work. Thanks to the precise and unimpeachable astronometrical measurements of one Tycho Brahe, Kepler found this error: his prediction of Mars' orbit based on his own geometric theory differed by eight minutes arc from the observations of Tycho.[60]

Kepler tried fixing his geometric model, but the result remained unsatisfactory, so he tried a different approach. This time he decided to prove that the planets operated on a system that correlated to the harmonic intervals of the Pythagorean musical scale.[61] Need-

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for reversing trial courts' awards of alimony. When alimony decisions are reversed without any theoretical basis for the appellate ruling, it's because the justices of the Law Court merely disagree with the trial judge, not because the trial judge has violated any affirmative rule of law. *See, e.g.*, Pongonis v. Pongonis, 606 A.2d 1055 (Me. 1992) (reversing a trial judge's denial of nominal alimony for abuse of discretion, without citing any theoretical basis supporting that conclusion). The mere fact that an appellate court disagrees with a trial judge's decision isn't normally supposed to justify a reversal. *See* Smith v. Smith, 419 A.2d 1035, 1038 (Me. 1980) ("Absent a violation of some positive rule of law, this [Law] Court will overturn the trial court's decision . . . only if it results in a plain and unmistakable injustice, so apparent that it is instantly visible without argument.").

I would argue that it's better for the Law Court to acknowledge that its decisions on alimony lack clear theoretical predicate, than for the court to prop up its decisions with reference to a theory that lacks credibility.

60. KOESTLER, *supra* note 1, at 326.

61. *Id.* at 279. Koestler explains the Pythagorean "Harmony of the Spheres":

> The Ionian philosophers had begun to prise open the cosmic oyster, and to set the earth adrift; in Anaximander's universe the earth-disc no longer floats in water, but stands in the centre, supported by nothing and surrounded by air. In the Pythagorean universe the disc changes into a spherical ball. Around it, the sun, moon, and planets revolve in concentric circles, each fastened to a sphere or wheel. The swift revolution of each of these bodies causes a swish, or musical hum, in the air. Evidently each planet will hum on a different pitch, depending on the ratios of their respective orbits—just as the tone of a string depends on its length. Thus the orbits in which the planets move form a kind of huge lyre whose strings are curved into circles. It seemed equally evident that the intervals between the orbital cords must be governed by the laws of harmony. According to Pliny, Pythagoras thought that the musical interval formed by earth and moon was that of a tone; moon to Mercury, a semi-tone; Mercury to Venus, a semi-tone; Venus to Sun, a minor third; Sun to Mars, a tone; Mars to Jupiter, a semi-tone; Jupiter to Saturn, a semi-tone; Saturn to the sphere of the fixed stars, a minor third.

Id. at 31-32 (footnote omitted).

This ancient concept of universal harmony appealed greatly to Shakespeare, who referred to it in these beautiful lines from *The Merchant of Venice*:

> How sweet the moonlight sleeps upon this bank!
> Here will we sit and let the sounds of music
> Creep in our ears: soft stillness and the night
> Become the touches of sweet harmony:
> Sit, Jessica,—look how the floor of heaven
> Is thick inlaid with patens of bright gold,

less to say, that didn't work either,[62] so he commenced a decades-long trial-and-error effort to explain the behavior of Mars. It was in the course of this tribulation that he discovered (and then immediately ignored[63]) his important laws of planetary motion. He could believe that geometry or music ruled the universe as long as he lacked objective proof of their inadequacy. Yet when faced with that proof from Tycho, he had to look for some other explanation for the recalcitrant orbit. That search led him to his cosmologically revolutionary, if aesthetically offensive and personally disappointing, discoveries.[64]

There's not the smallest orb which thou behold'st
But in his motion like an angel sings,
Still quiring to the young-ey'd cherubins;
Such harmony is in immortal souls,
But whilst this muddy vesture of decay
Doth grossly close it in, we cannot hear it.

WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 5, sc. 1, l. 54-65.

62. *See* KOESTLER, *note* 1 at 279-80.

[A]s he began to compute the details of his cosmic musical box, he ran into increasing difficulties. . . . The principal trouble was that a planet does not move at uniform speed, but faster when it is close to the sun, slower when away from it. Accordingly it does not "hum" on a steady pitch, but alternates between a lower and a higher note. The interval between the two notes depends on the lopsidedness or "eccentricity[sic] of the planet's orbit. But the eccentricities were only inaccurately known. It was the same difficulty he had come up against when he had tried to define the thickness of the spherical shells between his perfect solids, which also depended on the eccentricities. How could you build a series of crystals, or a musical instrument, without knowing the measurements? There was only one man alive in the world who possessed the exact data which Kepler needed: Tycho de Brahe.

Id.

63. *See id.* at 403.

Kepler's Laws seem[ed to him] to have no particular *raison d'être.* Of the first he was almost ashamed: it was a departure from the circle sacred to the ancients, sacred even to Galileo and, for different reasons, to himself. The ellipse had nothing to recommend it in the eyes of God and man; Kepler betrayed his bad conscience when he compared it to a cartload of dung which he had to bring into the system as a price for ridding it of a vaster amount of dung. The Second Law he regarded as a mere calculating device, and constantly repudiated it in favour of a faulty approximation; the Third as a necessary link in the system of harmonies, and nothing more.

Id.

64. *See id.* at 341.

The problem of the planetary orbits had been hopelessly bogged down in its purely geometrical frame of reference, and when Kepler realized that he could not get it unstuck, he tore it out of that frame and removed it into the field of physics. This operation of removing a problem from its traditional context and placing it into a new one, looking at it through glasses of a different colour as it were, has always seemed to me [to be] the very essence of the creative process. It leads not only to a revaluation of the problem itself, but often to a synthesis of much wider consequences, brought about by a fusion of the two previously unrelated frames of reference. In

Kepler's confidence in the geometric and musical solutions to universal mysteries derived from his tunnel vision; objectivity forced him to broaden his horizons.

C. *Turning Lead into Lead, Part 2*

We ought to recognize something similar about our own divorce law. As long as we believe what Law Court precedent says about alimony, we may have confidence that our current alimony statute adequately guides us. This is because the statute says that one of the things a judge is supposed to consider when deciding whether to award alimony is whether a spouse will need support after the divorce.[65] The statute confirms the theory that need is important. Yet if we acknowledge that need is not an adequate basis for awarding alimony, the statute loses its theoretical anchor. If, in other words, we recognize that need-based alimony derives from the same kind of tunnel vision that badgered Kepler, we have no choice but to broaden our own horizons. It is then that we will recognize that the statute is as useless a guide to alimony as geometry and tonality were to the planets.

Need, as I have suggested, has not been shown to be an adequate basis for a modern award of alimony. As alimony's theoretical foundation, need did make a brief appearance in our statutes. It then disappeared, however, for over 100 years, only to reappear recently in a new and unpersuasive guise.

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our case, the orbit of Mars became the unifying link between the two formerly separate realms of physics and cosmology.

Id. (footnote omitted).

65. Maine's alimony statute reads in pertinent part:

1. Factors. The court shall 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.

ME. REV. STAT. ANN. tit. 19, § 721 (West Supp. 1994-1995).

Our original divorce statute of 1821[66] described the purpose of alimony in unmistakable terms. The purpose was to meet the wife's post-divorce need. In 1847 the legislature revised Maine's statutes but made no substitute changes to the alimony provisions.[67]

Something significant, however, had occurred by the time of the next revision in 1857 (omitting hereafter, for their decreasing relevance to this discussion, the portions dealing with divorce from bed and board):

> When a divorce is decreed to the wife for the fault of the husband for any other cause [than impotence] . . . [t]he court may . . . decree to her reasonable alimony out of his estate, having regard to his ability; . . . or instead of alimony, may decree a specific sum to be paid by him to her . . . .[68]

For the first time we had an alternative to alimony, a specific sum. Yet, also for the first time, there was no mention of the purpose of either alimony or the "specific sum." The concern for the wife's "reasonable and comfortable support" had disappeared from the statute. That omission held true for the next 100 years. In 1954, the divorce statute read:

> When a divorce is decreed to the wife for the fault of the husband for any other cause [except impotence] . . . [t]he court may . . . decree to her reasonable alimony out of his estate, having regard to his ability, . . . or, instead of alimony, may decree a specific sum to be paid by him to her or payable in such manner and at such times as the court may direct . . . .[69]

This statute expanded the court's discretionary powers. Or maybe it merely codified the expansive discretion that the court always had. I don't know which, but the purpose of alimony remained unstated, and to all appearances unchanged since Millard Fillmore. Nor did the legislature's reticence change with its next revision of the alimony statute in 1977:

> The court may decree to either spouse reasonable alimony out of the estate of the other spouse, having regard to that spouse's ability to pay . . . . The court may order instead of alimony, a specific sum to be paid or to be payable in such manner and at such times as the court may direct.[70]

Alimony was now no longer the exclusive prerogative of women, but we still couldn't tell what its purpose was. Need certainly wasn't mentioned. Did that change with the next, and current, version of the alimony statute?

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66. P.L. 1821, ch. LXXI, § 5 (alteration in original).
67. P.L. 1847, ch. XIII, § 2.
68. P.L. 1857, ch. 60, § 6.
69. P.L. 1954, ch. 166, § 63.
70. P.L. 1977, ch. 564, § 86.

The answer is yes and no. The legislature revised the statute in 1989 when it threw out the language that had been appearing since 1847 and added fourteen specific "factors" that a "court shall consider . . . [when] determining an award of alimony."[71] The factors include post-divorce need; however, they also include the age of the parties, the age of the marriage, the health, employment, and incomes of the parties, the tax consequences of the divorce, the spouses' contributions to the household, economic misconduct, the parties' standard of living, and "any other factors the court considers appropriate."[72]

Nothing in the statute, however, identifies the actual purpose of alimony. Need is no more important than any other factor, so the statute hardly supports the Law Court's recent announcement that reducing need is "the primary purpose of alimony."[73] In the final analysis, the statute is so internally inconsistent that it is impossible to deduce *any* single purpose of alimony. Consider:

- Factors D (parties' employment history and potential), G (their retirement and health insurance benefits), and I (their health) suggest awarding alimony to address the *recipient's post-divorce need*;
- Factor B (the parties' ability to pay) suggests awarding alimony *irrespective of the recipient's post-divorce need*;
- Factors K (the parties' contributions as homemaker) and L (the parties' contributions to each other's earning potential) suggest awarding alimony to compensate for *pre-divorce beneficence*;
- Factor M (economic misconduct) suggests awarding alimony to compensate for *pre-divorce malice*;
- Factor O ("any other factors the court considers appropriate") suggests that *none of the fourteen enumerated factors suggests the purpose of alimony.*[74]

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71. *See supra* note 65.

72. *See supra* note 65; those hoping to incorporate Maine's new alimony statute into a grand scheme of emerging alimony theory will be disappointed by the statute's theoretically impoverished origins. According to those drafters whom I have interviewed, the statute was amended in response to a single divorce case. In that case the husband had built up substantial earnings and earning power in a business he would continue to operate after the divorce; the wife, on the other hand, had served as homemaker almost all of the marriage and would leave the marriage with few if any marketable skills. The trial judge, inexperienced in divorce law and especially ingenuous about alimony, denied her any alimony. The local community funnelled its indignation 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.

Here is the entire text of the statement of fact that accompanied the amendment: "This bill enumerates the factors a court must consider when determining an alimony award." L.D. 656, Statement of Fact (114th Legis., 1989).

73. Noyes v. Noyes, 662 A.2d 921, 922 (Me. 1995).

74. *See supra* note 65.

Let me illustrate with the following example why it's impossible to deduce the purpose of alimony from this statute:

> You're standing in a field. A man approaches carrying a bunch of big bulls-eye targets. He sets up the first one and turns to you and says, "Consider this." He sets up a second one, turns to you and says, "Consider this." As he sets up each of the rest of the bulls-eye targets (coincidentally, fifteen in all), he turns to you and repeats the same phrase. When they're all set up and he's said the same thing as the last time, he hands you a bow and a quiver full of arrows. Then he steps back.
>
> You look at the targets. Then you turn to him and say, "I'm supposed to shoot at them, right?" He doesn't respond. You say, "Is any one more significant than any other?" No answer. "I'm a little out of practice—does it make any difference if I miss one?" No answer. "Well, assuming that each is as important as the other, is there some combination of them that I should attempt?" No answer. "Are these my targets, or do they merely frame a more distant objective?" No answer. "Why should I shoot at any of them?" No answer. "What is the purpose of this exercise?" No answer.

What is the purpose of considering the alimony factors? Is any one of them more important than any other? If so, why? If not, why not? If you hit upon a certain secret combination of the factors, does the purpose of alimony magically appear? If the factors, singly or in combination, outline the purpose of alimony, why doesn't the statute simply tell us what it is rather than beating around the bush? If, on the other hand, the factors don't tell us the purpose of alimony, then why should we consider them at all?

We shouldn't. I know the statute mandates that we consider these factors, and I hesitate to advise judges to violate any statute. But I've considered them and considered them until I got blue in the face, and I finally realized that what was frustrating me was the fact that *the statute doesn't mean anything.* It requires us judges to consider all sorts of things without ever telling us why we should do so.[75] Thus it mandates that judges award alimony *arbitrarily* because, if the definition of "arbitrary" is "determined by chance, whim, or impulse, and not by necessity, reason, or principle,"[76] this statute never identifies the necessity, reason, or principle for awarding alimony. Having conscientiously studied the emperor and having discovered that he is stark naked, I wonder why we should participate in the ritual of contemplating his clothing.

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75. The Law Court appears to agree with this assessment. In *Noyes* the court cited *Skelton* as the authority on the purpose of alimony, not the statute. Noyes v. Noyes, 662 A.2d at 922.

76. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 94 (3d Ed. 1992).

IV. DENYING REALITY

If Law Court precedent has inadequately analyzed the purpose of alimony, and if our statute provides no analysis at all, do we have any idea what we're supposed to be doing? The answer is that we do, but we don't realize it. The Law Court holds the key to change in its collective hand, but it's so anchored to the past that it virtually can't admit it.

The recent Law Court decision in *Noyes v. Noyes*[77] proves the point. In that case the parties were awarded unequal shares in the marital property and the wife was awarded $2,000 alimony. The wife appealed on the ground that the meager $2,000 alimony award was inadequate because the parties left the marriage with unequal earning capacities.

The Law Court agreed. The court opened with the usual ceremony, honoring its ancestors and genuflecting to the legislature:

> The primary purpose of alimony is to provide "maintenance and support" for the future needs of the payee spouse. *Harding v. Murray*, 623 A.2d 172, 176 (Me. 1993) (quoting *Skelton v. Skelton*, 490 A.2d 1204, 1207 (Me. 1985)). To determine an alimony award, the trial court must consider the factors enunciated in 19 M.R.S.A. § 721 (Supp. 1994)."[78]

Then the court got down to brass tacks:

> [T]here is a substantial difference in the amount each is presently able to earn.
>
> Both parties are in their late forties. Linwood earns over $15 per hour at Great Northern Paper Company. Although he has earned as much as $44,000 as a result of extensive overtime, his gross income in 1992 was $39,000. He receives medical and life insurance benefits from his employer, and is vested in a noncontributory pension plan. At the age of 65, he will be entitled to receive a lump sum payment of $12,576.56 or payments of $465.95 per month. . . .
>
> Sandra earns $5.60 per hour as a dietary aide in a boarding home. In 1992, she earned $11,723 working forty hours per week. After deductions, including costs of health insurance, she takes home $680 per month. She has no retirement benefits. . . . *An alimony award premised on the assumption that the spouse will invade her portion of the marital assets is insufficient.* . . . "[I]t is inequitable to force a spouse to invade that spouse's marital assets for the benefit of the other. Such a concept defeats the presumably careful and equitable distribution of marital property."[79]

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77. 662 A.2d 921.

78. *Id.* at 922.

79. *Id.* at 923 (citing Bonnevie v. Bonnevie, 611 A.2d 94, 95 (Me. 1992)) (emphasis added).

Two points. First, *Skelton v. Skelton* never said any such thing. Not once in that decision did the court intimate, as it did in *Noyes*, that the purpose of alimony is found in Maine's equitable distribution statute, the Marital Property Act; not once did *Skelton* even *mention* marital property.[80] *Noyes's* initial obeisance to *Skelton* is spurious.

Second, the Law Court *cannot* mean what *Noyes* says. It *says* that "[a]n alimony award premised on the assumption that the spouse will invade her portion of the marital assets is insufficient."[81] Consider this example, however:

> At the time of the divorce, husband earns $15 per hour and expects to gross $39,000 per year. Wife, on the other hand, earns $5.60 per hour and expects to gross $11,723 per year. Wife gets 100% of the marital property, worth $250,000. She also gets $1 per year of alimony.

If *Noyes* means what it says, the judge committed reversible error because the wife will have to invade her portion of the marital assets to support herself. Such a conclusion, however, is nonsense. The total award proposed there plainly favors the wife. On the other hand, if the judge refuses to give her any of the marital property or alimony, no reversible error has occurred because there's no alimony award at all, so alimony cannot have been "premised on the assumption that the spouse will invade her portion of the marital assets"[82] (which doesn't exist either). This conclusion is as absurd as the previous.

Let us assume, then, that *Noyes*'s import lies not in the phrase quoted in the previous paragraph but in this one: "[I]t is inequitable to force a spouse to invade that spouse's marital assets for the benefit of the other."[83] What that seems to mean is that if one spouse has to use up marital property because the other isn't paying alimony, the latter is enjoying an unfair "benefit." But that may not be true either. Consider this example:

> At divorce, both parties earn $5.60 per hour and expect to gross $11,723 per year. They split the marital property, worth $20,000, equally. Husband is fifty-five and of uncertain health; wife is forty and in good health. Neither has health insurance. Neither is awarded alimony.

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80. In fact, the law at the time *Skelton* was decided was probably just the opposite. *See* Smith v. Smith, 419 A.2d 1035, 1039 (Me. 1980): "There is no basis in the marriage and divorce statutes of this State for supposing that the provisions for division of property in section 722-A were intended to abrogate or limit the traditional discretion of the trial judge to determine the amount of alimony as justice may require . . . ."

81. Noyes v. Noyes, 622 A.2d at 923 (citing Bonnevie v. Bonnevie, 611 A.2d at 95).

82. *Id.*

83. *Id.*

If need were the controlling or "primary" consideration, the husband might argue on appeal that he's entitled to alimony because he's older and more likely to encounter medical expenses. But he's unlikely to win on appeal because if he invades his marital property he's not benefitting the other spouse. The reason is that the other spouse could not have afforded to pay alimony in the first place and, given her small income, might have to invade her marital property too. The primary factor in this example isn't need, it's the ability to pay and the equality of means. Where the ability to pay is meager or the means of the parties equal, the significance of need is diminished.

Finally, consider this example:

> At divorce, husband earns $39,000 per year and wife earns $11,723. They were married for 6 months before wife sued for divorce. At the time of the divorce hearing their marriage is nine months old. Their incomes haven't changed in the past three years. There is only $12,000 of marital property which the judge awards them in proportion to their incomes. Neither is awarded any alimony.

Once again, if need were the "primary" issue the husband would have to pay lots of alimony. But the marriage is so short that making him do so seems unfair. The reason is that the disparity of the spouses' incomes isn't the product of their marriage, so it isn't a fair basis for awarding alimony.[84] The "primary" issue here is the nonmarital source of the disproportion; need plays no role whatsoever.[85]

What, then, does *Noyes* really mean? At base, it recognizes two kinds of assets: marital property and income. If one ex-spouse has to invade marital property for his or her support and the other doesn't because the latter earns more, that flags the possibility that the order that divided all of the parties' assets, including income, wasn't fair. If, as the result of the marriage, the parties' incomes are disproportionate at divorce, either the spouse who earns more will

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84. *See, e.g.*, Ira M. Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 3, 75 (1989):

> We allow the wife a claim when she sacrifices her earning capacity to advance her husband's. But where one spouse enters the marriage with a great fortune or a lucrative talent, and the other has no similar asset, we have a different situation. Divorce law cannot remedy all of life's inequalities, and it is perfectly reasonable for such a couple to leave their marriage as unequally endowed as they entered it.

Id.

85. By comparison, the parties in *Noyes* married in 1982, separated in 1990, and were still married in 1995, because the first divorce hearing ended in a reversal by the Law Court. Noyes v. Noyes, 617 A.2d 1036, 1037 (Me. 1992). By the date of the second divorce hearing, in mid-1993, the husband had been working at the Bowater paper mill for about 22 years. *Id.* at 1037. A substantial portion of his income at the time of divorce must have been due to his employment during the marriage.

have to pay alimony or the spouse who earns less will have to get more marital property than the other. This is so unless there's a good reason to the contrary such as equality of division of all assets or inability to pay.[86] The controlling principle doesn't look like need at all; it looks like the equality of the division of marital property and income.

It would be nice if the court just *said* that: *the purpose of alimony is to enable a divorce court to divide equally all of the assets of the marriage, including the "career asset" of earning power.*[87]

If so, then we have one important thing to be thankful for: what guides the court is fundamental fairness. That means that, at least as long as the Law Court retains principal authority for defining the purpose of alimony, we are likely to be spared presumptive alimony guidelines, those charts that purport to dictate the magnitude of an alimony award in every divorce.[88] Assuming that I have at last figured out where the Law Court is going with alimony it would appear that what defines the amount of alimony in every case is largely *internal* to the marriage (based on a computation of the value of the assets, tempered by fair thinking) rather than imposed by table from without. That's a relief because it means that we may continue to explore the purpose of alimony without being tempted to abort the inquiry for the reason that the guidelines have preempted it.[89]

On the down side, however, is the inevitable uncertainty of developing case law. I am not confident that I know where the Law Court is headed: that it continues to worship the decomposed idol of *Skelton* is perplexing; that it refuses to acknowledge what it's obviously doing is ominous.

Furthermore, there may be developing in the court a schizophrenia about the object of divorce itself. In *Noyes* the court found equitable reason for prolonging the spouses' post-divorce financial

86. The present alimony statute identifies many of the "reasons to the contrary." *See supra* note 65. That doesn't change my opinion of the statute. If I'm right about *Noyes* the statute may be considered to list the reasons why *not* to award alimony.

87. The term "career assets" was coined by Lenore Weitzman to describe things like education and professional training, job seniority, employment security and future earning capacity; things that are not "property" and therefore cannot be reached through equitable division statutes but that have palpable value to those who enjoy them. Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1115 (1989) (*citing* LENORE WEITZMAN, THE DIVORCE REVOLUTION: THE UNINTENDED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 111 (1985)).

88. *See, e.g.*, PA. R. CIV. P. 1910.16-3.

89. So long as we have a yardstick by which to measure how much alimony to award, we are likely to refrain from asking why we should award it at all. The existence of precise, numerical standards blinds us to the deficiencies of policy. Thus we risk repeating the error of our medieval ancestors, who found the Ptolemaic system such a sufficiently accurate predictor of planetary motion that they didn't have to question its objective truth.

relationship, despite the trial judge's preference that it be curtailed. Yet only three months earlier the same court had reversed a trial judge, who had prolonged the spouses' post-divorce financial relationship, *because* such things should be curtailed.[90] In that case the divorce judgment denied the wife alimony but entitled her to "stumpage rights"[91] for ten years on the woodlot the court awarded to the husband. The Law Court reversed, citing cases from three other states for the proposition that "a court should endeavor to divide the marital property in such a manner as to avoid continued financial interaction between the parties."[92] Assuming for the moment that the court meant *only* to quash ex-spouses' bickering (because it stated, "[I]t is particularly important to avoid creating situations where the divorced parties remain in joint management of income producing property."[93]), the decision makes perfect sense. But if the court intended by that innocuous thought to introduce Maine at long last to the clean-break theory of divorce—the idea that whenever possible the parties' financial ties should be severed finally at divorce[94]—then there's a theoretical tension about divorce that needs to be relieved.

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90. Berry v. Berry, 658 A.2d 1097 (Me. 1995). The trial judge who got reversed was your humble author.

91. "Stumpage rights" means she had the right to cut and sell timber growing on the property.

92. Berry v. Berry, 658 A.2d at 1099.

93. *Id.*

94. *See* Reynolds, *supra* note 56, at 833-35.

> The divorce reform movement of the 1960's, although largely focused on the elimination of fault, sought to promote the role of property division laws to address postdivorce need. The reformers' preference for property division instead of alimony to address postdivorce need centered on one feature: the different treatment accorded property division and alimony in divorce litigation. . . . [C]ommentators involved in the reform movement apparently assumed that property awards would remain nonmodifiable and extolled the virtues of property division as the superior means of making economic adjustments at divorce largely on the basis of its nonmodifiability.
>
> The virtues of nonmodifiability have long been recognized. Nonmodifiability brings finality at least to one aspect of the relationship, and ending a source of controversy between the ex-spouses is certainly a legitimate goal. Moreover, for psychological reasons, reformers have favored procedures that end as much contact between the parties as possible in order to cut the emotional ties and leave the parties free to form other, more enduring relationships.

Id.

See also John C. Sheldon, *Toward a Coherent Interpretation of Maine's Marital Property Act*, 43 ME. L. REV. 13, 40 (1991): "[B]y adopting Section 307 [of the Uniform Marriage and Divorce Act, enacted in 1971 as Maine's Marital Property Act [hereinafter MPA], ME. REV. STAT. ANN. tit. 19 § 722-A], Maine necessarily incorporated the objectives of that statute's drafters, including their goals for the use of marital property instead of alimony."

That tension is due to the fact that alimony prolongs financial ties. Awards of marital property are normally final and unmodifiable, whereas awards of alimony may normally be amended.[95] It is incompatible with the clean-break theory of divorce that alimony serve as a basic constituent of divorce: if divorce is supposed to sever the parties' financial ties completely, then alimony should only be a last resort. Only when an award of marital property, disproportionate if necessary, fails to produce a fair result should a court award alimony. The clean-break theory of divorce was a cornerstone of the divorce revolution that produced, among other things, no-fault divorce and the Marital Property Act in Maine.[96]

It would be consistent with the clean-break theory of divorce that need serve as a sort of admission ticket to alimony. Alimony would not be awarded unless somebody needed it: absent any need at all, the clean-break theory of divorce applies. So if one party is a Carnegie and the other is a Rockefeller, neither gets alimony irrespective of the division of marital property. On the other hand, alimony *might* be awarded if a party might need it: if need exists then the court has to pursue an equitable division of all of the parties' assets, including earning power.[97]

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95. Reynolds, *supra* note 56, at 834; Wardwell v. Wardwell, 458 A.2d 750 (Me. 1983) (citations omitted):

> While statutory provisions relating to alimony and child custody expressly permit a divorce court to consider post-judgment motions for modification of an original divorce decree, the statutory provision relating to the division of marital property contains no corresponding grant of authority. In the absence of statutory authorization to modify a judgment dividing marital property, the courts are without jurisdiction to do so.

Id. at 752.

96. *See supra* note 94.

97. Pennsylvania's experience with alimony is instructive. In 1988, Pennsylvania amended its alimony statute to provide a list of "relevant factors" that "the court shall consider" in order to determine "whether alimony is necessary, and in determining the nature, amount, duration, and manner of payment of alimony." 23 PA. CONS. STAT. ANN. § 3701(b) (1991). There are 17 factors and they include, at least implicitly if not expressly, all of the factors listed in ME. REV. STAT. ANN. tit. 19, § 721 (West 1994-1995), except the tax consequences of the division of marital property (ME. REV. STAT. ANN. tit. 19, § 721(H) (West 1994-1995)). Pennsylvania's statute does not include a discretionary catch-all similar to § 721(O) ("Any other factors the court considers appropriate").

With a statute similar to ours, Pennsylvania takes a position on alimony similar to that suggested here in the text: "[A]limony following divorce is a secondary remedy and is available only where economic justice and the reasonable needs of the parties cannot be achieved by way of an equitable distribution award and development of an appropriate employable skill." Grandovic v. Grandovic, 564 A.2d 960, 965 (Pa. Super. 1989) (citations omitted). *See* Patrick M. Coyne, *The History of Alimony in Pennsylvania: A Need for Further Change*, 28 DUQ. L. REV. 709 (1990).

Need may serve a pivotal role in determining alimony if Maine pursues a clean-break theory of divorce.[98] Do we? Recent case law isn't clear and I doubt that anybody knows. This means, I fear, that we are unable to define even the purpose of divorce.

V. THE SPECTER OF CHANGE

And there remains, ever festering and ever growing, a deeper issue: why do we spend so much effort carving out special remedies for divorcing spouses at all? Why do we keep distinguishing things on the basis that the parties either were or weren't married? Every time we do so, we extend increasingly antique concepts into an increasingly changed world.

Consider this problem. In a 1991 divorce case the Law Court said, "In equity and common sense, the fact that some of [the wife's contributions] took place before the marriage or before the creation of the joint tenancy[99] does not bar the court from weighing them in its decision as to a just division of the house that it found was wholly marital property."[100] In a 1993 decision regarding the equitable partition of real estate between two unmarried joint tenants, however, the court declared:

> [T]he division of property held in joint tenancy should take into account all equities growing out of that relationship. Contributions of the parties to the property prior to the joint tenancy, however, are not equities growing out of the joint tenancy relationship. To allow the consideration of contributions preceding the joint tenancy would defeat joint ownership.[101]

Two diametrically opposed rules of law apply for two virtually identical circumstances, differentiated only by a wedding ceremony.[102]

In the narrow sense, the 1993 decision was unwise because it prevents judges from being fair. When a pair of unmarried joint ten-

98. I should point out that if this is so, need plays a role that has no relationship to the role that need played under the tradition *Skelton* drew on: alimony addressed one spouse's need because of the other's societal obligation of support. If need is an admission ticket to alimony, it is a function of the clean-break theory of divorce, which *Skelton* never considered and which the Law Court had never heard of when it decided many of the cases that *Skelton* cited as authority for its holding.

99. Joint tenancy with right of survivorship means that each tenant owns the property equally with all of the other tenants; upon the death of a tenant, that tenant's interest in the property expires. *See* Maine Savings Bank v. Bridges, 431 A.2d 633 (Me. 1981).

100. Anderson v. Anderson, 591 A.2d 872, 874 (Me. 1991).

101. Boulette v. Boulette, 627 A.2d 1017, 1018 (Me. 1993) (citations omitted).

102. In *Boulette* the parties had divorced previously, and Mrs. Boulette received title to the property in the divorce judgment. She and her former husband later reconciled, but they never remarried. During the period of reconciliation Mrs. Boulette deeded the real estate to herself and her former husband as joint tenants. *Id.*

ants litigates to dissolve their tenancy, the judge is not allowed to ensure that each gets credit for what might have been a valuable pre-joint tenancy contribution to the property. That rule renders the judge powerless to prevent the benefit of such a contribution from devolving to an undeserving party.

In the broad sense, that decision creates a policy that limits fairness arbitrarily to a particular class of people: married couples. If, "in equity and common sense," it's unfair to deny spouses credit for pre-joint tenancy contributions, it's no less unfair to deny unmarried individuals the same thing. Or, to put it in another context, if it's reversible error to require one *ex*-spouse to expend capital "for the benefit of the other," why should we tolerate in policy the circumstance where one *non*-spouse expends capital that ultimately benefits the other?[103]

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103. Professor Twila Perry has suggested that there are ominous sociological overtones to the fact that alimony is available only to those who have married:

> Let us take the example of two women, neither of whom has ever held a job in her adult life. The first woman was married right out of college to a young man with a promising career. The other woman never married but had three children and ended up receiving public assistance. Both women have been out of the workforce caring for their children at home for the last several years. In one case, the husband has now decided that he wants to end the marriage. In the other case, the government has decided to take more severe measures against mothers receiving public assistance and to force them into workfare programs.
>
> . . . The former [woman] is viewed as having sacrificed her career in order to spend time with her children, the latter is seen as just plain lazy. . . .
>
> . . . A woman who has been supported by a man for twenty years is seen as deserving of continued economic support; a women [sic] who has been supported by the government rather than by a man for the same period is not. Both women may have been superb homemakers and wonderful, attentive mothers, yet only one is viewed as deserving.
>
> In short, we are willing to reward . . . women who have been "good wives."

Perry, *supra* note 56, at 2500-2502 (footnotes omitted). To the extent that alimony may be considered private welfare, the debate over reducing public welfare undermines the argument that alimony has a place in the modern world. To the extent, on the other hand, that alimony derives from a concept of gender subordination in the middle and upper class, *id.* at 2507, it turns into a remedy available exclusively to women of means—which also dooms it, although for the reason of its social injustice rather than of the combination of its exorbitant cost and incompatibility with the work ethic. Thus, Professor Perry concludes:

> Feminists must . . . recognize that the search for a theory of alimony also reinforces privilege—or at least the image of privilege—in a group that is predominately white and middle or upper-middle class, in a world where women of color and other poor women often live lives of economic desperation. To the extent that alimony reinforces the subordination of poor and minority women, it fuels a divisiveness that undermines and weakens the women's movement.

Id. at 2519.

A worse policy cannot be imagined. These days, lots of people build their dream home on one or the other's acreage and then render a joint tenancy. Lots of them don't get married. Why does it make a difference, when they break up, if they ever wedded or not? It shouldn't, and as time goes by we look increasingly antiquarian by maintaining that it does.[104]

VI. CONCLUSION

What's the problem? Why can't we keep up? Why do we keep propping up old shibboleths whose time has passed?

I have asked myself that question about *Skelton* a hundred times. Why does the court keep citing *Skelton* as a basis for its decisions? I *guess* that the jurisprudential explanation is that appellate courts hesitate to overrule their precedents because they fear casting doubt on the reliability of their decisions. So instead they miscite them, as with *Skelton*, or they distinguish their precedents factually[105] or they

104. *See* JAMES A. SWEET & LARRY L. BUMPAS, AMERICAN FAMILIES AND HOUSEHOLDS 10-11 (1987):

> While the causes are not well understood, the propensity to marry has fluctuated considerably over this century. Substantial deviations associated with the depression of the 1930's and the demobilization following World War II are evident . . . . Three main trends are evident: (1) a steady increase in marriage rates from the low around 1930 to the postwar peak; (2) a steady decline from this peak around 1947 until the early 1970's; and (3) an acceleration in the rate of decline since then.

The authors conclude:

> Marriage and family relationships seem to be occupying a shrinking space in our lives. Marriage rates before age 25 have declined markedly, so that young people spend a much larger proportion of their adult lives before adopting marital obligations; it is possible that a significant proportion may never do so. Parenthood is also being delayed, so that an increased proportion of the early years of marriage is being spent in lifestyles that are not defined in terms of the family roles that children bring. Again, a substantial proportion of today's youth may never become parents at all.

Id. at 391.

105. In 1980 the Law Court decided that whenever a spouse deeds real property titled in his or her name only to both spouses in joint tenancy, the property is "transmuted" into marital property. Carter v. Carter, 419 A.2d 1018 (Me. 1980) ("marital" property is that which the divorce court has the discretionary power to award to either party, or to split between the parties, as equity requires). Two years later, however, the court limited *Carter* to "documentary transactions," and refused to adopt Illinois precedent that "transmuted" real estate standing in the name of one spouse only into marital property if the spouses spend their marital money to improve real estate. I commented:

> The Law Court . . . spurned Illinois' analysis and rejected the argument, stating that "[t]o permit nonmarital property to be 'transmuted' into marital property and thus to be subject to equitable distribution deprives a spouse of nonmarital property contrary to legislative intent." One wonders how the husband in *Carter* would have felt had he read *that*, and discovered that the Law Court made not the slightest attempt to distinguish *Carter* on other than the factual basis described above.

ignore them completely.[106] This assures casting doubt on the reliability of their decisions.

Sheldon, *supra* note 94, at 28 (quoting Hall v. Hall, 462 A.2d 1179, 1182 (Me. 1982)) (footnotes omitted).

106. *See* the discussion of Smith v. Smith, *supra* note 80; *Smith* is plainly incompatible with *Noyes*; however, the Law Court neither mentioned *Smith* nor addressed that incompatibility in *Noyes*.

In Lalime v. Lalime, 629 A.2d 59 (Me. 1993), the Law Court addressed the trial court's determination that certain real estate was "nonmarital" property. During the marriage, the husband had deeded two parcels of real estate, previously owned by himself alone, to himself and his wife as joint tenants. Under the Law Court's previous interpretation of the MPA in *Carter*, this conveyance would ordinarily have rendered the property "marital." *See supra* note 105. However, in this case the trial court decided to declare the property nonmarital. Nonmarital property may be awarded only to the titular claimant, so by declaring these parcels nonmarital the trial court could only have awarded each party an undivided half-interest in each parcel. In this case, the wife wanted a greater share of the real estate, and she argued on appeal that by declaring the parcels nonmarital, thereby depriving itself of discretion over their disposition, the trial court erred as a matter of law.

A bare majority of the Law Court agreed with her. Writing for three other justices, Justice Dana disputed the trial court's factual basis for its legal conclusion that the parcels were nonmarital. The trial court had believed the husband's testimony that he had only transferred the parcels to himself and his wife jointly so that he could obtain a loan. This, the trial court decided, was justification for declaring the property nonmarital, because the husband had not intended by his transfer to enhance the "marital estate." The majority of the Law Court concluded that the husband's testimony of his ulterior intention "does not constitute evidence," *id.* at 61, that the property qualifies as nonmarital. Absent such evidence, the trial court was obliged to follow the ordinary rule—that transfers of property into joint tenancy during the marriage render the property marital. Thus, the Law Court concluded that the trial court should have retained the power to dispose of the real estate at its discretion.

Two justices joined Justice Rudman in dissent. If prior case law meant what it said, Justice Rudman argued, then the trial court had the authority to decide whether the husband should be believed. According to such case law, the husband had to present the trial judge with clear and convincing evidence that his transfer to joint tenancy had not been meant to enhance the marital estate. If the husband did that, then the trial court was supposed to declare the property nonmarital. *Whether* the husband did that was an evidentiary conclusion that the trial court was supposed to make on its own, and one that the appellate court had no right to disturb if there was "competent evidence to support it." *Id.* at 62. Since there was abundant evidence to support the trial judge's finding here, Justice Rudman voted to sustain the original divorce judgment.

Neither the majority nor the dissent explained how their respective positions would affect the Law Court's decision in Dubord v. Dubord, 579 A.2d 257 (Me. 1990). In *Dubord* the wife had contributed $20,000 of her nonmarital money to contribute to the down payment on a house that she and her husband purchased during the marriage. The trial court had relied on the transmutation rule in *Carter* to declare the home marital. The Law Court, however, reversed on the theory that transmutation applies only to transfers of nonmarital real estate interests from one spouse to both spouses. Since *Dubord* involved the initial purchase of real estate by the parties rather than an interspousal transfer, the Law Court ruled that transmutation did not apply. The wife's $20,000 contribution, along with whatever apprecia-

That jurisprudential flaw is so obvious that I wonder whether something deeper is at work. I wonder whether the ultimate issue may be the *fear of change*, and whether Koestler, once again, provides a clue.

In the Ptolemaic universe, God was in the heavens. You could tell by looking at them, because they never changed. The stars represented the divine ideal: perfect immutability. Only lower down on the scale of existence was change encountered: in the solar system—the motion of the sun, planets, and moon—and on Earth—motion, life, death, and impermanence that was the curse of human existence. To the ancients, change was synonymous with inferiority, mutability with decay.[107]

This distrust of change appealed to the Christian world. Aristotelian and Christian doctrines shared the view that "all change, all generation and decay were confined to the immediate vicinity of the earth."[108] In this respect, the Ptolemaic system reinforced the Christian dogma that all of human history proceeded from the Fall of Man, a fall from perfection. And it explains why Ptolemy's system proved so enduring: the sun revolved around the earth for as long as it did because, so long as it did so, the seemingly motionless and immutable stars remained a constant reminder of the omnipresence of divine perfection, the perpetual foil to change and decay

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tion it enjoyed in the form of a real estate investment, remained her nonmarital property.

This ruling alarmed many students of family law because it substantially complicated the divorce practice. Prior to *Dubord*, many practitioners and judges alike had applied the theory of transmutation broadly to all post-marital interspousal transactions in which the parties had commingled nonmarital funds. The advantage of this practice was simplicity: at the time of divorce, the attorneys could prepare for trial without having to trace through the marriage each spouse's percentage of ownership of each piece of property to the purchase of which either spouse had made a contribution from an arguably nonmarital source. Furthermore, the availability of transmutation gave judges more freedom to pursue the equitable division of property than they would have had if they had had to trace all nonmarital contributions. The latter function, in complicated cases, could approach nightmare proportions and escalate litigation costs by inviting certain appeal. *Dubord*, which limited *Carter* to its facts, put transmutation beyond the usual reach of practitioners and trial judges alike, and threatened to snarl mercilessly the practice of divorce law.

Lalime, however, was a step in the other direction. By revitalizing transmutation a majority of the Law Court reaffirmed the court's hostility to the tracing of assets (an aversion that led the court to adopt transmutation in the first place) and committed itself to the simplification of divorce litigation. Unfortunately, however, neither the majority nor the dissent even mentioned *Dubord*, let alone attempted to distinguish it. Thus, students of family law in Maine were left with the uncomfortable knowledge that although four justices had distanced themselves from the effect of *Dubord* none had expressed any interest in overruling it. It remains the law to this day.

107. KOESTLER, *supra* note 1, at 57-58.

108. *Id.* at 292. Shakespeare emphasized this idea heavily. *See supra* note 61.

here on earth.[109] Kepler was magnetized by a similar conviction—hence, a lifetime of salivating at the thought of the divinely perfect universe. For centuries, humans aspired to and pursued perfection as a balm to their abhorrence of change.

Is that what's at work in the late 20th Century? Is it a fear of change that drives us to behave illogically? Do we tolerate purposeless rituals and contemplate vacuous statues in pursuit of security? Perhaps the Law Court keeps running *Skelton* up the flagpole because the Justices simply fear admitting that the law should have changed. Perhaps we treat the joint tenancy of a married couple differently from that of an unmarried couple because we don't dare face the fact that the couples are the same, that marriage doesn't make a difference anymore—that a perfect ideal isn't ideal anymore.[110]

Maybe this will prove reassuring:

> The history of American family life suggests that we need not be disturbed by change in and of itself, because change—and not stability—has been the norm. American families have repeatedly had to change in order to adapt to novel circumstances—from challenges of New World colonization to the commercial and industrial revolutions, enslavement, immigration, depression, and war—and the changes that have taken place in family structure, roles, and conceptions have been so far reaching that they might be considered revolutionary. Nor do we need to worry obsessively about the increasing diversity of family arrangements, since ethnic, religious, and

109. The appearance of a supernova in 1572 dented that idea. KOESTLER, *supra* note 1, at 291-92. The discovery of sunspots—blemishes on a previously perfect body—in 1612 was a further blow for the traditionalists. *Id.* at 433.

110. There is a sense that the nuclear family is such a time-honored ideal that contemporary assaults on that institution must be recent, transitory, and therefore inconsequential enough that they do not deserve the attention of the law. Such a perception is false:

> Because changes are so much more rapid now than they were, say, thirty years ago, we are misled into thinking that they must have been caused by something that has happened recently. WILLIAM J. GOODE, in WORLD REVOLUTION AND FAMILY PATTERNS (1968), has noted how family changes tend to get compared to a fictional golden past. The truth of the matter is that accelerating change stretches into the distant past.
>
> Consider three critical dimensions of family change: marriage and marital stability, childbearing and parenting, and the roles of women. Each of these is closely interrelated with the others, but the critical point is that changes in all three have deep historical and cultural roots. The shrinking dominance of family roles in the lives of men and women reflects the relative value our society places on these roles in comparison with other adult roles. This, in turn, is a continuation of the reduction of family functions over several centuries that has occurred with the transformation of our economy, and with an associated increasing cultural value on individualism.

SWEET & BUMPAS, *supra* note 104, at 392.

> economic diversity has always been a defining characteristic of American family life.[111]

That sanguine assessment takes the sting out of this one, no less true:

> [M]arriage as an ideal is less important today. . . . [P]ositive values associated with voluntary singleness have become more common, making marriage more of a choice than a necessity among those who traditionally have been in the marriage market. If this is true, marriage as a valued institution is indeed in trouble and other forms of nonmarital living arrangements may replace marriage in the future.[112]

The future is here. Unmarried cohabitation is common, and will soon be as common as married cohabitation.[113] Marriage is left with one remaining, redeeming legal quality: it defines who's eligible for the remedies of divorce. Absent marriage we don't know what kind

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111. MINTZ & KELLOGG, *supra* note 23, at 243.

112. Dennis K. Orthner, *The Family Is in Transition*, *in* THE FAMILY IN AMERICA 25, 27 (David L. Bender & Bruno Leone eds., 1992). *See also* SWEET & BUMPAS, *supra* note 104:

> That the family is adaptive, and that family relationships continue to play a very important role in the lives of Americans, are incontrovertible. At the same time, it seems likely that the relative dominance of these relationships in competition with other adult roles is likely to continue to dwindle over the foreseeable future.

Id. at 401.

113. This is the basis for my dissatisfaction with most of the academic debate about alimony: It presumes heterosexual marriage. This presumption dooms the debate, because it ignores the larger question: Why limit alimony to divorce? Why, for example, should we limit discussions of the economic efficiency of spousal specialization (the spouse with the greater earning power working, the spouse with the smaller earning power home raising the kids) to cases of spouses? Consider this, criticizing the "clean-break" theory of divorce:

> The economic justification [for alimony] . . . acknowledges what the early reformers chose to ignore: that decisions about the allocation of work and family responsibilities during marriage are likely to have economic consequences that endure long after a marriage is formally dissolved. Thus, it is neither realistic nor appropriate to expect instant rehabilitation or a clean financial break.

Singer, *supra* note 13, at 2435. Assuming that Professor Singer is correct, his analysis has nothing to do with marriage and everything to do with family. As this quotation illustrates, the modern academic debate about alimony proceeds virtually without any recognition of the fact that marriage and family are distinguishable. Thus:

> [T]he most dramatic change in the latter part of the 20th century has not been a decrease in specialization within the nuclear family, but rather an increase in specialization among women in the provision of child care and other domestic services.

Id. at 2439 (footnote omitted). No, it isn't. The most dramatic change in the latter part of the 20th century has been the demise of the heterosexual nuclear family. The alimony debaters need to broaden their horizons. They have to consider why we limit alimony to divorce, and why we don't recognize it for non-spouses. They have to stop reading each other's law review articles and start reading the sociologists.

of relationships qualify, upon termination, for alimony and the Marital Property Act remedy. But to tout marriage as a legal convenience is, obviously, to condemn it as well, and also to condemn the statutes that fail to address the ever-ballooning varieties of unmarried relationships.[114]

To those who would view this valedictory to marriage as heretical of a timeless institution, I would reply that no human social institu-

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To limit alimony to heterosexual spouses is also to ignore the growing trend toward homosexual marriage and, necessarily, homosexual divorce. *See* THE EDITORS OF THE HARVARD LAW REVIEW, SEXUAL ORIENTATION AND THE LAW 94 (1990):

> Although the law denies all unmarried couples many legal and economic privileges regardless of sexual orientation, the effect on same-sex relationships is particularly troublesome. The law's seemingly evenhanded treatment of unmarried couples in fact penalizes same-sex couples more severely, because gay men and lesbians do not have the option of marriage. Basic tenets of fairness should compel courts and legislatures to eliminate laws and policies governing private law entitlements that discriminate against same-sex couples, either by affording gay men and lesbians the right to marry or at least by offering them those personal and economic benefits that are vital to their welfare.

114. I intend the term "unmarried relationships" in the broadest sense, to include not only those relationships that lack a wedding but also those with weddings that the law doesn't recognize, especially homosexual "marriages." As homosexual marriages become more common, the likelihood of their legitimacy increases. Consider this, from the Ecumenical News International Bulletin:

> Derek Rawcliffe, the former Anglican bishop of Glasgow and Galloway, has told a BBC television programme that he is homosexual and has called for a church blessing for gay couples. Rawcliffe . . . is believed to be the highest ranking Anglican cleric in Britain to state publicly that he is gay. . . . In his statement, Cardinal Hume [the leader of Roman Catholics in England and Wales] said that it "is a fundamental human right of every person, irrespective of sexual orientation, to be treated by individuals and by society with dignity, respect and fairness." The church "has a duty to oppose discrimination in all circumstances where a person's sexual orientation or activity cannot be reasonably regarded as relevant," he said, adding that " 'homophobia' should have no place among Catholics."

Homosexuality 'Most Contentious Issue' Facing Churches, ECUMENICAL NEWS INT'L, Mar. 14, 1995, at 3.

For a discussion of developing alternatives to marriage, *see generally* LAWRENCE CASLER, PH.D., IS MARRIAGE NECESSARY (1974).

In one respect, Maine law already recognizes unmarried cohabitation. Maine has two statutes that guide courts in determining rights and responsibilities for the children of parents who live apart. One statute, ME. REV. STAT. ANN. tit. 19, § 214 (West Supp. 1994-1995), pertains to parents who never married. The other, ME. REV. STAT. ANN. tit. 19, § 751 (West Supp. 1994-1995), pertains to parents who are getting divorced. Space does not permit reproducing the statutes here for comparison, so the reader will have to accept my assurance that, in material part, the statutes are identical. The implication of this fact is that, because Maine offers the same remedies to parents irrespective of whether they married, Maine does not discriminate in favor of those parents who did. The further implication is that, in the field of parental rights and responsibilities, Maine acknowledges the social acceptability of parenting without marrying.

tion is timeless, and none should be considered so. Marriage has been problematic for decades:

> [M]arriage used to be an institution for the *physical* survival and well-being of two people and their offspring. This function gave rise to a particular rule-governed structure suitable to the situation. Today, except in time of war or accident, the struggle for survival in industrialized societies does not require purely physical strength. Instead, we have primarily the struggle for *psychological* and *emotional* survival. The family unit is the natural unit for human survival regardless of what the hazard is. But so far, the changes in the structure, form, and processes of marriage have been too few and too unsystematic to cope with the new psychological and emotional problems. Marriage still is an anachronism from the days of the jungle, or at least from the days of small farms and home industries.[115]

To those who would view this article as an heretical obituary of the nuclear family, I will offer these personal observations. I was raised in a 1950s American nuclear family: father commuting to work in New York, mother raising three boys and tending home in suburban New Jersey, milkman delivering quart bottles to the back stoop daily. There were virtues: we never locked our doors, we never heard of drugs, there were no missing children.

At the same time, there were peculiarities. Every day when I walked home from school, I would pass black women waiting on the street corners for the bus to take them home. These people were maids who commuted every day to and from the black slums of Newark to perform domestic work in homes in the white suburbs. No black people lived in my neighborhood. No black people traveled through my neighborhood unless they had specific business there. When I was in seventh grade I took a trip with my junior high school class to Washington, D.C.; we stayed in a Virginia motel with this sign over the restaurant door: "Whites Only." Those of my classmates who were girls had three basic, ultimate options: secretary, schoolteacher, or homemaker, and, as my sixth grade teacher expressly warned me, Harvard was graduating 500 Communists every year.

We can't have our cake and eat it too. If we agree that racial and gender segregation and McCarthyism have no place in our world, we agree that the social values that produced those attitudes were flawed. Those identical social values produced the concept of the ideal nuclear family, the Ozzie and Harriet marriage. As our society matures, it changes, and we leave behind the qualities—good and bad—that we outgrow. There is no point in trying to retain those qualities—they belong to the past.

115. WILLIAM J. LEDERER & DON D. JACKSON, M.D., THE MIRAGES OF MARRIAGE 37 (1968).

The nuclear family belongs to the past; similarly, marriage seems not long for the present. If we attempt to breathe life into those ideals we will blunder just as thoroughly as did Nicholas Copernicus, clinging desperately to his Aristotelian ideal. We must not merely acknowledge change: we must tolerate it, accept it, and incorporate it into the rules we formulate as law. We must keep up. I'm not hopeful about the prospect that we can count on our legislature to do so; they're probably the most Aristotelian body around.[116] So it devolves to our courts to do the job to the extent that they are empowered.[117] Either we learn from Copernicus or we imitate him.

116. That is why I don't advocate amending the alimony statute to permit palimony.

117. Alimony has always been considered a pure creation of statute. *See* Wood v. Wood, 407 A.2d 282 (Me. 1979). It would therefore be presumptuous of courts to attempt to revise the concept to apply to unmarried couples. However, I will point out that, whereas the previous alimony statutes expressly limited the source of alimony to "the estate of the other spouse," (see § 721 as it existed prior to the 1989 amendment), the present statute has no such limitation, and refers to each litigant as a "party," not as a spouse. The implication is that alimony is a remedy that is not limited to spouses, but that has been made available to all cohabitants.