The Empty Promise of Enforceable Court-Ordered Parenting Plans in the Era of Grievances and Righteousness

by
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I. Introduction

Following the second inauguration of President Trump on January 20, 2025, the Executive Branch of the U.S. Government began issuing "Executive Orders" (EOs) which a president may generally use when Congress grants the president authority to act unilaterally and without additional Congressional legislation.[1] This flurry of EOs directs the dismantling of agencies enacted by Congress over decades, directed that funding already authorized

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[1] This tension between grants of Congressional authority for presidents to act in the future without Congress, the scope of that authority, and the power of the president to ignore legislation and judicial precedent is before the Supreme Court in multiple cases. *See* Trump v. Wilcox, 605 U.S. ___, ___ (2025) (Kagan, J., dissenting from the grant of an application to vacatea stay) (slip op., at 8) ("Today's order, however, favors the President over our precedent; and it does so unrestrained by the rules of briefing and argument—and the passage of time— needed to discipline our decision-making. I would deny the President's application. I would do so based on the will of Congress, this Court's seminal decision approving independent agencies' for-cause protections, and the ensuing 90 years of this Nation's history."); A.A.R.P. v. Trump, 605 U.S. ___, ___ (2025) (Alito, J., dissenting from the grant of an application foran injunction) (slip op., at 5) ("Both the Executive and the Judiciary have an obligation to follow the law. The Executive must proceed under the terms of our order in Trump v. J. G. G., 604 U.S. ___ (2025) (per curiam), and this Court should follow established procedures."). For an historical perspective, see Karen Baehler, *Federal Workforce Reforms in Trump's Second Term: Two Scenarios*, 21 Pol'y Q. 38 (2025); Christopher J. Deering & Forrest Maltzman, *The Politics of Executive Orders: Legislative Constraints on Presidential Power*, 52 Pol. Res. Q. 767 (1999).

by Congress be frozen or re-purposed, and ordered that thousands of federal employees, including veterans and those who provide services to the elderly and disabled, be fired or resign.[2] What is critical is that the authority of a president to use "the stroke of a pen" to neuter Congress and enhance the potency of the executive branch has been challenged since the founding of the nation.[3]

Left to ferment in its own silo, these tensions between the expansion of the Executive under Article I of the Constitution through EOs, the generously passive abdication of legislative power under Article II by Congress, and the Supreme Court's choice of self-preservation as a pre-1803 branch under Article III, is not just of scholarly interest to family law academics and practitioners. This may seem an odd place, however, to start an article on the enforcement of court-ordered parenting plans. It is not. As a result of the flood of EOs, the legislative vacuum concerning due process and civil rights is filled by federal trial courts applying federal laws and budgets as enacted by Congress in the context of fulfilling its duty to review and apply the Constitution since 1803.

For state-level judges and lawyers, careful attention to these developments is required because the federal trial courts, and soon state courts, will be fending off threats of violence, the attempted purchase of state supreme court seats,[4] and threats of impeachment for protecting laws already passed by Congress or securing

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[2] Annette Choi et al., *Tracking Trump's Overhaul of the Federal Workforce*, CNN (Mar. 12, 2025), https://www.cnn.com/politics/tracking-federal-workforce-firings-dg/index.html; Timothy Gardner et al., *Fired and Rehired: The Dizzying Confusion of Trump's Government Overhaul*, Reuters (Feb. 21, 2025), https://www.reuters.com/world/us/fired-rehired-dizzying-confusion-trumps-government-overhaul-2025-02-21/.

[3] *See generally* Phillip J. Cooper, By Order of the President: The Use and Abuse of Executive Direct Action. Revised and Expanded (2014); Joel L. Fleishman & Arthur H. Aufse, *Law and Orders: The Problem of Presidential Legislation*, 40 Law & Contemp. Probs. 1 (1976); Kenneth R. Mayer, *Executive Orders and Presidential Power*, 61 J. Pol. 445 (1999).

[4] Elections carry a consequence with fundraising and competing political parties but that itself is not new. *See* Caperton v. A. T. Massey Coal Co., 556 U.S. 868, 884 (2009) ("We turn to the influence at issue in this case. Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case."). Federal judges are constitutionally appointed for life with no age of retirement and can only be removed by impeachment. State court judges, including state supreme courts, are elected in 21 states. *See A Look at How States Select Their State*

any meaningful right to due process for ordinary individuals.[5] State courts are not immune to this nascent and propagating movement. Or the pressure to accede to a political and social constituency whose life force is feeling aggrieved when their righteousness is not effusively acknowledged by state court judges when failing to privately resolve parenting disputes.[6]

Even before the 2024 Presidential election, one of the profound social and political shifts in the United States is the level of public, and even professional, disrespect for judicial systems and for judges. Some of this is old news from the conception of the American Experiment.[7] The intensity of the vitriol today towards federal trial courts, however, portends consequences for what has

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Supreme Court Justices, Ballotpedia (Mar. 18, 2025), https://news.ballotpedia.org/2025/03/18/a-look-at-how-states-select-their-state-supreme-court-justices/.

5 *See* Jack Goldsmith, *The President's Favorite Decision: The Influence of* Trump v. US *in Trump 2.0*, Lawfare (2025); Karla McKanders, *Real Talk: What Project 2025 Means for Your Life*, Thurgood Marshall Instit., Soc. Sci. Rev. Res. Paper 36 (2025); Douglas C. Youvan, *DeSantis, and the Battle over Judicial Authority: Congress, Impeachment, and the Limits of Power* (2025), Trump-DeSantis-and-the-Battle-Over-Judicial-Authority-Congress-Impeachment-and-the-Limits-of-Power.pdf.

6 Some interesting research from psychology is studying this thinking in the context of "concept creep." *See* Frank Furedi, *The Cultural Underpinning of Concept Creep*, 27 Psychol. Inquiry 34, 35 (2016) ("The 21st-century version of personhood communicates a narrative that continually raises doubts about people's emotional capacity to deal with physical and emotional harms. The transformation of distress into a condition of emotional injury has as its premise the belief that people are likely to be damaged by unpleasant encounters and the setbacks thrown up by everyday life. In this context, trauma has become an all-purpose term to describe the individual's state of mind in the aftermath of an adverse experience. As the current debate on trigger warning indicates, such an adverse experience can be as banal as being disturbed by reading about distressing events.").

7 *See* Mark Kozlowski, The Myth of the Imperial Judiciary: Why the Right Is Wrong About the Courts ix (2006) ("Political criticism of judges in this country goes back at least as far as Thomas Jefferson, who called federal judges "sappers and minors" working to undermine the constitutional system."). For one of the most cogent readings describing the fabric of democracy and judicial authority (and one that should be assigned to all law students), see Max Lerner, *Constitution and Court as Symbols*, 46 Yale L.J. 1290, 1311 (1937) ("There is a curious cult of judges that has grown up in America. President Taft, in the 1912 campaign, said with a trace of seriousness that he believed that Heaven got its quality from the judicial character.").

been euphemistically called the "myth of the robe."[8] That topic is much more encompassing than the narrow topic here, but it is not disconnected. Although the 1954 *Brown v. Board of Education*[9] decision is much more famously known by the public, the more compelling and relevant decision here is the unanimous 1958 *per curium* decision to enforce court decrees in *Cooper v. Aaron*: "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."[10]

The ever more puerile and pounding disrespect for federal courts, with which many fewer Americans will ever have contact, will inevitably encourage toxic attitudes toward state family courts where the public has substantially more contact.[11] Underlying what is happening in the federal courts, and inexorably sliding toward state courts, is that "my" choices, "my" behavior, "my" actions are never "my" responsibly—not ever. No part of state judicial systems are more vulnerable to the consequences of chronic degradation of the federal courts than state family courts, present in the lives of millions of Americans who divorce, separate, and litigate child custody matters, or find themselves in child protective proceedings.[12] If the public, in the sense of a deteriorating social

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8 This myth takes on many shapes for researchers and political scientists, but any humanly organized society requires decisionmakers as a means to mitigate self-help and violence. *See* Lee Epstein & Joseph Kobylka, The Supreme Court & Legal Change: Abortion and the Death Penalty 33 (1992) (arguing the "'myth of the robe' is a myth, but the robe is a reality"); Shane A. Gleason et al., *The Role of Gender Norms in Judicial Decision-Making at the U.S. Supreme Court: The Case of Male and Female Justices*, 47 Am. Pol. Res. 494, 518 (2019) ("Although the Court has been quick to defend the 'myth of the robe,' ample research indicates that extra judicial factors influence case outcomes at the U.S. Supreme Court.").

9 347 U.S. 483 (1954).

10 358 U.S. 1, 18 (1958).

11 In 2023, there were 920,611 cases filed in federal court and 67,607,164 in state courts. Court Statistics Project, at *State Versus Federal Caseloads*, Court Statistics Project, National Center for State Courts, https://www.courtstatistics.org/court-statistics/state-versus-federal-caseloads (last visited May 24, 2025) ("An average of 98.5% of U.S. court cases were filed in state courts since 2012. Only 1.5% were filed in federal courts.").

12 Analyzing this data nationally is challenging because case counts, post-judgment filings, and definitions of family matters differ between states. *See Court Statistics Project (2020), State Court Caseload Digest: 2018 Data*, National Center for State Courts 11 (2020), https://www.ncsc.org/resources-courts/data ("Domestic Relations (DR) cases account for a little more than 5.5 percent of all

contract, perceive parenting orders as empty promises, or, more critically, dangerous, pre-purchased, vacuous, or engineered by a "rigged system" of elitist judges, the consequences may be more defiance, violence, or self-help.[13]

When those court orders concern the legal and physical custody rights of parents,[14] there is the additional risk of sustained emotional, economic, and psychological harm with children caught between their own parents for years. What makes parenting orders unique from other civil or criminal actions is that a parenting order can be subjected to iterations of motions such as restraining orders, child protection petitions by government, or motions to modify and enforce parenting orders until the child is emancipated by age or other means. This is not a judgment about whether such actions are needed to protect children or family systems, but that family courts are required, by legislation, to hear and resolve conflicts concerning the "best interest of the child."[15]

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trial court cases nationally or about 12 percent of the non-Traffic caseload. DR includes divorce, civil protection orders (CPO), child support, custody, paternity, adoption, and other domestic issues. The Domestic Relations caseload peaked in 2010 at about 5.9 million cases, but by 2018 had declined by over 1.1 million cases.").

13 Given that so much of American society passes through state courts daily, legitimacy is required as parents file for relief and abdicate, freely or not, autonomy and self-determination. *See* Dana E. Prescott, *Inconvenient Truths: Facts and Frictions in Defense of Guardians ad Litem for Children*, 67 Me. L. Rev. 43, 70 (2014) ("When the 'myth of the robe' intersects with the court's visible role as a 'street-level social service agency,' the public may, as a rather normal reaction, deflect that anger onto professionals who cannot adequately defend themselves against charges of self-interest or publicly reveal the truth in a case because of ethical and legal responsibilities and confidentiality.").

14 Use of the term "parent" is complex today since it is not limited to biological or birth parents but may include kinship, adoption, guardianships, de facto parents, state agencies, stepparents, and surrogacy and IVF. For purposes of this article, "parent" is intended to mean any person who has legal rights recognized by statute or court order. *See* Pitts v. Moore, 90 A.3d 1169, 1173 (Me. 2014) (plurality) ("For some time now, we and other courts have been considering the law of parentage in light of advancements in technology, changes in social norms and family structures, and the resulting ever-expanding list of legal issues relating to children and families.").

15 The argument connecting the lack of efficacy of the best interests factors, as policy or social science, is not new. *See* Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 Yale L. & Pol'y Rev. 267, 267 (1986) ("Because the "best interests of the child" standard is more a vague

There is an emphasis on Maine law in this article because that is the experience of the author. There are nuances between states concerning the entry and enforcement of parenting plans as court orders that require caution before generalizing. For purposes here, state differences in the scope and variety of the "best interests of the child" factors are not relevant. What is relevant is that the historical devotion of state family courts to an intentionally designed adversarial system creates risk for children as they have no choice but to survive that systemic form of conflict irresolution. Given that litigation in the United States is the intentionally designed pathway for parents who cannot privately resolve custody disputes, a question often asked by clients who may spend years and money to obtain a final parenting order is: Why are court-ordered parenting plans illusory as swiftly and rigorously enforceable orders? That is the practice and policy question that will be addressed in this article.

For that purpose, the first section will explore the philosophical and political choices that encourage child custody litigation as a solution to parental conflict. When parents receive an original parenting order signed by a judge by agreement or after a trial, that order is docketed in the court records and transmitted to the parents. In that context, the second section of the article will explore the general rules for judicial imposition of remedial (make-up time, change of custody) and coercive (civil incarceration, fines) forms of contempt.[16] This discussion describes barriers

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platitude than a legal or scientific standard, it is subject to abuse both by judges who administer it and parents who use it to further their own interests.").

16 *See, e.g.,* Me. R. Civ. Pro. R. 66(d)(3) Remedial Sanctions:

> The court may impose any of the following sanctions on a person adjudged to be in contempt in a proceeding seeking remedial sanctions. The court may also order such additional relief as has heretofore been deemed appropriate to facilitate enforcement of orders, such as appointment of a master or receiver or requirement of a detailed plan or other appropriate relief. An order containing a remedial sanction shall contain a clear description of the action that is required for the contemnor to purge the contempt.
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> (A) Coercive Imprisonment. A person adjudged to be in contempt may be committed to the county jail until such person performs the affirmative act required by the court's order.
>
> (B) Coercive Fine. A person adjudged to be in contempt may be assessed a fine in a specific amount, to be paid: (i) unless such

to enforcement of parenting plans and, concomitantly, a tactical bonanza from delay or obstruction for a parent violating a parenting order. In the third section, a statutory mandate for enforcement similar to Maine Revised Statutes title 19-A § 1653(7),[17] as incorporated by mandate in Maine's parental rights and responsibilities statute,[18] is discussed as a feasible policy option. This article

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person performs an affirmative act required by the court's order; or (ii) for each day that such person fails to perform such affirmative act or continues to do an act prohibited by the court's order.

(C) Compensatory Fine. In addition to, or as an alternative to, sanctions imposed under subparagraph (A) or (B) of this paragraph, if loss or injury to a party in an action or proceeding has been caused by the contempt, the court may enter judgment in favor of the person aggrieved for a sum of money sufficient to indemnify the aggrieved party and to satisfy the costs and disbursements, including reasonable attorney fees, of the aggrieved party.

17 *See* Me. Rev. Stat. Ann. tit. 19-A § 1653(7):

Violation of order concerning parental rights and responsibilities and contact. Either parent may petition the court for a hearing on the issue of noncompliance with the order issued under subsection 2. If the court finds that a parent has violated a part of the order, the court may find that parent in contempt and may:

A. Require additional or more specific terms and conditions consistent with the order;

B. Order that additional visitation be provided for a parent to take the place of visitation that was wrongfully denied; or

C. Order a parent found in contempt to pay a forfeiture of at least $100.

18 *See* Me. Rev. Stat. Ann. tit. 19-A § 1653(1)(A-C):

Legislative findings and purpose. The Legislature makes the following findings concerning relationships among family members in determining what is in the best interest of children.

A. The Legislature finds and declares as public policy that encouraging mediated resolutions of disputes between parents is in the best interest of minor children.

B. The Legislature finds that domestic abuse is a serious crime against the individual and society, producing an unhealthy and dangerous family environment, resulting in a pattern of escalating abuse, including violence, that frequently culminates in intrafamily homicide and creating an atmosphere that is not conducive to healthy childhood development.

C. The Legislature finds and declares that, except when a court determines that the best interest of a child would not be served, it is the public policy of this State to assure minor children of frequent

concludes that any of these policy changes are limited by the structural rigidity of any family court system, including fiscal budgets and assessment tools that allow entry into the "black box" of judicial decision making.

II. The Adversarial Design of Family Courts

The "myth of the robe" in a pluralistic republic always hinged on the external "truth" of legitimacy for court orders surviving a cauldron of individual grievances—real or imagined.[19] If a court judgement has validity only if an order meets internal "needs and wants" with evidence to the contrary categorized as fake-news or alternative facts, any judicial system may be smudged away by true believers or tribal nationalism that Eric Hoffer[20] and Hannah Arendt[21] preternaturally described decades ago. More consequentially, constitutional liberties, such as procedural due process, exist only to serve the aggrieved without regard for the more global

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and continuing contact with both parents after the parents have separated or dissolved their marriage and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.

19 In a book published in 1997, Professor David Saunders described the emergence of a centralizing territorial State when Church and State "worked together" centuries ago to discipline national populations, at least until "unbridled religious enthusiasms loosed uncontrollable civil war between perfect enemies: uncompromising rival confessions driven by purity of principle and communal hatred." David Saunders, Anti-Lawyers: Religion and the Critics of Law and State viii (1997).

20 Eric Hoffer, The True Believer: Thoughts on the Nature of Mass Movements 85 (1951, republished 1963) ("To be in possession of an absolute truth is to have a net of familiarity spread over the whole of eternity. There are no surprises and no unknowns. All questions have already been answered, all decisions made, all eventualities foresee. The true believer is without wonder or hesitation.").

21 Hannah Arendt, The Origins of Totalitarianism 227 (1958, new ed. 1968) ("Politically speaking, tribal nationalism always insists that its own people is surrounded by a 'world of enemies,' 'one against all,' that a fundamental difference exists between this people and all others. It claims its people to be unique, individual, incompatible with all the others, and denies theoretically the very possibility of a common mankind long before it is used to destroy the humanity of man.").

needs of civil society.[22] Although the source of the "Law" has spawned much debate among scholars for generations, a body of laws in a given society is really just "an exercise of power so that one could not sensibly ask what commands should be obeyed. Sanctions and only sanctions made law."[23] If judicial power is devoid of such a myth by an interminable battering, and, simultaneously, the myth is erased by empty promises, then that may ensure more charges up steps with limp bayonets pointed, with the next generation raised to argue that "liberty" includes violence and conflict without any institutional guardrails as that was true at the founding of the nation.[24]

Importantly, there are many thousands of wonderful parents who, even living apart, share the values of empathy and kindness for their children and each other. Regrettably, the very fabric of many other custody cases reveals parents manipulating children's loyalty, mental health or addiction struggles, interpersonal violence, and the sexual, economic, emotional, and physical weaponization of children, with the judicial system as ground zero. In cases of repeated litigation, adultification, parentification, and enmeshment are present in conflicted family systems often due to the presence of intergenerationally-embedded dynamics.[25] And it should never be ignored that systematic and societal inequality from poverty, race, socio-economic status, and gender blend together to enhance the risk of disadvantage and powerlessness

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22 *See* Stephen Greenblatt, Tyrant: Shakespeare on Politics 25 (2018) ("'The truth appears so naked on my side,' declares York, 'That any purblind eye may find it out.' 'And on my side,' replies Somerset, it is "So clear, so shining, and so evident/That it will glimmer through a blind man's eye.' There is no acknowledgment of a gray area here, no recognition that it might be possible for reasonable people to disagree. Each thinks it must be mere perversity not to admit what is so undeniably 'evident.'").

23 Albert W. Alschuler, Law Without Values: The Life, Work, and Legacy of Justice Holmes 160 (2000).

24 *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 237 (2022) ("In deciding whether a right falls into either of these categories, the Court has long asked whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty'").

25 *See generally* Benjamin D. Garber et al., A Family Law Professional's Field Guide to High Conflict Litigation: Dynamics, not Diagnoses (2022); Benjamin D. Garber, *Sherlock Holmes and the Case of Resist/Refuse Dynamics: Confirmatory Bias and Abductive Inference in Child Custody Evaluations*, 58 Fam. Ct. Rev. 386 (2020).

so many parents experience when trying to find agency within an adversarial system designed to be expensive and last months or years.[26]

Precise data on the rates of child custody litigation in family courts is difficult to assess due to many demographic variables that may overlap or neglect that data point as part of custody orders pertaining to children: nonmarried and married parents, child protection and foster care placements, and juvenile incarceration, homelessness, hospitalization, race, immigration, and poverty, among other forms of child custody arrangements for children. What can be derived from existing data is that millions of children, during their minority years, experience separation and divorce annually, or travel between homes and institutions.[27] There

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26 *See* Tonya L. Brito et al., *Negotiating Race and Racial Inequality in Family Court*, 36 Inst. Res. Poverty Focus 3, 7 (Dec. 2020) ("A colorblind approach to assessing civil contempt cases ignores racially discriminatory employment conditions. While undoubtedly desirable to some, race-neutral approaches such as these fail to challenge inaccurate assumptions about how race is related to employment prospects."); Christopher Wildeman et al., *The Cumulative Prevalence of Termination of Parental Rights for US Children*, 2000–2016, 25 Child Maltreatment 32, 39 (2020) ("Overall, the risk of parental rights termination is sufficiently high, variable across states, and racially disparate to merit significantly more attention. Moreover, as we demonstrate, stage of CPS contact emerges as acutely important for analyzing racial disparities in child welfare engagement.").

27 *See* June Carbone & Naomi Cahn, Marriage Markets: How Inequality Is Remaking the American Family 90 (2014) ("It is time to recognize that family scripts have been rewritten, and they have been rewritten along the diverging lines of gender, class, and culture."); Lydia Anderson, et al., *Living Arrangements of Children: 2019, Current Population Reports, P70-174,* at 7, U.S. Census Bureau (Feb. 2022), https://www.census.gov/content/dam/Census/library/publications/2022/demo/p70-174.pdf ("Although divorced parents have become more likely to share custody of their children since the 1980s and 1990s, most children who live with one parent continue to reside with their mother. In 2019, the CPS estimated that 83.0 percent of children who lived with one parent were living with their mother, and the remaining 17.0 percent lived with their father"); Bailey D. Barnes, *Contracts for Cohabitating Romantic Partners*, 75 Me. L. Rev. 101, 105 (2023) ("In addition to the declining marriage rate, Americans are viewing cohabitation among unmarried romantic couples more favorably than they had previously. This is significant because as unmarried cohabitation becomes more socially accepted, there will necessarily be decreased pressure to get married."); Andrew J. Cherlin, *Demographic Trends in the United States: A Review of Research in the 2000s*, 72 J. Marriage & Fam. 403, 413-14 (2010) ("Cohabiting relationships may not have a clear beginning point. Single parents and their adolescents often

are, therefore, plenty of cases for the courts as a conflict resolution system given the rates of children raised in two (or more) homes under the wishful umbrella of a parenting order. After all, if professionals and parents are honest about child custody litigation, every court-ordered parenting plan is "human experimentation" on children. In the realm of scientific research ethical codes, this "can be broadly defined as anything done to an individual to learn how it will affect him."[28] It is unlikely, however, that there is any political will to collaboratively invest in the kinds of constitutional

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disagree on whether new, seemingly cohabiting partners are part of the family. The cross-household ties that multiple partner fertility can create may lead to families without clear boundaries."); Shelley Lundberg et al., *Family Inequality: Diverging Patterns in Marriage, Cohabitation, and Childbearing*, 30 J. Econ. Persp. 79, 91 (2016) ("The enormous literature on the association between family structure and outcomes for children documents strong and consistent correlations between child outcomes such as educational attainment, crime, and mental health, and family structure indicators such as years with an unpartnered parent and family transitions."); Elaine Sorensen, *Characteristics of Custodial Parents and Their Children: Who Receives Child Support (IV-D) Services and Who Doesn't?* 3 Admin. for Children & Families (Nov. 2021), https://acf.gov/sites/default/files/documents/ocse/characteristics_cps_and_their_children.pdf ("As of April 2018, there were 12.9 million custodial parents nationwide, 7.9 million (62%) of whom received IV-D services. The other 5 million custodial parents did not receive IV-D services"); *Trial Court Caseload Overview*, Court Statistic Project (2024), https://www.ncsctableauserver.org/t/Research/views/TrialDashboards/Overview?%3Aembed=y&%3AisGuestRedirectFromVizportal=y (Over a five year trend, domestic relations filings reported from 33 states, went from 64,033,966 to 52,129,243).

28 M. Cheriff Bassiouni et al., *An Appraisal of Human Experimentation in International Law and Practice: The Need for International Regulation of Human Experimentation*, 72 J. Crim. L. & Criminology 1597, 1597 (1981). This is especially challenging in family courts because so much of what happens in a laboratory (including extrapolation from animal studies on primates) cannot account for all the variability and impact of the adversarial system. *See* Tommie Forslund et al., *Attachment Goes to Court: Child Protection and Custody Issues*, 24 Attachment & Hum. Dev. 1, 7 (2022) ("Accurate implementation of attachment theory and attachment assessments in this context has, however, been hampered by a variety of factors. First, there is a great deal of misinformation about attachment in circulation across various contexts, including the family courts. This includes misinformation about fundamental matters such as what attachment is, the nature of children's multiple attachment relationships, and what can be inferred–at the level of an individual child–from assessments of attachment quality.").

and legislative structural changes with adequate resources to engage in conflict interdiction and prevention.[29]

Protecting the human rights (and humanity) of children does not undermine a parent's authority and duty to exercise the fundamental freedom to parent without government intrusion.[30] Parental

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[29] Many efforts at reform in Maine and other states have been explored in depth by scholars and policy advocates for decades. *See* Barbara A. Babb & Amy G. Applegate, *International Judicial Symposium on Family Court Reform*, 62 Fam. Ct. Rev. 1, 8 (2024) ("Participants discussed differences between the adversarial system and the inquisitorial system. Regardless of perspective, however, they agreed that all jurisdictions should have a dedicated family court, equipped with the appropriate number of judges, adequate court staff, and dedicated resources"); Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 Wm. Mitchell L. Rev. 495, 520 (2001) ("The ideal family court would have its own building with an information center, court services, mediation rooms, childcare facilities and secure courtrooms. This system would utilize a single judge, one social services team per family, centralized physical facilities, comprehensive support services, time standards, integrated information systems, adequate training, intake services, and community advisory council."); Edward S. Godfrey, *Structure of the Maine Court System, 1956-1991*, 43 Me. L. Rev. 353, 354 (1991) ("Even when systemic causes of dysfunction have been identified, it has been hard to convince those who have the authority to make the necessary changes to expend the energy and political capital needed to do so. An incumbent judicial bureaucracy - judges and their supporting personnel - is seldom happier than any other bureaucracy at the prospect of changes in its organization, policies and procedures, changes that may adversely affect individual income, workload, status and perquisites."); Peter L. Murray, *Maine's Overdue Judicial Reforms*, 62 Me. L. Rev. 631, 631 (2010) ("First of all, the basic tiered structure of our courts of first instance, district, superior and probate, is a relic of the nineteenth century. The movement to unify these courts that began in the 1990s should be brought to its logical conclusion with the creation of a single Maine Trial Court."); Deirdre M. Smith, *From Orphans to Families in Crisis: Parental Rights Matters in Maine Probate Courts*, 68 Me. L. Rev. 45, 92 (2016) ("Maine has a remarkable history of studying the problems of the probate court system generally and their handling of parental rights matters specifically and then not acting on the resulting recommendations.").

[30] The argument that children have independent human rights that are fundamental and natural is one of vigorous debate. *See* Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, 33 Fam. L.Q. 815, 831 (1999) ("The twentieth century shift to a theory of parental powers centered on the child's interests is consistent with an international human rights revolution taking place around the globe."). The question of human rights is a complex philosophical and political one, but what is plain to many trial lawyers and judges is that the adversarial system may not be the most effective design to adjudicate human rights—but may be all there is for now. *See*

rights, as fundamental rights subject to some form of constitutional protection, are still the subject of considerable academic and judicial kvetching, or, as Justice Scalia so summarized substantive due process: "It's spinach."[31] As the U.S. Supreme Court and state supreme courts nationally spread this spinach from child protective cases involving state/government interference with child custody rights to private parenting disputes, there were (and are) implications for enforcement of court orders. The language of "rights" can thereby mask or deflect harmful iterations of behavior using the language of gender bias, alienation, or domestic violence, with loyalty pressure on children to conform and submit.

State governments, by nonfeasance more than malfeasance, have adopted litigation between parents as the means for resolving post-parenting order disputes over decision-making, parenting time, and child support. Cases that end up with contempt motions may have raised, formally (filed motions) and informally (lawyer, parent, therapist, parent coordinator), all of these claims over longer periods of time. When done formally through the court, judges may give a few bites at compliance (partial at least) before any kind of formal sanctions are imposed. A judge is thereby charged with the duty to act on evidence after a hearing demonstrating an intentional or willful violation of a court order and, as described below, a capacity of the violator to comply.[32] As one scholar vividly

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Sandra Fredman, *Allies or Subversives — The Judiciary and Democracy*, 32 Isr. L. Rev. 407, 426 (1998) ("[N]o attempt has been made to adapt the traditional adversarial bipolar litigation to one more suited to human rights litigation. Apart from a provision requiring that the Crown be notified that a court is considering whether to make a declaration of incompatibility and giving a Minister of the Crown the right to be joined as a party to the proceedings, the presumption is that human rights cases will proceed in the usual adversarial mode. An adversarial action assumes that the dispute is between two parties only; with the court a passive arbiter, dependent on the information supplied by the two parties. Moreover, the result is 'all or nothing': one party wins and the other loses.").

31 David M. Wagner, *Thomas v. Scalia on the Constitutional Rights of Parents: Privileges and Immunities, or Just Spinach*, 24 Regent U.L. Rev. 49, 49 (2011).

32 Future U.S. Supreme Court Justice Benjamin Cardozo in 1925 described the standard for resolving child custody matters, as follows:

> He acts as parens patriae to do what is best for the interest of the child. He is to put himself in the position of a "wise, affectionate and careful parent" and make provision for the child accordingly. He is not adjudicating a controversy between adversary parties, to compose their

summarized, "[t]he formal nature of the courts pits the parties against one another like two scorpions in a bottle, at a time when they are most angry and hostile toward one another."[33] What distinguishes family law is that unlike tort or commercial lawsuits, family law, by statute or rule, allows parents to battle each other to enforce a parenting order during the minority of their children.[34]

Besides the expansion of the right to litigation over children for the duration of their minority, the national data suggests that nonmarried separation and divorce are occurring with more pre-school children and that many of those children will experience multiple forms of households over their minority.[35] Too many parents eventually find themselves suing each other, with or without lawyers, within an intentionally designed

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> private differences. He is not determining rights "as between a parent and a child" or as between one parent and another. He "interferes for the protection of infants, qua infants, by virtue of the prerogative which belongs to the (state) as parens patriae."

Finlay v. Finlay, 240 N.Y. 429, 433-34, 148 N.E. 624, 626 (1925).

33 Jessica J. Sauer, *Mediating Child Custody Disputes for High Conflict Couples: Structuring Mediation to Accommodate the Needs and Desires of Litigious Parents*, 7 Pepp. Disp. Resol. L. J. 501, 505 (2007).

34 *See* Elrod, *supra* note 29, at 501 ("In addition, unlike tort cases that end with a money judgment, issues regarding children remain modifiable throughout a child's minority, giving parents more opportunities to carry on a dispute.").

35 It is important to be careful with this kind of data as it can adopt implicit biases and shame/blame language. Nevertheless, models for judicial intervention require some fidelity to what is happening with families and caregiver transitions for children. *See* Lydia R. Anderson et al., *Coresident Grandparents and Their Grandchildren: 2021, Current Population Reports, P20-588,* at 5, U.S. Census Bureau (2024) ("Both the number of grandparents living with and responsible for their grandchildren were lower in 2021 than 2012 (7.1 million grandparents were living with their grandchildren and 2.7 million were responsible for their grandchildren in 2012). Similarly, the percentage of grandparents who were responsible for their coresident grandchildren declined from 2012 (38.8 percent) compared to 2021 (31.3 percent)."); Kelly Musick & Katherine Michelmore, *Cross-National Comparisons of Union Stability in Cohabiting and Married Families with Children*, 55 Demography 1389, 1392 (2018) ("The United States is exceptional in its high degree of union instability among both married and cohabiting couples."); R. Kelly Raley & Megan M. Sweeney, *Divorce, Repartnering, and Stepfamilies: A Decade in Review*, 82 J. Marriage & Fam. 81, 82 (2020) ("An extensive body of work makes it clear that the more family structure transitions children face, the lower their level of well-being on average. This pattern holds across multiple domains of well-being, including problem behavior, health, and emotional well-being, as well as socioeconomic attainment and relationship stability in adulthood.").

adversarial system or "blame machinery" as one scholar decried that process.[36] Indeed, the expansion of old laws and enactment of new laws by state legislatures encourages more variations of litigation. Among a short list are parentage and parental rights (nonmarried) complaints,[37] divorce complaints, protection from abuse and harassment complaints,[38] emergency and permanent

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36 *See* Karin Aronsson, *Negative Interrogatives and Adversarial Uptake: Building Hostility in Child Custody Examinations*, 136 J. Pragmatics 39, 48 (2018) ("The courtroom is an arena where social interaction takes place within an overall context of blame. Prior research on contrasting narratives in legal and couple-therapy contexts has documented what has been called a *blame machinery* where blame tends to generate counter-blame. In the present cross-examinations, such recursive dynamics can also be seen in how the parents' defensive and hostile uptake is related to adversarial features in the attorneys' negative interrogatives.") (emphasis in original); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. Chi. L. Rev. 1, 24 (1987) ("A custody battle places a child in many difficult roles: mediator, weapon, pawn, bargaining chip, trophy, go-between or even spy. Use of expert and character witnesses can be especially harmful. 'The parents will call each other officially crazy, and the children will begin to wonder about themselves as well as their parents. Also, the 'efforts of attorneys, working in an adversary spirit, can escalate conflict between parents and draw children into divorce arguments.'").

37 *See* Jessica Feinberg, *The Boundaries of Multi-Parentage*, 75 SMU L. Rev. 307, 346 (2022) ("Maine is a state that recognizes multi-parentage and provides full legal parentage to individuals who satisfy the state's de facto parentage doctrine."); Jeffrey A. Parness, *Comparable Pursuits of Hold out and De Facto Parentage: Tweaking the 2017 Uniform Parentage Act*, 31 J. Am. Acad. Matrim. Law. 157, 164 (2018) ("In both Delaware and Maine, whose recent enactments were specifically touted in the 2017 UPA, standing to pursue de facto parentage seemingly is recognized for a range of litigants who might be interested in either child support or childcare involving those who did not reside with a child for the child's first two years.").

38 In 2019, the Legislature amended Maine's Protection from Abuse Act to provide that economic misconduct is much more than just theft or concealment from a spouse:

> "Economic abuse" means causing or attempting to cause an individual to be financially dependent by maintaining control over the individual's financial resources, including, but not limited to, unauthorized or coerced use of credit or property, withholding access to money or credit cards, forbidding attendance at school or employment, stealing from or defrauding of money or assets, exploiting the individual's resources for personal gain of the defendant or withholding physical resources such as food, clothing, necessary medications or shelter.

Me. Rev. Stat. Ann. tit. 19-A § 4002 (3-B). In response to these parallel concerns in the context of divorce, the Legislature in 2021 enacted, and the Governor

guardianship petitions,[39] name changes,[40] private parental terminations,[41] post-judgment motions to modify (as many times as a parent may like to file in many states), as well as enforcement and contempt. The court-sponsored forms for litigation are publicly available on most state websites, the fees for filing are relatively low, and there are helpful descriptors of who have legally recognized rights to file suits in court.[42] There is cursory mention

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signed, H.P. 703-L.D. 947: *An Act To Address the Long-Term Impact of Economic Abuse by a Spouse*, which explicitly codified this form of abuse for an award of spousal support and equitable distribution of property. *See* Me. Rev. Stat. Ann. tit. 19-A § 951-A(2)(C)(3) ("Economic abuse by a spouse. For the purposes of this subparagraph, "economic abuse" has the same meaning as in section 4002, subsection 3-B."); Me. Rev. Stat. Ann. tit. 19-A § 953(1)(D) ("Economic abuse by a spouse. For the purposes of this paragraph, "economic abuse" has the same meaning as in section 4002, subsection 3-B.").

39 *See* Guardianship by Joseph W., 244 A.3d 708, 712 (Me. 2021) ("Maine's Probate Courts may grant three different types of guardianships of minors: (1) a full guardianship pursuant to 18-C M.R.S. § 5-204(2); (2) a guardianship on an emergency basis pursuant to 18-C M.R.S. § 5-204(4)(A)-(B); and (3) a temporary guardianship pursuant to 18-C M.R.S. § 5-205(8) (2020). The York County Probate Court's consent order does not make the findings required to support the appointment of any of these three types of guardianships, see 18-C M.R.S. §§ 5-204(2), (4), 5-205(2), (8) (2020), and the order specifically provides that "[t]he Petition for Guardianship shall be continued.").

40 In 2021, the Legislature enacted 1 Me. Rev. Stat. Ann. tit. 19-A § 1653(2)(F) ("The court may order that a minor's name be changed pursuant to Title 18-C, section 1-701."). *See* Landeen v. Burch, 2025 ME 5, ¶13 (The parties, former romantic partners who never married, are the parents of a two-year-old child. At the time the child was born, paternity had not been established, and the parties were no longer romantically involved. Burch gave the child her last name. After reviewing Maine and national case law, the court held; "In sum, parents share equal rights to name their child; to support a name change, the parent seeking the change bears the burden of persuasion to show good cause; and the touchstone is always and exclusively the best interest of the child.").

41 In 2021, the Legislature enacted Me. Rev. Stat. Ann. tit. 19-A § 1658 ("A petition for termination of a parent's parental rights and responsibilities with respect to a specific child may be filed by another parent or the parent or guardian of a child's minor parent on any grounds set forth in subsection 3-A. A parent may not file a petition under this section to terminate the parent's own parental rights and responsibilities.").

42 The Law Court's website, like many state court websites, explains the process and the available forms, so that litigation is easily accessible. *See Decisions About Children*, Maine Judicial Branch, https://www.courts.maine.gov/courts/family/divorce-separation/decisions-children.html (last visited Apr. 15, 2024); *A Guide to Family Separation in Maine: Divorce and Parental Rights*

of consequences for children or the moral and ethical obligations to protect children from iterations of conflict. This is not that surprising as parents in the United States may rage on-line and in court filings about "rights" more than personal responsibility or accountability.

There is an additional point about the adversarial system in the United States. After a final court order, parents may experience the "cliff effect": a free fall often without post-order interventions and oversight to reduce conflict or minimize the risk of more child custody litigation. Court-mandated mediation is encouraged but that is often limited by availability and court hours for families lacking the resources for private mediation.[43] And court-sponsored mediation is usually available for pending cases not as a form of pre-litigation intervention.[44] Very dedicated and skilled court mediators educate and help families mitigate harm to children, but mediation has its own set of risks and benefits given power and information imbalances.[45] A court-appointed guardian ad litem,[46]

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and Responsibilities Cases, Maine Judicial Branch (Sept. 2020), https://www.courts.maine.gov/help/guides/family-separation-guide.pdf.

43 For a comprehensive and scholarly discussion of mediation, see Sarah Rudolph Cole et al., 1 Mediation: Law, Policy & Practice § 2:9, at 31-32 (2021) ("For general goals have produced substantial effort to regulate mediation: fairness, effectiveness, quality, and access. Yet these goals prove at times to be internally inconsistent and often incompatible with one another.").

44 *See* Mediation & Alternative Dispute Resolution (ADR), State of Maine Judicial Branch, https://www.courts.maine.gov/programs/adr/index.html (last visited May 27, 2025).

45 For anyone not from Maine, mediation fees for court mediators are paid by the parties or waived and are $160 for up to three hours and two mediation sessions. *See id.*; Me. R. Civ. Pro. R. 92(b) ("(1) Mediation Required. All contested divorce, parental rights, judicial separation, and child support actions shall be referred to mediation, unless mediation is waived pursuant to 19-A M.R.S. § 251(2)(B). (2) Mediation Optional. Actions for visitation rights of grandparents, emancipation of minors, paternity or parentage, guardianships of minor children, termination of guardianships of minor children, adoptions of minor children, name changes of minor children, and motions to modify a preliminary injunction, motions to enforce a judgment, and motions for contempt may be referred to mediation. (3) Mediation Not Available. Protection from abuse and protective custody actions (other than those that may be specially referred or included in a pilot mediation program) are not subject to referral to mediation.").

46 *See, e.g.,* Coppersmith v. Coppersmith, 786 A.2d 602, 603 (Me. 2001) ("Given the extensive history of conflict between the parents and the age of Kevin (ten) and Jennifer's age (twelve), the District Court needed an objective

co-parenting counselor, parent coaches, parent education, therapists for parents and children, forensic psychological evaluations, and other professional interventions are available often at considerable expense and in a haphazard way that depends upon the willingness (or capacity) of parents and the inclination of lawyers and judges to support such interventions. Encouragement of post-order litigation (intervention) and discouragement of alternatives (prevention) *after* lawsuits are filed is disheartening at many levels, including the availability of remedies based upon family net worth or health insurance and not the needs and security of the children.

In contrast to budgeting for any of these interventions, multi-millions of dollars have been and will be pledged for and spent on buildings and technology, but relatively little on the (non-lawyer) human and professional services needed to help reduce children's suffering, over a lifespan, from parental conflict.[47]

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and independent investigation into the interests and desires of the Coppersmiths' children, and did not abuse its discretion in appointing a guardian ad litem."); Richards v. Bruce, 691 A.2d 1223,1225 (Me. 1997) ("The guardian serves as the court's agent and prepares a report for the court detailing his or her findings. The guardian ad litem's duties can include interviewing, subpoenaing, and examining witnesses and parties, reviewing mental health and other medical records, and procuring counseling and evaluation services for the child and parents. The guardian's report offers the court a compendium of information that aids the court in determining the best interests of the child.") (citation omitted). The debate about the scope of the GAL role, and lawyers offering expert opinion which apply psychological and social science, is a source of discussion, though more still needs to be had. *See* Dana E. Prescott & Diane A. Tennies, *The Lawyer as Guardian ad Litem: Should Status Make Expert Opinions All-In and Trump Gatekeeping Functions by Family Courts*, 30 J. Am. Acad. Matrim. Law. 379, 393-94 (2017) ("The GAL role is intended by policy makers to fill this gap by acquiring information through investigation and inquiry outside the courtroom and then transferring that knowledge, by report and testimony, to judicial fact finding and decision making.").

47 The research on brain development and the impact of traumatic events (called Adverse Childhood Events or ACEs in the literature) shows that the more ACEs a child experiences, the more physical, social, and emotional difficulties a child is at risk for as they move into adulthood (with the impact being multiplicative). Examples of ACEs are exposure to intimate partner violence, loss of a caregiver, various forms of child maltreatment, and a caregiver's mental illness or exposure to substance abuse in household. Research has demonstrated a strong relationship between ACEs, substance use disorders, academic struggles, relationship challenges, and behavioral problems as children age into adolescence and early adulthood. *See generally* Craig McEwen & Dana E. Prescott,

This is not to say that court administrators and judicial officers are not as stymied by feasible solutions as everyone else. Political tradition and logrolling, however, make budgeting for buildings and tech more routine than engaging evidence informed interventions which may take years to measure as effective. Indeed, the structural willingness to sustain random and mysterious judicial outcomes in child custody cases within an adversarial environment encourages more of a lottery effect, which encourages more litigation, not less.[48]

For many years, some state family justice courts have sought to implement reforms to diminish the cliff effect.[49] These reforms are intended to encourage policy makers to provide trial judges with authority and resources to impose post-order interventions rather than to try to change thoughts and behaviors by lecture, often with the best of intentions, from the bench.[50] For example,

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Adverse Childhood Experiences and COVID-19: Implications for Family Courts and Legal Professionals, 34 J. Am. Acad. Matrim. Law. 409 (2022).

48 For an accessible book on the topic of rational choice and game theory, see Kenneth H. Waldron & Allan R. Koritzinsky, Game Theory and the Transformation of Family Law: Change the Rules—Change the Game: A New Bargaining Model for Attorneys and Mediators to Optimize Outcomes for Divorcing Parties 14 (2015) ("Thus, ironically, while the legal system throws numerous opportunities in the paths of separating parents to develop healthy communication and cooperation, the fundamental system itself appears to be set up to increase parental conflict.").

49 This effect, as mentioned in this Journal, remains unstudied in the context of child custody orders and the efficacy of interventions. *See* Dana E. Prescott & Tim Fadgen, *Adversarial Systems and Forensic Experts in Child Custody: How About Adding a Hot Tub*, 32 J. Am. Acad. Matrim. Law. 117, 132 (2019) ("Once the trial is done and the judge decides, families are then subject to what may be termed the "cliff effect." This too often means that families return to court in various iterations during the legal minority of a child; and if the family has resources, they continue to hire more experts or new experts."); Dana E. Prescott & Diane A. Tennies, *Bias Is a Reciprocal Relationship: Forensic Mental Health Professionals and Lawyers in the Family Court Bottle*, 31 J. Am. Acad. Matrim. Law. 427, 460 (2018) ("Once the trial is done and the judge decides, families are then subject to what is termed by the authors as the cliff effect.").

50 Some things are slow to change. *See* Andrew S. Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 Syracuse L. Rev. 55 (1969) ("Judges, perhaps somewhat more than other human beings, tend to believe that if they inveigh against something strongly enough. change will ensue. It rarely works. All too often, judicial moralizing only reiterates that which has been repeatedly stated to the parties before, and it only helps the listener to turn off his hearing. insuring a negative result."). And in some states, there are legal

the delegation of judicial authority to arbitrators in child custody cases is the source of developing policy and practice considerations apart from ongoing debates concerning parent coordination, but such a delegation has a higher potential for efficacy for children given the study results and policy precision proffered by its proponents.[51]

In the meantime, trial courts struggle with an unrelenting stream of family conflict which increases delays for hearings and rendering decisions. This statement does not absolve adult care providers from responsibility for conflict and litigation since they do not have to make such choices. But domestic violence, addiction, poverty, and mental health struggles, mixed with distorted thinking, require more professionally available *post-order* interdictions to protect children than an overburdened centuries old adversarial system can provide.[52] As it currently stands, Maine law,

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barriers to interventions. *See, e.g.,* Griffin v. Griffin, 92 A.3d 1144,1145 (Me. 2014) (vacating an order that gave approval authority over the choice of counselor to the GAL because this "grant of post-judgment authority is neither contemplated in the GAL's appointment order nor authorized by statute."); Karamanoglu v. Gourlaouen, 140 A.3d 1249, 1252 (Me. 2016) (vacating a requirement of pre-filing mediation because it has "an adverse effect on the parties' right to free and timely access to the courts" and undermines "the statutory process for a waiver of mediation" such that "mandatory pre-filing mediation constitutes obvious error.").

51 *Compare* Amy J. Amundsen & Carolyn Moran Zack, *Family Law Arbitration—A Guide for Providing Sound Counsel to Litigants*, 37 J. Am. Acad. Matrim. Law. 49, 49 (2024) ("Achieving resolution of family law disputes privately, more quickly, more cheaply, and with less adversarial posturing, are goals shared by family lawyers and their clients. Family law arbitration, which is the process by which parties voluntarily submit their claims for adjudication to a third-party neutral, allows parties to effectuate these goals.'"), *with* Bridgette Woodford, *Leave It to the Courts: Why Child Custody Arbitration Is Improper*, 14 Arb. L. Rev. 54, 68 (2023) ("Despite Americans' distrust in the judicial process and disdain towards litigious proceedings, arbitration does not provide an effective alternative in determining child custody issues. The advantages of typical arbitration one may be aware of are not attainable with child custody arbitration.").

52 *See* Dana E. Prescott, *Consent Decrees, the Enlightenment, and the Modern Social Contract: A Case Study from* Bates*,* Olmstead*, and Maine's Separation of Powers Doctrine*, 59 Me. L. Rev. 75, 97 (2007) (quoting Marshall J. Tinkle, The Maine State Constitution: A Reference Guide (1992) ("Since its adoption in 1820, the Maine Constitution has remained essentially the same, both functionally and structurally. As author Marshall Tinkle has observed, what is important for our current purposes is that 'Maine's constitutional development has been conservative in the Burkean sense: reforming to preserve, adapting old

and that of other states, allows the mostly unfettered filing (not necessarily winning but filing) of post judgment motions to modify or enforce a parenting plan. These iterations of post-parenting order motion practice, however, are not isolated from the structural weakness of untimely enforcement of judicially ordered parenting plans.[53]

If there is a modern shift to judges feeling discomfort with exercising constitutional and statutory authority or punishing or declining to punish by virtue of implicit biases or poverty, then that is worth exploring through research and trainings.[54] As the public learns, in this age of politically encouraged disdain for institutions of many kinds, court orders can be illusions. The lack of timely

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institutions to meet current exigencies, but eschewing the kind of innovation that would obliterate the past. It has been chiefly marked by continuity and stability-traits that, however desirable, make for dull history."').

53 For an interesting example of the intersection of social science research and judicial decision-making, see generally Morris B. Hoffman, The Punisher's Brain: The Evolution of Judge and Jury (2014). A recent study worth reading concerns outcomes influenced by whether a case is heard before or after lunch. *See* Shai Danziger et al., *Reply to Weinshall-Margel and Shapard: Extraneous Factors in Judicial Decisions Persist*, 108 Proc. Nat'l Acad. Sci. E834, E834 (2011) ("We have presented evidence suggesting that when judges make repeated rulings, they show an increased tendency to rule in favor of the status quo. This tendency can be overcome by taking a break to eat a meal, consistent with previous research demonstrating the effects of a short rest, positive mood, and glucose on mental resource replenishment"). The statistical analysis has been subject to challenge. *See* Andreas Glöckner, *The Irrational Hungry Judge Effect Revisited: Simulations Reveal that the Magnitude of the Effect Is Overestimated*, 11 Judgment & Decision Making 601, 601 (2016) ("According to previous findings on mental depletion, the 'irrational hungry judge effect' should at best be small in magnitude (if existing at all) which might render the observed extraneous influence less relevant from a practical point of view and the need for state interventions less urgent.").

54 This point raises some very delicate issues. Without independent training outside the echo chamber of court-sponsored trainings concerning family demographics and dynamics, this is a real hazard. Yet, thinking about bias and its implications are nothing new in the juridical literature. *See* Benjamin N. Cardozo, The Nature of the Judicial Process 167 (1921) ("Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge."). For a selection of current literature, see Alison Shlom, *Moving Towards an Impartial Judiciary: Recommendations to Prevent and Discipline Judicial Bias*, 29 Widener Commonwealth. L. Rev. 135 (2020); Catie Wheatley, *Honesty Is the Best Policy: Addressing Implicit Bias in the Judiciary*, 9 Ind. J.L. & Soc. Equality 94 (2021).

oversight and enforcement may yield more costly and protracted harm to children from iterations of litigation.[55] Whether failure to expediently enforce parenting orders causes more modification motions is one hypothesis. There is, however, a crucial legislative element because Maine has created and supported a trip wire standard for modification of parenting plans as described in more detail below.

III. Tripwire Standards and Serial Lawsuits

Parenting cases eventually finish with a court-ordered parenting plan by agreement or after a trial. Unlike criminal (A is sentenced to 364 days in jail) and civil (A pays B $10,000) cases, parenting orders do not end litigation. Child custody orders explicitly permit iterations of post-judgment motions over various matrices of parenting time, financial support, or parental rights and responsibilities.[56] Meanwhile, the demographics of these family systems have grown ever more complex and ever evolving.[57] Among the most complex challenges is the dislocation and reformation

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55 *See* Jennifer Elek & Andrea Miller, The Evolving Science on Implicit Bias, National Center for State Courts 1 (2021) ("The judiciary is regarded by the public as a legitimate authority largely because of the perception of independence and impartiality. That perception is under threat. During the past turbulent year, public trust in government declined across the globe. As public trust declines, the ability of the judiciary to skillfully and effectively demonstrate the ideals of fairness and impartiality under law becomes ever more critical.").

56 This is not a new area for policy discussion. *See* Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 Yale L.J. 757, 760 (1985) ("The law in every state, whether statutory or common, permits the courts to modify orders directing the custody of a child upon the divorce of his or her parents.").

57 *See* Sheila R. van Berkel et al., *What About the Children? Co-Occurrence of Child Maltreatment and Parental Separation*, 29 Child Maltreatment 53, 53 (Feb. 2024) ("Parental separation (defined as the termination of the relationship between a child's parents regardless of whether parents were married) is for many children a traumatic experience in itself and has been associated with numerous negative long-term outcomes on academic achievement, mental health, delinquency, self-esteem, and interpersonal relations Detailed international data from official sources on the prevalence of separation of couples with children are lacking. However, a cross-national comparative study on family dynamics based on National survey data of the US, Russia and 17 European countries indicates that in these countries 10–44% of the couples with children had separated before one of their children reached the age of 15 years.").

of family systems from divorce and separation, child protection and parental termination, foster and kinship care, IVF, surrogacy, and adoption, guardianship, remarriage, and cohabitation, and biological and non-biological sibling relationships, and more recent legally recognized de facto parentage. As a result, children may experience physical and emotional maltreatment at younger ages, and fewer children are raised to adulthood in the same household with the same parents (or kinship) present daily.[58]

The conventional epigenetic traits of human behavior that some researchers and philosophers say tend toward conflict, self-righteousness, and violence increases the probability of litigation as parents form and reformulate family systems over a decade or more of a child's childhood.[59] In Maine and many other states, the test for modification of established parenting orders was defined by statute and reinforced for decades by case law:

> [T]he petitioning parent must demonstrate that a substantial change in circumstances has occurred since the previous decree and that the modification is in the best interests of the children . . . .

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58 *Id*. ("Child maltreatment poses a considerable risk for detrimental outcomes in multiple developmental domains. Among the many family, parent and child characteristics associated with child maltreatment, aspects related to parental separation or divorce seem to play an important role, such as single parenthood, living with a stepparent, and interparental violence.").

59 This is an arena of science and law that has considerable controversy attached to it-for good reason. There are centuries of racism, colonialism, institutionalization, and death from the use of force to argue that genetics predetermines outcomes or human rights violations. *See* Riccardo Vecellio Segate, *Exposing, Reversing, and Inheriting Crimes as Traumas from the Neurosciences to Epigenetics: Why Criminal Law Cannot Yet Afford A (nother) Biology-induced Overhaul*, 43 Crim. Just. Ethics 146, 155 (2024) ("In considering these factors, one of the obvious risks is a descent too deep into determinism. Our bodies, minds, behaviors, relationships, and achievements are far more and else than what our genes and epigenetic markers can explain, disclose, or predict—there are chance, chaos, luck, serendipity, and probably a spiritual dimension that could never be encoded in biologically explainable growth and maturity. There are social variables that act on large numbers and whose effects can only be conceptualized macroscopically via models such as game theory."). For lawyers and policy makers who may have forgotten lessons from the merger of science (real or junk) and policy (power) it is helpful to revisit *Buck v. Bell*, 274 U.S. 200 (1927). *See* Alschuler, *supra* note 23, at 29 ("No one of note, however, joined Holmes in writing approvingly of killing 'everyone below standard' and 'putting to death infants that didn't pass an examination." Eugenics, moreover, was the only progressive movement Holmes favored.") (emphasis in original).

> To determine whether a substantial change has occurred, the court must ask (1) whether there has occurred a change in circumstances that has a sufficiently substantial effect on the children's best interests to justify a modification of the prior order, and (2) if so, how the court should modify the custody arrangement in furtherance of the children's best interests. The purpose of the substantiality requirement "is to prevent disappointed parents from bringing repeated motions to modify divorce decrees" and "shopping" for a judge who will revise the order.[60]

The moving party bears the burden of proof to compel the trial court to make findings necessary to grant a motion to modify.[61]

For much of the last three decades, Maine, as one policy example, has discouraged the use of ordinary civil legal concepts such as *res judicata* or summary dismissal to truncate specious litigation.[62] Conversely, Arizona has a prudent mechanism for summary dismissal. Although only a memorandum decision, the Arizona Court of Appeals summarized the policy as follows:

> Mother's Expedited Petition did not meet the requirements of A.R.S. § 25-411. To the extent she requested a change in parenting time within one year of the Stipulated February Order, she had to submit affidavits to show "the child's present environment may seriously endanger the child's physical, mental, moral or emotional health." A.R.S. § 25-411(A). Although that same time line does not apply to petitions to modify legal decision-making orders on the allegation that the order was violated, a petition to modify legal decision-making orders must

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60 Jackson v. MacLeod, 100 A.3d 484, 488-89 (Me. 2014) (citations omitted).

61 Roalsvik v. Comack, 208 A.3d 367, 369 (Me. 2019).

62 *See* Doe v. Forino, 242 A.3d 1098, 1102 (Me. 2020) ("We have cautioned against a strict and sweeping application of res judicata principles in cases involving children."); Neudek v. Neudek, 21 A.3d 88, 90 (Me. 2011) ("Furthermore, we note that dispositive motion practice, such as Deborah's motion to dismiss the motion to modify, is rarely appropriate in domestic relations cases on questions that involve fact disputes or judgmental evaluations of evidence in a record."). Unlike standing, in *de facto* parenting or grandparent cases, there is no preliminary mechanism for dismissing a case without merit, which means that most cases will incur substantial additional cost and stress. *See, e.g.,* Fiske v. Fiske, 276 A.3d 31, 33 (Me. 2022) ("Given that the de facto parentage statute and the GVA have the same framework for determining standing, Davis's holding that a single standard of proof—preponderance of the evidence—governs standing determinations under the de facto parentage statute applies with equal force to the GVA. The court correctly required the grandmother to prove standing by a preponderance of the evidence.") (citation omitted).

> comply with all of the requirements of A.R.S. § 25-411, id., or it will be subject to automatic denial without a hearing.[63]

Thus, the difference between these test contrasts a "trip-wire" standard that allows a parent (or both) to use a court-sponsored form to file whether reached by agreement or after trial even weeks or months after the order was signed,[64] compared to a procedural barrier that reduces revolving courthouse door policy or "litigation abuse" (or "litigation terrorism" as it is sometimes styled in the literature).[65] As for these policy differences and the needs and rights of a child, the Vermont Supreme Court aptly stated years ago that iterations of litigation that treat a child as "a shuttlecock in a game of badminton" should not be condoned.[66] Nevertheless, the threat of sanctions, such as attorney's fees and costs, is too dependent on the capacity and the willingness of a judge to take such action when parties are self-represented, there are no legislative constraints on filing post-order motions, or an imbalance of family resources affords much greater opportunity to abuse a parent and the court processes.[67]

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63 Walker v. Sinikova, 2016 Ariz. App. Unpub. LEXIS 100, ¶12, **10-11 (Ariz. Ct. App. 2016).

64 *See id*. at ¶¶11-12, **10-12.

65 *See* Lisa A. Tucker, *The [E]x Factor: Addressing Trauma from Post-Separation Domestic Violence as Judicial Terrorism*; 99 Wash. U.L. Rev. 339, 361 (2021) ("Judicial terrorism is pernicious in part because it shapeshifts; while it allows the abuser to continue to harass and stalk his victim, it bears the imprimatur of legitimacy because it takes place through the court system. Just like abusers who, as intimate partners, are 'supposed' to be nurturing and caring, the court system—which should be a source of justice and liberty from abuse—becomes a forum for ongoing violence.").

66 Ohland v. Ohland, 442 A.2d 1306, 1309 (Vt. 1982).

67 Family courts have broad authority to award attorney's fees and costs. *See* McBride v. Worth, 184 A.3d 14, 19 (Me. 2018) ("Whether the need for the post-judgment proceeding arose out of a party's failure to abide by an existing order may also factor into the court's consideration.");Wooldridge v. Wooldridge, 940 A.2d 1082, 1085 (Me. 2008) ("Among the factors a court may consider when determining whether to award attorney's fees in divorce and post-divorce matters is whether inappropriate conduct of a party has contributed to the duration of the litigation."). Self-represented litigants are to be held to the same standards as represented parties at least from an appellate perspective. *See, e.g*., *Wooldridge*, 940 A.2d at 1085 ("Self-represented litigants are held to the same standards as represented parties when determining whether to impose sanctions for frivolous appeals."). A so-called "Spickler Order" is available for frivolous or vexatious litigation but that is very rare. *See* Spickler v. Key Bank of S. Me., 618 A.2d 204,

Concomitantly, alternative research-based interventions that may reduce the duration and depth of litigation cycles are met with a shortage of trained clinicians familiar with family dynamics and litigation impacts on family systems. This is not to say that such interventions are empirically effective over the short- or long-term, as that is the source of debate in the social sciences, but having no consistent and empirically-based resources is, essentially, equivalent to allowing the court to be a forum for adult grievances rather than feasible solutions for children across multiple developmental phases.[68] The reason that modification motions cycle through a judicial portal may be more prevalent (and this is just an hypothesis), is that enforcement of existing parenting orders is so random and delayed. The next section examines the promise to the public of enforcement by contempt or other remedies when an order is negotiated and approved by a judge or imposed by a judge after trial.

IV. The "Remedy" of Civil Contempt"

The power of contempt is a historically inherent power of a court to protect its dignity and enforce its orders.[69] The distinction

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207 (Me. 1992) ("The Spicklers argue that the court abused its discretion in granting the defendants' motion for a permanent injunction against them because it impermissibly restricts their access to the courts. It is well-settled that a court may enjoin a party from filing frivolous and vexatious lawsuits.").

68 In the universe of conflict and harm, the debate over the protection of vulnerable populations by government engages has some force when courts may choose doing nothing for children. *See* Michael P. Scharf & Paul R. Williams, *The Functions of Justice and Anti-Justice in the Peace-Building Process*, 35 Case W. Res. J. Int'l L. 161, 182 (2003) ("While accommodation may be a useful and valuable tool, appeasement is characterized by an artificial moral equivalence, neutrality in the face of aggression, active efforts to erode the moral imperative to become involved, and the total exclusion of the use of force and the norm of justice, with the effect of often encouraging further violence and atrocities.").

69 The federal courts' authority to exercise its inherent contempt power is, as of the date of this draft, subject to legislation in Congress as part of an omnibus bill. *See* 119th Cong. 1ST Sess., H. R. 1 An Act To Provide for Reconciliation Pursuant to Title II of H. Cong. Res. 14 (May 2025) ("Sec. 70302. Restriction on Enforcement. No court of the United States may enforce a contempt citation for failure to comply with an injunction or temporary restraining order if no security was given when the injunction or order was issued pursuant to Federal Rule of Civil Procedure 65(c), whether issued prior to, on, or subsequent to the date of enactment of this section."). For an analysis of the history of judicial contempt

between civil and criminal contempt, and the trial court's inherent powers to enforce its orders, pre-dates the adoption of statutes and rules conferring that power on trial courts.[70] Although more rarely done than civil contempt, the court may, on its own initiative, refer a criminal contempt in its presence for prosecution.[71] Civil and criminal contempt orders are, however, fundamentally different:

> A civil contempt proceeding is a remedial action brought to benefit another party. An essential element of the civil contempt order is the opportunity to purge oneself of contempt by satisfying the court order or judgment not complied with previously. The purpose of criminal contempt, in contrast, is to punish an affront to the dignity and authority of the court. The sanctions arising from criminal contempt are determinate and there is no right to purge. In addition, in criminal contempt proceedings, there are constitutional implications not present in civil contempt proceedings.[72]

In *Murphy v. Bartlett*,[73] the Maine Law Court extensively discussed the differences between punitive and remedial contempt and then vacated an order that the father had the ability to meet his support obligations. In this two-part analysis, the test was, first, did

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authority, see Emile J. Katz, *The "Judicial Power" and Contempt of Court: A Historical Analysis of the Contempt Power as Understood by the Founders*, 109 Calif. L. Rev. 1913, 1956 (2021) ("Many states thought that their state judges did not have an inherent power to punish for contempts in the years following the ratification. In his dissenting opinion in Green v. U.S., Justice Black expounds on some of the early post Constitution history of contempt. He wrote that in 1804, justices of the 'Pennsylvania Supreme Court were actually impeached for sentencing a person to jail for contempt. While the Justices were narrowly acquitted this apparently only aggravated popular antagonism toward the contempt power.'").

70 *See, e.g.,* Meyer v. Meyer, 414 A.2d 236, 238 (Me. 1980) ("A right to purge is an essential element of a civil contempt sanction. We have recently held that the criminal contempt sanction provided for in 19 M.R.S.A. § 722 (Supp. 1979-80) is not exclusive; that it is not the purpose of that section to deprive the District or Superior Court of the power to employ the sanction of civil contempt to achieve remedial enforcement in a proper case.") (footnote and citations omitted).

71 *See* Alexander v. Sharpe, 245 A.2d 279, 282 (Me. 1968) ("It has long been recognized that the power of a court to punish summarily for a contempt committed in the presence of the Court is inherent in the nature and constitution of a court and necessary for the court to possess in the exercise of all its other powers.") (citation omitted).

72 *See* International Paper Co. v. United Paperworkers Int'l, 551 A.2d 1356, 1358-59 (Me. 1988) (citations omitted).

73 86 A.3d 610 (Me. 2014).

the party fail to comply with the divorce judgment "to the fullest extent possible as of the date of the contempt judgment" and, second, does that party "have the prospective ability to make all of the payments required by the divorce judgment."[74] What makes civil contempt particularly challenging is that these elements must be proven by "clear and convincing evidence" which means that the evidence "provides the fact-finder with an abiding conviction that the truth of the proponent's contentions is highly probable."[75] Other jurisdictions have adopted a similar evidentiary test in child custody cases.[76]

Assuming that this higher evidentiary bar is met as to each element, the trial court may impose a remedial sanction directed toward securing the rights of another party: "to coerce compliance and to obtain for the other party the benefits of the court order."[77] This judicial authority includes coercive imprisonment, coercive or compensatory fines, or "additional relief to facilitate enforcement of orders."[78] Many federal and state courts, including Maine, have "figuratively described the requirement" as contemnors "carry the keys of their prison in their own pockets" and as an "essential predicate for the imposition of coercive incarceration as a coercive remedy for civil contempt. "[79] The challenge with civil

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74 *Id*. at 614.

75 Beckerman v. Pooler, 119 A.3d 74, 76 (Me. 2015).

76 *See e.g.,* Puff v. Puff, 222 A.3d 493, 506 (Conn. 2020) ("It is the burden of the party seeking an order of contempt to prove, by clear and convincing evidence, both a clear and unambiguous directive to the alleged contemnor and the alleged contemnor's willful noncompliance with that directive."); Matter of Tedesco v. Mazzara, 206 A.D.3d 917, 919 (N.Y. App. Div. 2022) ("To prevail on a motion to hold another party in civil contempt, the movant is required to prove by clear and convincing evidence that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, that the order was disobeyed and the party disobeying the order had knowledge of its terms, and that the movant was prejudiced by the offending conduct'") (citations omitted); Breen v. Black, 467 P.3d 1023, 1027 (Wyo. 2020) ("To establish civil contempt, the plaintiff must show by clear and convincing evidence that: 1) there was an effective court order requiring certain conduct by the alleged contemnor; 2) the contemnor had knowledge of the order; and 3) the alleged contemnor willfully disobeyed the order.").

77 Murphy v. Bartlett*,* 86 A.3d 610, 616 (Me. 2014).

78 *Id*.

79 *Id*. (citations omitted).; *see* McPhail v. McPhail, 357 So. 3d 602, 623 (Miss. 2023) ("Unlike criminal contempt, which typically carries a punitive fixed

contempt is that successfully proving that a court order was valid and violated is often a hollow victory when the passage of time from hearing to sanction may have embedded the violation in the children's lives without the other parent.

Criminal contempt is rarely charged in private child custody cases short of kidnapping or criminal restraint.[80] And though said in chambers more than in opinions, judges and lawyers may believe that more harm may follow to the parent-child relationship from incarceration than other remedies. Yet rendering court orders a nullity by concluding that enforcement is futile because "no keys are available" may send a powerful message to a public already cynical about judicial authority and paying for lawyer advice.[81]

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sentence, a civil contemnor 'carries the keys to his prison in his own pocket' through his ability to comply with the court's orders and end his remedial sanction.").

80 *See, e.g.,* Marler v. Lambrianakos, 371 So. 3d 287, 310-11 (Ala. Ct. App. 2022) ("Given the evidence in the record on appeal, and the trial court's emphasis on the mother's ongoing pattern of interference with and attempts to obstruct the paternal grandmother's visitation, we cannot say that the evidence does not support the trial court's criminal-contempt finding with regard to the April 2019 weekend visitation the mother refused to allow the paternal grandmother to exercise."); Mitchell v. State 426 P.3d 830, 838-39 (Wyo. 2018) ("Our conclusion that Mr. Mitchell was held in civil contempt is dispositive of his double jeopardy claim. "The [Double Jeopardy] Clause protects only against the imposition of multiple criminal punishments for the same offense." Mr. Mitchell was not subjected to successive criminal prosecutions for the same offense and, consequently, the constitutional prohibition against double jeopardy was not implicated.") (citation omitted).

81 One noticeable change in the practice of family law is lawyers who tell a client not to follow a court order. Besides the possible ethics violation, it seems a rather risky proposition to try and deny that later in court when the client will: (1) throw the lawyer under the bus from the stand in a heartbeat, and (2) if the client is lying about what they say the lawyer said, thereby place the lawyer in the position of telling the court that was false or suborning perjury. Bad plan all around. There is no uniform opinion on whether that behavior is limited to fraudulent or criminal conduct by a lawyer on behalf of a client, but experience dictates that family law practitioners may be treated differently than other specializations. *See* Paul R. Tremblay, *At Your Service: Lawyer Discretion to Assist Clients in Unlawful Conduct*, 70 Fla. L. Rev. 251, 282 (2018) ("This review of the Model Rules permits a reasonably confident, if far from certain, conclusion that those professional guidelines do not prohibit a lawyer from advising a client about, encouraging a client to engage in, or assisting a client with unlawful actions that are not criminal or fraudulent. The carefully chosen language of Rule 1.2(d) communicates that message to members of the bar, and none of the other

A. *Civil Contempt and Parenting Orders*

A common enough fact pattern is this:

> *A and B have two children, ages 9 and 13. For 5 years following the divorce the children had a shared residential schedule with the parents living within a half hour of each other and school. The 13-year-old began to refuse to see her mother about 6 months ago when her mother remarried. The father says he tries to make the teenager go but that their daughter refuses because she saw her mother and stepfather argue and yell at each other. The father's wife has no children but encourages the schedule "as long as it is safe." The stepfather has two children from his prior relationship and when those children visit the mother's home now the teenager must share her bedroom with stepsiblings a few years older than her. The younger child still follows the schedule.*

The mother brings a motion for contempt with the expectation of a summary enforcement proceeding. The father objects and counters with a motion to modify because the child refuses to go, which essentially guarantees a delay of months for a hearing, or even a year or more. The family dynamics here are not as relevant as the arguments regarding the current ability to comply. If the family has financial resources, the parent may hire "experts" to prove something else like "parental alienation syndrome."[82] And courts may recognize good faith attempts to comply with court orders.[83] If a parent does not have financial resources, then she

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more restrictive provisions has the clarity or force to trump Rule 1.2(d)'s plain language.").

[82] This article is not the place for an exploration of the conceptual, not scientific, argument for parental alienation syndrome. The origin story for PAS has been explored in numerous articles and books but may be summarized as having "arisen from emotions emanating from custody battles, publicity, and economics rather than sound, scientific study." T.M. Houchin et al., *The Parental Alienation Debate Belongs in the Courtroom, not in DSM-5*, 40 J. Am. Acad. Psychiatry & L. 127, 127 (2012).

[83] *See, e.g.,* Rodas v. Franco, 974 N.W.2d 856, 879 (Neb. Ct. App. 2022) ("In Martin v. Martin, 294 Neb. 106, 881 N.W.2d 174 (2016), the Supreme Court upheld the trial court's determination that a mother was in willful contempt of court because the mother had a consistent pattern of transferring her responsibility to her children and the father was not able to exercise his court-ordered parenting time. In other words, the Supreme Court has affirmed not holding a parent in contempt when that parent did not encourage or instruct the children to refuse the visit, and it has upheld the decision to hold a parent in contempt where that parent consistently transferred the responsibility of deciding whether to attend visitation to the children and the noncustodial parent repeatedly was unable to exercise his court-ordered visitation.").

may be able to afford some hours for a GAL and a lawyer to try to obtain a remedy to enforce the existing order. In the meantime, the teenager has little contact with her mother and her sibling has become the communicator between the parents while stressing over loyalty to her sister as she navigates between homes. Soon, enough time will pass that the minor ages out or there is a need for "reunification therapy."[84] The case is finally set for trial. But the question is what remedy is appropriate as trial courts struggle with a level of sanction commensurate with the level of misconduct.[85]

In terms of civil incarceration, civil contempt has proven, essentially, unavailable against contemnors in parenting cases for various reasons.[86] A common one that may not be found in published decisions is the tendency of courts not to want to jail a parent with the risk that the children might become further estranged from that parent.[87] But even a fine has its limits. For example, in *Jackson v. MacLeod*,[88] a parent argued that the court exceeded its authority by imposing a monetary penalty on him in the absence of a pending motion for contempt. The Law Court stated that there

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84 The Law Court has recognized, in the context of guardianships and parenting under the Probate Code, that parental rights "tethers the temporal scope." Guardianship of Thayer, 136 A.3d 349, 351 (Me. 2016).

85 *See, e.g.,* Winters v. Winters, 863 S.E.2d 868, 874-75 (Va. Ct. App. 2021) (vacating the dismissal of an appeal, and commenting: "our conclusion that the sanction in this case was inappropriate does not mean that a more measured sanction would be equally inappropriate. Ultimately, and as mother's motion for sanctions specifies, the circuit court had a variety of alternative sanctions at its disposal that would have sufficiently punished and deterred further violations of the circuit court's orders without impacting the statutory rights of the children of the parties. Among those alternative options were the imposition of reasonable attorney's fees, a 'leave of court' requirement in which father would have to obtain permission from the court before filing further pleadings, limiting production of father's evidence, imposition of a monetary fine, or even incarceration. Thus, there were sanctions available to the circuit court that would not have affected the right of the children in this case to have their best interests considered by the circuit court.").

86 *But see* White v. Taylor, 717 S.W.2d 497, 499 (Ark. Ct. App. 1986) ("It appears to this court that the chancellor in this case has made numerous attempts to allow appellant opportunities to purge herself of contempt. The disobedience of any valid judgment, order, or decree of a court having jurisdiction to enter it is such an interference with the administration of justice as to constitute contempt.").

87 *See* Harshman v. Harshman, 206 A.3d 297, 300-01 (Me. 2019).

88 100 A.3d 484 (Me. 2014).

are only two methods by which a trial court in a family matter may impose a civil penalty against a party:

> First, the court may assess a civil penalty for noncompliance with a parental rights and responsibilities order upon motion and a finding that the party is in contempt. See 19-A M.R.S. § 1653(7)(C) (2013)5; M.R. Civ. P. 66(c). Second, the court may impose a civil penalty for contempt committed in the court's presence. M.R. Civ. P. 66(b). Here, a motion for contempt had been filed, but it had been resolved by the August 2013 order as later amended. Because no motion for contempt was pending at the November 2013 hearing, there was no procedure under which the court could validly enter a contempt finding. Therefore, the court lacked authority to impose the civil penalty.[89]

Some trial courts have suspended visitation by the violating parent, but that may not survive appeal.[90] The Law Court also addressed the use of a change of custody as a sanction. Beginning with the traditional role of courts in making custody determinations the trial judge must decide as a "wise, affectionate and careful parent" what custody arrangement will be in the best interest of the child.[91] This central focus has evolved because a custody decision may have "a crucial and potentially long-term impact on the physical and psychological well-being and potential future development of the child at a time in its life when its future as a balanced, healthy and happy individual is most clearly at stake."[92] For example, the Law Court affirmed a change of custody in *Cloutier v. Lear*[93] with the holding that, "The court does not abuse its discretion by determining that the best interest of the child requires

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89 *Id*. at 489.

90 *See, e.g.,* Kowalczyk v. Bresler, 149 A.3d 1247, 1251 (Md. Ct. Spec. App. 2016) ("We agree with appellant that the purge provision was in fact punishment for her past failure to comply with the October 13 and 21 visitation orders. Any order imposing a penalty in a civil contempt action must include a purging provision with which the contemnor has the present ability to comply. A lawful purge provision "affords the defendant the opportunity to exonerate him or herself, that is, to rid him or herself of guilt and thus clear him or herself of the charge . . . [i]n this way, a civil contemnor is said to have the keys to the prison in his own pocket." Here, the sanction was the suspension of visitation. There was no way for appellant to perform some act and thereby avoid the sanction.") (citations omitted).

91 Cyr v. Cyr, 432 A.2d 793, 796 (Me. 1981).

92 Harmon v. Emerson, 425 A.2d 978, 983 (Me. 1981).

93 691 A.2d 660 (Me. 1997).

developing the best possible relationship with *both* parents.'"[94] In *Cloutier*, however, the trial court "determined based on its consideration of all factors that for the children to have a 'continued and significant exposure to plaintiff's [the mother's] conduct will surely and significantly impair if not destroy their relationship with their father.'"[95]

In *Huff v. Huff*,[96] the Law Court, however, vacated a change of custody because the judge making the decision impermissibly deviated from "the real and only true objective in such matters, i.e. the best interests of the child. It is apparent from the record before us that he used the custody award as a sanction to punish Howard Huff for being in contempt and for his 'contemptuous' behavior."[97] The court, therefore, concluded that it was error to use a custody award as a sanction for a parent's contempt, noting that "the court's complete failure to mention the child's interest

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94 *Id*. at 663 (citations omitted).

95 *Id*. at 664. The Maine Legislature has adopted parental interference (or its inverse the "friendly parent") factor as one of the elements of the best interests' test. *See* Me. Rev. Stat. Ann. tit. 19-A § 1653(3)(F), (H), (J). The modification of parenting arrangements because of unilateral interference with the access rights of the other parent is supported by case law around the country. *See* Mullins v. Mullins, 490 N.E.2d 1375 (Ill. App. 1980) (evidence that the mother had refused to use the father's surname as the children's surname, had filed false sexual abuse complaints against the father, and had limited or denied him visitation was sufficient to support findings that the mother had engaged in a scheme to terminate the father's parental rights and destroy the children's relationship with him, warranting transfer of custody to the father); Carl P. v. Mary P., 539 N.Y.S.2d 836 (N.Y. Fam. Ct. 1988) ("Indeed, it often has been declared that interference by a custodial parent with the relationship between the child and a non-custodial parent may be so inconsistent with the child's best interests as to raise a strong probability that the [offending party] is unfit to act as custodial parent."); Coreel v. Allen, 380 S.E.2d 580 (N.C. App. 1989) (affirming change of custody from the mother to the father as result of the mother's continued interference).

96 444 A.2d 396 (Me. 1982).

97 *Id*. at 398. *But see* Glenn v. Glenn, 692 N.Y.S.2d 520, 522-23 (N.Y. App. Div. 1999) ("Finally, respondent argues that Family Court erred in modifying custody without conducting an evidentiary hearing or making any findings, and, as such, the custody modification was punitive. We disagree. No hearing is required when the court is possessed of sufficient information with which to make a comprehensive, independent review of the best interests of the children. Moreover, willful interference with a noncustodial parent's right to visitation is "so inconsistent with the best interests of the children as to, per se, raise a strong probability that the [offending party] is unfit to act as a custodial parent") (citations omitted).

while awarding custody, clearly indicates that the court was vindicating its authority rather than addressing the child's best interests."[98] Similarly, in *Ezell v. Lawless*,[99] the court held that, standing alone, the magistrate's decision to transfer sole parental rights and responsibilities to Ezell who, as of the date of the hearing, had just begun to establish a relationship with a daughter he had not seen in seven years, was error. In concurrence, then Justice Levy wrote that, "Although courts need not countenance parents who fail to appear, they 'may not use changes of custody as a sword to punish parental misconduct.'"[100] Other state courts have struggled with the same enforcement and sanctions issues when weighing the relevant best interest factors.[101]

Although civil contempt cases support an array of remedies such as coercive imprisonment, coercive or compensatory fines, or additional relief deemed appropriate to facilitate enforcement of orders, the practical demise of contempt is a function of its higher evidentiary standards and allows the passage of time to determine a winner – if courts do nothing, it may fix itself or just go away. In many ways, this is just modern thinking about authority, whether schools, government, or courts. If the same due process right to access to justice established for collecting a credit card debt by a bank applied to violations of parenting orders, then this analysis would apply to family court orders:

> [T]he fundamental requirement of due process is that a party must be given notice and an opportunity to be heard." The notice and opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." This fundamental requirement necessitates "an opportunity to be heard upon such notice and proceedings as are

98 *Id*.

99 955 A.2d 202, 210 (Me. 2008).

100 *Id*. at 210 (Levy, J., concurring) (citations omitted).

101 *See* Cheek v. Hesik, 73 So. 3d 340, 345 (Fla. Ct. App. 2011) ("This is not to say that the manner of makeup time-sharing imposed by the trial court is inherently unreasonable or inappropriate; indeed, we recognize the difficulty faced by the trial court in crafting a remedy that provides meaningful makeup time-sharing for an out-of-state father where the record reflects that the mother has refused to comply with court orders and has shown little to no interest in the child having a relationship with his father. However, as explained above, before ordering a temporary change of custody or any other type of makeup time-sharing, the trial court was required to consider the best interests of the child.").

> adequate to safeguard the right which the particular pertinent constitutional provision purports to protect.[102]

But it still may not, at least not quickly enough or effectively enough. Thus, it is suggested that a more feasible, or less futile, policy and enforcement, with advance notice in every parenting order, may be a more effective pathway using comparable laws to Maine Revised Statutes title 19-A § 1653(7).

B. *The Potential Efficacy of Maine Revised Statutes Title 19-A § 1653(7)*

Since 1995, the Legislature explicitly incorporated in all parenting orders a remedial right to enforcement under Maine Revised Statutes title 19-A § 1653(7),[103] which only requires proving the violation by a preponderance of the evidence. The court may require additional or more specific terms and conditions consistent with the order; order that additional visitation be provided for a parent to take the place of the visitation that was wrongfully denied; or order a parent found in contempt to pay a forfeiture of at least $100. Although section 1653(7) uses the term "contempt," explicitly missing from section 1653(7) is civil incarceration. Of no small matter, inclusion in the original parenting plan of the range of sanctions for violations provides actual notice, for due process purposes.[104] The potential penalties include such things as financial sanctions for each missed future court-ordered visit, fines for

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102 Citibank, N.A. v. Moser, 314 A.3d 194, 196 (Me. 2024) (citations and footnotes omitted).

103 Title, 19-A, § 1653(7): Violation of order concerning parental rights and responsibilities and contact. Either parent may petition the court for a hearing on the issue of noncompliance with the order issued under subsection 2. If the court finds that a parent has violated a part of the order, the court may find that parent in contempt and may:

> A. Require additional or more specific terms and conditions consistent with the order;
>
> B. Order that additional visitation be provided for a parent to take the place of visitation that was wrongfully denied; or
>
> C. Order a parent found in contempt to pay a forfeiture of at least $100.

104 *Cf.* McMahon v. McMahon, 200 A.3d 789, 793 (Me. 2019) ("For a court to find a party in contempt, the complaining party must establish by clear and convincing evidence that the alleged contemnor failed or refused to comply with a court order and presently has the ability to comply with that order. 'Further, the

every missed visit in the past, and/or calculation of a fine payable within a fixed time frame.

In *Pratt v. Spaulding*,[105] the Law Court contrasted the contempt rules and section 1653(7) after the trial court awarded Pratt expanded contact with his son, including a longer period of uninterrupted contact in the summer. The court, however, imposed no fine or other sanctions on Spaulding for her contempt.[106] The Law Court affirmed the finding of contempt by clear and convincing evidence, but made clear that section 1653(7) should not be blurred into civil contempt because the Legislature should be understood to know the different burdens of proof when enacting a statute and that statute did not require the higher burden of proof.[107]

In *Desjardins v. Desjardins*,[108] the Law Court subsequently provided a fitting analysis, without the higher burden of proof, under subparts A-C of section 1653(7): "The compensatory fine provision states that the court may enter judgment for a sum of money sufficient to indemnify the aggrieved party and to satisfy the costs and disbursements, including reasonable attorney fees, of the aggrieved party."[109] In *Jackson v. MacLeod*,[110] a decade later, the court noted that a "court may assess a civil penalty for noncompliance with a parental rights and responsibilities order upon motion and a finding that the party is in contempt."[111] By itself, this makes section 1653(7) more accessible to a parent seeking to prove a violation and provides a court with flexible remedies under sections 1653(7)(A) and (B) for enforcing *prospective* rights

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'*court order must inform the person in definite terms what duties the order imposes upon him*.'") (citations omitted and emphasis added).

105 822 A.2d 1183 (Me. 2003).

106 *Id*. at 1187.

107 *See* Guardianship of Chamberlain, 118 A.3d 229, 234 (Me. 2015) ("The court is bound to assume that, in the passage of any law, the Legislature acted with full knowledge of all constitutional restrictions and intelligently, honestly and discriminatingly decided that they were acting within their constitutional limits and powers.").

108 876 A.2d 26 (Me. 2005).

109 *Id.* at 28.

110 100 A.3d 484 (Me. 2014).

111 *Id*. at 489 (citing Me. Rev. Stat. Ann. tit. 19 § 1653(7)(C) (2013); Me. R. Civ. Pro. r. 66(c)).

under a parenting order.[112] Admittedly, if parents have little in the way of assets or income, the threat of economic sanctions may have little meaning under section 1653(7)(C). But that should not be the threshold criterion with parents who do have the resources to litigate, hire experts, and engage in iterations of self-help modification of an established court order.

The hypothetical, however, raises the classic dilemma that banks may not experience. By the time a parenting violation case gets to hearing in Maine, the chambers conference may go like this with the lawyer whose client ignored the order saying: "Well, judge too much time has passed and [insert the rest of the justification], so it is best for the child to have visitation over the next six months with a supervising therapist who can then decide when unsupervised access should occur since it was not my client's fault this took too long to get to a hearing." The judge then says, "we must look forward not backwards for the child's emotional well-being so your client needs to stop focusing on the past, so what therapist can you find to do this work? Any sanctions can be considered at a final hearing, of course. And make sure that your client knows that no more interference will be tolerated"[113]

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112 There is, however, some emerging research that suggests that reducing or restricting contact may worsen emotional risk to the child absent other interventions. *See* Aurelie M.C. Lange et al*., Parental Conflicts and Posttraumatic Stress of Children in High-Conflict Divorce Families*, 15 J. Child & Adolescent Trauma 615, 623 (2022) ("The current study further suggests that professionals need to carefully observe the relationship between the interparental contact frequency and the parental conflicts within each family. Although reducing contact may be a strategy to reduce conflict, we found that low contact was actually related to high levels of conflict.").

113 This request is often labeled as "reunification therapy." *See* Benjamin D. Garber, *Cognitive-Behavioral Methods in High-Conflict Divorce: Systematic Desensitization Adapted to Parent–Child Reunification Interventions*, 53 Fam. Ct. Rev. 96, 103 (2015) ("The research around efficacy and protocols remains to be studied and is not a one size fits all approach assuming that there is a professional properly trained. Approaching court-ordered reunification as a mutual, parallel exercise in desensitization within the context of a larger family therapy has thus far proven far more promising."); April Harris-Britt et al., *One Size Really Does not Fit All: The Importance of Incorporating Culturally Relevant Adaptations in Reunification Therapy*, 59 Fam. Ct. Rev. 673, 673 (2021) ("There is an overall dearth of literature related to effective clinical interventions for families engaged in high-conflict custody disputes who ultimately are referred for parent–child reunification or reparative therapy. As for the research in which specific programs or protocols are evaluated, case studies, clinical observations,

It is true that the best interests of the child should be considered when looking at interventions, especially when there is IPV or other risks. The question is what to do about the past self-help that may have created the current estrangement and will discourage that behavior in the future. In *Hogan v. Veno*,[114] the Law Court reminded trial courts that futility is not an answer when a parent renders an established court order a nullity:

> At the conclusion of the hearing, the court expressed its opinion that based on the judge's own experience, there was nothing it could do to change Hogan and that it would accept Hogan as she is. This premise fails to account for the fact that Hogan had never been subjected to the threat of coercive imprisonment during the years that she had refused to comply with the 2002 judgment. Without the history of a party's prior failure to respond to the threat or imposition of coercive imprisonment or an expert opinion that a party's psychological make-up renders her immune to the effects of a coercive remedy, the finding that Hogan will never respond to the same rests on nothing more than conjecture. Moreover, by informing Hogan that the court did not expect her to change, and then ordering relief that enables Hogan to avoid any change, the court's use of coercive imprisonment as a contempt remedy was rendered a nullity.[115]

The core legal point, as the Law Court reasoned after *Hogan*, is that "zero" compliance (or very *de minimus* at best when analyzed over time frames for children) is not a legitimate defense for violating court orders. Although a parent cannot be held in contempt when compliance is impossible, the ability to comply with a court order is "not an all or nothing proposition," but a parent "must comply to the fullest extent possible, regardless of whether such efforts result in compliance in whole or in part."[116]

Although section 1653(7) is often underutilized, it is an explicit policy that fits the overarching and beneficent policy of 19-A Maine Revised Statutes § 1653(1)(C) and other states' best interests standards:

> The Legislature finds and declares that, except when a court determines that the best interest of a child would not be served, it is the public

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and qualitative studies are dominant, with few randomized controlled trials or other empirical research.").

114 909 A.2d 638 (Me. 2006).

115 *Id*. at 648 (emphasis added).

116 Murphy v. Bartlett, 86 A.3d 610, 614-15 (Me. 2014) (citations omitted and emphasis added).

> policy of this State to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.[117]

This policy of enforcement is not without its limits as any remedial sanctions must still fall within the ambit of the relevant best interest factors under Maine Revised Statutes title 19-A § 1653(3).[118] The difference, however, is that self-help and delays in enforcement by the structure of the judicial system are also not in the best interests of children. As courts have noted for generations, "justice delayed, is justice denied" when the lack of serious enforcement gradually erodes the parent-child relationship and renders an established a parenting order a nullity.[119]

V. Conclusion

A lawyer does not have to be a political philosopher to accept the argument that history is a dialectic and that the metaphorical pendulum can, and will, reset itself in time. Articles I and III may be museum pieces with those little labels listing the date of demise, the date of exhumation, and the derogatory and profane names each was called as an institution or as elected or appointed federal officers. It may take longer to derogate family state courts through violence and fear because this metaphorical rush up the courthouse stairs will require shifting that portion of the public's attention to additional and more local grievances and a sense of conspiracy that "their" rights are being "taken" by "them."

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117 Me. Rev. Stat. Ann. tit. 19-A, § 1653(1)(C).

118 *See, e.g.*, Bergin v. Bergin, 214 A.3d 1071, 1073 (Me. 2019) ("In particular, the court found that Nancy's persistent and unrelenting efforts to prevent the children from having a healthy relationship with their father outweighed other factors regarding the children's best interests. The record supports the court's finding that, despite a previously 'strong relationship' with Daniel, the children were left without a meaningful relationship with their father as a result of Nancy's interference, frequent moves, and refusal to allow and support regular contact between the children and Daniel. The court's thorough and thoughtful findings regarding the best interests of the children reflect an appropriate application of the legislatively established policy encouraging children's connections with both parents.").

119 *See* Hyde v. Irish, 962 F.3d 1306, 1309 (11th Cir. 2020).

Parenting court orders are a visible manifestation of much more than mere legal rhetoric to be parsed in law reviews and blogs. Court orders represent the binding outcomes of disputes between parties who enter (voluntarily or not) the courthouse portal.[120] Court orders are the tangible representation of the social contract conferring power on the government to protect children in a civilized society that may prefer non-violent solutions.[121] If trial judges cannot expeditiously and predictably enforce orders, and the thick bureaucracy of the judicial branch in collaboration with the legislative and executive branches, creates barriers to effective and meaningful enforcement, then the consequences may be public smirks and puerile name-calling which may, eventually, leaves a hollow judiciary.[122]

Collaborative reforms, however, between the legal profession, stakeholders, and the judicial, legislative, and executive branches of state government do not appear on any time horizon in this metaverse. This "policy drift"[123] is a function of *realpolitik*. At this

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120 *See* Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 13 (1987) (citations omitted) ("Our comments on why the contempt power was sufficiently important to justify abstention also are illuminating: 'Contempt in these cases, serves, of course, to vindicate and preserve the private interests of competing litigants, . . . but its purpose is by no means spent upon purely private concerns. It stands in aid of the authority of the judicial system, so that its orders and judgments are not rendered nugatory.'"); Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 Chap. L. Rev. 57, 57 (1998) ("An adversary system resolves disputes by presenting conflicting views of fact and law to an impartial and relatively passive arbiter, who decides which side wins what.").

121 This is not a suggestion for AI models to resolve child custody matters, although researchers are studying versions of that. *See* Soro Munoz et al., *A Model for Predicting Court Decisions on Child Custody*, 16 PloS One e0258993 (2021).

122 In an interesting and thoughtful article applying Friedrich August von Hayek's theory of law and liberty to contemporary family law, the author wrote that, "Hayek's framework of law and liberty requires judges to subordinate their own normative preferences to a single overriding end: maintaining the legal order itself. While spontaneous ordering through the evolution of customary rules is indispensable, enacting these changes is the province of politically accountable legislators. Judicial coercion through unpredictable particular judgments must be avoided. As Hayek artfully put it, 'the judge cannot be the vanguard.'" Jackson Neagli, *Hayek Goes to Family Court*, 133 Yale L.J. F. 802, 817 (2023-2024).

123 Ursala Hackett, *Litigating Policy Drift: Frozen Categories and Thresholds in Court*, Persp. on Pol. 1, 2 (2023), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/384CA41F0DAEEFBD57EFBE6E7A470392/

time, there appears no visible constituency with the political will and security to generate sustained change or that is even allowed "in the room"[124] to foster that change.

It is easy enough to mythologize the judicial process, from filing a motion to the entry of a written judgment applying complex and arcane rules of evidence (written and unwritten). The deeply embedded propositions, that trial-by-combat protects basic rights of due process (notice and the opportunity to tell one's side), is still critical to that myth, and hinges on the perception that a court order is a logical act of power and authority.[125] This myth also assumes that parties have equal economic resources to gather and translate evidence, that judges have the same resources and time that corporations receive in other federal and state judicial systems, and that experts apply a uniform understanding of social science.[126] The matrix of these assumptions yields an entailment: a

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S153759272300292Xa.pdf/div-class-title-litigating-policy-drift-frozen-categories-and-thresholds-in-court-div.pdf a ("Drift occurs where policies are rigid but the economic, social, and political environment changes.").

124 *See The Room Where It Happens*, Hamilton: The Musical, https://www.allmusicals.com/lyrics/hamilton/theroomwhereithappens.htm (last visited Apr. 15, 2024).

125 *See Citibank, N.A.*, 2024 ME at ¶8 ("'[T]he fundamental requirement of due process is that a party must be given notice and an opportunity to be heard. The notice and opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." This fundamental requirement necessitates "an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right which the particular pertinent constitutional provision purports to protect.'") (citations omitted).

126 The challenge of finding relevant and reliable social science data to assist judges with fact finding remains complex. *See* Phoebe C. Ellsworth & Robert J. Levy, *Legislative Reform of Child Custody Adjudication—An Effort to Rely on Social Science Data in Formulating Legal Policies,* 4 Law & Soc'y Rev. 167, 210 (1969) ("There is, of course, no reliable data to support the claim that custody dispositions aided by such nonadversary methods are in fact sounder; nonetheless, such methods have been widely adopted and will undoubtedly find increasing acceptance in the future."); Neil A. Lewis Jr., *What Counts as Good Science? How the Battle for Methodological Legitimacy Affects Public Psychology*, 76 Am. Psychol. 1323, 1323 (2021) ("The discourse during the pandemic was the latest manifestation of a longstanding battle over methodological legitimacy: a battle within the field over which approaches 'count' as valid methods of inquiry for generating knowledge about people's thoughts, feelings, and behaviors."); Lawrence W. Sherman, *Misleading Evidence and Evidence-Led Policy: Making Social Science More Experimental*, 589 Ann. Am. Acad. Pol. & Soc. Sci. 6, 8-9 (2003) ("Far more important for the logic of science is the distinction between

judge can discern the "truth" about a family system and the future needs of children based upon rational and equitably available adversarial agency and actions. The many logical contradictions and fallacies that connect these propositions have been well known to the legal profession and scholars for centuries.[127]

Child custody cases still occur in a very rule and outcome-based environment, not a laboratory or classroom, and certainly, despite some good intentions, not in a collaborative and non-blame/shame environment. For decades, therefore, the adversarial system, by intentional design, is where family law cases live, with disclosure of intimate details in a public forum, while aggravating pre-existing emotional, economic, and environmental vulnerabilities. In the context of this judicialization, the prominence and frequency of family litigation between private parties exists in a complex network of laws connected (with varying degrees of precision) to resolving the ordering of lives through public courts. As demographics and social and political realities establish new "normals," parent and child relationships will increasingly be caught in the "sticky web" of the state judicial system and its adversarial environment.[128] This social and legal reality is now deeply embedded in the state judicial market. The implications of dependency on this system to order lives over generations may portend the lessening of the

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systematic versus unsystematic methods of data collection and analysis. Both quantitative and qualitative research can be conducted in unsystematic ways, producing misleading evidence about the conclusions the study reaches concerning the sample of data collected and misleading claims about how far the conclusions may be generalized to other populations.").

127 *See, e.g.,* Jack Jackson, Law Without Future: Anti-Constitutional Politics and the American Right 118 (2019) ("On the one hand, the law is a tutor, a guide, a gentle braker; on the other, the law is the master, a foe, a domination."); Thane Rosenbaum, The Myth of Moral Justice: Why Our Legal System Fails To Do What's Right 154 (2004) ("Courthouses are stages where life gets played out in miniature, but life is a drama that simply cannot be staged.").

128 Theunis Roux, *American Ideas Abroad: Comparative Implications of US Supreme Court Decision-Making Models*, 13 Int'l J. Const. L. 90, 98 (2015) ("The comparative implications of this conception of the constraining capacity of law are clear: if fidelity to law is to have any purchase as an explanation for constitutional court decision-making, the court under examination would need to be operating in a relatively mature legal tradition in which institutionalized norms of legal reasoning have had time to develop, and where multiple decisions over numerous years have created a sticky web of shared legal-cultural values.").

private right and freedom to solve problems and, derivatively and perhaps irretrievably, cause forfeiture of family agency.

Even within a myth, the right of individual self-determination and personal autonomy regarding rights and duties to children, is not something that can be lost without consequence. The ever-invasive presence of fueled grievances impairs critical problem-solving skills and civility in a society. If a growing segment of family systems cannot organize themselves without enforcement and modification of court orders, then parenting plans have a crucial role in the orderly protection of children. Contempt sounds harsh, as it should, but the purpose of the judicial function of contempt is protection of the institutions and the rights and responsibilities distributed by a constitutional branch of government.[129] What is a much worse outcome is if, and when and if, the public that sees little value in participating in a judicial process, that talks tough, but which supports violations of court orders by delay and the absence of concrete action. As Professor David Saunders argued concerning centuries of tension between religion, lawyers, and the legal-administrative systems, we need to learn if "this is just a passing scuffle or a far more longstanding conflict whose effects remain to be seen."[130]

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129 As with many areas of sanctions imposed in criminal or civil courts, there is some research, but measurement is so highly variable due to different legal systems and variations on the quality of lawyers, judges, and experts, and the effect of poverty and race, among other moderating or mediating, or confounding variables. *See* Carlo Vittorio Giabardo, *Disobeying Courts' Orders—A Comparative Analysis of the Civil Contempt of Court Doctrine and of the Image of the Common Law Judge*, 10 J. Civ. L. Stud. 35, 53-54 (2017) ("The use of contempt is less driven by efficacy than mandating judicial authority. I believe, in other words, that there is a sort of correspondence, a connection, or at least an influence, between the, so to say, 'zero tolerance' for disobedience with judicial orders (well expressed by the civil contempt of court doctrine) and the symbolic image, or the 'social perception,' of common law judges. Basically, while in common law jurisdictions judges are characterized by a high social prestige, and the judiciary function is strongly 'personalized,' on the contrary, in continental legal culture, judges are essentially seen as de-personalized, anonymous, bureaucratic figures that completely lack that 'paternal authority' that characterizes their common law counterparts.").

130 Saunders, *supra* note 19, at 141.