No. 08-6261

IN THE

Supreme Court of the United States

JOHN ROBERTSON,

Petitioner,

v.

UNITED STATES *ex rel.* WYKENNA WATSON,

Respondent.

On Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF FOR *AMICI CURIAE* FAMILY LAW JUDGES, PRACTITIONERS & SCHOLARS IN SUPPORT OF RESPONDENT

Yisroel Schulman
Kim Susser
C. Brandt-Young
Tanya Guerrero
NEW YORK LEGAL ASSISTANCE GROUP
450 West 33rd Street
New York, New York 10001
(212) 613-5000

Evan A. Davis*
Ebunoluwa Taiwo
Nathaniel E. Jedrey
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000

Counsel for Amici Curiae

March 8, 2010

* *Counsel of Record*

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INTEREST OF *AMICI CURIAE*

Amici Curiae are nonprofit legal service organizations practicing family and matrimonial law, private family and matrimonial attorneys, law professors, law school clinical programs, and former judges with wide experience in family and matrimonial law (hereinafter referred to as family law) as it is practiced across the fifty states and across an economically and culturally diverse population. Practitioner and judicial *amici* are familiar with how orders in the family law context are fashioned and how they operate in practice. Academic *amici* have conducted years of scholarly research on this area of the law. *Amici* are well positioned by reason of their training, research and experience to address the importance of preserving the ability of judges and the parties to family disputes to enforce civil court orders through criminal contempt without having to obtain the participation of prosecutors, whether governmental or specially appointed private persons. All *amici* have an interest in ensuring the Court is fully and accurately informed about the day-to-day realities in family courts as well as the scholarly research surrounding the issues at hand.[1]

[1] Names and Statements of Interest of the individual *amici* are set forth in Appendix 1. Letters consenting to the filing of *amicus curiae* briefs are on file with the Clerk of the Court. No counsel for a party authored the brief in whole or in part and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus curiae* or their counsel made a monetary contribution to its preparation or submission.

QUESTION PRESENTED

Whether an action for criminal contempt in a congressionally created court may constitutionally be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States?

SUMMARY OF THE ARGUMENT

The private pursuit of criminal contempt by an interested party is of critical importance in family disputes because of the equitable responsibility of courts issuing such orders in their affirmative role of protecting children; the character of the orders such a court issues, including their mandatory nature, their duration, and their requirement of on-going compliance; and the emotional forces often driving those to whom they are directed. At times, civil contempt is simply not enough to vindicate a court's authority and protect the legally recognized rights of the beneficiary of the order in addition to the public interest in enforcement of particular orders. Moreover, government prosecutorial resources are insufficiently available to achieve adequate compliance with voluminous family law orders whose enforcement falls outside the organizational focus of a governmental prosecutor and the alternative of appointing a private disinterested prosecutor is neither necessary nor viable. In light of the foregoing, there is no reason to extend the requirement in *Young*[2] of a disinterested prosecutor to family law disputes.

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[2] *Young v. U.S. ex. rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804 (1997).

ARGUMENT

I. PERMITTING PUNITIVE SANCTIONS IN PRIVATELY LITIGATED CONTEMPT ACTIONS IS NECESSARY TO THE ADEQUATE ENFORCEMENT OF FAMILY LAW ORDERS

Civil contempt alone is an insufficient remedy to vindicate the interests either of courts or of litigants in the enforcement of orders relating to family law. This reality is reflected in the practice of numerous states, the historical underpinnings of the judiciary's affirmative role to protect children, and the nature of the judicial process in these matters. The private pursuit of criminal contempt allows for the enforcement of court orders which would otherwise be ignored. A constitutional bar to such suits would negatively impact the public interest as well as the private interests of often vulnerable parties. It would also frustrate the development of effective approaches to cases involving family dysfunction that may require punitive enforcement, and the credible threat thereof, to achieve the court's behavior-altering objective.

A. The Duty of the Court to Protect Children's Welfare Makes Enforcement of Such Orders of Particular Public Import

Family courts in the United States trace their history to England's Chancery Courts. During the mid-eighteenth century, the Chancery Court obtained exclusive jurisdiction over matters

involving children.[3] The Chancery Court exercised *parens patriae* jurisdiction over children, a power it derived from the Crown's interest in protecting those who had no legal rights.[4] United States Courts have long acknowledged that States have a "traditional and transcendent interest in protecting the welfare of children."[5]

Orders in family law matters often relate to the welfare of children. These orders demonstrate that the judiciary takes responsibility for outcomes in the family law context and does not merely play the role of the "neutral adjudicator" referenced in *Young*.[6] This affirmative and protective role makes the ability of the court to achieve compliance with its orders in this area of particular public importance.

The consequences of flouting court orders related to children—whether for child support, for appropriate educational placement or for protection against an abusive parent or guardian—are especially serious and irreparable. And, if there are children in the family, almost every order in the

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[3] Danaya C. Wright, *The Crisis of Child Custody: A History of the Birth of Family Law in England*, 11 Colum. J. Gender & L. 175, 189 (2002); 4 Joseph Story, *Commentaries on Equity Jurisprudence, As Administered in England and America* 637-38 (13th ed. 1886).

[4] John Seymour, *Parens Patriae and Wardship Powers: Their Nature and Origins*, 14 Oxford J. Legal Stud. 159 (1994); Wright, *supra* note 2, at 189.

[5] *See, e.g.*, *Maryland v. Craig*, 497 U.S. 836, 837 (1990) (citations omitted).

[6] *Young*, 481 U.S. at 816.

family law context will affect the welfare of those children. For example, determining which parent will foster the child's education, religious upbringing, and physical and emotional growth are all decisions that impact the child's welfare, and are reduced to written orders. The judge is the only government actor with supervisory and monitoring responsibilities over the many actors with duties to children, including both institutional participants such as child protective and foster care agencies as well as individual parents and guardians.

B. Because of their Nature and Duration, Some Family Law Orders May Be Impervious to Civil Contempt

The family law context typically requires the court to manage family relationships over an extended period of time and in considerable detail. Child support, visitation, and custody orders can last until children reach the age of 18 or 21, or in the case of spousal support, until a former spouse dies or remarries. These orders, moreover, most often require repeated conduct, which results in weekly or monthly opportunities for violation. Those violations may be persistent and have significant negative effects on the whole family, yet be impervious to civil contempt. This problem can be exacerbated by family dysfunction.

1. Custody and Visitation Orders

Violations of custody and visitation orders are sometimes impervious to civil contempt remedies

as they are often cured after damaging non-compliance but before the other parent can take the matter to court. For instance, a parent may repeatedly and consistently return children several days late from overnight visitation,[7] causing the children to miss vital school time, and causing the other parent, and likely the child, significant anxiety. A father who consistently drank alcohol during his visitation with his son is another example. Despite repeated admonishments by the court his drinking continued until caught on tape by a private investigator. It was only after spending five days in jail that he finally stopped drinking during his visits.[8]

In these kinds of situations "by the time the injured parent seeks judicial relief, the children are 'where they should be' under the terms of the parenting plan. In these circumstances, the current imposition of a fine or jail sentence cannot, as a practical matter, be used by the court to coerce the compliant behavior that has already occurred."[9] Suspension of visits as a remedy is generally undesirable because it punishes the children as much as the recalcitrant parent, and supervision of visitation

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[7] *See*, *e.g.*, *Wilson v. Freeman*, 402 So. 2d 1004, 1007 (Ala. Civ. App. 1981), *infra* note 10.

[8] Email exchange with Elizabeth Green Lindsey of Davis, Matthews and Quigley P.C. (Feb. 23, 2010) (on file with NYLAG).

[9] Margaret M. Mahoney, *The Enforcement of Child Custody Orders by Contempt Remedies*, 68 U. Pitt. L. Rev. 835, 868 (2007).

may be prohibitively expensive or inappropriate for older children. Several courts have concluded that criminal contempt remedies are the most effective ones for ongoing violations of these types of orders.[10]

Persistent violations of visitation orders are also impervious to compensatory remedies, another reason criminal contempt, while rare compared to the overall number of violations, is so important in this arena. "In many cases, an injunctive order was entered in the first place because the individual rights protected by the order could not be easily quantified or protected by a monetary award."[11]

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[10] *See*, *e.g.*, *Bruzzi v. Bruzzi*, 481 A.2d 648 (Pa. Super. Ct. 1984); *Fields v. Fields*, 240 S.E.2d 58, 60 (Ga. 1977) ("With respect to short periods of visitation the most practical means of enforcement is by use of criminal contempt as the visitation time period has usually expired before the court can act."); *Wilson v. Freeman*, 402 So. 2d at 1007 ("There is a serious question as to whether a *civil* contempt proceeding is an effective remedy for the violation of visitation rights.") (emphasis added); *Boggs v. Boggs*, 692 N.E.2d 674, 678 (Ohio Ct. App. 1997) ("[W]e believe that the court found appellant in criminal contempt for his 'repeated and blatant' exposure of the children to his paramour. Because . . . there is no way to purge past violations of said order, we believe that the court did not err in failing to provide a purge mechanism . . . ."); *In re Marriage of King*, 721 P.2d 557, 559 (Wash. Ct. App. 1986) ("It may be argued that the remedies afforded by the civil contempt statute are inadequate in this [visitation violation] case. . . . We recognize the potential for an individual so inclined, to frustrate the authority of the court, particularly if she is given repeated opportunities to purge the contempt in spite of previous disobedience of the court's lawful orders.") (dicta).

[11] Mahoney, *supra* note 9, at 872.

There is no clear way to calculate actual damages for the children's educational and social losses because of missed school time.[12] Monetary awards may be of limited deterrence to a person of limited means to pay a judgment while a person of substantial means may well be willing to bear the risk of repetitive litigation knowing the burden that such litigation imposes on the aggrieved party.

2. Child Support Orders

In this very case, the court below noted that in the District of Columbia a comparable regime for party-initiated criminal contempt enforcement of child support orders parallels the order of protection regime directly at issue here.[13] By statute, the District allows "[t]he Mayor or a party who has a legal claim to child support" to initiate a criminal contempt action for failure to pay the support by filing a motion in the civil action in which the support order was established.[14] Thus, if this Court bars party-initiated criminal contempt actions as

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[12] There is much social science research attesting to the negative impact of children missing school—either because a parent kept the child beyond a visitation date by which he was supposed to be returned or because of an inconvenient foster care placement. Jane Sundius & Molly Farneth, *Missing School: The Epidemic of School Absence* (Open Society Institute-Baltimore 2008), *available at* http://www.soros.org/initiatives/baltimore/articles_publications/articles/truancy_20080317/whitepaper1_20080919.pdf.

[13] *In re Robertson*, 940 A.2d 1050, 1058 (D.C. 2008).

[14] D.C. CODE § 46-225.02 (2009).

an enforcement tool for orders of protection it will be barring enforcement of child support orders as well. This would be highly unfortunate because the need for criminal enforcement of child support orders without the intervention of government or specially appointed prosecutors is compelling.

As detailed in Section II, States are unable to collect vast amounts of unpaid child support despite the financial incentives offered by Congress. The sheer amount owed indicates numerous ongoing violations of orders and thus the need in some of these cases for the use of criminal contempt.[15]

Delay in the payment of child support can lead to irreparable injury to children. For example, an eviction that results from lack of receipt of child or spousal support can cause young children to lose not only their home, and the permanence and stability it brings, but potentially a change in schools and, in the confusion of crisis, the loss of personal belongings—a favorite teddy bear or security blanket—that can never be replaced. In this context, when orders may require payments for years, a nonpayor may fall into a habit of late

[15] *See also Missouri ex rel. O'Brien v. Moreland*, 778 S.W.2d 400, 406-07 (Mo. Ct. App. 1989) ("If the offending party has assets, a civil contempt action *may* be sufficient to encourage obedience of the court's decree. When the offending party is indigent, civil contempt proceedings are virtually meaningless. Indirect criminal contempt proceedings, including the authority to incarcerate, gives the trial court the power to enforce its order.") (emphasis added).

payment or payment only after repeated court threats. The purpose of criminal contempt remedies—whether by fines paid directly to the court or by additional jail time—in such a situation is to move the nonpayor into future compliance through the realization that such behavior will have serious consequences.

Enforcement of other financial orders in matrimonial actions is similarly difficult and also in need of the remedy of criminal contempt. The New York State Courts Matrimonial Commission reported in 2006 that enforcement of orders in divorce cases was among the areas most in need of reform.

> [T]he Commission urges a change in the rules and substantive law pertaining to the enforcement of court orders. The Commission heard substantial testimony from litigants, attorneys and the judiciary that non-compliance with court orders largely contributed to the increased delay and cost of divorce. Moreover, the litigation process can be delayed or stymied by one party's refusal to cooperate in the process. To ameliorate the deleterious effects of one's failure to comply with court orders . . . the Commission . . . recommends that Domestic Relations Law § 245 be amended to provide Supreme Court judges with the same authority to enforce orders by [criminal] contempt now enjoyed by Family Court judges.[16]

[16] State of New York Unified Court System Matrimonial Commission, *Report to the Chief Judge of the State of New*

In short, criminal contempt, while rare, is an indispensible tool for judges in family matters to enforce their orders.

C. A Disproportionate Number of Family Law Litigants Are Highly Willful Actors Driven by Strong Emotion and Therefore Are Not Responsive to Civil Contempt Remedies

The intensely interpersonal subject matter of family law actions, perhaps more consistently than any other area of law, leads litigants to sacrifice their own financial interests and liberty in favor of other considerations. Emotions, either well-meaning or based on vindictiveness, cause some litigants to ignore family law based orders. Reminding litigants of the possibility of punishment is an important judicial tool for deterring violations.

Most importantly, the plight of the family law judge, who often must deal with dysfunctional family relationships and who is seeking a problem-solving, behavior-altering result in the most trying of circumstances, deserves sympathetic attention. By necessity, the family law judge bears the special burdens of enforcing not only prohibitory but also mandatory injunctive relief. That judge needs to be able to say: "Next time you come into this court

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York (2006), *available at* http://www.courts.state.ny.us/reports/matrimonialcommissionreport.pdf (citing N.Y. Fam. Ct. Act § 454, which in subsection 3(a) gives N.Y. Family Court judges the power to imprison willful violators of child support orders for up to six months).

having violated my order, you had better bring your toothbrush." That direct threat and its deterrent value is not achieved by threatening to call the prosecutor or to appoint a private person as a special prosecutor. Street knowledge that the prosecutor lacks the resources and/or interest, and that the Court lacks the funds to compensate the special prosecutor, will render the Court's words entirely hollow.

Punishment of actors through criminal contempt also has the positive effects of expressing society's disapproval and sending a deterrent message to others, regardless of whether the contemnor himself is moved.

The distorted motivations for litigation of some parties to family law cases have a significant impact on the number of family law cases that are brought.

> Studies of custody disputes indicate that fathers who battered the mother are twice as likely to seek sole physical custody of their children than are nonviolent fathers, and they are more likely to dispute custody if there are sons involved. . . . [T]hey are likely to continue to threaten and harass the mother with legal actions. Battering fathers also are three times as likely to be in arrears in child support and are more likely to engage in protracted legal disputes over all aspects of the divorce.[17]

[17] American Psychological Association Presidential Task Force on Violence and the Family, *Violence and the Family* 40 (1996).

Parties with vindictive motives are more likely to bring affirmative suits of their own and to be in violation of court orders, resulting in the need for more enforcement actions. While this is arguably true in any area of law, when manifested in family law, which produces multiple orders requiring repeated, affirmative conduct over long periods of time, the intransigent family litigant has the opportunity to cause dramatically more need for the court's enforcement powers than a similar litigant in a different area of law. Every enforcement tool needs to be available, including criminal contempt.

Child support, as already noted, is a particular area in which states have found it necessary to develop more aggressive enforcement mechanisms, including criminal statutes and the increased use of judicial contempt.[18] In this context, the issue of circumvention is also present. In *United States v. Ballek*, the Ninth Circuit held that the federal Child Support Recovery Act is equally violated by "refusal to work . . . motivated by sloth, a change of lifestyles or pursuit of new career objectives."[19]

The failure to effectively enforce child support can also have collateral consequences in an

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[18] Teresa A. Myers, *National Conference of State Legislators, Case in Brief: Courts Uphold Criminal Penalties for the Failure to Pay Child Support* (1999), *available at* http://www.ncsl.org/IssuesResearch/Human Services/CaseinBriefCourtsUpholdCriminalPenaltiesfo/tabid/16445/Default.aspx.

[19] 170 F.3d 871, 875 (9th Cir. 1999).

emotionally charged family law arena. Child support issues that are not firmly addressed can escalate. Seeking child support often prompts violence and retaliatory filings of child custody or visitation petitions.[20] Courts have recognized this dynamic of escalation and developed responsive protocols.[21] Congress has also recognized the potential for retaliatory violence as a basis for the promulgation of the Family Violence Option ("FVO") in 1996.[22] The FVO allows states to exempt battered women from many of the requirements of Temporary Assistance for Needy Families ("TANF"), including the obligation to identify the father to facilitate a State child support action.[23]

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[20] Judy Reichler & Liberty Aldrich, *Child Support Protocol: A Guide for Integrated Domestic Violence Courts* 1, 6-7 (Center for Court Innovation 2004); Nisha Patel & Vicki Turetsky, *Safety in the Safety Net: TANF Reauthorization Provisions Relevant to Domestic Violence*, 1-2 (Center for Law and Social Policy year 2004), *available at* http://www.clasp.org/admin/site/publications_archive/files/0167.pdf; American Psychological Association Presidential Task Force on Violence and the Family, *Violence and the Family* 39 (1996).

[21] Reichler, *supra* note 20.

[22] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (*codified as amended at* 42 U.S.C. § 602(a)(7) (1999)).

[23] Shriver Center on Poverty Law, *"WomanView"* Vol. 11, Issue 12, May 21, 2008.

II. GOVERNMENT RESOURCES ALONE ARE INSUFFICIENT TO PROVIDE NECESSARY CRIMINAL CONTEMPT ENFORCEMENT OF FAMILY LAW ORDERS

A. The Sheer Number of Family Law Cases Militate in Favor of Private Enforcement of Those Orders

Family law has broad application and family law disputes are likely unique in their pervasiveness. By 1985, every state but New York allowed for no-fault divorce. That has meant an increase in the number of divorces and an increase in the number of adults and children who are party to litigation involving family law.[24] In addition, divorce cases are highly likely to produce further litigation after the divorce is over. In one study of divorcing families in Massachusetts, 41% of the families with children in the study had returned to court to ask for modification or enforcement of some aspect of the court's financial, custody, and visitation decisions within two years of the divorce becoming final.[25]

An examination of data from a few states demonstrates the significance and impact of family law cases on states' trial court dockets. In Maryland, nearly forty-six percent (127,974)

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[24] Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 Ind. L.J. 775 (1997).

[25] Amy Koel *et al.*, *Patterns of Relitigation in the Postdivorce Family*, 56 Journal of Marriage & Family 265, 269 (1994).

of the 278,511 total filings in the trial court of general jurisdiction involve family and juvenile cases. In Nebraska, family law cases amount to fifty-eight percent of the state's total trial court caseload. In Nevada, forty-nine percent of the statewide trial court caseload involves family-related cases.[26] In 2008, 190,075 custody/ visitation petitions, 305,954 support petitions, and 54,569 family offense petitions were filed in New York City alone.[27]

The high percentage of civil litigation consisting of family law matters, combined with the high number of mandatory orders that family cases produce, results in an extraordinary number of orders that must be enforced. While only a small percentage of those cases will require criminal contempt remedies, because of the high proportion of civil litigation composed of family law, the number of such cases in absolute terms will still be significant. There simply are not enough resources at the state level to provide appropriate and needed criminal enforcement if private litigants are foreclosed from doing so.

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[26] Barbara A. Babb, *Reevaluating Where We Stand: A Comprehensive Survey Of America's Family Justice Systems*, 46 Fam. Ct. Rev. 230 (2008) (footnotes omitted).

[27] New York State Unified Court System Annual Report 2008, *available at* http://www.courts.state.ny.us/reports/ annual/pdfs/UCSAnnualReport2008.pdf.

B. Even Where Public Resources Have Been Allocated, Child Support Enforcement is Abysmal

The failure of State and local governments to initiate necessary criminal contempt proceedings to enforce family court orders is evidenced by the astronomical amount of child support arrears owed nationwide.[28] Recognizing that child support is "not an area of jurisprudence about which this country can be proud," Congress, in 1975, passed Title IV-D of the Social Security Act.[29] In passing this legislation, Congress noted that thousands of unserved child support warrants had accumulated in many jurisdictions where traffic infractions often were given higher priority than support cases. Under Title IV-D, the states must comply with federal guidelines regarding child support; the penalty for noncompliance is the reduction or termination of federal matching funds.[30] In 1992, over five billion dollars in child support were still going unpaid in the United States, forcing Congress

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[28] U.S. Department of Health and Human Services, Administration for Children and Families, Office of Child Support Enforcement, *Fiscal Year 2006 Annual Report to Congress* (2006), *available at* http://www.acf.hhs.gov/programs/cse/pubs/2009/reports/annual_report (hereinafter, "Office of Child Support Enforcement FY 2006 Annual Report to Congress").

[29] Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(A), 88 Stat. 2337 (1975).

[30] Lisa Stamm, *Section 1983 And Title IV-D Of The Social Security Act: In Pursuit Of Improved Child Support Enforcement*, 60 U. Cinn. L. Rev. 221, 222 (1991).

to enact the Child Support Recovery Act.[31] And in 1998, the Deadbeat Parents Punishment Act creating additional federal crimes was enacted in a further attempt to ameliorate the problem.[32]

The federal Office of Child Support Enforcement was created with the goal of remedying the dearth of enforcement of child support orders for recipients of public assistance by funding state agencies that, among other things, establish support obligations and collect support payments from individuals.[33] Yet, despite the federal allocation of funds specific for this purpose, the enforcement rate for child support is abysmal.[34] As of September 2006, States reported that the total national unpaid child support debt that has accumulated since the program began in 1975 is $105 billion."[35] In California, the amount of arrears owed in fiscal year 2006 was a staggering $19,187,770,046; in Texas it was $9,260,200,751; and in Florida it was $5,128,716,969.[36] In the past twenty years nearly half of the state courts and 11 federal circuit courts of appeal have heard cases

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[31] Pub. L. No. 102-521, 1992 U.S.C.C.A.N. (106 Stat. 3403) 2909.

[32] Pub. L. No. 105-187, 112 Stat. 618-619 (1998).

[33] Social Services Amendments of 1974, § 101(A).

[34] *See* Office of Child Support Enforcement FY 2006 Annual Report to Congress.

[35] *Id*.

[36] *Id*.

regarding criminal violations of child support orders.[37]

Indigent litigants make up a large percentage of contemnors; however, as discussed above, there are many high net worth individuals who do not pay.[38] *Amici* have seen numerous examples of judges, high profile attorneys, doctors, and other professionals who go to great lengths to avoid paying support orders.

A bar to private criminal enforcement mechanisms of child support orders would, due to the magnitude of the arrears, call for a vast increase in public resources and this increase is highly unlikely to be forthcoming.

C. Appointment of an Independent Private Special Prosecutor is Neither Necessary nor Viable

The appointment of an independent private prosecutor is not a viable solution. State and local governments that lack the resources to assign the requisite number of government prosecutors to these cases will *a fortiori* lack the resources to compensate private independent prosecutors. State courts have pointed out that, unlike the federal system, no funds at the State level compensate private counsel appointed to prosecute criminal

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[37] *Id.*

[38] *See* Elaine Sorensen *et. al.*, *Assessing Child Support Arrears in Nine Large States and the Nation*, The Urban Institute (July 11, 2007).

contempt actions.[39] The *Moreland* court also indicated that "[t]he potential for criminal contempt charges to arise in the State court system is far greater that in the Federal system," particularly in the context of family law cases that will most likely be handled by the states.[40] Requiring additional or substitute procedures would therefore impose "tremendous fiscal and administrative burdens" on the states, something a number of courts have been unwilling to do.[41]

Moreover, referring criminal contempts to an independent public or private prosecutor undermines the trial court's interest in compliance with its own orders because the referral creates delay and uncertainty. Family law judges should have the opportunity to apply the commonly accepted premise of criminal justice that punishment is more effective when imposed swiftly and consistently.

Judges are therefore more likely to deter violations of repetitive orders like visitation schedules and child support by using swift, certain punishment for violation of those orders when

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[39] *Gordon v. Florida*, 960 So. 2d 31, 40 (Fla. Dist. Ct. App. 2007); *Moreland*, 778 S.W.2d at 406-07; *Wilson v. Wilson*, 984 S.W.2d 898, 903 (Tenn. 1998), *cert. denied*, 528 U.S. 822 (1999).

[40] 778 S.W.2d at 406 (citing statistics).

[41] *Wilson*, 984 S.W.2d at 903; *see also Gordon*, 960 So.2d at 39 ("To require the appointment of an independent prosecutor in all cases would inject delay and additional expense into proceedings where litigants are often of limited means.").

necessary. The inherent delay and uncertainty of referral to an independent prosecutor reduces the deterrent effect of the criminal contempt sanction and thereby reduces the Judiciary's ability "to vindicate its own authority without complete dependence on other Branches."[42]

In the family law context, the participation of a governmental or private special prosecutor in criminal contempt proceedings is not necessary from a fairness perspective. First, in all likelihood the use of criminal contempt will be in the context of petty criminal contempt not triable to a jury under *Bloom v. Illinois*.[43] This means that the judge will have complete control of the outcome just as he or she does in the case of civil contempt. Second, the facts establishing the violation of the order and the willfulness of that violation are likely to be demonstrated by the course of the repeated appearances of the parties that are commonplace in the family law context. Third, there is nothing unfair in having the court play a more inquisitorial role in establishing the facts that warrant criminal sanctions in those cases where the relevant witnesses and documents are before it. Fourth, while the independent prosecutor may be less zealous than an overly vindictive private party, the Judge can easily cut short any adverse consequences of overzealousness by declining summarily to entertain the application.

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[42] *Young*, 481 U.S. at 796.

[43] 391 U.S. 194 (1968).

D. Mandating the Appointment of a Disinterested Prosecutor Risks Foreclosing Effective Redress for Vulnerable Populations

By denying private parties the right to bring contempt actions, the Court risks silencing vulnerable populations. This Court has held that the Due Process Clause requires the States to afford certain litigants a "meaningful opportunity to be heard" by removing obstacles to their full participation in judicial proceedings.[44] Allowing private parties to draw the Court's attention to contumacious behavior is a practical way to give individuals a meaningful opportunity to participate in matters of the greatest importance to them.[45]

Other arms of government have made clear their lack of interest in enforcing these orders. In New York City, it is the policy of the New York Police Department not to enforce custody or visitation provisions in court orders despite the fact that

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[44] *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) ("Within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard" in its courts).

[45] Although the public has an interest in an order entered in a family law or domestic violence case, the interest of the party seeking the enforcement or protection of the order is of at least equal importance. A litigant's interest in receiving child support or being free from physical harm or harassment is pressing, real and extraordinarily significant. *See Gordon*, 960 So. 2d at 39. Nothing in this brief is meant to lessen the importance of that interest.

custodial interference is a violation of the New York Penal Code[46]:

> Due to the civil nature of a custody decree, a police officer should not attempt to enforce its provisions. A parent or guardian who is found violating the decree's provisions will not be arrested. . . . A party involved in a custody dispute should only be arrested when there is probable cause to believe that an offense other than a violation of the custody decree has occurred (i.e., violation of an existing order of protection, custodial interference, endangering the welfare of the child).[47]

Police frequently regard visitation violations as not being within their jurisdiction, mission or interest to enforce. They have a mission to ensure public safety and have policies against enforcing orders they deem "civil in nature."[48]

Likewise, prosecutors have an institutional disinterest in orders regarding private parties. It is unrealistic to expect prosecutors to pursue all contempt actions arising from alleged violations of civil court orders. As a Florida District Court of

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[46] N.Y. Penal L. §§ 135.45, 135.50 (1965).

[47] John A. Morrison, *Child Custody Disputes*, Office of the Deputy Commissioner (NYPD)–Legal Matters Legal Bureau Bulletin Vol. 19 No. 1 (March 1989). This practice remains in effect.

[48] *Id.*

Appeal noted in *Gordon*, "[a]lthough an indirect criminal contempt proceeding in a family law case is vitally important to the parties, such a case often has little interest to a professional prosecutor."[49] This disinterest results in part from the fact that it is not in the organizational mission of prosecutors to pursue such cases. In addition, prosecutors lack the time, the resources, and in some cases the will to prosecute transgressors of civil domestic relations orders.

Criminal contempt proceedings initiated by the aggrieved party may well be the most effective remedy in these situations to prevent them recurring, and only the interested parties will likely file them.

Amici are all too aware of the identified noncompliance in the family law area. These persistent violations demonstrate a lack of respect by recalcitrant violators and erode the ability of courts to protect the rights of continually aggrieved victims. The judiciary currently has the appropriate powers to protect their authority and those rights, which powers should not be eviscerated by a constitutional ruling from this Court.

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[49] 960 So. 2d at 39; *see also Wilson*, 984 S.W.2d at 903 ("It is unrealistic to expect district attorneys to prosecute contempt actions arising from alleged violations of civil court orders. District attorneys already have a heavy case load prosecuting violations of the general criminal laws.").

III. *YOUNG* DOES NOT BAR PARTY-INITIATED CONTEMPT ENFORCEMENT IN FAMILY LAW DISPUTES.

In *Young*, this Court held that an interested private party could not seek criminal contempt for violation of an order issued in trademark litigation and that a disinterested private prosecutor would have to be appointed by the court. The Court rejected the argument that a government prosecutor would have to be appointed as this would put the enforcement of court orders at the discretion of another branch of government. The Court made this decision in the exercise of its supervisory power over federal courts and not as a matter of due process.

Since *Young*, several state courts have declined to follow the portion of *Young*'s holding requiring that a disinterested prosecutor be appointed out of concern that dependence on disinterested prosecutors, whose salaries would necessarily have to be paid from public funds, would leave many state court orders unenforced and many citizens from vulnerable demographics "deprived of the benefits to which they have already been adjudged entitled."[50]

In part, decisions that reject *Young*'s application in the family law context are based on the recognition that the interests of the public and of the litigant seeking enforcement are not in conflict

[50] *Wilson*, 984 S.W.2d at 903; *see also Moreland*, 778 S.W.2d at 406.

any more than the interests of a litigant seeking enforcement of a contract are in conflict with the public interest that contracts be enforced. The Supreme Court of Tennessee has noted that "[i]n a contempt proceeding alleging a violation of a court order . . . the interest of the private litigant coincides with the interests of the court [because] [t]he common goal is to force compliance with the court order."[51] The *Wilson* court took comfort in this overlap to conclude that allowing an attorney representing an interested party to prosecute a criminal contempt action neither creates the potential for conflict nor the appearance of impropriety.[52]

These and similar decisions recognize that the congruence of public and private interests in the private enforcement of orders in the family law context outweighs any potential concern about the pro-enforcement bias of a private litigant seeking that relief.[53] This is entirely normal in litigation and it is the job of the court, not the litigant, to make the decision as to what his or her order commands and, in the case of petty contempt, whether it has been violated. The ability of a governmental or specially appointed independent prosecutor to exercise discretion not to prosecute is

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[51] *Wilson*, 984 S.W.2d at 904 (denying a challenge to a contempt conviction based on *Young*); *see also Moreland*, 778 S.W.2d at 407.

[52] *Wilson*, 984 S.W.2d at 904.

[53] *Young*, 481 U.S. at 807.

highly duplicative of the role of the judge in the Family Court. Just as there is no constitutional entitlement to indictment by a grand jury[54] there should be no constitutional entitlement to a prosecutor who is empowered to decline prosecution of a valid court order.

Indeed, many state courts in rejecting the need to resort to a government prosecutor or to appoint a private special prosecutor in family law disputes have relied on the disinterested role of the judge and the various procedural protections in place to eliminate any concern that might otherwise arise.[55] Other state courts have noted that the

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[54] *Green v. United States*, 356 U.S. 165, 184 (1958), *rev'd in part on other grounds*, *Bloom v. Illinois*, 391 U.S. 194 (1968).

[55] *Wilson*, 984 S.W.2d at 903 ("[t]he risk that a defendant's liberty interest will be erroneously deprived by the current practice which allows a litigant's private attorney to prosecute contempt is slight because it is the trial judge, not the private attorney, who actually decides whether a contempt action may proceed."); *Furtado v. Furtado*, 402 N.E.2d 1024 (Mass. 1980) (examining the importance of procedural protections in the private prosecution of criminal contempt prior to *Young* in a domestic relations law context); *Cantrell v. Williams*, No. M2005-00413-COA-R3-CV, 2007 WL 1574280 (Tenn. Ct. App. May 30, 2007) (holding that a conviction for criminal contempt resulting from a *pro se* Petition for Contempt against defendant could not be sustained where guilt was by "preponderance of the evidence"); *Gordon*, 960 So. 2d at 38 (noting that Florida law "provides adequate procedural safeguards to protect against abuse of the contempt sanction" and that "[p]recision is required at each stage of the contempt proceeding").

private party seeking criminal contempt will "not ordinarily [be] clothed with all the powers of a public prosecutor" and so any concern over the private exercise of sovereign power may be non-existent.[56] Other states have noted that proceedings for criminal contempt are *sui generis*.[57] All these cases reflect the view of numerous judges that *Young*'s concerns over the bias of the private litigant seeking criminal contempt do not have sufficient force in the family dispute context to warrant any additional protection against abuse provided by prosecutorial discretion.

These state court decisions are sound and should not be effectively overruled by the decision that this Court renders in this case. There being no valid objection from the due process or separation of powers perspectives, there is no cause for this Court to preclude the States, or the District of Columbia, from allowing private parties to seek criminal contempt in family court matters. Because the proactive role of a judge resolving family law disputes is and should be very different than the passive neutral arbiter of the trademark dispute involved in *Young*, the *Young* requirement of a disinterested prosecutor should not be extended to this area of law.

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[56] *Wilson*, 984 S.W.2d at 904.

[57] *See, e.g., Moreland*, 778 S.W.2d at 403; *Henry v. Schmidt*, 91 P.3d 651, 654 (Okla. 2004) (proceedings are *sui generis* by virtue of statue); *Thomas v. Barrow*, 157 P.3d 1185, 1188 (Okla. Civ. App. 2007).

CONCLUSION

For the reasons stated, it is respectfully submitted that this Court should hold that private party initiated criminal contempt proceedings in family law matters are barred neither under this Court's supervisory power with respect to proceedings in the District of Columbia nor by the Constitution with respect to proceedings in state court.

Respectfully submitted,

Yisroel Schulman
Kim Susser
C. Brandt-Young
Tanya Guerrero
NEW YORK LEGAL ASSISTANCE GROUP
450 West 33rd Street
New York, NY 10001
(212) 613-5000

Evan A. Davis*
Nathaniel E. Jedrey
Ebunoluwa A. Taiwo

CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, NY 10006
(212) 225-2000

Counsel for Amici Curiae

* *Counsel of Record*

CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the document contains 6,370 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 8, 2010.

By: /s/

Yisroel Schulman
Kim Susser
C. Brandt-Young
Tanya Guerrero
NEW YORK LEGAL ASSISTANCE GROUP
450 West 33rd Street
New York, NY 10001
(212) 613-5000

Evan A. Davis*
Nathaniel E. Jedrey
Ebunoluwa A. Taiwo

CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, NY 10006
(212) 225-2000

Counsel for Amici Curiae

* *Counsel of Record*

APPENDIX

Background Information about *Amici*

Betty Weinberg Ellerin, retired Presiding Justice of the Appellate Division of the Supreme Court of the State of New York, First Department

Justice Ellerin (retired) is currently a senior counsel in the New York office of Alston & Bird's Litigation and Trial Practice group. She also chairs the New York State Judicial Committee on Women in the Courts and is a member of the New York State Advisory Committee on judicial ethics. She previously served as Vice Chair of the Committee on Character and Fitness of the Appellate Division, First Department, and she served more than 20 years as an Associate Justice on that bench. Justice Ellerin (retired) was the first woman appointed as Deputy Chief Administrative Judge of the State of New York for the New York City Courts where she was responsible for the operation of all the trial courts within the city. She is well known for her continuing interest in, leadership and thoughtful opinions in domestic relations law.

Marjory D. Fields, retired New York State Family Court Judge and Supreme Court Justice

Justice Fields (retired) presided in cases of spousal abuse and intimate partner violence and child abuse and neglect for 16 years. Prior to becoming a judge, Justice Fields (retired) was the managing attorney of the matrimonial law unit at

Brooklyn Legal Services for 15 years, where she and her team represented abused low income women in divorce and child custody proceedings. She testified before Congress and state legislatures in support of stronger legal remedies and protection for abused women and their children. From 1979 to 1989, Justice Fields (retired) was Co-Chair of the New York Governor's Commission on Domestic Violence, working to improve laws and government policy to provide protection for domestic violence victims and their children. Justice Fields retired from the Court in 2002 and returned to working for improved protection for domestic violence victims. She has seen first hand over 38 years the need for private remedies for victims of domestic violence, whose protection order enforcement cases are often overlooked or rejected by government prosecutors.

Judith M. Reichler, retired Judge and Support Magistrate, New York State Family Court

Judge Reichler (retired) is a former Support Magistrate in New York State Family Court and a former Town Justice in New Paltz, New York. Judge Reichler (retired) served as Executive Director of the New York State Commission on Child Support during the development of the Child Support Standards Act. She also served as President of the Ulster County Magistrates' Association, and previously served on the New York State Family Violence Task Force, which develops and presents training to judges throughout the state. Judge Reichler (retired) has authored several articles on

child support and battered women and currently works as a consultant to family law attorneys.

The American Academy of Matrimonial Lawyers

Founded in 1962, AAML's mission is "to encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, to the end that the welfare of the family and society be protected." There are currently more than 1600 Fellows in 50 states generally recognized as preeminent family law practitioners with a high level of knowledge, skill and integrity. Academy Fellows represent individuals in all facets of family law, including divorce, annulment, prenuptial agreements, postnuptial agreements, marital settlement agreements, child custody and visitation, business valuations, property valuations and division, alimony, child support and other family law issues.

To qualify for membership Fellows must be recognized by the bench and bar in his or her jurisdiction as an expert practitioner in matrimonial law; be admitted to the bar for 10 years; have the majority of their practice as matrimonial law; obtain state certification or have completed 15 hours of continuing legal education in each of previous five years; pass an examination on wide-ranging issues pertaining to matrimonial and family law; be interviewed by a state board of examiners; aspire to the ethical standards set forth in the "Bounds of Advocacy" as well as state bar rules of professional conduct and demonstrate

involvement in study or improvement of matrimonial law, such as publishing articles or continuing education presentations.

This brief does not necessarily reflect the views of any judge who is a member of the American Academy of Matrimonial Lawyers. No inference should be drawn that any judge who is a member of the Academy participated in the preparation of this brief or reviewed it before its submission. The AAML does not represent a party in this matter, is receiving no compensation for acting as *amicus*, and has done so *pro bono publico*.

The American Academy of Matrimonial Lawyers joins the within brief as *amicus curiae* in support of the preservation of private rights of action to prosecute criminal forms of contempt in family law matters not limited to those matters involving domestic violence.

The Family Violence Litigation Clinic at Albany Law School

The Family Violence Litigation Clinic ("FVLC") at Albany Law School provides direct representation and technical assistance to survivors of domestic violence in Albany, Rensselaer, Schenectady and Saratoga counties in New York, while teaching law students about Family Court procedure, substantive law and the dynamics of domestic violence. In addition, the FVLC participates in community outreach initiatives to help educate the general public about domestic violence and civil remedies. Direct representation may include matters such as civil orders of protection, custody, child support,

visitation and child neglect proceedings. We regularly use the tools of contempt to help our clients and their children maintain their safety, as well as for batterer accountability.

Day One

Day One is the only agency in New York City solely focused on providing comprehensive legal services to teen survivors of dating violence. We also operate the City's only Dating Violence Helpline specifically for young people, ages 12-24. With a specific focus on advocating on behalf of teens, Day One is recognized for the organization's knowledge and resources for teen survivors of dating violence and for providing widespread training for young people, law enforcement, and organizations working on behalf of young people.

Since its founding in 2003, Day One has developed a comprehensive program that integrates professional expertise advocating with and on behalf of young people to help provide for the complex legal and social needs of survivors. Within the organization, our legal department works to protect the rights of survivors while our Community Education and Peer Leadership programs work with young people in middle school, high school, and college to help prevent the occurrence of dating violence and to provide referrals and resources. Our direct services include the helpline, crisis intervention, counseling, advocacy, and legal assistance. We also work consistently to increase public awareness, train professionals, advocate for needed system changes,

and insure social accountability and responsiveness in identifying and assisting victims.

InMotion

InMotion, a nonprofit corporation founded in 1993, seeks to make a real and lasting difference in the lives of women—low-income, under-served, abused—by offering them legal services designed to foster equal access to justice and an empowered approach to life. InMotion fulfills its mission by providing free, quality legal services, primarily in the areas of matrimonial, family, and immigration law, in a way that acknowledges mutual respect, encourages personal growth, and nurtures individual and collective strength. InMotion also works to promote policies that make our society more responsive to the issues, such as domestic violence, confronting the women we serve.

Legal Aid of North Carolina

The Domestic Violence Prevention Initiative (DVPI) is a specialized, statewide project of Legal Aid of North Carolina that provides free legal assistance to victims of domestic violence. It is comprised of attorney/advocates based in Legal Aid of North Carolina field offices (geographically located across North Carolina) and a project director located in Raleigh. These DVPI attorneys/ advocates are trained in the laws available to help increase the safety and self-sufficiency of victims, as well as the dynamics of domestic violence and safety planning. DVPI are asked to train members

of the private bar, law enforcement and members of the judiciary on a regular basis.

The Domestic Violence Prevention Initiative also works closely with community-based programs, agencies and task forces serving victims of domestic violence. The DVPI has existing formal collaborative agreements and referral protocols with more than 60 domestic violence victim services organizations throughout the state, and informal working relationships with at least 20 others. Additionally, the DVPI partners with several law schools, at which a DVPI attorney trains and supervises law students in the domestic violence clinics.

Legal Services NYC

Legal Services NYC is the largest civil legal services program in the country and has provided free legal services to poor people in New York City for over 40 years. We have offices in all the boroughs of the City, and have a long history of providing high quality legal representation to victims of domestic violence. In addition to advocating for orders of protection, we represent victims in custody, visitation, child support, and divorce matters. Our neighborhood offices have established strong ties to community based domestic violence groups as well as other agencies in the community and work closely with other public interest legal agencies involved in this work. Our offices are some of the lead agencies at the Family Justice Centers in the boroughs where they are established and have been actively involved in their creation. In addition to

providing representation to individual clients, we provide continuing legal education to the public interest law community, provide consultation on cases to other lawyers, and participate in advocacy organizations, such as the Lawyers' Committee Against Domestic Violence.

My Sisters' Place

My Sisters' Place strives to engage each member of society in our work to end domestic violence so that all relationships can embrace the principles of respect, equality, and peacefulness. Since 1978 we have advanced this mission in Westchester County, New York and the surrounding region through advocacy, community education, and services to those harmed by domestic violence. Through advocacy, we act as a force for social change in law and public policy. Through community education, we challenge public perceptions of intimate violence and the social inequities that give rise to it, and we promote prevention with a special emphasis on youth. Through direct services, we support the abused, primarily women and their children, in seeking safety, self-determination, and justice.

Established in 1997, My Sisters' Place's Legal Center provides victims of domestic violence who are financially unable to retain counsel, greater access to legal protections and remedies critical to their survival and safety. Currently, the Legal Center serves over 1,000 clients each year, primarily with issues related to family law and immigration. The family law docket includes orders

of protection, custody, visitation, child and spousal support, and abuse and neglect matters.

The Sargent Shriver National Center on Poverty Law (Shriver Center)

The Shriver Center champions social justice through fair laws and policies so that people can move out of poverty permanently. Our methods blend advocacy, communication, and strategic leadership on issues affecting low-income people. National in scope, the Shriver Center's work extends from the Beltway to state capitols and into communities building strategic alliances. The Shriver Center's work includes domestic violence and family law. A family life free from domestic violence and strife over custody, visitation and child support is essential for the economic, physical, mental and emotional well-being of all family members. Court orders, whether they are protective orders, custody orders, child support orders, or visitation orders, must be complied with and vigorously enforced when they are not. The ability to enforce civil court orders through criminal contempt initiated by an interested party must be preserved. The Shriver Center has a strong interest in the enforcement of court orders that help individuals and families lead safe and secure lives.

STEPS To End Family Violence

Since 1986 STEPS to End Family Violence ("STEPS"), a program of Edwin Gould Services for Children and Families, has provided comprehensive

services to victims of domestic violence and provides the only direct services program specifically addressing abused women involved in the criminal justice system, including those who assault or kill their abuser. Some are charged with child neglect because their abuser harmed the children. STEPS provides a complete assessment of the needs of both mother and child and provides appropriate services. STEPS provides additional specialized services such as counseling, court advocacy, parenting skills, children's therapy, and civil legal services to victims of interpersonal violence.

The Domestic Violence Litigation Clinic at St. John's University School of Law

The Clinic provides students with an exciting, well-supervised, hands-on clinical experience. Clinic students, working in pairs, represent clients in family offense and visitation matters throughout the five boroughs of New York City. Students have the opportunity to handle cases from inception to final disposition. Clinic students enroll in the domestic violence clinic placement and in a two-credit seminar component. The seminar provides students with substantive knowledge in aspects of family, matrimonial, immigration, and criminal law relevant to the practice portion of the course. In addition, students are introduced to the integration of law and psychology specific to intimate violence and participate in skills classes in interviewing, safety planning, case preparation, evidence gathering, legal writing, trial advocacy and negotiation skills. This two-semester course

maximizes each student's opportunity to fully service each client while maintaining continuous client representation on sensitive legal matters.

Professor D. Kelly Weisberg

Professor Weisberg teaches at Hastings College of the Law, University of California, in the areas of Family Law, and Children and the Law. She received her B.A. at Brandeis University, Ph.D. at Brandeis University, and J.D. degree from Boalt Hall School of Law, UC Berkeley. She joined the Hastings faculty in 1982 after two years on the faculty at Washington University School of Law. Before that time, she participated in federally-funded studies of juvenile parole, justice prostitution, family violence, and child sexual abuse. At Hastings, she served as Director of the Family Law Concentration from 2004-2007. She is the author of several law review articles and books, including Modern Family Law: Cases and Materials (co-authored with Susan F. Appleton) (Aspen Publishers, 4th ed. 2009); Adoption and Assisted Reproduction: Families Under Construction (co-authored with Susan F. Appleton) (Aspen Publishers, 2009); Child, Family, State: Cases and Materials on Children and the Law (co-authored with Robert H. Mnookin) (Aspen Publishers, 6th ed., 2009); The Birth of Surrogacy in Israel (University Press of Florida, 2005); and the Applications of Feminist Legal Theory to Women's Lives (Temple University Press, 1996). In Spring 2010, she holds the position of Hurst Distinguished Visiting Chair at the University of Florida Levin College of Law.