
DIVORCE ALL THE WAY DOWN: LOCAL VOICE AND FAMILY LAW’S DEMOCRATIC DEFICIT

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Elections for local judges are parodies of democracy, and yet family court judges are tasked with making a series of value judgments in the course of exercising their broad discretion. Those idiosyncratic value judgments determine who gets custody and under what conditions. They determine who deserves more of the marital property and how much of it there is. Over the last thirty-five years, reformers have asked state legislators and appellate courts to cabin judicial discretion by imposing top-down rules that govern these issues. These reforms have uniformly failed. This Article outlines a reform strategy that is novel along two dimensions. First, it turns the attention of reformers downward, not upward. The future of family law reform is local. Second, it introduces family law reformers to a new space along the rules-standards continuum: rules of thumb. Although each of these two innovations—localism and rules of thumb—could be pursued independently, the combination yields important synergies. Empowering cities and school boards to weigh in on family law issues provides them with a new and muscular voice that can amplify the impact of communities that are excluded from existing power structures at the state level. Local influence over family law also generates much-needed policy experiments, creates new opportunities for expressive sorting, and has the potential to reinvigorate citizen engagement with local politics. Channeling this influence through local rules of thumb eliminates over and under inclusion problems and significantly mitigates fears that local politicians will be able to oppress local minorities.

INTRODUCTION

Family law's private dispute resolution function—divorce and child custody—relies predominantly on open-ended standards.¹ Judges' broad and

¹ See, e.g., CYNTHIA LEE STARNES, *THE MARRIAGE BUYOUT: THE TROUBLED TRAJECTORY OF U.S. ALIMONY LAW* 111-12 (Nancy E. Dowd ed., 2014); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 478 (1984); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1182 (1986); Judith G. McMullen, *Alimony: What Social Science*

largely unreviewable discretion invites them to impose idiosyncratic value judgments on families. These powers, combined with local judges' abysmal democratic pedigree and their racial, educational, and class homogeneity, create a democratic deficit in family law. Reformers have sought to solve these problems by asking legislatures and appellate courts to develop top-down rules to cabin judicial discretion.² That reform strategy has uniformly failed.³

Critiques of family law's open-ended standards, while longstanding, have renewed salience today. Family law's ongoing shift toward mediation is what I call a hydraulic reform.⁴ Although it has reduced the impact of judges and judicial caprice, it has relocated issues of bias and unpredictability in even less democratically accountable actors like custody evaluators. Technological shifts have also increased the importance of taming discretion. Assisted reproductive technologies have destabilized old rules for parentage, and appellate courts are increasingly turning to open-ended standards to decide who gets to be a parent.⁵ Judges now ask whether a "parent-like" relationship formed between the child and the relevant adult.⁶ Would a woman raising her grandchild alongside her daughter qualify? Can an older sibling have a parent-like relationship with her younger brother? Can more than two people have a parent-like relationship with a child? These issues are now decided by idiosyncratic trial court judges with little lived experience with the relevant family forms, and little to no appellate or legislative oversight.⁷

This Article outlines a reform strategy that is novel along two dimensions. First, it turns the attention of reformers downward, not upward. The future of

and Popular Culture Tell Us About Women, Guilt, and Spousal Support After Divorce, 19 DUKE J. GENDER L. & POL'Y 41, 43 (2011); Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1143 (1999).

² See, e.g., CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* 124-26 (2014).

³ Failed proposals include: JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 38 (1973) (advocating for a bright line rule where the courts should not order any visitation and should leave all decisions to the custodial parent); Michael R. Clisham & Robin Fretwell Wilson, *American Law Institute's Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles or Obligatory Footnote?*, 42 FAM. L.Q. 573, 576 (2008); Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 237 (1982) (arguing for a primary caretaker presumption); Steve Bousquet, *Gov. Rick Scott Vetoes Alimony Bill, Cites Potential Harm to Children*, MIAMI HERALD (Apr. 15, 2016), <http://www.miamiherald.com/news/politics-government/state-politics/article72042847.html> [<https://perma.cc/2KAJ-3CCK>].

⁴ See *infra* Section I.C.2.

⁵ See *infra* Section I.B.

⁶ See, e.g., *Conover v. Conover*, 146 A.3d 433, 446-47 (Md. 2016).

⁷ See *infra* notes 13-18, 95-99, 108 and accompanying text.

family law reform is local. Cities,⁸ school boards, and groups of local trial court judges can all play an important role in family law reform.⁹ Second, it introduces a new space along the rules-standards continuum: rules of thumb. Although each of these two innovations—localism and rules of thumb—could be pursued independently, the combination yields important synergies.

There are powerful benefits to creating formal pathways for local entities like cities and school boards to influence family law policy. City councils¹⁰ have a different, and arguably stronger, democratic pedigree than judges to make the value judgments that family law currently requires. Should judges favor athletic or academic achievement when deciding what is in the child's best interest? How many extramarital affairs justifies an unequal division of marital property? What if the "affair" was with a twelve-year-old?¹¹ There are no objectively correct answers to these questions. Just as judges might seek advice from experts in child psychology when the relevant question concerns a child's post-traumatic stress disorder ("PTSD") or attention deficit hyperactivity disorder ("ADHD"), it makes sense for judges to seek advice from institutions that purport to represent the community when value judgments are integral to the judge's decision. Allowing city councils to weigh in on family law issues could make those value judgments more legitimate and better informed. Similar arguments could be made about school boards, which also potentially possess important expertise about the effects of divorce on children's academic performance and emotional well-being.

Empowering majority-minority cities and school districts is likely to create particularly illuminating feedback about the proper role of the state in adjudicating family conflict. Family law scholars have long lamented the gap between real families and family law, often arguing that family law is designed

⁸ I use the term "city" to refer to general-purpose local governments that include cities and townships. LYNN A. BAKER & CLAYTON P. GILLETTE, *LOCAL GOVERNMENT LAW: CASES AND MATERIALS* 46 (Robert C. Clark et al. eds., 4th ed. 2010). Although the term "city" may evoke visions of skyscrapers, most cities are small and might be more aptly called suburbs. See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 348 (1990).

⁹ See Heather K. Gerken, Foreword, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 31, 39, 63-64 (2010) (discussing the benefits of pushing the logic of federalism down to the local level, thereby empowering cities and school boards to dissent from within the system and create important avenues of democratic feedback).

¹⁰ I use the term "city council" to describe the legislative arm of cities, towns, and other general purpose local governments. BAKER & GILLETTE, *supra* note 8, at 46.

¹¹ See Karma Allen, *Mary Kay Letourneau's Husband and Former Student, Vili Fualaau, Files for Separation*, ABC NEWS (May 31, 2017, 7:24 AM) <http://abcnews.go.com/US/husband-files-separate-6th-grade-teacher-mary-kay/story?id=47740438> [https://perma.cc/N6YT-LZAX] (discussing former sixth grade teacher Mary Kay Letourneau's extra-marital "affair" with twelve-year-old student). See generally *In re Marriage of Schu*, 211 Cal. Rptr. 3d 413 (Cal. Ct. App. 2016).

only for the elite.¹² Today, many issues central to family law look quite different to different segments of society.¹³ For example, the non-marital birth rate hovers around five percent for women with college degrees and about eighty-five percent for women without high school degrees.¹⁴ Child support policies impact poor communities far differently than wealthy communities.¹⁵ Family forms that are uncommon among whites who go on to earn graduate degrees—like judges—might be common among other groups.¹⁶ Judges need to understand these potentially unfamiliar family forms and how they are affected by various policies. One way to accomplish this is to set up a formal system where judges must consider the family law advice of institutions with more diversity. Houston has been a majority-minority city for decades.¹⁷ But where do these minority residents find their voice? Not in the judiciary: All of the judges who handle divorces are white.¹⁸ Its sixteen member city council, in contrast, includes three black men, one black woman, one Hispanic man, and one Asian man.¹⁹ It includes a Harvard-educated lawyer and people who started off with only an associate's degree;²⁰ it includes a bail bondsman, an elementary school teacher, and an architect.²¹ This city council reflects voices and experiences that are currently excluded from the local judiciary.

Shifting focus to the local level also avoids the core problems that have thwarted top-down reforms, while accomplishing their central goal of harmonizing judicial opinions and making outcomes more predictable.²² The most compelling explanation for the failure of top-down reforms is that each has triggered forces that cause political paralysis.²³ Presumptions that favor joint

¹² See Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 259, 270 (2009).

¹³ See June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185, 1185-86.

¹⁴ *Id.* at 1198.

¹⁵ See Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617, 623-24 (2012).

¹⁶ See Carbone & Cahn, *supra* note 13, at 1185-86.

¹⁷ Valerie A. Lewis, Michael O. Emerson & Stephen L. Klineberg, *Who We'll Live with: Neighborhood Racial Composition Preferences of Whites, Blacks and Latinos*, 89 SOC. FORCES 1385, 1390 (2011).

¹⁸ See *infra* notes 236-37 and accompanying text.

¹⁹ See *infra* note 238 and accompanying text.

²⁰ See *infra* note 242 and accompanying text.

²¹ See *infra* note 243 and accompanying text.

²² See *infra* Section III.A.

²³ See Ira Mark Ellman, *A Case Study in Failed Law Reform: Arizona's Child Support Guidelines*, 54 ARIZ. L. REV. 137, 149 (2012); Elizabeth S. Scott & Robert E. Emery, *Gender*

physical custody favor men; presumptions that favor primary caretakers in custody favor women.²⁴ These predictable effects mobilize interest groups that can take advantage of the fact that it is often easier to block legislation than pass it.²⁵ Their predictable gendered impacts also make voting on these presumptions especially controversial—and legislators often want to avoid intense controversy.²⁶ Appellate courts also have incentives to avoid controversy.²⁷ For both legislators and appellate judges, providing trial courts with more discretion is a good tool to avoid it. Localities are far more likely to overcome these barriers. Norms and values will often be more uniform at the local level than at the state level.²⁸ This is partly due to the statistical realities of smaller groups, and partly due to both voluntary and involuntary geographic segregation. Austin is liberal; Colorado Springs is conservative. Within cities, some neighborhoods are red while others are blue.²⁹ Some school districts encompass populations that are predominately poor and white, some poor and black, some rich and Latino. This segregation is deeply problematic in many ways, but it has at least one silver lining. Local entities that serve homogeneous communities are far more likely to be able to come to agreement on family law's controversial issues and at least partially rulify them.

The resulting second-order diversity among family law voices has the potential to achieve many of the benefits that result more generally from devolving power to lower levels of government.³⁰ It can serve as a gadfly to spur debate on the state and national stage; both cities and school boards have an insider status that makes them hard to ignore.³¹ Local pronouncements on family law matters can also create a system of democratic feedback.³² Should relatives of a recently deceased man be allowed to harvest his sperm? Should unmarried co-parents owe one another duties of support based solely on their shared relationship with a child? Should sperm donors be able to obtain parental rights? Giving localities a voice in these debates provides a mechanism for judges and

Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard, 77 LAW & CONTEMP. PROBS. 69, 82-83 (2014).

²⁴ Scott & Emery, *supra* note 23, at 76.

²⁵ *See id.* at 81.

²⁶ *See* John J. Sampson, *Choking on Statutes Revisited: A History of Legislative Preemption of Common Law Regarding Child Custody*, 45 FAM. L.Q. 95, 106 (2011).

²⁷ *See infra* note 108 and accompanying text.

²⁸ *See infra* note 267.

²⁹ Rebecca Salinas, *The 10 Most Republican and Democratic Neighborhoods in Bexar County, According to Primary Data*, SAN ANTONIO EXPRESS-NEWS (Mar. 7, 2016), <http://www.mysanantonio.com/news/local/politics/article/The-10-most-republican-and-democrat-6875046.php> [<https://perma.cc/TP5V-D5ZT>].

³⁰ *See infra* Part IV.

³¹ *See* Gerken, *supra* note 9, at 39.

³² *See id.* at 63-64.

other policymakers to learn how different communities feel about these complex judgments.³³ Local power can also promote local political participation and facilitate expressive sorting by allowing cities and school boards to publicly express their commitment to, for example, transgender rights. Localism can also generate numerous policy experiments. A locality that adopts a specific alimony formula might see a decrease in litigation. A locality that seeks to credit unemployed fathers for their in-kind child-care labor might increase the ability of single mothers to work demanding jobs. These policy experiments have the potential to generate important insights for further family law reform.

Of course, local power raises the specter of minority oppression. Local politicians might pass an ordinance stating that atheists should generally not get custody of their children or that gay parents shouldn't.³⁴ But this specter, like others, is more imagined than real. To understand the first of several reasons why, it is important to say more about rules of thumb.

Rulification is a continuum.³⁵ Reformers might seek a bright-line rule—an extreme form of rulification.³⁶ They might seek a presumption—a milder form. Rules of thumb are milder still. They offer advice only. Yet there is a great deal of evidence suggesting that even this mildest form of rulification will have a significant impact.³⁷ For example, two professors developed advisory spousal support guidelines in Canada, and despite the fact that they were never formally adopted by any legislative body, the major complaint six years later was that judges were adhering to them too closely.³⁸ Other examples further support the potentially counterintuitive claim that nonbinding advice is highly influential in family law.³⁹ Why? Because judges crave advice. They are looking for help to navigate the paralyzingly broad discretion with which they have been saddled. Advice that comes from cities and school boards will likely have a particularly large impact. Their power comes not only from their ability to offer focal points for judicial consideration, but from their ability to persuade judges that they have more expertise or greater democratic legitimacy to make the value judgments that family law requires.⁴⁰

Concerns of minority oppression are significantly weakened when localities can adopt rules of thumb. While rules of thumb have the power to influence

³³ See *id.* at 61-62.

³⁴ Of course, these proposed local rules would face constitutional challenges. See *infra* Sections IV.E.1, IV.E.4.

³⁵ Kathleen M. Sullivan, *Forward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57 (1992).

³⁶ See *id.* at 59.

³⁷ See *infra* Section III.B.

³⁸ See Carol Rogerson & Rollie Thompson, *The Canadian Experiment with Spousal Support Guidelines*, 45 FAM. L.Q. 241, 241-42, 264 (2011).

³⁹ See *infra* Section III.B.1.

⁴⁰ See *infra* notes 214-16 and accompanying text.

family law outcomes, they do so only through their ability to persuade judges that the generalizations embedded within them are sensible.⁴¹ Therefore, two institutional actors have to agree that a particular rule of thumb is good policy before it can influence outcomes. Setting aside constitutional constraints for the moment, a local entity that adopts a policy against atheists getting custody of their children would have to convince a judge that being raised by an atheist parent is generally not in children's best interests, and that it is not in the best interest of the particular child in the particular case before the judge.⁴² This creates a significant barrier to minority oppression. Judges are not likely to simply rubber stamp local policy advice. They are not only elected by different constituencies than other local entities, they are also well versed in the idea that they might have to protect individuals against local oppression.⁴³ Judges will only significantly weigh local advice when it points to one outcome within the range of outcomes that the judge believes are reasonable.⁴⁴

A host of other barriers, including constitutional ones, further mitigate fears of minority oppression.⁴⁵ For example, city council members will not be able to say that Muslims should not get custody of interfaith children.⁴⁶ School board members who had just read *Battle Hymn of the Tiger Mother*⁴⁷ could not say that Asian Americans should get custody of biracial children.⁴⁸ These and many other evil plots would easily fail constitutional scrutiny.

For readers who are still worried about empowering city councils and local school boards, this Article offers another reform. Groups of local judges could come together and adopt local court rules that create substantive rules of thumb, much like they currently adopt local procedural rules. This reform is not "local" in the traditional sense—because judges are state actors—but it is "localish" and perhaps also localist.⁴⁹ Those local rules of thumb could be important vehicles for transmitting communal wisdom from more experienced judges to newer ones and for making judicial decisions more consistent.

⁴¹ See *infra* note 175 and accompanying text.

⁴² One might hope that judges would never endorse an unconstitutional rule of thumb. But hopes are sometimes disappointed. See Julie E. Artis, *Judging the Best Interests of the Child: Judges' Accounts of the Tender Years Doctrine*, 38 LAW & SOC'Y REV. 769, 780, 784 (2004) (finding that some judges admitted to adopting an obviously unconstitutional maternal preference).

⁴³ See *infra* Section IV.E.

⁴⁴ See *infra* note 177 and accompanying text.

⁴⁵ See *infra* Section IV.E.

⁴⁶ See *infra* Section IV.E.

⁴⁷ AMY CHUA, *BATTLE HYMN OF THE TIGER MOTHER* (2011).

⁴⁸ See *infra* Section IV.E.

⁴⁹ Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897, 907 (2013) (defining "localist" policies as those that are infused with local preferences, values, or concern).

This Article takes a broad perspective. It does not seek to identify one single best local institution to influence family law policy. Rather, it discusses local judges, city councils, and school boards, each of which has something unique to offer. In two companion pieces, I delve more deeply into particular local entities. In the first, *Sex in the City*, I extensively canvas existing home-rule and intrastate preemption doctrines and argue that at least some cities already have the power to adopt local rules of thumb in the family law context.⁵⁰ In the second, *Wild Flowers in the Swamp: Local Rules and Family Law*, I consider the judicial form of local family law.⁵¹ Local rules of thumb offer trial judges a powerful new signaling device to communicate with appellate courts and legislatures. They open up a dialogue between judges and community members that can better inform judges of local values. They also invite conversation with child psychologists, tax accountants, marriage counselors, and others who might have expertise relevant to divorce policy.⁵² For purposes of this Article, I set aside these deeper explorations and ask whether and to what extent local rules of thumb can mitigate family law's democratic deficit and capture the benefits commonly attributed to localism more generally.

This Article is organized as follows. Part I provides an overview of the traditional critiques of family law's open-ended standards. These critiques apply equally to the new paradigm in family law—with its focus on mediation—and apply with even more force in the context of new family forms. Part II introduces the concept of rules of thumb and explores judges, cities, and school boards as potential sites for family law reform. This Part also introduces the possibility of creating customized Family Law Boards which could harness the power of neighborhoods or balance the value and technocratic elements of family law in multiple ways. Part III outlines the core benefits of localism, drawing heavily from classic works on devolving power to the local level. Although local family law may not achieve all of these classic benefits, it would have a profound impact on policy experimentation, political entrepreneurship, civic participation, and expressive sorting. Part IV turns to the darker side of localism and explores the common pitfalls of moving power to the local level, including disuniformity, races to the bottom, and forum shopping. This Part pays special attention to the possibility of minority oppression, outlining a series of evil plots that local politicians might hatch in order to illustrate the immense barriers to such oppression.

⁵⁰ See generally Sean Hannon Williams, *Sex in the City*, 43 *FORDHAM URB. L.J.* 1107 (2017).

⁵¹ See generally Sean Hannon Williams, *Wild Flowers in the Swamp: Local Rules and Family Law*, 65 *DRAKE L. REV.* 781 (2017).

⁵² See generally *id.*

I. TRADITIONAL CRITIQUES, REBORN

A. *Old Problems, Old Places*

In divorce cases, courts are called upon to divide couples' existing assets and determine the size and duration of alimony payments. Regardless of their marital status, if the couple had children, the court must determine child support and custody. Of these tasks, all but one relies on open-ended standards.⁵³ These open-ended standards have the classic virtues and vices attributed to standards more generally. On the virtue side, family law's open-ended standards give judges the power to adjust their rulings to the unique facts of each case.⁵⁴ But most scholarly attention has focused on the vices; they make outcomes unpredictable and invite judicial bias.⁵⁵

Family law's open-ended standards tend to make outcomes unpredictable. Although mothers tend to get custody more often than fathers,⁵⁶ custody is not binary. Non-custodial parents can get more or less visitation, and more or less decisional authority. This makes custody decisions highly unpredictable.⁵⁷ Property-related issues are also unpredictable. In the most thorough study to date, researchers found that New York judges awarded one spouse two-thirds or more of the marital property in twenty-nine percent of cases, but found it impossible to predict when judges would do so.⁵⁸ Alimony is also

⁵³ Child support is the only outlier. Notably, the federal government forced states to rulify this area as part of larger welfare reforms. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1307 (codified as amended in scattered sections of 42 U.S.C.); Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified as amended in scattered sections of 42 U.S.C.).

⁵⁴ See Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 400 (1985).

⁵⁵ For a concise overview of these criticisms, see Steven N. Peskind, *Determining the Undeterminable: The Best Interest of the Child Standard as an Imperfect but Necessary Guidepost to Determine Child Custody*, 25 N. ILL. U. L. REV. 449, 457-64 (2005).

⁵⁶ JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 42 (2006); Artis, *supra* note 42, at 789; Sanford L. Braver et al., *Lay Judgments About Child Custody After Divorce*, 17 PSYCHOL. PUB. POL'Y & L. 212, 213 (2011). *But see* Sanford L. Braver, Jeffrey T. Cookston & Bruce R. Cohen, *Experiences of Family Law Attorneys with Current Issues in Divorce Practice*, 51 FAM. REL. 325, 330 (2002).

⁵⁷ See, e.g., JEFF ATKINSON, *MODERN CHILD CUSTODY PRACTICE* § 4-1 (2d ed. 2012); Daniel A. Krauss & Bruce D. Sales, *Legal Standards, Expertise, and Experts in the Resolution of Contested Child Custody Cases*, 6 PSYCHOL. PUB. POL'Y & L. 843, 848 (2000).

⁵⁸ Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 431, 454 (1996) [hereinafter Garrison, *How Do Judges Decide*]. The best indicator of these lopsided awards was family violence. *Id.* at 465. Law students also show a good deal of disagreement about how to divide marital property when presented with various vignettes. Marsha Garrison, *What's Fair in Divorce Property Distribution: Cross-National Perspectives from Survey Evidence*, 72 LA. L. REV. 57, 82-88 (2011).

unpredictable.⁵⁹ None of the statutory factors that New York judges were supposed to consult were correlated with their decisions to award permanent alimony.⁶⁰ Instead, the judges' political party influenced this determination.⁶¹ Another study asked laypeople to award alimony based on a vignette.⁶² About half awarded nothing, but others awarded \$19,000 per year.⁶³ Judges in Ohio were similarly inconsistent in alimony determinations. When confronted with identical facts, those judges awarded a lifelong homemaker anywhere from \$5000 to \$175,000 per year—a thirty-five thousand percent difference.⁶⁴

Appellate review does nothing to improve this unpredictability. Appellate judges give extreme deference to trial court judges.⁶⁵ Accordingly, those trial court judges have no direct advice about how to exercise their discretion and no precedent to guide them.⁶⁶

The unpredictability of family law litigation hinders settlement. This is particularly ironic because there is widespread agreement that litigation harms children.⁶⁷ Once litigation begins, open-ended standards increase the importance of good attorneys and the money to pay for them,⁶⁸ and undermine the idea that like cases should be treated alike.⁶⁹ Even if spouses settle, uncertainty distorts settlement terms. For example, it could allow the less risk-averse spouse to

⁵⁹ See Katherine K. Baker, *Homogeneous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. 319, 337; Cynthia Lee Starnes, *Alimony Theory*, 45 FAM. L.Q. 271, 271 (2011) ("The broad discretion vested in judges to determine alimony eligibility and quantification, together with the absence of a theory to guide decision-making, has produced an alimony regime that is marked by unpredictability, uncertainty, and confusion.").

⁶⁰ See Garrison, *How Do Judges Decide*, *supra* note 58, at 489.

⁶¹ *Id.* The binary decision about whether to award alimony was more predictable. *Id.* at 490. But regional variations appeared. *Id.* at 495.

⁶² Ira Mark Ellman & Sanford L. Braver, *Lay Intuitions About Family Obligations: The Case of Alimony*, 13 THEORETICAL INQUIRIES L. 209, 212 (2012).

⁶³ *Id.* at 229.

⁶⁴ Alexandra Harwin, Opinion, *Ending the Alimony Guessing Game*, N.Y. TIMES, July 3, 2011, at A19.

⁶⁵ See, e.g., Peskind, *supra* note 55, at 461-62 ("[N]ot only is a trial court required to struggle through the thicket of the unknown, the appellate court does not consider itself in a position . . . to challenge the trial court's omniscience.").

⁶⁶ *Id.* at 461 ("Each case presents the trial court with unique facts spanning the spectrum of the entire human condition. Thus, it is virtually impossible to rely on precedent as no two fact patterns can be similar enough to merit reliance on precedent.").

⁶⁷ *Id.* at 456.

⁶⁸ *Id.* at 464.

⁶⁹ See Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2272 (1991) (noting that indeterminate standards increase the risk of violating "the fundamental precept" that similar cases should be decided similarly).

systematically obtain better divorce terms than the more risk-averse spouse.⁷⁰ Traditionally, it is thought that this favors men.⁷¹

Because judges have such wide discretion and so little guidance about how to exercise that discretion, they are likely to be highly influenced by their “gut feeling[s].”⁷² And those gut feelings are often the result of stereotypes and biases. Examples of thinly veiled judicial biases are disturbingly common; they reveal biases based on gender, race, sexuality, disability status, and many other characteristics.⁷³ In Indiana, over half of surveyed judges admitted to using an obviously unconstitutional presumption in favor of awarding custody to women.⁷⁴ After all, women are “natural” caregivers.⁷⁵

Even if judges no longer harbored implicit or explicit biases against certain groups, family law’s open-ended standards invite judges to impose their own values on litigants.⁷⁶ When determining custody, should judges favor the parent who believes in the importance of school or the parent who believes in the importance of church? When deciding how much each spouse contributed to the marital property, how should the court weigh the efforts of a stay-at-home parent? How many extramarital affairs justify awarding the innocent spouse more money? (In some places, it turns out the answer is four.)⁷⁷ There are no

⁷⁰ Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 978-80 (1979).

⁷¹ Glendon, *supra* note 1, at 1170; Mnookin, *supra* note 70, at 979. There is some disagreement about whether this actually occurs. Mary Jean Dolan & Daniel J. Hyman, *Fighting over Bedtime Stories: An Empirical Study of the Risks of Valuing Quantity over Quality in Child Custody Decisions*, 38 LAW & PSYCHOL. REV. 45, 88 (2014). As discussed more in Part III, local rules of thumb have the potential to help answer these questions by creating a series of local experiments.

⁷² *McKee v. Dicus*, 785 N.W.2d 733, 738 (Iowa Ct. App. 2010) (“Often trial judges . . . come away with a gut feeling that one parent is a better fit than the other, though it may be difficult to explain the underlying reasons.”).

⁷³ See NAT’L COUNCIL ON DISABILITY, ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN 21 (Sept. 27, 2012), https://ncd.gov/rawmedia_repository/89591c1f_384e_4003_a7ee_0a14ed3e11aa.pdf [<https://perma.cc/7PW2-VM89>] (finding that parents with disabilities “regularly encounter discriminatory practices” in custody disputes); D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 686-88, 691 (5th ed. 2013) (collecting cases exhibiting stereotypes about gender and sexual orientation); Rebecca Aviel, *A New Formalism for Family Law*, 55 WM. & MARY L. REV. 2003, 2014-15 (2014); Katharine T. Bartlett, *Comparing Race and Sex Discrimination in Custody Cases*, 28 HOFSTRA L. REV. 877, 883-86 (2000).

⁷⁴ Artis, *supra* note 42, at 780.

⁷⁵ *Id.* at 784.

⁷⁶ Peskind, *supra* note 55, at 457.

⁷⁷ I have spoken to several judges who were very consistent in saying that two or three affairs is not sufficiently egregious to justify any special consideration in property division.

objectively correct answers to these questions. (But really, four!?!?) Judges are making contestable value judgments. As I will discuss more below, this is particularly problematic given the judiciary's abysmal democratic pedigree.

B. *Old Problems, New Places*

Scholars have long noted that family law presumes a heterosexual, marital, nuclear family.⁷⁸ For example, in states that have them, visitation guidelines assume two parents, each of whom had significant contact with the child before the parents' separation. Increasingly, this assumption will be false. Having children out of wedlock is common. Forty percent of all births are to unmarried women.⁷⁹ Unmarried parents might live together, but they might not.⁸⁰ The father might have a relationship with the child, but he might not.⁸¹ Some illuminating data come from the Fragile Families Study, which followed approximately five thousand children born between 1998 and 2000.⁸² By the time children were five years old, just over half of unmarried mothers had lived with or dated a new partner, and just under half had given birth to a child with another partner.⁸³ Fathers, too, went on to have new partners and have children with them.⁸⁴ These fathers may forge relationships with their children that never relied, or no longer rely, on them residing together.⁸⁵ Whatever relationships such fathers have with their children, they may look far different from the model that undergirds visitation guidelines—that of a residential parent in a long-term, stable, monogamous relationship. This model is a poor fit for many families.

⁷⁸ JANE C. MURPHY & JANA B. SINGER, *DIVORCED FROM REALITY: RETHINKING FAMILY DISPUTE RESOLUTION* 72 (2015).

⁷⁹ *Fast Stats: Unmarried Childbearing*, CTR. FOR DISEASE CONTROL & PREVENTION (Mar. 31, 2017), <http://www.cdc.gov/nchs/fastats/unmarry.htm> [<https://perma.cc/S5WZ-BAKY>].

⁸⁰ Marcia Carlson, Sara McLanahan & Paula England, *Union Formation in Fragile Families*, 41 *DEMOGRAPHY* 237, 250 (2004) (finding that, one year after child's birth, fifty percent of unmarried mothers were either married or cohabitating with the child's father).

⁸¹ *Id.* (finding that, one year after child's birth, twenty-two percent of fathers had no relationship with the children or their mothers).

⁸² *Id.* at 243.

⁸³ Laura Tach et al., *Parenting as a "Package Deal": Relationships, Fertility, and Nonresident Father Involvement Among Unmarried Parents*, 47 *DEMOGRAPHY* 181, 190 (2010).

⁸⁴ See Carlson et al., *supra* note 80, at 247 (finding that thirty-two percent of fathers who had children with an unmarried woman had at least one other child born to a different woman).

⁸⁵ See, e.g., KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* 207-10, 220-27 (2013).

The child may live in a house with her grandparents or other extended family. A child might even have three adults whom she identifies as her parents.⁸⁶

Judges do not have ready guidance to deal with these deviations from the marital nuclear family model. This opens up a new space for judicial discretion—a new place where decisions are unpredictable and rooted in the individual judge’s idiosyncratic experiences and beliefs.

Nowhere is this new discretion more powerful than in parenting determinations. Traditionally, parenthood was determined by relatively clear rules. Biology and marital status controlled.⁸⁷ Now, however, states are radically enlarging the role of judicial discretion. When a same-sex couple uses assisted reproductive technology to conceive, and only one of them is the biological parent of the resulting child, is the other person entitled to the label “parent” with all the rights and obligations that it carries? Increasingly, this question is within the discretion of a trial court to decide. In the summer of 2016, Maryland’s highest court tackled the question.⁸⁸ Under its “de facto” parent doctrine, a lot depends on the trial judge’s understanding of what a “parent-like” relationship entails, and what relationships are “parental in nature.”⁸⁹ These questions may have predictable answers in the context of married same-sex partners as long as they hew close to the married nuclear family norm. But how will the de facto parent doctrine apply to a grandparent who has been raising a child alongside the parent? How about an older sibling who largely raised the child? Can a child have a “parent-like” relationship with three people? Four? Again, new family forms have opened up new spaces of judicial discretion, with all of its attendant vices.⁹⁰

⁸⁶ Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1264 (2016) (“California courts can now recognize three parent-child relationships in appropriate situations.”).

⁸⁷ DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 295-96 (4th ed. 2015) (“At common law, marriage determined parenthood: a husband and wife were presumed to be the father and mother of children born into the marriage.”).

⁸⁸ *Conover v. Conover*, 146 A.3d 433, 446-47 (Md. 2016).

⁸⁹ *Id.*

⁹⁰ See Jane Murphy, *Legal Recognition of De Facto Parents: Victory for Same-Sex Parents or Threat to Parental Autonomy?*, CONCURRING OPINIONS (Sept. 11, 2016), <https://concurringopinions.com/archives/2016/09/legal-recognition-of-de-facto-parents-victory-for-same-sex-parents-or-threat-to-parental-autonomy.html> [https://perma.cc/U6W7-2G35] (worrying that “uncertainty will result from the broader, vague definitions of de facto parent”); Jana Singer, *Family Law After Obergefell*, CONCURRING OPINIONS (Sept. 20, 2016), <https://concurringopinions.com/archives/2016/09/family-law-after-obergefell.html> [https://perma.cc/E3WJ-NUXM].

C. *Failed and Hydraulic Reforms*

Reformers have almost uniformly sought to solve these problems by rulifying family law. They have asked either legislatures or appellate courts to create presumptions to guide trial judges' discretion. These top-down rulification efforts have failed. The recent shift toward mediation decreased the impact of judicial biases simply because it decreased the impact of judges. But now the biases of unelected and undertrained custody evaluators take center stage.

1. Failed Reforms: Top-Down Rulification

By far, the most common reform proposal over the last forty years asks legislatures to adopt presumptions to guide judicial discretion. Feminist scholars have asked for a primary caretaker presumption since the 1980s and as recently as 2014.⁹¹ Throughout the last twenty years, fathers' rights groups have asked for a presumption in favor of joint physical custody.⁹² In 2002, the prestigious American Law Institute ("ALI") sought to transform all aspects of family law—from alimony and property division to custody and prenups—by creating presumptions in each of these areas to limit judicial discretion.⁹³

These efforts have failed. In the 1980s, the Minnesota Supreme Court tried to adopt the primary caretaker presumption,⁹⁴ but the legislature quickly rejected it.⁹⁵ West Virginia is the only state that has adopted the ALI's custody presumption.⁹⁶ No state has adopted the other presumptions the ALI proposed.⁹⁷ Only two states, Louisiana and New Mexico, have adopted presumptions in favor of joint physical custody.⁹⁸

⁹¹ See Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 237 (1982); see also HUNTINGTON, *supra* note 2, at 127.

⁹² See Scott & Emery, *supra* note 23, at 70.

⁹³ PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 2.08, 3.05, 4.09, 7.05 (AM. LAW INST. 2002).

⁹⁴ *Pikula v. Pikula*, 374 N.W.2d 705, 712 (Minn. 1985) (“[W]hen both parents seek custody of a child too young to express a preference, and one parent has been the primary caretaker of the child, custody should be awarded to the primary caretaker absent a showing that that parent is unfit to be the custodian.”).

⁹⁵ MINN. STAT. ANN. § 518.17 (2017).

⁹⁶ W. VA. CODE ANN. § 48-9-206(a) (2017) (“[T]he court shall allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child . . .”).

⁹⁷ *Clisham & Wilson*, *supra* note 3, at 576.

⁹⁸ ATKINSON, *supra* note 57, at § 6-19.

Why have legislatures turned a blind eye to the many criticisms of family law's open-ended standards? Political stalemate is a likely culprit.⁹⁹ States have adopted the best-interests-of-the-child standard.¹⁰⁰ Other proposed standards—like the primary caretaker presumption, the ALI's approximation method, and presumptions in favor of joint physical custody—all have predictable, gendered impacts.¹⁰¹ These gendered impacts help mobilize interest groups to oppose legislation. And because it is generally easier to defeat legislation than pass it, the groups opposing reforms have the upper hand.¹⁰² Legislators may also simply wish to avoid controversy.¹⁰³

Another common reform proposal seeks to convince appellate courts to rulify family law.¹⁰⁴ Given the questionable democratic pedigree of state appellate courts,¹⁰⁵ these reformers may have been more motivated by concerns about predictability than by concerns about legitimacy.¹⁰⁶ They envision a world where appellate courts use the power of the common law method to slowly develop presumptions in at least some circumstances.¹⁰⁷ These reform efforts have failed as well. This should not be a surprise. Swelling dockets make it nearly impossible for trial courts to issue the type of detailed written opinions that would be required for meaningful appellate review. Appeals court judges are unlikely to have the time or inclination to wade through those opinions, and

⁹⁹ An ill-founded faith in custody evaluators and other mental health professionals may also contribute. See Scott & Emery, *supra* note 23, at 91-92 (citing political-economy deadlock and over-reliance on custody evaluators as reasons for the "entrenchment of the best-interests standard").

¹⁰⁰ *Id.* at 69 ("The best-interests-of-the-child standard has been the prevailing legal rule for resolving child-custody disputes between parents for nearly forty years.").

¹⁰¹ *Id.* at 82-83.

¹⁰² *Id.*; see also Ellman, *supra* note 23, at 177 (discussing interest group opposition to child support guidelines).

¹⁰³ See Ellman, *supra* note 23, at 149 (describing ways that state actors attempt to avoid difficult policy questions); Sampson, *supra* note 26, at 106 ("It seems to many observers that avoiding controversy if at all possible is a central principle of the Texas Legislature.").

¹⁰⁴ See Schneider, *supra* note 69, at 2262-63, 2293 (calling for increased rule-creation by courts, especially appellate courts, in family law decisions); see also Peskind, *supra* note 55, at 479-80 ("The criteria relied upon needs to be set forth clearly in order that the appellate court has a guidepost in which to measure the court's . . . conclusions.").

¹⁰⁵ See, e.g., Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1092 (2007) (noting that judicial elections should be considered "quasi-elections" because they are rarely contested and lack robust turnout and informed voters).

¹⁰⁶ The term "legitimacy" here and throughout refers to its moral and sociological dimensions. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795-96 (2005).

¹⁰⁷ See Glendon, *supra* note 1, at 1172, 1178, 1183.

often want to avoid controversy as much as state legislators.¹⁰⁸ Trial judges today know that their decisions are not subject to meaningful appellate review. One judge in Indiana said: “we can do just about anything we want to, and if the judge spends a little time writing it, whatever decision we make will be upheld on appeal.”¹⁰⁹ Even more disturbingly, attorneys in California report that “because trial judges in family law cases realize that (as a practical matter) they are immune from appellate review, many decisions ignore the controlling law.”¹¹⁰ Overall, meaningful appellate review remains illusory.¹¹¹

Of course, there are a few isolated areas of rulification. Twenty-four states have a presumption against giving custody to the perpetrator of domestic violence.¹¹² Many states also preclude judges from considering the race or sex of the parties.¹¹³ These rules reflect the sparse areas where legislators can agree: domestic violence is bad, as are racism and sexism. But these remain small islands within a large sea of dysfunctional discretion.¹¹⁴

¹⁰⁸ See June Carbone & Naomi Cahn, *Judging Families*, 77 UMKC L. REV. 267, 299-300 (2008) (noting that appellate court judges increased their deference to trial courts when one state supreme court justice tried to inject Christian values in family law’s open-ended standards); Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota’s Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 480 (1990) (“Minnesota appellate courts rarely corrected trial court decisionmaking and provided little guidance to the trial courts in limiting the definition of the caretaker preference or its exceptions.”).

¹⁰⁹ Artis, *supra* note 42, at 791.

¹¹⁰ Carol S. Bruch, *The Use of Unpublished Opinions on Relocation Law by the California Courts of Appeal: Hiding the Evidence?*, in LIBER MEMORIALIS: UNIVERSALISM, TRADITION AND THE INDIVIDUAL 225, 230 (J. Erauw et al. eds., 2006); see also Andrea M. Seielstad, *Unwritten Laws and Customs, Local Legal Cultures, and Clinical Legal Education*, 6 CLINICAL L. REV. 127, 129-30 (1999) (“[A]lthough one may, pursuant to written domestic relations law binding in all Ohio jurisdictions, obtain a divorce on the grounds of extreme cruelty on account of domestic violence, judges in one local domestic relations court grant divorce only on the ground of incompatibility and will not entertain hearings or evidence on other grounds for divorce.”).

¹¹¹ Peskind, *supra* note 55, at 462 (“[T]he appellate court does not consider itself in a position . . . to challenge the trial court’s omniscience. The whole notion of appellate review is thus emasculated . . .”).

¹¹² *Id.*

¹¹³ See Schneider, *supra* note 69, at 2296; see also D.C. CODE ANN. § 16-914(a)(1)(A) (West 2018) (“The race, color, national origin, political affiliation, sex, sexual orientation, or gender identity or expression of a party, in and of itself, shall not be a conclusive consideration.”); MINN. STAT. ANN. § 518.17 (2017) (military, disability); TEX. FAM. CODE ANN. § 153.003 (West 2017) (sex or marital status); *Mani v. Mani*, 869 A.2d 904, 904 (N.J. 2005) (fault).

¹¹⁴ HUNTINGTON, *supra* note 2, at 108 (“These reforms, then, are best described as islands in a sea of dysfunction.”).

2. Hydraulic Reforms: Mediation

Over the last twenty years there has been a normative revolution in one important aspect of family law: child custody.¹¹⁵ Under this new vision of family law, judges should no longer see their role as simply to determine the legal rights of the parties. Rather, the ideal judge sees herself as an ongoing conflict manager.¹¹⁶ By putting conflict management in the center of the new paradigm, judges can hopefully reduce acrimony and smooth a family's transition to a new parenting arrangement. A key component of this new paradigm is mediation.¹¹⁷ Mediation allows the parties themselves to determine their custody arrangements.¹¹⁸ It reduces the role of judges and the role of law.¹¹⁹ Of course, law always casts a shadow on private bargaining. But when the law is unpredictable, that shadow is hard to discern and has limited impact.

Mediation is what you might call a hydraulic reform. Limiting judicial intervention in one area creates pressures increasing the need for judicial intervention in others. Parents in mediation tend to favor joint legal custody—that is, they tend to provide that both parents will have a say in making important decisions for their children.¹²⁰ These arrangements may smooth over conflict at the initial stage of separation,¹²¹ but they invite increased judicial intervention later.¹²² What do parents with joint legal custody do when they disagree about an important decision? They go to court. As one judge recently noted:

Unmarried parents (both divorced and never-married) ask courts to make parenting decisions all the time. They ask judges to decide what school their children will attend, what church they can go to, what medicine they should take and what activities in which they can enroll. They seek orders about haircuts, piercings and names.¹²³

This litigation recreates the problems of unpredictability and judicial bias.

¹¹⁵ MURPHY & SINGER, *supra* note 78, at 34, 37-38.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 37, 186-89.

¹²⁰ *Id.* at 40-41, 101.

¹²¹ Gregory S. Forman, *Joint Legal Custody: What Is It? Why Have It?*, 12 S.C. LAW. 19, 20 (2000) ("Many a parent who can accept having his or her child spending less than half the nights in that parent's home cannot abide having little or no say in the child's education or religious upbringing, in these cases joint legal custody may be an effective method of resolving such claims.").

¹²² MURPHY & SINGER, *supra* note 78, at 101 ("The increased prevalence of joint legal custody and other shared parenting arrangements has expanded opportunities for such ongoing judicial involvement.").

¹²³ Randall H. Warner, *Parenting from the Bench*, ARIZ. ATT'Y, July/Aug. 2010, at 24.

This hydraulic effect works on a broader level as well: limiting the legal system's influence in one area increases it in others. The new paradigm reduces a judge's influence over the custody outcome, but increases the power of other individuals by relying on several non-judicial actors to facilitate mediation.¹²⁴ First, because mediation is inappropriate for some high conflict couples and in cases of domestic violence, someone has to be in charge of a triage system that sends some couples to mediation and others to court.¹²⁵ Second, the new paradigm makes generous use of custody evaluators to facilitate agreement.¹²⁶ Combined, these non-judicial actors wield a great deal of power.¹²⁷

The new paradigm recreates issues of bias, contestable value judgments, and unpredictability, but in even less democratically accountable actors. For example, custody evaluators heavily influence mediation outcomes.¹²⁸ Even if the best interests of the child was simply a technocratic question that experts in child psychology could answer, custody evaluators are not experts. They often have minimal qualifications and minimal training.¹²⁹ But more importantly, the best-interests standard is not merely a technocratic question; it requires value judgments. And neither child psychology experts nor custody evaluators have any legitimate claim to be able to make those value judgments. The hydraulics of the new paradigm are also evident in the triage systems it creates. Whereas previously we worried about judicial bias, now we might worry about the biases of whomever is in charge of the triage system. Bankruptcy lawyers steer black clients into more expensive proceedings.¹³⁰ Mortgage brokers steer minority buyers into higher interest mortgages.¹³¹ It is not hard to imagine that triage personnel would steer minority families toward more burdensome dispute resolution mechanisms.

¹²⁴ MURPHY & SINGER, *supra* note 78, at 43-45, 48, 138.

¹²⁵ *Id.* at 138 (noting that courts currently use a "one size fits all" triage method in family disputes, but some commentators have advocated for a more "sophisticated and careful triaging").

¹²⁶ *Id.* at 43-45, 48.

¹²⁷ *Id.* (noting that non-judicial actors like custody evaluators are increasingly important in the mediation process).

¹²⁸ Mary Elizabeth Lund, *The Place for Custody Evaluations in Family Peacemaking*, 53 FAM. CT. REV. 407, 409 (2015) ("Custody evaluations do appear to lead to settlement, which probably means they shorten the length of time the family is involved in litigation." (internal citation omitted)).

¹²⁹ Scott & Emery, *supra* note 23, at 71.

¹³⁰ A. Mechele Dickerson, *Racial Steering in Bankruptcy*, 20 AM. BANKR. INST. L. REV. 623, 623, 641-43 (2012) (finding that black debtors are disproportionately placed in chapter 13—which is more expensive and more burdensome than chapter 7—while bankruptcy lawyers steer whites away from chapter 13).

¹³¹ *Id.* at 637.

II. LOCAL RULES OF THUMB

This Part outlines a reform strategy that is novel in two ways. First, it embraces bottom-up, rather than top-down, rulification.¹³² That is, it draws on local entities to provide guidance to trial court judges rather than seeking that guidance from state appellate courts or state legislatures. As I will discuss more below, shifting focus to the local level avoids the core problems that top-down rulification has encountered: political paralysis and incentive-incompatible reform proposals.¹³³ Second, it introduces the concept of rules of thumb. Rules of thumb offer advice only. Yet there is a great deal of evidence suggesting that even this mildest form of rulification will have a significant impact.¹³⁴

Although each of these two innovations—localism and rules of thumb—could be pursued independently, the combination of the two yields important benefits. As I argue in a companion piece, existing home-rule and intrastate preemption doctrines already give cities some power to rulify family law, but only through rules of thumb.¹³⁵ By focusing on rules of thumb, therefore, there is hope for local reform even if state-level actors continue to drag their feet and fail to affirmatively authorize local influence. Regardless, limiting local voice to its most modest form—rules of thumb—sweeps away many of the classic objections to local power.¹³⁶

A. *What Is a Rule of Thumb?*

It is common for scholars to note that debates about rules and standards are really debates about where legal directives should lie along a continuum.¹³⁷ Open-ended standards are at one end, bright-line rules are at the other.¹³⁸ Family law reforms have often taken what I will call a mid-sized step toward rulification. They have sought presumptions that can be overcome only if the judge has a heightened level of certainty about the proper outcome.¹³⁹ Rules of

¹³² The spatial metaphor works best for local judges, who are at the bottom of a judicial hierarchy. That metaphor does not capture the complexity of the relationships between other local actors, trial judges, and state-wide bodies. But it nonetheless gets the main point across.

¹³³ See *infra* Section III.C.

¹³⁴ See *infra* Section III.B.

¹³⁵ Williams, *supra* note 50, at 1134-50 (discussing the ways that local rules of thumb would better serve the needs of family law participants).

¹³⁶ See *infra* Part IV.

¹³⁷ Sullivan, *supra* note 35, at 57.

¹³⁸ See *id.*

¹³⁹ See, e.g., *Allen v. Allen*, 320 S.E.2d 112, 115 (W. Va. 1984) (“The primary caretaker presumption is rebuttable and may be overcome if the primary caretaker parent is shown by a clear preponderance of the evidence to be an unfit person to have custody of a child.” (emphasis added)).

thumb offer a smaller step toward rulification. Rules of thumb offer advice.¹⁴⁰ They do not take any discretion away from trial court judges. A judge that conducts a totality of the circumstances test and concludes that the mother should get custody, or that a business is a marital asset, or that alimony should be awarded, will rule on that basis. Rules of thumb only exert force when a totality of the circumstances test is inconclusive.¹⁴¹ At this moment, a judge may well take the advice that a rule of thumb offers. For example, a judge in equipoise about a child custody issue might take into account the local value judgment that elevates academic performance over athletic encouragement. To take a common Texas example, local advice might weigh in on whether it is in a child's best interest to be red-shirted.¹⁴² Again, a rule of thumb does not supplant judicial discretion, it supplements it by offering advice about how to exercise that discretion.

Presumptions and rules of thumb exist along the same continuum, but there are three important differences. The first is a matter of degree. The term presumption has many meanings.¹⁴³ A presumption could signify who has the burden of production,¹⁴⁴ or who has the burden of proof,¹⁴⁵ or it could simultaneously assign the burden of proof and heighten it. This third species of presumption is common in family law. For example, the ALI created presumptive awards akin to alimony that courts could deviate from only if those rules created a "substantial injustice."¹⁴⁶ Similarly, the amount of child support determined by a state's child support formula is presumptively in the best interests of the child, and courts can deviate only if they make specific written findings that the amount would be "unjust or inappropriate."¹⁴⁷ More abstractly,

¹⁴⁰ FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 108-09 (1991).

¹⁴¹ *See id.*

¹⁴² Douglas E. Abrams, *The Challenge Facing Parents and Coaches in Youth Sports: Assuring Children Fun and Equal Opportunity*, 8 VILL. SPORTS & ENT. L.J. 253, 263 n.43 (2002) ("'Red-shirting' is the practice where parents . . . hold the athletes back in school . . . for a year or two in order to 'bulk them up' for a more impressive athletic showing once they return to the sport.").

¹⁴³ Leo H. Whinery, *Presumptions and Their Effect*, 54 OKLA. L. REV. 553, 553 (2001).

¹⁴⁴ This type of presumption is consistent with the Thayer-Wigmore theory of presumptions. Paul R. Rice, *The Evidence Project: Proposed Revisions to the Federal Rules of Evidence with Supporting Commentary*, 171 F.R.D. 330, 429 (1997).

¹⁴⁵ This is consistent with the Morgan-McCormick theory of presumptions. *Id.* at 430.

¹⁴⁶ PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 93, at §§ 5.04-5.05; *see also id.* at § 3.07 (allowing judges to deviate from the presumption only under explicitly enumerated circumstances, and only if those circumstances made the presumptive outcome "unjust or inappropriate").

¹⁴⁷ *See, e.g.*, FLA. STAT. § 61.30 (2017) (requiring this finding only if the judge deviates from the guidelines by more than five percent); KY. REV. STAT. ANN. § 403.211(2)-(3) (West 2017); TEX. FAM. CODE ANN. § 154.122 (West 2017).

presumptions in family law are designed to take discretion away from judges by raising the level of certainty required for the judge to rule in a way inconsistent with the presumption.¹⁴⁸ If we reduce the complex ideas of certainty and uncertainty to a single scale, we might describe a presumption as requiring a judge to be seventy-five percent sure that the presumption leads to an incorrect result before deviating from it. Absent the presumption, some judges would have comfortably ruled in favor of one party, but with the presumption, they must rule for the other party. Rules of thumb do not operate this way. They operate in the space where judges might be saying to themselves: "I might as well flip a coin!"¹⁴⁹ Again, this might be illustrated with a simple scale of uncertainty by saying that rules of thumb operate when judges are between forty-nine and fifty-one percent sure of something.

The second way that rules of thumb differ from presumptions is not merely a matter of degree. Presumptions have authoritative weight. Rules of thumb only have persuasive weight. Some judges might be uncomfortable ruling in favor of one party even if they are seventy-four percent sure that this is the right outcome. For them, rules of thumb and presumptions might operate in the same set of cases. But they operate differently. A judge operating in good faith will abide by the presumption regardless of whether they think it is the best outcome in this specific case—the presumption has authoritative weight. But a judge considering a rule of thumb is free to reject it. Rules of thumb only influence outcomes when judges are persuaded that the generalizations embedded within them are relevant in the case at issue.

These two differences point to a third. Unlike bright-line rules and burden-heightening presumptions, rules of thumb do not create over and under inclusion problems. To use a classic example of over inclusion, a rule might state "no vehicles in the park."¹⁵⁰ This might be overly inclusive as applied to a monument that incorporates a military truck.¹⁵¹ If you think that this is an instance of an overly inclusive rule, then you have determined that the proper result under an all things considered judgment about the meaning of the rule was to allow the

¹⁴⁸ SCHAUER, *supra* note 140, at 108-09.

¹⁴⁹ Judges have, indeed, decided custody issues this way. *In re Brown*, 662 N.W.2d 733, 736 (Mich. 2003) ("Respondent produced a coin, allowed the defendant to call heads or tails, and flipped it."); *Judicial Inquiry & Review Comm'n v. Shull*, 651 S.E.2d 648, 652 (Va. 2007) ("While Judge Shull admitted that he had determined a contested legal matter by twice flipping a coin during a courtroom proceeding, he argued that his action was intended to encourage the litigants to resolve the custody issues by themselves . . .").

¹⁵⁰ H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958) (discussing the interpretation of a rule that says "no vehicles in the park").

¹⁵¹ Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 663 (1958) ("What would Professor Hart say if some local patriots wanted to mount on a pedestal in the park a truck used in World War II, while other citizens, regarding the proposed memorial as an eye-sore, support their stand by the 'no vehicle' rule?").

monument in the park. Now suppose that the directive is only a rule of thumb. It might be expressed as “when you are uncertain of what to do, exclude vehicles from the park.” But you are not uncertain, you have already decided that it is proper to allow the monument in the park. Rules of thumb only exert influence within the set of reasonable outcomes—that is, within the set of outcomes that we cannot label as examples of under or over inclusion.

B. *Where Are Its Teeth?*

The previous discussion might make readers wonder whether rules of thumb can have any real impact. How often are judges so uncertain that rules of thumb would apply? Would judges really accept unsolicited advice? The answers to these questions are, respectively, all the time and emphatically yes.

Judges face massive uncertainty in almost all areas of family law. Judges often complain that there are no satisfactory ways to decide between two fit and loving parents.¹⁵² Some judges have even flipped a coin to decide.¹⁵³ There is also no way to decide how much visitation is optimal, or whether \$1000 per month in alimony is more appropriate than \$900 or \$1100. If the studies above are any indication, there are perhaps not even satisfactory ways to decide between awards of \$0 or \$15,000 per month.¹⁵⁴

This uncertainty makes judges crave advice. Evidence for this can be found in existing judicial practices. Consider first, the case of custody evaluations. Custody evaluations are junk science.¹⁵⁵ Many evaluators are not even mental health professionals.¹⁵⁶ Even among those that are, there is no professional consensus on proper methodologies for custody evaluations.¹⁵⁷ There is no scientific evidence supporting the idea that custody evaluators can determine who will be a better parent.¹⁵⁸ Custody evaluators persist in using “deeply

¹⁵² 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, 202 (1969) (“[J]udges often indicate that their role in custody adjudication is an onerous and frustrating one.”); see also Robert F. Kelly & Sarah H. Ramsey, *Child Custody Evaluations: The Need for Systems-Level Outcome Assessments*, 47 *FAM. CT. REV.* 286, 287 (2009) (“Many reasonable, but anecdotal, reports indicate that judges find custody cases to be difficult and frustrating.”).

¹⁵³ See *supra* note 149.

¹⁵⁴ Harwin, *supra* note 64 (“When asked how much alimony a lifelong homemaker married to a doctor deserved, judges in an Ohio survey estimated as little as \$5,000 a year and as much as \$175,000.”).

¹⁵⁵ Scott & Emery, *supra* note 23, at 69, 95.

¹⁵⁶ Sacha M. Coupet, *The AAML Child Custody Evaluation Standards: Bridging Two Worlds*, 25 *J. AM. ACAD. MATRIM. L.* 295, 305 (2013).

¹⁵⁷ Lund, *supra* note 128, at 410.

¹⁵⁸ *Id.* at 410, 412.

flawed¹⁵⁹ methods. For example, custody evaluators often use the Minnesota Multiphasic Personality Inventory test, despite the fact that it has no proven association with parenting ability.¹⁶⁰ Custody evaluations offer an “aura of scientific objectivity,”¹⁶¹ but it is illusory. In reality, the practice just shifts discretion from the judge to the custody evaluator. Despite these frequent and decisive critiques, the vast majority of judges want custody evaluators to weigh in on the ultimate issue of custody,¹⁶² specifically hire and task evaluators with doing so,¹⁶³ do not apply *Daubert*-type tests to screen this inappropriate evidence,¹⁶⁴ and defer to the evaluators.¹⁶⁵ Why? The best explanation is that the best-interest test is so indeterminate that judges are reaching out for any advice that they can get.¹⁶⁶ And their self-serving need for guidance is overwhelming their ability to accurately judge the underlying science.

Judges’ hunger for guidance appears outside of the custody context as well. In Michigan, fifty-two percent of judges use a formula to help set alimony, even though that formula has never been formally adopted by any official body.¹⁶⁷

¹⁵⁹ Robert E. Emery, Randy K. Otto & William T. O’Donohue, *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6 PSYCHOL. SCI. PUB. INT. 1, 6-10 (2005).

¹⁶⁰ Bari L. Nathan, *Mixing Oil & Water: Why Child-Custody Evaluations Are Not Meshing with the Best Interests of the Child*, 46 LOY. U. CHI. L.J. 865, 901-02 (2015); see also Gary B. Melton et al., *Psychological Evaluations for the Courts*, in HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 484 (1997) (“[T]here is probably no forensic question on which overreaching by mental health professionals has been so common and so egregious. Besides lacking scientific validity, such opinions have often been based on clinical data that are, on their face, irrelevant to the legal questions in dispute.”).

¹⁶¹ Scott & Emery, *supra* note 23, at 94.

¹⁶² *Id.* at 95; Lund, *supra* note 128, at 410 (noting that eighty-four percent of surveyed judges wanted this).

¹⁶³ Dolan & Hynan, *supra* note 71, at 81.

¹⁶⁴ Scott & Emery, *supra* note 23, at 99-100 (explaining that in most courts, the admissibility of scientific evidence is regulated by the *Daubert* test, but such regulations do not apply to psychological science in custody proceedings).

¹⁶⁵ Stephen J. Yanni, *Experts as Final Arbiters: State Law and Problematic Expert Testimony on Domestic Violence in Child Custody Cases*, 116 COLUM. L. REV. 533, 534 (2016) (collecting studies and noting that judges follow evaluator recommendations in seventy to ninety percent of cases).

¹⁶⁶ Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 415 (2008) (collecting evidence and concluding that “[s]pecific recommendations appear to be what judges and attorneys want and what evaluators provide”); Kelly & Ramsey, *supra* note 152, at 287 (“Many reasonable, but anecdotal, reports indicate that judges find custody cases to be difficult and frustrating and that they turn to mental health professionals for assistance.”).

¹⁶⁷ ALIMONY GUIDELINES PROJECT OF THE EQUAL ACCESS INITIATIVE, STATE BAR OF MICHIGAN STANDING COMMITTEE ON JUSTICE INITIATIVES EQUAL ACCESS INITIATIVE,

The most commonly cited formula is embedded in a practitioner-created computer program called MarginSoft that ultimately reports “what Craig Ross, [the program’s creator], would recommend for alimony.”¹⁶⁸ It is hard to know why judges should care what Craig thinks about the many value judgments embedded in alimony determinations. I doubt they do. But again, they are likely searching for any advice they can get.

The Canadian experience is even more telling. There, two professors developed guidelines for spousal support in 2008 with the help of a grant from the Canadian Department of Justice.¹⁶⁹ The guidelines offered suggested ranges for support amounts.¹⁷⁰ They did not purport to bind judges in any way or to reduce their discretion.¹⁷¹ The guidelines were never formally adopted by any legislative body.¹⁷² After only six years, the major complaint about them was that they were *too influential*.¹⁷³ This again shows that judges crave advice, and will take it from where they can get it.

Legislators in Colorado appear to understand this. Colorado recently developed a complex alimony formula.¹⁷⁴ Instead of imposing it on judges in the form of a bright-line rule or a presumption, the Colorado Legislature made it completely nonbinding.¹⁷⁵ Judges must do the relevant computations, but, after that, nothing in the statute requires them to give the result any weight.¹⁷⁶ Why would legislators go to all this trouble? Probably because they understand that judges will give significant weight to even nonbinding formulas as long as they

ALIMONY GUIDELINES SURVEY REPORT 4-5 (2005) <https://www.michbar.org/file/programs/eai/pdfs/alimonyguidelinessurvey.pdf> [<https://perma.cc/WA95-7EYV>].

¹⁶⁸ *Id.* at 5; Craig Ross, *Alimony (the Program) Some Thoughts/Explanations* (Aug. 1998), <http://www.marginsoft.net/Writings1.htm> [<https://perma.cc/E7DB-5UHV>] (discussing the specific formula).

¹⁶⁹ Rogerson & Thompson, *supra* note 38, at 241.

¹⁷⁰ *Id.* at 251.

¹⁷¹ *Id.* at 241-42 (“Unlike child support guidelines, the Canadian spousal support guidelines are not legislated and their application is not mandatory.”).

¹⁷² *Id.* at 250.

¹⁷³ *Id.* at 264-65. The veneer of mathematical precision that alimony formulas provide is likely to make them even more appealing. See Ellman, *supra* note 23, at 185 (“[T]he fact that the [original child support] guideline always produces an exact support amount, down to the penny, gives an impression of scientific certainty. Users see this precise number, not all the questionable assumptions that go into producing it. Repeated reliance on the numbers produced by the existing guidelines creates a powerful anchor effect in the minds of users, who come to assume they are the correct answer . . .”).

¹⁷⁴ COLO. REV. STAT. § 14-10-114 (2017).

¹⁷⁵ *Id.* § 14-10-114(3)(e) (“The maintenance guidelines . . . do not create a presumptive amount or term of maintenance. The court has discretion to determine the award of maintenance that is fair and equitable to both parties based upon the totality of the circumstances.”).

¹⁷⁶ *Id.* § 14-10-114(3)(a).

reduce the radical uncertainty that judges face and offer advice that lies within a very broad range of reasonable outcomes.¹⁷⁷

These examples suggest that family law rules of thumb are powerful enough to accomplish what decades of reform efforts have failed to achieve—to usefully rulify family law’s open-ended standards.

C. *Why Would States Embrace Localism?*

Before discussing specific local entities that states might empower to create local rules of thumb, it will be useful to discuss localism more broadly. Readers may rightly wonder why state legislatures would embrace any form of localism given that they have experienced political paralysis when faced with substantive family law reform. There are four major reasons to think that localism will not be adversely affected by political paralysis. First, when faced with political paralysis, legislators have delegated substantive family law decisions. Local family law embraces this avoidance strategy. It merely seeks to shift the target of this delegation from judges alone to a partnership between judges and, for example, cities. Second, localism benefits from a longstanding perception of legitimacy.¹⁷⁸ Accordingly, state legislators who want change but do not want to take controversial substantive positions on family law matters might still empower cities or school boards to weigh in on those controversial issues.¹⁷⁹

Third, delegating some family law power to localities will not have predictable effects that mobilize interest group resistance. For example, some localities may adopt rules of thumb that tend to benefit mothers in custody contests—like favoring the primary caretaker—while others might adopt rules of thumb that tend to benefit wage earners in the division of marital assets. The sheer number of local entities makes it impossible to predict who, in the aggregate, will benefit. This may mean that interest groups, like father’s rights organizations, might not be as willing or able to mobilize against legislation that empowers localities. Fourth, even if political paralysis prevents express delegations to local entities, some cities already have the power to enact local family law rules of thumb.¹⁸⁰ In these instances, political paralysis at the state level allows local family law to flourish.

¹⁷⁷ Of course, other explanations are possible. Perhaps the bill was watered down at the last minute by interest group pressure such that few would have really wanted the law to emerge in its final form.

¹⁷⁸ Richard Briffault, *Our Localism: Part I—the Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1 (1990) (“Localism as a value is deeply embedded in the American legal and political culture.”).

¹⁷⁹ Non-local forms of experimental family law could also be worthwhile. Suppose political parties adopted varying alimony formulas and judges from each party applied their respective formulas. This would create experimentation, participation, and allow for political entrepreneurship. This type of experimentation, however, would not benefit from the deeply ingrained tendency in America to respect geographic forms of variation.

¹⁸⁰ Williams, *supra* note 50, at 1134-50.

D. *Which Entities Are “Local”?*

This Section will discuss four local entities that have something important to contribute to local family policy: local courts, cities, school boards, and Family Law Boards. Most modestly, states could encourage local courts to enact local rules of thumb. Just as local courts publish local procedural rules, they could also agree on local rules of thumb that guide their discretion in substantive matters. This is the most modest form of local family law because it does not invite any more voices into the conversation, but that is a weakness as well. Family law would benefit from offering formal pathways for other democratic institutions to communicate their preferences to local judges. States could empower cities to adopt ordinances that require judges to consider local advice. They could also empower school boards to adopt local rules of thumb. Of course, this does not exhaust the choice set.

It may be that someone can make a compelling case that regional water treatment districts are the best institutions to develop local family policy (although I doubt it). Limiting discussion to courts, cities, and school boards provides a sufficient starting point. But to the extent that readers have objections to specific aspects of these entities, I offer a fourth hypothetical source of local family law: Family Law Boards. States could create these from scratch and they could take almost any form—their members could be elected or appointed, the bodies could be large or small, they could be regional or at the neighborhood level, and they could have any number of additional features. These hypothetical Family Law Boards provide a useful tool to consider localism apart from any specific objections that stem from, for example, how certain local officials are chosen or what incentives they face.

This Section describes how each of these local entities might contribute to family law policy. It does not specifically advocate for one over another, and even leaves open the possibility that multiple local entities will attempt to influence family law at the same time.¹⁸¹

¹⁸¹ The different sources of local family law are not necessarily mutually exclusive. One could imagine a state authorizing an experiment in two different cities, in two rural school boards, and in two local courts in disparate parts of the state. Local family law could even come from multiple overlapping entities at the same time. One might imagine a state allowing courts, school boards, and city councils to each adopt local family law. Although I would not endorse this as a permanent state of affairs, it has some positive features. The resulting cacophony of conflicting voices may be particularly illuminating to judges. They might gain valuable information about the preferences of various other actors, and settle on a judicially created local rule that they would not have come to without those extra voices. Allowing the cacophony to continue might ensure that judges stay tuned to changes in citizen preferences.

1. Local Court Rules

States could authorize judges to adopt local rules of thumb to guide their collective discretion in family law matters. This form of local family law is the most modest, in that it retains judicial control over the entire process.

Some states have already embraced aspects of local family law. Several courts have enacted local rules on their own initiative that make alimony more predictable. Santa Clara County Family Court Rule 3(C) creates a formula that defines the presumptive amount of temporary alimony—alimony which is provided while the case is ongoing.¹⁸² Many other California courts follow the Santa Clara formula.¹⁸³ In the 1980s, the Texas Legislature specifically authorized local courts to develop local visitation guidelines.¹⁸⁴ Counties in Oregon also have the power to adopt local visitation schedules by virtue of an order from the Oregon Supreme Court.¹⁸⁵ Some counties provide more visitation, some less.¹⁸⁶ Some counties have detailed schedules for children of various ages, while others split children into just two groups, those older or younger than eighteen months.¹⁸⁷ Some counties have different visitation

¹⁸² SANTA CLARA CTY. FAMILY CT. R. 3(C), http://www.sccourt.org/general_info/rules/pdfs/Family.pdf [<https://perma.cc/9F47-MFGT>] (“Temporary spousal or partner support is generally computed by taking 40% of the net income of the payor, minus 50% of the net income of the payee, adjusted for tax consequences.”).

¹⁸³ Mary Kay Kisthardt, *Re-thinking Alimony: The AAML’s Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. AM. ACAD. MATRIM. LAW. 61, 73 (2008).

¹⁸⁴ Sampson, *supra* note 26, at 110.

¹⁸⁵ OR. UNIF. TRIAL CT. R. ch. 8.070, http://www.courts.oregon.gov/rules/UTCR/2017_UTCR_ch8.pdf [<https://perma.cc/72PH-QQ2D>].

¹⁸⁶ Compare COLUMBIA CTY. SUPP. LOCAL R. app. D, [https://www.ojd.state.or.us/Web/ojdpublications.nsf/Files/Columbia_SLR_2016.pdf/\\$File/Columbia_SLR_2016.pdf](https://www.ojd.state.or.us/Web/ojdpublications.nsf/Files/Columbia_SLR_2016.pdf/$File/Columbia_SLR_2016.pdf) [<https://perma.cc/TC3M-Y8GX>] (suggesting the non-custodial parent should have visitation rights on alternate weekends, alternate Wednesdays, part of winter break, Thanksgiving break in even-numbered years, spring vacation during odd-numbered years, five weeks during summer vacation, alternate legal holidays, the parent’s birthday, and part of the child’s birthday in even-numbered years), with DESCHUTES CTY. SUPP. LOCAL R. app. 3, [https://www.ojd.state.or.us/Web/ojdpublications.nsf/Files/Deschutes_SLR_2016.pdf/\\$File/Deschutes_SLR_2016.pdf](https://www.ojd.state.or.us/Web/ojdpublications.nsf/Files/Deschutes_SLR_2016.pdf/$File/Deschutes_SLR_2016.pdf) [<https://perma.cc/H7LC-H8SE>] (separating visitation guidelines by the child’s age and suggesting that the non-custodial parent has a child over five years old for eighty-five overnights per year).

¹⁸⁷ Compare LINCOLN CTY. SUPP. LOCAL R. 8.075, [https://www.ojd.state.or.us/Web/ojdpublishations.nsf/Files/Lincoln_SLR_2016.pdf/\\$File/Lincoln_SLR_2016.pdf](https://www.ojd.state.or.us/Web/ojdpublishations.nsf/Files/Lincoln_SLR_2016.pdf/$File/Lincoln_SLR_2016.pdf) [<https://perma.cc/HH49-ZA3Q>] (providing suggested parenting schedules for children younger than twelve months, children ages one through three years, children between four and five years old, children ages six through twelve, and adolescents over twelve), with LAKE CTY. STANDARD PARENTING PLAN (Jan. 26, 2011), http://www.courts.oregon.gov/Lake/docs/2011_standard_parenting_plan.pdf [<https://perma.cc/88GU-ADRA>] (providing separate suggested parenting

guidelines when the parents live sixty miles apart, for other counties the cutoff is one hundred twenty miles apart, and for still others it is two hundred twenty-five miles.¹⁸⁸

Local rules differ not only in specific content, but also in the weight that they purport to carry. Most are rules of thumb: they are defaults that operate only when the best interests of the child are unclear. For example, Ohio's Wyandot County Local Rule 25 simply says that "the non-custodial parent shall have parenting time as follows, unless otherwise Ordered by the Court."¹⁸⁹ Other local rules purport to carry more weight. Adams County Local Rule 16 states that "[i]n such case where the parents cannot agree to Parenting Time, this Schedule will be ordered by the Court, and considered controlling over Parenting Time issues."¹⁹⁰ Other counties have language that falls in between these extremes.¹⁹¹

Even when there is no formal court rule, local courts may develop norms that guide their decisions. Marsha Garrison's study of New York judges provides qualified support for this claim.¹⁹² It found that decisions to award alimony were fairly consistent—suggesting some norm had emerged with regard to this initial determination—even though decisions about the duration of the awards were not.¹⁹³ A bit of Texas history is also instructive. In the early 1990s, six of the

schedules for children younger than eighteen months and children older than eighteen months).

¹⁸⁸ Compare JOSEPHINE CTY. STANDARD PARENTING PLAN 2-3 (May 2005) http://www.courts.oregon.gov/OJD/docs/osca/cpsd/courtimprovement/familylaw/jos_stdparentingplan_060215.pdf [<https://perma.cc/28AF-WKW7>] (stating that a parent who lives more than sixty miles from the other parent should follow the schedule for "medium or long distance parenting"), with BENTON CTY. STANDARD PARENTING PLAN 2 (Mar. 2000), http://www.courts.oregon.gov/OJD/docs/osca/cpsd/courtimprovement/familylaw/parent_plan.pdf [<https://perma.cc/MK65-8UX9>] (stating that a parent who lives more than one hundred twenty miles from the other parent should follow the schedule for "Medium and Long Distance Parenting"), and SIXTH JUDICIAL DISTRICT PARENTING PLAN (Feb. 1, 2011), <http://www.courts.oregon.gov/Umatilla/Pages/FamilyLaw.aspx> [<https://perma.cc/K789-B6DW>] (providing a parenting plan to be used only when the parents live less than two hundred twenty-five miles apart).

¹⁸⁹ WYANDOT, OHIO LOCAL CT. R. 25, <http://www.cornwell-law.com/wp-content/uploads/2009/12/WYANDOT-COUNTY-VISITATION-SCHEDULE1.pdf> [<https://perma.cc/T7JV-KUDC>].

¹⁹⁰ ADAM CTY., OHIO CT. C.P.R. 16.1, https://adamscountyoh.gov/files/Adams_County_OH_COURT-RULES_1-4-2011.pdf [<https://perma.cc/T7BE-XNKW>].

¹⁹¹ See, e.g., SANDUSKY CTY., OHIO CT. C.P.R. 23, http://www.sandusky-county.org/Clerk/Clerk_of_Courts/Local_Court_Rules/Local%20Rules%20May%202005%20webready.pdf [<https://perma.cc/VW9P-C9AM>] ("The Court has adopted a Standard Order for Parenting Time . . . which shall be used unless the parties agree otherwise, or unless the evidence and the best interests of the children require otherwise.").

¹⁹² Garrison, *How Do Judges Decide*, *supra* note 58, at 489-90.

¹⁹³ *Id.*

seven family law judges in Dallas County developed an informal local rule.¹⁹⁴ This rule created a presumption against allowing custodial parents to move out of Dallas County.¹⁹⁵ Informal local norms like these are probably common.

States should expand and channel these existing practices. They should authorize courts to develop local guidelines that address these and other aspects of family law's open-ended standards. But these local efforts at rulification should be limited to rules of thumb as a first step. They should also take the form of published local rules, rather than informal norms. Although attorneys may be able to keep track of informal norms, *pro se* litigants cannot. To promote predictability, as well as several other benefits of localism described in Part III, local rules should be explicit and public rather than informal and unwritten. Allowing judges to speak through public local rules of thumb expands their influence by giving them the opportunity to speak as one.¹⁹⁶ An appellate court may well dismiss a single trial court's opinion as ill-conceived, but it is much harder to dismiss the considered judgment of all ten local judges who signed on to a local rule of thumb.

Of course, there is much more to be said about local court rules. In a companion piece, I delve deeper into this form of local family law.¹⁹⁷ That piece considers whether deliberation will alter the decisions that judges make, whether judges will experience group polarization on hot button issues, whether existing rules against rulification apply to rules of thumb, how local rules might create feedback opportunities for local citizens, whether rules of thumb might be in tension with concerns about prejudging cases, and a host of other issues.¹⁹⁸ For purposes of this Article, I set aside these deeper explorations.

2. Local Legislation

Even those who feel drawn to the judicial form of local family law described above need to consider the possibility that other institutions might have something unique to contribute to local family law. States could authorize cities to enact local rules of thumb, and they could mandate that local judges consider those rules of thumb. This mild power sharing arrangement should sound familiar to many judges. Something very similar already exists in the context of tort law.¹⁹⁹ In such cases, judges are called upon to determine whether the defendant exercised due care. Due care is not self-defining. It is an open-ended inquiry into reasonableness. Currently, state court judges can and do examine

¹⁹⁴ *Bates v. Tesar*, 81 S.W.3d 411, 424 n.9 (Tex. App. 2002).

¹⁹⁵ *Id.*

¹⁹⁶ Gerken, *supra* note 9, at 64 (arguing that dissent is more powerful when it is collective and public act).

¹⁹⁷ *See generally* Williams, *supra* note 51.

¹⁹⁸ *See generally id.*

¹⁹⁹ Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671, 704 (1973).

local ordinances to help define what reasonableness means in a particular place.²⁰⁰ Similarly, local zoning laws help define the contours of nuisance doctrine,²⁰¹ and the violation of both state statutes and city ordinances can trigger negligence per se.²⁰² In this judicial-local partnership, judges use local ordinances to help flesh out the meaning of a state-level open-ended standard.²⁰³ This is the same type of partnership that local municipal family law embraces.

Transporting these judicial-local partnerships into family law offers three principle benefits. First, although neither city councils nor judges have a particularly stellar democratic pedigree, the combination of the two will strengthen the democratic pedigree of the family law system as a whole. Second and relatedly, cities will often be better conduits for minority viewpoints. Third, cities have existing methods of soliciting input from community members that judges lack.

A common assumption of democratic theory is that, all else being equal, value judgments should be made by institutions with stronger democratic pedigrees.²⁰⁴ Elected officials generally have a stronger democratic pedigree than appointed ones. Officials who face more frequent or more vigorous competition in elections would have a stronger democratic pedigree than those elected infrequently or without competition.

Judges do not fare well on these measures of democratic pedigree. Eleven states appoint their trial court judges and do not even subject them to retention elections.²⁰⁵ Judicial elections, when they occur, often seem like a parody of democracy. Voter disinterest and abysmally low information is the norm.²⁰⁶ Out

²⁰⁰ *Id.* (“It is black letter law that city ordinances and state statutes stand on an equal footing in negligence litigation. . . . [V]iolation of ordinances carries substantial evidentiary value. . . . [E]ven negligence per se means only that courts choose for good common law reasons to allow legislation to specify the meaning of ‘due care’ within the framework of a traditional common law negligence suit.”).

²⁰¹ *Id.* at 706-07.

²⁰² RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 14 cmt. a (AM. LAW INST. 2010); Schwartz, *supra* note 199, at 704.

²⁰³ Local law can also more directly “refine” state law. C. DALLAS SANDS ET AL., LOCAL GOVERNMENT LAW § 14.38, at 14-109 (1997 & Supp. 2000); Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1462-65 (2001) (detailing ways that cities can “refine” state crimes by, for example, adding forfeiture and even altering mens rea requirements).

²⁰⁴ C. Edwin Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 TEX. L. REV. 1029, 1038 (1980) (noting “democratic theory’s preference for legislative value judgments”).

²⁰⁵ AM. BAR ASS’N, FACT SHEET ON JUDICIAL SELECTION METHODS IN THE STATES, https://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf [<https://perma.cc/YT8L-U8RB>] (last visited Feb. 24, 2018).

²⁰⁶ Leib, *supra* note 49, at 913 (“It is conventionally believed that the elections that seat, retain, or unseat local judges are not particularly salient with the electorate and do not inspire

of every five judicial elections that are, in theory, contestable, citizens are only offered a choice between potential judges in one.²⁰⁷ In the other four elections, citizens have no realistic way to select another judge.²⁰⁸ Even if voters had options, it is not clear that they would use them wisely. In one study of county court elections, only 2.5% of people could name a single candidate.²⁰⁹ The following anecdote is illustrative: “the only successful Democrat to obtain reelection for district judge in Dallas County in 1990 was a gentleman who had the same name as a local popular disc jockey.”²¹⁰ This is one aspect of family law’s democratic deficit.

Of course, there are benefits to insulating judges from electoral pressures.²¹¹ I do not take a position on how best to select judges or on classic debates about the relative virtues of accountability and independence.²¹² But as judges become

a great deal of deliberation.”); Michael J. Nelson, *Uncontested and Unaccountable? Rates of Contestation in Trial Court Elections*, 94 JUDICATURE 208, 209 (2011) (noting that “‘voter ignorance, apathy, and incapacity’ are the norm in judicial elections” (citations omitted)); see also Dmitry Bam, *Voter Ignorance and Judicial Elections*, 102 KY. L.J. 553, 555 (2013) (“At the same time, the voters, ignorant of judicial decisions and misled by deceptive television advertising, are unable to hold judges accountable for erroneous decisions, clear bias, or even unethical conduct. . . . Few voters can evaluate judicial performance based on their limited knowledge about judges or judging.”). This may, in part, be because local elections are still largely “low key friends-and-family affairs” without the influence of money or interest groups. Brian K. Arbour & Mark J. McKenzie, *Has the “New Style” of Judicial Campaigning Reached Lower Court Elections?*, 93 JUDICATURE 150, 151 (2010).

²⁰⁷ Nelson, *supra* note 206, at 214-15.

²⁰⁸ *Id.* at 216-17.

²⁰⁹ Charles A. Johnson et al., *The Salience of Judicial Candidates and Elections*, 59 SOC. SCI. Q. 371, 374 (1978) (explaining that while 14.5% of the sample could name one candidate for the state supreme court or the court of criminal appeals, only 2.5% could name a candidate in the uncontested county court elections).

²¹⁰ Mark Jonathan McKenzie & Ryan J. Rebe, *Political Knowledge of Local Courts: Are Rural Voters More Informed than Urban Voters?*, 96 JUDICATURE 169, 171 (2013).

²¹¹ Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 726 (1995) (“[E]lective judiciaries pose two problems for the constitutional democrat. First, the rights of individuals and unpopular minority groups may be compromised by an elective judiciary. Second, and more mundane but no less important, the impartial administration of ‘day-to-day’ justice may be compromised.”).

²¹² *Id.* at 710 (“Where judges are unelected and otherwise rather unaccountable, questions arise concerning the legitimacy of their power over the majority and the compatibility between the existence of that awesome power and the majoritarian principle of democracy. Where, on the other hand, judges are elected or are otherwise rather accountable, questions arise concerning the preservation of the constitutionalism’s protection principle given the possible danger that judicial decision making will reflect majoritarian sentiment.”); Jordan M. Singer, *The Mind of the Judicial Voter*, 2011 MICH. ST. L. REV. 1443, 1444-45 (discussing different opinions about which selection method is most likely to maximize judicial independence and accountability).

more independent, it becomes more important to provide them with information about local values, preferences, and concerns—information that they would have incentives to seek out if they were more accountable.²¹³ Independence should not yield ignorance. Local family law can facilitate this informed independence by requiring judges to consider the family law advice of institutions like city councils.

Although city councils have democratic deficiencies as well,²¹⁴ the differences between judicial and city council elections mean that city councils will tend to reflect different sub-parts of the electorate. For example, some cities elect councilmembers by districts rather than in at-large elections.²¹⁵ This tends to improve minority representation.²¹⁶ In some states judicial elections are nonpartisan, while some local elections are partisan.²¹⁷ This greatly affects turnout.²¹⁸ Cities have also experimented with expanding voting rights. In Takoma Park and Hyattsville, sixteen- and seventeen-year-olds can vote in local

²¹³ This information is important even for judges who face electoral pressures because the fact-intensive nature of family law issues makes it extremely difficult for citizens to hold judges accountable for their decisions. To make matters worse, in most places judges do not specialize in family law matters. Sampson, *supra* note 26, at 98 (“The largest metropolitan areas, Dallas-Fort Worth-Arlington, San Antonio, and Houston, designate trial judges who generally specialize in family law. In much of the rest of Texas, such specialization is not common practice.”). They might hear divorces alongside criminal cases and tort suits, two areas that might generate far greater electoral pressures.

²¹⁴ Turnout for city council elections varies massively, both between cities and in the same city over time. Neal Caren, *Big City, Big Turnout? Electoral Participation in American Cities*, 29 J. URBAN AFF. 31, 31 (2007) (reporting turnout rates of two percent to more than fifty percent). On average, turnout is about twenty-five percent, compared to just over fifty percent for presidential elections and thirty-eight percent in off-year elections for congressional or gubernatorial offices. *Id.* at 39. Turnout in most cities varies between twenty percent and forty percent. *Id.* (describing average turnout rates in big American cities). Regardless of the actual democratic responsiveness of city councils, people are likely to ascribe more legitimacy to enacted local family law. See Briffault, *supra* note 178, at 113 (describing “a systemic belief in the social and political value of local decision making”).

²¹⁵ Suzanne Leland & Holly Whisman, *Local Legislatures*, in THE OXFORD HANDBOOK OF STATE AND LOCAL GOVERNMENT 415, 419 (Donald P. Haider-Markel ed., 2014).

²¹⁶ *Id.*

²¹⁷ For example, though local elections are often nonpartisan, judicial elections in Baltimore and Louisville are partisan. *Partisan v. Nonpartisan Elections*, BALLOTPEdia, <http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-officials/partisan-vs-nonpartisan-elections> [https://perma.cc/J33H-KGD3] (last visited Feb. 24, 2018) (describing judicial election types in the thirty most populous cities); *United States Municipal Elections, 2016*, BALLOTPEdia https://ballotpedia.org/United_States_municipal_elections_2016 [https://perma.cc/K5PK-QSZS] (last visited Feb. 24, 2018) (noting that local elections are often nonpartisan by law).

²¹⁸ See Brady Baybeck, *Local Political Participation*, in THE OXFORD HANDBOOK OF STATE AND LOCAL GOVERNMENT, *supra* note 215, at 95, 101-02.

elections.²¹⁹ Other cities have considered allowing noncitizens to vote²²⁰ and devised novel campaign finance regimes.²²¹ These differences between judicial and local elections mean that they will draw out different voices. Allowing city councils to have a say in family law matters brings more voices to the table. This enhances the democratic credibility of the family law system as a whole, even if the democratic pedigree of judges and city councils, individually, are each less than stellar.

Majority-minority localities provide the most striking illustration of how local family law can help new voices become heard. There are over a thousand majority-black cities,²²² more than eight hundred majority-Latino cities,²²³ and seven majority-Asian cities.²²⁴ Although the city councils of these cities may not be majority-minority at the moment,²²⁵ minority representation on city councils increases as minority populations increase.²²⁶ City and county governments could therefore supply an important new voice to minority populations.²²⁷

Consider Rockdale County, just outside of Atlanta. Rockdale had the greatest racial demographic shift in the United States between 2000 and 2013.²²⁸ In 2000,

²¹⁹ Josh Douglas, *Lowering the Voting Age to 16 for San Francisco's Elections*, PRAWFSBLAWG (Oct. 26, 2016), http://prawfsblawg.blogs.com/prawfsblawg/law_and_politics/page/2/ [<https://perma.cc/5HMR-M98Z>].

²²⁰ Josh Douglas, *Most Important Election Law Question of the Decade: Local Rules on Voting Rights*, PRAWFSBLAWG (Oct. 11, 2016), http://prawfsblawg.blogs.com/prawfsblawg/law_and_politics/page/2/ [<https://perma.cc/B659-4KMH>] (“San Francisco voters may expand the voter rolls to allow . . . noncitizens to vote in school board elections.”).

²²¹ Mark Schmitt, *Seattle's New Political Vouchers Are an Experiment. How Will We Know If They're Working?*, VOX (Nov. 16, 2015), <http://www.vox.com/polyarchy/2015/11/16/9743144/seattle-political-vouchers> [<https://perma.cc/BGQ7-SZSM>] (describing campaign finance reform initiatives in Maine and Seattle).

²²² Paru Shah & Melissa Marschall, *The Centrality of Racial and Ethnic Politics in American Cities and Towns*, in OXFORD HANDBOOK OF URBAN POLITICS 312, 314 (Karen Mossberger et al. eds., 2012).

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at 317-22.

²²⁶ See James M. Vanderleeuw & Thomas E. Sowers, *Race, Roll-Off, and Racial Transition: The Influence of Political Change on Racial Group Voter Roll-Off in Urban Elections*, 88 SOC. SCI. Q. 937, 946 (2007).

²²⁷ County governments often have more limited powers than cities, but they might still be viable candidates to adopt local family law rules of thumb. See James L. Magavern, *Fundamental Shifts Have Altered the Role of Local Governments*, N.Y. ST. B.J., Jan. 2001, at 52, 56 (describing the differences between county and city government powers).

²²⁸ Jens Manuel Krogstad, *Reflecting a Racial Shift, 78 Counties Turned Majority-Minority Since 2000*, PEW RESEARCH CTR. (Apr. 8, 2015), <http://www.pewresearch.org/fact-tank/2015/04/08/reflecting-a-racial-shift-78-counties-turned-majority-minority-since-2000/> [<https://perma.cc/AJP7-E3S9>].

the county was seventy-three percent non-Hispanic white; by 2013 it was only thirty-eight percent non-Hispanic white.²²⁹ Where do these new minority residents find their voice? As of January 2017, there were two judges on the Superior Court who handled divorce cases for the county.²³⁰ They were both older white men.²³¹ The county board of commissioners, in contrast, consisted of one black man, one black woman, and one white woman.²³² The one incorporated city in the county, Conyers,²³³ had a relatively homogenous city council. Only one out of six city councilmembers was non-white.²³⁴ But having some voice at the table is far different from having none, which is the state of affairs at the superior court level.²³⁵

This pattern is quite clear in Houston as well. In Harris County, where Houston is located, eleven judges hear divorce cases.²³⁶ As of January 2017, all of them were white.²³⁷ Houston's city council was far more diverse. Its sixteen-member board included three black men, one black woman, one Hispanic man, and one Asian man.²³⁸

²²⁹ *Id.*

²³⁰ *Judges*, ROCKDALE CTY. CLERK OF CTS., <http://www.rockdaleclerk.com/judges/index.html> [<https://perma.cc/ZTL3-PUFD>] (last visited Feb. 24, 2018).

²³¹ *Id.*

²³² *Board of Commissioners*, ROCKDALE CTY., <http://www.rockdalecountyga.gov/about/company-history/board-of-commissioners/> [<https://perma.cc/L98P-J6WB>] (last visited Feb. 24, 2018).

²³³ *Rockdale County*, GEORGIA.GOV, <https://georgia.gov/cities-counties/rockdale-county> [<https://perma.cc/CP3Q-VF89>] (last visited Feb. 24, 2018).

²³⁴ *City Council*, CITY OF CONYERS, <http://www.conyersga.com/government/city-government/city-council> [<https://perma.cc/WGV7-FJW9>] (last visited Feb. 24, 2018).

²³⁵ Timothy B. Krebs, *Local Campaigns and Elections*, in THE OXFORD HANDBOOK OF STATE AND LOCAL GOVERNMENT, *supra* note 215, at 189, 193 (finding that election of the first minority representative on local bodies is “a watershed event that positively affects the future electoral prospects” of other minorities); Christine Kelleher Palus, *Local Policy and Democratic Representation*, in THE OXFORD HANDBOOK OF STATE AND LOCAL GOVERNMENT, *supra* note 215, at 584, 598 (finding that when minorities get school board seats, policies tend to benefit minority students more).

²³⁶ *Family Court Judges*, HARRIS CTY. DIST. CT., <https://www.justex.net/Courts/Family/FamilyCourts.aspx> [<https://perma.cc/9FVP-LYMA>] (last visited Feb. 24, 2018).

²³⁷ *Id.*

²³⁸ *City Council*, CITY OF HOUS., <http://www.houstontx.gov/council/> [<https://perma.cc/LB6P-V3RS>] (last visited Feb. 24, 2018). This diversity may be due to its district system, which includes several majority-minority districts. *New Houston City Council Districts Announced*, ABC NEWS (May 10, 2011), <http://abc13.com/archive/8122722/> [<https://perma.cc/5C5A-RBYG>] (explaining that several of Houston's newly-created districts were majority-Hispanic or majority-black).

In addition to racial diversity, city and county governments display much more educational diversity,²³⁹ which likely correlates with class diversity. As of January 2017, the city councilmembers in Conyers included people with advanced degrees and people with associate's degrees.²⁴⁰ It included high school coaches and medical doctors.²⁴¹ Houston showed similar diversity. The city council included both a Harvard-educated lawyer and people who started out in community college.²⁴² It included an architect, a bail bondsman, and an elementary school teacher.²⁴³

This diversity could be highly useful when crafting family law policy. In the 1990s, one hot topic in family law was whether advanced degrees, like juris doctorates, would be considered marital property.²⁴⁴ It perhaps is not surprising that the people with those degrees—judges—were resistant to the idea that they would have to share their earnings with their spouses, even when their spouses supported them through law school.²⁴⁵ If judges at the time had a clear institutional channel to hear from community members with more diverse experiences, they may have been less cavalier in rejecting this so-called human capital theory of marital property.²⁴⁶

Today, many issues central to family law look quite different to different segments of society.²⁴⁷ People with college degrees look much like idyllic 1950s households on television. Their divorce rate is very low—around seventeen

²³⁹ See *City Council*, *supra* note 234.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² Councilwoman Edwards is a lawyer, trained at Harvard Law School, and Councilman Gallegos graduated from Houston Community College. *Council Member Amanda Edwards*, CITY OF HOUS., http://www.houstontx.gov/council/4/about_amanda_edwards.html [https://perma.cc/2DBV-XV44] (last visited Feb. 24, 2018); *Council Member Robert Gallegos*, CITY OF HOUS., <http://www.houstontx.gov/council/i/> [https://perma.cc/N9ML-STRD] (last visited Feb. 24, 2018).

²⁴³ David Robinson is an architect, Michael Kubosh is a bail bondsman, and Karla Cisneros is a third grade teacher. *Council Member David Robinson*, CITY OF HOUS., <http://www.houstontx.gov/council/2/> [https://perma.cc/JHE4-N2FC] (last visited Feb. 24, 2018); *Council Member Karla Cisneros*, CITY OF HOUS., http://www.houstontx.gov/council/h/about_karla_cisneros.html [https://perma.cc/4N9H-M4P5] (last visited Feb. 24, 2018); *Council Member Michael Kubosh*, CITY OF HOUS., <http://www.houstontx.gov/council/3/> [https://perma.cc/AUF8-QNC9] (last visited Feb. 24, 2018).

²⁴⁴ See Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2268-70 (1994).

²⁴⁵ See *id.* at 2274 (hypothesizing judges typically decline to classify advanced degrees as marital property partly because they themselves hold advanced degrees).

²⁴⁶ See *id.* at 2267.

²⁴⁷ See Carbone & Cahn, *supra* note 13, at 1185.

percent.²⁴⁸ People without college degrees have roughly double that chance of divorce.²⁴⁹ We see even larger differences in non-marital birth rates, which hover around five percent for women with college degrees, and about eighty-five percent for women without high school degrees.²⁵⁰ These drastic differences are accentuated once we take race into account. For example, the non-marital birth rate for white women with college degrees is two percent.²⁵¹ It is ninety-six percent for black women without high school degrees.²⁵²

Family law scholars have long lamented the gap between real families and family law, often arguing that family law is designed only for the elite.²⁵³ These critiques are just as salient under family law's new paradigm, because custody evaluators have no guidance about how to address cultural differences that might, for example, affect commonly evaluated factors like parental warmth.²⁵⁴ These are additional dimensions of family law's democratic deficit.

These deficiencies highlight the importance of incorporating the diversity of family experiences into family law. This is harder to do when the relevant judges and evaluators all have advanced degrees, and the judges, in particular, lack sufficient economic and racial diversity. It is easier to do when judges have better access to more diverse voices. One way to accomplish this is to set up a formal system where judges must consider the family law advice of institutions with more diversity and different, if not stronger, democratic pedigrees. Just as judges might seek advice from experts in child psychology when the relevant question concerns a child's PTSD or ADHD, it makes sense for judges to seek advice from institutions that purport to represent the community when value judgments are integral to the judge's decision.

Even a city council with a very poor democratic pedigree has something to offer.²⁵⁵ City councils can more easily gather data on local values, rather than

²⁴⁸ *Id.* at 1196, 1198 (explaining that the divorce rate for first marriages begun between 1990 and 1994 between a man and a college-educated woman was roughly seventeen percent).

²⁴⁹ *Id.* at 1196 (noting that the divorce rate for first marriages begun between 1990 and 1994 between a man and a woman without a college degree was over thirty-five percent).

²⁵⁰ *Id.* at 1198.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ See Berger, *supra* note 12, at 259.

²⁵⁴ See Jonathan W. Gould & David A. Martindale, *Cultural Competency and Child Custody Evaluations: An Initial Step*, 26 J. AM. ACAD. MATRIM. LAW. 1, 2-3, 9 (2013) ("None of the primary child custody texts provide guidance on how to address cultural issues in child custody assessment.").

²⁵⁵ The democratic pedigrees of city councils may even improve in a world with local family law. Zoltan L. Hajnal & Paul G. Lewis, *Municipal Institutions and Voter Turnout in Local Elections*, 38 URB. AFF. REV. 645, 649 (2003) ("One of the potential by-products of

relying solely on the parties and issues that happen to come before a court. Many city councils already have open meetings where citizens voice concerns.²⁵⁶ They could easily have a special session to get community feedback on the value judgments embedded in family law. This could be highly beneficial regardless of whether the local community is relatively homogeneous or heterogeneous in regards to an issue. If people tend to agree that even one instance of adultery should lead to disproportionate shares of the marital estate, a city council can pass along that advice to local judges. If there is widespread disagreement, a city council could pass along what you might call a negative rule of thumb. Instead of saying that judges should generally take into account any adulterous acts, they could say that judges should generally ignore adultery because there is no community consensus on point. Because city councils already have the apparatuses to draw out these voices, and many will already have an institutional culture that promotes listening to them, even city councils elected in low information elections with abysmal turnout may offer advantages over having family law policy crafted exclusively by individual judges attempting to intuit local values.²⁵⁷

3. Local School Boards

States might also turn to school boards to create local rules of thumb.²⁵⁸ School boards may possess unique expertise about children. They also have a unique potential to communicate local values. Finally, arguments in favor of local control over education—often rooted in parents' rights to raise their

giving more decision-making power to the people in the form of initiatives, referenda, and recall is increased interest and greater turnout.”).

²⁵⁶ See *Calendar*, CITY OF CONYERS, <http://www.conyersga.com/Home/Components/Calendar/Event/3780/64?curm=12&cury=2017> [<https://perma.cc/R4UK-Z9A7>] (last visited Feb. 24, 2018).

²⁵⁷ For discussions of local judges attempting to intuit local values, see Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 141-42 (1997) (noting that, in making their decisions, judges can attempt to identify and uphold the values of the communities they serve); Leib, *supra* note 49, at 907 (describing the various ways judges might attempt to make their legal analyses “localist”).

²⁵⁸ Of course, school boards are not homogeneous creatures. In New York City, the school board is controlled by the Mayor. Paul Manna, *Education Policy*, in THE OXFORD HANDBOOK OF STATE AND LOCAL GOVERNMENT, *supra* note 215, at 667, 675. This means that choosing whether to vest power over local family law in the city council or the school boards partially devolves into a question of whether the power should be in the hands of the Mayor or the council. In Maryland, most school boards operate at the county level. *Id.* This means that some will encompass multiple small towns. This heterogeneity suggests there is no single answer to whether adopting local family law through school boards would be preferable to using other local entities. Nonetheless, some general patterns emerge, and this Section discusses them.

children—apply even more strongly to local control over family law matters that affect children.²⁵⁹

School boards have access to information that is relevant to local family law. Teachers and guidance counselors each have a unique window into the lives of children affected by divorce. They see firsthand the effect it has on children's academic achievement, athletic performance, and social interactions. They also have firsthand knowledge about the impact of switching schools, which is a potential incident of divorce and an almost inevitable incident of relocation disputes. Of course, other local entities could theoretically interview teachers and guidance counselors. But school board members have an existing relationship with principals and other school personnel, as well as many opportunities to interact. Teachers also play a large role in electing board members.²⁶⁰ This suggests that school boards may be uniquely able to access or channel the expertise that school personnel possess.

The geographical segregation of the school system plagues reformers of school finance and proponents of diverse schools.²⁶¹ But it may have two positive side effects for the purposes of local family law. As discussed above in the context of city councils, there are some benefits to creating formal pathways for judges to hear from majority-minority constituencies. A school board that largely serves white, upper-middle class families will be attuned to the issues facing that group and the values that those people hold. Similarly, a school board that largely serves poor, black families will be attuned to the challenges that they face and the values held by their constituents. This means that school boards will often be particularly good at informing judges about the preferences of various subgroups. But the benefits do not merely accrue to judges. Local family law that is more attentive to the needs of various subgroups may also better serve those subgroups. For example, judges may respond to the different challenges of low income noncustodial fathers by offering this group some child support offset for in-kind child labor.²⁶²

Arguments about local control over education further bolster the idea that school boards might be appropriate sites of family law policy. Local control of

²⁵⁹ See Justin R. Long, *Democratic Education and Local School Governance*, 50 WILLAMETTE L. REV. 401, 436 (2014) (explaining that advocates of localism cite parents' right to direct their children's education as rationale for local control of schools).

²⁶⁰ Manna, *supra* note 258, at 683.

²⁶¹ See generally Goodwin Liu, *The Parted Paths of School Desegregation and School Finance Litigation*, 24 LAW & INEQ. 81 (2006); Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495 (2010).

²⁶² See Laurie S. Kohn, *Money Can't Buy You Love: Valuing Contribution by Nonresidential Fathers*, 81 BROOK. L. REV. 53, 90 (2015). For an overview of the challenges that the current child support regime creates for low income families, and for various reform proposals, see Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991 (2006).

education facilitates parents' rights to guide their children's education.²⁶³ It allows communities to pursue their shared vision of what is valuable and promotes pluralism.²⁶⁴ These benefits apply to local family law as well. Parents' rights to guide their children's education is just one part of a larger set of rights that include their right to make daily decisions for their children, such as where they live and with whom they associate. That larger set of rights is implicated in child custody decisions. As a *prima facie* matter, arguments in favor of local educational control that rely on notions of parental rights and parental autonomy apply even more strongly to the custody context, where those concerns are weightier.

4. Local Family Law Boards

There are several reasons why a state might prefer to create a customized local entity to adopt local family law policy rather than piggyback off of existing local entities like cities, school boards, and local courts. States might view family law matters as technocratic and desire specialized experts. If so, those states could appoint a combination of marriage therapists, national child development experts, local teachers, and regional school psychologists. States might alternatively view family law matters as value judgments and desire more electoral accountability than existing entities possess. They may balance those two visions of family law in any number of ways.

My goal here is not to advocate for any particular type of Family Law Board, or even to advocate for them in the abstract. Rather, I want to use the idea of Family Law Boards as a tool to isolate various aspects of local family law. One reader may object to localism because they fear provincial school boards will impose their narrow view of the good life on everyone. One response to this reader is to embrace one form of Family Law Board—one that limits their accountability to local majorities. Another reader may object to localism and embrace regionalism. Yet another may want family law policy to be made at the neighborhood level. Because there are no existing governmental entities at the regional or neighborhood level that might plausibly be vested with the power to influence family law, the state might create Family Law Boards to do so.²⁶⁵ The idea of a Family Law Board serves as a useful tool to clear away large sets of contingent arguments and focus attention on whether localism—at least in some

²⁶³ See Long, *supra* note 259, at 436 (describing several cases where the Supreme Court struck down state statutes that indirectly limited local control over education, citing parents' rights to control their children's education). Of course, any such control is, in practice, constrained by state and federal education policy. *Id.* at 448-49.

²⁶⁴ *Id.* at 455.

²⁶⁵ Neighborhood associations are often informal bodies and do not have the formal selection procedures that cities, school boards, and judges do. Regional entities are often focused on transportation or water management; these would not be natural sites for the formation of family policy.

theoretical form—could usefully address some of the deficiencies in family law’s open-ended standards.

III. LOCALISM’S PROMISE

This Part begins by outlining how local rules of thumb can alleviate the traditional problems associated with discretion in family law. It then explores a set of benefits often associated with increasing local power more generally. Delegating power to the local level is often thought to promote policy experimentation, offer new platforms for political entrepreneurship, increase citizen participation, and create opportunities for citizens to sort themselves into political units that better fit their preferences.²⁶⁶

A. *Predictability and Idiosyncrasy*

Local rules of thumb can increase predictability and decrease the impact of idiosyncratic beliefs. This is most obvious for judicially created local rules of thumb, where groups of judges come together to jointly agree on family law policy. Other sources of local family law can also yield these benefits. For example, a large city might contain multiple judges within its borders. Local family law ordinances could help harmonize the decisions of those judges.²⁶⁷ They would also make it far easier for people to learn the content of the law *ex ante*. If a person wanted to know how their divorce might come out under the current system, they would have to learn the private proclivities of each and every judge in the state that might hear their case and discount the impact of each by the probability that the particular judge will actually hear their case. Allowing localities to rulify family law would significantly decrease that burden both by harmonizing multiple judges and by making policies public rather than private.

Localism has these benefits even when judges hear cases from multiple towns or school districts.²⁶⁸ Those judges would have to contend with multiple rules of thumb. But this is unlikely to be problematic. A judge might sensibly apply the

²⁶⁶ See, e.g., Richard Briffault, “What About the ‘Ism’?” *Normative and Formal Concerns in Contemporary Federalism*, 47 *VAND. L. REV.* 1303, 1312-14 (1994).

²⁶⁷ Of course, local family law will not always have these positive effects. If, for example, there is a strong judicial norm against deviating from an equal division of marital property even though judges have wide discretion to do so, then local family law would have the potential to disrupt this norm-driven predictability. But most applications of family law’s open-ended standards lack these alternate sources of predictability and could benefit from local rules of thumb. See Rebecca Aviel, *A New Formalism for Family Law*, 55 *WM. & MARY L. REV.* 2003, 2006 (2014) (noting that reform efforts have sought to make family law more predictable).

²⁶⁸ See, e.g., TEX. JUDICIAL BRANCH, STATE DISTRICT COURTS (Oct. 2017), <http://www.txcourts.gov/media/1439023/district-court-map-october-2017.pdf> [<https://perma.cc/ADG4-FLTJ>] (mapping the location and grouping of state district courts by county).

rule of thumb from City X or District X to families that live within that locality, and the rule from City Y or District Y to families that live there. Even if judges refuse that common sense strategy, they will now have two sources of advice, one from locality X and one from locality Y. It is far easier to predict what a judge would do if offered two focal points rather than none—it becomes much more likely that they will choose one of the two focal points or some compromise between the two.

B. *Policy Experimentation*

Justice Brandeis famously noted that “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”²⁶⁹ The benefits of devolving power to sub-state entities are even larger. Doing so increases the number of laboratories where experimentation may take place. This increases the likelihood that one experiment will succeed, while simultaneously cabining the negative fallout from failed experiments. This rationale for localism does not demand that local entities adopt policies that align with the preferences or beliefs of their constituents.²⁷⁰ All that matters is that those local entities differ in the policies that they enact, and others have some vehicle to learn from those differences.

1. Will Localities Experiment?

At least some courts, cities, and school boards are likely to experiment with local family law if given the chance to do so. The simple statistical realities of smaller political units make experimentation more likely at the local versus state level. It is easier for groups of five or fifteen local officials to agree on a proposition than it is for fifty or a hundred state legislators to do so.²⁷¹ Many cities within a state will be far more homogeneous than the state as a whole.²⁷² Colorado Springs is conservative; Boulder is liberal.²⁷³ This increases the

²⁶⁹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

²⁷⁰ There may even be benefits, from an experimentation perspective, to having local entities enact policies that ignore community preferences. This would reduce selection effects that otherwise make it difficult to assess the effect of local policy. Michael Abramowicz, Ian Ayres & Yair Listokin, *Randomizing Law*, 159 U. PA. L. REV. 929, 952-53 (2011).

²⁷¹ Krebs, *supra* note 235, at 191, 200 (stating that the average size of city councils is six, and that the average school board has between five and nine members); Leland & Whisman, *supra* note 215, at 423 (reporting that most county commissions have between three and five members).

²⁷² BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* 5 (2009) (explaining how people who are similar in both their ways of life and politics have clustered in “communities of sameness” in America).

²⁷³ David Schkade, Cass Sunstein & Reid Hastie, *What Happened on Deliberation Day?*, 95 CALIF. L. REV. 915, 915 (2007).

likelihood that at least some of the thirty-nine thousand localities in the United States²⁷⁴ will be able to agree on contestable value judgments like those embedded in family law.²⁷⁵ Even the fact that Austin is more dog friendly than many other cities may matter: they might take pet ownership more seriously in the context of divorce. School districts are similar. Among the fifteen thousand districts,²⁷⁶ some are rich and red, some are rich and blue, some are poor and red, some are poor and blue. Although there are many reasons to lament this intra-district homogeneity combined with inter-district differences, it may have the positive side effect of promoting experimentation.

When authorized to do so, local courts have happily experimented in family law matters. In Oregon, local judges are explicitly authorized to develop their own local guidelines for visitation, and many have done so.²⁷⁷ In California, counties have developed their own spousal support guidelines.²⁷⁸ In Texas, in the 1980s, some counties developed local visitation guidelines.²⁷⁹ Today, local courts in Texas and elsewhere have standing orders that differ from courthouse to courthouse, sometimes in important ways.²⁸⁰ These judges are most likely motivated by simple practicality. They want collective wisdom and guidance about how to exercise their paralyzingly broad discretion.

Cities are likely to innovate for different reasons. They have shown a propensity to enact nonbinding ordinances, at least when they have high expressive value. One hundred seventy communities passed ordinances ahead

²⁷⁴ BAKER & GILLETTE, *supra* note 8, at 46.

²⁷⁵ HUNTINGTON, *supra* note 2, at 214 (noting the difficulty of passing “purple” reforms that appeal to both red and blue constituents); Long, *supra* note 259, at 438 (“Locating control over public schools at the local level puts this sort of homogeneity within reach for some communities.”).

²⁷⁶ WILLIAM HOWELL, BESIEGED: SCHOOL BOARDS AND THE FUTURE OF EDUCATION POLITICS 173 (2005).

²⁷⁷ OR. UNIF. TRIAL CT. R. ch. 8.070.

²⁷⁸ Kisthardt, *supra* note 183, at 73.

²⁷⁹ Sampson, *supra* note 26, at 110.

²⁸⁰ For children under age one, Columbia County Oregon provides thirty hours per week of visitation to the noncustodial parent, while Deschutes County provides nine. COLUMBIA CTY. CIRCUIT CT. SUPP. LOCAL R. app. D, 13(a) (Feb. 1, 2017), http://www.courts.oregon.gov/rules/Documents/Columbia_SLR_2017.pdf [<https://perma.cc/N64Z-44A9>]; DESCHUTES CTY. CIRCUIT CT. SUPP. LOCAL R. app. 3 5.1(a) (Feb. 1, 2017), http://www.courts.oregon.gov/rules/Documents/Deschutes_SLR_2017.pdf [<https://perma.cc/32E3-Y7MT>]. Texas courts, too, differ on important matters. Compare COLLIN CTY. STANDING ORDER (Tex. 2017), http://www.collincountytx.gov/district_courts/documents/dc_forms/standing_order_children.pdf [<https://perma.cc/5ZKS-55PP>] (precluding overnight guests during divorce proceedings), with TRAVIS CTY. STANDING ORDER (Tex. 2017) https://www.traviscountytx.gov/images/courts/Docs/standingorder_childrenproperty_civildistrict.pdf [<https://perma.cc/2UD9-GTMG>] (not imposing similar restriction).

of the U.S. invasion of Iraq to denounce that course of action.²⁸¹ There have been over four hundred local resolutions condemning the PATRIOT Act.²⁸² These expressive ordinances are not limited to the aftermath of 9/11. Thirteen towns have passed ordinances that reject the FDA's authority to regulate locally grown food.²⁸³ One hundred twenty cities have passed ordinances that prevent local officials from reporting someone's immigration status to the federal government.²⁸⁴ Cities have declared that English was their official language²⁸⁵ and that they were nuclear free zones.²⁸⁶

Cities have also been at the forefront of several social movements. San Francisco was a leader and important catalyst in the same-sex marriage movement.²⁸⁷ Prior to *Obergefell v. Hodges*,²⁸⁸ many cities created local domestic partner registries.²⁸⁹ Cities have continued to enact local anti-discrimination statutes to protect gays, lesbians, and transgendered persons.²⁹⁰ Cities were also the first to ban indoor smoking.²⁹¹ Cities were the first to demand calorie counts on menus.²⁹² Cities led the way in limiting cigarette advertisements and banning trans fat.²⁹³ And it was a city that recently attempted to limit the size of sodas.²⁹⁴ Cities have also experimented with expanding the right to vote. For example, Hyattsville, Maryland, allows sixteen- and

²⁸¹ LORI RIVERSTONE-NEWELL, *RENEGADE CITIES, PUBLIC POLICY, AND THE DILEMMAS OF FEDERALISM* 181 (2014).

²⁸² *Id.* at 3.

²⁸³ *Id.* at 1.

²⁸⁴ *Id.* at 3, 151 (documenting local activism on both sides of the controversial undocumented immigrants issue).

²⁸⁵ *Id.* at 148.

²⁸⁶ *Id.* at 176. Over two hundred localities passed resolutions against nuclear testing in the 1980s. *Id.*

²⁸⁷ Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 147 (2005).

²⁸⁸ 135 S. Ct. 2584 (2015).

²⁸⁹ Yishai Blank & Issi Rosen-Zvi, *The Geography of Sexuality*, 90 N.C. L. REV. 955, 973-74 (2012).

²⁹⁰ June Carbone, *Marriage as a State of Mind: Federalism, Contract, and the Expressive Interest in Family Law*, 2011 MICH. ST. L. REV. 49, 71-81 (describing such actions in the states of Colorado, Michigan, New Jersey, and New York, and the city of Philadelphia).

²⁹¹ Paul Diller, *Why Do Cities Innovate in Public Health?—Implication of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1225, 1229 (2014).

²⁹² *Id.* at 1239.

²⁹³ *Id.* at 1226, 1238.

²⁹⁴ *Id.* at 1240-41.

seventeen-year-olds to vote on local matters,²⁹⁵ and San Francisco allows noncitizen parents to vote in local school board elections.²⁹⁶

Given the long history of city innovation, and especially given the role that cities played in same-sex marriage, it seems likely that at least some cities would experiment with family law matters. One could easily imagine a city proclaiming that free-range parenting—such as allowing one’s children to walk alone to school²⁹⁷—should be favored in custody disputes, or at least that it should not be disfavored. One city may pass an ordinance that derides corporal punishment, while another may pass an ordinance stating that judges should generally ignore run of the mill spanking. San Francisco might again try to be a national leader by considering whether adultery should be treated the same way in opposite-sex and same-sex marriages.²⁹⁸

Local school boards also have an appetite for innovation and experimentation. Texas explicitly allows local schools to opt out of some of the state’s rigid rules in order to conduct five-year experiments, an option many schools have signed up for.²⁹⁹ In Colorado, elementary schools are experimenting with whether early mental health screenings can head off behavioral problems before they start.³⁰⁰

²⁹⁵ Joshua Douglas, *Expanding the Right to Vote*, REG BLOG (Nov. 8, 2016), <https://www.theregreview.org/2016/11/08/douglas-expanding-right-to-vote/> [<https://perma.cc/NGK6-NDJE>].

²⁹⁶ Rong-Gong Lin II, *San Francisco Measure to Allow Noncitizen Parents to Vote in School Board Elections Leading*, L.A. TIMES (Nov. 9, 2016), <http://www.latimes.com/nation/politics/trailguide/la-na-election-aftermath-updates-trail-san-francisco-measure-to-allow-1478692962-htlmlstory.html> [<https://perma.cc/ZSR2-V5AS>] (“Proposition N would allow noncitizens living in San Francisco to vote for school board members if the person is a parent, legal guardian or legally recognized caregiver of a child living in the city.”).

²⁹⁷ David Pimentel, *Criminal Child Neglect and the “Free Range Kid”: Is Overprotective Parenting the New Standard of Care?*, 2012 UTAH L. REV. 947, 949, 957 (“‘Free Range’ parenting, [is] rooted in the philosophy that children can and should be given greater responsibility and autonomy at young ages and that the perceived risks that prompt overprotective parenting are overblown.”).

²⁹⁸ Although fault is irrelevant to the distribution of marital property, it is relevant to spousal support. *In re Marriage of Schu*, 211 Cal. Rptr. 3d 413, 415-17 (Cal. Ct. App. 2016).

²⁹⁹ TEX. EDUC. AGENCY, *Districts of Innovation*, https://tea.texas.gov/Texas_Schools/District_Initiatives/Districts_of_Innovation/ [<https://perma.cc/6CV2-KJTE>] (last visited Feb. 24, 2018); Laura Isensee, *Spring Branch ISD Joins Texas Experiment to Create ‘Districts of Innovation’*, HOUS. PUB. MEDIA (July 26, 2016), <https://www.houstonpublicmedia.org/articles/news/2016/07/26/161504/spring-branch-isd-joins-texas-experiment-to-create-district-s-of-innovation> [<https://perma.cc/4A9B-XZTY>].

³⁰⁰ Ann Schimke & Kate Schimel, *Schools Experiment with Universal Mental Health Screenings*, CHALKBEAT (Jan. 24 2014), <http://www.chalkbeat.org/posts/co/2014/01/24/schools-experiment-with-universal-mental-health-screenings/#.WCJPy48rJjU> [<https://perma.cc/B4M4-V3A4>].

Wisconsin schools have had a great deal of success with similar programs.³⁰¹ School programs that focus on mental health issues are closely aligned with what school boards might wish to study if they had influence over divorce policy. Divorce affects children's mental health and their school performance.³⁰² Some school districts already take a direct interest in divorce, in that they offer advice and services to divorcing parents in the hopes of smoothing the transition for children.³⁰³ Given these overlapping interests in mental health and divorce, at least some school boards may be willing to offer their input in the form of local rules of thumb.

2. Will Judges Listen?

There is little doubt that judges will listen to local rules of thumb that they themselves create. As discussed above, they are also likely to listen to rules of thumb created by other local entities.³⁰⁴ Judges crave advice. Cities have a strong foundation of perceived legitimacy that make them a credible source of such advice.³⁰⁵ School boards have the potential to harness important expertise.³⁰⁶ This increases the credibility of their advice. It is therefore likely that at least some judges will take local advice into account.

3. Will They and Others Learn from Experiments?

Once one or more localities innovate, existing entities can facilitate the process of evaluating the experiment and learning from it. Just as courts routinely canvas the policies and rulings of other courts, cities, school boards, and other organizations routinely try to learn from one another.³⁰⁷ Many non-

³⁰¹ Kelly Meyerhofer, *More Wisconsin School Districts Move to Provide Mental Health Services*, MILWAUKEE-WIS. J. SENTINEL (Sept. 28, 2014), <http://archive.jsonline.com/news/education/more-wisconsin-school-districts-move-to-provide-mental-health-services-b99356934z1-277381731.html/> [<https://perma.cc/RAE9-QBUL>].

³⁰² Paul R. Amato, *Research on Divorce: Continuing Trends and New Developments*, 72 J. MARRIAGE & FAM. 650, 653 (2010).

³⁰³ OR. SCH. DIST., *Oregon School District Mental and Behavioral Health Committee*, <http://www.oregonsd.org/parents.cfm?subpage=7605> [<https://perma.cc/H4WT-TPVE>] (last visited Dec. 15, 2017).

³⁰⁴ See *supra* Section II.B.

³⁰⁵ See *supra* Section II.D.2.

³⁰⁶ See *supra* Section II.D.3.

³⁰⁷ Stacy Marz, *Early Resolution for Family Law Cases in Alaska's Courts*, 31 ALASKA JUST. F. 13, 14 (2014) (describing how courts in Alaska mimicked an experimental triage program in Anchorage); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1629 (2006) (pointing out that states look to experiences of other states when shaping policy and legal rules); Charles F. Vuotto Jr., Editor-in-Chief Column, *Alimony Trends*, 33 N.J. FAM. LAW. 6,

profits have the express mission of facilitating this type of learning. The National Center for State Courts is a broad clearinghouse of research and information about various state and local court policy experiments.³⁰⁸ It has also conducted its own research on family law issues.³⁰⁹ The National Council of Juvenile and Family Court Judges creates and publicizes model court practices and provides judicial training on topics like implicit bias, domestic violence, and elder abuse.³¹⁰ It has also gathered best practices when it comes to setting retroactive child support.³¹¹ The Center for Court Innovation conducts and distributes research about a host of local experiments in New York state.³¹² For example, the Center runs a program in King County, New York, that offers help to obligors behind on their child support, and is actively working to establish similar programs in other jurisdictions.³¹³ The Center has also evaluated an experiment in Nassau County, New York, in which high conflict cases were

6, 12-20 (2012) (conducting survey of state and local alimony guidelines to inform debate in New Jersey about whether to adopt them).

³⁰⁸ NAT'L CTR. FOR STATE CTS., <http://www.ncsc.org/About-us.aspx> [https://perma.cc/MH86-6R73] (last visited Feb. 24, 2018).

³⁰⁹ See, e.g., NORA SYDOW & RICHARD VAN DUIZEND, STRATEGIES FOR EFFECTIVE STATEWIDE JUDICIAL COMMISSIONS ON THE PROTECTION OF CHILDREN (2011), <https://cdm16501.contentdm.oclc.org/digital/collection/famct/id/378> [https://perma.cc/K8N9-K5KH] (surveying twenty-one states with judicial commissions that focus on child welfare).

³¹⁰ NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, *About NCJFCJ*, <http://www.ncjfcj.org/about> [https://perma.cc/8LTR-9CFH] (last visited Feb. 24, 2018); NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *Calendar*, <http://www.ncjfcj.org/conference-training/calendar> [https://perma.cc/9AUF-5CGM] (last visited Feb. 24, 2018); NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, *Educational Opportunities*, <http://www.ncjfcj.org/educational-opportunities> [https://perma.cc/U6SF-XHN9] (last visited Feb. 24, 2018); NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, *The Family Violence Department's Role in Domestic Violence Prevention* (Nov. 29, 2011), <http://www.ncjfcj.org/family-violence-department%E2%80%99s-role-domestic-violence-prevention> [https://perma.cc/NS36-6JU4].

³¹¹ NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, A PRACTICE GUIDE: MAKING CHILD SUPPORT ORDERS REALISTIC AND ENFORCEABLE (2005), <http://www.ncjfcj.org/sites/default/files/NCJFCJ%20Bench%20Cards.pdf> [https://perma.cc/A4BU-E4KM] (discussing, for example, Connecticut and Massachusetts's attempts to reduce default judgments, and evidence regarding the correlation between the length of retroactive child support and the probability that the obligor will pay it).

³¹² MICHELLE ZEITLER & SAMANTHA MOORE, CHILDREN COME FIRST i-vi (2008), <http://www.courtinnovation.org/research/children-come-first-process-evaluation-nassau-county-model-custody-part?url=research%2F8%2Fpublication&mode=8&type=publication&page=3> [https://perma.cc/3F5P-59X5].

³¹³ CTR. FOR CT. INNOVATION, *Parent Support Program Helps Repair Parent-Child Relationships* (2012), <http://www.courtinnovation.org/research/parent-support-program-helps-repair-parent-child-relationships> [https://perma.cc/XD97-A94Y].

identified early and custody issues were resolved before financial issues.³¹⁴ These associations and research organizations, along with numerous academic researchers interested in these issues,³¹⁵ will help ensure that localities that want to learn from one another can do so.

Experiments are useful even if there is no consensus on the proper standard against which to judge the outcome. For many aspects of family law, different people, different localities, and different states might have different ideas about what constitutes a successful experiment. One might focus on the needs of ex-spouses and evaluate alimony experiments by the percentage of ex-spouses in poverty.³¹⁶ But another might define success as giving to obligees the amount they deserve based on their investments in the marriage.³¹⁷ This is not amenable to easy assessment. Nonetheless, there are still some potentially useful evaluations. An organization could, for example, evaluate alimony formulas by asking whether more cases settle in areas with local alimony formulas, whether lawyers report that alimony formulas make those settlements less acrimonious, and whether divorced couples are more satisfied with (or appeal less often) the results of their cases under some formulas compared to others.

Regardless of whether there is widespread agreement or ongoing debate about the best way to evaluate a given experiment, a host of actors—researchers from the organizations discussed above, academics,³¹⁸ reporters,³¹⁹ government entities,³²⁰ and casual observers—will likely attempt to assess the relevant experiments using a variety of benchmarks. This will facilitate at least some learning. Even if no one can agree on any relevant benchmarks, local family law creates a feedback mechanism that provides information to both states and other localities about the preferences of local majorities. The resulting differences and

³¹⁴ ZEITLER & MOORE, *supra* note 312, at i-vi.

³¹⁵ See, e.g., Kimberly E. Hoagwood et al., *Empirically Based School Interventions Targeted at Academic and Mental Health Functioning*, 15 J. EMOTIONAL & BEHAV. DISORDERS 66, 66 (2007) (analyzing efficacy of mental health interventions in elementary schools on both mental health and school performance).

³¹⁶ Ira Mark Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1, 5 (1989).

³¹⁷ Starnes, *supra* note 59, at 280.

³¹⁸ See, e.g., Douglas W. Allen & Margaret F. Brinig, *Child Support Guidelines: The Good, the Bad, and the Ugly*, 45 FAM. L.Q. 135, 135 (2011) (discussing the effects of child support regimes on divorce rates); Anthony W. Dnes, *The Division of Marital Assets Following Divorce*, 25 J.L. & SOC'Y 336, 339 (1998) (discussing the incentive effects of post-divorce property distribution).

³¹⁹ See, e.g., Lizette Alvarez, *In an Age of Dual Incomes, Alimony Payers Prod States to Update Laws*, N.Y. TIMES, Mar. 4, 2012, at A11 (chronicling Florida's effort to reinvent the state's alimony law by lessening financial distress on non-custodial parents).

³²⁰ See generally, e.g., CARMEN SOLOMON-FEARS, CONG. RESEARCH SERV., *CHILD SUPPORT ENFORCEMENT AND DRIVER'S LICENSE SUSPENSION POLICIES* (2011) (discussing driver's license suspensions as they relate to a non-custodial parent's stress in making court-mandated payments).

disagreement highlight the many ways that reasonable people can disagree about family law's open-ended standards. Here, policy experimentation would help us learn that there is no single-best policy solution. This too counts as an important benefit of experimentation.³²¹

The story of Texas visitation guidelines shows how even a small number of experiments can drive policy reform. In 1983, the Texas Legislature invited courts to adopt local visitation guidelines.³²² A few local courts developed such guidelines.³²³ The Travis County guidelines were much more generous to non-custodial parents than previous practice.³²⁴ Six years later, the Texas Legislature decided to adopt those Travis County guidelines statewide.³²⁵ This suggests that even if only a few local entities innovate, and even if the only vehicles for learning are casual observation and common sense, local experimentation can facilitate important legal reforms.

C. *Political Entrepreneurship*

In addition to creating policy experiments, localities can be sites of political entrepreneurship.³²⁶ In this mode, the local actor's goal is not necessarily to find better policy solutions to a particular problem, but rather to stimulate discussion or prod other units of government to act. For example, when Roy Moore used his position as a Justice on the Alabama Supreme Court to assert Christian values, he triggered a national dialogue about the appropriateness of religious symbols in public spaces.³²⁷ When Mayor Gavin Newsom began issuing same-sex marriage licenses in San Francisco, he started a chain of events that led to state courts weighing in on the issue, a state ballot initiative, and a Supreme

³²¹ Garrick B. Pursley & Hannah J. Wiseman, *Local Energy*, 60 EMORY L.J. 877, 933-34 (2011).

³²² Act of June 16, 1983, ch. 304 § 1(d), 68th Leg., 1608-09.

³²³ Sampson, *supra* note 26, at 110.

³²⁴ *See id.* at 111, 114.

³²⁵ *Id.* at 111-12.

³²⁶ Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1129 (2007); *see also* Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 350 (2011) (arguing that federal and state tort law “provide an important defense mechanism” and a “residential locus for the airing of grievances” when there are no other responsive actors); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 21 (2007) (describing how politicians at the state and local levels are “natural policy entrepreneurs” who can significantly influence public perception).

³²⁷ Christine Lagorio, *‘Moore’ Religion in Government?*, CBS (June 27, 2005, 8:06 PM), <https://www.cbsnews.com/news/moore-religion-in-government/> [<https://perma.cc/7GAT-DS37>].

Court case.³²⁸ Across the bay, the Oakland Unified School District set off its own national debate (“the biggest linguistic brouhahas in the USA in the twentieth century”) when it officially recognized the legitimacy of Ebonics.³²⁹ Localities could also weigh in on emerging issues in family law such as posthumous reproduction or the viability of recognizing three parents.

Cities and school boards have an existing base of democratic legitimacy that allows them to stimulate debate. New York City would no doubt attract much attention if it passed an ordinance stating that relocating to New Jersey was presumptively not in children’s best interest.³³⁰ Similarly, a diverse school district would create immense debate if it adopted a policy saying that it was presumptively not in children’s best interest to move to a more homogeneous school district. This would be particularly hard to ignore because school boards have access to a great deal of expertise on which factors allow children to thrive in school. These and many other local policies would force state legislatures to debate issues that they might otherwise wish to avoid and could trigger broader public discussions as well.

Local judges have an even stronger insider status and can dissent from within the system by declaring how they will exercise the authority that states have expressly delegated to them.³³¹ For example, groups of local judges could dissent from the state policy of using open-ended standards to govern family law by creating bright-line rules. Of course, this form of civil disobedience³³² might

³²⁸ *In re Marriage Cases*, 183 P.3d 384, 447 (Cal. 2008) (holding that differential treatment accorded to same-sex couples embodied in the statute impinged upon fundamental interests of same-sex couples); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2585 (2015); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2655 (2013) (describing the ballot initiative, known as Proposition 8, that amended the definition of marriage to exclude same-sex couples).

³²⁹ John Baugh, *Ebonics and its Controversy*, in *LANGUAGE IN THE USA: THEMES FOR THE TWENTY-FIRST CENTURY* 305, 305 (Edward Finegan & John R. Rickford eds., 2004) (describing the chain of political and research events that developed out of a school board’s declaration that Ebonics was the “predominantly primary language” of its many black students); *Oakland School Board Resolution on Ebonics (Original Version)*, 26 J. ENG. LINGUISTICS 170, 171 (1998).

³³⁰ Although all states use a best-interests analysis for relocation, they vary greatly in terms of the details, such as who has the burden of proof. Merle H. Weiner, *Inertia and Inequality: Reconceptualizing Disputes over Parental Relocation*, 40 U.C. DAVIS L. REV. 1747, 1754-56 (2007). For a discussion of the debates surrounding relocation, see generally Sally Adams, *Avoiding Round Two: The Inadequacy of Current Relocation Laws and a Proposed Solution*, 43 FAM. L.Q. 181 (2009).

³³¹ Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1259 (2009); Gerken, *supra* note 9, at 11-28 (“Like cities and states, substate and sublocal institutions can serve as sites of minority rule and sources of dialogue, dissent, and resistance.”).

³³² Bulman-Pozen & Gerken, *supra* note 331, at 1278, 1284 (describing uncooperative behavior from state or local actors as akin to civil disobedience).

be quickly overridden by appellate courts or the state legislature. But the open-ended nature of family law standards leaves substantial room for local judges to dissent while staying within the confines of state law.³³³ Local judges could also dissent from prevailing norms where they exist. For example, they could adopt a local rule of thumb that contradicted a common practice of splitting marital assets fifty-fifty, and instead split assets in proportion to the incomes of the spouses. Finally, one could imagine judges attempting to influence legislative action. In states debating family law reforms, judges might speak with a particularly loud voice if they preemptively adopted these reforms as a rule of thumb, or alternatively if they adopted rules of thumb that were antithetical to the proposed reforms. Regardless of what local judges say, they speak with some force because they are the actors to whom the state has delegated the task of making the broad fairness determinations that family law requires.

Some of the above examples gesture toward a role for courts, cities, and school boards that does not rely solely on their capacity to guide judicial discretion by creating local rules of thumb. Each of these entities could seek to influence family law by influencing top-down rules or policies. Although the portion of family law that this paper focuses on—the private dispute resolution function—has adopted open-ended standards, there are other portions of family law that state-level actors have not yet settled on how to regulate.

Consider the following largely unresolved issues. Should relatives of a recently deceased man be allowed to harvest his sperm?³³⁴ If a child is conceived, does the man's estate owe child support?³³⁵ Should unmarried co-parents owe one another duties of support based solely on their shared relationship with a child?³³⁶ Should there be limits on the number of children that a single sperm donor can produce?³³⁷ Should anonymous donations be banned?³³⁸ Should sperm donors be able to obtain parental rights?³³⁹

These emerging issues could benefit from local voices. State legislators and state supreme court justices will certainly want to know what lower court judges

³³³ *Id.* at 1272.

³³⁴ Browne C. Lewis, *Dead Men Reproducing: Responding to Existence of Afterdeath Children*, 16 *GEO. MASON L. REV.* 403, 403 (2009) (describing courts grappling with whether a woman could use her dead husband's sperm to conceive his child).

³³⁵ *Id.* at 415 (discussing the balance of equities regarding child support and posthumously conceived children).

³³⁶ Cynthia Lee Starnes, *Lovers, Parents, and Partners: Disentangling Spousal and Co-Parenting Commitments*, 54 *ARIZ. L. REV.* 197, 203 (2012).

³³⁷ Naomi Cahn, *The New Kinship*, 100 *GEO. L.J.* 367, 376-77 (2012) (describing the lack of regulation regarding the number of children who should be produced from an individual donor's gametes).

³³⁸ *Id.* at 420-21.

³³⁹ Melissa Murray, *Family Law's Doctrines*, 163 *U. PA. L. REV.* 1985, 2009-10 (2015) (describing a situation where a child was conceived through in vitro fertilization and the sperm donor petitioned for parental rights).

think about these issues. But why limit that input to the select few local judges who happened to be assigned a case where this was an issue? As it stands, these random judges are the only local actors that have the opportunity to shape policy. Cities and school boards could also play a useful role. Trial court judges, regardless of whether they act alone or in groups, have no expertise in mapping out the consequences of their rulings in these cases and insufficient democratic pedigree to make the necessary value judgments. Allowing cities and school boards to weigh in on these issues gives citizens an additional voice and provides a mechanism for state policymakers to learn about the values of different communities. If Miami and Jacksonville adopt conflicting stances on whether to allow posthumous reproduction, Florida courts and legislators might be forced to debate the issue. If city councils in Atlanta, Augusta, and Savannah all issued statements in support of limiting the number of children that a single donor could conceive, the Georgia Legislature might be more willing to consider doing so. School boards might have unique information about how children fare with three parents—for example, when a gay couple uses a surrogate or egg or sperm donor who remains involved in the child’s life. If multiple school boards declared that children with three parents thrive, and that having three parents did not present any logistical difficulties for school administration, then state judges and legislators might be more willing to formalize the status of third-party parents. Regardless of what they say, cities and school boards have a unique perspective to share, especially when they represent a group of citizens that are routinely shut out of other political bodies.

D. *Participation*

Some scholars have argued that shifting power to smaller political units promotes civic engagement.³⁴⁰ The basic argument is appealing. One’s voice is more powerful in local elections compared to state or national elections. Accordingly, people may be more likely to engage with local as opposed to state or national politics.³⁴¹

These benefits are more theoretical than real.³⁴² People care much more about national politics than state or local politics.³⁴³ Can you recall one “down ballot” name from your own trip to the voting booth in the last presidential election?

But family law is perhaps uniquely capable of reinvigorating local participation. Many of the things that local governments do are rather technocratic: they take care of the trash, repair playscapes at local parks, and

³⁴⁰ See generally GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (1999).

³⁴¹ Diller, *supra* note 326, at 1128 (“Empowering local government, it is said, enables public participation and the creation of a sense of community in a way that is impossible at the state or national level.”).

³⁴² *Id.* at 1130.

³⁴³ David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419, 421-25 (2007).

make sure buses are on time. These are unlikely to inspire much civic engagement, at least until these things are totally neglected. Schools boards are similar. People may see their job as keeping test scores up and may ignore school board elections unless and until something goes wrong. But on issues of value, and particularly on issues of family, people are likely to care deeply. Almost everyone will have either gone through a divorce or will have friends who have gone through a divorce. They will have opinions on alimony, opinions on property division, and opinions on what tends to be in children's best interest. If cities began to pass local ordinances that affected divorce law, or if elected school boards had power to influence divorce policy, citizens would likely pay attention and make their opinions heard.

E. *Efficient Sorting*

In a seminal article, Charles Tiebout argued that local policy variation would allow people more choices among policy-bundles.³⁴⁴ This would allow people to sort themselves into areas with more favorable policies.³⁴⁵ People who want more policing can get it. People who want more parks can get them. People who want more parking can get it.

There are numerous barriers to efficient sorting based on local family dispute resolution systems. The reason is simple: no one thinks they will ever need them. People are notoriously optimistic about their probability of divorce. In one study, the median respondent said that she had a zero percent chance of divorcing.³⁴⁶ That is, more than half of respondents reported that no force on earth, no change in circumstances, and not even divine intervention could ever prompt them or their spouse to seek a divorce. Other studies have similarly found rampant overoptimism in the family law context and beyond.³⁴⁷

Even if people overcome their overoptimism, it is unclear how much they would weigh the possibility of divorce in their decisions about where to live. Many aspects of one's locality provide immediate and certain benefits, such as commute times, job options, housing prices, school quality, and co-locating near family. Behavioral research confirms that these immediate and certain benefits

³⁴⁴ Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956).

³⁴⁵ *Id.*; see also Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 520-21 (1991) (providing some evidence of such sorting).

³⁴⁶ See Lynn Baker & Robert Emery, *When Every Relationship is Above Average*, 17 LAW & HUM. BEHAV. 439, 443 (1993).

³⁴⁷ Sean Hannon Williams, *Sticky Expectations: Responses to Persistent Over-Optimism in Marriage, Employment Contracts, and Credit Card Use*, 84 NOTRE DAME L. REV. 733, 742-46, 757-58 (2009).

have a far greater impact on choice than uncertain future benefits.³⁴⁸ Even hypothetical couples for whom divorce policy is particularly important are unlikely to choose where to live based on local family law. Those couples are much better off writing prenups or postnups. Such agreements create far more predictability, they are far more tailored to the couple's needs, and they are enforceable even if the couple moves to a new jurisdiction.³⁴⁹

F. *Expressive Sorting*

Some family law issues might be salient enough that people might choose where to move based on the stance that a city or school district took on the issue. A couple who is deciding between two school districts might pay attention to more than just the academic experience at those schools. For example, they might look favorably upon a school policy that allows transgender students to use the bathroom associated with their gender identity, and might do so even if their children are not transgender. Similarly, they might be inclined to move to a district that had stances on family law issues to the extent that those stances had expressive force. Couples might similarly move in response to local court rules, but I suspect that they are far less visible than local ordinances and local school board policies.

This type of sorting can occur even in the face of massive overoptimism. Even a couple who is sure they will never divorce may want to support the expressive efforts of a school board or city. They may want to live in a city that expresses a commitment to supporting single-parent households, or they may want to live in a district that is committed to the notion that two-parent families are best. They may want to live in a district that supports helicopter parenting or one that has a strong stance against corporal punishment.

This expressive sorting has both costs and benefits. The costs might include further exacerbating trends like the big sort.³⁵⁰ I will return to those themes later when I discuss the externalities associated with local family law.³⁵¹ Here, I want to highlight some benefits. Most people would agree that it is perfectly fine for people to want to live in San Francisco because it is known as a gay-friendly

³⁴⁸ Manuel A. Utset, *Hyperbolic Criminals and Repeated Time-Inconsistent Misconduct*, 44 HOUS. L. REV. 609, 628-30 (2007) (discussing hyperbolic and extreme discounting); Sean Hannon Williams, *Probability Errors: Overoptimism, Ambiguity Aversion, and the Certainty Effect*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 335, 344-46 (Eyal Zamir & Doron Teichman eds., 2014) (discussing the certainty effect and ambiguity aversion).

³⁴⁹ This highlights one additional limit to local family law. Although local variation creates many benefits, prenups and postnups merit more centralization to allow couples the freedom to define their lives in ways that are respected in multiple jurisdictions. Leib, *supra* note 49, at 924-25 (arguing that uniformity is particularly important for contract law).

³⁵⁰ BISHOP, *supra* note 272, at 40.

³⁵¹ See *infra* Section III.D.

city, just as it is fine for people to move to Austin because of its liberal tilt and fine for people to move to Tacoma Park, Maryland, as a way of supporting the many political statements that its city council has made. These associations offer people the opportunity to be part of something larger than themselves, which everyone should agree can be a positive thing. Although I doubt that expressive sorting will have a large effect in practice—jobs, commute times, housing stock, the academic quality of schools, and many other factors will be far more important to many people—expressive sorting may create some benefits for some people.

IV. OBJECTIONS

This Part explores the common pitfalls of moving power downward to the local level: disuniformity, races to the bottom, forum shopping, and minority oppression.³⁵² Some of these traditional objections to localism are largely inapplicable to local family law, others are far weaker when localities can only create rules of thumb, and others can be avoided with minimal effort.

A. *Disuniformity*

Normally, localism creates disuniformity. Local family law turns this objection on its head. As previously discussed, local influence over family law promotes uniformity by harmonizing the decisions of multiple judges.³⁵³ Of course, local rules of thumb still allow inter-local differences. But they replace a particularly pernicious form of disuniformity—secret, unreviewable, judge-by-judge disuniformity—with a more palatable one—public, reviewable, geographic disuniformity like that embraced by federalism.³⁵⁴

B. *Races to the Bottom*

Readers may fear that some rulification institutions—most notably cities—could be forced into races to the bottom. In a traditional race to the bottom localities may compete for mobile capital.³⁵⁵ For example, cities might compete with each other to entice a company to build a factory or headquarters within their jurisdiction. This inter-locality competition can lead cities to enact laws that deviate from local preferences.³⁵⁶ Local family law is unlikely to create these races.

The above discussion of efficient sorting suggests the first reason that reformers should not worry about races to the bottom. If people refuse to acknowledge that they could ever divorce, they are unlikely to weigh local family law at all when deciding where to move. For those rare couples who

³⁵² See Briffault, *supra* note 266, at 1314.

³⁵³ See *supra* Section III.A.

³⁵⁴ For an extensive discussion of disuniformity, see Williams, *supra* note 50, at 1139.

³⁵⁵ Diller, *supra* note 326, at 1132.

³⁵⁶ *Id.*

actually think about divorce, prenups and postnups provide far more security than merely moving to a jurisdiction with favorable family law rules.

A second reason emerges when one considers the differences between couples and businesses. Again, in a classic race to the bottom, cities might decrease taxes or regulatory burdens to entice companies to locate within the city. In order for these competitive pressures to create races to the bottom, mobile actors must be relatively homogeneous in their preferences. For businesses, this is likely the case: almost all business want lower taxes and less regulation. This homogeneity is critical to creating races to the bottom. But among couples, heterogeneity is the norm. Consider a city that expresses one vision of family law—for example, that two-parent households are generally better than single-parent households. Even if couples weighed the city's stance in their decision about where to move—which is unlikely—that stance would attract some couples but repel others. This prevents races to the bottom.

The previous comments focused on between-couple heterogeneity. But within-couple heterogeneity yields a third reason not to worry about races to the bottom. Many aspects of family law create zero-sum games.³⁵⁷ If one spouse gets more property in the divorce, the other gets less; if one spouse obtains more parenting time, the other spouse obtains less. Cities that favor one spouse over the other—by, for example, favoring the spouse with the higher income—will be attractive to one spouse, but proportionately unattractive to the other spouse. This presents yet another barrier to races to the bottom.

C. *Forum Shopping*

Legal variation creates the potential for forum shopping.³⁵⁸ Nonetheless, there are substantial barriers to forum shopping in family law, and, regardless, it is easy to police.

The current link between residence and forum creates significant practical barriers to forum shopping. Far unlike the standard forum shopping situation, forum shopping in the divorce context requires physically moving to a new locality. Standard state venue rules require that divorces be filed in the county in which the spouses have resided for the last six to twelve months.³⁵⁹ It is hard to pick up and move with one's family. This is especially true with children, who have existing friend networks in their neighborhoods, day cares, or schools. Moving is likely to be particularly hard when divorce looms and there is significant marital strife. Behavioral research provides further support for these

³⁵⁷ They are only roughly zero-sum. For example, with creative tax planning, a couple may be able to reduce their taxes and increase their total wealth.

³⁵⁸ Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1677 (1990).

³⁵⁹ 27A CORPUS JURIS SECUNDUM DIVORCE § 166 (2017); *Chart 4: Grounds for Divorce and Residency Requirements*, 40 FAM. L.Q. 596 (2007).

general claims; people are unlikely to incur the immediate and substantial costs of moving to obtain an uncertain benefit.³⁶⁰

Of course, residency requirements do not make forum shopping impossible. Luckily, when forum shopping occurs, it is easy to police. If judges suspect that one member of the couple is forum shopping, they can use their wide discretion to punish them. In addition, other institutions can police forum shopping. A good start might be to create a local rule declaring that all local family law rules of thumb are applicable only to couples who have either lived in the locality for more than two years or since they got married. Obviously, one could imagine similar guiding rules with more nuance or different time thresholds. The main point is simply that, if states or localities fear forum shopping, there are relatively simple ways to mitigate the problem.

D. Externalities

Localism is often associated with externalities. Classic “not in my backyard” ordinances exclude certain people or things from one locality, which increases the concentration of those people or things in another locality.³⁶¹ For example, a local ordinance that makes it hard for sex offenders to find places to live may force them into an adjacent town.

Local family law does not create these sorts of externalities. The closest it comes to doing so is when one member of a divorcing couple moves to a new locality. The new locality will have to deal with the consequences of the decision of the former locality. But this is true of any court case. A judge in Kansas may determine the rights and obligations of two parties to a tort or contract case, and when those parties move, the consequences of that decision still follow them. This is not generally seen as an externality problem. In fact, family law has made great strides to ensure that family law issues are not relitigated in different states—finality is far too important.³⁶² Of course, some aspects of family law are disanalagous to tort and contract cases. Namely, couples often have ongoing disputes over child custody and child support issues. One might object to a regime where the locality of the divorce had jurisdiction over these issues even if all parties have moved away. But local family law will not create such a

³⁶⁰ See, e.g., Yuval Feldman & Shahar Lifshitz, *Behind the Veil of Legal Uncertainty*, 74 *LAW & CONTEMP. PROBS.* 133, 134-36 (2011) (finding that people are significantly less willing to take a risk to obtain an ambiguous or probabilistic benefit than rational choice models would predict).

³⁶¹ Diller, *supra* note 326, at 1160.

³⁶² Kevin Wessel, *Home Is Where the Court Is: Determining Residence for Child Custody Matters Under the UCCJEA*, 79 *U. CHI. L. REV.* 1141, 1141-42 (2012).

regime. Uniform family laws already handle these matters, and determine when it is proper for a new court to handle such ongoing issues.³⁶³

Readers may also be concerned about a more amorphous externality, namely, that the type of expressive sorting described earlier³⁶⁴ might exacerbate trends of geographic segregation that already promote political polarization.³⁶⁵ If different localities express different visions of family law, and if those visions are important enough for people to make location choices based on them, then we might have more political homogeneity in cities and school districts than we already do.

But expressive sorting based on visions of the family may mitigate, rather than exacerbate, these issues. Sorting is often seen through the lens of red versus blue or conservative or liberal. On some issues, such as gay marriage, visions of the family may track these divisions. But we might be surprised by the numerous ways that positions on family law do not follow the simple red and blue paradigm. Does a housewife deserve generous amounts of post-divorce support in the form of alimony? Utah says yes.³⁶⁶ Texas says no.³⁶⁷ Yet, both are red states. California was the first state to embrace no-fault divorce.³⁶⁸ New York was the last.³⁶⁹ Both are blue states. We might not find common ground on family law matters, but we might find that our disagreements do not neatly track red/blue or conservative/liberal divides. This opens up the possibility that expressive policies could mitigate, rather than exacerbate, political polarization.

E. *Oppressive or Idiotic Policies*

Readers may be wary of allowing locally elected laypeople to influence family law. They may fear that cities and school boards are controlled by

³⁶³ See, e.g., UNIFORM CHILD-CUSTODY JURISDICTION AND ENFORCEMENT ACT § 201 (UNIF. LAW COMM'N 1997); UNIFORM INTERSTATE FAMILY SUPPORT ACT § 205 (UNIF. LAW COMM'N 2008).

³⁶⁴ See *supra* Section III.F.

³⁶⁵ BISHOP, *supra* note 272, at 28.

³⁶⁶ See UTAH CODE ANN. § 30-3-5(a)(2)(8) (LexisNexis 2017) (allowing lengthy terms of alimony that equalize the standards of living for the parties).

³⁶⁷ TEX. FAM. CODE ANN. § 8.054 (West 2017) (limiting the duration of maintenance to “the shortest reasonable period that allows the spouse seeking maintenance to earn sufficient income to provide for the spouse’s minimum reasonable needs”); see also TEX. FAM. CODE ANN. § 8.051 (West 2017) (providing restrictive situations in which maintenance is proper); TEX. FAM. CODE ANN. § 8.055(a) (West 2017) (limiting the amount of maintenance to the lesser of \$5,000 or twenty percent of the spouse’s gross income).

³⁶⁸ JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 177-78 (2011).

³⁶⁹ *Id.* at 178 (“New York was the lone holdout on true no-fault divorce until the twenty-first century.”). Some New York Judges still resist it. Sophia Hollander, *(No) Fault Divorce: Divorces Drag on Even After Reform*, WALL ST. J., May 6, 2012, at A19.

meddlesome idiots who will either be so incompetent that they routinely enact bad policy, or, worse still, actively seek to oppress local minorities. Some readers may fear that a city will try to prevent gay parents from obtaining custody, or that a school will attempt to influence custody decisions such that members of a local church are favored.³⁷⁰ Other readers may fear that city councils or school boards will punish parents for spanking their children or practicing free-range parenting, or for not doing those things.³⁷¹ Still others may fear that local politicians will pander to wealthier citizens and, for example, try to reduce alimony or split marital property in proportion to the incomes of the parties.

There are three features of local family law that substantially mitigate these potential problems: the possibility of state level override, the advisory nature of local rules of thumb, and the zero-sum nature of many aspects of divorce and custody disputes. Constitutional constraints also severely limit the harm that local officials can cause. After outlining these general barriers to oppression, this Section will address several hypothetical attempts to oppress local minorities in order to illustrate the enormous barriers to such discrimination. In each, I will focus on child custody, the area where readers might think the most is at stake, and hence the area where localities can do the most harm.

It is important to set the stage for the remaining discussions by viewing localism within the robust set of constraints that it sits. Family law matters are subject to intrastate preemption. States have the power to override cities, school boards, and groups of local judges.³⁷² This creates an important check on local power.³⁷³ And the more outlandish a local law is, the more likely it is that the state will step in to create boundaries of acceptable variation. State legislatures may be particularly trigger-happy when it comes to preemption. After all, they have also already endorsed open-ended standards. State supreme courts will also play a role in policing both their own judges and other local entities.³⁷⁴

³⁷⁰ Other fears have grounds as well. *Gillman v. Sch. Bd. for Holmes Cty.*, 567 F. Supp. 2d 1359, 1365, 1378-79 (N.D. Fla. 2008) (discussing a school board supporting a policy that banned pro-gay messages in the school).

³⁷¹ Currently, these concerns exist for local prosecutors and local judges. Pimentel, *supra* note 297, at 947-49; Elizabeth G. Porter, *Tort Liability in the Age of the Helicopter Parent*, 64 ALA. L. REV. 533, 533-34 (2013).

³⁷² There are many instances of state governments reversing local ordinances, for example. Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2558 (2006).

³⁷³ Paul Diller made a similar point in the context of the private law exception to local power, namely, that the state's ultimate authority to police localities means we have less to fear from local power. Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1110 (2012); accord Gerken, *supra* note 9, at 51.

³⁷⁴ Policing publicly announced local policies is much easier than policing trial court discretion on a case-by-case basis. Accordingly, the arguments for why appellate review in family law matters is currently weak do not apply to local family law.

In addition to the hierarchical protections stemming from state level overrides, there are lateral protections built into any system that only allows localities to create rules of thumb. Recall that rules of thumb provide advice.³⁷⁵ Judges crave such advice, but they would not be obligated to follow it or give it any more weight than they think it deserves. The key point is that two institutional actors—both the individual judge hearing the case and the institution that made the rule of thumb—have to agree that the particular rule of thumb is good policy. Cities and school districts cannot mandate an outcome. Their power comes from their ability to persuade judges that they have more expertise or stronger democratic legitimacy to make the relevant value judgments. Even ignoring constitutional constraints for the moment, a city that tries to discriminate against gay parents cannot accomplish its goals without a judge signing off. And there are reasons to think that judges will not merely rubber stamp local rules of thumb. Judges are quite familiar with the idea that they might have to critique or even strike down local actions, judges will often be elected from districts that do not track the boundaries of the relevant city or school district, and I think it is fair to say that judges generally take their jobs seriously and try to divide marital property in an “equitable” manner and to do what is in a child’s “best interest.” For all these reasons, judges will not merely abdicate their important, independent role.³⁷⁶

The basic structure of divorce and custody issues makes them poor vehicles for at least some forms of oppression. Many family law matters are zero-sum.³⁷⁷ If one spouse gets more money or parenting time, the other gets less. This makes family law a particularly ill-suited venue for discriminating against a family as a whole.³⁷⁸ Of course, this also makes divorce and custody actions a potentially promising venue for discriminating against one member of a couple, and in favor of the other. But existing constitutional constraints significantly reduce that potential.

There are powerful constitutional barriers to expressly using race, sex, or religion to decide who receives favorable or unfavorable treatment.³⁷⁹ Using

³⁷⁵ See *supra* Section II.A.

³⁷⁶ This also reduces the likelihood that local influence in the form of formulas or rules of thumb will hurt the exceptional cases most. See Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 838, 850 (2011).

³⁷⁷ Anne L. Alstott, *Private Tragedies? Family Law as Social Insurance*, 4 HARV. L. & POL’Y REV. 3, 3 (2010) (“Family law is full of private tragedy. Case after case pits one family member against another in a zero-sum struggle for resources. Spouses battle over limited assets; parents clash over child support; and children fight each other for resources when parental income is stretched across multiple families.”).

³⁷⁸ Of course, this does not mean that one cannot harm families as a whole even within a zero-sum game. See *infra* Section IV.E.3.

³⁷⁹ This stands in interesting contrast to the scant barriers between local minorities and judicial oppression in family law matters. See, e.g., *In re Marriage of Gambla*, 853 N.E.2d

race would trigger strict scrutiny.³⁸⁰ Using sex would trigger intermediate scrutiny.³⁸¹ Using religion would run afoul of the Establishment Clause.³⁸² Whatever the specific level of scrutiny, family law rules cannot survive it. Family law already provides individualized hearings, so regardless of whether child well-being is a sufficiently weighty interest, any suspect generalizations embedded in local family law will not be sufficiently tailored.³⁸³

More concretely, there are a number of hypothetical local policies that would clearly violate these constitutional limitations. A school district would not be able to say mothers should generally obtain custody.³⁸⁴ A city would not be able to say that the Muslim member of an interfaith couple should generally not get

847, 868-69 (Ill. App. Ct. 2006) (arguing judges are free to give race as much weight as they want, as long as race does not trump all other factors combined); Artis, *supra* note 42, at 789-90 (interviewing judges who adhered to unconstitutional gender presumptions); Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537, 538, 542 (2014) (noting that the Supreme Court has “repeatedly declined invitations to [police family law’s use of race], based at least in part on the Court’s race conservatives’ perception that the remaining uses of race in family law were simply ‘different’ and, at least in some circumstances, ‘benign’”). One should also be cautious about assuming that lawyers—and by extension, judges—will generally be more “enlightened” than city councilmembers. *See, e.g.*, Michael E. Miller, *Tenn. Judge Refuses to Grant Straight Couple Divorce Because . . . Gay Marriage*, WASH. POST: MORNING MIX (Sept. 4, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/09/04/tenn-judge-refuses-to-grant-straight-couple-a-divorce-be-cause-of-gay-marriage/?utm_term=.26d22d4b9274 [<https://perma.cc/N4XQ-XBA7>].

³⁸⁰ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 290-91 (1978) (“Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.”).

³⁸¹ *Craig v. Boren*, 429 U.S. 190, 198-99 (1976) (condemning the use of “overbroad generalizations” rooted in sex and applying intermediate scrutiny to such classifications).

³⁸² Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 666 (2006) (noting that favoring one religion for purposes of child custody would “pressure parents to participate in religious practice or to profess religious belief” in order to bolster their chance of obtaining custody); *id.* at 667 (noting that the state cannot discriminate against nonbelievers either).

³⁸³ *Orr v. Orr*, 440 U.S. 268, 281 (1979) (holding that it is not necessary to use sex as a proxy for need when the relevant statutory scheme already provides for an individualized hearing that could address need).

³⁸⁴ Several state courts have held unconstitutional similar maternal preferences. *Ex parte Devine*, 398 So. 2d 686, 695 (Ala. 1981) (“[W]e conclude that the tender years presumption represents an unconstitutional gender-based classification which discriminates between fathers and mothers in child custody proceedings solely on the basis of sex.”); *New York ex rel. Watts v. Watts*, 350 N.Y.S.2d 285, 291 (N.Y. Fam. Ct. 1973) (“[T]he ‘tender years presumption’ in addition to its other faults, works an unconstitutional discrimination against the respondent.”); *Pusey v. Pusey*, 728 P.2d 117, 119-20 (Utah 1986).

custody,³⁸⁵ or that courts should favor parents who celebrate Christmas with a crèche.³⁸⁶ A city council who just read *Battle Hymn of the Tiger Mother*³⁸⁷ as part of their book club could not say that Asian Americans should generally get custody of biracial children. They could not say that Mexican American couples should pay higher filing fees, or that black families should be barred from using mediation and collaborative divorce.

Legislators who were initially disposed to passing such laws might respond in one of three ways to the barriers that they face. First, many, if not most, will follow the boundaries established by the constitutional doctrines above. That is, they will acknowledge their mistake and move on. Second, local politicians acting in good faith, but perhaps overly influenced by implicit biases, might believe that their proposals are sound and try to find alternative ways to enact them. But the process of questioning the soundness of using race, religion, sex, or sexuality to categorize people may itself help debias these politicians. They might at first believe that atheists should not get custody of children, but navigating the constitutional limits on explicitly adopting such a law will likely help at least some of them see the policy concerns that cut the other direction. Of course, some local politicians may not be debiased by this process. They will join the third group of responders: officials who actively seek to circumvent the law in order to discriminate against a disfavored group. I will call these people “evil.”

In the remainder of this Section, I will explore a handful of hypothetical evil plots to illustrate how difficult they are to achieve. There are numerous grounds upon which evil officials may want to discriminate, numerous proxies an evil official might consider to avoid explicitly identifying protected classes, and numerous ways that evil officials might try to burden a disfavored group. Therefore, the discussions below cannot be comprehensive. They are not meant to be. But they are nonetheless sufficient to illustrate how difficult it would be to effectively discriminate through local family law.

I will focus on four evil plots. First, evil school board members may want to discriminate against one member of an interfaith couple. Second, evil city council members may want to discriminate against one member of an interracial couple. Third, evil city council members may want to further punish people who have been roped into the criminal justice system. Fourth, evil city council members may want to discriminate against entire families instead of individuals within families. To explore this last possibility, I will consider the chances that

³⁸⁵ 6 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 21.3(a) (5th ed. 2012) (“[A]ny denominational preference violates the establishment clause unless the government can demonstrate that the law is necessary to promote a compelling interest.”).

³⁸⁶ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524-25 (1992).

³⁸⁷ CHUA, *supra* note 47.

evil councilmembers could successfully convince judges that same-sex parents should be subjected to more invasive custody evaluations.

1. Religion

Before detailing the evil plot at issue in this Section, it is useful to dispel some potential myths. In the 1990s there was a concern that Christians were infiltrating school boards in order to impose their beliefs on students.³⁸⁸ This concern was overblown in many ways. For example, there was little evidence of any centralized movement.³⁸⁹ Most importantly, members who ran for office using their religiosity as a selling point ended up supporting very similar policies to other board members.³⁹⁰ Even Christian Right board members who were originally motivated to run so that they could infuse school policy with religion soon learned more about the diversity of viewpoints in their community and ended up differing only moderately from non-Christian Right board members.³⁹¹ So the threat of an evil school board is more hypothetical than real. Nonetheless, the remainder of this Section stops resisting the hypothetical and addresses it head on.

An evil school board member is likely to face significant challenges in finding a proxy for the more religious member of the couple, or the member who practices a particular religion. Perhaps the best proxy for religiosity would be attendance at religious services. But existing constitutional doctrine prevents burdening people based on their religious behavior.³⁹² A school board would not be able to say that custody should generally go to the parent who spends more time in buildings owned by non-profit charities over the weekend.³⁹³ Although this does not explicitly favor one denomination over another, courts scrutinize such laws to ensure that they do not have an illicit purpose.³⁹⁴ The obvious effect of this facially neutral policy is to favor those who attend religious services, and this effect is strong evidence of its illicit purpose.³⁹⁵ This and similar ordinances

³⁸⁸ See MELISSA M. DECKMAN, *SCHOOL BOARD BATTLES: THE CHRISTIAN RIGHT IN LOCAL POLITICS* 83, 123 (2004).

³⁸⁹ *Id.* at 118.

³⁹⁰ *Id.* at 144-47, 153 (discussing examples of boards with significant Christian Right membership that did not result in a change towards a religiously motivated policy that would be favored by the Christian Right).

³⁹¹ *Id.*

³⁹² *Church of Lukumi Babaly Aye*, 508 U.S. at 524.

³⁹³ ROTUNDA & NOWAK, *supra* note 385, at § 21.8(a) (“[T]he free exercise clause would invalidate a law that appeared to be religiously neutral on its face, if it could be shown that the purpose of the legislature [was] prohibiting or regulating an act because of its religious significance.”).

³⁹⁴ *Church of Lukumi Babaly Aye*, 508 U.S. at 525-28 (examining the effect of the law to determine whether it had an invidious purpose).

³⁹⁵ *Id.* at 543.

also illustrate the dynamic mentioned above: even if the school board successfully convinces one judge (the judge who hears a facial challenge) that the policy does not contain a veiled denominational preference, the school board must still convince another judge (the family law judge hearing a particular divorce case) that it reflects a sensible and weighty rule of thumb in custody cases. This is a different and often more onerous burden. After all, the link between a child's best interests and things like the proportion of meals a parent expresses thanks prior to consuming is far from obvious. If these examples seem like strawmen, it is only due to the immense difficulty of finding any plausible and constitutionally permissible proxies that distinguish one member of a couple from the other on the grounds of religiosity.³⁹⁶

2. Race

Evil officials may want to favor one particular parent within an interracial couple,³⁹⁷ but there are no obvious proxies for race that would allow them to do so. Interracial couples, like monoracial couples, are likely to be similar along numerous dimensions.³⁹⁸ In general, people select partners that have similar levels of education, similar political views, similar religious engagement, similar degrees of physical attractiveness, and similar levels of social desirability.³⁹⁹ Couples also sort based on their health behaviors, like smoking and exercise habits.⁴⁰⁰ These tendencies are exacerbated by structural constraints. Many workplaces, churches, and schools are homogenous along at least one dimension.⁴⁰¹ This constrains who we meet and who we ultimately fall in love

³⁹⁶ If school boards cannot rely on religious behavior, what other proxies for religion might be available? Perhaps few. In one recent study, a researcher attempted to predict the likelihood that individuals would enter interfaith marriages, and found that the only variable that correlated with these unions was age. Naomi Schaefer Riley, Opinion, *Interfaith Unions: A Mixed Blessing*, N.Y. TIMES, Apr. 5, 2013, at A17. The older the couple, the more likely they were to marry outside of their faith. Other than that, the researcher could not find a proxy for interfaith marriages, let alone a proxy for one individual within one such union.

³⁹⁷ Of course, interracial couples may face discrimination as a family unit. Colleen Curry, *Interracial Family in Cheerios Ad Gets Hate Comments*, ABC NEWS (May 31, 2013), <http://abcnews.go.com/News/interracial-family-in-cheerios-ad-gets-hate-comments/blogEntry?id=19297869> [<https://perma.cc/4ZNB-K7MH>]. But identifying one member of an interracial couple, or even identifying the couple itself, through facially neutral proxies is likely to be very difficult.

³⁹⁸ Lindon J. Eaves & Peter K. Hatemi, *Do We Choose Our Spouse Based on Our In-Laws? Resolving the Effects of Family Background and Spousal Choice for Educational Attainment, Religious Practice, and Political Preference*, 92 SOC. SCI. Q. 1253, 1254 (2011).

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

⁴⁰¹ Samuel Perry, *More Like Us: How Religious Service Attendance Hinders Interracial Romance*, 75 SOC. REL. 442, 457 (2014).

with.⁴⁰² Anecdotal evidence supports the idea that couples will tend to be similar along a number of dimensions.⁴⁰³ The Onion perhaps said it best with an article entitled *Woman Relieved Soulmate Turned out to Be in Same Socioeconomic Bracket*:

“From the moment I met David, I knew we were kindred spirits who were destined to be together, and it’s just such a relief that his income mirrors mine so well,” said Winters . . . “It’s also reassuring to know there really aren’t any glaring gaps in educational background between me and the only man I could ever love. I’m such a lucky girl!” Winters went on to say she was especially relieved that the one person she could ever imagine growing old with was the same race she was.⁴⁰⁴

These similarities suggest that many potential proxies will fail to adequately identify one partner in an interracial couple. The interactions of race and sex further complicate any efforts to find proxies for race. Although income may correlate strongly with race in a particular city, it will also correlate with sex.⁴⁰⁵ This makes these proxies particularly problematic as ways to identify persons of a particular race, at least within heterosexual interracial couples.

3. Criminality

Although evil officials may be frustrated in their efforts to identify one member of an interracial couple, they may have other goals. Instead of attending to just race, they may seek to disadvantage people at the intersection of race, gender, and class. It will often be harder to find proxies for these more complex

⁴⁰² Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1367-69 (2009) (“One factor that certainly matters to who loves whom, in a but-for sense, is the simple fact of who does and does not meet—or what demographers sometimes call ‘propinquity.’”); Perry, *supra* note 401, at 442 (“[B]ecause the majority of American congregations are racially homogenous, more frequent attendance hinders interracial romantic engagement by embedding churchgoers within primarily same race religio-cultural communities.”).

⁴⁰³ Consider, for example, family law’s most famous interracial couple: the Lovings. They were both residents of the same rural county, and both came from relatively poor backgrounds. See generally PETER WALLENSTEIN, RACE, SEX, AND THE FREEDOM TO MARRY: *LOVING V. VIRGINIA* (2014).

⁴⁰⁴ *Woman Relieved Soulmate Turned out to Be in Same Socioeconomic Bracket*, ONION (July 28, 2015, 1:47 PM), <https://www.theonion.com/woman-relieved-soulmate-turned-out-to-be-in-same-socioe-1819578046> [<https://perma.cc/5UHS-27RF>].

⁴⁰⁵ Anna Brown & Eileen Patten, *The Narrowing, but Persistent, Gender Gap in Pay*, PEW RESEARCH CTR.: FACT TANK (Apr. 3, 2017), <http://www.pewresearch.org/fact-tank/2017/04/03/gender-pay-gap-facts/> [<https://perma.cc/U7BS-BCQ2>] (“The gender gap in pay has narrowed since 1980, particularly among younger workers, but it still persists. In 2015, women earned 83% of what men earned, according to a Pew Research Center analysis of median hourly earnings of both full- and part-time U.S. workers.”).

groups. But not always. One possible way is to piggyback on the selection effects of other institutions. The criminal justice system is one such institution, and it disproportionately engages with one such group: poor, minority men.⁴⁰⁶ Evil politicians might also use criminality as the central justification for family law policy rather than just as a radically over- and underinclusive way of identifying poor minority men.

Consider a simple ordinance saying that generally custody should not be given to people who have been arrested in the last two years. Assuming it would survive constitutional challenges, the question will be: what effect would it have on judges? Probably not much. What is the link between arrests—which tell you very little about wrongdoing—and parenting skill? Perhaps police officers disproportionately arrest people who have trouble controlling their temper, and controlling one’s temper is an important parenting skill. This is minimally plausible, but no more. It is unlikely that judges would assign this rule of thumb much weight in their determinations.

Consider a second ordinance, saying that parents who have been incarcerated in the last ten years should generally not get custody and should only get supervised visitation. Compared to state laws that are already on the books, this ordinance is rather ordinary.⁴⁰⁷ Many states already make incarceration relevant to parental termination hearings, in part because of the ways that incarceration itself hinders parenting and in part because of the overly broad conclusion that incarcerated individuals have moral failings that affect their parenting.⁴⁰⁸ Illinois illustrates the second rationale.⁴⁰⁹ There, parents can have their parental rights terminated if they have been incarcerated more than once, even if they were released long before the birth of their children.⁴¹⁰

Given that many states seem to endorse the logic behind the incarceration ordinance, some judges may think that it reflects at least a minimally plausible judgment about a child’s best interests. But again, it is doubtful that judges would think that past incarceration was a particularly weighty factor. Too much

⁴⁰⁶ See Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1274, 1288 (2004) (“In Washington, D.C. and Baltimore more than half of young black men were then under criminal supervision. Prison is now a common and predictable experience for African American men in their twenties.”).

⁴⁰⁷ Deseriee A. Kennedy, *Children, Parents & the State: The Construction of a New Family Ideology*, 26 BERKELEY J. GENDER L. & JUST. 78, 95-96 (2011) (“More than half of the states have statutory provisions that include parental incarceration as one of the criteria upon which a state may base a parental termination.”).

⁴⁰⁸ Caitlin Mitchell, Note, *Family Integrity and Incarcerated Parents: Bridging the Divide*, 24 YALE J.L. & FEMINISM 175, 190-91 (2012).

⁴⁰⁹ *In re Gwynne P.*, 805 N.E.2d 329, 340-41 (Ill. App. Ct. 2005).

⁴¹⁰ *Id.* Of course, multiple incarcerations are not a sufficient condition for termination, a judge must also find that termination is in the child’s best interests. *Id.* at 342.

depends on the particular crimes. And even if the crimes were plausibly related to parenting skill, the court is likely to have much more probative and recent evidence to ascertain the parent's capacities.

4. Sexual Orientation

Recent events highlight the possibility that local officials may seek to discriminate against same-sex couples. Kim Davis, the Clerk of Rowan County Kansas, consistently refused to issue marriage licenses to same-sex couples.⁴¹¹ This raises the specter of local discrimination not only in distributing marriage licenses, but also perhaps in local rules of thumb that govern divorce and child custody. But this specter, like others, is more imagined than real. Davis was in the minority even among local clerks⁴¹²—her own hometown passed a gay and lesbian anti-discrimination ordinance in 2013⁴¹³—and many cities have a strong interest in attracting gay and lesbian residents.⁴¹⁴ Further, recall that the zero-sum structure of most family law issues makes discrimination against the family as a whole upon divorce or dissolution particularly difficult. Nonetheless, creative and evil officials might be able to find a few mild ways to do so.

Evil officials could seek to add transaction costs to some families and not others. For example, a councilmember could seek to influence judges when they decide which cases require custody evaluations. An ordinance might simply say that same-sex parents should have to go through invasive custody evaluations because judges are less familiar with same-sex parenting. There are significant barriers to enforcing such an ordinance.

⁴¹¹ Claire Galofaro, *Kentucky Clerk Again Asks for Delay on Gay-Marriage Licenses*, ASSOCIATED PRESS (Sept. 12, 2015), <https://apnews.com/e4d8a958234b445caef72db4f385421> [<https://perma.cc/X9FZ-9R3J>].

⁴¹² James Higdon & Sandhya Somashekhar, *Kentucky Clerk Ordered to Jail for Refusing to Issue Gay Marriage License*, WASH. POST (Sept. 3, 2015), https://www.washingtonpost.com/national/defiant-kentucky-clerk-could-be-found-in-contempt-thursday/2015/09/03/34e50f08-51af-11e5-9812-92d5948a40f8_story.html?utm_term=.a1f5961f26a4 [<https://perma.cc/D292-F6VE>] (reporting that all but one deputy clerk under Davis would sign marriage certificates for same-sex couples).

⁴¹³ Steve Bittenbender, *Kentucky Town's Brush with Gay Marriage Spotlight Stirs Tensions*, REUTERS (Sept. 11, 2015), <https://www.reuters.com/article/us-usa-gaymarriage-kentucky-morehead/kentucky-towns-brush-with-gay-marriage-spotlight-stirs-tensions-idUSKCN0RB2HK20150911> [<https://perma.cc/J7QG-SNTP>] (“In 2013, the city council approved a Fairness Ordinance that extended discrimination protections to gay, bisexual and transgender people for employment and housing after several gay and lesbian students were denied off-campus housing, according to a spokeswoman for the Rowan County Rights Coalition.”).

⁴¹⁴ Robert R.M. Verchick, *Same-Sex and the City*, 37 URB. LAW. 191, 192-93 (2005) (noting that “cities, perhaps more than their home states as a whole, have a greater interest in promoting gay rights . . . [because] cities now see their own economic and cultural success as tied to the gay community”).

Existing state-level doctrines lend a good deal of protection to same-sex families. Before judges can rely on a parent's sexuality or sexual orientation to set custody or visitation, most states require them to explicitly articulate a nexus between parental actions and specific harms to the child.⁴¹⁵ Nexus tests arose, in part, where one biological parent subsequently came out as gay.⁴¹⁶ Their goal was to eradicate the influence of moral disapproval of a parent's sexuality.⁴¹⁷ They require judges to take a step back, reconsider their initial thoughts, and specifically defend any limitations on child custody.

Nudging courts to conduct invasive custody evaluations for same-sex families is in significant tension with the purposes behind nexus tests. Their primary purpose is to prevent implicit biases from infecting decisions.⁴¹⁸ Although they were developed in the context of custody outcomes, their logic applies equally to smaller outcomes like undergoing custody evaluations. In both cases, nexus tests will likely be interpreted to prevent stereotypes about gay families from affecting them. This is particularly clear when one considers the plasticity of the concept of harm. Nexus tests require judges to draw a clear and specific link between sexual orientation or sexual behavior and harm.⁴¹⁹ As critics have noted, the harm principle is malleable.⁴²⁰ If you search long enough for harm, you are likely to find it. Nexus tests would therefore be gutted if courts were given a free pass to adjust the scope of custody evaluations based on their stereotypes.

The Supreme Court's recent discussion of same-sex marriage in *Obergefell v. Hodges*⁴²¹ creates another significant barrier to discrimination. Much of Justice Kennedy's decision focused on the expressive nature of law. Even if same-sex couples can gain all of the material benefits of marriage through some other status, reserving the label of marriage to opposite-sex partners "demeans" same-sex couples.⁴²² Excluding same-sex couples from marriage "has the effect of teaching that gays and lesbians are unequal in important respects."⁴²³ Kennedy went on: "Especially against a long history of disapproval of their relationships,

⁴¹⁵ WEISBERG & APPLETON, *supra* note 73, at 703.

⁴¹⁶ See Suzanne Kim, *The Neutered Parent*, 24 YALE J.L. & FEMINISM 1, 15-17 (2012).

⁴¹⁷ See *id.* at 15-18.

⁴¹⁸ See *id.*

⁴¹⁹ *Id.* at 17.

⁴²⁰ *Id.* at 20.

⁴²¹ 135 S. Ct. 2584 (2015).

⁴²² *Id.* at 2602 ("But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.").

⁴²³ *Id.*

this denial to same-sex couples of the right to marry works a grave and continuing harm . . . [that] serves to disrespect and subordinate them.”⁴²⁴

An ordinance that singled out gays and lesbians for more intrusive processes upon divorce would seem to similarly demean them and teach others that they are lesser parents. Just as “the State ‘cannot demean their existence or control their destiny by making their private sexual conduct a crime,’”⁴²⁵ the State cannot demean gays and lesbians or control their destiny by making their private sexual choices the basis for imposing significant costs upon them, especially in a setting as important and central to one’s personhood as raising children.

Of course, not all aspects of *Obergefell* clearly undermine the hypothetical ordinance. Its holding is partially rooted in concerns about child welfare.⁴²⁶ Marriage is a fundamental right in part because it promotes the kinds of stability that benefit children.⁴²⁷ The hypothetical ordinance would seek to turn the concern for child welfare against gays and lesbians. But Kennedy’s concern for children extends to the expressive harms that they might suffer. “[M]arriage allows children ‘to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.’”⁴²⁸ Denying same-sex couples the right to marry causes “children [to] suffer the stigma of knowing their families are somehow lesser.”⁴²⁹ Similarly, the hypothetical ordinance singles out gay and lesbian parents and indicates that their parenting is more suspect. This would teach their children that their family deserves less respect. Just as it would “disparage their choices and diminish their personhood”⁴³⁰ to deny same-sex couples the right to marry, it would disparage and diminish them to subject them to special scrutiny as parents.

No finite set of illustrations can assuage all fears. But the examples above show how difficult it is for local officials to oppress local minorities. The pressures from constitutional doctrine and the need to persuade judges that local ordinances reflect sound policy leave evil policymakers with little or no breathing room. This constrained capacity to harm stands in stark contrast to the set of weighty benefits that localism can provide in this area.

CONCLUSION

Providing a formal pathway for local citizens to weigh in on family law policy can significantly mitigate family law’s democratic deficit. Empowering cities

⁴²⁴ *Id.* at 2604.

⁴²⁵ *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

⁴²⁶ *Id.* at 2595, 2600-04.

⁴²⁷ *Id.* at 2600.

⁴²⁸ *Id.* (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2694-95 (2013)).

⁴²⁹ *Id.*

⁴³⁰ *Id.* at 2602.

and school boards to adopt local rules of thumb creates a formal feedback mechanism for local citizens to inform judges and state legislators about the content of local values and local preferences. Those local values and preferences can inform both classic and cutting edge issues within family law, from whether to encourage helicopter parenting and how to respect the relationships that children might form with grandparents, to whether widows should be allowed to posthumously harvest sperm from their late husbands or whether and under what circumstances the state should recognize three or more parents. Providing this new voice to local communities will be particularly illuminating when it empowers people who are currently excluded from power at the state level. Majority-minority school boards, for example, will be able to offer mostly white male heterosexual judges important insights into how family law policies affect their communities.

Localism of the sort defended here also generates much-needed policy experiments and can yield immediate benefits to the hundreds of thousands of people who divorce each year. Local rules of thumb can solve a classic problem in family law by making outcomes more predictable within a locality. They also open up the possibility of inter-locality differences that can lead to a better understanding of how various policies impact things like settlement rates, compliance rates, child poverty, and the stability of relationships between children and non-custodial parents. This Article's novel focus on rules of thumb makes it possible to achieve these benefits without significant side effects. Rules of thumb increase predictability without creating over and under inclusion problems, and they incorporate multiple safeguards into local policy experiments. Overall, states that empower local entities to adopt local rules of thumb will risk little and yet will set the stage for a host of powerful benefits.