**Fordham Urban Law Journal**

Volume 43
Number 4 *Flourishing Families in Context: A New Lens for Urban Law*
Article 6

2016

# Sex in the City

Sean Hannon Williams

# SEX IN THE CITY

*Sean Hannon Williams*[*]

## ABSTRACT

*This Article explores a radical idea at the intersection of family law and local government law. It outlines the surprisingly strong case for allowing local governments a voice in the dispute-resolution function of family law. Under the existing intrastate distribution of power within family law, states set broad policies but delegate enormous discretion to individual judges to implement those policies as they see fit in individual cases. This distribution of power is commonly criticized because it eviscerates predictability and allows a host of biases to infect judicial decisions. This Article offers an alternate distribution of power, where cities can insert themselves between the state and the judge by providing guidance about whether, in that city, free range parenting is generally considered harmful to children or whether, in that city, adultery should trigger a disproportionate award of marital property to the innocent spouse. Such local rules of thumb have the potential to mitigate one of the most intractable problems within family law: how to cabin judicial discretion and make family law more rule-like in the absence of widespread agreement on mid- or even high-level policy goals. More generally, local family law opens up avenues for much-needed policy experimentation, facilitates political entrepreneurship, and has the potential to reinvigorate citizen engagement with local politics. Properly structured, local*

---

[*] Professor of Law, University of Texas School of Law. This Article is part of a larger project at the intersection of local government law and family law. This larger project, and portions of this Article, have benefitted greatly from the insightful comments of Kerry Abrams, Lynn Baker, June Carbone, Maxine Eichner, Joseph Fishkin, William Forbath, Jill Hasday, Carissa Hessick, Clare Huntington, Ethan Leib, Daniel Rodriguez, Nadav Shoked, and Richard Schragger. Thanks also to participants at the Southwest Law Faculty Conference, the Emerging Family Law Scholars Conference, the International Academy for the Study of the Jurisprudence of the Family Conference, and participants in law school faculty colloquia at St. Louis University, the University of Virginia, and Georgetown. Most importantly, thanks to the participants at Fordham's Cooper-Walsh Colloquium and the editors of the *Fordham Urban Law Journal*.

*family law can accomplish all of this without creating a serious risk of races to the bottom, forum shopping, externalities, or minority oppression.*

## TABLE OF CONTENTS



## INTRODUCTION

In *Failure to Flourish*, Clare Huntington offers a compelling vision for the future of family law. The traditional core of family law needs to be restructured to help ensure that children's relationships with

their parents remain strong, stable, and positive.[1] Additionally, institutions outside of the traditional core of family law—like zoning boards—should also be attentive to these policy concerns.[2] Huntington's vision calls for reforms at the local, state, and federal level. This Article focuses on the local level and explores a radical proposal: cities[3] should have the power to weigh in on issues even within the very heart of family law—divorce and child custody.

Some local efforts to influence family law have already been documented. For example, many cities have used their home rule authority to create local domestic partner registries.[4] Several cities—most notably San Francisco—tried unsuccessfully to create local variation in marriage license requirements by issuing licenses to same-sex couples.[5] This Article moves beyond marriage and turns localist scholarly attention toward local regulation of family dissolution and the regulation of families more broadly.[6]

The dominant narrative of family law is that it is created and maintained at the state level. This narrative ignores the actual content of state family law.[7] Although states set out the broad policy

---

1. CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS xvi, 80, 83 (2014).

2. *Id.* at 58, 99, 184.

3. For ease of exposition, I use the term "city" to refer to a host of general-purpose local governments that include cities and townships. I use the term "city council" to describe the legislative arms of these local governments. LYNN A. BAKER & CLAYTON P. GILLETTE, LOCAL GOVERNMENT LAW: CASES AND MATERIALS 46 (4th ed. 2010). Although the term city may evoke visions of large metropolises, most cities are small and might be more aptly called suburbs or towns. *See* Richard Briffault, *Our Localism: Part II*, 90 COLUM. L. REV. 346, 348 (1990).

4. June Carbone, *Marriage as a State of Mind: Federalism, Contract, and the Expressive Interest in Family Law*, 2011 MICH. ST. L. REV. 49, 75 (2011).

5. Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 148 (2005).

6. Sarah Swann addresses local ordinances that have an indirect effect on families, and sometimes have the indirect effect on cleaving those families apart. Sarah Swann, *Home Rules*, 64 DUKE L. J. 823 (2015). Her discussion focuses on local landlord tenant laws rather than family law; she does not discuss divorce or the possibility that cities could regulate the family more directly. *Id.*

7. This narrative also ignores the surprisingly robust role that the federal government has played in family law. *See* Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761 (2005) (citing several examples of federal family law, including immigration, welfare, war pensions, pre-civil war federal court jurisdiction, and 120 proposed family law amendments to the federal constitution between 1880 and 1929); Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 872-73 (2004).

goals of family law, they delegate enormous discretion to trial court judges to implement those policies as they see fit in individual cases. Because the state's policies are so broad—for example, judges are asked to split marital property in an "equitable" manner and are asked to do what is in the child's "best interests"—family law is largely created at the level of the individual judge.[8] This has implications for the doctrines that police the boundary between local and state authority. Arguably, many cities already have the power to initiate legislation in this area, and they can do so in ways that avoid existing intrastate preemption doctrine. Cities may have more power over family affairs than scholars have previously acknowledged. Regardless, a surprisingly strong case can be made that they should have more power.

Creating space for a uniquely local voice has the potential to create two distinct sets of benefits. First, city power can accomplish what decades of reform efforts have failed to achieve: to alleviate the problems with, and open up a more productive dialogue about, family law's open-ended standards. Second, local family law is uniquely situated to fulfill the promise of local government law more generally without incurring the costs that traditionally accompany local power.

Family law's open-ended standards ensure that intrastate variation is endemic to divorce law.[9] Some judges think that viewing pornography in private is probative of parental fitness.[10] Others do not.[11] Depending on the specific judge assigned to their case, gay parents could lose custody for engaging in public displays of affection with their partner.[12] Ironically, gay parents who are wary of this possibility could find themselves in front of a different judge and lose custody for *not showing enough* affection to their partners.[13] This unpredictability infects monetary decisions as well. According to

---

8. *See generally* A.L.I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002).

9. These open-ended standards control property division, alimony, and child custody. Although custody is decided predominately based on one factor—the best interests of the child—that factor is protean enough to effectively be an open-ended invitation to consider a near infinite number of factors.

10. *See* Petty v. Petty, 2005 WL 1183149, at *4 (Tenn. Ct. App. 2005) (reviewing trial court order that allowed father with "penchant for pornography" to exercise his overnight co-parenting time only in the grandparent's house with them present).

11. *See id.* (overturning the trial court's order).

12. Suzanne Kim, *The Neutered Parent,* 24 YALE J.L. & FEMINISM 1, 33 (2012).

13. *Id.* at 42 (*citing* Uvland v. Uvland, 2000 WL 33407372, at *4 (Mich. Ct. App. Aug. 22, 2000)).

some judges, a stay-at-home mom deserves to be compensated for her sacrifices.[14] But according to others, a stay-at-home mom should get a job and learn to support herself after a divorce.[15]

Existing reform proposals—Huntington's included—seek to rulify family law's open-ended standards. That is, they attempt to convince state legislatures or state appellate courts to provide more concrete guidance to trial courts.[16] Unfortunately, these proposals have been uniformly ignored, in large part because of political stalemate at the state level. This Article explores the possibility of local rather than state reform. Local rulification can accomplish much of what reformers have been seeking.[17]

This Article offers an initial defense of a mild form of local rulification.[18] Although its conclusions are necessarily preliminary, this Article argues that cities should be able to guide judges as they exercise the broad discretion that the state has provided them. At most, cities would be able to require local judges *to consider* local judgments.[19] These rules of thumb[20] would provide non-binding advice to judges about how to exercise the discretion that the state has given them. They would tell the judge what, in that locality, constitutes an equitable monetary award for a stay-at-home parent, or

---

14. *See generally* Cynthia Lee Starnes, *Alimony Theory*, 45 FAM. L.Q. 271 (2011).

15. *Id.*

16. *See, e.g.*, HUNTINGTON, *supra* note 1, at 124-26.

17. I do not suggest that reformers should ignore state legislatures. Reforms at the state level occur occasionally. *See, e.g.*, N.Y. DOM. REL. LAW § 236(B)(5–a) (McKinney 2016).

18. For a broader discussion of localism and family law reform, see two companion pieces. Sean Hannon Williams, *Divorce All the Way Down: Local Voice and Family Law's Democratic Deficit* (U. Tex. L., Pub. L. Research Paper), https://ssrn.com/abstract=2955198 (discussing the potential role of cities, school boards, and groups of local judges) [hereinafter Williams, *Local Voice*]; Sean Hannon Williams, *Wild Flowers in the Swamp: Local Rules and Family Law* (U. Tex. L., Pub. L. Research Paper No. 670), https://ssrn.com/abstract=2955202 (discussing local court rules that address substantive matters rather than procedural ones).

19. Of course, this would require that state judges interpret local power and state preemption doctrines in ways that allow this form of influence. *See infra* Part III for a full discussion.

20. FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 4-6, 108-09 (1991). Rules of thumb do not exert any influence beyond the reasons undergirding them. They influence decisions only when there is uncertainty—they guide judges toward one outcome within a larger set of possible reasonable outcomes. Even if a judge has some idea that another outcome is best, rules of thumb can elevate the level of certainty or confidence the judge needs to deviate from the outcome indicated by the rule of thumb. *Id.*

whether, in that locality, spanking is an acceptable means of disciplining children. Although these advisory rules of thumb have limited teeth, many judges desperately seek out advice to help guide the paralyzingly broad discretion that the state gives them. Other jurisdictions that have experimented with advisory rules of thumb have confirmed that they have a surprisingly large amount of influence.[21]

Although merely advisory, local influence over family law shares many of the benefits of local power more broadly.[22] Properly structured, local power over divorce and child custody can facilitate much-needed policy experimentation, political entrepreneurship, and participation.[23] An ordinance in Berkeley might require judges to consider a local judgment that helicopter parenting is generally harmful to children. San Jose might come to the opposite conclusion. Even if only a few cities experiment, a host of organizations will attempt to assess those experiments so that both the state and other cities can learn from them.[24] City councilmembers can also act as political entrepreneurs and force the state to debate issues that it would rather avoid. A Houston ordinance proclaiming that parents who host overnight guests should rarely get custody could force the state legislature to debate the issue when deciding whether to preempt the ordinance. Finally, local power over family law issues has a unique potential to rekindle the often-ridiculed communitarian benefits of local government.[25] Of all the things that local government might do, family law is one of a select few that are likely to spur significant and sustained citizen engagement.

Of course, local power is not unequivocally positive, but the common negative effects of local power are either absent or can be easily managed in the context of local rules of thumb.[26] Municipal power will not lead to races to the bottom or externalities on other cities. Forum shopping, while theoretically possible, faces a number of practical obstacles and, regardless, can be easily policed. Although local law is normally associated with decreased uniformity, local family law turns this traditional analysis on its head. Open-ended family law standards create judge-by-judge variation that has the

---

21. *See infra* Part III.C.
22. *See infra* Part II.
23. Part II outlines these claims in detail.
24. *See infra* Part II.B.
25. *See infra* notes 139 and 140 and accompanying text.
26. *See infra* Part IV.

effect of creating widespread disuniformity. Moving some aspects of family law to the local level can dramatically increase uniformity. The advisory nature of local rules of thumb radically decreases the likelihood that city councils would be able to oppress local minorities, as do a set of existing constitutional doctrines that create substantial barriers to singling out people for different treatment.[27] Ordinances would not be able to say that the lighter skinned member of an interracial couple should generally get custody, or that mothers should generally get custody, or that the Christian member of an interfaith couple should generally get custody. This constrained capacity to harm stands in stark contrast to the important benefits that localism can provide in this area.

This Article proceeds in four parts. Part I introduces family law's open-ended standards and their common critiques. Part II illustrates the promise of local power over divorce and other family law matters. Part III discusses doctrinal obstacles to local family law, paying special attention to cities' initiative power and preemption concerns. Part IV briefly examines six objections to shifting power to the local level—races to the bottom, forum shopping, externalities, disuniformity, incompetence, and the possibility of oppressing local minorities. Finally, the conclusion argues that reformers of almost all stripes should seriously consider the potential benefits of local rules of thumb. Counterintuitively, even those who favor more centralization and greater federal control over family law have reason to support the form of localism that this Article defends.

## I. THE PROBLEM

As Huntington rightly notes, the dispute resolution branch of family law often intervenes in a manner that makes things worse.[28] Huntington cites two primary culprits: the all-or-nothing character of the dispute resolution system and its adversarial nature.[29]

The all-or-nothing character of family law's dispute resolution is not so much a matter of its legal directives, but of how people perceive them. Courts may grant custody to one parent and visitation to another. This promotes the perception that one parent has won and the other has lost. In Texas, judges often award parents "joint

---

27. *See infra*, Part IV.D.
28. HUNTINGTON, *supra* note 1, at 115.
29. *Id.*

managing conservatorship."[30] The court then gives one joint conservator the power to determine the child's primary residence and gives the other the right to possess the child at certain times.[31] Substantively, this is the same as granting one parent physical custody and the other visitation, but the nomenclature puts a different—and arguably more beneficial—spin on it.[32]

The adversarial nature of the system also promotes conflict, which in turn undermines the ability of parents to work together as co-parents after a split. But the adversarial structure of litigation is not entirely to blame for its adversarial nature. The substantive law also contributes to the adversarial nature of family law disputes. For example, custody is primarily determined by reference to the best interests of the child. This substantive rule creates incentives for each parent to attack and denigrate the other's parental abilities.[33] This is hardly a recipe for rebuilding the already strained relationship of the parents.

Perhaps most importantly, the substance of the law contributes to excessive and overly acrimonious litigation because the legal directives embedded within family law's dispute resolution system are overwhelmingly open-ended standards rather than concrete rules. Upon divorce, courts are called upon to divide the couple's existing assets and determine alimony. Regardless of their marital status, if the couple had children, the court must determine child support and define the detailed parameters of physical and legal custody. Of these tasks, all but one relies on open-ended standards.[34] These open-ended standards suffer from the classic virtues and vices that are often attributed to standards. On the virtue side, family law's open-ended standards give judges the power to adjust their rulings to the unique

---

30. TEX. FAM. CODE ANN. § 153.134 (West 2016).

31. *Id.*

32. *See* JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE §§ 6-8 (2d ed. 2012) (noting that "the term joint custody can act as a placebo even if the reality is just a standard custody/visitation").

33. HUNTINGTON, *supra* note 1, at 89, 131 ("[W]hen the parents do not need to tear each other down to get their desired outcome, the parents are in a much better position to co-parent.").

34. Child support is the only outlier. All states use formulas to presumptively determine child support. Notably, this innovation was not introduced by the states, but mandated by Congress as part of welfare reforms. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378 (codified as amended at 42 U.S.C. § 667); Family Support Act of 1988, P.L. 100-485 (42 U.S.C. §§ 651-667).

facts present in each case.[35] But the bulk of scholarly attention has focused on their vices.[36] Much of this work discusses family law's child custody standard—the best interests of the child. This standard is uniformly disparaged.[37] Generally, open-ended standards create two related problems. First, at the beginning of the litigation process, these standards make it nearly impossible to predict the outcome. Second, at the end of the litigation process, they set the perfect stage for litigants to subsequently view the outcomes as illegitimate. Each of these features of the current system tends to undermine the ability of parents to maintain a positive relationship after judicial intervention.

### A. Ex Ante Unpredictability

Family law's open-ended standards make the outcome of family law cases unpredictable.[38] Although there is some evidence that mothers obtain custody in greater numbers than fathers,[39] custody determinations are so multifaceted[40] that they are impossible to predict.[41] Because parents cannot predict which arguments will carry the day, they are incentivized to mount an all-out assault on the other parent's fitness. Judicial decisions regarding property division and alimony are also unpredictable, and can promote lengthy litigation about the relative contributions that each spouse made to the

---

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

36. For a recent 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).

37. *See generally* A.L.I, *supra* note 8, at 2.

38. Katherine Baker, *Homogeneous Rules for Heterogeneous Families: The Standardization of Family Law when there is No Standard Family*, 2012 U. ILL. L. REV. 319, 331, 337.

39. JAMES DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN 42 (2006). Other estimates suggest that mothers and fathers win in equal proportions, which might just suggest that litigants accurately adjust to judicial biases and only litigate close cases. Stanford L. Braver, Jeffrey T. Cookston & Bruce R. Cohen, *Experiences of Family Law Attorneys with Current Issues in Divorce Practice*, 51 FAM. REL. 325, 327-28, 330 (2002).

40. In addition to determining the primary custodian, judges must determine precisely how much time the other parent can spend with the child, and under precisely what set of conditions and circumstances.

41. *See, e.g.*, ATKINSON, *supra* note 32, at § 4-1 ("Cases with very similar facts may be decided in divergent ways by courts of different states, and even by courts within the same state. The differing results often come from the hearts and emotions of judges, rather than from the facts of the case.").

marriage. Courts are directed to make an equitable division of the assets and award a reasonable amount of maintenance.[42] These courts are then given long lists of relevant factors that, in practice, offer no help to litigants who want to predict how their case will come out.[43]

Although many judges stick close to a fifty-fifty division of marital property, researchers have found it impossible to predict when judges will deviate from equal splits.[44] In one study of alimony, *none* of the statutory factors that judges were supposed to consult correlated with their decisions to award permanent alimony.[45] In a recent study, lay people addressing the same set of facts awarded between $0 and $19,000 in annual alimony payments.[46] When judges in Ohio were asked how much alimony a lifelong homemaker married to a doctor deserved, they gave estimates ranging from $5000 to $175,000 per year.[47]

---

42. Only nine states split marital property evenly or have a presumption in favor of doing so. The rest give courts wide discretion to split those assets equitably. Baker, *supra* note 38, at 334.

43. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-82 (West 2016) ("In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider the evidence presented by each party and shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties"); IOWA CODE ANN. § 598.21 (West 2016) ("The court shall divide all property, . . . equitably between the parties after considering all of the following: a. The length of the marriage. b. The property brought to the marriage by each party. c. The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services. d. The age and physical and emotional health of the parties. e. The contribution by one party to the education, training, or increased earning power of the other. f. The earning capacity of each party . . . . i. Other economic circumstances of each party . . . . m. Other factors the court may determine to be relevant in an individual case.").

44. *See* Marsha Garrison, *Reforming Divorce: What's Needed and What's Not*, 27 PACE L. REV. 921, 927 (2007) [hereinafter *Reforming Divorce*]; Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 431 (1996). The best indicator of these lopsided awards was family violence. Garrison, *supra*, at 464.

45. Garrison, *supra* note 44, at 489.

46. Ira Mark Ellman & Sanford Braver, *Lay Intuitions about Family Obligations: The Case of Alimony*, 13 THEORETICAL INQUIRIES L. 209, 225 (2012).

47. Alexandra Harwin, *Ending the Alimony Guessing Game*, N.Y. TIMES OP. ED., (Jul. 3, 2011), http://www.nytimes.com/2011/07/04/opinion/04harwin.html. This variation should not be surprising given that alimony presents a translation problem: no one knows how to translate admiration (for a dutiful homemaker) or outrage (for an adulterous lout) into dollars. Cass R. Sunstein et al., *Predictably Incoherent*

This unpredictability creates fertile ground for self-serving biases to skew each spouse's determination of what settlement is fair and what settlement is likely.[48] This hinders settlement and increases the likelihood of litigation, which is just about the only thing that people agree is *not* in the best interest of children.[49]

Of course, there are some small islands of predictability. For example, a judge's political party and education appear to influence some alimony determinations.[50] But this points to the second problem with family law's open-ended standards: litigants are likely to believe that the outcome of their case was dictated by the judge's personal bias or other illegitimate factors.

### B. Ex Post Illegitimacy

Judges have no way to decide most custody cases other than resort to their personal biases and beliefs.[51] The best interests standard has a long and unfortunate history of being used to deny gay parents custody, to deny people with disabilities custody, to police women's post-divorce sexuality, and to reinforce traditional gender roles.[52] A

---

*Judgments*, 54 STAN. L. REV. 1153, 1169 (2002) (discussing this translation problem in the context of punitive damages).

48. *See generally* Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109, 109 (1997).

49. Hence, some scholars have entertained the possibility of adjudicating child custody by flipping a coin. *See, e.g.*, Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy,* 39 LAW & CONTEMP. PROBS. 226, 289-91 (1975). Judges who have actually used this method have been subjected to reversal and disciplinary action. Benjamin Shmueli, *Civil Actions for Acts That are Valid According to Religious Family Law but Harm Women's Rights: Legal Pluralism in Cases of Collision between Two Sets of Laws*, 46 VAND. J. TRANSNAT'L L. 823, 836 n.40 (2013). Once in litigation, open-ended standards also increase the importance of good attorneys and the money to pay for them, undermine the principle that like cases should be treated alike, and systematically favor the less risk-averse spouse. Peskind, *supra* note 36, at 464; Schneider, *infra* note 51, at 2274; *see also* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950, 978-80 (1979).

50. Peskind, *supra* note 36, at 486-87. The binary decision about whether to award alimony was more predictable. *Id.* at 486. But regional variation appeared. *Id.* at 469-70, 481.

51. Of course, a judge's power is not entirely unbounded. The best interests of the child standard excludes some considerations. *See* Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard,* 89 MICH. L. REV. 2215, 2252-59 (1991).

52. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 701-04, 707 (4th ed. 2010); *see* Katharine T. Bartlett, *Comparing Race and Sex Discrimination in Custody Cases*, 28 HOFSTRA L. REV. 877,

study of Indiana judges in 1998 is particularly illuminating.[53] It revealed that more than half of the judges expressed support for the tender years doctrine—a now-publically-disavowed presumption that mothers should obtain custody of young children.[54] A few stated that, although they could not admit to their beliefs publically, they thought that mothers were more "natural" caregivers and had better "instincts."[55] Another said he always gave custody to the mother "assuming she's not nuts."[56]

Judicial beliefs correlated with actual custody decisions. In cases where one child was six or under, judges that supported the tender years doctrine gave custody to mothers more than judges who rejected the doctrine.[57] When the children were seven or older, there were no differences between the two sets of judges.[58] This pattern—inter-judge variation alongside some intra-judge predictability—is precisely the pattern one would expect if personal beliefs were infecting the best interests standard. More recent evidence paints the same picture. For example, one California judge publically stated in 2004 that he never allowed custodial parents to relocate, even though the controlling state precedent at the time cautioned judges against second guessing a custodial parent's decision to move.[59]

Although today's judges may harbor more implicit than explicit biases, the result is the same. Litigants suspect that their case was decided based on illegitimate factors. This is likely to foster bitterness both toward the judge and toward the other parent. After all, in the eyes of the disgruntled parent, the other parent used the

---

882-86 (2000); Nat'l Council on Disability, *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and their Children* (2012).

53. Julie E. Artis, *Judging the Best Interests of the Child: Judges' Accounts of the Tender Years Doctrine*, 38 LAW & SOC. REV. 769, 780, 784 (2004).

54. *Id.* at 783.

55. *Id.* at 780, 84.

56. *Id.* at 786.

57. *Id.* at 795.

58. *Id.*

59. *See* Carol S. Bruch, *The Use of Unpublished Opinions on Relocation Law by California Courts*, *in* LIBER MEMORIALIS PETAR SARCEVIS: UNIVERSALISM, TRADITION, AND THE INDIVIDUAL 234 n.40 (J. Erauw et al. eds., 2006). For more evidence of inter-judge variability, but this time among state supreme court judges, see Elaine Martin & Barry Pyle, *State High Courts and Divorce: The Impact of Judicial Gender*, 36 U. TOLEDO L. REV. 923, 936 (2004) (finding that "[f]emale justices supported female litigants 75.6% of the time while male justices supported female litigants 53.6% of the time.").

judge's biased holding to steal the kids and perhaps the family money as well.

### C. Existing Reform Proposals: Rulification

"Among those who live and work in the world of family law obligation, there is a yearning for predictability and efficiency. Context is expensive and invasive."[60]

"To call this kind of discretionary grant an 'equitable discretion' law is like calling the MX missile a 'peacekeeper.' Its authors may hope for that result, but it has great potential to do the opposite."[61]

* * *

Existing reform proposals—Huntington's included—seek to rulify family law's open-ended standards.[62] Of course, rulification is not the only goal. Not all rules will help foster strong, stable, positive relationships. A rule that totally cut off one parent from seeing their child would certainly not do so, nor would a rule that left custodial parents so poor that they had to take second jobs and hence they were not able to spend quality time with their children. But there is an extraordinarily wide range of rules that would offer improvements on the current system, in part because rules—regardless of their content—decrease the number of things to fight about, and it is precisely the adversarial fighting that does the most damage to parents' ongoing relationship with one another.

Huntington's first proposal is to adopt something akin to Elizabeth Scott's or the ALI's approximation rule.[63] Under this rule, post-dissolution parenting time does not depend on the whims of a biased judge. Rather, it depends on ascertainable facts. Post-dissolution custody reflects the pre-dissolution child-care arrangement between the parents. So if the court finds that the mother was responsible for seventy percent of the care before the split, then she would get seventy percent of the parenting time after the split.[64] This rule makes custody determinations more predictable, which in turn

---

60. Baker, *supra* note 38, at 320.

61. Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1172 (1986).

62. *See* HUNTINGTON, *supra* note 1, at 124-26 (describing proposals by the ALI and endorsing some of them).

63. *See id.*

64. *See* A.L.I, *supra* note 8, at § 2.08.

reduces litigation.[65] Huntington rightly concludes that this rule would be a vast improvement over the current system,[66] at least in terms of reducing litigation, improving predictability, and decreasing the likelihood that parents will come away feeling like the outcome was the result of illegitimate judicial bias.[67]

Huntington is less committed to any one proposal in the context of spousal maintenance. Nonetheless, she offers qualified praise for the ALI's model rule, at least insofar as it would reduce acrimony.[68] It would do so primarily by virtue of the fact that it relies more on rules than standards.[69]

Rulification is the common thread that runs through almost all proposals to reform family law's dispute resolution system, regardless of their political valence. Many scholars and judges have argued that states should adopt a primary caretaker presumption, under which a judge would presumptively award custody to the child's primary caretaker.[70] Fathers' rights groups have consistently sought a presumption in favor of joint physical custody.[71] Men's rights groups more broadly have sought to implement a rule that would cut off

---

65. *See* HUNTINGTON, *supra* note 1, at 124-25.

66. *Id.* at 125.

67. Huntington also touts the rule because it channels the parents' fighting into a less personal arena. *Id.* at 125. Calling your partner a bad mother is perhaps more damaging to your co-parenting relationship than asserting that she was only responsible for 35% of the care. But parents are likely to have plenty of ill will about who did what. Many parents are bitter about unequal burdens of child care. That bitterness makes assertions like "I did just as much as her!" quite personal, and quite offensive. So although the proposed approximation rule may make matters more predictable, it might still leave ample opportunities to damage the future co-parenting relationship.

68. *See id.* at 127-28.

69. As an additional bonus, the ALI rule would generally shift money to those with child custody. It does so because it is quite generous to the parent who undertook the bulk of the child care responsibilities prior to the split. A.L.I, *supra* note 8, at § 5.05.

70. *See* Glendon, *supra* note 61, at 1181-82. *See generally* R. NEELY, THE DIVORCE DECISION 14-16 (1984); David Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L REV. 477, 480-81 (1984); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision-Making*, 101 HARV. L. REV. 727, 727-28 (1988).

71. *See* Jack Sampson, *Choking on Statutes Revisited: A History of Legislative Preemption of Common Law Regarding Child Custody*, 45 FAM. L. Q. 95, 105-06 (2011); Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best Interest Standard*, 77 L. & CONTEMP. PROBS. 69 (2014). *See generally* Ira Mark Ellman, *A Case Study in Failed Law Reform: Arizona's Child Support Guidelines*, 54 ARIZ. L. REV. 137, 148-49 (2012).

alimony when the obligor retires.[72] More complex alliances of reformers have sought alimony formulas that determine the amount and/or duration of alimony.[73]

These proposals have had very little success.[74] Why have legislatures remained largely inactive in the face of widespread criticism of family law's open-ended standards? Stalemate at the state-level is a likely culprit.[75] Many reform proposals have predictable, gendered impacts.[76] For example, the primary caretaker presumption favors mothers over fathers. These gendered impacts make altering the best interest standard especially unappealing to state legislatures[77] and especially hard given that predictable legislative effects help mobilize interest groups.[78] Reforming

---

72. Barry Nolan, *Attack of the 50-Foot Feminist Agenda*, BOS. MAG., Sept. 2012, http://www.bostonmagazine.com/2012/08/angry-men-feminist-agenda/.

73. *See, e.g.*, *id.*; Beth Pinsker, *Breadwinning Women Are Driving Alimony Reform*, REUTERS (Nov. 17, 2015), http://www.reuters.com/article/us-women-divorce-alimony-idUSKCN0T61O920151117.

74. Minnesota and West Virginia are the only states that have adopted either the primary caretaker presumption or the ALI's standard. *See* MINN. STAT. ANN. § 518.17 (1989); W. VA. CODE § 48-9-206 (2003); Pikula v. Pikula, 374 N.W.2d 705 (Minn. 1985); Garska v. McCoy, 278 S.E.2d 357, 362 (W. Va. 1981). Fathers' rights groups have also largely failed to obtain a presumption in favor of joint physical custody. *See* ATKINSON, *supra* note 32, at § 4-1 (listing only two states—NM and LA—that have enacted presumptions in favor of joint physical custody); Scott & Emery, *supra* note 71, at 76.

75. A misplaced faith in custody evaluators and other mental health professionals may also contribute. Scott & Emery, *supra* note 71, at 71.

76. *See id.* at 2.

77. Sampson, *supra* note 71, at 106 ("It seems to many observers that avoiding controversy if at all possible is a central principle of the Texas Legislature."); *See* Ellman, *supra* note 71, at 149 (describing ways that state actors attempt to avoid difficult policy questions).

78. *See* Ellman, *supra* note 71, at 177 (noting that interest groups that faced potential losses from a set of child support amendments appeared to be more aggressive than interest groups that faced potential gains, making change particularly difficult); Scott & Emery, *supra* note 71, at 76-77. Some reforms can avoid potentially stalemate. As Barbara Stark and Jeffery Evans Stake have argued, states could mandate that spouses and parents opt-in to one of a potentially capacious set of pre-packaged family law rules. Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397, 429-30 (1992); *See* Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CALIF. L. REV. 1479, 1521 (2001). This may not have predictable gendered effects and creates the appearance of getting the informed consent from each participant. But this reform requires substantial state action that has yet to occur.

property division or alimony would create similarly gendered effects.[79]

Another major set of reform proposals argues that family law's open-ended standards should be cabined through the process of common law—rather than legislative—rulemaking.[80] Trial courts could be required to issue written opinions outlining their reasoning, and appellate courts could use those opinions to more aggressively guide trial-court discretion.[81]

Unfortunately, appellate review today remains ineffectual.[82] In 1998, one Indiana judge said: "[R]ead the cases and find the number of child custody cases that are reversed . . . 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."[83] In the early 2000s, California practitioners reported 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."[84]

Why is appellate review still ineffectual? Overworked trial courts are likely hesitant to add to their workload by issuing detailed written opinions. Appellate courts, too, are unlikely to significantly increase their workload. Even if appellate judges had ample extra time, the lack of consensus on the relevant value judgments makes it likely that appellate courts, like state legislatures, would simply pass the buck on controversial issues to trial courts. This is precisely what appellate courts in Alabama did after a member of the Alabama Supreme Court tried to inject Christian values into custody determinations.

---

79. For a host of reasons, husbands out-earn wives. Reforms of property division that, for example, seek to increase the importance of the spouses' relative monetary contributions would systematically favor men. Similarly, because alimony transfers money from the higher earning spouse to the lower earning spouse, alimony reform has predictable gendered impacts. Despite this, a small number of state legislatures have been relatively active in alimony reform. *See, e.g.*, Colo. Rev. Stat. Ann. § 14-10-114; Mass. Stat. 208 § 49; Kathleen Haughney & Lisa Huriash, *Alimony Law in Florida Changes Drastically Under New Bill*, SUN SENTINEL (Apr. 18, 2013), http://articles.sun-sentinel.com/2013-04-18/news/fl-alimony-changes-final-passage-20130418_1_florida-alimony-reform-permanent-alimony-alimony-law.

80. *See* Peskind, *supra* note 36, at 479-80; Schneider, *supra* note 51, at 2290.

81. Schneider, *supra* note 51, at 2294.

82. Peskind, *supra* note 36, at 462 (noting that appellate review is still "emasculated").

83. Artis, *supra* note 53, at 791 (quoting a judge's statement during interview).

84. Bruch, *supra* note 59, at 230, 234 n.40.

Faced with this contentious issue, appellate courts dodged it and simply gave more deference to trial courts.[85]

## II. LOCALISM'S PROMISE

These reform failures suggest that reformers need to look beyond the state. Here, Huntington's broad focus helps bring other possible solutions into view. For example, she invites zoning boards to take a more active role in shaping family relationships.[86] Those boards can facilitate the construction of parks and playgrounds that benefit child development, and they can at least make modest contributions to reducing commute times which rob children of valuable parental interaction.[87] On a higher level of generality, this discussion of zoning boards invites reformers to look to local governments. This turns out to be a quite fruitful invitation. Cities and other localities could, at least in part, fill the reform void at the state level.

Local rulification comes with several benefits over state rulification. Local governments are much more likely to avoid stalemate on contested family law issues. Further, if local government officials believe that they have a role to play in the very heart of family law, even if it is a small one, they are much more likely to embrace Huntington's plea that they consider family welfare across a range of issues, including housing, zoning, and anti-discrimination.[88] Local family law—whether in the form of rulification or otherwise—could also have benefits common to other instances of local power, including policy experimentation, political entrepreneurship, participation, and efficient sorting.[89] This Part briefly explores each

---

85. *See* June Carbone & Naomi Cahn, *Judging Families*, 77 UMKC L. REV. 267, 273 (2008).

86. *See* HUNTINGTON, *supra* note 1, at 23, 99, 184.

87. *See id.*

88. *See id.* at 23, 64-65, 99, 181-89.

89. *See, e.g.*, Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1312, 1314 (1994) (identifying the following values: innovation, participation, responsiveness, and checks on tyranny); Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 1024-25 (2007) (identifying the following values: experimentation, efficiency, participation, and checks on other power). This Article sets aside issues of checking federal and state power because local family law can only operate within the bounds set by state law. This Article also sets aside non-instrumentalist arguments for local family law. *See* Davidson, *supra*, at 1008 n.218 (bracketing non-instrumentalist concerns); *see also* Briffault, *supra*, at 1303-05 (noting that federalism scholars have turned to instrumentalist arguments to defend federalism and arguing that the values ascribed

of these potential benefits. Again, for ease of exposition, I refer to various local government units collectively as cities and their legislative arms as city councils.[90]

### A. Will Cities Innovate?

There are several reasons to think that cities would be particularly attracted to legislating on family law matters. Those areas have high expressive value and would reflect expansions in local power. Expressive and power-expanding ordinances have been quite popular recently.[91] Thirteen cities have passed laws rejecting the FDA's authority to regulate locally grown food.[92] By the time the United States invaded Iraq, 170 localities had passed resolutions denouncing that possibility.[93] There have been more than 400 resolutions opposing the PATRIOT Act.[94] In direct contradiction of federal law, 120 ordinances stipulate that local officials cannot report another's immigration status to the federal government.[95] The list goes on. During the 2000s, almost 300 cities engaged in some form of foreign policy activism.[96] Cities have designated themselves nuclear free zones,[97] and asserted that English is their official language.[98] Many cities have a taste for expressive activism.[99] Local family law fits this mold. An ordinance might say that free range parenting is good for kids, or that delaying or refusing vaccinations is bad for children, or

---

to federalism are largely the same as the values ascribed to allowing local governments to exercise power).

90. *See supra* note 3 and accompanying text.

91. Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 260 (2004) ("A review of recent home rule cases around the country provides striking evidence of the local willingness to experiment with new policies concerning public health and safety, individual rights, social welfare, political reform, and the private provision of public services.").

92. LORI RIVERSTONE-NEWELL, RENEGADE CITIES, PUBLIC POLICY, AND THE DILEMMAS OF FEDERALISM 1 (2014).

93. *Id.* at 177.

94. *Id.* at 3.

95. *Id.* at 3, 151.

96. *Id.* at 177.

97. *Id.* at 176. In the 1980s, 220 localities passed resolutions against nuclear testing. *Id.*

98. *Id.* at 148.

99. Of course, some cities have engaged in more impactful activism. *Id.* at 115-16 (discussing cities who issued same-sex marriage licenses); Paul Diller, *Why Do Cities Innovate in Public Health*, 91 WASH. U. L. REV. 1219, 1225, 1239 (2014) (discussing indoor smoking bans and the proliferation of New York City's calorie disclosure requirements).

that children are generally harmed when they witness their parents entertaining new overnight guests, or that spanking is a reasonable means of disciplining a child. Each of these ordinances connects with larger public debates, giving them particular expressive force.

Local rulification is also cheap.[100] An ordinance might require judges to consider the city's judgment that the ALI's approximation standard is the proper way to ensure that custody decisions are in the best interests of children. Another ordinance might require judges to consider the local judgment that alimony should be no longer than three years. These forms of local rulification do not take any money way from the town fisc. Instead, they will likely save divorcing voters money on their attorney's fees.

The bargain price of local rulification stands in contrast to other ways in which cities might promote family welfare, such as through zoning or universal pre-K. One set of possible reforms—including pre-K and nurse partnerships—requires direct expenditures.[101] Another set of reforms requires more indirect expenditures. Zoning is a good example. A city might require that developers install more sidewalks or build more playgrounds or plant more trees,[102] but all of this costs money. In the context of a new development, these expenses would simply get passed on to the people who choose to live there in the form of higher housing prices and higher rents. Costing residents money may not be something elected officials are in a hurry to do. In contrast to pre-K, nursing programs, and zoning, local

---

100. Of course, expressive ordinances might have political costs. RIVERSTONE-NEWELL, *supra* note 92, at 168-69.

101. As Huntington notes, if localities are required to balance their budgets on an annual basis, her arguments about the long term cost savings of these programs may fall on deaf ears at the city level. *See* HUNTINGTON, *supra* note 1, at 215-16. The federal government may therefore be the right target for these arguments rooted in cost benefit analysis. Even if cities could engage in these long-term investments, it is not clear that cities could fully capture their positive effects. If they operate as hoped, many young adults will be more mobile and may leave the locality. Pre-K in New York City may later benefit the northern New Jersey suburbs. Although cities can capture part of the benefit by having to provide services to fewer persons, they may not obtain the benefits of future tax dollars that more productive citizens generate. This alters the cost-benefit analysis in ways that again favor reforms at the state or national level.

102. Each of these might facilitate community and parenting in its own way—sidewalks create opportunities for neighbors to meet casually, playgrounds do the same while also providing a gathering area for children, trees provide shade, which as we know in Texas during the summer, is required to convince anyone to walk on the sidewalks or go to the playground.

rulification does not require the city or its citizens to incur any monetary costs.

In addition to local family law's high expressive value and low monetary cost, local governments are significantly less likely to experience the stalemate that reformers have seen at the state level. A state's various cities are likely to be far more homogeneous than the state as a whole. This is in part due to the statistical realities of taking small samples of the state's population, and in part due to the selective sorting that takes place when people decide where to live.[103] While reformers at the state level have to carefully craft "purple" reforms that are acceptable to both red and blue voters,[104] smaller political units are more likely to be either red or blue. This increases the likelihood that the residents of at least some of the 36,000 municipal and township units in the country[105] will be able to avoid stalemate and agree on more rule-like justice in family law matters.

Enacting local family law is, at least in some ways, a particularly good first step along the path to more robust consideration of family law matters at the local level. Zoning board members may feel a bit uncomfortable thinking seriously about how to facilitate proper parenting. If we can convince cities that they have a role to play in what people see as the very heart of family law—child custody and divorce—then it is more likely that cities will embrace less direct means of influencing families. This "core-out" strategy is not necessarily always better than a "peripheral-in" strategy where reformers start with zoning boards and playgrounds and only later seek to engage city councils in the regulation of divorce and parenting. Rather, the best strategy for engaging local governments in family law is likely a *set* of strategies—some aimed directly at zoning boards and school boards, others aimed at city councils.

---

103. *See generally* BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART 129 (2009). *But see* Samuel J. Abrams & Morris P. Fiorina, *"The Big Sort" That Wasn't: A Skeptical Reexamination*, 45 POL. SCI. & POL. 203, 203 (2012). I do not mean to suggest that all, most, or even many cities will be homogeneous enough to push local family law reform. Many cities may be as diverse as the states that they reside in, or more so, making it difficult to generate enough political will to create local family law ordinances. *See* Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2550-51 (2006).

104. *See* HUNTINGTON, *supra* note 1, at 214; Justin R. Long, *Democratic Education and Local School Governance*, 50 WILLAMETTE L. REV. 401, 438 (2014).

105. BAKER & GILLETTE, *supra* note 3, at 46.

### B. Policy Experimentation

One of the primary defenses of moving power to smaller political units is rooted in the benefits of policy experimentation. "[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."[106] This rationale is even stronger in the context of local versus state power. Increasing the number of laboratories increases the number of experiments[107] and thereby increases the likelihood that one experiment will succeed. In addition to increasing the number of laboratories, devolving power to the local level also decreases the costs of failed experiments. Local experiments are smaller. Their failures will hurt fewer people, while their successes can be mirrored in other jurisdictions.

A bit of Texas history suggests that some cities will innovate, and that this innovation can help promote legal reform. In the 1970s almost every divorce decree in Texas gave the non-custodial parent "reasonable visitation."[108] This vague standard effectively gave the custodial parent the power to grant, regulate, or deny visitation.[109] In 1983, the legislature invited courts to establish local visitation guidelines.[110] Although the legislature called upon local courts to experiment, it could have also called upon other local entities, including cities.[111] The legislature's invitation was largely ignored.[112]

---

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

107. *See infra* Part IV (discussing existing safeguards against too much experimentation).

108. Sampson, *supra* note 71, at 101.

109. *Id.* This is perhaps a particularly poetic result. The state effectively left the judge without guidance about how to decide visitation, and the judge then passed the buck and left the parents with the same unhelpfully vague standards.

110. Acts 1983, 68th Leg., p. 1608, ch. 304, § 1, eff. Aug. 29, 1983; Acts 1983, 68th Leg., p. 1728, ch. 338, §, eff. Sept. 1, 1983.

111. In future work, I address the possibility of a judicial form of local family law—that is, the possibility that groups of local trial court judges could develop shared public norms that act as rules of thumb among those judges. Although some recent literature attempts to bring local judges into the fold of local government, local judges exist within a state hierarchy and are not all beholden to local citizens in the same way that local governments are. *See* Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897, 924-25 (2013). Accordingly, this judicial form of local family law merits separate treatment.

112. Sampson, *supra* note 71, at 110.

But a few local courts developed guidelines.[113] The Travis County guidelines, for example, were particularly generous to the non-custodial parent.[114]

By 1989, legislators were frustrated by what they felt was the failure of judicial discretion and the failure of those judges to remedy the problem with guidelines.[115] The legislature then retracted its invitation and developed its own guidelines.[116] Most importantly for purposes of this Article, the legislature based its guidelines primarily on the ones that the local courts in Travis County developed.[117] This suggests that even if only a few cities innovate, and even if the only vehicles for learning are casual observation, common sense, and the occasional argument generated by interest groups,[118] local experimentation can be a valuable tool for legal reform.

Today, municipal experiments are likely to be subject to multiple evaluations[119] and successful experiments are even more likely to be mirrored in other jurisdictions. Local bar associations that are considering reforming some aspect of family law routinely canvas the practices of other local bars.[120] Additionally, numerous associations and research organizations have the express mission of evaluating experiments and spreading successful ones. For example, The National Center for State Courts conducts its own research on the

---

113. *Id.* at 110.

114. *See id.* at 111, 114.

115. *Id.* at 110.

116. *Id.*

117. *Id.* at 111-12.

118. *See id.* at 97 (arguing that most changes to the Texas family code were the result of lobbying by, for example, the Texas Family Law Foundation and fathers' rights groups).

119. People can learn from policy experiments even if there is no consensus on the proper standard against which to judge the outcome. An organization could, for example, evaluate local 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 bring fewer appeals to) the result of their cases under some formulas compared to others. These evaluations avoid thorny questions about the normative foundation of alimony.

120. Charles F. Vuotto Jr., *Editor-in-Chief Column: Alimony Trends*, 33 N.J. FAM. LAW. 6, 12 (2012); N.M. JUDICIAL EDUC. CTR., ET AL., NEW MEXICO FAMILY LAW MANUAL 4 (2011) [hereinafter NM Family Law Manual]; *see also* Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1629 (2006) (noting that "state jurists have a long history of interjurisdictional consultation—reviewing the experiences of their sibling states as they shape legal rules.").

effectiveness of different states' approaches to family law issues[121] and serves as a clearinghouse for a broad set of other research.[122] 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.[123] The Center for Court Innovation conducts and distributes research about a host of local experiments in New York State.[124] These associations and research organizations help ensure that cities that want to learn from the experiences of other cities will be able to do so.

Although the virtues of policy experimentation rely on some degree of learning, an anemic version of learning can still be beneficial. Even if no consensus emerges on which policies are reasonable and which transgress important boundaries, local experimentation can highlight the plasticity of family law's open-ended standards and the many ways in which reasonable people can disagree about how to implement them. In this way, policy experimentation can lead to the exact opposite of a single-best solution; it can lead to the acknowledgment that there is no clear answer to the relevant policy question. This too is a benefit of policy

---

121. *See, e.g.*, NORA SYDOW & RICHARD VAN DUIZEND, STRATEGIES FOR EFFECTIVE STATEWIDE JUDICIAL COMMISSIONS ON THE PROTECTION OF CHILDREN (2010) (surveying twenty-one states with judicial commissions that focus on child welfare).

122. NATIONAL CENTER FOR STATE COURTS, http://www.ncsc.org/About-us.aspx. [https://perma.cc/4P3S-KTVN].

123. Nat'l Council of Juvenile and Family Court Judges (NCJFCJ), http://www.ncjfcj.org/about. It has also gathered best practices when it comes to setting retroactive child support. NCJFCJ, *A Practice Guide: Making Child Support Orders Realistic and Enforceable* (2005), http://www.ncjfcj.org/sites/default/files/NCJFCJ%20Bench%20Cards.pdf (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).

124. For example, they run a program in King County, New York that offers help to obligors in child support arrearages, and are actively working to establish similar programs in other jurisdictions. CENTER FOR COURT INNOVATION, PARENT SUPPORT PROGRAM (2012), http://www.courtinnovation.org/research/parent-support-program-helps-repair-parent-child-relationships. They also evaluated an experiment in Nassau County, New York in which high conflict cases were identified early and custody issues were resolved before financial issues. Michelle Zeitler & Samantha Moore, *Children Come First: A Process Evaluation of the Nassau County Model* (2008), http://www.courtinnovation.org/research/children-come-first-process-evaluation-nassau-county-model-custody-part.

experimentation.[125] It helps clarify the malleable nature of the values at stake.

### C. Political Entrepreneurship

In addition to creating policy experiments, local government can serve as a platform for political entrepreneurship.[126] Here, the goal is not necessarily to find better policy solutions to a given problem, but instead to serve as a gadfly to stimulate state legislatures to debate issues that they might otherwise prefer to avoid (although the two will often go together).

Cities are particularly well situated to spur debate. Cities have an existing base of democratic legitimacy and an insider status that makes them hard to ignore.[127] San Francisco's issuance of marriage licenses to same-sex couples provides a good example. Although San Francisco's actions were quickly overturned,[128] they led to an eventual victory in the California Supreme Court, a defeat at the polls, and a victory at the U.S. Supreme Court.[129] Similarly, San Diego would assuredly cause a commotion if it asserted its authority to require residents to live separate and apart before divorcing[130] or if it declared that relocating to northern California is presumptively not in children's best interests.[131] Alternatively, cities might enact

---

125. Garrick B. Pursley & Hannah J. Wiseman, *Local Energy*, 60 EMORY L.J. 877, 933-34 (2011) (rejecting the idea that policy experimentation must lead to a single best solution and noting the virtues of informing and publicizing the relevant debates).

126. 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); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 21 (2007).

127. Some local bar associations have attempted to create local rules of thumb in the context of alimony, but judges sometimes ignore them because bar associations lack the authority to do so. Ramsay v. Wheeler-Ramsay, 232 P.3d 1249, 1258 (Ariz. Ct. App. 2010).

128. Lockyer v. City and County of San Francisco, 95 P.3d 459, 463-64 (Cal. 2004).

129. *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Hollingsworth v. Perry, 133 S. Ct. 2652, 2659 (2013); In re Marriage Cases, 183 P.3d 384 (Cal. 2008).

130. Currently, living separate and apart is not required for a divorce under California law, although it is relevant to determining when the marital relationship ended for purposes of community property and spousal support. *See generally* In re Marriage of Manfer, 144 Cal. App. 4th 925 (2006); In re Marriage of Hardin, 38 Cal. App. 4th 448 (1995).

131. 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,

different alimony formulas. Denver might equalize the ex-spouses' incomes for some period following divorce.[132] While Boulder might transfer much less money, perhaps because they focus on ensuring only that the ex-spouse's minimum needs are met. These differing formulas are likely to trigger debate at the state level and perhaps even at the national level.

Entrepreneurship (and experimentation) might be valued even more highly if they draw on the experiences of, and give voice to, groups who are marginalized at higher levels of government. For example, there are a number of majority-minority cities. In over 1000 cities, a majority of the residents are black.[133] There are over 800 majority-Latino cities, and 7 majority-Asian cities.[134] Of course, whether those groups are well-represented on the relevant city councils is a different and important question.[135] But these majority-minority cities highlight at least the potential for localism in family law to reveal voices that are drowned out at the state and national level.

### D. Participation

One traditional justification for local power is that it promotes heightened civic participation.[136] Because one's voice is more powerful in smaller political units, people may be more likely to participate in local politics.[137] Local participation also builds a sense of community that perhaps can only exist in political units that cover a relatively small geographic area.[138]

---

*Inertia and Inequality: Reconceptualizing Disputes Over Parental Relocation*, 40 U.C. DAVIS L. REV. 1747, 1754-56 (2007). For general discussions of the debates surrounding relocation, see Sally Adams, *Avoiding Round Two: the Inadequacy of Current Relocation Laws and a Proposed Solution*, 43 FAM. L.Q. 181 (2009) and ATKINSON, *supra* note 32 at § 4-26.

132. *See* Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2229, 2258-61 (1994) (advocating equalizing household standards of living with alimony payments until the youngest child leaves the home and a certain number of years has passed).

133. Paru Shah & Melissa Marschall, *The Centrality of Racial and Ethnic Politics in American Cities and Towns*, *in* OXFORD HANDBOOK OF URB. POL. 314 (2012).

134. *Id.*

135. *See id.* at 317-26.

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

137. Diller, *supra* note 126, at 1128.

138. *Id.*

Some local government scholars have questioned whether local power actually contributes to communitarian goals in practice.[139] Many people care predominately if not solely about national politics.[140] Even if people wanted to care about local laws, the increased mobility of the population increases the costs of getting involved in local government and decreases the resulting benefits.

Yet if any subject can reinvigorate the communitarian benefits of local government, it is family law. Of all the things that local government might do, local family law is among the most accessible and important to the public. Few areas of law are as close to the heart as family law. Almost everyone who is affected by an alimony order (whether the obligor or the obligee or the new spouse of either) has an opinion about alimony law. Almost everyone who has known someone involved in a custody dispute will have opinions on how to best balance the liberty of the parents against the welfare of the children. If cities began to enact local family law, it is likely that many citizens would weigh in and would do so vigorously.[141]

### E. Sorting

A classic argument for local power asserts that people will sort themselves into areas that fit their preferences.[142] Greater municipal control leads to more variety among municipalities, which allows a tighter fit between municipal policy and citizen preferences.[143]

Efficient sorting provides a weak argument for local laws surrounding family dissolution. There are at least four barriers to selecting one's home based on divorce laws. First, people rarely know the content of divorce laws before they consult a lawyer about a divorce.[144] Second, people are notoriously optimistic about their own

---

139. *Id.* at 1130.

140. 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).

141. *See* Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1886-87 (2004) (arguing that courts should allow local citizens the freedom to negotiate norms surrounding the forms of government-sponsored religious expression that are acceptable).

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

143. There is some evidence that this type of sorting occurs. Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 520-21 (1991).

144. *See generally* Lynn Baker & Robert Emery, *When Every Relationship is Above Average*, 17 LAW & HUM. BEHAV. 439 (1993); Baker, *supra* note 38, at 367.

marriages. Most refuse to acknowledge that they might someday divorce.[145] Third, even if they manage to overcome this over-optimism, other factors—such as job opportunities and schools—are likely to be far weightier factors in choosing a home. Fourth, if people have sufficient foresight to plan for divorce, then in most cases they would be much better off negotiating a prenup or a postnup than relying on local law.[146]

Even where efficient sorting is plausibly relevant to an analysis of local divorce law, its impact is likely to be small. When a couple's preferences are aligned, there are some instances where they might sort themselves based on local divorce law. Prenups and postnups cannot control all aspects of divorce law; most notably, they cannot control child custody.[147] Parents who wanted to precommit themselves to a particular custody arrangement might move to a city with laws that make this arrangement more probable. Nonetheless, the obstacles to efficient sorting based on divorce law are significant.[148]

As Professor Richard Briffault rightly observes, it is possible that people will inadvertently sort themselves into their preferred divorce regime.[149] This might happen if their preferences about divorce correlate with the preferences about other amenities that localities may offer. For example, people who prefer densely populated areas might also tend to prefer certain rules of thumb on divorce. Or people who want to live in "blue" or "red" areas might favor certain rules of thumb over others. This is certainly possible. But I know of no data, and I have no strong intuitions, that would bear on the

---

145. Sean Hannon Williams, *Sticky Expectations: Responses to Persistent Over-Optimism in Marriage, Employment Contracts, and Credit Card Use*, 84 NOTRE DAME L. REV. 733, 757-59 (2009).

146. This suggests that uniform treatment of prenups and postnups might be a counterweight to any residual problems of forum shopping and races to the bottom. Consistent with the themes of this Article, family law needs to be disaggregated to understand the costs and benefits of local family law. Although local variation might be a net positive for many areas of family law, prenups and postnups merit more centralization. Leib, *supra* note 111, at 924-25 (noting that the virtue of uniformity plays out differently for different laws, and arguing that uniformity is particularly important for contract law).

147. Unif. Premarital Agreement Act § 3 (amended 2001), 9C U.L.A. 43 (1983).

148. This mitigates one classic problem with sorting, which occurs when localities design their amenities to repel low-income citizens. Richard Briffault, *Beyond City and Suburb: Thinking Regionally*, 116 YALE L.J. POCKET PART 203, 206 (2006).

149. Richard Briffault, *On Family Law Localism: A Comment on Sean Hannon Williams's "Sex in the City,"* 43 FORDHAM URB. L.J. 1175, 1183 (2016).

consistency and strength of these potential correlations. So I remain hesitant to claim that local family law will generate efficient sorting.

* * *

Although it is unclear whether local family law can capture the benefits of sorting, it can open up avenues for much-needed policy experimentation, facilitate political entrepreneurship, and has the potential to reinvigorate citizen engagement with local politics.

## III. POWER AND PREEMPTION: THE CASE FOR LOCAL RULES OF THUMB

If state legislators are convinced by the arguments in Part II, then they could authorize local family law in several ways. They could, for example, set up special Family Law Boards or regional entities with power to experiment with family law reform.[150] But if states desire this type of experimentation, it is unclear why they would create entities from scratch. They might instead simply empower existing entities like city governments.[151] But it is not clear how receptive state legislators will be to localist reforms of this sort. As discussed above, all states use multifactor tests that grant trial judges a great deal of discretion and thwart meaningful efforts at providing uniformity and predictability.[152] Again, these tests reflect, at least in part, political paralysis at the state level. Given the stubborn stability of state laws in this area, it is important to explore reforms that do not depend on state action.[153]

This Part addresses the potential for cities to use their home rule authority to influence family law *without an explicit grant of authority from the state*. It examines a set of doctrines designed to demarcate

---

150. This Article does not take a position on these possibilities. For more detailed discussions, see generally Williams, *Local Voice*, *supra* note 18.

151. Non-local forms of experimental family law could also be worthwhile. Suppose political parties adopted varying guidelines and judges from each party applied their respective guidelines. 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. Richard Briffault, *Our Localism: Part I*, 90 COLUM. L. REV. 1, 1 (1990) ("Localism as a value is deeply embedded in the American legal and political culture.").

152. *See supra* Part I.A.

153. Of course, delegating decisions to cities reduces some of the pressures that cause stalemate at the state level. For example, such delegation does not require that state legislators take positions on the substance of family law, but risk-averse state interest groups may still cause state-level paralysis.

the boundary between state and local authority. Ultimately, this examination reveals that cities may have more power over family affairs than commonly assumed. More specifically, there is a surprisingly strong argument that at least some cities can currently enact one form of local family law: local rules of thumb.[154] This section fleshes out that argument. Because of the large amount of diversity between states, this section paints with a broad brush. Its goal is to show that there is a good chance that *at least some cities in some states* can currently implement local family law rules of thumb.

Without explicit authorization, local legislative involvement in family law faces two obstacles: power and preemption. Do home rule grants of authority include the power to initiate regulation regarding family law? If so, would such regulation be preempted by existing state law that outlines a list of non-exclusive factors that courts must consider when determining custody, property division, and alimony? This Part speaks directly to cities when it argues that existing home rule doctrines provide them with the power to initiate local family law; it speaks to appellate courts when it argues that existing state statutes do not preempt many forms of local family law.

Although both power and preemption create obstacles for local family law, preemption causes more serious concern.[155] Existing preemption doctrines create one horn of a dilemma. How can municipalities regulate subtly enough to avoid preemption (the first horn) while impacting judicial decisions enough to make their actions worthwhile (the second horn)? Perhaps surprisingly, even if preemption is at its strongest, local ordinances can have a profound effect on family law.

---

154. Rules of thumb exert influence only in those cases where judges are already uncertain. They guide judges toward one outcome within the set that the judge has already determined represent a reasonable range of outcomes. SCHAUER, *supra* note 20, at 108-09.

155. The general trend in state courts is toward allowing more local power. Richard Briffault, *Local Leadership and National Issues*, *in* PAPERS FROM THE ELEVENTH ANNUAL LIMAN COLLOQUIUM AT YALE LAW SCHOOL, WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY 67, 72 (2008) ("[I]t is fair to say that the scope of local initiative has grown and courts have been willing to sustain local power to act with respect to a host of matters not clearly or uniquely local."); *see also* SANDRA M. STEVENSON, ANTIEAU ON LOCAL GOVERNMENT LAW § 21.05 (2d ed. 2013) [hereinafter ANTIEAU] ("Some courts have indicated that while a broad topic may be of statewide concern, nevertheless, particular aspects—because of their paramount local concern—should be subject to local controls.").

Many scholars have argued that the various tests for initiative power and preemption offer limited guidance and that courts are simply making their own ad hoc policy determinations.[156] This suggests that the policy discussion of Part II should carry great weight. The remainder of this Part, however, takes doctrine seriously—perhaps more seriously than it deserves—and asks whether family law is a matter of mixed or local concern that can survive preemption.

The short answer is yes. Despite the common trope that family law is a matter of state concern, many aspects of it are also matters of local concern. Although family law statutes are comprehensive, the large space they leave open for judicial discretion also creates a space for local ordinances to weigh in on how judges ought to exercise that discretion. Even if such ordinances would be preempted in some states, cities certainly have the power to merely ask that judges consider local judgments. A great deal of evidence suggests that even this latter form of local family law, which has no formal teeth whatsoever, is likely to greatly influence the large number of judges who are actively seeking guidance in exercising their paralyzingly broad discretion.

### A. Power: State and Local Matters

Many grants of home rule authority include all initiative powers not specifically denied by the state.[157] For these states, there is no serious question of whether municipalities have the power to initiate ordinances that regulate the family.[158] Rather, the question is one of preemption, which will be discussed in the next Subpart. This Subpart focuses on those states that grant municipalities initiative

---

156. Diller, *supra* note 126, at 1116, 1140-41 (describing intrastate preemption doctrines as unhelpful and judicial applications of these doctrines as inconsistent); Briffault, *Local Leadership*, *supra* note 155, at 76 ("Most courts in most states most of the time [treat preemption] as a question of legislative intent, which is resolved in a multifactored relatively ad hoc inquiry."); Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1344, 1350 (2009) (describing the term "local affairs" as notoriously ambiguous, and collecting cases supporting the claim that courts are making ad hoc judgments about its scope); *see also* Briffault, *Local Leadership*, *supra* note 155, at 72 ("No constitutional formula can determine what courts will actually do in contested cases.").

157. These are "legislative" home rule states. ANTIEAU, *supra* note 155 at § 21.01.

158. *Id.* at § 21.06.

power only over "local" issues or "municipal affairs,"[159] and argues that many family law issues are matters of both state and local concern.

Courts have been unable to produce a satisfactory test to determine the line between state and local issues.[160] This is perhaps because few if any issues are entirely the concern of only one level of government; nothing is only local or only relevant to the state.[161] But three common touchstones have emerged to draw the line between local and state power: the need for legal uniformity, the possibility that local law will create externalities, and the historical balance of power between state and local authorities.[162]

The possibility of disuniformity and externalities are by far the most important factors.[163] Lynn Baker and Dan Rodriguez offer a fourth possible touchstone. They suggest that state court judges are conducting ad hoc determinations of institutional competence.[164] Some issues, when viewed within their particular temporal and political context, might be better decided at the local level than the state level. Overall, courts tend to interpret home rule grants generously to allow cities to legislate even when an issue is a mixed matter of state and local concern.[165]

Although marriage may not be a local concern, divorce is. The conventional wisdom is that family law is solely a matter of state concern.[166] This conventional wisdom reflects an overgeneralization.

---

159. *Id.* at § 21.05. These are "imperio" home rule states. *Id.* at § 21.01.

160. *Id.* at § 21.05.

161. *See* Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 623-25 (2001) (discussing federal power under the Commerce Clause and arguing that the terms "truly local" and "truly national" are descriptively inaccurate).

162. Baker & Rodriquez, *supra* note 156, at 1351.

163. *Id.*

164. *Id.* at 1353-54 (arguing that uniformity and externalities are often pretexts for a larger concern about institutional competence).

165. ANTIEAU, *supra* note 155, at § 21.04, § 21.06; Diller, *supra* note 126, at 1127 (noting that there is now widespread acknowledgement that many issues are of mixed state and local concern, in which case municipalities have the power to legislate); *see also* Richard Briffault, *Home Rule*, *supra* note 91, at 264 ("There should be a broad presumption of local power to act on matters that affect the locality or the people within it. This is central to the basic democratic, decentralizing, innovative thrust of home rule.").

166. Schragger, *supra* note 5, at 150-53.

Determining who can marry may be a state issue,[167] but determining who can access benefits because of marriage-like relationships can be a mixed state and local issue.[168] More importantly, determining who can marry and adjudicating disputes upon divorce look quite different when viewed in light of touchstones for delineating state and local concerns—uniformity, externalities, history, and institutional competence. Three of the four touchstones for local power favor local family law. The only impediment is history.

### *1. History*

Historically, the balance of power between state and local governments has tipped decisively in favor of states within the context of family law.[169] State law controls divorce; state law controls paternity; state law controls abuse and neglect standards. However, past inaction is not a strong reason to support future inaction,[170] especially when the instrumentalist touchstones—uniformity, externalities, and institutional competence—each support local family law.

### *2. Uniformity*

The context of divorce turns the traditional arguments about uniformity on their head. Traditionally, uniformity favors state rather than local control. Uniformity is generally considered a virtue because it reduces the costs of learning and complying with multiple laws in multiple jurisdictions and ensures that like cases are treated alike.[171] But when the state delegates broad powers to individual judges with minimal appellate review, the state is effectively creating widespread disuniformity. Allowing localities to influence family law decisions can increase rather than decrease uniformity. This is

---

167. *Compare id.* (arguing that the case against local control over marriage law is weak), *with* Lockyer v. City & County of San Francisco, 95 P.3d 459, 471 (Cal. 2004) ("[T]here can be no question but that marriage is a matter of statewide concern rather than a municipal affair, and that state statutes dealing with marriage prevail over any conflicting local charter provision, ordinance, or practice.").

168. *See* Yishai Blank & Issi Rosen-Zvi, *The Geography of Sexuality*, 90 N.C. L. REV. 955, 974-76 (2012).

169. H. MCBAIN, THE LAW AND PRACTICE OF MUNICIPAL HOME RULE, 673-74 (1916).

170. Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671, 703 (1973).

171. Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1570 (2008).

clearest for large cities that contain several judges within their borders. Local family law can also promote uniformity even when a single judge (often elected at the county level or in larger districts) hears cases involving the residents of multiple towns.[172]

In big cities, multiple judges often hear divorce cases. Those judges may differ wildly in their proclivities. Local rules of thumb could help align their rulings, which would promote predictability and horizontal equity. Houston judges may still differ from Dallas judges, but at least there will be more consistency within cities, and their respective residents will not be subject to an outcome-determinative city-level lottery of which judge gets assigned to their divorce case.

Local family law will not always promote uniformity, even in big cities. Family law must be disaggregated into its component parts. If, for example, there is a strong judicial norm against deviating from the child support guidelines even though judges have wide discretion to do so, then local family law could disrupt this norm-driven uniformity. By and large, however, the best data we have suggests that disuniformity is the norm in many areas of family law, including property division, alimony, and many issues within the rubric of child custody.[173] In these areas, local family law can drastically increase uniformity. Even in those places where local family law decreases uniformity, the standardly cited costs of this disuniformity are likely to be low in the context of family law. The major cost of disuniformity cited in debates about the boundary between matters of local and state concern is that it creates compliance costs when it forces people or businesses to know and adapt to different laws in different jurisdictions. But this compliance cost aspect of disuniformity is largely irrelevant in the area of family law. People have very little knowledge of family law.[174] They do not seek to know their state's divorce law (a least not until they are on the brink of divorce), and it is very unlikely that they research family law when they consider where to move. This ignorance of family law prevents

---

172. *See, e.g.,* Texas District Court Map, http://www.txcourts.gov/media/914401/District-Court-Map-Sept-2014.pdf [https://perma.cc/G6EF-2C8B].

173. *See supra* Part I.

174. Baker & Emery, supra note 144.

people from incurring the costs of learning about local family law[175] and adjusting their behavior to accommodate local variation.[176]

Outside of the big cities, judges may have jurisdiction over an entire county or a larger district, and that area may contain two or more small cities.[177] Those cities might develop competing rules of thumb. Although this may appear problematic at first blush, it is not. Without local family law, these judges will have no focal points and no advice to help resolve many family law issues. With local family law, they now have two suggested rules of thumb. This is an improvement. Uniformity will increase if, rather than choosing among a world of options, judges gravitate toward one of the two focal points, even if they randomly choose which rule of thumb to follow. But judges are unlikely to choose randomly. They are much more likely to take the advice that they decide is better, or as I will discuss in the next Part,[178] to apply City A's rule of thumb to its residents and apply City B's rule of thumb to its residents. This should be no more objectionable that the same judge applying City A's zoning ordinances to its residents and City B's zoning ordinances to its residents. Our federalist system embraces such geographic variation.

### *3. Externalities*

The classic examples of externality-creating laws are "not in my backyard" ordinances preventing landfills, sex offenders, or other perceived threats from locating within a city.[179] Such laws shift those

---

175. Ignorance of family law may also be a positive good because it helps prevent people from strategically altering their behavior to gain an advantage once a divorce occurs.

176. Sometimes businesses have an interest in family law matters. Closely held corporations, hedge funds, and other businesses sometimes wish to insulate themselves from the turmoil that a divorce might cause. *See* Brooke Masters, *'Postnup' Boom Among Hedge Fund Managers*, FIN. TIMES (May 30, 2007), https://www.ft.com/content/a6499b80-0eee-11dc-b444-000b5df10621 [https://perma.cc/VS3E-GC2W]. Although these entities might incur costs researching divorce law, they are already forced to use prenups and postnups rather than rely on any particular state's default divorce law regime. As long as local family law does not create variation in the enforceability of prenups and postnups, the businesses that are most directly affected by divorce law will not suffer compliance costs from disuniformity.

177. *See, e.g.,* Texas District Court Map, *supra* note 172.

178. *See infra* Part IV.A.

179. Diller, *supra* note 126, at 1160.

threats to other cities. These kinds of externalities are not present in local family law.

The closest family law comes to creating externalities occurs when a judge determines the rights of a couple who subsequently move to another city. The new city would have to live with the results of the first city's family law. Yet there are two reasons to think that this will not be problematic. First, this is not generally seen as a problem in the interstate context. In fact, various laws ensure that an original divorce decision is enforced even when people move to a new state that might have differing policy preferences about how to handle that divorce.[180] In the intrastate context, the same preference for finality should prevail over a preference for each new city to re-litigate the divorce. Second, local family law does make the externality problem worse than it already is. Currently, when a divorced person moves to a new city, that city has to live with the effects of *an individual judge's* determination of what custody and property arrangements were best. Local family law simply attempts to ensure that this initial determination is more informed and more consistent. If anything, local family law alleviates externality concerns because it makes family law much more public. Armed with this new information, cities may begin to examine whether family law is creating externality problems. If they decide those problems exist, they could then seek reforms at the state level. This is all far preferable to the hidden idiosyncratic family law system we currently have.

Professor Briffault is especially worried about externalities in part because he envisions a world in which people are governed by the laws of the locality in which they divorced regardless of where they subsequently move.[181] But that is not how family law currently operates, and local family law does not alter this. There are some aspects of an initial divorce decree that are not modifiable. Other cities may have to live with the consequences of these determinations, but as discussed in the previous paragraph, local family law does not exacerbate these concerns. Other aspects of an initial divorce decree are modifiable—like alimony, child support, and child custody. Various rules determine which court is vested with this power to modify. That is, various rules determine when the original judge

---

180. Nat'l Comm. of Commissioners on Uniform State Laws (NCCUSL), Uniform Child Custody Jurisdiction and Enforcement Act § 201 (UCCJEA); NCCUSL, Uniform Interstate Family Support Act § 205 (UIFSA).

181. *See* Briffault, *On Family Law Localism*, *supra* note 149, at 1180-81.

keeps jurisdiction and when jurisdiction transfers to a new judge (for example, when the child moves to a new area).[182] New judges exercise their own independent judgments about those aspects of a divorce judgment that can be modified, at least when there has been a "material and substantial" change in circumstances.[183] Local family law does not change any of this. All it does it offer the judge advice if she decides that modification is warranted.

### *4. Institutional Competence*

Insofar as the proper way to navigate the state-local divide is by analyzing institutional competence, there are reasons to embrace local family law. Both people and judges are divided on many family law issues. For example, they may disagree about whether to award alimony, how much to award, and for how long. This implies that there is a wide range of acceptable answers to the questions that alimony poses. Fundamentally, alimony decisions are value judgments about the degree to which spouses, by virtue of their wedding vows, have ongoing responsibilities toward one another even after the marriage ends. Allowing local law to influence this aspect of divorce allows alimony law to better reflect community values.[184] Similarly, local laws can ensure that community values influence the complex tradeoffs implicated in other family law decisions.

The particular way that states have distributed power over family law matters is also relevant to assessments of institutional competence. The choice is not actually between state and local control; it is between local control and control by an individual judge. The local legislative process offers advantages over judicial fiat as the proper way to adopt value-laden policy. The former allows for more community involvement, deliberation, and debate, and more effectively ensures that like cases are treated alike.

---

182. *See* TEX. FAM. CODE ANN. § 155.201(b) (West 2016) (governing intrastate moves); UCCJEA §201(a)-(b) (governing interstate moves).

183. *See, e.g.*, TEX. FAM. CODE ANN. § 8.057 (West 2016). Of course, there are some constraints. *Id.* (allowing downward but not upward modifications of spousal maintenance).

184. Schragger, *supra* note 5, at 161 ("[P]ublic assertions of moral values are more appropriately made at the local level."); *cf.* Jason Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331, 1377-78 (2012) (noting the limits of a geographically-bounded conception of "community").

### *5. The Private Law Exception and State-Local Partnerships*

Even if all of the above factors favor local family law, one traditional limitation might prevent it. The so-called private law exception prevents municipalities from legislating with respect to "private and civil affairs" including contract law, property law, and tort law.[185] Ultimately, Professor Briffault and I agree that the private law exception makes the "question of local power . . . far from open and shut."[186] But there are reasons to be optimistic that at least some courts in some states will allow the private law exception to peacefully coexist with local family law rules of thumb.

The role of municipalities in tort law illuminates the scope of the private law exception. One can be liable in tort if one does not exercise reasonable care.[187] But what is reasonable care? This is an open-ended inquiry.[188] Although municipalities have no direct control over setting this standard of care, state court judges can and do look to municipal codes to help define what is reasonable in that particular municipality.[189] Similarly, state court judges use local zoning laws to help define actions that constitute a nuisance.[190] Other areas of tort law also embrace state-local partnerships. In most states that recognize negligence per se, the violation of either a state statute or a city ordinance carries this same consequence.[191] In each of these cases, local law is being used to understand the definition of reasonableness within state law.[192] The fact that state courts embrace this interpretive structure for tort law suggests that similarly

---

185. Schwartz, *supra* note 170, at 671. This exception, however, does not prevent cities from altering property rights through zoning or contract rights through the regulation of gambling. *Id.* at 690-91.

186. Briffault, *On Family Law Localism*, *supra* note 149, at 1180.

187. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 3 (AM. LAW INST. 2010)

188. *Id.*

189. Schwartz, *supra* note 170, at 704.

190. *Id.* at 706.

191. *Id.* at 704; *see also* RESTATEMENT (THIRD) OF TORTS § 14 cmt. a (2010).

192. 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) (noting the permissible sweep of "[r]efinements of detail which are reasonably related to differing local conditions and which are consistent with the broad parameters of the state law"); Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1464 (2001) (detailing ways that cities can "refine" state crimes by, for example, adding forfeiture and even altering mens rea requirements).

structured local family law would not run afoul of the private law exception.

### B. Preemption: The First Horn of the Dilemma

One home rule scholar has noted that "[i]t seems safe to conclude that as for both the administration of wills and the law of divorce, legislation in almost every state has preempted the field."[193] But this statement may be too broad. State law may not completely occupy the field of divorce law and may not conflict with many powerful municipal actions. State law requires judges to consider many factors when making a host of family law decisions. Normally, these lengthy lists of factors end with an open-ended one that invites judges to consider *any other relevant factor*.[194] This invitation opens up a space for local involvement in family law.

Intrastate preemption comes in two flavors: express and implied.[195] Because state statutes that control alimony, child custody, and other family law matters do not contain express provisions preempting local law, this section will focus on implied preemption. Intrastate implied preemption doctrine distinguishes between conflict and field preemption.[196] There are several tests for conflict preemption. Some states ask whether a local law prohibits an act permitted by the state or permits an act prohibited by the state.[197] If so, then the local law is preempted.[198] Other states allow local law to be more stringent than state law but not less.[199] For example, a city could require a higher minimum wage that state law provides for, but not a lower one.[200] Courts frequently treat field preemption like conflict preemption and ask whether the local law frustrates the purpose of the state law.[201]

Even if courts apply the above tests formalistically—which is highly unlikely—some forms of local family law have a good chance of surviving preemption. Consider two scenarios that would present

---

193. Schwartz, *supra* note 170, at 692.

194. *See, e.g.*, 23 PA. STAT. AND CONS. STAT. ANN. § 3502 (West 2016).

195. Diller, *supra* note 126, at 1141. Most states have a form of implied preemption, and some states recognize only express preemption. *Id.* at 1141, 1157.

196. *Id.* Although, of course, there are numerous subtle variations.

197. *Id.* at 1142.

198. *Id.*

199. *Id.* at 1152.

200. New Mexicans for Free Enter. v. City of Santa Fe, 126 P.3d 1149, 1155 (N.M. Ct. App. 2005).

201. Diller, *supra* note 126, at 1155-57, 1168.

relatively easy preemption questions. One law might mandate that state court judges use a particular alimony formula or mandate that they prevent parents from entertaining overnight guests when the child is present. Either law would be preempted because it is inconsistent with the legislative purpose of granting trial courts discretion. Another law might merely encourage judges to consider a particular alimony formula or encourage a particular stance on expressions of parental sexuality. This law would not be preempted. It is just a suggestion; it does not prohibit or permit anything and it is doubtful that a judge could find any legislative intent to prevent interested parties (including local governments) from making suggestions about what factors might be relevant to family law determinations. Although this law only creates a suggestion, it may have more influence than one might expect. I will discuss this possibility in the next section.

Consider a harder scenario, where a local law requires judges to *consider* an alimony formula or a local stance on vaccination as one relevant factor, but does not purport to make the local judgment presumptively correct. This law has a good chance of passing the various preemption tests, even if they are applied formalistically. For state laws that explicitly allow courts to consider any relevant factor, the question becomes: who is authorized to determine whether a factor is "relevant"? Is it only the judge, or local governments as well?[202] If a multifactor state statute is silent on the issue, then under conflict preemption, courts might apply a permit/prohibit test. The state law could be read to permit a judge to ignore local factors, while this law prohibits a judge from ignoring them. Under this analysis, the local law would be preempted. If the court instead asks whether the local law is more stringent than state law, it could survive conflict preemption. This law is more stringent than state law because it requires judges to do something more than state law required, just as Santa Fe could require businesses to pay a higher minimum wage than state law required.[203] This law is also likely to survive field preemption. To determine whether field preemption would preclude this law, we must derive the legislative purpose of multifactor family law statutes and ask whether this law would substantially interfere

---

202. There is a traditional prohibition on cities interfering with judicial administration by, for example, adjusting judicial salaries, procedure, election rules, or filing fees. ANTIEAU, *supra* note 155, at § 22.17. But these would not prevent cities from influencing substantive law. *See supra* Part III.A.5.

203. *New Mexicans for Free Enter.*, 126 P.3d at 1155.

with that purpose.[204] The purpose would appear to be to provide some guidance to courts (by listing factors), but to allow the trial court to make the ultimate decision about the weight of those factors in an individual case. This ordinance does not substantially interfere with that purpose. Rather, it is consistent with it because it offers guidance in the traditional form of listing factors, but does not impinge upon the judge's ultimate discretion.

Once we combine policy rationales with the formalistic preemption tests, a law that requires a judge to consider a particular local factor should survive preemption challenges with relative ease. Even if some appellate courts would declare that such a law was preempted, the milder form of local family law—where cities merely make suggestions to state judges—would assuredly survive.

### C. Impact: The Second Horn of the Dilemma

The two forms of local family law that can survive preemption might at first appear weak. One merely requires judges to consider a local factor, while the other only suggests that they do so. Nonetheless, a surprising number of judges are likely to be influenced by local advice even under the weaker of these two versions of local family law. Both forms of local family law create rules of thumb.[205] They exert influence only in cases where the judge is uncertain about the proper outcome.[206] However, uncertainty is the norm in these determinations.[207]

Judges crave guidance when implementing the broad discretion that family law provides them. Judges may have an intuition that children are harmed when a parent publically displays affection toward a new sexual partner. They may also have the opposite intuition: that children are harmed when parents fail to publically display affection toward their new sexual partners. Regardless, many judges want something more than just their intuition to go on. Elizabeth Scott and Robert Emery have argued that judges rely too heavily on undertrained custody evaluators and other pseudo-psychologists.[208] They do so precisely because they are reaching out

---

204. Diller, *supra* note 126, at 1155-57, 1168.

205. SCHAUER, *supra* note 20, at 108-109.

206. *Id.*

207. *See supra* Part I.A.

208. Scott & Emery, *supra* note 71, at 92-93; *see also* Leslie Eaton, *For Arbiters in Custody Battles, Wide Power and Little Scrutiny*, N.Y. TIMES, May 23, 2004,

for something more than their own intuitions. Above all, judges want competent advice.[209]

The advice that judges seek can come from various sources. When the relevant question relates to whether a child is psychologically harmed by a parent's sexual behavior,[210] then judges seek the advice of people who purport to understand child psychology. When questions of value are relevant, they should turn to institutions that have the proper democratic pedigree to make those value judgments: such as local governments.[211]

Given the extremely broad discretion that judges are burdened with, they are likely to take any reasonable advice. There is ample evidence to support this. Recent experiments have focused on alimony formulas. These sources of formulaic advice provide a good test case for whether judges are likely to be influenced by even the weakest form of local family law.

---

http://www.nytimes.com/2004/05/23/nyregion/for-arbiters-in-custody-battles-wide-power-and-little-scrutiny.html (reporting that judges routinely rely on unqualified "expert" custody evaluators).

209. 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 and that they turn to mental health professionals for assistance.").

210. This is the relevant question under the majority "nexus" test. Kim, *supra* note 12, at 17.

211. Of course, I do not claim that city councils have an impeccable democratic pedigree; local governments are not free from all political pathologies and do not necessarily accurately represent the preferences of their constituents. Currently, city councils are elected to conduct rather mundane city business (for example, to make sure trash is collected on time) rather than to make value judgments about divorce policy. So right now, it is unclear whether city councils would accurately reflect the preferences of the electorate on family law issues. But of course, electorates adapt. If voters learn that city councils influence divorce law then they will take this into account when they vote. Further, city councils often have a much stronger democratic pedigree than judges who face minimal election pressure. Brian Arbour & Mark McKenzie, *Has the "New Style" of Judicial Campaigning Reached Lower Court Elections?*, 93 JUDICATURE 150, 151 (2010); Michael Nelson, *Uncontested and Unaccountable-Rates of Contestation in Trial Court Elections*, 94 JUDICATURE 208, 209 (2010) (noting that "'voter ignorance, apathy, and incapacity' are the norm in judicial elections"). Regardless of the actual democratic responsiveness of city councils, people are likely to ascribe more legitimacy to enacted local family law. Richard Briffault, *Our Localism: Part I*, *supra* note 151, at 1. Perhaps surprisingly, there may be benefits to municipal family law that is unresponsive to local preferences. Such laws would reduce selection effects that otherwise hinder the assessment of social policy. Michael Abramowicz, Ian Ayres & Yair Listokin, *Randomizing Law*, 159 U. PA. L. REV. 929, 931, 952-53 (2011).

The available evidence overwhelmingly shows that judges are highly influenced by available alimony formulas.[212] The majority of judges in Michigan use the results of a popular attorney-generated alimony formula as a factor to consider in determining alimony, and some use the formula's results as the presumptively correct amount of alimony.[213] Colorado legislators appear to agree that advisory formulas will influence outcomes. They recently enacted a complex series of alimony formulas that address both the duration and amount of alimony.[214] However, these formulas are not binding.[215] Judges merely have to make the relevant computations.[216] After that, they have complete discretion to set both the duration and amount of alimony. Assuming that legislators in Colorado did not intend to waste their own time, it is likely that many of them thought that even merely advisory formulas could have a great impact.[217]

The Canadian experience with spousal support guidelines provides further evidence that nonbinding advice can have a profound impact on decisions. With a grant from the Canadian Department of Justice, two Canadian professors developed advisory spousal support guidelines in 2005.[218] These guidelines produced ranges of spousal support amounts.[219] Judges have discretion both within these ranges, and to deviate from them entirely.[220] No legislature has voted on

---

212. There is also evidence that legal actors seek similar formulaic justice in other areas of law. Alexandra D. Lahav, *The Case for "Trial by Formula,"* 90 TEX. L. REV. 571, 609 (2012) (discussing judicial efforts in mass tort cases to try representative cases and extrapolate to other cases without having additional trials); Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 805-807 (2011) (identifying settlement mills where formulas create going rates for various classes of cases).

213. State Bar of Michigan, Standing Committee on Justice Initiatives, Equal Access Initiative Alimony Guidelines Project, Alimony Guidelines Survey Report 4 (2011).

214. COLO. REV. STAT. ANN. § 14-10-114 (West 2016).

215. *Id.* § 14-10-114(3)(e).

216. *Id.* § 14-10-114(3)(a).

217. Outside the context of alimony, a judge struggling with the best interest test might welcome a local ordinance that weighs in on helicopter parenting. Similarly, a judge may look to local law in cases where she is unsure of whether to divide marital property equally. Local law can provide much-needed guidance to judges in the many instances where consideration of the state's multiple factors leaves the judge unsure of what to do.

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

219. *Id.*

220. *Id.*

these guidelines and they only purport to be advisory.[221] Nonetheless, they have received support from appellate courts and are now widely used.[222] The major complaint as of 2011 was that lawyers and judges *rely too heavily* on the guidelines and stick to the guideline range even in cases where a deviation might be justified.[223] The Canadian experience provides another reason to believe that even merely advisory guidelines can have a significant impact.[224]

Regardless of whether local advice comes in the form of rules of thumb for custody determinations or advisory formulas for alimony determinations, judges are likely to embrace such advice. In each case, judges face decisions that they are ill equipped to handle. City councils, by contrast, better represent local community values and are in a much better position to resolve the innumerable value questions that arise in family law matters. City councils are also in a better position to gather data (rather than relying solely on the parties and issues that happen to come before a court) and make rules of thumb that are undergirded by both value judgments and more objective determinations such as whether free range parenting harms

---

221. *Id.*

222. *Id.*

223. *Id.* The veneer of mathematical precision that alimony formulas provide is likely to make them even more appealing. For discussions of this phenomenon in cost-benefit analysis, see Michael Livermore & Richard Revesz, *Retaking Rationality Two Years Later*, 48 HOUS. L. REV. 1, 6 (2011) and Wendy Wagner et al., *Misunderstanding Models in Environmental and Public Health Regulation*, 18 N.Y.U. ENVTL. L.J. 293, 295 (2010). For a related discussion about child support see Ellman, *supra* note 71, 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.").

224. The Canadian experience might lead a reader to think that advisory guidelines will have *too much* influence rather than too little. But judges will still be able to reject or moderate abjectly unreasonable local guidelines. We do not know precisely why Canadian judges follow the guidelines closely. But it seems reasonable to conclude that they do so because they view them as reasonable estimators of alimony. Insofar as local experiments stay within a band of reasonableness, this type of judicial deference to the guideline has numerous benefits. If and when local experiments transgress the admittedly fuzzy boundaries of reasonableness—for example, if a city's formula leaves the obligee with significantly more income than the obligor, or if it leaves the obligee in poverty—local judges are unlikely to apply it mechanically.

children,[225] and, if so, whether any such harm is outweighed by the liberty interests of the parents themselves.

* * *

A surprisingly strong case can be made that cities currently have the power to create local rules of thumb, and that those advisory rules can survive preemption in at least some states. But even if cities do not currently have this power or if courts interpret their preemption doctrines to stop this form of local influence, state legislatures could still affirmatively authorize cities to enact local rules of thumb. Doing so has the potential to create significant benefits. The next Part addresses the cost side of the equation, and suggests that local rules of thumb largely avoid a series of objections commonly lodged against local power.

## IV. OBJECTIONS

Although local law comes with a number of well-explored pitfalls, they either are unlikely to manifest themselves in the context of local rules of thumb, or they can be dealt with rather easily. This Part briefly discusses seven potential pitfalls and provides an initial defense of local rules of thumb against these possible objections.[226] First, local rules of thumb might lead to races to the bottom, where competition for residents leads cities to adopt laws that deviate from their true policy preferences.[227] Second, spouses might have the capacity to forum shop when filing for divorce, and parents might have a similar capacity when they file suits regarding custody and child support.[228] Third and fourth, local rules of thumb could create externalities or disuniformity. Fifth and sixth, councilmembers may

---

225. David Pimentel, *Criminal Child Neglect and the "Free Range Kid": Is Overprotective Parenting the New Standard of Care?,* 2012 UTAH L. REV. 947, 949 (2012) ("'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."). There are value judgments imbedded in the determination of whether free-range parenting creates harms, such as how much and what types of harm to consider. There are also more objective elements, such as whether children experience stress as measured by, for example, cortisone levels.

226. I leave for another day a defense of local family law more broadly, although some discussions in this Subpart have implications beyond rules of thumb.

227. Diller, *supra* note 126, at 1132.

228. Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1677 (1990) (calling for a more nuanced understanding of forum shopping, which is generally seen as an evil).

enact systematically bad or oppressive policies. Seventh, local family law may provide a platform for divisive political posturing on hot-button issues.

None of these concerns appear to present a serious challenge to local rules of thumb. Although the following discussion is preliminary, it should go a long way toward assuaging the fears of skeptical readers and convincing them that local rules of thumb have sufficiently robust built-in protections that they are worthy of serious consideration.

### A. Races to the Bottom

Races to the bottom are very unlikely to occur in the context of local family law, for some of the same reasons that local family law will not capture the benefits of efficient sorting. People rarely know the law, refuse to acknowledge that they might split up, are constrained in their ability to move based on local law, and would be better off with a prenup or a postnup in the unlikely event that they wanted to plan for divorce.[229] Additionally, because many aspects of family law are zero-sum games—like alimony, property division, and physical custody—moving to a particular jurisdiction will usually be a benefit to one spouse and a detriment to another.[230] Finally, races to the bottom require that mobile agents have homogeneous preferences, which is unlikely to describe people's preferences for family law. In the classic race to the bottom, a government might lower taxes or decrease regulation to attract more business. As a general rule all businesses want the same thing—to increase profits—and this often takes the form of wanting lower taxes and less regulation. This homogeneity is crucial to creating races to the bottom; if many businesses wanted high taxes, then areas with high tax rates would still attract businesses. Heterogeneity, not homogeneity, is the rule in the context of family law. A city that expresses a preference for two-parent households is likely to repel a great deal of potential residents at the same time that it attracts others. This will prevent races to the bottom.

---

229. *See supra* Part II.D.

230. These are only roughly zero-sum games. For example, through creative reallocation of resources a couple may be able to avoid taxes and thereby increase the size of the marital estate.

### B. Forum Shopping

Variation among local rules of thumb increases the potential for forum shopping, but substantial barriers remain. Currently, forum shopping is possible, but requires moving to a new state. Moving to the suburbs, or moving from one suburb to another, is often far easier than moving to a new state. Accordingly, we should expect more forum shopping under a system of local family law. But perhaps not much more.

There are substantial costs associated with forum shopping even at the local level. Standard state venue rules tie venue to residence.[231] Most spouses are not free to move to a favorable city. It may be particularly difficult to convince your spouse to relocate during a period in which there is most likely some marital strife. If the couple has school-aged children, a forum-shopping spouse may also have to convince his partner to transfer the kids to a new school.

Even in a situation where one spouse can convince the other to move, forum shopping is a manageable problem. Because trial court judges retain discretion to deviate from local advice, they could easily police opportunistic behavior by following the advice of the couple's original city. Further, when dividing marital property in an equitable manner or considering each spouse's parenting abilities, judges are unlikely to look kindly on a spouse who was willing to uproot his or her family at great monetary and emotional expense just to obtain the possibility of a more favorable venue.

### C. Externalities and Uniformity

Part III.A has already argued that local rules of thumb create neither externalities nor disuniformity. Although I will not repeat the full discussion here, it is worth briefly reiterating the previous discussion on uniformity. The context of divorce turns the traditional arguments about uniformity on their head. Traditionally, uniformity favors state rather than local control. But when the state delegates broad powers to individual judges with minimal appellate review, the state is effectively creating widespread disuniformity. Moving family law to the local level would often increase rather than decrease uniformity.

One potential complication with this argument cleaves apart actual and perceived uniformity. Local family law increases actual

---

231. 27A C.J.S. *Divorce* § 166 (2016).

uniformity in part by helping to align the decisions of multiple judges.[232] But by making family law outcomes more predictable and more public, local family law highlights a different form of disuniformity: disuniformity across cities. However, there are strong reasons to suspect that people will see municipal variation as legitimate. Local family law must be judged within the larger context of our federal system, which openly embraces unequal treatment across state lines.[233] We generally do not see this as unfair or as undermining the legitimacy of the law.[234] Local law creates similar variation. Possessing a six inch knife may be a crime in one city but not another.[235] Similarly, many people would agree that cities can legitimately differ about what degree of public nudity is acceptable. Here, just as in local family law, local citizens have the opportunity to create laws that reflect their local preferences. The fact that local laws result from local democratic processes may help explain why this form of variation is generally not seen as unfair or a significant violation of the principle that like cases should be treated alike.[236]

Even if the costs of disuniformity are higher than I argued above, those costs must still be balanced against the other virtues of local rules. Disuniformity may be a price that is worth paying for increased policy experimentation, more avenues of political entrepreneurship, and renewed citizen engagement with local politics.[237]

### D. Oppressive or Bad Policies

The power to influence families is the power to both help them flourish and hinder that flourishing. Accordingly, any reform proposal that creates more power for local government needs to address possible constraints on that power. Local rules of thumb are already subject to robust constraints that limit their incompetent or nefarious uses.

Before outlining those constraints, one clarification is in order. These constraints do not eviscerate the benefits of localism. As

---

232. *See supra* Part III.A.2.

233. Frost, *supra* note 171, at 1594-95.

234. *Id.* at 1594-95. The term "legitimacy" here refers to its moral and sociological dimensions. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794 (2005).

235. Logan, *supra* note at 192, at 1430 (discussing local criminal law).

236. *See* Frost, *supra* note 171, at 1595-96.

237. *See id.* at 1581 (arguing that uniformity must be balanced against other values).

illustrated above, many of the benefits of localism can be achieved even if only a single locality innovates.[238] The set of constraints described below prevents the floodgates from opening but still allows a trickle of experimentation, and this is a prudent first step down the novel path of local family law.

Municipal experimentation with child custody rules of thumb is likely to be particularly controversial.[239] Many people might be concerned that city ordinances will require courts to consider the local majority opinion that gay parents are generally worse than straight parents, or that married parents are generally better than unmarried parents.[240] People may also worry about local discrimination based on the parents' religiosity (or lack thereof), parenting styles, or even their practice of punishment and discipline.[241]

The examples above invoke fears that cities will oppress local minorities or might be particularly prone to enacting bad policy. There are three important features of the types of local rules of thumb described here that substantially mitigate each of these potential problems. First, the zero-sum structure of most divorce and child custody actions drastically reduces the ability of city councilmembers to discriminate against families as a whole. Second, the possibility of state level override helps prevent the harms that objectionable local ordinances could create. Third, and more importantly, local rules of thumb are advisory only.

Because physical custody, alimony, property division, and child support are largely zero-sum games, it is very difficult to discriminate

---

238. *See supra* Part II.B.

239. Of course, one can imagine nefarious uses of local power in the realm of property division and alimony as well. If people with high incomes control local politics, then we might expect local family law to protect those individuals by adopting stingy alimony formulas and glosses on equitable distribution that favor the higher earner.

240. Not everyone shares these worries. In the context of religious oppression, Richard Schragger has argued that cities today are less likely to oppress local minorities and therefore should be supervised less closely by courts. Schragger, *The Role of the Local*, *supra* note 141, at 1820-21.

241. Similar worries emerge in regards to local prosecutors and local judges in tort cases. Pimentel, *supra* note 225, at 947-49; Elizabeth G. Porter, *Tort Liability in the Age of the Helicopter Parent*, 64 ALA. L. REV. 533, 533-34 (2013); Conor Friedersdorf, *Working Mom Arrested for Letting Her 9-Year-Old Play Alone at Park*, THE ATLANTIC (Jul. 15, 2014), at http://www.theatlantic.com/national/archive/2014/07/arrested-for-letting-a-9-year-old-play-at-the-park-alone/374436/ [https://perma.cc/FNR6-D4SQ].

against the family as a whole. Any discrimination would simply shift power from one family member to another. If one spouse gets more money, the other gets less. If one parent gets more time with the child, the other gets less. This makes divorce and custody actions particularly ill-suited for discriminating against the family as a whole.[242] Of course, these zero-sum structures do not hinder attempts to discriminate against one member of a couple and in favor of the other. But this form of discrimination faces other barriers.

The possibility of state level override reduces the likelihood that local law will be oppressive or idiotic. Interest groups can seek a state statute that limits local power generally or rejects the particular city ordinance at issue.[243] Of course, I do not want to suggest that all oppressed local minorities have effective state lobbying groups. But state legislatures have already revealed their preference for open-ended standards. This suggests that they might be particularly receptive to using their preemption authority against cities that try to guide judicial discretion. State supreme courts may also be willing to police egregious ordinances.[244] These state-level overrides, or just the looming threat of them, reduce the likelihood that local family law will become oppressive or reflect bad policy choices.

Most importantly, these objections are drastically weakened by the modesty of local rules of thumb. City councils cannot mandate an outcome. They can only require a judge to consider a locally enacted

---

242. Of course, this does not mean that one cannot harm families as a whole even within a zero-sum game. Allowing children to see one of their parents live in luxury while the other wallows in poverty may cause those children substantial emotional distress. But this example suggests that this will be the exception rather than the rule. Giving all assets or all parenting responsibilities to one parent may be harmful to children, but judges strongly prefer middle ground, and it is unlikely that evil councilmembers could convince them to take such extreme positions. Evil councilmembers could also try to use child support against families. They could favor high child support awards for especially low income men, thereby perpetuating a cycle of punishment for non-payment. Because the child support is unlikely to be collected, the evil councilmember could hurt one family member without necessarily helping the other one. But child support is the least discretionary of family law's standards. Local influence is at its weakest here.

243. Paul Diller makes a similar point while arguing that very little harm would result if states abandoned the private law exception to local law. Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1110 (2012).

244. Appellate courts are much more likely to police city councils than individual judges. Policing individual judges under the current system requires intense engagement with the facts of particular cases, because those judges are vested with such wide discretion. Policing city councils only requires deciding whether an explicit policy statement laid out in an ordinance violates some statewide policy.

factor. This creates an important check on local power. Two institutional actors must agree before local policy affects individuals. Consider a municipality that tries to stamp out helicopter parenting by advising judges that helicopter parents should generally not obtain custody. Judges may well take this into account, but no local minority can be burdened by this law without a judge agreeing that helicopter parenting is harmful in a particular case. Helicopter parenting is perhaps an unlikely target. Homosexual parents, adulterous parents, and interracial parents are more likely to be targeted.[245] But again, municipalities must convince a judge that their policies are sound. And there are reasons to think that those two actors will maintain a good degree of independence from one another.[246] This creates barriers to local oppression. Similarly, bad policy choices are less likely to affect actual litigants because both the municipality and the relevant judges have to agree that the policy is in fact reasonable.[247]

Some skeptics may be particularly worried cities will discriminate against minorities who have been the traditional targets of oppression. But city councils face significant hurdles to doing so. Legislatures face almost impenetrable hurdles to expressly using race, sex, or religion to define a set of persons who should receive special treatment.[248] They cannot use race without triggering strict

---

245. Of course, constitutional limits may prevent judges from following some local policies.

246. Although Ethan Leib has attempted to conceptualize local judges as local officials, they are state officials and exist within a state judicial hierarchy. Leib, *supra* note 111, at 924-25. Although technically elected in many states, trial court judges face notoriously little pressure from the electorate. Arbour & McKenzie, *supra* note 2111, at 151. Even if trial court judges were more responsive to the electorate, judges would often (although not always) be accountable to a different set of voters than the ones that city councilmembers will be accountable to. Judges are often elected at the county level, while towns and cities do not always respect those lines. *See, e.g.*, https://en.wikipedia.org/wiki/List_of_U.S._municipalities_in_multiple_counties [https://perma.cc/26ZC-4Z5L].

247. This also reduces the likelihood that local influence in the form of formulas or rules of thumb will hurt the exceptional cases most. Engstrom, *supra* note 212, at 850.

248. This stands in interesting contrast to the scant barriers between local minorities and judicial oppression. *See, e.g.*, In re Marriage of Gambla, 853 N.E.2d 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); Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537, 538, 542 (2014) (noting that the 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.'"); *see also* Clair v. Clair, 153 Idaho 278, 283, 281 P.3d 115, 120 (2012) ("Additionally, the preference for the mother as custodian over the father

scrutiny.[249] They cannot use sex without triggering intermediate scrutiny.[250] They cannot use religion without running afoul of the Establishment clause.[251] Even if courts held that furthering the best interests of children was a sufficiently weighty interest in these cases, family law already provides individualized hearings. Thus, any suspect generalizations embedded in ordinances will not be sufficiently tailored to pass any form of heightened scrutiny.[252] Ordinances would not be able to say that the lighter skinned member of an interracial couple should get custody, or that mothers should get custody,[253] or that the Christian member of an interfaith couple should get custody,[254] or that custody should generally go to the parent who attends religious services on Sunday (as opposed to

---

of a child of 'tender years' is considered only where all other considerations are found to be equal."). One should also be cautious about assuming that lawyers—and by extension, judges—will generally be more "enlightened" then city councilmembers. Michael Miller, *Tenn. Judge Refuses to Grant Straight Couple Divorce Because . . . Gay Marriage*, WASH. POST, Sept. 4, 2015, https://www.washingtonpost.com/news/morning-mix/wp/2015/09/04/tenn-judge-refuses-to-grant-straight-couple-a-divorce-because-of-gay-marriage/?utm_term=.ff2211af36dd.

249. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 290 (1978).

250. Craig v. Boren, 429 U.S. 190, 198 (1976) (condemning the use of "overbroad generalizations" rooted in sex, and applying intermediate scrutiny to such classifications).

251. 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); *see Craig*, 429 U.S. at 198 (noting that the state cannot discriminate against nonbelievers either).

252. Orr v. Orr, 440 U.S. 268, 281 (1979) (holding that there is no need to use sex as a proxy for need when the relevant statutory scheme already provides for an individualized hearing that could address need).

253. Several state courts have held the tender years presumption unconstitutional. *Ex parte* Evine, 398 So. 2d 686 (Ala. 1981); State *ex rel.* Watts v. Watts, 77 Misc. 2d 178, 350 N.Y.S.2d 285 (Fam. Ct. 1973); Pusey v. Pusey, 728 P.2d 117, 119-20 (Utah 1986). Similar doctrines would likely fail constitutional inquiry. Dalin v. Dalin, 512 N.W.2d 685, 689 (N.D. 1994) ("We agree that if the trial court assumed that fathers, as a group, are incapable of adequately raising their daughters, it would be relying on an improper factor to determine custody. Trial courts should not 'perpetuate the damaging stereotype that a mother's role is one of caregiver, and the father's role is that of an apathetic, irresponsible, or unfit parent'" (citation omitted)). *But see* Clair v. Clair, 153 Idaho 278, 283, 281 P.3d 115, 120 (2012) ("Additionally, the preference for the mother as custodian over the father of a child of 'tender years' is considered only where all other considerations are found to be equal.").

254. 6 RONALD D. ROTUNDA & JOHN E. NOWAK, ROTUNDA AND NOWAK'S TREATISE ON CONSTITUTIONAL LAW § 21.3(a) ("any denominational preference violates the establishment clause unless the government can demonstrate that the law is necessary to promote a compelling interest.").

Saturday or non-attendance).[255] They would also not be able to say that African American couples should pay higher filing fees or that Muslim families should be barred from using collaborative divorce. Although the constitutional limits on singling out same-sex couples may be in flux, both *Obergefell v. Hodges*[256] and existing state doctrines create significant barriers to oppressing gays and lesbians. That evolving set of doctrines strongly suggest that local ordinances could not, for example, recommend that gay parents should have to submit to more invasive custody evaluations,[257] or that custody should generally go to the parent who currently embraces heterosexuality.[258]

### E. Posturing

One final objection is, ironically, rooted in the many safeguards that area already built into local rules of thumb. If city councilmembers know that judges will ignore or moderate their ordinances, they might feel more emboldened to posture and make broad pronouncements on hot-button issues.[259] These overly-bold policy statements might then degrade public debate and fuel an us vs. them mentality that exacerbates existing rifts within a state's population.

But there are reasons to doubt this dire prediction. First, as discussed in the previous section, constitutional constraints significantly reduce the number of floats in this parade of horribles: Local family law rules of thumb could not use race, sex, religion, or sexual orientation to define benefitted groups. Second, if the state-

---

255. Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1992).

256. 135 S. Ct. 2584 (2015).

257. An ordinance that singled out gays and lesbians for more intrusive processes upon divorce would have "the effect of teaching that gays and lesbians are unequal in important respects;" it would "demean" them; it would "disrespect and subordinate them;" and it would cause their "children [to] suffer the stigma of knowing their families are somehow lesser." Obergefell v. Hodges, 135 S. Ct. 2584, 2600, 2601-02, 2604 (2015). These effects make such a local ordinance constitutionally suspect.

258. 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. Nexus tests arose in cases where one biological parent subsequently came out as gay. Their goal was to eradicate the influence of general sentiments like "exposure to homosexual behavior is generally harmful to children" or "gay parents generally cannot provide a stable home environment for children." For more background on nexus tests, see WEISBERG & APPLETON, *supra* note 52, at 703. For a critique of nexus tests, see Kim, *supra* note 12, at 20.

259. *See* Briffault, *On Family Law Localism*, *supra* note 149, at 1185.

wide expressive impact of a city's ordinance is correlated with that city's population (which seems likely), then posturing has another built in constraint. Posturing also has political costs. If the issue is truly a "hot-button" one, then the councilmember's own constituents are likely to pay attention to the expressive impact of the ordinance. Others are too. Cities that posture risk losing tourism or convention revenue. Some cities won't have these problems. Councilmembers could easily posture in a small town that is not dependent on tourism, where the vast majority of the population agrees with the expressive force behind the bold posturing. But again, this posturing might not have much impact on the state-wide stage. Of course, it is possible that this might fuel an us vs. them mentality. But it is worth considering the possibility that the reverse is may occur. Although many issues generate distinct red and blue positions, it might be that family law is not among them. We might be surprised by the ways that positions on family law sometimes do and sometimes do not follow red and blue scripts. Therefore, local family law might serve to problematize some us vs. them logics even if it might promote others. Overall, the constraints to posturing, combined with the fact that division is not its inevitable result, significantly weaken this objection.

* * *

The above discussion is too brief to assuage all fears; it is not meant to.[260] Rather, it suggests that one should not dismiss local family law out of hand. There are a surprisingly large number of safeguards already built into local rules of thumb. This constrained capacity to harm stands in stark contrast to the widespread and important benefits that localism can provide in this area. This should make readers question any initial skepticism they may have had and to be more open to localism within family law.

## CONCLUSION

At the start of this Article, I introduced a radical idea: that localities could have a say in policy matters at the very heart of family law. At this point in the Article that idea should no longer look radical. Rather, it should look plausible, and perhaps even plainly preferable to the current system.

Local family law rules of thumb have the potential to revolutionize family law by disrupting its long-entrenched distribution of power

---

260. For a fuller discussion, see Williams, *Local Voice*, *supra* note 18.

where states have nominal control over family law, but delegate the real decision-making authority to individual judges. This disruption can accomplish what decades of reform efforts have failed to do: push family law away from frustratingly indeterminate standards and toward predictable rules.

Adding a local voice to family law promotes uniformity, facilitates policy experiments, creates avenues for political entrepreneurship, and is perhaps uniquely capable of reinvigorating civic engagement with local politics. Properly structured, local family law can likely accomplish all of this without creating a serious risk of races to the bottom, forum shopping, externalities, or minority oppression.

Of course, no one can predict exactly what will happen if cities accept my invitation for local innovation. But the numerous constraints built into local rules of thumb suggest that states and academics should at the very least tolerate the addition of this local voice.

Local rules of thumb are also a useful gateway to more robust municipal engagement with family policy. Weighing in on child custody or divorce matters has high expressive value, but costs no money. Its low monetary stakes can make it an appealing first step. If councilmembers come to believe that they can do good in this area, they might then be more likely to invest money in pre-K programs, nurse-partnerships, parks, or any other project that helps children thrive.

As local experimentation develops, it could help clarify the respective roles of the state and federal government as well. One might imagine state and local legislatures settling into the following roles. States would determine the broad policy goals of family-oriented policy—such as finding the custody arrangement that is in the child's best interest—while also creating boundaries within which local experimentation can occur. For example, the state could set up two visitation orders that reflect a range of aggregate visitation times; orders that fall within this range might be presumptively in the child's best interests. Local law would then have its impact within this range, that is, within the boundaries for experimentation set by the state.[261]

---

261. This basic model—providing a bounded space for local autonomy and experimentation—closely tracks other arguments for the respective roles of individual freedom, state family law, and federal family law. Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1790 (1995); Stark, *supra* note 78, at 1479. One could also imagine a more proactive state that embraced democratic

Local rules of thumb also open up important conversations about the role of the federal government in family policy. Several scholars have argued that the conventional narrative that family law is a matter of state concern devalues family law and obscures the importance of enforcing federal rights in the context of the family.[262] For these scholars, the prospect of making family law more local might signal an even greater devaluation of family law and a further weakening of constitutional rights in this area.[263] But if anything, local family law will alleviate rather than exacerbate these concerns.

Local family law will necessarily open up a public dialogue about the respective roles of both the city and the state. In fact, the more outlandish and oppressive local law attempts to be, the more state legislators might then be motivated (and might have adequate political cover) to provide more guidance to family law judges or set up the appropriate boundaries within which local experimentation could take place. This conversation expressly reinforces the idea that multiple levels of government are responsible for regulating the family. The analogy to federal rights is hard to miss. If the state can and should police the proper boundaries of local family law, then the federal government can and should police the proper boundaries of state family law. This suggests that even those who favor greater federal oversight in family law matters could welcome the localism described in this Article.

Cities are capable of revolutionizing family law. This Article has taken the first steps toward assessing whether they should do so, and offers an optimistic view of local power. Local family law rules of thumb have the potential to create an impressive confluence of low-risk benefits, each of which could help families flourish.

---

experimentalism. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 287-88, 316 (1998).

262. *See, e.g.*, Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1094-95 (1994); Judith Resnik, *Reconstructing Equality: Of Justice, Justicia, and the Gender of Jurisdiction*, 14 YALE J.L. & FEMINISM 393, 399 (2002).

263. Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537, 537-39 (2014); Courtney Joslin, *Federalism and Family Status*, 90 IND. L.J. 787 (2015). Of course, not all local matters are considered trivial. The fact that zoning is a local matter has not prevented the Supreme Court from creating a large takings jurisprudence. Although it is up for debate whether the Court is sufficiently attentive to constitutional protections in this area.