

WILD FLOWERS IN THE SWAMP: LOCAL RULES AND FAMILY LAW

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ABSTRACT

Family law reform is stuck in a rut. Reformers have criticized family law's open-ended standards for decades and have uniformly sought to make those standards more rule-like by imposing top-down rules to cabin trial court judges' discretion. That reform strategy failed 35 years ago, it failed 25 years ago, it failed 15 years ago, and it will fail today. This Article explores a bottom-up solution. Just as local judges routinely adopt local procedural rules, they should also be empowered to adopt substantive rules of thumb to guide their individual discretion in family law matters. This reform can accomplish what reformers have long failed to achieve: to cabin the discretion of individual judges and to bolster the democratic legitimacy of their decisions. Collective rules of thumb also create two novel dialogic benefits. They provide the first clear opportunity for local citizens to communicate to local judges about the content of local values. This is especially important when mostly heterosexual, white, wealthy judges are increasingly out of touch with minority family forms. In addition to giving a voice to local citizens, collective rules of thumb provide judges with a powerful new signaling device to communicate with appellate courts and legislatures. Whatever judges may say, they speak with much more force when they speak as a group. The vision of local power that this Article defends has implications that extend far beyond family law as well. Most notably, its novel focus on rules of thumb forces revisions to existing accounts of "rules against rulification," and its account of citizen-judge dialogue offers insights into recent theoretical work on the proper scope of local judicial power.

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* 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, James Dwyer, 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, Fordham's Cooper-Walsh Colloquium, and participants in law school faculty colloquia at St. Louis University, the University of Virginia, and Georgetown University.

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I. INTRODUCTION

Family law reformers have long sought to cabin the broad discretion of trial court judges by creating top-down rules to govern various family law issues.¹ That reform strategy failed 35 years ago, it failed 25 years ago, it

1. See, e.g., CYNTHIA LEE STARNES, *THE MARRIAGE BUYOUT: THE TROUBLED TRAJECTORY OF U.S. ALIMONY LAW* 155 (2014); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 478 (1984); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1182 (1986); Judith G. McMullen, *Alimony: What Social Science and Popular Culture Tell Us About Women, Guilt, and Spousal Support After Divorce*, 19 DUKE J. GENDER L. & POL'Y 41, 44 (2011); Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1142–43 (1999).

failed 15 years ago, it failed 5 years ago,² and it will fail today. The first key insight of this Article is that trial court judges, if given the right kind of power, will solve the problem themselves. States should empower trial court judges to collectively adopt *local rules of thumb* to guide judges as they exercise the discretion the states has saddled them with.

Local rules have been called wild flowers in the garden to highlight the ways they might interfere with the order put in place by more centralized actors.³ But one cannot describe family law as an orderly garden. Although wild flowers might sully a neat row of tulips, they would be a welcome sight in an otherwise unruly and wild swamp. Unruly and wild are fair descriptors of the current state of family law. Idiosyncratic variation is endemic in divorce law. Some judges think that watching porn, even in private, makes

2. Failed proposals include: JOSEPH GOLDSTEIN, ANNA FREUND & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 38 (1973) (advocating a bright-line rule for visitation: the court should not order any, and should leave all decisions to the parent who received custody); Michael R. Clisham & Robin Fretwell Wilson, *American Law Institute's Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles or Obligatory Footnote?*, 42 *FAM. L.Q.* 573, 576 (2008) (describing the failure of the American Law Institute's host of rulification reforms published in 2002); Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 *WOMEN'S RTS. L. REP.* 235, 237 (1982) (arguing for a primary caretaker presumption); Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 *CALIF. L. REV.* 615, 617–18 (1992) (advocating the approximation rule for child custody); Steve Bousquet, *Gov. Rick Scott Vetoes Alimony Bill, Cites Potential Harm to Children*, *MIAMI HERALD* (Apr. 15, 2016), www.miamiherald.com/news/politics-government/state-politics/article72042847.html (describing governor's veto of a Florida joint custody bill because it would constrain the trial court's discretion); *Iowa Joint Custody Bill Faces Rough Sledding*, *NAT'L PARENTS ORG.*, <https://nationalparentsorganization.org/blog/14095-iowa-joint-custody-b> (last visited June 15, 2017) (describing an Iowa joint custody bill's cool reception); Michelle O'Neil, *The Trend of Shared Parenting Laws*, *DALL. DIVORCE L. BLOG* (Sept. 6, 2016), <http://www.dallastxdivorce.com/2016/09/articles/children-and-parenting/possession-scheduleparenting-times/the-trend-of-shared-parenting-laws/> (discussing a failed Texas bill that would have created a presumption in favor of equal parenting time). Of course, there are occasional successes. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 208, § 49(b), (f) (West 2017) (terminating alimony automatically when the obligor reaches retirement age and implementing presumptive caps on the duration of alimony that are tied to the length of the marriage); N.Y. DOM. REL. L. § 236(B)(5-a) (McKinney 2017) (providing a statewide formula that gives the presumptively correct amount of temporary alimony).

3. *See* Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 *U. PA. L. REV.* 1999, 2011–26 (1989) (discussing local procedural rules).

you a bad parent.⁴ Others think that the two things are largely unrelated.⁵ Some judges would deny custody to a parent who kisses her now same-sex partner in front of her child.⁶ Other judges would deny custody to a parent for *not* kissing her now same-sex partner in front of her child.⁷ Some judges think that a stay-at-home mom deserves financial compensation for her sacrifices.⁸ Other judges think stay-at-home moms should get a job and support themselves.⁹ Judge-by-judge variation is even more problematic today, where assisted reproductive technologies are forcing judges to determine parentage by asking whether a “parent-like” relationship formed between the child and the relevant adult.¹⁰ Would a grandparent who lives with the parent and child ever be able to show this? Can a child have a parent-like relationship with more than two people? I don’t know the answers to these questions; neither do trial judges. We can expect a great deal of variation both now and in the future, as appellate courts continue to defer to trial court judges on these sensitive and controversial issues.¹¹

In a companion piece, I described and defended two innovations in family law.¹² First, I argued that the future of family law reform is local.¹³ Legislators and appellate court judges have declined numerous invitations to rulify family law, that is, to move family law directives toward the rules end of the rules–standards continuum. Bottom-up rulification has significant advantages, both political and substantive, over these failed efforts at top-down rulification.¹⁴ Second, I identified a new space along the rules–standards continuum: rules of thumb.¹⁵ Rules of thumb offer advice only.¹⁶

4. See *Petty v. Petty*, No. E2004-01421-COA-R3-CV, 2005 WL 1183149, at *1 (Tenn. Ct. App. May 19, 2005).

5. See *id.* (overturning the trial court’s order limiting visitation).

6. Suzanne A. Kim, *The Neutered Parent*, 24 YALE J.L. & FEMINISM 1, 41–42 (2012) (citing *Scott v. Scott*, 665 So. 2d 760, 764 (La. Ct. App. 1996)).

7. *Id.* at 42 (citing *Ulvund v. Ulvund*, No. 224566, 2000 WL 33407372, at *4 (Mich. Ct. App. Aug. 22, 2000)).

8. See Cynthia Lee Starnes, *Alimony Theory*, 45 FAM. L.Q. 271, 276 (2011).

9. See, e.g., *id.* at 273–74.

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

11. See *infra* notes 107–12 and accompanying text.

12. Sean Hannon Williams, *Divorce All the Way Down: Local Voice and Family Law’s Democratic Deficit* 98 B.U. L. REV. (forthcoming 2018) (manuscript at 1) [hereinafter Williams, *Divorce All the Way Down*].

13. *Id.* at 39.

14. *Id.* at 39, 44.

15. *Id.* at 32–33.

16. *Id.*

They exert influence only in cases of uncertainty.¹⁷ For example, when the best interests of the child are clear, judges would rule on that basis. But when it is not clear which custody arrangement would be best for the child, judges may follow a local rule of thumb.¹⁸ Conceptually, this is a narrow space; practically, it is much wider. Judges face a great deal of uncertainty because family law determinations are complex, multifaceted, value laden, and there is often no adequate evidence to resolve them.¹⁹ Accordingly, rules of thumb can have profound influence without taking discretion away from individual judges, and without creating over and underinclusion problems that plague bright-line rules.²⁰

In a second companion piece, I applied these innovations to cities and defended a robust role for city councils in family law reform and family law policymaking.²¹ Here, I focus on trial court judges. Ironically, while many scholars were lambasting family law's focus on binaries like husband and wife, they were simultaneously seduced by other binaries.²² Because trial court judges were the problem, reformers could not see that they could also be the solution. Many trial court judges do not want unfettered discretion.²³ They instead crave guidance.²⁴ Unfortunately, appellate courts have sometimes prevented them from creating their own guidance in the form of local rules.²⁵ This is a mistake, both as a matter of policy and as a matter of

17. *Id.*

18. *See id.* at 32.

19. *See id.* at 18.

20. *Id.* at 32.

21. *See generally*, Sean Hannon Williams, *Sex in the City*, 42 FORDHAM URB. L.J. (forthcoming 2017) [hereinafter Williams, *Sex in the City*].

22. *E.g.*, Courtney Megan Cahill, *Reproduction Reconceived*, 101 MINN. L. REV. 617, 685 (2016) (discussing sex–nonsex binary in the context of reproduction); Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 54–58 (2012) (discussing “marriage–crime binary”); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 220 (2007) (discussing marriage–friendship binary); Manuel A. Utset, *The Temporally Extended Family & Self-Control: An Essay for Lee E. Teitelbaum*, 2006 UTAH L. REV. 107, 112–16 (discussing public–private, minor–adult, and children’s rights distinctions).

23. Phoebe C. Ellsworth & Robert J. Levy, *Legislative Reform of Child Custody Adjudication: An Effort to Rely on Social Science Data in Formatting Legal Policies*, 4 LAW & SOC’Y REV. 167, 202 (1969); *see* 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 . . .”).

24. *See infra* notes 303–11 and accompanying text.

25. *See infra* notes 270–79 and accompanying text.

existing doctrine. Just as groups of local judges collectively adopt and publish local procedural rules, they should be empowered to create substantive rules of thumb to guide their discretion.

Grassroots rulification can accomplish precisely what reformers have sought for decades. Rules of thumb increase predictability and reduce the impact of unconscious judicial biases. Reducing the impact of these unconscious biases will limit the influence of gender stereotypes that demand too much of mothers²⁶ and not enough from fathers,²⁷ and can help loosen the grip of heteronormativity that still burdens less traditional family forms.

Skeptical readers may be uncomfortable with the idea that couples in one part of a state would be treated differently than couples in another simply because the respective judges in those areas have settled on different rules of thumb. But the choice is not between statewide uniformity and local variation. It is between secret, unreviewable, and idiosyncratic judge-by-judge disuniformity, and publicly reviewable local differences. For a host of obvious and nonobvious reasons, the latter is far more preferable.²⁸

Solving this classic problem in family law is merely the first of several benefits that stem from empowering local judges to adopt local rules of thumb. The process of deliberating about possible local rules of thumb itself has at least three benefits. First, deliberation tends to reduce the influence of stereotypes.²⁹ For example, a judge who simply assumed that mothers were more natural caretakers than fathers would likely question her assumption if she had to articulate and defend it before her peers. Second, deliberation is especially effective at reducing egocentric biases—the tendency to believe that others think like you.³⁰ This is likely to inject more humility into judicial decisions. Third, deliberation offers opportunities for the group to harness the expertise of its various members.³¹

26. *See, e.g.*, *Rowe v. Franklin*, 663 N.E.2d 955, 959 (Ohio Ct. App. 1995) (critiquing trial court for punishing the mother for “selfishly” moving with the child so that she could attend law school).

27. *See, e.g.*, *Fulk v. Fulk*, 827 So. 2d 736, 741 (Miss. Ct. App. 2002) (describing a father who threatened to kill his wife with a hammer and padlocked her in the house when she was pregnant, and critiquing the lower court’s conclusion “that the father may have done some things in the past he is not proud of, but the Court thinks that the responsibility of fatherhood has matured him”).

28. *See infra* Part III.

29. *See infra* notes 192–99 and accompanying text.

30. *See infra* notes 204 and accompanying text.

31. *See infra* notes 211–12 and accompanying text.

When and where judges adopt local rules of thumb, they will create an even more important set of benefits. Every local rule of thumb is a potential policy experiment. Some rules of thumb may promote settlement, others may increase voluntary child support payments, and still others might reduce poverty rates among children. Local rules of thumb also create important new avenues of communication. They offer trial judges a powerful new signaling device to communicate with appellate courts and legislatures.³² Whatever judges may say, they speak with much more force when they speak as a group.³³ They can dissent from prevailing family law norms, create new ones, or weigh in on controversial emerging issues such as whether to allow posthumous reproduction.³⁴ Public rules of thumb have other dialogic benefits as well. Rather than just creating a tool for judges to speak, they create an opportunity for judges to listen. They open up a dialogue between judges and community members that can better inform judges of local values and bolster local judges' weak democratic pedigree. They also invite input from child psychologists, tax accountants, marriage counselors, and others who might have expertise relevant to divorce policy.

Empowering judges to enact local rules of thumb may be particularly valuable to local minorities. Judicial elections provide many minority groups with extremely limited options—the vast majority of judicial elections are uncontested, and the candidates are disproportionately relatively well-off white men.³⁵ Many members of a local minority group (for example, a group of recently resettled Syrian immigrants) might ideally prefer to elect someone with knowledge of their culture and lived experiences, but might have to wait until one of their own goes to law school, comes back, establishes herself within the local bar, and runs in a judicial election. This is a long time to wait. Local rules of thumb offer a much more immediate avenue for dialogue between judges and local minorities.

The vision of local power outlined above has implications beyond family law as well. The conception of local rules of thumb that this Article outlines forces both descriptive and normative revisions to existing work on rules against rulification³⁶ and offers insights to work on local judicial

32. See *infra* Part III.B.

33. See *infra* Part III.C.

34. See *infra* Part III.D.

35. Michael J. Nelson, *Uncontested and Unaccountable? Rates of Contestation in Trial Court Elections*, 94 JUDICATURE 208, 209 (2011); Malia Reddick et al., *Racial and Gender Diversity on State Courts: An AJS Study*, 48 JUDGES J. 28, 30 tbl.1 (2009).

36. Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644 *passim* (2014).

power.³⁷

Federal courts have long adopted implicit rules against rulification.³⁸ That is, higher courts that have adopted standards have simultaneously resisted attempts by lower courts to reduce portions of those standards to rules.³⁹ Descriptively, rules against rulification do not apply to rules of thumb.⁴⁰ Courts have routinely rejected attempts by trial court judges to convert standards into bright-line rules, or to overlay standards with presumptions.⁴¹ In the family law context, for example, local judges cannot impose a presumption against allowing a custodial parent to relocate with her children when the statewide legal directive is an open-ended standard.⁴² They cannot reduce an inquiry into whether a marriage is “long-term” into a set number of years.⁴³ Yet higher courts have routinely allowed lower courts to rulify standards by adopting rules of thumb.⁴⁴ Normatively, this nuance is consistent with the underlying logic of rules against rulification—to preserve the centrality of the underlying standard.⁴⁵ Rules of thumb operate only when the underlying standard has failed to isolate a single outcome. They operate as tiebreakers by identifying one outcome within a range of outcomes that the underlying standard cannot adequately distinguish from one another. Accordingly, they do no violence to the underlying standard; they allow the standard to do all the work it can rather than circumventing a totality-of-the-circumstances inquiry with presumptions or bright-line rules. They supplement rather than supplant legal standards; they complement rather than contradict them.

The version of localism that this Article defends also offers insights into recent work on local judicial power. Judges are normally considered state rather than local officials.⁴⁶ But when judges are elected locally, they serve two masters: the state and their local constituency.⁴⁷ Judges arguably owe duties to their constituents to channel local concerns when they decide cases.

37. Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897, 901 (2013).

38. Coenen, *supra* note 36, at 663–68.

39. *Id.* at 702.

40. *See infra* Part IV.B.

41. Coenen, *supra* note 36, at 663–68.

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

43. *See Gnall v. Gnall*, 119 A.3d 891, 904 (N.J. 2015).

44. *See infra* Part IV.B.

45. *See* Coenen, *supra* note 36, at 681.

46. *See* Leib, *supra* note 37, at 901 & n.9.

47. *Id.* at 901.

For example, they might be particularly attentive to local values when they interpret ambiguous statutes.⁴⁸ This is a narrow vision of local power. Looking more broadly, the benefits of localism extend beyond elected judges and beyond instances where judges channel local values. Even if we limit our focus to elected judges responding to local values, channeling localism through public rules of thumb offers significant benefits. Formally adopting substantive positions through local rules of thumb invites dialogue and debate with local citizens. This is likely far superior to judges simply trying to intuit local values, at least if the goal is to have those values reflected in actual decisions.

Of course, local rules of thumb carry some potentially serious risks. The most salient of those is the risk of group polarization. The vast literature on group polarization suggests that the process of deliberating can cause people to adopt more extreme views than they otherwise would have.⁴⁹ Skeptics might rightly worry that groups of deliberating judges will end up supporting policies that few or none of them would have supported individually. If this is the likely effect of deliberation, it would be deeply problematic. However, a close look at the empirical literature reveals that, even in groups specifically designed to heighten group polarization—with homogeneous members who are unfamiliar with one another and are told they must reach consensus—the magnitude of group polarization is often quite mild, resulting in shifts of opinion of roughly 1 to 5 points on a 100-point scale.⁵⁰ Groups of judges are unlikely to experience even this mild level of polarization because those groups are likely to have several inoculating features. Judges, unlike many other people, understand the foundational value of dissent. They also face no external pressure to reach consensus. If they disagree on one issue, they can simply decline to create a rule of thumb about it. Even these failures are successes. They promote humility by informing judges that their peers do not agree with them. Ultimately, group polarization and other potential concerns do not significantly weaken the case for local rules of thumb.

This Article proceeds as follows: Part II provides necessary background on family law's open-ended standards, their common critiques, and traditional reform proposals. Part III describes the concept of local rules of thumb and outlines the numerous benefits of allowing local judges to develop them. Local rules of thumb can increase predictability, reduce the

48. *Id.* at 907.

49. For a recent review, see CASS R. SUNSTEIN & REID HASTIE, *WISER: GETTING BEYOND GROUPTHINK TO MAKE GROUPS SMARTER* 78–88 (2015).

50. *See infra* Part III.E.

influence of idiosyncratic beliefs, improve the democratic legitimacy of judicial decisions, facilitate expert involvement, promote productive deliberation, provide new methods for trial judges to communicate with other state officials, and generate much-needed policy experiments. Part IV confronts various potential objections, including the possibilities of forum-shopping and group polarization. Part V concludes.

II. CRITIQUES OLD AND NEW

A. *Traditional Critiques*

Family law judges have extraordinarily wide discretion. They are asked to divide marital property “equitably,” to determine the amount and duration of alimony as “the court deems just,” and to identify the custody arrangement that is in the child’s “best interest.”⁵¹ These legal directives suffer from the classic virtues and vices of open-ended standards. On the virtue side, they give judges the power to respond to the unique facts of each case.⁵² But the bulk of scholarly attention has focused on the vices.⁵³ For example, critics routinely cite two major problems with the best interests standard: it makes litigation unpredictable and it allows a judge’s personal biases to infect decisions.⁵⁴ Those two critiques apply to family law’s other open-ended standards as well.

1. *The First Critique: Unpredictability*

The open-ended standards that govern family law make outcomes particularly difficult to predict.⁵⁵ Custody determinations are vexingly unpredictable.⁵⁶ This should not be surprising. The fundamental question

51. DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 629, 667, 804 (4th ed. 2015).

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

53. For an overview, see, e.g., 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, 456–64 (2005) (discussing issues relating to judicial discretion and the best interests standard).

54. *Id.* at 456 (quoting PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2 (AM. LAW INST. 2002)).

55. Child support is the only outlier. Notably, states were *forced* to rulify child support as part of federal welfare reforms. Katharine K. Baker, *Homogeneous Rules for Heterogeneous Families: The Standardization of Family Law When There is No Standard Family*, 2012 U. ILL. L. REV. 319, 329.

56. See, e.g., JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE § 4-1 (2d ed. 2013); Daniel A. Krauss & Bruce D. Sales, *Legal Standards, Expertise, and Experts in the*

that judges are asked is vague and often requires significant extrapolation from the child's current circumstances. For example, a judge might have to predict how a child will react to each of a set of custody arrangements that the child has never experienced and will have to resolve what is "best" for the child when each of those arrangements may be better or worse along various dimensions. The multifaceted nature of custody determinations—where noncustodial parents could obtain more or less visitation, or more or less decisional authority—compounds these problems of predictability.⁵⁷

Judicial decisions regarding property division are also difficult to predict. This again should not be surprising. Judges are asked to divide marital property in a "just and right" or "equitable" manner.⁵⁸ These broad mandates are often followed by a list of 10 to 20 factors that judges should consider.⁵⁹ At best, these lists are useless. At worst, they are counterproductive. Most factors boil down to asking the judge to consider the spouses' relative needs and their relative contributions to the marriage.⁶⁰ Ironically, these often point in opposite directions.⁶¹ The lower-earning spouse has greater need—and hence deserves more of the marital property—but has also contributed less to accruing the marital property—and hence deserves less. Empirical research illustrates these problems:

- Judges in New York awarded one spouse two-thirds or more of the marital property in 29 percent of cases, yet researchers found it *impossible to predict* when judges would do so.⁶²
- One-third of U.S. law students who were given a vignette of a deadbeat husband who contributed no money to the marriage awarded him around 50 percent of the marital assets anyway,

Resolution of Contested Child Custody Cases, 6 PSYCHOL. PUB. POL'Y & L. 843, 848 (2000).

57. This makes custody determinations unpredictable even in courts that favor mothers. See Stanford L. Braver et al., *Experiences of Family Law Attorneys with Current Issues in Divorce Practice*, 51 FAM. REL. 325, 330–31 (2002) (reporting attorney opinions on whether courts favor mothers in custody determinations).

58. TEX. FAM. CODE ANN. § 7.001 (West 2017); VA. CODE ANN. § 20-107.3 (West 2017).

59. See, e.g., VA. CODE ANN. § 20-107.3.

60. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 4.09 cmt. a (AM. LAW INST. 2002).

61. *Id.*

62. Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 431, 454 tbl.8 (1996) [hereinafter Garrison, *How Do Judges Decide Divorce Cases?*].

but one-fourth awarded him less than 25 percent.⁶³

Even in states where there is a strong norm of equal division,⁶⁴ courts still have to decide which property is marital—and hence subject to division—and which is not.⁶⁵ Some of these determinations are governed by open-ended standards.⁶⁶ When Harold and Sue Ann Hamm divorced, an Oklahoma judge was tasked with determining how much of the appreciation in Harold's stock was marital property by asking how much was attributable to his efforts versus efforts of other employees or market forces.⁶⁷ This stock was worth roughly \$18,000,000,000.⁶⁸ One judge, applying one highly malleable standard, got to determine the fate of 18 billion dollars.⁶⁹

Alimony is generally considered to be the most unpredictable of all of the decisions that family law judges must make.⁷⁰ At the risk of being repetitive, this should not be a surprise. Judges are given wide discretion to set the amount and duration of alimony. In Tennessee, they are tasked with doing so “according to the nature of the case and the circumstances of the parties.”⁷¹ That is hardly helpful. In New Jersey after a sweeping alimony reform bill passed in 2014 which included durational caps on alimony,⁷²

63. Marsha Garrison, *What's Fair in Divorce Property Distribution: Cross-National Perspectives from Survey Evidence*, 72 LA. L. REV. 57, 84 tbl.3 (2011).

64. Ten states have a presumption in favor of equal divisions. Baker, *supra* note 55, at 334 n.112.

65. ABRAMS ET AL., *supra* note 51, at 582. This is largely a rule-based inquiry, but pockets of wide discretion remain.

66. *Id.* at 599; *see, e.g.*, Middendorf v. Middendorf, 696 N.E.2d 575, 577–78 (Ohio 1998) (citations omitted).

67. Memorandum Order with Findings of Fact and Conclusions of Law at 23–24, Hamm v. Hamm, No. FD-2012-2048 (D. Okla. Nov. 10, 2014), <http://www.oscn.net/dockets/GetCaseInformation.aspx?db=oklahoma&number=FD-2012-2048&cmid=2868292>.

68. *See id.* at 23, 70–72 (noting that the court goes through the value of each stock awarded).

69. *Id.* at 71. (finding that only \$2 billion was marital property); *see also* Gregory S. Forman, *On the Same Day Two Separate Court of Appeals Panels Reverse Transmutation Findings*, GREGORY S. FORMAN (July 13, 2016), <http://www.gregoryforman.com/blog/2016/07/on-the-same-day-two-separate-court-of-appeals-panels-reverse-transmutation-findings/> (“Whether the family court will find transmutation when there is some, but not overwhelming, evidence of intent, is one of the hardest issues to predict in family law.”).

70. Baker, *supra* note 55, at 337; Starnes, *supra* note 8, at 271.

71. TENN. CODE ANN. § 36-5-121(West 2017) (offering some more concrete advice, such as treating homemakers as equal contributors to the marriage).

72. N.J. STAT. ANN. 2A:34–23 (West 2017).

judges were still left adrift. For a 20-year marriage, they can award up to 20 years of alimony, in such an amount “as the circumstances of the parties and the nature of the case shall render fit, reasonable and just”⁷³ The statute goes on to list 14 internally contradictory factors for the court to consider, the last of which is “[a]ny other factors which the court may deem relevant.”⁷⁴ Again, not helpful. The evidence supports the radical unpredictability of alimony:

- None of the statutory factors that were supposed to provide guidance to New York judges correlated with permanent alimony awards.⁷⁵
- One study of laypeople asked them to award alimony based on a vignette.⁷⁶ About half awarded no alimony, but others awarded over \$35,000 per year.⁷⁷
- Ohio judges examining the same set of facts awarded a lifelong homemaker anywhere between \$5,000 per year and \$175,000 per year—a 3,500 percent difference.⁷⁸
- Colorado Judges examining the same set of facts awarded between \$0 and \$60,000 per year for life to the same hypothetical wife.⁷⁹

This unpredictability hinders settlement and increases litigation. Litigation, in turn, harms children and increases the importance of money to pay for good attorneys.⁸⁰ Even in cases that settle, judicial unpredictability has the potential to distort settlement terms in ways that may favor men.⁸¹

73. *Id.*

74. *Id.*

75. Garrison, *How Do Judges Decide Divorce Cases?*, *supra* note 62, at 489–90.

76. Ira Mark Ellman & Sanford L. Braver, *Lay Intuitions About Family Obligations: The Case of Alimony*, 13 THEORETICAL INQUIRIES L. 209, 210–19 (2012).

77. *Id.* at 229 fig.4.

78. Alexandra Harwin, *Ending the Alimony Guessing Game*, N.Y. TIMES (July 3, 2011), <http://www.nytimes.com/2011/07/04/opinion/04harwin.html>.

79. Colleen O’Connor, *New Law Changes Alimony Landscape for Divorcing Colorado Couples*, DENVER POST (Oct. 18, 2013), <http://www.denverpost.com/2013/10/18/new-law-changes-alimony-landscape-for-divorcing-colorado-couples/>.

80. See W. Dennis Duggan, *Rock-Paper-Scissors: Playing the Odds with the Law of Child Relocation*, 45 FAM. CT. REV. 193, 194 (2007); Peskind, *supra* note 53, at 464.

81. See Mary Jean Dolan & Daniel J. Hynan, *Fighting Over Bedtime Stories: An Empirical Study of the Risks of Valuing Quantity over Quality in Child Custody Decisions*, 38 L. & PSYCHOL. REV. 45, 88, 90–93 (2014); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J.

2. *The Second Critique: Personal Biases and Idiosyncratic Beliefs*

Given how little guidance judges get, it's not surprising that they are likely to revert to their "gut feelings."⁸² And those gut feelings are often rooted in personal biases. Judges have:

- Given mothers preference for custody because they are more "natural" caregivers.⁸³
- Punished mothers who went to graduate school instead of staying home with their children.⁸⁴
- Demanded to be able to time a disabled mother to see how fast she could get up the stairs, despite reports from occupational therapy experts that testified to her independence.⁸⁵
- Limited a father to supervised visitation because he sometimes viewed pornography after the children went to bed.⁸⁶
- Ordered a parent to take her child to church.⁸⁷
- Denied custody to a father after noting that he had pictures of drag queens in the home, and that children should not be "subjected to" such pictures.⁸⁸
- Ordered parents to *hide* their homosexuality from their children.⁸⁹
- Ordered parents to *reveal* their homosexuality to their children.⁹⁰

950, 978–80 (1979).

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

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

84. *Rowe v. Franklin*, 663 N.E.2d 955, 955, 959 (Ohio Ct. App. 1995).

85. NAT'L COUNCIL ON DISABILITY, *ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN* 117 n.527 (2012), https://www.ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf.

86. *Petty v. Petty*, No. E2004-01421-COA-R3-CV, 2005 WL 1183149, at *1 (Tenn. Ct. App. May 19, 2005).

87. *McLemore v. McLemore*, 762 So. 2d 316, 320 (Miss. 2000).

88. *Pulliam v. Smith*, 501 S.E.2d 898, 901–02 (N.C. 1998).

89. *Hogue v. Hogue*, 147 S.W.3d 245, 252 (Tenn. Ct. App. 2004).

90. *DeLong v. DeLong*, No. WD 52726, 1998 WL 15536, at *3 (Mo. Ct. App. Jan. 20, 1998).

- Punished parents for kissing their same-sex partner in front of their children.⁹¹
- Punished parents for *not* kissing their same-sex partner in front of their children.⁹²

Other examples of biased decisions abound.⁹³

Even if biases and illicit stereotypes did not infect gut feelings, many family law decisions would be problematic. Family law's open-ended standards often require contested value judgments. Should judges favor the parent who encourages chess club or the parent who encourages soccer camp? Should they favor helicopter parenting over free-range parenting? How much should a stay-at-home parent's efforts count for purposes of evaluating the parties' relative contributions to their assets? How much more marital property should a wife receive when her husband has an affair . . . with the nanny?⁹⁴ . . . with his wife's sister?⁹⁵ How much less alimony should a wife receive when she has an affair with her son's 12-year-old friend?⁹⁶ These questions have no objective answer, they depend on contestable value judgments.

B. *The Failure of Top-Down Presumptions*

Calls for reform have generally sought to alter the traditional mix of rules and standards within family law by making family law more rule-like. Feminist reformers have long sought a statutory presumption that the

91. Kim, *supra* note 6, at 41 (citing *In re Marriage of Davis*, 652 S.W.2d 324, 324 (Mo. Ct. App. 1983)).

92. *Id.* at 42 (citing *Ulvund v. Ulvund*, No. 224566, 2000 WL 33407372, at *4 (Mich. Ct. App. Aug. 22, 2000)).

93. See, e.g., NAT'L COUNCIL ON DISABILITY, *supra* note 85, at 113–28; D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 701–04, 707 (3d ed. 2006) (collecting cases); Rebecca Aviel, *A New Formalism for Family Law*, 55 WM. & MARY L. REV. 2003, 2007–08 (2014) (collecting cases); Katharine T. Bartlett, *Comparing Race and Sex Discrimination in Custody Cases*, 28 HOFSTRA L. REV. 877, 882–86 (2000); Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631 (2006) (collecting cases).

94. See Emily Shire, *The Curse of the Celebrity Nanny*, DAILY BEAST (Nov. 11, 2015), <http://www.thedailybeast.com/articles/2015/07/30/the-curse-of-the-celebrity-nanny.html>.

95. See Michael Inbar, *Did Larry King Cheat on Wife with Her Sister?*, TODAY (Apr. 15, 2010), http://www.today.com/id/36547934/ns/today-today_news/t/did-larry-king-cheat-wife-her-sister/#.WFBrM9UrJjU.

96. See *Schu v. Schu*, 211 Cal. Rptr. 3d 413, 415 (Ct. App. 2016).

primary caretaker should get custody.⁹⁷ Fathers' rights groups have long sought a presumption in favor of joint physical custody.⁹⁸ Other reformers have called on appellate courts to develop a common law of custody, property division, and alimony that could create rules in at least some circumstances.⁹⁹

These efforts at top-down rulification have failed.¹⁰⁰ They failed because they ignored the political economy and incentive structures of their targeted rulemakers.¹⁰¹ Proposed statutory presumptions create predictable winners and losers, often along gender lines.¹⁰² This mobilizes interest group opposition.¹⁰³ It also makes voting on these presumptions especially controversial—and legislators generally want to avoid controversy.¹⁰⁴ Reforms at the appellate level have also failed.¹⁰⁵ Trial court judges don't have the time or incentive to write the detailed opinions required for meaningful appellate review.¹⁰⁶ Appellate judges have no interest in wading through trial court opinions and have no interest in staking out controversial positions on sensitive issues.¹⁰⁷ It's far easier to just say "do what's best for the child" and defer to the trial judge. This is exactly what happened in Alabama when Roy Moore, the state's controversial (and now former) supreme court chief justice, tried to inject explicitly Christian values into

97. See, e.g., Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision-Making*, 101 HARV. L. REV. 727, 738 (1988); Glendon, *supra* note 1, at 1182.

98. Ira Mark Ellman, *A Case Study in Failed Law Reform: Arizona's Child Support Guidelines*, 54 ARIZ. L. REV. 137, 155 (2012); Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, L. & CONTEMP. PROBS., 2014, at 69, 70, 77.

99. See Peskind, *supra* note 53, at 479–80; Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2262, 2293 (1991).

100. No state has a primary caretaker presumption, and only two states have a presumption in favor of joint physical custody. Williams, *Sex in the City*, *supra* note 21, at 14 n.74.

101. *Id.* at 14.

102. See Scott & Emery, *supra* note 98, at 77–80.

103. See *id.* at 78; see, e.g., Ellman, *supra* note 98, at 176–77.

104. John J. Sampson, *Choking on Statutes Revisited: A History of Legislative Preemption of Common Law Regarding Child Custody*, 45 FAM. L.Q. 95, 106 (2011) ("It seems to many observers that avoiding controversy if at all possible is a central principle of the Texas Legislature.").

105. Williams, *Divorce All the Way Down*, *supra* note 12, at 13.

106. *Id.*

107. *Id.*

custody determinations.¹⁰⁸ Instead of addressing Moore's claims head on—which would have been quite controversial—the appellate courts simply gave more deference to trial judges.¹⁰⁹ Overall, appellate review in family law matters is largely ineffectual.¹¹⁰ Trial judges report: “We can do just about anything we want to . . . whatever decision we make will be upheld on appeal.”¹¹¹ Lawyers report that appellate deference is so strong that trial court judges routinely ignore controlling law.¹¹²

C. *The New Paradigm: Traditional Critiques Reborn*

The traditional problems and solutions described above focus on litigation. This focus may seem outdated to those familiar with recent developments in family law. Today, there is a new paradigm in child-custody dispute resolution.¹¹³ The vision of an ideal family law regime has shifted away from litigation and toward mediation and collaboration, toward holistic and therapeutic approaches, and toward actively building parental capabilities rather than merely assessing them.¹¹⁴ Judges who have embraced this new paradigm are ongoing conflict managers rather than one-time decisionmakers.¹¹⁵ They are managers in a different sense as well, as the new paradigm generally creates a larger role for custody evaluators, who are often appointed by judges to conduct tasks that the judge outlines.¹¹⁶ Of course, there are large gaps between the ideal and real.¹¹⁷ Some judges in

108. June Carbone & Naomi Cahn, *Judging Families*, 77 UMKC L. REV. 267, 299 (2008).

109. *Id.*

110. Peskind, *supra* note 53, at 462 (noting that appellate review is still “emasculated”).

111. Artis, *supra* note 83, at 791.

112. Carol S. Bruch, *The Use of Unpublished Opinions on Relocation Law by the California Courts of Appeal: Hiding the Evidence?*, in LIBER MEMORIALIS PETAR ŠARČEVIĆ: UNIVERSALISM, TRADITION AND THE INDIVIDUAL 225, 230, 234 n.40. (J. Erauw et al. eds., 2006) (describing trial judges who purposefully thwart state law, and reporting 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”); Andrea M. Seielstad, *Unwritten Laws and Customs, Local Legal Cultures, and Clinical Legal Education*, 6 CLINICAL L. REV. 127, 129–30 (1999) (observing that some Ohio judges refuse to allow fault-based divorce despite statutes that specifically allow it).

113. JANE C. MURPHY & JANA B. SINGER, *DIVORCED FROM REALITY: RETHINKING FAMILY DISPUTE RESOLUTION* 34–35, 37–38 (Nancy E. Dowd et al. eds., 2015).

114. *Id.*

115. *Id.* at 38.

116. *Id.* at 43–44, 48.

117. See CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES*

some places embrace the role of conflict manager, others hew more closely to the traditional model.¹¹⁸

Some aspects of the new paradigm replicate the traditional problems of unpredictability and bias outlined above. Although promoting settlement has benefits, it sometimes just kicks the can down the road.¹¹⁹ Parents seem to appreciate joint legal custody—where each parent is given the right to weigh in on major decisions for the child.¹²⁰ This reduces conflict at the initial stage of the couple's dissolution.¹²¹ But if conflicts arise later, the couple may well go back to court.¹²² Judges are now in the position of having to decide, several years after the divorce, “what school [the] children will attend, what church they can go to, what medicine they should take and what activities in which they can enroll.”¹²³ Parents seek “orders about haircuts, piercings and names.”¹²⁴ This litigation has the same problems of unpredictability and caprice present in initial divorce litigation.¹²⁵

A similar pattern emerges in the context of physical custody. Decisions about physical custody that make the initial stage of dissolution easier become problematic later.¹²⁶ When parents agree to share ample custodial time, courts have a much harder time deciding when and under what conditions a parent can move away with the child.¹²⁷ These relocation

FAMILY RELATIONSHIPS 108 (2014) (describing these reforms as “islands in a sea of dysfunction”).

118. See REPORT OF THE IOWA SUPREME COURT FAMILY LAW CASE PROCESSING REFORM TASK FORCE 7 (2016), <http://www.iowacourts.gov/wfdata/frame10056-1382/File75.pdf> (reporting that some circuits in Iowa embraced mediation more than others); ANDREW I. SHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 79 (2004) (noting that California was a leader in the new paradigm, while New York lagged far behind and continued to rely on adversarial dispute resolution techniques).

119. See, e.g., Gregory S. Forman, *Joint Legal Custody: What Is It? Why Have It?*, GREGORY S. FORMAN (Apr. 2000), <http://www.gregoryforman.com/publications/joint-legal-custody/> (describing how a joint custody settlement can break down if the parents do not get along, which results in the parties going back to court).

120. See *id.*

121. See *id.*

122. See *id.*

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

124. *Id.*

125. See *id.* at 28.

126. See Linda D. Elrod, *National and International Momentum Builds for More Child Focus in Relocation Disputes*, 44 FAM. L.Q. 341, 342 (2010).

127. See, e.g., *id.* at 354–55 (noting some states have a rebuttable presumption that

disputes are governed by open-ended standards that create vast unpredictability.¹²⁸ The high stakes of these cases, combined with the uncertainty of the outcome, promote harmful litigation.¹²⁹

Other aspects of the new paradigm create new and different problems. These problems stem from the need to manage a host of nonlegal personnel who wield substantial power under the new paradigm.¹³⁰

The new paradigm relies on a “triage system” to properly sort people early in the dispute process.¹³¹ Mediation is often criticized for failing to counteract power imbalances, and it is inappropriate for couples experiencing domestic violence.¹³² At a minimum, courts need a triage system that identifies domestic violence. But triage systems will only get more complex as judges embrace the new paradigm more fully.¹³³ For example, families with extended caregiving networks might benefit from different mediation formats than those that were designed around a traditional nuclear family.¹³⁴

Who will make these triage decisions? One might just ask court clerks to do so. But this replicates issues of unpredictability and potential bias in an even less democratically accountable actor. Just as bankruptcy lawyers steer African American clients into more expensive and burdensome proceedings than white clients, and mortgage brokers steer African American and Latino buyers into high-fee, high-interest mortgages, we might expect clerks or other personnel to be affected by implicit biases in the sorting process.¹³⁵ If judges do their own triage or hire their own triage experts, then we have also replicated the problems of judge-by-judge variation.

The new paradigm also asks judges to manage custody evaluators. In those states without applicable laws, judges can create their own minimum qualifications for custody evaluators.¹³⁶ Even if the qualifications for custody

relocation is allowed but only if the parents do not have joint custody).

128. *Id.* at 342–43, 356.

129. *See id.* at 352.

130. MURPHY & SINGER, *supra* note 113, at 45–46.

131. *Id.* at 99–101.

132. *E.g., id.* at 52–53.

133. *See id.* at 96–101.

134. *Id.* at 137.

135. *See* A. Mechele Dickerson, *Racial Steering in Bankruptcy*, 20 AM. BANKR. INST. L. REV. 623, 623, 641–43 (2012).

136. They can do so simply by hiring only certain people with certain qualifications. *See* Bari L. Nathan, Comment, *Mixing Oil & Water: Why Child-Custody Evaluations Are*

evaluators are set by statute or local rule,¹³⁷ judges may differ in what questions they want those evaluators to answer.¹³⁸ Some may want the evaluator to weigh in on the ultimate issue of custody.¹³⁹ Others may want evaluators to answer narrower questions.¹⁴⁰

The new paradigm greatly increases the power of these nonlegal actors.¹⁴¹ It is therefore all the more important to determine, both accurately and consistently, the scope of their power and to set up guidelines about their necessary qualifications. Without these determinations, and to a degree even with them, we are just replicating the traditional problems of variability and bias in less democratically accountable actors.

D. *The New Family: Traditional Critiques Reborn and Expanded*

Even the new paradigm is behind the times. It still largely assumes a two-parent divorcing family.¹⁴² Yet approximately 40 percent of births are to unmarried women.¹⁴³ Some of those women will marry the father of the child, but many will not.¹⁴⁴ Even those who do may soon split up, re-partner,

Not Meshing with the Best Interests of the Child, 46 LOY. U. CHI. L.J. 865, 867 (2015) (noting a complete lack of guidelines addressing what type of specialist the court may appoint).

137. See, e.g., TEX. FAM. CODE ANN. § 107.104 (West 2017) (requiring a master's degree, state license, and two years of supervised experience); DUPAGE CTY., ILL. CT. R. 15.16(c), <https://www.dupageco.org/Courts/LocalCourtRules/2649/> (requiring custody evaluators to have a Ph.D); KANE CTY., ILL. LOCAL R. 15.22, <http://www.illinois16thjudicialcircuit.org/Documents/localCourtRules/article15.pdf> (requiring custody evaluators to have a master's degree); Donna-Jo Vorderstrasse, *A Judicial Perspective on Child Custody Evaluations*, in HANDBOOK OF CHILD CUSTODY 17, 19 (Mark L. Goldstein ed., 2016).

138. One classic debate concerns whether custody evaluators should speak directly to the best interests of the child, or rather only to subsidiary issues. See Mary Elizabeth Lund, *The Place for Custody Evaluations in Family Peacemaking*, 53 FAM. CT. REV. 407, 410, 412 (2015).

139. See *id.* at 410 (citing James N. Bow & Francella A. Quinnell, *Critique of Child Custody Evaluations by the Legal Profession*, 42 FAM. CT. REV. 115, 121 (2004)) (noting that 84 percent of surveyed judges wanted this).

140. *Id.*

141. MURPHY & SINGER, *supra* note 113, at 43–45, 48.

142. See *id.* at 72, 76.

143. *Unmarried Childbearing*, CTR. DISEASE CONTROL PREVENTION, <http://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm> (last visited June 17, 2017).

144. Sara S. McLanahan & Irwin Garfinkel, *Fragile Families: Debates, Facts, and Solutions*, in MARRIAGE AT THE CROSSROADS: LAW, POLICY, AND THE BRAVE NEW WORLD OF TWENTY-FIRST-CENTURY FAMILIES 142, 145–47 (Marsha Garrison & Elizabeth S. Scott eds., 2012).

and have additional children with someone else.¹⁴⁵ Fathers may forge relationships with their children that never relied on them residing together.¹⁴⁶ One might imagine that the best visitation schedule for these parents is different than the best schedule for a divorcing couple that co-resided with the children for a substantial period of time. Existing templates and judicial experience are likely to provide little useful guidance. Those templates are also poor fits for many families that have used assisted reproductive technologies. What is the proper custody award for a lesbian couple who is divorcing, when only one is the biological parent, and they both encouraged a relationship between the child and the sperm-donor father? In these scenarios, many judges will be exercising their immense discretion without even a rough familiarity with the lived experiences of the children and the caregivers in their lives.¹⁴⁷

Recent doctrinal innovations illustrate these new spaces for variability. New York's highest court was recently asked to determine parentage under the following facts: a lesbian couple used a sperm donor to conceive, and when the couple split, the biological mother attempted to restrict the rights of the nonbiological mother.¹⁴⁸ The court held that "where a petitioner proves by clear and convincing evidence that he or she has agreed with the biological parent of the child to conceive and raise the child as co-parents, the petitioner has presented sufficient evidence to achieve standing to seek custody and visitation of the child."¹⁴⁹ This is fairly rule-like. But the court went on to say:

[W]e stress that this decision addresses only the ability of a person to establish standing as a parent to petition for custody or visitation; the ultimate determination of whether those rights shall be granted rests in the sound discretion of the [trial] court, which will determine the best interests of the child.¹⁵⁰

This is true for every parent, so why did the court feel the need to emphasize

145. *Id.* at 151–52.

146. *See, e.g.,* KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* 207–10, 220–28 (2013) (discussing relationships between children and unmarried nonresidential fathers).

147. *See* Merle H. Weiner, *Thinking Outside the Custody Box: Moving Beyond Custody Law to Achieve Shared Parenting and Shared Custody*, 2016 U. ILL. L. REV. 1535, 1566 (discussing the likely role judicial discretion will continue to play in shared custody determinations).

148. *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 491–92 (N.Y. 2016).

149. *Id.* at 501.

150. *Id.*

it? Perhaps because the justices are unfamiliar with this family form, and they want to leave open the possibility that nonbiological intended parents may have different types of relationships with their children, or different co-parenting arrangements, than the traditional heterosexual divorce model would suggest. This humility is proper. But it would be foolish to think that granting unfettered discretion to trial courts is the answer. Now judges are exercising their discretion without any personal familiarity with the underlying family forms, and likely without any cultural scripts or templates to apply to them. This is a recipe for either the imposition of the heterosexual divorce template, or substantial variation and unpredictability.

Under similar facts, Maryland's highest court opened up an even larger role for trial court discretion.¹⁵¹ They held that de facto parents can seek custody.¹⁵² A third party seeking de facto parent status must show:

1. that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child;
2. that the petitioner and the child lived together in the same household;
3. that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and
4. that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.¹⁵³

Some of these elements are rule like, such as the cohabitation prong.¹⁵⁴ But decisions will largely turn on the trial judge's understanding of what a "parent-like" relationship entails, or what types of relationships are "parental in nature."¹⁵⁵ Would a grandparent who lives with the parent and child ever be able to show this? Could an older sibling be a de facto parent? I don't know the answers to these questions. And I would wager that trial judges don't either. We can expect a great deal of variation in the near

151. *Conover v. Conover*, 146 A.3d 433, 453 (Md. 2016) (citations omitted).

152. *Id.* at 446–47.

153. *Id.*

154. *See id.*

155. *See id.* at 453.

future,¹⁵⁶ and probably even enduring variation as appellate courts defer to trial court judges on these issues. We can also expect judicial biases to rear their head again. For example, might women be held to higher standards than men when courts ask whether they have taken “significant” responsibility for the child’s care?

III. A NEW SOLUTION: BOTTOM-UP RULES OF THUMB

Motivated by the continuing problems of unfettered discretion and the consistent failure of top-down reforms, this Part argues for grassroots rulification. Judges should be encouraged to deliberate amongst themselves and develop local rules of thumb to guide their discretion. Although this reform is not a panacea, it will move family law substantially in the direction that reformers have long sought. As I describe more below, the proposal is also aligned with the incentives of trial judges and appellate judges. The former bear the burden of discretion and have an incentive to seek collective advice. The latter only need to stay out of the way, which is what appellate courts already favor.

What is a rule of thumb? As I discuss in detail in a companion piece, rules of thumb offer advice only.¹⁵⁷ They exert influence only in cases where the judge is uncertain about the proper outcome.¹⁵⁸ When the best interests of the child are clear, judges would rule on that basis. But when it is not clear which custody arrangement would be best for the child, judges may follow the local rule of thumb.¹⁵⁹ More specifically, a judge might conclude that there is some set of reasonable outcomes, and that there is substantial uncertainty about which of those outcomes is best. If the rule of thumb points to one of the outcomes with that larger set, then the judge may follow it. But if the rule of thumb points to an outcome that the judge has already determined to be outside of the set of reasonable outcomes, or if the judge believes that another outcome is better, the judge is free to disregard the rule of thumb.¹⁶⁰ Rules of thumb supplement rather than supplant judicial discretion.¹⁶¹

156. See Jana Singer, *Family Law After Obergefell*, CONCURRING OPINIONS (Sept. 20, 2016), <https://concurringopinions.com/archives/2016/09/family-law-after-obergefell.html> (arguing that these determinations are “fact-specific and uncertain”).

157. Williams, *Divorce All the Way Down*, *supra* note 12, at 16–18.

158. *Id.*

159. *Id.* at 33.

160. See *id.* at 16.

161. *Id.*

There is no set formula to determine the amount of uncertainty required to open up a space for rules of thumb. There is some admittedly fuzzy degree of uncertainty that is consistent with the good faith claim that the totality-of-the-circumstances test has resulted in a tie. This is the space where rules of thumb operate. Conceptually, it is a narrow space; practically, it is much wider. Judges face a great deal of uncertainty because family law determinations are complex, multifaceted, value laden, and there is often no adequate evidence to resolve them.¹⁶²

Local rules of thumb have a lot in common with existing practices, but are also an important extension of them. Local judges already get together to adopt local procedural rules.¹⁶³ They also create local standing orders that govern substantive issues.¹⁶⁴ Those standing orders apply to litigants before the judge has a chance to conduct any meaningful review of the case.¹⁶⁵ They reflect the judges' collective judgment about what orders are generally appropriate.¹⁶⁶ For example, in Collin County near Dallas, Texas, the standing order precludes divorcing couples from entertaining overnight guests.¹⁶⁷ But in Travis County, the home of more liberal Austinites, the judges declined to put such a limitation in their standing order.¹⁶⁸ In California, several groups of judges have adopted local rules that set temporary alimony—alimony which is provided while the case is ongoing.¹⁶⁹ Local rules can also govern final orders. In Ohio and Oregon, local courts have developed local visitation guidelines.¹⁷⁰ Some counties provide more

162. *See id.* at 18.

163. *See* Subrin, *supra* note 3, at 2037–38.

164. *See* William H. Stolberg & Jane Hawkins, *Freezing Your Assets Off: A Powerful Remedy on Thin Ice*, FLA. B.J., May 2002, at 68.

165. *See* Eric D. Beal, *The Fundamentals of Texas Family Law Case Strategy*, in STRATEGIES FOR FAMILY LAW IN TEXAS: LEADING LAWYERS ON ANALYZING RECENT LEGAL TRENDS, IMPLEMENTING CREATIVE STRATEGIES, AND OVERCOMING COMMON CHALLENGES, 2010 WL 6425330, at *8 (Westlaw 2010).

166. *See, e.g.*, Subrin, *supra* note 3, at 2037–38.

167. COLLIN CTY., TEX. STANDING ORDER REGARDING CHILDREN, PROPERTY, AND CONDUCT OF THE PARTIES, http://www.collincountytx.gov/district_courts/Documents/dc_forms/standing_order_children.pdf [hereinafter COLLIN CTY., TEX. STANDING ORDER].

168. TRAVIS CTY., TEX. STANDING ORDER REGARDING CHILDREN, PROPERTY, AND CONDUCT OF THE PARTIES, https://www.traviscountytx.gov/images/courts/Docs/standingorder_childrenproperty_civildistrict.pdf.

169. Charles F. Vuotto Jr., *Alimony Trends*, N.J. FAM. LAWYER, June 2012, at 6, 12, 18 n.3.

170. *See, e.g.*, OHIO REV. CODE ANN. § 3109.051 (West 2017); *Columbia County Standard Parenting Plan*, OREGON JUDICIAL DEPARTMENT (2016),

visitation, some less.¹⁷¹ Some counties have detailed schedules for children of various ages, while others split children into just two groups, those older or younger than 18 months.¹⁷²

The Article seeks a controlled expansion of these types of local rulemaking. States should authorize courts to create local rules about each of family law's open-ended standards. But as a first step, those local rules should take the form of rules of thumb. This limitation ensures that local rules will not create over and underinclusion problems¹⁷³ while still creating numerous benefits. Even this mild form of rulification can promote predictability and horizontal equity, lead to decisions that are more informed by experts, create a new avenue for democratic input into the value judgments that family law's open-ended standards require, create a space for much-needed policy experimentation, and open up new avenues of political entrepreneurship.

A. Increased Predictability

Regardless of their content or the processes that generate them, local rules of thumb can increase the predictability of family law. They can do so in two ways. First, local rules of thumb help align the rulings of different

http://www.courts.oregon.gov/rules/documents/Columbia_SLR_2017.pdf

171. Compare JUDICIAL DEP'T STATE OF OR., COLUMBIA CTY. CIR. CT. SUPPLEMENTAL LOCAL RULES: OUT-OF-CYCLE ADOPTION OF SLR CHAPTER 16, at 28 (2016), [https://www.ojd.state.or.us/Web/ojdpublications.nsf/Files/Columbia_SLR_2016.pdf/\\$File/Columbia_SLR_2016.pdf](https://www.ojd.state.or.us/Web/ojdpublications.nsf/Files/Columbia_SLR_2016.pdf/$File/Columbia_SLR_2016.pdf) [[https://web.archive.org/web/20160309094719/https://www.ojd.state.or.us/Web/ojdpublications.nsf/Files/Columbia_SLR_2016.pdf/\\$File/Columbia_SLR_2016.pdf](https://web.archive.org/web/20160309094719/https://www.ojd.state.or.us/Web/ojdpublications.nsf/Files/Columbia_SLR_2016.pdf/$File/Columbia_SLR_2016.pdf)], with JUDICIAL DEP'T STATE OF OR., DESCHUTES CTY. CIR. CT. 2016 SUPPLEMENTAL LOCAL RULES app. 3 (2016), [https://www.ojd.state.or.us/Web/ojdpublications.nsf/Files/Deschutes_SLR_2016.pdf/\\$File/Deschutes_SLR_2016.pdf](https://www.ojd.state.or.us/Web/ojdpublications.nsf/Files/Deschutes_SLR_2016.pdf/$File/Deschutes_SLR_2016.pdf) [[https://web.archive.org/web/20160309094736/https://www.ojd.state.or.us/Web/ojdpublications.nsf/Files/Deschutes_SLR_2016.pdf/\\$File/Deschutes_SLR_2016.pdf](https://web.archive.org/web/20160309094736/https://www.ojd.state.or.us/Web/ojdpublications.nsf/Files/Deschutes_SLR_2016.pdf/$File/Deschutes_SLR_2016.pdf)].

172. Compare JUDICIAL DEP'T STATE OF OR., LINCOLN CTY. CIR. CT. SUPPLEMENTARY LOCAL RULES 29 (2016), [https://web.archive.org/web/20160309094909/https://www.ojd.state.or.us/Web/ojdpublications.nsf/Files/Lincoln_SLR_2016.pdf/\\$File/Lincoln_SLR_2016.pdf](https://web.archive.org/web/20160309094909/https://www.ojd.state.or.us/Web/ojdpublications.nsf/Files/Lincoln_SLR_2016.pdf/$File/Lincoln_SLR_2016.pdf) [[https://web.archive.org/web/20160309094909/https://www.ojd.state.or.us/Web/ojdpublications.nsf/Files/Lincoln_SLR_2016.pdf/\\$File/Lincoln_SLR_2016.pdf](https://web.archive.org/web/20160309094909/https://www.ojd.state.or.us/Web/ojdpublications.nsf/Files/Lincoln_SLR_2016.pdf/$File/Lincoln_SLR_2016.pdf)], with JUDICIAL DEP'T STATE OF OR., LAKE COUNTY STANDARD PARENTING PLAN (2016), http://www.courts.oregon.gov/Lake/docs/2011_standard_parenting_plan.pdf.

173. See Williams, *Divorce All the Way Down*, *supra* note 12, at 16–18; *infra* Part IV.B.

judges.¹⁷⁴ This promotes both predictability and horizontal equity.¹⁷⁵ Harris County judges may still differ from Travis County judges—in part because citizens of those counties tend to have different stances on many social issues¹⁷⁶—but at least we would see more consistency among local judges. And residents would not have to face the often outcome-determinative lottery of which judge gets assigned to their case. Second, making rules of thumb *explicit* and *public* will enable more litigants to predict the outcome of their case. Although lawyers may be able to keep track of private rules of thumb for their clients, pro se litigants cannot. To ensure that rules of thumb are as useful as possible to the 90 percent of cases where at least one party does not have an attorney,¹⁷⁷ those rules should be explicit and public.¹⁷⁸

Some readers may still feel some residual discomfort at the idea that people will be treated differently just because they live in different counties. But as a reminder to those readers, the choice is not between statewide uniformity and local rules. It is between secret, unreviewable judge-by-judge disuniformity and publicly reviewable local differences.¹⁷⁹ The latter choice is preferable for many reasons, including the one highlighted in this subpart: it promotes predictability.¹⁸⁰

174. *See id.* at 16–18.

175. Of course, these aspects of local family law will not make fiancés research divorce law. So at the time couples decide to marry, divorce law will remain unpredictable to them. But when the couple considers divorce, they are likely to seek to understand divorce law by, for example, consulting lawyers or friends who have been through a divorce. The more consistent local judges are, the more likely those lawyers and friends will paint a consistent picture of the litigant’s prospects.

176. *See* Kirk Goldsberry, *Mapping the Changing Face of the Lone Star State*, FIVE THIRTY EIGHT (Nov. 4, 2014), <https://fivethirtyeight.com/features/mapping-the-changing-face-of-the-lone-star-state/>.

177. *Id.* at 594 (“[A]pproximately 90% of the cases involved at least one litigant who self-represented, while in 52% of the cases both parties self-represented.”); *see* Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases*, 12 J.L. & FAM. STUD. 57, 72–75 (2010) (discussing number and characteristics of pro se litigants in divorce cases).

178. In addition to making local rules of thumb public, they would serve the goal of predictability better if they were relatively stable over time, instead of changing every time a new judge was elected or every time a judge was reassigned from family law cases to some other area.

179. Samuel P. Jordan, *Local Rules and the Limits of Trans-Territorial Procedure*, 52 WM. & MARY L. REV. 415, 460–61 (2010) (discussing the tradeoff between official local rules and their likely alternative: a system of idiosyncratic, judge-specific rules that are not written or available to the public).

180. *See id.*

Increased predictability benefits both the traditional family and the new family, and also helps achieve the goals of the new paradigm. Members of married heterosexual partnerships might be particularly interested in increasing the predictability of alimony and relocation decisions.¹⁸¹ Members of more complex families may be interested in gaining any semblance of predictability about what constitutes a “parent-like” relationship,¹⁸² regardless of whether that predictability is used to help them create such relationships or to avoid them. The more predictable each of these outcomes are, the easier it will be to achieve the goals of the new paradigm—to promote settlement and to keep people out of acrimonious litigation.

B. Increased Engagement with Community and Expert Opinion

Again, regardless of their initial content and regardless of how local rules of thumb are created, if they are made public then they will have additional benefits. Public rules invite public commentary. This additional avenue of local feedback serves several important functions.

Public rules of thumb strengthen judges’ often-weak democratic pedigree by offering opportunities for community members to voice disagreements with judicial policy. Judicial elections are far from models of democratic engagement.¹⁸³ “[V]oter ignorance, apathy, and incapacity’ are the norm in judicial elections.”¹⁸⁴ Providing other avenues for public feedback strengthens the democratic imprimatur of judicial decisions. Of course, any feedback would not be direct or structured. This Article is not advocating a form of notice-and-comment rulemaking, although others might.¹⁸⁵ But Op-Eds that critique local rules of thumb can serve similar

181. See, e.g., Elrod, *supra* note 126, at 351–52 (discussing the unpredictability of relocation rulings); Vuotto, *supra* note 169, at 12, 18 n.3 (discussing that the law of alimony “results in unpredictable . . . awards”).

182. Some readers may strongly prefer uniformity, especially surrounding parentage determinations. Local rules of thumb violate that uniformity at first blush, by highlighting the important consequences that might flow from living in Long Island City as opposed to White Plains, New York. But this public disuniformity has profound advantages over hidden disuniformity, as the next subparts will illustrate.

183. See Leib, *supra* note 37, at 913 (“It is conventionally believed that the elections that seat, retain, or unseat local judges are not particularly salient with the electorate and do not inspire a great deal of deliberation.”).

184. Matthew J. Streb et al., *Voter Rolloff in a Low-Information Context: Evidence from Intermediate Appellate Court Elections*, 37 AM. POL. RES. 644, 645 (2009) (quoting Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 63 (2003)).

185. See *id.* (arguing that many areas could benefit from some form of notice-and-comment rulemaking); FED. R. CIV. P. 83 (“After giving public notice and an

purposes. And lawyers who wish to obtain a ruling inconsistent with a local rule of thumb will have incentives to bring contrary opinion to light. These conversations may also spur more active engagement in judicial elections, which would be an additional boon to their democratic legitimacy.

These informal avenues of communication can also correct judicial biases and misinformation. Judges are often critiqued for bringing a set of assumptions to their decisions that reflect their high levels of education, their class, their gender, their race, etc.¹⁸⁶ To the extent that local judges are homogeneous along one or more of these dimensions, they may benefit from wider sources of input. For example, it may be useful for a judge to know that many local community members think free-range parenting is superior to helicopter parenting, or that many local community members think that grandparents often have parent-like relationships with grandchildren. Even if the judge ultimately disagrees with these local sentiments, this additional avenue of engagement increases the likelihood that the judge's decision will be rooted in well-reasoned positions rather than knee-jerk reactions.

Similarly, public rules of thumb offer experts a new avenue to communicate with judges. Some judges may shy away from interviewing children in the hopes that it will protect them from the trauma of divorce.¹⁸⁷ Others may think that the best way to protect children is to include them in the process to avoid the perception that divorce is a Kafka-esque nightmare.¹⁸⁸ Creating public rules of thumb about these issues would invite a host of experts to weigh in. Child psychologists might tend to side with one of the above opinions over the other, or they might offer significantly more nuanced guidance. They might, for example, be able to give guidance on which children should be given a voice and in what way.

Consider also a local rule of thumb that guides triage decisions under the new paradigm. If the resulting local rule is public, then local

opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice.”); Katherine A. Macfarlane, *A New Approach to Local Rules*, 11 STAN. J. C.R. & C.L. 121, 150–51 (2015) (advocating notice-and-comment procedures for adopting local procedural rules).

186. See Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 33 (1999) (“[M]ale judges . . . could not see why come-ons, however crude, should not be seen as compliments and . . . could not understand why women should not just have to put up with dirty jokes if they wanted to participate in a male world.”); Elaine Martin & Barry Pyle, *State High Courts and Divorce: The Impact of Judicial Gender*, 36 U. TOL. L. REV. 923, 936 (2005) (finding that “[f]emale justices supported female litigants 75.6% of the time while male justices supported female litigants 53.6% of the time”).

187. MURPHY & SINGER, *supra* note 113, at 132–34.

188. See *id.* for comments on this debate.

psychologists, social workers, and advocates will have a chance to weigh in. Perhaps one local rule does not adequately understand the markers of domestic violence in the gay community, or does not reflect the emerging consensus among social workers about how to identify high-conflict cases, or completely ignores potentially useful knowledge that educators have about the types of cases that tend to cause academic distress among children. Public rules of thumb invite expert feedback that can improve local decision-making.

Expert input may ultimately convince judges that no rule of thumb is possible. Even here, the rule of thumb will have proved useful because the conversations that the rule produced are likely to be beneficial to future judicial decision-making.

Public rules of thumb may be particularly valuable to local minorities. Elections provide many minority groups with limited options. Even when a minority group is large enough to influence local elections in theory, they may not be able to do so in practice.¹⁸⁹ The vast majority of local judicial elections are uncontested—that is, voters are given absolutely no choice.¹⁹⁰ Even in contested elections, the limited choice of candidates may not allow local minorities to exercise any real influence.¹⁹¹ Many members of a local minority group might prefer to elect someone with knowledge of their culture and lived experiences, but might have to wait until one of their own goes to law school, comes back, establishes herself within the local bar, and runs in a judicial election. Public rules of thumb offer a much more immediate avenue for dialogue with local minorities.

C. Increased Deliberation with Other Judges

Theoretically, local judges could create local rules of thumb through a variety of procedural mechanisms. For example, they could take an internal survey and adopt rules that aligned with their median member. They could vote publicly or privately for various potential rules of thumb. They could even set up something akin to an information market to allow judges to express the intensity of their views. But all of this seems rather far-fetched. Judges will most likely deliberate as a group. Some groups of local judges might deliberate face-to-face and take the process very seriously. Others might deliberate over email and be less involved. Regardless, these more and less rigorous forms of deliberation all have the potential to improve decisions. Of course, deliberation has a darker side as well, and can, for

189. Nelson, *supra* note 35, at 209.

190. *Id.*

191. *See id.*; Reddick et al., *supra* note 35, at 28–29.

example, lead to group polarization. Part IV confronts this darker side, and ultimately concludes that group polarization is unlikely to significantly affect local rules of thumb. This subpart explores the upsides of deliberation.

Deliberation tends to reduce the influence of stereotypes. In one study, subjects judged the credibility of a rape victim based on a video recording of her testimony.¹⁹² Without deliberation, credibility judgments were heavily influenced by whether the victim fit subjects' preconceptions of rape victims.¹⁹³ Sobbing victims were deemed credible; victims who did not show emotion were not deemed credible.¹⁹⁴ Deliberation eliminated this effect.¹⁹⁵ In another study, deliberation reduced the impact of biases that associated gay men with child molestation.¹⁹⁶ In an identical scenario, 70 percent of individuals indicated that they would convict a gay man of child molestation, while only 55 percent of individuals indicated that they would convict a straight man.¹⁹⁷ This disparity highlights the effect of the stereotype. When those same individuals deliberated, the disparity was greatly reduced.¹⁹⁸ Other studies support the tendency of deliberation to reduce stereotypes,¹⁹⁹ although not all studies agree.²⁰⁰ Reducing the impact of explicit and implicit stereotypes is immensely important. It could serve to limit the impact of gender stereotypes that demand too much from mothers and not enough

192. Janne Dahl et al., *Displayed Emotions and Witness Credibility: A Comparison of Judgments by Individuals and Mock Juries*, 21 APPLIED COGNITIVE PSYCHOL. 1145, 1147–48, 1150 (2007).

193. *Id.* at 1149.

194. *Id.*

195. *Id.*

196. Sarah Stawiski et al., *The Roles of Shared Stereotypes and Shared Processing Goals on Mock Jury Decision Making*, 34 BASIC & APPLIED SOC. PSYCHOL. 88, 92–93 (2012).

197. *Id.* at 93 fig.2.

198. *Id.* (finding that, after deliberation, 55 percent of groups would convict the gay man and 48 percent would convict the straight man).

199. Tamara M. Haegerich et al., *Are the Effects of Juvenile Offender Stereotypes Maximized or Minimized by Jury Deliberation?*, 19 PSYCHOL., PUB. POL'Y, & L. 81, 89 tbl.3, 90–92 (2013).

200. Garold Stasser & Beth Dietz-Uhler, *Collective Choice, Judgment, and Problem Solving*, in BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: GROUP PROCESSES 48 (Michael A. Hogg & R. Scott Tindale eds. 2001) (noting mixed results when investigating whether dyad discussions promote or mitigate stereotypes); Mona Lynch & Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 L. & HUM. BEHAV. 481, 481 (2009) (finding that deliberation “appeared to activate and amplify the tendency to treat Black defendants more harshly than their White counterparts, especially among White jurors”).

from fathers,²⁰¹ it could preemptively mitigate biases in triage systems that might otherwise have adverse effects on families of color,²⁰² and it could help loosen the grip of heteronormative assumptions about how families operate.²⁰³

Deliberation is especially effective at mitigating egocentric bias: the belief that others think like you do.²⁰⁴ Deliberation, even in its less rigorous forms, can expose conflicts among the judges. Some judges might simply assume that overnight guests are harmful to children, and others might assume that overnight guests do not meaningfully impact children. Exposure to opposing opinions will encourage any judge acting in good faith to question her assumptions. This is particularly likely to be true if there is any degree of collegiality among the judges. Although you may dismiss the opinion of a stranger, it is much harder to dismiss the opinion of a friend or respected colleague.²⁰⁵ This does not ensure that judges will reach consensus on disputed issues, but it does increase the likelihood that individual judges will be more humble about their own judgments, and it also increases the likelihood that judges will look more closely at the facts of each case to determine whether, for example, overnight guests might be harmful to children.²⁰⁶ Exposing these conflicts may also encourage judges to take advantage of outside experts.²⁰⁷ For example, judges may learn that they

201. See, e.g., *Fulk v. Fulk*, 827 So. 2d 736, 741 (Miss. Ct. App. 2002) (critiquing the trial court for describing a father who threatened to kill his wife with a hammer and padlocked her in the house when she was pregnant in the following way: “I find that the father may have done some things in the past he is not proud of, but the Court thinks that the responsibility of fatherhood has matured him”); *Rowe v. Franklin*, 663 N.E.2d 955, 959 (Ohio Ct. App. 1995) (critiquing trial court for punishing the mother for “selfishly” moving with the child so that she could attend law school).

202. See *Dickerson*, *supra* note 135, at 641–42 (discussing racial bias in mortgage-lending practices).

203. See, e.g., Heather Kolinsky, *The Intended Parent: The Power and Problems Inherent in Designating and Determining Intent in the Context of Parental Rights*, 119 PENN ST. L. REV. 801, 805 (2015) (“Continuing to perpetuate a system that favors maintaining the traditional hereto-normative marital unit as the model family, or to make everything else look like it, causes every person involved in the procreative process to become more vulnerable to competing interpretations of the law and different biases.”).

204. See, e.g., Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U. L. REV. 962, 993 (2005).

205. If anything, the concern is that such deference will be too large, leading to the suppression of conflicting information. See Part III.E.

206. See *COLLIN CTY., TEX. STANDING ORDER*, *supra* note 167.

207. See also *Krauss & Sales*, *supra* note 56, at 862 (explaining judges also look to expert guidance in custody cases that are difficult to adjudicate).

have differing opinions about what circumstances lead children to maintain academic success during a divorce. If so, they can reach out to guidance counselors and teachers at local schools for potentially helpful input.

Finally, deliberation can expand the influence of expertise that judges already possess. Some judges may have more expertise in the local job market, which might help them set more accurate durations for rehabilitative alimony.²⁰⁸ Others might have more expertise in tax matters, which would help them make more equitable distributions of marital property. In any given area, some judges are likely to have more expertise than others. Deliberation offers a way for judges with less expertise to learn faster. Rules of thumb codify some of these expert judgments and allow judges with less expertise to reach better decisions by being able to consult the generalized wisdom of their more learned peers.

Although research on whether groups accurately identify experts in their midst is mixed,²⁰⁹ there are reasons to be optimistic that groups of judges will be better at identifying experts than the subjects of many of the relevant studies. Some studies have found that groups fail to recognize experts.²¹⁰ Other studies find that groups do identify experts.²¹¹ And still others find that groups can benefit from experts even if they cannot identify them.²¹² One of the challenges to identifying experts is that it takes expertise to know expertise. A person who cannot understand calculus cannot distinguish between an accurate proof and an inaccurate one. This often

208. ABRAMS ET AL., *supra* note 51, at 689–91 (discussing types of alimony).

209. See, e.g., Bryan L. Bonner, *Expertise in Group Problem Solving: Recognition, Social Combination, and Performance*, 8 GROUP DYNAMICS: THEORY, RES., & PRAC. 277, 278 (2004); Bryan L. Bonner et al., *Collective Estimation: Accuracy, Expertise, and Extroversion as Sources of Intra-Group Influence*, 103 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 121, 123 (2007) [hereinafter Bonner et al., *Collective Estimation*] (citations omitted).

210. See, e.g., Glenn E. Littlepage et al., *An Input-Process-Output Analysis of Influence and Performance in Problem-Solving Groups*, 69 J. PERSONALITY & SOC. PSYCHOL. 877, 880–81, 885 (1995) (finding that undergraduates judged expertise by the amount of time someone talked, which was not related to actual ability to solve the relevant task).

211. See, e.g., Robert D. Sorkin et al., *Signal-Detection Analysis of Group Decision Making*, 108 PSYCHOL. REV. 183, 194 (2001) (finding that groups gave more weight to the judgments of individuals in their midst who performed better on the relevant visual task).

212. See, e.g., Bonner et al., *Collective Estimation*, *supra* note 209, at 129; Bryan L. Bonner et al., *The Effects of Member Expertise on Group Decision-Making and Performance*, 88 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 719, 720 (2002).

prevents groups from fully capitalizing on expertise.²¹³ Many judges will have years of experience hearing family law cases, and many will have heard from numerous mental health professionals who have conducted custody evaluations. If this experience creates expertise, then many judges will have it and will be able to identify it in others. At a minimum, groups of judges will be able to recognize the expertise that is shared by a majority of their members.²¹⁴ If they do so, then they can benefit from this level of expertise.²¹⁵ When they recognize better experts, they will do even better. And there are reasons to think that they will often do better. New judges may not be able to assess the expertise of others directly. Accordingly, they are likely to use simple heuristics to identify experts.²¹⁶ One simple heuristic is the amount of experience that others have. If expertise among family law judges is a function of their experience—and this seems very likely—then the heuristic will lead to relatively accurate decisions. More experienced judges are not only more knowledgeable about family law, but they are likely more knowledgeable about one another. And groups that have worked together in the past tend to be better at identifying experts in their midst.²¹⁷ Unlike laboratory experiments where people have no prior knowledge about one another, judges are likely to know each other and can draw from a host of experiences to gauge expertise.

Even if, contrary to the arguments above, judges are not able to identify experts within the group, those internal experts can still significantly influence outcomes. I suspect that local rules of thumb will only come about if judges reach consensus on them. Rules of thumb—like any local court rules—are most useful when all or most judges agree. They become less and less useful as more judges defect. Expert judges may decline to endorse a particular rule of thumb. If they do, then that rule of thumb is less likely to be adopted by the group. In this way, even unidentified experts can influence rules of thumb.

213. *Id.* at 887; David Dunning, *On Identifying Human Capital: Flawed Knowledge Leads to Faulty Judgments of Expertise by Individuals and Groups*, 32 *ADVANCES IN GROUP PROCESSING* 149, 163 (2015).

214. See Michael R. Baumann & Bryan L. Bonner, *Member Awareness of Expertise, Information Sharing, Information Weighting, and Group Decision Making*, 44 *SMALL GROUP RES.* 532, 532 (2013).

215. See *id.* at 553.

216. See Littlepage et al., *supra* note 210, at 881 (noting that undergraduate students tended to use heuristics such as speaker confidence to (mis)identify experts).

217. John R. Hollenbeck et al., *Multilevel Theory of Team Decision Making: Decision Performance in Teams Incorporating Distributed Expertise*, 80 *J. APPLIED PSYCHOL.* 292, 308 (1996).

Of course, this raises the possibility of anti-experts. But disagreement by anti-experts is likely to be less influential. Although people often fail to identify people with *more* expertise than themselves—and mistake them for people with equivalent knowledge to themselves—they routinely and easily identify people with *less* expertise than themselves.²¹⁸ In one illustrative study, subjects took a logical reasoning test and were asked to bet on whether they scored better than another test taker.²¹⁹ Subjects were not good at identifying better test takers.²²⁰ About half of the 101 subjects thought that they beat or tied the top performer.²²¹ None beat the top performer, and only one tied.²²² But subjects were extremely accurate in their judgments about the worst test taker.²²³ Compared to the person who got the worst score, 84 subjects thought their score was higher, and 7 thought that their score was the same.²²⁴ In reality, 89 subjects had higher scores, and there were 6 ties.²²⁵ If an especially uninformed judge refuses to endorse a local rule of thumb, the other judges are likely to accurately identify that judge's opinion as deserving less weight. Accordingly, they may be more willing to bend consensus-seeking norms when an anti-expert, rather than an expert, stands outside of consensus. Even if anti-experts have the same influence as experts in blocking consensus, the result is simply to reinforce the status quo. There would be fewer rules of thumb. But those that are created can still have the benefits outlined in this Part.

D. New Avenues for Policy Experimentation

The benefits mentioned so far all accrue to the judges and citizens of localities that consider or adopt local rules of thumb, but their benefits extend to other jurisdictions as well. Every local rule of thumb is a local policy experiment.²²⁶ Local experiments have advantages even over state experiments. There can be far more local experiments, simply by virtue of

218. Dunning, *supra* note 213, at 164.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. See A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1579 (1991) (discussing local procedural rules as means of local experimentation); see also Megan M. La Belle, *The Local Rules of Patent Procedure*, 47 ARIZ. ST. L.J. 63, 68 (2015) (proposing new uniform rules of procedure informed by past local experiments).

the number of local communities within states. Smaller experiments mean that failures affect fewer people, while successes can still be translated to other jurisdictions.²²⁷ In fact, a host of nonprofit organizations specifically conduct or monitor local experiments in family law.²²⁸

Who would make a better custody evaluator: a childless woman with a Ph.D. in social work or a mother of three with an associate's degree? Do local visitation guidelines reduce acrimony? Do parents comply with court orders more when they are rooted in local rules of thumb rather than just individual discretion? Local experiments can help answer these questions.

A bit of Texas history shows how useful local experimentation can be, even if only a few local courts innovate. In 1983, the Texas legislature decided it was unhappy with the state of visitation in Texas.²²⁹ Before that time, courts often awarded "reasonable visitation" without further specification.²³⁰ This standard was so vague that it effectively gave custodial parents complete control over whether noncustodial parents saw their children.²³¹ So the legislature invited courts to create local guidelines: "The court by local rule may establish and publish schedules, guidelines, and formulas for use in determining the times and conditions for possession of and access to a child."²³² Most local courts ignored this invitation, but a few accepted it; Travis County judges got together and developed a set of guidelines that happened to be quite generous by the standards of the day.²³³ By 1989, legislators decided to end their experiment and make their own guidelines. But they did not do so from scratch. Instead, they drew heavily on the experiences in Travis County and adopted guidelines that were similar to those originally developed there.²³⁴ Now, the entire state benefits from the work that a handful of judges in Travis County did several decades

227. See Williams, *Divorce All the Way Down*, *supra* note 12, at 33.

228. See, e.g., *About NCJFCJ*, NAT'L COUNCIL JUV. & FAM. CT. JUDGES, <http://www.ncjfcj.org/about> (last visited May 25, 2017); *About Us*, NAT'L CTR. FOR ST. CTS., <http://www.ncsc.org/About-us.aspx> (last visited May 25, 2017); *Parent Support Program Helps Repair Parent-Child Relationships*, CTR. FOR CT. INNOVATION (Aug. 2012), <http://www.courtinnovation.org/research/parent-support-program-helps-repair-parent-child-relationships>.

229. Sampson, *supra* note 104, at 103–04.

230. *Id.* at 101.

231. *Id.* This is perhaps a particularly poetic result. The state had 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 standard.

232. *Id.* at 104 (citing S.B. 79, 68th Leg., Reg. Sess. (Tex. 1983)).

233. See *id.* at 110, 114.

234. *Id.* at 111.

ago.

Of course, people may not always be able to agree on what constitutes a successful policy. There is no right answer to the value judgments required by family law's open-ended standards. Nonetheless, experimentation is useful. Attempts to assess policy experiments can help judges and laypeople appreciate that reasonable people can disagree, and can highlight the degree to which, even with local rules of thumb, a divorce case might depend on the luck of the draw.²³⁵ This could in turn facilitate settlement, promote arbitration, prenups, postnups, or other innovative responses. More optimistically, attempts to evaluate policy experiments might reveal side effects that most people would agree are relevant. If some local rule of thumb reduces settlement and increases the length of litigation, then that would count against it even if it were rooted in a value judgment.

E. *New Avenues for Dissent and Political Entrepreneurship*

Public rules of thumb open up a powerful avenue for communicating with higher courts and legislators. Currently, judges can use the cases that come before them to send various signals to higher courts.²³⁶ For example, they can hold or opine that a certain precedent should no longer be controlling, or they can read precedent narrowly or broadly.²³⁷ These types of signals would all be more potent if, rather than the actions of a lone judge, they reflected the considered judgment of groups of judges. Similarly, these actions could speak louder if they were not tied to a particular case context, but were instead broader statements of policy that purported to govern a whole class of cases.

Of course, this is in tension with the idea that judges should not judge a case before they hear it. But as long as the statements are rules of thumb, they remain within the spirit and the letter of ethics codes.²³⁸ Recall that rules of thumb seek only to influence outcomes when the relevant standard fails to isolate one single best answer, and only when the rule of thumb points to one outcome with the set of outcomes that are reasonable under the relevant standard. Informing the public of how local judges *generally* resolve ties is

235. Garrick B. Pursley & Hannah J. Wiseman, *Local Energy*, 60 EMORY L.J. 877, 933–34 (2011) (noting the benefits of policy experimentation even when it fails to reveal a single best solution).

236. See, e.g., Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1910 (2014).

237. *Id.* (offering an initial critique of such motivated interpretations of precedent).

238. See, e.g., MODEL CODE OF JUDICIAL CONDUCT r. 4.1(a)(13) (AM. BAR ASS'N 2008).

not a form of pledge, promise, or commitment that is inconsistent with their impartial performance.²³⁹ It is not a pledge, promise, or commitment at all. And publically announcing potential tiebreakers promotes impartiality by reducing the effects of idiosyncratic biases.²⁴⁰

One could also imagine groups of local judges attempting to influence legislation. Several states have recently debated durational limits or caps on alimony.²⁴¹ Local judges might be able to speak with a particularly loud voice if they, for example, created local rules of thumb that publically embraced those caps and limits before they were even enacted. Alternatively, judges might protest proposed caps by creating local rules of thumb that made alimony more generous and reinforced its importance. Regardless of what local judges say, they speak with some force because they are the actors to whom the state has delegated the task of making the broad fairness determinations that family law requires.²⁴² And they speak with even more force when they speak publically as a group.²⁴³

F. *Local Rules of Thumb Versus Intrastate Judicial Federalism*

With the above benefits in mind, we can distinguish the vision of local power that this Article defends from Ethan Leib's call for intrastate judicial federalism.²⁴⁴ Leib argues that local judges can and should put local glosses on ambiguous state statutes.²⁴⁵ Judges have the democratic authority to do so, according to Leib, because they are elected *locally*.²⁴⁶ The arguments for local family law rules differ in two ways.

First, the arguments for local family law rules of thumb extend beyond

239. *See id.* at r. 4.1(a)(13) cmt. 13 (“The making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined . . .”).

240. *See generally id.* at r. 1.2 (“A judge shall act in a manner that promotes public confidence in the . . . impartiality of the judiciary . . .”).

241. Belinda Luscombe, *The End of Alimony*, TIME (May 27, 2013), <http://www.time.com/time/magazine/article/0,9171,2143555,00.html?pcd=pw-edit>; *see also* Associated Press, *Florida Gov. Scott Vetoes Bill That Would End Permanent Alimony in State*, FOX NEWS (May 2, 2013), <http://www.foxnews.com/politics/2013/05/02/florida-gov-scott-vetoes-bill-that-would-end-permanent-alimony-in-state/>.

242. *See* Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 31, 39–40, 63–65 (2010).

243. *See id.* at 64.

244. Leib, *supra* note 37, at 903.

245. *Id.* at 907.

246. *Id.* at 925.

elected judges. Leib's analysis of localist judging is limited to elected judges.²⁴⁷ He uses the structure of local judicial elections as the centerpiece of the normative case for localist judging.²⁴⁸ Locally elected judges serve two masters—the state and the locality—and this gives them the democratic credentials to pursue local agendas when they interpret ambiguous state statutes.²⁴⁹ Leib's discussion of the value of experimentation and dialogue takes place within this context, and appears to play a supporting role.²⁵⁰ In contrast, the normative case for local rules of thumb relies predominantly on predictability, dialogue, and policy experimentation. These laudable features exist regardless of whether local judges are elected. Although local-regarding norms that are adopted by elected judges may have a greater democratic imprimatur,²⁵¹ the great need within family law for policy experimentation and the disruption of state-level political stalemates extends the case for localism within family law to non-local-regarding rules of thumb and to rules of thumb developed by appointed judges.

Second, the fact that family law's multifactor tests reflect expressly delegated discretion rather than statutory ambiguity²⁵² has implications for the scope of a judge's freedom to experiment.²⁵³ Family law's broad delegations assume and accept disuniformity.²⁵⁴ In contrast, one cannot infer a tolerance for disuniformity from statutory ambiguity. The ambiguity may have been unintentional, or the legislature may have envisioned that the state supreme court would ultimately provide a uniform interpretation of the statute. As a descriptive matter, one might predict that the state's legislature would be more accepting of local glosses in the context of delegated authority. After all, the legislature has already decided that other

247. *Id.* at 912, 929.

248. *Id.* at 929.

249. *Id.* at 925.

250. *See id.* at 910–28 (focusing on the structure of elections and whether local judges should be faithful agents of the state legislature, and only, for example, mentioning experimentation twice).

251. *Id.* at 907.

252. The distinction is not ironclad. One could frame family law's multifactor statutes as containing an ambiguity about the weight of those factors. *See* discussion *supra* Part II.A. But the intentional admission by the state legislature that another institutional actor should make the important decisions that the law calls for has both descriptive and normative implications for the relationship between state and local actors. *See* discussion *supra* Part II.B.

253. *See* Leib, *supra* note 37, at 924–25 (arguing for a nuanced and deeply contextual analysis of localist interpretive authority).

254. *See* discussion *supra* Part II.A.

institutional actors are better suited to make the important decisions.²⁵⁵ As a normative matter, local glosses on broad delegations can promote uniformity and predictability, while the reverse is true of local glosses on statutory ambiguity.

IV. OBSTACLES AND OBJECTIONS

Local rules of thumb face three potential obstacles and two major objections. This Part addresses each in turn. First, existing statutes that require judges to use open-ended standards in the first instance may limit rules of thumb. Second, even if those statutes are not in explicit conflict with rules of thumb, they may give rise to an implied rule against rulification. Third, even if such rules are allowed, it may not always be in judges' narrow self-interest to adopt them. Fourth, the more rules of thumb promote predictability, the more they might incentivize forum-shopping. Fifth, the deliberation that will likely accompany rules of thumb may cause groups of judges to adopt policies that are more extreme than they would have adopted individually. None of these concerns is particularly weighty. The three obstacles prove illusory, forum-shopping is easy to police, and many aspects of the decision environment mitigate group polarization.

A. Existing Statutes

One might at first wonder whether local rules of thumb would be in tension with existing family law statutes. After all, state statutes often dictate what courts can and cannot consider. But nothing in these statutes is inconsistent with local rules of thumb. Consider a relevant Pennsylvania statute that states: "In determining whether alimony is necessary and in determining the nature, amount, duration and manner of payment of alimony, the court shall consider all relevant factors, including . . ." and then lists 17 factors.²⁵⁶ The statute is silent on the issue of whether courts can assign weights to various factors or come up with tiebreakers. Weights and tiebreakers would not prevent a court from fulfilling its duty to "consider all relevant factors."²⁵⁷ In fact, it is likely that individual judges already have unspoken and perhaps unconscious weights for the various factors.²⁵⁸ For

255. This prediction is supported by the expressly authorized local visitation schedules described above. See discussion *supra* text accompanying notes 171–72 and accompanying text.

256. 23 PA. STAT. AND CONS. STAT. ANN. § 3701(b) (West 2017).

257. *Id.*

258. See B. Robert Farzad, *How Do Judges Decide Divorce Cases? By Applying Facts, Law and Using Judicial Discretion*, FARZAD FAM. L. (Aug. 28, 2015),

example, different judges almost assuredly have different opinions about how “contribution . . . as [a] homemaker”²⁵⁹ should factor into alimony, and how to define a spouse’s “needs.”²⁶⁰ Allowing trial courts to explicitly create weights and other rules of thumb regarding the various factors would simply convert unspoken, unchallenged beliefs into public norms.²⁶¹ Such weighting schemes would also be consistent with the broader policy of allowing courts discretion while guiding that discretion by mandating that they consider a list of factors.

B. Rules Against Rulification

Although existing statutes do not explicitly preclude local rules of thumb, one might wonder whether appellate courts would nonetheless resist rulification. Michael Coenen recently identified what he called “rules against rulification.”²⁶² He identified Supreme Court cases that created standards and follow-up cases that rejected lower courts’ attempts to rulify those standards.²⁶³ Consider, for example, probable cause. The Court has adopted a totality-of-the-circumstances test for probable cause.²⁶⁴ Subsequently, the Supreme Court of Florida adopted a specific checklist to assess whether probable cause exists when a drug-sniffing dog signals the presence of a controlled substance.²⁶⁵ For example, the court required evidence of the dog’s credentials.²⁶⁶ The U.S. Supreme Court rejected Florida’s approach.²⁶⁷ It held that focusing on the dog’s credentials was the “antithesis of a totality-of-the-circumstances [test],” which would allow the court to consider other indicia of the dog’s abilities.²⁶⁸ Here, the court implicitly adopted a rule against rulification. More generally, rules against rulification prevent standards from moving toward the rule end of the rule–standards spectrum.²⁶⁹

<http://farzadlaw.com/california-divorce/how-do-judges-decide-divorce-cases/#more-10041> (“‘I am a 50/50 judge.’ Yes, I have heard judges say that.”).

259. 23 PA. STAT. AND CONS. STAT. ANN. § 3701(b)(12).

260. *Id.* § 3701(b)(13).

261. Jordan, *supra* note 179, at 461.

262. Coenen, *supra* note 36, at 648.

263. *Id.* at 663–68.

264. *Id.* at 646–47 (discussing *Florida v. Harris*, 133 S. Ct. 1050, 1055–58 (2013)).

265. *Id.* (citing *Harris v. State*, 71 So. 3d 756, 775 (Fla. 2011), *rev’d*, 133 S. Ct. 1050).

266. *Id.* at 647 (citing *Harris*, 71 So. 3d at 775).

267. *Id.* (citing *Harris*, 71 So. 3d at 775).

268. *Id.* (quoting *Harris*, 133 S. Ct. at 1056).

269. *Id.* at 681.

Family law is one area where courts have sometimes embraced rules against rulification. In the early 1990s, several judges in Dallas County, Texas, developed an informal local rule.²⁷⁰ This rule created a presumption against allowing custodial parents to move out of Dallas County.²⁷¹ Multiple appellate courts denounced this rule.²⁷² One appeared almost embarrassed by it:

We find ourselves in the difficult position of offering some historical perspective in Dallas County which is available only through reference to an unpublished decision from the Dallas Court of Appeals. . . . [That] court recognized the existence of a local rule adopted by six of the seven family law courts in Dallas County establishing a presumption in favor of restricted domicile. The Dallas Court of Appeals “specifically disapprove[d] of any local rule that establishes a presumption in favor of restricted domicile. A domicile restriction should only be made when warranted by the evidence, on a case-by-case basis.”²⁷³

In Kansas, an appellate court chastised a trial court for creating a bright-line rule that it is always in a child’s best interests to know who her biological father is.²⁷⁴ In its place the court demanded a case-by-case determination of the child’s best interests.²⁷⁵ In Georgia, a trial court judge was naïve enough to indicate that it was his ongoing policy not to award custody to parents who lived in the same house as a nonrelative.²⁷⁶ The Supreme Court of Georgia rejected this rigid rule and reiterated that the best interests test was incompatible with bright-line rules.²⁷⁷ New Jersey similarly rejected a lower court which held that a 15-year marriage could not be considered “short-term” for purposes of their alimony statute.²⁷⁸ Other examples abound.²⁷⁹

270. *See, e.g.*, *Bates v. Tesar*, 81 S.W.3d 411, 424 n.9 (Tex. App. 2002) (citing *Jenkins v. Jenkins*, No. 05-98-01849-CV, 2001 WL 507221, at *5 (Tex. App. May 15, 2001)).

271. *Id.*

272. *Id.*

273. *Id.* (alteration in original) (citation omitted).

274. *Ross v. Austin*, 783 P.2d 331, 336 (Kan. 1989).

275. *Id.* at 338–39.

276. *Todd v. Todd*, 703 S.E.2d 597, 600 (Ga. 2010).

277. *Id.*

278. *Gnall v. Gnall*, 119 A.3d 891, 903 (N.J. 2015) (noting that the Appellate Division inadvertently created a bright-line rule).

279. *See, e.g.*, *Rudder v. Hurst*, 337 S.W.3d 565, 574 (Ark. Ct. App. 2009) (citing *Valetutti v. Valetutti*, 234 S.W.3d 338, 341 (Ark. Ct. App. 2006)) (“We adhere to no mathematical formula or bright-line rule in awarding alimony.”); *Hoverson v. Hoverson*, 828 N.W.2d 510, 516 (N.D. 2013) (“There is no bright-line rule to determine whether a

These examples might lead one to wonder whether rules against rulification present a significant barrier to rules of thumb. They do not. There is an unarticulated but critical distinction between rules and rules of thumb, both in family law cases and in the cases that Coenen identifies. Coenen ignores this distinction, yet it is critical both descriptively and normatively.²⁸⁰

As a descriptive matter, an analysis of Coenen's antirulification examples reveals that in all of them, the Court was rejecting bright-line rules.²⁸¹ These bright-line rules remove discretion from trial judges and hamstringing a totality-of-the-circumstances inquiry. The family law examples also concern rulification that reduced a trial court's discretion.²⁸² Kansas and Georgia confronted and rejected bright-line rules.²⁸³ Texas confronted a

marriage should be deemed a short-term or a long-term marriage.”).

280. See *infra* notes 281–97 and accompanying text.

281. The Supreme Court cases are as follows: *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756–57 (2014) (rejecting “inflexible framework” that limited the definition of “exceptional” cases to those with certain listed features); *Florida v. Harris*, 133 S. Ct. 1050, 1055–56 (2013) (rejecting “bright-line tests” concerning the reliability of drug-sniffing dogs); *Ark. Game & Fish Comm’n v. United States*, 133 S. Ct. 511, 522 (2012) (rejecting a rule that categorically exempted temporary flooding from Takings Clause); *Cullen v. Pinholster*, 131 S. Ct. 1388, 1406 (2011) (rejecting “specific guidelines” that would require certain investigations to avoid ineffective assistance of counsel claims); *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1313–14, 1321 (2011) (holding that an inquiry into materiality of reports mandated by the Securities Exchange Act “cannot be reduced to a bright-line rule” and instead requires a “contextual inquiry”); *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 419 (2007) (rejecting a “rigid rule” for determining whether an invention is too obvious to be patented); *eBay Inc. v. Mercexchange L.L.C.*, 547 U.S. 388, 391 (2006) (quoting *Mercexchange, L.L.C. v. eBay, Inc.*, 401 F.3d 1323, 1339 (Fed. Cir. 2005)) (rejecting a “general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances”); *Equal Emp’t Opportunity Comm’n v. Waffle House, Inc.*, 534 U.S. 279, 293 (2002) (rejecting a “categorical rule” in the arbitration context); *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (rejecting “absolute rule” about when government employers can suspend employees without pay); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (holding that the analysis of fair use claims is “not to be simplified with bright-line rules”); *Florida v. Bostick*, 501 U.S. 429, 439–40 (1991) (noting that the lower court “erred in adopting a per se rule”); *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (rejecting a bright-line rule requiring pretermination evidentiary hearing in the context of social security disability benefits).

282. Some of these discretion-reducing rules were voluntarily imposed by the trial judges themselves. Nonetheless, they still operate to thwart the totality-of-the-circumstances tests that family law is so fond of.

283. See, e.g., *Todd v. Todd*, 703 S.E.2d 597, 600 (Ga. 2010); *Ross v. Austin*, 783 P.2d 331, 336 (Kan. 1989).

presumption that would operate to overrule a totality-of-the-circumstances analysis if that analysis yielded, for example, a belief that it was more likely than not in the best interests of the child to move, but some uncertainty remained.²⁸⁴

While courts have rejected bright-line rules in family law, they have often embraced rules of thumb, even when those rules of thumb ruly an underlying standard. Consider Georgia again. That state's supreme court rejected a bright-line rule regarding custody.²⁸⁵ Yet that same court embraced a custody rule of thumb. When a spouse alleges that one party was at fault—rather than simply seeking a no-fault divorce—there is a tiebreaker for custody: it should be awarded to the innocent spouse.²⁸⁶ Of course, if the court's best interests analysis shows that the child will be better off with the other parent, then that other parent should be awarded custody.²⁸⁷ But when the best interests test fails to differentiate between the parents, the rule of thumb comes into play.²⁸⁸ New Jersey shows a similar pattern. Although that state rejected a bright-line rule about what constitutes a short-term marriage, it held that one factor—the duration of the marriage—should control determinations of whether to award permanent alimony when all other factors are in equipoise.²⁸⁹ One could certainly imagine a potentially more useful rule of thumb about the number of years required to award permanent alimony. But a rule of thumb that isolates one factor as determinative still helps guide judges. Other courts have embraced other rules of thumb.²⁹⁰ As have state legislators.²⁹¹

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

285. *Todd v. Todd*, 703 S.E.2d 597, 600 (Ga. 2010).

286. *Patel v. Patel*, 577 S.E.2d 587, 589 (Ga. 2003).

287. *Id.*

288. *Id.*

289. *Gnall v. Gnall*, 119 A.3d 891, 901–02 (N.J. 2015).

290. *See, e.g., Clair v. Clair*, 281 P.3d 115, 120 (Idaho 2012) (citing *Moye v. Moye*, 627 P.2d 799, 801–02 (Idaho 1981)) (“[T]he 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.”); *Housand v. Housand*, 509 S.E.2d 827, 828 (S.C. Ct. App. 1998) (“The court used the ‘tender years’ doctrine as a tiebreaker when awarding custody to the Mother. The award of custody to the Mother was affirmed on appeal . . .”). *But see Hadick v. Hadick*, 603 A.2d 915, 919 (Md. Ct. Spec. App. 1992) (alterations in original) (“We have stated that ‘[t]here can be no tie-breaker in a custody case because . . . there should never be a tie.’”). Other courts have gone further and embraced presumptions that require special showings to overcome. *See, e.g., Hodge v. Hodge*, 174 P.3d 1137, 1138–39 (Utah Ct. App. 2007) (outlining presumption of an equal division of marital property that can be overcome by “exceptional circumstances”).

291. *See* ARK. CODE ANN. § 9-13-101 (West 2017) (beginning with the command that

The descriptive pattern above—where courts reject rulification via bright-line rules but embrace rulification via rules of thumb—has a great deal of normative appeal. Taking a strong antirulification stance has some benefits. It promotes the same benefits as standards: flexibility and allocating power to trial courts.²⁹² Rulification through rules of thumb maintains these benefits. Allowing rulification through rules of thumb would not imperil the flexibility of the underlying standards. Coenen paints with too broad a brush when he says that “if the first-order choice of a standard over a rule stems primarily from the Court’s desire to minimize problems of over- and under-inclusiveness in the application of law to fact, then the Court will have good reason to bolster the standard with an anti-rulification rule.”²⁹³ He had bright-line rules (or presumptions) in mind. While these rules take discretion away from trial judges, and are indeed the antithesis of totality-of-the-circumstances standards, rules of thumb do not take discretion away from trial judges. Rules of thumb exert force only after the totality-of-the-circumstances test has failed to isolate only one acceptable outcome. They exert force only when they point to an outcome within the set of outcomes that the standard cannot adequately distinguish from one another—that is, within the set of outcomes that cannot clearly be identified as examples of over or underinclusion.²⁹⁴ Accordingly, rules of thumb complement rather than contradict the underlying standards. Further, the rules of thumb that this Article envisions leave power in the hands of trial courts. This is because those rules of thumb are created by trial judges themselves.

Rules of thumb also avoid the substantial costs associated with a strong antirulification stance. Such a stance impedes the process of precedential accumulation that is the hallmark of the common law, hinders experimentation by lower courts, and often merely drives rulification underground rather than eliminating it.²⁹⁵ Family law’s open-ended standards have indeed thwarted the type of progress that normally accompanies common-law reasoning. Rules of thumb represent the first step toward harnessing the power of the common law form. They begin a conversation among local judges, between judges and local citizens, and

“the award of custody of a child of the marriage shall be made . . . solely in accordance with the welfare and best interest of the child” but then noting that “an award of joint custody is favored”). Legislators have also sought to create tiebreakers. *See, e.g.*, H.B. 453, 85th Leg., Reg. Sess. (Tex. 2017).

292. Coenen, *supra* note 36, at 687–88, 690.

293. *Id.* at 683.

294. Williams, *Divorce All the Way Down*, *supra* note 12, at 18.

295. Coenen, *supra* note 36, at 681, 683, 693.

between trial and appellate courts that has so far remained suppressed. As discussed above, rules of thumb also allow for local experimentation and innovation.²⁹⁶ And rather than driving rules underground,²⁹⁷ embracing public rules of thumb exposes them to sunlight and allows both judges and other interested parties to engage in conversations about judicial policies.

Ultimately, rules against rulification do not—as a descriptive or normative matter—create barriers to the rules of thumb that this Article proposes.

C. *Overworked Judiciary*

Recall that several commentators have asked appellate courts to develop a common law around family law’s open-ended standards.²⁹⁸ Those reforms ask appellate courts to voluntarily increase their workload by actively policing trial courts, and ask trial courts to increase their workload by issuing written opinions that are detailed enough to allow for meaningful appellate scrutiny.²⁹⁹ Local rules of thumb do not create these burdens and, in fact, alleviate some of them.

Local rules of thumb reduce the workload of trial courts. Rather than searching endlessly through a haystack of testimony to find a needle that will allow a judge to decide which parent should have custody, or whether to award \$1,000 or \$1,100 per month in alimony, local rules of thumb offer advisory tiebreakers. Judges have already shown that they crave advice in these matters. For example, many judges hire custody evaluators.³⁰⁰ Those evaluators are often underqualified and use psychological methods proven to be irrelevant to custody matters.³⁰¹ Custody evaluations are junk science.³⁰² Nonetheless, judges defer because they crave advice.³⁰³ Several

296. *See supra* Part III.

297. *See* Coenen, *supra* note 36, at 693.

298. *See supra* Part II.C.

299. *See supra* Part II.B.

300. Lund, *supra* note 138, at 410.

301. *Id.* (noting “the lack of empirical foundation” for many recommendations made by custody evaluators); Nathan, *supra* note 136, at 900–01 (critiquing faulty psychological methods of custody evaluators).

302. *See* Scott & Emery, *supra* note 98, at 95 (noting that custody evaluators often provide opinions based upon biases, as opposed to scientific knowledge or training).

303. *See, e.g.,* Milfred D. Dale & Jonathan W. Gould, *Science, Mental Health Consultants, and Attorney-Expert Relationships in Child Custody*, 48 FAM. L.Q. 1, 5 (2014); Kelly & Ramsey, *supra* note 23, at 287; Lund, *supra* note 138, at 412 (noting that “judges’ orders are in accord with custody recommendations in about 85% of cases”);

recent innovations in alimony provide additional support for this. In Michigan in the late 1980s, two local attorneys developed alimony guidelines and embedded them in a software package for family law attorneys.³⁰⁴ Today, the majority of judges in Michigan consider the results from that program when setting alimony, and some view the results as presumptively correct.³⁰⁵ The formulas in Michigan have also migrated out of state.³⁰⁶ Colorado recently enacted a complex set of alimony formulas that are completely nonbinding.³⁰⁷ Courts just have to do the calculations.³⁰⁸ The Colorado legislature essentially created a rule of thumb. Colorado legislators apparently think, and rightly so, that trial courts will welcome the guidance that nonbinding rules of thumb provide. One final example shows even more clearly the judicial appetite for advice. In 2005, Canadian law professors developed alimony guidelines with a grant from the Department of Justice Canada.³⁰⁹ These guidelines provide presumptive ranges for the amount of spousal support, but judges have discretion to award amounts within or outside those ranges.³¹⁰ Although no legislature ever adopted those guidelines, the major complaint as of 2011 was that judges did not deviate from them enough.³¹¹ This again shows how much trial judges crave advice, and suggests that they would embrace local rules of thumb as a way to decrease the overwhelming burden of family law's open-ended standards.

Appellate judges would not see the same benefits from local rules of thumb, but they would not be significantly burdened by them either. At first,

Mary E. O'Connell, *Mandated Custody Evaluations and the Limits of Judicial Power*, 47 FAM. CT. REV. 304, 310 (2009); Noel Semple, *The "Eye of the Beholder": Professional Opinions About the Best Interests of a Child*, 49 FAM. CT. REV. 760, 760 (2011).

304. See STATE BAR OF MICH., STANDING COMMITTEE ON JUSTICE INITIATIVES: ALIMONY GUIDELINES SURVEY REPORT BY THE ALIMONY GUIDELINES PROJECT OF THE EQUAL ACCESS INITIATIVE 1-2 (2005), <https://www.michbar.org/file/programs/eai/pdfs/alimonyguidelinessurvey.pdf>.

305. *Id.*

306. N.M. JUDICIAL EDUC. CTR. ET AL., NEW MEXICO FAMILY LAW MANUAL: TOPICS IN FAMILY LAW FOR THE NEW MEXICO JUDICIARY 2 (2011), <http://jec.unm.edu/manuals-resources/manuals/Family%20Law%20Manual%2001-11%20-%20FINAL.pdf>.

307. COLO. REV. STAT. ANN. § 14-10-114 (West 2017).

308. *Id.* § 14-10-114(3)(a), (3)(e).

309. Carol Rogerson & Rollie Thompson, *The Canadian Experiment with Spousal Support Guidelines*, 45 FAM. L.Q. 241, 241-45, 250 (2011).

310. *Id.* at 251.

311. *Id.* at 264. To the extent that local family law rules of thumb incorporate numeric formulas, they are likely to benefit from an illusion of precision. See Ellman, *supra* note 98, at 185.

local rules of thumb would only require appellate courts to refrain from acting; that is, to refrain from telling trial courts that they cannot create local rules. Later, as local rules of thumb develop, appellate courts would have the opportunity to step in when those rules of thumb are outside of the wide range of reasonable interpretations of family law's open-ended standards. Even if appellate courts would have to intervene often to police rules of thumb, this requires much less than previous reform proposals. The numbers alone matter. Instead of policing every individual decision by every individual judge, appellate courts would face the far less significant burden of policing statements by groups of judges that are relatively stable over time. Local rules of thumb not only reduce the number of cases that appellate courts would face, but would also offer a clear target for appellate scrutiny. Instead of having to sift through opinions for clues of bias or hints as to pretextual motives, appellate courts would merely read the local rule of thumb. Even after the target of appellate scrutiny is identified, this reform asks less of appellate courts than past reform proposals. It would likely be far easier for appellate courts to identify those rules of thumb that transcend important boundaries of reasonableness (the bad apples) than to choose one rule among the large set of reasonable rules (for example, staking out a position on whether gala apples are superior to honeycrisp).³¹² The latter is what reformers sought to saddle appellate courts with when they asked them to create a common law of divorce. The former is what policing local rules of thumb requires.

D. Forum-Shopping

Increasing the predictability of divorce cases increases the possibility that one spouse will attempt to forum-shop. But there are substantial barriers to forum-shopping. In divorce and other family law actions, venue is determined by the couple's county of residence.³¹³ Moving is always difficult, and it is especially difficult when it involves switching children to a new school or when there is marital strife.

Most importantly, forum-shopping is incredibly easy to police. Under family law's open-ended standards, a spouse who moves her family to a new jurisdiction in an effort to obtain a more favorable divorce ruling is likely to suffer greatly. What does it say about that person's parenting if they are willing to move the child to a new school just for the opportunity for a better

312. The Author inadvertently started a surprisingly lengthy and heated debate by doing the latter and favoring honeycrisp apples.

313. 27A C.J.S. *Divorce* § 166 (2017).

divorce result? Judges can and will respond accordingly. At a minimum, it would be easy for a judge who suspects that one spouse is attempting to forum-shop to simply apply the local rules of thumb from the family's former place of residence.³¹⁴ Similarly, states could mandate such a result in the unlikely event that forum-shopping becomes prevalent and judges are unable or unwilling to police it.

E. Group Polarization and Ideological Amplification

Group deliberation is no silver bullet. In fact, it carries risks. Many deficiencies of group deliberation, however, are simply not relevant in the context of local rules of thumb. Other deficiencies, like the possibility of group polarization, are relevant but unlikely to cause significant problems.

Some deficiencies in group processing are not particularly concerning. Although the relevant research often reports mixed results, group deliberation has sometimes been found to exacerbate the endowment effect,³¹⁵ sunk cost bias,³¹⁶ and the effects of priming by attorneys,³¹⁷ at least when a majority of group members exhibit those effects prior to deliberation.³¹⁸ Similarly, group discussion sometimes exacerbates framing effects, at least when all members are exposed to the same frame.³¹⁹ But

314. There are details to be worked out that require some arbitrary linedrawing. State law might single out families that have moved within the last two years, or one year, or six months. The Uniform Child Custody and Jurisdiction Act uses six months. UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT §§ 102(7), 201(a)(1) (UNIF. LAW COMM'N 1997). Under that uniform law, a mother who moves with her children to a new state before a divorce can still be subject to the laws of the children's former home for six months, as long as the other parent remains in their former home state. *Id.* § 201(a)(1).

315. See Jeremy A. Blumenthal, *Group Deliberation and the Endowment Effect: An Experimental Study*, 50 HOUS. L. REV. 41, 51–52 (2012).

316. See Stasser & Dietz-Uhler, *supra* note 200, at 48 (collecting studies finding that groups are more likely than individuals to escalate their commitment to a failing course of action, especially when they identify strongly with the group).

317. Haegerich et al., *supra* note 199, at 89–92 (finding that deliberation reduced pre-existing stereotypes about young offenders, but exacerbated the effects of attorney-encouraged stereotypes in one of two scenarios).

318. See SUNSTEIN & HASTIE, *supra* note 49, at 54–55; Sunstein, *supra* note 204, at 991.

319. Kerry F. Milch et al., *From Individual Preference Construction to Group Decisions: Framing Effects and Group Processes*, 108 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 242, 242–43 (2009) (collecting studies and noting the mixed results of framing and group discussion); Ilan Yaniv, *Group Diversity and Decision Quality: Amplification and Attenuation of the Framing Effect*, 27 INT'L J. FORECASTING

these biases are quite tangential to the process of creating local rules of thumb. So too are a host of biases that tend to be mitigated by group discussion, like anchoring, availability, and the hindsight bias.³²⁰

Another critique of deliberation is that it often fails to harness the positive potential of groups.³²¹ This type of group failure—the failure to produce better decisions than individuals—is not a strong reason to resist local rules of thumb. Groups often perform as well or better than their average member.³²² Group deliberation has the potential to produce better overall decisions, while at worst generating decisions that are no better or worse than individual decisions taken as a whole.³²³ So groups will often offer the possibility of a large upside without a large downside. Even if rules of thumb only reflect the wisdom and expertise of the average judge, rather than the best judge, they nonetheless have significant advantages. Rules of thumb—regardless of their content—increase predictability by harmonizing the decisions of individual judges and offer more avenues for other stakeholders to weigh in on family law matters.³²⁴

Group polarization is potentially more troubling. Deliberating groups sometimes experience ideological amplification.³²⁵ For example, if Trump supporters begin with mild support for the proposition that global warming is a hoax, they might well strengthen that conviction after talking with one another. In a common study design, subjects are asked to state their agreement with a proposition on a 10-point scale.³²⁶ Then those individuals discuss the issue and are asked to generate a group response to the same

41, 44–46 (2011) (finding that group members experiencing similar frames exhibited an amplified framing effect).

320. SUNSTEIN & HASTIE, *supra* note 49, at 53 (analyzing the effects of availability and anchoring biases); Sunstein, *supra* note 204, at 993 (discussing hindsight bias).

321. SUNSTEIN & HASTIE, *supra* note 49, at 30, 93; Sunstein, *supra* note 204, at 997 (emphasis added) (stating, with regard to common knowledge effects and hidden profiles, “[D]eliberating groups would have lost *nothing* in terms of accuracy if they had simply averaged the judgments of the people involved”).

322. See SUNSTEIN & HASTIE, *supra* note 49, at 31 (noting that groups often reflect the views and expertise that a majority of their members hold); Dunning, *supra* note 213, at 163 fig.3, 163–64 (finding that people accurately identify nonexperts, but have trouble identifying those with more expertise than themselves).

323. See Sunstein, *supra* note 204, at 983.

324. See Williams, *Divorce All the Way Down*, *supra* note 12, at 31–32.

325. See, e.g., David Schkade et al., *What Happened on Deliberation Day?*, 95 CAL. L. REV. 915, 927 (2007) [hereinafter Schkade et al., *What Happened on Deliberation Day?*].

326. See, e.g., *id.* at 919–20.

question.³²⁷ Individuals are also asked to restate their opinion after deliberation.³²⁸ Groups often adopt a more extreme position than the mean of its predeliberation individual members would suggest.³²⁹ Individuals' opinions also become more extreme.³³⁰

One classic study sorted people from Colorado into liberal and conservative groups.³³¹ Those homogeneous groups then discussed hot-button issues of the day: global warming, affirmative action, and civil unions.³³² Of the groups that were able to reach consensus, 76 percent experienced ideological amplification.³³³ That is, group answers were more extreme than the average prediscussion answers provided by their members.³³⁴

Group polarization is caused by three principle factors.³³⁵ First, arguments that are favored by a majority of group members will be more plentiful during discussions.³³⁶ This imbalanced argument pool skews opinion.³³⁷ Second, social pressure to agree can cause people to defer to others even when they have important contributions to make.³³⁸ Third, group deliberation often increases confidence, which itself can reduce members' inclinations toward moderate positions.³³⁹

Happily, there are reasons to think that group polarization will not be a large problem for local judges. First, social pressures among judges are likely to operate quite differently than social pressures among, for example, jurors. These differences stem from both the differing contexts that those groups operate within, and the different dispositional traits that judges are likely to possess. Second, judges understand the value of dissent, and

327. *See, e.g., id.*

328. *See, e.g., id.*

329. David Schkade et al., *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139, 1165 (2000) [hereinafter Schkade et al., *Deliberating About Dollars*].

330. *Id.*

331. Schkade et al., *What Happened on Deliberation Day?*, *supra* note 325, at 918–19.

332. *Id.* at 920.

333. *Id.* at 924.

334. *Id.*

335. SUNSTEIN & HASTIE, *supra* note 49, at 83–84.

336. *Id.* at 83.

337. *Id.* at 83–84.

338. *Id.* at 84.

339. *Id.*

promoting dissent is a common antidote to group polarization. Third, even if judges do exhibit group polarization, its magnitude will be small and it will have a silver lining.

Requiring a group to reach consensus exacerbates group polarization.³⁴⁰ In some groups, there are strong pressures to reach consensus. The jury is a quintessential example. The social pressures that accompany striving for consensus can cause people to suppress information that conflicts with the majority view.³⁴¹ This self-censorship deprives groups of potentially valuable information and dissenting opinions that might otherwise moderate the group's decision.³⁴²

The pressures for consensus in the context of local rules of thumb are far weaker than they are, for example, in the context of juries. Juries must reach consensus in order to finish their task properly.³⁴³ Jurors are likely to feel that a hung jury reflects some deliberative failure on their part.³⁴⁴ Judges do not face that pressure. Judges might simply find that they do not agree, in which case they can simply decline to adopt a rule of thumb. In fact, not making any decision is the easiest course of action. Unlike juries, where disagreement normally means that the jurors have to put in more work, if judges disagree they get to go home early. It is only if they agree that they then have to worry about drafting specific language to capture that agreement. Judges can also shift targets easily. If they cannot agree on a rule of thumb for custody, they might still be able to come to agreement on one for alimony or relocation. So even if judges feel some social pressure to find an agreement, they can shift topics to the one most likely to yield that agreement. In contrast, jurors are stuck answering the questions they have been given.

The fact that judges are attempting to reach consensus on value judgments also matters. To see why, it will be useful to first consider factual judgments. Groups sometimes deliberate to find the answer to a complex factual question. In these situations, group members often defer to the majority opinion even when they initially disagreed with the factual answer the majority gave.³⁴⁵ This deference deprives the group of potentially

340. *See id.* at 83–85.

341. Sunstein, *supra* note 204, at 1013.

342. *See* SUNSTEIN & HASTIE, *supra* note 49, at 38.

343. *See* Lynch & Haney, *supra* note 200, at 485.

344. *See* Monica K. Miller & Brian H. Bornstein, *Do Juror Pressures Lead to Unfair Verdicts?*, AM. PSYCHOL. ASS'N (Mar. 2008), www.apa.org/monitor/2008/03/jn.aspx.

345. SUNSTEIN & HASTIE, *supra* note 49, at 29–30.

moderating voices.³⁴⁶ These patterns are less likely to hold when groups deliberate about value judgments. Judges, just like other people, will understand that people can legitimately disagree about questions of value. For example, how much should adultery matter in dividing the marital property? This is not a question that is amenable to a correct answer, and so judges are unlikely to defer to their peers because they think they are more likely to have the right answer.

Judges also possess traits that make group polarization less likely. One commonly cited way to reduce group polarization is to invite dissent and promote the idea that dissent is productive.³⁴⁷ Judges already understand this. Their legal training was assuredly full of famous dissents. Almost all constitutional law casebooks discuss *Lochner v. New York* and *Plessy v. Ferguson*.³⁴⁸ In those cases, it is the dissent that is canonical.³⁴⁹ Other famous dissents come easily to mind, like *Olmstead v. United States*, *Korematsu v. United States*, and *Abrams v. United States*.³⁵⁰ Judges, perhaps more than any other group, understand the value of dissent.

Another commonly cited method for reducing group polarization is encouraging people to share their opinions and information rather than remaining silent.³⁵¹ Here again, judges are likely to do well in groups. Judges are not shrinking violets. They were often highly successful attorneys before their time on the bench. It is likely that their time on the bench only bolsters their assertiveness. They are each in charge of their own fiefdom; they rule on motions; they decide cases. These are not people who will shy away from sharing their opinion or expressing disagreement.

Additionally, judges who want to promote good group deliberations could do many other things. They could assign a devil's advocate.³⁵² They could structure deliberations to brainstorm fully before selecting a single

346. These dynamics also allow both preexisting majorities and higher-status individuals to have a disproportionate influence on group outcomes. J. Richard Hackman & Nancy Katz, *Group Behavior and Performance*, in 2 HANDBOOK OF SOC. PSYCH. 1208, 1228 (Susan Fiske et al. eds., 5th ed. 2010).

347. *Id.* at 1129; see SUNSTEIN & HASTIE, *supra* note 49, at 108.

348. J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1018 (1998).

349. Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 245–46 (1998) (discussing famous dissents).

350. See William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 432 (1986).

351. See SUNSTEIN & HASTIE, *supra* note 49, at 111–12.

352. See *id.* at 116–18.

solution.³⁵³ Or they could seek information from outside the group—for example, from psychologists.³⁵⁴ This last method is, in fact, partially built into local rules of thumb. Sunstein has touted the benefits of notice-and-comment procedures for reducing group biases.³⁵⁵ Although local rules of thumb can be created without such outside influence, making those rules of thumb public ensures that outsiders will have opportunities to offer potentially useful insights or critiques. So even if a rule of thumb does not initially benefit from outside opinions, later iterations of it will.

This public feedback mechanism also mitigates the third main cause of group polarization: deliberation's tendency to increase confidence. As local rules of thumb develop, judges are likely to consult other local rules of thumb before adopting their own.³⁵⁶ Seeing different and potentially conflicting local rules of thumb will mitigate overconfidence. If judges know that many of their reasonable peers disagree with them, they are less likely to suffer from an overabundance of confidence in their own judgments.

Suppose that, despite situational and dispositional factors that mitigate group polarization, judges experience ideological amplification. Any such amplification is likely to be mild and potentially useful.

Legal commentary on group polarization often highlights its potential dangers without sufficiently attending to the magnitude of the effect. Even under conditions that were created to facilitate group polarization, it nonetheless produces only mild results. Consider again the classic examination of group polarization in Colorado.³⁵⁷ Group opinions tended to be 5 to 15 units more extreme on a 100-point scale.³⁵⁸ In another study, individuals were sorted by their preferred presidential candidate (Romney versus Obama) or their preferred president (Obama versus Bush).³⁵⁹ These like-minded groups exhibited polarization after discussions aimed at

353. *Id.* at 128–29.

354. Williams, *Divorce All the Way Down*, *supra* note 12, at 28.

355. SUNSTEIN & HASTIE, *supra* note 49, at 197.

356. After all, this is analogous to consulting the policies of sister states that is part of what many judges would naturally do when their state law leaves interpretive gaps.

357. Schkade et al., *What Happened on Deliberation Day?*, *supra* note 325, at 918–19.

358. *Id.* at 921. The study used a 10-point scale. I've converted it to 100 points for ease of comparisons with other studies. The largest shift was equivalent to 21.6 units on a 100-unit scale. This shift occurred for conservative groups discussing global warming. *Id.*

359. Jessica Keating et al., *Partisan Underestimation of the Polarizing Influence of Group Discussion*, 65 J. EXPERIMENTAL SOC. PSYCHOL. 52, 53–54 (2016).

generating a consensus on the reasons for their choices.³⁶⁰ Individuals' postdiscussion opinions were between 1 and 6 points more extreme on a 100-point scale.³⁶¹ In another study, groups of jurors exhibited group polarization when assessing the appropriate level of punishment that a defendant deserved.³⁶² There was a good deal of heterogeneity in the data; some juries polarized, others did not, and others shifted in the reverse direction and moderated individual judgments.³⁶³ But across groups, there was evidence of mild polarization.³⁶⁴ Converted to a 100-point scale, deliberation tended to increase punishment judgments by 2.5 points if the individuals were initially disposed to favor more punishment.³⁶⁵ In groups where individuals indicated that less punishment was appropriate, deliberation decreased punishment judgments by about 3.75 points.³⁶⁶

These shifts associated with group polarization, although real, are not particularly severe. A 1-to-6 point shift on a 100-point scale seems mild. And

360. *Id.* at 56.

361. *Id.* at 55 tbl.1, 57 tbl.2. Subjects indicated the strength of their preferences by putting a mark on a line that was 15.8 centimeters long. This 15.8-point scale has been converted into a 100-point scale for ease of comparison.

362. Schkade et al., *Deliberating About Dollars*, *supra* note 329, at 1152 tbl.3. Note that the authors use the term "choice shift" to describe the difference between pre-deliberation individual judgments and group judgments. *Id.* at 1160, 1164. They reserve the term group polarization for differences between pre and postdeliberation individual judgments. *Id.* at 1160, 1164. For ease of exposition, I use the term group polarization for both.

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.* at 1155. Readers familiar with this study may wonder whether judges will experience a severity shift. The short answer is no. In the study, juries exhibited a severity shift—they tended to award more in damages than their median member, and sometimes awarded more than any of the members thought appropriate before deliberation. *Id.* at 1140, 1153. The authors opined that this was due to a rhetorical asymmetry. *Id.* at 1161. It was easier to argue for more money than less, in part because potential dollar awards face a boundary on the low end—zero—but not on the high end. *Id.* at 1147–48, 1161. They can go up and up, especially when the defendant is a large corporation. Such severity shifts do not occur when group members are using a bounded scale—like a scale from zero to eight—to indicate their judgment. *Id.* at 1152. Local family law has built-in scales. Consider a judge who favors awarding more money to the innocent spouse in adultery cases. She cannot ramp up that monetary penalty without bound. *See Williams, Divorce All the Way Down*, *supra* note 12, at 8–9. She is limited to splitting a fixed and often very small pot of marital property. Judges are, accordingly, used to thinking in terms of percentages rather than raw dollars. *See id.* at 38. One spouse might deserve 60 percent of the marital property because of some fault of the other, rather than the often unspoken default of 50–50.

most of the shifts were in this range.³⁶⁷ A 15-to-20 point shift is more significant, although perhaps not sufficient to condemn group deliberation for its polarizing effect.

These often mild effects must be interpreted in light of the survey designs that produced them. The more severe shifts were produced by studies that first segregated groups to ensure that they were homogeneous, and then asked them to come to a consensus on the relevant issue.³⁶⁸ These features exacerbate group polarization.³⁶⁹ That is, these studies attempted to find group polarization under its ideal conditions. Some readers may wonder whether groups of local judges will be a lot like the homogeneous segregated groups in the Colorado study. Recall that Collin County, Texas, has a standing order that precludes overnight guests, while Travis County's standing order does not.³⁷⁰ This suggests that local judges might be similar, perhaps simply because some cities have particular characters. Austin tends to attract people who are more likely to be liberal and belong to the Democratic Party, making it a blue island in a red state.³⁷¹ But even in counties where one party dominates judicial elections, there is substantial room for disagreement about family law matters. Does a housewife deserve large amounts of alimony? Utah, a very red state, says yes.³⁷² Texas, a very red state, says no.³⁷³ California, a blue state, was the first state to embrace no-fault divorce.³⁷⁴ New York, a blue state, was the last.³⁷⁵ More generally,

367. Keating et al., *supra* note 359, at 55, 57.

368. *Id.* at 53–54; Schkade et al., *What Happened on Deliberation Day?*, *supra* note 325, at 928.

369. SUNSTEIN & HASTIE, *supra* note 49, at 79, 83–85.

370. *See supra* notes 167–68.

371. *See, e.g.*, Marian Salzman, *Austin Envy*, FORBES (June 3, 2013), <https://www.forbes.com/sites/mariansalzman/2013/06/03/austin-envy/#2d11691f1444> (discussing Austin's liberal atmosphere).

372. *See* UTAH CODE ANN. § 30-3-5(8) (West 2017) (allowing lengthy terms of alimony that equalize the standards of living of the parties).

373. TEX. FAM. CODE ANN. § 8.051 (West 2017) (providing restrictive situations in which maintenance is proper); § 8.054 (limiting the duration of maintenance to “the shortest reasonable period that allows the spouse seeking maintenance to earn sufficient income to provide for the spouse’s minimum reasonable needs”); § 8.055 (limiting the amount of maintenance to the lesser of \$5,000 or 20 percent of the spouse’s gross income).

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

375. *Id.* at 178–79. And some New York judges still resist it. Sophia Hollander, *Divorces Drag On Even After Reform*, WALL STREET J. (May 6, 2012), <https://www.wsj.com/articles/SB10001424052702304811304577368110112622548>.

political party may be a poor proxy for many, although not all, family law issues.³⁷⁶

Of course, different groups of judges will have different dynamics, and it is possible that some will experience polarization. But even if this occurs it will still have a silver lining. As discussed above, one of the benefits of local rules of thumb is policy experimentation.³⁷⁷ More extreme positions are more likely to have measureable impacts that can be used to learn about the effects of various policies. More extreme positions are also likely to create more public dialogue and debate. Those data and debates have the potential to better define the range of reasonable policy positions.

V. CONCLUSION

The vision of local power described and defended above—the power of local judges to enact public and substantive local rules of thumb to guide judicial discretion—has the potential to revolutionize family law. It can accomplish what former revolutionaries have failed to achieve. It can make family law’s open-ended standards more rule-like and predictable. This is even more important now than it was when these reform efforts began. Today, idiosyncratic judicial discretion can control even the basic definition of parent, and the idiosyncratic discretion of nonelected custody evaluators exerts a powerful influence on mediation outcomes. Local rules of thumb can tame these instances of discretion and thereby promote the settlement goals of family law’s new paradigm without creating the over and underinclusion problems that would have flowed from the presumptions that past reforms have sought.

Local rules of thumb do not merely take up the causes of past revolutionaries. They create a novel set of benefits that mitigate underappreciated concerns. Allowing judges to adopt local rules of thumb provides local citizens with their first opportunity to examine and comment on judges’ family law policy.³⁷⁸ This feedback begins the process of bolstering the legitimacy of those policies. Local rules of thumb not only create new opportunities for judges to listen, they also create new opportunities for judges to speak, both to one another and to other state officials. The process of deliberating on local rules of thumb itself has numerous benefits, not the least of which is reducing the effect of various stereotypes that might otherwise infect judicial decisions. If and when judges can agree on local

376. Same-sex marriage stands out as the issue that is perhaps most partisan.

377. See *supra* Part II.D.

378. For a more extreme set of solutions to this problem, see Williams, *Divorce All the Way Down*, *supra* note 12, at 41–42.

rules, they can serve as novel signaling devices to appellate courts and state legislators. Local judges might dissent from a statewide norm of equal property division, they might generate norms for relocation disputes where none have previously existed, they might weigh in on whether a man's estate owes child support for a posthumously conceived child, or they might endorse or critique proposed legislative efforts to impose new limits on alimony. Local rules of thumb provide the first channel for local judges to speak as one on these important issues.

Finally, local power promotes experimentation.³⁷⁹ Who would make a better custody evaluator: a childless woman with a Ph.D. in social work or a mother of three with an associate's degree? Does the mere existence of a local alimony formula promote settlement by giving litigants an initial suggestion about what local officials think is fair? Do different child support collection practices hinder or promote stable relationships between children and noncustodial parents? Local experiments can help answer these and many other questions.

Local rules in the family law context are a far cry from the disruptive wild flowers that might undermine the uniformity of a well-tended garden. They are still disruptive. But they disrupt an unruly status quo and offer an important and innovative set of benefits to family law.

379. *See supra* Part III.D.