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## On Family Law Localism: A Comment on Sean Hannon Williams's Sex in the City

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# ON FAMILY LAW LOCALISM: A COMMENT ON SEAN HANNON WILLIAMS’S “SEX IN THE CITY”

*Richard Briffault\**

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## INTRODUCTION

In his Article “Sex in the City,” Professor Sean Hannon Williams addresses the problems of enormous trial court discretion and concomitant unpredictable and inconsistent decisions found in divorce cases by proposing that local governments adopt nonbinding “rules of thumb” that would guide judges in exercising that discretion with respect to issues such as child custody, property division, and income support.<sup>1</sup> He contends that this proposal would fit within the existing legal framework of state-local relations and would advance the goals of both family law reform and local empowerment with respect to family issues.<sup>2</sup> Specifically, he urges that local legislative action could be a significant step towards the “rulification” reform that state legislatures have so far been unable to achieve, while also serving as a springboard for greater local government participation in a range of issues relevant to family welfare.<sup>3</sup> It is an intriguing proposal. My comment focuses on two issues: (i) local power to act

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1. Sean Hannon Williams, *Sex in the City*, 43 *FORDHAM URB. L.J.* 1107, 1111 (2016).

2. *See id.* at 1110-12.

3. *See id.* at 1123.

on family law matters, specifically the consequences of divorce; and (ii) the appropriate role for local legislative bodies in addressing these issues.

### I. FAMILY LAW LOCALISM: THE LEGAL FRAMEWORK

As Professor Williams explains, family law localism presents two distinct but overlapping questions—whether there is local power to act in the first place, and whether, even if in theory a local government has power to legislate on the subject, it has the further power to prevent state preemption of the local measure.<sup>4</sup> These are sometimes referred to as the powers of initiative and immunity, or the sword and the shield.<sup>5</sup> The two issues overlap because, as is often the case, if the relevant state constitutional or statutory provisions are unclear, courts tend to turn to similar criteria—the costs and benefits of statewide uniformity versus local variation; external effects of local actions; history; and relative institutional capacity—for both questions.<sup>6</sup> The two issues are different, though, because there are many matters that are “local enough” that a local government may have power to address them in the first instance, but that are also “state enough” that the state can displace local action.

#### A. Local Initiative

Starting with local power to act, the general background norm in the United States is Dillon’s Rule, which provides that a local government possesses only those powers (i) expressly delegated to it by the state, (ii) necessarily implied in or incident to the express delegation, or (iii) essential to accomplish the expressly delegated powers.<sup>7</sup> Although Dillon’s Rule has been supplanted by home rule for most cities and some counties in many states,<sup>8</sup> it remains the governing principle wherever home rule has not been provided.<sup>9</sup>

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4. *See id.* at 1135.

5. *See, e.g.*, RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 346-432 (8th ed. 2016).

6. *See id.*

7. *See id.* at 327.

8. *See, e.g.*, *State v. Hutchinson*, 624 P.2d 1116, 1126 (Utah 1980) (criticizing Dillon’s Rule as “antithetical to effective and efficient local and state government.”).

9. *See, e.g.*, Hugh Spitzer, “*Home Rule*” vs. “*Dillon’s Rule*” for Washington Cities, 38 SEATTLE UNIV. L. REV. 809, 856 (2015) (noting that although the state constitution and statutes vest home rule powers in many Washington cities, “Washington should be considered a ‘Dillon’s Rule state’ for its special purpose districts, non-charter counties, and the state’s nine non-code cities and sixty-nine towns”).

Virginia, for example, remains a Dillon's Rule state, and, as a result, tends to read local regulatory powers narrowly,<sup>10</sup> and Dillon's Rule continues to be invoked in many other states, including recent examples in Illinois,<sup>11</sup> South Dakota,<sup>12</sup> and Vermont.<sup>13</sup> For a Dillon's Rule city or county, any local powers with respect to family law are likely to be closely cabined to the authority expressly granted by the state. Thus, in Virginia, the state supreme court concluded that the state law authorizing counties to provide the dependents of county employees with health benefits did not give the county authority to provide dependent benefits to the unmarried domestic partners of county employees, even though the benefits were funded solely by the county.<sup>14</sup>

Many states provide some cities and counties with a broader grant of power to act over a range of issues without having to obtain specific state authorization. This is known as home rule.<sup>15</sup> Home rule can result from a state constitutional amendment, state legislation, or even from expansive state judicial interpretation of legislative grants.<sup>16</sup> Home rule classically takes two forms. Early versions of home rule, dating back to the late nineteenth century, sought to provide municipalities with both authority to take action and protection from state displacement in the area of "local" or "municipal" affairs.<sup>17</sup> In other words, this type of home rule combined initiative with immunity. Building off a United States Supreme Court reference to such an early home rule measure as creating an "imperium in imperio,"<sup>18</sup> this is known as *imperio* home

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10. See, e.g., *Marble Tech., Inc. v. City of Hampton*, 690 S.E.2d 84 (Va. 2010) (holding in absence of express or implied grant of authority from state legislature, locality may not use certain criteria in designating a resource protection area); *Bd. of Zoning Appeals v. Bd. of Supervisors*, 666 S.E.2d 315 (Va. 2008) (holding in absence of specific grant of authority, zoning appeals board lacks power to bring declaratory judgment action); *Bd. of Supervisors of Augusta Co. v. Countryside Inv. Co.*, 522 S.E.2d 610 (Va. 1999) (holding state law allowing counties to impose requirements for subdivision of land did not authorize denial of subdivision approval on basis that development would destroy county's rural environment).

11. See, e.g., *Tri-Power Res. Inc. v. City of Carlisle*, 967 N.E.2d 811, 813 (Ill. App. Ct. 2012) (non-home-rule municipalities in Illinois are subject to Dillon's Rule).

12. See, e.g., *Olesen v. Town of Hurley*, 691 N.W.2d 324, 328-29 (S.D. 2004) (holding state law authorizing municipalities to operate bars that sell alcohol by the drink "does not imply a necessary power" to offer meals at such a bar).

13. See, e.g., *City of Montpelier v. Barnett*, 49 A.3d 120, 127-29 (Vt. 2012).

14. See *Arlington Co. v. White*, 528 S.E.2d 706 (Va. 2001).

15. See, e.g., BRIFFAULT & REYNOLDS, *supra* note 5, at 346.

16. See, e.g., *State v. Hutchinson*, 624 P.2d 1116, 1126 (Utah 1980).

17. See BRIFFAULT & REYNOLDS, *supra* note 5, at 346-47.

18. *City of St. Louis v. W. Union Tel. Co.*, 149 U.S. 465, 468 (1893).

rule.<sup>19</sup> Although providing locally-initiated measures with immunity from state displacement should have created a powerful foundation for local autonomy, in practice state courts were reluctant to immunize local actions from state regulation.<sup>20</sup> As a result, the notion of “local” or “municipal” affairs often received narrow interpretations in both the initiative and immunity settings. In response, in the mid-twentieth century local autonomy advocates developed a new home rule form that sought to strengthen local initiative power at the price of relinquishing local immunity claims. Known as “legislative home rule,” this type of home rule provides that a home rule local government can exercise all legislative powers that the state could delegate unless and until a power is taken back by the state.<sup>21</sup> Most modern home rule enactments have been of the legislative form, although in practice some state constitutions blur these theoretically sharp distinctions and use a mix of both *imperio* and legislative language.<sup>22</sup>

Under legislative home rule, most contested issues are preemption questions rather than local-power-to-act-in-the-first-place issues, which would provide some support for family law localism, at least in the first instance. However, some legislative home rule provisions contain a further qualification, based on a proviso in the National Municipal League’s model home rule amendment, that the broad delegation of powers “shall not include the power to enact private or civil laws governing civil relationships except as incident to the exercise of an independent power.”<sup>23</sup> This idea that regulating “private or civil law governing civil law relationships” is inherently beyond the scope of local power is an old one, and was part of the analysis of local or municipal affairs in *imperio* states.<sup>24</sup> Although an obviously vague concept, it almost surely encompasses family law, including the consequences of divorce. The two most quoted dicta concerning this phrase were uttered by Benjamin Cardozo, when he was chief judge of the New York Court of Appeals, and Chief Judge Arthur Vanderbilt of the New Jersey Supreme Court. According to Chief Judge Cardozo:

There are other affairs exclusively those of the state, such as the *law of domestic relations*, of wills, of inheritance, of contracts, of crimes

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19. See, e.g., BRIFFAULT & REYNOLDS, *supra* note 5, at 347.

20. See, e.g., *id.* at 347-48.

21. See, e.g., *id.* at 348.

22. See, e.g., *id.* at 348-50.

23. See, e.g., *id.* at 364-75.

24. See, e.g., *id.* at 372-75.

not necessarily local (for example, larceny or forgery), the organization of courts, the procedure therein. None of these things can be said to touch the affairs that a city is organized to regulate, whether we have reference to history or to tradition or to the existing forms of charters.<sup>25</sup>

Relying on Cardozo's statement, Chief Judge Vanderbilt observed:

Provisions for home rule have not given omnipotence to local governments. Matters that because of their nature are inherently reserved for the State alone and among which have been the master and servant and landlord and tenant relationships, matters of descent, the administration of estates, creditors' rights, *domestic relations*, and many others of general and statewide significance, are not proper subjects for local treatment under the authority of the general statutes. The broad grant of power . . . relates to matters of local concern . . . not to those matters involving state policy or in the realm of affairs of general public interest and applicability . . . The limitation upon legislative power is in the subject itself, and not in the nature or character of the political subdivision to which the grant is made.<sup>26</sup>

To be sure, as Professor Williams has observed,<sup>27</sup> many local government actions can affect common law private or civil relationships. Local housing codes can be considered by courts in landlord-tenant disputes, local zoning ordinances can influence the resolution of nuisance cases, and local consumer protection or anti-discrimination measures can play a role in determining the outcome of other tort actions.<sup>28</sup> So, too, the exception to the limitation on local power to enact laws governing civil relationships for measures "incident to an exercise of an independent" local power could provide authorization for local laws grounded in the grant of police power to promote the local general welfare—such as the well-being of children affected by divorce—that "incidentally" affect private or civil

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25. *Adler v. Deegan*, 167 N.E. 705, 713 (N.Y. 1929) (emphasis added).

26. *Wagner v. Mayor & Council of Newark*, 132 A.2d 794, 800-01 (N.J. 1957) (quoting *Paul v. Gloucester Co.*, 50 N.J.L. 585, 601-02 (Ct. Err. & App. 1888) (emphasis supplied)).

27. See Williams, *supra* note 1, at 1143.

28. See, e.g., Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109 (2012); Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671 (1973). But see *McCrorry Corp. v. Fowler*, 570 A.2d 834 (Md. 1990) (invalidating local employment discrimination ordinance); *Bannerman v. City of Fall River*, 461 N.E.2d 793 (Mass. 1984) (invalidating local regulation of the conversion of rental units to condominiums on private/civil relationships grounds).

relationships.<sup>29</sup> Still, the concept of “incidental” may be key; local measures intended to directly influence the determination of state-law rights, such as those of divorcing marital partners with respect to their children, property, and ongoing post-divorce obligations in state civil litigation, may go to the heart of the private/civil law limitation on local power to act.<sup>30</sup> Perhaps the safest thing to say is that given the vagueness of both the private/civil law limitation and the incident-to-independent-power exception to the limitation, it is uncertain how this restriction would affect family law localism, but it certainly means that the question of local power to act in the first instance is pretty far from open and shut.

To recap, in the absence of an express state grant, local power to act on family law matters is unlikely to exist for local governments subject to Dillon’s Rule. However, it could exist in home rule jurisdictions, particularly in legislative home rule states that do not impose the private/civil law limitation. In those states the question would be whether these are matters that could be delegated to local governments. Given that these are matters that affect the welfare of local residents, I assume the answer would be “yes, they are delegable” and, thus, presumed delegated. In *imperio* states, the question would be whether these issues—such as child custody, property settlements, alimony and support—are local/municipal matters. That is a more difficult question because although these matters surely affect local residents, they are also matters of state concern and historically have been treated as such.

Professor Williams argues that one of the traditional arguments against local action—the value of statewide uniformity—is undermined in the divorce context because of the currently open-ended nature of state standards and the resulting disuniformity in trial court decision-making.<sup>31</sup> He may be right about that. On the other hand, I think he greatly understates the significance of the concern about the external effects of local actions, specifically, the impact that local rules will have on people outside the local jurisdiction, such as when a member of a divorcing couple moves away from the city

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29. *New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149 (N.M. Ct. App. 2005) (holding local living wage ordinances regulates private relationships but is authorized by home rule grant as incidental to the local power to promote the general welfare of local employees).

30. *Cf. Diller*, *supra* note 28, at 1129-34, 1162-67 (arguing that the main effect of the private/civil law exception is to limit the ability of localities to authorize private citizens to bring private civil litigation to enforce local regulations of private behavior).

31. Williams, *supra* note 1, at 1115-17.

whose local law was initially applied, possibly taking the children. He summarily notes “this is not generally seen as a problem in the interstate context.”<sup>32</sup> But what may not be a problem in dealing with just fifty states could become one when dealing with thousands of municipalities. Multiple, varying local building, housing, and zoning codes within a state are feasible because they apply to properties that stay put within the regulating jurisdiction. But applying different intrastate rules to people who can move around a state could cause burdensome legal complications.

Probably the strongest argument for Professor Williams’s version of family law localism is the nature of the local laws that he proposes. By urging only local “rules of thumb” which would function as nonbinding norms that courts would have to consider but need not apply, he may be avoiding the uncertain legal status of local regulation of private or civil relationships by eschewing regulation. Like local challenges to the Patriot Act or declarations of nuclear-free zones,<sup>33</sup> these would be local expressions of views rather than laws, albeit articulated like laws through the official medium of a city council enactment. By falling below the level of laws and purporting not to bind, they might be consistent with even a relatively restricted definition of local power to act.

### B. Preemption

Finding that a locality has power to act is only the first step in the determination of whether a local measure of a subject is valid. With the relatively rare exception of matters in *imperio* states in which local regulation is protected from state displacement, most local measures are subject to preemption by state law.<sup>34</sup> Preemption will occur when state law forbids local action on a subject, the local law is in conflict with state regulation, or state regulation is so pervasive that the state is said to “occupy the field” to the exclusion of local regulation.<sup>35</sup> Professor Williams asserts that “state statutes that control alimony, child custody, and other family law matters do not contain express provisions preempting local law.”<sup>36</sup> I will defer to him on that claim, observing only that the lack of express preemption is almost surely due to the assumption that this is an area in which

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32. *Id.* at 1141.

33. *See id.* at 1111-12, 1124.

34. *See generally* BRIFFAULT & REYNOLDS, *supra* note 5, at 432-94.

35. *See generally id.* at 432-94.

36. Williams, *supra* note 1, at 1144.



there is no local power to act in the first place, thus rendering express preemption language unnecessary. The real issues, then, are conflict and field preemption.

As Professor Williams indicates, whether a local measure would be preempted on conflict or field theories would turn on what a state's law actually says. If state law lays out the factors for a court to consider in making a judgment on an issue like custody or visitation or support, then a local effort to add criteria – even nonbinding rules of thumb – could very well be preempted. On a conflict analysis, the decision would turn on whether the state's law would be treated as a floor – “at least these criteria must be considered, but the court may consider additional criteria” – or as a floor and a ceiling – “these criteria must and only these criteria may be considered.”<sup>37</sup> On the one hand, as long as the local criteria are not themselves inconsistent with the state-listed criteria, there is arguably no conflict and the locally-generated criteria could be added to the court's consideration. On the other hand, the mere fact of adding new criteria means that the state-listed criteria may be given less weight. The factors going into a court's determination of whether this is an appropriate area for local action in the first place could also influence its judgment as to whether the locally-added factors legitimately supplement or illegitimately crowd out the state's factors. Given the state's traditional control of family law, the likelihood of a finding of field preemption is even stronger than conflict preemption.

But if, as Professor Williams contends, state law is more open-ended and “invites judges to consider *any other relevant factor*” in addition to those specifically listed,<sup>38</sup> then there would be no conflict preemption and probably no field preemption either. However, even with an “any other relevant factor” state law, the local government could not *compel* the state court to consider the factors the locality proposes. It would be up to the court to decide whether as a matter of state law a local legislature's enactment of a family law resolution makes the content of that resolution relevant to the court's disposition of the issue which is the subject of the resolution. The fact that a local government has authority to pass a resolution on a subject does not mean it can bind a state court's determination of whether the local government's position is relevant to the legal issue. The court would have to consider the appropriate role of local legislative bodies in the resolution of family law questions.

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37. See BRIFFAULT & REYNOLDS, *supra* note 5, at 469-71 (discussing the role of floors and ceilings in preemption analysis).

38. Williams, *supra* note 1, at 1144.

## II. THE PLACE OF LOCAL LEGISLATURES IN RESOLVING FAMILY LAW DISPUTES

The place of local legislative bodies in the resolution of family law disputes involves separate consideration of the role of the local and the role of the legislature. Professor Williams focuses on some of the principal theoretical arguments for decentralization—the possibility of experimentation, openness to policy entrepreneurship, and the incentive for local political participation.<sup>39</sup> Interestingly, he rejects “efficient sorting” as a justification for his proposal, even though, as he acknowledges, it is “a classic argument”<sup>40</sup> for local decision-making. Efficient sorting is the idea that different people in different local areas have different policy preferences, so that decentralization which permits local policies to match the preferences of local majorities will make more people happy than higher level decision-making which will impose a rule that the overall majority favors but local majorities oppose. The sorting argument is a critical one for localism. If each city were a perfect microcosm of the state as a whole, with the same division of opinion, then local policy actions will leave just as many people as unhappy policy losers as state decision-making. Professor Williams is probably right that few people are likely to select their home city or county based on local policies concerning child custody or alimony after divorce. But views on these policies could conceivably correlate with differences in jurisdictional size and type (big city, small town, suburb, rural area); partisan political preference; race or ethnic composition; socio-economic status; or community lifestyle (“traditional values” evangelical vs. hipster). If so, that is, if views on disputed family law issues correlate with demographic or cultural differences, then the case for family law localism is stronger. If, on the other hand, the different “rules of thumb” adopted by different localities are likely to be more random, the case for localism is weaker, turning on the idea that local governments—unlike the gridlocked state—will actually take action and that the ability to adopt local rules would be an incentive for local political action.

Of course, we already have local decision-making on family law issues—but by local judges, not city councils or county commissions. Trial judges in thirty-four states are locally elected; the remainder are appointed—usually by the governor based on the recommendation of

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39. See Williams, *supra* note 1, at 1127-32.

40. Williams, *supra* note 1, at 1132.

a judicial selection commission—to serve in local districts.<sup>41</sup> In some states, the appointed judges are subject to retention elections.<sup>42</sup> As Professor Ethan Leib has explained, these judges are part of and reflect “a local legal culture.”<sup>43</sup> Although part of the state judiciary, they often see themselves as “in the business of using statutory law to address and accommodate local needs and priorities.”<sup>44</sup> When, as in the family law setting, “state judicial and statutory or pronouncements are ambiguous or vague,” local judges may already be inclined to take a localist approach to contested issues.<sup>45</sup> Professor Leib defends such localist judging as long as the courts are staffed by professional lawyers, are subject to direct supervision by the state judiciary through appellate review, and are composed of elected judges.<sup>46</sup>

But if the local election of state judges has already provided an opening for localist family law, why add local legislatures to the process? I think there are two arguments for adding the legislatures, and two against. In favor of some form of modest local law-making, such as the rules of thumb Professor Williams proposes, legislative action would promote local level uniformity in family law and provide greater democratic engagement with family law decision-making. Of course, the arguments against are exactly the same.

With respect to uniformity, local legislative involvement could increase uniformity of decision-making within a locality. If the city council adopts a rule of thumb and all the judges elected or appointed within that city follow it, there would be greater consistency and predictability of local decisions within that locality—even if the degree of variation within the state as a whole remains the same. On the other hand, identifying a particular rule with particular places—and potentially with particular ethnic groups, party affiliations, and cultural commitments—could harden the divisions within a state and

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41. See INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, Selection & Retention of State Judges: Methods from Across the Country <http://iaals.du.edu/quality-judges/publications/selection-retention-state-judges-methods-across-country> [<https://perma.cc/X6B8-BQSF>].

42. See, e.g., National Center for State Courts, Judicial Selection and Retention: Resource Guide, <http://www.ncsc.org/Topics/Judicial-Officers/Judicial-Selection-and-Retention/Resource-Guide.aspx> [<https://perma.cc/BTJ5-JH4W>].

43. Ethan Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897, 905 (2013).

44. *Id.* at 908.

45. *Id.* at 927.

46. *Id.* at 929.

make approaches to family issues seem to turn on ineffable “community values” and moral judgments rather than the product of principled deliberation, and less subject to judicial review.<sup>47</sup> Professor Williams optimistically suggests that multiple, varying local rules will be followed by studies that generate a set of best practices that will ultimately lead to state-level action.<sup>48</sup> But it is also possible that local rules will freeze divisions and stiffen the resistance of people in one part of the state to rules associated with another.

The democratic case for local legislative involvement is also straightforward. Although locally-elected judges have a democratic pedigree, local councils have an even stronger claim to representing community views and, especially, the diversity of views within the community. Whereas trial court adjudication vests decision-making authority in the hands of a single individual, legislative bodies have plural membership, permitting disagreement and debate,<sup>49</sup> and encouraging engagement by the broader community. Even when both local judges and local legislators are elected, the larger size of the legislative body can enhance the representativeness and the deliberativeness of the decision. On the other hand, given the nonbinding nature of the proposed rules of thumb, local legislators may be tempted to use the occasion of a debate on a question of family law to posture and make public statements intended to please a political audience rather than think through the implications of a decision. This may be particularly likely if the issue involves an emotional, “hot-button” question. When the legislature is not responsible for the outcomes of actual cases, there may be a temptation to act irresponsibly. Local rules of thumb may not be exactly “cheap talk”—they could have political as well as legal consequences<sup>50</sup>—but the lack of binding effect could make them an occasion for not-fully-thought-through action. This may be particularly likely with respect to divorce-related issues that are the subjects of intensive lobbying, which could occur when conflicting members of the local matrimonial bar (say pro-husband vs. pro-wife) push for different resolutions that could be helpful to them in specific

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47. See, e.g., Courtney G. Joslin, *The Perils of Family Law Localism*, 48 U.C. DAVIS L. REV. 623, 634-54 (2014).

48. Williams, *supra* note 1, at 1127-30.

49. See, e.g., Jeremy Waldron, *The Dignity of Legislation*, 54 MD. L. REV. 633, 641-48 (1995).

50. See, e.g., Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons of Congressional Practice*, 61 STAN. L. REV. 573, 589-90 (2006) (holding soft law measures are not necessarily cost-less “cheap talk”).

cases, and use campaign contributions to bolster the appeal of their positions.

Professor Williams's proposal is, in a sense, a "vertical" solution to what might be called a "horizontal" problem—the failure of state legislatures to provide courts with appropriately detailed laws that would result in more consistent resolution of disputed cases. There is also arguably a vertical problem within the court system, with appellate courts not providing proper guidance to trial courts. It is not clear to me whether he believes that local legislative decision-making is actually the better way to resolve family law questions, or whether this is a second best solution to the failures of state-level institutions put forward in the hope that the local resolutions of these issues will be studied and provide a path toward state-level agreement. Decentralization is appropriate when the reasons for failure to resolve the problem at the higher level of government involve a deep disagreement over policies or values within the larger community but there is a greater degree of consensus on these issues within local governments. Decentralization also makes sense when the differences in local needs, conditions or circumstances are so great that the law ought to take them into account because state-wide rules will not work well. It is unclear whether this describes the family law setting.

These comments are not intended to disagree with Professor Williams's call for local legislatively-enacted rules of thumb. Greater clarity and predictability in the law would be desirable, even if only at the local level, and the rules of thumb could facilitate that. But I doubt this will "revolutioniz[e] family law."<sup>51</sup> Local decision-makers are already central to family law judgments. Local legislative enactments might result in a more consistent, more democratically legitimate expression of community sentiments on these issues, but that could just as easily harden disagreements and inflame debates as provide the path Professor Williams seeks toward greater state-level rulification.

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51. See Williams, *supra* note 1, at 1161.