# Family Law's Democratic Foundations

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Sean Hannon Williams, *Divorce All the Way Down: Local Voice and Family Law's Democratic Deficit*, 98 **B.U. L. Rev.** 579 (2018)

For decades, scholars have heaped scorn on family law's open-ended legal standards like "equitable" distribution or the "best interests" of the child.[1] The prevailing view is that such standards are indeterminate because they call on judges to weigh competing values in the absence of social consensus or to make impossible predictions.[2] They therefore invite—in fact, require—judges to make decisions that resonate with their personal preferences or experiences.[3] Laypeople appear to be in full agreement. Virtually every person I've known who has gone through a divorce has a story about the trial judge who "screwed" him or her by imposing values inconsistent with that person's own.

But despite this virtually universal dissatisfaction, attempts to replace these standards with clearer rules or guidelines have largely failed. Scholars have offered convincing explanations for why this failure has been inevitable: people simply do not agree on the values that family law doctrines should reflect; state legislators shy away from controversial substantive positions on family law matters; and interest-group mobilization makes it easier to defeat, rather than to pass, proposed legislation.

This hostile environment is the setting for Sean Hannon Williams's provocative article, *Divorce All the Way Down: Local Voice and Family Law's Democratic Deficit*. Rather than fight the same losing battles, Williams identifies two key insights that gesture toward greater success in the field: first, we should focus on local rather than statewide reforms; and second, instead of bright-line rules or presumptions, we should encourage the development of "rules of thumb"—advice that would kick in when a totality of the circumstances test is inconclusive. These rules of thumb would help to answer questions like, "When determining custody, should judges favor the parent who believes in the importance of school or the parent who believes in the importance of church? When deciding how much each spouse contributed to the marital property, how should the court weigh the efforts of a stay-at-home parent?," (p. 590) providing some guidance for decisions that are usually bundled into the opaque exercise of judicial discretion.

Williams's turn to local solutions—which may come from city governments, school boards, or groups of local trial court judges (p. 582)—is partially motivated by practical considerations. Local governments are both smaller and more homogenous politically and demographically than states. While this may trouble us for other reasons, this lack of diversity may help localities to arrive at a consensus about questions like spousal support guidelines. (P. 621.) Moreover, the sheer number of localities may make it harder for interest groups, like fathers' rights groups, to mobilize opposition to reforms. The relatively benign nature of rules of thumb—only exerting influence within a set of reasonable outcomes—may further diminish incentives for opposition.

But underlying the proposal is a normative critique of family law's open-ended standards that differs from those that have previously been heard. To my mind, the most common critiques of family law's broad standards cluster around concerns about fairness. The judgment may favor one or the other party without substantial justification, or uncertainty may cause the more risk-averse party to settle for less than what he or she might otherwise be entitled.[4] The result is therefore different than what it should

ideally be. Another common critique is that these standards undermine the legitimacy of the judicial system by producing outcomes through a seemingly opaque and arbitrary process.[5]

Williams, in contrast, avoids these traditional critiques, instead depicting open-ended standards as an affront to democratic values. He argues that the ongoing critique of family law as elitist and out of touch with all families arises, at least in part, from the fact that judges often do not reflect the communities they represent. (P. 615.) Moreover, although many judges theoretically stand for election or re-election, most elections are not seriously contested and voters usually lack basic information about the candidates. (Pp. 609-10.) When judges rely on the opinions of private actors like custody evaluators, they invite even less democratically accountable actors to influence the decision-making process. (P. 597.) These decisions are therefore less likely to reflect community values. Just as problematically, the lack of transparency deters community participation and open debate. Encouraging local actors to articulate rules of thumb, either through the legislative process or through the adoption of rules of court, would encourage public participation and allow beneficial innovations to percolate up to the state level. In this regard, local rules of thumb would perform a democracy-forcing function.

Williams addresses a wide range of objections to his proposal, but he devotes the bulk of his attention to the fear that local authorities will adopt either wrongheaded or oppressive rules of thumb. What happens, for example, when local officials discriminate against same-sex parents by adopting a rule that those parents have to go through invasive custody evaluations? (P. 645.) It may be the case, as Williams argues, that most of these attempts would fail because of state and federal antidiscrimination laws or constitutional constraints. But Williams's focus on this concern highlights a deeper uncertainty about the value of democracy in family law. Certain types of value judgments—like how zealously to expose one's child to religion or whether wives should be encouraged to work outside the home—are thought to be central to family autonomy. The idea that the answers should be subject to the preferences of others, even if reflective of the surrounding community, is disquieting.

Williams's proposal puts us to a choice: would we rather have the resolution of family disputes depend on community values or the preferences of democratically unaccountable individuals? The article provides a strong normative case for local experimentation that is already ongoing and shows that many fears about local rules of thumb would be overblown. That said, by setting up a conflict between democratic values and individual autonomy, Williams's article left me surprisingly more uncertain about the elimination of open-ended standards than I was at the outset. But this discomfort is the article's greatest success, injecting new energy into a stale but essential debate.

1. *See, e.g.*, Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 **Law & Contemp. Probs.** 226 (1975); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 **Tul. L. Rev.** 1165 (1986); Ira Ellman, *Why Making Family Law Is Hard*, 35 **Ariz. St. L.J.** 699 (2003).
2. See Mnookin, supra note 1, at 229.
3. See id. at 263.
4. See, e.g., Mnookin, supra note 1, at 262-65.
5. See, e.g., Glendon, supra note 1, at 1169-70.

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