

A THEORY OF LOCAL COMMON LAW

Annie Decker[†]

TABLE OF CONTENTS

INTRODUCTION	1940
I. WHAT IS LOCAL COMMON LAW.....	1945
A. <i>What Local Common Law Is Not</i>	1945
1. Custom.....	1945
2. Social Norms	1949
3. Local Legal Culture	1950
4. Idiosyncratic Local Judicial Behavior	1951
5. What Is “Law” Anyway?.....	1951
B. <i>The State Common Law Baseline</i>	1953
II. A THEORY OF LOCAL COURTS.....	1956
A. <i>Snapshot of Complexity</i>	1956
B. <i>Tentativeness of Local Decision-Making</i>	1962
C. <i>Historical Foundations</i>	1963
III. CONDITIONS CONDUCIVE TO LOCAL COMMON LAW DEVELOPMENT.....	1966
A. <i>Substantive Local Common Law</i>	1967
1. Limited Subject Matter Jurisdiction	1967
2. Stickiness of Appeal	1968
3. Lack of Action by Highest State Court.....	1970
4. Other Factors Likely at Play.....	1972
B. <i>Procedural Local Common Law</i>	1975

[†] Urban Law Fellow, Fordham Law School, and Adjunct Professor, Columbia Law School and Fordham Law School. I am very grateful for the insightful critiques and suggestions provided by Aaron Bruhl, Alexandra Cox, Nestor Davidson, Alfred, Sylvia, and Tom Decker, Catherine Fisk, Mary Gibbons, Rick Hills, Ethan Leib, Lela Love, Joseph Nolfo, Daniel Pearlstein, Nicholas Phillips, Patricia Salkin, David Schleicher, Eve Stotland, Sean Williams, Richard Zorza, and the participants in Cardozo’s Junior Faculty Workshop, the Local Government Law Works-in-Progress Conference, and the Yale Law Women’s Developing Scholarship Workshop. Sarah Jaramillo and Lynn Wishart provided critical library research assistance. Joseph Mercurio provided terrific research assistance.

IV. WHO CARES ABOUT LOCAL COMMON LAW?.....	1978
A. <i>Local Common Law from a Vertical Perspective</i>	1978
B. <i>Access to Justice Problems</i>	1980
1. Identifying the Problems.....	1981
2. Strategies for Ameliorating the Problems.....	1984
V. EXTENDING LOCAL COMMON LAW THEORY.....	1988
CONCLUSION.....	1991

INTRODUCTION

We often hear about state common law: the statewide, judge-made law developed by the highest-level state courts.¹ Occasionally, we acknowledge that slivers of federal common law exist.² But we take for granted that there is no such thing as truly *local* common law: common law only applicable within city, county, or other sub-state boundaries.

In 1963, John Simonett, an attorney who went on to become a prominent Minnesota judge, wrote a short piece satirizing the idea of local common law.³ He opened *The Common Law of Morrison County* with an anecdote:

“There are three great branches of the law,” the senior member of the bar told me when I first arrived at the county seat. I listened respectfully, but also somewhat skeptically, as befitted a man fresh out of law school. He then elaborated: “First, there is the statutory law, the law enacted by the legislature, found in the codes and statute books; second, there is the common law, the law handed down in court decisions since before the days of Coke and found in the reported court cases; and finally, and most important, there is the common law of Morrison County.

It is now ten years later and, oh, ’tis true, ’tis true. Not all the law is in the books.

....

¹ *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 86 (2d Cir. 2006) (“Historically, common law liability has formed the bedrock of state regulation . . .”), *aff’d sub nom.* *Warner-Lambert Co. v. Kent*, 552 U.S. 440 (2008).

² See, e.g., Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1167 (1986); Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 597 (2006).

³ See John E. Simonett, *The Common Law of Morrison County*, 49 A.B.A. J. 263 (1963), available at <http://mnbenchbar.com/2011/09/the-common-law-of-morrison-county>.

... [E]ach year of law practice has brought with it an increasing realization of my vast ignorance of the third great branch of the law⁴

Despite the jest, Simonett captured something happening in thousands of jurisdictions across the United States.

This Article sets out a theoretical and normative theory of “local common law,” supported by on-the-ground stories. Local common law is the town, city, and county counterpart to state common law. Like state common law, local common law is judge-made, extended to the limits of, but not beyond, a single jurisdiction, and has a legal effect. But state and local common law differ in meaningful ways, such as in geographic scope and source of authority.

Today’s local common law is substantive, covering tort, landlord-tenant, mental health, family, and criminal law.⁵ Local common law is also procedural,⁶ providing rules for issuing protective orders, statutes of limitation, methods of collecting traffic fines in city courts, the validity of using pre-sentence investigation reports, whether motions and trials are split, class certification procedures, and more. Local common law has existed since at least the nineteenth century, when Maryland’s highest court affirmed the “local common law of the city of Baltimore” in a property lease case.⁷

⁴ *Id.* at 263, 265. Some have found nuggets of wisdom in Simonett’s essay without endorsing the idea of local common law. *See, e.g.,* *Equibank v. I.R.S.*, 749 F.2d 1176, 1180 (5th Cir. 1985); *United States v. Judson*, 322 F.2d 460, 467 & n.2 (9th Cir. 1963); Douglas A. Hedin, *A Citation History of Pine River State Bank v. Mettelle: A Study of Common Law Change, Judicial Influence, and the Birth of a Discipline*, 33 WM. MITCHELL L. REV. 297, 310 n.66 (2006).

⁵ *Cf.* Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 470 (1996) (“The conventional account treats substantive criminal law as exclusively legislative in origin; there are and can be no federal common law crimes. But this view is impossible to sustain on close inspection.” (footnote omitted)); *id.* (revealing “the products of judicial invention”).

⁶ The literature and case law on federal trial court rules often use the phrases “local rules,” “local procedure,” and “local practice,” but such usage is irrelevant here. *See, e.g.,* Daniel A. Austin, *State Laws, Court Splits, Local Practice Make Consumer Bankruptcy Anything but “Uniform,”* 29 AM. BANKR. INST. J. 1 (2011); Justin Sevier, *The Unintended Consequences of Local Rules*, 21 CORNELL J.L. & PUB. POL’Y 291 (2011); *cf.* Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 819–20 (2008) (drawing attention to federal procedural common law); Laurens Walker, *The Other Federal Rules of Civil Procedure*, 25 REV. LITIG. 79, 82 (2006). *Compare* Z.W. Julius Chen, Note, *Following the Leader: Twombly, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431, 1432 (2008) (“[T]he majority of states have patterned their entire systems of civil procedure after the Federal Rules, to varying degrees.”), *with* John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 358–59 (2003) (finding increasing disuniformity in state procedural rules over time).

⁷ *See* *Crowe v. Wilson*, 5 A. 427, 428 (Md. 1886) (permitting a tenant holding a renewable lease to commit waste and tear down a building under what “may be considered as the *local common law* of the city of Baltimore, founded on a fixed, uniform, invariable usage reaching back much longer than a century” (emphasis added)). Later decisions cited *Crowe*’s local

Aside from a few gestures, local common law has gone under the radar. The reigning assumption is that local common law cannot exist,⁸ and any suggestion otherwise is disparaged as an “old ‘background’ canard,”⁹ or satirized, as with Simonett. The phrase “local common law” is used sometimes to describe state common law¹⁰—primarily to highlight state common law’s difference from federal law.¹¹ In a few instances, “local common law” seems to refer to more than just state common law, but without explanation.¹²

common law principle. *See, e.g.*, *Potomac Edison Co. v. Routzahn*, 65 A.2d 580 (Md. 1949); *Martin’s Appeal*, 9 A. 490 (Pa. 1887).

⁸ *See, e.g.*, Brief for Defendants-Respondents, *Kirilescu v. Am. Home Prods. Corp.*, Nos. 99-10459, 99-10462, 2000 WL 34488730 (N.Y. App. Div. May 30, 2000) (No. 5284/97) (“[S]ince there can be no ‘local’ common law . . .”).

⁹ *State v. Gonzalez*, 154 Ohio App. 3d 9, 2003-Ohio-4421, 796 N.E.2d 12, at ¶96 (1st Dist.) (calling the prosecutor’s position on evidentiary relevance an “old ‘background’ canard that has somehow grown up in this county over the years, and seems to fool many people,” and stating that “there is no separate Hamilton County common law, and this intelligence-insulting argument exists nowhere else”); *see also In re Crow Wing Cnty. Attorney*, 552 N.W.2d 278, 280 n.2 (Minn. Ct. App. 1996) (“That Crow Wing County also has a body of controlling local common law is an idea we reject.”). However, a student project gets closer. *See* Andrea C. Loux, Note, *The Persistence of the Ancient Regime: Custom, Utility, and the Common Law in the Nineteenth Century*, 79 CORNELL L. REV. 183 (1993). Loux focuses on the British courts’ recognition of certain customs as exceptions to the general common law that then became part of the English common law. *Id.*; *see also* Erin Pitts, Comment, *The Public Trust Doctrine: A Tool for Ensuring Continued Public Use of Oregon Beaches*, 22 ENVTL. L. 731, 732 & n.5, 755 (1992) (describing custom on coastlines as effectively “the equivalent of local common law”).

¹⁰ *See, e.g.*, *Monroe v. Pape*, 365 U.S. 167, 245 (1961); *Royal Indem. Co. v. United States*, 313 U.S. 289, 295 (1941); *Kryger v. Wilson*, 242 U.S. 171, 176 (1916) (“But that [land contracts question], being purely a question of local common law, is a matter with which this court is not concerned.”); Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1275 (1985); Robert Justin Lipkin, *The Quest for the Common Good: Neutrality and Deliberative Democracy in Sunstein’s Conception of American Constitutionalism*, 26 CONN. L. REV. 1039, 1057 n.72 (1994); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 777 (2010); Comment, *Constitutional Restraints on State Freedom of Action in Conflict of Laws Cases*, 40 YALE L.J. 291, 295–96 (1930) (quoting *Kryger*, 242 U.S. 171).

¹¹ *See, e.g.*, *Harran Transp. Co. v. Nat’l Trailways Bus Sys.*, No. 84-2864, 1985 WL 2349 (D.D.C. Aug. 5, 1985) (“The complaint includes both local common law (‘state’) and federal causes of action . . .”); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An “Institutionalist” Perspective*, 83 NW. U. L. REV. 761 (1989) (providing various iterations of the concept); Gary J. Simson, *Resisting the Allure of Better Rule of Law*, 52 ARK. L. REV. 141, 152 (1999) (similar); William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2174–75 (2002) (“Just as many jurisdictions have a functional local common law of probable cause, judges and magistrates might fashion, over time, bodies of local common law of reasonable treatment.”).

¹² *See, e.g.*, *Brown v. United States*, 742 F.2d 1498, 1508–09 (D.C. Cir. 1984) (“As a matter of local common law the District has waived most of its traditional municipal tort immunity.”); *Cherilus v. Bloomingdale Operating Co.*, No. 11-5633 (CCC), 2012 WL 3038525 (D.N.J. July 25, 2012) (“Congress intended that a uniform federal labor law would prevail over inconsistent state and local common law.”); *S. Cal. Reg’l Rail Auth. v. Superior Court*, 77 Cal. Rptr. 3d 765, 768 (Ct. App. 2008) (“Here, the ‘State requirement’ is the application of state or local common law negligence principles to Metrolink’s use of push mode operation.”); Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 562 (2012) (quoting the Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 231(a), 122 Stat. 3016, 3070). Sample settlement agreements and severance clauses also use the phrase “local common law,” likely

Local common law has been overlooked or rejected on several reasonable grounds. First, most local decisions can be appealed to higher-level state courts, and local governments are creatures of the state, subject to dismantling by the state¹³—meaning that all local courts are in a sense “state” courts. Therefore, local decisions are assumed to be particularly temporary and tentative, not bulwarks of the common law.

Second, local courts—the site of much local common law production—are typically ignored. This oversight is surprising given that most people go to local courts to resolve their disputes¹⁴ and given that local courts wield critical powers, ranging from jailing people and imposing substantial financial penalties to being the most frequent site of everyday dispute resolution.¹⁵ However, scholars and practitioners ignore these local courts because of anticipatory fatigue, among other factors, given that there are thousands of local courts with a corresponding multitude of structures and rules.¹⁶ A couple recent studies nonetheless have tried to figure out what local courts do.¹⁷ Relatedly, few empirical studies have compared outcomes between local

motivated by the desire to cover every conceivable situation. *See, e.g.*, Robert B. Fitzpatrick, *Settlement of Employment Disputes: A Checklist*, C932 ALI-ABA 567, 605–07 (1994); *Sample Severance Agreement*, 75 FORMS & CHECKLISTS BI-MONTHLY ARTICLE V (May/June 2010); *see also infra* notes 49, 53.

¹³ *See, e.g.*, Annie Decker, *Preemption Conflation: Dividing the Local from the State in Congressional Decision Making*, 30 YALE L. & POL’Y REV. 321, 323 (2012).

¹⁴ Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897, 898 n.1 (2013) (“In 2009, the CSP reported that about ninety-five percent of cases filed nationwide were initiated in state courts.” (citing Don Goodnow, *A Comment from the Chair*, in ROBERT C. LAFOUNTAIN ET AL., COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS (2011))).

¹⁵ As a New York State judge declared about the Small Claims Part of the Civil Court of the City of New York, “[o]ur court is where everyday people come to resolve their everyday civil legal problems.” Hon. Fern A. Fisher, *New York City Small Claims Court*, NYCOURTS.GOV, <http://www.nycourts.gov/courts/nyc/smallclaims/welcome.shtml> (last updated Mar. 5, 2013); *see also New York City Courthouses*, NYCOURTS.GOV, <http://www.courts.state.ny.us/courts/nyc/civil/civil.shtml> (last updated Mar. 4, 2013); *see also, e.g.*, Bruce Zucker & Monica Her, *The People’s Court Examined: A Legal and Empirical Analysis of the Small Claims Court System*, 37 U.S.F. L. REV. 315, 315 (2003) (describing small claims court as the part of “the court that comes most directly into contact with the citizenry of a jurisdiction”); Thomson Reuters, *50 State Statutory Surveys: Civil Laws: Civil Procedure, Small Claims Filings*, 0200 SURVEYS 14 (2013).

¹⁶ *See generally State Court Sites*, ST. & LOC. GOV’T ON NET, <http://www.statelocalgov.net/50states-courts.cfm> (last visited Apr. 18, 2014). There are 3000 counties or county equivalents; 16,500 towns; and 20,000 cities in the country. *See* RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 12–13 (7th ed. 2009) (citing Census 2002 data); U.S. CENSUS BUREAU, *GOVERNMENT ORGANIZATION*, VOL. 1, 2002 CENSUS OF GOVERNMENTS (2002); *Domestic Names—Frequently Asked Questions (FAQs)*, U.S. BOARD ON GEOGRAPHIC NAMES, U.S. GEOLOGICAL SURV., <http://geonames.usgs.gov/domestic/faqs.htm> (last updated Sept. 25, 2013).

¹⁷ *See* Leib, *supra* note 14, at 898–99 (starting to fill in the gap in the literature, while noting that “legal scholars have almost universally ignored the law in local courts, favoring the study of federal courts and state appellate courts”); *id.* at 899 n.3 (surveying the limited literature).

jurisdictions; empirical data would help raise the visibility of local, as opposed to state, common law.¹⁸

Another reason why local common law has gone under the radar is the perceived dryness of municipal and county law as compared with federal and state law.¹⁹ Additionally, many suspect that the “law” essentially disappears at the truly local level, aside from what is lodged in city codes or in formal administrative rules;²⁰ instead, what matters to outcomes, they suspect, is how many opponents to a proposed local rule or ruling show up at a given hearing.²¹

This Article shows that local common law exists and why it matters.

Part I defines local common law partly through contrast, explaining why the literature on customs, social norms, local legal culture, and idiosyncratic local judicial behavior does not cover the same ground. This Part also sets local common law against state common law, highlighting the similarities amid their differences. Part II provides a theory of local courts, exploring their complexity, the tentativeness of local court decisions, and the development of local courts in the United States.

¹⁸ Almost all the empirical studies on judicial decision-making have looked at judge-judge differences within a single jurisdiction or at other factors without looking at the effect of local jurisdictional boundaries. See, e.g., DAVID LEVIN, U.S. DEP'T OF JUSTICE, PRETRIAL RELEASE OF LATINO DEFENDANTS (2008), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/223852.pdf>; Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519, 530–31 (2008); Theodore Eisenberg et al., *The Decision to Award Punitive Damages: An Empirical Study*, 2 J. LEGAL ANALYSIS 577 (2010); Joel Waldfogel, *Does Inter-Judge Disparity Justify Empirically Based Sentencing Guidelines?*, 18 INT'L REV. L. & ECON., 293, 293–304 (1998). A substantial number of studies on local variation in the death penalty provide one important exception. See, e.g., W. David Ball, *Tough on Crime (on the State's Dime): How Violent Crime Does Not Drive California Counties' Incarceration Rates—And Why It Should*, 28 GA. ST. U. L. REV. 987, 992–93 & nn.15–20 (2012) (collecting sources); Robert J. Smith, Essay, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227 (2012). Urban-rural differences in sentencing have received empirical attention, though, given the nature of urban-rural divides, these studies are not as concerned with local jurisdictional boundaries as this Article is. See, e.g., Lisa R. Pruitt, *Gender, Geography & Rural Justice*, 23 BERKELEY J. GENDER L. & JUST. 338, 385 (2008); Victoria A. Springer et al., *Felony Sentencing in Rural and Urban Courts: Comparing Formal Legal and Substantive Political Models in the West* (July 3, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1441593>.

¹⁹ Local government theory and courses have been burgeoning over the past couple decades. See, e.g., Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L.J. 1364 (2012); Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109 (2012); Heather K. Gerken, *The Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010); Laurie Reynolds, *A Role for Local Government Law in Federal-State-Local Disputes*, 43 URB. LAW. 977, 1013 (2011).

²⁰ Cf. Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 756 (2013) (“Almost all jurists and scholars resist the notion that [the rules of statutory interpretation] are ‘law.’”).

²¹ E-mails from Roderick M. Hills, Jr., William T. Comfort, III, Professor of Law, N.Y. Univ. Sch. of Law, to Annie Decker, Urban Law Fellow, Fordham Law Sch. (May 7, 2012, 08:34 AM EST; May 8, 2012, 10:39 AM EST, 11:05 AM EST) (on file with author).

Part III draws on the earlier arguments to identify the conditions most conducive to the development of local common law. Substantive local common law seems particularly likely to arise when courts have limited subject matter jurisdiction, when appeals are hard to bring, and when higher state courts do not take action. Procedural local common law, in contrast, springs up from a combination of opportunity and judicial need.

Part IV turns to why local common law matters, highlighting concerns about the proper scope of local power and access to justice. Part V concludes with suggestions for extending the local common law theory framework further.

I. WHAT IS LOCAL COMMON LAW

Local common law resembles but is distinct from custom, social norms, local legal culture, and local idiosyncrasy. Similarly, local common law fits within existing state common law traditions yet occupies its own territory.

A. *What Local Common Law Is Not*

Legal scholarship does not need a new concept (local common law) if existing ones—custom,²² social norms,²³ and local legal culture—suffice. And if all that is occurring is just random local behavior, we can pack up and go home. But “local common law” is not just a replacement or wordier label for those concepts.

1. Custom

Of the four phenomena, custom seems most closely related to local common law. Yet, they differ. First, formal decision makers—judges—

²² Evolving from the French and Latin, the term “custom” entered the English vocabulary centuries before Hamlet described Claudius’s debauchery as “a custom/More honor’d in the breach than the observance.” WILLIAM SHAKESPEARE, *HAMLET*, act 1, sc. 4.

²³ Property scholarship on custom ranges from common-pool resources, miners’ camps during the Gold Rush, and beach access and the regulation of coastline development to whaling. See, e.g., ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990); Michael C. Blumm & Erika Doot, *Oregon’s Public Trust Doctrine: Public Rights in Waters, Wildlife, and Beaches*, 42 ENVTL. L. 375, 414 n.266 (2012); Gregory M. Duhl, *Property and Custom: Allocating Space in Public Places*, 79 TEMP. L. REV. 199 (2006). The contracts literature on customs is also rich. See, e.g., Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153 (2012).

produce the common law.²⁴ Judges do not merely discover the common law but actively develop it.²⁵ The process is Janus-faced, both looking backward—building on precedent—and looking forward—evolving with an eye to public policy concerns.²⁶ The process is incremental in part because the judge’s “horizon” is limited to the facts of the case in front of her.²⁷ In contrast, communities produce custom,²⁸ in part by acquiescing to preexisting usages.²⁹

Second, unlike custom, the common law is formally or informally binding on other judges in the relevant jurisdiction,³⁰ and it does not

²⁴ See *infra* note 25.

²⁵ The Holmesian view, which I am closest to adopting, is that judges create the common law, unlike the Blackstonian view, that the common law is discovered, snatched from the ether and made concrete. Compare *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897); Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 888 (2006) (“[I]t is far too late in the day to deny that judges are often (some would say ‘always’) engaged in the process of making law.” (footnote omitted)), with *Hart v. Massanari*, 266 F.3d 1155, 1165 (9th Cir. 2001) (discussing this view’s early dominance); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS 68 (1899); KARL N. LLEWELLYN, THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL 71 (2008); Hon. Diarmuid F. O’Scannlain, *Rediscovering the Common Law*, 79 NOTRE DAME L. REV. 755, 759 (2004) (“Hamilton and the other Framers assumed that judges merely interpreted existing law rather than made new law.”). See also Marin Roger Scordato, *Post-Realist Blues: Formalism, Instrumentalism, and the Hybrid Nature of Common Law Jurisprudence*, 7 NEV. L.J. 263, 265–66 (2007) (describing the shift from formalism to instrumentalism).

²⁶ See, e.g., *Kreitz v. Behrensmeier*, 36 N.E. 983, 984 (Ill. 1894) (“The common law is a system of elementary rules and of general judicial declarations of principles, which are continually expanding with the progress of society . . .”); Henry G. Manne, *The Judiciary and Free Markets*, 21 HARV. J.L. & PUB. POL’Y 11, 21–22 (1997) (calling the common law system “evolutionary in nature”); Andrew J. Wistrich, *The Evolving Temporality of Lawmaking*, 44 CONN. L. REV. 737, 763 (2012) (“Adjudication is inherently backward-looking.”). As a result, the common law is prized for increasing the predictability of the law. Frank B. Cross, *Identifying the Virtues of the Common Law*, 15 SUP. CT. ECON. REV. 21, 21 (2007).

²⁷ See Edward L. Rubin, *The Concept of Law and the New Public Law Scholarship*, 89 MICH. L. REV. 792, 799 (1991).

²⁸ See, e.g., John Hasnas, *Hayek, the Common Law, and Fluid Drive*, 1 N.Y.U. J.L. & LIBERTY 79, 83 (2005); Kadens, *supra* note 23, at 1163 (calling custom “bottom up”); *id.* (noting that “the behavior of a specific community” creates custom).

²⁹ See, e.g., Kadens, *supra* note 23, at 1163. Usage is generally considered to be nonbinding. *Id.* at 1164. It is more about repeated acts that give rise to a custom, the equivalent of a habit and assent. *Id.*; see also 12 WILLISTON ON CONTRACTS § 34:2 (4th ed. 2013). Juries used to be involved in finding custom as a matter of fact. David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1383–85 & n.39 (1996) (“It is laid down . . . by . . . writers of the best authority, that there must be at least two witnesses to prove a custom; and that they must assign acts done as the ground of their belief . . .” (alterations in original) (quoting *The Twee Gebroeders* (1801), 165 Eng. Rep. 485 (Admlty) 490; 3 C. Rob. 336, 349–50)).

³⁰ See, e.g., *Worthington v. State*, 58 Md. 403, 404 (1882); JOHN HUDSON, THE FORMATION OF THE ENGLISH COMMON LAW: LAW AND SOCIETY IN ENGLAND FROM THE NORMAN CONQUEST TO MAGNA CARTA 16–17 (1996) (defining a feature of the common law as that it “should be generally available, at least to a significant portion of the population”). Precedent creation became more feasible with time. Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1570, 1573–74 (2003).

bind other jurisdictions.³¹ In other words, a common law rule is enforced within delineated governmental boundaries.³² The binding force of common law rules depends on the level of court; *appellate* action, particularly published appellate opinions, is most binding,³³ but parallel court decisions also can have a persuasive effect.³⁴ Local common law resembles the latter, influencing other judges, horizontally, in the jurisdiction.³⁵ Custom, in contrast, need not be bound by jurisdictional lines—it can operate sublocally or across local lines, for example.³⁶

Third, the common law looks both backward and forward,³⁷ while custom is backward- and present-centered,³⁸ seeking to resolve current disputes based on preexisting understandings.

The common law has more legal force than custom; it falls higher on the legal hierarchy. The common law, in other words, can trump custom, but custom cannot trump the common law.³⁹ Of course, judges

³¹ A state cannot overturn another state's common law or apply its common law in another state. The common law is territorial, not personal. HUDSON, *supra* note 30, at 17. Unplanned spillovers, however, can occur. *See id.* They are less desirable with certain categories of torts, such as products liability, where the presence of out-of-state defendants decreases the prized sensitivity to local interests of tort law, causing ex ante difficulties for manufacturers seeking to conform to conflicting state requirements and a loss of significant economies of scale during the process of conforming. *See* Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917, 928, 950 (1996); *see also* Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781, 853 (2010).

³² *See, e.g.*, Monaghan, *supra* note 10, at 774 (“Americans understood that the common law varied from state to state . . .”).

³³ In Mead's study of district court stare decisis, he notes that, while circuit practices regarding publication and precedent are rigid, “the modern approach amongst district courts is to treat published and unpublished decisions alike.” Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 804 (2012).

³⁴ *See, e.g.*, Ellie Margolis, *Authority Without Borders: The World Wide Web and the Delegalization of Law*, 41 SETON HALL L. REV. 909, 916 (2011) (“Authority that is not binding but is relied upon to give credence to a point is called persuasive authority.”); Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1944–45 & nn.47–49 (2008) (discussing state court practice of relying on rules in other jurisdictions, while discussing the distinction between persuasion and authority).

³⁵ *Cf.* Mead, *supra* note 33, at 788 (“Despite the significant role horizontal stare decisis plays in litigation, legal practitioners and scholars have paid relatively little attention to horizontal stare decisis at levels outside the Supreme Court. . . . [T]he practices of district courts—where most litigation is resolved—have gone virtually unexamined.”).

³⁶ *See, e.g.*, Kadens, *supra* note 23, at 1177, 1184 (“[T]he evidence suggests that substantive customs remained geographically local or confined to a particular network of repeat players.”).

³⁷ *See supra* note 26.

³⁸ *Cf.* Hasnas, *supra* note 28, at 88; Kadens, *supra* note 23, at 1163.

³⁹ *See, e.g.*, Nat'l Bank v. Burkhardt, 100 U.S. 686 (1879) (rejecting a custom or usage that would alter parties' common law contractual rights); Barnard v. Kellogg, 77 U.S. 383 (1870) (similar); Marincovich v. Tarabochia, 769 P.2d 866 (Wash. Ct. App. 1989) (similar), *aff'd*, 787 P.2d 562 (1990).

can rely on custom as a source for crafting common law rules.⁴⁰ William Blackstone had a checklist for deciding when an established custom obtains a legal effect.⁴¹ Such reliance has occurred in the development of state common law for contracts,⁴² torts,⁴³ and property law,⁴⁴ and such reliance seems expressly embraced by tribunals such as the tribal courts.⁴⁵ But judges also draw on other considerations when crafting the common law, such as public policy, reasonableness, and equity. Courts also retain custom as an ongoing express factor in common law claims—a consideration in negligence cases, for example, or as a defense to trespass claims.⁴⁶ But the very act of relying on custom just highlights the common law’s essential difference.

⁴⁰ Cf. Hasnas, *supra* note 28, at 81 (noting that early common law was closer to customary law than the modern common law); John R. Nolon, Comment, *In Praise of Parochialism: The Advent of Local Environmental Law*, 23 PACE ENVTL. L. REV. 705, 754 (2006) (“The common law was initially created by local customs and local courts and discovered and applied at higher levels of the judicial order . . .”).

⁴¹ See, e.g., Bederman, *supra* note 29, at 1385 & n.42; see also Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1, 31 n.171 (1995) (“Custom is recognized by common law courts as *lex loci* or local common law.” (citing Loux, *supra* note 9, at 186)).

⁴² See, e.g., AM. JUR. 2D, *Conflict of Laws* § 78 (noting that “[t]he law of the place designated by the parties to a contract” determines the steps required for establishing a custom and its effects); Louis F. Del Duca & Alain A. Levasseur, *Impact of Legal Culture and Legal Transplants on the Evolution of the U.S. Legal System*, 58 AM. J. COMP. L. 1, 7–8 (2010) (“As the new nation’s commercial, industrial, and agricultural industries expanded, new legal norms were needed to settle disputes. Domestic law in the areas of property, contracts, and torts began to grow out of local usages, customs, and the needs of local citizens.” (footnote omitted)).

⁴³ Custom also can be relevant to tort rights and liabilities, in addition to being embedded in particular common law rules. See, e.g., RESTATEMENT (SECOND) OF TORTS § 295A (1965) (recognizing a custom defense of sorts to a negligence suit: “[i]n determining whether conduct is negligent, the customs of the community, or of others under like circumstances, are factors to be taken into account, but are not controlling”); *id.* § 652D cmt. c (1965) (“The protection afforded to the plaintiff’s interest in his privacy must be relative to the customs of the time and place . . .”); John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1747, 1840 (1998).

⁴⁴ 12 WILLISTON ON CONTRACTS § 34:2 (4th ed. 2013) (“[C]ustom has from early times been recognized as a source of law.” (citing various water rights cases)). Indeed, in early Anglo courts, “[c]ommon law courts frequently adopted the ‘customs’ of important municipalities, such as London, and incorporated them into the common law of the realm.” Keith M. Stolte, *How Early Did Anglo-American Trademark Law Begin? An Answer to Schechter’s Conundrum*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 505, 537 n.142 (1998).

⁴⁵ Pat Sekaquaptewa, *Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking*, 32 AM. INDIAN L. REV. 319, 321–22 (2008) (“Some focus on defining ‘law’ to include custom. Some analogize custom to American common law or define it as part of a unique tribal or indigenous common law. Many assert that it is a way of doing things . . .” (footnotes omitted)).

⁴⁶ *McConico v. Singleton*, 9 S.C.L. (2 Mill) 244 (1818); see also *Dick’s Sporting Goods, Inc. v. Dick’s Clothing & Sporting Goods, Inc.*, No. 98-1653, 1999 WL 639165, at *3 (4th Cir. Aug. 20, 1999) (noting trademark and geographic areas); *Midwest Guaranty Bank v. Guaranty Bank*, 270 F. Supp. 2d 900, 908 (E.D. Mich. 2003) (similar).

To say that local common law is not custom does not mean that common law and custom do not share features. Both can be trumped by local, state, and federal legislation, as well as by state and federal constitutional law.⁴⁷ Both are distinct from statutory interpretation.⁴⁸ And given that customs often are sub-state–bounded, local common law is more like custom than state common law is like custom.⁴⁹ But the differences still remain.

2. Social Norms

One also can object that local common law is just a form of social norm production at work.⁵⁰ But social norms overlap even less than custom does with local common law. The inquiries, however, stem from similar impulses to explore what is happening at the local, community, and concrete level.⁵¹

The key difference is that local substantive and procedural common law imposes order through the machine of the law itself—the judiciary or other adjudicatory bodies. In contrast, social norms arise outside of formal law,⁵² within gaps in formal law,⁵³ or despite formal

⁴⁷ See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 338 n.9 (2001); *State v. Buchanan*, 5 H. & J. 317 (Md. 1821) (“The common law, like our acts of assembly, are subject to the control and modification of the legislature, and may be abrogated or changed as the general assembly may think most conducive to the general welfare . . .”).

⁴⁸ The common law can fill in the interstices in statutes and edge quite close to statutory interpretation. See, e.g., Barrett, *supra* note 6, at 822 (noting the same in the context of federal common law).

⁴⁹ See, e.g., *Bell v. Gough*, 23 N.J.L. 624, 689 (N.J. 1852) (“[W]e have in this state a local common law, which extends the title to the soil in a riparian owner to low water mark on navigable tide water streams.”); see also *Ward Sand & Materials Co. v. Palmer*, 237 A.2d 619, 621 (N.J. 1968) (“In 1851, the legislature enacted the ‘Wharf Act’ [1851 N.J. Laws 335] which both adopted and superseded the local common law or custom.” (citing *Bell*)); *Ross v. Mayor & Council of Borough of Edgewater*, 115 N.J.L. 477, 485 (N.J. 1935) (“This was a local custom or usage which acquired the force of a local common law.”); *Gough v. Bell*, 22 N.J.L. 441, 470 (N.J. 1850) (“The custom of making such appropriation, long enjoyed and universally acquiesced in, constitutes a local common law . . .”).

⁵⁰ See, e.g., Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); David Fagundes, *Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093 (2012) (discussing roller derby skaters’ self-regulation of their in-rink pseudonyms); Dotan Oliar & Christopher Sprigman, *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008).

⁵¹ ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES*, at vii (1991) (discussing the desire “to venture out into the world to learn more about how [local courts] interact with one another”); Barbara Yngvesson, *Inventing Law in Local Settings: Rethinking Popular Legal Culture*, 98 YALE L.J. 1689, 1699–1700 (1989).

⁵² ELLICKSON, *supra* note 51, at 1.

⁵³ See, e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968–69 (1979); Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV.

law.⁵⁴ As with custom, the common law can arise from and rely on social norms, but the two are not interchangeable.⁵⁵ That said, social norms and local common law might overlap more in small communities than they do in larger cities.⁵⁶

3. Local Legal Culture

The study of local common law can learn much from the literature on local legal (or “local court”) culture,⁵⁷ and legal culture influences local common law. But local common law is the rule in force; local legal culture is merely one of the factors leading to the development of divergent rules across jurisdictions.

That said, some examples of local legal culture have captured what this Article means by substantive local common law.⁵⁸ Studies on local legal culture also have shown differences in case management approaches, for example, that resemble what I call procedural local common law.⁵⁹

1687, 1764 (2006); Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317, 322–25 (2011); Naomi Straus, Comment, *Trade Dress Protections for Cuisine: Monetizing Creativity in a Low-IP Industry*, 60 UCLA L. REV. 182, 198–99 (2012) (describing why the patent system does not cover recipes and how one study, confined to elite chefs, found that social norms filled in the gaps for this group); see also Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187 (2008).

⁵⁴ See, e.g., Robert C. Ellickson, *How Norm Entrepreneurs and Membership Associations Contribute to Private Ordering: A Response to Fagundes*, 90 TEX. L. REV. 247, 249 (2012); Fagundes, *supra* note 50, at 1097–98.

⁵⁵ Cf. Barrett, *supra* note 6, at 823 n.23 (“[J]udge made’ does not mean that judges have made them up out of whole cloth. On the contrary, judges fashion much federal common law . . . by drawing from norms generally accepted by the legal community.”).

⁵⁶ Thanks to Professor Holly Doremus for this insight, which she made based on her experience as a municipal attorney in a small town.

⁵⁷ See, e.g., Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501 (1993); Mary Helen McNeal, *Slow Down, People Breathing: Lawyering, Culture and Place*, 18 CLINICAL L. REV. 183 (2011). Much of the commentary on local legal culture focuses on lower federal courts. See, e.g., *Priestley v. Astrue*, 651 F.3d 410, 420, 424 (4th Cir. 2011) (Davis, J., concurring) (“I have previously acknowledged that ‘local legal culture drives [certain] practices,’ and recognize that ‘local legal culture’ certainly can influence a district court’s local rules.” (alteration in original) (quoting *Robinson v. Wix Filtration Corp.*, 599 F.3d 403, 414 (4th Cir. 2010) (Davis, J., concurring))); Thomas W. Church, Jr., *Examining Local Legal Culture*, 3 AM. B. FOUND. RES. J. 449 (1985).

⁵⁸ See, e.g., Andrea M. Seielstad, *Unwritten Laws and Customs, Local Legal Cultures, and Clinical Legal Education*, 6 CLINICAL L. REV. 127 (1999). Seielstad argues, for example, that unwritten “rules are applied . . . with sufficient regularity by particular courts and/or magistrates and enforced by local practitioners such that they acquire the force of law and may be ascertained and predicted by the thoughtful and informed practitioner.” *Id.* at 130; see also *id.* at 145 (similar).

⁵⁹ BRIAN J. OSTROM, ROGER HANSON & MATTHEW KLEIMAN, NAT’L CTR. FOR STATE COURTS, CASELOAD HIGHLIGHTS: EXAMINING COURT CULTURE (2005), available at <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/664>.

4. Idiosyncratic Local Judicial Behavior

Finally, substantive or procedural irregularities by individual judges do not constitute local common law, unless they are binding or persuasive throughout the jurisdiction.

Such irregularities thread, for example, throughout the stories of New York town and village courts. One justice interviewed the defendant before trial, not knowing that doing so violated “the elementary legal rule that bars a judge, except in the most extraordinary circumstances, from secret contact with one side of a case.”⁶⁰ Another village justice who refused to issue a protective order and later said to a clerk, “[e]very woman needs a good pounding every now and then,” and another judge explained that “I just follow my own common sense And the hell with the law.”⁶¹

Irregularity, of course, is not limited to remote or local courts. Every practitioner knows, for example, that “[j]udges applying the same substantive and procedural law—and sometimes sitting in adjacent courtrooms—[will] dispense justice in radically different ways.”⁶² While conflicting interpretations need not be unprincipled or even idiosyncratic,⁶³ courts at every level can issue both kinds of rulings.⁶⁴

5. What Is “Law” Anyway?

I conclude by emphasizing a point that threads through the sections above: Local common law is the *law*.⁶⁵ But what is the “law”? One question is how long a rule with legal effect needs to be in force to be considered law: A day? A month? Years? In Connecticut, by statute, judges preside over a given housing court for a year and a half, if

⁶⁰ William Glaberson, *Delivering Small-Town Justice, with a Mix of Trial and Error*, N.Y. TIMES, Sept. 26, 2006, at A1.

⁶¹ William Glaberson & Jo Craven McGinty, *In Tiny Courts of New York, Abuses of Law and Power*, N.Y. TIMES, Sept. 25, 2006, at A1 (citations omitted).

⁶² John M. Conley & William M. O’Barr, *Fundamentals of Jurisprudence: An Ethnography of Judicial Decision Making in Informal Courts*, 66 N.C. L. REV. 467, 504 (1988).

⁶³ Compare *In re Tyson G.*, 534 N.Y.S.2d 1023 (App. Div. 1988) (holding that the results of a forced mental health examination of a parent of an allegedly neglected child would be admissible at a fact-finding hearing), with *In re Aryeh-Levi K.*, 521 N.Y.S.2d 50 (App. Div. 1987) (having reached a different conclusion).

⁶⁴ See, e.g., Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); Frederick Schauer, *The Failure of the Common Law*, 36 ARIZ. ST. L.J. 765, 780–82 (2004) (“[T]he common law has been exposed as a system in which the identities and preferences of the judges make a difference.”); Dan Markel & Eric J. Miller, *Bowling, as Bail Condition*, N.Y. TIMES, July 13, 2012, at A17.

⁶⁵ Cf. Gluck, *supra* note 20, at 770–808 (challenging the assumption that rules of statutory interpretation are not “law,” including federal common law); *id.* at 758 (asking whether certain rules of statutory interpretation might be the “law,” even if not precedential).

possible.⁶⁶ A single judge presides over New Haven housing courts. A student who clerked for one such judge noted that the judge created a host of new rules, essentially developing common law that persisted for the term of that judge's tenure (typically a year and a half).⁶⁷ A year and a half likely would qualify as the law, in the same way that it would be "law" if the highest state court developed a common law rule that it subsequently overruled after a year and a half in force.

In contrast, without qualifying as the "law," local factors can affect the severity of sentences,⁶⁸ rates of arrest and conviction, and alimony amounts ordered without qualifying as the "law." One study found that "culture, language, and power stood in the way of presenting valid defenses" in Baltimore housing courts, and another found that housing courts in Chicago showed "widespread 'lack of respect for the human dignity of tenants.'"⁶⁹ Similarly, one of few statistical studies of sub-state variation in court outcomes identified here found locational preferences correlated at a statistically significant level with the appearance of

⁶⁶ See CONN. GEN. STAT. ANN. § 51-165(c) (West 2014) ("Any judge assigned to hear housing matters . . . if practicable, shall devote full time to housing matters. If practicable, he should be assigned to hear matters for not less than eighteen months.").

⁶⁷ Comment by student at Yale Law Women's Developing Scholarship Workshop, October 1, 2013.

⁶⁸ See, e.g., *People v. Brodhead*, 965 N.Y.S.2d 250, 251 (App. Div. 2013) (discussing a county court's discretion over granting youthful offender status to a defendant); *Plaxico, Lil Wayne Got Tougher Sentences for Gun Possession Than This Thug*, N.Y. DAILY NEWS (Nov. 17, 2009, 12:04 AM EST), <http://www.nydailynews.com/news/crime/plaxico-lil-wayne-tougher-sentences-gun-possession-thug-article-1.196237> ("Brooklyn Supreme Court Justice Abraham Gerger [gave one defendant a better deal] even though the Brooklyn district attorney's office wanted [the defendant] to get no better a deal than [football player Plaxico] Burrell got that same month across the bridge in Manhattan."); cf. Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745 (2012) (discussing the substance-procedure divide in sentencing); Gary Muldoon, *Conviction in Local vs. Superior Court*, in *HANDLING A CRIMINAL CASE IN NEW YORK* § 21:61 (discussing differences in youthful offender status based on whether the conviction is in a local court or instead in a superior court) (citing N.Y. CRIM. PROC. LAW § 720.20(1)(b) (McKinney 2014)); see also MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 59 (1973) ("I think the ultimate questions of substance—the length, frequency, and kinds of sentences—will not be handled with rationality and overall fairness until we have organized the work of evolving rational and fair principles of law."), quoted in Mark A. Adams, *The Federal Sentencing Guidelines as Legal Process Jurisprudence*, 31 AM. CRIM. L. REV. 259, 286 (1994).

⁶⁹ Mary Spector, *Tenant Stories: Obstacles and Challenges Facing Tenants Today*, 40 J. MARSHALL L. REV. 407, 409 (2007) (quoting CHI.-KENT COLL. OF LAW CLASS OF 2004 HONORS SCHOLARS, LAWYERS' COMM. FOR BETTER HOUSING, NO TIME FOR JUSTICE: A STUDY OF CHICAGO'S EVICTION COURT 6 (2003), available at <http://lcbh.org/images/2008/10/chicago-eviction-court-study.pdf>); see Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2047–69 (1999) (describing family, bankruptcy, and housing courts in Boston and New York City). Spector suggests that statutory bases underlie those summary procedures and that "they are widely used in every state in the nation." Spector, *supra*, at 409. Local jurisdictions can have different landlord-tenant ordinances. *Id.* at 422.

juveniles in criminal court:⁷⁰ “New York’s Albany and Erie counties differed substantially in their rates of arrest and conviction of juveniles as offenders[,] . . . even for the less serious offenses.”⁷¹ One explanatory factor seemed to be that the less populous county (Albany) “followed more of the stated requirements of New York’s form of legislative waiver than Erie county” (the denser county), and that, as a result, Albany “produced a more tightly coupled system of criminal justice for juveniles.”⁷² In other words, Erie County developed its own local ways while Albany County more closely followed the state, but it is unclear whether Erie actually developed common law. In family law, local legal culture matters too, with a study finding significant geographical variation in New York State divorce cases in terms of how much alimony the lower court justices awarded.⁷³

The point here is that how we define the “law” helps determine what is seen as local common law and what is seen, instead, as custom, social norms, legal culture, or local idiosyncrasy.

B. *The State Common Law Baseline*

A side effect of comparing local common law with other local phenomena is that doing so highlights the features that *state* and local common law share. This section further fills in the contours of local common law by explicitly situating it alongside and within state common law. One need not start from scratch to understand local common law; state common law has set the stage.

Local common law shares and even exaggerates many traits of state common law. Two such traits are particularly important: adaptiveness and divergence.

⁷⁰ Simon I. Singer, *The Significance of Place in Bringing Juveniles into Criminal Court*, 18 QUINNIPIAC L. REV. 643, 655 (1999) (“Ordinary least square regression . . . shows that the strongest predictor of percent of juvenile arrests brought to criminal court is *place*.” (emphasis added)).

⁷¹ See *id.* at 654 (footnote omitted); see also Solomon J. Greene, *Vicious Streets: The Crisis of the Industrial City and the Invention of Juvenile Justice*, 15 YALE J.L. & HUMAN. 135, 159 (2003) (citing Barry C. Feld, *Justice by Geography: Urban, Suburban, and Rural Variations in Juvenile Justice Administration*, 82 J. CRIM. L. & CRIMINOLOGY 156, 159 (1991)) (“As recent studies by legal scholars and sociologists have argued, ‘place’ matters in the administration of juvenile justice.” (citing Singer, *supra* note 70)); *id.* at 135 (quoting Denver Juvenile Court Judge Ben B. Lindsay’s observation on urban-rural differences).

⁷² Singer, *supra* note 70, at 654.

⁷³ See Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 481 (1996) (“[T]he likelihood of an alimony award varied significantly by case region.”). Garrison also found it relevant that “[a]ppellate action regarding alimony or child support was much less common and more difficult to categorize” than with other decisions in divorce cases, such as property distribution. *Id.* at 501 (footnote omitted).

This observation builds on a theory of “local megafederalism”—the idea that many “pro-state arguments have even stronger force when applied to the local level.”⁷⁴ The familiar reasons for sometimes preferring state regulation to federal regulation—ranging from increased participation to increased innovation—only expand when we contrast local regulation with state or federal regulation.⁷⁵ The idea here is that local common law can be tailored even more closely than state common law can and that local common law also will exhibit more variance.

The Supreme Court of Maryland declared in 1821 that “[w]hether particular parts of the common law are applicable to *our local circumstances and situation*, and our general code of laws and jurisprudence, is a question that comes within the province of the courts of justice, and is to be decided by them.”⁷⁶ The court’s use of the term “local” in the context of state common law-making is not accidental; courts and scholars often use the term “local” to evoke the particular connectedness that state law has with its residents’ needs as compared with federal law.⁷⁷ This is true not only because of smaller population size and geography⁷⁸ but also because “the peculiar boast and excellence of the common law”—judge-made law as compared with legislative or constitutional law—is its “flexibility and capacity for growth and adaptation.”⁷⁹

For example, the state common law of torts,⁸⁰ a subject “built on the bedrock of state common law,”⁸¹ is seen as more responsive and

⁷⁴ See Decker, *supra* note 13, at 356–57.

⁷⁵ *Id.*

⁷⁶ *State v. Buchanan*, 5 H. & J. 317, 365–66 (Md. 1821) (emphasis added), *quoted in* C. Christopher Brown, *A Search for Clarity and Consistency in Judicial Process: The Maryland Court of Appeals Decides Whether to Change Common-Law Rules*, 62 MD. L. REV. 599, 604–05 (2003) (emphasizing the “inherent dynamism of the common law”).

⁷⁷ It is not unusual for state judges, when talking about the subjects of their common lawmaking, to use a localist rhetoric. See cases cited *supra* notes 10–11 (providing examples of the use of the term “local” to mean “state”). I discussed this conflation of the local with the state in the context of federal preemption. See Decker, *supra* note 13, at 330 (“The conflation goes well beyond the common practice of using the terms ‘state’ and ‘local’ interchangeably.”).

⁷⁸ For example, federal efforts to set remedial caps and other uniformity on tort law included the sense that, at the state level, “there is a greater prospect for monitoring the package of reforms and responding to post-enactment reservations than if a distant Congress enact similar measures.” Robert L. Rabin, *Federalism and the Tort System*, 50 RUTGERS L. REV. 1, 30 (1997).

⁷⁹ *Hurtado v. California*, 110 U.S. 516, 530 (1884); see also Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655, 667 (2013) (“[E]ach state reserved the right to adapt the common law to its local conditions, but each state’s reception of the common law immediately gave it a developed body of municipal law by which to govern itself.”).

⁸⁰ A tort is generally considered conduct that constitutes “a legal wrong” (other than a contracts violation) “that causes harm for which courts will impose civil liability.” Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1507 (2009) (quoting DAN B. DOBBS, *THE LAW OF TORTS* 1 (2000)); *id.* at 1510 (“Initially, tort

complex than state tort legislation.⁸² Indeed, “[t]he ability of states to formulate tort law allows states to uniquely tailor the law to their particular needs”⁸³ and to experiment with law development.⁸⁴ Medical malpractice, car crashes, and on-premise accidents all “retain a distinctly local character.”⁸⁵

Local substantive common law is even more likely to adapt to local conditions. As is local procedural common law: The tendency of procedural rules is toward localization, shaped by “standing orders, procedural interpretation, procedural discretion, inherent authority, and procedural common law”⁸⁶—in other words, by much of what here is called “local common law.”⁸⁷

Another feature of state common law is divergence among the states as they develop their own rules. One justification is duty: States are responsible for their residents’ public health; safety; protection from

law was almost exclusively a matter of state common law.”); Brown, *supra* note 76, at 602–03 (similar); Michael D. Green, *The Road Less Well Traveled (and Seen): Contemporary Lawmaking in Products Liability*, 49 DEPAUL L. REV. 377, 379 (1999) (similar).

⁸¹ Rabin, *supra* note 78, at 2; *see also* Bates v. Dow Agrosciences, LLC, 544 U.S. 431, 449 (2005) (state tort law is an area of “traditional state regulation”).

⁸² Rabin, *supra* note 78, at 11 (noting, for example, the web of New York common law rules surrounding a single doctrinal stand like bystander emotional distress recovery).

⁸³ R. Patrick Bedell, Note, *The Next Frontier in Tort Reform: Promoting the Financial Solvency of Nursing Homes*, 11 ELDER L.J. 361, 388 & n.227 (2003) (switching, without explanation, in the associated footnote to talking about local governments, seemingly to exploit the rhetorical force of the “local”).

⁸⁴ Klass, *supra* note 80, at 1503 (“[I]n recent years, state attorneys general and local governments have been reviving the common law tort of public nuisance in efforts to obtain injunctive relief and damages for harm caused by lead paint, gun violence, greenhouse gas emissions, and mortgage foreclosures.”); Joel Rosenblatt & Jack Kaskey, *Sherwin, NL, ConAgra Lose \$1.1 Billion Lead Paint Ruling (2)*, BLOOMBERG BUS. WK. (Dec. 17, 2013), <http://www.businessweek.com/news/2013-12-16/sherwin-nl-conagra-lose-1-dot-1-billion-lead-paint-verdict-1>.

⁸⁵ Rabin, *supra* note 78, at 29; *see also* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1383–84 (2006) (calling medical malpractice “quite localized in [its] impact”); Schwartz, *supra* note 31, at 949 (“For most sectors of tort law[,] . . . the parties to particular cases and the incidents giving rise to those cases are typically concentrated within a single state,” making variation among the states “not dysfunctional”). Consider also state-level laws that formally incorporate local standards. *See, e.g.*, NEB. REV. STAT. ANN. § 44-2816 (West 2013) (“Informed consent shall mean consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities.”); Joshua Baker, Note, *The Standard of Care: The Road Not Taken—Using County Size to Determine the Standard of Care*, 43 U. MEM. L. REV. 767, 769 (2013).

⁸⁶ Samuel P. Jordan, *Local Rules and the Limits of Trans-Territorial Procedure*, 52 WM. & MARY L. REV. 415, 420–21 (2010) (footnotes omitted).

⁸⁷ The advantages of divergent federal district court rules also prove instructive: “Examples of the unappreciated benefits cited include the potential for local rules to act as ‘experiments’ leading to broader procedural reform, lower barriers to local procedural change, and assistance with vital court administrative functions[,]” “develop[ing] a more robust defense of local rules.” *Id.* at 419–20 (footnotes omitted).

injury; and recourse when the inevitable injury occurs.⁸⁸ While sharing a general responsibility, then, individual states' "interests are distinct" and, as a matter of sovereignty, such differences "should be respected"—"California may have its reasons for being more (or less) charitable to tort victims than Nevada."⁸⁹ To give a few concrete cases: Because of environmental differences, western states crafted unique common law rules for water allocation;⁹⁰ anti-profanity laws differ based on regional values;⁹¹ and states have crafted differing rules governing landowner liability and distinctions among categories such as invitees, licensees, and trespassers.⁹² Local divergence is even more likely, given the number of local jurisdictions and the variance in local preferences.

II. A THEORY OF LOCAL COURTS

A theory of local common law is incomplete without a theory of local courts. As noted, the literature has been remarkably silent about what local courts do. This Part fills in that silence on local courts by painting a picture of local court heterogeneity. Part III later sets out the factors most conducive to the creation of local common law in part by drawing on this theory of local courts.

A. *Snapshot of Complexity*

Following is a sketch of courts in New York State. Given the thousands of courts in the United States and the difficulty in obtaining data about them, this sketch captures just a chunk of the iceberg.⁹³

⁸⁸ See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (describing the "historic primacy of state regulation of matters of [public] health and safety"); cf. Abigail R. Moncrieff, Essay, *Federalization Snowballs: The Need for National Action in Medical Malpractice Reform*, 109 COLUM. L. REV. 844, 847 (2009) ("I do not dispute that both tort law and medical regulation are traditional state concerns or that all of the relevant industries are localized."); Rabin, *supra* note 78, at 5–6.

⁸⁹ Rabin, *supra* note 78, at 6.

⁹⁰ *Id.* at 6–7 (citing iconic property cases such as *Rylands v. Fletcher*, [1868] 3 H.L. 330 at 335 (Eng.), which imposed a strict liability rule that western states rejected, and open range laws regulating the trespassing of cattle in the western states, which diverged from rules in the eastern states).

⁹¹ *Id.* at 7–8 ("Clearly, a single, nationwide definition of 'outrageous interpersonal conduct' would have been insensitive to the more genteel standards of social behavior in some regions of the country than in others.").

⁹² Schwartz, *supra* note 31, at 927.

⁹³ See, e.g., Lonn Lanza-Kaduce et al., *Juvenile Transfers in Florida: The Worst of the Worst?*, 10 U. FLA. J.L. & PUB. POL'Y 277, 285 (1999) ("Florida is divided into twenty judicial circuits, and case detail is compiled in the records of the county clerks of court. Gleaning information from court records is a slow and labor-intensive process.").

The New York State court system is vast—it “handled 4.7 million cases [in 2009], involving almost every type of endeavor known to humanity.”⁹⁴ The court structure differs significantly within versus outside of the New York City borders. To begin outside: The supreme courts, though only trial courts, are courts of “superior” jurisdiction (as opposed to limited jurisdiction),⁹⁵ and they handle civil matters. The county courts handle criminal matters, conducting trials in felony cases and sharing authority over misdemeanors and other minor offenses with city, town, and village courts.⁹⁶ County courts also can hear limited civil matters (up to \$25,000).⁹⁷ Additionally, sixty-one cities have their own civil courts that hear cases involving up to \$15,000 and have criminal courts that hear preliminary matters in felony cases, misdemeanors, and other lesser offenses.⁹⁸ Every county in the state has a surrogate’s court⁹⁹ and a family court.¹⁰⁰

And then there is the most local of the local: the nearly 2000 town and village courts (which New York sometimes calls the “justice courts”).¹⁰¹ These courts hear civil cases involving matters up to \$3000 and handle criminal violations and misdemeanors, preliminary

⁹⁴ See Jonathan Lippman, *A Message from the Chief Judge*, in JONATHAN LIPPMAN & ANN PFAU, N.Y. STATE UNIFIED COURT SYS., THE NEW YORK STATE COURTS: AN INTRODUCTORY GUIDE (2010), available at <http://www.nycourts.gov/admin/NYCcourts-IntroGuide.pdf>; see also Quintin Johnstone, *New York State Courts: Their Structure, Administration and Reform Possibilities*, 43 N.Y.L. SCH. L. REV. 915, 916 (1999–2000) (“The complexity of the court structure is most obvious at the trial court level.”); *NYS Court’s Functions and Jurisdiction*, NYJUSTICECOURTS.ORG, http://www.nyjusticecourts.org/NYS_Court_Function_Jurisdiction.htm (last visited Feb. 1, 2014) (“New York State has one of the most complex judicial systems in the United States.”); *Structure of New York State Courts*, COURTS.STATE.NY.US, <http://www.courts.state.ny.us/admin/stateofjudiciary/stofjud8/struct.htm> (last visited Mar. 24, 2014).

⁹⁵ See N.Y. CONST. art. VI, § 7 (2002).

⁹⁶ See N.Y. CRIM. PROC. LAW § 10.20 (McKinney 2014); cf. Steven C. Davidson, *Local Court Criminal Practice*, 31 WESTCHESTER B.J. 51, 55 (2004) (“Criminal defense work in the local, village or District courts can be fun and challenging, but like any[] other legal matter, it must be handled carefully.”).

⁹⁷ See N.Y. CONST. art. VI, § 11(a) (2002); N.Y. JUD. LAW §§ 190, 190-a, 190-b, 191 (McKinney 2014).

⁹⁸ These courts are called “district courts” in Nassau County and in five cities in western Suffolk County. These courts replaced the justice courts. See N.Y. CONST. art. VI, § 16 (2002); 1936 N.Y. Laws 1858, amended by 1963 N.Y. Laws 2155; 1962 N.Y. Laws 3472.

⁹⁹ These courts—one per county throughout the state—hear cases involving deceased individuals, such as probate and estate matters, as well as adoptions and guardianship (for adults). See N.Y. CONST. art. VI, § 12(d)–(e) (2002).

¹⁰⁰ See *id.* art. VI, § 13(b)–(c). Family courts handle various matters involving children and families, from custody to guardianship of children and delinquency. *Id.* They do not, however, handle divorce, legal separation, or annulment; the supreme courts do. See *New York CourtHelp: Which Courts Handle Family Legal Problems?*, NYCOURTS.GOV, <http://www.nycourts.gov/courthelp/FamProb.html> (last visited Mar. 24, 2014).

¹⁰¹ See *City, Town & Village Courts*, NYCOURTS.GOV, <https://www.nycourts.gov/courts/townandvillage> (last visited Apr. 23, 2014).

proceedings in more serious cases, and traffic violations.¹⁰² The *New York Times* conducted a series of articles on them several years ago emblazoned with critical headlines.¹⁰³ Many of these town and village judges are not attorneys,¹⁰⁴ and many “have scant grasp of the most basic legal principles.”¹⁰⁵ These courts are “local” in terms of size and ease of appeal, though they have broader subject matter jurisdiction than, say, the surrogate court.¹⁰⁶

Inside New York City, the supreme courts handle civil matters, particularly matters that the courts of limited jurisdiction cannot take,¹⁰⁷ plus felony criminal matters. These courts are high up on the local versus state court hierarchy, with broad subject matter jurisdiction. Each of the five counties, coterminous with the boroughs, in New York City has a family court and a surrogate’s court. New York City also has a court of claims.¹⁰⁸ There are also New York City civil courts¹⁰⁹ and criminal courts,¹¹⁰ which are courts of limited jurisdiction.¹¹¹ The civil

¹⁰² See Glaberson & McGinty, *supra* note 61 (noting that hearings were held in “tiny offices or basement rooms without a judge’s bench or jury box”); William Glaberson, *How a Reviled Court System Has Outlasted Critics*, N.Y. TIMES, Sept. 27, 2006, at A1 [hereinafter Glaberson, *How a Reviled Court System*]; William Glaberson, *Money Trail Often Murky in Small-Town Courts*, N.Y. TIMES, Jan. 29, 2007, at A3 [hereinafter Glaberson, *Money Trail*]; Glaberson, *Small-Town Justice*, *supra* note 60.

¹⁰³ See *supra* note 102.

¹⁰⁴ See Glaberson & McGinty, *supra* note 61 (“Norman P. Effman has been the public defender for 16 years in Wyoming County, where he said only one of the 37 justices was a lawyer.”).

¹⁰⁵ *Id.*

¹⁰⁶ In Arizona, justice of the peace courts can hear certain criminal, traffic, and other civil matters (currently up to \$5000 in value), and they resemble New York’s justice courts in their low bar to entry for judges. See Cathy Lesser Mansfield, *Disorder in the People’s Court: Rethinking the Role of Non-Lawyer Judges in Limited Jurisdiction Court Civil Cases*, 29 N.M. L. REV. 119, 120–27 (1999) (providing concrete, startling examples); see also Anne E. Nelson, *Fifty-Eight Years and Counting: The Elusive Quest to Reform Arizona’s Justice of the Peace Courts*, 52 ARIZ. L. REV. 533 (2010).

¹⁰⁷ Cf. Leib, *supra* note 14, at 898 n.1 (“Of the 103.5 million incoming cases in 2010, 68 million (66%) were processed in limited jurisdiction courts.” (quoting ROBERT C. LAFOUNTAIN ET AL., COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 1 (2012))).

¹⁰⁸ This court hears tort and other claims against the State of New York and some state-related entities. See N.Y. CONST. art. VI, § 9 (2002); see also N.Y. CT. CL. ACT § 9 (McKinney 2014) (addressing the jurisdiction of the court of claims).

¹⁰⁹ The NYC civil court system includes the Bronx County Civil Court and Bronx County Housing Court (Bronx), Kings County Court and Redhook Community Court (handling both criminal and civil matters) (Brooklyn), New York County Court and Harlem Community Justice Center (Manhattan), Queens County Court, and Richmond County Court (Staten Island). See, e.g., *New York City Civil Court: Phone Listings & Addresses*, NYCOURTS.GOV, <http://www.nycourts.gov/courts/nyc/civil/addresses.shtml> (last updated Feb. 19, 2013).

¹¹⁰ The criminal courts include Bronx Criminal Court, Kings (Brooklyn) Criminal Court, New York (Manhattan) Criminal Court, Midtown Community Court, Queens Criminal Court, Red Hook Community Justice Center, and Richmond (Staten Island) Criminal Court. *New York City Criminal Court: Court Information by County*, NYCOURTS.GOV, <http://www.nycourts.gov/courts/nyc/criminal/generalinfo.shtml> (last updated Nov. 26, 2013).

courts hear more than 625,000 cases per year¹¹² and have jurisdiction over cases involving matters up to \$25,000 and any cases a supreme court refers to them.¹¹³ Civil courts also have internalized specialized courts,¹¹⁴ including a small claims part that handles claims of up to \$5000, and a housing part that hears landlord-tenant and housing code matters, such as holdovers, possession, warranty of habitability, and motions to compel compliance with orders to correct housing violations.¹¹⁵ New York City also has community courts and other problem solving courts.¹¹⁶ For example, the Harlem Community Justice Center is praised for its “community setting,” which “encourages the judge to develop an understanding of the neighborhood’s hot spots and eyesores,” leading to “more informed decision making.”¹¹⁷ Seeking to replicate those advantages are other New York City courts, such as the domestic violence courts (including criminal courts);¹¹⁸ drug courts;¹¹⁹ and mental health courts.¹²⁰

¹¹¹ See Cheng, *supra* note 18, at 525 (“Even state courts have increasingly turned to specialized courts or a subject-matter rotation system.”).

¹¹² Hon. Fern A. Fisher, *New York City Civil Court: Welcome*, NYCOURTS.GOV, <http://www.nycourts.gov/COURTS/nyc/civil/welcome.shtml> (last updated Jan. 27, 2014).

¹¹³ *New York City Civil Court: New York City Courthouses*, NYCOURTS.GOV, <http://www.courts.state.ny.us/courts/nyc/civil> (last updated Mar. 4, 2013).

¹¹⁴ See, e.g., Johnstone, *supra* note 94, at 918 & n.10.

¹¹⁵ See, e.g., Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City’s Housing Court*, 3 CARDOZO PUB. L. POL’Y & ETHICS J. 659 (2006); Johnstone, *supra* note 94, at 919 n.13 (“In 1998, there were 326,212 cases filed in the New York City Housing Court . . .”).

¹¹⁶ See, e.g., VICTOR E. FLANGO, NAT’L CTR. FOR STATE COURTS, DWI COURTS: THE NEWEST PROBLEM-SOLVING COURTS (2004), available at <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/traffic/id/44>; Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1587, 1590–91 (2012) (discussing the decarceration approach in about “3,000 specialized criminal courts”); *Problem Solving Courts Overview*, NYCOURTS.GOV, http://www.nycourts.gov/courts/problem_solving (last updated Jan. 6, 2014).

¹¹⁷ See *Harlem Community Justice Center: How It Works*, CENTER FOR CT. INNOVATION, <http://www.courtinnovation.org/project/harlem-community-justice-center> (last visited Feb. 4, 2014).

¹¹⁸ MELISSA LABRIOLA ET AL., A NATIONAL PORTRAIT OF DOMESTIC VIOLENCE COURTS (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/229659.pdf> (focusing on criminal courts, and noting that “[d]omestic violence courts also lack a single information clearinghouse as exists with drug courts (National Association of Drug Court Professionals), leading many such courts to reflect *specific local* or statewide approaches.” (emphasis added)).

¹¹⁹ HON. FERN FISHER ET AL., STATE OF N.Y. UNIFIED COURT SYS., CRIMINAL COURT OF THE CITY OF N.Y., DRUG COURT INITIATIVE ANNUAL REPORT 7, 13–14 (2008), available at <http://www.nycourts.gov/courts/nyc/criminal/Annual%20Report%202008%20Final%20101509.pdf> (noting that judges’ rates of referral to drug treatment diversions soon after arraignment vary by jurisdiction—for example, the Manhattan Misdemeanor Treatment Court and Queens Misdemeanor Treatment Court refer at different rates).

¹²⁰ See, e.g., *Problem-Solving Courts: Mental Health Courts: Overview*, NYCOURTS.GOV, http://www.nycourts.gov/courts/problem_solving/mh/home.shtml (last updated Jan. 6, 2014).

The New York City criminal courts adjudicate misdemeanors and violations and house preliminary hearings in felony cases.¹²¹ Each criminal court oversees a domestic violence court. The criminal courts disposed of almost 373,000 criminal matters in 2010.

Hovering over the New York trial courts are four types of appellate courts—the New York Court of Appeals (the highest court, called the supreme court in most other states), appellate divisions, appellate terms,¹²² and county courts in certain circumstances.¹²³

Finally, there are administrative courts. New York City has numerous local administrative courts.¹²⁴ There are at least four major administrative bodies with adjudicatory power, known as the “high volume” tribunals: “the Adjudication Division of the Department of Finance [(Finance)], the Environmental Control Board [(ECB)],¹²⁵ the Taxi and Limousine Commission Courts, and the Tribunal at the Department of Health and Mental Hygiene.”¹²⁶ Together, these courts

¹²¹ The *New York Times* reporter who so unlovingly detailed the habits of New York State’s town and village justices, William Glaberson, has detailed the extensive delays in obtaining a trial in the Bronx courts in misdemeanor cases. See William Glaberson, *Even for Minor Crimes in Bronx, No Guarantee of Getting a Trial*, N.Y. TIMES, May 1, 2013, at A1; see also Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011).

¹²² Appellate terms have a “provisional status,” unlike appellate divisions. See *People v. Pestana*, 762 N.Y.S.2d 786, 791 (Crim. Ct. 2003) (“[O]ne may even ask how this court can be bound by an unpublished decision of the Appellate Term, First Department.”).

¹²³ The county courts can serve as appeals courts in two of the state’s four judicial departments. See, e.g., JONATHAN LIPPMAN & A. GAIL PRUDENTI, N.Y. STATE UNIFIED COURT SYS., *THE NEW YORK STATE COURTS: AN INTRODUCTORY GUIDE* 4 (2014), available at <https://www.nycourts.gov/admin/NYCourts-IntroGuide.pdf>.

¹²⁴ See David B. Goldin & Martha I. Casey, *New York City Administrative Tribunals: A Case Study in Opportunity for Court Reform*, 49 JUDGES’ J. 20, 20 (2010) (“The city’s administrative tribunals are easily analogized to courts, but there are important differences between the two types of decision-making bodies.”); cf. *id.* at 27 (“Municipal administrative tribunals . . . represent a significant facet of the overall adjudicative function of American government.”). Administrative tribunals even have taken on new criminal court matters. *Id.* at 21. New York City administrative bodies are governed by the New York City Charter and the New York City Administrative Procedure Act (CAPA). *Id.* at 21 & n.9; Sherry M. Cohen & Joanna Weiss, *Know Your Audience: How NYC Tribunals Have Addressed Self-Represented Litigants and Increased Access to Justice*, 29 J. NAT’L ASS’N ADMIN. L. JUDICIARY 485, 487 (2009). City agencies are not subject to state administrative law. See *id.*

¹²⁵ The ECB handles violations for various agencies, including Sanitation, the Department of Buildings, the Department of Transportation, the Fire Department, the Department of Environmental Protection, the Department of Health and Mental Hygiene, and the Police Department. See *Office of Administrative Trials and Hearings (OATH): Environmental Control Board: Ticket-Issuing Agencies*, NYC.GOV, <http://www.nyc.gov/html/oath/html/ecb/ecb.shtml> (last visited Apr. 18, 2014); see also *Office of Administrative Trials and Hearings (OATH): ECB Tribunal Data*, NYC.GOV, <http://www.nyc.gov/html/oath/html/ecb/ecb-tribunal-data.shtml> (last visited Apr. 18, 2014). Mayor Bloomberg made the ECB part of the Office of Administrative Trials and Hearings (OATH) in 2008. *Office of Administrative Trials and Hearings (OATH): About OATH*, NYC.GOV, <http://www.nyc.gov/html/oath/html/about/about.shtml> (last visited Apr. 18, 2014).

¹²⁶ Cohen & Weiss, *supra* note 124, at 487.

handle an enormous number of cases: “nearly three million summonses each year.”¹²⁷ According to a different measure, “[e]very year the more than 500 administrative law judges (ALJs) in New York City’s administrative tribunals hear and decide over a million cases.”¹²⁸

Adjudication in local administrative tribunals is complex. The time allotted to cases varies dramatically by agency—from ten minutes to months.¹²⁹ Some administrative courts have extensive hearings and make findings of fact. ALJs can preside over small courtrooms or offices, usually with no petitioner present.¹³⁰ The New York City Conflict of Interest Board (COIB) can conduct trial-like hearings—usually via the ALJ of an Office of Administrative Trials and Hearings (OATH) tribunal, but occasionally by the COIB or a board member—establishing facts and imposing penalties.¹³¹ Some agencies have “broad decision-making authority, while others are confined to a strict application of a statute.”¹³² Some ALJs merely determine narrow remedial issues, such as the amount of a penalty due for a violation. ALJs lodged under the ECB, for example, only can determine liability and assign penalties according to a schedule.¹³³

New York never could boast of having a streamlined system. For example, back in 1687, the colony established six types of courts—chancery, also serving as the court of appeals; courts of oyer and terminer within each county; a mayor and aldermen’s court; a system whereby court commissioners heard petty cases; and a court of adjudication that heard land matters.¹³⁴ The functions of these early courts could range from looking into how vegetables were priced to regulating the use of arms. And courts blurred the boundaries between

¹²⁷ *Id.* at 487 & n.4 (citing *NYC Administrative Justice Coordinator: Tribunals*, NYC.GOV, <http://www.nyc.gov/html/ajc/pages/tribunals/tribunals.shtml> (last visited Apr. 18, 2014)).

¹²⁸ Goldin & Casey, *supra* note 124.

¹²⁹ *Id.* at 21.

¹³⁰ See generally Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1478 (2009) (“Administrative law judges (ALJs) toil in the shadows of the civil justice system. They work for the executive branches of state and federal governments, usually embedded in specialized agencies. Located outside the courtrooms in which generalist judges preside, they comprise a ‘hidden judiciary.’”).

¹³¹ Joan R. Salzman & Vanessa Legagneur, *Enforcement of Local Ethics Law*, in AM. BAR ASS’N, ETHICAL STANDARDS IN THE PUBLIC SECTOR, ABA-ESPS Ch. 11 (Patricia E. Salkin ed., 2008). The ALJ sends a confidential report to the COIB and the relevant parties; parties then can submit comments; and the COIB then states its findings of fact, conclusions of law, and can issue an order with penalties. *Id.*

¹³² Goldin & Casey, *supra* note 124, at 21.

¹³³ Instead of ALJs fixing penalties case by case, the ECB adopts a penalty schedule that fixes the amounts. *Id.* at 25.

¹³⁴ See Glaberson & McGinty, *supra* note 61 (“A 13th-century English institution, the justice of the peace was imported to the colonies in the 1600’s along with a fundamental notion: that laymen could settle small-bore cases with practical solutions grounded in local custom or common sense.”).

judicial and administrative responsibilities, “much like those of the earliest itinerant judges in England.”¹³⁵

B. *Tentativeness of Local Decision-Making*

One objection against local common law is that local decision-making is so temporary that it is effectively not law. Yet this critique also can be levied against state and federal common law decisions, as well as against legislative and constitutional decisions issued by courts that are not the highest in the jurisdiction.

A position of tentativeness does not mean a court lacks the power to create law. Contingency is embedded in our legal regime. Deprivations can be temporary but still require remedies.¹³⁶ Remedies can be temporary, but meaningful.¹³⁷ Legal statutes can be contingent, but carry the force of law.¹³⁸ Legal rights can fade over time or never become actualized, but still have been backed by the law.¹³⁹ State common law and federal common law are subject to legislative trumping at any point.¹⁴⁰ Moreover, higher courts can overturn the lower courts’ rulings. And the U.S. Supreme Court can, in rare

¹³⁵ PAUL SAMUEL REINSCH, *ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES* 33 (1899).

¹³⁶ See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 335 (2002) (describing the test for a temporary regulatory taking); *First Lutheran Church v. Cnty. of Los Angeles*, 482 U.S. 304 (1987) (compensation due on a “[t]emporary’ regulatory taking[.]”).

¹³⁷ See, e.g., Donald M. Peters, *Temporary Restraining Orders and Preliminary Injunction*, 31 *ARIZ. ATT’Y* 25 (1995).

¹³⁸ See, e.g., Richard S. Belous, *The Rise of the Contingent Work Force: The Key Challenges and Opportunities*, 52 *WASH. & LEE L. REV.* 863 (1995); Russell D. Covey, *Temporary Insanity: The Strange Life and Times of the Perfect Defense*, 91 *B.U. L. REV.* 1597, 1598 (2011); Angelica M. Ochoa, *Nonimmigrant Employment-Based Visas*, 41 *COLO. LAW.* 27 (2012); Clyde W. Summers, *Contingent Employment in the United States*, 18 *COMP. LAB. L.J.* 503 (1997).

¹³⁹ See, e.g., Glen O. Robinson, *Explaining Contingent Rights: The Puzzle of “Obsolete” Covenants*, 91 *COLUM. L. REV.* 546 (1991); J. L. Thorndike, *Contingent Remainders*, 30 *HARV. L. REV.* 226 (1917); cf. Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 *COLUM. L. REV.* 595 (1993) (exploring the extension of contingency fees from the civil to the criminal context); Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 *S. CT. ECON. REV.* 77 (2010) (objecting to the use of contingent fee counsel by governments as opposed to private parties).

¹⁴⁰ See, e.g., *Bulger v. People*, 156 P. 800, 802–03 (Colo. 1916); *Ex parte Chesser*, 112 So. 87, 89 (Fla. 1927); *Simonson v. McDonald*, 311 P.2d 982 (Mont. 1957); *Snell v. Rupert*, 541 P.2d 1042 (Wyo. 1975) (finding that state statutes have superseded common law ways of necessity); Rubin, *supra* note 27, at 792 (“Our legal system is dominated by legislatures and administrative agencies and consists primarily of the huge volume of statutes and regulations they produce.”); Robert F. Williams, *Statutes As Sources of Law Beyond Their Terms in Common-Law Cases*, 50 *GEO. WASH. L. REV.* 554, 555 (1982); cf. William N. Eskridge, Jr. & John Ferejohn, *Essay, Super-Statutes*, 50 *DUKE L.J.* 1215, 1219 (2001) (“Thus, the Statute of Frauds and the Statute of Uses both changed the common law and became objects of evolution and judicial elaboration, common law-style.”).

circumstances, overturn state court interpretations of state law in order to consider a federal question.¹⁴¹ The law is replete with indeterminacy.

However, uniformity might be a long time coming because of low appeal rates, because the higher courts are declining or hesitating to resolve splits, because the division among lower courts is not obvious, or because of local control over the issues through home rule or other grants of power to local bodies. It is well known that the U.S. Supreme Court waits before resolving federal circuit splits to let federal circuit courts of appeal take the first crack at the legal and policy questions. Federal district courts also develop longer-standing rules than we might expect. One study of federal district court stare decisis practices found that, “unlike well-defined circuit court stare decisis practices, there are few clear rules for district courts,” yet deference is extended.¹⁴² Therefore, to sum up, the federal circuits eventually might resolve district court conflicts, and the United States Supreme Court might resolve circuit splits; but for years, parties can be subject to vastly different rules solely because of geographic chance. Local common law divergences similarly operate with the full force of the law until appellate courts impose greater regularity.

This Article calls “suspended state common law” those types of local common law rules, primarily substantive, that await uniformity from the higher courts. Although vulnerable to erasure or homogenization, they operate until such resolution as the law, bounded by smaller jurisdictional boundaries than the state. A court in the Bronx can implement, for example, a different version of the common law than a court in Albany,¹⁴³ as can the intermediate courts of appeal throughout the state.

C. *Historical Foundations*

The current complex local court structure, the localist rhetoric that courts employ to talk about the attributes and values of state common law, and the cultural embracing of sub-federal variation owe a partial debt to early Britain common law.

¹⁴¹ See *Murdock v. City of Memphis*, 87 U.S. 590 (1875); Michael G. Collins, *Reconstructing Murdock v. Memphis*, 98 VA. L. REV. 1439, 1442 (2012); cf. Jonathan F. Mitchell, *Reconsidering Murdock: State-Law Reversals as Constitutional Avoidance*, 77 U. CHI. L. REV. 1335, 1336–37 (2010) (“This Article challenges the longstanding notion that the Supreme Court should never reverse a state supreme court’s judgment solely on state-law grounds.”).

¹⁴² Mead, *supra* note 33, at 803 (“Practices are unwritten (or, at best, mentioned briefly through the opinions of individual judges), uncertain, and vary from individual judge to judge. The circumstances under which judges extend deference remain a mystery.” (footnote omitted)).

¹⁴³ Cf. Leib, *supra* note 14, at 904 (excluding from a definition of local courts “[s]ome classes of lower trial courts of general jurisdiction”).

The local courts described above grew out of peculiarly local law in the colonies and early American republic. Even earlier, the British common law's universalizing power developed in part to do away with the various rules produced by a plethora of local courts¹⁴⁴ and their ancestors, the early British courts—going all the way back to Anglo-Saxon England.¹⁴⁵ Though not necessarily praising the heterogeneity, “as late as 1765, Blackstone observed in his Commentaries that multiple types of law still prevailed in England, including natural law, divine law, the law of nations, the English common law, local customary law, Roman law (governing Oxford and Cambridge Universities), ecclesiastical law, statutory law, and the law merchant.”¹⁴⁶ Royal courts, over time, came to include “the King's Bench, Common Pleas, Exchequer, and Chancery” courts;¹⁴⁷ and, again over time, began to displace the others. General agreement exists that once uniform courts and case reporters became prevalent, the precedential effect of the common law increased.¹⁴⁸ But the uniform never triumphed entirely over the local.¹⁴⁹

The early American proto-judicial system shared traits with the pre-regularization British judicial system and, therefore, with today's local courts. The early courts were comfortable with oral culture,¹⁵⁰ a lack of self-consciousness about creating “common law,”¹⁵¹ a vertical hierarchy of courts to which appeals can be made,¹⁵² a mix of the formal and informal,¹⁵³ frequent self-representation,¹⁵⁴ greater influence of local reputation,¹⁵⁵ and complicated or nonexistent rules about stare

¹⁴⁴ Cf. HUDSON, *supra* note 30, at 17 (“Common law must contrast with a regionally based law.”).

¹⁴⁵ *Id.* at xi, 20 (citing Patrick Wormald, *Maitland and Anglo-Saxon Law: Beyond Domesday Book*, in *THE HISTORY OF ENGLISH LAW: CENTENARY ESSAYS ON “POLLOCK AND MAITLAN”* (John Hudson ed., 1996)).

¹⁴⁶ Zywicki, *supra* note 30, at 1587.

¹⁴⁷ John Hasnas, *Confusion About Hayek's Confusion: A Response to Morison*, 2 N.Y.U. J.L. & LIBERTY 241, 246 (2007).

¹⁴⁸ Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 48 EMORY L.J. 585, 597–98 (2009). The enactment of the Judicature Act of 1873 and the Appellate Jurisdiction Act of 1876 assisted in imposing uniformity. Hasnas, *supra* note 28, at 92–93, 93 n.45, 94 (“At this point, the common law had lost its character as a customary law.”).

¹⁴⁹ See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 134 (1996) (Souter, J., dissenting) (“Much of the common law related to matters which were purely local . . .” (quoting Richard C. Dale, *The Adoption of the Common Law by the American Colonies*, 30 AM. L. REG. 553, 554 (1882))).

¹⁵⁰ HUDSON, *supra* note 30, at 10.

¹⁵¹ *Id.* at 18.

¹⁵² *Id.* at 2, 13.

¹⁵³ See, e.g., *id.* at 9–10. Charles Hilkey's work on colonial Massachusetts courts describes the informality of actions at the time: “Little regard was paid to the forms of actions.” CHARLES J. HILKEY, *LEGAL DEVELOPMENT IN COLONIAL MASSACHUSETTS, 1630–1686*, at 63, 70 (1967).

¹⁵⁴ *Id.* at 11.

¹⁵⁵ *Id.* at 12.

decisis.¹⁵⁶ Important here is that courts came in a wide variety of sizes and shapes and had independence to engage in lawmaking. For example, county courts mediated disputes and held great power in the colonies, handling matters ranging from bill collection to garbage collection.¹⁵⁷ And selectmen in the towns of Dedham and Watertown heard cases involving property, welfare, and livestock damage, turning them into a powerful political force.¹⁵⁸

In the pre-Civil War South, local courts often battled with state courts, leading an author to coin the phrase “localized law.”¹⁵⁹ Laura Edwards’s description of local courts during this time period captures a phenomenon resembling local common law: “[A]s a broad version of common law, or as local courts filling in gaps left by state statu[t]es, which at times allowed wide discretion to localities.”¹⁶⁰ A study of courts in early Virginia, particularly on its Eastern Shore, found that decisions regarding free women married to enslaved men were “intensely local,” with “magistrates and masters interpret[ing] the legalities of coverture to support their own ends.”¹⁶¹ And pre-statehood courts in three Cambridgeshire, Maryland villages developed different rules for what inheritance rights they gave women when their spouses died.¹⁶²

The colonies did not make a clean break from British common law. Many of the lawyers who populated the seventeenth-century colonies had studied Sir Edward Coke’s approach in Britain,¹⁶³ and some

¹⁵⁶ Stare decisis appears to be a relatively recent phenomenon (a child of the late nineteenth century, not a trait of the early common law), though “debate on this particular issue has become quite spirited.” Zywicki, *supra* note 30, at 1566 & n.41.

¹⁵⁷ Yngvesson, *supra* note 51, at 1696 & n.41 (quoting Julius Goebel, Jr., *King’s Law and Local Custom in Seventeenth Century New England*, in *ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW* 88 (David H. Flaherty ed., 1969)).

¹⁵⁸ *Id.* at 1696 & n.39 (quoting Kenneth A. Lockridge & Alan Kreider, *The Evolution of Massachusetts Town Government, 1640 to 1740*, in *COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT* 203, 210 (Stanley Katz ed., 2d ed. 1971)).

¹⁵⁹ See LAURA F. EDWARDS, *THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH* (2009).

¹⁶⁰ See Jessica K. Lowe, *A Separate Peace? The Politics of Localized Law in the Post-Revolutionary Era*, 36 *LAW & SOC. INQUIRY* 788, 794 n.3 (2011) (reviewing EDWARDS, *supra* note 159) (noting that Edwards’s project went beyond common law: “Localized law, [Edwards] argues, encompassed all the varying rubrics—statutory, common law, cultural, religious, and other—that were applied in local cases.”).

¹⁶¹ Terri L. Snyder, *Marriage on the Margins: Free Wives, Enslaved Husbands, and the Law in Early Virginia*, 30 *LAW & HIST. REV.* 141, 146–48 (2012) (“[F]ree black women in mixed-status marriages would need to carefully navigate the competing aims of masters, local courts, and statute law in order to keep their households intact.”).

¹⁶² Lois Green Carr & Lorena S. Walsh, *The Planter’s Wife: The Experience of White Women in Seventeenth-Century Maryland*, 34 *WM. & MARY Q.* 542, 557–58 & n.51 (1977) (citing MARGARET SPUFFORD, *CONTRASTING COMMUNITIES: ENGLISH VILLAGERS IN THE SIXTEENTH AND SEVENTEENTH CENTURIES* 85–90, 111–18, 161–64 (1974)).

¹⁶³ Gedicks, *supra* note 148, at 614 (“Because most of the American colonies were initially chartered and settled during the early seventeenth century, when Coke’s career as a judge and member of Parliament was at its height, Coke exerted a strong influence on colonial law. . . .

traditions were imported from the borough and manor courts that colonists had known in England.¹⁶⁴ Indeed, New York, for example, had manor courts.¹⁶⁵

But they did not adopt the British common law wholesale. The British spawn not only mistrusted the law of their parents¹⁶⁶ but also recognized that certain rules did not suit the new soil.¹⁶⁷ The romantic tale of the colonial judicial system is that the settlers took what they wished from the British common law system¹⁶⁸—as a New Jersey court put it, “the common law purified from its local dross,”¹⁶⁹ emphasizing the break from the royal courts.¹⁷⁰ However, the emerging law also diverged from the British model because the colonists lacked resources. They had few attorneys, few law books, little time, and less money.¹⁷¹ As in England, with time came greater unification, but never a complete smoothing out of this patchwork of local courts. This early localism has lived on in both the heterogeneity of our local courts and in the localist rhetoric used to talk about the practice of judge-made law.

III. CONDITIONS CONDUCIVE TO LOCAL COMMON LAW DEVELOPMENT

This Part provides a preliminary map of the variables most conducive to the development of both substantive and procedural common law. Future empirical research will substantiate these hypotheses or point us in new directions.

Even after Blackstone, Coke’s higher-law constitutionalism remained the more influential school of thought before and during the Revolution.”).

¹⁶⁴ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 134 (1996) (Souter, J., dissenting) (describing Julius Goebel, *King’s Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416 (1931)).

¹⁶⁵ HILKEY, *supra* note 153, at 66. Some grants of land in the Hudson River Valley included “a full set of feudal jurisdictional privileges, including the right to hold both court leet and court baron.” *Id.* at 69.

¹⁶⁶ ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 7 (1938); *see also* CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 224–25 (1911) (quoted by Justice Souter in his *Seminole Tribe* dissent, *see Seminole Tribe*, 517 U.S. at 134 n.31 (Souter, J., dissenting)).

¹⁶⁷ *See, e.g.*, REINSCH, *supra* note 135, at 5 (observing that the law of the colonies, while adopting the legal institutions of the mother country, “always retains the impress of the earlier originality”).

¹⁶⁸ *See, e.g.*, Angela Fernandez, Pierson v. Post: *A Great Debate, James Kent, and the Project of Building a Learned Law for New York State*, 34 LAW & SOC. INQUIRY 301 (2009) (explaining that Blackstone’s “*Commentaries* were wildly popular” in part because colonists “took a selective and reasoned approach to the legal rules”).

¹⁶⁹ *Arnold v. Mundy*, 6 N.J.L. 1, 16 (N.J. 1821).

¹⁷⁰ *See, e.g.*, *Cox v. Morrow*, 14 Ark. 603, 611 (1854).

¹⁷¹ *Seminole Tribe*, 517 U.S. at 133 (Souter, J., dissenting) (describing the courts and legislatures in the freshly formed states deliberately approaching the development of the common law).

A. *Substantive Local Common Law*

Three factors are most likely to help cultivate *substantive* local common law: (1) having a trial court with limited subject matter jurisdiction,¹⁷² (2) stickiness of appeal, and (3) unwillingness of the higher courts to resolve particular differences among the lower courts. A concluding section suggests that other factors could be at play in the development of substantive local common law—a strong local legal culture, the size of the jurisdiction, whether the court specializes in local or, instead, state law, whether a party has a lawyer, barriers to entry for lawyers to practice in neighboring jurisdictions, and how often decisions are published.

1. Limited Subject Matter Jurisdiction

The first factor relevant to developing substantive local common law is breadth of subject matter jurisdiction: The more specialized a court is, the more apt it is to produce local common law.¹⁷³ As Part II.A detailed, state trial courts of general jurisdiction hear a broader range of claims than do state trial courts of limited subject matter jurisdiction, such as city criminal courts or village courts. The benefits of limited jurisdiction to local common law resemble the so-called “silo effect” in administrative common law.¹⁷⁴

To give some examples from family and housing courts: Though Ohio statutes permit parties to “obtain a divorce on the grounds of extreme cruelty on account of domestic violence,” nonetheless, “judges in one local domestic relations court grant divorce only on the ground of incompatibility and will not entertain hearings or evidence on other grounds for divorce.”¹⁷⁵ In other words, the domestic relations court—a court of limited jurisdiction—developed its own common law of divorce. Or take courts specializing in housing matters: Each of New York City’s five counties has a housing court.¹⁷⁶ Parties rarely appeal

¹⁷² Thanks to Professor Lee Fennell for pushing against the assumption that limited subject matter jurisdiction courts would be more likely to produce local common law. It is possible that having hundreds of small courts throughout a state creates more fertile grounds than having fewer, yet stratified, courts. Conversation with Lee Fennell, Professor, Univ. of Chi. Law Sch., in Washington, D.C. (Oct. 18, 2013).

¹⁷³ See generally Cheng, *supra* note 18, at 525 (“Even state courts have increasingly turned to specialized courts or a subject-matter rotation system.”).

¹⁷⁴ Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 501, 510–15, 526, 529, 552–71 (2011).

¹⁷⁵ See Seielstad, *supra* note 58, at 130 (footnote omitted).

¹⁷⁶ See, e.g., *New York City Housing Court: Phone Listings & Addresses*, NYCOURTS.GOV, <http://www.nycourts.gov/COURTS/nyc/housing/addresses.shtml> (last updated Dec. 6, 2012);

decisions more than once, and lawyers and judges tend to cite trial cases from their own boroughs, where judges have developed a certain expertise. Manhattan and the Bronx share an appellate court, as do Brooklyn and Queens. Therefore, binding precedent can differ depending on which side of the East River one lives on. As a recent example of local common law arising in this context, Bronx and Manhattan courts developed different duties for banks to maintain the premises in foreclosed-on properties.¹⁷⁷

Local administrative tribunals also seem likely to produce something like the common law, given their limited jurisdiction and specialization. Suggesting that local common law could emerge from administrative courts is not entirely radical: They are decision-making tribunals whose decision makers are often called “judges” or “hearing officers.” There are indications, for example, that New York City’s COIB has created a “common practice” in “rely[ing] on advisory opinions.”¹⁷⁸

2. Stickiness of Appeal

The second factor even more likely to produce substantive local common law is difficulty of appeal: The harder it is to appeal a lower court decision, the more likely the law will stay locally bounded. The decision is effectively protected from review.

Formal requirements and informal practices make appeals difficult. For example, certain states prohibit appeals from small claims courts.¹⁷⁹ Parties only can appeal New York City’s BSA decisions to the state trial courts in cases of “illegality” under the New York City administrative code.¹⁸⁰ And sometimes states require extra steps to appeal decisions from the lowest-level courts, making it harder to get to the highest court and harder to obtain statewide law.¹⁸¹ Further, some courts, such as

see also Ken Karas, *Recognizing a Right to Counsel for Indigent Tenants in Eviction Proceedings in New York*, 24 COLUM. J.L. & SOC. PROBS. 527, 537–38 & nn.85–91 (1991).

¹⁷⁷ See Steven T. Hasty, *Protecting Tenants at Foreclosure by Funding Needed Repairs*, 20 J.L. & POL’Y 581, 583 n.15 (2012) (describing how Bronx courts have placed new duties on banks to maintain the premises in foreclosed-on properties, comparing a Bronx case with a Kings County (Brooklyn) case).

¹⁷⁸ See Salzman & Legagneur, *supra* note 131 (“It is common practice to allow as a defense to an ethics enforcement action reasonable reliance upon an ethics board’s advisory opinion.”).

¹⁷⁹ See, e.g., *Small Claims*, JUD. BRANCH ARIZ., MOHAVE COUNTY, http://www.mohavecourts.com/Justice/Jcss_SmallClaims.html (last visited Apr. 18, 2014).

¹⁸⁰ See BSA, NYC BD. OF STANDARDS & APPEALS, RULES OF PRACTICE AND PROCEDURE 29 (2012), available at http://www.nyc.gov/html/bsa/downloads/pdf/forms/rules_of_practice_procedure_2012.pdf.

¹⁸¹ In Arizona, limited jurisdiction and justice of the peace court decisions are appealed to the Arizona Superior Court (the lower trial court), and then on to an intermediate appellate court, and finally to the state supreme court. See, e.g., *Guide to AZ Courts: How a Case Moves Through the Court System*, AZCOURTS.GOV, <http://www.azcourts.gov/guidetoazcourts/Howa>

Arizona's justice of the peace courts, are not "courts of record," which means that they need not provide transcripts to parties—yet, under Arizona law, a party cannot appeal a decision if she failed to ask for a transcript of the proceedings at the start of trial.¹⁸²

Informal obstacles to appeals include substandard trial recording processes. Many municipal court trials in Texas, for example, are not recorded.¹⁸³ A *New York Times* investigation of New York's town and village courts (for which two-thirds of the state's judges work) linked low appeal rates to inadequate recording of trials: With the town and village justices "not required to make transcripts or tape recordings of what goes on," "it is often difficult to appeal their decisions."¹⁸⁴ New York now requires digital recordings of proceedings and provides the recordation equipment, though courts still do not have to publish their proceedings.¹⁸⁵

Finding data on appeal rates from local courts is generally difficult. Many states do not even make this data available. Even finding data on initial dispositions is challenging.¹⁸⁶ But we do have data. For example, there was a 1.2% appeals rate from the Texas justice courts in 2011–2012.¹⁸⁷ The appeals rate from the civil justice courts and district and

CaseMovesThroughtheCourtSystem.aspx (last visited Apr. 18, 2014); see also *Justice of the Peace Courts: Justice Court Case Activity, Fiscal Year 2011*, in ARIZ. SUPREME COURT, THE ARIZONA COURTS: DATA REPORT FOR FY 2011, VOLUME II, at 3 (2011), available at http://www.azcourts.gov/Portals/39/2011DR/JP_Intro.pdf#page=3; *Limited Jurisdiction Courts: Limited Jurisdiction Court Case Activity, Fiscal Year 2011*, in ARIZ. SUPREME COURT, THE ARIZONA COURTS: DATA REPORT FOR FY 2011, VOLUME II, at 3 (2011), available at http://www.azcourts.gov/Portals/39/2011DR/LJ_CaseActivity.pdf.

¹⁸² Mansfield, *supra* note 106, at 130.

¹⁸³ See OFFICE OF COURT ADMIN., THE TEXAS JUDICIAL SYSTEM 5 (2005), available at <http://www.courts.state.tx.us/oca/pdf/JudSysPam0604.pdf>.

¹⁸⁴ *Id.* "This can create problems if an appellate court is asked to review a decision made by a justice court judge." *New York Town and Village Courts (Justice Courts)*, NYJUSTICECOURTS.ORG, <http://www.nyjusticecourts.org> (last visited Apr. 18, 2014).

¹⁸⁵ *New York Town and Village Courts (Justice Courts)*, *supra* note 184; see also Glaberson, *How a Reviled Court System*, *supra* note 102 ("For the first time, all justices will be given computers, fax machines and tape recorders, and be required to tape proceedings.").

¹⁸⁶ For example, California compiles statistics on statewide caseloads. JUDICIAL COUNCIL OF CAL., 2012 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS, 2001–2002 THROUGH 2010–2011 (2012), available at <http://www.courts.ca.gov/documents/2012-Court-Statistics-Report.pdf>.

¹⁸⁷ The Texas constitution authorizes the creation of justice of the peace courts, plus "such other courts as may be provided by law." *Ex parte Hart*, 56 S.W. 341, 341 (Tex. Crim. App. 1900). The justice courts disposed of almost two million criminal cases from September 2011 to August 2012, and only about 23,000 decisions were appealed (most after having been decided without trial). See DAVID SLAYTON, OFFICE OF COURT ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR 2012, at 84, available at <http://www.courts.state.tx.us/pubs/AR2012/AR12.pdf>. Texas also issues reports of interest on, for example, the Municipal Courts, at quite granulated levels. See *Municipal Courts*, TEX. COURTS ONLINE, <http://www.courts.state.tx.us/courts/mn.asp> (last updated Mar. 25, 2013).

county courts were similar.¹⁸⁸ In Montana, “despite the ready availability of an appeal from a civil judgment in justice or city court, only 1.6% of justice and city court cases do in fact end in appeal, probably due to the minimal amounts at issue.”¹⁸⁹ One scholar suggests a positive spin, arguing that low appeal rates show that local courts matter as the “courts of first and last resort for many Montanans,” and perhaps “the only courts to which many citizens are ever exposed,” with a “civil caseload [that] is increasing exponentially.”¹⁹⁰ A less positive interpretation calls the difficulties in appealing justice of peace decisions in Arizona frustrating and dysfunctional.¹⁹¹

3. Lack of Action by Highest State Court

Many examples of local common law do not arise from limited jurisdiction courts but instead are instances of what I call “suspended state common law”: where intermediate state courts have affirmed or created the split, and the highest state court has not acted.

For example, substantive civil local common law has developed in tort cases when the various “departments” or “divisions” in a state like New York or intermediate appellate courts elsewhere develop different rules.¹⁹² Rulings in a given New York judicial department are binding within that department and on the courts below it. The departments, at times, instruct their trial courts to follow the appellate decisions in other departments if their own department has not spoken on the issue.¹⁹³ But, as with the federal circuit courts of appeal, different appellate departments are free to develop different rules. When conflicts develop,

¹⁸⁸ The county courts have original jurisdiction over all misdemeanors not dedicated to the justice courts. TEX. CRIM. PROC. CODE ANN. § 4.07 (West 2013).

¹⁸⁹ Cynthia Ford, *Civil Practice in Montana’s “People’s Courts”: The Proposed Montana Justice and City Court Rules of Civil Procedure*, 58 MONT. L. REV. 197, 202–03 (1997) (footnote omitted); see also *People v. Pestana*, 762 N.Y.S.2d 786, 791 (Crim. Ct. 2003) (“[T]he high volume of cases handled in the local criminal court, and relatively low number of appeals taken, [indicates] there may be little cause for concern.”).

¹⁹⁰ Ford, *supra* note 189, at 198. Montana has almost three times as many justice, city, and municipal courts and judges as courts and judges of general jurisdiction. *Id.* at 201–03.

¹⁹¹ Mansfield, *supra* note 106, at 129–30. Mansfield’s survey of the literature on justice of the peace courts only confirms her suspicions that such problems are widespread. *Id.* at 132.

¹⁹² See, e.g., *Mountain View Coach Lines, Inc. v. Storms*, 476 N.Y.S.2d 918, 919–20 (App. Div. 1984) (“We . . . decline to follow two Third Department cases to the contrary. . . . While we should accept the decisions of sister departments as persuasive, we are free to reach a contrary result.” (citations omitted)).

¹⁹³ See, e.g., *id.* at 919; cf. Jill Paradise Botler et al., *The Appellate Division of the Supreme Court of New York: An Empirical Study of Its Powers and Functions as an Intermediate State Court*, 47 FORDHAM L. REV. 929, 941 (1979).

the trial courts follow the rules of their own department, like the “law of the circuit” that federal circuit courts of appeals impose.¹⁹⁴

For example, New York City courts recently faced the question of how much information a landlord must put in a notice of nonrenewal in a tenant holdover case; the appellate departments split, one of them reversing lower court holdings.¹⁹⁵ Local common law also has shaped, for example, the division of retirement benefits pursuant to residuary clauses,¹⁹⁶ whether military disability retirement pay is divisible community property under federal statutes,¹⁹⁷ “the proper standard to employ in reviewing the evidence supporting protective orders,”¹⁹⁸ and the “presumption favoring joint managing conservatorship.”¹⁹⁹ Local common law also has developed in high-stakes mental health adjudications involving forced confinement.²⁰⁰

¹⁹⁴ See Mead, *supra* note 33, at 789 (internal quotation marks omitted) (calling this “a particularly rigid form of horizontal stare decisis”).

¹⁹⁵ See *In re Giancola*, 900 N.Y.S.2d 752 (App. Div. 2010) (reversing the decisions of the Civil Court of the City of New York, Kings County, and of the New York Supreme Court, Appellate Term, applying a more lenient test, than the First Department, in a holdover action for what is required in a landlord’s notice of nonrenewal in order to satisfy the requirements of N.Y. COMP. CODES R. & REGS. tit. 9, § 2524.2(b) (2012)); *Hirsch v. Stewart*, 877 N.Y.S.2d 285, 290 (App. Div. 2009) (affirming the New York Supreme Court, Appellate Term’s affirmance of the Civil Court, New York County, holding of noncompliance).

¹⁹⁶ *Soto v. Soto*, 936 S.W.2d 338, 343 (Tex. Ct. App. 1996) (comparing the law created by the appellate division in Dallas with that in Corpus Christi).

¹⁹⁷ *Wallace v. Fuller*, 832 S.W.2d 714 (Tex. Ct. App. 1992) (recognizing the split regarding the divisibility of military disability benefits under Texas marital property laws).

¹⁹⁸ *In re I.E.W.*, No. 13-09-00216-CV, 2010 WL 3418276, at *10 & n.6 (Tex. Ct. App. Aug. 27, 2010) (comparing the application of an abuse of discretion standard in Texarkana with the “legal and factual sufficiency standard” in Corpus Christi); see also Lawrence Schlam, *Federalism and the Question of Uniform Laws: The Case of Third Party Custody* “Standing” Provisions, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 157, 186 (2012) (noting that the adoption of uniform laws “may hinder the ongoing development of local common law consistent with currently predominant local social views”).

¹⁹⁹ *Bates v. Tesar*, 81 S.W.3d 411, 424 (Tex. Ct. App. 2002) (concluding that the trial court misapplied the presumption in modification proceedings). Thanks to Sean Williams for this reference.

²⁰⁰ E-mail from Nicholas J. Phillips, Legal Intern & Student, Civil Rights Clinic, Benjamin N. Cardozo Sch. of Law, to Annie Decker, Urban Law Fellow, Fordham Law Sch. (Jul. 1, 2012, 11:17 AM EST) (on file with author). Under Article 10 of the New York State Mental Hygiene Law, individuals can be confined or subjected to what is known as Strict and Intensive Supervision and Treatment (SIST). *Id.* Ending the SIST determination requires a hearing. *Id.* Phillips described differences between the First Department (an appellate court for Manhattan and the Bronx) and the Fourth Department (an appellate court for Buffalo, Rochester, and Syracuse) regarding whether ending confinement requires a hearing, “possibly in part because many of the actual facilities in which detained sex offenders are civilly committed are located in the Fourth Department, whereas none are located in the First Department.” *Id.*

4. Other Factors Likely at Play

Moreover, other factors are likely at play in the development of substantive local common law. First, a strong local legal culture probably facilitates the development of local common law. Second, size: If a jurisdiction is small, local common law might flourish because the law is not as visible and therefore less likely to be targeted and overturned by higher state courts. On the other hand, local common law might flourish when towns grow big enough to have “real scale economies,” with “specialized staff with law degrees and so forth.”²⁰¹ Third, if a court hears cases involving city or county ordinances as opposed to state or federal laws, local common law might find more room to develop,²⁰² even if the context is as small as parking ticket adjudications²⁰³ and dog license fees.²⁰⁴ Fourth, litigants in small claims courts being unrepresented might contribute to the development of local common law by giving judges power; local judges in small claims court, for example, must supply “the law” when parties lack counsel.²⁰⁵ Fifth, barriers to entry that make it harder for lawyers to practice in more than one county might nurture local legal differences.²⁰⁶

Finally, the publication of local decisions might both destroy and build up local common law. Publication exposes local common law to review and, therefore, to reversal; however, publication also helps produce local common law by permitting formal precedent building and allowing decision makers to rely on prior decisions.²⁰⁷

²⁰¹ E-mails from Roderick M. Hills, Jr., *supra* note 21; *cf.* BRUCE H. MANN, *NEIGHBORS & STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT* (1987).

²⁰² *See, e.g.,* Leib, *supra* note 14, at 901 (“What has not been widely noticed is that the judges that serve in local courts . . . apply both local and state law.”). The literature has grappled with the concept of “administrative common law,” but has not turned to whether local administrative agencies produce the common law. *Cf.* Gillian E. Metzger, *Embracing Administrative Common Law*, 80 *GEO. WASH. L. REV.* 1293, 1295 (2012) (“[D]isagreement continues over a fundamental feature of judicial review: the role of administrative common law.”).

²⁰³ *See, e.g.,* Gerald Lebovits, *Small Claims Courts Offer Prompt Adjudication Based on Substantive Law*, 70 *N.Y. ST. B.J.* 6 (1998).

²⁰⁴ The Niagara City Court in upstate New York manages dog license fees. *Paradise v. O’Laughlin*, 621 *F. Supp.* 694 (W.D.N.Y. 1984) (discussing a conflict between a city staffer and the Niagara City Court over how it handled the collection of dog license fees).

²⁰⁵ Paris R. Baldacci, *A Full and Fair Hearing: The Role of the ALJ in Assisting the Pro Se Litigant*, 27 *J. NAT’L ASS’N ADMIN. L. JUDICIARY* 447, 490 (2007) (“[A] judge in Small Claims court, who must not only apply substantive law to the facts presented by the pro se parties, but must also identify the substantive law to be applied to the facts since a Small Claims judge does not have the benefit of lawyers to brief the law.”).

²⁰⁶ Telephone Conversation with Richard Zorza, Esq., Author, Access to Justice Blog (Oct. 1, 2013).

²⁰⁷ *See, e.g., In re Holtzman*, 695 *N.E.2d* 1104 (N.Y. 1998) (an example of a reported New York decision on appeal from a COIB determination). According to Mark Davies, the Executive Director at COIB since 1994, there is “not much data available for the COIB.” E-mail from

As one might expect, publication practices vary dramatically among local courts and local administrative agencies. For example, decisions are only available for certain local civil actions in New York courts—specified civil cases, replevin actions, and transfers from supreme courts.²⁰⁸ Decisions also are available for commercial claim, landlord-tenant, and small claims cases in city courts in certain judicial districts; from other enumerated city courts; from the district courts in Nassau County; and from name changes in New York City civil courts, but not arbitration decisions.²⁰⁹

Turning to administrative agencies, decisions are published and made available, for example, from New York City's Department of Consumer Affairs, the ECB, the OATH, the Tax Appeals Tribunal, and the Taxi and Limousine Commission.²¹⁰ The BSA publishes opinions when enforcing the city's zoning, building, fire, multiple dwelling, and labor laws,²¹¹ with decisions available by borough and by community district. The BSA, however, is not supposed to make "law,"²¹²

All New York State Court of Appeals and appellate division decisions must be reported.²¹³ At the same time, New York statutes

Mark Davies, Exec. Dir. & Counsel, COIB (May 6, 2012, 12:28 PM EST) (on file with author). The CityLaw project at New York Law School collects administrative decisions by New York City agencies, including COIB enforcement decisions and formal advisory opinions. See *CityAdmin Online Library*, N.Y. L. SCH., http://www.nyls.edu/center-for-new-york-city-law/cityadmin_library (last visited Apr. 18, 2014).

²⁰⁸ See, e.g., *UCS eCourts: WebCivil Local*, N.Y. ST. UNIFIED CT. SYS., <http://iapps.courts.state.ny.us/webcivilLocal/LCMain> (last visited Apr. 18, 2014); cf. Brian T. Damman, *Guess My Weight: What Degree of Disparity Is Currently Recognized Between Published and Unpublished Opinions, and Does Equal Access to Each Form Justify Equal Authority for All?*, 59 *DRAKE L. REV.* 887, 888–89 (2011) (arguing that unpublished opinions should be given more weight than they currently have).

²⁰⁹ See *UCS eCourts: WebCivil Local*, *supra* note 208.

²¹⁰ Decisions of the NYC Tax Appeals Tribunal are binding on the City's Department of Finance, but not on taxpayers, who can move for Article 78 proceedings. See *New York City Tax Appeals Tribunal, Appeals Division*, NYC.GOV, <http://www.nyc.gov/html/tat/html/about/appeals.shtml> (last visited Apr. 18, 2014). New York City Tax Commission hearing officers need not be attorneys. See *New York City's Tribunals*, NYC.GOV, <http://www.nyc.gov/html/ajc/html/tribunals/tribunals.shtml> (last visited Apr. 18, 2014). Other tax courts could be actively engaged in the production of local common law. Thanks to Professor Eric Rakowski for this tip. See, e.g., *Tax Court of New Jersey*, N.J. CTS., <http://www.judiciary.state.nj.us/taxcourt> (last visited Apr. 18, 2014) (providing an example of a court of limited jurisdiction).

²¹¹ See BSA, NYC BD. OF STANDARDS & APPEALS, *supra* note 180; BSA, NYC Board of Standards and Appeals: About BSA, NYC.GOV, <http://www.nyc.gov/html/bsa/html/mission/mission.shtml> (last visited Apr. 18, 2014) ("This power includes the ability to vary in certain instances the provisions of these regulations.").

²¹² See BSA, NYC Board of Standards and Appeals: About BSA, *supra* note 211 (describing the mission of the BSA). Decisions are available by borough and community district. BSA, NYC Board of Standards and Appeals: BSA Decisions, NYC.GOV, <http://www.nyc.gov/html/bsa/html/decisions/decisions.shtml> (last visited Apr. 10, 2014).

²¹³ The Law Reporting Bureau by statute is required to publish every opinion, memorandum, and motion transmitted to it by the New York State Court of Appeals and the New York State Appellate Divisions. See N.Y. JUD. LAW § 431 (McKinney 2014).

authorize the New York State Reporter to select only a portion of appellate term and trial court opinions for publication.²¹⁴ The New York State Reporter publishes less than 7% of appellate term and trial court opinions submitted for publication, which the Law Reporting Bureau selects according to various factors: precedential significance, novelty, public importance, practical significance, subject matter diversity, geographical diversity, author diversity, and literary quality.²¹⁵

Yet practitioners have noted that many unpublished decisions seem to provide novel points of view.²¹⁶ Finding the unpublished decisions requires going to the courthouse with the case index number or party names. One case accordingly refers to unpublished opinions as circulating “in samizdat form only.”²¹⁷ Legal aid attorneys try to make up for under-publication by circulating potentially useful opinions to each other, but that process is both inefficient and incomplete.²¹⁸ Relatedly, a study of California opinions governing one parent’s rights to move with the children when the other parent objects found significant differences in outcomes between the published appellate cases (primarily permitting relocation) and the unpublished appellate cases (less so).²¹⁹

²¹⁴ *Id.*

²¹⁵ *New York Official Reports Selection of Opinions for Publication: Criteria for Selection of Opinions*, COURTS.STATE.NY.US, <http://www.courts.state.ny.us/reporter/Selection.htm> (last visited Apr. 18, 2014). California has a similar list of factors. See CAL. R. CT. § 8.1105 (West 2014) (formerly cited as CA. ST. MISC. R. § 976(c) (West 2005)); see also Carol S. Bruch, *The Use of Unpublished Opinions on Relocation Law by California Courts of Appeal: Hiding the Evidence?*, in LIBER MEMORIALIS PETAR ŠARČEVIĆ: UNIVERSALISM, TRADITION AND THE INDIVIDUAL 225, 227 & n.12 (Vesna Tomljenovic et al. eds., 2006) (“Publication is decided by majority vote of the judges who heard the case.” (citing CAL. R. CT. §§ 976(b), (c) (West 2005) (original version available at <http://www.appellatelaw.net/ca/rule976.htm>))).

²¹⁶ See, e.g., *In re State v. Abdul A.*, No. 0001X/11, at *4–13 (N.Y. Sup. Ct., Nassau Cnty. May 23, 2012) (applying *In re Miguel M.*, 950 N.E.2d 107 (N.Y. 2011)), which addressed N.Y. Mental Hygiene Law § 9.60, to N.Y. Mental Hygiene Law Article 10 and holding that the federal Health Insurance Portability & Accountability Act (HIPAA) preempted state law and authorized the release of medical records only if the patient so authorized); *In re State v. R.J.*, No. 30238-2008 (N.Y. Sup. Ct. July 20, 2011) (holding that the state had not met the burden of proving with clear and convincing evidence that the respondent was a detained sex offender with a mental abnormality—an unusual ruling, practitioners found, because most decisions involving this law find for the State). Thanks to Nicholas Phillips for tips on these cases.

²¹⁷ *Yellow Book of N.Y. LP v. Dimilia*, 729 N.Y.S.2d 286, 287 (Dist. Ct. 2001).

²¹⁸ Conversation with Eve Stotland, Attorney, Urban Justice Ctr., Mental Health Project, Manhattan, NY (July 10, 2012).

²¹⁹ Bruch, *supra* note 215, at 226–27 (“Not only was there an inordinate percentage of denials” in the unpublished cases, “given the substantive law; the law was applied in a palpably different manner.”). This matters because “relatively few custodial parents are in a financial position to mount an appeal.” *Id.* at 228–30, 230 n.25.

B. *Procedural Local Common Law*

Local, judge-made *procedural* variation springs up often,²²⁰ spurred on by both opportunity and need. The most important factors, I suggest, to the development of local procedural common law follow: having a court with limited subject matter jurisdiction, which would correlate with judges having greater fiefdoms and developing practices tailored over time to the underlying substantive law;²²¹ and formal or informal obstacles to challenging local procedures.

One of the few times the phrase “local common law” has been used to mean truly *local* common law appeared in an en banc Texas Court of Criminal Appeals decision, the court of final resort, referring to local procedure.²²² The defendant was appealing convictions for murder and aggravated robbery, each carrying a fifty-five year sentence. He argued, inter alia, that the judge had improperly recessed the proceedings to await a pretrial investigation report.²²³ The majority upheld the procedure: “Although there is some division in thought as to the use of the presentence investigation report, it was not error.”²²⁴

Judge Clifton objected in dissent: “Essentially at issue here is the validity of a procedure utilizing a presentence investigation report that appears to have developed from what may be called the ‘*local common law*’ of the jurisdiction from which this appeal comes to us, and perhaps others as well.”²²⁵ After examining the cases that led to that “division in thought” regarding whether the report could be used for sentencing individuals to confinement or only for sentencing to probation,²²⁶ Judge Clifton concluded that “a trial court is not authorized to order, receive and consider a presentence investigation report in assessing punishment by confinement. In sum, the *local common law* procedure utilized here should be rejected by the Court.”²²⁷ He noted that the majority’s

²²⁰ See, e.g., WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011); Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749, 1753 (2011) (describing “a sophisticated procedural system” that “emerged” to implement Maricopa County’s new “self-smuggling” rules: “This system includes state alienage-based rules for criminal bail, sentencing, material witnesses, and jails. It also includes local policies for arresting, charging, detaining, and plea bargaining.”).

²²¹ To be called local common law under my rubric, those fiefdoms would have to be bound by local lines, extending to the limit of those boundaries.

²²² Cf. *Temple v. State*, 342 S.W.3d 572, 628 (Tex. Ct. App. 2010) (“Issues of hierarchical precedent are not child’s play. ‘Inferior courts are absolutely bound to follow the decisions of the courts having appellate or revisory jurisdiction over them.’” (quoting HENRY CAMPBELL BLACK, *HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS* 10 (1912))), *aff’d*, 390 S.W.3d 341 (Tex. Crim. App. 2013).

²²³ *Mason v. State*, 604 S.W.2d 83, 84 (Tex. Crim. App. 1979).

²²⁴ *Id.* (citations omitted).

²²⁵ *Id.* at 84–85 (Clifton, J., dissenting) (emphasis added).

²²⁶ *Id.* (internal quotation marks omitted).

²²⁷ *Id.* at 90 (emphasis added).

decision seemed to rest on its conclusion that “we must await the day when an accused refuses to comply with *the local common law procedure*.”²²⁸ Five years later, an appellate court in Texas agreed, reversing course.²²⁹

Local common law procedures also have been found to govern the process of issuing protective orders,²³⁰ statutes of limitation in child support cases,²³¹ methods of collecting traffic fines in city courts,²³² and whether or not motions and trials are split.²³³ So-called “magnet” jurisdictions—counties in a few states—have been found to apply particularly lenient class certification procedures.²³⁴

Local procedural law sometimes builds on a foundation of state regulation that addresses what degree of local procedural variation is permitted.²³⁵ Some states give local criminal court judges discretion to develop their own procedures,²³⁶ though others do not.²³⁷ Some jurisdictions prohibit criminal procedural common law.²³⁸

²²⁸ *Id.* at 90 n.21 (emphasis added).

²²⁹ The court held that the report could not be used in confinement sentences, at least when the defendant has objected below to such use. *See* Jackson v. State, 680 S.W.2d 809, 813 (Tex. Crim. App. 1984) (involving an appeal by a defendant convicted of sexually abusing a child in the 187th Judicial District Court of Bexar County, highlighting the dissent’s critique of “local common law procedure,” and citing *Mason*, 604 S.W.2d at 88 (internal quotation marks omitted)); *see also* Conversation with Alexandra Cox, Assistant Professor, SUNY New Paltz, Brooklyn, NY (May 9, 2012) (noting that New York City criminal courts have their own policies regarding the time period between arrest and arraignment and on clearing warrants during appearances).

²³⁰ *In re Salgado*, 53 S.W.3d 752, 759 (Tex. Ct. App. 2001) (“The [State] Family Code does not currently provide for appeal of Chapter 81 protective orders and there is a split among intermediate appellate courts regarding their appealability.” (footnote omitted)).

²³¹ Huff v. Huff, 634 S.W.2d 5, 5–6 (Tex. Ct. App. 1982) (comparing the ten-year statute of limitations period in Fort Worth, Dallas, and Beaumont, with the four-year statute of limitations in Texarkana and El Paso).

²³² *City of Clarksville v. Dixon*, No. M2004-01656-COA-R3-CV, 2005 WL 3504589, at *5 (Tenn. Ct. App. Dec. 20, 2005) (“[A] city court may not only collect judgments b[ut] may also adopt rules establishing how to attribute payments by municipal offenders in satisfaction of fines.”); *see also* *State v. Kreger*, 2000-0968 (La. App. 1 Cir. 12/22/00); 774 So. 2d 1273, 1274–75 (finding sufficient a city court’s practice of not having a court reporter in the room and rejecting a motion to quash on that basis).

²³³ For example, in certain Brooklyn courts, motions and trials are split; in Manhattan, they are not split, but instead are heard by the same judge. Conversation with Glen Parker, Manhattan Civil Court Coordinator, N.Y. Peace Inst., Manhattan, NY (June 25, 2013).

²³⁴ *See* David Marcus, Erie, *The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1293 (2007) (“The odd frequency with which multistate class actions found their ways to certain isolated counties [in Illinois, Texas, Alabama, and Mississippi] suggests that there may be something to the magnet jurisdiction claim.”); *id.* at 1294 (providing an example that “does illustrate the potentially abusive power one remote county court could exercise”).

²³⁵ *See* *New York State Unified Court System: Administrative Rules of the Unified Court System & Uniform Rules of the Trial Courts*, NYCOURTS.GOV, <http://www.nycourts.gov/rules/trialcourts/200.shtml> (last updated Feb. 22, 2013).

²³⁶ *See, e.g.,* *People v. Hogan*, 780 N.Y.S.2d 883, 897 (City Ct. 2004) (relying on “this court[’]s authority [t]o devise and make new process and forms of proceedings necessary to

But even when state law prohibits or is in tension with local variation, parties find it hard to challenge local violations. As a study of a clinical program in Ohio detailed, “although the Ohio Revised Code guarantees tenants the right to demand a jury trial in forcible entry and detainer actions, local practice may not easily accommodate demands for juries.”²³⁹ The justice courts in Arizona repeatedly have deviated from state procedural rules, creating *de facto* local procedural systems.²⁴⁰ And, “the NAACP Legal Defense and Educational Fund found that people awaiting trial in Schuyler County in [New York’s] Finger Lakes were jailed for months simply waiting for court to convene again.”²⁴¹ As one practitioner wrote, “this case is pending in the Civil Division of the Court of Common Pleas of Allegheny County. Now, it irritates me to know that as soon as most litigators read the previous sentence, they laughed.”²⁴²

To be clear in conclusion: Substantive and procedural local common law rules do not automatically result from the operation of any of the factors outlined above. Limited subject matter jurisdiction courts are often in lockstep with state law, for example. And, conversely, even state superior courts of general jurisdiction can create local common law when they diverge from one another, as the theory of suspended state common law suggests. However, certain features of the judicial environment are most welcoming to local common law, this Part suggests.

carry into effect the powers and jurisdiction possessed by [this court]” (second and third alterations in original) (quoting N.Y. JUD. LAW § 2-b (McKinney 2014)); *id.* at 890–92 (developing a now often-cited rule that neither a state prosecutor nor the city court could waive an in-custody defendant’s right to a preliminary hearing before the grand jury convened); *id.* at 886 (noting that the judge sought to address “issues . . . which Local Court Judges confront daily”). *See generally* 7D AM. JUR. PL. & PR. FORMS, CRIMINAL PROCEDURE § 419 (2013) (“Many matters of criminal trial procedures are court-fashioned and may or may not be reflected in statutes or formal rules of court. Some are not written, but are merely rules generally understood and recognized by attorneys practicing before the specific court. Thus, there are variations in criminal trial proceedings among the various jurisdictions, and there may also be variations among different courts in one jurisdiction.”).

²³⁷ Cities in New York cannot organize local courts or determine what procedure to follow; the state legislature does so. *See* *Browne v. City of New York*, 149 N.E. 211 (N.Y. 1925); *In re Siracusa*, 212 N.Y.S. 400, 403–04 (Sup. Ct., Ontario Cnty. 1925). But they can be given that authority. 21 C.J.S., COURTS § 130 (2013); 6A MCQUILLIN MUN. CORP. § 24:47 (3d ed. 2013). There is a state act in New York for city courts. N.Y. UNIFORM CITY CT. ACT § 902 (McKinney 2014).

²³⁸ *See* 21 AM. JUR. 2D, CRIMINAL LAW § 9 (2013) (“In some jurisdictions, there is no common law of criminal procedure, the subject being regulated entirely by statute. In others, notwithstanding there may be no common-law offenses, the common law of criminal procedure prevails, unless a statute or rule provides otherwise.” (footnote omitted)).

²³⁹ Seielstad, *supra* note 58 (footnote omitted).

²⁴⁰ Mansfield, *supra* note 106, at 121–23 (providing concrete, startling personal examples).

²⁴¹ Glaberson & McGinty, *supra* note 61.

²⁴² Amy J. Greer, *Local Court Litigator’s Lament*, 3 LAWYERS J. 4 (2001).

IV. WHO CARES ABOUT LOCAL COMMON LAW?

Even if local common law exists and we can identify some of the paths it takes, why does it matter?

To begin with, the literature on local governance, local courts, and federalism is deepened by identifying and providing an explanatory framework for local common law. Moreover, local common law increases barriers to justice for all litigants. Recognizing, as this Article does, that something other than custom, social norms, legal culture, local idiosyncrasy, and state common law is at work takes the first step toward designing strategies to ameliorate local common law's harms.

A. *Local Common Law from a Vertical Perspective*

Local common law teaches us about the role of the local within a federalist system. Local common law features traits of local lawmaking that federalism prizes, from experimentalism²⁴³ and local expertise to adaptation and flexibility. It also worries us, relatively, for all the reasons why local law is troublesome as compared with state and federal law.

The theory of experimentalism says that the best of local common law rules can percolate up through the state court system, instead of staying lodged in a single local jurisdiction,²⁴⁴ and that judges can experiment, even if legislatures are more capable of doing so.²⁴⁵ Even when local rules do not percolate up, their existence sustains pluralism and multiplicity.²⁴⁶ As for expertise, the local judiciary, particularly judges in courts of limited jurisdiction and administrative tribunals, can wield more substantive expertise than the higher court generalist judges can. Further, local common law also likely reflects local norms;²⁴⁷ the

²⁴³ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also David J. Barron, *Fighting Federalism with Federalism: If It's Not Just a Battle Between Federalists and Nationalists, What Is It?*, 74 *FORDHAM L. REV.* 2081, 2091 (2006) (calling experimentalism the "essence to constitutional federalism").

²⁴⁴ See John J. Sampson, *Choking on Statutes Revisited: A History of Legislative Preemption of Common Law Regarding Child Custody*, 45 *FAM. L.Q.* 95, 111-12 (2011) (providing an example from Texas, where county courts were asked to develop visitation guidelines by local rule, and the state eventually adopted the guidelines from Travis County). Thanks to Sean Williams for this example.

²⁴⁵ Judges are only working with limited facts presented to them in individual cases, taking an incremental approach to lawmaking, and so rarely implementing dramatic changes in the law. See, e.g., Roscoe Pound, *Common Law and Legislation*, 21 *HARV. L. REV.* 383, 406 (1908) ("Today . . . [w]e recognize that legislation is the more truly democratic form of lawmaking. . . . That courts cannot conduct such laboratories is self evident.").

²⁴⁶ See, e.g., Reynolds, *supra* note 19, at 996 & n.91 (citing *Kalodimos v. Vill. of Morton Grove*, 470 N.E.2d 266, 274 (Ill. 1984)).

²⁴⁷ It is not easy to identify a "community" or local preference, however. Cf. HUDSON, *supra* note 30, at 2 (standing for the proposition that even when describing twelfth-century England,

more local the court, the more likely it is that the law-creation function of common law judges will reflect the preferences of the local polity.²⁴⁸ Town and village courts have persisted in New York State in part because they are perceived as representing local preferences.²⁴⁹

Finally, lower courts tend to be more informal in practice, and informality can benefit parties. New York City administrative courts, for example, have been praised for their “informality and flexibility,” which in turn is seen as assisting “self-represented parties.”²⁵⁰ Indeed, local court litigation can be more amenable to self-representation than is litigation in higher state or federal courts.²⁵¹ The swifter “justice” doled out in local courts tends to place less of a strain on under-resourced parties.²⁵² Local *procedural* variation could be even more desirable than substantive variation—trans-territoriality might be less important to procedural law.²⁵³

Yet local common law also has drawbacks when viewed through a federalism lens. Informality can lead to inequity; without a baseline or a firm standard, the risk of inter-jurisdictional divergence—the very kind that cultivates local common law—increases, along with a certain form of “rough justice.”²⁵⁴ Further, implementing local norms can mean repressing minority interests; can have spillover effects in other jurisdictions; and can be inefficient or ineffective.²⁵⁵

“[a]ny idyll of the small community as always one of peaceful, egalitarian self-regulation should be rejected”).

²⁴⁸ At the extreme of local groups seeking to adapt courts to their purposes, see the semi-sovereigntist efforts, led by groups such as the “Multnomah County Common Law Court (“MCCLC”), a group of citizens with grievances against government officials,” *United States v. Bell*, 303 F.3d 1187, 1189 (9th Cir. 2002), who seek to create “a nation subject only to their own local common-law.” *United States v. Mitchell*, 405 F. Supp. 2d 602, 606 (D. Md. 2005).

²⁴⁹ In other states as well, such as Massachusetts, the efforts to centralize local courts met with fierce local resistance. Yngvesson, *supra* note 51, at 1700.

²⁵⁰ Goldin & Casey, *supra* note 124, at 27; see also Jeanne Charn, *Celebrating the “Null” Finding: Evidence-Based Strategies for Improving Access to Legal Services*, 122 *YALE L.J.* 2206, 2233–34 (2013) (“[I]f swaths of problems can be resolved effectively with less or even no lawyer input, then lawyer services can be triaged where we have evidence that they are needed and will make a difference.”).

²⁵¹ See, e.g., *Gissel v. Sehdeva*, 413 So. 2d 1370, 1371 (La. Ct. App. 1982) (upholding a city court’s unusual decision to “treat[a] defendant’s letter . . . as a motion for suspensive appeal” because “[u]nder our jurisprudence liberally construing pleadings, and especially considering the informality of city court procedure,” the “motion . . . was timely filed”); *Bosley v. Prudential Ins. Co. of Am.*, 135 P.2d 479, 480 (Okla. 1943) (observing that the state legislature and courts have protected the more liberal pleading rules in city courts and for justices of peace).

²⁵² “For generations, justices have hailed [New York’s town & village courts] as ‘poor man’s courts,’ where ordinary people can get simple justice with little formality or expense.” Glaberson, *Small-Town Justice*, *supra* note 60 (proceeding to highlight all the drawbacks of these courts).

²⁵³ Jordan, *supra* note 86, at 419–21.

²⁵⁴ See, e.g., Yngvesson, *supra* note 51, at 1699 & n.53 (citing *ROUGH JUSTICE: PERSPECTIVES ON LOWER CRIMINAL COURTS* (John A. Robertson ed., 1974)).

²⁵⁵ Cf. *Mansfield*, *supra* note 106, at 133 (“I could not hope to answer for each of the 50 states whether non-lawyer judges should be permitted to adjudicate civil cases.”).

Local common law also raises questions about the balance between state and local authority. In addition to conflicting outright with state law, local common law also can undermine state objectives more subtly. A local court might regularly host a certain kind of state law claim, for example, and impose a local twist the state would not want. The degree to which local courts should be anything other than pure surrogates for state claims is a difficult question. It resembles the issues raised when state courts hear federal claims under their general jurisdiction powers, or when federal courts hear state claims on the basis of diversity²⁵⁶ or supplemental jurisdiction.²⁵⁷

B. *Access to Justice Problems*

Barriers to justice for low-income and other litigants are not new, though the form they take and proposed solutions change with time. For example, “[t]he recent economic recession has brought new urgency to longstanding problems in the delivery of legal services,”²⁵⁸ and shifts in court decisions increase the barriers that some litigants face.²⁵⁹ Many states are stepping up to the challenge.²⁶⁰ For example, to try to address notice and representation problems in New York State, Chief Judge Lippman formed a Task Force to Expand Access to Civil Legal

²⁵⁶ See 28 U.S.C. § 1332 (2012).

²⁵⁷ See *id.* § 1367.

²⁵⁸ Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531, 531–32 (2013) (“High rates of unemployment, bankruptcies, foreclosures and reductions in social services have created more demands for legal representation at a time when many of its providers have faced cutbacks in their own budgets.”); see also PAULA HANNAFORD-AGOR & NICOLE L. WATERS, NAT’L CTR. FOR STATE COURTS, COURT STATISTICS PROJECT, CASELOAD HIGHLIGHTS: ESTIMATING THE COST OF CIVIL LITIGATION, (2013), available at http://www.courtstatistics.org/~media/microsites/files/csp/data%20pdf/csph_online2.ashx (surveying the costs of lawyers); Lydia Chan, *New York’s New Rule: A Novel Approach to Closing the Access to Justice Gap*, 26 GEO. J. LEGAL ETHICS 597 (2013) (describing New York’s new pro bono requirements for aspiring attorneys); Russell Engler, *Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*, 7 HARV. L. & POL’Y REV. 31, 35–37 (2013) (describing the components of the access to justice movement); Richard Zorza, *Access to Justice Blog*, <http://accesstojustice.net> (last visited Apr. 18, 2014); *National Center for Access to Justice*, CARDOZO L. SCH., <http://ncforaj.org> (last visited Apr. 18, 2014); *Resource Center for Access to Justice Initiatives*, AM. BAR ASS’N, http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice.html (last visited Apr. 18, 2014).

²⁵⁹ See, e.g., A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 445 (2013) (describing the Supreme Court’s decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), as “not an exercise in rule interpretation, but rather yet another demonstration of the Court’s willingness of late to place policy above principle in ways that restrict access to justice”); A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710 (2013).

²⁶⁰ See, e.g., *Access to Justice—Civil Right to Counsel—California Establishes Pilot Programs to Expand Access to Counsel for Low-Income Parties*, 123 HARV. L. REV. 1532 (2010).

Services.²⁶¹ The task force found that 2.3 million New Yorkers lacked an attorney when navigating the civil court system.²⁶²

1. Identifying the Problems

Local common law creates at least two concerning access to justice problems: It provides inadequate notice to litigants, and low-income litigants who lack resources to learn about local rules are especially hard hit.

a. Inadequate Notice

Notice of substantive law allows individuals to conform their behavior and avoid going to court in the first place.

However, learning about the law is always a challenge, even for lawyers. Learning about local common law is particularly difficult. First, there is the sheer number of local jurisdictions.²⁶³ Richard Briffault and Laurie Reynolds flagged this problem in the context of considering a world of local substantive (legislative) law: If cities rejected statewide rules and adopted their own contract or tort rules, “those injured by tortfeasors in the City would have little reason to know of these special rules and each would cause notice, compliance, and choice of law issues”; “these types of private or civil law changes would frustrate and confuse even the most diligent consumer, businessperson, or lawyer.”²⁶⁴ Learning about local common law is also difficult because, as the *common law*, local common law is not written in any code.²⁶⁵ Further,

²⁶¹ Lillian M. Moy, *Justice, Justice, Shall You Pursue for Rich and Poor, High and Low Alike*, 75 ALB. L. REV. 635, 635–37 (2012).

²⁶² According to a follow-up report, “[b]eyond harming vulnerable low-income families and individuals, this crisis of the unrepresented burdens our courts and represented parties.” STATE OF N.Y. UNIFIED COURT SYS., THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 1 (2011) [hereinafter REPORT TO THE CHIEF JUDGE OF NY], available at http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-2011TaskForceREPORT_web.pdf. For example, “63 percent of New Yorkers are unrepresented at statutorily required settlement conferences in foreclosure cases—70 percent in New York City and 59 percent in the rest of the State,” and there are very low rates of representation in eviction cases. *Id.* at 16. A recent study of Canadian litigants reveals in great detail the challenges faced by self-represented parties. See JULIE MACFARLANE, THE NATIONAL SELF-REPRESENTED LITIGANTS PROJECT: IDENTIFYING AND MEETING THE NEEDS OF SELF-REPRESENTED LITIGANTS, FINAL REPORT (2013), available at <http://representingyourselfcanada.com/PDF/reportM15.pdf>.

²⁶³ See *supra* note 16 and accompanying text.

²⁶⁴ BRIFFAULT & REYNOLDS, *supra* note 16.

²⁶⁵ Cf. Timothy Meyer, *Codifying Custom*, 160 U. PA. L. REV. 995, 997–98 (2012) (describing customary international common law and long-running efforts to codify it in order to increase clarity and encourage compliance).

lower court decisions are published less often than higher court decisions are and are subject to less strict stare decisis principles.²⁶⁶

Notice of local procedural rules allows plaintiffs and defendants to adequately defend their rights in court—yet it is also particularly unavailable at the local level. For example, attorneys who had not known about a county's new "rocket docket" found that, "without some predictable schedule for the case, going from the case being placed 'issue' to trial in six months is tough. And one wonders about the quality of the justice obtained so quickly for unprepared litigants."²⁶⁷ As a study of local lawyers discovered, "one of the strongest reactions pertained to local rules of civil procedure"; in responding to the study, "[l]awyers contend that variations in local rules often ensnare attorneys who come from the outside to practice in a county."²⁶⁸ One problem was that "[m]any counties haven't reduced their rules to writing."²⁶⁹ While some might say that uncertainty in the law is a good thing because it encourages compliance, that argument has no applicability to procedural local common law and only slight applicability to substantive local common law.

Another notice problem is inefficiency: Litigants and attorneys having to learn differing local rules increases costs. In other words, barriers to entry to practice in a given locality or to understand local rules represents an increase in pricing. Litigants, for example, can end up paying for more expensive local lawyers that they would if there were no local common law. This also means that repeat players have a leg up. For example, familiarity with processes matters in housing court²⁷⁰ and in small claims court.²⁷¹

Finally, it is fundamentally unfair for litigants to receive different treatment—some winning, and others losing—based solely on the geographic happenstance of living on one side of a river, or in one part of a state.²⁷² Variations based on geographical chance are particularly

²⁶⁶ See, e.g., *supra* notes 220–21 & accompanying text.

²⁶⁷ Greer, *supra* note 242.

²⁶⁸ Dianne Molvig, *Taking the Profession's Pulse: Bench-Bar Survey Reveals Lack of Local Court Rule Standards Among Concerns*, 74 WIS. LAW. 10, 11–12 (2001).

²⁶⁹ *Id.* at 12 (quoting Gerald Mowris, State Bar President, Wisconsin State Bar).

²⁷⁰ See, e.g., Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557, 574 (1988) (quoting THE N.Y.C. WIDE TASK FORCE ON HOUSING COURT, 5 MINUTE JUSTICE, OR "AIN'T NOTHING GOING ON BUT THE RENT!" 91 (1986)).

²⁷¹ Lee Harris, Essay, *Judging Tenant Protections: The Evidence from Enforcement of Landlord Penalties*, 42 U. MEM. L. REV. 149, 171 & n.73 (2011). Magistrates told Harris that "they 'constantly get the same landlords' in disputes." *Id.* (quoting Telephone Interview with Linda Gordon, Conn. Hous. Magistrate (Dec. 16, 2002)).

²⁷² Lack of notice of local common law rules, of course, shows yet again the failure of pure Tiebout theory to describe reality. This theory (which Charles Tiebout himself acknowledged was only schematic) would suggest that people have sufficient information about factors such as, here, local rules, to make optimal locational decisions for themselves. See Charles M.

problematic in the criminal context, given that the punishment and other ramifications of a criminal conviction are more severe.²⁷³

The better-known effects of federal district court procedural variation shed light on these problems by analogy. Federal district court judges can craft “local” rules under Federal Rule of Civil Procedure 83,²⁷⁴ and the resulting variation has advantages. But, as Samuel Jordan has noted, local variation also can undermine “trans-territoriality,” “disadvantage nonlocal counsel,” and, at the extreme, “threaten the equal treatment of like cases and may contribute to forum shopping.”²⁷⁵ The proliferation in rules also can create “inefficiency in federal practice,” in part “because lawyers must devote resources to mastering multiple sets of local rules.”²⁷⁶

b. Inadequate Resources

Barriers to smooth and fair proceedings affect everyone. But low-income litigants end up at even more of a systematic disadvantage: They

Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). Even if low-income residents of a jurisdiction had the resources to move to another jurisdiction to avoid the laws of their own (and if those laws were so important that they outweighed other reasons to stay put), often local rules are not known until one gets into court—and even then they are murky to lawyers, let alone to unsophisticated litigants. See also William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201 (1997); Nestor M. Davidson & Sheila R. Foster, *The Mobility Case for Regionalism*, 47 U.C. DAVIS. L. REV. 63 (2013); John D. Donohue, *Tiebout? Or Not Tiebout? The Market Metaphor and America’s Devolution Debate*, 11 J. ECON. PERSP. 73 (1997); Lee Anne Fennell, *Beyond Exit and Voice: User Participation in the Production of Local Public Goods*, 80 TEX. L. REV. 1 (2001); Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 43–47 (2004); Clayton P. Gillette, *Opting Out of Public Provision*, 73 DENV. U. L. REV. 1185 (1996); Todd E. Pettys, *The Mobility Paradox*, 92 GEO. L.J. 481 (2004); Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437, 441 & n.13 (2006) (citing Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473 (1991)) (describing the “development of Tiebout’s ideas within the legal literature”).

²⁷³ Cf. *Hudson v. United States*, 522 U.S. 93, 99–100 (1997) (outlining seven “guideposts” to help determine when a civil remedy crossed the line into criminal punishment, including “[w]hether the sanction involves an affirmative disability or restraint” (alteration in original) (citation omitted)); Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2674 (2013) (“Plea bargaining is no sport, at least not for defendants. Rather, it is a serious event that—depending on whether and how it is conducted—can result in a lifelong mark of a criminal record and loss of liberty or even life.”).

²⁷⁴ See FED. R. CIV. P. 83; see also David M. Roberts, *The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers*, 8 U. PUGET SOUND L. REV. 537, 537 (1985).

²⁷⁵ Jordan, *supra* note 86.

²⁷⁶ *Id.* at 437–40; see also *id.* at 418–19 (“the larger problem with local [*i.e.*, federal] rules is that they are almost unavoidably in tension with the norm of trans-territoriality[.] . . . creat[ing] variations in procedural requirements precisely on the basis of geography,” as opposed to any substantive difference); *id.* at 436 (“Particulars aside, the core criticism of local rules is that they disrupt the trans-territoriality that is a central procedural value of the federal system.”).

cannot afford attorneys' fees,²⁷⁷ cannot afford childcare during litigation, and so on. As Russell Engler has summarized, "[t]he consequences of appearing without counsel are devastating, since unrepresented litigants often fare poorly in the courts," though "recent empirical work involving randomized studies suggests that the correlation between full representation and case outcomes is not clear in all settings."²⁷⁸

Cases need not involve large amounts of money for being self-represented to matter. Franklin County, New York—"poor and remote"—sees "[c]ases too minor to draw much interest from the rest of the legal system—evictions, misdemeanor charges, disputes between neighbors, driving infractions and applications for bail—come with real consequences for small-town residents who may have little money or access to a lawyer."²⁷⁹ Divergent outcomes for those with limited resources²⁸⁰ increase in the face of substantive or procedural local common law.

2. Strategies for Ameliorating the Problems

In theory, at least, states can control local abuses of power.²⁸¹ The state retains formal powers to homogenize local law—more power, indeed, than the federal government has to homogenize state and local laws. States are sovereigns in our federalist system,²⁸² and local governments are not.²⁸³ Under principal-agent theory, the state can

²⁷⁷ See generally Russell Engler, *And Justice For All—Including the Unrepresented Poor: Revisiting Roles of the Judges, Mediators, and Clerks*, 67 *FORDHAM L. REV.* 1987, 2022 (1999) ("The adversarial system presumes that both sides will be represented by counsel . . ."); Deborah L. Rhode, *The Constitution of Equal Citizenship for a Good Society: Access to Justice*, 69 *FORDHAM L. REV.* 1785 (2001).

²⁷⁸ Engler, *supra* note 258, at 35; see also D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 *HARV. L. REV.* 901, 947 (2013) (Even "long-term familiarity with [the court's] informal procedures and norms" might not shape outcomes.").

²⁷⁹ See, e.g., Glaberson, *Small-Town Justice*, *supra* note 60; Mansfield, *supra* note 106, at 133 (similar).

²⁸⁰ See, e.g., Jonathan Smith, *Closing the Courthouse Door on Maryland's Poor*, 34 *MD. B.J.* 19, 20 (2001) ("The barriers to equal access to justice are real and plentiful and, for poor persons and persons historically disenfranchised, are often insurmountable.").

²⁸¹ Cf. Marcus, *supra* note 234, at 1294–95 (noting that "state appellate courts remain a potent check on abuse" and discussing state legislative fixes).

²⁸² See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) ("As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government."); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (similar).

²⁸³ See, e.g., Bd. of Supervisors v. Local Agency Formation Comm'n of Sacramento Cnty., 838 P.2d 1198, 1205 (Cal. 1992) ("In our federal system the states are sovereign but cities and counties are not . . ."); David J. Barron, *A Localist Critique of the New Federalism*, 51 *DUKE L.J.* 377, 390 (2001). *But see* Decker, *supra* note 13, at 331–32 & nn.28–36 (describing pushback against this so-called *Hunter*-esque view of local power). Local decision-making does have

constrain local action that does not conform to its vision of how much local experimentation or unplanned divergence is desirable.²⁸⁴ The state might, for example, tolerate local procedural variation less if the underlying claim is based on state, not local, substantive law. The state must wield its power to constrain local judicial independence, however, while understanding that it benefits from delegating work to local courts.²⁸⁵

When devising strategies, a state can take local power differences into account, incorporating home rule and “other transfers of regulatory power” that the state already has made to its localities.²⁸⁶ States also can share knowledge with each other and propose changes through uniform commissions and state bar associations.

a. Improve Notice

States can develop strategies to improve litigants’ notice of local common law.

i. Encourage Shift to Legislative Law

The first approach would be horizontal: taking power away from courts and giving it to legislatures. The state could increase the lawmaking authority of local legislative bodies, such as city councils, town boards, and county boards of supervisors, and of the local agencies that promulgate rules and regulations. The state legislature also could increase its own scrutiny of local common law, particularly local *criminal* common law, and consider gap-filling changes in the relevant state statutes. However, as federal sentencing guideline revisions have

certain non-constitutional sources of power. See, e.g., Gerken, *supra* note 19.

²⁸⁴ Scholars have applied principal-agent theory to the federal judiciary, seeking to describe the relationship between the U.S. Supreme Court (the principal) and the lower federal courts (the agents). See Pauline T. Kim, *Beyond Principal-Agent Theories: Law and the Judicial Hierarchy*, 105 NW. U. L. REV. 535, 535–36 & nn.1–3 (2011) (surveying the literature); see also Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1855 (2011).

²⁸⁵ See, e.g., Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 23 (1990); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1864–70 (1994).

²⁸⁶ Reynolds, *supra* note 19, at 980 (footnotes omitted); see also Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (2007); Decker, *supra* note 13; Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures’ Control*, 97 MICH. L. REV. 1201 (1999); Reynolds, *supra* note 19, at 1001 nn.111–12. These changes are implemented via state statutory and constitutional provisions, as well as through state common law. See David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2278 (2003); Reynolds, *supra* note 19, at 999 (stating that, aside from home rule, local governments exercise power through “a general health, safety, and welfare enabling law, or from specific detailed statutory transfers of enumerated powers” (footnote omitted)).

shown, giving judges—local ones, in this case—less flexibility can lead to different kinds of injustice.²⁸⁷

ii. Recording and Publication of Substantive Decisions

Litigants who cannot afford lawyers are at a disadvantage in local courts.²⁸⁸ They would benefit from better access to published opinions or to other methods of learning about local rules and practices. States therefore can mandate (and fund) improved recording of trials, publication of decisions, and posting of procedural rules.

iii. Clearer Drafting and Sharing of Local Procedural Rules

States can require that local courts be more transparent and formal about what their local court rules are.

The 1995 amendments to Federal Rule of Civil Procedure 83, addressing the variation in federal district court procedural rules, provide a template; “[b]ecause local [federal] rules vary from district to district,” Samuel Jordan observed, “lawyers who practice in multiple districts must master multiple sets of formal procedural packages.”²⁸⁹ Instead of limiting court authority, the Advisory Committee “institut[ed] measures designed to facilitate identification and compliance and to decrease sanctions for noncompliance in certain cases”; techniques included imposing uniform numbering systems and prohibiting courts from stripping parties of rights for a “nonwillful failure to comply” with local form requirements.²⁹⁰

b. Increase Resources

Increased resources would soften the notice and equity blows of local common law.

²⁸⁷ See, e.g., K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271 (2009) (discussing the “inflexible state and federal sentencing guidelines”); Ryan W. Scott, *How (Not) to Implement Cost as a Sentencing Factor*, 24 FED. SENT’G REP. 3 (2012), available at 2012 WL 3288707 (noting “the (deservedly) awful reputation of the severe, inflexible, and complex federal Sentencing Guidelines”); Joanna Shepherd, *Blakely’s Silver Lining: Sentencing Guidelines, Judicial Discretion, and Crime*, 58 HASTINGS L.J. 533 (2007) (“Surveys of federal judges and many federal judicial opinions demonstrate that many federal judges perceive federal sentencing guidelines to be too harsh and inflexible.”).

²⁸⁸ Cf. Rhode, *supra* note 277, at 1816 (“Simplified forms and streamlined procedures could expand ordinary Americans’ opportunities to handle routine matters such as governmental benefits, probate, uncontested divorces, landlord-tenant disputes, and consumer claims.”); Gary Blasi, *How Much Access? How Much Justice?*, 73 FORDHAM L. REV. 865 (2004) (discussing Rhode’s approach).

²⁸⁹ Jordan, *supra* note 86, at 433.

²⁹⁰ *Id.* at 433–35 (quoting FED. R. CIV. P. 83(a)(2)) (“Again, the Advisory Committee’s notes reflect an awareness that lawyers may be burdened by the complexities of local rules, and may therefore be unaware or forgetful of formal requirements contained therein.” *Id.* at 434.).

First, funding: New York State Chief Judge Lippman's Task Force recommended more funding for civil legal services "involving the 'essentials of life'—housing, family matters, access to health care and education, and subsistence income."²⁹¹

Second, court assistance for pro se litigants: One key strategy for addressing access to justice problems is "expanding the roles of the key [judicial] players."²⁹² A leading component, given a push by the Supreme Court's recent decision in *Turner v. Rodgers*,²⁹³ is "the central role the courts must play both in promoting access to justice and in developing an expanded civil right to counsel."²⁹⁴ Steps courts can take include simplifying procedures, improving technology, and "facilitat[ing] the role of judges and court staff in assisting litigants," allowing for better pairing of attorneys and litigants in triage mode.²⁹⁵ The culture of local common law represents barriers to simplification in particular, and pro-simplification efforts can have a large impact.²⁹⁶

Third, changing who can provide legal assistance and when: Additional resources to ameliorate the harms of local common law variation include permitting assistance from non-lawyers and from lawyers on a triage basis at key moments during litigation where such help is most needed (known as "unbundled legal services").²⁹⁷ Further, self-help initiatives and improved technology can help self-represented litigants navigate through complex lower court systems.²⁹⁸

²⁹¹ REPORT TO THE CHIEF JUDGE OF NY, *supra* note 262.

²⁹² Engler, *supra* note 258, at 32.

²⁹³ 131 S. Ct. 2507 (2011).

²⁹⁴ Engler, *supra* note 258, at 57–59 ("A coordinated, overarching access-to-justice strategy, which includes leadership from the courts and an effective civil-right-to-counsel component, is essential to making this vision a reality."); *see also id.* at 57–58 (discussing an "emerging consensus" that Richard Zorza identifies that involves "court simplification, bar flexibility, legal aid efficiency and availability, and systems of triage and assignment" (quoting Richard Zorza, *Access to Justice: The Emerging Consensus and Some Questions and Implications*, 94 JUDICATURE 156, 156–57 (2011))); Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 41 (2010) (discussing unrepresented litigants).

²⁹⁵ Engler, *supra* note 258, at 58.

²⁹⁶ *Id.*; *see also* Richard Zorza, *Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation*, 61 DRAKE L. REV. 845, 868 (2013) ("Simplification efforts should focus on those areas that produce the most problems for the self-represented, and for which they therefore seek help from counsel.").

²⁹⁷ *See, e.g.*, Greiner et al., *supra* note 278, at 911 ("Facts on the ground [have] overwhelmed the bench and bar's squeamishness toward the idea of unbundled legal assistance in litigation.").

²⁹⁸ Important efforts include those of the Chicago-Kent College of Law, Columbia Law School, Concordia University School of Law, CUNY School of Law, Georgetown University Law Center, UNC School of Law, and University of Miami School of Law's A2J Author Community Website and Access to Justice Clinic Project, as well as the work of the organization Probono.net. *Access to Justice: A2J Author Community Website*, A2JAUTHOR.ORG <http://www.a2jauthor.org/drupal> (last visited Apr. 18, 2014); *Access to Justice Clinical Course Project*, A2JCLINIC, <http://a2jclinic.classcaster.net/category/a2j-clinic> (last visited Apr. 18,

V. EXTENDING LOCAL COMMON LAW THEORY

The framework for local common law and local courts developed in this Article should be applied to sub-local and extra-local adjudicatory bodies that are not normally conceived of as “local courts” or as producing the “common law.” In other words, the category of who counts as a “judge” for purposes of common law development should expand to other legal decision-makers who evaluate facts and apply the law.

This Part teases out several promising possibilities. Neighborhood or religious mediation and arbitration groups, homeowners association boards, parole boards, and other sub-local or extra-local entities that share certain trappings of common-law-making tribunals: All should be subjected to the local common law scrutiny.²⁹⁹ So too should regional and water boards, which often transcend local or state boundaries. The increasing role of private contracting over procedures could influence this analysis.³⁰⁰ Following are initial steps toward applying this framework to sub-local and extra-local bodies.

For example, the New York City Council votes on rezoning and related land use decisions under the Uniform Land Use Review Procedure (ULURP).³⁰¹ These decisions affect citizens’ rights via changes in zoning and city maps, land use conversions, street platting,

2014); *Our Mission and Programs*, PROBONO.NET, <http://www.probono.net/about/item.Mission> (last visited Apr. 18, 2014); see also Sarah Glassmeyer, *CALI Spotlight Blog: Law Schools Team Up with CALI to Harness Skills of Law Students, Develop Online Tools for Low-Income Litigants*, CALL.ORG (Jan. 2, 2013, 9:23 AM), <http://spotlight.cali.org/2013/01/02/law-schools-team-up-with-cali-to-harness-skills-of-law-students-develop-online-tools-for-low-income-litigants>.

²⁹⁹ Cf. Wayne A. Logan, *Criminal Law Sanctuaries*, 38 HARV. C.R.-C.L. L. REV. 321, 322 (2003) (“This Article explores the manner in which Anglo-American law has, and has not, addressed criminal activity within churches, families, and corporations. Each institution has afforded a measure of immunity from prosecution, in effect establishing criminal law sanctuaries . . .”).

³⁰⁰ Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 510 (2011) (“The last generation has seen a subtle but discernable shift in the relation between private mechanisms for dispute resolution and the public courts.”); cf. Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 936 (1999) (“By such interpretations of the FAA, courts condone and encourage the use of arbitration to resolve disputes between individuals and entities who, far from sharing in a common normative community, occupy vastly different positions of power vis-à-vis each other.”).

³⁰¹ *Uniform Land Use Review Procedure (ULURP)*, N.Y.C. DEP’T OF CITY PLANNING, http://www.nyc.gov/html/dcp/html/ap/step5_ulurp.shtml (last visited Apr. 18, 2014). See generally Richard K. Norton, *Who Decides, How, and Why? Planning for the Judicial Review of Local Legislative Zoning Decisions*, 43 URB. LAW. 1085, 1086 (2011). See also, e.g., Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the “Zoning Budget,”* 62 CASE W. RES. L. REV. 81, 128 (2011) (noting that ULURP “requires map amendments to undergo a gauntlet of public hearings before a community board as well as planning commission, assuring that politically attentive residents will register their protests before the proposal reaches the city council.”). Courts can review these decisions and the application of ULURP. *Id.*

special permit grants, capital projects, and zoning variances. To the extent that actors end up applying repeated or iterative rules, a form of local common law might develop. Decisions made pursuant to New York City Housing Authority administrative hearings, New York City Public Assistance hearings, and New York City Civilian Review Complaint Board processes should be inspected for a version of the common law.

Alternative dispute resolution bodies offer further intriguing possibilities. Unlike mediation, arbitration generally includes no right of appeal—decisions are final and binding, except in extreme cases.³⁰² Therefore, they are particularly “localized.” These arbitration decisions, however, do not bind non-parties; that fact removes a pillar of the common law—its precedential value.³⁰³ (Observers have called for more “precedential value.”³⁰⁴) However, experts say that rules develop over time for parties that repeatedly enter into arbitration.³⁰⁵ Additionally, alternative dispute resolution bodies can be formally integrated into local government structures, which makes them further resemble local courts.³⁰⁶ For all these reasons, arbitration and mediation bodies that

³⁰² Michael H. LeRoy, *Are Arbitrators Above the Law? The “Manifest Disregard of the Law” Standard*, 52 B.C. L. REV. 137, 138 (2011) (“But when a judge confirms an award in which the arbitrator flouts the law, does the finality rule put the arbitrator above the law?”); cf. James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 646 (2004).

³⁰³ See Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 419 (2006). As an exception to the rule that arbitrators do not explain their decisions and just issue awards, labor arbitration panels occasionally issue written opinions: “[A] body of published decisions has created a ‘common law’ of the unionized workplace.” David A. Hoffman, *Alternatives to Litigation*, in MASSACHUSETTS SUPERIOR COURT CIVIL PRACTICE MANUAL § 10.5.3(k), CIVP MA-CLE 10-1 (2013).

³⁰⁴ Karen A. Lorang, Comment, *Mitigating Arbitration’s Externalities: A Call for Tailored Judicial Review*, 59 UCLA L. REV. 218 (2011). New York City has an Office of Collective Bargaining, which offers various arbitration options, including one that explicitly does not create precedent. See *Arbitration*, OFF. COLLECTIVE BARGAINING, <http://www.ocb-nyc.org/arbitration.php> (last visited Apr. 18, 2014).

³⁰⁵ Cf. Symeon C. Symeonides, *Choice of Law in the American Courts in 2011: Twenty-Fifth Annual Survey*, 60 AM. J. COMP. L. 291, 327–28 (2012) (discussing the edge held by repeat players in arbitration, though not focusing on neighborhood arbitration panels); Stephen J. Choi et al., *The Influence of Arbitrator Background and Representation on Arbitration Outcomes* (U. Mich. Pub. Law Research, Paper No. 285; N.Y.U. Law & Econ. Research, Paper No. 12-17; U. Pa. Inst. for Law & Econ. Research, Paper No. 12-35, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2109712.

³⁰⁶ For example, New York City has an Office of ADR and Court Improvement Programs that handles disputes “between neighbors, acquaintances, family members, landlords and tenants, or consumers and merchants.” *Alternative Dispute Resolution: ADR Programs in Criminal Court (New York City)*, NYCOURTS.GOV, <http://www.nycourts.gov/ip/adr/NYCCriminal.shtml> (last visited Apr. 18, 2014). These initiatives include the “Court-Connected ADR Programs, the Community Dispute Resolution Centers Program,” and more. *Court Administration: OCA Support Units, Division of Professional and Court Services*,

regularly practice in a given jurisdiction seem like promising production sites for local common law.

We also could find a hyper-local version of common law by unpacking the decisions of what can be called micro-local bodies—from homeowners associations, neighborhood-focused arbitration panels, and religious tribunals³⁰⁷ to prison boards of correction, parole boards, and grievance procedure bodies.³⁰⁸ Leave it to John Simonett—whose satire about Morrison County’s common law opened this Article—to gesture at micro-local law, which he calls “uncommon law”: While “[t]he arena of the common law is the lawyer’s office, the courtroom, and the appellate judge’s chambers,” he observed, “the arena of the uncommon law is the realtor’s office, the sales barn, and the street corner.”³⁰⁹

Pivoting from the micro-local to the extra-local, we could look at regional decision-makers or tribal courts. Indeed, there are signs that tribal courts, for example, selectively incorporating customs into the common law—with a result that we could call local common law, or something else.³¹⁰ Tribal court powers vary, defying generalization—for example, Congress has mandated state law involvement in tribal jurisdiction over criminal matters only in specified states; however, “substantial powers remain with the tribes” over civil matters in the other states,³¹¹ as well as family law, tax matters, and some minor crimes.³¹² Further, scholars have categorized tribal common law into distinct types. One type is the common law associated with a specific tribe, which seems relevant to the local common law project—i.e., the tribe is the conceptual equivalent of the locality, even though the

NYCOURTS.GOV, <http://www.nycourts.gov/admin/supportunits.shtml> (last updated Aug. 6, 2013). If parties choose arbitration in small claims cases, “they must sign an acknowledgment that they are willing to waive their appellate rights.” Lebovits, *supra* note 203, at 6.

³⁰⁷ See, e.g., Mona Rafeeq, Comment, *Rethinking Islamic Law Arbitration Tribunals: Are They Compatible with Traditional American Notions of Justice?*, 28 WIS. INT’L L.J. 108 (2010).

³⁰⁸ This effort would parallel in some ways the move in local government law to look at special purpose districts, juries, and other sub-local bodies. See Gerken, *supra* note 19; cf. Simonett, *supra* note 3 (“Each day new precedents are being set down in every county by real estate agents, bankers, justices of the peace, constables, auction sale clerks, notaries public, and other prominent jurists.”).

³⁰⁹ See Simonett, *supra* note 3.

³¹⁰ Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part I of II)*, 46 AM. J. COMP. L. 287, 294 (1998) (“Our field research concludes that all tribal courts selectively enforce social norms and few tribal courts systematically refine precedent.”); see also Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. COLO. L. REV. 59, 74 (2013). Thanks to Professors Kristen Carpenter and James Anaya for the suggestion to look at tribal courts.

³¹¹ Cooter & Fikentscher, *supra* note 310, at 306–07.

³¹² *Id.* at 309.

territory to which the tribal law applies is not always coterminous with formal local government boundaries.³¹³

Additional research questions remain. For example, what is the role of prosecutors in shaping substantive law in local courts through decisions to pursue—or not—cases and in presenting their own novel interpretations of the law?³¹⁴ What is the relevance to local common law development of the “very local” courts not using juries? And does the local common law framework help us better evaluate the work of federal district courts?

CONCLUSION

The common law has proven flexible over the centuries. Though local common law fell outside our focus,³¹⁵ it has continued to be developed by local courts, from the most local courts to state courts of general jurisdiction. Indeed, local common law seems inevitable given the vast numbers and heterogeneity of local courts in the United States. While local common law is in part a reimagining of well-accepted state common law rules, and though it draws on state common law traditions (revealing state common law itself to be partially a localist enterprise), local common law is an independent, complex phenomenon.

Yet identifying local common law’s existence, the conditions most conducive to its creation, and its place within the federalist structure does not mean that it must be accepted. Local-level common law variation might go too far, providing inadequate notice to litigants, accentuating unequal access to justice, and threatening state interests.

³¹³ *Id.* at 314 (“[W]e hypothesize that Indian common law can be distinguished according to whether it is unique to a tribe, characteristic of groups of tribes, or common to all Indians.”); *id.* at 328 (“[I]n essence, Indian customary law develops into Indian common law.”); *see also* Justice Raymond D. Austin, *American Indian Customary Law in the Modern Courts of American Indian Nations*, 11 WYO. L. REV. 351, 365 (2011) (noting that custom plays a complex role in the development of tribal common law; some customs have the force of law for a given tribe).

³¹⁴ *See* Eagly, *supra* note 220, at 1754, 1769–70, 1774 (detailing how in the criminal courts of Maricopa County, Arizona, judges adopted the reading of “popularly elected city and county prosecutors” of a 2005 state alien smuggling law); Ray Rivera & Sharon Otterman, *For Ultra-Orthodox in Abuse Cases, Prosecutor Has Different Rules*, N.Y. TIMES, May 11, 2012, at A25 (“[T]he district attorney ‘expressed no opposition or objection,’ the rabbi, Chaim Dovid Zwiebel, recalled,” to a rabbi instructing his community to come to him first to determine whether allegations of child sexual abuse should be prosecuted in Brooklyn).

³¹⁵ Despite the common law content of first-year law school casebooks in torts, contracts, property, and criminal law, the common law is out of vogue, seen as messier than and replaced by the legislative state in practice. *See, e.g.*, Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 63 (2003) (noting “the decline of state common law generally over the course of the past century” (citing GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1 (1982))); H. Marlow Green, *Can the Common Law Survive in the Modern Statutory Environment?*, 8 CORNELL J.L. & PUB. POL’Y 89 (1998).

Local legislatures, state appellate courts, and state legislators might want to flatten out local common law rules instead of letting them flourish.

In addition to building a theory, therefore, this Article has articulated the real-world effects of local common law and suggested both pragmatic and conceptual avenues for further exploration. As local common law takes its place alongside and beneath state and federal common law, productive debates about its legitimacy and proper contours will arise. These debates in turn will contribute to our understanding of sub-local, local, state, and federal power. They also will direct our attention to the contested relevancy of the common law in today's regulatory environment and the substantial barriers that litigants face when engaged at all levels of the legal system.