

The Future of Family Law Education

by
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Introduction

Predicting the future is always a perilous task. Who, apart from science fiction writers,¹ would have predicted the world in which we are living today, even five years ago? Yet the task of predicting the future of family law education may be easier than that of predicting other institutional futures. Neither the legal profession nor legal education are notable for their innovation;² both institutions have embraced change slowly. Accordingly, a safe bet would be to expect evolution rather than revolution in family law education.

Nonetheless, while the profession and the academy may both be inherently conservative,³ the exception to this general observation can be found in family law practice and family law

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¹ Three of my favorites: MICHAEL CRICHTON, *THE ANDROMEDA STRAIN* (1969); Ursula LeGuin, *Solitude*, *THE BIRTHDAY OF THE WORLD* 119 (2002); Annalee Newitz, *When Robot and Crow Saved East St. Louis*, *SLATE* (Dec. 29, 2018), <https://slate.com/technology/2018/12/annalee-newitz-short-story-when-robot-and-crow-saved-east-st-louis.html>.

² “Lawyers are not good at innovation. They are risk-averse, self-protective, prone to focusing on problems, and too wedded to precedent to be able to drive change at scale.” James J. Sandman, *Five Requirements for Realizing Technology’s Potential to Improve Access to Justice*, *LEGAL SERV. CORP.*, Jan. 16, 2020, <https://www.lsc.gov/media-center/blog/2020/01/16/five-requirements-realizing-technologys-potential-improve-access>.

³ I use the term in the sense of “cautious about change or innovation” rather than as a political category. In terms of the political meaning, American lawyers lean to the liberal end of the spectrum, though the scale shows a slight bimodality to the distribution and on either side tends toward moderation: “the ideology of American lawyers peaks around Bill Clinton on the left and around Mitt [Romney] on the right.” Adam Bonica, Adam S. Chilton, & Maya Sen, *The Political Ideologies of American Lawyers*, 8 *J. LEGAL ANALYSIS* 277, 292 (2016). Among types of practice, family law attorneys fall in the middle of extremes represented by oil and gas attorneys and entertainment attorneys. *Id.* at 318. Law professors are more liberal than most attorneys. *Id.* at 296.

education. Perhaps because traditional legal structures and tools are so ill suited to the regulation of human relationships,⁴ family law practice has often been the source of important innovations in law practice: alternative dispute resolution, unbundling, specialty courts, and more.⁵

Moreover, the current pandemic and the resulting social and economic disruption will not leave law practice or legal education untouched. Legal education in general was already in crisis, with an economic crisis of rising costs and declining applications and support; an institutional crisis in which the value of a higher education in general and a law degree in particular is increasingly questioned;⁶ and an existential crisis as the profession of law struggles to define and differentiate itself from the increasing variety of “legal services providers.”⁷

The conditions are ripe for dramatic change for law practice and law schools. Yet, what that future will look like depends far less on either the profession or the academy, as both institutions are shaped largely by “influences of society, culture, technology, economics, and globalization.”⁸ Thus, this essay speculates as to the effects of these broader trends as well as the changes in the profession that will drive changes in family law education.

Any analysis of family law education must begin with families, where the trends toward more diverse, less formalized family structures along with the demographic and economic forces will create significantly different worlds of family law. Part II explores these changing demographics. The question for the future of family law education will be, “Which world do we teach?”

⁴ JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 49-52 (1979) (concluding that law is “a crude instrument” for regulating family relationships).

⁵ *See generally* JANE C. MURPHY & JANA B. SINGER, *DIVORCED FROM REALITY: RETHINKING FAMILY DISPUTE RESOLUTION* (2015) (reviewing changes in family dispute resolution processes).

⁶ BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012); ROBIN L. WEST, *TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM* (2013).

⁷ THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* (2010); DEBORAH L. RHODE, *THE TROUBLE WITH LAWYERS* (2015); RICHARD SUSSKIND, *TOMORROW’S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* (2013).

⁸ JAMES E. MOLITERNO, *THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE* 215 (2013).

Part III examines the role of technology in family law practice and education. Among the many transformations of American lives that the pandemic has wrought, the acceleration of the move toward more virtual practice is likely the one that will remain long after the virus is brought to heel.

Undoubtedly technology will continue to disrupt legal practice and legal education; however, some aspects of lawyering – especially in representing families — will remain unchanged. That is, the need to be able to address not only the legal problems but the people involved in those problems. Thus, Part IV will examine the so-called “soft skills” that are key components of family law education. In particular, always a central part of competent family law practice, discussions of identity and injustice have been amplified by the current climate. Accordingly, this section will examine family law educators’ role in developing the next generation of attorneys who will need to have a higher degree of cultural competence than ever before.

II. The Future of Families and the Content of the Family Law Curriculum

The future of families is already here, with an increasing diversity of family forms and a stratification of family structures according to race, education, and class. The question for the future of family law education is the degree to which the doctrinal focus of the curriculum will match the reality of family life and family law practice. This is a particularly critical question for the basic family law course, which is the only touchstone for family law for the majority of law students today.

In so many ways, the marital families that are featured in law school textbooks are but a tiny slice of the families in society today.⁹ Today only half of adults are married, down substantially from a half-century earlier.¹⁰ Of those adults who are living with

⁹ Katharine Silbaugh, *Distinguishing Households from Families*, 43 *FORDHAM URB. L.J.* 1071, 1080 (2016) (“Family law pays attention to a particular set of relationships, and the rest are recognized incidentally for limited purposes.”).

¹⁰ *Id.* at 1077. Courtney G. Joslin, *Discrimination in and out of Marriage*, 98 *B.U. L. REV.* 1, 3 (2018) (“the number of adults living outside of marriage is large and growing . . . The rate of increase of nonmarital cohabitation shows no sign of stopping.”); Lawrence W. Waggoner, *Marriage Is on the Decline and*

a partner, the percentage who are married has decreased in comparison to those who cohabit.¹¹ Moreover, as an increasing number of individuals are delaying marriage,¹² many are spending some time in a cohabitation arrangement.¹³ And the pandemic may result in even fewer marriages.¹⁴

Marriage is no longer the primary vehicle for raising children. Overall, about 40% of births today are non-marital.¹⁵ More than half of cohabiting couples are raising children together, with the child being the child of both cohabitants in nearly a third of these relationships.¹⁶

As parents form, dissolve, and reform relationships, families have once again¹⁷ become more complex.¹⁸ Twenty percent of

Cohabitation Is on the Rise: at What Point, If Ever, Should Unmarried Partners Acquire Marital Rights?, 50 FAM. L.Q. 215, 215 (2016) (“between 2000 and 2010, the population grew by 9.71%, but the husband-and-wife households only grew by 3.7%, while the unmarried-couple households grew by 41.4%.”).

¹¹ “[T]he share of adults ages 18 to 44 who have ever lived with an unmarried partner (59%) has surpassed the share who has ever been married (50%).” Pew Research Studies, *Marriage and Cohabitation in the U.S.*, Nov. 6, 2019, <https://www.pewsocialtrends.org/2019/11/06/marriage-and-cohabitation-in-the-u-s/>.

¹² The median age at first marriage for both men and women has increased since 2006. For women, the median age was 27.7 years in 2013-2017, up from 26.3 in 2006-2010; for men, 29.6 years in 2013-2017, up from 28.1 in 2006-2010. *United States Indicators*, POPULATION RES. BUREAU, <https://www.prb.org/usdata/indicator/> (last visited Aug. 18, 2020).

¹³ Silbaugh, *supra* note 9, at 1079. A quarter of 25-34 year olds who have not married live with a partner

¹⁴ See Emily Burrow, *The Pandemic Is Putting Marriage Further Out of Reach*, ATLANTIC (July 27, 2020), <https://www.theatlantic.com/family/archive/2020/07/pandemic-marriage-out-of-reach-americans/614506/>.

¹⁵ *Births: Final Data for 2018*, 68:13 NAT’L VITAL STATISTICS REP., Table 10 (Nov. 27, 2019), https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68_13-508.pdf.

¹⁶ Silbaugh, *supra* note 9, at 1079.

¹⁷ Multiple families were the norm historically, because maternal death rates left men to care for their motherless children. See, e.g., Angela Fernandez, *American Treatise Writers and the Nineteenth-Century Debate on Marriage with a Deceased Wife’s Sister in Transatlantic Context*, 59 AM. J. LEGAL HIST. 324, 328 (2019).

¹⁸ While the “nuclear family” may have been the normative family in the 1960’s, for much of America’s history, single parenthood and remarriage were far more common. “The prevalence of single-parent families is about the same at the end of the 20th century as it was at the beginning, but the reasons

children will experience parental divorce during childhood.¹⁹ About 20% of women have children with more than one partner and about one in seven men do.²⁰ Among divorced parents, shared custody is increasingly the norm,²¹ and remarriage is common,²² so that a sizeable percentage of children are spending some of their childhood in step families²³ and in multiple households.

Even the very definition of who is a parent has become more complex, as adults may have no marital or biological tie to the children they are raising.²⁴ Assisted reproductive technologies and surrogacy arrangements pose the possibility that a child may

are very different. In the early part of the century, single parenthood was usually the result of death; in the latter part it was generally the result of choice by at least one parent.” Martha Farnsworth Riche, *America’s Diversity and Growth: Signposts for the 21st Century*, POPULATION RES. BUREAU (June 1, 2000), <https://www.prb.org/americasdiversityandgrowthsignpostsforthe21stcenturypdf503kb/>.

¹⁹ Silbaugh, *supra* note 9, at 1079.

²⁰ *Id.*

²¹ Daniel R. Meyer et al., *The Growth in Shared Custody in the United States: Patterns and Implications*, 55 FAM. CT. REV. 500, 505 (2017) (documenting the dramatic decline in the United States of mother sole custody arrangements following divorce).

²² Gretchen Livingston, *The Demographics of Remarriage*, PEW RES. CTR. (Nov. 14, 2014), <https://www.pewsocialtrends.org/2014/11/14/chapter-2-the-demographics-of-remarriage/>. (More than half of divorced or widowed adults over the age of 35 have remarried. However, remarriage is increasingly less common among younger age groups. Moreover, while men are more likely to remarry than women, that gender gap has been closing in recent years.).

²³ Fifteen percent of American children live with a stepparent and parent. Lawrence Ganong & Marilyn Coleman, *Studying Stepfamilies: Four Eras of Family Scholarship*, 57 FAM. PROCESS 7 (2017). Stepfamilies are complex, including not only “remarried families” but also “de facto stepfamily households headed by cohabiting unmarried partners, serial romantic partnerships and multiple partner fertility,” with multiple household transitions. *Id.* at 18.

²⁴ “[P]arentage declarations occur under differing names, including equitable adoption; parentage by estoppel; and de facto, presumed, or psychological parentage. . . . Imprecise norms establishing de facto parenthood can include same-household residence as the child, holding out a child as one’s own, and/or the establishment of a parental-like relationship.” Jeffrey A. Parness & Matthew Timko, *De Facto Parent and Nonparent Child Support Orders*, 67 AM. U. L. REV. 769, 777–78 (2018). See also Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261 (2020)(arguing for constitutional protection for nonbiological parents).

be considered to have multiple parents: three biological parents,²⁵ a gestational parent, and one or more adoptive, marital, or de facto parents.²⁶

As society ages and with increasing life expectancy, grandparents play an increasingly important role in family life. Multigenerational families have increased in recent years, including adult children living with parents and aging parents living with their adult children.²⁷ The number of grandparents raising grandchildren continues to grow.²⁸ Reasons for this trend include “higher rates of divorce among parents of young children, increased long-term parental unemployment, military deployment, and disruptive factors such as drug use or incarceration that render parents incapable of caring for their children.”²⁹

Family structure and the legal issues families face have significant variations among different racial, ethnic,³⁰ educational,³¹

²⁵ Lucy Clarke-Billings, *World's First Baby Born with Three Biological Parents*, NEWSWEEK (Sept. 27, 2016), <https://www.newsweek.com/worlds-first-baby-born-three-biological-parents-503438#:~:text=the%20world's%20first%20baby%20with,condition%20that%20killed%20his%20siblings>. The “three-parent” procedure involves combining the nucleus of one mother’s egg and the mitochondrial DNA of another mother’s egg. The resulting egg, with DNA from both mothers, is then fertilized by sperm from a father.

²⁶ June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 CHI.-KENT L. REV. 9, 12 (2017)(arguing that more than two parents could be recognized by the legal system if the concept of equal status did not necessarily flow from recognition of parentage).

²⁷ One out of every five U.S. residents lives in a multigenerational household. Silbaugh, *supra* note 9, at 1085.

²⁸ In 2015, 2.9 million children had grandparents as their primary caregivers, up from 2.5 million ten years earlier. Teresa Wiltz, *Why More Grandparents Are Raising Children* (Nov. 2, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/11/02/why-more-grandparents-are-raising-children>.

²⁹ Sarah E. Boslaugh, *Grandparents Raising Grandchildren*, SALEM PRESS ENCYCLOPEDIA (2019), <https://search-ebsohost-com.proxy.library.umkc.edu/login.aspx?direct=true&db=ers&AN=89677557&site=eds-live&scope=site>.

³⁰ In 2018, nonmarital births accounted for 11.7% of births to non-Hispanic Asian mothers, 28.2% of births to non-Hispanic white mothers, 51.8% for Hispanic mothers, and 69.4% for non-Hispanic black mothers. While nonmarital birth rates declined from 2017 to 2018 for most age groups, for older women, nonmarital birth rates reached historical peaks. *Births: Final Data for 2018*, *supra* note 16, at 4.

³¹ JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 19-20 (2014) (“For the majority

geographic, and age groups. For all of the changes in family formation on the current landscape, these changes are especially profound when viewed through the lenses of race and ethnicity.³² For example, while women in general are marrying later in life and are less likely to marry at all, for Black women this is far more true than for both white and Hispanic women.³³ Explanations for these differences vary and are a matter of considerable controversy among social scientists. One important reason is, as with all racial groups, economic circumstances. Employment opportunity disparities and the effects of structural racism, especially as it impacts Black men, make marriage less affordable. Other explanations focus on imbalances in the numbers of Black men and women available for marriage – the result of dramatically higher incarceration and death rates for young Black men, educational differentials between Black men and women, and the greater likelihood of interracial marriage for Black men than for Black women.³⁴

Income, in particular, has a dramatic effect on differences in family structures. As June Carbone and Naomi Cahn have described the effect:

The elite, which . . . constitutes the roughly one-third of the country who graduate from college and/or enjoy substantial incomes, has become, if anything, more likely to raise their children in committed two-parent families. The marginalized bottom third has largely given up on marriage, raising children in the context of single-parent families and contingent, rather than committed, relationships with a second adult. The middle is in flux, as it remains more likely to marry than the bottom, more likely to divorce than the top, and in the midst of an unresolved struggle to redefine the new terms for multiple parents, stepparents, and intimate partners.³⁵

of Americans who haven't graduated from college, marriage rates are low, divorce rates are high, and a first child is more likely to be born to parents who are single than to parents who are married.”).

³² R. Kelly Raley, Megan Sweeney & Danielle Wondra, *The Growing Racial and Ethnic Divide in U.S. Marriage Patterns*, 25:2 FUTURE OF CHILDREN 89 (2015), <https://doi.org/10.1353/foc.2015.0014>.

³³ *Id.* at 90.

³⁴ *Id.* at 95-96.

³⁵ June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185, 1186. See also Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 169–70 (2015) (“Marriage, particularly long-term marriage that does not end in divorce,

For attorneys, of all the factors that influence the selection of clients, income level is likely the most significant differentiator. The content of the typical family law curriculum assumes that graduates will represent family members in a private civil practice and that these clients will have adequate personal and financial resources to engage an attorney to meet their legal needs. However, the substantial number of families in poverty and the rise of pro se litigation³⁶ calls into question the viability of this career trajectory for many graduates who wish to practice family law.

Among low-income families with children under the age of eighteen, the unmet need for legal services is substantial. Twenty-seven percent of low income families with children experienced a custody or other child-focused civil legal problem in a year.³⁷ Seventeen percent experience other family law issues.³⁸ While many families never seek legal assistance,³⁹ those that do often are unable to find that help.⁴⁰ Indeed, in most low-income families, family disputes are not resolved with the help of private legal representation but informally and outside the framework of the legal system. In part this is because of distrust that flows from government intervention into poor families.⁴¹ For these families,

is thus increasingly becoming an institution concentrated among the most privileged families.”).

³⁶ While nationwide study of pro se representation is lacking, in four states that participated in the National Center for State Courts recent data collection, the percentage of self-represented litigants in domestic relations cases was substantial, from a high of 85.7% in Minnesota to 30.8% in Missouri. N. Waters, K. Genthon, S. Gibson, & D. Robinson, COURT STATISTICS PROJECT DATAVIEWER (Nov. 20, 2019), http://popup.ncsc.org/CSP/CSP_Intro.aspx.

³⁷ LEGAL SERVICES CORPORATION, THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 23 (2017).

³⁸ *Id.* at 24. These include “domestic violence or sexual assault (8%), filing for divorce or legal separation (5%), and situations where a vulnerable adult has been taken advantage of or abused (4%).”

³⁹ Only 48% of low income individuals with a custody issue seek legal assistance and only 31% of individuals with other family law issues seek legal assistance. *Id.* at 31.

⁴⁰ For example, the LSC report notes that “low-income parents and guardians of minor children received inadequate or no professional legal help for 87% of their civil legal problems in 2017.” *Id.* at 51.

⁴¹ Jacquelyn L. Boggess, *Low-Income and Never-Married Families: Service and Support at the Intersection of Family Court and Child Support Agency*

access to the courts does not necessarily mean “access to justice” – indeed courts are generally to be avoided, since the therapeutic interventions of these courts rarely come with norms of autonomy.

For decades, scholars have recognized that the legal profession operates in two worlds of legal practice: attorneys, often in large elite law firms, representing entities, on one hand, and attorneys representing individuals, largely in solo and small firms,⁴² on the other. Family law has traditionally been the province of the latter sphere of practice. The private practice of domestic relations law itself is divided, among generalists, high-volume/low-cost specialists, and low-volume/high-cost practices.⁴³

Public legal services look quite different than the private practice of family law. While scholars promote an ideal legal system response to family disputes as one involving non-adversarial, educational, therapeutic, and individualized processes, a system with these elements demands significant resources that may be available only to families with wealth.⁴⁴ Alternative dispute resolution services allow for individualized control over decision making; however, most decisions can be negotiated in the shadow of the law⁴⁵ only if both sides are adequately represented.

In contrast, for families in poverty, the primary types of assistance provided are pro se assistance through some form of limited scope representation. Pro se assistance likely best meets the needs of clients facing minimally contested matters or in areas of

Systems, 55 FAM. CT. REV. 107, 112 (2017); Clare Huntington, *Nonmarital Families and the Legal System's Institutional Failures*, 50 FAM. L.Q. 247, 247 (2016).

⁴² JOHN P. HEINZ, ROBERT L. NELSON, REBECCA L. SANDEFUR & EDWARD O. LAUMANN, *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* 7 (2005).

⁴³ Lynn Mather & Craig McEwen, *Client Grievances and Lawyer Conduct: The Challenges of Divorce Practice*, in LYNN MATHER & LESLIE LEVIN, *LAWYERS IN PRACTICE, ETHICAL DECISION MAKING IN CONTEXT* 71, 87-88 (2012). In this study, 35% of attorneys devoted at least half of their caseload to divorces. Specialists were significantly more likely to be women and were more likely to represent wealthier clients. *Id.* at 74.

⁴⁴ JANE C. MURPHY & JANA B. SINGER, *DIVORCED FROM REALITY: RE-THINKING FAMILY DISPUTE RESOLUTION* (2015).

⁴⁵ Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

law in which there is little room for contest.⁴⁶ In state-provided child support actions, for example, clarity and inflexibility of the law make the attorney's work in establishing child support for a low-income parent look like the work in an H&R Block office in April.⁴⁷ While limited scope representation is clearly superior to providing no legal assistance at all, additional study is required to know which forms of limited scope assistance are the most helpful to which types of practice.

Into the future, this fragmentation and diversity of family formation is likely to only continue as this country itself becomes more diverse.⁴⁸ The differences in family formation and dissolution among different economic, racial, and ethnic groups lends even more complexity to the future of families.

What does all of this portend for the future of family law education? Family law faculty have a foundational choice to make when designing their learning outcomes in the basic family law course and throughout the family law curriculum. Which families are they preparing their students to represent?

While rarely articulated as such, in any given law school course, students are introduced to a world of clients. In the basic family law course, that world is one made up largely of divorcing middle-class or wealthy parents. Given the changing makeup of families today, family law professors planning their doctrinal content must increasingly question the primacy of divorce as the

⁴⁶ Stacey Marz, *Faster and as Satisfying: An Evaluation of Alaska's Early Resolution Triage Program*, 57 *FAM. CT. REV.* 478, 483 (2019).

⁴⁷ Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 *J. GENDER RACE & JUST.* 617, 635 (2012) ("Congress intended the numeric guidelines to promote consistent child support orders among families with similar circumstances and to reduce judicial discretion leading to disparate orders."). Indeed, the U.S. Supreme Court in *Turner v. Rogers*, 564 U.S. 431 (2011), impliedly endorsed pro se assistance when it concluded that due process did not demand representation of a payor parent facing incarceration in a civil contempt proceeding for nonpayment of child support if the parent was on notice of the issue of ability to pay and was provided a form to supply necessary information on that issue.

⁴⁸ Mark Mather et al., *America's Changing Population: What to Expect in the 2020 Census*, 74 *POPULATION BULL.* 1, 9 (June 2019) (noting that only half of the population under age 18 are projected to be non-Hispanic white by 2020 and that "the fastest-growing racial/ethnic group between 2010 and 2020," increasing by 36%, will be "the population identifying with two or more races.").

core content of the basic family law course. The status of marriage is still one that plays a critical role in society, as has been apparent from the battles to extend the right of marriage throughout recent history.⁴⁹ However, to focus the majority of the content of the family law course on divorce and its incidents (property division, support, and custody of marital children) is to presume that marriage is the normative family structure today – an assumption belied by current data.⁵⁰ Family law education in the future must address the many lacunae in the law addressing the rights and responsibilities among family members in a variety of structures.

While the most popular textbooks used to teach family law do address “non-traditional families,” these materials are only a small portion of these comprehensive texts.⁵¹ Most of these texts do provide substantial materials to permit the examination of the law’s treatment of diverse family forms. However, as a practical matter, faculty teaching the family law course must affirmatively choose to teach these materials, as it would be the rare course indeed that would be able to cover meaningfully the full content of these comprehensive textbooks, even in a three-credit hour course.⁵²

⁴⁹ *Loving v. Virginia*, 388 U. S. 1 (1967)(interracial marriage); *Zablockiv. Redhail*, 434 U. S. 374, 384 (1978)(delinquent child support payors); *Turnerv. Safley*, 482 U.S. 78, 95 (1987)(prisoners); *Obergefell v. Hodges*, 576 U.S. 644 (2015)(same-sex marriage).

⁵⁰ *See supra* text at notes 9-15.

⁵¹ *See, e.g.*, LESLIE JOAN HARRIS, JUNE R. CARBONE, LEE E. TEITELBAUM, & RACHEL REBOUCHÉ, *FAMILY LAW* (6th ed. 2018). This comprehensive text contains more than 1000 pages. Of the 576 pages in the text devoted to “family dissolution,” 46 are expressly devoted to nonmarital unions (Chapter Four Legal Recognition of Informal Family Partnerships) and four pages are devoted to property division in these relationships (Chapter 6-B-3 Property Division and a Cohabitation Remedy?). Likewise, D. KELLY WEISBERG, *MODERN FAMILY LAW: CASES AND MATERIALS* (7th ed. 2020) devotes 94 pages (Chapter Five) of the 863 pages to “The Nontraditional Family.” In both texts, a substantial portion of the text is devoted to child custody, which of course could include custody of nonmarital children; however, most of the cases in these pages are custody actions in the context of divorce. In both texts, the questions of parentage, including adoption and ART, are found in the last chapter in the textbook and in most law schools, these topics are more often the subject of advanced family law courses focusing on children and the law.

⁵² Using the Rice University Course Workload Estimator and dividing the average number of pages of these textbooks by 14 weeks of reading, results

Despite the diversity of family formation in society, one can safely assume that a re-thinking of the core content of the family law course will not occur easily. The likely default position of most faculty members teaching the course will be to continue to concentrate on marriage and divorce. First, it is traditional divorce practice that constitutes the “bread and butter” of private family law attorneys.⁵³ While there is clearly an untapped need for lawyers for middle class families,⁵⁴ the pro se phenomenon demonstrates that the legal profession has yet to meet that demand in ways that the public (at least in the United States) finds affordable and accessible.

Second, from a doctrinal perspective, when considering teaching the law related to nontraditional families “there is no there there” – most of these relationships are formed, maintained, and dissolved without any legal system intervention.⁵⁵ Exploring the legal ramifications of the trends away from marriage and toward less formalized family arrangements would cede

in a reading workload of about 10 hours per week. Rice University, Center for Teaching Excellence, <https://cte.rice.edu/workload> (last visited Aug. 18, 2020). This workload doesn’t include any work beyond reading to engage with the material, such as preparing for final exams or any skills assignments integrated into the course. Even for a three-credit-hour course, this is well beyond the ratio of two hours of out-of-class study for every one hour in class which is the ABA accreditation definition of a credit hour. AM. BAR ASS’N, MANAGING DIRECTOR’S GUIDANCE MEMO: STANDARD 310 DETERMINATION OF CREDIT HOURS FOR COURSEWORK (May 2016).

⁵³ See, e.g., N.Y. State Board of Law Examiners, *Course Materials for the New York Law Course and New York Law Examination* (Sept. 2019), <https://www.nybarexam.org/Content/NewYorkCourseMaterials.pdf> (focusing entirely on validity of marriage and property, support and custody in the context of divorce).

⁵⁴ Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1 (2012)

⁵⁵ Clare Huntington, *Family Law and Nonmarital Families*, 53 FAM. CT. REV. 233, 234 (2015) (“Marriage is so ubiquitous in family law that it is easy to overlook its presence. Our legal system, however, has always used marriage as the focus for the regulation of families and continues to do so today.”); Deborah Zalesne, *The Intersection of Contract Law, Reproductive Technology, and the Market: Families in the Age of ART*, 51 U. RICH. L. REV. 419, 424 (2017) (“The lag of family law behind technology can be explained both by state legislatures remaining slow to expand statutory definitions of family, and by family law remaining doctrinally wedded to its patriarchal origins.”).

much of traditional family law to the worlds of contract, tort, and property law.

Third, to the extent there is sufficient “content” (i.e., development of legal doctrines regulating nonmarital families), these are not the topics frequently tested on bar exams. As bar passage rates become more closely tied to accreditation of law schools at the same time that those rates have fallen across the country,⁵⁶ more law schools are focusing on preparation for the bar exam as a high priority across the curriculum, but especially in bar tested subjects.⁵⁷

Despite these headwinds, the family law curriculum must continue to evolve to not only respond to changes in the law but to help students be equipped to evaluate and lead those changes. Of course, some students might object that their purpose in enrolling in a family law course is not to learn these broader questions but instead to focus on their immediate future of practice.⁵⁸ Yet, devoting core curricular time to exploring these questions is consistent with the professional responsibility of all attorneys as public citizens with a special duty for the quality of justice.⁵⁹ If the current constellation of crisis events has taught us nothing else, it is that we must be prepared – and must prepare our students – for an unpredictable and fast-changing future.

⁵⁶ *Bar Passage Rates Improve for ABA-Approved Law Schools*, ABA NEWS (Feb. 24, 2020), <https://www.americanbar.org/news/abanews/aba-news-archives/2020/02/bar-passage-rates-improve/> (noting a five-year decline in bar passage rates and accreditation Standard 316, which requires 75% of a school’s graduates who sit for the bar to pass it within two years).

⁵⁷ *Bar Exam Results Improve as Law Schools Push Prep*, 23:4 PRE-LAW 4 (Spring 2020).

⁵⁸ In a State of the Legal Industry Survey, commissioned by LexisNexis in 2010, 65% of law students and 90% of lawyers expressed their belief that law school teaches students legal theory, but “does not teach the practical business skills needed to practice law.” LexisNexis, *State of the Legal Industry Survey 7* (2010), <http://www.managingpartnerforum.org/tasks/sites/mpf/assets/image/MPF%20-%20WEBSITE%20-%20WHITE%20PAPER%20-%20LN%20State%20of%20the%20Profession%20-%201-12-10.pdf>.

⁵⁹ MODEL RULES OF PROF’L CONDUCT, Preamble ¶6 (2020)(“As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education.”).

III. Making Room for Technology

No discussion of the future would be complete without considering the impact of technology. At the same time that there is a pressure for expanding (or at least re-focusing) the doctrinal content of the family law curriculum, an even more powerful pressure will be exerted on family law educators to provide students with the skills needed for a changing practice. One of the most neglected of important skills for new lawyers is competency in evaluating and using technology.

Technology has transformed all aspects of life, including how people form and reform their families. Dating apps and online algorithms help people choose mates,⁶⁰ so much so that this is now the predominant method of locating a romantic partner.⁶¹ ART expands the abilities to have children in the context of various relationships, or outside any relationship.⁶²

Technology has been transforming legal practice for some time as well.⁶³ While the profession in general is not quick to

⁶⁰ Thirty percent of U.S. adults have used a dating app and 12% have married or been in a committed relationship that began with a dating site or app. Monica Anderson, Emily Vogels, & Erica Turner, *The Virtues and Downsides of Online Dating*, PEW. RES. CTR (Feb. 6, 2020), <https://www.pewresearch.org/internet/2020/02/06/the-virtues-and-downsides-of-online-dating/>; Margaret Ryznar, *Robot Love*, 49 SETON HALL L. REV. 353 (2019).

⁶¹ “Internet meeting is displacing the roles that family and friends once played in bringing couples together.” Michael Rosenfeld, Reuben Thomas, & Sonia Hausen, *Disintermediating Your Friends: How Online Dating in the United States Displaces Other Ways of Meeting*, PROC. NAT’L ACAD. SCI. (Sept. 3, 2019), <https://www.pnas.org/content/pnas/116/36/17753.full.pdf>.

⁶² Jenna Casolo, Campbell Curry-Ledbetter, Megan Edmonds, Gabrielle Field, Kathleen O’Neill, & Marisa Poncia, *Assisted Reproductive Technologies*, 20 GEO. J. GENDER & L. 313 (2019); *See also* Dana E. Prescott & Gary A. Debele, *Shifting Ethical and Social Conundrums and “Stunningly Anachronistic” Laws: What Lawyers in Adoption and Assisted Reproduction May Want to Consider*, 30 J. AM. ACAD. MATRIM. LAW. 127 (2017)(examining ethical issues raised by the rapidly advancing science and technology involved in ART).

⁶³ “Technology has irrevocably changed and continues to alter the practice of law in fundamental ways. Legal work can be, and is, more easily disaggregated; business development can be done with new tools; and new processes facilitate legal work and communication with clients.” American Bar Association Commission on Ethics 20/20, *Introduction and Overview* 3 (Aug. 2012), https://www.legalethicsforum.com/files/20120508_ethics_20_20_final_hod_introduction_and_overview_report.pdf.

change, it has been swept into the future along with the rest of society. As one court observed in 1992 in addressing the increasing use of video depositions:

even the average 'country lawyer's' office is comparable to a mini-Kennedy Space Center with all of its state of the art computers, word processors, faxes, Lexis and now, the latest in video equipment. Thus, suffice it to say, video depositions are here to stay for, surer than death or taxes, lawyers like to play with new toys.⁶⁴

The pandemic has accelerated this transformation,⁶⁵ and family law practice has not been an exception to this trend.⁶⁶

Discovery practice in general has been transformed through e-discovery tools. In family law litigation, the fact that social networking makes public much of what was once private has changed the landscape of evidence. "In 2010, eighty-one percent of divorce lawyers surveyed by the American Academy of Matrimonial Lawyers saw an increase in the number of cases using social networking evidence in the last five years, with Facebook being the top source for online evidence."⁶⁷

Technology tools can open new avenues for resolving parenting disputes. Virtual communications can connect clients to their families across distances,⁶⁸ which may change the calculus of parenting time or relocation decisions.⁶⁹ Parenting is

⁶⁴ Roche v. Udell, 588 N.Y.S.2d 76, 81 (1992).

⁶⁵ See, e.g., David Barks, *Pandemic Will Accelerate Digital Change*, FIN. TIMES (June 4, 2020), <https://www.ft.com/content/b88eb996-2a9c-48de-840f-883a602b095b>; Lyle Moran, *Will the COVID-19 Pandemic Fundamentally Remake the Legal Industry?*, ABA J. (Aug. 1, 2020), <https://www.abajournal.com/magazine/article/will-the-covid-19-pandemic-fundamentally-remake-the-legal-industry>.

⁶⁶ David Hodson, *The Role, Benefits, and Concerns of Digital Technology in the Family Justice System*, 57 FAM. CT. REV. 425 (2019) ("Digitalization is increasing across family justice systems around the world.")

⁶⁷ Patrick Marshall, Note, *What You Say on Facebook May Be Used Against You in a Court of Family Law: Analysis of This New Form of Electronic Evidence and Why It Should Be on Every Matrimonial Attorney's Radar*, 63 ALA. L. REV. 1115, 1115-16 (2012).

⁶⁸ Research on the use of video conferencing after relocation indicates that most children found this method of connecting with parents less than satisfactory. Philip M. Stahl, *Emerging Issues in Relocation Cases*, 25 J. AM. ACAD. MATRIM. LAW. 425, 441 (2013).

⁶⁹ See Elisabeth Van Horn, *Are Webcams Being Used as an Excuse to Allow Relocation?*, 21 J. AM. ACAD. MATRIM. LAW. 171 (2008).

increasingly mediated by computerized parenting coordination and communication services.⁷⁰

For perpetrators of intimate partner violence, technology gives new tools to stalk,⁷¹ monitor, harass, and control victims.⁷² At the same time, technology can be used as a tool to monitor perpetrators⁷³ or protect victims.⁷⁴

Online filing and paperless law practice are so much the norm in many areas that one is barely able to practice on paper and attorneys are expected to be able to access the courts through these systems as a basic element of competence.⁷⁵ Judges and attorneys are becoming more familiar with conducting hearings, mediations, and other dispute resolution processes using web conferencing software and other technological tools as the pandemic has closed courts.⁷⁶ Family courts are challenged to conduct these virtual hearings in a system that is alien to most

⁷⁰ Kristen M. Blankley, *Online Resources and Family Cases: Access to Justice in Implementation of A Plan*, 88 *FORDHAM L. REV.* 2121, 2122 (2020); Sharon D. Nelson & John W. Simek, *Through a Glass, Darkly*, *OR. ST. B. BULL.*, Oct. 2013, at 62 (reporting that parents have been “ordered to use apps like “Our Family Wizard” to track parenting time, reduce divorce conflict and remove the “he said/she said” that keeps families returning to court over custody and coparenting issues.”).

⁷¹ Cynthia Fraser, Erica Olsen, Kaofeng Lee, Cindy Southworth, & Sarah Tucker, *The New Age of Stalking: Technological Implications for Stalking*, 61 *JUV. & FAM. CT. J.* 39 (Fall 2010).

⁷² Xinge He, Emma Johnson, Lauren Katz, Blake Pescatore, Alexandra Rogers, Eva & Schlitz, *Domestic Violence*, 21 *GEO. J. GENDER & L.* 253, 292–96 (2020). *See also* Delanie Woodlock, *The Abuse of Technology in Domestic Violence and Stalking*, 23:5 *VIOLENCE AGAINST WOMEN* 584 (2017)(noting that technology is used to “create a sense of the perpetrator’s omnipresence, and to isolate, punish, and humiliate domestic violence victims. Perpetrators also threatened to share sexualized content online to humiliate victims.”).

⁷³ Justine A. Dunlap, *Intimate Terrorism and Technology: There’s an App for That*, 7 *U. MASS. L. REV.* 10, 25-28 (2012)(exploring GPS monitoring of perpetrators of intimate partner violence).

⁷⁴ He, et al., *supra* note 72, at 293 (describing the Aspire New app, which provides survivors of domestic violence a tool to locate shelters, contact police, or record events, while appearing to be a new app).

⁷⁵ *See, e.g.*, Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010) (en banc) (per curiam)(holding that attorneys must “use reasonable efforts to examine the litigation history” of jurors selected but not empaneled ed (Case.net)).

⁷⁶ The National Center for State Courts reports that five of the most common efforts state courts are taking to combat COVID included “encouraging or requiring teleconferences and videoconferences in lieu of hearings.”

clients; in hearings in which decisions often hinge on determinations of credibility and character; and in cases for which delay has tremendous costs for children.

Technology has been offered as a solution to the unmet need for legal services in family law.⁷⁷ Yet, technology can create barriers as well as access.⁷⁸ As courts move to mandatory e-filing and online hearings, many low-income or rural litigants may find themselves shut out of the system by the digital divide.⁷⁹

Privacy and confidentiality can be impacted by technology.⁸⁰ For example, as more aspects of family law disputes become computerized, so too do the threats to the relative privacy of these proceedings.⁸¹ The ease of inadvertent disclosures when working remotely and sharing files through the cloud requires increased vigilance.⁸²

Coronavirus and the Courts, <https://www.ncsc.org/newsroom/public-health-emergency> (last visited August 23, 2020).

⁷⁷ LEGAL SERVICES CORPORATION, *THE SUMMIT ON THE USE OF TECHNOLOGY TO EXPAND ACCESS TO JUSTICE* (2013), https://www.srln.org/system/files/attachments/LSC_Tech%20Summit%20Report_2013.pdf.

⁷⁸ Mark Lloyd, *The Digital Divide and Equal Access to Justice*, 24 HASTINGS COMM. & ENT. L.J. 505, 536 (2002) (“New Communications technologies can help correct this, if they are properly used to focus and direct political dialogue. The justice divide, just like the digital divide, can be closed, but first we must understand that the divide is neither caused by, nor can it be corrected by, the market or the machine. We must understand that the digital divide, like the justice divide, is a political divide.”).

⁷⁹ Julia R. Gordon, *Legal Services and the Digital Divide*, 12 ALB. L. J. SCI. & TECH 809, 811 (2002); John Greacen, *Eighteen Ways Courts Should Use Technology to Better Serve Their Customers*, 57 FAM. CT. REV. 515, 523 (2019)(arguing that courts must take the responsibility to make e-filing systems that are accessible to pro se litigants).

⁸⁰ Laura W. Morgan & Lewis B. Reich, *The Individual’s Right of Privacy in a Marriage*, 23 J. AM. ACAD. MATRIM. LAW. 111 (2010)(noting privacy concerns of spouses wiretapping, videotaping, and GPS tracking one another).

⁸¹ Laura W. Morgan, *Preserving Practical Obscurity in Divorce Records in the Age of E-Filing and Online Access*, 31 J. AM. ACAD. MATRIM. LAW. 405, 407 (2019)(“privacy scholars have noted with increasing alarm the loss of practical obscurity, and thus the loss of privacy, that has accompanied all courts’ transition to e-filing and maintaining judicial records and documents on-line”).

⁸² Amanda Showalter, *Comment: What’s Yours Is Mine”: Inadvertent Disclosure of Electronically Stored Privileged Information in Divorce Litigation*, 23 J. AM. ACAD. MATRIM. LAW. 177 (2010). For a cautionary tale, see *Harleysville Ins. Co. v. Holding Funeral Home, Inc.*, No. 1:15 cv 00057, 2017 U.S. Dist. LEXIS 18714 (W.D. Va. Feb. 9, 2017). In this case, the plaintiff’s attorney used

Of particular concern is the role of algorithms in assisting decision making. This technology has developed rapidly in computerized research systems.⁸³ Predictive analytics and natural language searching have increasingly replaced human-mediated research through digests, indices, and even key numbers.⁸⁴ As predictive analytics are used in other aspects of legal services, attorneys must be aware of bias that can be built into these system, with the risks of discrimination, unfairness, and denials of due process that can result.⁸⁵ For example, as algorithms are used to triage cases, especially in the child welfare system, bias built into these algorithms can be hidden from sight yet produce systemic unfairness.⁸⁶

To preserve against these risks, the underlying data must be accurate; algorithms and the decisions they produce must be explainable to the people affected by those decisions; and these systems must be subject to audit.⁸⁷ Ultimately, this means that attorneys must have the same responsibility to supervise the

an online file sharing service to share files with opposing counsel. Because the attorney did not properly limit access within the folder, defense counsel was able to see all of the opposing attorney's confidential legal files. The court held that the plaintiff's attorney-client privilege and work-product protections both had been waived by the inadvertent disclosure. However, the court also sanctioned the defendant's counsel for failing to notify the plaintiff's counsel of the disclosure and for improperly accessing the files.

⁸³ Paul Callister, *Thinking Like a Research Expert: Schemata for Teaching Complex Problem-Solving Skills*, 28 LEG. REFERENCE SERV. Q. 31 (2008).

⁸⁴ Susan Nevelow Mart, *The Case for Curation: The Relevance of Digest and Citor Results in Westlaw and Lexis*, 32 LEG. REFERENCE SERV. Q. 13 (2013), <http://dx.doi.org/10.1080/0270319X.2013.759036>.

⁸⁵ Jack Balkin, *The Three Laws of Robotics in the Age of Big Data*, 78 OHIO ST. L.J. 1217 (2017). Balkin argues that "algorithms (a) construct identity and reputation through (b) classification and risk assessment, creating the opportunity for (c) discrimination, normalization, and manipulation, without (d) adequate transparency, accountability, monitoring, or due process." *Id.* at 1239.

⁸⁶ Clare Huntington, *The Empirical Turn in Family Law*, 118 COLUM. L. REV. 227, 232-33 (2018) ("the adoption of predictive analytics to triage suspected cases of child abuse and neglect allows agency officials to throw up their hands and claim they are simply following the algorithm, thus avoiding questions about whether the system improperly intervenes in the lives of low-income families of color.").

⁸⁷ Frank Pasquale, *Toward a Fourth Law of Robotics: Preserving Attribution, Responsibility, and Explainability in an Algorithmic Society*, 78 OHIO ST. L.J. 1243 (2017).

technology that helps them serve clients as much or even more so than they supervise the non-lawyer human assistants in their practice.⁸⁸

The answer cannot be to simply eschew technology altogether.⁸⁹ Rather, information literacy and technological competence have become core aspects of an attorney's duty of competence.

Accordingly, family law education in the future must make room for students to learn how to choose and use technology. Equally, students must learn about the risks of technology and gain a sophisticated level of information literacy.⁹⁰

Some of this education is happening organically under the current circumstances of online delivery of legal education. Across the nation, shelter-in-place orders required law schools during Spring 2020 to pivot to online delivery of legal education. "The tech-enabled, crisis-created shift from classroom to online learning occurred with astonishing speed, pervasiveness, and seamlessness."⁹¹ and most law schools have remained largely or

⁸⁸ MODEL RULES OF PROF'L CONDUCT r. 5.3 (2020) Examples in Note 3 to this rule reflect the increasing role of technology, including litigation database managers and cloud services for storing files. The note describes the factors that go into determining the reasonableness of an attorney's supervision: "including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality." See also David Lat, *The Ethical Implications of Artificial Intelligence*, ABOVE THE LAW (2020), <https://abovethelaw.com/law2020/the-ethical-implications-of-artificial-intelligence/> ("If a lawyer delegates something to subordinates, whether junior lawyers or paralegals, there's an ethical duty to make sure the work has been done competently. And this duty extends to AI-based tools.").

⁸⁹ Lat, *supra* note 88 ("Some of the psychological attributes commonly associated with lawyers – a focus on detail, a desire for control, and aversion to risk – the greater danger might very well be underutilization of , rather than overreliance upon, AI.").

⁹⁰ MODEL RULES OF PROF'L CONDUCT r. 1.1, cmt. 8 (noting that basic competence includes "keeping abreast of . . . the benefits and risks associated with relevant technology").

⁹¹ Mark A. Cohen, *Post-Pandemic Legal Education*, FORBES (Aug 13, 2020), <https://www.forbes.com/sites/markcohen1/2020/08/13/post-pandemic-legal-education/#1767891d75d2>.

exclusively online as the pandemic continues.⁹² Just as attorneys are mastering the art of practicing law virtually, so too students are being required to attend classes through video conferencing and collaborate through document sharing programs and online learning platforms. Along the way they are learning how to communicate effectively in these environments, not only as to the technological tools themselves but also as to the social dynamics of forming communities in a virtual space.

Whether online classes remain a feature of legal education remains to be seen. In part, this will turn on regulation. The American Bar Association standards of accreditation for law schools have long required that the majority of a student's legal education be through in person formats.⁹³ In response, the ABA amended its standards to permit the Council on Legal Education and Admission to the Bar to approve variations in practices due to emergencies.⁹⁴ The question is whether the ongoing pandemic and the resulting shifts to virtual practice in the profession will lead the ABA to more permanently amend its standards to permit more online education. Of course, state courts will need to approve these changes as part of their admissions standards as well if legal education is to change dramatically.⁹⁵

Regardless of whether students remain online or return to the classroom and clinic, technology skills must become a required learning outcome set for all law students just as it has become for attorneys.⁹⁶ Currently, few law schools offer courses

⁹² Paul Caron, *At Least 1/6 of Law Schools Will Be Online This Fall*, TAX LAW PROF BLOG (Aug. 6, 2020), https://taxprof.typepad.com/taxprof_blog/2020/08/.

⁹³ American Bar Association, *2019-20 Standards and Rules of Procedure for Approval of Law Schools*, Standard 306 Distance Education.

⁹⁴ Rule 2 of the ABA Standards and Rules of Procedures for Approval of Law Schools permits the Council to take action to provide law schools "appropriate and necessary relief from the requirements of the Standards" in the event of disasters or emergencies. *Id.* at r. 2.

⁹⁵ Karen Sloan, *NY Court Relaxes Limits on Online Law Classes Amid COVID-19 Response*, N.Y.L.J. (Mar. 18, 2020), <https://www.law.com/newyorklawjournal/2020/03/18/ny-courts-relax-limits-on-online-law-classes-amid-covid-19-response/>.

⁹⁶ Michele Pistone, *Law Schools and Technology: Where We Are and Where We Are Heading*, 64 J. LEGAL EDUC. 586 (2015).

designed to promote these skills.⁹⁷ For family law students, who often go on to practice in solo or small firms or government/non-profit practice, an in-house technologist will be a luxury they will not be able to afford. Accordingly, family law students must learn how to use practice management software, communications platforms, internet investigation tools, as well as the specialized software designed to help clients in family law disputes.

Students will need to learn not only the “how to” of these technologies but the why and when as well. These students will then be equipped to use technology to address some of the core challenges of family law practice. For those working in public service or government sectors, learning to use technological tools will allow them to serve larger numbers of clients by developing online tools to help the public to understand their rights and the legal system.⁹⁸ Computerized guided interviews can help clients through paperwork that previously required a paralegal or attorney’s time and attention.⁹⁹ Overall, educating family law students in the use of technology prepares them to be able to deliver legal services more efficiently and effectively by automating an increasing number of routine tasks. For the family law curriculum to prepare students for practice, technology must be more than the medium for delivering legal education but must constitute part of the content of that education.

IV. Skills for the Human Side of Family Law

As technology and algorithms transform and even replace many legal tasks, legal education will be required to emphasize increasingly “skills computers struggle with (social skills, creative

⁹⁷ Approximately thirty-seven law schools have a skills-development course in law practice technology, based on a review of courses listed in the Law & Technology Curriculum database of the Legal Technology Laboratory https://www.thelegaltechlab.com/index.php/resources/ltl-curriculum#sort=attr.ct14.frontend_value&sortdir=asc&attr.ct16.value=Tech%2520Competencies%2520Training&page=10 (last visited Aug. 23, 2020). The database lists 85 courses in discovery. The most common courses are focused on legal doctrine rather than skills: Privacy/Data Security (430 courses) and Cyberlaw (332).

⁹⁸ Conrad Johnson, *Learning in the Digital Age*, in *TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY* 308, 311 (Susan Bryant, Elliot Milstein, & Ann Shalleck, eds. 2014).

⁹⁹ *Id.*

thinking, multidisciplinary) versus those where they excel (repetition, memorization, calculation).”¹⁰⁰ Family law practice more than most areas of law requires the development of strong interpersonal skills. “Empathy, emotional intelligence, and communication skills are very important for most personal plight lawyers. These skills are useful for other lawyers as well, but more sophisticated and experienced clients are less likely to require the same level of interpersonal and ‘soft’ skills from their lawyers.”¹⁰¹

Working with families means being able to understand diverse perspectives. The impact of cognitive biases, including implicit bias based on stereotypes about categories of people, is especially easy to discern in family law. As a curriculum whose subject matter about which all students have immediate personal knowledge to some degree – after all, we all have families – family law can help students place their own experience of family in perspective, so that they can be aware of their own assumptions and biases and engage in respectful and productive exchanges of ideas.

Law schools are increasingly recognizing the importance of these skills and perspectives and some are explicitly targeting them as key learning outcomes for all students. The American Bar Association accreditation standards have in recent years moved from “input” measures (number of faculty, courses, books in the library) to “outcome” measures (student learning, bar passage, job placement). As of 2017, all law schools were required to have identified learning outcomes for their students. These outcomes must include the traditional content of legal education: “knowledge and understanding of substantive and procedural law and legal analysis and reasoning, legal research, problem solving, and written and oral communication in the legal context.”¹⁰² However, the standards also direct law schools to iden-

¹⁰⁰ David Tal, *Future of Education*, QUANTUMRUN 1 (Feb. 21, 2019), <https://www.quantumrun.com/prediction/trends-pushing-our-education-system-towards-radical-change-future-education-p1> (emphasizing the “Four Cs: communication, creativity, critical thinking, and collaboration. These are the skills humans can excel at over machines, and they will represent the bedrock skills demanded by the future labor market.”) *Id.* at 3.

¹⁰¹ Noel Semple, *Personal Plight Legal Practice and Tomorrow’s Lawyers*, 39 J. LEGAL PROF. 25, 35 (2014).

¹⁰² AM. BAR ASS’N, MANAGING DIRECTOR’S GUIDANCE MEMO: STANDARDS 301, 302, 314-315, at 1 (June 2015), <https://www.americanbar.org/content>

tify outcomes that aim at “the exercise of proper professional and ethical responsibilities to clients and the legal system” as well as identifying “other professional skills needed for competent and ethical participation as a member of the legal profession.”¹⁰³

As a product of this shift in standards, the degree of emphasis a school places on interpersonal skills has become more visible. A number of law schools have identified outcomes such as cross-cultural competency, professional work habits, or collaboration among their core learning outcomes for all students.¹⁰⁴ The family law curriculum presents significant opportunities to contribute to these learning outcomes.

First, the family law curriculum is by necessity multi-disciplinary. Students cannot truly understand the law of divorce or domestic violence or juvenile justice without also understanding some basic concepts of family dynamics and child development. To be able to practice in this multidisciplinary field, family law students must learn interprofessional collaboration skills.¹⁰⁵ As family law practice leads the way in developing a route for paraprofessionals to fill unmet legal needs, law students will need to learn how to collaborate with and, in the majority of jurisdictions that require these paraprofessionals to work with attorneys,¹⁰⁶ to supervise these individuals.

/dam/aba/administrative/legal_education_and_admissions_to_the_bar/govern
ancedocuments/2015_learning_outcomes_guidance.authcheckdam.pdf.

¹⁰³ *Id.*

¹⁰⁴ Neil Hamilton, *Connecting Prospective Law Students’ Goals to the Competencies that Clients and Legal Employers Need to Achieve More Competent Graduates and Stronger Applicant Pools and Employment Outcomes*, 9 ST. MARY’S J. LEGAL MALPRACTICE & ETHICS (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3351468.

¹⁰⁵ J. Herbie DiFonzo & Mary E. O’Connell, *The Family Law Education Reform Project Final Report*, 44 FAM. CT. REV. 524, 525 (2006). See generally BARBARA GLESNER FINES, *ETHICAL ISSUES IN FAMILY REPRESENTATION* (2010).

¹⁰⁶ A limited number of jurisdictions (New York, Washington State, and Ontario) have begun licensing independent paralegals, but the trend is not yet a robust one. See, e.g., *By-Law 4: Licensing*, LAW SOCIETY OF UPPER CANADA §§ 5-6 (2014), <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147485805>; *Court Navigator Program*, NEW YORK CITY HOUSING COURT, <http://www.courts.state.ny.us/COURTS/nyc/housing/rap.shtml> (last visited Aug. 18, 2020); *Supreme Court Adopts Rule Authorizing Non-Lawyers to Assist in Certain Civil Legal Matters*, WASH. CTS. (June 15, 2012), <http://www.courts.wa>

In addition, law schools increasingly will be called upon to expand their educational programs to directly educate these paraprofessionals. The ABA Taskforce on the Future of Legal Education specifically suggests limited licensure and an educational pathway to that licensure as “a potential strategy for fostering law student competence, reducing debt, and facilitating access to justice” in “potential areas of high-need limited licensure practice (e.g., family law).”¹⁰⁷ Indeed, these paraprofessional degrees are the fastest growing segment of legal education.¹⁰⁸

Even if family law attorneys do not incorporate paraprofessionals into their practice, they will undoubtedly need to be able to work with professionals from other disciplines. Medical, nursing, dentistry, and pharmacy schools all already include interprofessional education as core competencies in their professional curriculum.¹⁰⁹ Social work is an integral discipline for interprofessional health practice.¹¹⁰ Learning to work across these disciplines and in collaborative teams is a type of cross cultural work that requires appreciating the professional world-view and

gov/newsinfo/?fa=newsinfo.internetdetail&newsid=2136; For a summary of these and other threats to the legal profession’s monopoly, see Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 *FORDHAM L. REV.* 2611 (2014).

¹⁰⁷ AM. BAR ASS’N TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, REPORT AND RECOMMENDATIONS 3, 24-25 (2014).

¹⁰⁸ As of January 2020, there were 129 programs in law schools aimed at non-lawyers. John B. Thornton, *Whether to Regulate Non-J.D. Programs: Considering the Whats, Whys, and Hows*, Presentation at American Association of Law Schools 2020 Annual Meeting (Jan. 16, 2020), <https://am.aals.org/wp-content/uploads/sites/4/2020/01/AM20PostGraduateLegalThorntonPresentation.pdf>.

¹⁰⁹ Interprofessional Education Collaborative. *Core Competencies For Interprofessional Collaborative Practice: 2016 Update*. (2016), <https://www.aacnursing.org/Interprofessional-Education>. See also Association of American Medical Colleges, *Interprofessional Education Requirements at US Medical Schools* (2019), <https://www.aamc.org/data-reports/curriculum-reports/interactive-data/interprofessional-education-requirements-us-medical-schools> (last visited Aug. 23, 2020) (reporting that an increasing number of medical schools are requiring interprofessional education).

¹¹⁰ Christiane Petrin Lambert, *Professional Development and Interprofessional Practice — Social Workers Share with (and Learn from) Colleagues in Other Disciplines*, 19 *SOC. WORK TODAY* 26 (2019), <https://www.socialworktoday.com/archive/SO19p26.shtml>.

ethical norms of those professionals.¹¹¹ The best way to acquire these skills is through interdisciplinary courses and clinics. For law to catch up with the rest of professional education, these programs will need to be an increasingly important part of family law education.¹¹²

Of course family law attorneys must not only work with professionals from a wide range of disciplines, but must also work with diverse clients. To be successful, family law attorneys must be effective working with children, and with families from different races, cultures, educational, socio-economic backgrounds, and gender identifications. The skill is not limited to family law practitioners alone of course. So critical is this ability to work across differences that a number of states have incorporated a separate requirement for continuing education in these skills for attorneys.¹¹³ Cross-cultural competencies must be an increasingly critical part of family law education. What does this education require?

First students must understand that cognitive biases are simply part of how the brain functions. People's brains process 11 million *bits* of information every second. But people can only consciously process 16 to 40 bits each second. The vast majority of the work that brains do is unconscious.¹¹⁴ Cognitive biases are simply the ways in which the unconscious mind deals with four basic problems: The need to act or decide fast, the need to decide

¹¹¹ Mary Kay Kisthardt, *Working in the Best Interest of Children: Facilitating the Collaboration of Lawyers and Social Workers in Abuse and Neglect Cases*, 30 RUTGERS L. REC. 1 (Spring 2006).

¹¹² GLESNER FINES, *supra* note 105, at 67-79.

¹¹³ In 2016, the American Bar Association's Diversity and Inclusion 360 Commission proposed that states make diversity and inclusion a separate CLE requirement, which became part of Goal III of the American Bar Association Mission and Goals which aspires to "promote full and equal participation in the association, our legal profession, and the justice system by all persons and to eliminate bias in the legal profession and justice system." American Bar Association, *ABA Mission and Goals* (2016), www.americanbar.org/about_the_aba/aba-mission-goals.html. Since then, a number of states have followed through on this requirement. *See, e.g.*, Missouri Supreme Court Order dated June 30, 2019, re: Rule 15.01 Regulation 15.01.10, Rule 15.05, and Rule 18.05, <https://www.courts.mo.gov/page.jsp?id=141933> (requiring that attorneys complete "at least one credit hour of accredited programs and activities devoted exclusively to cultural competency, diversity, inclusion, and implicit bias").

¹¹⁴ DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

what to remember, the problem of too much information, and the problem of not enough meaning.¹¹⁵ Without cognitive biases, people would be paralyzed by input or decision-making.

Students must learn to identify these cognitive biases that affect not only judgment but even the ability to perceive information. These biases affect the independent professional judgment that is the core of the lawyer's value to clients.¹¹⁶ For example, the attorney who does not understand confirmation bias (the tendency to look for and favorably evaluate information that confirms one's prior beliefs and to ignore or discount that which undermines our conclusions) is unlikely to take the affirmative steps necessary to prevent a skewed evaluation of the client's case.¹¹⁷

Judgments about the reasons for another's behavior are especially prone to biased thinking. Fundamental attribution error means that people are more likely to attribute another person's bad behavior to their personality, character, or ability.¹¹⁸ Ego-centric biases lead people to attribute more of their own bad behavior to situational or external factors. Family law attorneys are well aware of these phenomena, since they often witness differences between their client's explanations for their own behavior and the explanation of the behavior of the opposing party.

In recent years, some of the most important work in understanding bias has come from the research in implicit bias, the process by which cognitive biases that lead people to fill in the blanks in their understanding with subconscious associations they have developed between concepts (e.g., black people, gay peo-

¹¹⁵ For a useful graphic representing the more than two hundred cognitive biases identified by psychologist and behavioral economists, see Buster Benson, *Cognitive Bias Cheat Sheet* (Sept. 2016), <https://medium.com/better-humans/cognitive-bias-cheat-sheet-55a472476b18>.

¹¹⁶ MODEL RULES OF PROF'L CONDUCT r. 2.1 (2020).

¹¹⁷ C. Bryan Cloyd & Brian C. Spilker, *Confirmation Bias in Tax Information Search: A Comparison of Law Students and Accounting Students*, 22 J. AM. TAX'N ASS'N. 60 (2000) (noting that training in research methods can counteract the tendency to overlook precedent that undermines the client's position).

¹¹⁸ Matthew I. Fraidin, *Decision-Making in Dependency Court: Heuristics, Cognitive Biases, and Accountability*, 60 CLEV. ST. L. REV. 913, 947 (2013) (arguing that judges in dependency court proceedings are prone to "dispositional bias in attribution," also named the "over-attribution" and the "fundamental attribution error.").

ple) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy). These biases are learned at a very early age. Like any other cognitive bias, implicit biases are unconscious and pervasive and may conflict with the person's expressed views.

Numerous studies have shown the prevalence of bias in the child welfare,¹¹⁹ juvenile justice, and domestic relations systems. Everyone has experience of family that shapes their implicit biases about roles and responsibilities, resulting in strong attitudes and associations formed about what is normal, right, good, in a family relationship.¹²⁰ Family is where culture and morality are expressed strongly and moral judgments are especially where fast thinking operates. If attorneys are not aware of their stereotypes and evaluations about culture and morality, they are likely to overlook or discount information that presents a different viewpoint or experience of family.

Family law is a field in which implicit bias can operate strongly to influence decisions.¹²¹ Open-textured standards such as "equitable" division and "best interests of the child" leave room for considerable discretion and thus more room for bias to operate for attorneys, experts, and judges.¹²²

¹¹⁹ Sandra T. Azar & Phillip Atiba Goff, *Can Science Help Solomon? Child Maltreatment Cases and the Potential for Racial and Ethnic Bias in Decision Making*, 81 ST. JOHN'S L. REV. 533 (2007); Rakesh Beniwal, Note, *Implicit Bias in Child Welfare: Overcoming Intent*, 49 CONN. L. REV. 1021 (2017); Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215 (2013); Leah A. Hill, *Do You See What I See? Reflections on How Bias Infiltrates the New York City Family Court – The Case of the Court Ordered Investigation*, 40 COLUM. J.L. & SOC. PROBS. 527 (2007); Karen Zilberstein, *Parenting in Families of Low Socioeconomic Status: A Review with Implications for Child Welfare Practice*, 54 FAM. CT. REV. 221, 223 (2016) (noting that "[r]esearch has found much variation in parenting across class, racial, and ethnic lines that evaluations often neglect to consider.").

¹²⁰ Lynn Hecht Schafran, *Gender Bias in Family Courts: Why Prejudice Permeates the Process*, FAM. ADVOC., Summer 1994, at 22.

¹²¹ "Custody decisions are affected by implicit biases of all types—race, gender, religion, education, and sexual orientation, to name a few. It is impossible to isolate the role that a particular type of bias, if any, played in a custody determination." Solangel Maldonado, *Bias in the Family: Race, Ethnicity, and Culture in Custody Disputes*, 55 FAM. CT. REV. 213, 231 (2017).

¹²² Dana E. Prescott & Diane A. Tennies, *Bias Is a Reciprocal Relationship: Forensic Mental Health Professionals and Lawyers in the Family Court Bottle*, 31 J. AM. ACAD. MATRIM. LAW. 427 (2019) (exploring explicit and implicit bias in family court cases); See also Katharine T. Bartlett, *Comparing*

Some of the skills most often taught in the family law curriculum are important tools in de-biasing thinking¹²³ and adopting intellectual and cultural humility.¹²⁴ Active listening is perhaps one of the most basic skills taught in family law skills courses and clinics and a critical skill for cross-cultural practice.¹²⁵ Perspective taking, a skill developed in mediation training that is a core aspect of family law dispute resolution is also a critical skill for de-biasing.¹²⁶

While many of these skills and understandings of how bias operates can be taught in the classroom, the most effective way to develop these is in clinical experiences. Since 2013, standards for accreditation of law schools require law students to take six credits of experiential learning as a condition of graduation.¹²⁷ Because family law is one of the highest areas of unmet legal needs, law schools frequently focus on some aspect of family law as the basis for their in-house clinical programs.¹²⁸ Undoubtedly, the future of family law education will continue to look to these clinical programs as the place in which students can best learn how to understand themselves and their clients.

Race and Sex Discrimination in Custody Cases, 28 HOFSTRA L. REV. 877, 883 (2000).

¹²³ Maldonado, *supra* note 121 (exploring strategies to reduce implicit bias in child custody disputes).

¹²⁴ JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (2007)(see especially *Chapter Six: Representing the Child-in-Context: Five Habits of Cross-Cultural Lawyering*, *id.* at 285).

¹²⁵ GLESNER FINES, *supra* note 105, at 53-59.

¹²⁶ Douglas N. Frenkel & James H. Stark, *Improving Lawyers' Judgment: Is Mediation Training DeBiasing?*, 21 HARV. NEGOT. L. REV. 1. 34-40 (2015).

¹²⁷ ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2015-2016, Standard 303(a)(3)(2020) (“An experiential course must be a simulation course, a law clinic, or a field placement. To satisfy this requirement, a course must be primarily experiential in nature and must: (i) integrate doctrine, theory, skills, and legal ethics, and engage students in performance of one or more of the professional skills identified in Standard 302; (ii) develop the concepts underlying the professional skills being taught; (iii) provide multiple opportunities for performance; and (iv) provide opportunities for self-evaluation.”).

¹²⁸ ABA, *Public Interest Clinics*, https://www.americanbar.org/groups/center-pro-bono/resources/directory_of_law_school_public_interest_pro_bono_programs/definitions/pi_pi_clinics/ (last visited Aug. 25, 2020).

V. Concluding Thoughts on the Future of Family Law Education

The future is exciting for family law education. For many years, both in the academy and in practice, family law has suffered “prestige deprivation.”¹²⁹ For many law students and lawyers alike, family law, like other “personal plight” fields of practice is seen as “less remunerative, less personally satisfying, and less prestigious than legal careers in the corporate hemisphere.”¹³⁰ In the academy, practice-oriented scholarship and teaching are less valued than policy and theory.¹³¹

Yet, the future bodes well for family law as having a core role in the law school curriculum. As large law firms continue to downsize and as globalization and technology continue that contraction,¹³² the ever-steady need for attorneys to assist individuals with their family transitions may create a student market demand for family law education.¹³³ Indeed, once in practice, it is not uncommon for attorneys who had sworn as law students that they would never practice family law, to find themselves moving into the field as a reliable source of income.¹³⁴

¹²⁹ CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* 232 (1981). *See also* HEINZ ET AL., *supra* note 42, at 84-85 (noting that in an empirical study of the perceived prestige of differing areas of practice among attorneys, of forty-two fields of law, the prestige ranking for Divorce came in last place, Juvenile Law ranked 40/42 and General Family Practice ranked 37/42 (for poverty clients) and 36/42 (for paying clients)). *See also* Zara Suleman, *Not with a Ten-Foot Pole: Law Students’ Perceptions of Family Law Practice* (2010), <http://www.westcoastleaf.org/wp-content/uploads/2014/10/2009-REPORT-Not-With-a-Ten-Foot-Pole-Law-Students-Perceptions-of-Family-Law-Practice.pdf> (exploring Canadian law students’ perception of family law).

¹³⁰ Semple, *supra* note 101, at 39.

¹³¹ Chaired professorships in constitutional law outnumber chaired professorships in family law. Clinical professors earn less than doctrinal professors and, in many schools, continue to have no tenure or a separate tenure or tenure-equivalent track.

¹³² Semple, *supra* note 101, at 33 (“Personal plight practice is relatively sheltered from the long-term offshoring and computerization threats to developed country lawyers”).

¹³³ *Id.*

¹³⁴ J. Herbie DiFonzo, *Changing Matrimonial Practice in 21st Century New York: A Report of the 2017 Matrimonial Bar Summit*, 56 *FAM. CT. REV.* 626, 628 (2018); Barbara Glesner Fines, *Fifty Years of Family Law Practice—The Evolv-*

Moreover, fundamental questions of law's role in regulating families are becoming a more central part of political and policy discourse. Family law attorneys have always recognized the complexity of this area of law. However, it is likely that the complexity of these questions will become increasingly apparent to policy makers and the bar in general. Since the prestige value of a practice area depends significantly on the perceived intellectual complexity of the subject,¹³⁵ family law may attract more faculty and students alike to specialize in this area.

Most importantly, family law education, like family law practice, will continue to lead the profession in innovations that improve access to justice, more peaceful and therapeutic resolution of disputes, and more respect for the diversity and dignity of those our justice system is designed to serve.

ing Role of the Family Law Attorney, 24 J. AM. ACAD. MATRIM. LAW. 391 (2012).

¹³⁵ HEINZ ET AL., *supra* note 42, at 85-86.