Introduction

The Door to the Family Home

Picture your front door. Do you see grand wood or smudged glass? Can you hear that door groan as it opens? Or do you feel the tug as it sticks in the summer humidity? Is it a door painted a bright, loud red or stained to match the wraparound front porch? Can you smell the neighbor’s dinner in the next-door apartment? Is there a holiday wreath? A welcome mat? An eviction notice? Do you readily turn the knob, knowing that the door rarely is locked? Or do you only reach for the knob after unlocking several deadbolts? As your door begins to open, what do you see? When you picture your home, is it your childhood home that you see, or is it where you live now? Is it a set of worn stairs leading to your childhood room that you shared with your big brother? Is it an expansive great room with light pouring in from skylights and east-facing windows? Is it a narrow hallway leading to the rest of the apartment? Is it cold and dark or light and warm? What family awaits you inside the home? Is it your partner and his children? A grandmother and some cousins? Your Alaskan husky and a kitten? Your dad? Two moms? Your foster parents and foster siblings? Your elderly dad and your wife? A mom and a dad and one sibling?

For me, the door is sometimes metal, sometimes wood, and sometimes glass. Some are grand while others have seen better days. The home inside is a combination of rooms and hallways from all the different houses I have called home. The family inside is not only a combination of my current family—me, my supportive husband, and my wise-beyond-her-years teenage daughter—but also the generations of me. I see my grandparents, aunts, uncles, parents, sister, brothers-in-law, sister-in-law, and all my beloved nieces and nephews. My definition of family will always be influenced by these people whom I call my family.
The lens through which I see the world is shaped and polished by each one of them. I expect that is true for you, too.

We all approach family law from the vantage point of personal experience. There is no other area of law that shapes us in such intimate ways at key turns in our lives. No matter your social experience with your parents, it is a biological certainty that genetically you have at least two parents. And, no matter the social structure of your family, the law was involved in some way like it is involved in all social structures. For some, the law may have positively intervened; for others, it may have negatively interfered. Still others may not have recognized the role of law in their family—but it was there.

I was met with some doubt when I first started discussing this book with colleagues and generally anyone who would listen to me talk about my “book deal.” Is there enough to say for a whole book? Maybe you should write a law review article on the topic first or a column for your department newsletter. After all, how much can you say about the role of psychology in family law? Most people took a very narrow view of the topic and thought I was planning to write an entire book about therapy sessions for couples and children going through a divorce. In no way diminishing the role of psychological therapy during divorce, that topic is but a small illustration of the myriad ways in which psychological theory and research stand to help us understand and critique family law. For both psychology and family law there is a great deal more to them than the superficial topics that provide chatter with your airplane seat companion. The current text provides a first look at how psychology and family law are inextricably linked yet distinct. Psychology and law seem like they would naturally fit together because they both focus on human behaviors and solve human problems. But psychology is based on empiricism whereas the law is based on precedent. In other words, psychology is descriptive whereas the law is prescriptive, and those core differences mean the two systems’ goals can and will clash.

When I teach about family law and juvenile law, I analogize government intrusion on family privacy and decision making to that of entering a door to the family home. Just as each of us has a different picture of a physical door and home, there are also differences in how much that door is opened to government involvement. Consider two families. The first family includes a married couple and one child. The child is 12 years
old; neither the parents nor the child has had any legal infractions—in fact, no known family members have ever had more of a criminal record than a speeding ticket. This family lives in a home they purchased in a quiet neighborhood. The second family includes a divorcing couple with one biological child and one foster child. Both children have been arrested, and the foster child is currently on probation. The father recently moved out and is living with his father (the paternal grandfather), who is a registered sex offender. The mother and two children live in a rented apartment. Although the mother is a legal U.S. citizen, her parents are undocumented immigrants who live with the mother during the winter when they are not able to find work.

Now imagine the metaphorical door to the family home for these two families. The door represents how much government or legal oversight there is in family decisions. For the first family, the door is merely cracked open. The law is barely a factor in the decisions that the family makes. No judge, probation officer, or caseworker will examine the size of the child’s room or dictate how many children are permitted to share a bedroom. If this family decides to take an impromptu road trip across three state lines, there will be no one to call except a neighbor to watch their pets and water their plants. If the child in the first family brings home a report card with a few more Ds than As, the parents will have the power, within reason, to decide how to motivate their child to be a better student. Of course, the door can be pushed wide open if that child goes to school with bruises and broken bones from parents attempting to “motivate” better grades, but requiring more studying or taking away privileges is within the parents’ power. Although the law determines how many days of school the child can miss before truancy becomes an issue, the parents have a great deal of latitude when deciding whether their child stays home from school a few days.

Contrast family one’s barely cracked open door to that of family two’s wide-open door. Although the law is consistent for both families, the second family’s door is open because of their situation. For example, the law defines minimal standards for both families, and they are both held to the same standard of school attendance. However, unlike family one, the law is likely the main factor family two considers in their decisions. School absences could take on a new meaning because of impending child custody agreements or probation requirements. Consider the anal-
ogy of leaving your front door cracked open versus wide open. Before long, the outside is in the house permeating every surface. Sometimes outside is the smell of fresh jasmine, and other times, it is ice. The second family’s approach to child-rearing is similarly affected by the sometimes cracked, but often wide-open, door for government involvement into their family home.

The metaphorical door to the family home makes family law a uniquely personal and psychologically relevant area of the law. Everyone has a different experience with how wide the door was open and how much the law was a part of their family decision making. How wide that door opens has long-term impacts on the psychological well-being of both the individual family members and the family unit. It also determines how we, as adults, approach basic questions about family law.

The Law and Psychology of Families

How does a person decide whom to marry? Can you marry your cousin? Who gets to decide if you can marry your cousin? Does a prenuptial agreement undermine the contractual and emotional promises of marriage? What basis do you need to get a divorce? How should property be divided when a couple divorces? Can an unmarried person adopt? How much should a noncustodial parent pay in child support? When does corporal punishment become abuse? Should grandparents have visitation rights with their grandchildren? What surname should a child receive? Should a husband be able to sue his wife for her tortious acts?

Each one of these questions can be answered either legally or psychologically. Often the two disciplines are in general agreement, with their answers intertwined in such a way that they are virtually impossible to separate. Other times, as you will read throughout this book, the law proscribes certain behaviors that psychology would encourage or encourages certain behaviors that psychological research suggests are counterproductive. In addition to the juxtaposition of psychology and law, the fragmentation of family law should also be obvious. The preceding list of questions represents a staggering number of both legal and psychological topics, even though it only begins to touch on the issues addressed by family law doctrine. Family law attorneys and judges
need to understand a vast array of psychological topics to adequately handle family law matters, from child development to substance abuse and mental illness. Moreover, according to a recent Pew Research Center survey, a vast majority of respondents (76%) said family was the most important element in their life. Another 22% said it was one of the most important elements. These results demonstrate that when family matters appear before the courts, the courts’ focus is on a topic, the family, which is often the most important element in someone’s life. It is undeniable that the psychological underpinnings and effects are immense.

Family Law Theory—or Lack Thereof

Law school professors Kelly Weisberg and Susan Freligh Appleton, in their family law casebook, explain it this way: “Modern Family Law offers valuable interdisciplinary perspectives. Family law has been heavily influenced by work in the fields of family history, psychology, sociology, social work, medicine, and philosophy . . . family law is not just analyzed and applied—it is experienced.” Many other areas of law tend to garner centralizing theories. For example, the law of torts focuses on the circumstances surrounding when a person or an entity is to be held civilly liable for harming another person or entity. Holistic doctrinal explanations fall short for family law. Instead, centralized principles, concepts, or themes are provided as doctrinal structure. Some scholars structure the discipline around the battle between privacy and state power. Law professor Vivian Hamilton describes conjugal, privacy, contract, and parens patriae as the four main principles in family law. Another law professor, Brian Bix, expands this list to ten overarching principles, ranging from federalism to the primary notion of the family. For the current book’s purposes, a number of Bix’s principles are particularly relevant psychologically. For example, Bix explains the tension between ex post and ex ante decision making that pulls between making decisions that are best and most just for the current parties versus creating the best incentives and policies for future parties. This, of course, summons the psychological principles of motivation and conditioning. Another example is that of discretionary versus nondiscretionary decisions, exemplified by the best interest standard versus strict child support guidelines.
As noted earlier, despite the diversity of issues encompassed within family law, the two main topics everyone thinks of when they think of family law and psychology are divorce and counseling. Although this book addresses those two topics, it goes well beyond them to demonstrate the wide reach of psychological study within family law.

Beyond Divorce

Without a doubt, the topic of divorce overshadows much of the family law curriculum, especially courses on family law practice. In a quick survey of the family law texts on my own bookshelf, material focused on topics related to divorce generally composes one-third to more than one-half of the chapters. These chapters address topics such as the act of divorce, division of property, alimony, child custody, child support, and alternative dispute resolution. And the focus is on litigated appellate cases. Divorce is certainly an important topic, and like the textbooks, it comprises a great deal of family law attorneys’ time. But family law doctrine and practice are much broader ranging than litigated divorce, and understanding these other topics is essential to an informed perspective on the field.

The current text goes beyond divorce to address those issues that arise before a wedding, such as dating and barriers to marriage. There is a chapter on staying married and avoiding divorce. An additional chapter describes reproductive issues. Finally, there is another chapter that addresses domestic violence including intimate partner, child, and older adult abuse—topics often addressed in different courses and texts such as domestic violence, children and the law, or elder law.

Beyond Counseling

Legal professionals may not be clear on the different types of psychologists and the types of expertise they could bring to family law issues. Indeed the public mostly sees psychologists as only clinicians or counselors who address mental health issues. Yet, similar to family law, psychology is a diverse field. In fact, the American Psychological Association (APA) has 54 distinct divisions that each focus on either a subdiscipline of psychology or a specific topic area within psychology.
These divisions range from general psychology\(^{19}\) to the advancement of pharmacotherapy.\(^{20}\) The APA is the largest scientific and professional organization for psychology in the United States, with more than 120,000 members, and it reflects the wide variety of issues addressed by psychological theory and research.\(^{21}\)

This diversity is also mirrored in most university psychology departments, which offer separate programs or tracks available for faculty affiliation and graduate student training. In addition, psychologists are frequently found in other departments at universities and collaborate with many different people across campuses. Recently, psychology’s wide reach has led to it being characterized as a “hub science.”\(^{22}\) A hub science is one that is central to a variety of theorizing and research. Other hub disciplines include mathematics, physics, chemistry, earth sciences, medicine, and the social sciences.\(^{23}\) It is thus clear that psychology is a science that goes well beyond counseling sessions. Psychology at its core wants to know how and why people make decisions and how and why they perceive, think, feel, and act.\(^{24}\) All different kinds of psychologists and psychological research can speak to virtually every area within the law.

Unfortunately, although law psychology exists as an interdisciplinary field, it has not realized its birthright of influence on the law.\(^{25}\) One reason law psychology has not had the intended impact may be because the emphasis of the discipline has been too narrow in scope.\(^{26}\) Most law-psychology research and writing is focused on jury decision making and eyewitnesses.\(^{27}\) Despite repeated calls for broadening the discipline,\(^{28}\) very little attention branches beyond the safety of a few select areas. This book and the series of which it is a part seek to make an impact in that void. There is much to be gained in the law from interdisciplinary ventures and empirical psychology examinations.\(^{29}\) And there is much to be gained in psychology by understanding the legal issues that raise empirical questions.

The Natural “Marriage” of Psychology and Family Law

Although family law is diverse and does not fit into a neat theoretical objective statement as do many other areas of law, one consistent theme is present in family law—human behavior. As law professor Brian
Bix notes, “[w]hen courts, legislators, or commentators argue for legal change in family law—or when they argue for status quo, for resisting change—they often do so on the basis of an express or implied claim about the effect a proposed change would have on human behavior.”30 Bix continues: “These are empirical claims about the world, and they are in principle subject to experimental support or refutation. However, the fact is that in family law (and likely in many other areas of law), the social science data relevant to law and law reform is scarce, and what data there is, is frequently controversial and subject to challenge.”31 Bix then provides the example of custody or divorce rules and a desire to have one such rule over another because we believe that a particular rule will serve the long-term benefit of most family members better than another rule. We focus on the individual and social well-being and attempt to use that in our process of selecting what rules would be best. But we must be careful to not let our own biases rather than empirical data shape these decisions.32

It is important to note that there are risks with relying too heavily and uncritically on empirical data and conclusions. Family law scholar Clare Huntington provides an in-depth critique of blindly accepting empirical data to change family law.33 Not only is it unethical to use stringent experimental methods such as random assignment in most family law contexts; it is also extremely difficult to be able to adequately test complex family law issues, such as love and acceptance with empirical science. Huntington also highlights the risks of empirical sciences neglecting marginalized groups while also allowing a value-based judgment to look neutral. At the same time, there are promise and utility because empirical science provides a balance against politicizing family law policy. As such, Huntington describes the need for legal scholars to serve as gatekeepers to best utilize empirical science in family law. In her framework, she advocates for those gatekeepers to determine when there is a consensus about values being considered and then to be sophisticated and skeptical in that empirical evidence.34 When there is no consensus, Huntington argues that empirical evidence is less useful. Of course, it is possible that empirical evidence could serve to build consensus.

Despite the lack of unifying theory for family law and some risks of empiricizing family law, this book focuses on the premise that empirical research in family law—or, to borrow from our physician friends,
“evidence-based”\textsuperscript{35} family law—can lead to better outcomes in many situations. Like other texts in the current series, this book examines and includes a variety of psychological theories stemming from both applied and basic research. Many of the subdisciplines of psychology are represented—with social, developmental, clinical, and counseling among the most often referenced areas. At times, the research presented is basic science and seemingly unrelated or far too simple to be applied to the weighty issues of family law, but this is done to provide a starting point or a spark from which future researchers can think about integrating known basic science tenets into complex and thorny family law issues. Additionally, other related areas of social science are relied on when appropriate because this interdisciplinary focus provides a broad foundation on which future psychology research can be based.

The current book has four main ambitions: (1) to explain the current state of family law, (2) to demonstrate the relevance of psychological research to family law topics, (3) to describe the existing research on those topics, and (4) to outline areas for future research, offering specific research questions in some instances. This book focuses on current U.S. society, but often our conceptions of family and the laws surrounding it are only historical or cultural constructions. The very notion of a nuclear family is a modern phenomenon born out of class development.\textsuperscript{36} Therefore, the chapters that follow generally provide a historical and cultural context for each topic. As legal scholar Deborah Anthony noted in an article about surnames, “[t]he law—especially family law—serves the function of channeling people into certain socially preferred institutions and practices, while discouraging those that are viewed as less acceptable.”\textsuperscript{37} But getting married, staying married, and having children within a marriage are no longer norms. The general institution of marriage is in flux. Historically, marriage meant a way to have, support, and protect children. Today, many of those requirements can be achieved without marriage. Although the legal distinction of men’s duty to support and women’s duty of service is largely a historical relic, are there psychological vestiges that remain in the form of stereotypic expectations?\textsuperscript{38} Because of historical trends and changes, our grandfather’s family law is not the same family law we study and practice today. Today’s family law serves to channel people into different institutions and practices from what it did merely a few decades earlier.\textsuperscript{39}
In their 2011 book on modern marriage, law professors Joanna Grossman and Lawrence Friedman inquire, “If behavior changes, can legal change be far behind?” Grossman and Friedman conclude that legal change is inevitable. The chapters that follow in the current book explore that notion by examining the historical behaviors and individual choices that laid the foundation for the evolution of family law from its origin to its current state. The book also asks the complement of Grossman and Friedman’s question by examining the resulting behaviors (or lack thereof) associated with changes in family law.

Conclusion

Grossman and Friedman begin their book by noting that “[e]verybody, in every society, is born into a family. Even a newborn baby, unwanted, abandoned as soon as it is born . . . will eventually end up in somebody’s family.” They go on to say that human beings are “social animals, family animals. The family is the fundamental unit of society.” Indeed, family law, like no other area of law, is intimately linked to personal experience, because every individual has personal experience with family law. Not only does everyone have a history with family law, but the topics on which the area of family law touches are also those that are most deeply personal and private. Despite the magnitude of the area, there is no clear unifying theory or holistic doctrine from which to guide examination, especially when the goal is to focus on more than simply divorce or counseling. The only constant this book has is the desire to bring empirical research to aid in answering the legal questions. And, as Carl Schneider and Lee Teitelbaum, two legal scholars, note, “every corner of family law is drenched with empirical questions on whose answers good policy depends. Those questions are massively ignored.” This book acknowledges these questions and shines a light on them.

The next chapter addresses the way in which the law has attempted to restrict some people from getting married and what the underlying psychological reasons for such restrictions may be.