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In education, scholars study different methods for fostering early childhood development. Indeed, the field of early childhood education is well established: graduate schools offer multiple degrees and certificates in early childhood education,<sup>51</sup> universities sponsor research education institutes focused on early childhood,<sup>52</sup> and entire academic journals are dedicated to research on early childhood education.<sup>53</sup> Scholars in this field study how to design effective early childhood education programs and the limits of educational interventions later in childhood, exploring questions of preschool curriculum, evaluation, and access, among other topics.<sup>54</sup>

In economics, scholars focus on the relationship between early childhood and later outcomes. Nobel laureate James Heckman, for example, has documented the economic efficiency of investing in early childhood, demonstrating that interventions during the first several years of life are more cost effective than interventions during the school years and far more cost effective than programs for adults, such as job training initiatives.<sup>55</sup> Raj Chetty and Nathaniel Hendren are the principal investigators of the Equality of Opportunity Project, which explores the relationship between

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49. For an excellent summary of this research, see *Deep Dives: Early Childhood Mental Health*, CTR. ON DEVELOPING CHILD HARV. U., <http://developingchild.harvard.edu/science/deep-dives/mental-health> (last visited May 18, 2017); *InBrief: Early Childhood Mental Health*, CTR. ON DEVELOPING CHILD HARV. U. (2013), <http://developingchild.harvard.edu/resources/inbrief-early-childhood-mental-health>; *InBrief: The Science of Neglect*, CTR. ON DEVELOPING CHILD HARV. U. (2013), <http://developingchild.harvard.edu/resources/inbrief-the-science-of-neglect>; *Key Concepts: Brain Architecture*, CTR. ON DEVELOPING CHILD HARV. U., <http://developingchild.harvard.edu/science/key-concepts/brain-architecture> (last visited May 18, 2017).

50. See *infra* Part I.B.

51. See, e.g., *In the Department of Curriculum & Teaching: Early Childhood Education*, TEACHERS COLL. COLUM. U., <http://www.tc.columbia.edu/curriculum-and-teaching/early-childhood-education> (last visited May 18, 2017) (describing the five degrees offered).

52. See, e.g., NATIONAL INSTITUTE FOR EARLY EDUCATION RESEARCH, <http://nieer.org> (last visited May 20, 2017); *Rita Gold Early Childhood Center*, TEACHERS COLL. COLUM. U., <http://www.tc.columbia.edu/ritagold> (last visited May 18, 2017).

53. Some of the peer-review journals include *Early Childhood Research Quarterly*, *Journal of Early Intervention*, and *Early Education and Development*.

54. See generally Debra J. Ackerman & Rachel A. Sansanelli, *The Source of Child Care Center Preschool Learning and Program Standards: Implications for Potential Early Learning Challenge Fund Grantees*, 12 EARLY CHILDHOOD RES. & PRAC. (2010), <http://ecrp.uiuc.edu/v12n1/ackerman.html> (describing the results of a study that surveyed 391 child care center directors to learn their preschool learning expectations and program standards); J.T. Hustedt & W.S. Barnett, *Issues of Access and Program Quality*, 2 INT'L ENCYCLOPEDIA EDUC. 110 (2010) (examining the current state of access to preschool education across the globe and the quality of the education).

55. Heckman is a prolific author. For an accessible summary of his research, see JAMES J. HECKMAN, *GIVING KIDS A FAIR CHANCE* 3–41, 125–32 (2013), and for more examples of his work and others, see HECKMAN, <http://heckmanequation.org> (last visited May 18, 2017).

neighborhood effects during childhood and future earnings as an adult.<sup>56</sup> The acceptance of using economic tools to study early childhood is further reflected in the academic conferences dedicated to the subject<sup>57</sup> and the academic journals publishing articles on early childhood.<sup>58</sup>

As with the first generation of early childhood researchers, today's scholars play a central role in the development of policy. In 2006, for example, Harvard opened the Center on the Developing Child, which seeks "to drive science-based innovation that achieves breakthrough outcomes for children facing adversity," with an emphasis on using scientific research about early childhood development "to educate policymakers and build support for early investment."<sup>59</sup> The Center is part of the National Scientific Council on the Developing Child, which is an interdisciplinary effort involving multiple universities seeking to translate scientific findings for policymakers to improve outcomes for children.<sup>60</sup>

The interdisciplinary efforts have deeply influenced early childhood policies. Government officials hold regular conferences to learn more about

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56. EQUALITY OPPORTUNITY PROJECT, <http://www.equality-of-opportunity.org> (last visited May 18, 2017). Chetty and Hendren are not focused exclusively on early childhood, but they do disaggregate their findings by the age of the child. There are numerous other scholars who research the economic impact of differences in early childhood. For example, see Roland G. Fryer, Jr., Steven D. Levitt & John A. List, *Parental Incentives and Early Childhood Achievement: A Field Experiment in Chicago Heights* (Nat'l Bureau of Econ. Research, Working Paper No. 21477, 2015) (describing a study about the effects on children's cognitive and non-cognitive skills of providing parents with financial incentives to engage in behaviors designed to increase early childhood and executive function skills).

57. E.g., *Chicago Initiative for Economic Development and Early Childhood (CEDEC) Conference*, U. CHI.: HUM. CAP. & ECON. OPPORTUNITY GLOBAL WORKING GROUP, <https://hceconomics.uchicago.edu/events/chicago-initiative-economic-development-and-early-childhood-cedec-conference> (follow "Program" expansion button) (last visited May 20, 2017) (programs in 2012 included "Status of children, nature of family influence and the definition of child poverty" and "What is the return to child development compared to other strategies?"); *Yale UNICEF Conference on Children's Rights: Early Childhood Development*, YALE UNICEF, <http://yaleunicef.strikingly.com> (last visited May 18, 2017) (describing a session entitled "The Economics of Early Childhood Development").

58. See generally David Cesarini et al., *Wealth, Health, and Child Development: Evidence from Administrative Data on Swedish Lottery Players*, 131 Q. J. ECON. 687 (2016) (discussing the impact of lottery wealth on Swedish lottery players' own health and their children's health and developmental outcomes); Chetty et al., *Childhood Environment*, *supra* note 4 (describing the role of family background and childhood environment in shaping outcomes in adulthood); Daniela Del Boca et al., *Household Choices and Child Development*, 81 REV. ECON. STUD. 137 (2014) (discussing how household behavior and decisions affect children's outcomes); James Heckman et al., *Understanding the Mechanisms Through Which an Influential Early Childhood Program Boosted Adult Outcomes*, 103 AM. ECON. REV. 2052 (2013) (analyzing the sources of the Perry Preschool program's success in improving participants' cognitive and non-cognitive outcomes).

59. *History of the Center*, CTR. ON DEVELOPING CHILD HARV. U., <http://developingchild.harvard.edu/about/who-we-are/history-of-the-center> (last visited May 18, 2017).

60. *National Scientific Council on the Developing Child*, CTR. ON DEVELOPING CHILD HARV. U., <http://developingchild.harvard.edu/science/national-scientific-council-on-the-developing-child> (last visited May 18, 2017).

the research and integrate it into policies,<sup>61</sup> and nonprofit organizations and educational groups advocating for early childhood programs rely on the research.<sup>62</sup> Moreover, the research has helped make the issue of government support less contentious. In Oklahoma, for example, local leaders say “[t]his isn’t a liberal issue . . . . This is investing in our kids, in our future. It’s a no-brainer.”<sup>63</sup> In Florida, Governor Rick Scott, a Republican, stated that “[f]amilies want their children to have high-quality educational opportunities and research shows a good education begins early. That is why investing \$1.1 billion in early childhood education is so important for our state.”<sup>64</sup>

The interdisciplinary dialogue and policy debate, however, are lacking a key element: the perspective of the law. It is telling that one of the foundational publications influencing policy, *From Neurons to Neighborhoods*,<sup>65</sup> catalogues multiple influences on early childhood development but does not mention the role of the law. As a result of this disconnect, both scholars and policymakers are missing the unique contributions—described in detail in Part III—that lawyers and legal scholars can bring to this debate.

#### B. KEY FINDINGS FOR LEGAL SCHOLARS

For legal scholars, there are three key findings of particular relevance in the voluminous literature on early childhood development: early childhood is a critical period for the acquisition of cognitive and non-cognitive skills; development during this period turns on the parent-child relationship; and disadvantages during early childhood have lifelong ramifications. This section provides a brief summary of the research that establishes these core insights.

Most fundamentally, early childhood lays the foundation for all future learning.<sup>66</sup> During the prenatal period and early childhood, the brain lays

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61. See, e.g., *The Administration for Children and Families’ (ACF) National Research Conference on Early Childhood*, OFF. PLAN., RES. & EVALUATION, <http://www.acf.hhs.gov/opre/events/the-national-research-conference-on-early-childhood-2016> (last visited May 18, 2017).

62. See, e.g., *Policy and Advocacy*, ZERO TO THREE, <https://www.zerotothree.org/policy-and-advocacy> (last visited May 18, 2017).

63. Nicholas Kristof, *Oklahoma! Where the Kids Learn Early*, N.Y. TIMES (Nov. 9, 2013), <http://www.nytimes.com/2013/11/10/opinion/sunday/kristof-oklahoma-where-the-kids-learn-early.html> (quoting Skip Steele, Republican Tulsa City Council member).

64. *Governor Rick Scott Highlights Early Learning Funding in Miami*, RICK SCOTT: 45TH GOVERNOR FLA., <http://www.flgov.com/gov-rick-scott-highlights-early-learning-funding-in-miami> (last visited May 18, 2017).

65. See NAT’L RESEARCH COUNCIL & INST. OF MED., *supra* note 7, at 1–10.

66. This section discusses several core aspects of early childhood development—brain maturation, language acquisition, and basic psychosocial skills—but there are numerous other areas of childhood development, such as learning to recognize and regulate emotions and relate to peers, which also turn on

down neural pathways that form what some neuroscientists call the brain architecture for future development, with brain cells—neurons—forming circuits.<sup>67</sup> The neural circuits that are used repeatedly grow stronger, but those that are not used regularly die off.<sup>68</sup> Neural circuits form the basis for the development of language, emotions, logic, memory, motor skills, and behavioral control.<sup>69</sup> With repeated use, the circuits become more efficient, connecting different areas of the brain more rapidly, affecting a person's ability to think effectively and regulate emotions.<sup>70</sup> If the foundation is strong, it is easier to build upon in later years, but if the foundation is weak, it is much harder for the brain to develop the higher-level skills that rely on efficient connections between different areas of the brain.<sup>71</sup>

The basic neural circuitry for vision and hearing develops shortly before and soon after birth, and the circuits used for language and speech production peak before age one.<sup>72</sup> The higher level circuits used for cognitive functions develop throughout the first several years of life.<sup>73</sup> Executive functions, such as the ability to hold information in the short-term, ignore distractions, and switch gears between contexts and priorities, are developed from birth through late adolescence, with a particularly important period occurring from ages three to five.<sup>74</sup>

The second key finding is that development during early childhood does not occur in a vacuum and instead is dependent on the relationship between a parent or other long-term caregiver and a child.<sup>75</sup> Brain development, for example, is stimulated by what some neuroscientists refer to as “serve and

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relationships with parents. *Id.* at 92–181 (describing in detail multiple aspects of early childhood development).

67. *Id.* at 185; *InBrief: The Science of Early Childhood Development*, CTR. ON DEVELOPING CHILD HARV. U. (2007), <http://developingchild.harvard.edu/resources/inbrief-science-of-eccd>.

68. See *InBrief: The Science of Early Childhood Development*, *supra* note 67.

69. See *Id.*

70. *Id.*

71. *Id.*; Nat'l Sci. Council on the Developing Child, *The Timing and Quality of Early Experiences Combine to Shape Brain Architecture* 1–4 (Ctr. on the Developing Child at Harvard Univ., Working Paper No. 5, 2007), [http://46y5eh11fhgw3ve3ytpwxt9r.wpengine.netdna-cdn.com/wp-content/uploads/2007/05/Timing\\_Quality\\_Early\\_Experiences-1.pdf](http://46y5eh11fhgw3ve3ytpwxt9r.wpengine.netdna-cdn.com/wp-content/uploads/2007/05/Timing_Quality_Early_Experiences-1.pdf) [hereinafter NSCDC Working Paper No. 5]. Much of the critical development period occurs before a child enters formal schooling at age five, although some processes continue into adulthood. NSCDC Working Paper No. 5, *supra* at 1–5.

72. NSCDC Working Paper No. 5, *supra* note 71, at 2–3.

73. *Id.* at 3–4.

74. Nat'l Sci. Council on the Developing Child & Nat'l Forum on Early Childhood Policy & Programs, *Building the Brain's "Air Traffic Control" System: How Early Experiences Shape the Development of Executive Function* 1–2, 4–5 (Ctr. on the Developing Child at Harvard Univ., Working Paper No. 11, 2011), <http://46y5eh11fhgw3ve3ytpwxt9r.wpengine.netdna-cdn.com/wp-content/uploads/2011/05/How-Early-Experiences-Shape-the-Development-of-Executive-Function.pdf>.

75. See NSCDC Working Paper No. 1, *supra* note 7, at 1–2.

return” communication between a parent and child.<sup>76</sup> An illustration of this “serve and return” communication is when a child babbles, moves, and uses facial expressions, and the adult responds with similar sounds and gestures.<sup>77</sup> Through this exchange, neural circuits are established and strengthened, laying the foundation for future communication, language, and social skills.<sup>78</sup> And language development turns on a child speaking and interacting with parents and other caregivers.<sup>79</sup>

The parent-child relationship during early childhood also influences a child’s psychosocial development. Very young children attach to their primary caregiver,<sup>80</sup> looking to this person when in danger or need.<sup>81</sup> When this relationship is secure, children confidently explore their surroundings, knowing they can come back to the caregiver for comfort and familiarity at any time.<sup>82</sup> A secure attachment also helps a child develop a sense of self-efficacy. When a child looks to a parent to satisfy a need, such as ensuring the child is safe, and the parent responds, this teaches the child that she can influence those around her.<sup>83</sup> In this way, securely attached children learn to regulate their own emotions and solve problems because they feel effective; they also learn that negative emotions can be tolerated and managed.<sup>84</sup> As a result, they develop good problem-solving skills, emotional balance, and positive expectations for relationships.<sup>85</sup> Further, through attuned interaction between a parent and child, a child develops basic social intelligence, learning how to read the emotions of another person.<sup>86</sup>

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76. *Id.*

77. *Id.* at 2.

78. *Id.* at 1–2; see Nat’l Sci. Council on the Developing Child, *Children’s Emotional Development Is Built into the Architecture of Their Brains* 1–2 (Ctr. on the Developing Child at Harvard Univ., Working Paper No. 2, 2004), <http://developingchild.harvard.edu/resources/childrens-emotional-development-is-built-into-the-architecture-of-their-brains>.

79. See NAT’L RESEARCH COUNCIL & INST. OF MED., *supra* note 7, at 126, 136–39. Through these interactions, children learn both the operative rules of language—pairing nouns and verbs, making words plural, and so on—as well as particular vocabulary words. See *id.* at 126–28, 136–38.

80. See generally JOHN BOWLBY, ATTACHMENT, *supra* note 2 (discussing the development of attachment behavior and patterns of attachment behavior); JOHN BOWLBY, SEPARATION, *supra* note 2 (discussing human behavior relating to sorrow, separation, anxiety, distress, fear, security, and anger); JOHN BOWLBY, SADNESS, *supra* note 2 (discussing adults’ and children’s behavior in response to loss, specifically their mourning process); JOHN BOWLBY & MARY D. SALTER AINSWORTH, CHILD CARE AND THE GROWTH OF LOVE (Margery Fry ed., abr. 2d ed. 1965) (discussing the adverse effects of maternal deprivation on children and how to prevent maternal deprivation).

81. BOWLBY, ATTACHMENT, *supra* note 2, at 371–74.

82. NAT’L RESEARCH COUNCIL & INST. OF MED., *supra* note 7, at 230; see BOWLBY, ATTACHMENT, *supra* note 2, at 344–46.

83. NAT’L RESEARCH COUNCIL & INST. OF MED., *supra* note 7, at 229–30.

84. *Id.*

85. MARIO MIKULINER & PHILLIP R. SHAVER, ATTACHMENT IN ADULTHOOD: STRUCTURE, DYNAMICS, AND CHANGE 190–92, 194–218 (2007).

86. See DANIEL J. SIEGEL, THE MINDFUL BRAIN: REFLECTION AND ATTUNEMENT IN THE CULTIVATION OF WELL-BEING 164–69 (2007) (explaining the role of resonance circuits—a combination

The final key finding is that the period of early childhood profoundly influences a child's life trajectory, and thus disadvantages in early childhood play a pivotal role in replicating inequality.<sup>87</sup> There are many reasons why children from low-income families become low-income adults,<sup>88</sup> but a significant piece of the puzzle is differences in early childhood. Infants from different socioeconomic backgrounds display, on average, similar levels of cognitive ability, but as early as eighteen months, researchers can detect a divergence.<sup>89</sup> By the time they reach kindergarten, children from lower socioeconomic backgrounds score much lower on tests of cognitive ability<sup>90</sup> as well as on measures of the non-cognitive abilities needed for school success, such as the ability to self-regulate, get along with peers, listen, and focus.<sup>91</sup> These gaps can be significant. Tests of five year olds entering kindergarten, for example, showed that some children had a vocabulary of a twenty-one-month-old while others had the vocabulary of a ten-year-old.<sup>92</sup> This gap in school readiness is tenacious, predicting much of a child's subsequent school achievement.<sup>93</sup>

For all of the other factors that influence child outcomes, the evidence is clear that much of the gap in school readiness is rooted in differences in parent-child interactions. One review of parenting studies found that approximately one-third to one-half of the gap in school readiness can be attributed to parenting differences.<sup>94</sup> The underlying studies measured various aspects of parenting during early childhood, including nurturance

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of the prefrontal areas of the brain and mirror neurons—in the development of social and emotional skills).

87. See NAT'L RESEARCH COUNCIL & INST. OF MED., *supra* note 7, at 125 (citations omitted) (surveying the literature and concluding that “[o]ne of the most significant insights about educational attainment in recent years is that educational outcomes in adolescence and even beyond can be traced back to academic skills at school entry. Academic skills at school entry can, in turn, be traced to capabilities seen during the preschool years and the experiences in and out of the home that foster their development.”).

88. See generally Reardon, *supra* note 5 (exploring the connection between inequality and family, neighborhood, schools, and labor markets).

89. See NAT'L RESEARCH COUNCIL & INST. OF MED., *supra* note 7, at 137.

90. EMMA GARCÍA, ECON. POLICY INST., *INEQUALITIES AT THE STARTING GATE: COGNITIVE AND NONCOGNITIVE SKILLS GAPS BETWEEN 2010-2011 KINDERGARTEN CLASSMATES* 15–17, 20 (2015).

91. See NAT'L RESEARCH COUNCIL & INST. OF MED., *supra* note 7, at 149.

92. See *id.* at 138–39.

93. See *id.* at 125, 138–39, 149 (discussing multiple studies making this finding as it relates to both cognitive abilities and skills such as self-regulation). See generally Greg J. Duncan & Katherine A. Magnuson, *Can Family Socioeconomic Resources Account for Racial and Ethnic Test Score Gaps?*, 15 *FUTURE CHILD*. 35 (2005) (discussing the aspects of parental socioeconomic status that appear to account for racial and ethnic school readiness gaps). For an extended exploration of the relationship between parenting during early childhood and life outcomes, see CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* 7–10, 15–22, 145–46, 149–52, 159–64 (2014).

94. Jeanne Brooks-Gunn & Lisa B. Markman, *The Contribution of Parenting to Ethnic and Racial Gaps in School Readiness*, 15 *FUTURE CHILD*. 139, 150–51 (2005).



and discipline, but the most salient factor affecting school readiness was language use—whether the mothers spoke and read to their children.<sup>95</sup> Other factors, particularly economic resources, also influence school readiness. But again, the particularly salient window is early childhood. Studies have found that low socioeconomic status during early childhood predicts educational achievement more than low socioeconomic status during the school-age years.<sup>96</sup>

It is possible to remediate some of the school readiness gap once a child reaches school,<sup>97</sup> and not all later achievement is predicted by school readiness.<sup>98</sup> But the lasting effects of early childhood are so profound, and the school readiness gap is so significant, that scholars and policymakers alike are focused on addressing the problem.<sup>99</sup> Preschool and other forms of child care can help balance deficits in the home,<sup>100</sup> but a significant portion of the difference in school readiness is attributable to the home environment.<sup>101</sup>

### C. A MISSING ELEMENT IN LAW AND LEGAL SCHOLARSHIP

Despite the robust literature on early childhood development, the ongoing policy debates, and the tremendous importance of early childhood for both human flourishing and the replication of inequality, the legal system largely disregards what is distinct and vitally important about early childhood. As this section explains, most legal doctrines and legislation are not age sensitive, and only a few legal scholars have explored the legal implications of the literature on early childhood development. This indifference to early childhood is particularly notable in family law, but it is also true in other fields, such as workplace law, property law, and criminal

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95. *Id.* at 139, 147–50.

96. NAT'L RESEARCH COUNCIL & INST. OF MED., *supra* note 7, at 159.

97. *Id.* at 125.

98. New research is showing, for example, that late adolescence is another sensitive period of brain development, offering an opportunity to correct earlier deficits. LAURENCE STEINBERG, *AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 10–11* (2014); *see also* CAROL S. DWECK, *MINDSET: THE NEW PSYCHOLOGY OF SUCCESS 7* (2007) (explaining that cognitive ability is not fixed, and in the “growth mindset,” people believe that their “basic qualities are things [they] can cultivate through [their] efforts”).

99. Cecilia Rouse et al., *Introducing the Issue*, 15 *FUTURE CHILD* 5, 5–6 (2005). *See also* Julia B. Isaacs, Brookings Inst., *Starting School at a Disadvantage: The School Readiness of Poor Children*, SOC. GENOME PROJECT, Mar. 2012, at 1 (discussing reasons why children from low-income families start school at a disadvantage as well as programs to combat this problem).

100. *See* Katherine A. Magnuson & Jane Waldfogel, *Early Childhood Care and Education: Effects on Ethnic and Racial Gaps in School Readiness*, 15 *FUTURE CHILD* 169, 171, 173–75 (2005).

101. NAT'L RESEARCH COUNCIL & INST. OF MED., *supra* note 7, at 157 (“[T]he home environment accounts for the lion’s share of the variation in what young children know and are ready to learn when they enter kindergarten.”); *see* Brooks-Gunn & Markman, *supra* note 94, at 143–47.

law, which do not account for the impact of the law on the parent-child relationship and thus, by extension, early childhood development. As a result, the national conversation about how to foster healthy early childhood development is missing a vital element—the voices of lawyers and legal scholars.

### 1. Legal Doctrine and Legislation

In light of the profound importance of early childhood, it is surprising that legal doctrine largely ignores the distinctiveness of this period. This section provides three illustrations of this phenomenon: child custody rules, permanency timelines for children in foster care, and a set of legal rules governing the wider context of parenting.

#### a. Child Custody

Child custody laws are rooted in psychological principles,<sup>102</sup> but most child custody laws are not age specific. This starkly ignores the consensus among psychologists that very young children have different needs than older children and that custody orders should reflect these particular needs.<sup>103</sup> Psychologists disagree about whether young children, especially children under the age of three, should have only one primary caregiver and spend all the nights in that person's home,<sup>104</sup> but they agree that age matters to custody decisions.<sup>105</sup>

The vast majority of states, however, provide no statutory guidance to courts and litigants on this critical issue and instead merely cite age generically as one factor governing the award of custody.<sup>106</sup> Even more

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102. Although custody laws do not wholly reflect their principles, the work of legal scholar Joseph Goldstein, and psychoanalysts Albert Solnit and Anna Freud, is foundational to child custody laws. See generally JOSEPH GOLDSTEIN, ALBERT J. SOLNIT, SONJA GOLDSTEIN & ANNA FREUD, *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* (1996) (compiling and revising the trilogy of books by Joseph Goldstein, Freud, and Solnit into one edition discussing the use of psychoanalytic theory to develop general guidelines to child placement, focusing on the least detrimental alternative for the child).

103. See Joan B. Kelly & Michael E. Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*, 38 *FAM. & CONCILIATION CTS. REV.* 297, 303–09 (2000).

104. See Jana B. Singer, *Bargaining in the Shadow of the Best-Interests Standard: The Close Connection Between Substance and Process in Resolving Divorce-Related Parenting Disputes*, 77 *L. & CONTEMP. PROBS.* 177, 182–84 (2014) (describing the lack of consensus about joint physical custody, especially for very young children).

105. See Kelly & Lamb, *supra* note 103 (arguing custody orders should reflect the particular needs of young children).

106. See, e.g., D.C. Code Ann. § 16-914(a)(3)(M) (West, Westlaw through Jan. 3, 2017); IND. CODE ANN. § 31-17-2-8(1) (West, Westlaw through 2016 Second Reg. Sess. legislation); N.J. STAT. ANN. § 9:2-4 (West, Westlaw through L.2016, c. 83, and J.R. No.11); VA. CODE ANN. § 20-124.3(1) (West, Westlaw through end of 2016 Reg. Sess.).

troubling, relatively recent laws in three states—Arizona, Iowa, and Wisconsin—require courts to maximize the time the child spends with both parents.<sup>107</sup> These statutes, which do not contain exceptions for the custody of very young children,<sup>108</sup> may make sense for older children,<sup>109</sup> but, by privileging parental division of contact, the laws ignore the particular needs of very young children for continuity of caregiving.

There are two exceptions nationwide, which highlight the gap all the more. Utah takes careful note of the stability needs of a young child, providing clear guidance about children's ages and the amount of time the child should spend with each parent.<sup>110</sup> Under Utah's detailed statutory scheme, the nonresidential parent of a child younger than five months is entitled to a minimum of six hours of visitation a week, preferably in three periods, all in the custodial home.<sup>111</sup> The number of hours increases with age, with overnight visits beginning when the child is eighteen months, and a full visitation schedule beginning at age five.<sup>112</sup> This calibration limits the rights of nonresidential parents, but does so in the service of fostering attachment to the custodial parent during the ages when children are most vulnerable to disruption.

Texas paints in broader brush strokes but also provides some guidance. The state has adopted a rebuttable presumption that for children older than three, a "standard possession order" applies: if the parents live within one hundred miles of each other, the nonresidential parent will see the child every Thursday night for two hours, every other weekend for forty-eight hours, on alternating holidays, and for one month during the summer.<sup>113</sup> For children

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107. See ARIZ. REV. STAT. ANN. § 25-403.02(B) (Westlaw through 2016 Second Reg. Sess.); IOWA CODE ANN. § 598.41(1)(a) (West, Westlaw through 2016 Reg. Sess. legislation); WIS. STAT. ANN. § 767.41(4)(a)(2) (West, Westlaw through 2015 Act 392). Despite its maximization statute, Arizona does contemplate much less than a 50-50 split for a young child. The Arizona courts have issued a document with detailed guidance for parents on crafting shared parenting by age, including much less time with the noncustodial parent when the child is very young. See ARIZ. SUPREME COURT, COURT SERVS. DIV., COURT PROGRAMS UNIT, PLANNING FOR PARENTING TIME: ARIZONA'S GUIDE FOR PARENTS LIVING APART 21-44 (2009) <http://www.azcourts.gov/portals/31/parentingtime/ppwguidelines.pdf>. It is notable, however, that the statute does not contain such guidance and instead requires maximization regardless of a child's age.

108. See, e.g., WIS. STAT. ANN. § 767.41(4)-(5) (West, Westlaw through 2015 Act 392) (containing no exception for the custody of very young children but listing as a factor the child's age in determining what is in the child's best interest).

109. See Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 227-29 (2015) (advocating for such rules, especially for unmarried fathers, who already play a marginal role in their children's lives).

110. UTAH CODE ANN. § 30-3-35.5(3) (West, Westlaw through 2016 Fourth Spec. Sess.).

111. *Id.* § 30-3-35.5(3)(a)(i).

112. *Id.* § 30-3-35.5(3).

113. TEX. FAM. CODE ANN. §§ 153.251(d), 153.252, 153.311-312, 153.314 (West, Westlaw through end of 2015 Reg. Sess.). The standard order differs if the parents live more than one hundred miles apart. *Id.* § 153.313.

younger than three, there is no presumption, and instead, courts are required to consider a list of factors to determine a visitation schedule.<sup>114</sup> Most of these factors relate to the child's need for stability in caregiving during early childhood, including the effect on the child if separated from either parent, the child's need for routine, and the parenting ability of both parents; other factors are also relevant, including the child's need to form relationships with both parents.<sup>115</sup>

These two states differ in their approaches, and reasonable minds can disagree about the policy choices these states have made. But what is significant is that these states have grappled with the distinctiveness of early childhood, shaping their custody laws to reflect the importance of stability and continuity during this period. In so doing, Utah and Texas have balanced competing interests—a child's need for stability, a child's interest in maintaining a relationship with both parents, and the nonresidential parent's interest in maintaining a relationship with the child—and chosen to give primacy to early childhood development. Other jurisdictions leave judges and parties to sort out this difficult balance on their own, signaling that there is no difference between the needs of a six-month-old child and a six-year-old or sixteen-year-old child. More troubling are the states that require the maximization of parental contact for children of all ages without regard to developmental differences.

The failure to provide statutory guidance to the courts for the physical custody of very young children has a disproportionate impact on unmarried parents, who are overwhelmingly young and low-income and thus already facing multiple parenting challenges.<sup>116</sup> Children in these families are much more likely to be very young when their parents separate than children in divorcing families—an average age of two as compared with nine.<sup>117</sup> Nonmarital families are thus faced with the additional problem of legal rules that provide no guidance on custody during early childhood.

#### b. The Child Welfare System

A second example of the law's troubling disregard for developmental differences among children is the permanency rule governing a child's stay in foster care. Under the Adoption and Safe Families Act of 1997 (ASFA),<sup>118</sup>

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114. *Id.* § 153.254(a).

115. *Id.*

116. *See* Huntington, *supra* note 109, at 184–96, 202–12.

117. PATRICIA BROWN & STEVEN T. COOK, INST. FOR RESEARCH ON POVERTY, UNIV. OF WIS.—MADISON, CHILDREN'S PLACEMENT ARRANGEMENTS IN DIVORCE AND PATERNITY CASES IN WISCONSIN 1, 6–7 tbl.1b (2012) (examining custodial arrangements in Wisconsin for cases from 1996 to 2007).

118. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as

states must commence proceedings to terminate parental rights for children who have been in foster care for fifteen of the most recent twenty-two months.<sup>119</sup> Setting aside the contentious debate about whether ASFA strikes the right balance between children's need for permanency and the shared interest of children and parents in reunifying the family,<sup>120</sup> ASFA has a fundamental flaw from the perspective of child development: it is not age sensitive. As with custody, the same rules apply equally to a seventeen-month-old and a seventeen-year-old, despite the obvious developmental differences between the two children.

This is particularly problematic because 39 percent of the children in foster care in 2015 were aged five or younger.<sup>121</sup> This insensitivity to the developmental needs of very young children is startling for a law that is supposed to elevate the interests of the child. ASFA contains no justification for the one-size-fits-all approach to permanency.<sup>122</sup> By contrast, other countries have adopted age-sensitive rules for children in foster care. In Australia, for example, the time frame for reunification is six months for a child under age two and twelve months for a child aged two or older.<sup>123</sup>

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amended at scattered sections of 42 U.S.C.).

119. 42 U.S.C. § 675(5)(E) (2012). ASFA established three permissible exceptions to the time limit: the child is living with a relative, the state provides a compelling reason for not seeking termination of parental rights, or the state has not made "reasonable efforts" to work with the family to return the child home. *Id.*

120. Compare ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 24 (1999) (noting with approval that ASFA prioritizes giving children a permanent home "at the earliest possible point"), with MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* 192–201 (2005) (criticizing ASFA on numerous grounds, including the failure to differentiate the reasons why children entered care).

121. U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, ADMIN. ON CHILDREN, YOUTH & FAMILIES, CHILDREN'S BUREAU, *THE AFCARS REPORT 1* (2016), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport23.pdf>.

122. Congress initially contemplated an age-sensitive timeline. See Adoption Promotion Act of 1997, H.R. 867, 105th Cong. § 5 (as introduced in the House on Feb. 27, 1997) (suggesting the addition of the following provision: "in the case of a child who has not attained 10 years of age and has been in foster care under the responsibility of the State for 18 months . . . of the most recent 24 months, the State shall initiate a proceeding to terminate the parental rights of the child's parents"). This provision was ultimately rejected with little explanation, although one concern was the treatment of a sibling group of different ages. *The "Adoption Promotion Act of 1997": Hearing on H.R. 867 Before the Subcomm. on Human Res. of the H. Comm. on Ways & Means*, 105th Cong. 1 (1997) (statement of Jess McDonald, Director, Illinois Department of Children and Family Services) ("In addition, questions were raised concerning how such a requirement would affect sibling groups where one of the siblings was not under age ten. This could, in effect, separate sibling groups when it is in their best interest to remain together."); see also Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 670–71 (1999) (offering reasons for the rejection of an age-sensitive rule).

123. *Children and Young Persons (Care and Protection) Act 1998* (NSW) ch 5 pt 2 s 83 (5) and (5A) (Austl.). (Section 83 (5) and (5A) were added by the *Child Protection Legislation Amendment Act 2014*, (NSW) sch 1 (Austl.).)

### c. Regulating the Context of Family Law

A final example, or set of examples, sweeps more broadly. Despite the overwhelming evidence that the parent-child relationship is critical to early childhood development, a host of laws that influence that relationship—from workplace law to landlord-tenant law to criminal law—do not take account of the impact of the legal rules on the parent-child relationship during early childhood.

Beginning with workplace law, a bedrock principle is at-will employment, which means that in every state except Montana,<sup>124</sup> an employer can fire an employee for almost any reason.<sup>125</sup> The principle of freedom of contract similarly means that in every state employers, who have superior bargaining power in the low-wage market, are able to set the legal terms for employment.<sup>126</sup> These principles encourage employer practices such as limited benefits, just-in-time scheduling, part-time work when the worker seeks full-time work, shift work, and so on, all of which make it exceedingly difficult for a parent to care for a young child.<sup>127</sup> When children are born, the absence of paid parental leave means parents must choose between putting food on the table and bonding with newborns. Inflexible and unpredictable schedules require parents to scramble to find day care at the last minute, often relying on an unqualified family member or neighbor because other care is unavailable.<sup>128</sup> Moreover, low wages and a scarcity of full-time employment mean many parents have to work multiple jobs, piecing together an income to support the family but taking time away from children during the critical early years when child development turns on the

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124. See MONT. CODE ANN. §§ 39-2-903–904 (West, Westlaw through 2015 Sess.) (setting forth Montana’s rule requiring good cause for ending all employment relationships after a probationary period).

125. RESTATEMENT OF EMP’T LAW § 2.01 (AM. LAW INST. 2015) (“Either party may terminate an employment relationship with or without cause unless the right to do so is limited by a statute, other law or public policy. . .”).

126. See RESTATEMENT (SECOND) OF CONTRACTS, ch. 8, intro. note (AM. LAW INST. 1981) (“In general, parties may contract as they wish, and courts will enforce their agreements without passing on their substance.”).

127. Service sector jobs often require evening, overnight, and weekend work. LIZ WATSON ET AL., NAT’L WOMEN’S LAW CTR., COLLATERAL DAMAGE: SCHEDULING CHALLENGES FOR WORKERS IN LOW-WAGE JOBS AND THEIR CONSEQUENCES 1 (2015), [https://nwlc.org/wp-content/uploads/2015/08/collateral\\_damage\\_fact\\_sheet\\_june\\_2015.pdf](https://nwlc.org/wp-content/uploads/2015/08/collateral_damage_fact_sheet_june_2015.pdf). Many employers use “just-in-time” scheduling practices: changing staffing levels as needed based on customer demand, sending workers home soon after they have arrived or requiring them to stay on after a shift has ended, with little or no advance notice. *Id.* at 2; NANCY K. CAUTHEN, DEMOS, SCHEDULING HOURLY WORKERS: HOW LAST MINUTE, “JUST-IN-TIME” SCHEDULING PRACTICES ARE BAD FOR WORKERS, FAMILIES AND BUSINESS 1 (2011), [http://www.demos.org/sites/default/files/publications/Scheduling\\_Hourly\\_Workers\\_Demos.pdf](http://www.demos.org/sites/default/files/publications/Scheduling_Hourly_Workers_Demos.pdf).

128. WATSON ET AL., *supra* note 127, at 3–4 (noting that “[w]ith work schedules and incomes that fluctuate from week to week, many workers have no choice but to cobble together child care at the last minute”).

parent-child interaction.<sup>129</sup>

Similarly, landlord-tenant laws do not help families with very young children. Lower-income families move more often than middle- and upper-income families,<sup>130</sup> disrupting social networks of support and wreaking havoc on the family's life and particularly on the parent-child relationship.<sup>131</sup> But these families receive no extra protection under the law. The Fair Housing Act prohibits a landlord from discriminating on the basis of familial status,<sup>132</sup> but the prohibition does not address the particular needs of families with very young children. Similarly, subsidized housing laws establish no preferences for families with children under age five.<sup>133</sup>

In the criminal justice system, sentencing laws have a tremendous and underappreciated impact on the parent-child relationship. The emphasis on incarceration over community sentencing, even for non-violent offenders,<sup>134</sup> and the decision to locate prisons far from families, mean that parents are physically separated from their children and that it is exceedingly difficult to maintain contact.<sup>135</sup> Phone calls from prison are prohibitively expensive, as much as seventeen dollars for a fifteen-minute phone call.<sup>136</sup> The cost of visiting a parent in prison is similarly high, with one study concluding that families living in the Bronx spent at least 15 percent of their monthly incomes to communicate with and visit an incarcerated relative.<sup>137</sup> This

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129. Lower-level service workers earn an average of \$24,220. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, DIV. OF OCCUPATIONAL EMP'T STATISTICS, MAY 2014 NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES, USDL-39-9000, USDL-39-9099 (last modified Mar. 25, 2015), [https://www.bls.gov/oes/2014/may/oes\\_nat.htm](https://www.bls.gov/oes/2014/may/oes_nat.htm). Further, many jobs offer only part-time work though the worker wants full-time work. WATSON ET AL., *supra* note 127, at 3.

130. REBECCA COHEN & KEITH WARDRIP, CTR. FOR HOUS. POLICY, SHOULD I STAY OR SHOULD I GO? EXPLORING THE EFFECTS OF HOUSING INSTABILITY AND MOBILITY ON CHILDREN 3 (2011).

131. See Naomi Schoenbaum, *Mobility Measures*, 2012 BYU L. REV. 1169, 1174–75 (2012). For a detailed ethnographic account of the tremendous strain on family life from unstable housing, see generally MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016) (describing the lives of landlords and tenants in some of the poorest areas of Milwaukee between 2008 and 2009).

132. 42 U.S.C. § 3604(b) (2012).

133. The U.S. Department of Housing and Urban Development's housing choice voucher program, for example, is targeted at very low-income families, the elderly, and the disabled. 24 C.F.R. § 982.207 (2016). There is no special priority for families with very young children. *See id.*

134. See TRACY L. SNELL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS., *WOMEN IN PRISON 1* (1991).

135. In 2007, 744,200 fathers and 65,600 mothers to 1.7 million children were in prison. LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *PARENTS IN PRISON AND THEIR MINOR CHILDREN 2* (rev. 2010); *id.* at 3 (about 22 percent of the children of state inmates and 16 percent of the children of federal inmates are younger than five). For an excellent discussion of the impact of incarceration on family members, see DONALD BRAMAN, *DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA* 89–96 (2004).

136. Sam Gustin, *Prison Phone Calls Will No Longer Cost a Fortune*, TIME (Feb. 12, 2014), <http://time.com/6672/prison-phone-rates>.

137. Johnna Christian et al., *Social and Economic Implications of Family Connections to Prisoners*, 34 J. CRIM. JUST. 443, 450 (2006).

disproportionately affects low-income families of color.<sup>138</sup> Parental absence due to incarceration affects children of all ages, but the problem is particularly acute during early childhood when parents play such a pivotal role in child development.

These are only a few examples of how the legal system broadly—and directly—influences the ability of parents to care for young children. Across an array of doctrinal areas, the law simply takes no cognizance of this critical developmental window.

## 2. Theoretical Debates

Perhaps legislation and doctrine so rarely account for the dynamics of early childhood education because so few legal scholars have brought the literature on early childhood development into the law. There are some notable counterexamples, but these isolated forays have not led to greater engagement by the legal academy or scholars in other disciplines and largely have not moved the law.

Barbara Bennett Woodhouse, for example, has posited a theory of state regulation of families that she terms “ecogenerism.”<sup>139</sup> By this she means a system that prioritizes the development of the next generation and calls for shared responsibility in the well-being of children.<sup>140</sup> For Woodhouse, this requires attention to what she calls the “exosystem,” defined as “places where children do not necessarily go, but areas that have powerful effects on children’s well-being, such as the financial markets and the health care system” or a parent’s workplace.<sup>141</sup> Woodhouse’s ecogenerist approach is relevant to children at all ages, but she specifically addresses the needs of children and families during early childhood.<sup>142</sup>

Nancy Dowd is another scholar who has tied the early childhood

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138. See PAUL GUERINO ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2010, 27 app. tbls.14 & 15 (rev. 2012), <https://www.bjs.gov/content/pub/pdf/p10.pdf> (documenting the disproportionate number of Black and Hispanic prisoners, and noting that Black children are seven-and-a-half times as likely as white children to have at least one parent in prison and Hispanic children are two-and-a-half times as likely as white children).

139. See Barbara Bennett Woodhouse, *A World Fit for Children is a World Fit for Everyone: Ecogenerism, Feminism, and Vulnerability*, 46 HOUS. L. REV. 817, 819–22 (2009).

140. See Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents’ Rights*, 14 CARDOZO L. REV. 1747, 1749, 1754–57 (1993).

141. See Woodhouse, *supra* note 139, at 822–23. Other legal scholars have called for this as well. See MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 130 (1991) (“Just as individual identity and well-being are influenced by conditions within families, families themselves are sensitive to conditions within surrounding networks of groups—neighborhoods, workplaces, churches, schools, and other associations.”). Both Woodhouse and Glendon build on the work of Urie Bronfenbrenner. See *id.*; Woodhouse, *supra* note 139, at 821–22. To read about Bronfenbrenner’s work, see BRONFENBRENNER, *supra* note 45.

142. See Woodhouse, *supra* note 139, at 824–27.



development literature to theories of state regulation of families, proposing a model of “developmental equality.”<sup>143</sup> Focusing on the inequality that begins in early childhood, Dowd draws on the literature about the intersection of child development and race, gender, and class.<sup>144</sup> She focuses in particular on Black boys from birth to age eighteen, showing how at each stage of development, Black boys and young men face exceptional challenges.<sup>145</sup>

Anne Dailey has argued that the research on developmental psychology should lead to a new constitutional approach to family law.<sup>146</sup> Noting that much constitutional doctrine assumes an informed citizenry capable of reasoned decision making, Dailey argues that the legal system cannot take this for granted and instead must acknowledge the central role of families, and especially early caregiving relationships, in cultivating these citizens.<sup>147</sup> Dailey contends there is a “distinctly public role for the family in raising future citizens,”<sup>148</sup> challenging the notion embedded in much constitutional doctrine that the preparation of citizens occurs primarily in schools.<sup>149</sup> Dailey argues that a developmental approach to constitutional doctrine provides a new basis for understanding parental rights, rebalances the federal role with respect to supporting families, and invigorates state sovereignty over some matters of child welfare as a means of protecting pluralism.<sup>150</sup>

Maxine Eichner has developed an argument for what she calls “buffered spheres”—the idea that the state should buffer the family from market forces to allow all families to provide the critical caregiving necessary for human flourishing.<sup>151</sup> Eichner contends that the laissez-faire attitude to the market’s impact on families is a late twentieth-century phenomenon, and that before this period there was widespread acceptance that the state should protect families—or, more specifically, white families—from the harshness of industrialization.<sup>152</sup> Eichner makes the argument for this buffering throughout a child’s life, but she draws on the early childhood development literature to argue for the acute necessity of this state intervention during

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143. Nancy E. Dowd, *Black Boys Matter: Developmental Equality*, 45 HOFSTRA L. REV. 47, 48–52 (2016).

144. *See id.* at 50, 61–72.

145. *See id.* at 72–103.

146. *See* Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 433–35 (2006).

147. *See id.* at 497–98.

148. *Id.* at 434.

149. *Id.* at 458.

150. *See id.* at 487–95.

151. *See* Maxine Eichner, *The Privatized American Family*, 93 NOTRE DAME L. REV. (forthcoming 2018).

152. *See id.*

early childhood.<sup>153</sup>

Finally, Emily Buss also has brought the developmental literature into the law, although she focuses on the entire span of childhood and not only on early childhood. Buss has articulated a theory for dividing developmental responsibility between parents, children, and the state.<sup>154</sup> She contends that, as compared with the state, parents are generally better positioned to determine what is in their particular child's best interests and thus to make most decisions regarding a child.<sup>155</sup> By contrast, the state is better positioned to determine what is needed for a child to become a capable citizen, and thus the state should have greater control over schools; the state is also better positioned to determine a societal consensus about appropriate child rearing and thus can and should set outer limits on parental behavior that has the potential to harm a child.<sup>156</sup>

These scholars have generated trenchant insights, but this nascent conversation has not led to a sustained discourse about early childhood development and the law. One important theme in family law, for example, is justifying and explaining in theoretical terms why the state should invest in families. Highlighting the common vulnerability of all humans, Martha Fineman argues that the state must account for the inevitable dependency that accompanies the human condition as well as the derivative dependency of caretakers.<sup>157</sup> Putting these arguments in the context of liberal political theory, Maxine Eichner contends that instead of fostering only liberty and equality—the traditional cornerstones of liberal theory—the state should incorporate caretaking and human development into the conception of the

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153. *See id.*

154. Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, 2004 U. CHI. LEGAL F. 27, 29–30 (2004) [hereinafter Buss, *Allocating Developmental Control*]; cf. Emily Buss, *Adrift in the Middle: Parental Rights After Troxel v Granville*, 2000 SUP. CT. REV. 279, 285 (2000) (suggesting that the law could allocate child-rearing authority amongst parents, legislatures, and courts).

155. Buss, *Allocating Developmental Control*, *supra* note 154, at 31–32.

156. Emily Buss, “Parental” Rights, 88 VA. L. REV. 635, 647–48 (2002) [hereinafter Buss, “Parental” Rights]. Buss also contends that children should have some control over decisions, particularly as they mature. Buss, *Allocating Developmental Control*, *supra* note 154, at 34–35. For two other examples of scholars noting the importance of early childhood, see JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 161–62 (2014) (calling for greater investments in high-quality child care and early childhood education as a means for redressing inequality and supporting families); MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS 84 (2010) (describing policy proposals that would support caretakers of young children, including paid parental leave, shorter workweeks, early childhood education, and afterschool programs).

157. *See* MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 33–38, 47–49 (2004) [hereinafter FINEMAN, THE AUTONOMY MYTH]; Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 255–56 (2010) [hereinafter Fineman, *The Vulnerable Subject*] (“Vulnerability is posited as the characteristic that positions us in relation to each other as human beings and also suggests a relationship of responsibility between state and individual.”).

goods that the state should further, and that the state and families have a conjunctive responsibility to care for children and further human development.<sup>158</sup> And Linda McClain views the state and familial roles as complementary, contending that families are engaged in a “formative project,” molding individuals who are responsible, capable, and self-governing, and that the state has an interest in supporting this project.<sup>159</sup>

These scholars have profoundly influenced the debate about state responsibility for caregiving, but they have not closely grappled with the implications of the early childhood development literature.<sup>160</sup> I, too, have not integrated the research on early childhood development into my own theoretical arguments about the regulation of families, to the detriment of my contentions. In past work, I catalogued the myriad ways the law has a negative impact on families, but I did not unpack this phenomenon by age.<sup>161</sup> And in my work on nonmarital families, I described the impact of parental separation on child outcomes,<sup>162</sup> but I did not address a critical distinction between children of divorcing parents and children of unmarried parents. As noted above, the latter tend to be much younger at the time of separation—age two as compared with age nine for children of divorcing parents<sup>163</sup>—and thus experience the negative effects of parental separation during early childhood. This insight makes the need to stabilize these families all the more imperative.

The lack of a sustained dialogue within the legal academy is mirrored by an absence of legal scholars in interdisciplinary research and the national debate about fostering early childhood development as a means of combatting inequality.<sup>164</sup> Scholars in other disciplines regularly draw on each other’s work, but they do not incorporate legal scholarship, to the extent it exists. And legal scholars do not participate in the interdisciplinary efforts to change policy. A notable example is the highly influential National Scientific Council on the Developing Child. As noted above, the Council is an interdisciplinary, multi-university effort that seeks to bring academic

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158. See EICHNER, *supra* note 156, at 48–53, 59–62.

159. LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 3–4, 17 (2006).

160. As noted previously, in her recent work, Eichner has addressed this research. See *supra* text accompanying notes 151–153.

161. See HUNTINGTON, *supra* note 93, at 81–108.

162. See Huntington, *supra* note 109, at 196–202.

163. See BROWN & COOK, *supra* note 117 and accompanying text.

164. For the rare exception, see *Early Childhood National Summit*, U. FLA.: ANITA ZUCKER CTR. FOR EXCELLENCE IN EARLY CHILDHOOD STUDIES, <https://ceecs.education.ufl.edu/national-summit> (last visited May 20, 2017) (describing the two-day working conference on early childhood development organized by the University of Florida; the conference brought together an interdisciplinary group of academics, including legal scholars, as well as service providers and government officials).

research into the world of policy. The Council members come from numerous disciplines including the social sciences,<sup>165</sup> yet there is not a single legal scholar involved in the project.

Policy is instantiated through the legal system. Thus, policy development without lawyers and legal scholars is incomplete. While psychologists, neuroscientists, and others may be in a better position to determine the content of, say, a parenting program, they need lawyers and legal scholars to assist in the formulation and implementation of this policy, taking into consideration a host of legal issues.

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In short, unlike in many other disciplines, neither the legal system nor the majority of legal scholars adequately acknowledge early childhood as a distinct period worthy of study and differentiation. As a result, legal scholars are not part of the ongoing interdisciplinary debate about how to strengthen families to foster early childhood development. As Part III demonstrates, it is not self-evident when and how the law should incorporate the research on early childhood development, but the more fundamental and immediate problem is a lack of engagement both within law and across other disciplines.

## II. A NEW FIELD: EARLY CHILDHOOD DEVELOPMENT AND THE LAW

To encourage a sustained and focused discourse within law, and to foster the participation of legal scholars in interdisciplinary research and policy efforts, it is important for the legal academy to recognize and support a new and clearly delimited field: early childhood development and the law. As developed in Part III, this new field will help legal scholars systematically explore the numerous theoretical and doctrinal questions posed by the research, and it will facilitate interdisciplinary dialogue and policy debate. This Part first describes the benefit of recognizing a distinct field within the law and then offers three successful models of focused subdisciplines: juvenile justice, domestic violence, and elder law.

### A. THE VALUE OF A DISTINCT SUBDISCIPLINE

Recognizing a distinct field of study within the law can be controversial,

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165. Members include scientists and social scientists. *Council Members*, CTR. ON DEVELOPING CHILD HARV. U., <http://developingchild.harvard.edu/science/national-scientific-council-on-the-developing-child/council-members> (last visited May 20, 2017) (“[M]embers include[] leading researchers and scientists representing the fields of neurobiology, immunology, molecular biology, endocrinology, psychology, economics, social policy, and pediatric medicine.”).

often raising what is sometimes called “the law of the horse” concern.<sup>166</sup> The contention is that an understanding of the law is furthered by studying systems of regulation that demonstrate the workings of the law generally, such as contract law and tort law, rather than focusing on specific kinds of transactions, such as the sale of horses.<sup>167</sup> Broadly framed, the question is whether there is an advantage to studying something in isolation rather than as part of a larger phenomenon.

There are significant benefits to considering the field of family law as a whole. To determine the appropriate role of the state in regulating families, or the limits of state regulation of private ordering more generally, students and scholars are well-served by looking at the overarching system. It is possible, for example, to see the differential autonomy granted to intact families as compared with the far more intrusive regulation of non-intact families only by analyzing the whole system of family law.<sup>168</sup> Indeed, in much of my work, I have argued for expanding our understanding of the realm of family law beyond traditional domestic relations, to encompass the myriad ways the state influences family life.<sup>169</sup>

But looking at the whole can also obscure what is important about a narrower, coherent subset of questions. By subsuming early childhood into family law, we miss what is distinct and particularly consequential about this period of development as well as the ways the law differentially affects children of various ages.<sup>170</sup> For example, asking whether and how the state should support families leads to different insights and arguments if the question is framed with respect to *all* families or specifically families with very young children. As elaborated below, there are strong arguments that the state interest in families with young children is different in kind, not just

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166. The use of this term to refer to “‘Law and . . . ’ courses” originates with Gerhard Casper, former dean of the University of Chicago Law School, who was proud that the school did not focus on these kinds of courses. Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 CHI. LEGAL F. 207, 207, 214 (1996) (describing this history and noting that the original phrase is from Karl Llewellyn, who contrasted the Uniform Commercial Code with idiosyncratic rules for trade between amateurs, which he called the law of the horse).

167. Easterbrook, *supra* note 166, at 207 (“Lots of cases deal with sales of horses; others deal with people kicked by horses; still more deal with the licensing and racing of horses, or with the care veterinarians give to horses, or with prizes at horse shows. Any effort to collect these strands into a course on ‘The Law of the Horse’ is doomed to be shallow and to miss unifying principles.”).

168. See Emily Buss, “*Parental Rights*,” *supra* note 156, at 654–66.

169. See generally HUNTINGTON, *supra* note 93 (discussing how many aspects of the law affect family relationships).

170. I am well aware that many scholars think their proposed specialty is the exception to the rule. See, e.g., Lawrence Lessig, Comment, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 502 (1999) (agreeing with Easterbrook that law school courses should illuminate the entire law but arguing that studying cyberspace offers insights into the general system of the law and therefore is the exception to the rule).

degree, from the broader state interest in functioning families,<sup>171</sup> and certainly doctrine and legislation would look quite different if this particular state interest came to the fore.<sup>172</sup> These insights are apparent only by disaggregating families and life stages. By revealing what is distinctive about early childhood that the law should take into account, it is possible to initiate a focused discourse on how to do this effectively. In short, isolating early childhood gives an internal coherence to a set of legal and policy questions.

By narrowing a set of questions to ask specifically about early childhood, we are perhaps ironically able to surface broader connections. The need to support families when children are young, for example, is not simply a matter of family law. As shown above, multiple areas of the law, including workplace law, property law, and criminal law, all influence the parent-child relationship and, by extension, child development. Sweeping early childhood into family law obscures these connections.

Finally, the potential scholarly and practical gains, both within law and across disciplines, are so substantial that the gain of specialization is worth the risk of an overly blinkered discourse. As demonstrated in Part III, recognizing this new field will affect how legal scholars teach, connect with each other, collaborate with scholars across disciplines, and participate in the formulation and implementation of policy.

#### B. THREE EXAMPLES OF A FOCUSED INQUIRY

Scholarly debates between lumpers and splitters may seem abstract, but there are many examples that demonstrate the value of a dedicated field within law and provide guidance for the new specialty of early childhood development and the law. Three have particular resonance here: juvenile justice, which draws on interdisciplinary evidence to advocate for developmentally sensitive legal rules; domestic violence, which draws attention to a pressing social issue; and elder law, which is an age-demarkated specialty within family law. In each case, recognizing a subdisciplinary specialty has led to deeper theoretical insights, significant doctrinal change, effective interdisciplinary collaboration, and stronger policy recommendations.

##### 1. Juvenile Justice

The field of juvenile justice, a specialty at the intersection of criminal law and family law, exemplifies the benefits of a focused discourse. Delineating the study of juvenile justice created a platform for bringing

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171. See *infra* Part III.A.

172. See *infra* Part III.B.

interdisciplinary research into the law, encouraged interdisciplinary collaboration, focused the scholarly discourse on the need for age-sensitive legal rules, and positively affected both law and policy.

Beginning with interdisciplinary research and collaboration, juvenile justice advocates have long sought support from various disciplines. During the Progressive Era, when reformers strived for a new approach to juvenile crime, they drew on emerging research in the field of psychology, contending that adolescents were more like children than adults and should not be held to the same standard of conduct as adults.<sup>173</sup> Reformers thus pushed for the creation of a juvenile court, built on the foundational principle that adolescent crime should be addressed, at least as a default matter, through rehabilitation rather than through the punitive approach of the criminal justice system.<sup>174</sup> The reformers brought their own race and class biases to these arguments and were animated, at least in part, by an interest in Americanizing immigrant children and tempering the influence of immigrant parents,<sup>175</sup> but the effect of their arguments was profound: by 1925, every state had a juvenile justice system predicated on rehabilitation.<sup>176</sup>

During the last quarter of the twentieth century, arguments about the juvenile justice system drifted from their anchor in developmental psychology, with politics more central to reform debates. Liberals criticized the rehabilitative underpinnings of the system because they papered over the reality that juveniles were subject to harsh penalties without the same procedural protections as adult criminal defendants, including the right to counsel and to confront witnesses.<sup>177</sup> Conservatives criticized the rehabilitative approach because it insufficiently deterred and punished violent crime by juveniles.<sup>178</sup>

By the beginning of the twenty-first century, advocates were able to begin moving away from this politicized debate by drawing on a new body

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173. See ELLEN RYERSON, *THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT* 28–30, 35–36 (1978); DAVID S. TANENHAUS, *JUVENILE JUSTICE IN THE MAKING* 3–6 (2004).

174. ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 84–86 (2008). The rehabilitative approach was premised on the notion that juveniles who committed crimes were not so different from children who were neglected by their parents and thus should be treated with similar solicitude. *Id.* at 85.

175. *Id.* at 87.

176. *Id.* at 88.

177. *Id.* at 89. Liberals thus argued for and won procedural protections for juveniles. See generally *In re Gault*, 387 U.S. 1 (1967) (requiring procedural safeguards to protect a juvenile's liberty).

178. See SCOTT & STEINBERG, *supra* note 174, at 94–96. Recharacterizing juvenile offenders as irredeemable threats to society, conservative reformers argued for and won numerous reforms, most notably a greater ability to transfer offenders from the juvenile court to adult criminal court. See *id.* at 92, 94–110, 113–15.

of research in multiple fields, including neuroscience, psychology, and sociology, which all established that adolescent brains are still maturing.<sup>179</sup> Researchers found that although brain structures are in place by age five or six, the brain continues to develop through early adulthood. Neuroscientists focused in particular on the prefrontal cortex, finding that adolescents have less forethought and impulse control than fully matured adults.<sup>180</sup> Additionally, researchers found that adolescents are still developing their characters and personalities and that there are many opportunities for change and growth.<sup>181</sup>

Having a well-developed and clearly recognized field of juvenile justice means that scholars in multiple disciplines can readily find each other, draw on each other's research, and work together.<sup>182</sup> One of the most productive collaborations is between legal scholar Elizabeth Scott and psychologist Laurence Steinberg. In a highly influential article, Scott and Steinberg laid out a framework for a developmentally sensitive approach to juvenile justice.<sup>183</sup> They argued that adolescents are less mature than adults, with a propensity to engage in reckless behavior, that adolescents are more vulnerable to peer pressure and find it more difficult to leave a situation in which a crime may be committed, and that their characters are not fully formed.<sup>184</sup> Scott and Steinberg contended that these developmental insights should inform the approach to juvenile crime: the immaturity of adolescents means they are not as morally culpable; their vulnerability makes it more understandable that they have not created a life away from negative influences; and their still developing characters means there is an

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179. For a small sample of this literature, see Alison S. Burke, *Under Construction: Brain Formation, Culpability, and the Criminal Justice System*, 34 INT'L J.L. & PSYCHIATRY 381, 382–83 (2011); Eveline A. Crone & Maurits W. van der Molen, *Developmental Changes in Real Life Decision Making: Performance on a Gambling Task Previously Shown to Depend on the Ventromedial Prefrontal Cortex*, 25 DEVELOPMENTAL NEUROPSYCHOL. 251, 252 (2004); Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 ANNALS N.Y. ACAD. SCI. 77, 83 (2004); Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174, 8178 fig.3 (2004).

180. E.g., Burke, *supra* note 179; see, e.g., Crone & van der Molen, *supra* note 179, at 274 (“Under the hypothesis that prefrontal brain cortex does not mature until late in adolescence. . . . [o]ur findings are consistent with this prediction . . .”) (citation omitted); Giedd, *supra* note 179, at 79 (“Although the total size of the brain remains relatively stable across the ages of 6 to 20 years, the various subcomponents of the brain undergo dynamic changes.”).

181. See STEINBERG, *supra* note 98, at 22–25, 29–31, 36–45, 56–58.

182. See Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount*, 31 L. & INEQ. 263, 277–304 (2013) (reviewing the legal literature, which heavily draws on the underlying interdisciplinary research).

183. See Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1016 (2003).

184. *Id.* at 1011–15.



opportunity for rehabilitation.<sup>185</sup>

The Supreme Court adopted this approach in a series of cases. Starting with *Roper v. Simmons* in 2005,<sup>186</sup> and through the most recent pronouncement in *Montgomery v. Louisiana* in 2016,<sup>187</sup> the Court embraced the developmentally sensitive framework proposed by Scott and Steinberg,<sup>188</sup> holding that the Eighth Amendment places substantial constraints on sentences for crimes committed before age eighteen.<sup>189</sup>

## 2. Domestic Violence

Another model for early childhood development and the law is the field of domestic violence. Rooted first in the temperance movement and then in the women's rights movement, reformers have addressed domestic violence since at least the middle of the nineteenth century.<sup>190</sup> Domestic violence did not, however, grow into a distinct academic discipline until the 1970s and 1980s, when scholars from different disciplines, including law, provided a theoretical framework for reform and legitimized the study of the problem.<sup>191</sup> Since then, domestic violence has become a robust area of inquiry, studied by scholars in multiple disciplines, including sociology,<sup>192</sup> psychology,<sup>193</sup>

185. *See id.* at 1013–15.

186. *See Roper v. Simmons*, 543 U.S. 551 (2005).

187. *See Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

188. *See id.* at 736; *Roper*, 543 U.S. at 569–71.

189. *See Montgomery*, 136 S. Ct. at 736 (2016) (holding that *Miller* applies retroactively); *Miller v. Alabama*, 132 S. Ct. 2455, 2469–71 (2012) (partially extending *Graham* to minors guilty of homicide, but clarifying that the Eighth Amendment “mandates only that a sentencer follow a certain process—considering an offender’s youth and attendant characteristics—before imposing [life without the possibility of parole on a minor convicted of homicide]”); *Graham v. Florida*, 560 U.S. 48, 82 (2010) (“The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.”); *Roper*, 543 U.S. at 578–79 (holding that the imposition of the death penalty upon a minor, a seventeen-year-old who committed first degree murder, was unconstitutional: “[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.”).

190. Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2127–29 (1996); *see* ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 69, 89 (1987).

191. *See* LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 9–28 (2012) (describing the legal and scholarly history of the domestic violence movement beginning in the 1970s).

192. *E.g.*, RICHARD J. GELLES & MURRAY A. STRAUS, INTIMATE VIOLENCE: THE CAUSES AND CONSEQUENCES OF ABUSE IN THE AMERICAN FAMILY (1989); MICHAEL P. JOHNSON, A TYPOLOGY OF DOMESTIC VIOLENCE: INTIMATE TERRORISM, VIOLENT RESISTANCE, AND SITUATIONAL COUPLE VIOLENCE (2008).

193. *E.g.*, PAULA NICOLSON, DOMESTIC VIOLENCE AND PSYCHOLOGY: A CRITICAL PERSPECTIVE (2010); Katherine M. Kitzmann et al., *Child Witnesses to Domestic Violence: A Meta-Analytic Review*, 71 J. CONSULTING & CLINICAL PSYCHOL. 339 (2003).

medicine,<sup>194</sup> and economics.<sup>195</sup> In law, domestic violence is a clearly demarcated specialty within family law and criminal law, with scholars critiquing law reform efforts and advocating for change.<sup>196</sup>

Conceptualizing domestic violence as a field was essential to legitimizing the study of the issue and instituting important reforms, leading to far-reaching changes in the law. In criminal law, many jurisdictions have adopted mandatory-arrest and no-drop-prosecution policies.<sup>197</sup> In property law, the use of civil and criminal protection orders operates as an effective eviction of the assailant from the home, rearranging property rights.<sup>198</sup> And in immigration law, numerous provisions protect non-citizen victims of domestic violence, ensuring, for example, that the law does not create an incentive to stay with a violent partner.<sup>199</sup>

Cabining off domestic violence from other areas of the law and highlighting what is distinctive about the operation of the law in domestic violence has also led to important theoretical advances. Scholars now have an intellectual home for overarching debates, such as the appropriate balance between victim agency and state intervention. Some scholars question, for example, whether the current criminal law approach to domestic violence goes too far in stripping victims of agency and imposes too great a cost on communities of color.<sup>200</sup> This debate is far from settled, but scholars in multiple disciplines can find each other's work and engage on this important issue.

### 3. Elder Law

At the other end of the age spectrum, elder law provides an example of the practical and scholarly benefits of recognizing specialty within family law. In elder law, legal scholars and practicing lawyers address issues such

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194. E.g., EMPOWERING SURVIVORS OF ABUSE: HEALTH CARE FOR BATTERED WOMEN AND THEIR CHILDREN (Jacquelyn C. Campbell ed., 1998); K. M. Devries et al., *The Global Prevalence of Intimate Partner Violence Against Women*, 340 SCI. 1527 (2013).

195. E.g., Anna Aizer, *The Gender Wage Gap and Domestic Violence*, 100 AM. ECON. REV. 1847 (2010); Amy Farmer & Jill Tiefenthaler, *An Economic Analysis of Domestic Violence*, 55 REV. SOC. ECON. 337 (1997).

196. For two foundational articles, see Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515 (1982); Siegel, *supra* note 190.

197. GOODMARK, *supra* note 191, at 107–13.

198. Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 30–33 (2006).

199. See Ilene Durst, *Remedies for Non-Citizen Victims of Domestic Violence: A Brief History and Some Observations*, 32 T. JEFFERSON L. REV. 87, 89–91 (2009).

200. GOODMARK, *supra* note 191, at 124–35, 145; Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 804–06, 805 n.271 (2007). See generally DOMESTIC VIOLENCE AT THE MARGINS: READINGS ON RACE, CLASS, GENDER, AND CULTURE (Natalie J. Sokoloff & Christina Pratt eds., 2005) (collecting works examining the structural inequalities impacting battered women across various minority communities).

as Medicare coverage, income and asset protection, estate planning, elder fraud, and age discrimination, as well as issues that disproportionately affect the elderly population, such as adult guardianship, powers of attorney, and advanced medical directives.<sup>201</sup>

Both the study and practice of elder law are interdisciplinary, overlapping with medicine and social work.<sup>202</sup> Recognizing the specialty of elder law has allowed scholars from different disciplines to find each other and work together.<sup>203</sup> Determining the legal competency of an elderly person, for example, requires an understanding of both the law and science.<sup>204</sup> And lawyers specializing in elder law regularly work with professionals in other fields.<sup>205</sup>

Isolating a stage of life has led to important scholarly insights. Power imbalances within families, for example, is a theme throughout family law, but elder law scholars emphasize the distinctive nature of these power imbalances in the particular context of end-of-life questions.<sup>206</sup> Similarly, as Martha Fineman has argued, human vulnerability is a common attribute relevant to all of family law,<sup>207</sup> but when scholars examine vulnerability in

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201. Lawrence A. Frolik, *The Developing Field of Elder Law: A Historical Perspective*, 1 ELDER L.J. 1, 2–4 (1993); Marshall B. Kapp, *Older Clients with Questionable Legal Competence: Elder Law Practitioners and Treating Physicians*, 37 WM. MITCHELL L. REV. 99, 99–100 (2010); Nina A. Kohn & Edward D. Spurgeon, *Elder Law Teaching and Scholarship: An Empirical Analysis of an Evolving Field*, 59 J. LEGAL EDUC. 414, 429–30 (2010); Rebecca C. Morgan, *The Future of Elder Law Practice*, 37 WM. MITCHELL L. REV. 1, 7–10, 8 n.35 (2010).

202. For a sample of this literature, see Sia Arnason et al., *Elder Law and Elder Care: A Team Response to the Needs of Elderly Clients*, 34 J. GERONTOLOGICAL SOC. WORK 3 (2001); Israel Doron & Asaf Hoffman, *Time for Law: Legal Literacy and Gerontological Education*, 31 EDUC. GERONTOLOGY 627 (2005); Mary Lynn Pannen, *A Win-Win Partnership: The Elder Law Attorney and Geriatric Care Manager*, 34 J. GERONTOLOGICAL SOC. WORK 25 (2001). Other disciplines, too, recognize that there is something distinctive about this age group, with medicine, for example, now offering a specialty in geriatrics. See *Who We Are*, AM. GERIATRICS SOC., [http://www.americangeriatrics.org/about\\_us/who\\_we\\_are](http://www.americangeriatrics.org/about_us/who_we_are) (last visited May 18, 2017) (describing the field of geriatrics).

203. See, e.g., Jennifer Moye et al., *Clinical Evidence in Guardianship of Older Adults Is Inadequate: Findings from a Tri-State Study*, 47 GERONTOLOGIST 604, 610–11 (2007) (evaluating the quality of clinical evidence used in adult guardianship proceedings). But see Kohn & Spurgeon, *supra* note 201, at 423–28, 430 (conducting an empirical analysis of the field of elder law and finding that legal scholars do not collaborate as much as they could with scholars in other disciplines and tend not to publish in non-law journals).

204. See Wayna M. Marshall et al., *A Primer for Legal Proceedings*, in CHANGES IN DECISION-MAKING CAPACITY IN OLDER ADULTS: ASSESSMENT AND INTERVENTION 121, 121–23 (Sara Honn Qualls & Michael A. Smyer eds., 2007).

205. See JoNel Newman, *Miami's Medical-Legal Partnership: Preparing Lawyers and Physicians for Holistic Practice*, 9 IND. HEALTH L. REV. 473, 476–80 (2012) (discussing the operations of an interdisciplinary medical-legal clinic in Miami).

206. See, e.g., Dorothy D. Nachman, *Living Wills: Is It Time to Pull the Plug?*, 18 ELDER L.J. 289, 304 (2011).

207. See Fineman, *The Vulnerable Subject*, *supra* note 157, at 255 (“Vulnerability is posited as the characteristic that positions us in relation to each other as human beings and also suggests a relationship of responsibility between state and individual.”).

the context of aging, they are able to see the limits of vulnerability theory and offer solutions to make it more attuned to the needs of the elderly.<sup>208</sup>

### C. A SYNTHESIS

These three models offer important lessons about the value of recognizing a new specialty within family law. First, a focused discourse can generate theoretical insights not otherwise available. In juvenile justice and elder law, isolating a stage of development led to a new understanding of individual development and the role of the state. By identifying what is distinct about adolescents—apart from children and apart from adults—legal scholars could articulate a basis for a different state response to juvenile crime. By identifying what is unique about the elderly, scholars were able to challenge and refine vulnerability theory.

As Part III will show, isolating early childhood also leads to important theoretical insights about the interests of the state, revealing that the stakes are not only more significant but also in many important ways, truly different. It also leads to a broader view of the role of the state. Separating early childhood development as a stand-alone interest shows that many areas of the law, not just family law, influence this development. It leads scholars to examine other areas, such as criminal law, property law, workplace law, and so on. As with domestic violence and elder law, early childhood development and the law *could* be part of family law, but as with those two examples, there is a richness that comes from looking at what is distinctive.

Second, focusing on a discrete set of questions can lead to significant doctrinal changes. Scholars in both juvenile justice and domestic violence have achieved far-reaching reforms to the law. As noted above, there is ongoing debate, especially within the field of domestic violence, about whether these reforms go too far, but there is no doubt that the legal scholarship and advocacy generated by the focused research and debate has been highly influential.

Third, recognizing a distinct specialty facilitates interdisciplinary work. The field of juvenile justice provides a precedent and a roadmap for how legal scholars can collaborate with scholars in other disciplines. It also shows the tremendous value of doing so. When legal scholars were able to integrate the evidence on child development, they were better able to advocate for age-sensitive legal rules, where appropriate.<sup>209</sup> The field of juvenile justice also

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208. Nina A. Kohn, *Vulnerability Theory and the Role of Government*, 26 *YALE J.L. & FEMINISM* 1, 23–27 (2014) (drawing on Martha Fineman’s vulnerability theory to investigate what is distinct about aging and to identify the limits of the theory, notably its tendency toward paternalism).

209. Recognizing adolescence as a distinct stage of life and attaching legal consequences to this

demonstrates how scientific evidence can provide an important counterweight to political claims. Rather than indulging the rhetoric on both sides about juvenile offenders, the current approach is rooted in research across multiple disciplines. And perhaps most importantly for purposes of this Article, all three models demonstrate how creating a focused discourse within law encourages collaboration and cross-pollination across disciplines, with scholars from multiple disciplines more able to find each other and engage with the research from other disciplines.

Fourth, the focused discourses in the three models have led to stronger policy recommendations. In juvenile justice, for example, legal scholars, and not just psychologists and neuroscientists, argued in favor of an age-sensitive approach to sentencing, thereby shaping the doctrinal development of Eighth Amendment law. And in domestic violence, legal scholars have been deeply involved in the reform movement, bringing the research on the dynamics of domestic violence into the legal system. As these examples demonstrate, and as elaborated in Part III, legal scholars are well positioned to add important insights and guide the form and content of different policies.

Finally, the three models illustrate the practical gains of recognizing a specialty. The three fields have dedicated treatises and casebooks,<sup>210</sup> law

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distinction is not a widespread phenomenon. Most areas of legal regulation still adopt a binary approach of child and adult. See SCOTT & STEINBERG, *supra* note 174, at 68–81.

210. See, e.g., MELISSA L. BREGER ET AL., *NEW YORK LAW OF DOMESTIC VIOLENCE* (3d ed. 2013); BARRY C. FELD, *CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION* (4th ed. 2013); LAWRENCE A. FROLIK & ALISON BARNES, *ELDER LAW: CASES AND MATERIALS* (6th ed. 2015); NANCY K.D. LEMON, *DOMESTIC VIOLENCE LAW* (4th ed. 2013); NINA A. KOHN, *ELDER LAW: PRACTICE, POLICY, AND PROBLEMS* (2014); NANCY K.D. LEMON, *DOMESTIC VIOLENCE LAW* (4th ed. 2013); RAYMOND C. O'BRIEN & MICHAEL T. FLANNERY, *THE FUNDAMENTALS OF ELDER LAW: CASES AND MATERIALS* (2015).

school classes,<sup>211</sup> academic conferences,<sup>212</sup> and professional groups.<sup>213</sup> Creating a field of early childhood development and the law can have the same effect, prompting law schools to offer courses, academic journals and centers to organize conferences, students to pursue careers, and professionals to form groups.

### III. MAPPING THE NEW FIELD

The twin goals of the new field are to determine the contours and content of a legal system that prioritizes early childhood development and to integrate lawyers and legal scholars into the ongoing interdisciplinary dialogue and policy debates. This Part maps the new field of early childhood development and law, identifying the kinds of questions scholars should address. It demonstrates that the new field will encourage legal scholars to engage with a host of specific theoretical and legal questions implicated in early childhood development, potentially leading to far-reaching changes in doctrine and legislation. Notably, this research agenda is relevant to legal scholars from multiple areas of the law, including employment law, property law, criminal law, and urban law. This Part also shows how the new field will insert legal scholars into the national debate about fostering early childhood development, which will improve research and make policies more effective.

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211. See, e.g., Kohn & Spurgeon, *supra* note 201, at 418 (“The Overview Study found that 112 out of 192 law schools have an elder law course listed as part of their curriculum.”); *Course Catalog*, HARV. L. SCH., <http://hls.harvard.edu/academics/curriculum/catalog/default.aspx?o=68909> (last visited May 19, 2017) (listing a course entitled “Gender Violence, Law and Social Justice”); *Specialized Family Law: Domestic Violence*, U. ILL. C. LAW, <https://law.illinois.edu/academics/courses/specialized-family-law-domestic-violence> (last visited May 19, 2017) (listing a course entitled “Specialized Family Law: Domestic Violence”).

212. See, e.g., *2017 NAELA Annual Conference*, NAT’L ACAD. ELDER L. ATTY’S (NAELA), [https://www.naela.org/Public/Meetings\\_and\\_Events/Live\\_NAELA\\_Events/Annual\\_Meeting/Public/Meetings\\_and\\_Events/Live\\_NAELA\\_Events/Annual\\_Meeting.aspx](https://www.naela.org/Public/Meetings_and_Events/Live_NAELA_Events/Annual_Meeting/Public/Meetings_and_Events/Live_NAELA_Events/Annual_Meeting.aspx) (last visited May 19, 2017) (“For over 25 years, NAELA’s Annual Conference has provided Elder and Special Needs Law professionals an unparalleled opportunity to learn, discover, and succeed in the field.”); *Upcoming Conferences*, END VIOLENCE AGAINST WOMEN INT’L, <http://www.evawintl.org/conferences.aspx> (last visited May 19, 2017) (providing information about the “International Conference on Sexual Assault, Domestic Violence, and Engaging Men & Boys,” which took place on March 22–24, 2016 in Washington D.C.); *Upcoming Trainings, Webinars and Events Around the Country*, NAT’L CTR. ON DOMESTIC & SEXUAL VIOLENCE, [http://www.ncdsv.org/ncd\\_upcomingtrainings.html](http://www.ncdsv.org/ncd_upcomingtrainings.html) (last visited May 20, 2017) (providing information about a workshop on “Enhancing Judicial Skills in Domestic Violence Cases,” which will take place on June 11–14, 2017 in Louisville, Kentucky).

213. See, e.g., *Commission on Domestic & Sexual Violence*, AM. BAR ASS’N, [http://www.americanbar.org/groups/domestic\\_violence.html](http://www.americanbar.org/groups/domestic_violence.html) (last visited May 19, 2017); *Commission on Law and Aging*, AM. BAR ASS’N, [http://www.americanbar.org/groups/law\\_aging.html](http://www.americanbar.org/groups/law_aging.html) (last visited May 19, 2017); *Criminal Justice Section: Juvenile Justice Committee*, AM. BAR ASS’N, <http://apps.americanbar.org/dch/committee.cfm?com=CR200000> (last visited May 19, 2017).

## A. THEORETICAL INSIGHTS

## 1. Interests of the State

A critical task for family law scholars is to articulate the state interest in functioning families and to theorize the role of the state in supporting families. Numerous scholars have undertaken this work, generating important insights, but this scholarship largely does not account for what is different and distinctly important about early childhood.<sup>214</sup> Thus, a foundational effort in early childhood development and the law is integrating the research on early childhood into the existing theories of the family-state relationship. This Article cannot elucidate all of the implications of the research, but it can demonstrate the profound effect of cultivating a developmentally sensitive theoretical construct.

The starting point is recognizing that the state has an interest in the early childhoods of all children because of the deep connection between this period and human flourishing. The state also has a more targeted interest in the early childhoods of low-income children because of the connection between early disadvantage and the replication of inequality. The state interest in this period is not just one iteration of a broader theoretical concern with caregiving, but rather an explicit differentiation of caring relationships that foregrounds the parenting of young children.<sup>215</sup>

The field of early childhood development and the law can encourage scholars to integrate this insight to refine existing theories. Martha Fineman, for example, contends that all people share a common vulnerability and experience dependency at some point in their lives, that society cannot free ride on familial caregiving, and that we need to account both for this caregiving and also for the derivative dependency of the caregivers.<sup>216</sup> The difficult question posed by early childhood development and the law is whether society should value some types of caregiving more than others. Children under the age of five experience dependency that has significant lifelong consequences, and in light of the long-term impact of relationships during early childhood, society could choose to prioritize this kind of dependency over others, such as the care of the elderly. This creates an unsettling notion of valuing able-bodied future workers. This conversation is both instrumentalist and distasteful in the apparent valuing of some lives over others, but in a world of scarce resources, the state may need to make

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214. See *supra* Part I.B and text accompanying notes 157–160.

215. This is not to argue that caring for older children, the elderly, or disabled people at any life stage is inherently less valuable, but rather to highlight the distinctive state interest in the care of very young children.

216. FINEMAN, THE AUTONOMY MYTH, *supra* note 157, at 33–38, 47–49.

difficult choices about which dependencies to prioritize, and scholars must grapple with these questions.

Similarly, Maxine Eichner contends that the state should incorporate caregiving and human development into the liberal goods necessary for the advancement of responsible citizenship, but the question is whether the conjunctive responsibility of the state and families should account for the most influential aspect of that project—the early years of a child’s life.<sup>217</sup> Highlighting the distinctive state interest in early childhood development can recalibrate the nature of state responsibility for families with very young children. This, in turn, requires an examination of the risks of such a strong pronouncement of state interest because it may well jeopardize family autonomy, as discussed below.

Finally, Linda McClain posits that the state should support families because of their formative work in cultivating responsibility, capability, and self-governance.<sup>218</sup> McClain thus envisions that older children will have the ability to make decisions about reproductive issues and develop autonomous political views.<sup>219</sup> But the self-reflection and critical thinking that she wants for young adults has its roots in early childhood. In other words, the ability of families to play an effective role in fostering self-governance turns in no small measure on getting early childhood development right. As with Fineman and Eichner, the research on early childhood development offers an opportunity to think more closely about the role of the state and the relationship between the state and families.

After identifying the state interest in child development, legal scholars must determine the balance between state support and family autonomy. There is some tension between the state interest in healthy child development and the competing state interests of fostering pluralism and deferring to parental decision-making.<sup>220</sup> Multiple approaches to parenting can be and are effective for establishing a loving bond between parents and children,<sup>221</sup>

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217. See EICHNER, *supra* note 156, at 9–13. As discussed earlier, Eichner has incorporated the literature on early childhood development into her work arguing for a state role in buffering the family from market forces. See *supra* text accompanying notes 151–153.

218. MCCLAIN, *supra* note 159, at 85–87, 90, 111–14.

219. See *id.* at 223 (“A fundamental component of fostering responsibility and respecting personal self-government with regard to family life is protecting the freedom to decide whether or not to exercise one’s capacity to reproduce.”).

220. See, e.g., *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–36 (1925) (striking down law requiring that children be educated at public schools); *Meyer v. Nebraska*, 262 U.S. 390, 400–03 (1923) (striking down law prohibiting courses on or instruction using any language other than English).

221. See generally Margaret F. Brinig, *Religion, Race, and Motherhood* (Notre Dame Law Sch., Legal Studies Research Paper No. 10-06, 2010), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1565030](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1565030) (describing multiple styles of parenting and how each can be successful except for detached and disinterested parenting).



but the state has a particular interest in parents engaging in the kinds of activities that promote school readiness. Left unchecked, the state interest in early childhood development could be used to support sweeping changes to the law, intruding deeply into the lives of families. The state could, for example, invoke its interest in early childhood to justify laws that remove children from marginal homes and place them in foster care, set a higher divorce standard for couples with very young children, or require parents to provide evidence of early literacy activities as a condition of receiving state support.

Given this risk, it is imperative to determine how to provide support in a way that furthers rather than hinders autonomy. This is particularly true for low-income families and families of color, for whom state support is too often accompanied by state control.<sup>222</sup> It will be essential for legal scholars to explore the many ways the state can further early childhood development without infringing on family autonomy and judging parents.

Early childhood development and the law could lead to innovative approaches to this problem. To address the risk that state support will be accompanied by state control, especially for marginalized families, legal scholars could propose that policymakers state explicitly how a contemplated measure will further early childhood development, pluralism, and parental deference.<sup>223</sup> Policymakers could show that rather than requiring parents to take certain actions, the state is offering education to parents about the value of some kinds of parent-child interactions but leaving it to parents to decide whether to act on the new information. Head Start programs, for example, have long encouraged parents to read to their children,<sup>224</sup> and a more recent innovation is to involve parents in building math skills.<sup>225</sup> Parents are not required to do these activities at home, but they are shown the value of doing so. Policymakers could also be required to demonstrate how the trade-offs are made for different demographic groups, ensuring that the deference needs of low-income parents and parents of color

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222. For a small sample of the rich literature on this topic, see Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 317, 318–20 (2014) (describing this phenomenon); Khiara M. Bridges, *Towards a Theory of State Visibility: Race, Poverty, and Equal Protection*, 19 COLUM. J. GENDER & L. 965, 971–78 (2010); Katherine M. Franke, *Taking Care*, 76 CHI.-KENT L. REV. 1541, 1544 (2001); Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 303, 357–71 (2002).

223. For a discussion of how to offer support in an autonomy-enhancing manner, see JENNIFER NEDELSKY, *LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* 121–24 (2011).

224. See *About Us*, HEAD START, <http://eclkc.ohs.acf.hhs.gov/hslc/hs/about> (last updated Feb. 21, 2017).

225. *Early Math Family Engagement Project: California Head Start Training for Family Service and Education Program Leaders*, CAL. HEAD START ASS'N, [http://caheadstart.org/early\\_math.html](http://caheadstart.org/early_math.html) (last visited May 20, 2017).

are also considered.<sup>226</sup>

There is no easy answer to the tension between early childhood development and pluralism, and there is no easy mechanism to curb the state's tendency to hyperregulate low-income families.<sup>227</sup> Nevertheless, requiring state actors to be explicit about their choices will prompt them to at least consider these concerns.

Another challenge for legal scholars exploring the state interest in early childhood is determining how to surface this interest. Often policymakers simply do not account for the effect of the law on early childhood development, as when employment law fails to consider the impact of workplace rules on families. Legal scholars can identify the mechanisms for foregrounding this interest.

Similarly, legal scholars can help determine when and how the state interest in early childhood should be balanced with other considerations. The state has multiple interests, such as promoting employment, protecting the environment, and controlling crime. Sometimes furthering these interests will also help families with young children. Increasing the number of living-wage jobs, for example, will help combat poverty.<sup>228</sup> Protecting the environment is essential to child well-being.<sup>229</sup> And children benefit from safe neighborhoods.<sup>230</sup>

But sometimes there will be a tension. Take crime, for example. Although it is subject to much contestation, there is some evidence that incarceration, at least at a low-level, reduces crime.<sup>231</sup> But incarceration not only harms disadvantaged racial groups, especially Blacks,<sup>232</sup> it also

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226. Cf. R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1544–52 (2011) (proposing a voluntary process at the local level for municipalities to identify structural barriers to racial equality).

227. See Bach, *supra* note 222, at 318 (coining the term “hyperregulatory” to refer to this phenomenon).

228. See Michael Hout & Erin Cumberworth, *Labor Markets*, in THE POVERTY AND INEQUALITY REPORT 8, 8, 10 (2014) (describing the central importance of employment in combatting jobs to lowering poverty).

229. Cf., e.g., Abby Goodnough, *Flint Weighs Scope of Harm to Children Caused by Lead in Water*, N.Y. TIMES (Jan. 29, 2016), <https://www.nytimes.com/2016/01/30/us/flint-weighs-scope-of-harm-to-children-caused-by-lead-in-water.html> (describing the contamination of the water supply in Flint, Michigan, leading to elevated levels of lead in the blood of many resident children).

230. Cf. Chetty et al., *Childhood Environment*, *supra* note 4, at 282, 287 (noting that exposure to high-poverty, disadvantaged neighborhoods has a particularly harmful effect on boys).

231. COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION ET AL., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 130–56 (Jeremy Travis et al. eds., 2014) (“Most studies estimate the crime-reducing effect of incarceration to be small and some report that the size of the effect diminishes with the scale of incarceration. Where adjustments are made for the direct dependence of incarceration rates on crime rates, the crime-reducing effects of incarceration are found to be larger.”).

232. See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF

separates children from their parents<sup>233</sup> and makes parents less able to support their families, both while in prison and afterwards.<sup>234</sup> As difficult as it is to balance these competing interests, foregrounding early childhood development through a new field encourages sustained engagement with this intersection and offers a compelling argument against mass incarceration.

## 2. Focusing State Regulation

Another theoretical debate central to early childhood development and the law is the appropriate focus of state regulation. One of the most important insights from the literature on early childhood development is that very young children develop life skills and crucial capacities through relationships, particularly with parents or other long-term caregivers. It is essential, then, for legal scholars to contemplate how the law can fortify the parent-child relationship during the first few years of life. This entails an examination of three aspects of the parent-child relationship: the structure, the context, and the content. In each area, legal scholars should determine how the law could strengthen the parent-child relationship during the critical window of early childhood development.

Beginning with structure, the parent-child relationship must be relatively stable, with a parent reliably providing a child with the time and attention needed for healthy development.<sup>235</sup> For many families, however, this stability is hard to come by, especially for low-income, unmarried families.<sup>236</sup> Thus, legal scholars should determine how the law can reinforce the parent-child bond in all families and particularly in low-income, unmarried families. As I have elaborated elsewhere, the challenge is developing legal rules, institutions, and norms that encourage unmarried parents to actively co-parent children, even after their relationship ends.<sup>237</sup>

Next, legal scholars from multiple areas of the law should examine the many ways the law influences the context of parenting and, by extension, early childhood development.<sup>238</sup> This would include, for example, an analysis of how the low-wage workplace, the dearth of affordable, stable

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COLORBLINDNESS 9 (2012).

233. See *supra* text accompanying notes 134-135.

234. See Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893, 902, 904, 909-15 (2014) (describing the deleterious effect on employment of a criminal record, including an arrest record without a subsequent conviction).

235. See NSCDC Working Paper No. 1, *supra* note 7.

236. See Huntington, *supra* note 109, at 185-96 (discussing nonmarital families).

237. *Id.* at 224-36.

238. I have written about this at length elsewhere. See HUNTINGTON, *supra* note 93, at 55-68, 71-80.

housing, and the criminal justice system all directly and negatively affect the parent-child relationship.<sup>239</sup> In each area, the law plays a crucial role, and this should be the focus of legal research.

Finally, legal scholars should examine the many ways the law influences the content of the parent-child relationship. Certain interactions, such as “serve and return” exchanges between infants and caregivers and language-rich conversations with toddlers, are critical for early childhood development, but it is a fraught enterprise for the law to influence these interactions, at least directly. Legal scholars should identify the concerns associated with the state attempting to regulate the content of the parent-child relationship while balancing this concern with the importance of certain kinds of interactions and experiences during early childhood.

These theoretical inquiries lead directly to a related set of debates about the mode of state regulation. In light of autonomy concerns, especially with overt regulation, legal scholars should explore how and when the state could deploy different modes of regulation to further the goal of fostering early childhood development while also protecting family autonomy. With these concerns in mind, legal scholars should determine the relative merits and appropriate contexts for regulating the parent-child relationship directly and indirectly, and also when to regulate interactions with third parties, such as employers. Scholars may find that indirect regulation is more likely to be autonomy enhancing than direct regulation. Rather than conditioning the receipt of funds on desired behavior, for example, the state could subsidize preferred behavior, such as child care vouchers. Similarly, regulation of third parties is likely to be less intrusive, such as the requirement in the Affordable Care Act that larger employers provide women with children under the age of one the time and physical space to express breastmilk.<sup>240</sup>

Another set of questions about the mode of state regulation concerns the exercise of discretion. When executive branch officials make decisions based on open-ended legislative delegations, there is typically considerable room for informed judgment. Scholars should explore how making the state interest in early childhood development an explicit factor in the exercise of discretion could lead state actors to consider the impact of their decisions on

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239. For an example of this kind of inquiry, see Eichner, *supra* note 151 (arguing that the only protection the United States offers to protect families from market forces is the Family and Medical Leave Act, which applies to one-half of the United States workforce and only guarantees twelve weeks of unpaid leave; further arguing that this lack of protection is having a dramatic effect on American families, with children placed in subpar daycare centers, left unsupervised after they return home from school, and stripped of the chance to end the day with their parents around the family dinner table; calling for a “buffering” between the family and market forces).

240. 29 U.S.C. § 207(r)(1) (2012).

this period of development.

### 3. Identifying Dangers

There are downsides to elevating early childhood, and here too, legal scholars should play a key role in identifying and debating these dangers. Perhaps the biggest concern is that a focus on early childhood development pits parents against children. Broadly speaking, state intervention can diminish parental rights, and in specific regulatory contexts, there can be a tension between child development and parental interests and rights. Thus, any regulatory conflict could be considered purely from the child's perspective, purely from the parents' perspective, or some combination of both. Consider the custody of an infant. From the child's developmental perspective, it may well be better to live with only one parent for the majority of the time.<sup>241</sup> But from the parents' perspective, especially the parent who would not be the primary custodian, this is far from ideal. This tension between parents and children runs throughout family law, but it is acute with early childhood development because of the stakes for the child and society more broadly, and the reality that developmental imperatives may dictate some distance from one parent. These are complex and contentious questions, and legal scholars can help determine the right balance.

A different type of concern is with the state of the science, specifically whether the evidence on early childhood development is sufficiently reliable. The neuroscientific research into brain development, for example, is still emerging, and much remains unknown.<sup>242</sup> Moreover, precisely how early experiences affect later outcomes is a complex topic, subject to much debate among social scientists.<sup>243</sup> It is difficult to determine causality because child development is a dynamic process, with a child influenced by numerous, often interacting, factors. Some factors, such as exposure to lead paint, directly influence a child; other factors, such as parental education, indirectly influence a child by affecting parenting; and still other factors, such as

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241. See *supra* text accompanying notes 103–105 (describing the debate among psychologists about this issue).

242. See Jay Belsky, Opinion, *The Downside of Resilience*, N.Y. TIMES (Nov. 28, 2014), <https://www.nytimes.com/2014/11/30/opinion/sunday/the-downside-of-resilience.html> (explaining that “some children are more affected by their developmental experiences—from harsh punishment to high-quality day care—than others” but noting that the reasons are not well known).

243. A substantial literature in the field of developmental psychology unpacks the dynamics of early childhood development and later outcomes. For an excellent summary of the research in this area, see L. Alan Sroufe et al., *Implications of Attachment Theory for Developmental Psychopathology*, 11 DEV. & PSYCHOPATHOLOGY 1, 2–6 (1999) (describing the now dominant understanding of child development that genetics, early experiences, environment, and relationships all interact in a highly complex and mutually influencing fashion), and for a particularly accessible summary, see Brooks-Gunn & Markman, *supra* note 94, at 143–47.

poverty, have both a direct and an indirect influence.<sup>244</sup>

This leads to a related question, which is how the science will be used. There is a history of the law using scientific evidence that appears to be sound but in retrospect is unreliable and is used to exploit vulnerable populations.<sup>245</sup> The eugenics movement, for example, drew on scientific “evidence” of genetic inferiority to justify state laws permitting the involuntary sterilization of women thought to carry a “feeblemindedness” gene.<sup>246</sup> A central concern is that the existing evidence will be used to oppress marginal populations.<sup>247</sup> It is not hard to imagine such a scenario. In an individual case, a child could be removed from a parent’s custody because the parent is not adequately engaging the child. And at a policy level, the state might try to discourage childbearing by groups that the state deems insufficiently prepared to nurture very young children. Legal scholars could look to other areas of the law to determine how best to draw on scientific evidence. In juvenile justice, for example, the Supreme Court relied on the neuroscientific evidence to reach broad conclusions about the Eighth Amendment, but did not apply the evidence of adolescent brain development to the particular defendants in the cases.<sup>248</sup>

The final concern is that a focus on early childhood inevitably leads to the prenatal period. Indeed, the neuroscience that underscores the importance of early childhood development also shows that cognitive development begins prenatally.<sup>249</sup> This could lead to the kinds of interventions that severely limit women’s autonomy and privacy. In some states, for example,

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244. Sroufe et al., *supra* note 243, at 2.

245. See Jed S. Rakoff, *Neuroscience and the Law: Don’t Rush In*, N.Y. REV. BOOKS, May 12, 2016, <http://www.nybooks.com/articles/2016/05/12/neuroscience-and-the-law-dont-rush-in> (describing examples).

246. *Id.*; see also PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* 18–19, 47–51, 91–102 (2008).

247. For a discussion of other concerns, see Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13, 13–14 (2009) (arguing that the law in general, and courts in particular, should be wary about using research on child development to determine children’s capacities, which in turn affects the conferral or denial of rights and responsibilities; and identifying four central concerns: (1) the law cannot accurately account for the complexity of capacity or the relative immaturity of the scientific research, (2) a more nuanced understanding of children’s development tends to caricature adult capacity, (3) the insistence on developing one account of children’s capacity that applies in different legal contexts distracts from the need for coherence in other areas of children’s law, and (4) focusing on current capacity does not reflect society’s hopes for children’s development and suggests that the law does not affect that development).

248. Terry A. Maroney, Essay, *Adolescent Brain Science After Graham v. Florida*, 86 NOTRE DAME L. REV. 765, 779–81 (2011) (arguing that the Supreme Court was properly cautious in relying upon neuroscientific evidence of differences between adolescent and adult brains with respect to decision making, in part because it did not rely on an individualized assessment).

249. *InBrief: The Science of Early Childhood Development*, *supra* note 67.

it is a crime to expose a fetus to a narcotic or a controlled substance,<sup>250</sup> and women who have been using such substances have been put in rehabilitation centers for the duration of their pregnancy (or longer)<sup>251</sup> or prosecuted after the baby is born.<sup>252</sup> There is no simple way to resolve this tension, but legal scholars can crystallize the debate by clarifying the interests—healthy child development on the one hand and the costs to women’s autonomy and privacy on the other.

At heart, these dangers only underscore the need to create the field of early childhood development and the law. Despite the relatively nascent stage of the science and ongoing questions about the mechanisms of influence, there is undeniable evidence that early childhood matters. This creates a policy imperative to shore up children’s experiences during these first years. The potential dangers do not obviate the importance of early childhood. They only highlight the need for additional debate and engagement.

## B. IMPLICATIONS FOR THE LEGAL SYSTEM

Bringing these theoretical insights and concerns, as well as the interdisciplinary research on early childhood development, into the law can have a profound effect on both core family law doctrines and the legal context of parenting. To demonstrate the tremendous purchase of foregrounding early childhood development within the law, this section returns to child custody rules, the permanency timeline for children in foster care, and non-family-law rules that structure the parent-child relationship.

### 1. Child Custody

The interdisciplinary research poses a fundamental challenge to existing custody rules. Examining these rules through the lens of early childhood development, it is clear that there are serious problems. The first issue is the need to provide greater stability and continuity in the parent-child relationship during the first five years of life. The law takes partial account

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250. *E.g.*, TENN. CODE ANN. § 39-13-107(c)(2) (2015).

251. Stephanie Chen, *Pregnant and Addicted, Mothers Find Hope*, CNN (Oct. 24, 2009, 10:39 AM), <http://www.cnn.com/2009/CRIME/10/24/pregnant.addicts/index.html> (describing a rehabilitation program for pregnant women and new mothers; some women go voluntarily and some are sent by the state).

252. *Hicks v. State*, 153 So. 3d 53, 54 (Ala. 2014) (upholding conviction of a mother charged with chemical endangerment for exposing a fetus to a controlled substance); *State v. McKnight*, 576 S.E.2d 168, 171, 174–75 (S.C. 2003) (upholding conviction of a mother charged with homicide by child abuse for exposing a fetus to cocaine in violation of South Carolina law, which the Court interpreted as applying both to born and unborn children).

of this need through the recognition of parental rights,<sup>253</sup> but when parents end their relationship, and a child's custody is at issue, more attention is needed to the problem of stability and continuity.

Beginning with unmarried parents, there are numerous ways the law destabilizes nonmarital families,<sup>254</sup> but one problem noted throughout this Article is that unmarried parents typically end their relationships much earlier in a child's life than married parents. Children in nonmarital families thus experience the disruption of parental separation at a much earlier age than children of divorcing parents.

The pressing question, then, is how to help stabilize these families. I have argued that although we are increasingly witnessing the separation of marriage from parenthood, we cannot separate relationships from parenthood. Whether unmarried parents get along deeply affects how they parent their children. If they do get along, both parents are better able to provide their children with the relationships necessary for healthy child development. Thus, I have proposed that the law should adopt rules, build legal institutions, and foster norms that encourage co-parenting by unmarried parents even after the relationship ends.<sup>255</sup>

By contrast, other scholars contend that the law should fortify the relationship between an unmarried mother and her child, with less solicitude for unmarried fathers. June Carbone and Naomi Cahn, for example, are concerned that giving more legal power to unmarried fathers would upset expectations and the bargaining power of mothers in ways that may be detrimental to mothers and possibly families.<sup>256</sup> They argue that unmarried fathers should have legal protections commensurate with their commitment to and involvement in the raising of children.<sup>257</sup>

Early childhood development and the law does not necessarily resolve

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253. See Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2439–41 (1995) (arguing that parental rights encourage parents to invest emotionally and financially in their children knowing the investment will be protected from interference by third parties).

254. Family law's failures to address the needs of unmarried families are legion: Custody rules encourage mothers to block fathers' access to children, and child support laws aggravate existing acrimony. Huntington, *supra* note 109, at 202–09. Family law's institutions are not designed for nonmarital families, and thus nonmarital families do not have an effective venue for working out a new family life that includes both parents. *Id.* at 209–10. And family law's norms cast unmarried fathers as only breadwinners, not caregivers, weakening their place in the family. *Id.* at 210–11.

255. *Id.* at 224–36.

256. See CARBONE & CAHN, *supra* note 156, at 124–31; see also MERLE H. WEINER, A PARENT-PARTNER STATUS FOR AMERICAN FAMILY LAW 266–70 (2015) (proposing that the birth of a shared child, within or without marriage, should lead to enforceable obligations between parents but expressing some concern about imposing the same obligations on unmarried parents because of the qualitatively different nature of their commitment to each other).

257. See CARBONE & CAHN, *supra* note 156, at 192–93.



this debate, but it does provide a body of research and set of theoretical insights to help guide it. The interdisciplinary research clarifies that the child's future is at stake.<sup>258</sup> And the theoretical insights generated from the new field confirm that this is an appropriate issue to resolve because an important focus of state regulation is the structure of the parent-child relationship during early childhood.<sup>259</sup>

Another doctrinal custody issue concerns overnight visits between a nonresidential parent and a very young child, which has long been a contentious issue in family law. Early childhood development and the law emphasizes the need to provide much greater guidance to parties and courts. Commentators, courts, and policymakers agree that, absent violence or other extenuating circumstances, the legal system should encourage an ongoing relationship between children and both parents.<sup>260</sup> Thus, many custody arrangements allow for joint legal custody of the child, empowering both parents to make important decisions for children,<sup>261</sup> such as where children should attend school and how to address medical needs. Custody law also expresses a preference for ongoing and meaningful contact between children and both parents.<sup>262</sup> A recurring question, however, is what constitutes meaningful contact, especially when the child is very young.<sup>263</sup> As described above, only Utah and Texas provide explicit guidance on the relevance of age.<sup>264</sup>

Again, early childhood development and the law helps guide this debate. As an initial matter, it highlights the importance of providing a child with a stable, continuous relationship with a primary caregiver in early childhood, recognizing that there is something distinct about the first few years of life that calls for different rules.<sup>265</sup> However, it also illuminates a potential conflict: while a child has an interest in a stable and continuous relationship with a primary caregiver, the child also has an interest in ongoing contact with both parents, and the nonresidential parent has an

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258. See *supra* Part I.B.

259. See *supra* Part III.A.1–2.

260. See Singer, *supra* note 104 (describing this movement and consensus, at least as it applies to joint legal custody); see also PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.02 cmt. e (AM. LAW INST. 2002) (stating that there is a “clear consensus” that “the continuity of existing parent-child attachments after the break-up of a family unit is a factor critical to the child’s well-being”).

261. Singer, *supra* note 104, at 183–84.

262. See *id.* at 183–84.

263. See *id.* at 184 (describing the lack of consensus about joint physical custody).

264. See *supra* text accompanying notes 110–115.

265. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08 cmt. e (finding that a reasonable visitation schedule for a child under the age of six months would be four to six hours a week and that for a child over the age of six, the child could see the other parent for six to eight days a month, but not giving much guidance for the period in between).

interest in a relationship with the child. To a certain degree, these interests cannot be reconciled. The problem is made all the more difficult because unmarried fathers are more likely than divorced fathers to drift away over time,<sup>266</sup> and thus it is important to involve these fathers from the start. And the problem of physical custody for a very young child is more likely to arise for a child of unmarried parents than a child of divorcing parents.

Recognizing these competing interests should inform the exercise of judicial discretion. Very few custody cases proceed to a contested hearing or trial,<sup>267</sup> but for initial case conferences and in the few cases that are decided by judges, taking cognizance of this interest asks judges to exercise their discretion under the best-interests-of-the-child standard in a more systematic way, explicitly accounting for the stability needs of a very young child.

Perhaps most important in light of the high likelihood of settlement in custody cases, legislators should take the state interest in early childhood into account by providing statutory guidance on the physical custody of a very young child. This default rule will, in turn, influence settlement negotiations and mediations.<sup>268</sup> This does not mean that Utah and Texas have necessarily found the right balance of competing interests, but they are having the right conversation and have reached a defensible substantive conclusion. The decision to prioritize stability risks alienating the nonresidential parent, but a very young child's developmental needs for a steady, consistent presence arguably outweighs the parental interest, at least in substantial overnight visits. When the child is somewhat older—age three in Texas and age five in Utah—the balance shifts because the child is better able to tolerate changes in caregiving.<sup>269</sup> Further, unlike the child welfare system, in the context of a private custody dispute the law is allocating physical custody between two parents, not ending a parent-child relationship entirely. This makes it more defensible to emphasize the child's interest in stability over the parent's interest in a substantial number of overnight visits.

Finally, early childhood development and the law shows that the few states that have adopted rules requiring courts to maximize the time the child spends with both parents should reconsider this blanket direction for very

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266. See Huntington, *supra* note 109, at 186, 189–90, 193–96.

267. For an example of state level statistics, see THOMAS GEORGE, WASH. STATE CTR. FOR COURT RESEARCH, RESIDENTIAL TIME SUMMARY REPORTS FILED IN WASHINGTON FROM JULY 2009 TO JUNE 2010 4 (2010) (explaining that in the period studied, 88 percent of custody cases were resolved by agreement of the parties, 2 percent went to a contested hearing or trial, and 10 percent were decided by a default judgment).

268. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968–69, 977–80 (1979).

269. See *supra* text accompanying notes 110–115.

young children.<sup>270</sup> At the very least, these statutes should specify that a child's age is relevant to whether the child's time with each parent should be maximized. And states should consider a different rule, such as maximizing daytime visits or allowing for more frequent but shorter visits with the other parent.<sup>271</sup>

## 2. The Child Welfare System

Research on the dynamics of early childhood development can also inform ongoing debates about the child welfare system, crystallizing conflicts between children's need for permanency and parents' need for time to address the issues leading to the removal of the child. As noted above, ASFA requires states to commence proceedings to terminate parental rights for children who have been in foster care for fifteen of the most recent twenty-two months.<sup>272</sup> For many families, the math does not favor family reunification, and indeed, reunification rates have gone down since the passage of ASFA.<sup>273</sup>

Early childhood development and the law raises the stakes even higher by highlighting that foster care is populated with very young children, and yet ASFA imposes the same time limit for infants and teenagers, thereby failing to account for their qualitatively different needs.<sup>274</sup> This does not necessarily mean that a state should set a shorter time limit for young children,<sup>275</sup> but it does mean the state should consider the timeline in light of the state's interest in early childhood development.

Foregrounding the state interest in early childhood development is important, but must be weighed against competing interests, particularly the shared interest of both the parent and child in reunification.<sup>276</sup> In a private

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270. See *supra* text accompanying notes 107–109 (describing these statutes).

271. Kelly & Lamb, *supra* note 103, at 308 (recommending more frequent visits for shorter periods of time when the child is very young).

272. 42 U.S.C. § 675(5)(E) (2012).

273. In 1998, shortly after the enactment of ASFA, 60 percent of the children leaving foster care returned home to their parents. U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, ADMIN. ON CHILDREN, YOUTH & FAMILIES, CHILDREN'S BUREAU, THE AFCARS REPORT: FINAL ESTIMATES FOR FY 1998 THROUGH FY 2002 8 (2006), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport12.pdf>. This number dropped to only 51 percent in 2014. U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 121, at 3.

274. See *supra* text accompanying note 119.

275. Some commentators would welcome this. See James G. Dwyer, *A Constitutional Birthright: The State, Parentage, and the Rights of Newborn Persons*, 56 UCLA L. REV. 755, 756, 758, 761–62, 769–72, 835 (2009) (arguing that children have a substantive due process right not to live with unfit parents and that in some cases the state may be justified in removing the child at birth and placing the child for adoption).

276. *Santosky v. Kramer*, 455 U.S. 745, 760 (1982) (“[U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural

custody dispute, the question is how much time the nonresidential parent will see a very young child. By contrast, in a child welfare case, the question is whether to sever the parent-child relationship completely. Both the parent and the child have an interest in preserving that relationship, and the law should weigh all of these interests.

One blunt approach to balancing these interests is to shorten the time frame for reunification for a very young child. This is problematic because the individual circumstances of each removal proceeding can vary significantly and a bright-line rule might overly privilege developmental needs. A more subtle approach would be to raise the standard for removing a very young child from the custody of a parent. Before removing the child, the state would have to meet a heightened evidentiary standard for establishing abuse or neglect or show a high degree of likelihood that the child would not be returned home after a foster care placement. Making these kinds of predictions is notoriously difficult,<sup>277</sup> and the risk of maltreatment is highest for children under age four,<sup>278</sup> but elevating the centrality of early childhood development could lead to a variety of substantive and procedural reforms.<sup>279</sup>

### 3. Beyond Family Law

As noted in the discussion of theoretical debates, a focus on early childhood development clarifies that the state should examine the legal context of the parent-child relationship. This leads to a reconsideration of a host of doctrinal rules in areas such as workplace law, property law, and criminal law, three vital areas of the law that profoundly affect parenting.

#### a. Workplace Law

It is imperative to consider the kinds of rules that would make

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relationship.”).

277. See Angela Moreland Begle et al., *Predicting Child Abuse Potential: An Empirical Investigation of Two Theoretical Frameworks*, 39 J. CLINICAL CHILD & ADOLESCENT PSYCHOL. 208, 217 (2010) (describing the limitations of a study on child abuse potential).

278. See *Child Abuse and Neglect: Risk and Protective Factors*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/childmaltreatment/riskprotectivefactors.html> (last updated Apr. 5, 2016).

279. One example is the Center for Court Innovation’s new program, the Strong Starts Court Initiative. *Strong Starts Court Initiative*, CTR. FOR COURT INNOVATION, <http://www.courtinnovation.org/project/strong-starts-court-initiative> (last visited May 20, 2017). Embracing research on early childhood and recognizing that children under the age of six make up a large percentage of those entering foster care, the program’s goals are to (1) conduct comprehensive and periodic assessments of infants to ensure appropriate and targeted plans are generated for each family, (2) develop and foster a network of community-based service providers to serve these families, and (3) move to a collaborative approach to problem-solving. *Id.* To achieve these goals, the program holds frequent case conferences with families to ensure their needs are being met and encourages frequent court appearances with a dedicated judge who monitors the family and their needs. *Id.*

workplaces more supportive of the parent-child relationship during early childhood. An obvious starting point is the need to reconsider paid parental leave to attend to the particular concerns of parents of young children,<sup>280</sup> but there is so much more to be done, especially after parents return to work.<sup>281</sup> Foregrounding early childhood development challenges core workplace rules such as at-will employment and freedom to contract. A state could, for example, adopt a law requiring for-cause termination for workers with children aged five and younger. This is not so difficult to imagine. Montana already has a for-cause requirement for all employment after a probationary period.<sup>282</sup> State actors might decide that this is the right balance of interests. By contrast, other state actors might strike a different balance of interests, maintaining more of the status quo while still protecting workers with young children. State actors could, for example, offer incentives for employers to adopt more family-friendly policies targeted particularly at parents of young children, such as tax credits for employers that give advance notice of work schedules.<sup>283</sup>

There are other incremental changes in workplace law that would lessen the harm of the low-wage workplace on the parent-child relationship in the first five years of children's lives. Take, for example, the requirement in most state unemployment insurance programs that the employee have "good cause" to leave a job.<sup>284</sup> States specify allowable bases for leaving a job that satisfy this requirement, including workplace safety, a cut in hours, and so on.<sup>285</sup> Some of the bases relate to family matters, such as leaving to care for a disabled or sick family member or to avoid domestic violence or stalking.<sup>286</sup> Caregiving responsibilities more broadly, however, are not a

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280. See generally Linda A. White, *The United States in Comparative Perspective: Maternity and Parental Leave and Child Care Benefits Trends in Liberal Welfare States*, 21 *YALE J.L. & FEMINISM* 185 (2009) (discussing parental leave benefits trends in several countries and arguing that the United States is unique in its failure to provide national paid parental leave).

281. See *supra* text accompanying notes 151–153 (discussing Maxine Eichner's theoretical justification for regulating the marketplace to promote family functioning).

282. MONT. CODE ANN. § 39-2-904 (West, Westlaw through 2015 Sess.).

283. Another model is to provide subsidies for employers. See, e.g., 42 U.S.C. § 1790(b)(3) (2012) ("[T]he Secretary may . . . provide funds to . . . employers, for the purpose of assisting such entities in the distribution of breastpumps and similar equipment to breastfeeding women.").

284. E.g., CAL. UNEMP. INS. CODE § 1256 (West, Westlaw through 2016 Reg. Sess. legislation); FLA. STAT. ANN. § 443.101 (West, Westlaw through 2016 Second Reg. Sess.); 820 ILL. COMP. STAT. ANN. 405/601(A) (West, Westlaw through P.A. 99-920 of 2016 Reg. Sess.); TEX. LAB. CODE ANN. § 207.045(a) (West, Westlaw through end of 2015 Reg. Sess.).

285. See, e.g., *Moore v. Unemp't Ins. Appeals Bd.*, 215 Cal. Rptr. 316, 321 (Ct. App. 1985) (finding good cause in a "good faith, subjective belief there was a substantial health risk in working within the assigned radiation areas"); *Henderson v. Ill. Dep't of Emp't Sec.*, 595 N.E.2d 96, 99 (Ill. App. Ct. 1992) (citation omitted) ("A reduction in pay may constitute 'good cause' depending upon the surrounding circumstances."); *Ramjawan v. Comm'r of Labor*, 808 N.Y.S.2d 507, 508 (App. Div. 2006) (noting that "fear for one's safety may constitute good cause for leaving employment").

286. E.g., CAL. UNEMP. INS. CODE § 1256 (West, Westlaw through 2016 Reg. Sess. legislation)

permitted basis. As a result, an employee would not have good cause to leave the job, and thus would be ineligible for unemployment insurance, if a child care arrangement fell through and the parent was unable to find an alternative source of affordable, safe child care.<sup>287</sup> States thus should incorporate the unavailability of child care and other parenting issues as potential good cause bases.

b. Property Law

In property law, it is important to consider the appropriate rules that would lead to greater housing stability for families with young children. When a family is facing eviction, for example, some states and localities allow a court to stay the judgment for up to six months in specified circumstances.<sup>288</sup> This discretionary judgment can turn on numerous factors, such as “extreme hardship” to the tenant or family.<sup>289</sup> When applying this standard, courts could factor in the disruption to the parent-child relationship for children aged five or younger. Families would need to move eventually, but the additional time might allow them to make the transition more easily, lessening the adverse effect on the parent-child relationship.<sup>290</sup>

Early childhood development and the law also provides guidance to the state for establishing priorities for scarce resources. There is an enormous and growing demand for subsidized housing,<sup>291</sup> but there is no clear statutory or regulatory preference for families, let alone an explicit preference for families with children aged five or younger. State actors could prioritize the needs of families with children aged five or younger.

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(“An individual may be deemed to have left his or her most recent work with good cause if he or she leaves employment to protect his or her family, or himself or herself, from domestic violence abuse.”); 820 ILL. COMP. STAT. 405/601(B) (West, Westlaw through P.A. 99-920 of 2016 Reg. Sess.) (creating an exception when an “individual’s assistance is necessary for the purpose of caring for his or her spouse, child, or parent”); N.Y. LAB. LAW § 593(1)(b)(i)–(ii) (McKinney through L.2016) (allowing unemployment benefits when the “separation from employment” was “due to any compelling family reason,” which includes “domestic violence” and “the illness or disability of a member of the individual’s immediate family”).

287. There is evidence that many people, especially women, leave jobs because of child care responsibilities for young children. See CHILD CARE AWARE OF AMERICA ET AL., PARENTS AND THE HIGH COST OF CHILD CARE: 2015 REPORT 17 (2015), <http://usa.childcareaware.org/wp-content/uploads/2016/05/Parents-and-the-High-Cost-of-Child-Care-2015-FINAL.pdf>.

288. E.g., CONN. GEN. STAT. ANN. § 47a-39 (West, Westlaw through 2016 Sept. Spec. Sess.); MASS. GEN. LAWS ANN. ch. 239, § 9 (West, Westlaw through Ch. 375 of 2016 Second Ann. Sess.); N.Y. REAL PROP. ACTS. LAW § 753(1) (McKinney through L.2016).

289. N.Y. REAL PROP. ACTS. LAW § 753(1) (McKinney through L.2016).

290. See DESMOND, *supra* note 131, at 162–66 (describing the devastating impact of eviction on family functioning).

291. U.S. Dep’t of Hous. & Urban Dev., *Preserving Affordable Rental Housing: A Snapshot of Growing Need, Current Threats, and Innovative Solutions*, EVIDENCE MATTERS, Summer 2013, at 1, 1, 2–3.

The Moving to Opportunity for Fair Housing demonstration project provides support for such a preference. The program gave housing vouchers to randomly selected low-income families to help them move from high-poverty neighborhoods to low-poverty neighborhoods.<sup>292</sup> It was enormously successful. As compared with families that remained in the high-poverty neighborhood, the children of the families that moved had significantly better outcomes, as measured by college attendance, income as an adult, and the likelihood of living in a high-poverty neighborhood as an adult.<sup>293</sup> What is particularly interesting about the findings is that they differ by the age that the child moved. There were not enough children in each age group to determine if there was a clear age at which benefits were maximized, but the positive effect of the move increased with each additional year the child grew up in the low-poverty neighborhood.<sup>294</sup> This research is consistent with other findings that moving to a neighborhood with more opportunities—as defined by access to schools, transportation, jobs, lower levels of crime, and so on—has more positive effects for each year the child lives in the new neighborhood.<sup>295</sup>

A similar but less obvious priority for housing subsidies is to house noncustodial parents near their young children.<sup>296</sup> Currently, the demand for subsidized housing is so great that non-disabled, non-elderly, single adults are the smallest percentage of individuals served.<sup>297</sup> This means that fathers are often living far from their children, further undermining their ability to maintain a close relationship with the children. Keeping these parents physically close to their children would allow the fathers to play a greater role in their children's lives.

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292. *Moving to Opportunity for Fair Housing*, U.S. DEP'T OF HOUS. & URBAN DEV., <https://portal.hud.gov/hudportal/HUD?src=/programdescription/mto> (last visited May 20, 2017).

293. Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855, 857 (2016). The children who moved were also more likely not to be single parents. *Id.*

294. *Id.* at 858; *see also id.* at 885 (cautioning that a causal relationship could not be established because “the MTO experiment only randomized voucher offers; it did not randomize the age at which children moved, which could be correlated with other unobservable factors.”). The move had a positive effect for children who moved before age thirteen, but either no effect or a slight negative effect for children who moved at age thirteen or older. *Id.* at 857–58.

295. *See* Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility: Childhood Exposure Effects and County-Level Estimates 1–2* (May 2015) (unpublished manuscript), [http://scholar.harvard.edu/files/hendren/files/nbhds\\_paper.pdf](http://scholar.harvard.edu/files/hendren/files/nbhds_paper.pdf).

296. *See* Katharine Silbaugh, *Housing Design and Policy for Households and for Families*, 43 FORDHAM URB. L.J. (forthcoming 2016).

297. *See* NAT'L LOW INCOME HOUS. COAL., *Who Lives in Federal Assisted Housing?*, HOUSING SPOTLIGHT, Nov. 2012, at 2 tbl.1 (recording that 13 percent of households that receive public housing are non-elderly, non-disabled, without children).

### c. Criminal Law

In criminal law, states should adopt alternative sentencing standards for parents of young children, taking a parent's role in early childhood development into account when sentencing a defendant. Courts already acknowledge family ties to some degree,<sup>298</sup> but filtering the sentencing decision through the lens of early childhood development would ask a court to take systematic account of the defendant's role in that development as well as the anticipated harm of incarceration on young children. In the case of a nonviolent offender, for example, a court could order a delayed sentence, requiring the defendant to serve the time after the child reaches age five.<sup>299</sup> Losing a parent to prison at any age can be problematic, but the particular cost of losing a parent during the first five years of a child's life is acute. To eliminate an incentive to conceive an additional child and further delay the sentence, a court could delay the sentence only once.

A court could also use the state interest in early childhood development as a reason for sending the parent of a very young child to an alternative-to-incarceration program, rather than prison. A community-based program would allow the parent to remain in the home or in the neighborhood, seeing the child at regular intervals. To be eligible, the defendant would need to demonstrate an ongoing relationship with the young child. This would be particularly beneficial for female defendants, whose children are at heightened risk of placement in foster care.<sup>300</sup> And decisions about incarceration placement could seek to facilitate on-going familial bonds by not placing prisoners unreasonably far away if they have small children.<sup>301</sup>

### C. INTERDISCIPLINARY DIALOGUE AND BROADER POLICY DEBATES

Foregrounding early childhood development in the law will not only improve the legal system, it will also improve the existing interdisciplinary dialogue and policy debates about early childhood and inequality. As Part I argued, scholars across a range of disciplines share a common vocabulary and a focused discourse on early childhood development, and they regularly

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298. See DAN MARKEL, JENNIFER M. COLLINS & ETHAN J. LEIB, *PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES* 12–15 (2009) (describing state and federal practices accounting for family ties in sentencing).

299. I thank Katharine Bartlett for this idea.

300. See U.S. DEP'T OF JUSTICE, *PARENTS IN PRISON AND THEIR MINOR CHILDREN* 5 (2008) (11 percent of mothers in state prison reported their children were "in the care of a foster home, agency, or institution").

301. See Piper Kerman, *For Women, a Second Sentence*, N.Y. TIMES (Aug. 14, 2016), <http://www.nytimes.com/2013/08/14/opinion/for-women-a-second-sentence.html> (advocating against the closure of the Federal Correctional Institution in Danbury, Connecticut, which would have transferred inmates to Alabama and elsewhere, because of the difficulty of the female prisoners seeing their children).



work together to influence policy. This scholarly exchange, however, is disconnected from law. Recognizing the field of early childhood development and the law will link legal scholars with scholars in other disciplines and the policymakers who draw on their work.

Beginning with interdisciplinary dialogue, research in other fields would be stronger if it was connected to the law, as exemplified by the issue of nonmarital families and custody rules, discussed above. At heart, the debate is predicated on an empirical question: which custody rule—one that treats unmarried parents the same as married parents, or one that gives unmarried mothers greater control—is better for children? There are several studies of nonmarital families, from the ongoing Fragile Families and Child Wellbeing Study to the ethnographic work of Kathryn Edin and Timothy Nelson.<sup>302</sup> These are deeply valuable studies, but they do not track the custodial status of the parents, nor have scholars collected data about the number of fathers who have gone to court seeking a visitation or custody order. We do not know, therefore, the impact of different rules on parent dynamics and child outcomes, hindering both the development of legal rules and effective policies to support nonmarital families. The work of legal scholars would be deeply enriched by data linking child outcomes to different custody orders. And the work of scholars in other disciplines would be enriched if they considered legal variables, such as the presence of a custody order or state variation in default custody rules.<sup>303</sup> The field of early childhood development and the law would encourage this kind of cross-pollination in research.

As a practical matter, recognizing a new specialty of early childhood development and the law will make it easier for scholars in other disciplines to find and engage with legal scholars with similar research interests. Research silos are a hallmark of the academy, but it is important to fight this tendency. Facilitating contact will have considerable tangible benefits. At a minimum, it will help scholars in law and other disciplines draw on and cite each other's work. More fundamentally, when sociologists, economists, education scholars, and so on organize a conference on early childhood development or establish a research network, the new field will encourage these scholars to include legal scholars as well, enriching the dialogue for all.

Turning to policy, decades of interdisciplinary work has begun to

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302. See KATHRYN EDIN & TIMOTHY NELSON, *DOING THE BEST I CAN* (2013); *About the Fragile Families & Child Wellbeing Study*, PRINCETON U.: FRAGILE FAMS. & CHILD WELLBEING STUDY, <http://www.fragilefamilies.princeton.edu> (last visited May 20, 2017) (crediting Sara McLanahan and Irwin Garfinkel as principal investigators).

303. See Huntington, *supra* note 109, at 204 (describing this variation).

influence prominent policy debates, but that pollination process has not systematically involved legal scholars. This has been a significant lost opportunity to strengthen that policy discourse. As a foundational matter, legal scholars bring a deep understanding of the institutions of the state, the structure of the government, the tools available to the state, and legal institutional details. All of these are important for creating and implementing effective policy. Indeed, policy must be instantiated in law, and lawyers and legal scholars steeped in early childhood development are critical to translating policy goals into actual legislation and doctrine.

There are a range of proposed programs, for example, that would fortify the parent-child relationship during early childhood, including delayed childbearing through the use of long-acting reversible contraceptives,<sup>304</sup> targeted parenting support,<sup>305</sup> anti-poverty measures,<sup>306</sup> and language interventions.<sup>307</sup> Legal scholars, however, have not played a central role in these policy conversations, and their absence adversely affects the effectiveness of the proposals that have, in fact, become policy.

If we are going to encourage more investment and support of families—and we should—then legal scholars are also essential to the conversation about protecting family autonomy. Legal scholars possess a thorough knowledge of individual rights and appreciation of the need to constrain the state. Legal scholars thus can help policymakers balance the potential impact on individual rights and find the practical tools needed to moderate intervention with family autonomy.

Policy debates over birth control are a perfect counterexample, highlighting the value of engagement. Lawyers and legal scholars have played a central role in not only ensuring access to birth control,<sup>308</sup> but also constraining state efforts to control reproduction, especially among low-

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304. See SAWHILL, *supra* note 4, at 122–28.

305. See Jane Waldfogel, *Gaps in Early Childhood, School Readiness, & School Achievement: Policy Responses*, BROOKINGS INSTITUTION (Jan. 27, 2014), <http://www.brookings.edu/blogs/social-mobility-memos/posts/2014/01/27-gaps-in-early-childhood-school-readiness-achievement> (explaining that “some parenting programs can improve parenting and child outcomes”).

306. For a discussion of possible interventions that would boost family income, as well as the potentially limited effect of such interventions, see Duncan & Magnuson, *supra* note 93.

307. See *About*, PROVIDENCE TALKS, <http://www.providencetalks.org/about> (last visited May 20, 2017) (describing the city-wide program that is designed “to do something never before attempted at the municipal level: to intervene at a critically early age, from birth to age four, to close the 30 million word gap at a city-wide scale and ensure that every child in Providence enters a kindergarten classroom ready to achieve at extraordinary levels” by providing families with “free access to a ‘word pedometer’ and bi-weekly coaching from trained home visitors”).

308. See *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (holding that a statute prohibiting the distribution of contraceptives to unmarried persons was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (holding that a statute forbidding the use of contraceptives was unconstitutional).

income people of color. In North Carolina, for example, the state sterilized approximately 7,600 people between 1929 and 1975.<sup>309</sup> More than two dozen other states had similar eugenics programs,<sup>310</sup> but North Carolina's stands out because of the large numbers and the design of the program. Most state programs targeted institutionalized patients, such as the mentally ill and the physically disabled,<sup>311</sup> but in North Carolina, social workers often coerced young teens to consent to sterilization by threatening to cut off the family's welfare.<sup>312</sup> Under the guise of "preventive medicine," low-income youth, especially girls and those with low IQ test scores or the undereducated, were sterilized.<sup>313</sup> Many girls were forcibly sterilized after giving birth in the hospital.<sup>314</sup> Beginning in the 1960s, racial minorities were disproportionately the victims of the sterilizations.<sup>315</sup> Lawyers played a key role in challenging this practice and serving the victims.<sup>316</sup> Similarly, legal scholars, such as Dorothy Roberts and Michele Goodwin, have developed theories for balancing the state goals of helping women attain greater self-determination over reproduction while also curbing the state's tendency to control women—especially low-income women of color.<sup>317</sup>

In all these ways, the new field will have far-reaching consequences, within the legal academy, across multiple disciplines, and in the world of policy.

## CONCLUSION

Despite overwhelming evidence that early childhood development is

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309. Adam Owens, *N.C. Dedicates Marker to Eugenics Program*, WRAL (June 22, 2009), <http://www.wral.com/news/local/story/5406081>; Laura Leslie & Renee Chou, *Victims of State Sterilization Tell Their Stories*, WRAL (June 22, 2011), <http://www.wral.com/news/video/9755940/#/vid9755940>.

310. Leslie & Chou, *supra* note 309 ("Thirty-three states adopted eugenics programs in the early 1900s . . .").

311. DANIEL J. KEVLES, *IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY* 100 (1985).

312. JOHN RAILEY, *RAGE TO REDEMPTION IN THE STERILIZATION AGE: A CONFRONTATION WITH AMERICAN GENOCIDE* 60–61 (2015).

313. Clarence J. Gamble, *Eugenic Sterilization in North Carolina*, 12 N.C. MED. J. 550, 550–51 (1951).

314. *See* RAILEY, *supra* note 312, at 56–57.

315. *See id.* at 17–39.

316. *See id.* at 54–74 (describing the role of the ACLU in bringing the suit challenging North Carolina's practices); *NCBA Members Representing Eugenics Victims*, N.C. BAR ASS'N, <http://www.ncbar.org/news/ncba-members-representing-eugenics-victims> (last visited May 20, 2017) (describing the role of lawyers in representing victims).

317. *See* Michele Goodwin, *The Black Body as Medical Commerce*, in *IMAGINING, WRITING, (RE)READING THE BLACK BODY* 52, 58–59, 62–64 (Sandra Jackson, Fasil Demissie, & Michele Goodwin eds., 2009); DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 294–312 (1999).

foundational for all children and that it plays an important role in perpetuating inequality, the law has been slow to confront this reality. Creating a new field of early childhood development and the law will initiate a debate about how the legal system can strengthen families and encourage healthy development in this crucial developmental stage. There are numerous legal questions that can and should be debated at length. Early childhood development and the law will foster this sustained inquiry and exploration by legal scholars. It will also connect legal scholars with scholars across multiple disciplines dedicated to understanding the dynamics and consequences of early childhood development, enriching the interdisciplinary dialogue and creating more effective policies. Numerous disciplines recognize the central importance of early childhood and are deeply influencing a range of policy debates. Legal scholars need a seat at this table.