

A PROMISING START FOR EARLY CHILDHOOD DEVELOPMENT AND THE LAW

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Examining the role of the law in early childhood development is not new; several legal scholars have engaged in such an inquiry, including scholars at this symposium.¹ But this engagement has not led to a sustained debate about how the legal system can foster early childhood development, nor has it yet led to the integration of legal scholars into the interdisciplinary research on, and policy debates about, early childhood. I have argued that the creation of a new subdiscipline in family law—early childhood development and the law—would achieve these goals, sparking debate within law, bringing a legal perspective to interdisciplinary research, and involving legal scholars in policy debates about supporting early childhood development.² As I elaborate below, this symposium and the preceding national summit are promising steps in the creation of this new subdiscipline, highlighting the theoretical and practical benefits of this focused inquiry and generating a research agenda. Drawing on this momentum, this essay also identifies the next steps for building the subdiscipline, with the ultimate goal of reorienting the legal system to nurture early childhood development.

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1. See, e.g., Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, 2004 U. CHI. LEGAL F. 27, 29–30 (2004) (articulating a theory for dividing developmental responsibility among parents, children, and the state); Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 433–35, 497–98 (2006) (contending that the research on developmental psychology should lead to a new constitutional approach to family law because much constitutional doctrine assumes an informed citizenry capable of reasoned decision making, and yet 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); Nancy E. Dowd, *Black Boys Matter: Developmental Equality*, 45 HOFSTRA L. REV. 47, 48–72 (2016) (tying the early childhood development literature to theories of state regulation of families and proposing a model of “developmental equality”); Maxine Eichner, *The Privatized American Family*, 93 NOTRE DAME L. REV. 213, 216 (2018) (developing an argument for “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, notably during early childhood); 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) (proposing a theory of state regulation of families termed “ecogenerism,” a system that prioritizes the development of the next generation; this requires attention to 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; noting that the ecogenerist approach is relevant to children at all ages, but is particularly addresses the needs of children and families during early childhood).

2. See generally Clare Huntington, *Early Childhood Development and the Law*, 90 S. CAL. L. REV. 755 (2017).

I. THE BENEFITS OF A NEW SUBDISCIPLINE³

Scholars in numerous disciplines focus on early childhood: psychologists develop theories about the importance of attachment for very young children,⁴ neuroscientists map brain development during the first five years of life,⁵ economists calculate the profound impact of early childhood experiences on educational attainment and lifetime earnings,⁶ and educational scholars assess the impact of the school readiness gap that develops during early childhood.⁷ This interdisciplinary dialogue has been remarkably rich and varied, and, at heart, has generated three key insights. First, early childhood is a critical period of development, laying an essential foundation for academic achievement and life skills. Second, this development does not happen in a vacuum but instead turns on the interaction between a parent or other long-term caregiver and the child. Third, a child's experiences in early childhood profoundly affect the child's trajectory, in school and throughout adulthood.

Research on early childhood development has not been conducted in hermetic academic silos. Instead, scholars across disciplines are connected to each other and to the world of policy. By creating interdisciplinary research institutes and research councils that translate the scholarship for policymakers, scholars from multiple disciplines are influencing each other and the national debate about inequality and early childhood. One example is the Harvard Center on the Developing Child, created with the mission of translating neuroscientific research into child development for policymakers.⁸ Much of the terminology that has now become widespread—such as a child's "brain architecture" and the impact of "toxic stress"—comes from the translation efforts of the

3. This summary is based on my earlier article. *See id.* at 761–801 (elaborating on the benefits of creating the new subdiscipline of early childhood development and the law).

4. *See, e.g.*, JOHN BOWLBY, ATTACHMENT AND LOSS, VOL. 1: ATTACHMENT 265–349 (1969) (exploring the development of theories of attachment).

5. *See, e.g.*, Jack P. Shonkoff & Pat Levitt, *Neuroscience and the Future of Early Childhood Policy: Moving from Why to What and How*, 67 NEURON 689, 689 (2010) (exploring the ways in which the "robust interactions among genes, early experiences, and environmental influences" shape the developing brain).

6. *See, e.g.*, ISABEL V. SAWHILL, GENERATION UNBOUND: DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE 67–72, 75–80 (2014) (describing the impact of early childhood experiences, family structure, and class on educational attainment and lifetime earnings).

7. *See, e.g.*, Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in WHITHER OPPORTUNITY? RISING INEQUALITY, SCHOOLS, AND CHILDREN'S LIFE CHANCES 91, 92, 104–05 (Greg J. Duncan & Richard J. Murnane eds., 2011).

8. *See About The Center*, CTR. ON DEVELOPING CHILD HARV. UNIV., <https://developingchild.harvard.edu/about/> [<https://perma.cc/X7R4-XPU7>] ("Our founding mission was to generate, translate, and apply scientific knowledge that would close the gap between what we know and what we do to improve the lives of children facing adversity.").

Center.⁹

As noted above, some legal scholars engage with the distinctiveness of early childhood and how this relates to the legal regulation of families, but this debate tends to be disconnected from the interdisciplinary research on early childhood development and the national debate about fostering early childhood development as a means of combatting inequality. Thus, scholars from other disciplines generally do not incorporate legal scholarship, 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. This interdisciplinary, multi-university effort seeks to bring academic research into the world of policy. Council members come from numerous disciplines including the social sciences, yet there is not a single legal scholar involved in the project.¹⁰

Additionally, despite the widespread recognition of the importance of early childhood, the legal system generally does not recognize, protect, and support development during this period. Family law rules, for example, are generally not age-sensitive.¹¹ Child custody statutes in almost every state do not differentiate the needs of a two-year-old child and a twelve-year-old child.¹² The strict rules governing the child welfare system similarly do not distinguish the particular permanency needs of very young children, even though forty-one percent of children in foster care are age five or younger.¹³ And legal rules affecting how people parent—from employment laws that shape the low-wage workforce to landlord-tenant laws that determine whether a family has stable housing—do not account for the particular needs of parents with young children.

The absence of legal scholars from the national debate about early childhood development is a loss not only for legal scholars but also for

9. See *Brain Architecture*, CTR. ON DEVELOPING CHILD HARV. UNIV., <https://developingchild.harvard.edu/science/key-concepts/brain-architecture/> [https://perma.cc/SQ97-ME76] (defining brain architecture); *Toxic Stress*, CTR. ON DEVELOPING CHILD HARV. U., <https://developingchild.harvard.edu/science/key-concepts/toxic-stress/> [https://perma.cc/M2HT-2QCB] (defining toxic stress).

10. See *Council Members*, CTR. ON DEVELOPING CHILD HARV. UNIV., <http://developingchild.harvard.edu/science/national-scientific-council-on-the-developing-child/council-members> [https://perma.cc/2K9F-ZH7Y] (“[M]embers include[] leading researchers and scientists representing the fields of neurobiology, immunology, molecular biology, endocrinology, psychology, economics, social policy, and pediatric medicine.”).

11. FLA. STAT. § 61.29 (2011) (setting forth guidelines for the parent’s “minor or legally dependent child”).

12. *Id.*

13. U.S. DEP’T HEALTH & HUM. SERVS., ADMIN. CHILDREN & FAMILIES, CHILDREN’S BUREAU, THE AFCARS REPORT 1 (2017), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf> [https://perma.cc/AUC8-FSX8].

the broader debates about effective policies to foster early childhood development. Policy is instantiated through the legal system, and thus policy development without lawyers and legal scholars is incomplete. Psychologists, neuroscientists, and others are well-suited to determining the content of a parenting program, for example, but the formulation and implementation of policy is more effective when lawyers and legal scholars provide guidance with respect to a host of legal issues.

Four examples illustrate the substantial contributions legal scholars can make to the debates about fostering early childhood development. First, legal scholars have a deep understanding of the legal framework guiding state support of families. In exchange for considerable autonomy in rearing children, the state bears no affirmative responsibility for the well-being of families, including very young children. Knowing the constitutional roots for this passive approach to family well-being helps policymakers understand why, in the United States, efforts to support families often meet such political resistance.

Next, legal scholars possess a thorough knowledge of individual rights and an appreciation of the need to constrain the state. There is often tension between the state interest in healthy child development and the competing state interests of fostering pluralism and deferring to parental decision-making. 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 and especially the lives of low-income families. It is imperative, then, to determine how to provide support in a way that furthers rather than hinders autonomy. Legal scholars can help policymakers balance the potential impact on individual rights and find the practical tools needed to moderate intervention with family autonomy.

Similarly, legal scholars can help identify potential downsides of elevating early childhood, such as pitting 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. This is particularly true when the focus turns to the prenatal period because of the particular concern of intruding on a woman's right to reproductive decision-making. These are complex and contentious questions, and legal scholars can help determine the right balance.

Finally, legal scholars with a particular focus on the institutional context for policy can help surface the state interest in early childhood as it relates to multiple aspects of state regulation. 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, criminal law fails to appreciate the effect of incarceration on children, and zoning law fails to understand the

relationship between neighborhood configuration and family life. Legal scholars can identify the mechanisms for foregrounding this interest state interest in early childhood and help balance it with other state goals.¹⁴

To integrate legal scholars into interdisciplinary research and policy debates, and to prompt the law to take greater cognizance of early childhood, I recently called for a new field of early childhood development and the law.¹⁵ The idea draws on similar efforts to carve out areas that used to be subsumed into family law and criminal law, notably juvenile justice, domestic violence, and elder law. The success of these and other flourishing fields underscores that a subdiscipline with a specific research base, particular theoretical concerns, and practical implications increases scholarly engagement, can lead to significant legal reform, and can influence policy.

The new field of early childhood development and law should be built on three foundational principles. First, early childhood is so acutely important for human development, and it has such an enduring impact on a child's outcomes, that the state has a distinctive interest in healthy development during this period, which should be reflected in the legal system. Second, the state should be attentive to the needs of families throughout children's lives, but there is something different in kind, and not just degree, in the imperative to bolster the parent-child relationship during this early period. Finally, the new subdiscipline should define the contours and content of a legal system committed to fostering positive development in the first five years of life. Following these principles will help legal scholars to integrate into the interdisciplinary debate and policy dialogue about early childhood and inequality.

As the next sections describe, this new subdiscipline is beginning to take root.

II. THE NASCENT SUBDISCIPLINE AND LEADERSHIP FROM THE UNIVERSITY OF FLORIDA

The University of Florida has been a leader in integrating lawyers and legal scholars into interdisciplinary debates about early childhood development and ensuring that this collaboration reaches policymakers. In February 2017, the Anita Zucker Center for Excellence in Early Childhood Studies at the University of Florida brought together multiple parts of the University, including the colleges of Education, Medicine, Public Health and Health Professions, and Law, as well as service providers, policymakers, government officials, and scholars from other

14. There are numerous other examples, such as legal scholars questioning the state of the science, specifically whether the evidence on early childhood development is sufficiently reliable and asking how the science will be used. *See generally* Clare Huntington, *The Empirical Turn in Family Law*, 118 COLUM. L. REV. 227 (2018).

15. *See* Huntington, *supra* note 2.

academic institutions for a national summit on early childhood.¹⁶ In the two-day working summit, the participants engaged a series of questions focused on developing effective policies and gaining political support for investments in early childhood. The three areas of inquiry were using research to inform policy,¹⁷ developing policies that foster early childhood development,¹⁸ and garnering support for the needed investments.¹⁹ The summit successfully brought together groups that do not interact nearly enough, particularly academics and service providers. And the summit usefully grounded the discussion by involving elected officials, who focused the conversation on the art of the possible.

Among other follow-up efforts, the University of Florida Levin College of Law hosted a two-day conference in April 2018 for legal scholars. In a series of roundtables, the group considered bedrock commitments of the legal system and the needs of families and children, debated strategies and next steps, and reflected on the particular role of legal scholars in the multidisciplinary project. As the next section describes, both gatherings demonstrated the generative potential of the subdiscipline of early childhood development and the law.

The Early Childhood National Summit in 2017 and the University of Florida's law school conference in 2018 highlighted the importance of incorporating legal scholars into ongoing interdisciplinary work, generated a research agenda for the new subdiscipline, and showcased the potential contributions of legal scholars to policy debates. It is beyond the scope of this essay to capture the nuanced and far-ranging conversations at both gatherings, and the dialogue at each was wonderfully robust, but a few examples illustrate the value of this nascent subdiscipline.

Beginning with interdisciplinary work, almost every conversation at each gathering drew in some manner on underlying research from multiple fields. When we talked about the legal structure of care, for example, which places the burden of caregiving on families not society, we referred to psychological and neuroscientific research on children's need for attentive interactions with a stable caregiver. When we discussed

16. *See Early Childhood National Summit*, UNIV. FLA.: ANITA ZUCKER CTR. FOR EXCELLENCE IN EARLY CHILDHOOD STUDIES, <https://ceecs.education.ufl.edu/national-summit/> [<https://perma.cc/SD6G-2PHM>].

17. *See id.* ("Discovering the Keys to Opening Young Minds: Identify how knowledge from neuroscience, epigenetics, and the learning sciences, may be used to inform strategies that strengthen children's resilience to biological, environmental and established risks.")

18. *See id.* ("Influencing the Influencers to Unlock Children's Potential: Identify effective strategies to integrate and advance social policies focused on young children who are vulnerable and their families.")

19. *See id.* ("Inspiring New Initiatives for the Next Generation: Identify approaches that have shown promise for supporting caregivers' and practitioners' implementation of evidence-based practices and improving children's health, developmental, and learning outcomes.")

legal impediments to accessing long-acting reversible contraceptives, we referred to the research on the economic and relationship benefits of delaying childbearing. And when we discussed the legal rules governing unmarried fathers' access to young children, we referred to the interdisciplinary Fragile Families and Child Wellbeing Study.

But as we drew on this research, we also noted that it lacks a legal perspective. Consider research on nonmarital families. The current research—by sociologists, scholars of social work, and others²⁰—sheds light on relationships and dynamics in these families. But this research does not address a core issue of concern to legal scholars: the proper custody rule for unmarried fathers. As we discussed at the law school gathering, this is an active debate in legal scholarship. Some legal scholars contend that the law should treat unmarried parents the same as married parents, and thus give unmarried fathers considerable rights to their children from birth; by contrast, other scholars argue that such a rule would harm unmarried mothers and children.²¹ This debate ultimately turns on an empirical question: which custody rule is better for children? Research in other disciplines, however, does not answer this question because scholars are not tracking the custodial status of the parents and are not collecting data about whether unmarried fathers seek a visitation or custody order. The research *does* show that unmarried parents are likely to end their relationships much sooner than married parents,²² and thus the custody rule for unmarried parents matters a great deal for early childhood development. But we do not know which custody rule is better for children. As we noted at the gatherings, legal scholars and scholars in other disciplines would all benefit if the interdisciplinary research considered legal variables such as the presence of a custody order or state variation in default custody rules. The nascent subdiscipline of early childhood development and the law should help encourage this kind of cross-pollination.

20. See KATHRYN EDIN & TIMOTHY NELSON, *DOING THE BEST I CAN* (2013); *About the Fragile Families & Child Wellbeing Study*, PRINCETON UNIV.: FRAGILE FAMS. & CHILD WELLBEING STUDY, <https://fragilefamilies.princeton.edu/about> [<https://perma.cc/GT3E-JW58>] (last visited May 20, 2017) (crediting Sara McLanahan and Irwin Garfinkel as principal investigators).

21. Compare Clare Huntington, *Post-Marital Family Law: A Legal Structure for Non-Marital Families*, 67 *STAN. L. REV.* 167 (2015), with June Carbone & Naomi Cahn, *Nonmarriage*, 76 *MD. L. REV.* 55 (2016).

22. Patricia Brown & Steven T. Cook, *Children's Placement Arrangements in Divorce and Paternity Cases in Wisconsin*, INST. FOR RESEARCH ON POVERTY, UNIV. OF WIS.-MADISON 1, 6–7 tbl.1b (2012), https://www.irp.wisc.edu/wp/wp-content/uploads/2018/06/Task4A_CS_09-11_Final_revi2012.pdf [<https://perma.cc/7NSE-WBVT>] (examining custodial arrangements in Wisconsin for cases from 1996 to 2007 and finding that when unmarried parents seek a custody order, the child is an average of two years old, as compared with nine years old for divorcing couples).

Turning to a research agenda, one of the touchstones in both gatherings was the success of many states in securing state-level funding for early childhood education, especially pre-kindergarten for four-year-olds. We repeatedly noted that this success took effective leadership and broad-based political support at the state level. And we discussed the surprising fact that states with conservative-leaning political cultures—not known for generous social welfare spending—are national leaders on this issue. These reflections made us realize that we need a much better understanding of the political economy of public investment in pre-kindergarten. As I have elaborated elsewhere,²³ there are multiple questions to explore: Are the state-level preschool investments part of a broader anti-poverty strategy? What is driving the state-level investments in preschool in states that do not typically provide robust social welfare programs? What is the rhetoric of early childhood development and state funding? How can advocates and policymakers in other states learn from these success stories? Relatedly, what is the likelihood this political momentum will transfer to other kinds of family-supportive efforts and programs? What are the trade-offs in terms of policy but also politics? And what are the dangers in calling for additional support for early childhood development? In short, as much as the National Summit and the law school follow-up focused on what we do know, they also helped identify what we still need to learn.

Finally, the gatherings showed the important contributions of legal scholars to policy debates. During the last day of the summit, for example, the participants broke into small groups and identified a broad agenda for promoting early childhood development. One theme in these conversations was conditioning state support on families taking certain, sometimes onerous, steps to receive this support. The legal scholars in the room were able to identify the longstanding and problematic history of linking state support with the loss of family autonomy, especially for low-income families. The legal scholars were also able to place the debate in a legal framework, helping the participants appreciate the constitutional commitment to family autonomy and pluralism. Similarly, when the discussions repeatedly assumed that mothers would be able to shoulder additional responsibility for their children's development, the legal scholars tied this conversation to larger debates about gender roles in the family and the role the law too often plays in reinforcing traditional roles. In both instances, legal scholars helpfully steered the policy debate, reinforcing the importance of legal scholars having a seat at the policy table.

23. Clare Huntington, *Early Childhood Development and the Replication of Poverty*, in *FEDERALISM AND POVERTY* (Ezra Rosser ed.) (Cambridge Univ. Press forthcoming).

Where do we go from here? Broadly speaking, there is an increasing awareness and appreciation of the importance of early childhood development for both individual and societal flourishing. The interdisciplinary research and policy debates about fostering this development, however, have been missing a legal perspective—until now. With the leadership of key academic institutions, particularly the University of Florida, and with the growing embrace of a new subdiscipline in the law—early childhood development and the law—legal scholars are beginning to play a vital role in these debates.

To build on this promising start, legal scholars should take several steps. To begin, we must continue to engage each other through written work and conferences, such as this symposium in the *Florida Law Review Forum* and the gathering organized by the University of Florida Levin College of Law. A robust and ongoing scholarly dialogue about the role of the legal system in fostering early childhood development is critical to furthering our understanding of the issues identified in this essay. It will also help legal scholars identify new avenues of scholarly exploration, encouraging us to challenge each other and our own thinking. We should also continue to meet in person. These gatherings help us build an identity as a group of scholars committed to a set of theoretical and practical questions about the legal system and early childhood development.

As we establish a scholarly dialogue and identity within law, we should also work with scholars in other disciplines. Interdisciplinary collaboration often presents logistical and substantive challenges, but it is absolutely necessary in the area of early childhood development. Legal scholars must organize and attend interdisciplinary conferences, co-author with scholars from other disciplines, publish in non-legal journals and edited volumes, and establish professional relationships with scholars from a range of disciplines. Through this collaboration, the interdisciplinary research on early childhood will begin to incorporate a legal perspective, deepening the knowledge and understanding of scholars in multiple disciplines. Relatedly, we should encourage our own universities to develop interdisciplinary centers, such as the Anita Zucker Center for Excellence in Early Childhood Studies. This kind of institutional leadership and practical means for integrating scholars across a university is invaluable.

Finally, we should insert ourselves more directly into policy debates. As noted throughout this essay, legal scholars have much to offer, and policymakers will benefit from our contributions, but right now they do not know what they are missing. Interdisciplinary centers housed in universities can play a key bridge role, but scholars can also reach out directly. Inviting service providers and elected officials to conferences, agreeing to speak in public fora, and writing an accessible version of a scholarly article for a popular audience are all effective strategies for

developing ties to the policy world. As we become a more consistent presence at the table, our participation will soon be as unremarkable as it is critical.

As this brief outline suggests, there is much more to be done. But we are off to a good start.