
Over-Parenting

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Today the child is king. Child rearing practices have changed significantly over the last two decades. Contemporary parents engage in Intensive Parenting. Parents devote their time to actively enriching the child, ensuring the child's individual needs are addressed and that he is able to reach his full potential. They also keep abreast of the newest child rearing knowledge and consistently monitor the child's progress and whereabouts. Parents are expected to be cultivating, informed, and monitoring. To satisfy these high standards, parents utilize a broad array of technological devices, such as the cellular phone and the Internet, making Intensive Parenting a socio-technological trend.

Many legal doctrines aim at defining the scope of parental responsibilities; yet, courts, legislatures, and scholars alike have ignored this significant change in child rearing practices. Unattended, the law already plays an important role in enhancing the socio-technological trend of Intensive Parenting. In the area of custody disputes, legislatures and courts effectively enforce Intensive Parenting norms. Other recent legal developments, such as the constriction of the Parental Immunity Doctrine and recurring transformation of preferred child rearing practices into

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legal standards, open the door to the incorporation of additional Intensive Parenting norms into the law.

This Article underscores that despite its advantages, Intensive Parenting can become over-parenting. First, the Article shows that Intensive Parenting is not a universal trend. It is dependent on class, race, ethnicity, and culture. Enforcement of Intensive Parenting in a multicultural society would increase existing biases in the child welfare system and force Intensive Parenting on those who may be financially unable or ideologically unwilling to adopt it. Second, the Article reveals that although Intensive Parenting carries important advantages, it can disrupt healthy psychological development in children. The Article, therefore, cautions against hasty incorporation of Intensive Parenting norms into the law.

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INTRODUCTION

In the early 1990s, the “Mozart Effect” swept the country. French researcher, Dr. Alfred A. Tomatis, in his 1991 book titled *Pourquoi Mozart?*, argued that a baby who listens to Mozart’s music may improve his mental and cognitive skills.¹ In 1993, the prestigious journal *Nature* published research backing Tomatis’s claim. The research demonstrated that students who listened to Mozart have enhanced mental skills.² In 1994, *New York Times* columnist Alex Ross wrote that Tomatis’s research had “determined that listening to Mozart actually makes you smarter.”³

In subsequent years, different books, such as Don Campbell’s, *The Mozart Effect for Children: Awakening Your Child’s Mind, Health, and Creativity with Music*,⁴ spread the notion that parents should invest effort in exposing their babies to music in order to enhance their development. A multitude of commercial products followed. These products included videotapes and DVDs such as “Baby Mozart,” which was part of the “Baby Einstein” series,⁵ classical music DVDs and CDs for babies,⁶ books,⁷ and even specially designed music players.⁸

¹ ALFRED TOMATIS, *POURQUOI MOZART?* 17, 58-59 (1991).

² See Frances H. Rauscher et al., *Music and Spatial Task Performance*, 365 *NATURE* 611 (1993).

³ Alex Ross, *Listening to Prozac . . . Er, Mozart*, *N.Y. TIMES*, Aug. 28, 1994, at 223.

⁴ DON CAMPBELL, *THE MOZART EFFECT FOR CHILDREN: AWAKENING YOUR CHILD’S MIND, HEALTH, AND CREATIVITY WITH MUSIC* 8-9, 13-16 (2000) [hereinafter *AWAKENING YOUR CHILD’S MIND*]; see also DON CAMPBELL, *THE MOZART EFFECT: MUSIC FOR MOMS AND MOMS-TO-BE* (2005) [hereinafter *MUSIC FOR MOMS*]; DON CAMPBELL, *THE MOZART EFFECT: TAPPING THE POWER OF MUSIC TO HEAL THE BODY, STRENGTHEN THE MIND, AND UNLOCK THE CREATIVE SPIRIT* 15-30 (1997) [hereinafter *TAPPING THE POWER OF MUSIC*]; MARY MICHE, *WEAVING MUSIC INTO YOUNG MINDS* (2001); GORDON L. SHAW, *KEEPING MOZART IN MIND* 169-205 (2d ed. 2004).

⁵ The “Baby Einstein” series includes numerous titles based on Mozart’s music and music by other classical composers whose music is presumed to generate the same effect. See, e.g., *BABY BACH: MUSICAL ADVENTURE* (Walt Disney Video 2000); *BABY BEETHOVEN: SYMPHONY OF FUN* (Walt Disney Video 2002); *BABY MOZART: MUSIC FESTIVAL* (Walt Disney Video 2000).

⁶ Some of the above-mentioned DVDs have accompanying CDs. See, e.g., *BABY BEETHOVEN: CLASSICAL MUSIC TO STIMULATE AND DELIGHT YOUR BABY* (Buena Vista 2002); *BABY MOZART: A SOOTHING CLASSICAL MUSIC EXPERIENCE FOR BABIES* (Buena Vista 2002). Don Campbell’s books (see *supra* note 4) also have accompanying music CDs. See, e.g., *THE MOZART EFFECT: MUSIC FOR BABIES VOLUME 1: FROM PLAYTIME TO*

Additional research showed that to the extent that a Mozart Effect exists, it is limited only to short-term benefits,⁹ while other research demonstrated that the Mozart Effect is no more than a myth.¹⁰ Ultimately, The Walt Disney Company offered refunds for all purchases of “Baby Einstein” videos.¹¹ Despite all this, since the 1990s, parents methodically expose their children to classical music to ensure that they develop to their full potential.¹²

Interestingly, the Mozart Effect not only transformed child rearing practices, but also carried political and legal effects. In 1998, Zell Miller, Governor of Georgia, pledged to allocate \$105,000 a year for providing every newborn in Georgia with a tape or CD of classical music.¹³ Similarly, in 1999, the state of Florida enacted a law

SLEEPYTIME (Children’s Group 1998); THE MOZART EFFECT: MUSIC FOR BABIES VOLUME 2: NIGHTY NIGHT (Children’s Group 2000); THE MOZART EFFECT: MUSIC FOR NEWBORNS: A BRIGHT BEGINNING (Children’s Group 2000).

⁷ See CAMPBELL, AWAKENING YOUR CHILD’S MIND, *supra* note 4; CAMPBELL, MUSIC FOR MOMS, *supra* note 4; CAMPBELL, TAPPING THE POWER OF MUSIC, *supra* note 4; MICHE, *supra* note 4; SHAW, *supra* note 4.

⁸ See, e.g., Baby Einstein Take Along Tunes, http://www.amazon.com/Baby-Einstein-30704-Takealong-Tunes/dp/B000YDDF6O/ref=sr_1_3?ie=UTF8&s=toys-and-games&qid=1249109453&sr=1-3 (last visited Feb. 14, 2010); The First Years: Crib CD Player, <http://www.amazon.com/First-Years-Crib-CD-Player/dp/B000056J6T> (last visited Feb. 14, 2010).

⁹ See, e.g., Kenneth Steele et al., *Failure to Confirm the Rauscher and Shaw Description of Recovery of the Mozart Effect*, 88 PERCEPTUAL & MOTOR SKILLS 843, 843 (1999) [hereinafter *Failure to Confirm*]; Kenneth Steele et al., *Listening to Mozart Does Not Enhance Backwards Digit Span Performance*, 84 PERCEPTUAL & MOTOR SKILLS 1179, 1182-83 (1997) [hereinafter *Listening to Mozart*].

¹⁰ See, e.g., Steele et al., *Failure to Confirm*, *supra* note 9, at 847; Steele et al., *Listening to Mozart*, *supra* note 9, at 1182-83; Kenneth Steele et al., *The Mystery of the Mozart Effect: Failure to Replicate*, 10 PSYCHOL. SCI. 366, 366 (1999); Kenneth Steele et al., *Prelude or Requiem for the ‘Mozart Effect?’*, 400 NATURE 826, 826-27 (1999).

¹¹ Tamar Lewin, *No Einstein in Your Crib? Get a Refund*, N.Y. TIMES, Oct. 23, 2009, at A1.

¹² See Adrian Bangarter & Chip Heath, *The Mozart Effect: Tracking the Evolution of a Scientific Legend*, 43 BRIT. J. SOC. PSYCHOL. 605, 609 (2004).

¹³ Kevin Sack, *Georgia’s Governor Seeks Musical Start for Babies*, N.Y. TIMES, Jan. 15, 1998, at A12. Governor Miller explained his initiative in an interview:

As you know, the brain has two lobes. The studies show that music engages both hemispheres of the brain — its creativity and emotion engage the right lobe, while rhythm and pitch engage the left. So people who receive musical exposure at a young age develop a bundle of nerves that connects those two halves.

Glenn McNatt, *Music: The Music-loving Governor of Georgia is Providing Every Newborn in His State with a CD of Classical Music*, BALTIMORE SUN, July 6, 1998, quoted in Bangarter &

mandating state-run schools and daycares to play classical music daily in order to expose toddlers to the music and its benefits.¹⁴

The Mozart Effect is not an isolated phenomenon. It is part of a child rearing trend, which has dominated parenting in the last two decades. Since the mid-1980s, parents have been increasingly involved in their children's lives. The media and popular writers have described this practice as: "helicopter parenting," "smothering mothering," "alpha parenting," or "child-centered parenting."¹⁵ We will use the term "Intensive Parenting" to describe the dominant contemporary parent.¹⁶ This parent is an intensive parent who actively cultivates her child, acquires sophisticated knowledge of best child rearing practices, and utilizes this knowledge to closely monitor the child's development and daily activities.

Legal scholars have written about parental responsibilities in different contexts. Some scholars considered the scope of parents' liability in tort for their child's injury.¹⁷ Other scholars considered basic parental obligations and diverse parenting styles in the context of abuse and neglect proceedings.¹⁸ Many scholars discussed parental responsibility upon divorce.¹⁹ Yet, surprisingly, despite the striking

Heath, *supra* note 12, at 609.

¹⁴ S. 660th leg. (Fla. 1998) (approved by Governor on May 21, 1998); *see also* RAHIMA BALDWIN DANCY, *YOU ARE YOUR CHILD'S FIRST TEACHER: WHAT PARENTS CAN DO WITH AND FOR THEIR CHILDREN FROM BIRTH TO AGE SIX* 236 (2000) (discussing Florida bill); Erica Goode, *Mozart for Baby? Some Say, Maybe Not*, N.Y. TIMES, Aug. 3, 1999, at F1 (describing Florida bill).

¹⁵ Lisa Belkin, *Let the Kid Be*, N.Y. TIMES, May 31, 2009, at MM19.

¹⁶ We borrow and alter the term used by Sharon Hays, "Intensive Mothering." *See* SHARON HAYS, *THE CULTURAL CONTRADICTIONS OF MOTHERHOOD* 1-18 (1996).

¹⁷ *See generally* Maureen S. Binetti, *Child's Right to Life, Liberty and the Pursuit of Happiness: Suits by Children Against Parents for Abuse and Abandonment*, 34 RUTGERS L. REV. 154 (1981) (discussing children's right to sue parents for abuse in conjunction with the demise of Parental Immunity Doctrine); Vincent R. Johnson & Claire G. Hargrove, *The Tort Duty of Parents to Protect Minor Children*, 51 VILL. L. REV. 311 (2006) (arguing that courts should impose an affirmative duty on parents to protect their children from serious physical harm not created by parent); Sandra L. Haley, Comment, *The Parental Tort Immunity Doctrine: Is It a Defensible Defense?*, 30 U. RICH. L. REV. 575 (1996) (critiquing the Parental Immunity Doctrine).

¹⁸ *See, e.g.*, ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 60-159 (1999) (describing neglect and abuse cases and traditional state reactions); DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 59-60 (2002) (describing bias in neglect proceedings against shared parenting practices that are common among African Americans).

¹⁹ *See generally* Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL'Y & L. 5 (2002) (discussing trends in custody law reform); Solangel Maldonado, *Beyond Economic*

transformation of the child-parent relationship over the past two decades and the existing and potential legal effects of this change, legal scholars have failed to address the implications of Intensive Parenting.

In this Article, we present the practice of Intensive Parenting. The dominant contemporary parents are intensive parents: they are cultivating, knowledgeable, and monitoring. We demonstrate that Intensive Parenting is enhanced by parental use of new technologies, such as the Internet and cellular phone. These technologies enable access to vast amounts of information about child rearing and facilitate the monitoring of children. Indeed, Intensive Parenting carries important advantages, including improved academic achievements and enhanced ability to negotiate with institutions.²⁰ Yet, Intensive Parenting can be excessive and detrimental to the psychological well-being of children. Intensive Parenting's position as the dominant parenting style disadvantages classes and cultures that do not share the middle class ideal of Intensive Parenting. Turning to the law, certain norms of Intensive Parenting have already been incorporated, particularly in the area of custody disputes. Furthermore, the law contains enabling structures that can facilitate the integration of the high standards of Intensive Parenting into legal standards. While we do not criticize parental involvement per se, we argue that Intensive Parenting can be harmful when practiced without moderation and coerced on those who espouse different parenting styles. We, therefore, argue that the norms of Intensive Parenting should not be hastily incorporated into the law.

Fatherhood: Encouraging Divorced Fathers to Parent, 153 U. PA. L. REV. 921 (2005) (discussing problem of paternal disengagement after divorce); Elizabeth S. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995) (developing a model of the parent as a fiduciary); Elizabeth S. Scott, *Pluralism, Parental Preference and Child Custody*, 80 CALIF. L. REV. 615 (1992) (proposing the Approximation Rule for resolving custody allocations) [hereinafter *Pluralism*]; Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search of a Just and Workable Standard*, 33 FAM. L.Q. 815 (1999) (arguing for the need to perfect the best interest of child standard in the context of custody law).

²⁰ See ANNETTE LAREAU, *UNEQUAL CHILDHOODS: CLASS, RACE AND FAMILY LIFE* 5-6 (2003); Wendy S. Grolnick & Richard M. Ryan, *Parents Styles Associated with Children's Self-Regulation and Competence in School*, 81 J. EDUC. PSYCHOL. 143, 143 (1989) (indicating that involved mothers produced children with higher grades); Timothy Keith et al., *Does Parental Involvement Affect Eighth-grade Student Achievement?: Structural Analysis of National Data*, 22 SCH. PSYCHOL. REV. 474 (1993) (showing that increased parental involvement had direct impact on children's motivation, achievement, and time spent completing homework).

We begin by describing the social practice of Intensive Parenting. Today's parents are much more involved in their children's lives than were parents of previous generations. The intensive parents are on a constant quest to obtain updated knowledge of the best child rearing practices and use this information actively to cultivate their child and monitor all aspects of the child's life.²¹ Intensive Parenting begins as early as pregnancy, when the pregnant mother accesses an ever increasing amount of information instructing her on how to achieve an optimal pregnancy.²² When the child is born, Intensive Parenting continues as parents rely on a multitude of monitoring devices, such as "nanny cams," and safety devices, such as helmets and knee pads for bicycle riding.²³ As the child enters school, parents monitor him by organizing and regularly participating in a growing number of school and after-school activities.²⁴ Finally, parental involvement does not end as the child leaves home. This generation of parents, in a sense, accompanies its children to college. Colleges have recently adjusted to accommodate a new generation of parents who insist on being in direct contact with college administrators and professors to monitor their children's lives.²⁵

²¹ See *infra* Part I.

²² The pregnant woman can consult a growing number of pregnancy books and websites that contain information about the best practices for achieving the optimal pregnancy. See generally VICKI IOVINE, *THE GIRLFRIEND'S GUIDE TO PREGNANCY* (2007); HEIDI MURKOFF & SHARON MAZEL, *WHAT TO EXPECT: EATING WELL WHEN YOU ARE EXPECTING* (2005); HEIDI MURKOFF & SHARON MAZEL, *WHAT TO EXPECT WHEN YOU ARE EXPECTING* (4th ed. 2008) [hereinafter *WHAT TO EXPECT WHEN YOU ARE EXPECTING*]; BABYCENTER, <http://www.babycenter.com> (last visited Feb. 14, 2010); *Pregnancy & Parenting*, iVILLAGE, <http://parenting.ivillage.com> (last visited Feb. 14, 2010).

²³ For websites selling nanny cams, see for example *Hidden Cameras or Nanny Cams*, TBO-TECH: SELF-DEFENSE PRODUCTS, <http://www.tbotech.com/hidden-cameras.htm> (last visited Feb. 14, 2010); *Marquis Security Cameras*, NANNY CAMS, <http://www.knowyournanny.com> (last visited Feb. 14, 2010). For websites discussing and selling bicycle riding safety equipment for children, see for example *Dora Micro Bicycle Helmet and Protective Value Pack (Child)*, AMAZON.COM, <http://www.amazon.com/Micro-Bicycle-Helmet-Protective-Value/dp/B0018CUSYW> (last visited Feb. 14, 2010); *Pamphlet: A Bicycle Helmet for My Child*, BICYCLE HELMET SAFETY INSTITUTE, <http://www.bhsi.org/childpam.htm> (last visited on Feb. 14, 2010).

²⁴ See JUDITH WARNER, *PERFECT MADNESS: MOTHERHOOD IN THE AGE OF ANXIETY* 115-16 (2005).

²⁵ See Hara Estroff Marano, *A Nation of Wimps*, 37 *PSYCHOL. TODAY* 58, Nov. 1, 2004, at 64-68, available at <http://www.psychologytoday.com/articles/pto-20041112-000010.html>. Many colleges have dedicated parts of their websites to parents. See for example *Parent's Guide*, N.Y. UNIV., <http://www.nyu.edu/community/parents.guide.html> (last visited Feb. 14, 2010) [hereinafter *Parent's Guide*].

We posit that Intensive Parenting is not confined to social child rearing norms. Intensive Parenting norms are significantly reinforced by available technologies making Intensive Parenting a socio-technological trend.²⁶ New information technologies provide parents with sophisticated options to improve the monitoring of their children.²⁷ Two technologies are particularly important for the intensive parent: the cellular phone and the Internet. Parents use the cellular phone to exercise remote parenting and stay in constant contact with their children.²⁸ In the words of one mother: “I can’t be a mom and not have a phone.”²⁹ As intensive parents use the cellular phone to communicate with their college-aged children over the smallest anecdotes of life, some have called the cellular phone “the world’s longest umbilical cord.”³⁰ The Internet is another important tool for the intensive parent. The intensive parent spends many hours online researching his child’s development to assess potential developmental problems and to learn of new safety risks, such as recalled items.³¹

The law has an important role in enhancing the socio-technological trend of Intensive Parenting.³² First, we reveal that it is during divorce

²⁶ We tend to create technologies in our image. Our technologies reflect our social values, but in turn as they are used they also enforce the values that created them. See DAVID ELLIOTT & RUTH ELLIOTT, *THE CONTROL OF TECHNOLOGY* 10 (1976) (describing a two-way process in which values affect technologies and technologies affect values); ANDREW FEENBERG, *ALTERNATIVE MODERNITY: THE TECHNICAL TURN IN PHILOSOPHY AND SOCIAL THEORY* 227-28 (1995) (describing the relationship between society and technology as reciprocal, that is, our way of life is also affected by our technologies).

²⁷ Doubtless society as a whole has become more monitoring, as is evident by the ubiquity of surveillance cameras, companies collecting personal information on the Internet, and large government databases. See generally DAVID BRIN, *THE TRANSPARENT SOCIETY* (1998). Parental monitoring in a sense reflects this societal trend but is also enhanced by the social pressure of the movement of Intensive Parenting.

²⁸ See Leysia Palen & Amanda Hughes, *When Home Base Is Not a Place: Parents’ Use of Mobile Telephones*, 11 *PERS. UBIQUITOUS COMPUTING* 339, 343 (2007).

²⁹ *Id.*

³⁰ See Sue Shellenbarger, *Tucking the Kids in — in the Dorm: Colleges Ward off Overinvolved Parents*, *WALL ST. J.*, July 25, 2005, at D1; see also Judith Hunt, *Make Room for Daddy . . . And Mommy: Helicopter Parents Are Here!*, *J. ACAD. ADMIN. HIGHER EDUC.*, Spring 2008, at 9, available at [http://jwpress.com/JAAHE/Issues/JAAHE-Spring2008.pdf?Spring07=Spring+2008+Issue+\(Copyright+2008+JW+Press](http://jwpress.com/JAAHE/Issues/JAAHE-Spring2008.pdf?Spring07=Spring+2008+Issue+(Copyright+2008+JW+Press).

³¹ See *infra* Part II.B.

³² For discussion of the way the law affects social norms in the family context, see generally STEVEN L. NOCK, *MARRIAGE IN MEN’S LIVES* 23 (1998); William Bishop, *Is He Married?: Marriage as Information*, 34 *U. TORONTO L.J.* 245 (1984); Eric A. Posner, *Family Law and Social Norms*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* 256, 259-62 (F.H. Buckley ed., 1999); Maldonado, *supra* note 19; Elizabeth S. Scott, *The*

and specifically during custody disputes that the law already actively enforces Intensive Parenting norms. Custody laws in effect enhance Intensive Parenting through laws tying custody determinations to past parental caretaking roles and laws reducing child support payments when additional time is spent with the child.³³

Secondly, we uncover legal enabling structures that can facilitate the incorporation of Intensive Parenting norms into legal standards. We discuss the constriction of the Parental Immunity Doctrine. The Parental Immunity Doctrine traditionally held that children cannot bring tort actions against their parents.³⁴ Yet, over the last three decades, courts have significantly narrowed the scope of the Doctrine, thereby exposing parents to additional sources of liability based on their functioning as parents.³⁵ We also analyze the way in which novel cultivation and monitoring norms based on new child rearing knowledge are incorporated into the law, thereby creating new legal duties. We examine parental liability for children's lead-based injuries; legislative measures against women who consume alcohol during pregnancy; and child obesity as a cause for child removal from parents and as a factor in determining custody allocation. These are illustrations of legal standards based on norms that are derived from newly acquired knowledge of preferred or safe child rearing practices.³⁶ This Article's goal is not to challenge the appropriateness

Legal Construction of Norms: Social Norms and the Legal Regulation of Marriage, 86 VA. L. REV. 1901 (2000) [hereinafter *Legal Construction of Norms*]; Sarah Waldeck, *Using Male Circumcision to Understand How Social Norms Work as Multipliers*, 72 U. CIN. L. REV. 455 (2003). For discussions of the law's ability to influence the design and use of new technologies, see generally Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035 (2002); Niva Elkin Koren, *Making Room for Consumers Under the DMCA*, 22 BERKELEY TECH. L.J. 1119 (2007); Beth Simone Noveck, *Trademark Law and the Social Construction of Trust: Creating the Legal Framework for Online Identity*, 83 WASH. U. L.Q. 1733 (2005).

³³ See *infra* Part III.

³⁴ The Supreme Court of Mississippi created the Parental Immunity Doctrine in 1891. In *Hewellette v. George*, the Court ruled that a minor daughter could not bring a false imprisonment claim against her mother for putting the daughter away in an insane asylum. 9 So. 885, 886-87 (Miss. 1891), *abrogated by* *Glaskox v. Glaskox*, 614 So. 2d 906 (Miss. 1992).

³⁵ Some states completely abolished the Doctrine. See, e.g., *Gibson v. Gibson*, 479 P.2d 648, 651 (Cal. 1971); *Anderson v. Stream*, 295 N.W.2d 595, 599-600 (Minn. 1980); *Guess v. Gulf Ins. Co.*, 627 P.2d 869, 871 (N.M. 1981). Other states constricted the Doctrine. See, e.g., *Silesky v. Kelman*, 161 N.W.2d 631, 632-34 (Minn. 1968), *overruled by* *Anderson v. Stream*, 295 N.W.2d 595 (Minn. 1980); *Goller v. White*, 122 N.W.2d 193, 198 (Wis. 1963).

³⁶ See *infra* Part V.

of these measures in the context of lead, alcohol, or obesity, but to reveal the existence of enabling structures for future incorporation of the high standards of Intensive Parenting into legal monitoring duties. We caution that even desirable Intensive Parenting norms may be unsuitable as legal standards.

Finally, we argue against hasty incorporation of the norms of Intensive Parenting into legal standards. We posit that although Intensive Parenting has important advantages it is not an innocuous practice. Intensive Parenting can be excessive and has the potential of becoming over-parenting. We advocate caution in incorporating Intensive Parenting norms into legal standards because such integration can carry adverse social and individual ramifications. Furthermore, some commentators have recently pointed to the beginning of a social backlash against Intensive Parenting.³⁷ The incorporation of Intensive Parenting norms into legal standards would prevent a social evolution away from Intensive Parenting. Specifically, Intensive Parenting is a culture and class dependent practice of child rearing, originating from the American middle class, and affecting particularly women. This trend is resisted among members of other cultures and members of social classes that lack the resources or the desire to engage in this practice. Furthermore, we argue that incorporation of Intensive Parenting standards could enhance the existing bias in the child welfare system against minority child rearing practices.³⁸ Moreover, we discuss new psychological research suggesting that Intensive Parenting carries adverse ramifications for children's psychological well-being. Studies find that Intensive Parenting contributes to higher rates of anxiety, depression, and substance abuse and, furthermore, impairs children's sense of independence.³⁹

This Article proceeds as follows. Part I examines the social practice of Intensive Parenting, demonstrating that the contemporary intensive parent is exceedingly cultivating, monitoring, and knowledgeable. Part II shows that the norms of Intensive Parenting are reinforced by new technologies, focusing specifically on the intensive parents' use of the cellular phone and the Internet. Part III reveals that the law in the area

³⁷ See Belkin, *supra* note 15, at MM19 (arguing that the trend of Intensive Parenting is ending); Nancy Gibbs, *The Growing Backlash Against Overparenting*, TIME, Nov. 20, 2009, <http://www.time.com/time/nation/article/0,8599,1940395-1,00.html> (describing a backlash against Intensive Parenting).

³⁸ See *infra* Part V.A.1.

³⁹ See *infra* Part V.B.

of custody disputes already reinforces Intensive Parenting norms. Part IV uncovers legal structures that can further facilitate the transformation of Intensive Parenting norms into legal standards. Part V reveals the adverse ramifications of Intensive Parenting, arguing against the hasty incorporation of Intensive Parenting norms into the law, which would amplify these detrimental effects.

I. THE SOCIAL TREND OF INTENSIVE PARENTING

“I wish my parents had some hobby other than me.”⁴⁰

Parental involvement in children’s lives has changed dramatically throughout history. Parental care began from virtually no involvement in the infant’s life in antiquity.⁴¹ This lack of involvement later transformed into increased but carefully measured involvement in the first half of the twentieth century,⁴² finally becoming intense and ongoing supervision in many contemporary cultures, including American culture. Current parenting standards have been dubbed “helicoptering,” “smothering mothering,” “alpha parenting,” or “child-centered parenting.”⁴³

Some commentators and parents practicing Intensive Parenting believe that the philosophy of Intensive Parenting stems from the writings of attachment theorists who held that intensive maternal or parental love is crucial to meet the complex needs of children. They assert that Intensive Parenting aims at producing a securely attached child.⁴⁴ At the same time, Intensive Parenting is also the result of the

⁴⁰ Marano, *supra* note 25, at 64 (quoting an anonymous patient).

⁴¹ In Roman society, for example, the parents would not see the child until the age of two due to the high rates of infant mortality. For a review of parental duties and rights in Roman law and society, see JANE F. GARDNER, *WOMEN IN ROMAN LAW AND SOCIETY* 137-61 (1995).

⁴² This approach was advocated by Dr. Spock’s theory. See generally BENJAMIN SPOCK, *THE COMMON SENSE BOOK OF BABY AND CHILD CARE* (1946).

⁴³ Belkin, *supra* note 15, at MM19. It should be noted that these changes in parental involvement consist of circular trends. See, e.g., MARILYN YALOM, *A HISTORY OF THE WIFE* 352-91 (2001) (demonstrating how throughout the twentieth century, changing social trends reshaped parental involvement in their children’s lives: from working mothers during World War II, through stay-at-home mothers of the 1950s, and back to working mothers of the 1980s and 1990s). But see Margaret F. Brinig, *Religion, Race and Motherhood* *1 (Notre Dame Legal Studies, Paper No. 10-16, 2010) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1565030 (examining alternative parenting styles, including the authoritative, authoritarian, permissive and uninvolved styles).

⁴⁴ For attachment theorists, see generally MARY AINSWORTH, *PATTERNS OF*

competitiveness of contemporary society. Parents want to assure their children's prospects of success in order to ensure that as adults they will not be deprived of the lifestyle in which they have grown up.⁴⁵

The practice of Intensive Parenting is comprised of three main components. First, parents acquire sophisticated knowledge of what experts consider proper child development in order to recognize and respond to every stage of the child's emotional and intellectual development.⁴⁶ Second, parents engage in "Concerted Cultivation": parents actively foster and assess the child's talents, orchestrate multiple child leisure activities, and regularly intervene in institutional settings on the child's behalf.⁴⁷ Third, to fulfill the same goals, parents closely monitor many aspects of the child's life.

Intensive Parenting begins at pregnancy and continues into young adulthood. The pregnant woman accesses vast amounts of information instructing her on how to assure an optimal pregnancy.⁴⁸ The pregnant woman reads about the importance of abstaining from major hazards for the well-being of her baby, such as alcohol and cigarettes. She also reads of the need to avoid a long list of other potential risks, such as raw fish that may cause an abdominal infection⁴⁹ or chemicals contained in hair color.⁵⁰ The pregnant woman obtains information that informs her that certain activities are beneficial yet hazardous at the same time. For example, she reads that exercise is important, yet she should avoid over-strenuous exercise.⁵¹

ATTACHMENT: A PSYCHOLOGICAL STUDY OF THE STRANGE SITUATION (1978); JOHN BOWLBY, A SECURE BASE: PARENT-CHILD ATTACHMENT AND HEALTHY HUMAN DEVELOPMENT (1990); JOHN BOWLBY, MATERNAL CARE AND MENTAL HEALTH (1951). *See also* HAYS, *supra* note 16, at 43-44 (discussing relationship between contemporary Intensive Parenting norms and attachment theorists).

⁴⁵ *See* Tali Schaefer, *Disposable Mothers: Paid In-Home Caretaking and the Regulation of Parenthood*, 19 YALE J.L. & FEMINISM 305, 336-37 (2008).

⁴⁶ *See* HAYS, *supra* note 16, at 8.

⁴⁷ *See* LAREAU, *supra* note 20, at 31.

⁴⁸ *See* HELENA MICHIE & NAOMI R. CAHN, CONFINEMENTS: FERTILITY AND INFERTILITY IN CONTEMPORARY CULTURE 24-31 (1997) (discussing ways in which pregnancy guides police pregnant women).

⁴⁹ MURKOFF & MAZEL, WHAT TO EXPECT WHEN YOU ARE EXPECTING, *supra* note 22, at 113-17.

⁵⁰ *Is It Safe to Color My Hair During Pregnancy?*, BABYCENTER.COM, http://www.babycenter.com/404_is-it-safe-to-color-my-hair-during-pregnancy_3273.bc (last visited Feb. 14, 2010).

⁵¹ *See* MURKOFF & MAZEL, WHAT TO EXPECT WHEN YOU ARE EXPECTING, *supra* note 22, at 224-31.

Once the baby is born, safety and monitoring are paramount. Parents can use baby monitors that alert them if the baby cries or, more importantly, if the baby ceases to breathe.⁵² Some parents who hire a nanny equip their home with “Nanny Cams.”⁵³ These cameras secretly monitor the nanny’s behavior and alert the parents in case of any misconduct.⁵⁴ In addition, unlike previous generations, parents assure that their children play in rubber-cushioned playgrounds, use sanitizing gel,⁵⁵ sit in car seats, and wear helmets and knee pads while riding their bicycles.⁵⁶

During the kindergarten and school years, parents regularly participate in an increasing number of school activities. In a sense, conventional teaching is progressively outsourced, and parents find themselves sharing in and performing tasks that were traditionally the teachers’ responsibility. Parents actively monitor their children’s progress. One mother whose two girls barely missed the cutoff IQ score for the Gifted and Talented program at their school took prompt action. She studied the regulation, appealed the result, arranged for her daughters to be privately tested and succeeded in having them both admitted to the program.⁵⁷ Volunteering in academic and nonacademic settings is a widespread norm among working and nonworking parents. Indeed, one Montessori school recently had no choice but to cancel a field trip because too many parents volunteered to chaperon.⁵⁸ The school could not accommodate such a large number of chaperons, and since no parent agreed to withdraw, it was cancelled.⁵⁹

⁵² Margaret K. Nelson, *Watching Children: Describing the Use of Baby Monitors on Epinions.com*, 29 J. FAM. ISSUES 516, 520 (2008).

⁵³ “Nanny Cams” are cameras that are hidden inside another object, such as a teddy bear.

⁵⁴ See, e.g., Caroline H. Dworin, *Spies Around the Sandbox*, N.Y. TIMES, Oct. 14, 2007, http://www.nytimes.com/2007/10/14/nyregion/thecity/14nann.html?pagewanted=1&_r=1&sq=Caroline%20H.%20Dworin,%20Spies%20Around%20the%20Sandbox&st=cse&scp=1.

⁵⁵ See Marano, *supra* note 25, at 61.

⁵⁶ Critics of the safety devices trend argue that the corporations inventing and manufacturing these devices nurture parental panic, regardless of the significance of the actual threat, in order to increase their profits. See LENORE SKENAZY, *FREE-RANGE KIDS: GIVING OUR CHILDREN THE FREEDOM WE HAD WITHOUT GOING NUTS WITH WORRY* 31-40 (2009).

⁵⁷ LAREAU, *supra* note 20, at 176.

⁵⁸ WARNER, *supra* note 24, at 29.

⁵⁹ *Id.*

Beyond direct involvement in their children's activities, parents have additional ways to monitor their children's daily lives. Parents can ensure that their children are eating healthily, preferably organic meals, by monitoring their children's lunch menu through special websites.⁶⁰ Furthermore, some schools provide parents with the option of using specialized record-keeping software to access the schools' websites and monitor their children's grades and class attendance.⁶¹

Parental involvement in their children's school activities coexists with a decline in teachers' authority over children during school time. Parents have become increasingly involved in activities and decisions that were previously within the teachers' absolute discretion and control.⁶² For example, teachers require parents actively to participate in their children's homework, through questions specifically targeted at parents. In addition, parents are increasingly involved in school governance and decision-making regarding curricular and extracurricular activities. Some commentators attribute the decline in teachers' authority to the increase in lawsuits by parents against schools and educators for a broad range of injuries experienced by their children.⁶³

Parental involvement extends beyond academic activities. Parents organize multiple extra-curricular activities for their children and actively participate in them, despite the toll on finances and parental work schedules.⁶⁴ Parents regularly intervene on their children's behalf in their extra-curricular activities to ensure that their children's

⁶⁰ Anne Holcomb, *Tech Tools Allow Parents to Keep Tabs on Kids: What's Your View?*, KALAMAZOO GAZETTE (Feb. 25, 2008, 12:29 pm), http://blog.mlive.com/kalamazoo_gazette_extra/2008/02/tech_tools_allow_parents_to_ke.html.

⁶¹ *Id.* Some of these tracking tools might cost up to a \$100 a month. *Id.*

⁶² See, e.g., Kathleen Cotton & Karen Reed Wikeland, PARENT INVOLVEMENT IN EDUCATION 2, in SCHOOL IMPROVEMENT RESEARCH SERIES: RESEARCH YOU CAN USE (Nw. Reg'l Educ. Lab. ed., 1989), available at http://educationnorthwest.org/webfm_send/567. See generally Linda L. Schuler, *Parental Rights in the Twenty-First Century: Parents as Full Partners in Education*, 32 ST. MARY'S L.J. 611 (2001) (describing legal reform to facilitate parental involvement in school system in Texas).

⁶³ SKENAZY, *supra* note 56, at 45; James Fanelli & Mike Scholl, *Base Accusation: Injured Kid's Mom Sues 'Slide Fool' Coach*, N.Y. POST, May 20, 2007, at 7; AM. TORT REFORM ASS'N, SCHOOL PRINCIPAL SURVEY REVEALS FEAR OF LIABILITY LIMITS EDUCATIONAL OPPORTUNITIES FOR AMERICA'S CHILDREN (Sept. 1, 2007), <http://www.atra.org/show/91> (survey conducted by The American Tort Reform Association ("ATRA") in conjunction with National Association of Elementary School Principals and National Association of Secondary School Principals, finding that schools are eliminating activities and programs due to fear of lawsuits).

⁶⁴ See, e.g., LAREAU, *supra* note 20, at 38-65 (describing hectic schedule of one middle-class family).

individual needs are addressed.⁶⁵ The emergence of a full-time parent liaison in camps whose job is to answer concerned parents' phone calls and emails is indicative of such interventions.⁶⁶

Overall it appears that Intensive Parenting has shaped a new standard of parenting: a move from "quality time" to "quality *and* quantity time."⁶⁷ There is a strong cultural demand of "being there."⁶⁸ According to a recent public opinion poll, fifty-eight percent of mothers believe they are more involved in their children's lives than their mothers were.⁶⁹ Indeed, "in American families," as one scholar has noted, "the child is king."⁷⁰ And the child remains king even after leaving home for college. Parental involvement extends well beyond the childhood years, sometimes even into early adulthood. The intensive parent continuously makes every effort to guide the child toward academic achievement rather than emphasizing the process of skill development, including the experience of trial and error.⁷¹ Parents are known to call professors to protest their son's or daughter's grade. In one instance, a parent who is a judge sent a threatening letter to a professor who told his students he expected them to work hard. The letter, written on official judicial stationery, complained about the "mistreatment" of the students.⁷²

Many colleges currently dedicate part of their websites to parents. For example, on the New York University website, a parent can find information on the "Parent's Guide" page about "Student Life & Health," "visiting NYU," and "Parent Services."⁷³ Parent Services include the full academic calendar, membership in a "Parents

⁶⁵ See, e.g., *id.* at 171-73 (describing resources invested by one middle-class mother in finding appropriate gym class for her daughter and mother's follow up interventions to assure that her daughter's gym experience was optimal).

⁶⁶ Tina Kelley, *Dear Parents: Please Relax, It's Just Camp*, N.Y. TIMES, July 26, 2008, at A1.

⁶⁷ WARNER, *supra* note 24, at 116.

⁶⁸ *Id.*

⁶⁹ Belkin, *supra* note 15, at MM19. The poll showed that thirty-seven percent of the mothers believed they were involved in their children's lives as much as their own mothers, and only four percent believed they were less involved than their own mothers. *Id.*

⁷⁰ Hervé Varenne, *Love and Liberty: The Contemporary American Family*, in A HISTORY OF THE FAMILY, VOLUME II: THE IMPACT OF MODERNITY 416, 421 (André Buruière et al. eds., 1996).

⁷¹ *Id.*

⁷² Marano, *supra* note 25.

⁷³ *Parent's Guide*, *supra* note 25.

Committee,” information about nutrition, and a Parents Helpline.⁷⁴ Parental involvement in college students lives is apparently on the rise. A comparison of the current New York University website to its 2002 version showed that the following items and links were added to the Guide: dining and housing information, banking, employment opportunities, and a link to the Registrar’s office. The website specifies that these links enable parents to access transcripts, grades, and enrollment verification.⁷⁵

II. TECHNOLOGIES AND INTENSIVE PARENTING

Our technologies are not accidental. We create our technologies in our image. Although it is often not readily apparent, society’s values and priorities guide the choice of one technology over another, the way a technology is designed, and the way it is used.⁷⁶ Intensive

⁷⁴ “The Parent’s Helpline is a source of information and assistance for almost any University-related question or problem. The staff of the Student Resource Center will answer [the parent’s] questions, refer [her] to appropriate resources, and, if necessary, act as a problem-solving liaison with other University units.” *Parent’s Guide: Information*, N.Y. UNIV., <http://www.nyu.edu/parents.guide/serv-info-helpline.html> (last visited Feb. 14, 2010), available at <http://web.archive.org/web/20080201055022/>; <http://www.nyu.edu/parents.guide/serv-info-helpline.html>; <http://www.nyu.edu/community/parents/involvement.html>.

⁷⁵ The search was conducted through the Internet Archive website. INTERNET ARCHIVE, <http://www.archive.org/index.php> (last visited Feb. 14, 2010). For example, on June 13, 2002, the NYU Parent Guide page included only eight links. See INTERNET ARCHIVE, <http://web.archive.org/web/20020613054705/http://www.nyu.edu/parents.guide/services.html> (last visited Feb. 14, 2010) (reproducing New York University’s website as of 2002). As of February 2010, it included thirty-four links. *Parent’s Guide*, *supra* note 25. The February 13, 2007 version of the Parent’s Guide also included a list of recommended reading for parents. See INTERNET ARCHIVE, <http://web.archive.org/web/20060909050023/www.nyu.edu/parents.guide/reading.html> (last visited Feb. 14, 2010) (reproducing New York University’s website as of 2007).

⁷⁶ See ELLIOTT & ELLIOTT, *supra* note 26, at vii, 1-3 (describing the choice of one technology over another as based on a scheme of values and priorities in a given society); Claude Fischer, *The Telephone Industry Discovers Sociability*, in TECHNOLOGY & CHOICE 87 (Marcel C. Lafollette & Jeffrey K. Stine eds., 1991) (stating that while phone companies initially marketed the phone as a business instrument, it was individual users who decided to use it as social tool); Marcel C. Lafollette & Jeffrey K. Stine, *Contemplating Choice: Historical Perspectives on Innovation and Application of Technology*, in TECHNOLOGY & CHOICE, *supra*, at 1 (arguing that the creation of technology is accompanied by choice even when choice is not apparent). *But cf.* JACQUES ELLUL, THE TECHNOLOGICAL ORDER, in PHILOSOPHY AND TECHNOLOGY: READINGS IN THE PHILOSOPHICAL PROBLEMS OF TECHNOLOGY 86, 88 (Carl Mitchum & Robert Mackey eds., 1972) (arguing that man is enveloped by his technologies and does not exercise choice). See also literature discussing the need to design technologies to reflect social values, for example, Batya Friedman & Peter H. Kahn, Jr., *Human Agency*

Parenting values influence parents' use of information technologies. Parents use these technologies effectively to monitor their children and gain knowledge of beneficial child rearing practices. Yet, technologies are not only designed and used to reflect social values, they also play a role in enhancing these values.⁷⁷ Technology plays an important role in reinforcing the trend of Intensive Parenting. This Part argues that the trend of Intensive Parenting has not only influenced the prominence and use of information technologies among parents, but that the use of these technologies enhances the social trend of Intensive Parenting.

In this Part we will focus on two technologies that play an important role in Intensive Parenting: the cellular phone and the Internet. Parents use the cellular phone to stay in constant touch with their children or their children's caregivers. They use the Internet to research potential child hazards and to study their child's development. Although both the cellular phone and the Internet are popular technologies irrespective of the trend of Intensive Parenting, we argue that Intensive Parenting enhanced their prominence among parents and influenced the way parents use these technologies. Parents aided by the cellular phone and the Internet can monitor more effectively and be better informed than ever before. But by doing this, they reinforce the trend of Intensive Parenting by raising the standards of how involved an intensive parent can be.

A. *The Cellular Phone as a Monitoring Device*

Parents use the cellular phone to exercise "remote parenting" while being away from their children. Today's children are raised in a hothouse, which, thanks to the cellular phone, no longer has any geographical or temporal limits. Parents view the cellular phone as an effective tool in exercising their parental responsibility.⁷⁸ Parents' use of the cellular phone depends on their children's age.

and Responsible Computing: Implications for Computer System Design, in HUMAN VALUES AND THE DESIGN OF COMPUTER TECHNOLOGY 221 (Batya Friedman ed., 1997); Batya Friedman & Helen Nissenbaum, *Bias in Computer Systems*, in HUMAN VALUES AND THE DESIGN OF COMPUTER TECHNOLOGY, *supra*, at 21.

⁷⁷ See ELLIOTT & ELLIOTT, *supra* note 26, at 10 (describing the two-way process in which values affect technologies and technologies affects values); FEENBERG, *supra* note 26, at 227-28 (describing the relationship between society and technology as reciprocal, that is, our way of life is also affected by our technologies).

⁷⁸ See Marano, *supra* note 25, at 64-65; Palen & Hughes, *supra* note 28, at 340.

Parents of young children, who are under caregiver supervision, use the cellular phone to be attentive and vigilant of their children. Commentators described this trend as the “parallel shift.” Primary caregivers use the phone to care for children while at work. The cellular phone offers parents the capability of working while parenting.⁷⁹ Working parents always make sure their phones are nearby. They take care to adjust the ringer to suit the environment so they can continue to monitor their children. For example, a parent in a meeting will change her ringer status to vibrate to remain available in case of need with only minimal disruption to the meeting. Nonparent caregivers know they can reach the working parent. Remote parenting was described as “what happens when the parent pervasively monitors the phone that hardly ever rings.”⁸⁰ Only when in the presence of their children do these parents indicate fewer instances of “phone attachment.” Specifically, parents are more inclined to turn the phone off, leave it at home, or be less likely to know whether the ringer is on or off when with their children.⁸¹

Parents of older school-age children and teenagers use the phone to communicate with them throughout the day. These parents are adamant about using cellular phones to remain in constant communication with their children. Recently, parents in New York sued the City’s Board of Education to strike down a provision prohibiting students from bringing cellular phones to school. The parents argued that this prohibition affects their ability to communicate with their children on their way to and from school.⁸² Parents insist on continuing to use cellular phones to remain in constant touch with their children, even when sending their children off to camp. Some parents give their child two cellular phones, telling the child that if a camp counselor confiscates one phone the child will still be able to use the other one to stay in touch with his parents.⁸³

Parents of older children and teenagers are starting to use the cellular phone to monitor their children not only through oral communications but through the phone’s Global Positioning System (“GPS”) function, which indicates the location of the person carrying

⁷⁹ Lana F. Rakow & Vija Navaro, *Remote Mothering and the Parallel Shift: Women Meet the Cellular Phone*, 10 *CRITICAL STUD. MEDIA COMM.* 144, 153 (1993).

⁸⁰ See Palen & Hughes, *supra* note 28, at 345.

⁸¹ See Palen & Hughes, *supra* note 28, at 343.

⁸² *Price v. N.Y. City Bd.*, 837 N.Y.S.2d 507, 510 (N.Y. Sup. Ct. 2008), *aff’d*, 855 N.Y.S.2d 530 (N.Y. App. Div. 2008).

⁸³ Kelley, *supra* note 66, at A-1.

the cellular phone. One company advertised its services as follows: "Just give the cellular phone to your child. Log in to our secure website to see the exact location the child is currently at. If the child changes location, you will be able to track and see the movements on the map."⁸⁴ Some companies offer an additional feature, which lets a parent know, if a child is in a car, at what speed the car is traveling.⁸⁵ A parent can also arrange for a notification email from the system if the child does not turn up at school or another location.⁸⁶ In addition, some services incorporate a flashing light on the phone that notifies the child that she is being located.⁸⁷

The cellular phone plays an important role in the relationships of parents and their children who are going off to college. In that context, the cellular phone was called "the world's longest umbilical cord,"⁸⁸ and the parents using it to hover over their adult children were described as "helicopter parents."⁸⁹ Even in college parental contact continues on a daily basis, often a couple of times a day.⁹⁰ Many college students report to their parents every flicker of experience. In one overheard cellular phone conversation, which was held on a cross-campus walk, a student was telling her mother: "Hi Mom, I just got an ice-cream cone. Can you believe they put sprinkles on the bottom as well as on the top?"⁹¹ An education professor at Syracuse University reported that college students tell her they are late to class because their mothers did not call to wake them up that morning. She also recounted that she had students call their parents from the classroom on a cellular phone to complain about a bad grade and then pass the phone over to her, in the middle of the class,

⁸⁴ GUARDIAN ANGEL TECH., <http://www.guardianangeltech.com/> (last visited Feb. 14, 2010). See also *Kajeet Announces New GPS-Based Cellular phone Locator Service; GPS Feature Added to Online Management Suite of Tools for Kids Cellular Phone Service*, REUTERS, Mar. 31, 2008, available at <http://www.reuters.com/article/pressRelease/idUS138318+31-Mar-2008+PRN20080331> (describing similar service).

⁸⁵ GUARDIAN ANGEL TECH., *supra* note 84.

⁸⁶ *Trace Children with Cellular Phone GPS: Parents Get Peace of Mind with Service*, GRAND RAPIDS PRESS, Dec. 24, 2007, at D8.

⁸⁷ Dawn Witlin & Eric Convey, *Big Brother Meet Mom and Dad: Cell Phone Lets Parents Track Kids*, BOS. HERALD, Apr. 13, 2006, at 3.

⁸⁸ Shellenbarger, *supra* note 30, at D1.

⁸⁹ Hunt, *supra* note 30, at 10-11.

⁹⁰ BARBARA K. HOFER & ABIGAIL SULLIVAN MOORE, *THE ICONNECTED PARENT: STAYING CLOSE TO YOUR KIDS IN COLLEGE (AND BEYOND) WHILE LETTING THEM GROW UP 20-24* (2010) (reporting study of college students indicating an average of 13.4 communications per week between parents and child).

⁹¹ Marano, *supra* note 25, at 64-65.

because the parent wanted to intervene.⁹² Similarly, another report described students at the University of Georgia, who got frustrated during registration, taking out cellular phones, speed dialing their parents, and handing the phone to the adviser, saying “talk to my mom.”⁹³

B. Information Seeking on the Internet

The Internet enhances the social trend of Intensive Parenting by providing vast information about child rearing.⁹⁴ Parents have always consulted external sources, whether books, relatives, or friends on child rearing; yet, as the Internet became popular, parents gained access to vast amounts of parenting information. Furthermore, this information is now available at all times and in an interactive form, through discussion forums. Hence, today, parents routinely take advantage of the Internet to research child rearing information to ensure their children’s health and well-being.

Parents are motivated by awareness that early detection of developmental problems improves outcomes for parents and children.⁹⁵ They regularly research popular parenting websites to ensure that their children are accomplishing the milestones of normal development. Parenting websites are replete with information

⁹² Nancy Gibbs, *Parents Behaving Badly*, TIME, Feb. 21, 2005, at 40.

⁹³ Shellenbarger, *supra* note 30, at D1.

⁹⁴ Another way in which the Internet augments Intensive Parenting norms is through parental monitoring of children’s online activities. Responding to novel threats to children’s safety on the Internet, many parents nowadays install technological tracking devices to assure their children are not exposed to inappropriate materials or are in contact with strangers who may harm them. See *Parents Internet Monitoring Study*, KETCHUM GLOBAL RES. NETWORK (2005), <http://www.netSMARTZ.org/pdf/takechargestudy.pdf> (finding that forty-nine percent of parents of teenagers use monitoring software and fifty-one percent use blocking/filtering software); *Protecting Teens Online*, PEW INTERNET & AM. LIFE PROJECT ii (2005), available at http://www.pewinternet.org/~media/Files/Reports/2005/PIP_Filters_Report.pdf (finding that fifty-four percent of teenage parents use filtering software); *Keeping Kids Safe Online: Tips & Tools for Parents*, UNIV. OF OKLA. POLICE DEP’T, <http://www.ou.edu/oupd/kidtool.htm> (last visited Feb. 14, 2010) (providing a comprehensive list of online dangers to children).

⁹⁵ See, e.g., LYNN VANGORP, MUST-SEE WEBSITES FOR PARENTS AND KIDS (2007) (instructing parents on researching parenting information online); Nia Williams, Sabena Mughal & Mitch Blair, *Is My Child Developing Normally?: A Critical Review of Web-Based Resources for Parents*, 50 DEV. MED. & CHILD NEUROLOGY 893 (2008) (referring parents to reliable websites that offer guidelines for detecting developmental problems).

concerning developmental milestones and signs of delays. For example, an article featured on BabyCenter.com, a popular parenting website, asks: "Is it normal that my baby isn't crawling?" The site then features expert and community answers.⁹⁶ iVillage.com, another popular parenting site, features an article discussing: "Your 18 Months-Old; What's Happening with Your Child: 5 Things You Need to Know."⁹⁷ These websites also routinely feature safety information for babies and children. BabyCenter.com, for example, provides different safety checklists, such as "Childproofing Checklist: Before Your Baby Crawls."⁹⁸ Specialized sites also provide safety guidelines. For instance, the American Academy of Pediatrics website provides car safety seat guidelines for families.⁹⁹

Certain groups of parents are particularly active gatherers of information online. One such group is pregnant women and their partners.¹⁰⁰ Parenting websites are replete with guidelines and advice on behavior and nutrition that aim to help women maximize the chances of giving birth to a healthy child. For example, BabyCenter.com provides expert answers to a list of queries regarding safety during pregnancy. These queries include: "Is it safe to drink caffeinated sodas when I am pregnant?"; "Is it safe to drink milk from cows that were given BST while pregnant?"; "Is it safe to eat deli meat when I am pregnant?" Pregnant mothers today regularly follow these and many other guidelines to improve pregnancy outcomes.

⁹⁶ *Is It Normal that My Baby Isn't Crawling?*, BABYCENTER, http://www.babycenter.com/404_is-it-normal-that-my-baby-isnt-crawling_6857.bc (last visited Feb. 14, 2010).

⁹⁷ *Your 18-Month-Old: What's Happening with Your Child: 5 Things You Need to Know*, iVILLAGE, <http://parenting.ivillage.com/tp/tpdevelopment/0,,pgbr,00.html> (last visited Feb. 14, 2010).

⁹⁸ *Childproofing Checklist: Before Your Baby Crawls*, BABYCENTER, http://www.babycenter.com/0_childproofing-checklist-before-your-baby-crawls_9446.bc (last visited Feb. 14, 2010).

⁹⁹ *Car Safety Seats: A Guide for Families 2010*, AM. ACAD. OF PEDIATRICS, <http://www.aap.org/family/Carseatguide.htm> (last visited Feb. 14, 2010).

¹⁰⁰ Jay M. Bernhardt & Elizabeth Felter, *Online Pediatric Information Seeking Among Mothers of Young Children: Results from a Qualitative Study Using Focus Groups*, 6 J. MED. INTERNET RES. e7 (2004); Kristian Daneback & Lars Plantin, *Research on Parenthood and the Internet: Themes and Trends*, CYBERPSYCHOLOGY: J. PSYCHOSOCIAL RES. ON CYBERSPACE, Nov. 2008, at 1 (reporting on Yahoo marketing study, which found that eighty-six percent of parents-to-be use the Internet to search information about pregnancy).

III. THE LAW AS AN ENFORCER OF INTENSIVE PARENTING NORMS

The social trend of Intensive Parenting influences the ways in which parents use technologies. These technologies, in turn, enable better monitoring and information seeking, thereby enhancing the norms of Intensive Parenting. At the same time, the law also plays a role in enhancing the socio-technological trend of Intensive Parenting.¹⁰¹ Specifically, it is during divorce, when custody disputes arise, that the law is particularly powerful in its ability to exert pressure and mold parental trends of child rearing. Unsurprisingly, the laws created to govern custody disputes play a particularly important role in augmenting the social trend of Intensive Parenting.

In this Part we will focus on two legal doctrines, which are used in resolving custody disputes: (i) consideration of past parental caretaking roles in custody allocation decisions; (ii) parenting time as a factor in determining child support payments. While some states adopted these doctrines expressly to encourage parental involvement, other states had other goals in mind. Nevertheless, in practice, whether intended or not, the implementation of these doctrines enforces Intensive Parenting norms. Furthermore, in both cases of custody allocation decisions and child support payments, enforcement of Intensive Parenting can backfire resulting in unintended consequences.

A. *The Role of Past Parental Caretaking in Custody Determinations*

Courts often face difficult decisions in determining whether to grant custody of the couple's children solely to one parent, whether to grant joint custody, and how to divide the child's time between the parents. Since the mid-1990s, courts have looked to parents' pre-divorce caretaking roles and division of labor in the home as a factor in making custody determinations.¹⁰² States generally use the best

¹⁰¹ For discussions of the way the law affects social norms in the family context, see generally NOCK, *supra* note 32, at 23; Bishop, *supra* note 32; Maldonado, *supra* note 19; Posner, *supra* note 32, at 259-62; Scott, *Legal Construction of Norms*, *supra* note 32; Waldeck, *supra* note 32. For discussions of the law's ability to influence the design and use of new technologies, see generally Bernstein, *supra* note 32; Koren, *supra* note 32; Noveck, *supra* note 32.

¹⁰² See also Mary Ann Mason & Ann Quirk, *Are Mothers Losing Custody?: Read My Lips: Trends in Judicial Decision Making in Custody Disputes: 1920, 1960, 1990 and 1995*, 31 FAM. L.Q. 215, 224 (1997) (identifying a shift in the considerations analyzed in determining the child's best interests: from maternal preference and moral fitness to amount of time spent with children and stability of relationships).

interests of the child test to determine custody allocation. Currently, the majority of states, whether through statutes or case law, incorporated past parental caretaking into the best interests of the child test.¹⁰³ Courts evaluating the best interests of the child in custody determinations increasingly consider the quantity and quality of time each parent spent with the child prior to divorce. The parent who was more involved in the child's life before divorce would have an advantage in custody resolutions.

The rationale for considering past caretaking roles is that it promotes stability and continuity in the child's life. Furthermore, it reflects each parent's emotional attachment and parenting skills, thereby serving the child's best interests while not violating the autonomy interests of the parent.¹⁰⁴ The child can continue to maintain, as much as possible, the same relationship he had with each parent before the divorce.

¹⁰³ Elizabeth Scott has proposed that courts take into account in custody allocations the quality and quantity of time each parent spends with the child prior to divorce ("The Approximation Rule"). See Scott, *Pluralism*, *supra* note 19, at 617. In 2002 the American Law Institute published its influential *Principles of the Law of Family Dissolution* in which it endorsed the Approximation Rule. See generally AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002). While states have not adopted the Approximation Rule itself, many have incorporated past-parental caretaking as one of the factors considered in the best interests of the child test. See *id.* § 2.08, REPORTER'S NOTES ON cmt. a (listing states that incorporated past parental caretaking as factor in determining custody disputes). See specific examples, N.J. STAT. ANN. § 9:2-4(c) (West 2001) (requiring courts to consider extent and quality of time spent with child prior to or subsequent to separation); WASH. REV. CODE ANN. § 26.09.187(3)(a)(i) (West 2007) (requiring courts to make "residential provisions" for children at divorce to give "greatest weight" to "the relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child"); *Lamb v. Wenning*, 600 N.E.2d 96, 98 (Ind. 1992) ("One of the most significant elements of stability in a child's life is the child's primary caretaker — the person who cooks his meals, puts him to bed, and cares for him on a daily basis."); *Roan v. Roan*, 438 N.W.2d 170, 174 (N.D. 1989) ("Continuity in a child's relationship with the closest, nurturing parent is . . . a very important aspect of stability."); see also Charlene E. Depner et al., *Report 4: Mediated Agreements on Child Custody and Visitation, 1991 California Family Court Services Snapshot Study*, 33 FAM. & CONCILIATION CTS. REV. 87, 101 (1995) (describing a 1991 study of mediated agreements in California, which concluded that the factor with the greatest bearing on mediated agreements was the de facto time allocation already in place in the family).

¹⁰⁴ Scott, *Pluralism*, *supra* note 19, at 630-37; see also Karen Czapanskiy, *Interdependencies, Families and Children*, 39 SANTA CLARA L. REV. 957, 973 (1999) (discussing additional rationales for the Approximation Rule).

In a series of interviews with family law attorneys who regularly represent clients in custody disputes, practitioners revealed the way in which the consideration of past caretaking roles exerts pressure on parents on the eve of divorce to engage in Intensive Parenting. In a sense, the time period before custody determinations becomes a race for involvement, particularly for the parent who was not originally the primary caregiver.¹⁰⁵ Since courts look to pre-divorce parental roles in determining custody after divorce, lawyers representing clients on the eve of divorce encourage their clients to become as involved as possible in their child's life. As one attorney explained, it is important to get the case early in order to create a paper trail of parental involvement.¹⁰⁶

Lawyers advise parents, particularly the parent who is not the primary caregiver, to create an appearance of involvement by participating in all aspects of the child's life. Suggestions include: taking the child to school and picking her up (this is especially important in settings where a sign-up sheet would create a written record of parental involvement); ensuring that their phone number is the school or care-center primary contact number; going to parent-teacher conferences; being involved in the child's homework preparation; knowing the child's teachers; knowing the child's friends and their parents; calling or texting the child at least once a day; taking the child to doctor's appointments; coaching the child's sports team; and participating in child and parent classes.¹⁰⁷

These interviews uncovered the unfortunate drawbacks of considering past-parental caretaking in a world in which norms of Intensive Parenting prevail. First, attorneys acknowledged that despite warning parents to avoid getting strategically over-involved in their children's lives in a way that may appear controlling and insincere to the judge, many parents tend to go over-board. Parents often call and

¹⁰⁵ The lawyers we have interviewed were not randomly selected. We did not utilize survey methodology, but instead conducted extensive interviews with four lawyers who have substantial expertise in the area of custody disputes and were willing to talk reflectively about their practice. We interviewed lawyers who practice in New York, New Jersey, and California. Interestingly, all lawyers interviewed described similar trends in the effects of Intensive Parenting and the advice offered as a reaction to this trend. The identity of the lawyers was kept anonymous in order to protect the interests of their clients.

¹⁰⁶ Telephone Interview with A.B., Lawyer (May 30, 2009).

¹⁰⁷ *Id.*; Interview with C.D., Lawyer (June 11, 2009); Telephone Interview with E.F., Lawyer (June 12, 2009).

text their child multiple times a day.¹⁰⁸ Some take photos of cellular phones with their text messages to show as evidence in court because phone companies normally delete text messages after a certain period.¹⁰⁹ Parents also tend to become extremely involved in their children's sports activities, taking over the practice sessions.¹¹⁰

Secondly, attorneys acknowledged issuing advice based on their clients' social class. As one attorney explained, lower income parents tend to be less controlling and monitoring of their children, partly because they do not have the resources to become more involved. The attorney explained that she advises her lower income clients to act more like their higher income counterparts, that is, to become more monitoring and involved. Specifically, she advises them to become involved in a way that produces a written record of involvement. Instead of leaving the child with a relative, she suggests enrolling the child in a community day care (where parents have to sign in as they pick up the child) or taking the child to the library to borrow books (where a record is maintained).¹¹¹

Hence, while the consideration of past parental caretaking serves important goals, its application in a society in which Intensive Parenting norms prevail can backfire. For one, parents eager to gain custody become overly dominating in their interaction with their children. For example, some may take over sport practices and leave their children with no independent outlet. Others may overwhelm their children by constant phone calls and text messages. In addition, disruption of stable and potentially deep ties between a child and a kin member caretaker in order to establish involvement in an institutional setting disrupts stability and continuity in the child's life. This could undermine the very goals that the consideration of past parental caretaking seeks to accomplish.

B. Parenting Time and Child Support Payments

Another area in which custody laws enhance Intensive Parenting norms is child support guidelines. The 1983–87 National Support Guidelines Panel recommended that states adopt child support guidelines that encourage the involvement of both parents in the

¹⁰⁸ Telephone Interview with A.B., *supra* note 106; Telephone Interview with E.F., *supra* note 107.

¹⁰⁹ Telephone Interview with E.F., *supra* note 107.

¹¹⁰ *Id.*

¹¹¹ Telephone Interview with A.B., *supra* note 106.

child's life by considering the financial support provided directly by parents during visitation or shared physical custody.¹¹² The majority of states, mostly through statutory guidelines but at times through case law, consider the amount of time a child spends with each parent as a relevant factor in determining child support. States vary in the ways they account for parenting time; yet, the general principle is that the more time a parent spends with a child the less he or she will be required to pay in child support.¹¹³ Particularly illuminating is the

¹¹² Jane C. Venohr & Tracy E. Griffith, *Child Support Guidelines: Issues and Reviews*, 43 FAM. CT. REV. 415, 423 (2005).

¹¹³ See ALM, Consolidation of Cases Child Support Guidelines II (D)(2) (201108) (actual parenting time may be considered in adjusting child support); ALASKA R. CIV. P. 90.3 a(3) (2009) (providing that noncustodial parent payment may be reduced by up to seventy-five percent for any period for which he extended visitation over twenty-seven consecutive days); ARIZ. REV. STAT. ANN. § 25-999(11) (2000) (providing table adjusting child support in accordance with days of parenting time noncustodial parent spends with child); ARK. CODE ANN. tit. 9: App. Admin. Order No. 10: Child Support Guidelines App. § VI (2008) (providing that where child spends more than fourteen days [excluding weekends] with noncustodial parent, child support may be reduced by amount not to exceed fifty percent); CAL. FAM. CODE § 4055 (West 2008) (providing that time each parent spends with child shall be a factor in child support calculation formula); COLO. REV. STAT. ANN. § 14-10-115(8)(b) (West 2008) (providing that each parent's share of child support shall be multiplied by percentage of time child spends with other parent); DEL. FAM. CT. CIV. R. 505 (2009) (providing that where child spends more than 109 annual overnights but less than 175 annual overnights, child support will be adjusted according to number of overnights); D.C. CODE § 16-916.01(q) (2006) (calculating child support in relation to time child spends with each parent where child spends thirty-five percent or more time with each parent); FLA. STAT. § 61.30 11(b)(8) (2009) (providing for child support adjustment where child spends at least forty percent of the overnights per year with each parent); GA. CODE ANN. § 19-6-15(g), (k)(i) (2009) (providing that child support may be changed due to extended parenting time); IDAHO R. CIV. P. (6)(c)(6) (2009) (10)(e) (providing that child support will be adjusted where child spends more than twenty-five of overnights a year with each parent or where parent has child for fourteen consecutive days or more); IOWA CT. R. 9.9 (2009) (providing table for adjusting child support where noncustodial parental visitation exceeds 127 days per year); KAN. SUP. CT. ADMIN. ORDER NO. 128 (IV)(E.2(a)) (2007) (providing table for adjusting child support payments where child spends more than thirty-five percent of his time with parent who does not have primary residence); MD. CODE ANN., FAM. LAW § 12-204(m)(1)(2) (West 2010) (providing that time spent with child will be included as a factor in calculating child support in shared physical custody cases); MO. REV. STAT. § 452.340(1)(5) (2009) (providing that time each parent spends with child will be included in determining child support); NEB. CT. R. § 4-210 (providing that child support may be adjusted where parenting time substantially exceeds alternating weekend, holidays, and twenty-eight days or more in any ninety-day period); NEV. REV. STAT. ANN. § 125B.080(9)(j) (West 2009) (providing that amount of time child spends with each parent shall be factor in adjusting child support); N.M. STAT. ANN. § 40-4-11.1 (F)(2), (G) (2008) (providing that child support will be calculated on the

New York State statute, which explicitly describes forms of involvement in a child's life that could warrant an adjustment of child support. These include: time spent with the child by accompanying her to school and other activities; consultations with doctors, teachers, and therapists; time spent playing with the child; home education; trips; homework assistance; and personal and professional sacrifices made by parents.¹¹⁴

Some states provide a monetary rationale for connecting parenting time to payments. These states explain that since a parent who spends more time with the child incurs additional expenses, the parent should pay less in child support.¹¹⁵ Yet, some states indicate that the significance of parental involvement in a child's life also plays a role in

basis of days spent with child); N.J. CT. R., APP. IX-B (2009) (19); N.J. CT. R., APP. IX-A(13) (providing that child support may be adjusted for additional parenting time); 1-10 N.Y. CIVIL PRACTICE: FAMILY COURT PROCEEDINGS § 10.05 9(f)(j) (McKinney 2010) (allowing for consideration of longer visitation period and time spent on different activities with or for child); N.D. CENT. CODE § 14-09-09.7 (2009)(1)(e) (providing that child support guidelines will consider extended periods of time that child spends with obligor parent); OHIO REV. CODE ANN. § 3119.23 (D) (West 2009) (allowing consideration of parenting time in deviation from child support payments); OKLA. STAT. tit. 43, § 118E (2009) (allowing for reduction of child support when noncustodial parent is granted at least 121 overnights per year); 231 PA. CODE § 1910.16-4 (12)(31)(c) (2011) (including percentage of time spent with child in child support calculation formula); R.S.A. 458-C:5 (2009) (I)(h)(2)(B); 1989 S.D. ALS 220 (10)(5) (1989) (allowing deviation from custody support payment where children spend substantial amounts of time with each parent); UTAH CODE ANN. § 78B-12-216 (West 2008) (specifying percentages of reduction of child support in relation to number of consecutive days spent with noncustodial parent); VA. CODE ANN. § 20-108.2(G)(3) (2009) (providing that child support in shared custody will depend on the ratio in which parents share custody and visitation); WYO. STAT. ANN. § 20-2-304(c) (2008) (including time spent with each parent in the child support calculation formula); *In re Duerr*, 621 N.E.2d 120, 124-25 (Ill. App. Ct. 1993) (holding that child support may be adjusted when children spend prolonged time with obligor parent); *Pratt v. Sidney*, 967 A.2d 685, 678-88 (Me. 2009) (holding that time spent with child is a factor in adjusting child support); *Jucick v. Kleinman*, No. A06-1209, 2007 Minn. App. Unpub. LEXIS 465, at *6-7 (Minn. Ct. App. May 15, 2007) (allowing adjustment of child support where father spent practically no time with children); *In re Folley*, 821 A.2d 1132, 1133-34 (N.H. 2003) (holding that adjustments may be allowed when obligor parent share custody approximately equally); *Molstad v. Molstad*, 535 N.W.2d 63, 64 (Wis. Ct. App. 1995) (allowing consideration of amount of time child spends with paying parent in determining child support).

¹¹⁴ See 1-10 N.Y. CIVIL PRACTICE: FAMILY COURT PROCEEDINGS § 10.05 9(f).

¹¹⁵ See, e.g., ARIZ. REV. STAT. ANN. § 25-999(11) (2008) (explaining that when parenting time is exercised by noncustodial parent, portion of costs normally expended by custodial parent shifts to noncustodial parent); ARK. CODE ANN. tit. 9: App. Admin. Order No. 10: Child Support Guidelines App. § VI (2008) (tying reduced child support to additional costs to noncustodial parent).

allowing the adjustment of child support payments where additional time is spent with the child.¹¹⁶ Dr. Jane Venohr was involved in the drafting of over twenty state child support guidelines and in developing the appropriate formulas to adjust payments for shared parenting time. She explains that social trends, including research finding that involvement of both parents improves children's welfare, influenced the drafting of these statutes.¹¹⁷

Parental involvement of both parents is no doubt important to the welfare of the children of divorced parents. Tying money to parental time can be an effective tool in increasing such involvement. However, in many cases, the father who requests additional parenting time in order to reduce his child support payments fails to fulfill his obligation to spend time with the child. Although the statutes allow continued adjustments of child support payments, the mother rarely returns to court to seek an adjustment.¹¹⁸ Hence, coerced enforcement of Intensive Parenting norms on those unwilling or unable to abide by them results in depriving children of the resources to which they are legally entitled.

IV. ENABLING LEGAL STRUCTURES FOR TURNING INTENSIVE PARENTING NORMS INTO LEGAL STANDARDS

While the law already reinforces Intensive Parenting through custody laws, other legal doctrines contain enabling structures that can facilitate the creation of new legal standards that will reinforce the socio-technological trend of Intensive Parenting. Enabling legal structures do not currently enforce Intensive Parenting norms, but provide avenues for legal enforcement of these norms.¹¹⁹ This Part

¹¹⁶ See, e.g., ALM Consolidation of Cases Child Support Guidelines II (D)(2)(2008) (stating that these guidelines recognize that children must be allowed to enjoy society and companionship of both parents to greatest extent possible); MO. REV. STAT. § 452.340(7) (2009) (“[T]he public policy of this state [is] that frequent, continuing and meaningful contact with both parents . . . is in the best interest of the child.”)

¹¹⁷ Venohr & Griffith, *supra* note 112, at 415, 423.

¹¹⁸ See ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 100, 102 (1992); Karen Czapanskiy, *Child Support, Visitation, Shared Custody and Split Custody*, in *CHILD SUPPORT GUIDELINES: THE NEXT GENERATION* 43, 44 (Margaret Campbell Haynes ed., 1994); Marygold S. Melli & Patricia R. Brown, *The Economics of Shared Custody: Developing an Equitable Formula for Dual Residence*, 31 HOUS. L. REV. 543, 546 (1994); Interview with G.H., Lawyer (Aug. 17, 2009).

¹¹⁹ We are using the term enabling structures differently from its use by corporate law scholars. Corporate law scholars use the term enabling structures to depict default

identifies two enabling structures. First, we examine the constriction of the Parental Immunity Doctrine, which traditionally protected parents from liability in torts for injuries inflicted on their children. As most states constricted the Parental Immunity Doctrine, parents were increasingly sued for inappropriate care of their children. Second, we underscore the ways in which the law repeatedly incorporates knowledge about best child rearing practices into legal monitoring duties. Specifically, we examine legal measures imposing parental responsibility for child injuries caused by exposure to lead and fetal injuries caused by exposure to alcohol. We then turn to examine a recent legal development, in which courts consider child obesity in determining neglect and abuse cases and custody allocations. We argue that the constriction of the Parental Immunity Doctrine and the likely incorporation of additional knowledge of preferred child rearing practices into legal standards are likely to enhance the socio-technological trend of Intensive Parenting.

A. *The Constriction of the Parental Immunity Doctrine*

For years the Parental Immunity Doctrine, which holds that children cannot bring tort actions against their parents, was the prevailing law.¹²⁰ The Doctrine sought to safeguard the family relationship by preserving harmony and trust in domestic relations.¹²¹ It reflected an acknowledgment that parenting is a complex and ongoing journey through which some inevitable mistakes occur.¹²²

rules from which the parties can contractually opt out. See John C. Coffee, *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1619-20 (1989) (defining enabling structures). Instead, we use the term enabling structures to define doctrines or legal change that can facilitate the development of laws incorporating Intensive Parenting norms.

¹²⁰ Traditionally the Doctrine was held by many states. See, e.g., *Villaret v. Villaret*, 169 F.2d 677, 679 (D.C. Cir. 1948); *Hastings v. Hastings*, 163 A.2d 147, 151 (N.J. 1961); *Nahas v. Noble*, 420 P.2d 127, 128 (N.M. 1966); *Sorrentino v. Sorrentino*, 162 N.E. 551, 551 (N.Y. 1928); *Chaffin v. Chaffin*, 397 P.2d 771, 773 (Or. 1964); *Castellucci v. Castellucci*, 188 A.2d 467, 468 (R.I. 1963); *Ownby v. Kleyhammer*, 250 S.W.2d 37, 37-38 (Tenn. 1952); *Stevens v. Murphy*, 421 P.2d 668, 672 (Wash. 1966); *DeLay v. DeLay*, 337 P.2d 1057, 1059 (Wash. 1959).

¹²¹ See, e.g., *Herzfeld v. Herzfeld*, 781 So. 2d 1070, 1072 (Fla. 2001); see also Haley, *supra* note 17, at 579.

¹²² Haley, *supra* note 17, at 579. Another rationale for the Doctrine was to prevent collusion between parent and child to defraud insurance companies. See *Dennis v. Walker*, 284 F. Supp. 413, 417 (D.D.C. 1968) (holding that the existence of liability insurance actually supported the need for immunity because of the heightened risk of collusion to defraud insurers); Haley, *supra* note 17, at 579.

In the past three decades, however, courts have significantly narrowed down the Doctrine's scope and applicability.¹²³ Some states abolished the Parental Immunity Doctrine completely.¹²⁴ Other states constricted the scope of the Doctrine.¹²⁵ Currently, states that constricted the Doctrine deny immunity where parental behavior is "outside the scope of what is inherent to the fundamental right to parent."¹²⁶ Accordingly, in most jurisdictions, courts inquire whether the parental act inflicting the child's injury was within the parent's scope of authority over the child.¹²⁷ Another way in which courts narrowed the Doctrine was by constricting the scope of behavior that is inherent to the fundamental rights of the parent to discipline his child.¹²⁸ Moreover, some courts adopted a reasonably prudent parent standard, which allows them to assign liability even in cases in which

¹²³ Social changes played an important role in inducing the constriction of the Parental Immunity Doctrine. The Doctrine was conceived in the late nineteenth century, at a time when the father was the absolute master of the home and parents sternly disciplined their children. Hence, the law recognized absolute parental authority and the unlimited obligation of respect owed by the child to his parents. Irene Hansen Saba, *Parental Immunity from Liability in Tort: Evolution of a Doctrine in Tennessee*, 36 U. MEM. L. REV. 829, 834 (2005). Recent changes in the social legitimacy of parental autonomy and state intervention within the family influenced the constriction of the doctrine. Two sources of influence were the feminist movement and its critique of the family's immunity from state interference, and the children's rights movement, which sought to recognize the full humanity of children. On the feminist critique, see for example SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 25-40 (1989). On children's rights discourse, see generally John Eekelaar, *The Emergence of Children's Rights*, 6 OXFORD J. LEGAL STUD. 161 (1986).

¹²⁴ See, e.g., *Gibson v. Gibson*, 479 P.2d 648, 651 (Cal. 1971); *Anderson v. Stream*, 295 N.W.2d 595, 599-600 (Minn. 1980); *Guess v. Gulf Ins. Co.*, 627 P.2d 869, 871 (N.M. 1981); *Kirchner v. Crystal*, 474 N.E.2d 275, 276-77 (Ohio 1984); *Falco v. Pados*, 282 A.2d 351, 354-55 (Pa. 1971); *Elam v. Elam*, 268 S.E.2d 109, 110-12 (S.C. 1980); see also *Haley*, *supra* note 17, at 593-94.

¹²⁵ The first case to constrict the Parental Immunity Doctrine and to carve out exceptions to that doctrine was *Goller v. White*. The Court in *Goller* held that a parent would be immune from a tort action only if the tort involved "an exercise of parental authority . . . [or] ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care." *Goller v. White*, 122 N.W.2d 193, 198 (Wis. 1963). Other states followed. See, e.g., *Silesky v. Kelman*, 161 N.W.2d 631 (Minn. 1968), *overruled by Anderson v. Stream*, 295 N.W.2d 595 (Minn. 1980). For a full survey of post-*Goller* case law constricting the Parental Immunity Doctrine, see *Haley*, *supra* note 17, at 580-83.

¹²⁶ See *Saba*, *supra* note 123, at 830.

¹²⁷ The scope of immunity varies from state to state. For the most recent overview of the modified Parental Immunity Doctrine, see *id.* at 846-54.

¹²⁸ See *id.* at 830.

the parents acted within their scope of authority.¹²⁹ Hence, as states abolished or constricted the Parental Immunity Doctrine, parents have become increasingly exposed to lawsuits filed by their children.¹³⁰

The constriction of the Parental Immunity Doctrine is an important enabling structure for the incorporation of the practices of Intensive Parenting. Courts have narrowed the Parental Immunity Doctrine, thereby exposing the parent to additional sources of liability based on his or her functioning as a parent. Specifically, critics of this legal development explained that it discourages novel child rearing practices and creates potential for judgments discriminating against parents whose conduct does not conform to prevailing community standards.¹³¹ At the same time, the trend of Intensive Parenting requires more of the parent in terms of supervision and knowledge. As the two trends coalesce, parents are more likely to be sued for allegedly inadequate parental supervision.

B. Incorporating Child Rearing Practices into Legal Standards

Today's dominant parent is cultivating, monitoring, and knowledgeable. The three characteristics of the contemporary parent are closely related. As new knowledge of child rearing practices becomes common, it is incorporated into routine parental monitoring norms.¹³² The law, at times, incorporates these monitoring norms and

¹²⁹ Haley, *supra* note 17, at 595. See, e.g., Gibson, 479 P.2d at 653 (adopting the reasonably prudent parent standard for determining parental liability); Anderson, 295 N.W.2d at 599 (adopting the reasonably prudent parent standard); Hartman v. Hartman, 821 S.W.2d 852, 857 (Mo. 1991) (abolishing parental immunity and adopting the reasonably prudent parent standard).

¹³⁰ Despite the constriction of the Parental Immunity Doctrine, courts are less likely to bar parental immunity for claims of negligent supervision. Courts explain that parental supervision is part of parental authority. They mostly allow children's lawsuits against parents if parents' failure to properly supervise is intentional rather than negligent. Haley, *supra* note 17, at 589-90. But see cases in which courts allowed claims for negligent supervision, Anderson, 295 N.W.2d at 601 (allowing child's negligent supervision cause of action when child wandered into driveway and was hit); Andrews v. Cnty. of Otsego, 446 N.Y.S.2d 169, 172 (N.Y. App. Div. 1982) (allowing child's cause of action for negligent supervision against foster parent); Thoreson v. Milwaukee & Suburban Transp. Co., 201 N.W.2d 745, 753 (Wis. 1972) (allowing child's cause of action for negligent supervision where child was left alone and unsupervised in house, wandered off and was hit).

¹³¹ See Anderson, 295 N.W.2d at 603 (Rogosheske, J., dissenting) (specifically criticizing the adoption of the reasonably prudent parent standard for determining whether to apply the Parental Immunity Doctrine).

¹³² See MARIANA VALVERDE, LAW'S DREAM OF A COMMON KNOWLEDGE 169-72, 178

transforms them into legal duties. Once legal entrenchment occurs, parents are legally required to monitor their children in a way that incorporates this knowledge. This section uses three examples to illustrate the way the law routinely incorporates new knowledge about best child monitoring practices into legal standards. First, we examine counterclaims alleging parental liability, where parents sued landlords or paint manufacturers for their children's lead-caused injuries. Second, we look at legislative measures aimed at preventing alcohol consumption by pregnant women in order to protect the fetus. Finally, we discuss a recent development, which considers parental responsibility for child obesity as a factor in neglect and abuse proceedings and custody determinations.

Some commentators argue that although alcohol, lead, and obesity can pose hazards for children's health, the imposition of legal liability is inappropriate.¹³³ This critique underscores the difficulty inherent in turning parenting norms into legal standards. At the same time, our main goal in this section is not to assess the appropriateness of the legal measures directed at parents whose fetuses consume alcohol, whose children digest lead, or whose children are obese. Instead, our objective is to reveal an additional enabling structure for the incorporation of Intensive Parenting into the law. Intensive Parenting imposes a high standard of knowledge of best child monitoring practices on the parent. In this section we show that the law already contains the channels through which it can turn knowledge about best child monitoring practices into law.¹³⁴ The obesity cases are the latest example, but unlikely the last instance, in which knowledge about

(2003) (discussing how common knowledge is incorporated into the legal duty to know).

¹³³ See, e.g., Shireen Arani, *Case Comment: State Intervention in Cases of Obesity-Related Medical Neglect*, 82 B.U. L. REV. 875, 876 (2002) (contending that state intervention should only be permitted when obesity is so severe that child's life is in imminent danger or in order to enable child to lead a normal life). See generally Sue Thomas & Lisa Rickert, *The Meaning, Status and Future of Reproductive Autonomy: The Case of Alcohol Use During Pregnancy*, 15 UCLA WOMEN'S L.J. 1 (2006) (arguing for need for new strategy to enhance women's reproductive freedom, which is eroded by pregnancy alcohol consumption laws); Jennifer Tiller, *Easing Lead Paint Laws: A Step in the Wrong Direction*, 18 HARV. ENVTL. L. REV. 265 (1994) (arguing that parents should be granted immunity because they already have incentive to protect their children from injury).

¹³⁴ On the channeling function of law in the area of parenthood, see Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 502-03 (1992) (demonstrating how laws channel men and women toward certain models of parenthood and distance them from other possible models through a system of legal prohibitions and requirements).

best child monitoring practices crystallizes into a legal standard. Specifically, we argue that not all forms of child rearing knowledge deserve the same deference. While some safety measures should be incorporated into legal standards, other parenting norms should not be elevated into legal standards. We end this section by providing examples of Intensive Parenting practices that, while desirable as social norms, should not be hastily incorporated into legal standards.

1. Parental Liability for Child's Lead-Caused Injuries

Young children are particularly vulnerable to the dangers of lead. Most often children are exposed to lead by consuming paint chips in badly maintained premises in which the walls were painted with lead-based paint. Lead consumption can lead to both physical impairment and decreased intelligence.¹³⁵ While medical professionals knew of the dangers of lead since the late 1920s,¹³⁶ the first laws prohibiting use of lead paint and requiring landlords to protect tenants from lead paint came into force only in the 1970s.¹³⁷ The dangers of lead poisoning became common knowledge after 1990.¹³⁸ Currently, different sources have effectively publicized the dangers of lead poisoning to the general public. The dangers of lead poisoning appear in child rearing books,¹³⁹ parenting websites,¹⁴⁰ and warnings that landlords are legally required to issue to their tenants.¹⁴¹

¹³⁵ See AM. MED. ASS'N, REPORT 6 OF THE COUNCIL ON SCIENTIFIC AFFAIRS (I-94) (1994), <http://www.ama-assn.org/ama/no-index/about-ama/13681.shtml>.

¹³⁶ CHRISTIAN WARREN, BRUSH WITH DEATH: A SOCIAL HISTORY OF LEAD POISONING 31 (2000) (reporting that in the late 1920s and in the 1930s, frequency of reports of childhood lead poisoning in medical journals increased dramatically).

¹³⁷ The first federal law, the Lead Based Paint Poisoning Prevention Act, was enacted in 1971. 42 U.S.C. § 4822 (2006) (prohibiting use of lead paint in federal government or federally assisted residential structures).

¹³⁸ While the dangers of lead became known to the public during the mid-1960s, lead was considered to be a problem of the poor. It was only since the late 1980s to early 1990s that the public became aware that lead exposure endangers all children. See WARREN, *supra* note 136, at 152, 222-43.

¹³⁹ HEIDI E. MURKOFF & SANDEE E. HATHWAY, WHAT TO EXPECT THE FIRST YEAR 337 (2008).

¹⁴⁰ See, e.g., Louis Bergeron, *Lead Poisoning*, BABYCENTER, http://www.babycenter.com/0_lead-poisoning_1383942.bc (last visited Feb. 14, 2010); *Lead Exposure: 5 Things You Need to Know*, IVILLAGE, <http://parenting.ivillage.com/baby/bsafety/0,,4295,00.html> (last visited Feb. 14, 2010); *About Lead Poisoning*, KIDSHEALTH, http://kidshealth.org/parent/firstaid_safe/home/lead_poisoning.html (last visited Feb. 14, 2010).

¹⁴¹ For laws requiring landlords to issue warnings about a potential lead hazard, see for example 24 C.F.R. §§ 35.88, 35.92 (2008) (requiring that seller or lessor

Soon after parents whose children suffered lead based injuries began suing landlords,¹⁴² a landlord raised a counterclaim charging that a mother's negligent supervision of her child was the proximate cause of the child's injuries.¹⁴³ Following this lawsuit, different versions of the parental liability counterclaim appeared. In all these cases, parents sued the landlord or paint manufacturer for lead injuries suffered by their children, and the defendant counterclaimed that the parents were also at least partly liable.¹⁴⁴

At first, courts rejected these claims.¹⁴⁵ However, since 1990, while some courts continued to reject counterclaims against parents,¹⁴⁶ other

provide disclosure of lead hazards); N.Y. CITY ADMIN. CODE, tit. 27, ch. 2, subch. 2, art. 14, § 27-2056.1 *et seq.* (2004) (requiring owners periodically to check whether a child under six resides in the dwelling and provide information about lead). *See also* CAL. DEPT OF CONSUMER AFFAIRS, CALIFORNIA TENANTS: A GUIDE TO RESIDENTIAL TENANTS' AND LANDLORDS' RIGHTS AND RESPONSIBILITIES 22-23 (2010), *available at* <http://www.dca.ca.gov/publications/landlordbook/catenant.pdf> (notifying tenants of landlords' lead disclosure requirements).

¹⁴² Lawsuits against landlords for lead inflicted injuries began in the 1960s. *See, e.g.,* *Weaver v. Arthur A. Schneider Realty Co.*, 381 S.W.2d 866, 866-67 (Mo. 1964) (infant sued landlord for lead inflicted injuries); *Acosta v. Irdank Realty Corp.*, 238 N.Y.S.2d 713, 714 (N.Y. Sup. Ct. 1963) (explaining how infant and father sued realty corporation for damages due to lead poisoning).

¹⁴³ *See* *Davis v. Royal-Globe Ins.*, 223 So. 2d 912, 918-19 (La. Ct. App. 1969), *rev'd on other grounds*, 242 So. 2d 839 (La. 1970) (explaining how defendant argued that the mother's conduct was the proximate cause of her child's lead injuries).

¹⁴⁴ *See, e.g.,* *Caroline v. Reicher*, 269 Md. 125, 128 (Md. 1973) (summarizing how parents sued landlord for child's lead poisoning and landlord's argument that parents were contributorily negligent); *Morales v. Moss*, 44 A.D.2d 687, 688 (N.Y. App. Div. 1974) (summarizing how parent sued landlord and paint manufacturer for injuries caused to child who ate lead containing paint chips; defendants counterclaimed against the father for apportionment of damages).

¹⁴⁵ *See, e.g.,* *Jackson v. Wilmington Hous.*, No. 81C-MR-31, 1986 Del. Super. LEXIS 1143, at *5-6 (Del. Super. Ct. Apr. 10, 1986) (rejecting claim that intervening negligence of parents in failing to protect their children was a superseding cause of any harm to the child); *Davis*, 223 So.2d at 918-19 (rejecting claim that the mother's behavior in this case was the proximate cause of her child's injury); *Caroline*, 269 Md. at 129-31 (finding that the mother's actions were insufficient to warrant a superseding negligence instruction); *Morales*, 44 A.D. 2d at 688 (dismissing claim against the father for apportionment of damages).

¹⁴⁶ *See, e.g.,* *Tobin v. Conn. Hous. Fin.*, No. LPLCV 92333231S, 1997 Conn. Super LEXIS 1596, at *21-22 (Conn. Super. Ct. June 17, 1997) (rejecting counterclaim because parental supervisory function is protected under Parental Immunity Doctrine); *Kol v. Novella*, No. 31-85-11, 1996 Conn. Super. LEXIS 540, at *4-14 (Conn. Super. Ct. Feb. 20, 1996) (rejecting counterclaim because negligence of parents cannot be imputed to minors and because parents are protected by statutory immunity); *Canada v. McCarthy*, 567 N.W.2d 496, 501, 505-07 (Minn. 1997) (holding that the negligence of the mother and grandmother cannot supersede the

courts began admitting these claims.¹⁴⁷ In the period between 1990 and 2009, courts admitted forty percent of defendants' counterclaims alleging some form of parental responsibility.¹⁴⁸ Some courts refused to bar claims for negligent supervision.¹⁴⁹ Other courts allowed parental liability claims for contribution.¹⁵⁰ At the same time, some courts, particularly in states where parental immunity protection remained stronger, would admit claims against parents in cases where parental conduct included actions amounting to more than negligent supervision. Examples include parents who did not seek prompt medical attention,¹⁵¹ painted their apartment themselves,¹⁵² owned the premises,¹⁵³ or oversaw or conducted the renovation.¹⁵⁴

Through the last two decades, courts have shown an increasing willingness to admit counterclaims alleging parental monitoring

negligence of the landlord because the landlord owes an independent duty of care).

¹⁴⁷ The first case was *Ankiewicz v. Kinder*, which allowed a claim for contribution against the mother of a child who suffered lead injuries. See *Ankiewicz v. Kinder*, 563 N.E.2d 684, 686-87 (Mass. 1990).

¹⁴⁸ During the period between 1990 and March 2009, defendants raised counterclaims against parents in twenty-five cases and in ten of these cases, the courts admitted the claims. These results are based on a search of all federal and state cases conducted on Westlaw in March 2009. The search terms used were: "contribut! Negligen!" /p parent and lead /s paint; "comparat! Negligen!" /p parent and lead /s paint; "contribut! Negligen!" /p (father mother) and lead /s paint; "comparat! Negligen!" /p (father mother) and lead /s paint; lead /s paint /100 child! and negligen! /s (parent mother father) /50 lead; lead /s paint /100 child! and contribut! /s (parent mother father); lead /s paint /100 child! and apportion! /s (parent mother father); lead /s paint /100 (infant minor) and negligen! /s (parent mother father) /50 lead; lead /s paint /100 (infant minor) and contribut! /s (parent mother father); lead /s paint /100 (infant minor) and lead /s paint /100 (infant minor).

¹⁴⁹ This court noted that while parental immunity generally bars claims of negligent supervision, here there was parental failure to act even when the parent had actual knowledge of high lead levels and the means to reduce them. *Cooper v. Cnty. of Rensselaer*, 697 N.Y.S.2d 486, 491-92 (N.Y. Sup. Ct. 1999).

¹⁵⁰ See, e.g., *Torres v. Melody*, No. 98765, 1995 Conn. Super. LEXIS 3434, at *2-3 (Conn. Super. Ct. Dec. 7, 1995) (allowing a contributory negligence claim against parents); *Ankiewicz*, 563 N.E.2d at 688 (allowing a contribution claim against parents and refusing to interpret the Lead Paint Act as imposing exclusive liability on landlords).

¹⁵¹ See *Cantave v. Peterson*, 266 A.D.2d 492, 493 (N.Y. App. Div. 1999); *Alharb v. Sayegh*, 199 A.D.2d 229, 230 (N.Y. App. Div. 1993).

¹⁵² See *Cantave*, 266 A.D.2d at 493; *Alharb*, 199 A.D.2d at 230.

¹⁵³ See *Berger v. City of New York*, 676 N.Y.S.2d 909, 910 (N.Y. Sup. Ct. 1998).

¹⁵⁴ *Fernandes v. Deary*, No. LPLCV020067549S, 2003 Conn. Super. LEXIS 2729, at *4-5 (Conn. Super. Ct. Oct. 7, 2003); *Berger*, 676 N.Y.S.2d at 910-11.

liability.¹⁵⁵ This willingness correlates with the diffusion of knowledge among parents about the hazards of lead. As parents are repeatedly notified¹⁵⁶ of the hazards of lead and told to protect their children from lead consumption, courts are increasingly willing to consider imposing liability on parents who do not comply with existing monitoring norms.¹⁵⁷

2. Pregnant Women and Alcohol Consumption

In recent years, different sources warn pregnant women or women who are trying to conceive of the harms of alcohol consumption for the health of their fetuses.¹⁵⁸ Specifically, women are warned of the dangers of Fetal Alcohol Syndrome to the physical and mental well-being of their fetus. Fetal Alcohol Syndrome can cause mental

¹⁵⁵ It is important to note that these published cases do not indicate whether the parents were eventually found contributorily liable; they merely indicate that courts became increasingly willing to admit and allow these claims to be litigated. Yet, these opinions underscore an important evolution in courts' attitudes toward a willingness to entertain the possibility of parental liability as the knowledge of the dangers of lead became common knowledge.

¹⁵⁶ Only two court decisions treated the parents' actual knowledge of the existence of lead in their premises and its effects as a factor in determining liability. See *Richardson v. Schochat*, No. LPLCV 970398264S, 1998 Conn. Super. LEXIS 255, at *1, 4-6, 6 n.2 (Conn. Super. Ct. Jan. 29, 1998) (stating that court will allow a claim against parent only where parent intentionally permitted child to ingest lead; mentioning that in this case lead condition was a latent defect beyond knowledge of parent); *Cooper v. Cnty. of Rensselaer*, 697 N.Y.S.2d 486, 491-92 (N.Y. Sup. Ct. 1999) (allowing a counterclaim where parents received results of child's first lead blood test and failed to follow prescribed precautions, such as sweeping paint chips and washing child's toys and hands).

¹⁵⁷ The diffusion of knowledge about the dangers of lead was not the only factor affecting the acceptance of these claims. Another important factor was the constriction or abolition of the Parental Immunity Doctrine in many states. See *infra* Part IV.A.

¹⁵⁸ Fetal Alcohol Syndrome was first identified in the United States in 1973. However, the flow of this knowledge to the general public occurred gradually. For one, it was only in 1989 that mandatory labeling of a birth defects message on alcohol beverages was implemented. Furthermore, it was in 1997 that the American College of Obstetricians and Gynecologists and American Academy of Pediatrics issued a statement on alcohol use and pregnancy, which was published in *AM. ACAD. OF PEDIATRICS, GUIDELINES FOR PERINATAL CARE* (4th ed. 1997). NAT'L TASK FORCE ON FETAL ALCOHOL SYNDROME & FETAL ALCOHOL EFFECT, *REDUCING ALCOHOL-EXPOSED PREGNANCIES* 19 (2009), available at <http://www.cdc.gov/ncbddd/fasd/documents/121972RedAlcohPreg+Cov.pdf> (providing the timeline of the national efforts to prevent alcohol-exposed pregnancies); see also NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM OF THE NAT'L INST. OF HEALTH, *Alcohol Alert*, No. 13 PH 297, NATIONAL INSTITUTE OF HEALTH, July 1991, <http://pubs.niaaa.nih.gov/publications/aa13.htm>.

retardation, defects of major organ systems, growth retardation, damage to the nervous system, and facial malformations.¹⁵⁹ Popular pregnancy guide books such as *What to Expect When You Are Expecting* and websites for expecting mothers usually caution that women should completely abstain from alcohol during pregnancy.¹⁶⁰ Bars, restaurants, and liquor shops exhibit signs warning of the dangers of alcohol to pregnant women.¹⁶¹ Medical professionals caring for pregnant women routinely warn their patients of the dangers of consuming alcohol during pregnancy.¹⁶² Currently, the dangers of alcohol consumption appear to be common knowledge at least among pregnant women.¹⁶³

¹⁵⁹ See NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM, ALCOHOL ALERT NO. 50: FETAL ALCOHOL EXPOSURE AND THE BRAIN (2000), available at <http://pubs.niaaa.nih.gov/publications/aa50.htm>; NAT'L TASK FORCE ON FETAL ALCOHOL SYNDROME & FETAL ALCOHOL EFFECT, DEFINING THE NATIONAL AGENDA FOR FETAL ALCOHOL SYNDROME AND OTHER PRENATAL ALCOHOL-RELATED EFFECTS 2 (2002), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5114a2.htm>.

¹⁶⁰ See ARLENE EISENBERG & HEIDI MURKOFF, WHAT TO EXPECT WHEN YOU ARE EXPECTING 79 (3d ed. 2002). For examples of popular parenting and medical sites discussing the issue, see *Alcohol Effects on a Fetus: Topic Overview*, WEBMD, <http://www.webmd.com/baby/tc/alcohol-effects-on-a-fetus-topic-overview> (last visited Feb. 14, 2010) (“[A]ny amount of alcohol may affect your developing baby. You can prevent FASD by not drinking at all while you are pregnant.”); BabyCenter Med. Advisory Bd., *Drinking Alcohol During Pregnancy*, BABYCENTER, http://www.babycenter.com/0_drinking-alcohol-during-pregnancy_3542.bc (last visited Feb. 14, 2010) (“Alcohol and pregnancy don’t mix All public health officials in the United States recommend that pregnant women, as well as women who are trying to conceive, play it safe by steering clear of alcohol entirely.”).

¹⁶¹ Many state laws require businesses serving alcohol to post warnings that alcohol consumption during pregnancy is harmful to fetuses and can cause birth defects. See, e.g., ALASKA STAT. § 04.21.065 (2010); ARIZ. REV. STAT. § 4-261 (2010); GA. CODE ANN. § 3-1-5 (2010); 235 ILL. COMP. STAT. 5/6-24a (2010); N.J. STAT. ANN. § 33:1-12a (West 2010).

¹⁶² Medical organizations guidelines instruct prenatal caregivers to address alcohol consumption during pregnancy as part of their routine care. See, e.g., AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, COMMITTEE OPINION NO. 422: AT RISK DRINKING AND ILLICIT DRUG USE: ETHICAL ISSUES IN OBSTETRIC AND GYNECOLOGIC PRACTICE 2 (2008), available at <http://www.ncbi.nlm.nih.gov/pubmed/19037056> (abstract), full article available at http://www.acog.org/from_home/publications/ethics/co422.pdf (concluding that physician advice has been effective in reducing alcohol use during pregnancy and that physicians have an ethical obligation to screen and intervene to prevent alcohol use); HEALTH & ETHICS POLICIES OF THE AM. MED. ASS'N HOUSE OF DELEGATES, REPORT I-98, *reaff'd* CSAPH Rep. 2, A-08, H-420.962, H-420.991 (encouraging physicians to inquire routinely about alcohol use in the course of providing prenatal care and inform their patients of the effects of alcohol consumption during pregnancy).

¹⁶³ See Grace Chang et al., *Alcohol Use by Pregnant Women: Partners, Knowledge, and Other Predictors*, 67 J. STUD. ON ALCOHOL 245, 248 (2006) (explaining a survey

For years, state legislatures concerned about the health of fetuses have implemented different measures including civil commitment and criminal prosecution to prevent the use of illegal drugs among pregnant women.¹⁶⁴ As the dangers of alcohol consumption during pregnancy became known not just among medical professionals but also among women of child-bearing years, state legislatures began implementing measures to prevent alcohol consumption during pregnancy.

Since 1989, but mostly in the 1990s and after the turn of the century, state legislatures began enacting statutes that ranged in the severity of their enforcement measures.¹⁶⁵ At one end of the spectrum, some states adopted legislative pronouncements that support medical professionals who discover during a routine exam or conversation with a pregnant patient that she uses alcohol to encourage her to undergo treatment and facilitate such treatment.¹⁶⁶ Other states went further, adopting reporting requirements statutes. These reporting

showing that about ninety-five percent of pregnant women and their partners displayed knowledge of the harmful effects of alcohol during pregnancy); Suzanne Tough et al., *Do Women Change Their Drinking Behaviors While Trying to Conceive?: An Opportunity for Preconception Counseling*, 4 *CLINICAL MED. & RES.* 97, 101 (2006) (explaining that ninety-nine percent of pregnant women surveyed knew that alcohol was not recommended during pregnancy). For court opinions, see for example *State v. Zimmerman*, No. 96-CF-525, 1996 WL 858598, at *4 (Wis. Cir. Ct. Sept. 18, 1996), *rev'd*, *State v. Deborah J.Z.*, 596 N.W.2d 490 (Wis. Ct. App. 1999) (“A pregnant woman who consumes alcohol should know that it will enter her fetus. This also is common knowledge.”).

¹⁶⁴ See Linda Fentiman, *Pursuing the Perfect Mother: Why America’s Criminalization of Maternal Substance Abuse Is Not the Answer: A Comparative Legal Analysis*, 15 *MICH. J. GENDER & L.* 389, 399-408 (2009) (describing history beginning in the 1980s of criminal measures against pregnant women who consumed illegal drugs); Page McGuire Linden, *Drug Addiction During Pregnancy: A Call for Increased Social Responsibility*, 4 *AM. U. J. GENDER & L.* 105, 121-31 (1995) (describing state involuntary civil commitment measures of pregnant women who consume illegal drugs).

¹⁶⁵ Oregon and Minnesota’s statutes were enacted in 1989. However, most of the statutes were enacted from the 1990s onwards. See *OR. REV. STAT. ANN.* § 430.905 (West 2010) (enacted 1989); *MINN. STAT. ANN.* § 626.5561(1) (2006) (enacted 1989); see also *ARIZ. REV. STAT. ANN.* § 8-819 (2010) (enacted 2003); *IND. CODE* § 31-34-1-11 (2010) (enacted 1997); *KY. REV. STAT. ANN.* §214.160(2)-(4) (West 2010) (enacted 1992); *MINN. STAT. ANN.* § 253B.065(5)(c) (West 2010) (enacted 2007); *N.D. CENT. CODE* § 50-25.1-18(1)-(2) (2009) (enacted 2003); *OKLA. STAT. tit. 63, §§ 1-546.1, 546.5* (2010) (enacted 2000); *S.D. CODIFIED LAWS* § 34-20A-63 (2010) (codified 1998); *S.D. CODIFIED LAWS* § 34-20A-70 (2010) (enacted 1998); *S.D. CODIFIED LAWS* § 34-23B-6 (2010) (enacted 2006); *WIS. STAT. ANN.* § 51.46 (West 2009) (enacted 1997).

¹⁶⁶ See, e.g., *OR. REV. STAT. ANN.* § 430.905 (West 2009).

requirements vary, often including both mandatory and voluntary reporting responsibilities. The mandatory reporting requirements focus mostly on medical professionals,¹⁶⁷ while the voluntary reporting requirements encourage anyone who observes habitual and excessive consumption of alcohol by a pregnant woman to report to the relevant authorities who could offer treatment options.¹⁶⁸ At the same time, some states adopted legislation authorizing medical professionals to compel a pregnant woman to undergo a test for alcohol use.¹⁶⁹

Legislation in some states featured more severe measures. These states incorporated alcohol consumption during pregnancy as a factor in neglect and abuse determinations. Under these statutes, consumption of alcohol during pregnancy combined with an adverse effect on the child could lead to a finding that the mother neglected and abused the child, and the state could take the child from the mother.¹⁷⁰ Finally, at the farthest end of the spectrum, five jurisdictions currently provide for involuntary civil confinement and treatment of women who consume alcohol during pregnancy.¹⁷¹ In these states, a woman who consumes alcohol during pregnancy can be ordered against her will into a treatment facility to prevent additional alcohol consumption that may endanger her fetus.¹⁷²

Commentators arguing against imposing liability on pregnant women who consume alcohol expose the complexity of imposing parenting norms as legal standards.¹⁷³ However, the imposition of

¹⁶⁷ See, e.g., MINN. STAT. ANN. § 626.5561(1) (West 2010); N.D. CENT. CODE § 50-25.1-18(1) (2009).

¹⁶⁸ See, e.g., MINN. STAT. ANN. § 626.5561(1); N.D. CENT. CODE § 50-25.1-18(2); S.D. CODIFIED LAWS §§ 34-20A-70 (2010).

¹⁶⁹ See, e.g., KY. REV. STAT. ANN. § 214.160(2) (West 2009).

¹⁷⁰ See, e.g., ARIZ. REV. STAT. ANN. § 8-819 (2010); IND. CODE ANN. § 31-34-1-11 (2010); KY. REV. STAT. ANN. § 214.160(4) (West 2010).

¹⁷¹ These jurisdictions are Minnesota, Oklahoma, North Dakota, South Dakota, and Wisconsin. See MINN. STAT. ANN. § 626.5561(2) (West 2010); N.D. CENT. CODE § 50-25.1-18 (2009); OKLA. STAT. tit. 63, § 1-546.5 (West 2009); S.D. CODIFIED LAWS § 34-20A-63 (2008); WIS. STAT. ANN. § 51.46 (2009).

¹⁷² See MINN. STAT. ANN. §§ 253B.065(5)(c), 626.5561(2) (West 2010) (proposed legislation); N.D. CENT. CODE § 50-25.1-18; OKLA. STAT. tit. 63, § 1-546.5; S.D. CODIFIED LAWS § 34-20A-63; WIS. STAT. ANN. § 51.46; see also *Pregnancy and Alcohol: Civil Commitment*, ALCOHOL POLICY INFO. SYS., http://alcoholpolicy.niaaa.nih.gov/alcohol_and_pregnancy_civil_commitment.html? (last visited Feb. 14, 2010) (comparing civil commitment proceedings).

¹⁷³ See generally Thomas & Rickert, *supra* note 133 (arguing for the need for a new strategy to enhance women's reproductive freedom, which is eroded by pregnancy alcohol consumption laws); Judith Kahn, Note, *Of Woman's First Disobedience: Forsaking a Duty of Care to Her Fetus: Is This a Mother's Crime?*, 53 BROOK. L. REV. 807

