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## Parents Super-Sizing Their Children: Criminalizing and Prosecuting The Rising Incidence of Child Obesity as Abuse

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# **PARENTS SUPER-SIZING THEIR CHILDREN: CRIMINALIZING AND PROSECUTING THE RISING INCIDENCE OF CHILDHOOD OBESITY AS CHILD ABUSE**

*Cheryl George\**

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## **INTRODUCTION**

“61% of adults in the United States were overweight or obese (BMI > 25)\* in 1999; 13% of children aged 6 to 11 years and 14% of adolescents aged 12 to 19 years were overweight\* in 1999. This prevalence has nearly tripled for adolescents in the past 2 decades. The increases in overweight and obesity cut across all ages, racial and ethnic groups, and both genders.

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With all of the mudslinging that is taking place in the current health-care debate, very few proponents and opponents seem to be addressing the elephant in the room—obesity. Childhood obesity, specifically, is rising at an alarming rate. “The prevalence of obesity (BMI $\geq$ 30) continues to be a health concern for adults, children and adolescents in the United States.”<sup>2</sup> Sadly, the rate of adult obesity is increasing almost as dramatically as that of childhood obesity.<sup>3</sup> Based on the National Health and Nutrition Examination Survey (NHANES) study, in the combined years of 2003–2006, of children between the ages of two and nineteen, 16.3% of them were obese.<sup>4</sup> There is a 70% chance that a child who is obese will grow up to be an obese adult.<sup>5</sup> Since adults do not seem to have a problem becoming overweight all on their own, there is no reason we should send kids into adulthood already burdened with this problem. I bet we all remember growing up and playing outside with our friends, riding bikes, and running all over the neighborhood. Children today cannot do this while they are plagued by excessive extra weight.<sup>6</sup> “The habits you teach your child to-

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teaches International Human Rights: Global Sex Trafficking in Innsbruck, Austria in *St. Mary's Institute on World Legal Problems* at the University of Innsbruck. Professor George has also spoken (December 2007) in Beijing, China, on the issue of Global Sex Trafficking as well as in Gloucester, England (July 2007) on the topic of how we are creating a permanent underclass of people by not graduating People of Color in similar numbers as Whites. This paper was later published by Texas Wesleyan Law Review and is entitled, *Non-Education in America: Gateway to Subsistence Living*. Professor George has also published in *St. Mary's* law journal the Scholar *Slipping Through the Cracks and Into Schools: The Need for a Uniform Sexual-Predator Tracking System*. B.A., cum laude, Howard University 1990; J.D., Texas Tech University School of Law 1993.

I thank my husband Charles and my sons Gabriel and Nathaniel for their support during the time I was researching and preparing this paper. I give many thanks to my research assistants: LaBecca Buselli (J.D. – December 2009), and Lacey Ashworth (J.D. – May 2010), for their untiring research and diligence. Immeasurable thanks go to the editing team of the *DePaul University Health Law Journal*.

Finally, I would like to thank the Lord for His many gifts and blessings upon me and my family.

1. [http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact\\_glance.htm](http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact_glance.htm)
2. <http://www.cdc.gov/nccdphp/dnpa/obesity/> (last visited January 7, 2009).
3. Coyla J. O'Connor, *Childhood Obesity and State Intervention: A Call to Order!*, 38 STETSON L. REV. 131, 135 (2008) Article states that adult obesity in the U.S. doubled from 1980 – 2002 and that childhood obesity tripled within those same years. *Id.*
4. <http://www.cdc.gov/nccdphp/dnpa/obesity/> (last visited Jan. 7, 2009) (citing Ogden CL, Carroll MD, McDowell MA, Flegal KM. Obesity among adults in the United States – no change since 2003–2004. NCHS data brief no 1. Hyattsville, MD: National Center for Health Statistics, 2007) (explaining that this percentage is “at or above the 95th percentile of the 2000 BMI-for-age growth charts”). “Data from NHANES surveys (1976–1980 and 2003–2006) show that the prevalence of obesity has increased: for children aged 2–5 years, prevalence increased from 5.0% to 12.4%; for those aged 6–11 years, prevalence increased from 6.5% to 17.0%; and for those aged 12–19 years, prevalence increased from 5.0% to 17.6%.” *Id.*
5. Lisanne Mina, *Shocking Childhood Obesity Statistics*, [http://www.associatedcontent.com/article/437307/shocking\\_childhood\\_obesity\\_statistics.html?cat=51](http://www.associatedcontent.com/article/437307/shocking_childhood_obesity_statistics.html?cat=51), November 3, 2007 (last visited Sep. 24, 2009).
6. *Child Obesity is at Crisis Point as Physical Education Declines*, <http://sports.espn.go.com/espn/>

day could mean the difference between life or death later on.”<sup>7</sup> It is estimated that “[o]besity kills 300,000 people a year.”<sup>8</sup>

Many believe that the place to address childhood obesity is in the home.<sup>9</sup> This begs the question, what are parents doing (or not doing) to fuel this epidemic? What is the role of the parent in accepting responsibility for their child’s weight and its impact on the child’s health? If a parent is not properly caring for their child, can the state intervene with the parents’ custody rights?

Cases have held that “[t]he parent’s natural right to custody of children is not absolute.”<sup>10</sup> Parents legally have an affirmative duty to both support and attend to their children, and neglect of such duty can potentially result in the child’s removal from the home, parents’ loss of custody and/or termination of parental rights, and in extreme cases it can result in criminal liability.<sup>11</sup>

Part II of this Article discusses the background of childhood obesity and the role of the United States school system, parents, government and law makers as well as the medical field. Part III analyzes the issue of childhood obesity and develops a comparison to a case of child neglect or medical neglect in terms of parents starving their children to death. “Parents of morbidly obese children face a Hobson’s choice between losing custody of their child for medical neglect and subjecting their child to a regimen of increasingly dangerous interventions to control the child’s weight.”<sup>12</sup> This dilemma is illustrated in the final portion of Part III, which illustrates both the advantages and disadvantages of court intervention in childhood obesity cases. Finally, this Article concludes by proposing that parents (or guardians) of children that are considered medically to be morbidly obese should either face criminal charges for child abuse or at the very least have the children removed and placed in State custody.

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otl/news/story?id=4015831, (last visited Sep. 9, 2009). “The more kids are unhealthy, the less they can exercise.” *Id.*

7. Lisanne Mina, *Shocking Childhood Obesity Statistics*, [http://www.associatedcontent.com/article/437307/shocking\\_childhood\\_obesity\\_statistics.html?cat=51](http://www.associatedcontent.com/article/437307/shocking_childhood_obesity_statistics.html?cat=51), November 3, 2007 (last visited Sep. 24, 2009).

8. Breighanne Aileen Fisher, *Community-Based Efforts at Reducing America’s Childhood Obesity Epidemic: Federal Lawmakers Must Weigh In*, 55 DEPAUL L. REV. 711 (2006).

9. *Id.* at 715 (citing David Boaz, *Obesity and ‘Public Health’?*, July 20, 2004, available at <http://www.cato.org/dailys/07-20-04.html>). “[W]hile obesity is a widespread health problem, ‘it is not a public health problem...’” *Id.*

10. Laura A. Kelley, *What Should be the Standards for Intervening Between Parent and Child? The Parental Prosecution for a Young Boy’s Obesity*, 9 BUFF. WOMEN’S L.J. 7, 7 (2000–2001).

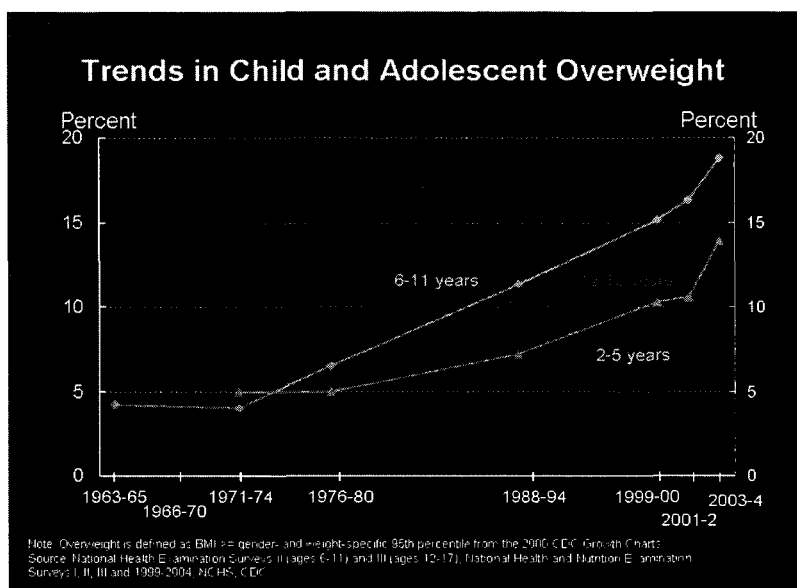
11. Marshall L. Wilde, *Bioethical and Legal Implications of Pediatric Gastric Bypass*, 40 WILLIAMETTE L. REV. 575, 601 (2004).

12. Marshall L. Wilde, *Bioethical and Legal Implications of Pediatric Gastric Bypass*, 40 WILLIAMETTE L. REV. 575, 578–83 (2004).

## II. BACKGROUND

### A. Growth of Childhood Obesity

The NHANES 2003-2004 survey results showed approximately 17% of adolescents and children are overweight.<sup>13</sup> The graph below shows that between ages 2-5 years there was an increase from 7.2 to 13.9%, an increase 11% to 19% for 6-11 year olds, and a leap from 11 to 19% for youth ages 12-19.<sup>14 15</sup>



How we commonly refer to overweight/obesity in adults is by using the body mass index (BMI). This same standard is also used in referring to overweight children or those that are at risk of becoming obese.<sup>16</sup> Experts in the medical field have set the standard as children who are in the 95<sup>th</sup> percentile or greater of the BMI charts as being categorized as overweight. As noted in Table 1, when this overweight definition is used to

13. [http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght\\_child\\_03.htm#Table%20](http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght_child_03.htm#Table%20) (last visited September 17, 2009). This survey used measure weights and heights.

14. [http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght\\_child\\_03.htm#Table%20](http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght_child_03.htm#Table%20) (last visited September 17, 2009). This graph shows the increases to be 6.7% for ages 2-5; 5% for ages 6-11 and 7% for young people ages 12-19.

15. [http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght\\_child\\_03.htm#Table%20](http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght_child_03.htm#Table%20) (last visited September 17, 2009).

16. [http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght\\_child\\_03.htm#Table%20](http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght_child_03.htm#Table%20) (last visited September 17, 2009).

chart earlier national health surveys, it is evident that the issue of being overweight in children and adults was stabilized from the period of the 1960's to 1980 (see Table 1).<sup>17</sup> But, from 1976-1980, the prevalence of overweight almost doubled in children and young adults.<sup>18</sup> The startling fact revealed in the NHANES study is that since 1994, the number of children that are overweight has not decreased or leveled off, but is instead increasing to greater numbers.<sup>19</sup> The study showed that there is a strong possibility that the youth of today will likely be the next generation of adults who will be at risk for serious overweight/obesity related health complications and conditions.<sup>20</sup>

Table 1. Prevalence of overweight among children and adolescents ages 2-19 years, for selected years 1963-65 through 1999-2002<sup>21</sup>

Age (years)	NHANES 1963-65 1966-702	NHANES 1971-74	NHANES 1976-80	NHANES 1988-94	NHANES 1999-2000	NHANES 2001-02	NHANES 2003-04
2-5	-	5	5	7.2	10.3	10.6	13.9
6-11	4.2	4	6.5	11.3	15.1	16.3	18.8
12-19	4.6	6.1	5	10.5	14.8	16.7	17.4

#### Definition, Causation, Persistence<sup>22</sup>

"Overweight and obesity are both labels for ranges of weight that are greater than what is generally considered healthy for a given height."<sup>23</sup> The definition for children is a bit different from that for adults because "BMI ranges above a normal weight have different labels (at risk of overweight and overweight)."<sup>24</sup>

17. [http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght\\_child\\_03.htm#Table%20](http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght_child_03.htm#Table%20) ([http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght\\_child\\_03.htm#Table%20](http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght_child_03.htm#Table%20) (last visited September 17, 2009).ast visited September 17, 2009)(see Table 1).

18. [http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght\\_child\\_03.htm#Table%20](http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght_child_03.htm#Table%20) (last visited September 17, 2009).

19. [http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght\\_child\\_03.htm#Table%20](http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght_child_03.htm#Table%20) (last visited September 17, 2009).

20. [http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght\\_child\\_03.htm#Table%20](http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght_child_03.htm#Table%20) (last visited September 17, 2009).

21. [http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght\\_child\\_03.htm#Table%20](http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght_child_03.htm#Table%20) (last visited September 17, 2009). Article noted that the statistics: Excludes pregnant women starting with 1971-74. Pregnancy status not available for 1963-65 and 1966-70. Article also noted that the data for 1963-65 are for children 6-11 years of age; data for 1966-70 are for adolescents 12-17 years of age, not 12-19 years.

22. Marshall L. Wilde, *Bioethical and Legal Implications of Pediatric Gastric Bypass*, 40 WILLIAMETTE L. REV. 575, 575 (2004).

23. <http://www.cdc.gov/nccdphp/dnpa/obesity/defining.htm> (last visited Jan. 7, 2009).

24. *Id.*

### III. DEFEATING CHILDHOOD OBESITY

The body's metabolism is better equipped to survive a famine than the over abundance high-sugary, high fatty, processed foods coupled with the overwhelming sedentary lifestyle of today's youth. Where has this led us? Over and over again, it has been declared that obesity in children is an epidemic in the United States.<sup>25</sup> However, childhood obesity is not just an epidemic affecting the United States, but instead is seen around the world in places such as Europe, the Near/Middle East, Asia-Pacific regions, Canada, and Great Britain. The number of children who are overweight has rapidly increased in the past two to three decades, doubling the amount of preschool kids and adolescents that are now considered obese.<sup>26</sup> One out of ten, or 155 million, school-aged children worldwide are overweight or obese.<sup>27</sup> Recent data indicated that 33.6% of individuals aged 2–19 years were overweight in 2003–2004, compared to 28.2% in 1999–2000.<sup>28</sup> For this particular age range, children overweight or at risk of being overweight was highest among Mexican Americans at 56.2%, followed by Non-Hispanic blacks at 55.1%, and Non-Hispanic whites at 49.8%.<sup>29</sup> Additionally, males had a higher percentage of being overweight at 18.2% compared to females at 16%.<sup>30</sup>

There exists competing views on what and who is to blame for childhood obesity. At a Senate hearing on Childhood Obesity, witnesses stated to U.S. lawmakers that “[c]ombating the growing obesity problem among children will require stronger action at all levels from food makers to gov-

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25. John Dorsey and Jeanne Segal, *Childhood and Juvenile Obesity: Tips for Parents*, Jan. 10, 2008, available at [http://www.helpguide.org/mental/childhood\\_obesity.htm](http://www.helpguide.org/mental/childhood_obesity.htm); Sheila Gahagan, University of Michigan Health System, *Your Child: How Parents Can Fight the Obesity Epidemic* (May 2008), available at <http://www.med.umich.edu/llibr/yourchild/fightobesity.htm>. “We hear a lot in the news about children and the ‘obesity epidemic’ lately.” *Id.*

26. See John Dorsey and Jeanne Segal, *Childhood and Juvenile Obesity: Tips for Parents*, Jan. 10, 2008, available at [http://www.helpguide.org/mental/childhood\\_obesity.htm](http://www.helpguide.org/mental/childhood_obesity.htm); Amanda L. Willette, *Where Have All the Parents Gone?*, 28 J. LEGAL MED. 561, 575 (2007).

27. P.K. Newby, *Are Dietary Intakes and Eating Behaviors Related to Childhood Obesity? A Comprehensive Review of The Evidence*, 35 J.L. MED. & ETHICS 35, (2007) (deducting from the 155 million that 30–45 million are obese); John Dorsey and Jeanne Segal, *Childhood and Juvenile Obesity: Tips for Parents*, Jan. 10, 2008, available at [http://www.helpguide.org/mental/childhood\\_obesity.htm](http://www.helpguide.org/mental/childhood_obesity.htm). (stating that one in five children are currently overweight).

28. P.K. Newby, *Are Dietary Intakes and Eating Behaviors Related to Childhood Obesity? A Comprehensive Review of The Evidence*, 35 J.L. MED. & ETHICS 35, (2007)

29. P.K. Newby, *Are Dietary Intakes and Eating Behaviors Related to Childhood Obesity? A Comprehensive Review of The Evidence*, 35 J.L. MED. & ETHICS 35, (2007); Amanda L. Willette, *Where Have All the Parents Gone?*, 28 J. LEGAL MED. 561, 563 (2007) (declaring that obesity has disproportionately affected African-American, Hispanic, and Native-American children).

30. P.K. Newby, *Are Dietary Intakes and Eating Behaviors Related to Childhood Obesity? A Comprehensive Review of The Evidence*, 35 J.L. MED. & ETHICS 35, (2007); But see Amanda L. Willette, *Where Have All the Parents Gone?*, 28 J. LEGAL MED. 561, 563 (2007). “Being overweight is more common in boys, around 32.7%, than in girls, around 27.8%.” *Id.*



ernments and schools[.]”<sup>31</sup> However, there was no mention as to the parents’ role in taking action to prevent their children from becoming obese.<sup>32</sup> It must be understood that unless parents take responsibility in the fight against obesity, what the other actors on different levels do will have little influence.<sup>33</sup> Parents like to put it off on a medical problem, such as thyroid disease.<sup>34</sup> However, less than 1% of obese children have a true hormonal imbalance.<sup>35</sup>

Then, there is the heredity and genetic make-up theory. This controversial response does not quite resolve the issue either, however, because even if a child inherits obese genes, “environmental factors such as a sedentary lifestyle and poor eating habits must be present for obesity to take hold.”<sup>36</sup> Instead, it is the daily choices that American youth make that directly relate to obesity, including hours spent watching television, hours spent playing video games, the lack of physical activity, and the choice of food for both snacks and meals.<sup>37</sup> Children, however, do not make these choices in isolation; the choice is also made by the child’s parents and the public school system,<sup>38</sup> as well as the government and the medical field. All four of these sources should be a primary focus for the prevention of childhood obesity.

#### IV. THE ROLE OF THE SCHOOL SYSTEM

While research is clear that the problem is incurable without parent and community support, there is plenty that schools can do in the meantime.<sup>39</sup> During the malnutrition crisis, schools were at the center of the effort to defeat the problem by teaching children about good nutrition.<sup>40</sup> Schools need to serve as a place where children learn about healthy dietary and physical activity habits as well as serving as a starting place for

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31. Dan Mitchell, *Senate Hearing on Childhood Obesity Glosses Over Parents’ Role*, BNET Industry, Sept. 23, 2008.

32. See Dan Mitchell, *Senate Hearing on Childhood Obesity Glosses Over Parents’ Role*, BNET Industry, Sept. 23, 2008.

33. See Dan Mitchell, *Senate Hearing on Childhood Obesity Glosses Over Parents’ Role*, BNET Industry, Sept. 23, 2008.

34. *Weight can Damage Self-Esteem*, at <http://kidsgrowth.com/resources/articleDetail.cfm?id=82> (last visited Sept. 15, 2008).

35. See *id.*

36. *Id.*

37. Julie Neal, *Childhood Obesity Prevention: Is Current Legislation Enough?*, 27 J. JUV. L. 108, 110 (2006).

38. *Id.*

39. See Black, *supra* note 10.

40. See Neal, 27 J. Juv. L. at 120.

healthy food consumption.<sup>41</sup>

Even if there remains a delay or neglect in federal and state legislation, school-based legislation is still a positive possibility. Schools are and will continue to be a “logical site for interventions aimed at controlling and preventing childhood obesity” because they are in a unique position to actively promote both healthful eating and physical activity.<sup>42</sup>

The vast majority of nationwide schools participate in the National School Lunch Program, and more than three-quarters of these schools also offer the School Breakfast Program.<sup>43</sup> In 2005, 29.6 million children ate a school lunch and 9.4 million ate a school breakfast on an average day school day.<sup>44</sup> This accumulates for an annual total of roughly five billion lunches and 1.6 billion breakfasts in one school year.<sup>45</sup> The National School Lunch Program, providing after-school snacks to children enrolled in extended-day or after-school programs, served more than 164 million after-school snacks to children.<sup>46</sup>

Moreover, schools have several unique venues through which physical activity can be promoted, including physical education classes, recess time, a variety of competitive and noncompetitive sports, and other programs such as dance classes and walking/running clubs.<sup>47</sup> School districts can work together with the states to prevent childhood obesity by implementing the following practices within the school system: (1) “[d]eveloping policy and program guidelines for schools[;]”<sup>48</sup> (2) “[s]trengthening physical activity requirements, standards and programs in

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41. *Id.*

42. Karen E. Peterson & Mary Kay Fox, *Addressing the Epidemic of Childhood Obesity Through School-Based Interventions: What Has Been Done and Where Do We Go From Here?*, 35 J.L. MED & ETHICS 113, 114 (2007); see also Breighanne Aileen Fisher, Comment, *Community-Based Efforts at Reducing America's Childhood Obesity Epidemic: Federal Lawmakers Must Weigh In*, 55 DEPAUL L. REV. 711, 726 (2006) (“State and local governments were wise to begin the battle against childhood obesity in schools because children spend a significant amount of time there and studies have shown certain school interventions to be effective.”).

43. *Id.* at 113 (documenting M. K. Crepinsek and M. K. Fox, “National School Lunch Program,” in M.K. Fox, W. Hamilton, and B.-H. Lin, eds., *Effects of Food Assistance and Nutrition Programs on Nutrition and Health, Volume 3: Literature Review* (Washington, D.C.: Economic Research Service, U.S. Department of Agriculture, 2004): 175–210; D. Connell and M. K. Fox, “School Breakfast Program,” in M. K. Fox, W. Hamilton, and B.-H. Lin, eds., *Effects of Food Assistance and Nutrition Programs on Nutrition and Health, Volume 3: Literature Review* (Washington, D.C.: Economic Research Service, U.S. Department of Agriculture, 2004): 211–235).

44. See *id.*

45. *Id.*

46. *Id.* (citing Food and Nutrition Service, U.S. Department of Agriculture, Program Data, available at <<http://www.fns.usda.gov/pd/cnpmain.htm>> (last visited September 15, 2008)).

47. *Id.*

48. *Preventing Obesity in Youth Through School-Based Efforts*, NGA Center for Best Practices—Health Policy Studies Division, Issue Brief (Feb. 4, 2003) 2–3 (discussing different policies and program guidelines implemented in California, Kentucky, Maine, and Michigan).

schools[;]”<sup>49</sup> (3) “[i]mplementing nutrition policies and education programs[;]”<sup>50</sup> (4) “[f]ostering school and community partnerships that promote regular physical activity[;]”<sup>51</sup> (5) “[e]ngaging students, school faculty, families, and communities in promoting healthy eating and regular physical activity[;]”<sup>52</sup> and (6) “[c]reating public awareness and education campaigns[.]”<sup>53</sup>

Due to the regular and frequent access to students, schools must recognize and accept the fact that they “are a critical part of the solution.”<sup>54</sup> In America, schools are easy targets for legislation aimed at preventing childhood obesity because the students are a captive audience, and regulation of physical activity levels, as well as eating habits, should be an easy implementation as prevention strategies.<sup>55</sup>

Many states have recognized that childhood obesity is a growing epidemic. This recognition has forced many states to implement state-mandated minimum nutritional standards in public schools as a means of combating childhood obesity. Many avenues of state reform have met with criticism.

For example, several states have tried to introduce a system of body mass index (BMI) reporting. In New York, State Assemblyman, Felix Ortiz, introduced legislation in 2004 that would require a brief health report which included a BMI score of each child to accompany report cards

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49. *Id.* (citing National Association for Sport and Physical Education. 2001 *Shape of the Nation Report: Status of Physical Education in the USA*. Washington, D.C.: National Association for Sport and Physical Education, 2001) (“Education reform efforts have spawned the development of educational standards, which in nearly all states (i.e., 44 states) include state standards for physical education. Over 80 percent of the states with physical education standards follow national guidelines. A few states include physical education as part of state assessments and graduation requirements.”).

50. *Id.* at 4 (noting that a significant amount of an individual child’s nutrients, in a given day, comes from the school’s food service program, especially for low-income children who receive the benefit of free or even reduced-price breakfasts and lunches).

51. *Id.* at 5. The author explains that:

States are developing unique partnerships between schools, communities, park and recreation programs, and biking programs to promote regular physical activity for youth, school faculty, and community members. As a result, schools and communities are creating safe walking and bike paths, encouraging walking and biking to school, and promoting the use of school and community facilities for exercise during extended hours. In communities where safe physical activity is a concern because of violence, ill-equipped walkways, or a lack of parks, these efforts are critical to providing important options for physical fitness. After-school care programs, and community sports and recreation programs also play a critical role in providing youth access to sports, physical activity, and active play.

*Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. Breighanne Aileen Fisher, Comment, *Community-Based Efforts at Reducing America’s Childhood Obesity Epidemic: Federal Lawmakers Must Weigh In*, 55 DEPAUL L. REV. 711, 713 (2006) (noting previously government-regulated public health issues such as “the transfer of communicable diseases and public sanitation”).

every six weeks.<sup>56</sup> Similar efforts were made in 2005 by State Senator Leticia Van dePutte because “many kids don’t have health insurance and rarely see a doctor.”<sup>57</sup> Attempts at monitoring a child’s BMI have been met with much opposition and criticism. The Association of Texas Professional Educators says, “teachers should just teach” and leave the physical aspects to medical professionals.<sup>58</sup>

Most often when budgetary decisions are made on the national, local as well as state level, physical education classes are the first on the chopping block.<sup>59</sup> Even if school administrators and/or parents want to start a physical education program at a school that does not have one, they may not have the budget to do so.<sup>60</sup> Starting a physical education program in a school that does not have one costs approximately half a million dollars.<sup>61</sup> This is a major hurdle for a school that is already cash strapped and not receiving significant funding from the federal government.

But administrators at some schools, like one in Ottumwa, Iowa, have not waited on the legislature for funding but have started their own programs. School Nurse Felicia Stevens and Counselor Marta Shafer started the “Feelin’ Good Mileage Club” at Eddyville Elementary School.<sup>62</sup> The “Feelin’ Good Mileage Club” is an optional program for students who wish to take optional walks during the noon recess.<sup>63</sup> Program administrators have noticed that the program offers many advantages beyond fitness. Students are more focused in class because the excess energy has been burned prior to entering the classroom.<sup>64</sup> The main goals of the program’s inventors are the hope that this program will influence the children to commit to a lifelong commitment to fitness and exercise.<sup>65</sup>

Other schools are doing what they can to make P.E., or what little time they can fit in during the day for schools that do not require P.E., more fun and entertaining for the students in order to encourage participa-

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56. Mark Boshnack, *Schools, Parents: Weight 'Report Cards' Won't Work*, THE DAILY STAR, Jan. 29, 2005, available at <http://old.thedailystar.com/news/stories/2005/01/29/weight4.html> (last visited January 26, 2010).

57. Jim Cummins, *Texas Senator Proposes 'Obesity Reports,'* at <http://www.msnbc.msn.com/id/6890798/print/1/displaymode/1098> (last visited September 7, 2009).

58. Cummins, *supra* note 47.

59. Debbye Turner, *Obesity Up, Phys Ed Down*, at <http://www.cbsnews.com/stories/2005/01/27/early-show/contributors/debbyeturner/printable669760.shtml> (last visited September 7, 2009).

60. A Cry for Health: State and Federal Measures in the Battle Against Childhood Obesity, 7 J. L. & Fam. Stud. 447.

61. *Id.*

62. Lori Faybik, *Eddyville Students, Teachers Walking To Better Health*, The Ottumwa Courier, (Jan. 29, 2005), available at <http://www.ottumwacourier.com>.

63. *Id.*

64. *Id.*

65. *Id.*

tion.<sup>66</sup> One school in West Virginia has implemented the use of the video game Dance Dance Revolution in their P.E. classes.<sup>67</sup> “At least several hundred schools in at least [ten] states are using Dance Dance Revolution, or D.D.R. as a regular part of their physical education curriculum.”<sup>68</sup> A multi-year study was done of the effects of overweight children who played D.D.R. regularly, which returned significant health benefits, “including improved blood pressure, overall fitness scores, and endothelial function....”<sup>69</sup>

Several states have acknowledged the importance of physical education in their schools. In 2008, Florida enacted a law that required “children in kindergarten through fifth grade to receive [thirty] minutes of continuous physical education every day.”<sup>70</sup> “Florida’s aim is to guide its youngest students away from a path leading to the state’s 11[%] of high school students who are obese, according to the CDC.”<sup>71</sup> Another state that is attempting to combat childhood obesity through physical education classes at school is California.<sup>72</sup> California Governor Schwarzenegger, in an effort to “emphasize the importance of physical education in California schools[,]... has devised a plan to combat childhood obesity.”<sup>73</sup> The state requires high school students who do not wish to participate in physical education to pass a physical fitness test called the Fitnessgram test.<sup>74</sup> The test is designed to determine a student’s physical fitness, not their athletic ability, so that the student’s respective school can be sure that the student who is not going to participate in physical education has a healthy body and weight.<sup>75</sup>

“If a student could not pass the test and exhibit a satisfactory level of health, the school was, and is, statutorily prohibited from granting a

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66. *Child Obesity is at Crisis Point as Physical Education Declines*, <http://sports.espn.go.com/espn/otl/news/story?id=4015831> (last visited Sep. 9, 2009). Teachers have created indoor fitness trails and play DVDs in the mornings for 5-10 minute exercise sessions. *Id.*

67. Seth Schiesel, *P.E. Classes Turn to Video Game That Works Legs, Not Thumbs*, N.Y. TIMES, April 30, 2007, available at 2007 WLNR 8118232.

68. *Id.*

69. *Id.* Included in this article is a story about a mother who was worried about her overweight son. *Id.* She bought him D.D.R. for his birthday and in her words, “it’s like he’s a different kid.” *Id.*

70. Richard Luscombe, <http://www.csmonitor.com/2008/1117/p01s01-ussc.htm?print=true>, Nov. 17, 2008 (last visited Sep. 9, 2009).

71. *Id.* Florida’s teachers have implemented such activities as mock martial-arts routines, yoga, and pilates to keep P.E. varied and fun for the students. *Id.*

72. Alex Harary, *Chapter 32: Battling the Bulge: Chapter 32 Clarifies Requirements for P.E. Exemptions*, 40 MCGEORGE L. REV. 339 (2009).

73. *Id.*

74. *Id.* at 340.

75. *Id.*

wavier from physical education. These standards worked to counteract increasing childhood obesity trends by ensuring that each student either participated in a physical education program or otherwise maintained good health.<sup>76</sup> While the effectiveness of the physical education program has been fairly modest to date, the statistics do show measurable improvement... [t]his incremental progress is a positive measure of California public schools' implementation of physical fitness programs."<sup>77</sup>

Even the National Football League (hereinafter NFL) has taken steps to encourage an active lifestyle for students of at least 60 minutes a day.<sup>78</sup> The goal of *NFL Play 60: The NFL Movement for an Active Generation* is to help reverse the trend of obesity in the United States by 2012.<sup>79</sup> The NFL is also encouraging schools to help children get their sixty minutes per day of physical activity by encouraging teachers to get excited and active with their students.<sup>80</sup> Based on the prediction that the current generation will be the first to not live longer than its parents,<sup>81</sup> the NFL is doing what it can to keep physical education in schools today, including offering challenges and contests to schools, like Take an NFL Player to School,<sup>82</sup> and a grant program to help with schools' physical education programs in any way necessary.<sup>83</sup> With people from all walks of life encouraging schools to either keep or restore mandatory physical education in their schools, from parents, professional athletes, legislators, and government officials, we can see the imperative need for physical education in order to combat childhood obesity.

As a nation, we are much less physically active than we once were.<sup>84</sup> According to a recent study on childhood obesity, in 1997, 20.2% of school-aged children walked to school compared to the 12.5% in 2001.<sup>85</sup>

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76. *Id.* at 341.

77. *Id.* at 343.

78. Judy Battista, *N.F.L. Takes Active Role Against Obesity*, NEW YORK TIMES, October 8, 2008, available at 2008 WL 19115788.

79. *Id.*

80. <http://www.americanheart.org/presenter.jhtml?identifier=3061814> (last visited Sep. 18, 2009). This website gives links to materials, resources, and creative ways to get kids excited about P.E. *Id.*

81. <http://www.nfl.com/news/story?id=09000d5d80b4a489&template=with-video&confirm=true>, (last visited Sep. 18, 2009).

82. *Id.*

83. <http://www.keeptogyminschool.com/> (last visited Sep. 18, 2009).

84. Fewer than half of American adults get the old minimum amount of recommended exercise (thirty minutes of vigorous activity daily, four days per week); and one American in four never exercises voluntarily. Centers for Disease Control and Prevention, *Prevalence of No Leisure-Time Physical Activity*, 53 (4)MMWR 82-86 (Feb. 6, 2004).

85. R. Sturm, *Childhood obesity—What we can learn from existing data on societal trends*, Part 2, available at [http://www.cdc.gov/pcd/issues/2005/apr/04\\_0039.htm](http://www.cdc.gov/pcd/issues/2005/apr/04_0039.htm), (last visited September 10, 2009).

That almost 8% reduction in the number of students who are no longer walking or riding bikes to school in conjunction with the increase in schools dropping physical education classes due to budgetary constraints, has contributed greatly to childhood obesity. According to the Institute of Medicine, only 8% of elementary schools and 6% of middle and high schools provide daily physical education for the whole school year and fewer than 30% of middle and high schools require physical education as part of their curricula.<sup>86</sup>

In 2008, thirty-six states required some sort of physical education for elementary school students; thirty-three states for middle school children; and forty-two states for high school children.<sup>87</sup> Experts have said that “there is no doubt that the erosion of physical education has been a major contributor to the skyrocketing obesity rates.”<sup>88</sup> A study published in 2007 illustrated that physical education requirements for high school students had declined from 41.6% in 1991 to 28.4% in 2003, with nearly half of high school students not attending physical education classes whatsoever.<sup>89</sup>

Even with statistics demonstrating that the removal of physical education has had a direct correlation with the increase in levels of childhood obesity, some researchers still argue that adding physical education courses back into the school curriculum will not solve the problem.<sup>90</sup> More will be required than just mandatory gym class.<sup>91</sup> Even the states that have adopted physical education requirements for school-age children are battling with funding and equipment challenges.<sup>92</sup> With the removal of physical education largely being attributed to the No Child Left Behind

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86. Institute of Medicine, *Preventing Childhood Obesity: Health in the Balance*, 2005, Report of the Institute of Medicine of the National Academies of Science (Sept., 2004).

87. Nat. Assoc. for Sport and Physical Educ. & Am. Heart Assoc., 2006 *Shape of the Nation Report: Status of physical education in the USA*, <http://www.aahperd.org/naspe/ShapeOfTheNation/PDF/ShapeOfTheNation.pdf> (2006).

88. *Child Obesity is at Crisis Point as Physical Education Declines*, <http://sports.espn.go.com/espn/otl/news/story?id=4015831> (last visited Sep. 9, 2009) (discussing an ESPN report on child obesity).

89. *Id.* Studies conducted by the CDC demonstrated that 46% of high school students were not attending any P.E. classes. *Id.*

90. Cher Thornhill, *Child Obesity Will NOT be Solved by PE Classes in School, Say Researchers*, <http://www.dailymail.co.uk/health/article-1178232/Child-obesity-NOT-solved-PE-classes-schools-say-researchers.html>, May 7, 2009 (last visited Sep. 18, 2009). Article stating that if children get their energy out at school, they will go home and refrain from doing anything active. *Id.* Suggests that kids will exercise more outside if they do not have PE at school, concluding that they will exercise the same amount whether PE is in the curriculum or not. *Id.*

91. *P.E. Classes Not Enough to Fight Childhood Obesity*, [http://foxnews.com/printer\\_friendly\\_story/0,3566,526586,00.html](http://foxnews.com/printer_friendly_story/0,3566,526586,00.html), June 16, 2009 (last visited Sep. 9, 2009). There must be more than mere required P.E. classes for students. *Id.* There must be a standardized P.E. curriculum so that children get the most of the time that is allotted for P.E. *Id.*

92. *Id.*

Act (hereinafter NCLB), one authority says that meeting the NCLB requirements at the expense of physical education is misguided.<sup>93</sup> The Associate Vice-President for Health Sciences at the University of South Carolina, Russell Pate, stated that “[s]tudies have long shown that giving kids time to play, both through physical education and recess, does not hurt their test scores[,]”[i]t could actually help.<sup>94</sup> Furthermore, Mr. Pate also stated that although physical education alone cannot solve today’s obesity problems, “it’s realistic to expect physical education to help solve the problem.”<sup>95</sup>

## V. THE ROLE OF THE GOVERNMENT

The government is far from escaping blame, while it is a primary source for prevention of childhood obesity. Just as the government has “intervened in matters of public health through regulation and legislation,” the government should intervene and take a solid stance on the prevention of childhood obesity.<sup>96</sup> “The government’s power lies in regulating childhood obesity as a matter of public health.”<sup>97</sup> Recently, the legislature has used schools as an opportunity to reduce and prevent childhood obesity.<sup>98</sup>

### A. Federal Legislation

Unfortunately, federal legislation has yet to be enacted in regards to childhood obesity prevention.<sup>99</sup> The attempted bills split straight down the party lines—Democratic legislators focus on prevention and education, regulation in food advertisement, and stricter, clearer labeling on food nutrition guides, but Republican legislators, on the other hand, focus on limiting or eliminating liability for food manufacturers in products liability suits.<sup>100</sup> Despite the split, the Democratic Bill, The Prevention of Childhood Obesity Act,<sup>101</sup> is the more prevalent view.<sup>102</sup> This Act addresses the

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93. *Id.*

94. *Id.*

95. *Id.*

96. Breighanne Aileen Fisher, Comment, *Community-Based Efforts at Reducing America’s Childhood Obesity Epidemic: Federal Lawmakers Must Weigh In*, 55 DEPAUL L. REV. 711, 726–27 (2006) (explaining that school-based legislation is a good starting point for the prevention of childhood obesity).

97. *Id.* at 712.

98. *Id.* at 716–20 (illustrating recent examples of school-based legislation).

99. Julie Neal, *Childhood Obesity Prevention: Is Current Legislation Enough?*, 27 J. JUV. L. 108, 118 (2006).

100. *See id.*

101. Prevention of Childhood Obesity Act, 109th Cong., 1st sess., S. 799 (“A bill to amend the Public Health Service Act to provide for the coordination of Federal Government policies and activities to prevent obesity in childhood, to provide for State childhood obesity prevention and control, and to establish grant programs to prevent childhood obesity within homes, schools, and communities.”).



two competing theories of obesity causation—personal choices and the dangerous eating environment.<sup>103</sup> The Act requires the Federal Trade Commission to create regulations for advertising and marketing of foods to children along with sections providing grants for schools and other programs that implement childhood obesity programs.<sup>104</sup> Unfortunately, since the Democrats referred the bill to a Senate subcommittee, immediately after its introduction on April 14, 2005, no further Congressional action has occurred.<sup>105</sup>

Other Acts introduced by the 109th Congress were the Improved Nutrition and Physical Activity Act, also known as the IMPACT Act,<sup>106</sup> the Childhood Obesity Reduction Act,<sup>107</sup> and the Healthy Lifestyles and Prevention America Act, also known as the Help America Act.<sup>108</sup> However, none of the preceding Acts have yet to be enacted as actual law.

The next closest enacted legislations that are remotely related to childhood obesity are the National School Lunch Act and the Child Nutrition Act of 1969, both of which Congress reauthorized in 2004 until 2009.<sup>109</sup> Because of the increase in childhood obesity, Congress amended and augmented several sections of the Acts “to provide school children with increased access to healthful foods and nutritional advice and assistance.”<sup>110</sup> Congress’ power to influence health food choices in schools is limited to the federal school lunch and breakfast programs.<sup>111</sup> Therefore, the reauthorization legislation encourages states to take further action and offers new federal grants to establish state nutrition educational programs.<sup>112</sup> This state encouragement on behalf of Congress is indicative of

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102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. IMPACT Act, 109th Cong., S. 1325 (“A bill to establish grants to provide health services for improved nutrition, increased physical activity, obesity and eating disorder prevention, and for other purposes.”).

107. Childhood Obesity Reduction Act, 109th Cong., S. 1324 (“A bill to reduce and prevent childhood obesity by encouraging schools and school districts to develop and implement local, school-based programs designed to reduce and prevent childhood obesity, promote increased physical activity, and improve nutritional choices.”). See also Childhood Obesity Reduction Act, 109th Cong., H.R. 4860.

108. Healthy Lifestyles and Prevention America Act, 109th Cong., S. 1074 (“A bill to improve the health of Americans and reduce health care costs by reorienting the Nation’s health care system toward prevention, wellness, and self care.”).

109. See generally Stacy L. Fabros, *A Cry for Health: State and Federal Measures in the Battle Against Childhood Obesity*, 7 L. & FAM. STUD. 447, 448 (2005) (documenting Child Nutrition and WIC Reauthorization Act of 2004 (“Child Nutrition Act of 2004”), Pub. L. No. 108–265, sec. 101–129, 118 Stat. 729 (2004)) (discussing the previous attempted legislation aimed at childhood obesity—National School Lunch Act and Child Nutrition Act of 1969).

110. *Id.*

111. *Id.*

112. *Id.*

the inefficiency of current federal legislation.

## B. State Legislation

For the most part, state governments have had a delayed reaction to this health crisis but are finally trying to develop responses to the problem.<sup>113</sup> Some states have made “grassroots efforts” to halt the obesity epidemic in schools through either local government levels or school boards proceedings.<sup>114</sup>

In 2004, the New York governor signed a bill into law establishing a childhood obesity prevention program within the state’s Department of Health.<sup>115</sup> The governor’s goal was to reduce obesity among children and adolescents and counteract the spread of diabetes and other serious medical problems associated with childhood obesity.<sup>116</sup> In Cambridge, Massachusetts, the state enacted a school-based healthy-weight program that kept track of elementary students’ BMI and sent report cards home to inform parents of their child’s weight and fitness.<sup>117</sup> Furthermore, in California, where one of four students is overweight, the state legislature passed three bills in 2005 which were aimed at childhood obesity prevention.<sup>118</sup> In combination, these bills prohibited candy and soda sales in vending machines, and instead, ordered a greater distribution of milk and juice throughout all elementary and middle schools.<sup>119</sup>

Receiving national recognition for its success in implementing progressive new policies, Texas has also employed innovative legal tactics for combating obesity.<sup>120</sup> In 2003, the governor propositioned for the U.S. Department of Agriculture to transfer the federal school good programs from the Texas Education Agency to the Texas Department of Agriculture.<sup>121</sup> To start, the Agriculture commissioner modified nutritional requirements in schools.<sup>122</sup> The legislature finally recognized that schools

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113. *The UB Obesity Report Card: An Overview*, at <http://www.ubalt.edu/experts/obesity/> (last visited Sept. 15, 2008).

114. *Id.*

115. Susan Black, *Beyond Baby Fat: Childhood Obesity is a Serious Health Problem-and One that Schools Can Help Address*, *American School Board Journal* Vol. 191, January 2004.

116. *Id.*

117. *Id.*

118. See Julie Neal, *Childhood Obesity Prevention: Is Current Legislation Enough?*, 27 *J. Juv. L.* 108, 115 (2006).

119. *Id.*

120. See generally Edward P. Richards et al., *Innovative Legal Tools to Prevent Obesity*, 32 *J.L. MED. & ETHICS* 59, 61 (2004 WL 3186138) (discussing the various implementations by the Texas legislature to secure a solution for childhood obesity in public schools).

121. See *id.*

122. *Id.*

provide the ideal place to begin the war on obesity.<sup>123</sup> Every state requires children to attend schools; therefore, up to 60% of a child's meal intake occurs at school.<sup>124</sup> As a result, the Texas government currently monitors the nutritional content of school-provided breakfast and lunch programs and has hired third parties to survey the cafeterias' eating environments.<sup>125</sup>

Furthermore, the Texas legislature has initiated several educational approaches to the problem, including three television commercials, in both English and Spanish, to raise awareness of proper home nutrition and exercise.<sup>126</sup> In response to the schools' concerns about the lost income from vending machines, the state, additionally, has produced a pamphlet entitled "Non-Food Ways to Raise Funds and Reward a Job Well Done" to inform the schools and introduce new ways of reinforcing good behavior without providing candy.<sup>127</sup>

Based on the increasing numbers of obese and overweight children in America, it is clear that current legislation is not enough to combat the problem of childhood obesity.<sup>128</sup> When examining the past successful efforts to remedy like problems such as "the national health crisis," "there are key factors that must be included in both state and national efforts to combat childhood obesity."<sup>129</sup>

The function of the federal government during the child nutrition crisis of the 1920's and 1930's was to provide appropriate funding and information to the local organizations and philanthropies devoted to combating the problem.<sup>130</sup> As for the current problem, the federal government "should act as an umbrella organization that disperses funds to state and local level childhood obesity prevention initiatives."<sup>131</sup>

## VI. THE ROLE OF PARENTS

As researchers continue to examine the parents' role in both the development of children being overweight and in obesity prevention, studies are specifying the ways in which parents affect their children's development of food and activity connected behaviors.<sup>132</sup>

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123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* (citing <<http://www.agr.state.tx.us>> as helpful resource for further inquiries and updates).

128. Alvarez, Kristy, et al. The Childhood Obesity Epidemic: Rebalancing the Scales, available at <http://jdc.jefferson.edu/cgi/viewcontent.cgi?article=1508&context=hpn> (last visited January 26, 2010).

129. *Id.*

130. *Id.*

131. *Id.*

132. 16 Ana C. Lindsay et. al., The Role of Parents in Preventing Childhood Obesity, at 169 (Spring

Parent's role at home is to influence their children's "dietary practices, physical activity, [and] sedentary behaviors."<sup>133</sup> Parents can influence their child's dietary practices through meal structure, healthy food selection, and nutritional home eating patterns.<sup>134</sup> Parents can also promote physical activity and prevent sedentary behavior by discouraging television viewing and encouraging outside activities.<sup>135</sup>

One reason parent's role is so key is because obesity runs in families, and children see their parents and other family members as role models.<sup>136</sup> If a parent tells a child to not watch television, but then watches television every night, the parent is not setting a good example for their child to follow. Likewise, if the parent snacks on potato chips and sodas, but encourages the child to eat vegetables and fruit for snacks, the child will be more likely to have abnormal eating behaviors that may lead to obesity. Therefore, positive reinforcement and support from the parents, in the course of "practicing what they preach,"<sup>137</sup> is critical to success at home on preventing childhood obesity.<sup>138</sup>

Parents are important forces for change in their children's activities.<sup>139</sup> Parents have a critical role in prevention because childhood obesity starts at home.<sup>140</sup> Therefore, it is important for parents to understand how their role in preventing obesity changes as the child matures.<sup>141</sup> Parents should take certain precautions "through critical developmental periods, from before birth and through adolescence."<sup>142</sup>

The first stage that a child goes through begins in the mother's womb

2006), available at [www.futureofchildren.org](http://www.futureofchildren.org)

133. 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 169 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org)

134. 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 169 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org)

135. See 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 169 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org)

136. 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 169 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org)

137. Mary L. Gavin, KidsHealth, *Overweight and Obesity* (2008), available at <http://kidshealth.org> (confirming that the secret is to take a whole-family approach by having a "practice what you preach" mentality).

138. Amanda L. Willette, *Where Have All the Parents Gone?*, 28 J. LEGAL MED. 561, 575 (2007) (agreeing that parents should display the kinds of eating habits they wish for their children to assume). "Parents should not tell children, 'Do as I say, not as I do.'" *Id.*

139. 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 169 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org)

140. 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 169 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org)

141. See 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 169 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org)

142. 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 169 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org)

and continues through infancy.<sup>143</sup> Many aspects of a mother's pregnancy influences an unborn child and can even put them at risk for being overweight as an infant and when they reach adulthood.<sup>144</sup> For example, a pregnant woman who suffers from diabetes, undernutrition or even over-nutrition may put an unborn child at risk for obesity.<sup>145</sup> Therefore, even at this early stage of child development it is important that a mother be screened and takes precautions to prevent these risks during their pregnancy.<sup>146</sup> Once the child is born, researchers believe that breastfeeding an infant develops control over their food intake and therefore has a positive effect on obesity prevention.<sup>147</sup> The mother should breastfeed for at least a year, because breast milk is the only food a baby needs at that point.<sup>148</sup>

The next critical stage parents will face is important because it is when the child begins to develop habits around physical activity and eating patterns.<sup>149</sup> Beginning as a toddler and ongoing into their preschool years, children need encouragement from their parents to be more healthful.<sup>150</sup> This is because children are outfitted with a natural set of taste biases in favor of salty and sweet foods, and opposed to bitter and sour tastes.<sup>151</sup> However, parents can change this through repeated exposure to a variety of healthful foods.<sup>152</sup> Parents should take the opportunity to em-

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143. See 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 169 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org)

144. See 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 169 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org)

145. 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 169 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org); Sheila Gahagan, University of Michigan Health System, *Your Child: How Parents Can Fight the Obesity Epidemic* (May 2008), available at <http://www.med.umich.edu/1libr/yourchild/fightobesity.htm> (commenting that a healthy weight during pregnancy will help prevent gestational diabetes and lower the child's risk of developing diabetes themselves). "Undernourished fetuses are also at increased risk of later obesity." *Id.*

146. 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 169 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org)

147. 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 170 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org); Sheila Gahagan, University of Michigan Health System, *Your Child: How Parents Can Fight the Obesity Epidemic* (May 2008), available at <http://www.med.umich.edu/1libr/yourchild/fightobesity.htm>

148. Sheila Gahagan, University of Michigan Health System, *Your Child: How Parents Can Fight the Obesity Epidemic* (May 2008), available at <http://www.med.umich.edu/1libr/yourchild/fightobesity.htm>

149. See 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 170 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org)

150. 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 170 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org)

151. See 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 170 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org)

152. See 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 170 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org); Amanda L. Willette, *Where Have All the Parents Gone?*, 28 J. Legal Med. 561, 575 (2007) (outlining that parents should keep foods in the home that are well balanced, and encourage their children to try different foods).

phasize vegetables, fruits, and grains at regular family meals.<sup>153</sup> Conversely, parents should leave it to the child to decide what to eat and the amount to eat from what they are offered.<sup>154</sup> It is by age two or three that a child develops their food habits, which are patterned mainly after what they learn in the family environment.<sup>155</sup> As stated earlier, it is imperative for parents to pattern their own eating behaviors as they desire their child's to be since the parents behavior will contribute to their child's development of habits.<sup>156</sup> In addition to being aware of their healthful eating patterns, parents must be conscious of their own amount of physical activities. It has been found that the children of active mothers were twice as likely to be active as children of inactive mothers, and likewise, the children of two active parents were 5.8 times more likely to be active than children of sedentary parents.<sup>157</sup> One obvious way parents can prevent childhood obesity is to encourage outdoor play and take the television out of the child's bedroom.<sup>158</sup>

The third critical stage of development that children go through happens when their focus shifts away from the family environment and towards the school environment.<sup>159</sup> This is when they enter into the sphere of outside influences such as media and peers, and begin to lose parental influence.<sup>160</sup> As adolescents, children began to spend more time away from home and are exposed to environments that encourage obesity.<sup>161</sup> In

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153. Sheila Gahagan, University of Michigan Health System, *Your Child: How Parents Can Fight the Obesity Epidemic* (May 2008), available at <http://www.med.umich.edu/1libr/yourchild/fightobesity.htm>

154. 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 170 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org); Sheila Gahagan, University of Michigan Health System, *Your Child: How Parents Can Fight the Obesity Epidemic* (May 2008), available at <http://www.med.umich.edu/1libr/yourchild/fightobesity.htm>. "Don't closely monitor the amounts your child eats or nag your child to eat at mealtime. This can interfere with your child's response to hunger and feeling full." *Id.* Mary L. Gavin, KidsHealth, *Overweight and Obesity* (2008), available at <http://kidshealth.org> (implying that parents must be aware of their child's hunger cues instead of maintaining a clean-plate policy).

155. Sheila Gahagan, University of Michigan Health System, *Your Child: How Parents Can Fight the Obesity Epidemic* (May 2008), available at <http://www.med.umich.edu/1libr/yourchild/fightobesity.htm>

156. See 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 171 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org); Amanda L. Willette, *Where Have All the Parents Gone?*, 28 J. LEGAL MED. 561, 575 (2007); Sheila Gahagan, University of Michigan Health System, *Your Child: How Parents Can Fight the Obesity Epidemic* (May 2008), available at <http://www.med.umich.edu/1libr/yourchild/fightobesity.htm> (concluding that "children learn by imitation").

157. 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 171 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org)

158. See 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 172 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org)

159. See 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 172 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org)

160. 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 172 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org)

161. 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 172 (Spring

these environments children face the obstacle of making their own choices about dietary and physical activities.<sup>162</sup> Many began to make the choice to eat out more and eat at home less.<sup>163</sup> In 2006, the average daily restaurant sales were \$1.4 billion.<sup>164</sup> Research shows that when children eat out at restaurants they consume more fat, calories, and fried foods than they do fruit, vegetables and fiber.<sup>165</sup> In fact, “[m]ore than 60% of American youth eat too many fatty foods, and less than 20% eat the recommended five or more servings of fruits and vegetables per day.”<sup>166</sup> This stage is crucial for parents to maintain the habits they have set, or even increase the number of family meals or physical activities spent together at home.<sup>167</sup> It is at this stage that children spend more time watching television, playing video games, and listening to music than they do any other activity.<sup>168</sup> The fact that the children have cookies, chips, and other snacks readily available to munch on while performing the sedentary activities only enhances the problem.<sup>169</sup> Studies show that children’s parents who

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2006), available at [www.futureofchildren.org](http://www.futureofchildren.org)

162. See 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 172 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org)

163. Marlene B. Schwartz & Kelly D. Brownwell, *Actions Necessary to Prevent Childhood Obesity: Creating the Climate for Change*, 35 J.L. MED. & ETHICS 80 (2007); John Dorsey and Jeanne Segal, *Childhood and Juvenile Obesity: Tips for Parents*, Jan. 10, 2008, available at [http://www.helpguide.org/mental/childhood\\_obesity.htm](http://www.helpguide.org/mental/childhood_obesity.htm). “[F]amily meals have often been replaced by munching continuously throughout the day.” *Id.*

164. Marlene B. Schwartz & Kelly D. Brownwell, *Actions Necessary to Prevent Childhood Obesity: Creating the Climate for Change*, 35 J.L. MED. & ETHICS 80 (2007)

165. Marlene B. Schwartz & Kelly D. Brownwell, *Actions Necessary to Prevent Childhood Obesity: Creating the Climate for Change*, 35 J.L. MED. & ETHICS 80 (2007)

166. John Dorsey and Jeanne Segal, *Childhood and Juvenile Obesity: Tips for Parents*, Jan. 10, 2008, available at [http://www.helpguide.org/mental/childhood\\_obesity.htm](http://www.helpguide.org/mental/childhood_obesity.htm).

167. 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 172 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org); Marlene B. Schwartz & Kelly D. Brownwell, *Actions Necessary to Prevent Childhood Obesity: Creating the Climate for Change*, 35 J.L. MED. & ETHICS 86 (2007). “Parents can be encouraged to manage their home environments as well as prevail over negative external influences that undercut their efforts.” *Id.* “Preventing kids from becoming overweight means adapting the way your family eats and exercises, and how you spend time together. Helping kids lead healthy lifestyles begins with parents who lead by example.” Mary L. Gavin, KidsHealth, *Overweight and Obesity* (2008), available at <http://kidshealth.org>

168. 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 173 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org); Marlene B. Schwartz & Kelly D. Brownwell, *Actions Necessary to Prevent Childhood Obesity: Creating the Climate for Change*, 35 J.L. MED. & ETHICS 80 (2007) (stating that children are far less active than they were thirty years ago when they used to walk to school and play outside); John Dorsey and Jeanne Segal, *Childhood and Juvenile Obesity: Tips for Parents*, Jan. 10, 2008, available at [http://www.helpguide.org/mental/childhood\\_obesity.htm](http://www.helpguide.org/mental/childhood_obesity.htm); Mary L. Gavin, KidsHealth, *Overweight and Obesity* (2008), available at <http://kidshealth.org> (stating that “television is a major culprit”). “[N]ow more than ever, life is sedentary—kids spend more time playing with electronic devices, from computers to handheld video game systems, than actively playing outside.” *Id.*

169. John Dorsey and Jeanne Segal, *Childhood and Juvenile Obesity: Tips for Parents*, Jan. 10, 2008, available at [http://www.helpguide.org/mental/childhood\\_obesity.htm](http://www.helpguide.org/mental/childhood_obesity.htm); Sheila Gahagan, University of Michigan Health System, *Your Child: How Parents Can Fight the Obesity Epidemic* (May 2008), available at <http://www.med.umich.edu/1libr/yourchild/fightobesity.htm> (connecting eating in front of the television

watch television more than two hours a day are more than two times as likely to be physically inactive than those whose parents watch less.<sup>170</sup> Therefore, parents may be able to help reduce their child's sedentary behavior simply by limiting their own sedentary behavior.<sup>171</sup>

## VII. THE ROLE OF THE MEDICAL FIELD

A study taken at the end of 2004 found that 47% of households understood childhood obesity to be a serious public health problem.<sup>172</sup> However, there is uncertainty as to whether it is viewed as a public health problem or a medical problem.<sup>173</sup> The medical model frames childhood obesity as a disease that affects individuals due to internal and external reasons.<sup>174</sup> When obesity is analyzed as a disease under the medical model, the initial conversation occurs between a patient and their doctor as to the cause and effect, and what treatment should take place to care for the problem.<sup>175</sup> Consequently, scientific research is important in order to intensify the understanding of the disease and open different possibilities for prevention and treatment techniques.<sup>176</sup> However, it is understood that since childhood obesity is a "disease whose roots as a public health problem ultimately lie in the environment,"<sup>177</sup> research on factors other than medical aspects are also fundamental to develop solutions. It is in this context that childhood obesity may be seen as a public health problem, and framed as a disease that strikes a population as a result of individual susceptibility in conjunction with exposure to environmental elements.<sup>178</sup> Traditionally, childhood obesity has been seen as a medical problem.<sup>179</sup> However, it is when it is viewed as a public health problem that other actors, such as so-

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with a greater risk of obesity).

170. 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 174 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org)

171. 16 Ana C. Lindsay et. al., *The Role of Parents in Preventing Childhood Obesity*, at 174 (Spring 2006), available at [www.futureofchildren.org](http://www.futureofchildren.org); John Dorsey and Jeanne Segal, *Childhood and Juvenile Obesity: Tips for Parents*, Jan. 10, 2008, available at [http://www.helpguide.org/mental/childhood\\_obesity.htm](http://www.helpguide.org/mental/childhood_obesity.htm). (adding that if a child comes from a heavy family where high-calorie food is available but physical activity is not, then the child is likely to become overweight).

172. P.K. Newby, *Moving Forward the Discussion on Childhood Obesity*, 35 J.L. MED. & ETHICS 7 (2007)

173. Marlene B. Schwartz & Kelly D. Brownwell, *Actions Necessary to Prevent Childhood Obesity: Creating the Climate for Change*, 35 J.L. MED. & ETHICS, Symposium 2007, at 82.

174. *Id.*

175. P.K. Newby, *Moving Forward the Discussion on Childhood Obesity*, 35 J.L. MED. & ETHICS 7, Spring 2007, at 7.

176. *Id.*

177. *Id.*

178. Schwartz & Brownwell, *supra* note 173, at 82.

179. *Id.*



ciety and the government, get involved.<sup>180</sup>

Scientifically, obesity results from an imbalance in the amount of energy taken in versus the amount expended.<sup>181</sup>

On the medical side, obesity can cause serious health issues for children that were once considered wholly adult conditions.<sup>182</sup> Furthermore, being obese as a child puts one at a greater risk of seeing the problem continue into adulthood.<sup>183</sup> These medical conditions include bone and joint problems, gastro-intestinal diseases, sleep apnea, high blood pressure, high cholesterol, liver and gall bladder disease, pre-diabetes, diabetes, and heart disease to name a few.<sup>184</sup> However, the health consequences to an obese child are not only physical, but may be emotional as well.<sup>185</sup> These include psychological problems such as depression, low self-esteem, bullying, and behavior and learning problems.<sup>186</sup> The psychological and social effects of obesity may be more damaging to children in the short run than any physical effect they experience in future.<sup>187</sup>

### VIII. HISTORY OF COURT INTERVENTION

“State intervention in the domestic sphere has always been controversial, with the privacy interest of the autonomous family competing against the state’s interest in social order and the protection of children.”<sup>188</sup> The American child welfare system, often known as Child Protective Services, has continuously played a large role in dealing and even intervening with family problems.<sup>189</sup>

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180. *Id.* at 78.

181. P.K. Newby, *Are Dietary Intakes and Eating Behaviors Related to Childhood Obesity? A Comprehensive Review of The Evidence*, 35 J.L. MED. & ETHICS, Spring 2007, at 37.

182. Mary L. Gavin, *Overweight and Obesity* KIDSHEALTH, (Feb. 2009), <http://kidshealth.org>; John Dorsey and Jeanne Segal, *Childhood and Juvenile Obesity: Tips for Parents*, Jan. 10, 2008, [http://www.helpguide.org/mental/childhood\\_obesity.htm](http://www.helpguide.org/mental/childhood_obesity.htm). (explaining that risks that were previously seen only in adults are now showing up in children).

183. See Sheila Gahagan, *Your Child: How Parents Can Fight the Obesity Epidemic*, UNIVERSITY OF MICHIGAN HEALTH SYSTEM, May 2008, <http://www.med.umich.edu/1libr/yourchild/fightobesity.htm>; Gavin, *supra* note 182.

184. Gahagan, *supra* note 183; Gavin, *supra* note 182; John Dorsey and Jeanne Segal, *Childhood and Juvenile Obesity: Tips for Parents*, Jan. 10, 2008, [http://www.helpguide.org/mental/childhood\\_obesity.htm](http://www.helpguide.org/mental/childhood_obesity.htm).

185. John Dorsey and Jeanne Segal, *Childhood and Juvenile Obesity: Tips for Parents*, Jan. 10, 2008, available at [http://www.helpguide.org/mental/childhood\\_obesity.htm](http://www.helpguide.org/mental/childhood_obesity.htm).

186. *Id.*

187. *Id.*

188. Shireen Arani, *State Intervention in Cases of Obesity-Related Medical Neglect*, 82 B.U. L. REV. 875, 879 (2002).

189. *Id.* (discussing the domestic sphere of state intervention and its controversial nature).

## IX. ANALYSIS

### A. The Law and Court Intervention

Courts must perform a balancing act in order to juggle their obligations to protect those fundamental rights given to parents with the need to step away from the bench and allow the state to perform its own duties to protect children.<sup>190</sup> State intervention is easily recognized and commended when the state steps in to protect neglected children; however, determining a bright line rule that establishes a specific level of neglect necessary to trigger intervention is not such an easy concept.<sup>191</sup>

For instance, state intervention is acceptable in those cases of medical neglect when parents fail to provide advised and needed medical treatment to their child despite the financial ability to pay for such treatment.<sup>192</sup>

Just as in the fight against child and medical neglect, courts have also been involved “[i]n the fight against morbid obesity.”<sup>193</sup> Various intervening alternatives include mandated enrollment in exercise and nutrition education programs, removal of the child from the home and placement in a foster home or other health facility for some temporary period of time, or in the extreme cases, criminal prosecution and liability.<sup>194</sup>

#### 1. Child Neglect Cases

Child neglect is “[t]he failure of a person responsible for a minor to care for the minor’s emotional or physical needs.”<sup>195</sup> Medical neglect, on the other hand, is the “[f]ailure to provide medical, dental, or psychiatric care that is necessary to prevent or to treat serious physical or emotional injury or illness.”<sup>196</sup> Other sources define medical neglect as “the failure to provide appropriate health care for a child although financially able to do so.”<sup>197</sup>

Courts and prosecutors have begun to take what may be classified as

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190. See Laura A. Kelley, *What Should be the Standards for Intervening Between Parent and Child? The Parental Prosecution for a Young Boy’s Obesity*, 9 BUFF. WOMEN’S L.J. 7, 8 (2000–2001) (explaining the necessity of balance between parental rights and state intervention).

191. *Id.*

192. Lindsey Murtagh, *Judicial Interventions for Morbidly Obese Children*, 35 J.L. MED. & ETHICS 497 (2007) (“Such intervention primarily occurs when necessary to prevent serious harm or imminent death.”).

193. Deena Patel, *Super-Sized Kids: Using the Law to Combat Morbid Obesity in Children*, 43 FAM. CT. REV. 164, 167 (2005).

194. *Id.* (outlining the various ways for courts to get involved in the fight against morbid obesity).

195. BLACK’S LAW DICTIONARY 1061 (8th ed. 2004).

196. *Id.*

197. Patel, *supra* note 193 at 167, (quoting *National Exchange Club Foundation*, at <http://www.preventchildabuse.com/neglect.htm>).

a drastic step towards combating childhood obesity. From the above definitions, parents may be held criminally liable under either child or medical neglect for starving their children.<sup>198</sup> Just as starving a child to the point of death is a direct consequence of little to no food, too much food can produce similar results, including even a child's death from morbid obesity.<sup>199</sup> Thus, the correlation and even justification for such courts and prosecutors is as follows: "[i]f parents or guardians starve a child to death, they can be criminally prosecuted[,] and "[s]ince parents can be criminally prosecuted if they starve their children to death, they should also be at risk for prosecution if their children die from morbid obesity."<sup>200</sup>

When trying to understand the grounds on which courts traditionally have allowed state intervention in medical neglect cases, one must explore the issue of parental non-compliance with professional medical orders.<sup>201</sup>

*Commonwealth of Pennsylvania v. Cottam*<sup>202</sup> illustrates one of the most extreme cases involving child neglect. In *Cottam*, Larry and Leona Cottam were found guilty of third degree murder, two counts of reckless endangerment of another person, and two counts of endangering the welfare of children.<sup>203</sup> All of the abovementioned charges stemmed from the six-week period of starvation which led to the death of the couple's fourteen-year-old son and the malnutrition of their twelve-year-old daughter.<sup>204</sup> Just as the Cottams were prosecuted and found criminally liable for starving their children, other parents potentially face the similar risk of being criminally prosecuted for their children who die or at risk of dying from morbid obesity.<sup>205</sup>

Another heart-breaking neglect case arises out of the Texas Court of Criminal Appeals. The harrowing words of a medical examiner's autopsy report of a two-year-old girl read as follows: "This child was very small, a little girl, white girl. She was very thin, emaciated, ribs showing, little muscle development a little muscle mass, at least in the arms or legs. She weighed, I think it was, twelve and three-quarters pounds, twenty-seven inches in height . . ."<sup>206</sup> This nightmarish image was an unfortunate truth

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198. *Id.* at 171.

199. *Id.* at 171.

200. *Id.* at 171. (explaining how courts have no problem finding parents liable for situations involving malnourishment of their children to the point of starvation and should likewise have no problem finding parents liable for situations involving malnourishment of their children to the point of morbid obesity).

201. Shireen Arani, *State Intervention in Cases of Obesity-Related Medical Neglect*, 82 B.U. L. REV. 875, 882 (2002).

202. *Commonwealth v. Cottam*, 616 A.2d 988 (Pa. Super Ct. 1992).

203. *Id.* at 993.

204. *Id.* at 993, 1000.

205. Patel, *supra* note 193, at 171.

206. *Harrington v. State*, 547 S.W.2d 616, 618 (Tex. Crim. App. 1977) (quoting the autopsy report of As-

for two-year-old Laini Deanne Harrington.<sup>207</sup> Dr. Green, the medical examiner, concluded that the deceased toddler starved to death after being “severely malnourished for a very substantial period of time.”<sup>208</sup> In this case, the Texas Court of Criminal Appeals held that the evidence sufficiently showed that the child’s death was caused by the mother’s “failure to perform her duty to support the child” and that the evidence was sufficient to show that both the mother and father “intentionally killed their child by starvation.”<sup>209</sup> The result in this case was a conviction of murder.<sup>210</sup>

Likewise, in *De Leon v. State*,<sup>211</sup> a mother was convicted of murder after a finding that the mother knew of her son’s need for food and nourishment and her continuous failure and refusal to provide such.<sup>212</sup> After the child died of starvation and dehydration, the court convicted the mother of starvation, and the jury sentenced her to thirty five years confinement in the Texas Department of Correction.<sup>213</sup>

As aforementioned, child welfare plays a major role in civil justice for child neglect cases. Persistent parental neglect of medical needs of a child can ultimately result in the child’s removal from the home with placement into foster care and possibly even termination of parental rights.<sup>214</sup> Placement in foster care is an example of state intervention where the state is executing its duty to protect the best interests of the child.<sup>215</sup> Criminal statutes prohibiting medical or child neglect tend to mirror civil statutes allowing the child’s removal and/or termination of parental rights in both substance and exceptions.<sup>216</sup> For those egregious abuse and neglect cases, states criminally punish parents or those in custody by prosecuting them and imposing jail time.<sup>217</sup>

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sistant Medical Examiner Giles Green).

207. *Id.* at 617–18.

208. *Id.* at 618.

209. *Id.* at 620.

210. *Id.* at 616.

211. *De Leon v. State*, 684 S.W.2d 774 (Tex. Crim. App. 1984).

212. *Id.* at 776.

213. *Id.* at 774–75.

214. *See generally* Wilde, *supra* note 11, at 602 (discussing the general principles of both child abuse and medical neglect in terms of civil liability).

215. Murtagh, *supra* note 192, at 498.

216. *See* Wilde, *supra* note 11, at 603 (illustrating how criminal and civil statutes both provide for the same type of substantive procedures and exceptions such as religion and other spiritual beliefs).

217. *See id.* at 601–06 (explicating the general principles of child abuse and child/medical neglect by presenting various case studies to illustrate the potential liability involved for both); *see also* Murtagh, *supra* note 192, at 498 (discussing how the death of a young, morbidly obese girl in California resulted in felony charges for child abuse and endangerment).

## 2. Texas Statutes and Cases

The Texas Family Code encompasses any of the following acts and/or omissions within its definition of abuse:

mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning; [or] causing or permitting the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment<sup>218</sup> in the child's growth, development, or psychological functioning.

The Code further states that governmental entities with an interest in a child have the authority to "file a suit affecting the parent-child relationship" that requests an order take possession of the child; the government can even take possession without a court order.<sup>219</sup> In doing such, "the child's health and safety is the paramount concern."<sup>220</sup>

According to the Texas Penal Code, "[a] person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child, elderly individual, or disabled individual: (1) serious bodily injury; (2) serious mental deficiency, impairment, or injury; or (3) bodily injury."<sup>221</sup> "Omission," referred to in the above provision, constitutes an offense punishable under the Penal Code if either "the actor has a legal or statutory duty to act" or if "the actor has assumed care, custody, or control of a child, elderly individual, or disabled individual."<sup>222</sup> If an omission, over a substantial period of time, to perform parental duties, either results in a serious physical deficiency, or has been intentional, knowing, reckless or with criminal negligence, then such omission will constitute the offense of "injury to a child."<sup>223</sup> Further, the Penal Code considers any person who is

218. TEX. FAM. CODE § 261.001 (2007).

219. *Id.* § 262.001(a).

220. *Id.* § 262.001(b).

221. TEX. PENAL CODE ANN. § 22.04(a) (Vernon 2005).

222. § 22.04(b); *See also id.* § 22.04(d) ("[T]he actor has assumed care, custody, or control if he has by act, words, or course of conduct acted so as to cause a reasonable person to conclude that he has accepted responsibility for protection, food, shelter, and medical care for a child, elderly individual, or disabled individual.").

223. *Compare* *Harrington v. State*, 547 S.W.2d 616 (Tex. Crim. App. 1977) (holding that in the case of a prosecution based upon failure to act over a substantial period of time, the State may prove murder against a parent circumstantially by showing that that parent had a duty of care, custody and control), *and* *Ahearn v. State*, 588 S.W.2d 327 (Tex. Crim. App. 1979) (finding a valid omission for a substantial period of time when the parents failed to provide proper food and medical care for four and a half months), *with* *Pickering v. State*, 596 S.W.2d 124, 128–29 (Tex. Crim. App. 1980) (refusing to find an omission for a substantial period of time since the child's injury occurred only a few days prior to medical attention).

fourteen years of age or younger a “child.”<sup>224</sup>

By administering punishments for both acts and omissions, the statute allows the state to prosecute parents for medical neglect.<sup>225</sup> An offense involving serious bodily injury or serious mental deficiency, impairment, or injury “is a felony of the first degree when the conduct is committed intentionally or knowingly” or a second degree felony “[w]hen the conduct is engaged in recklessly.”<sup>226</sup> An offense is considered a third degree felony “when the conduct is committed intentionally or knowingly” and is a state jail felony “[w]hen the conduct is engaged in recklessly.”<sup>227</sup> Moreover, an offense “is a state jail felony when the person acts with criminal negligence.”<sup>228</sup>

In one Texas case, the court allowed state intervention for prosecuting a mother for the consequences of allowing her son to grow morbidly obese. In 1995, a caseworker intervened in a medical dispute between a mother of a four-year-old obese boy and the boy’s doctor.<sup>229</sup> Because the boy weighed ninety-seven pounds at four years of age, the doctor wanted to sample the boy’s blood to determine the cause of his obesity; however, the mother refused.<sup>230</sup> The Texas Department of Protective and Regulatory Services (“TDPRS”)<sup>231</sup> began an investigation for medical neglect on behalf of the mother.<sup>232</sup> Despite the medical advice and instructions from several doctors, the mother refused to place the boy on a strict diet in order to combat his obesity.<sup>233</sup> Subsequently, TDPRS removed the boy from his home and placed him with a foster mother, at which point his weight began to drop.<sup>234</sup> After giving the mother various opportunities to reunite with her son, TDPRS moved for termination of the mother’s parental rights with the court because of the mother’s continuous noncompliance.<sup>235</sup> At trial, a six-person jury found that the mother’s behavior endangered her child and that the attempted reunification had failed; thus, the court terminated her parental rights.<sup>236</sup>

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224. TEX. PENAL CODE ANN. § 22.04(c)(1).

225. See Wilde, *supra* note 11, at 602–03 (explaining criminal liability under the Texas statute).

226. TEX. PENAL CODE ANN. § 22.04(e).

227. *Id.* § 22.04(f).

228. *Id.* § 22.04(g).

229. *In re G.C.*, 66 S.W.3d 517, 520 (Fort Worth 2002).

230. *Id.*

231. This is now known as the Texas Department of Family and Protective Services. See <http://www.dfps.state.tx.us/> (last visited Dec. 15, 2009).

232. *In re G.C.*, 66 S.W.3d at 520

233. *Id.*

234. *Id.* at 520–21.

235. *Id.* at 521.

236. *Id.* at 527.

Though this case is directly on point with the factual issues addressed in this Article, it is important to note that the decision fails to explicitly address the direct correlation between obesity and neglect and being able to prosecute one as the other.<sup>237</sup>

### 3. Other Case Studies

In New Mexico, Child Protective Services (“CPS”) removed three-year-old toddler Anamarie Martinez-Regino from her parents’ custody at a weight of one hundred and thirty pounds.<sup>238</sup> As a newborn, Anamarie weighed in at six pounds and thirteen ounces; thereafter, she weighed thirty-eight pounds at eight months and fifty pounds at only a year of age.<sup>239</sup> CPS’s removal petition alleged that if Anamarie was not immediately placed on a rigid diet and exercise program then she was sure to face life-threatening conditions.<sup>240</sup> The child neglect statute in New Mexico provides that “a ‘neglected child’ is one ‘without proper... medical... care... necessary for the child’s well-being because of the faults and habits of the child’s parent...or refusal of the parent to provide them.’”<sup>241</sup> New Mexico officials charged Miguel Regino and Adela Martinez with failure to follow Anamarie’s doctor’s orders to treat her obesity.<sup>242</sup> Because of the state’s intervention and the court’s instruction that Anamarie remain in state care, Anamarie survived.<sup>243</sup> However, not all children facing obesity are as lucky as Anamarie.

A case out of California brings to light an unfortunate story of a young girl, thirteen-year-old Christina Ann Corrigan, who weighed approximately six hundred eighty pounds.<sup>244</sup> Christina’s mother, Marlene Corrigan, allowed her to drop out of school and sit around the house watching television all day.<sup>245</sup> This behavior and lack of health-consciousness led to the poor girl’s death. Christina’s mother, being morbidly obese herself, said that “she never noticed the numerous, massive bed sores or evidence of [her daughter’s] uncleanness.”<sup>246</sup> During trial,

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237. See Wilde, *supra* note 11, at 605 (“[T]he court addressed the case like any other run-of-the-mill child neglect case, apparently unaware of the novelty of the issues presented.”).

238. *Id.* at 605

239. *Id.*

240. *Id.*

241. Patel, *supra* note 193, at 170 (quoting N.M. Stat. Ann. § 32A–4–2(E)(2) (Mich. 1978)).

242. Arani, *supra* note 188, at 877

243. Patel, *supra* note 193, at 171.

244. *Id.* at 170.

245. *Id.*

246. *Id.* (explaining that the girl was found with “feces in the folds of her skin”); see also Lori Leibovich, *Death of a Fat Girl: Is Christina Corrigan’s Mother on Trial for Neglect or for Having an Obese Child*, <http://www.salon.com/sept97/mothers/obese970922.html> (reporting that Christina’s room smelled like

Detective Don Horgan of the El Cerrito Police Department reported: “She was lying in her own filth. It wouldn’t matter if she was 30 years old or 50 or 80 or if she weighed two pounds or 5,000 pounds. This case is going to trial because of the conditions the girl was living in.”<sup>247</sup> The superior court judge in this case found the mother “guilty of misdemeanor child abuse.”<sup>248</sup>

Four-year-old Cory Andis from Indianapolis, Indiana was placed in foster care at a weight of one hundred thirty-eight pounds, which surpassed an average four-year-old’s weight by one hundred thirty pounds.<sup>249</sup> Marion County prosecutors, in a joint effort with Indianapolis child welfare officials, took action against Cory’s parents by first removing him from their home and then charging them “with five counts of criminal neglect.”<sup>250</sup> Cory’s doctors repeatedly urged Cory’s parents to place the boy on a strict, health-conscious diet in order to treat and prevent some of the serious health problems which are inevitable for morbidly obese children as well as those that Cory was already experiencing at the age of four.<sup>251</sup> Indiana officials took action and brought forth charges for child and medical neglect because the evidence illustrated that Cory’s parents “deliberately disregarded the doctor’s orders” after being repeatedly warned that Cory would eventually die from morbid obesity if the weight was not lost.<sup>252</sup> “[T]he parents were resentful . . . were seen giving him a fast-food meal while he was hospitalized,” and didn’t follow the doctors’ diet instructions because they were “too hard to follow.”<sup>253</sup> Ultimately, Judge Tanya Walton Pratt heard the case and accepted the parents’ guilty plea to the child neglect charge.<sup>254</sup> The judge ordered only a one and a half years probation sentence with one hundred hours of community service.<sup>255</sup>

In Iowa, ten-year-old Liza was removed from her mother at two hundred seventy pounds after the “record revealed that the child’s obesity was a potentially life-threatening condition and that it interfered with the

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urine; that various “food containers were strewn around her body[,]” and that the coroner’s report indicated that “there was evidence that insects had been feeding on her flesh”). *But see id.* (quoting Corrigan’s lawyer’s statement that Corrigan was not guilty of the neglect charges and denying that Corrigan’s home “always looked the way it did on the day Christina died”).

247. Leibovich, *supra* note 246.

248. Patel, *supra* note 193, at 170.

249. Kelley, *supra* note 10, at 7–8.

250. *Id.* at 7.

251. *See id.* at 8–9 (explaining that Cory had breathing problems which caused him to wear a portable oxygen machine and that he also experienced obstructed sleep apnea).

252. Patel, *supra* note 193, at 170.

253. Kelley, *supra* note 10, at 8–9.

254. Patel, *supra* note 193, at 170.

255. *Id.*



child's socialization.”<sup>256</sup> When looking to the child's best interest, the court declared Liza “a child in need of assistance” and thereafter removed Liza from her mother and placed in her foster care.<sup>257</sup>

The Supreme Court of New York reversed a decision involving a question of willful violations by a young girl's parents of conditions imposed upon Brittany to take control of the girl's morbid obesity.<sup>258</sup> Weighing into the 99th percentile of the body mass index for children, Brittany's weight “led to a variety of health issues, including gallstones, excessive fat in her liver, intermittent high blood pressure and cholesterol problems, as well as insulin resistance, acanthosis nigricans, knee pain and psychosocial complications associated with obesity.”<sup>259</sup> In order for the New York County Department of Social Services to remove a child from his or her parent's custody, the department must prove that the parents willfully violated some condition imposed and related to the particular case.<sup>260</sup> The Family Court in New York found that it was in the best interest of the obese child to be removed from her parents until she obtained and remained at a healthy weight and until one of her parents could support her healthy weight and lifestyle.<sup>261</sup>

## X. TWO SIDES OF THE SAME COIN

### A. Advantages of Court Intervention

When less drastic programs have shown themselves to not be effective in reducing childhood obesity, a more drastic step must be taken. That much more serious and drastic step is court intervention. This step is a divisive and touchy one because it impedes and intrudes on parents' fundamental liberty interest to raise their child free from governmental intrusion.

It has been stated that:

“the attitude that people's weight and health are an issue of personal rather than public responsibility vastly oversimplifies the

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256. *Id.*

257. *Id.*

258. *In re Brittany T. v. Shawna T.*, 852 N.Y.S.2d 475, 475 (App. Div. 2008).

259. *Id.* at 477.

260. *Id.* at 480 (“While we recognize and share petitioner's concern for the child's health and well-being and are not unmindful of the fact that her weight and dietary habits while in respondents' care had not been, to say the least, ideal, we cannot conclude that petitioner has demonstrated by clear and convincing evidence that respondents exhibited a ‘continuous, willful and unjustifiable refusal to accept petitioner's recommendation[s]’ or demonstrated an unwillingness to comply with the terms of the order.”)

261. *Id.* at 475.

problem and its causes. No one forces people to eat poorly or gain weight... but those choices are heavily influenced by factors that are beyond individuals' control."<sup>262</sup> "The availability and cost of food, portion sizes in restaurants, food advertising, access to information about ingredients and nutrition, cultural upbringing, and other factors"<sup>265</sup>

play a role in a person's decisions on what to eat and how much of it to eat.<sup>264</sup> And due to the fact that the government already plays a part in our food and beverage consumption through "governmental policies toward food production, distribution, advertising, and preparation," it seems appropriate for them to also play a role in making that consumption as healthy as possible.<sup>265</sup> Government intervention would also do wonders for "the national economy by reducing medical costs and other economic harms associated with this epidemic"<sup>266</sup> and would protect children from later in life "paying the price with their purses and their well-being."<sup>267</sup>

One particularly strong argument for governmental involvement in the fight against childhood obesity is that "not everyone is a fully-informed and [a] rational consumer."<sup>268</sup> The specific consumers we are addressing here are children. Adolescents depend on adults and schools for their information and "are particularly susceptible to food advertising."<sup>269</sup> Consequently, because children are a "captive audience"<sup>270</sup> what better place to teach them about health and wellness than at school, where they spend the majority of their day?

Research regarding the effects, advantages, and disadvantages of

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262. David Burnett, *Fast-Food Lawsuits and the Cheeseburger Bill: Critiquing Congress's Response to the Obesity Epidemic*, 14 VA. J. SOC. POL'Y & L. 357, 372 (2006) (citing Jason A. Smith, *Setting the Stage for Public Health: The Role of Litigation in Controlling Obesity* 28 U. ARK. LITTLE ROCK. L. REV. 443 (2006)).

263. *Id.* (citing Erica Goode, *The Gorge-Yourself Environment*, N.Y. TIMES, July 22, 2003, at D1; Kim Severson, *Seduced by Snacks? No, Not You*, N.Y. TIMES, Oct. 11, 2006).

264. *Id.* (citing Erica Goode, *The Gorge-Yourself Environment*, N.Y. TIMES, July 22, 2003, at D1; Kim Severson, *Seduced by Snacks? No, Not You*, N.Y. TIMES, Oct. 11, 2006).

265. *Id.* at 373.

266. *Id.* at 412 (citing *The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity* (2001), available at <http://www.surgeongeneral.gov/topics/obesity/caltoaction/CaltoAction.pdf>).

267. Valere Byrd Fulwider, *Future Benefits? Tax Policy, Advertising, and the Epidemic of Obesity in Children* 20 J. CONTEMP. HEALTH L. & POL'Y 217, 222 (2003).

268. *Id.* at 401 (citing Jenny Deam, *Hooked on Fast Food? While Law Prof Wants Warnings by Chains, Experts Say Burger, Fries Aren't Addictive*, DENVER POST, June 25, 2003, at F1).

269. *Id.* (citing Shawna L. Mercer et al., *Possible Lessons from the Tobacco Experience for Obesity Control* 77 AM. J. CLINICAL NUTRITION 1073S, 1075S (2003)).

270. Aileen Breighanne Fisher, 55 DEPAUL L. REV. 711, 716 (2005) (citing Jeffrey P. Koplan, *Committee on Prevention of Obesity in Children and Youth Preventing Childhood Obesity: Health in the Balance* (2005)) (This is a book written by Koplan and others that addresses the causes of obesity and proposes a prevention-oriented plan to combat childhood obesity).

government intervention shows that the overwhelming majority of commentators on the subject agree that the government should be involved in attempting to reduce the ever-growing obesity and overweight epidemic in America. This research, however, also demonstrates further consensus on another issue. The government should approach remedying the obesity issue in a way other than merely trying to distribute information about the disease to the general public. Efforts to make it easier to obtain healthy food and to find places to get exercise should also be initiated.<sup>271</sup> Equipping people with the right tools to fight this battle is essential.

Some would argue that court intervention should only come once the child's life is deemed by the court to be in "imminent danger" or when the child's quality of life is so poor that the child cannot lead a "normal life."<sup>272</sup> State courts in Texas, Pennsylvania, California, Indiana and New Mexico have held that obesity is a serious issue that merits state intervention into the family unit.<sup>273</sup> The advantages to court intervention include achievement of immediate weight loss.<sup>274</sup> Several cases have shown this to be accurate. One example is that of a four year old child who weighed more than 130 pounds; he was placed in a foster home where he was put on a specific diet.<sup>275</sup> After being in the home and on the diet, the child lost almost a third of his body weight (50 pounds).<sup>276</sup> The young lady from *In re Brittany* also lost weight once she was removed from her parents' custody. While the ideal goal is for families to remain together, there are advantages to court intervention where separation occurs.

Court intervention would also send a message to the community and other parents (or potential parents) that they will be held accountable for their contributions to their child's health. Many court cases are known for

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271. Kelli K. Garcia *The Fat Fight: The Risks and Consequences of the Federal Government's Failing Public Health Campaign* 112 PENN ST. L. REV. 529, 567 (2007) (giving examples of what should be done to make it easier for the American public to become healthier). Examples of possible remedies include lowering the costs of fresh and healthy fruits and vegetables, putting supermarkets in low-income neighborhoods so that there is a place to buy healthy food items, putting in sidewalks and pleasant scenery to encourage physical activity, and providing breast pumps and other services that would encourage breastfeeding to low-income mothers. *Id.*

272. Arani Shireen, *State Intervention in Cases of Obesity* 82 B.U.L. Rev. 875 (2002) (Argues that cases where state intervention is necessary is rare and should be done only in cases where the child's life is in imminent danger or where "the child's quality-of-life is so poor, due to either her inability to lead a "normal" life or the psychological damage that results from living with obesity, intervention is also justified").

273. Patel, *supra* note 193, at 169-173 (illustrating cases of court intervention involving morbidly obese youth).

274. Lindsey Murtagh, *Judicial Interventions for Morbidly Obese Children*, 35 J.L. MED. & ETHICS 497, 498 (2007).

275. L. A. Kelley, "What Should Be the Standards for Intervening between Parent and Child? The Parental Prosecution for a Young Boy's Obesity," *Court Watch*, Buffalo Women's Law Journal 9 (2000-2001): 7-11, at 8.

276. *Id.*

setting precedent in establishing guidelines for other on-lookers and members of our community as to what behavior society will not tolerate.

Interventions would also prevent unnecessary costs from being added to an already overburdened economic and health care system. The alarming fact is children treated for obesity are roughly three times more expensive for the healthcare system than children of normal weight.<sup>277</sup> Many are also shocked to learn that severely overweight people spend more on healthcare than smokers.<sup>278</sup> And even more astounding is that the current indirect and direct costs of treating obesity have been estimated at \$117 billion per year.<sup>279</sup>

State intervention will instill healthy lifestyle patterns for the child and parents will be better equipped to raise healthy children. A study done by the University of Iowa surveyed 333 children aged five. The study showed that when children are encouraged to exercise at an early age, their bodies will “bank” the positive aspects of exercising and the benefits will be seen later in life.<sup>280</sup> Researchers believe that less active children gain more weight because active children do not develop as many fat cells.<sup>281</sup>

Another advantage to court intervention is the possible prevention of premature deaths of children.<sup>282</sup> Studies have shown that teens that are obese have the same chances of dying a premature death as teens that smokes cigarettes.<sup>283</sup> Dr. Carolyn Landis, who leads the *Healthy Kids, Healthy Weight* program at a Cleveland hospital, states that the problem of premature deaths is not unique to teens but also plagues many children.<sup>284</sup> She says that she has seen children from 10 years of age who are overweight or obese and are diagnosed with type 2 diabetes.<sup>285</sup>

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277. Thompson and Medstat. “Childhood Obesity:Costs, Treatment Patterns and Disparities in Care.” (2006).

278. Heart Disease and Stroke Statistics – 2006 Update, American Heart Association.

279. *Id.*

280. Chris Irvine, *Active Five-Year Olds Are Thinner When They Grow Up*, TELEGRAPH, Jul. 30, 2009, available at <http://www.telegraph.co.uk/health/healthnews/5933824/Active-five-year-olds-are-thinner-when-they-grow-up.html> (last visited September 22, 2009).

281. *Id.* (noting that the children might also have a faster metabolism and that boys were more likelier than girls to maintain the healthier weight in future years).

282. Patel, *supra* note 193, at 171.

283. Salynn Boyles, *Teen Obesity As Deadly As Smoking*, Medicine.net.com, Feb. 25 2009, available at <http://www.medicinenet.com/script/main/art.asp?articlekey=98104> (last visited September 22, 2009) (Researchers also found that teens that are overweight are in the same death risk category as light smokers; The article also notes that a study done by Harvard School of Public Health reached the same conclusions).

284. *Id.*

285. *Id.*

### B. Disadvantages of Court Intervention

While there are advantages to court intervention, there are also of course disadvantages, as well. Some of the disadvantages include courts creating an inhibition in the child of developing skills of self-regulation.<sup>286</sup> How likely will children be to continue on a diet that is imposed on them in an environment in which they are unfamiliar? By “forcing” children to change their dietary patterns and begin an exercise program, the state is essentially taking away from children the motivation they will require to develop those skills on their own.

A controversy is currently raging over whether the government should interfere at all with the dramatic climb in obesity rates.<sup>287</sup> There are many schools of thought on this issue, but the argument for state intervention is the most persuasive and logical. Beginning with the negative aspects of governmental intervention, the most influential argument is that “obesity is a private rather than a public issue... governed by personal rather than communal responsibility and the problem is best addressed by individuals, parents, and medical professionals rather than by the federal government.”<sup>288</sup> Many commentators argue that “while obesity is a widespread health problem, ‘it is not a public health problem’ because obesity should be fought personally by eating less and exercising more.”<sup>289</sup> Some experts state that “society should not use government to interfere with (and perhaps even undermine)” the responsibility of parents to control their children’s health.<sup>290</sup> With this comes the realization that “[w]hen the public perceives governmental involvement as intrusion rather than protection, it will resist legal attempts to influence both personal behavior and the social environment.”<sup>291</sup>

In reaction to the Health Report Cards that some schools are implementing, which informs parents of the weight and fitness level of their children,<sup>292</sup> some authorities argue that not only will the report cards make

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286. Murtagh, *supra* note 274, at 498.

287. Richard Epstein, *What (Not) To Do About Obesity: A Moderate Aristotelian Answer*, 93 GEO. L.J. 1361, 1362 (2005).

288. Burnett, *supra* note 262, at 371.

289. Fisher, *supra* note 270, at 716. (citing David Boaz, *Obesity and ‘Public Health’?*, July 20, 2004, <http://www.cato.org/dailys/07-20-04.html>)).

290. Stephen Sugarman *Fighting Childhood Obesity Through Performance-Based Regulation of the Food Industry* 56 DUKE L.J. 1403, 1407 (April, 2007) (citing Richard A. Epstein, *Obesity Policy Choices: What (Not) to Do About Obesity: A Moderate Aristotelian Answer*, 93 GEO. L.J. 1361, 1366 (2005)).

291. Jess Alderman, et al, *Part II: Prevention and Treatment: Solutions beyond the Individual Application of Law to the Childhood Obesity Epidemic*, 35 J.L. MED. & ETHICS 90, 102 (2007).

292. *supra* note 270, at 718 (citing Elena Conis, *Taunts Can Haunt Obese Children; New Studies Identify Emotional Costs, Find That a Health Report Card Could Help Parents*, L.A. TIMES, Aug. 18, 2003, at F3.).

these overweight and obese children the victims of teasing, but they will “set children up to feel bad about their bodies which could prove to increase rather than minimize the problem.”<sup>293</sup> Although these are legitimate concerns, the government should not be blocked from implementing mandatory physical education classes and intervening in other appropriate circumstances solely because the feelings of children might be bruised.<sup>294</sup>

One concern that appears to hold some legitimate value is the argument that

“childhood obesity legislation will leave schools in underprivileged areas unable to compete academically with more affluent schools. It is possible that obesity legislation which takes fundraising opportunities such as vending machines away from schools or requires them to implement certain programs like PE and obesity report cards, could be putting already disadvantaged poor and minority students in America at a further disadvantage to their affluent counterparts.”<sup>295</sup>

While this side effect may hold some weight with legislation regarding schools and childhood obesity, it should not stop the government from stepping in to reform other areas, such as informing the general public and encouraging children and their parents to get outside and exercise.<sup>296</sup> While government involvement in the educational system may be a touchy subject, obesity levels in adolescents have risen to a point where intervention is necessary and crucial, and schools are the perfect place to begin.

Another disadvantage to government intervention in the fight against childhood obesity is that judicial intervention

“is too narrow an approach to effectively reduce or prevent childhood obesity in America because (1) judicial intervention is rarely used and does not directly affect families of overweight or mildly obese children,<sup>297</sup> and (2) the approach does not necessarily provide

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293. *Id.* (citing Judith Graham, *Arkansas to Grade Kids on Obesity: Foes Cite Worry About Self-Esteem*, CHI. TRIB., Sept. 15, 2003, at CN1.).

294. *Id.* (citing Elena Conis, *Taunts Can Haunt Obese Children: New Studies Identify Emotional Costs, Find That a Health Report Card Could Help Parents*, L.A. TIMES, Aug. 18, 2003, at F3). “This study also found that parents who received the health report cards were three times as likely to seek medical help for weight problems apparent in their child as parents who did not receive the cards.” *Id.* Only one parent actually called to complain about the cards. *Id.*

295. *Id.* at 729 (citing Camille Ricketts, *Child Obesity Linked to Schools’ Deals with Food Vendors*, PHILA. INQUIRER, Nov. 2, 2004 at A12, available at 2004 WL 6090230).

296. *Id.* at 723 (citing Improved Nutrition and Physical Activity Act, S. 1325, 109<sup>th</sup> Cong. (2005)). “The community-based legislative approach to childhood obesity prevention and reduction is embodied in the proposed federal legislation known as IMPACT. *Id.* It encourages the promotion of physical activity and improved nutrition. *Id.*

297. *Id.* at 732 (citing Shireen Arani, *Case Comment, State Intervention in Cases of Obesity-Related Medi-*

parents of morbidly obese children with the requisite tools to stop the problem.”<sup>298</sup>

But even this argument does not seem to imply that there should be no government intervention whatsoever. The government can and should take steps to be active in roles other than the judiciary and in cases other than the most extreme.<sup>299</sup>

strategy that does not solve the long-term problem.<sup>300</sup>

Some might argue as well that state intervention glosses over the issue of the possible problem of genetics.<sup>301</sup> “In one study, adults who were adopted as children were found to have weights closer to their biological parents than to their adoptive parents. In this case, the person’s genetic makeup had more influence on the development of obesity than the environment in the adoptive family home.”<sup>302</sup> In a study done on adopted children and obesity, it was found that 80% of the obesity risk is genetic.<sup>303</sup> And though “[t]here are genetic patterns that can predispose people to become overweight... there are also patterns of how they eat, snack, exercise, or don’t do exercise that form this whole mini-culture in the family, and that is where the child lives.”<sup>304</sup> Families tend to share the same lifestyle habits. They tend to eat the same kinds and amounts of food and exercise the same amount of time.<sup>305</sup> But there is still research to be done in this area<sup>306</sup> and genetics cannot be blamed “as the sole contributing factor of morbid obesity.”<sup>307</sup> Two other significant contributing factors are too much food and too little exercise.<sup>308</sup> Since of the vast majority of obese

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cal Neglect, 82 B.U. L. REV. 875, 876 (2002)).

298. *Id.* (citing Laura A. Kelley, *What Should Be the Standards for Intervening Between a Parent and Child? The Parental Prosecution for a Young Boy’s Obesity*, 9 BUFF. WOMEN’S L.J. 7, 8 (2001)).

299. *Id.* at 714 (citing Mary Anne Bobinski, *Health Disparities and the Law: Wrongs in Search of a Right*, 29 AM. J.L. & MED. 363, 375 (2003)). “Three justifications for the current, broader approach to public health in America are: (1) improving public health to reduce morbidity and mortality rates, (2) minimizing health disparities among racial and ethnic groups, and (3) reducing government expenditures on behavioral health conditions.” *Id.*

300. Murtagh, *supra* note 274, at 498.

301. Patel, *supra* note 193, at 171.

302. <http://www.athealth.com/consumer/disorders/understandingobesity.html>, (last visited Sep. 25, 2009).

303. Patel, *supra* note 193, at 171 (citing The Cleveland Clinic Information Center, available at [www.clevelandclinic.org/health/health-info/docs/2400/2434.asp?index=9467](http://www.clevelandclinic.org/health/health-info/docs/2400/2434.asp?index=9467)).

304. *Id.*

305. *Athealth.com*, *supra* note 302.

306. Patel, 43 FAM CT. REV. 164, 166.

307. *Id.*

308. *Id.* (citing Jill Smolowe, *Everything to Lose: Too Much Food and Too Little Exercise Have Left Millions of American Youths Overweight and at Risk for Devastating Illnesses. What Can Be Done?* *Plenty*, PEOPLE, Nov. 4, 2002, at 58.).

children grow up to be obese adults,<sup>309</sup> we should tackle and address the issue now to prevent more serious and catastrophic problems in the future.

Another argument that has been advanced against state intervention is that it is damaging to the child who is being removed from her home.<sup>310</sup> This results in the child “not only continu[ing] to face the issue associated with obesity due the deficient nature of an individualistic remedy but she also faces issues associated with the separation from and stigmatization of her family.”<sup>311</sup> This argument appeals to the emotions, but if judicial and state intervention were not allowed, the child would perhaps be deprived of the privilege of being with her family because of hospitalization or even death due to obesity.

Richard Epstein is a strong advocate for keeping the government out of people’s private lives when it comes to obesity.<sup>312</sup> “Not only does individual autonomy deserve great deference; government will get things wrong. ‘No sane person would trust his diet and lifestyle to a benevolent social planner... [A]n individual himself is the only person who can put all the separate pieces together to find out if he is healthy.’”<sup>313</sup>

“[T]he attachment between a parent and child forms the basis of who we are as human beings, and the continuity of that attachment is essential to a child’s natural development.”<sup>314</sup> By courts separating families the system is in essence creating more harm than good. Many children may develop psychological problems from the forced separation viewing themselves as the root cause of the family’s “divorce,” thereby creating even greater trauma for the child.

The disruption caused by the removal of children from their parents and the resulting interruption of the parent-child relationship may cause fear and anxiety in the child.<sup>315</sup> The question becomes whether the child’s emotional needs should come before the child’s physical problems caused by obesity. “If a child remains with his or her parents in order to affirm the “attachment,” we may be overlooking the looming morbid obesity

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309. *Id.* at 167 (citing Health Risks of Obesity, at <http://www.weight-loss-i.com/obesity-health-risks.htm>).

310. Coyla J. O’Connor *Childhood Obesity and State Intervention: A Call to Order!* 38 STETSON L. REV. 131, 152 (2008) (citing Elizabeth J. Sher, *Choosing for Children: Adjudicating Medical Care Disputes Between Parents and the State* 58 N.Y.U. L. REV. 157, 202 (1983)).

311. *Id.* at 153.

312. Epstein, 93 GEO. L.J. 1361, 1385.

313. M. Gregg Bloche, *Exchange: Obesity Policy Choice. Obesity and the Struggle Within Ourselves*, 93 GEO. L.J. 1335, 1351 (April, 2005) (citing Richard Epstein, *What (Not) To Do About Obesity: A Moderate Aristotelian Answer*, 93 GEO. L.J. 1361, 1368 (2005)).

314. Patel, *supra* note 193, at 172 (quoting Melanie Margarida Nowling, Note, *Protecting Children who Witness Domestic Violence: Is Nicholson v. Williams an Adequate Response?*, 41 FAM. CT. REV. 517 (2003)).

315. *Id.*



problem, which can be circumvented with the proper attention.”<sup>316</sup>

Although there is persuasive argument that removal of children from their homes if they are in life-threatening danger due to obesity is a legitimate approach to combating the epidemic of childhood obesity, it also comes with downfalls. Children that are removed from their home often have no knowledge of what or why this is happening, leaving them with feelings of fear and apprehension.<sup>317</sup> Experts have said that “the attachment between a parent and child forms the basis of who we are as human beings, and the continuity of that attachment is essential to a child’s natural development.”<sup>318</sup> When this relationship is disrupted, it may “provoke fear and anxiety in a child and diminish his or her sense of stability and self.”<sup>319</sup> This is true anytime the relationship is disrupted. “Even when it is necessary, research indicates that removing children from their homes interferes with their development.”<sup>320</sup> But the child’s health and safety are the main concern when determining whether to remove the child from the home<sup>321</sup> and it is sometimes necessary. “If a child remains with his or her parents in order to affirm the ‘attachment,’ we may be overlooking the looming morbid obesity problem, which can be circumvented with the proper attention.”<sup>322</sup> The risks that we are trying to deal with when removing a child from his or her home, the “fatal risks to the child’s physical health,”<sup>323</sup> should “be addressed *before* emotional health concerns in order to prevent irreparable damage that might be caused from the excess weight.”<sup>324</sup>

Opponents of state intervention argue that allowing states to intervene in the personal lifestyles and health of children is obtrusive and excessive.<sup>325</sup>

It is the belief of some that the government does not need to get involved in our private affairs.<sup>326</sup> Once the government is allowed to intervene in personal affairs, such as morbid obesity, where does the state intervention end? If the judicial system acquiesces to child neglect cases for

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316. *Id.*

317. *Id.*

318. *Id.* (citing Melanie Margarida Nowling, *Protecting Children who Witness Domestic Violence: Is Nicholson v. Williams an Adequate Response?*, 41 FAM. CT. REV. 517 (2003).

319. *Id.* (citing Melanie Margarida Nowling, *Protecting Children who Witness Domestic Violence: Is Nicholson v. Williams an Adequate Response?*, 41 FAM. CT. REV. 517 (2003).

320. *Effects of Attachment and Separation* from Children’s Service Practice Notes, Vol. 2, No. 4, July 1997, available at [http://www.practicenotes.org/vol2\\_no4/effects\\_of\\_separation\\_and\\_attachment.htm](http://www.practicenotes.org/vol2_no4/effects_of_separation_and_attachment.htm).

321. Tex. Fam. L. Code §262.001(b) (1999).

322. Patel, *supra* note 193, at 172.

323. *Id.*

324. *Id.*

325. Patel, *supra* note 193, at 172.

326. *Id.*

childhood obesity issues, then perhaps it will be acceptable to allow them every time an expert says that a particular lifestyle is not acceptable, creating a slippery slope.<sup>327</sup>

But there are three important points that justify the government being involved “with respect to obesity: (1) intervention may reduce human morbidity and mortality rates; (2) government intervention may reduce disparities in health within certain ethnic and racial groups that the nation cannot address without regulatory intervention; and (3) government intervention may reduce current levels of government expenditures on health conditions related to human behavior.”<sup>328</sup>

To expand on the first of these reasons: “[s]ince obesity is preventable, we should be working to educate parents and children in order to prevent obesity-related fatalities.”<sup>329</sup> Since “the number of people suffering from obesity dwarfs the number of people afflicted with other diseases including HIV/AIDS, cancer, diabetes, and heart disease,”<sup>330</sup> and obesity is an area that is completely preventable, this is something that can be controlled. This education and governmental influence could “drastically lower or at least slow down the number of morbid obesity-related deaths.”<sup>331</sup>

The second factor addressed is particularly important, given that certain ethnic and racial groups tend to be poorer than whites<sup>332</sup> and this puts them at a significant disadvantage in obtaining proper nutrition and education regarding obesity. Through government involvement, efforts can be made to rectify the disadvantages associated with being in a lower socioeconomic class.<sup>333</sup>

The final reason involves the amount of money expended on obesity

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327. *Id.*

328. Brian Thompson, *The Obesity Agency: Centralizing the Nation's Fight Against Fat*, 30 AM. J.L. & MED. 543, 555 (2004) (citing Mary Anne Bobinski, *Health Disparities and the Law: Wrongs in Search of a Right*, 29 AM. J.L. & MED. 363 (2003)).

329. Patel, *supra* note 193, at 172.

330. Thompson, *supra* note 328, at 555 (citing KELLY D. BROWNELL & KATHERINE BATTLE HORGAN, *FOOD FIGHT* (Contemporary Books) (2004)).

331. Patel, *supra* note 193, at 172.

332. Ashley B. Antler, *The Role of Litigation in Combating Obesity Among Poor Urban Minority Youth: A Critical Analysis of Pelman v. McDonald's Corp.* 15 CARDOZO J.L. & GENDER 275, 279 (2009) (citing David Burnett, *Fast-Food Lawsuits and the Cheeseburger Bill: Critiquing Congress's Response to the Obesity Epidemic* 14 VA. J. SOC. POL'Y & L. 357, 361 (2007)).

333. *Id.* at 282. Article suggests that “there are fewer recreational facilities and parks in low-income communities than in more affluent ones..., poor neighborhoods often lack clean, outdoor spaces for physical activity. Fear of crime also deters residents from walking and spending time outdoors.” *Id.* “Poverty prevents many Americans from having access to healthy foods... [L]ow-income and minority neighborhoods have fewer supermarkets and healthy food options, as well as lower quality produce available, compared to more affluent and white neighborhoods.” *Id.* at 282. “[T]here is an astonishingly high concentration of fast food restaurants in poor urban neighborhoods.” *Id.*

research and medical expenses. "Annual overweight- and obesity-attributable medical spending is estimated to be approximately \$78.5 billion per year."<sup>334</sup> Since every American ends up paying for some of these costs, whether it is monetarily, physically, or emotionally, "obesity influences the population as a whole, which justifies the creation of an agency that would reduce its harmful effects."<sup>335</sup> With the amount of money being spent on obesity and overweight-related medical problems, it is a legitimate governmental interest to intervene and lessen the economic effects of the problem.

Although there has not been extensive research done on the correlation between neglect and childhood obesity, one study done in Denmark has found a strong connection "between early childhood parental neglect and late adolescent obesity."<sup>336</sup> Another study, done in the U.S., has revealed that "[a] parent who neglects a child due to preoccupation with his or her own problems may promote obesity in the child."<sup>337</sup> This study indicated that "the odds of obesity [are fifty] percent greater in children who had experienced neglect."<sup>338</sup>

## XI. CONCLUSION

In order to prevent childhood obesity and obesity in the general American public, the federal and state governments must step in.<sup>339</sup> The fight against obesity cannot be done by the private individual alone, especially when it comes to children. It "will require action by the federal government, private businesses, local communities, educators, the health-care system, and advocacy groups in addition to personal responsibility by private citizens."<sup>340</sup>

If the wave of obesity is not stopped and reversed, the current generation of young people will live less healthy lives and pass away more prematurely than any recent generation. Our country has dramatically changed the way it plays, works, lives, and eats, thereby fostering a society that feeds into the obesity epidemic. Families are frantically busy and find

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334. Patel, *supra* note 193, at 172 (citing Eric A. Finkelstein, et al, *National Medical Spending Attributable to Overweight and Obesity: How Much and Who's Paying?*, 22 HEALTH AFFAIRS 219 (2003)).

335. Thompson, *supra* note 328, at 555.

336. Wilde, *supra* note 11, at 606 (citing Inge Lissau & Thorkild I.A. Sorensen, *Parental Neglect During Childhood and Increased Risk of Obesity in Young Adulthood*, 343 LANCET 324, 325 (1994)).

337. *Parental Neglect Linked to Child Obesity*, [http://www.upi.com/Health\\_News/2007/11/14/Parental-neglect-linked-to-child-obesity/UPI-68221195075096/](http://www.upi.com/Health_News/2007/11/14/Parental-neglect-linked-to-child-obesity/UPI-68221195075096/), Nov. 14, 2007 (last visited Sep. 28, 2009).

338. *Id.*

339. Burnett, 14 VA. J. SOC. POL'Y & L. 357, 373. Given that obesity is such a serious public issue, Congress can and should seriously address this epidemic health problem. *Id.*

340. *Id.* at 410.

themselves eating while on the run. Fast food restaurants proliferate and are a quick fix to meals. The food is inexpensive, "super-sized," low in nutrition but high in sugar and calories. Few schools offer a regimented exercise program for fitness and well-being, and physical activity outside of school has lessened due to the safety of children, available opportunities, and the ever-rising increase in popularity of video games. Parents are the front lines in the fight against this battle. Parents must and should be held accountable for their children's weight and health. Parents can be a solution in this health care crisis, but when they are derelict in their duties, they must be held criminally responsible for the consequences of their actions.

During the pendency of Marlene Corrigan's trial, the *Contra Costa Times* ("Times")<sup>341</sup> of California chose Anneke Hogeland for the Golden Pen Award after writing to the *Times* about Marlene's trial and the tragic death of Christina.<sup>342</sup> Dr. Eileen B. Peck, a retired public health nutritionist, wrote the following letter to the *Times* in response to its choosing Hogeland for the Golden Pen Award:

Dear Editor....Childhood obesity is a major health problem in this state and country that the health care industry and society are ill equipped to help....There are many situations in which childhood obesity is a multifaceted problem that does not yield to an easy solution. Christina's problem appeared to be one of these. To diagnose and treat a problem as severe as this takes a multidisciplinary health care team specializing in childhood obesity....If Mrs. Corrigan failed her daughter it was in not demanding that the health care and education systems give her and Christina the help they needed...Many people failed Mrs. Corrigan: the Doctors at Kaiser in not adequately diagnosing the disorder and providing the case management for which they are paid; the nutritionist in not realizing this was a problem that diet counseling alone could solve; the school personnel in assuming this was not a case warranting home schooling and neglecting their legal responsibility to follow up on truancy; the school and public health departments in not having public health nurses who could help with case management and referral when Christina did not attend school; the coroner in not performing a complete autopsy; society in being willing to blame fat people for their problems instead of providing the support and services families in stress need; and I and my former program for not having more aggressively demanded that resources be allocated to this important health problem. The story that really deserves reporting is that childhood obesity is a

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341. *Contra Costa Times*, <http://www.contracostatimes.com/>

342. Joanne Ikeda, "Prosecution of Parent for Death of Obese 13 Year Old," <http://mailman2.u.washington.edu/pipermail/phnutr-l/1997-December/001418.html> (last visited Jan. 18, 2009).

complex problem that the medical care system and society in general are not prepared to deal with.<sup>343</sup>

Will we, as a society, allow another child to suffer and die in a similar situation such as this one? Note the case of Alexander Draper. Alexander, at his heaviest recorded weight, weighed in at a staggering 555-pound at the age of 14. After his mother's arrest for criminal neglect, he was placed in foster care. Studies show that generally, once an obese child is placed in foster care and given a specific dietary program, they tend to lose the weight. It is still too soon to see what will happen to Alexander, but his mother has shown a consistent pattern of neglect by allowing her 14 year old to reach a quarter of a ton.

With the rise in obesity in children, our criminal justice system needs to re-evaluate its definition of medical neglect. In certain rare cases, that enlarged definition should be applied to parents that have consistently shown a disregard for their obese child's health. If we don't face this problem soon, more children will not have the opportunity to see a pediatrician for their health problems. They will instead be seen by a medical examiner. By then, we can all agree it is too late.

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343. Ikeda, *supra* note 342.

