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CHILDHOOD OBESITY AS CHILD ABUSE: CRIMINALIZING PARENTS FOR RAISING OBESE CHILDREN

*Lizet Dominguez**

INTRODUCTION: THE OBESITY EPIDEMIC

A new media trend in advertisements and documentaries focuses on obesity and specifically places a spotlight on the nation's obesity epidemic. Coca-Cola has announced it will begin airing a two-minute commercial addressing obesity during the highest-rated shows that air on CNN, Fox News and MSNBC.¹ “[T]he ads reflect the mounting pressures on the broader industry” (e.g., sugary beverages).² This news followed the now-repealed cap³ on the size of soft drinks that New York City planned to impose for restaurants, movie theaters, sports arenas and other venues selling soft drinks.⁴ With one-third of the children in America either overweight or obese, and nearly \$150 billion spent annually in healthcare on obesity, childhood obesity has become an imperative public health concern.⁵

As will be discussed, the problem of childhood obesity has sparked a series of cases in which parents are losing custody of their children,

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¹ Candice Choi, *Coca-Cola to Tackle Obesity for First Time in TV Ads*, ASSOCIATED PRESS, available at <http://bigstory.ap.org/article/coca-cola-address-obesity-first-time-ads> (last visited March 6, 2016).

² *Id.*

³ Chris Dolmetsch, *N.Y.'s Large Soda Ban Block Ruling Upheld on Appeal*, BLOOMBERG, available at <http://www.bloomberg.com/news/2013-07-30/ruling-striking-new-york-large-soda-limits-upheld.html> (last visited March 6, 2016).

⁴ Choi, *supra* note 1.

⁵ Childhood Obesity – 2011 Update of Legislative Policy Options, NATIONAL CONFERENCE OF STATE LEGISLATURES, available at <http://www.ncsl.org/issues-research/health/childhood-obesity-2011.aspx> (hereinafter Nat'l Conference of State Legislature).

being charged with child neglect, and, in some cases, becoming incarcerated for the eating habits of their child. These drastic steps can be avoided if lawmakers proactively concentrate on educating society about avoiding obesity. Obesity of a child should not be the sole reason a parent loses custody of a child or is incarcerated.

On February 9, 2010, First Lady Michelle Obama initiated a movement to raise a healthier generation of kids with the launch of the *Let's Move!* campaign.⁶ The campaign is a comprehensive initiative with the purpose of solving obesity within a generation so that children growing up today make healthier choices.⁷ This is the first Task Force on Childhood Obesity that proposes to reduce the childhood obesity rate to five percent by 2030 by implementing a series of recommendations to reduce the risk of obesity.⁸

What Causes Obesity

The American Academy of Child and Adolescent Psychiatry (“AACAP”) suggests that the causes of obesity are complex and, among other things, include: “genetic, biological, behavioral and cultural factors.”⁹ Obesity can be more complicated than simply eating more calories than a person’s body can burn. Studies also suggest that, “if one parent is obese, there is a [fifty] percent chance that their children will also be obese . . . [and] when both parents are obese, their children have an [eighty] percent chance of being obese.”¹⁰ The AACAP also says that obesity in children and adolescents can be related to poor eating habits, overeating, lack of exercise, family history of obesity, medical illnesses, medications (steroids, psychiatric medications), stressful life events or changes, family and peer problems, low self-esteem, depression or other emotional problems.¹¹

The Centers for Disease Control and Prevention (“CDC”) has suggested there are several environmental factors that influence whether

⁶ LetsMove.gov, *Let's Move: Learn the Facts*, <http://www.letsmove.gov/learn-facts/epidemic-childhood-obesity> (last visited March 6, 2016).

⁷ *Id.*

⁸ Solving the Problem of Childhood Obesity Within a Generation, WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY REPORT TO THE PRESIDENT, at 9, available at http://www.letsmove.gov/sites/letsmove.gov/files/TaskForce_on_Childhood_Obesity_May2010_FullReport.pdf (last visited March 6, 2016) (hereinafter White House Task Force).

⁹ Am. Acad. of Child & Adolescent Psychiatry, *Obesity in Children and Teens*, FACTS FOR FAMILIES NO. 79 (Mar. 2011), available at http://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Obesity-In-Children-And-Teens-079.aspx.

¹⁰ *Id.*

¹¹ *Id.*

the healthy option is the easy choice for the children and their parents.¹² Modern society has become characterized by environments that encourage the consumption of less nutritious food and discourage physical activity.¹³ “It can be difficult for children to make healthy food choices and get enough physical activity when they are exposed to environments in their home, child care center, school, or community that are influenced by [these environments].”¹⁴ The CDC has identified ten environmental factors.¹⁵

The first factor affecting consumer choices is the availability of sugary drinks and less healthy food options on school campuses.¹⁶ An estimated fifty-five million children attend schools throughout the United States – consuming meals and snacks there.¹⁷ Over ninety percent of American children in elementary or secondary school attend schools that offer one or more federal nutrition assistance programs.¹⁸ According to a recent national study of the content of federally financed National School Lunch Programs and School Breakfast Programs, most schools offer students the choice to select a balanced meal, but few students actually make healthful decisions.¹⁹ Despite the statistics, more than fifty percent of United States middle schools and high schools continue to offer sugary drinks and less nutritious foods.²⁰

The second factor involves the “advertising of less healthy foods.”²¹ Nearly half of United States middle schools and high schools permit advertising of unhealthy foods, which influences students’ desire to choose less healthy foods.²² “[F]oods high in total calories, sugars, salt, and fat, and low in nutrients are highly advertised and marketed through media targeted to children and adolescents,” as opposed to healthier foods, for which advertisements are almost nonexistent.²³

¹² CDC, *Overweight and Obesity: A Growing Problem*, CENTERS FOR DISEASE CONTROL AND PREVENTION, available at <http://www.cdc.gov/obesity/childhood/problem.html> (last visited March 6, 2016).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ White House Task Force, *supra* note 8, at 37 (stating, “In about [ninety percent] of all schools nationwide, a student had opportunities to select low-fat lunch options, but in only about [twenty percent] of all schools did the average lunch actually selected by students meet the standards for fat”).

¹⁹ *Id.* at 38.

²⁰ CDC, *supra* note 12.

²¹ *Id.*

²² *Id.*

²³ *Id.*

A third factor is the “variation in licensure regulations among child care centers.”²⁴ Despite the more than twelve million children spending time in child care centers outside the home, not all states implement licensing regulations on child care facilities to encourage more healthful eating and increased physical activity.²⁵

The fourth environmental factor includes “lack of daily, quality physical activity in all schools.”²⁶ A majority of adolescents do not follow the 2008 *Physical Activity Guidelines for Americans* recommendation of at least sixty minutes of aerobic physical activity each day, as only [eighteen percent] of students in grades [nine–twelve] met this recommendation in 2007.²⁷ While regular and qualitative physical education periods in school can help students meet these guidelines, in 2009, only thirty-three percent took advantage of physical education classes.²⁸

The fifth factor is the lack of a “safe and appealing place, in many communities, to play or be active.”²⁹ Some families have difficulty accessing parks and recreation centers due to communities being built in ways that make it burdensome or unsafe to access.³⁰ “For many children, safe routes for walking or biking to school or play may not exist,” and half of the children in the United States do not have the luxury of having a park, recreation center, or sidewalk in their neighborhood.³¹

Another important factor is the “limited access to healthy affordable foods.”³² The limited access to stores and supermarkets that sell healthy, economical food such as fruits and vegetables, especially in vulnerable neighborhoods, such as “rural, minority, and lower-income neighborhoods” is linked to obesity.³³ “Supermarket access is associated with a reduced risk of obesity.”³⁴ Parents who live in areas with an excess of retailers that tend to sell less healthy food, such as convenience stores and fast food restaurants, make choosing healthy foods a more difficult task.³⁵

²⁴ *Id.*

²⁵ *Id.*

²⁶ CDC, *supra* note 12.

²⁷ CDC, *supra* note 12.

²⁸ CDC, *supra* note 12.

²⁹ CDC, *supra* note 12.

³⁰ CDC, *supra* note 12.

³¹ CDC, *supra* note 12.

³² CDC, *supra* note 12.

³³ CDC, *supra* note 12.

³⁴ CDC, *supra* note 12.

³⁵ CDC, *supra* note 12.

Also affecting children and adolescents is the “greater availability of high-energy-dense foods and sugary drinks.”³⁶ High-energy-dense foods are characterized by the high amount of calories per bite.³⁷ “A recent study on dietary energy density among children showed that a high-energy-dense diet is associated with a higher risk for excess body fat during childhood.”³⁸ Not surprisingly, sugary beverages offer very few, if any, nutrients and “are the largest source of added sugar and an important contributor of calories in the diets of children in the United States.”³⁹ Obesity has been associated with an overconsumption of sugary beverages; of which, on a typical day, eighty percent of youth drink.⁴⁰

The “increasing portion sizes” is another factor.⁴¹ Over time, portion sizes of less healthy foods and beverages served in restaurants and other establishments have increased.⁴² “Research shows that children eat more without realizing it if they are served large portions,” this translates to an overconsumption of high calorie foods.⁴³

“Lack of breastfeeding support” is also affecting weight gain.⁴⁴ Pediatric studies suggest breastfeeding protects against childhood obesity.⁴⁵ A combination of factors likely contributes to the positive effects of breastfeeding.⁴⁶ First, infant formula contains almost twice the amount of protein per serving (which may stimulate unhealthy insulin secretion) when compared to breast milk.⁴⁷ Second, breast milk helps prompt the release of a protein that helps regulate the baby’s metabolism.⁴⁸ Also, infant formula increases the baby’s concentration of insulin in the blood, and is associated with an unfavorable concentration of leptin, a hormone that inhibits appetite and controls body fat.⁴⁹ While seventy-five percent of mothers in the United States start out breastfeeding, at the end of six months, only thirteen percent of babies are exclusively breastfed.⁵⁰

³⁶ CDC, *supra* note 12.

³⁷ CDC, *supra* note 12.

³⁸ CDC, *supra* note 12.

³⁹ CDC, *supra* note 12.

⁴⁰ CDC, *supra* note 12.

⁴¹ CDC, *supra* note 12.

⁴² CDC, *supra* note 12.

⁴³ CDC, *supra* note 12.

⁴⁴ CDC, *supra* note 12.

⁴⁵ CDC, *supra* note 12.

⁴⁶ White House Task Force, *supra* note 8, at 37.

⁴⁷ White House Task Force, *supra* note 8, at 37.

⁴⁸ White House Task Force, *supra* note 8, at 37.

⁴⁹ White House Task Force, *supra* note 8, at 37.

⁵⁰ CDC, *supra* note 12.

Finally, television and media are sources influencing childhood obesity.⁵¹ Television viewing takes away from the time children could be spending on physical activities, leading to increased caloric intake through snacking and eating meals while watching television.⁵² Television also influences children to make unhealthy food choices due to advertisements of less healthy food.⁵³ Children between eight and eighteen years of age spend an average of seven and a half hours a day using entertainment media, such as: television, computers, video games, cell phones, and movies. Additionally, eighty-three percent of children six months to six years of age view television or videos for almost two hours a day.⁵⁴

Health Risks Associated with Childhood Obesity

Obesity in children has immediate and long-term health effects.⁵⁵ Immediately, obese children are more likely to be at risk for cardiovascular diseases like high blood pressure and cholesterol.⁵⁶ According to the CDC, in a population-based sample of five to seventeen-year-olds, seventy percent of obese minors had, at minimum, one risk factor for cardiovascular disease.⁵⁷ Obese children are also at risk of developing type two diabetes, since they are more likely to have pre-diabetes which indicates a high risk for developing diabetes.⁵⁸ These children are also at a greater risk for bone and joint problems, as well as sleep apnea.⁵⁹ In the long-term, obese children and teenagers have a greater likelihood of “developing serious chronic diseases such as type two diabetes, heart disease, high blood pressure, cancer and other health conditions including asthma, sleep apnea, and psychosocial effects.”⁶⁰ A study cited by the National Conference of State Legislatures suggests, sixty-one percent of overweight children age five to ten, are already showing at least one risk factor for heart disease, and there is a seventy percent chance that an overweight adolescent will be overweight or obese as an adult.⁶¹

⁵¹ CDC, *supra* note 12.

⁵² CDC, *supra* note 12.

⁵³ CDC, *supra* note 12.

⁵⁴ CDC, *supra* note 12.

⁵⁵ CDC, *Childhood Obesity Facts*, CENTERS FOR DISEASE CONTROL AND PREVENTION, available at <http://www.cdc.gov/healthyyouth/obesity/facts.htm> (last visited March 6, 2016).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Nat'l Conference of State Legislatures, *supra* note 5, at 1.

⁶¹ Nat'l Conference of State Legislatures, *supra* note 5, at 1.

Other, less obvious, risks associated with childhood obesity include an “increased risk for many types of cancer, including cancer of the breast, colon, endometrium, esophagus, kidney, pancreas, gall bladder, thyroid, ovary, cervix, and prostate, as well as multiple myeloma and Hodgkin’s lymphoma.”⁶² Perhaps the most immediate consequence of being overweight and obese, as experienced by the children themselves, is social discrimination, which is linked to poor self-esteem, depression and other illnesses.⁶³

CHILD OBESITY AS CHILD NEGLECT

Some states such as Iowa, Indiana, New Mexico, New York, Pennsylvania, and Texas “adjudicated the obese children to be neglected [and have amended their state’s] statutory definition of medical neglect to encompass morbid obesity.”⁶⁴ In California, the mother of an obese child, who passed away before the case was heard, was charged with misdemeanor child abuse.⁶⁵

The problem is that the definitions of “abuse” and “neglect” have not been settled. In 1973, federal legislation presented the Child Abuse Prevention and Treatment Act (“CAPTA”), a guideline for defining child abuse and neglect.⁶⁶ CAPTA defines child neglect as “any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm.”⁶⁷ “States seeking federal funding for programs aimed at preventing, identifying and treating abuse and neglect were required to enact a state statute defining child abuse and neglect.”⁶⁸ Hence, all fifty states have adopted statutory definitions of child abuse and neglect.⁶⁹ CAPTA’s

⁶² CDC, *supra* note 55, at 1.

⁶³ U.S. Dep’t of Health and Human Services, The Surgeon General’s Call To Action To Prevent and Decrease Overweight and Obesity, SURGEON GENERAL, *available at* http://www.surgeongeneral.gov/library/calls/obesity/fact_adolescents.html (last visited December 17, 2012).

⁶⁴ Abigail Darwin, *Child Obesity: Is it Abuse?*, CHILDREN’S VOICE: CHILD WELFARE LEAGUE OF AMERICA, July/August 2008 *available at* <http://files.eric.ed.gov/fulltext/ED502687.pdf> (last visited March 6, 2016).

⁶⁵ *Id.* at 3.

⁶⁶ CAPTA, 42 U.S.C. §§ 5106-5119.

⁶⁷ *Id.*

⁶⁸ Stephanie Sciarani, *Morbid Childhood Obesity: The Pressing Need to Expand Statutory Definitions of Child Neglect*, 32 THOMAS JEFFERSON L. REV. 313, 318 (2010).

⁶⁹ *Id.*

broad interpretation of the term, “each state’s child neglect definition differs, [and ranges from] strict construction [to] broad construction.”⁷⁰

In a 1992 case in Iowa, the court ordered ten-year-old Liza, weighing 290 pounds, to “be placed in a residential treatment facility to address the child’s problems of morbid obesity, depression, and personality disorder.”⁷¹ Liza’s mother did not place Liza in a residential treatment program as required by the court, and failed to follow a recommended dietary program.⁷² While Liza’s mother had driven Liza to numerous appointments with physicians and dietitians, the court rejected the mother’s “contention that reasonable efforts have not been made to prevent the removal of Liza from the home.”⁷³ Consequently, Liza was placed in a temporary residential treatment foster care program.⁷⁴ Liza’s physicians diagnosed her as having a severe infantile personality disorder and concluded that her morbid obesity was caused by Liza’s practice of overeating as a coping mechanism to deal with the problems between her parents.⁷⁵

In Texas, F.M.’s parental rights to her child, G.C., were terminated in 2002 by holding the child to be neglected.⁷⁶ The court arrived at this conclusion by expanding the state’s statutory definition of medical neglect to encompass morbid obesity.⁷⁷ When the caseworker for the Texas Department of Protective and Regulatory Services (“TDPRS”) pursued the case, G.C. was four years old and weighed ninety-seven pounds.⁷⁸ G.C.’s weight ultimately reached 136 pounds.⁷⁹ TDPRS attempted to help the parent by bringing in a “homemaker” as a role model, but moved to terminate parental rights when the parent became noncompliant.⁸⁰

Another case in Indiana involved a four-year-old boy named Cory Andis, who weighed 111 pounds.⁸¹ His parents pled guilty to criminal child neglect.⁸² Here, the court ordered Cory’s mother to serve one-and-a-half years probation and assigned one hundred hours of community

⁷⁰ *Id.* (where strict construction leaves minimal room for statutory interpretation and broad construction allows courts more extensive room for interpretation).

⁷¹ *In Interest of L.T.*, 494 N.W.2d 450, 451 (Iowa App. 1992).

⁷² *Id.* at 452.

⁷³ *Id.* at 453.

⁷⁴ *Id.*

⁷⁵ *Id.* at 451.

⁷⁶ *In re G.C.*, 66 S.W.3d 517 (Tex. App.—Fort Worth 2002).

⁷⁷ *Id.* at 520–21.

⁷⁸ *Id.* at 520.

⁷⁹ *Id.*

⁸⁰ *Id.* at 521.

⁸¹ *Id.* at 520.

⁸² Darwin, *supra* note 64, at 26.

service for endangering her son's health, while Cory's father was sentenced to probation for three years.⁸³

In a similar Pennsylvania case, sixteen-year-old D.K.'s health situation was deemed life threatening, and required his admission to the hospital.⁸⁴ At five feet and three inches tall, D.K. weighed approximately four hundred pounds and was diagnosed with morbid obesity coupled with a depressive disorder.⁸⁵ He had few friends and reported spending nine hours per day in front of a television or a computer screen.⁸⁶

After being placed in foster care, D.K. desired to return home, and related "that his new eating habits are now ingrained; that he believ[ed] he could now shop and prepare his meals, with some assistance of his mother; and that there are more recreational activities near his home than where his foster parents reside."⁸⁷ D.K. desired to be reunited with friends from his previous school.⁸⁸ His mother also wanted to see him return home and stated that she would keep him on his diet.⁸⁹ The court ultimately adjudicated D.K. "dependent by reason of being without proper parental care or control necessary for his physical, mental and emotional health."⁹⁰ He was removed from his home and his custody was turned over to Northumberland County Children and Youth Services.⁹¹

In a more recent case, Jerri Gray of South Carolina was arrested in June of 2009, on charges of criminal neglect, and her fourteen-year-old son was placed in foster care.⁹² Gray's son, Alexander Draper, weighed over five hundred pounds at the age of fourteen.⁹³ Gray claimed to have followed the nutritional guidelines established by the state Department of Social Services for her son, but apparently he was getting other foods on his own while he was not under his mother's supervision.⁹⁴

Jerri Gray's arrest warrant claims that Alexander's weight was "serious and threatening to his health [and that she had placed him] at an unreasonable risk of harm."⁹⁵ Gray apparently did not attend the family

⁸³ *Id.*

⁸⁴ In re D.K., 58 Pa. D. & C.4th 353, 355 (Pa. Com. Pl. 2002).

⁸⁵ *Id.* at 354-55.

⁸⁶ *Id.*

⁸⁷ *Id.* at 356.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ In re D.K., 58 Pa. D. & C.4th at 361.

⁹¹ *Id.*

⁹² Ron Barnett, *S.C. case looks on child obesity as child abuse. But is it*, USA TODAY, http://usatoday30.usatoday.com/news/health/weightloss/2009-07-20-obesityboy_N.htm (last visited Oct. 11, 2012).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

court hearing in which Alexander was to be surrendered to foster care, and a warrant was issued for her arrest.⁹⁶ Gray and her son were found in Baltimore County, Maryland and were both returned to South Carolina.⁹⁷ Jerri Gray was arrested and subsequently released on a \$50,000 bond.⁹⁸

Jerri Gray was accused of unlawful neglect of a child in South Carolina.⁹⁹ In interviews, Gray's lawyers and a certified nursing assistant said Gray spent weeks in jail.¹⁰⁰ When asked how Alexander's weight got so out of control, Gray responded that "it had to do with lifestyle" and working fulltime second and third shifts keeping her away from home.¹⁰¹ Gray also blamed the purchase of fast food due to not having time to cook healthier meals.¹⁰² Gray has publicly expressed her belief that her son needs to be with her.

Mentally [Alexander] needs to be with me. We both need to be included together in whatever program that they have to offer so that we both can benefit from it. So as our lives go on together, then we will have learned how to control it and keep it under control.¹⁰³

CLASSIFYING OBESITY AS CHILD ABUSE: THE MEDICAL COMMUNITY

Childhood obesity is complex for several reasons. While there are unusual genetic and endocrine causes of obesity, most obesity involves several common factors.¹⁰⁴ Genetics allow for excess fat accumulation, and environmental factors, such as excess energy consumption and decreased physical activity, accelerate the trend of accumulating excess fat.¹⁰⁵ The medical community accepts that "the cause of obesity is not helpful in considering a charge of medical neglect."¹⁰⁶ As previously discussed, multiple factors contribute to childhood obesity, many

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Barnett, *supra* note 92.

⁹⁹ CBS, *Mom of 555-Pound Teen Speaks Out*, CBS NEWS, available at http://www.cbsnews.com/2100-500202_162-5112393.html (last visited March 6, 2016).

¹⁰⁰ *Is Child Obesity Child Abuse?* VARNER & SEGURA ATTORNEYS AT LAW, available at <http://varnerandseguraonline.com/?p=43> (last visited March 6, 2016).

¹⁰¹ CBS, *supra* note 99.

¹⁰² CBS, *supra* note 99.

¹⁰³ CBS, *supra* note 99.

¹⁰⁴ Todd Varness et al., *Childhood Obesity and Medical Neglect*, 123 PEDIATRICS 399, 400 (2009).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

encouraged by the current society we live in, such as advertisements for “junk food” and sugary beverages and school meals, to name a few.¹⁰⁷

A proposal by some members of the pediatric medical community recommends classifying childhood obesity as neglect when the parents or guardians of the child fail to seek medical care, provide recommended medical care, or control their child’s behavior so that the child is not at risk of serious harm or death.¹⁰⁸ “The threshold for state intervention in cases of medical neglect usually is high, because of respect for autonomy and the psychological stress of removing a child from the home.”¹⁰⁹ There seems to be a consensus among the medical community that the conditions necessary for coercive intervention by the state should be stringent.¹¹⁰ One proposed scheme advocates that removal of a child from his home is justified when three conditions are met:

- (1) [A] high likelihood that serious imminent harm will occur;
- (2) a reasonable likelihood that coercive state intervention will result in effective treatment; and
- (3) the absence of alternative options for addressing the problem... [t]here is no clear threshold level of childhood obesity (overweight, obese, or severely obese) that automatically predicts serious imminent harm.¹¹¹ Rather, it is the presence of serious comorbid conditions (at any obesity classification) that is relevant for assessment of the criteria of serious imminent harm.¹¹²

Treatment for Obesity

The requirement for state intervention in cases of neglect for failure to control weight becomes an important issue “because . . . it is reasonable to doubt whether effective weight control will occur in any setting.”¹¹³ In most cases, lasting weight loss can only be achieved when there is self-motivation. “Since obesity often affects more than one family member, making healthy eating and regular exercise a family activity can improve the chances of successful weight control for the child or adolescent.”¹¹⁴ With this in mind, how reasonable is it to expect parents or guardians to maintain effective weight loss for their child?

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Varness et al., *supra* note 104.

¹¹¹ Varness et al., *supra* note 104, at 399.

¹¹² Varness et al., *supra* note 104, at 399.

¹¹³ Varness et al., *supra* note 104, at 399.

¹¹⁴ American Academy of Child & Adolescent Psychiatry, Facts for Families: Obesity in Children and Teens, AACAP, available at http://www.aacap.org/galleries/FactsForFamilies/79_obesity_in_children_and_teens.pdf (No. 79 March 2010).

Furthermore, “if it has been impossible for a family to reduce weight, what evidence is there to suggest that removal from the home would be more successful?”¹¹⁵

Lifestyle interventions for obese children consist of a combination of dietary adjustments and increased physical activity.¹¹⁶ While diet and exercise are key for treatment of obesity, “these interventions frequently are judged to be ineffective, if the goal is complete sustained resolution of obesity.”¹¹⁷

In cases of childhood obesity with serious comorbid conditions, lifestyle interventions can offer a fair likelihood of success if three important elements are recognized.¹¹⁸ To begin, the setting of the lifestyle interventions is crucial for the rate of success.¹¹⁹ It is impractical to believe that foster families can obtain better weight loss results for children than their biological families.¹²⁰ Second, the intervention goal should not be to completely eliminate obesity, but to achieve a modest weight loss sufficient enough to alleviate the comorbid conditions.¹²¹ “The goal need not be a normal-weight child but may be a less-obese child.”¹²² Finally,

although population studies have not clearly defined a particular program that can be broadly implemented in a primary care setting to reduce the prevalence of childhood obesity, that does not mean that there is no reasonable chance of reducing the weight of and/or impact of a serious comorbid condition for an individual, severely obese child.¹²³

Although lifestyle interventions have not proven highly successful in providing a long-term resolution of obesity at a population level, with the right goals and environment, these interventions can have substantial success for an individual obese child with comorbid conditions.¹²⁴

Other remedies such as medications and surgery seem promising, but still have a doubtful risk/benefit ratio.¹²⁵ These remedies may seem

¹¹⁵ Varness et al., *supra* note 104, at 402.

¹¹⁶ Varness et al., *supra* note 104, at 402.

¹¹⁷ Varness et al., *supra* note 104, at 402.

¹¹⁸ Varness et al., *supra* note 104, at 402.

¹¹⁹ Varness et al., *supra* note 104, at 402.

¹²⁰ Varness et al., *supra* note 104, at 402.

¹²¹ Varness et al., *supra* note 104, at 402.

¹²² Varness et al., *supra* note 104, at 402.

¹²³ Varness et al., *supra* note 104, at 402.

¹²⁴ Varness et al., *supra* note 104, at 402.

¹²⁵ Varness et al., *supra* note 104, at 402.

attractive for some adolescents with severe obesity, though they are not options likely to be ordered for a child over a parent's protest.¹²⁶

Childhood obesity commonly evolves into a lifelong battle. A child or adolescent struggling with obesity must learn to eat healthy foods in regulated portions and increase their physical activity on a continued basis to maintain a desired weight.¹²⁷ This proves easier said than done. Most obese adolescents tend to return to their old habits of eating and limited physical activity, resulting in them gaining back their lost pounds.¹²⁸

The notable child obesity cases discussed above show court interventions taking place when a child's health was deemed to put them at high risk of harm or death. The extent to which other alternatives were implemented and exhausted is less clear in some cases, but overall, the cases discussed suggest that other alternatives were implemented and healthcare professionals were involved.

Debate continues over whether obesity is motivated by a person's lifestyle choices and behaviors, or simply the result of disease.¹²⁹ In many cases, it may even be both. In most of the prevalent cases discussed, an important consideration to the child's obesity was poverty.¹³⁰ Poverty limits a family's "access to healthy foods and space for exercise."¹³¹ It also affects a family's ability to acquire adequate health insurance coverage, "which can hinder access to weight loss programs."¹³² Charging these families with medical neglect due to their child's weight may seem unjust. "For example, there are parents with significant cognitive limitations who cannot properly mix formula, make medical appointments, or otherwise care for their child in a way that protects the child from harm. The parents are not morally culpable for their inability to provide adequate care."¹³³ At any rate, the child's health is what is at stake, and charges to the parents can only go to protecting a child from harm.

CHILDHOOD OBESITY AS AN EPIDEMIC

Is it fair to criminalize parents for providing their child a diet that has become all too common? In the case of Jerri Gray and her son

¹²⁶ Varness et al., *supra* note 104, at 402.

¹²⁷ American Academy of Child & Adolescent Psychiatry, *supra* note 112, at 1.

¹²⁸ Varness et al., *supra* note 104, at 402.

¹²⁹ Varness et al., *supra* note 104, at 404.

¹³⁰ Varness et al., *supra* note 104, at 402.

¹³¹ Varness et al., *supra* note 104, at 402.

¹³² Varness et al., *supra* note 104, at 402.

¹³³ Varness et al., *supra* note 104, at 402.

Alexander Draper, Gray was arrested and her son Alexander was removed from her custody.¹³⁴ This opened up the question about obesity and parental neglect. Is it proper to consider child obesity as child neglect simply because of feeding behaviors? Sherry F. Colb suggests, “[t]hough Draper’s weight is extreme (and may well reflect a metabolic disorder), the arrest of his mother and his removal from her custody raise an important question about parental obligations and nutrition: Might it be child neglect simply to feed our children the Standard American Diet?”¹³⁵

There are doubts as to whether charges for neglect or child abuse are fair for all parents, in all cases, of child obesity. This is especially true when many external influences can affect a child’s weight. A child’s weight “is not solely determined by what he or she is fed at home.”¹³⁶ In particular, as children get older, they become more independent, and it is harder for parents to control what their children eat.¹³⁷ Our schools deserve notable attention, and are “partly to blame, considering that most children consume anywhere from a third to more than half their total daily calories at school.”¹³⁸

Considering the few cases that have been heard regarding parents who have failed to follow medical recommendations to reduce the weight of their severely obese children, few cases have been cataloged as neglect cases.¹³⁹ These courts failed to consider external influences impacting the family home that could have contributed to the child’s obesity. By excluding these external factors, courts have conclusively decided that the parents are child abusers, and charged them for neglect.

Another reason it is unfair to criminalize parents for their child’s obesity is because of hereditary concerns, and the important part genetics play in determining a person’s weight. “Research shows that genetic factors do make some people more susceptible to gaining weight and keeping it on. Further, some genetic disorders, such as Turner Syndrome and Prader-Willi Syndrome, prevent a child from ever feeling full after eating.”¹⁴⁰ Kids with these conditions “are almost always severely obese

¹³⁴ Sherry F. Colb, *Child Obesity as Child Neglect: Is the Standard American Diet Dangerous?*, FINDLAW, (JULY 22, 2009) <http://writ.news.findlaw.com/colb/20090722.html>. (Sherry F. Colb received her J.D. magna cum laude from Harvard Law School and is a professor at Cornell University where she has taught courses in Criminal Procedure, Evidence, Mental Health Law, and Feminist Legal Studies.); See Legal Commentary, Columnists <http://writ.news.findlaw.com/colb/>.

¹³⁵ *Id.*

¹³⁶ Darwin, *supra* note 64, at 25.

¹³⁷ Darwin, *supra* note 64, at 25.

¹³⁸ Darwin, *supra* note 64, at 25.

¹³⁹ Darwin, *supra* note 64, at 25.

¹⁴⁰ Darwin, *supra* note 64, at 25.

as a consequence.”¹⁴¹ Other medical abnormalities such as hypothyroidism and central nervous disorders have been shown to cause obesity as well.¹⁴²

Educating Parents Rather than Criminalizing Parents

It is not rare for family dysfunction or illness to be an influence in severe child obesity.¹⁴³ Counseling for the entire family guarantees that all members of the family are in good mental health.¹⁴⁴ Counseling can help alleviate minor mental health problems, “such as situational depression.”¹⁴⁵ For the serious mental health problems that a family counselor cannot resolve, the counselor can refer the family to a higher certified mental health professional.¹⁴⁶

Educating families about proper eating habits and physical activity is an important part of getting the obese child on track to weight loss. “Many parents of severely obese children do not act intentionally to inflict harm on their children.”¹⁴⁷ Many parents of obese children are oblivious as to the importance or make-up of a proper diet and exercise.¹⁴⁸

In the case of four-year-old Cory who weighed 111 pounds, his parents told Indiana child welfare officials and nutritionists that the reason Cory’s recommended diet was not properly administered was due to a lack of understanding of the recommended diet, which they deemed too complicated to administer.¹⁴⁹ Another New Mexico case discussed in *Children’s Voice* involved a three-year-old child weighing 131 pounds.¹⁵⁰ The parents, in this case, blamed their child’s lack of exercise on poorly kept sidewalks.¹⁵¹

“Further evidence that parents of morbidly obese children are often not malicious, but rather just unaware of the importance and composition of a healthy diet and exercise is the fact that these parents are often severely obese themselves.”¹⁵² This is evident in the New York case of *In re Brittany T.*, in which Brittany’s mother was herself obese and weighed

¹⁴¹ Darwin, *supra* note 64, at 25.

¹⁴² Darwin, *supra* note 64, at 26.

¹⁴³ Darwin, *supra* note 64, at 26.

¹⁴⁴ Darwin, *supra* note 64, at 26.

¹⁴⁵ Darwin, *supra* note 64, at 26.

¹⁴⁶ Darwin, *supra* note 64, at 26.

¹⁴⁷ Darwin, *supra* note 64, at 26.

¹⁴⁸ Darwin, *supra* note 64, at 26.

¹⁴⁹ Darwin, *supra* note 64, at 26.

¹⁵⁰ Darwin, *supra* note 64, at 26.

¹⁵¹ Darwin, *supra* note 64, at 26.

¹⁵² Darwin, *supra* note 64, at 26.

436 pounds.¹⁵³ Similarly, in the case of *In re D.K.*, the obese child was being raised by a homebound obese mother, “allegedly in the 600-pound range,” who could “not even attend medical appointments with her son because of her own obesity.”¹⁵⁴

In the case of Jerri Gray and Alexander, removing Alexander from his home and mother¹⁵⁵ was based on an improper judgment. Alexander’s mother publicly professed her love for her son.¹⁵⁶ She supported herself and her son by working many hours and holding more than one job.¹⁵⁷ She also admitted to relying on fast foods – but not by preference.¹⁵⁸ This alone should not make her guilty of child abuse.

From what Jerri Gray alleges, we can gather that if the government had dedicated time and money in the form of programs specifically designed to help obese children, Gray would seem more willing to participate in those programs. Jerri publicly spoke of the need for her and her son to be together, as well as the need to learn how to keep Alexander’s weight under control.¹⁵⁹ Gray’s main problem seems to be her lack of resources, “not love or concern for her son.”¹⁶⁰ As Colb suggests, “[r]ather than employing people to take away Gray’s beloved child . . . the government could spend considerably less money providing her with healthy food and information about nutrition.”¹⁶¹

Colb illustrates a contrasting scenario in which a single father has a severely underweight fourteen-year-old daughter.¹⁶² “Preliminary investigation reveals that the daughter suffers from anorexia nervosa and refuses to eat more than a few hundred calories each day, because she believes she is fat.”¹⁶³ Aware of the fact that his daughter is too thin, he encourages his daughter to eat more, but the daughter declines to do so and the father is powerless to enforce his decree because his daughter is in school, or he is at work due to his low income.¹⁶⁴ The single father is not familiar with the condition of “anorexia nervosa” and is unaware of any mental health treatments available for it.¹⁶⁵

¹⁵³ *In re Brittany T.*, 835 N.Y.S.2d 829, 835 (N.Y. Fam. Ct. 2007) rev’d on other grounds, 852 N.Y.S.2d 475 (N.Y. App. Div. 3d Dept. 2008).

¹⁵⁴ *In re D.K.*, 58 Pa. D. & C.4th 353, 354 (Pa. Com. Pl. 2002).

¹⁵⁵ Barnett, *supra* note 92.

¹⁵⁶ Barnett, *supra* note 92.

¹⁵⁷ Barnett, *supra* note 92.

¹⁵⁸ CBS, *supra* note 99.

¹⁵⁹ CBS, *supra* note 99.

¹⁶⁰ Colb, *supra* note 134, at 2.

¹⁶¹ Colb, *supra* note 134, at 2.

¹⁶² Colb, *supra* note 134, at 2.

¹⁶³ Colb, *supra* note 134, at 2.

¹⁶⁴ Colb, *supra* note 134, at 2.

¹⁶⁵ Colb, *supra* note 134, at 2.

In the case of the severely underweight child, a government body wanting to help the underweight child would notify the father of the mental illness, and that it could result in a fatality if not treated.¹⁶⁶ If all else fails, the father might also be ordered to have his daughter forcibly admitted to a hospital.¹⁶⁷ In this case, as in Alexander Draper's case, the removal of the child from his parents is not warranted – especially while charging the parent for child neglect. “Doing this would break apart an otherwise loving family and needlessly add psychological trauma to an already fragile child's life.”¹⁶⁸

V. CONCLUSION

Criminalizing parents that are already in vulnerable situations will not fix the obesity epidemic. The severe child obesity cases presented here reflect a societal trend in the United States. As Colb suggests,

[today's] “Standard American Diet” is a recipe for obesity in children and adults, for cardiovascular disease, and for the other illnesses that are sometimes called “diseases of affluence” (including diabetes and many cancers) that afflict people who are largely sedentary and eat large quantities of fat, processed sugar, meat, and dairy.¹⁶⁹

Our nation's lawmakers should concentrate on education and begin by setting an example through our public schools, by providing healthier meals to school-aged children. “It is unfortunate that state intervention requires the language of neglect, which suggests moral judgment. As in many other instances that require state intervention to protect children, the purpose is not to make moral judgments about parents or to punish them but to protect children from serious harm.”¹⁷⁰

The obesity issue has been popularized by the American Medical Association's (“AMA”) official recognition of obesity as a disease.¹⁷¹ The AMA is the nation's largest physician group and although their decisions have no legal authority, some doctors and obesity advocates agree that the AMA's new definition would focus more attention on

¹⁶⁶ Colb, *supra* note 134, at 2.

¹⁶⁷ Colb, *supra* note 134, at 2.

¹⁶⁸ Colb, *supra* note 134, at 2.

¹⁶⁹ Colb, *supra* note 134, at 3.

¹⁷⁰ Varness et al., *supra* note 104, at 405.

¹⁷¹ Andrew Pollack, *A.M.A. Recognizes Obesity as a Disease*, THE NEW YORK TIMES, http://www.nytimes.com/2013/06/19/business/ama-recognizes-obesity-as-a-disease.html?_r=0 (last visited March 6, 2016).

obesity, and help in the fight against obesity related diseases such as type two diabetes and heart disease.¹⁷²

¹⁷² *Id.*

