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KINDERLARDEN COP: WHY STATES MUST STOP POLICING PARENTS OF OBESE CHILDREN

Elizabeth Ralston[*]

I. INTRODUCTION

Jerri Gray may spend the next fifteen years of her life in a South Carolina prison. She is not a drug dealer or a serial rapist. She has not robbed anyone or committed grand theft auto—she simply has an obese son.[1] Jerri's fourteen-year-old son, Alexander Draper ("Alex"), is morbidly obese, tipping the scales at a staggering 555 pounds.[2] After contacting Jerri about her son, the Department of Social Services issued her a treatment plan aimed at reducing Alex's weight.[3] Despite Jerri's compliance with the Department's guidelines, she received a court summons after Alex missed an agency-recommended medical appointment.[4] Fearing that the State would take her son away from her, and unable to afford a lawyer, she took Alex and fled the state.[5] Officials arrested Jerri in Maryland, where

[*] J.D., May 2012, Seton Hall University School of Law; B.A., Psychology, The University of Arizona, 2009. Thank you to Professor Solangel Maldonado for her wisdom and guidance; to Marissa Litwin for her comments, support, and most of all, her patience; and to Laura McNally, for lending me her comedic genius in crafting my comment title.

[1] Emiley Morgan, *Latest Sentence Sends Serial Rapist to Utah State Prison for 30 Years to Life*, DESERET NEWS (Nov. 7, 2010), http://www.deseretnews.com/article/700079083/Latest-sentence-sends-serial-rapist-to-Utah-State-Prison-for-30-years-to-life.html (reporting that a man has been charged with two counts of aggravated sexual assault, each of which carry a minimum prison sentence of 15 years); *Tallahassee Man Gets 15-Year Sentence After Leaving Man on Side of Road in Underwear*, WCTV.COM (Oct. 29, 2010), http://www.wctv.tv/home/headlines/Tallahassee_Man_Gets_15-Year_Sentence_After_Leaving_Man_on_Side_of_Road_in_Underwear_106347278.html (reporting that a man received a 15-year prison sentence after robbing a man and leaving him on the side of the road in his underwear); Lauren Cox, *Courts Charge Mother of 555-Pound Boy*, ABC NEWS (June 29, 2009), http://abcnews.go.com/Health/WellnessNews/story?id=7941609&page=1.

[2] Cox, s*upra* note 1.

[3] *Id.*

[4] *Id.*

[5] *Id.*

she had stopped to do laundry at a laundromat.[6] The Department placed Alex in foster care, and charged Jerri with two felonies: custodial interference and criminal medical neglect because of Alex's extreme obesity.[7] Jerri Gray is a single, African-American woman with a very limited income.[8] While she had been concerned that her son might have an undiagnosed medical condition, she could not afford health insurance.[9] Struggling just to make ends meet, Jerri was sometimes unable to afford the gas she needed to drive Alex to his doctor appointments.[10] She attempted to enroll Alex into a weight-loss program, but at 555 pounds, he was above the cutoff weight limit for all programs in South Carolina—even for programs designed specifically for morbidly obese children.[11]

In recent years, obesity in the United States has reached epidemic proportions.[12] Thirty-four percent of adults suffer from obesity, and a stunning sixty-eight percent are at least overweight.[13] Unfortunately, adults are no longer the only demographic affected by this disease; seventeen percent of children and adolescents are obese and over one-third are at least overweight.[14] The consequences of

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[6] *Id.*

[7] *Id.*

[8] Cox, *supra* note 1; Gaëlle Faure, *Should Parents of Obese Kids Lose Custody?*, TIME (Oct. 16, 2009), http://www.time.com/time/health/article/0,8599,1930772,00.html.

[9] Faure, *supra* note 8.

[10] Cox, *supra* note 1.

[11] Faure, *supra* note 8.

[12] At its most basic level, weight gain occurs when an individual consumes more calories than his body uses. *Obesity and Overweight: A Growing Problem*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/obesity/childhood/causes.html (last updated Nov. 28, 2011) [hereinafter *A Growing Problem*]. This imbalance, in combination with certain environmental and behavioral factors causes obesity. *Id.*

[13] Pam Belluck, *After a Longtime Rise, Obesity Rates in U.S. Level Off, Data Suggest*, N.Y. TIMES, Jan. 14, 2010, at A20. The system of measurement commonly used to screen both adults and children for obesity is the Body Mass Index (BMI) system, which measures weight in relation to height. *Obesity and Overweight for Professionals: Childhood: Defining*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/obesity/childhood/defining.html (last updated Oct. 20, 2009) [hereinafter *Childhood: Defining*]. For children, the BMI formula takes into account the child's age and gender to account for the differences in the developmental stages of growth. *Id.*

[14] Cynthia Ogden & Margaret Carroll, *The Prevalence of Obesity Among Children and Adolescents: United States, Trends 1963–1965 through 2007–2008*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 2010), http://www.cdc.gov/nchs/data/hestat/obesity_child_07_08/obesity_child_07_08.htm. A child or adolescent is considered obese when his BMI falls between the 85th and 95th percentiles—a child with a BMI above the 95th percentile is considered

obesity are serious and extend far beyond appearance—more than 2.6 million people die each year from health complications caused by excess weight.[15] Obesity is especially devastating for children because it puts them at risk of developing life-threatening ailments that, until recently, exclusively affected adults.[16]

Once the severity of the obesity epidemic became apparent, even before searching for solutions, society frantically sought someone to blame.[17] This epidemic has captivated and enraptured Americans. Thus, society condoned drastic and controversial measures aimed at combating the problem. One controversial approach targets the parents of obese children by characterizing childhood obesity as a form of child neglect.[18] This Comment will argue that removing a child from parental custody based on obesity is an ineffective solution, and is unconstitutional absent an imminent threat of harm.

While there are many competing schools of thought on how to

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morbidly obese. *Childhood: Defining*, *supra* note 13. Furthermore, an adolescent who is overweight has a seventy percent chance of becoming an overweight adult—this increases to eighty percent if at least one of his parents is also overweight or obese. *The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity: Overweight in Children and Adolescents*, OFFICE OF THE SURGEON GEN., http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact_adolescents.htm (last updated Jan. 11, 2007).

[15] *Programmes and Projects: Global Strategy Diet & Physical Activity: Why Does Childhood Overweight and Obesity Matter?*, WORLD HEALTH ORG., http://www.who.int/dietphysicalactivity/childhood_consequences/en/index.html (last visited May 15, 2012) [hereinafter *Programmes and Projects*].

[16] Health complications of obesity include type-2 diabetes, heart disease, high blood pressure, high cholesterol, hormonal imbalances, premature puberty, sleep apnea, asthma, heart attack, stroke, cancer, gallbladder disease, infertility, osteoarthritis, and premature death. *Childhood Obesity: Complications*, MAYO CLINIC (Oct. 9, 2010), http://www.mayoclinic.com/health/childhood-obesity/DS00698/DSECTION=complications; *Programmes and Projects*, *supra* note 15. Overweight and obese children are subject to significant psychological and social consequences including depression, low self-esteem, bullying, body image disorders, stereotyping, stigmas, discrimination, and social marginalization. *About Childhood Obesity*, *in* Prevention and Treatment of Childhood Overweight and Obesity, AMERICAN ACADEMY OF PEDIATRICS, http://www2.aap.org/obesity/about.html (last visited Apr. 9, 2012) [hereinafter *About Childhood Obesity*].

[17] Cheryl George, *Parents Super-Sizing Their Children: Criminalizing and Prosecuting the Rising Incidence of Childhood Obesity as Child Abuse*, 13 DEPAUL J. HEALTH CARE L. 33, 38–39 (2010) ("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 'combating the growing obesity problem among children will require stronger actions at all levels from food makers to governments and schools.'").

[18] *See* discussion *infra* Part III.B.

combat childhood obesity,[19] this Comment will focus mostly on judicial intervention. It is important to remember, however, that schools,[20] lawmakers,[21] and the food industry[22] are all important actors in solving the obesity crisis.[23] Judicial intervention plays a crucial part in addressing the important role that parents play in preventing childhood obesity. While it is important to educate parents and provide them with the tools they need to succeed in this fight, this Comment argues that where states seek to achieve this goal, they must also be mindful of parents' constitutional rights to the custody and control of their children.

This Comment concedes that state intervention is proper and constitutional when there is a risk of imminent harm to the obese child but will argue that states should intervene in the least intrusive way possible.[24] While some intervention is necessary, removing children from parental custody based solely on their weight flirts with unconstitutionality—and just as importantly, it is ineffective. This Comment will argue that instead of removing children from parental custody and placing them in foster care, courts should focus on educating parents and providing them with the tools necessary to

[19] George, *supra* note 17, at 38–39.

[20] Schools have been involved at the center of the childhood obesity crisis for some time now. Schools are in a unique position because children spend much of their time at school, and many children eat two meals a day at school. Schools also provide opportunities for physical activity, via physical education classes, sports and other recreational activities. Because children are required to attend school, they are a prime target for reaching a great number of children and their parents. Cuts in funding for education, however, have decreased the ability of schools to impact this crisis. George, *supra* note 17, at 40–46; *see also* Karen E. Peterson & Mary K. 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, 116 (2007) (discussing how school-based obesity intervention programs have been aggravated by the No Child Left Behind Act).

[21] *See generally* Stacey L. Fabros, *A Cry for Health: State and Federal Measures in the Battle Against Childhood Obesity*, 7 J.L. & FAM. STUD. 447 (2005) (discussing some actions lawmakers have taken in approaching the childhood obesity crisis).

[22] There is a push for legislation targeting the food industry. *See generally* Jess Alderman, Jason A. Smith, Ellen J. Fried & Richard A. Daynard, *Application of Law to the Childhood Obesity Epidemic*, 35 J.L. MED & ETHICS 90, 96–100 (2007) (discussing efforts to regulate the advertisement and food industries in response to childhood obesity).

[23] George, *supra* note 17, at 39 ("Children . . . do not make [poor] choices in isolation; the choice is also made by the child's parents and the public school system, 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.") (internal quotations omitted).

[24] *See* discussion *infra* Parts IV–V.

combat their children's obesity.

Part II of this Comment will discuss the development of parents' constitutional right to raise their children and how this right comes into tension with the states' power to act as *parens patriae*. In Part III, this Comment will discuss the history of child-welfare legislation, and will analyze the existing court decisions concerning childhood obesity. Part IV will concede that state intervention is appropriate in certain cases. Part V will follow by arguing that in order to respect parental autonomy and provide an effective remedy for childhood obesity, intervention should be limited and tailored to account for each individual family's environmental situation and cultural beliefs. Finally, Part VI will propose how the use of a court appointed family advocate would help the families of dangerously obese children without violating their constitutional rights.

II. THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE: THE FUNDAMENTAL RIGHT TO PARENT

The Fourteenth Amendment of the U.S. Constitution provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law."[25] The Supreme Court has explicitly recognized that this clause—commonly known as the Due Process Clause—"guarantees more than fair process."[26] It also protects select substantive rights by "provid[ing] heightened protection against government interference with certain fundamental rights and liberty interests."[27] The Fourteenth Amendment protects liberty interests that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[28] The Supreme Court has held that regardless of the procedures provided, the Due Process Clause forbids governmental interference with these fundamental liberties "unless the infringement is narrowly tailored to serve a compelling state interest."[29] When determining individual rights, courts must determine whether (1) the right at issue is fundamental, (2) that right has been infringed, (3) there is a compelling interest justifying government interference, and (4) the means are narrowly

[25] U.S. CONST. amend. XIV, § 1.

[26] Washington v. Glucksberg, 521 U.S. 702, 719 (1997).

[27] *Id.* at 720 (citing Reno v. Flores, 507 U.S. 292, 301–02 (1993)); *accord* Troxel v. Granville, 530 U.S. 57, 65 (2000).

[28] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[29] *Flores*, 507 U.S. at 302; *accord* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 794 (3d ed. 2006).

tailored to serve that interest.[30]

For almost a century, the Supreme Court has recognized that parents' interest in the "care, custody, and control of their children" is one of the fundamental liberties guaranteed by the Fourteenth Amendment.[31] Thus, parents have a fundamental right to raise their children as they see fit.[32] The Court explicitly recognized this interest for the first time in *Meyer v. Nebraska*, when it invalidated a statute that prohibited the teaching of foreign languages in any school.[33] The Court held that the due process right of "liberty" included the right to "establish a home and bring up children."[34] Two years later the Court struck down an Oregon statute requiring children to attend public schools—effectively prohibiting children from attending secular religious schools—holding that it violated parents' fundamental liberty to "direct the upbringing and education of children under their control."[35] These cases commence a long line of Supreme Court decisions establishing that "the relationship between parent and child is constitutionally protected."[36] Parents' right to the custody and control of their children, while fundamental, is not

[30] CHEMERINSKY, *supra* note 29, at 794 (laying out the strict scrutiny standard of judicial review that is applicable when fundamental rights are at issue).

[31] *Troxel*, 530 U.S. at 65 ("[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court.").

[32] *Id.*

[33] Meyer v. Nebraska, 262 U.S. 390 (1923).

[34] *Id.* at 399 (holding that parents have a right to direct the education of their children); *accord* CHEMERINSKY, *supra* note 29, at 798.

[35] Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

[36] Quillion v. Walcott, 434 U.S. 246, 255 (1977); *see* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); Stanley v. Illinois, 405 U.S. 645, 651 (1972) ("The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); Parham v. J.R., 442 U.S. 584 (1979) (recognizing that parents have "broad parental authority over minor children"); *see also* Santosky v. Kramer, 455 U.S. 745 (1982); Washington v. Glucksberg, 521 U.S. 702 (1997); *Troxel*, 530 U.S. at 57.

absolute.[37] As with most fundamental rights, the government may infringe on it when doing so would serve a compelling interest and where the means are narrowly tailored to achieve that compelling objective.[38]

States, like parents, also have an interest in protecting—and, in fact, a duty to protect—the welfare of children.[39] *Parens patriae*, literally meaning "parent of the country,"[40] is a concept derived from ancient British Common Law.[41] It stands for the principle that the government has a duty to protect its citizens who cannot protect themselves.[42] Therefore, the fundamental right of parental autonomy is not absolute, and states may infringe on this right when there is a compelling government interest, such as "preserving and promoting the welfare of the child."[43]

In *Prince v. Massachusetts* the Supreme Court upheld a statute prohibiting children under a certain age from selling articles or engaging in trading of items on any public street or place, regardless of parental consent or supervision.[44] In that case, the Court explicitly recognized the existence of a conflict between parents' fundamental liberty to control their children and the state's interest in protecting the welfare of children.[45] In reference to states' interests, the Court opined that "[i]t is in the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed

[37] Gomes v. Wood, 451 F.3d 1122, 1128 (10th Cir. 2006) (citing *Santosky*, 455 U.S. at 766).

[38] Reno v. Flores, 507 U.S. 292, 302 (1993) (correctly applying the strict scrutiny standard by holding that the government may not infringe on fundamental liberties "unless the infringement is narrowly tailored to serve a compelling state interest"). *But see*, *Troxel*, 530 U.S. at 57 (correctly recognizing that the Fourteenth Amendment grants parents the right to direct their children's upbringing but failing, incorrectly, to apply the strict scrutiny standard to this right).

[39] *Prince*, 321 U.S. at 166–67; Gregory Thomas, *Limitations on Parens Patriae: The State and the Parent/Child Relationship*, 16 J. CONTEMP. LEGAL ISSUES 51, 51 (2007).

[40] BLACK'S LAW DICTIONARY (9th ed. 2009).

[41] Thomas, *supra* note 39, at 51.

[42] *Id.* ("Government's parens patriae power—a species of paternalism—derives from the ancient prerogative of the British Crown to act as the guardian of persons such as children and the mentally disabled . . . .").

[43] *Flores*, 507 U.S. at 303 (quoting Santosky v. Kramer, 455 U.S. at 766); *see, e.g.*, *supra* text accompanying note 29.

[44] *Prince*, 321 U.S. at 165.

[45] *Id.* ("The parent's conflict with the state over control of the child and his training is serious . . . [and] [a]gainst these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end . . . .").

men and citizens."[46] Consequently, the Court held that the state, as *parens patriae,* may restrict parental control when it is necessary to protect the interests of children.[47]

While there remains no doubt that protecting the welfare of children is a compelling government interest, the means used to achieve that goal must be narrowly tailored to justify government intrusion.[48] It is true that the *parens patriae* power grants states a "wide range of power for limiting parental freedom and authority in things affecting the child's welfare."[49] But, a state may only use this power to advance the best interests of the individual it seeks to protect, and may not use it to advance any other objectives.[50] Furthermore, the state must prove that there are no less invasive alternatives that would effectively achieve the ends sought.[51]

Where these two powers conflict, the Supreme Court has historically given great deference to parents.[52] The point at which the state's *parens patriae* power outweighs the parent's fundamental liberty interest ultimately turns on parental fitness.[53] A parent is deemed fit so long as she adequately cares for her child.[54] In *Quilloin v. Walcott*, the Supreme Court stated:

> We have no doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."[55]

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[46] *Id.*

[47] *Id.* at 166 ("Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways.").

[48] *See supra* text accompanying note 29.

[49] *Prince*, 321 U.S. at 166–67.

[50] *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1199 (1980) [hereinafter *Developments in the Law*].

[51] CHEMERINSKY, *supra* note 29, at 797.

[52] *Id.* at 810; Parham v. J.R., 42 U.S. 584, 602–03 (1979) (conceding that "human experience . . . teach[es] that parents generally do act in the child's best interests.").

[53] Troxel v. Granville, 530 U.S. 57, 68–69 (2000) (Stevens, J., dissenting) ("[A] parent's interest in a child must be balanced against the State's long-recognized interests as *parens patriae*."); *see, e.g.*, Reno v. Flores, 507 U.S. 292, 303–04 (1993).

[54] *Flores*, 507 U.S. at 304 ("Even if it were shown, for example, that a particular couple desirous of adopting a child would *best* provide for the child's welfare, the child would nonetheless not be removed from the custody of its [sic] parents so long as they were providing for the child *adequately*.").

[55] Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (quoting Smith v. Org. of Foster

In order to respect parents' constitutional right to raise their children, this Comment argues that where states have a compelling reason that justifies interference in the sacred area of child-rearing, they may do so only in the least intrusive way possible.

III. STATE INTERVENTION IN CASES OF NEGLECT

A. *Child-Welfare Legislation*

For centuries, under authority of the *parens patriae* power, individual states have developed agencies to run child-welfare and protective services.[56] Around the middle of the twentieth century, Congress recognized the need for uniform regulation in the area of child-welfare and subsequently passed legislation to fulfill this need.[57] The federal legislation left states with wide latitude to prescribe their own laws and procedures in this area, but it also requires them to comply with certain federal requirements to receive federal funding.[58]

In 1935, the federal government began providing financial incentives to the states that offered preventative and protective services for children.[59] The Child Abuse Prevention and Treatment Act of 1974 (CAPTA) was the first of a recent bombardment of federal legislation that Congress enacted concerning child welfare and protection.[60] CAPTA defines child abuse and 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."[61] This sets the minimum requirements for the definition of child abuse and neglect; states are free to adopt definitions beyond what CAPTA requires.[62] The Department of

Families, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring)).

[56] *Id.*; Shireen Arani, Case Comment, *Intervention in Cases of Obesity Related Medical Neglect*, 82 B.U. L. REV. 875, 879 (2002) (discussing how state intervention in child-welfare cases was largely unregulated in the middle of the twentieth century).

[57] Arani, *supra* note 56, at 879.

[58] *Major Federal Legislation Concerned with Child Protection, Child Welfare, and Adoption*, ADMIN. FOR CHILDREN & FAMILIES 1 (2009), http://www.childwelfare.gov/pubs/otherpubs/majorfedlegis.pdf [hereinafter *Major Federal Legislation*].

[59] *Id.* at 2 n.1 (noting that the Child Welfare Services Program of 1935 provided grants to states for preventative and protective services).

[60] *Id.* at 1.

[61] Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106(g)(2) (2006) (emphasis added).

[62] *Major Federal Legislation*, *supra* note 58, at 15.

Health and Human Services administers the two largest federally funded programs concerning child welfare—found in Titles IV-B and IV-E of the Social Security Act.[63] Title IV-B contains the Promoting Safe and Stable Families Program.[64] The purpose of this program is to assist states in developing programs that offer community-based support systems, and to help preserve and reunite families in accordance with the Adoption and Safe Families Act of 1997 (ASFA).[65] The ASFA amended Title IV-E of the Social Security Act to require states to make "reasonable efforts to . . . preserve and reunify families" to remain eligible for federal funding.[66] Title IV-E now requires that states make reasonable efforts both "prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and to make it possible for a child to safely return to the child's home."[67] The only exception to the "reasonable efforts" requirement is where a court determines that the parent subjected the child to "aggravated circumstances."[68] The statute gives examples of "aggravated circumstances," including "abandonment, torture, chronic abuse, and sexual abuse," but specifies that states are free to define such circumstances however they please.[69] Title IV-E also requires states to hold permanency hearings no later than one year after a child enters foster care to determine if the child will return to the parents or to petition for termination of parental rights.[70] The goal of this requirement is to provide children with permanent and stable placements as quickly as possible.

B. Where States Have Intervened Based on a Child's Obesity

In response to the current explosion of childhood obesity, courts in several states have begun using child obesity as grounds to find neglect.[71] Thus far, courts in Iowa, Indiana, New Mexico,

[63] *Id.* at 2.

[64] Promoting Safe and Stable Families Program, 42 U.S.C. § 629 (2006).

[65] *Id.*

[66] Adoption and Safe Families Act of 1997, Pub. L. 105-89, 111 Stat. 2115 (codified as amended in 42 U.S.C. § 671(a)(15) (2006)).

[67] *Id.* at § 671(a)(15)(B)(i)–(ii).

[68] *Id.* at § 671(a)(15)(D)(i).

[69] *Id.*

[70] 42 U.S.C. § 675(5)(C) (2006).

[71] State child and medical neglect definitions are quite broad and allow courts great discretion to determine what falls under the umbrella of neglect. While child obesity has never been considered a form of neglect in the past, this is likely because it is a relatively recent phenomenon. George, *supra* note 17, at 56–57 ("Courts and

California, New York, Pennsylvania, and Texas have confronted the child obesity issue.[72] In 1992, Iowa was the first state to connect child obesity to a finding of child neglect.[73] There, the Iowa court of appeals affirmed the juvenile court's decision to remove the obese child from her mother's custody.[74] The ten-year-old child, Liza, was five feet and three inches tall and weighed 270 pounds.[75] Liza's severe depression caused her to overeat, and ultimately her weight reached morbidly obese levels.[76] After psychiatric and psychological treatment failed to curb Liza's weight gain, her mother sought help from the state's Department of Human Services.[77] Liza's caseworker referred them to a weight-control program, and Liza's psychiatrist recommended a long-term residential treatment program for Liza.[78] After her mother failed to follow the suggestions of either the caseworker or the psychiatrist, the state instituted a child-in-need-of-assistance proceeding and determined that Liza was a "child in need of assistance" (CINA) under Iowa law.[79] The juvenile court reasoned that Liza needed "immediate treatment to cure or alleviate her

prosecutors have begun to take what might be classified as a drastic step towards combating childhood obesity.").

[72] *In re* L.T., 494 N.W.2d 450 (Iowa Ct. App. 1992) (first case interpreting child-obesity as a form of neglect justifying removal from parental custody); *In re* D.K., 58 Pa. D. & C. 4th 353 (Com. Pl. 2002) (removing D.K. from his parents despite his desire to return home and his parents' willingness to help him lose weight); *In re* G.C., 66 S.W.3d 517 (Tex. Ct. App. 2002) (allowing state officials to remove a morbidly obese four-year-old boy from his mother's custody on grounds of medical neglect after she refused to consent to medical tests to determine the boy's cause of obesity and refused to place him on a weight loss plan); *In re* Brittany T., 835 N.Y.S.2d 829 (Fam. Ct. 2007), *rev'd*, 852 N.Y.S.2d 475 (App. Div. 2008) (trial court's decision that allowed state officials to remove Brittany from her parents' custody was reversed on appeal); *see, e.g.*, Deena Patel, *Super-Sized Kids: Using the Law to Combat Morbid Obesity in Children*, 43 FAM. CT. REV. 164, 170 (2005) (discussing unpublished cases from California and Indiana dealing with child-obesity); Nick Charles & Michael Haederle, *Desperate Measure: New Mexico Officials Take Custody of a 117-Pound 3-Year-Old, Claiming Her Parents Have Put Their Daughter's Health at Risk*, PEOPLE, Sept. 11, 2000, at 76, *available at* http://www.people.com/people/archive/article/0,,20132254,00.html (discussing the unpublished case of three-year-old Anamarie Martinez-Regino, who was removed from her parents' custody by child protective services in New Mexico).

[73] *See In re* L.T., 494 N.W.2d at 450.

[74] *Id.*

[75] *Id.* at 451.

[76] *Id.* at 451–52.

[77] *Id.* at 451.

[78] *Id.*

[79] *In re* L.T., 494 N.W.2d at 452; IOWA CODE § 232.2(6)(c)(2) (2009).

serious mental illness or emotional damage."[80] Reviewing the evidence de novo, the appellate court affirmed the decision of the juvenile court.[81] The appellate court additionally reasoned that Liza was a CINA because her obesity was "a potentially life-threatening condition which will likely result in a significantly increased risk of hypertension and a decreased life expectancy."[82] The court also justified removal because it believed that the mother encouraged Liza to eat as a method of coping with stress because she suggested giving Liza food as a reward.[83]

In 2002, Pennsylvania broached the issue of childhood obesity in the case of D.K., who weighed 451 pounds at age sixteen.[84] D.K.'s father was deceased, and his mother was homebound as a result of her own severe obesity.[85] Officials at D.K.'s school were concerned about his excessive weight gain and frequent absences from school and had him undergo an evaluation at a pediatric health center.[86] The health center believed that as a result of his morbid obesity, D.K. had developed a number of severe health conditions that required hospitalization.[87] D.K.'s mother voluntarily entrusted his care to the state, and he was placed on strict dietary and physical regimens in foster care.[88] After three months, D.K. lost fifty pounds and "expressed a strong desire to return home" at the time of the petition.[89] D.K. believed that his new lifestyle had been ingrained and that with some assistance from his mother, he could shop and prepare healthy meals for himself.[90] D.K. missed his mom, his school, and his friends.[91] Furthermore, he wanted to return to his home neighborhood because it provided more opportunities for physical activity than his foster-home neighborhood.[92] Unfortunately, the

[80] *In re* L.T., 494 N.W.2d at 452.
[81] *Id.*
[82] *Id.*
[83] *Id.* at 452–53.
[84] *In re* D.K., 58 Pa. D. & C. 4th 353, 354 (Com. Pl. 2002).
[85] *Id.*
[86] *Id.* at 355.
[87] *Id.* at 355 (reporting that D.K.'s examining physician found the following complications: an enlarged liver, hypertension, sleep apnea, knee pain, insulin resistance increasing his risk for diabetes, and respiratory problems that necessitated nightly oxygen).
[88] *Id.* at 355–56.
[89] *Id.* at 356.
[90] *In re* D.K., 58 Pa. D. & C. 4th at 356.
[91] *Id.*
[92] *Id.*

court determined that D.K.'s mother failed to provide "a minimum standard of care for [his] physical, intellectual and moral well-being"[93] because her own obesity prevented her from doing so.[94] If D.K. did not maintain his new lifestyle, the court was concerned that he would develop further heart and liver problems and would not live past the age of thirty.[95] The court expressly limited the holding to situations where obesity is life-threatening and has manifested itself in either physical or mental problems.[96] Further, the court justified its holding by comparing D.K. to *Commonwealth v. Cottam*, a case dealing with neglect by malnourishment to the point of near starvation.[97] The court expressly recognized that Pennsylvania law requires the state to make reasonable efforts to preserve the unity of the family, and to provide alternative methods of assisting the family before removing the child from custody.[98] Without citing any examples of when or how, the court held that the state had made reasonable efforts to preserve and reunify the family.[99] In reality, the state made no attempt to provide D.K.'s mother with the assistance she needed to maintain custody of her child. Only after determining that D.K. was a "dependent child" and refusing to return him to his mother's care did the court make any recommendations for his mother—and

[93] *Id.* at 357, 359 (quoting *In re* Pernishek, 408 A.2d 872, 877–78 (Pa. Super. Ct. 1979)).

[94] *Id.* at 356 ("The medical testimony . . . is that the diet is one that could be monitored in a home setting; however, [the pediatric nutritionist] did not believe that the mother here with her limitations as noted above would provide the necessary help and support the minor needs in order to avert a return to his former lifestyle.").

[95] *Id.*

[96] *In re* D.K., 58 Pa. D. & C. 4th at 358 ("This is an extreme case, and certainly [Child Youth Services] would not be justified by intervening simply because a child was overweight, or did not simply engage in a healthy and fit lifestyle. Rather, the obesity must be of a severe nature reaching the life threatening or morbid state, which has also manifested itself in physical problems, such as those present here, or mental problems."). However, it is difficult to imagine that the possibility of death fifteen years down the road can be considered "life-threatening." *See infra* Part IV.A.

[97] *In re* D.K., 58 Pa. D. & C. 4th at 358 (citing Commonwealth v. Cottam, 616 A.2d 988 (Pa. Super. Ct. 1992)).

[98] *Id.* at 358–59 ("The purpose of the Juvenile Act is to preserve, whenever possible, the unity of the family; children should be separated from their families only in cases of clear necessity. . . . Even where there are inadequacies in the child's home, the court should first consider ordering [Child Welfare Services] to take the steps necessary to instruct the parents in the skills needed, and to provide follow-up supervision in the home, where feasible.") (citations omitted in original).

[99] *Id.* at 361 ("[R]emoval of D.K. from the home was the result of a determination that continuation therein would be contrary to the health, welfare and safety of the child and that reasonable efforts were made by the agency to preserve and reunify the family.").

even so, these recommendations did not amount to any real assistance.[100]

Recently, a family court in New York followed suit by using child obesity as adequate grounds for a finding of neglect; however, the Appellate Division reversed the decision.[101] *In re Brittany T.* involved a young girl who had been in and out of foster care seven times due to her morbid obesity.[102] The family court found that each time Brittany was removed from her parents' care, she lost weight, and each time she returned to their care, she gained the weight back.[103] Nine-year-old Brittany weighed 261 pounds—placing her in the 99th percentile for her BMI[104]—when the state first removed her from her parents' custody.[105] The state's petition asserted that Brittany's parents had neglected her by failing to address her obesity issues and by not ensuring that she attend school regularly.[106] Because they wanted to help their daughter, Brittany's parents consented to a court order of supervision that required them to take certain measures to tackle Brittany's obesity-related health conditions and educational needs.[107] Three months later, the court found that Brittany's condition had not improved, and with parental consent, the state removed Brittany from her parents and placed her in foster care.[108] For over a year, Brittany experienced extreme fluctuations in her weight[109] as she bounced back and forth between foster care and parental custody.[110] After spending time in a pediatric weight management program, Brittany returned to her parents after reaching her lowest weight, 238 pounds; within six months she had gained it all back.[111]

The state alleged that Brittany's parents failed to comply with the court's order of supervision that required Brittany's parents to purchase a gym membership and take Brittany there two or three times a week and to participate in a nutrition program with

[100] *Id.* at 361–62.
[101] *In re* Brittany T. (*Brittany T. I*), 835 N.Y.S.2d 829 (Fam. Ct. 2007), *rev'd,* 852 N.Y.S.2d 475 (App. Div. 2008).
[102] *Id.* at 831.
[103] *Id.* at 831.
[104] *In re* Brittany T. (*Brittany T. II*), 852 N.Y.S.2d 475, 477 (App. Div. 2008).
[105] *Id.*
[106] *Id.*
[107] *Id.* at 480.
[108] *Id.*
[109] *Brittany T. I*, 835 N.Y.S.2d at 831, 833–34.
[110] *Brittany T. II*, 852 N.Y.S.2d at 477.
[111] *Brittany T. I*, 835 N.Y.S.2d at 831, 834.

Brittany.[112] The family court, not persuaded by the parents' physical limitations, determined that Brittany's parents had willfully violated the provisions of the supervisory court order, and placed Brittany in foster care.[113] Conceding that obesity in itself is not cause for removal, the court held that it is justified when there is evidence of "severe, life-limiting dangers due to parental lifestyle and persistent neglect."[114] Just as the Pennsylvania court did, the New York family court rationalized its holding by likening child-obesity to child-starvation.[115] Pursuant to court order, Brittany was placed into state custody for one year.[116] The court explained that if Brittany's parents could prove their ability to provide for Brittany within one year, she would be allowed to return home, otherwise the state would seek to permanently terminate the parents' custodial rights.[117]

Fortunately on appeal, the Appellate Division reversed the ruling of the lower court because the state failed to establish by clear and convincing evidence that Brittany's parents willfully violated the terms of the order of supervision.[118] While the appellate division did not explicitly rule on the issue of neglect, it suggested in dicta that the finding of neglect was improper.[119] The appellate division found evidence that despite their financial difficulty in doing so, Brittany's parents had, in fact, complied with the court's orders to the best of their ability.[120] Although Brittany continued to gain weight, the court found that there was no willful disregard of the state's terms—the parents exercised a good faith effort to comply with the supervisory order.[121]

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[112] *Id.* at 832–33.

[113] *Id.* at 836–37. Brittany's father had multiple health problems, was in a wheel chair, suffered from cardiomyopathy, muscular dystrophy, scoliosis, and arthritis. Brittany's mother is extremely obese (over 400 pounds) and had been hospitalized for gallstones. *Id.* at 835.

[114] *Id.* at 839.

[115] *Id.* ("This is no less a cause for determining neglect and ordering removal than is a matter where a child is at risk of life-limiting consequences due to malnourishment.").

[116] *Id.* at 839–40.

[117] *Brittany T. I*, 835 N.Y.S.2d at 839–40.

[118] *Brittany T. II*, 852 N.Y.S.2d 475, 478 (App. Div. 2008).

[119] *Id.* ("[R]espondents' challenge to the initial finding of neglect entered against them is not properly before us. That finding was entered with their consent and they failed to make a timely application in Family Court to vacate that order.").

[120] *Id.* at 480 (noting that Brittany's parents enrolled her in a gym that she attended at least once a week for twenty-seven out of thirty-one weeks, and frequently traveled over 130 miles to take Brittany to meet with her nutritionist).

[121] *Id.*

These cases present a number of important considerations. First, the two courts in Brittany's case managed to view the same set of facts in two very different ways. The family court portrayed neglectful parents who fed their morbidly obese daughter french fries and hamburgers.[122] Contrarily, the appellate division painted a different picture—one of parents who joined a gym they could not afford and who voluntarily gave up custody of their daughter as a last resort to try to help her.[123] Second, the majority of these courts removed children who were not in imminent danger.[124] Third, as seen in all three cases, many parents have a desire to help their children but cannot do so without assistance from the state. Unfortunately, of the five courts discussed, only the appellate division in New York got it right. The other courts effectively punished the parents who sought help by taking their children away from them.[125] It is important to move away from this practice, otherwise it will have a chilling effect, and parents who need assistance will no longer ask for help. Last, because federal law requires states to reunify families whenever possible,[126] it is likely that obese children will almost always ultimately return to their parents' custody.[127] Therefore, a more efficient way to approach child obesity is to provide families with the tools necessary to solve the problem from the start. If the state had taken this approach in Brittany's case, she would have avoided spending years of her life constantly changing homes, because her parents would have received what they asked for—the tools to assist their obese daughter.

[122] *Brittany T. I*, 835 N.Y.S.2d at 834.

[123] *Brittany T. II*, 852 N.Y.S.2d at 480.

[124] *See infra* note 132 and accompanying text; *supra* Part IV.A.

[125] *See* discussion *supra* notes 73–100 and accompanying text.

[126] Adoption and Safe Families Act of 1997, *supra* note 66 (States must make "reasonable efforts to preserve and reunify families."). The ASFA also requires states to initiate proceedings to terminate parental rights after a child has been in foster care for fifteen out of twenty-two months. Otherwise, the child must return to the parents. *Id.*

[127] Parental rights can be terminated only upon a showing of unfitness. Stanley v. Illinois, 405 U.S. 645, 657 (1972); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (holding that states may not terminate parental rights without a showing of unfitness and that separation would genuinely be in the child's best interest). Parental unfitness must be shown by clear and convincing evidence before a state can terminate parental rights. Santosky v. Kramer, 455 U.S. 745, 748 (1982). A parent is deemed fit so long as she adequately cares for her child. Reno v. Flores, 507 U.S. 292, 304 (1986).

IV. STATE INTERVENTION SHOULD BE LIMITED

The Constitution protects parents' fundamental right to raise their children free from governmental interference.[128] When the government interferes with an individual's exercise of a fundamental right, it must show that there is a compelling interest at stake, and that the intrusion is narrowly tailored to achieve the stated objective.[129] While courts have not yet held that combating child obesity qualifies as a compelling governmental interest, courts have recognized that protecting the general health, safety, and welfare of children is one.[130] Therefore, some courts have begun to read child obesity into their states' child-neglect statutes and have relied on this interpretation to infringe on parents' fundamental liberty.[131] Undeniably, childhood obesity is an important issue that needs to be addressed, and this Comment acknowledges that in some cases it is a compelling interest that justifies government interference. This Comment, however, further argues that the current application of child-neglect statutes is not narrowly tailored to achieve the goal sought—to reverse and prevent childhood obesity.

Although the statutes defining neglect and setting standards for preservation of families appear to be narrowly tailored to prevent child neglect, these statutes are not narrowly tailored in their implementation. There is no doubt that state legislatures are complying with federal regulations—but are state courts? Most states require that there be an imminent risk of substantial harm to the child before intervention is proper.[132] Once intervention is allowed,

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[128] *See* discussion *supra* notes 31–38 and accompanying text.

[129] *See* discussion *supra* notes 31–38 and accompanying text.

[130] *See* discussion *supra* notes 39–43 and accompanying text.

[131] *See* discussion *supra* Part III.B.

[132] *E.g.*, Kelly R. Schwab, *Lost Children: The Abuse and Neglect of Minors in Polygamous Communities of North America*, 16 CARDOZO J.L. & GENDER 315, 328 (2010) (discussing how the majority of courts requires a substantial threat of imminent harm to a child before intervention is proper); IOWA CODE § 232.79 (2010) (A child may be taken into custody without a court order when "[t]he child is in a circumstance or condition that presents an imminent danger to the child's life or health."); *see, e.g.*, N.J. STAT. ANN. § 9:6-8.21 (West 2010) (A neglected child is defined as one "whose physical, mental or emotional condition . . . is in imminent danger" because a parent has "created a substantial or ongoing risk of physical injury . . . which would be likely to cause death . . . ."); N.Y. SOC. SERV. LAW § 371 (McKinney 2010) (defining a neglected child as one "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired . . . ."); TEX. FAM. CODE ANN. § 261.001 (West 2011) (defining a neglected child as one who has been placed in "a situation that . . . results in bodily injury or a substantial risk of immediate harm."); *see also In Re* Tex. Dep't of Family & Protective Servs., 255 S.W.3d 613 (Tex.

the agency must take all steps reasonably possible to keep the family together.[133] Nonetheless, it seems that agencies in charge of child welfare services would rather take children away and place them in foster care than keep families together by providing them the assistance they need.[134]

A. *Only Imminent Harm to the Child Justifies State Intervention*

Judicial intervention on obesity grounds is an unconstitutional infringement on parents' fundamental liberty interest in the care and custody of their children unless the risk of the harm is substantial and imminent enough to justify the intrusion. Many state statutes expressly require children to be in imminent danger before welfare agencies may temporarily remove them from parental care.[135] While obesity may cause many long-term health complications, very few—if any—rise to the level of imminence.[136] For example, an obese person is significantly more likely to develop type 2 diabetes, hypertension and coronary artery disease.[137] The presence of these conditions increases the possibility of suffering a fatal heart attack.[138] There are, however, a variety of factors unrelated to weight that also affect whether an obese person will die prematurely.[139] Furthermore, these conditions only increase the risk that the child will die prematurely as an adult, perhaps in his or her forties or fifties.[140] Accordingly, the short-term consequences of child obesity do not include risk of

2008). In the Zion Ranch case, the Supreme Court of Texas returned the children to their homes because it determined that there was no imminent risk of continuing harm to the children, despite the evidence suggesting the likelihood of sexual abuse. *Id.* at 614–15.

[133] *See supra* note 126 and accompanying text.

[134] *See* discussion *supra* Part III.B.

[135] *See supra* note 132.

[136] A Law Professor at the University of Virginia states that "[o]besity, although potentially dangerous, does not generally put a child in imminent danger." Ron Barnett, *S.C. Case Looks on Child Obesity as Abuse, But is it?*, USA TODAY (July 7, 2009), http://www.usatoday.com/news/health/weightloss/2009-07-20-obesityboy_N.htm.

[137] *Weight Loss: Health Risks Associated with Obesity*, WEBMD.COM, http://www.webmd.com/cholesterol-management/obesity-health-risks (last visited Apr. 25, 2012).

[138] *Id.*

[139] *Id.*; *see supra* note 12.

[140] A recent study found that very obese children had an increased risk of dying before they reached the age of fifty-five. Roni Caryn Rabin, *Child Obesity Risks Death at Early Age, Study Finds*, N.Y. TIMES, Feb. 11, 2010, at A22. In the case of D.K., discussed in Part III.B, the court anticipated that D.K. might die in his thirties. *Supra* note 95; *see also, supra* note 124 and accompanying text.

immediate death.[141]

Proponents of broad judicial intervention argue that child obesity is similar to starvation cases.[142] Child obesity, however, differs from child starvation in many important ways.[143] Courts and scholars continually draw comparisons between obesity and starvation, and argue that providing either too little or too much food can both lead to death and are therefore the same.[144] This comparison is possible, legally, because some states have broad definitions that include "the failure to provide adequate food" as part of their child neglect definitions, regardless of whether the child suffered injury.[145] As compelling as this argument may be to the average person, it fails to recognize that medically, legally, and psychologically, starvation and obesity are two very different situations.

In order for the body to carry out life-sustaining functions, it needs energy, and for humans, that energy comes in the source of food.[146] Starvation occurs when the amount of energy consumed is less than the energy expended for a prolonged period of time.[147] When this occurs, the body must use existing tissue as an energy source.[148] Eventually the body begins to break down the body's

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[141] *Obesity and Overweight*: *Fact Sheet No. 311*, WORLD HEALTH ORG., http://www.who.int/mediacentre/factsheets/fs311/en/index.html (last updated March 2011) (stating that "childhood obesity is associated with a higher chance of . . . premature death . . . in adulthood" and qualifies this as an "increased *future* risk[]," distinguishing it from conditions obese children may develop immediately) (emphasis added).

[142] George, *supra* note 17, at 57.

[143] *A Growing Problem, supra* note 12 (explaining that child obesity occurs when a child consumes more food than his body uses for fuel). To starve someone is to "kill with hunger;" to be starved is to "perish from lack of food." *Starving: Medical Definition*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/medical/starving (last visited Apr. 16, 2012).

[144] George, *supra* note 17, at 57; Patel, *supra* note 72, at 171.

[145] *Compare* CAL. PENAL CODE § 11165.2 (West 2010) (defining general neglect as "the negligent failure . . . to provide adequate food, clothing, shelter, medical care, or supervision *where no physical injury to the child has occurred.*") (emphasis added), *with* N.J. STAT. ANN. § 9:6-8.21 (2010) (including the failure to "supply[] [a] child with adequate food, clothing, shelter, education, medical or surgical care" as neglect but only when that child's "physical, mental or emotional condition *has been impaired or is in imminent danger of becoming impaired* as a result of [that] failure," and it is only neglect "*when the parent is financially able to do provide but does not*") (emphasis added).

[146] Rebecca B. Schechter, Note and Comment, *Intentional Starvation as Torture: Exploring the Gray Area Between Ill-Treatment and Torture*, 18 AM. U. INT'L L. REV. 1233, 1238 (2003).

[147] *Id.*; Michael D. Lemonick et al., *It Takes More Than Food to Cure Starvation*, TIME, Dec. 21, 1992, at 36.

[148] Schechter, *supra* note 146, at 1238; Lemonick, *supra* note 147.

muscles, such as the heart, in order to maintain viability.[149] Once this process of self-catabolism begins, death is virtually certain,[150] and may occur in as few as two months.[151] This biological response to starvation is radically different than that which occurs as a result of obesity. When a person consumes more food than his body needs to use as energy, the excess calories are stored as fat cells, and this leads to weight gain.[152] Excess weight can lead to interference with hormonal and metabolic processes, which can increase a child's risk of heart attack or stroke, but only if obesity continues into adulthood.[153] While obesity may eventually lead to premature death, it takes years or decades for this to occur.[154] Therefore, even if an obese child may develop high blood pressure, diabetes, or heart disease, these conditions do not pose even a remotely imminent possibility of death.

The harrowing case of *Harrington v. Texas* evidences the severity of starvation.[155] The state convicted a mother and father of murder for the death of their two-year-old daughter, Laini, who died of starvation after she had sustained a substantial period of malnourishment.[156] The mother testified that she was a "bad mother" and did not like small children.[157] She admitted to neighbors that she never wanted children and that she had just decided to stop feeding her daughter.[158] She regularly left the child home, unattended and unfed for over nine hours at a time.[159] None of the child-obesity stories of D.K., Brittany, Liza, or Alex parallel the cruelty suffered by Laini.[160]

While starvation unquestionably satisfies the imminence

[149] Schechter, *supra* note 146, at 1239.
[150] Lemonick et al., *supra* note 147, at 36.
[151] Schechter, *supra* note 146, at 1239.
[152] Susan Levine et al., *How Obesity Harms a Child's Body*, WASH. POST, http://www.washingtonpost.com/wp-srv/health/childhoodobesity/obesityeffects.html (last visited Apr. 16, 2012).
[153] *Id.*
[154] *Id.* (mentioning a study that found that obese children may develop heart disease as early as their twenties, also using terms such as "in the long term" or "later in life" to describe fatal conditions); *e.g.*, *supra* note 140.
[155] Harrington v. Texas, 547 S.W.2d 616 (Crim. App. 1977).
[156] *Id.* at 617.
[157] *Id.* at 618.
[158] *Id.*
[159] *Id.*
[160] *See* discussion of child-obesity cases *supra* in Part III.B.

requirement, it is not clear that obesity rises to the same level.[161] Obesity, in and of itself, does not directly cause death; it is one of many factors contributing to the development of other diseases that may result in a shorter life expectancy.[162] Contrarily, starvation is a primary cause of death and can cause fatality within weeks.[163] Furthermore, parents have a legal duty to provide food for their children,[164] but there is no limit on how much or what kinds of food parents may provide. It is axiomatic that every person must consume food in order to survive—generally, this is not something that parents need to be taught.[165] Unfortunately, most parents are not generally educated on what constitutes *proper* nutrition, and these parents may even believe that they are feeding their children healthy foods when in fact they are not.[166]

There is a difference between parents who knowingly starve their children to death and those who, due to lack of nutritional education and poverty, overfeed their children. This distinction is clearly not lost on courts because otherwise they would not distinguish between parents who starve their children and parents of anorexic and bulimic children. Anorexia and bulimia carry the same physiological risks, including death, as child-starvation.[167] Yet, parents of anorexic and bulimic children are typically not at risk of judicial

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[161] *See* discussion *supra* notes 136–141 and accompanying text.

[162] *Id.*

[163] *See, e.g.*, Daniels v. Henry, No. C-03-5293, 2007 U.S. Dist. LEXIS 11475, at *25–26 (N.D. Cal. Feb. 5, 2007), *aff'd*, 2008 U.S. App. LEXIS 12215 (9th Cir. June 2, 2009) (parents were charged with homicide and felony child endangerment stemming from the death of one child and severe neglect of their other child, and the autopsy revealed that the child's cause of death was starvation over a period of weeks or months).

[164] Commonwealth v. Cottam, 616 A.2d 988, 1000 (Pa. Super. Ct. 1992).

[165] State v. Grantland, 709 So. 2d 1310, 1312 (Ala. Crim. App. 1997) (It is a "commonly known fact that human beings deprived of food will starve to death.").

[166] Jennifer Goodwin, *Changing Parental Behavior May Help Obese Kids Lose Weight*, U.S. NEWS, Jan. 25, 2011, http://health.usnews.com/health-news/family-health/brain-and-behavior/articles/2011/01/25/changing-parental-behavior-may-help-obese-kids-lose-weight (A nutritionist said that in her experience "there are plenty of parents who tell me they know what to feed their kids and that they are eating healthy . . . but when we analyze their diet, they are surprised that they are not following or providing age-appropriate portions or healthy foods for their kids."). The fact that two-thirds of the American population is overweight or obese provides further support of this proposition. *See supra* note 13 and accompanying text.

[167] Gina Shaw, *Anorexia: The Body Neglected*, WEBMD.COM, http://www.webmd.com/mental-health/anorexia-nervosa/features/anorexia-body-neglected (last visited May 15, 2012).

intervention.[168] If society does not assign blame to parents of very thin children unless it is evident that the parent is otherwise neglectful, how is it justified to do so where the children are fat rather than thin? Arguably, neither case constitutes grounds for judicial intervention. Ultimately, starvation cases cannot be reconciled with obesity cases; starvation falls within a state's power to define neglect more clearly than obesity does.

Although society may frown upon parents who "allow" their children to become obese, bad parenting does not provide sufficient grounds for violating parents' constitutional right to the care, custody, and control of their children.[169] Most educated people would agree that continually feeding your obese child fatty foods is bad parenting—but does it really rise to the level of neglect? Many children have grown up receiving sugary foods as a reward for good behavior, and giving children a reward or special treat is typically seen as a loving gesture. It is unfair to punish parents for innocently contributing to their child's obesity when their intentions are those of loving parents. Furthermore, it is important to recognize that there are a number of reasons why a child may become overweight despite a parent's earnest preventative efforts.[170] Although it is rare,[171] obesity can result from an underlying health condition or genetic predisposition.[172]

In other areas of child-neglect law, courts are reluctant to infringe on parental rights unless the harm to the child is imminent. Recently, this issue entered the public spotlight in the highly

[168] *See* Barnett, *supra* note 136 (Opponents of child-obesity intervention fear that intervention in this area will lead to interference in other areas "beyond parental control . . . to other eating disorders, and even behaviors not related to weight.").

[169] Troxel v. Granville, 530 U.S. 57, 72–73 (2000) ("The Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made."); *In re* Adrian D., 861 A.2d 1286, 1292 (Me. 2004) (Dana, J., dissenting) (The dissent in this decision from the Supreme Court of Maine criticized the majority's opinion which "equates bad parenting with jeopardy and in doing so lowers the very high standard that the constitution required be met to justify the invasion of family integrity. Inferior parenting may properly be subject to reproach and, hopefully, may generate assistance to the parent to reduce parenting problems, but a jeopardy finding is justified only if far more serious problems are identified.").

[170] Arani, *supra* note 56, at 890 (stating that there are more than two hundred genes that influence someone's weight by causing diseases such as leptin receptor deficiency).

[171] George, *supra* note 17, at 39 ("[L]ess than 1% of obese children have a true hormonal imbalance.").

[172] *See CDC Features: Obesity & Genetics*, CTR. FOR DISEASE CONTROL & PREVENTION (Jan. 19, 2010), http://www.cdc.gov/Features/Obesity/; *supra* note 12.

controversial Zion Ranch case, where 468 children were removed from their homes on the Yearning for Zion Ranch (the Ranch) in Texas.[173] The removal occurred after the Texas Department of Child Protective Services (CPS) received a phone call from a sixteen-year-old girl claiming that she was the victim of sexual and physical abuse at her home on the Ranch.[174] The Yearning for Zion Ranch is associated with the Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS), a Mormon sect known for its belief in polygamy.[175] CPS argued that removal was warranted because the "pervasive belief system" of the FLDS posed a danger to the children on the Ranch.[176] The Court of Appeals, however, held that "[e]vidence that children raised in this particular environment may someday have their physical health and safety threatened is not evidence that the danger is imminent enough to warrant . . . removal . . . ."[177] Specifically, the Court explained that even if some young girls were being forced to have sex, that fact alone insufficiently justified the removal of all pre-pubescent children.[178]

If the possibility of future rape is not considered imminent danger, then how can states properly claim that the possibility of future health consequences from childhood obesity constitutes imminent danger warranting removal of child from parent? If imminence is the standard, states must apply this requirement with an even hand. Accordingly, states may only intervene where an obese child is in imminent danger of substantial bodily harm.

V. STATES MAY INTERVENE TO PREVENT IMMINENT HARM, BUT ONLY IN THE LEAST INTRUSIVE WAY POSSIBLE

While obesity rarely creates imminent risks for children, child obesity does present a serious and dangerous problem. Thus, this Comment concedes that where there is an imminent or substantial risk of harm, judicial intervention is proper. For the following reasons, however, where the government does intervene, it should do so in the least intrusive way possible. First, federal legislation requires that states take all reasonable efforts to keep families together.

[173] *In re* Tex. Dep't of Family & Protective Servs., 255 S.W.3d 613, 613 (2008).
[174] *In re* Steed, No. 03-08-00235-CV, 2008 WL 2132014, at *4 (Tex. App. May 22, 2008) (mem.).
[175] Schwab, *supra* note 133, at 329–30.
[176] *In re* Steed, 2008 WL 2132014, at *2.
[177] *Id.* at *3.
[178] *Id.* at *2.

Second, removing the child only facilitates temporary weight loss because it does not address the root of the problem. Lastly, severing the parent-child relationship, even temporarily, is damaging to the child and can cause irreversible damage.

A. *Federal Law Requires the Use of Minimally Intrusive Measures*

Where a fundamental liberty is present, the Constitution only allows states to interfere where the means are narrowly tailored to achieve a compelling interest.[179] To be narrowly tailored, the action must be the least restrictive way to achieve the goal; if a less restrictive alternative exists, the action is not narrowly tailored.[180] Where infringing upon the parent-child relationship is the only way to protect the child from injury, it is constitutionally permissible.[181] But, if less invasive measures can protect the child's welfare, then the parent-child relationship must remain intact.[182]

Courts have generally responded to the child obesity issue by removing the child from the home and placing him in foster care.[183] But where there are less invasive ways of approaching the problem, removal is not narrowly tailored to address child obesity. Furthermore, because the family unit is constitutionally protected,[184] federal legislation requires states to take every possible measure to preserve the parent-child relationship and to reunify it where it has been disturbed.[185]

Reasonable measures to preserve the parent-child relationship include mandatory parenting-skills classes, assigning a supervisory authority or neutral person in the home to assist the parents, and any

[179] Stanley v. Illinois, 405 U.S. 645, 652 (1972) ("But we are here not asked to evaluate the legitimacy of the state ends, rather, to determine whether the means used to achieve these ends are constitutionally defensible . . . . We observe that the State registers no gain toward its declared goals when it separates children from the custody of fit parents.").

[180] James A. Cosby, *How Parents and Children 'Disappear' in Our Courts—And Why it Need Not Happen Ever Again*, 53 CLEV. ST. L. REV. 285, 295 (2005–2006) (discussing how the strict scrutiny standard applies to fundamental rights cases, stating infringement is only allowed when they are narrowly tailored to serve a compelling interest, and where less restrictive means are not available).

[181] *Stanley*, 405 U.S. at 652 ("We do not question that neglectful parents may be separated from their children.").

[182] Cosby, *supra* note 180, at 295.

[183] *See* discussion *supra* Part III.B.

[184] Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.").

[185] *See supra* notes 65–67 and accompanying text.

other measures aimed at rehabilitating the parents.[186] In New York, the Court of Appeals has held that the state is required to provide all services possible that would enable the parent to care for the child.[187] These services include, but are not limited to, "assistance with housing, employment, counseling, medical care and psychiatric treatment."[188]

B. *Removal Fails to Adequately Remedy Obesity*

Even if federal law did not require states to provide reasonable measures to enable the parent to care for the child, removing the obese child from his parents and placing him in foster care is inefficient because, at best, it merely provides a temporary solution.[189] It is not a permanent solution because it does not ensure that a child will keep the weight off and maintain a healthy lifestyle in the long term.[190] In most cases, children who are temporarily removed return to their parents within one year, increasing the probability that any progress made during removal, if any, will be moot.[191] A better approach would be to focus on assisting the obese child's parents from the outset.

No later than one year after a child enters foster care, federal law requires that the state either return the child to the parents or file for permanent termination of parental rights.[192] In addition, state agencies are required make all efforts reasonably possible to reunite the family before pursuing permanent termination of parental rights.[193] To succeed in permanent termination of parental rights, the state must prove that the parent is "unfit" by clear and convincing evidence.[194] The Supreme Court has established a three-part test that

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[186] D.M.P. v. State Dep't of Human Res., 871 So. 2d. 77, 87–88 (Ala. Civ. App. 2003).

[187] Kathleen A. Copps, Comment, *The Good, the Bad, and the Future of* Nicholson v. Scoppetta*: An Analysis of the Effects and Suggestions for Further Improvements*, 72 ALB. L. REV. 497, 512 (2009).

[188] *Id.* at 512 (quoting *In re* Marino S. Jr., 795 N.E.2d 21, 25 (N.Y. 2003)).

[189] *See* discussion *supra* Part III.B. Specifically, Brittany T. provides an example of this. *Supra* notes 101–111 and accompanying text.

[190] *Id.*

[191] Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 660 (2006) [hereinafter Huntington, *Rights Myopia*] ("Approximately half of children in foster care return to their biological families . . . .").

[192] *Supra* note 70 and accompanying text.

[193] *Supra* note 66 and accompanying text.

[194] Santosky v. Kramer, 455 U.S. 745, 747–48 (1982) ("Before a State may sever completely and irrevocably the rights of parents in their natural child, due process

balances the parents' fundamental privacy interest, the state's interest in protecting the welfare of the child, and the risk of error inherent in the chosen procedure.[195] This standard is difficult to meet, and it is unlikely the state will be able to prove parental unfitness based solely on the child's obesity.[196] This explains why children who are temporarily removed from the home usually end up back in parental custody within a year.[197]

Once the child returns home, if the parents still have not received the necessary assistance, the child will most likely gain back whatever weight he has lost and might be worse off than if removal had never occurred.[198] If the initial solution had been to provide the family with effective assistance, the child would have avoided the severe emotional consequences of being separated from his family.[199] Furthermore, the resulting fluctuation in weight—sometimes called "yo-yo-ing"—can be worse for the child's health than if he had never lost the weight in the first place.[200]

Proponents argue that removing obese children from their parents will send a message to the community that parents will be held responsible if they do not properly take care of their child's weight.[201] Studies show, however, that threat tactics are ineffective and generally do not deter the targeted behavior.[202] Threatening

requires that the State support its allegations by at least clear and convincing evidence.").

[195] *Id.* at 754 (1982) (quoting Matthews v. Eldridge, 424 U.S. 319, 335 (1976)).

[196] *See id.* at 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.").

[197] Huntington, *Rights Myopia*, *supra* note 191.

[198] Weight cycling can lead to an even further increased risk of developing metabolic and hormonal disorders, such as diabetes and hypertension. Karen Pallarito, *The Ups and Downs of Yo-Yo Dieting*, U.S. NEWS, Oct. 24, 2008, http://health.usnews.com/health-news/diet-fitness/fitness/articles/2008/10/24/the-ups-and-downs-of-yo-yo-dieting; Paul F. Campos, *First Do No Disinformation*, *in* Why Is Our Flab State Business?, L.A. TIMES, Sept. 18, 2007, http://www.latimes.com/news/opinion/la-op-dustup18sep18,0,568084.story.

[199] Removal from the home disrupts children's development, even when removal is necessary to help keep them safe. George, *supra* note 17, at 71.

[200] *Supra* note 198.

[201] George, *supra* note 17, at 65.

[202] *See generally* Stewart I. Donaldson, Andrea M. Piccinin, John W. Graham & William B. Hansen, *Resistance-Skills Training and Onset of Alcohol Use: Evidence for Beneficial and Potentially Harmful Effects in Public Schools and in Private Catholic Schools*, 14 HEALTH PSYCHOL. 291, 291 (1995) (citing studies proving that scare tactics were

parents will only serve to chill communication between families in need and the authorities that can provide assistance.[203] Instead, states should develop responsive measures that will encourage parents to seek help.[204]

Parents play a crucial role in the development of a child's habits and practices, and because a child will likely return to his parents' custody, it is imperative to address the influence that parents have over their child's obesity. Typically a child is reliant on his parent or guardian to prepare his meals, and he really has no choice but to eat what is provided. A child's eating behavior typically mimics that of his parents.[205] From gestation to adolescence, children are influenced by what their parents eat.[206] The proposition that "actions speak louder than words" is apparent here, and therefore, it is crucial that parents change their eating behaviors if they want their children's behavior to change.[207] The same applies with respect to physical activity—children of active parents are almost six times more likely to be active than are children of inactive parents.[208]

Common sense suggests how difficult it is for someone to change a routine or habit to which he has become accustomed—especially when he attempts to do so without assistance, support, and guidance. Placing a child in foster care to lose weight, and then subsequently placing that child back with his parents is akin to teaching someone to speak German and then sending him to a

generally ineffective at deterring children from using alcohol and drugs); Martin Lindstrom, Op-Ed., *Inhaling Fear: Scare Tactics Don't Work*, N.Y. TIMES, Nov. 12, 2008, http://www.nytimes.com/2008/12/12/opinion/12iht-edlinstrom.1.18632161.html (explaining how scare tactics have not deterred people from smoking).

[203] *See generally* Clare Huntington, *Happy Families? Translating Positive Psychology into Family Law*, 16 VA. J. SOC. POL'Y & L. 385, 395–96 (2009) [hereinafter Huntington, *Happy Families?*] (discussing how the current approach to family law is negative which causes the state to miss opportunities to make positive impacts on the lives of the community, and disallows parents to seek support from the government).

[204] "[P]revention programs, which are typically voluntary and work *with* parents to help them build strengths, are far more respectful of the parental decision-making authority than back-end programs . . . where the state intervenes in a far more heavy-handed fashion . . . ." *Id.* at 407.

[205] Ana C. Lindsay, Katarina M. Sussner, Juhee Kim & Steven Gortmaker, *The Role of Parents in Preventing Childhood Obesity*, 16 THE FUTURE OF CHILD. 169, 170 (Spring 2006), *available at* http://www.futureofchildren.org/futureofchildren/publications/docs/16_01_08.pdf.

[206] *Id.* at 170.

[207] *Id.* ("[I]t may be unrealistic to intervene with one member of a family while other family members are modeling and supporting behaviors that run counter to the intervention's goals.").

[208] *Id.* at 172.

Spanish-speaking country. The child will learn healthy behaviors, but, upon returning home, he will not have any of the tools needed to succeed. Courts have the ability to help families address the root of the problem from the very beginning—the child's home environment.

C. *Child-Obesity Intervention Must Address Socio-Economic and Cultural Aspects*

Because obesity is more prevalent among minorities and in impoverished families, states must take into account culture and socioeconomic status when approaching this issue.[209] While logic suggests there is a high correlation between poverty and emaciation, the opposite is actually true.[210] Instead of being underfed and underweight, children living in poverty are overfed and overweight.[211] In the United States, African-Americans and Hispanics are almost three times more likely to be living in poverty than are Caucasians.[212] Statistics show that obesity rates are also highest among these minorities.[213] African-American girls and Mexican-American boys have the highest incidence of obesity—roughly twenty-nine percent and twenty-seven percent, respectively.[214] In contrast, Caucasian boys (roughly seventeen percent) and Caucasian girls (roughly fifteen percent) have the lowest rates.[215] Furthermore, the majority of children in the child-welfare system are from low-income families.[216] Perhaps this is because agencies fail to recognize—or even acknowledge—the difference between poverty and neglect.[217] Taken

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[209] *See* discussion *supra* Part V.

[210] Kelly D. Brownell, *Why Poverty Leads to Obesity*, *in* Culture Matters in the Obesity Debate, L.A. TIMES, Sept. 21, 2007, http://www.latimes.com/la-op-dustup21sep21,0,2918815.story ("The likelihood of being overweight in the poorest 25% of the population is twice that of people in the highest quarter of economic class.").

[211] *Id.*

[212] *See About Poverty: Highlights*, U.S. CENSUS BUREAU (Sept. 13, 2011), http://www.census.gov/hhes/www/poverty/about/overview/index.html (reporting that for 2010 the percentage rates of people living in poverty were as follows: 9.9% of Whites, 27.4% of Blacks, and 26.6% of Hispanics).

[213] Ogden, *supra* note 14.

[214] *Id.*

[215] *Id.*

[216] Sandra Bullock, Comment, *Low-Income Parents Victimized by Child Protective Services*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1023, 1024 (2003) (stating that children from low-income homes are more likely to be reported to child-welfare agencies when compared to children from middle and high-income homes).

[217] *See id.* at 1043–45 (discussing how child protection agencies often remove

as a whole, the logical conclusion is that African-American and Hispanic children will represent a significant majority of child-obesity cases.[218] Consequently, solving the child-obesity crisis will revolve partially around these socio-economic factors; i.e., how they contribute to obesity, how to overcome the obstacles they pose, and how they can be wielded to prevent obesity.

Living in an impoverished neighborhood poses significant obstacles to living a healthy lifestyle. Families have fewer opportunities for physical activity because their schools do not have as many athletic programs, and bad neighborhoods eliminate walking to school or playing outside. Furthermore, access to supermarkets is extremely limited or nonexistent in many inner-city areas.[219] If there is a McDonald's across the street, but going to a grocery store would require taking three buses to get somewhere in the suburbs—which option is easier for a single mother of four living on the poverty line? Realistically, she cannot afford a babysitter, so she would have to bring her kids with her, and then she would have to carry all of the groceries on the return trip. While most people recognize that the grocery store is the healthier option—the option that society expects parents to take—reality does not always reflect utopian ideals.

In addition to the economic implications, cultural differences provide some insight into child-obesity as well. African-American and Hispanic women are generally more accepting of their more curvaceous bodies, while Caucasian women generally strive to be very thin.[220] By the same token, African-Americans and Latinos as a society are more accepting of bigger women.[221] In Latino culture, children are raised to finish all of the food in front of them before they can leave the table.[222] Because the food in their native land is healthier

children from low-income families because they mistake poverty for neglect).

[218] *Cf. id.* at 1024.

[219] *See* Brownell, *supra* note 210 (discussing the decline of supermarkets in inner-city Los Angeles from thirty-four in 1963 to five in 2002).

[220] Paul F. Campos, Op-Ed., *Inflicting White Neuroses on Nonwhite Women*, *in* Culture Matters in the Obesity Debate, L.A. TIMES, Sept. 21, 2007, http://www.latimes.com/la-op-dustup21sep21,0,2918815.story.

[221] In some countries, such as Cuba, and other less developed countries, being overweight is a sign of good health, fertility and wealth. Rajini Vaidyanathan, *Big Buttocks: Where Does Our Obsession Come From?*, BBC NEWS (Feb. 11, 2011), http://www.bbc.co.uk/news/world-us-canada-12411274.

[222] Debra Alban, *An Uphill Battle to Combat Latino Childhood Obesity*, CNN HEALTH (Oct. 21, 2009), http://articles.cnn.com/2009-10-21/health/childhood.obesity_1_childhood-obesity-obese-children-diabetes-and-obesity?_s=PM:HEALTH.

than the food they eat in the United States, this has translated into increased obesity rates for Latino-American children.[223] In many cultures being able to provide plentiful food is a sign of prosperity and love for one's family.[224] This cultural divide is further proof that minority parents who overfeed their children have the opposite intention of neglecting them. Therefore, it is vital to take into account the different cultural, economic, and environmental aspects that may contribute to child obesity.[225]

D. Removal Can Cause Detrimental Damage to the Child

Removing a child from the home does not ensure a permanent solution to weight loss, and it is damaging to the child in other ways as well.[226] Although there is an argument that removing an obese child from his parents is in his best interest, this may actually be far from the truth.[227] Overweight and obese children often suffer from depression or other psychological conditions, and are frequently the target of social stigmatization—all of which are likely to be exacerbated by uprooting the children from their homes.[228] There is a common misconception that the negative stigma associated with obesity motivates people to lose weight.[229] Proponents of removing obese children from parental custody believe that this fear will encourage people to lose weight.[230] Studies show that these beliefs

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[223] *Id.*

[224] *See* Vaidyanathan, *supra* note 221.

[225] According to Dr. Michael Goran, Director of the University of Southern California's Childhood Obesity Research Center, "You can't just try to change someone's behavior necessarily without trying to change their environment." Alban, *supra* note 222 (internal quotations omitted).

[226] Coyla J. O'Connor, Comment, *Childhood Obesity and State Intervention: A Call to Order!*, 38 STETSON L. REV. 131, 152–53 (2008) (discussing how state intervention compounds an obese child's problem because it burdens the child with the separation from his family).

[227] *See* Huntington, *Rights Myopia*, *supra* note 191, at 661–62 (explaining that children in foster care may have an even higher likelihood of being abused).

[228] "Obese children are 65% more likely to be bullied than their peers of normal weight . . . ." Madison Park, *When Parent's Good Intentions Disparage Obese Children*, CNN HEALTH (May 12, 2010), http://articles.cnn.com/2010-05-12/health/bullying.childhood.obesity_1_childhood-obesity-obese-children-obese-women?_s=PM:HEALTH; *see also* Marlene B. Schwartz & Kelly D. Brownell, *Actions Necessary to Prevent Childhood Obesity: Creating the Climate for Change*, 35 J.L. MED & ETHICS 78, 81 (2007) (stating that both obese child and adults suffer from discriminatory actions of others based on their weight).

[229] Schwartz, *supra* note 228, at 81.

[230] *Id.* ("Those rationalizing the bias and discrimination, believing that negative treatment is deserved, may also believe that stigma should not be changed because it

are completely contrary to the truth.[231] Children who are teased about their weight become depressed and cope with this stress by eating more and by avoiding physical activity.[232] Drawing attention to a child's weight will only cause further psychological harm. Furthermore, children may blame themselves as the cause of the family's break-up.[233]

From a child's perspective, placement in foster care represents being ripped away from everything he has ever known and suddenly finding himself in an unfamiliar place, surrounded by strangers. All humans have a primal need to form strong bonds with others and to resist the dissolution of these bonds.[234] A child who cannot form these bonds, or is forced to sever them, may suffer greatly.[235] Thus, even temporary removal can have severe negative implications on a child.[236] In fact, former foster care children suffer from higher rates of depression, social phobia, panic syndrome, and anxiety disorders.[237]

One illustrative example is an increased risk of developing separation anxiety disorder (SAD) in children who are separated from their parents.[238] SAD can cause a child to experience extreme distress that severely affects the child's ability to participate in normal activities.[239] Typically, a child develops SAD after suffering a traumatic life experience, such as a change in environment.[240] Even

motivates people to lose weight. However, current research suggests that the opposite is true; weight bias may exacerbate obesity through depression and binge eating.").

[231] According to the Director of Research and Weight Stigma Initiatives at the Rudd Center for Food Policy & Obesity at Yale University, bullying that occurs in subtle ways can be just as damaging as overt forms. Both children and adults are more likely to avoid physical activity when teased about their weight. Park, *supra* note 228.

[232] *Id.* ("Trying to scare kids into losing weight can do more harm than good . . . . Kids develop depression, anxiety, eating disorders, body image disturbance.") (internal quotations omitted).

[233] George, s*upra* note 17, at 71.

[234] Huntington, *Happy Families?*, *supra* note 203, at 401.

[235] *Id.*

[236] *Id.* at 401 ("[T]he relationship between a primary caregiver and a child is essential to the child's ultimate well-being; the failure to form a secure attachment can have lasting consequences throughout a child's life."); *see infra* notes 243–247 and accompanying text.

[237] Huntington, *Rights Myopia*, supra note 191, at 661.

[238] Copps, *supra* note 187, at 502.

[239] *Separation Anxiety Disorder in Children*, WEBMD.COM, http://children.webmd.com/guide/separation-anxiety, (last visited Apr. 25, 2012).

[240] *Id.*

temporary removal from the home can trigger a child to develop SAD, and symptoms may develop or worsen even after the child is returned to parental custody.[241] This happens because the child experiences severe anxiety over the possibility that he will be separated from his parent again. Therefore, any removal, even if temporary, has potential for devastating, life-long effects on a child.

Lastly, the actual foster home environment may be damaging to the child as well. In an idyllic world, typical foster homes consist of upper-middle-class families that are dedicated to spreading the enormous amount of love in their hearts to many disadvantaged children. Unfortunately the real world is not idyllic—instead of nurturing environments, many foster homes more closely resemble businesses.[242] Children in foster care are seventy-five percent more likely to be maltreated, four times more likely to be sexually abused, and are more likely to receive inadequate health care and develop behavioral and emotional problems.[243] One study even found that adults who had once been in the foster-care system were twice as likely to have post-traumatic stress disorder than were combat veterans.[244] Unless remaining in the home places a child in grave danger, it is unlikely that foster care is a better alternative for an obese child.

VI. PROVIDING GUIDANCE TO THE STATES

Because obesity-based intervention is inherently different than intervention in cases of child abuse or severe child neglect, the remedial action should be different as well. Instead of removing the child from the home, state intervention should focus on the specific needs of each family. Courts need to set realistic goals for parents, and states must provide the proper services to assist them to achieve those goals. It is vital to provide the most effective and efficient strategies for each family based on its needs. Realistically, the easier

[241] *See generally id.* (discussing the symptoms of SAD, including a child's constant fear that something bad will happen to their parents, nightmares about being separated, and fear of being alone).

[242] Ann Weber, ed., *Adoption and Foster Care*, 9 GEO. J. GENDER & L. 927, 950 (2008); *see* Betsey Krebs & Paul Pitcoff, *Reversing the Failure of the Foster Care System*, 27 HARV. WOMEN'S L.J. 357, 359 (2004) (noting that New York City agencies are paid daily for each child they have in the foster care system).

[243] Copps, *supra* note 187, at 502–03; Huntington, *Rights Myopia*, *supra* note 191, at 662 (discussing results of studies conducted in Maryland that found children in foster care were more likely to be abused and suffer from medically related neglect).

[244] Copps, *supra* note 187, at 502–03.

it is for parents to comply, the more likely it is that they will comply. As the obesity epidemic continues to dominate the attention of the public and thus the media, it is only a matter of time before child-obesity cases flood the child-welfare and court systems. It is imperative to provide courts and agencies with guidance on how to address this issue.

A. *Court Appointed Family Advocates*

Currently, federal law requires states to assign special advocates for children in all child-welfare proceedings.[245] This requirement was designed to ensure that children have a voice advocating solely for their interests.[246] One national organization called Court Appointed Special Advocates (CASA) trains volunteers to become child-welfare advocates to serve as a child's voice in legal proceedings.[247] CASAs help children navigate through the judicial process and assist them throughout the entire proceeding to ensure that the child is placed in a safe and permanent home.[248] Children with CASA volunteers are more likely to remain in permanent stable homes and are less likely to get lost in the foster-care system.[249]

States should adopt a similar approach specific to child obesity cases. Rather than having an advocate assigned to each child, an advocate should be assigned to each family[250] of an obese child. This Court Appointed Family Advocate (CAFA) would serve several functions. First, he or she would work with the obese child and parents to determine the cause of the child's obesity. Second, he or she would develop a realistic plan for the family to address the child's obesity and recommend this plan to the court. Third, the CAFA would support the family members through the process, assist them with any problems they encounter along the way, and ensure that they comply with the plan.

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[245] Huntington, *Rights Myopia*, supra note 191, at 648–49 (discussing how states are required to provide children with guardians during legal proceedings in order to receive federal funding).

[246] *Id.*

[247] *About Us*, COURT APPOINTED SPECIAL ADVOCATES ASSOCIATION, http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5301303/k.6FB1/About_Us__CASA_for_Children.htm (last visited Apr. 25, 2012).

[248] *Id.*

[249] *Id.*

[250] This Comment uses "family" to describe the unit consisting of the parent(s) or guardian(s) of the obese child, the obese child, and anyone else who is immediately involved in the child's caretaking and would like to participate.

Opponents will likely argue that this program will be too costly, but as a volunteer-based organization, the cost will be low. In fact, because of the phenomenal costs associated with foster care, the CAFA program could actually save the government money.[251] Given America's general obsession with obesity, coupled with the expected growth in the nutritional sciences field,[252] finding volunteers should not be difficult. Another potential argument is that CASA and other similar programs already serve the same purpose as CAFA would. State welfare agencies, however, are overwhelmed with cases and case workers are spread thinly as it is.[253] Providing a special department to deal with child obesity cases would help alleviate the strain on the child-welfare system and ensure that these families will receive the proper attention.

For this approach to be successful, each CAFA must have some knowledge of the relevant child-obesity issues, including general information regarding child welfare, nutrition, physical fitness, and the relevant state laws. Each state could have a local organization to solicit, screen, and train volunteers to become CAFAs. The local chapter would provide training on location-specific issues in addition to the general required topics.

There are many simple ways that CAFAs can help families, such as providing them with general nutritional education and showing them how to make small, but effective, immediate changes in their habits. For example, they can teach parents, and even children, how to make their favorite foods using healthier recipes, and educate them on how to order relatively healthy meals from fast food restaurants. This could be as simple as reminding parents to order food without mayonnaise or to ask for salad dressing on the side, things they otherwise may not have known to do.[254] The CAFA must also address the child's physical activity level. For many reasons, a child may not have access to a gym or other fitness facility, and CAFAs

[251] *See* Huntington, *Rights Myopia*, *supra* note 191, at 683–84 (discussing the costs associated with the foster care system, specifically that in 2002 the total cost to the government was $22.2 billion dollars).

[252] BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, DIETICIANS AND NUTRITIONISTS (2012–2013), *available at* http://www.bls.gov/oco/ocos077.htm#outlook (projecting a twenty percent employment growth in the nutritional sciences field between 2010 and 2020).

[253] Jeanine L. English & Michael R. Tritz, *In Support of the Family: Family Preservation as an Alternative to Foster Care*, 4 STAN. L. & POL'Y REV. 183, 184 (Winter 1992–1993) (discussing how California's child welfare agency is overwhelmed by the numerous responsibilities they are charged with supervising).

[254] *See supra* note 166.

will be trained to find creative alternatives for the family. Through the use of technology, there are now many ways that children can exercise without leaving their homes. CAFAs should help parents find a way for the child to get the recommended amount of daily exercise. Assuming the family has a television, parents may be able to access an "on-demand" fitness channel that provides fun and instructional fitness videos. Other in-home exercise options include interactive video games such as the Wii and Kinect.[255] There are many other inexpensive options as well, such as hula hooping, dancing, or simple calisthenics exercises, all of which provide children with an opportunity to exercise without leaving the home.

1. A CAFA Will Increase Family Preservation

Assigning a CAFA to each family will ensure that, wherever possible, the family remains together. The entire premise of the CAFA program will be to use the least intrusive, yet most beneficial measures to assist a family with the child's obesity struggle. This will eliminate the concern that the state is infringing on parents' autonomous rights.

If a CAFA does determine that the parents are completely unwilling or unable to provide the necessary care, he can recommend that the court proceed in removing the child. By providing parents with an opportunity to discuss the problems that they are having regarding their child's obesity, the likelihood of unnecessary removal will be decreased significantly. In the event that a CAFA finds that the parents really are unfit to care for their obese child, it is more likely that the state will succeed in permanent termination of parental rights. Therefore, a child will only be removed as a last resort, and it will be less likely that a child who is removed from parental care will have to eventually return to that harmful environment.

2. A CAFA Will Help Parents Effectively Remedy Their Child's Obesity

A CAFA will equip parents with the tools and resources necessary to become better parents by providing guidance on how to implement health changes in their obese child's life. The CAFA will work closely with the family in order to determine what obstacles they

[255] *See* Anne Underwood, *The Wii Fit Workout: Can a Videogame Help You Lose Weight?*, NEWSWEEK, May 20, 2008, http://www.newsweek.com/2008/05/20/the-wii-fit-workout.html.

are encountering regarding their child's obesity. Effectively, the CAFA will provide a buffer between the family and the system. This is important because when parents believe that the government is invading their privacy rather than trying to assist them, they tend to resist and become rebellious.[256] Thus, it is important that the CAFA establish a relationship of trust and understanding with the parents for the program to work effectively. The positive relationship between the CAFA and the family will foster communication, and parents will be more likely to ask for help when they need it.

If the parents are failing to comply with any part of the plan, the CAFA will first attempt to determine the reason behind the non-compliance. Many times, parents are unable to comply because of financial difficulty, work schedule, or lack of transportation. Unless it is clear that the parents have no interest in assisting their child in losing the weight, the CAFA should explore alternative plans and seek out any available means of assistance for the family. Because minorities have the highest rates of obesity and are more likely to be living in poverty, it is important for the CAFA to understand how socio-economic and cultural aspects influence a family's situation and be conscientious of this. CAFAs must be trained to offer creative alternatives that can assist families living in the inner city.

Having a CAFA work with the family decreases the chances that the child will ever enter the foster-care system. By concentrating on the family unit from the beginning, this approach utilizes the greatest available resource—the parental influence on the child. Implementing change from the top will have a trickle-down effect and ultimately benefit the child. This approach avoids the inevitable possibility that the child will lose weight in foster care, only to re-gain the weight once he returns home to parents who are continuing to live the same unhealthy lifestyle. Accordingly, fewer children will undergo dangerous fluctuations in weight as a result of temporary foster care placement.[257]

3. The Child Will Avoid Incurring Further Psychological Harm

Through a CAFA intervention, the child receives the best of all possible outcomes. The child is able to remain with his family, escaping the physical and psychological damage potentially caused by temporary or permanent removal. The child will also reap the

[256] *See* George, *supra* note 17, at 67.
[257] *See* discussion *supra*, Part V.

benefits of a healthier lifestyle, and will hopefully conquer obesity entirely. The discrete assistance that the CAFA will provide will draw less attention to the individual obese child, thereby decreasing the stigmatization effect on the child. Furthermore, this eliminates the possibility that the child will blame himself for the break-up of the family, thus reducing the overall damage caused to the child. Perhaps most importantly, this program will preserve the essential bond between parent and child.

VII. CONCLUSION

The right to raise a family is one deeply rooted in American tradition, and the government may not infringe on this right except when doing so is justified by the most compelling reasons. Obesity is not per se evidence of child neglect, and courts may not intervene merely because they believe one's choices constitute bad parenting. Nevertheless, childhood obesity is a dangerous epidemic that justifies limited state intervention. By providing effective and efficient assistance through the use of Court Appointed Family Advocates, states can help families through this immense struggle.

Let's revisit Alexander Draper—how could his case have been handled differently? Alex's mother, Jerri Gray, is an African-American woman living in poverty with an obese child; exactly the type of parent a CAFA has been trained to assist. If Gray had been provided with a CAFA, her desperate attempts to help her son would not have been futile, and certainly would not have gone unnoticed. With the assistance of a CAFA, Gray could have found a doctor for Alex closer to home, or a doctor who made house calls. The CAFA would have exhausted all options, including alternative modes of transportation, or the possibility of financial assistance from the state for transportation funds. The CAFA could have helped Jerri research all available weight loss treatment programs to find one that would accept a child of Alex's weight.

Alex would most likely have lost weight on a CAFA diet plan because the plan would be tailored to his needs, rather than a general nutrition plan administered by the court. In the event that Alex did not lose weight, the CAFA would have intervened to find out why the plan was not working, instead of blindly blaming his mother as the court did. A CAFA would be trained to recognize that as a teenager, Alex spends a lot of time outside of his mother's supervision, providing him with plenty of opportunities to eat food that he is not supposed to eat while he is at school or while his

mother is working. While the court did not even explore the possibility that Alex's condition was associated with a medical disorder, a CAFA would have covered this possibility with the family. Most importantly, a CAFA would have recognized that Jerri loved her son, and could have provided Jerri with the support she needed to help Alex reach a healthy weight instead of casting judgment on her. When Jerri felt overwhelmed and unable to help her son, instead of running away, she could have run to her advocate for help. Unfortunately, rather than receiving an offer for help, Jerri has lost custody of Alex and faces a harsh prison sentence. Sadly, Jerri and Alex can be added to the list of families that the system has failed to protect.

Now, instead of tucking in her son to sleep at night, Jerri spends her nights wondering if she will ever see her son again, and if so, if it will be through prison bars.