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## Filling the Gap: A Call for Legislative Action and Community Mobilization to Implement Physical Education Requirements in Colleges and Universities.

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**FILLING THE GAP: A CALL FOR LEGISLATIVE ACTION  
AND COMMUNITY MOBILIZATION TO IMPLEMENT  
PHYSICAL EDUCATION REQUIREMENTS IN  
COLLEGES AND UNIVERSITIES**

**LIA M. KRAUTMANIS\***

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\* Associate, Guadagnoli & Redding, P.C.; J.D. June 2012, Brooklyn Law School; B.A. May 2007, Boston College. As a former collegiate athlete, I have experienced first-hand the opportunities that regular exercise and competitive sports can provide for young adults. My desire to explore the positive impact that sustained participation in physical activity can have on both an individual and on a community basis provided the impetus to research the intersection between the law and physical education. I wish to thank my family and friends, particularly Max Burkett, for their support throughout the development, writing, and editing of this Article.

## INTRODUCTION

In February 2010, First Lady Michelle Obama launched the *Let's Move!* Campaign, a wide-ranging program aimed at eliminating childhood obesity in a generation.<sup>1</sup> Mrs. Obama has described the childhood obesity epidemic in the United States as a national health crisis, and it is not hard to see why.<sup>2</sup> Recent estimates show that 68% of American adults are considered overweight or obese.<sup>3</sup> That is a larger percentage than the voter turnout for the 2008 Presidential election,<sup>4</sup> and the next generation is not far behind.<sup>5</sup>

The obesity epidemic in the United States has reached beyond just personal health, affecting national security,<sup>6</sup> and the already weakened economy.<sup>7</sup> A study conducted by researchers at the Harvard School of Public

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1. See Mimi Hall & Nanci Hellmich, *Michelle Obama Aims to End Child Obesity in a Generation*, USA TODAY (Feb. 9, 2010, 6:24 PM), [http://usatoday.com/news/health/weightloss/2010-02-09-1Afirstlady09\\_CV\\_N.htm](http://usatoday.com/news/health/weightloss/2010-02-09-1Afirstlady09_CV_N.htm) (discussing Mrs. Obama's national plan, the *Let's Move!* campaign, to fight childhood obesity). Michelle Obama's *Let's Move!* campaign was launched in conjunction with the creation of "the first-ever Task Force on Childhood Obesity," which was charged with conducting a "review of every single program[] and polic[y] relating to child nutrition and physical activity and develop[ing] a national action plan to maximize federal resources and set concrete benchmarks toward the First Lady's national goal." *About Let's Move, LET'S MOVE!*, <http://www.letsmove.gov/about> (last visited Feb. 16, 2013).

2. Hall & Hellmich, *supra* note 1.

3. Katherine M. Flegal et al., *Prevalence and Trends in Obesity Among US Adults, 1999-2008*, 303 J. AM. MED. ASS'N 235, 236, tbl. 2 (2010), available at <http://jama.jamanetwork.com/article.aspx?articleid=185235>.

4. See Michael McDonald, *2008 General Election Turnout Rates*, U.S. ELECTIONS PROJECT, [http://elections.gmu.edu/Turnout\\_2008G.html](http://elections.gmu.edu/Turnout_2008G.html) (last updated Mar. 31, 2012) (estimating that approximately 62% of the voting-eligible population turned out for the November 2008 general election).

5. See WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY, SOLVING THE PROBLEM OF CHILDHOOD OBESITY WITHIN A GENERATION 4 (2010), available at [http://www.letsmove.gov/sites/letsmove.gov/files/TaskForce\\_on\\_Childhood\\_Obesity\\_May2010\\_FullReport.pdf](http://www.letsmove.gov/sites/letsmove.gov/files/TaskForce_on_Childhood_Obesity_May2010_FullReport.pdf) (noting that between 1976 and 2008, the percentage of children considered obese rose from five percent to seventeen percent).

6. See James Dao, *Making Soldiers Fit to Fight, Without the Situps*, N.Y. TIMES, Aug. 30, 2010, [http://www.nytimes.com/2010/08/31/us/31soldier.html?\\_r=0](http://www.nytimes.com/2010/08/31/us/31soldier.html?_r=0) (outlining the U.S. Army's new physical training program, which was "created to help address one of the most pressing issues facing the military today: overweight and unfit recruits.").

7. See NAT'L ASS'N FOR SPORT & PHYSICAL EDUC. & AM. HEART ASS'N, SHAPE OF THE NATION REPORT: STATUS OF PHYSICAL EDUCATION IN THE USA 6 (2010), available at <http://www.aahperd.org/naspe/publications/upload/Shape-of-the-tion-Revised2PDF.pdf> (stating that "[i]t is estimated that obesity will cost the United States \$344 billion in medical-related expenses by 2018, about 21% of the nation's health-care spending."); see also Edward P. Richards et al., *Innovative Legal Tools to Prevent Obesity*, 32 J.L. MED. & ETHICS 59, 59 (2004) (noting the link between obesity and chronic illnesses including diabetes, which many states estimate "accounts for about 10% of their health care budgets.");

Health shows that being obese or overweight ranks as one of the leading causes of preventable death in the United States, trailing only smoking and high blood pressure.<sup>8</sup> Perhaps the most alarming of the study's findings is that physical inactivity is its own independent cause of premature death, directly behind obesity and overweight.<sup>9</sup> The situation has become dire, and public health organizations,<sup>10</sup> scholars,<sup>11</sup> and the White House<sup>12</sup> are calling for federal and state government intervention to turn the tide on this national health crisis.

Encouraging institutions of higher education to adopt mandatory physical education (PE) requirements should be an element of any obesity prevention policy in the United States for a number of reasons. First, this is a population that is highly susceptible to unhealthy lifestyle habits.<sup>13</sup> Research indicates that participation in fitness and exercise activities

UNITEDHEALTH CTR. FOR HEALTH REFORM & MODERNIZATION, THE UNITED STATES OF DIABETES: CHALLENGES AND OPPORTUNITIES IN THE DECADE AHEAD 4 (2010), available at [http://www.unitedhealthgroup.com/hrm/unh\\_workingpaper5.pdf](http://www.unitedhealthgroup.com/hrm/unh_workingpaper5.pdf) (estimating that health spending for diabetes related to obesity was \$195 billion in 2010, "approximately seven percent of total U.S. health spending[,] and projecting the cost "to rise to \$500 billion by 2020.").

8. Goodarz Danaei et al., *The Preventable Causes of Death in the United States: Comparative Risk Assessment of Dietary, Lifestyle, and Metabolic Risk Factors*, PLOS MED., Apr. 2009, at 1, 15, available at <http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1000058>.

9. *Id.*; see *Defining Overweight and Obesity*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/obesity/defining.html> (last updated Apr. 27, 2012) (stating that although more commonly recognized as an adjective, "overweight" may also be used as a noun in medical settings to identify a "range[s] of weight that [is] greater than what is generally considered healthy for a given height."); *Overweight Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/overweight> (last visited Feb. 16, 2013) (defining "overweight" as a noun, adjective, and verb).

10. SHAPE OF THE NATION REPORT, *supra* note 7, at iii.

11. See generally 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, 35 (2010) (suggesting that states should intervene in situations where parents are unable to support or provide healthy environments for their morbidly obese children).

12. See Hall & Hellmich, *supra* note 1 (explaining First Lady Michelle Obama's *Let's Move!* campaign).

13. Anthony Serrano, *Boston U. Study Reveals Most Americans Will Become Overweight*, DAILY FREE PRESS, Oct. 11, 2005, <http://dailyfreepress.com/2005/10/11/bu-study-reveals-high-obesity-rates/> ("[N]ine out of [ten] men and seven out of [ten] women will become clinically overweight in their lifetimes . . ."). Vasani Ramachandran, author of the Harvard study, cautions that the statistics point to "specific ramifications [for] college students" because lifestyle choices made by young adults during their college years can become ingrained for a lifetime. See also Phillip B. Sparling, *College Physical Education: An Unrecognized Agent of Change in Combating Inactivity-Related Diseases*, 46 PERSPECTIVES BIOLOGY & MED., no. 4, 2003 at 579, 581, available at [http://muse.jhu.edu/journals/perspectives\\_in\\_biology\\_and\\_medicine/v046/46.4sparling.html](http://muse.jhu.edu/journals/perspectives_in_biology_and_medicine/v046/46.4sparling.html) (noting that "diseases of inactivity,"

steadily declines throughout high school and college, with an even more pronounced fall-off in the years immediately following college.<sup>14</sup> Approximately 15-20% of college students maintain a sedentary lifestyle, engaging in exercise less than one day a week.<sup>15</sup> Another 40% of college students are “irregular exercisers” whose reported physical activity habits still fall well below sufficient levels.<sup>16</sup>

Second, any progress that is made by implementing obesity prevention programs like *Let's Move!* in elementary, middle, and high schools may be for naught if students are not encouraged to maintain and improve upon those gains during their college years.<sup>17</sup> In a study of recent college graduates, 85% of respondents who exercised on a routine basis during their senior year of college reported that they were still as physically ac-

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such as coronary artery disease, diabetes, and colorectal cancer can begin in individuals as young as twenty or thirty years old).

14. Phillip B. Sparling, *College Physical Education: An Unrecognized Agent of Change in Combating Inactivity-Related Diseases*, 46 PERSPECTIVES BIOLOGY & MED., no. 4, 2003 at 579, 581, available at [http://muse.jhu.edu/journals/perspectives\\_in\\_biology\\_and\\_medicine/v046/46.4sparling.html](http://muse.jhu.edu/journals/perspectives_in_biology_and_medicine/v046/46.4sparling.html).

15. See *id.* (noting that “diseases of inactivity,” such as coronary artery disease, diabetes, and colorectal cancer can begin in individuals as young as twenty or thirty years old); see also Brookeblerdahl, *College Students Are At-Risk For Sedentary Lifestyles*, HEALTHY EATING & EXERCISING BLOG (Apr. 9, 2011), <http://healthyeatingandexercising.wordpress.com/2011/04/09/college-students-are-at-risk-for-sedentary-lifestyles/> (revealing that college “. . . is the first time they have to manage their time and make time to exercise.”); Alex Dombrowski, *The Health of a College Student*, FRUITFULMINDS, <http://www.fruitfulminds.org/articles/the-health-of-a-college-student.html> (last visited Feb. 16, 2013) (crediting a cumulative mix of a sedentary lifestyle along with stress and sleep deprivation with leading to an unhealthy lifestyle for college students).

16. Sparling, *supra* note 14 (labeling physical activity occurring one to two days a week as irregular); see Tara Parker-Pope, *Vigorous Exercise Linked With Better Grades*, N.Y. TIMES (June 3, 2010, 12:21 PM), <http://well.blogs.nytimes.com/2010/06/03/vigorous-exercise-linked-with-better-grades/> (linking high grades to an increased level of exercise); see also SarahsFabChannel, *Back to School Textbook Workout*, YOUTUBE, <http://www.youtube.com/watch?v=uVYAmSH0gZA> (last visited Feb. 16, 2013) (providing exercise routines to turn vices into healthy college activity).

17. See Nanci Hellmich, *Many Obese Teens Put on Even More Weight as Young Adults*, USA TODAY (Nov. 9, 2010, 4:00 PM), [http://www.usatoday.com/yourlife/fitness/2010-11-09-obese-teens\\_N.htm](http://www.usatoday.com/yourlife/fitness/2010-11-09-obese-teens_N.htm) (highlighting a recent study indicating that “heavy teenagers are often destined for skyrocketing weight gain in their 20s.”); see also Judy Baker, *Kids and College Volunteers All Benefit from Let's Move! in Kansas City*, LET'S MOVE BLOG (May 16, 2011), <http://www.letsmove.gov/blog/2011/05/16/kids-and-college-volunteers-all-benefit-let%E2%80%99s-move-kansas-city> (showcasing college students serving as volunteers to encourage younger students to not only increase physical activity but also graduation rates); FLOTUS: Says “Let's Move” College Students Walking Across US For False, PRO LIFE IN TN BLOG (May 26, 2011), <http://prolifeintn.blogspot.com/2011/05/flotus-says-lets-movecollege-students.html> (describing college students' commitment to walk twenty miles per day over their summer).

tive, if not more so, six years later.<sup>18</sup> Conversely, approximately 81% of respondents who did not regularly engage in exercise during their senior year of college reported that their “current activity level was about the same or even less” than when they were in college.<sup>19</sup> Significantly, a lack of mandatory PE classes throughout the college years has been identified by at least one study as a barrier to regular physical activity for college-aged students.<sup>20</sup> These statistics suggest that requiring college students to participate in a PE curriculum, including both physical activity and wellness courses, may effectively establish healthy habits that will lead to a physically active and healthy adulthood.<sup>21</sup>

This Article asserts that it is essential to the national fight against obesity that institutions of higher education implement uniform PE requirements. Part I provides a background to the obesity epidemic, as well as a brief history of PE in the United States. Part II analyzes the current status of PE programs in primary and secondary education schools (K-12 schools), and institutions of higher education. Part III outlines traditional administrative schemes at American institutions of higher education, and potential legal roadblocks to federal and state regulatory involvement. Part IV recommends that a mixture of community and school-based measures, including PE requirements, be utilized at the collegiate level. This Article concludes that, in order to fill a gap in the current national obesity prevention policy, legislation should be enacted providing financial support for PE programs in institutions of higher education, and that completion of PE and wellness courses should be a graduation requirement at all colleges and universities in the United States.

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18. Sparling, *supra* note 14, at 583.

19. *Id.*

20. Vivian Dzokoto et al., *Student Lifestyles and Emotional Well-Being at a Historically Black University* 511, 514 (Fayetteville State Univ. Sch. of Educ., Faculty Working Paper No. 11, 2007), available at [http://digitalcommons.uncfsu.edu/soe\\_faculty\\_wp/11](http://digitalcommons.uncfsu.edu/soe_faculty_wp/11); see also *Mandatory Physical Education in Colleges and Universities is at All-Time Low, Report Shows*, HUFFPOST HEALTHY LIVING (Feb. 4, 2013), [http://www.huffingtonpost.com/2013/01/07/physical-education-college-university-mandatory\\_n\\_2425627.html](http://www.huffingtonpost.com/2013/01/07/physical-education-college-university-mandatory_n_2425627.html) (notwithstanding the amount of funding placed into research on healthy activity, schools have not committed to applying this practice into the educational arena as a part of the curriculum).

21. Sparling, *supra* note 14, at 585 (“College physical education can serve as an agent of change in improving the quality of life for Americans. The evidence that regular physical activity improves health is indisputable.”).

## I. EPIDEMIC OBESITY: HOW DID WE GET HERE, AND HOW DO WE GET OUT?

Between 1980 and 2008, the incidence of obesity among young Americans increased threefold.<sup>22</sup> There is growing consensus that rising obesity rates are driving a surge in both Type 2 diabetes and indicators of heart disease risk in children.<sup>23</sup> Dr. Lee Goldman, a cardiologist and Dean at Columbia University, warns that “[t]he obesity epidemic in adolescents is the biggest adverse time bomb we’ve got going on in coronary diseases.”<sup>24</sup> Former U.S. Surgeon General Richard Carmona has even gone so far as to state that “[o]besity is the terror within, [and] . . . [u]nless we do something about it, the magnitude of the dilemma will dwarf 9/11 or any other terrorist attempt.”<sup>25</sup>

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22. See WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY, *supra* note 5 (stating that the prevalence of obesity among children and adolescents has tripled from 5% to 17% over a thirty year period); see also *Overweight in Children*, AM. HEART ASS’N (Jan. 16, 2013), [http://www.heart.org/HEARTORG/GettingHealthy/Overweight-In-Children\\_UCM\\_304054\\_Article.jsp](http://www.heart.org/HEARTORG/GettingHealthy/Overweight-In-Children_UCM_304054_Article.jsp) (noting that one in three American children are currently considered overweight or obese, and also noting that the American Heart Association recommends increased physically activity for children as a way to successfully reduce a child’s weight); CTR. FOR DISEASE CONTROL & PREVENTION, NAT’L CTR. FOR HEALTH STATISTICS, PREVALENCE OF OBESITY AMONG CHILDREN AND ADOLESCENTS: UNITED STATES TRENDS, 1963-1965 THROUGH 2007-2008, at 1, 1 (2010), available at [http://www.cdc.gov/nchs/data/hestat/obesity\\_child\\_07\\_08/obesity\\_child\\_07\\_08.htm](http://www.cdc.gov/nchs/data/hestat/obesity_child_07_08/obesity_child_07_08.htm) (reporting an increase in childhood obesity rates in the United States and noting that the increase began in the latter part of the 1970s).

23. See Pam Belluck, *Child Obesity Seen as Warning of Heart Disease*, N.Y. TIMES, Nov. 11, 2008, <http://www.nytimes.com/2008/11/12/health/12heart.html> (affirming that health experts believe that there is a correlation between increased prevalence of childhood obesity and an increase in rates of Type 2 Diabetes in children); see also Jonathan LaPook, *Type 2 Diabetes Surges Among Children and Teens*, CBS NEWS, Apr. 30, 2012, [http://www.cbsnews.com/8301-18563\\_162-57424501/type-2-diabetes-surges-among-children-and-teens-and-key-treatment-for-adults-often-fails](http://www.cbsnews.com/8301-18563_162-57424501/type-2-diabetes-surges-among-children-and-teens-and-key-treatment-for-adults-often-fails) (reporting that an increased number of young people are contending with Type 2 Diabetes, a disease that historically effects a greater number of adults than children. Health experts recommend physical activity as a method of reducing the risk of developing Type 2 Diabetes as a result of weight control issues).

24. Belluck, *supra* note 23. In a December 2007 publication, Dr. Goldman “predicted that by 2035, there would be 100,000 additional cases of heart disease attributed to current instances of obesity in children, an estimate especially noteworthy given that advances in treatment have reduced cardiac deaths in recent years.” *Id.*

25. Katrina A. Jackson, *Obesity Called ‘The Terror Within’: Surgeon General Says the Crisis Could Dwarf 9/11*, DESERET NEWS (Mar. 2, 2006), <http://www.deseretnews.com/article/635188632/Obesity-called-the-terror-within.html>. The article also notes that obesity rates among children and teens have tripled over the past forty years. *Id.*

### A. *The Perfect Storm: Contributing Factors to Expanding Waistlines*

The first step in combating obesity is identifying the problem. Put simply, obesity means weighing more than what is generally considered to be healthy for a given height.<sup>26</sup> One of the best tools for assessing a population's body fatness level is the Body Mass Index (BMI), a number determined by an individual's height and weight.<sup>27</sup> Unlike other body fat tests, BMI calculation "requires only height and weight" measurements, making it an "inexpensive and easy [tool] . . . for clinicians and for the general public" to use.<sup>28</sup> Once BMI is calculated, it is interpreted using different criteria to determine where the individual or population falls on a weight-status spectrum.<sup>29</sup> Individuals with a BMI that is 25.0 or higher are considered overweight, and those with a BMI of 30.0 or higher are identified as obese.<sup>30</sup>

The National Institutes of Health describe obesity as "a complex multifactorial chronic disease that develops from an interaction of genotype and the environment."<sup>31</sup> Thus, in addition to certain genetic predispositions,<sup>32</sup> "social, behavioral, cultural, [and] physiological" influences are also significant in the development of obesity.<sup>33</sup>

26. See NAT'L INSTS. OF HEALTH & NAT'L HEART, LUNG, & BLOOD INST., CLINICAL GUIDELINES ON THE IDENTIFICATION, EVALUATION, AND TREATMENT OF OVERWEIGHT AND OBESITY IN ADULTS: THE EVIDENCE REPORT, at xi (1998), available at [http://www.nhlbi.nih.gov/guidelines/obesity/ob\\_gdlns.htm](http://www.nhlbi.nih.gov/guidelines/obesity/ob_gdlns.htm) (noting that obesity and overweight are not mutually exclusive terms, as those who are obese are also overweight).

27. *Id.* "BMI is calculated as weight (kg)/height squared(m<sup>2</sup>). To estimate BMI using pounds and inches, use: [weight (pounds)/height (inches)<sup>2</sup>] x 703." *Id.*

28. *About BMI for Adults*, CTRS. FOR DISEASE CONTROL & PREVENTION, [http://www.cdc.gov/healthyweight/assessing/bmi/adult\\_BMI/index.html](http://www.cdc.gov/healthyweight/assessing/bmi/adult_BMI/index.html) (last updated Sept. 13, 2011). Although BMI does not measure body fat directly, "research has shown that BMI correlates to direct measures of body fat, such as underwater weighing and dual energy x-ray absorptiometry (DXA)." *Id.* For further discussion of the different body fat measuring techniques, see THE EVIDENCE REPORT, *supra* note 26, at xiv.

29. See *About BMI for Adults*, *supra* note 28 (listing as other assessments to be made: "skinfold thickness measurements, evaluations of diet, physical activity, family history, and other appropriate health screenings.").

30. *Id.* The calculation formula varies slightly for adults twenty years old and older versus children and adolescents, but the final numbers are comparable. *Id.*

31. THE EVIDENCE REPORT, *supra* note 26.

32. While it is clear that there are considerable genetic determinants influencing the occurrence of obesity, "the genetic composition of [a] population does not change rapidly." James O. Hill & Frederick L. Trowbridge, *Childhood Obesity: Future Directions and Research Priorities*, 101 PEDIATRICS 570, 571 (1998). Therefore, research shows that "the large increase in the prevalence of obesity . . . must reflect major changes in nongenetic factors." *Id.*

33. THE EVIDENCE REPORT, *supra* note 26.

Americans' increasingly sedentary lifestyles are the primary cause of the rapid spike in obesity and overweight in this country.<sup>34</sup> Contributing factors to an increasingly sedentary population include a growing reliance on technology, as well as environmental and societal shifts.<sup>35</sup> For example, rather than walk, people now drive or take public transportation to work, and, once there, they often have ready access to vending machines containing inexpensive and fattening processed foods.<sup>36</sup>

Harvard University researchers conducted a recent study that has also shed light on the social element of obesity, and revealed that “[o]besity spreads much like infectious diseases, particularly with respect to individuals’ social networks[,]” and that “having more interactions with obese people . . . increases one’s risks of becoming obese.”<sup>37</sup> These findings are particularly relevant to young adults because “they are thought to be more easily influenced by peers[,]”<sup>38</sup> and are subject to some of the unhealthy characteristics of the stereotypical college atmosphere.<sup>39</sup> The socially contagious nature of obesity,<sup>40</sup> coupled with peer pressure and a sedentary lifestyle, already prevalent on college campuses, puts college

34. See Benjamin Montgomery, *The American Obesity Epidemic: Why the U.S. Government Must Attack the Critical Problems of Overweight & Obesity Through Legislation*, 4 J. HEALTH & BIOMEDICAL L. 375, 380–81 (2008) (identifying examples such as driving rather than biking, using a dishwasher instead of washing dishes by hand, and playing basketball on a video game rather than outside).

35. See Sparling, *supra* note 14, at 582 (“As a society, decreasing amounts of time are spent in activities requiring physical skills and motor proficiencies. Instead, more time is spent in nonphysical pursuits involving televisions, computers, and cell phones.”). “[H]ours spent watching television, hours spent playing video games, the lack of physical activity and the choice of food for both snacks and meals” are also contributors to the decidedly more sedentary lifestyle of modern American youths. George, *supra* note 11, at 39.

36. *Understanding Adult Obesity*, WEIGHT-CONTROL INFO. NETWORK (last modified Sept. 13, 2010), <http://win.niddk.nih.gov/publications/understanding.htm>; see Stacey L. Fabros, *A Cry for Health: State and Federal Measures in the Battle Against Childhood Obesity*, 7 J. L. & FAM. STUD. 447, 447 (2005) (noting that the primary culprits of obesity in both children and adults are “eating too much and moving around too little.”).

37. Helen X. Yang, *Obesity Spreads Like the Flu, Study Finds*, HARVARD CRIMSON (Nov. 5, 2010), <http://www.thecrimson.com/article/2010/11/5/obesity-obese-people-social/>. David G. Rand, a co-author of the Harvard study, noted that “[t]raditional approaches to studying obesity don’t take into account social factors.” *Id.*

38. *Id.*

39. Research shows that college students are highly susceptible to forming bad health habits in college. See Nanci Hellmich, *Beer, Bad Habits Fuel College Weight Gain*, USA TODAY (Oct. 29, 2008), [http://www.usatoday.com/news/health/weightloss/2008-10-28-college-weight\\_N.htm](http://www.usatoday.com/news/health/weightloss/2008-10-28-college-weight_N.htm) (noting that unhealthy habits, like drinking large amounts of beer and not exercising, can develop during the college years and contribute to weight gain).

40. See Yang, *supra* note 37 (explaining how obesity can spread like a disease).

students at a distinct risk for obesity and the resultant health problems.<sup>41</sup> Required wellness and Physical Education courses can serve to counteract this dangerous trend.<sup>42</sup>

### B. *The History of Physical Education in the United States*

Health education classes have long been a part of the K-12 school curricula in the United States.<sup>43</sup> Following World War I, the U.S. government released statistics showing that a third of drafted men were “unfit for combat,” prompting the passage of legislation aimed at improving PE curricula in American public schools.<sup>44</sup> Influenced by the creation of the President’s Council on Youth Fitness and increased interest in the matter from a variety of organizations, including the American Heart Association (AHA) and the American Medical Association (AMA), PE programs continued to flourish in public schools throughout the twentieth century.<sup>45</sup> However, that trend has seen a sharp reversal in recent years, and the prevalence of successfully implemented PE programs is on the decline.<sup>46</sup> School officials have cited budgetary restraints and increasing demand for academic classes as driving forces behind the decrease in school-facilitated PE programs.<sup>47</sup> The effects extend from kindergarten all the way through college.

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41. See Sparling, *supra* note 14, at 581 (explaining that a sedentary lifestyle is linked to chronic diseases); see also Toben F. Nelson et al., *Disparities in Overweight and Obesity Among US College Students*, 31 AM. J. HEALTH BEHAV. 363, 371 (2007) (“The transition from adolescence to adulthood is one developmental period that may be a critical stage for weight gain.”).

42. See Sparling, *supra* note 14, at 583-84 (explaining that college-level physical education classes are the last chance to target obesity).

43. See Comm. on Health Problems in Educ., Am. Pub. Health Ass’n, *The Present Status of Health Education, Physical Education and School Medical Inspection*, 14 AM. J. PUB. HEALTH 868, 868 (1924) (noting that, as of the time of publication in 1924, “all states require[d] the teaching of hygiene and physiology” in schools).

44. Lance C. Dalleck & Len Kravitz, *The History of Fitness*, U.N.M., <http://www.unm.edu/~lkravitz/Article%20folder/history.html> (last visited Feb. 18, 2013).

45. *Id.*

46. Breighanne Aileen Fisher, *Community-Based Efforts at Reducing America’s Childhood Obesity Epidemic: Federal Lawmakers Must Weigh In*, 55 DEPAUL L. REV. 711, 719 (2006).

47. Nanci Hellmich, *Study: Physical Activity Can Boost Student Performance*, USA TODAY (Apr. 14, 2010), [http://www.usatoday.com/news/education/2010-04-14-letsmovein-school15\\_ST\\_N.htm](http://www.usatoday.com/news/education/2010-04-14-letsmovein-school15_ST_N.htm). While schools are decreasing or eliminating physical education because of the “assumption that more classroom time will improve academic performance and increased standardized test scores[.]” studies clearly show that physical activity improves a student’s ability to learn. NAT’L ASSOC. FOR SPORT & PHYSICAL EDUC., REDUCING SCHOOL EDUCATION PROGRAMS IS COUNTER-PRODUCTIVE TO STUDENT HEALTH AND LEARNING AND TO OUR NATION’S ECONOMIC HEALTH 1 (2009), <http://www.aahperd.org/>

In the first half of the twentieth century, most American universities required students to complete “two to four semesters” of PE in order to graduate.<sup>48</sup> One of the reasons for the requirement was the perceived necessity of preparing men for the physical challenges of war.<sup>49</sup> Another was the belief that a well-rounded student must be not only challenged academically, but also physically healthy.<sup>50</sup> However, by the early 1960s, PE requirements at American universities and colleges were on the decline.<sup>51</sup> Factors contributing to the decline included an increased student demand for a variety of course selection, a decrease in the perceived necessity of fitness as a national security issue, and substantial growth in the number of students attending college or a university thus making required courses administratively difficult to manage.<sup>52</sup>

Opponents of mandatory PE cite a host of reasons for removing the curricula from American schools. Yet, many of the purported justifications are unsupported. For example, school systems have cited pressure to perform well on standardized tests as a justification for the elimination of PE classes.<sup>53</sup> However, research indicates that students who take breaks from the classroom to be physically active during the day are better able to concentrate on their schoolwork, and may perform better on standardized tests.<sup>54</sup> Scholars have found the same to be true of college-aged individuals, for whom cardiovascular fitness optimizes educational

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[naspe/advocacy/governmentRelations/upload/REDUCING-SCHOOL-PHYSICAL-EDUCATION-PROGRAMS-IS-COUNTER-11-25-09-FINAL-2-3.pdf](http://www.aahperd.org/naspe/advocacy/governmentRelations/upload/REDUCING-SCHOOL-PHYSICAL-EDUCATION-PROGRAMS-IS-COUNTER-11-25-09-FINAL-2-3.pdf).

48. Pamela Hodges Kulinna et al., *The Progression and Characteristics of Conceptually Based Fitness/Wellness Courses at American Universities and Colleges*, 58 J. AM. C. HEALTH 127, 127 (2009).

49. Sparling, *supra* note 14, at 580.

50. *Id.*

51. Kulinna et al., *supra* note 48. Some of the factors that caused the decline were student demand for a wider variety of offered courses, the reduced need for physically fit boys for war, and the larger number of students enrolled in college itself, making administration of required physical education courses more difficult. *Id.*

52. *Id.*

53. See Hellmich, *Study: Physical Activity Can Boost Student Performance*, *supra* note 47 (quoting Howell Wechsler, Director of the Division of Adolescent and School Health, Centers for Disease Control and Prevention) (“Some short-sighted people thought that cutting back on time spent on physical education to spend more time drilling for tests would improve test scores[.]”).

54. *Id.*; see also Greg Berg, *Using Neuroscience as the New Front in Physical Education Advocacy*, STRATEGIES, Sept.–Oct. 2010, at 36, available at <http://www.aahperd.org/naspe/advocacy/governmentRelations/upload/Sept-Oct-10.pdf> (“There is empirical evidence that correlates physical activity and quality physical education with increased executive cognitive function and test scores.”); Kim Carrollo, *Physical Activity May Help Kids’ Grades, Too*, ABC NEWS (Jan. 3, 2012), available at <http://abcnews.go.com/Health/physical-activity-linked-academic-performance/story?id=15273908> (“New research suggests [physical activity] may also help [children] perform better in school.”).

achievements and cognitive performance.<sup>55</sup> Research also indicates that, in addition to improved academic performance among college students, regular physical activity leads to an improved overall quality of life.<sup>56</sup>

Budget constraints are also commonly cited as a reason for the exclusion of PE as a required subject in schools.<sup>57</sup> While it is undeniable that expanded school programming will require more funding in the present, there is strong evidentiary support for the future savings that preventative measures like physical education initiatives will provide.<sup>58</sup> Research has consistently linked obesity to chronic health problems like diabetes, hypertension, and coronary heart disease.<sup>59</sup> The medical costs associated with obesity and these related health problems are a huge burden on the U.S. economy, totaling approximately \$147 billion in 2008.<sup>60</sup> Studies have shown that “[a]cross all [Medicare, Medicaid, and private insurance] payers, obese people had per capita medical spending that was \$1,429 (42%) greater than spending for normal-weight people in 2006.”<sup>61</sup> These statistics point to an undeniable link between obesity and health spending,<sup>62</sup> suggesting that as obesity prevalence continues to grow, so too will

55. See Maria A. I. Åberg et al., *Cardiovascular Fitness Is Associated with Cognition in Young Adulthood*, 106 Proc. Nat'l Acad. Sci. 20906, 20908 (2009), available at <http://www.pnas.org/content/106/49/20906.full.pdf> (reporting that data from the group's study “demonstrate[s] a clear positive association between cardiovascular fitness and cognitive performance in a large population of young adults.”).

56. See Sparling, *supra* note 14, at 585 (“College physical education can serve as an agent of change in improving the quality of life for Americans.”).

57. See U.S. GOV'T ACCOUNTABILITY OFFICE (GAO), *K-12 EDUCATION: SCHOOL-BASED PHYSICAL EDUCATION AND SPORTS PROGRAMS* 14 (2012), available at <http://www.gao.gov/assets/590/588944.pdf> (finding that many school officials cite “budget cuts and inadequate facilities as major challenges for schools to provide physical education opportunities for students”); see also *Phys Ed Cuts May Leave Children's Health Behind*, FOX NEWS (Nov. 20, 2005), available at <http://www.foxnews.com/story/0,2933,176168,00.html> (reporting on cuts to physical education programs in California due to budget constraints).

58. See Eric A. Finkelstein et al., *Annual Medical Spending Attributable to Obesity: Payer-And Service-Specific Estimates*, 28 HEALTH AFFAIRS w822, w826 (2009) (summarizing long-term increased spending on medical care for obese people).

59. *Obesity and Overweight: Health Consequences*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/obesity/causes/health.html> (last updated Apr. 27, 2012). The Centers for Disease Control and Prevention also lists cancer, stroke, and liver and gallbladder disease as among those related to obesity. *Id.*

60. *Id.* Direct medical costs include diagnostic and treatment services, while indirect costs include the value of income lost from decreased productivity, restricted activity, and bed days. *Id.*

61. See Finkelstein et al., *supra* note 58 (noting that, in aggregate, the annual medial burden of obesity has increased from 6.9% to 9.1% of annual medical spending, possibly reaching as high as \$147 billion dollars in 2008 dollars).

62. See *id.* (stating that, in the absence of obesity, Medicare and Medicaid spending would be 8.5% and 11.8% lower, respectively).

the national healthcare bill.<sup>63</sup> Thus, one of the most effective means of normalizing ballooning healthcare costs is to implement a “strong and sustained reduction in obesity prevalence.”<sup>64</sup>

## II. THE CURRENT LAY OF THE LAND

The obesity crisis in the United States has compelled public policy and legislative action across a broad patchwork of society. Three of these initiatives: the Take Care New York campaign, the Patient Protection and Affordable Care Act (PPACA), and the *Let's Move!* campaign are particularly promising in their approach to the obesity epidemic, and are examples of the variety of tools available at the state and federal levels to promote public health.

The Take Care New York campaign, originally launched in 2004, is an example of a successful public policy initiative intended to promote healthy lifestyles within a diverse local community. Take Care New York sets forth benchmarks New Yorkers can aim for in order to become more physically active and eat healthier, and sets ambitious goals that are measured annually.<sup>65</sup> On the legislative side, the recently enacted PPACA is likely to influence obesity and overall health policy on a national scale.<sup>66</sup> The effect of the legislation will specifically impact the workforce, as em-

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63. See *id.* at 831 (explaining that the rise in obesity rates from 1998 to 2006 also attributed to a 37% increase in medical spending).

64. See *id.* (stating that although pharmaceutical, medical, and surgical interventions are available to treat obesity, these methods remain rare. Thus, the costs attributable to obesity are mainly associated with the costs generated from treating the diseases that obesity promotes).

65. N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, TAKE CARE NEW YORK 2012: A POLICY FOR A HEALTHIER NEW YORK CITY 3 (2009), available at <http://www.nyc.gov/html/doh/downloads/pdf/tcny/tcny-2012.pdf>. “Take Care New York (TCNY) is a comprehensive health policy crafted by the Department of Health and Mental Hygiene (DOHMH) to help New Yorkers live longer and healthier lives.” *Id.* at 2. The original TCNY initiative was so successful that it was renewed as Take Care New York 2012. *Id.* at 3. The new iteration of the health policy continues the fight against the primary causes of preventable death in New York City, including obesity. *Id.* Take Care New York 2012 has identified obesity as a problem that can be successfully combated using an evidence-based three-pronged approach, including: (1) “[d]eveloping laws, regulations and other policies that will improve environmental, economic[,] and social conditions affecting health,” (2) “[e]mphasizing preventive health care, improving quality of care, and expanding access to care,” and (3) promoting overall health through “[i]nforming, educating and engaging New Yorkers . . . .” *Id.*

66. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified in scattered sections of 42 U.S.C.). See generally Gwendolyn Roberts Majette, *PPACA and Public Health: Creating a Framework to Focus on Prevention and Wellness and Improve Public Health*, 39 J.L. MED. & ETHICS 366 (2011) (providing an in-depth analysis of the prevention, wellness, and overall aims of the PPACA).

employers look “to create or expand their wellness programs” to simultaneously take advantage of incentive provisions within the Act and lower their overall healthcare costs.<sup>67</sup> With respect to childhood obesity, Mrs. Obama’s *Let’s Move!* campaign provides PE benchmarks and recommendations for K-12 schools in addition to encouraging a combination of legislative action and community involvement to achieve those goals.<sup>68</sup> Schools are a logical environment for the implementation of obesity prevention initiatives; because children spend a great deal of their time there,<sup>69</sup> schools naturally serve as a primary location for “physical activity and dietary intake” for students.<sup>70</sup> This contention is supported by recent studies indicating that interventions at K-12 schools are effective.<sup>71</sup>

#### A. *Physical Activity Guidelines: What Should Be Required?*

One of the five pillars of the *Let’s Move!* campaign is “increasing physical activity” among children and adolescents.<sup>72</sup> This element is significant because regular physical activity is key to maintaining overall health, plus, healthy habits developed during childhood and young adulthood often lay the groundwork for physically active behavior throughout a lifetime.<sup>73</sup> Further, recent research shows that regular participation in PE

67. See Gregory C. Keating, *Survey Suggests PPACA’s Wellness Provisions Will Provide Boost to Wellness Programs*, HEALTHCARE EMP. COUNS. (June 9, 2010), <http://healthcareemploymentcounsel.com/employee-benefits/wellness-initiatives/survey-suggests-ppaca-wellness-provisions-will-provide-boost-to-wellness-programs/> (“[Sixty percent] of employers are likely or very likely to create or expand their wellness programs as a direct result of the PPACA’s incentive provision. [Seventy-eight percent] of employers already agreed or somewhat agreed with the statement that the costs of the health care reform law make it more important than ever that employers keep their workers healthy, and motivated to adopt healthy lifestyles.”).

68. See *About Let’s Move*, LET’S MOVE!, <http://www.letsmove.gov> (last visited Feb 17, 2013) (“Everyone has a role to play in reducing childhood obesity, including parents and caregivers, elected officials from all levels of government, schools, health care professionals, faith-based and community-based organizations, and private sector companies.”).

69. WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY, *supra* note 5, at 68.

70. William H. Dietz et al., *Policy Tools for the Childhood Obesity Epidemic*, 30 J.L. MED. & ETHICS (SPECIAL SUPP.) 83, 84 (2002).

71. Fisher, *supra* note 46, at 727.

72. *About Let’s Move*, *supra* note 68. The five pillars of the *Let’s Move!* campaign are: (1) “creating a healthy start for children,” (2) “empowering parents and caregivers,” (3) “providing healthy food in schools,” (4) “improving access to healthy, affordable foods,” and (5) “increasing physical activity.” *Id.*

73. See SHAPE OF THE NATION REPORT, *supra* note 7, at 3 (“Risk factors for chronic diseases such as heart disease, high blood pressure, Type 2 diabetes, and osteoporosis can develop early in life, and regular physical activity can be a significant preventative measure.”).

classes is directly associated with greater cardiovascular fitness and improved weight status among adolescents.<sup>74</sup>

Although federal law does not require that PE be provided in American schools, the federal government has implemented guidelines for K-12 schools to follow regarding PE classes.<sup>75</sup> In 2008, the U.S. Department of Health and Human Services (HHS) issued comprehensive physical activity guidelines for all age groups, including college-aged young adults.<sup>76</sup> HHS recommends that adults over the age of eighteen do “at least 150 minutes of moderate-intensity aerobic physical activity” per week, in order to reduce the risk of chronic illness and maintain a healthy body weight and fat percentage.<sup>77</sup> The National Association for Sport and Physical Education (NASPE) has also issued school-specific guidelines for the K-12 environment, recommending that high schools provide students with 225 minutes of instructional PE per week.<sup>78</sup> Similar to the guidelines and goals of the *Let's Move!* campaign, NASPE and the American Heart Association (AHA) released the “Shape of the Nation Re-

74. See Kristine A. Madsen et al., *Physical Activity Opportunities Associated With Fitness and Weight Status Among Adolescents in Low-Income Communities*, 163 ARCHIVES PEDIATRIC ADOLESCENT MED. 1014, 1018 (2009) (noting that the authors of the study identified physical education classes as the “highest-impact area” in terms of improving student physical fitness and reaching healthy weight status. The findings also suggests that “[a]ll facets of PE—exposure, intensity, enjoyability—positively affected students’ health . . . [thereby contributing to a] growing body of literature identifying the importance of PE in increasing physical activity and fitness.”).

75. See SHAPE OF THE NATION REPORT, *supra* note 7, at 1 (explaining that states set requirements and define the guidelines for PE programs but the individual school districts are charged with interpretation and enforcement). Although no current federal law explicitly requires that physical education be provided in American schools, several federal statutes related to education condition funding upon implementation of certain measures. See, e.g., Higher Education Act of 1965, 20 U.S.C. §§ 1071, 1077 (2006) (requiring certain educational measures in order to receive federal funding); Child Nutrition and WIC Reauthorization Act of 2004, 42 U.S.C. § 1754 (2006) (placing restrictions on the allocation of federal funds for nutrition programs).

76. See U.S. DEP’T OF HEALTH & HUMAN SERVS., 2008 PHYSICAL ACTIVITY GUIDELINES FOR AMERICANS 21 (2008), available at <http://www.health.gov/paguidelines/pdf/paguide.pdf> (noting that this is the first comprehensive set of guidelines regarding physical activity produced by the Federal government).

77. See *id.* (defining aerobic activities as physical activities where people move their larger muscles in a rhythmic manner for sustained periods of time. This causes a person’s heart to beat more rapidly in order to keep up with the body’s movements).

78. See SHAPE OF THE NATION REPORT, *supra* note 7, at 4–5 (referencing guidelines that suggest that both children and adolescents should engage in at least sixty minutes of physical activity daily consisting of aerobic, muscle-strengthening, and bone-strengthening exercises).

port” in 2010 to measure current PE standards in American K-12 schools and to provide additional recommendations.<sup>79</sup>

While federal guidelines are helpful tools, the states and local governments are currently burdened with developing PE programs and facilitating their implementation.<sup>80</sup> Hence, the Shape of the Nation Report also proposes that, rather than simply setting guidelines, Congress should pass legislation that would support the implementation, development, and improvement of PE programs, and encourage or require state and local governments to follow their lead.<sup>81</sup> Recent scholarship has also proposed that Congress extend the effects of the PPACA beyond the workforce by “mak[ing] PPACA-authorized state grants contingent on state and local laws that impose minimum requirements for public school physical education periods and on zoning regulations that alter the built environment to maximize activity and access to healthy foods.”<sup>82</sup>

Among other proposed legislation, NASPE and the AHA currently support the Fitness Integrated with Teaching Kids Act (FIT Kids Act), an amendment to the Elementary and Secondary Education Act (ESEA), which would require K-12 schools to incorporate physical fitness and wellness programs into the school day, and would expand research and

79. See *id.* at 1 (claiming the challenge in tracking the nation’s success in physical education is that there is not a standard benchmark to compare. The article notes that mandates differ greatly from state to state. The report explains the information measured is an attempt to compare “apples to apples . . . [b]ut not all states had every apple.”).

80. See *id.* (stating that school districts have the option of meeting the minimum requirements or may chose to go above the state mandates).

81. See *id.* at 73–74 (discussing various legislative measures that would support those goals); see also John Cawley et al., *The Impact of State Physical Education Requirements on Youth Physical Activity and Overweight 3* (Nat’l Bureau of Econ. Research, Working Paper No. 11411, 2005), available at <http://www.nber.org/papers/w11411.pdf> (positing that one of the main reasons that PE requirements are unsuccessful is failure to adhere to official requirements).

82. Lawrence O. Gostin et al., *Restoring Health to Health Reform: Integrating Medicine and Public Health to Advance the Population’s Well-Being*, 159 U. PA. L. REV. 1777, 1816 (2011). A “built environment” is one that is modified by humans, and may include “homes, schools, workplaces, parks . . . highways, urban sprawl,” and planned green spaces. Shoba Srinivasan et al., *Creating Health Communities, Health Homes, Healthy People: Initiating a Research Agenda on the Built Environment and Public Health*, 93 AM. J. OF PUBLIC HEALTH, no. 9, Sept. 2003 at 1146, 1446 available at <http://web.ebscohost.com/ehost/pdfviewer/pdfviewer?sid=1ea28503-c0a5-491d-9995-ff1cf58f8151%40sessionmgr11&vid=4&hid=26>. The meaning of “built environment” can be interpreted broadly to include features like “public policy, political action, and access to [amenities like] fresh food, physical activity, and even leisure time.” Jim Newkirk, *NC Initiatives to Increase Physical Activity, EAT SMART, MOVE MORE*, available at [http://www.nciom.org/wp-content/uploads/NCIOM/projects/prevention/Newkirk-Bors\\_082708.pdf](http://www.nciom.org/wp-content/uploads/NCIOM/projects/prevention/Newkirk-Bors_082708.pdf).

reporting on student health and the status of PE programs.<sup>83</sup> Similar legislation, such as the Physical Education to Create a Healthier Nation Act,<sup>84</sup> and the Access to Complete Education Act,<sup>85</sup> are also currently being considered by Senate and House committees. These bills would provide crucial funding to assist school districts in developing and implementing local wellness policies, which would be required to include, among other things, “specific policies on physical education.”<sup>86</sup>

NASPE and the AHA are also pushing for expanded federal funding for the Carol M. White Physical Education Program (PEP), which provides grants for “local education agencies and community-based organizations” to fund “the initiation, expansion[,] and improvement of physical education programs” in K-12 schools.<sup>87</sup> With increased federal funding, PEP grants would be available to more school districts,<sup>88</sup> and, potentially, institutions of higher education.

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83. FIT Kids Act, S. 576, 112th Cong. (2011). On March 15, 2011, the Senate FIT Kids bill was referred to the Senate Committee on Health, Education, Labor, and Pensions. *Bill Summary & Status, 112th Congress (2011–2012), S. 576, CRS Summary*, THOMAS, <http://thomas.loc.gov/home/LegislativeData.php> (select Congress “112”; enter “S576” into “search” area and select “Bill Number”; click “search”; follow “CRS Summary” hyperlink) (last visited Feb. 17, 2013). No further action has been taken. *Id.* On April 4, 2011, the House FIT Kids bill was referred to the House Subcommittee on Early Childhood, Elementary, and Secondary Education. *Id.* No further action has been taken. *Id.*

84. Physical Education to Create a Healthier Nation Act, H.R. 422, 112th Cong. (2011). Once enacted, the law would require that school districts that receive financial assistance under the Act ensure that elementary school students are offered one hundred fifty minutes of physical education every week, and middle or high school students two hundred and twenty-five minutes. *Id.* On February 25, 2011, the Act was referred to the House Subcommittee on Early Childhood, Elementary, and Secondary Education. *Bill Summary & Status, 112th Congress (2011–2012), H.R. 422, CRS Summary*, THOMAS, <http://thomas.loc.gov/home/LegislativeData.php> (select Congress “112”; enter “HR422” into “search” area and select “Bill Number”; click “search”; follow “CRS Summary” hyperlink) (last visited Feb. 17, 2013). No further action has been taken. *Id.*

85. Access to Complete Education Act, H.R. 1531, 112th Cong. (2011). This bill takes a broader approach, with physical education as part of a comprehensive curriculum that also includes liberal arts and social sciences. *Id.* On May 20, 2011, the Access to Complete Education Act was referred to the House Subcommittee on Early Childhood, Elementary, and Secondary Education. *Bill Summary & Status, 112th Congress (2011–2012), H.R. 1531, CRS Summary*, THOMAS, <http://thomas.loc.gov/home/LegislativeData.php> (select Congress “112”; enter “HR1531” into “search” area and select “Bill Number”; click “search”; follow “CRS Summary” hyperlink) (last visited Feb. 17, 2013). No further action has been taken. *Id.*

86. SHAPE OF THE NATION REPORT, *supra* note 7, at 74–75.

87. *Id.* PEP is “[a]uthorized through the ESEA and administered by the U.S. Department of Education . . .” *Id.*

88. *Id.* Currently, “only about 10% of applicants are able to receive grants because of limited funding.” *Id.*

B. *What Works: Can K-12 Physical Education Initiatives Provide Guidance for Institutions of Higher Education?*

Since most of the legislative action related to combating childhood obesity in K-12 schools is undertaken by the individual states, there are a variety of programs and tools in place at schools across the country.<sup>89</sup> Currently, the majority of states have some sort of mandated PE for all grade levels.<sup>90</sup> However, there are large disparities in both the rigor and enforcement of the state-developed requirements.<sup>91</sup> A common issue that arises with respect to K-12 PE curricula is quantity versus quality.<sup>92</sup> Critics of current PE programs argue that the class periods too often consist of unstructured and unmotivated class time, which actually ends up being relatively sedentary.<sup>93</sup> Further, most state requirements do not set forth explicit time amounts to be devoted to actual instruction, and approximately half permit “exemptions, waivers, and/or substitutions,” undermining any sway the original mandate or nationally promulgated recommendations may carry.<sup>94</sup>

However, while the states as a whole have had mixed results in their efforts to improve the physical health of their school children, some specific initiatives have been highly successful and serve as good models for

89. *Id.* at 6–7. The majority of state standards for physical education adopt some elements of nationally promulgated standards, suggesting that national recommendations remain a significant policy tool. *Id.*

90. *Id.* at 6. “Only six states in the country—Illinois, Iowa, Massachusetts, New Mexico, New York and Vermont—require physical education in every grade K-12. *Id.* at 7.

91. See Sally Hubbard, *Taking Roll: An Assessment of State and Local Governance of School Wellness Policies*, 5 *IND. HEALTH L. REV.* 201, 207–08 (2008) (describing the vast powers left to the states in how to design and implement school wellness policies). With so many schools and states focusing on scholastics, rather than PE, “state physical education requirements are often decreased.” *Id.* at 208. Additionally, the deficiencies in PE classes are typically caused by the lack of proper funding provided to the states, in order to bring about effective and adequate physical education and activities. *Id.* at 209.

92. See John Cawley et al., *The Impact of State Physical Education Requirements on Youth Physical Activity and Overweight* 18 (Nat’l Bureau of Econ. Research, Working Paper No. 11411, 2005), available at <http://www.nber.org/papers/w11411.pdf> (positing that one of the main reasons that PE requirements are unsuccessful is failure to adhere to official requirements). While many advocates argue for greater time devoted to physical activity during a school day, “improvements in PE curriculum should precede mandated increases in PE time in order to avoid inefficient use of school finances and student time.” *Id.*

93. *Id.*

94. *SHAPE OF THE NATION REPORT*, *supra* note 7, at 6. “Common reasons for exemptions include health issues, physical disability, religious beliefs and early graduation. Of the states allowing exemptions or waivers, all but five leave the reasons for, and granting of, waivers to the local school or school district.” *Id.* at 7. A national policy push encouraging schools to comply with national requirements, including limited waiver and exemption allowances, could assure that these tools serve their proper purpose, and aren’t just used as loopholes to avoid physical activity.

the collegiate setting.<sup>95</sup> For example, with the passage of Act 1220, Arkansas took the lead in the fight against obesity by implementing comprehensive nutrition and PE standards in its public schools.<sup>96</sup> Act 1220 includes many of the elements that are recommended by the Shape of the Nation Report and *Let's Move!*,<sup>97</sup> including participation “in a nationally recognized health fitness assessment,” and the establishment of an advisory committee specifically charged with implementing nutrition and physical activity standards.<sup>98</sup> It also requires BMI screening and reporting, which involves measuring students' BMI at school and discreetly reporting the results to parents.<sup>99</sup> Although BMI screening was initially “the most controversial piece of the law,”<sup>100</sup> after a few years of implementation, BMI reporting became not only an accepted practice, but also an important piece of the state's school-based obesity prevention initia-

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95. See Stacey L. Fabros, Note, *A Cry for Health: State and Federal Measures in the Battle Against Childhood Obesity*, 7 J.L. & FAM. STUD. 447, 448 (2005) (noting that in 2004, Congress suggested that the school-based obesity prevention measures passed by Arkansas were so successful that they “could serve as a model” for the rest of the United States).

96. UNIV. OF ARK. FOR MED. SCI., FAY W. BOOZMAN COLL. OF PUB. HEALTH, YEAR THREE EVALUATION: ARKANSAS ACT 1220 OF 2003 TO COMBAT CHILDHOOD OBESITY 1 (2006), available at [http://www.uams.edu/coph/reports/2006Act1220\\_Year3.pdf](http://www.uams.edu/coph/reports/2006Act1220_Year3.pdf). Act 1220, implemented in Arkansas, contained recommendations for schools which included: providing healthier options in vending machines and at concession stands, hiring more physical education teachers which are state-certified in physical education, and increasing recess for elementary students by thirty minutes. *Id.* at 14–15. Such changes resulted in greater parental awareness of health problems children may face, changes in nutrition and physical activity at home, and an increase in children not only buying, but wanting to buy healthier options at school. *Id.* at 19–21.

97. “*Let's Move!* is a comprehensive initiative, launched by the First Lady [Michelle Obama], dedicated to solving the challenge of childhood obesity within a generation, so that children born today will grow up healthier and able to pursue their dream.” *Learn the Facts, LET'S MOVE!*, <http://www.letsmove.gov/learn-facts/epidemic-childhood-obesity> (last visited Feb. 4, 2013).

98. See SHAPE OF THE NATION REPORT, *supra* note 7, at 17–18 (expressing the requirements and regulations put in place by Arkansas, along with all forty-nine other states, in regard to the nutrition and physical education standards for schools in their states); see also *Active Schools, LET'S MOVE!*, <http://www.letsmove.gov/active-schools> (last visited Feb. 4, 2013) (recommending that schools take part in the President's Physical Fitness Challenge); *Create a School Health Advisory Council, LET'S MOVE!*, <http://www.letsmove.gov/create-school-health-advisory-council> (last visited Feb. 4, 2013) (encouraging schools to create a school health advisory council to “assess the school's health status, make relevant policy recommendations and keep tabs on health-related issues.”).

99. UNIV. OF ARK. FOR MED. SCI., FAY W. BOOZMAN COLL. OF PUB. HEALTH, YEAR THREE EVALUATION, *supra* note 96, at 2.

100. The controversy surrounding the BMI initiative stemmed largely from the press and parents misunderstanding the method of BMI measurement that would be utilized, and fearing that student privacy would be violated through the use of public reporting. *Id.* The legislature acted quickly to reword the law, specifying the private nature of the BMI reporting procedure. *Id.*

tive as a whole.<sup>101</sup> Significantly, as a result of receiving the BMI measurement, along with information about its meaning, “[p]arents reported an increased awareness of the association between childhood obesity and [the resultant] health problems such as diabetes, hypertension, asthma and high cholesterol . . . .”<sup>102</sup>

### C. *Physical Education Beyond K-12*

Some institutions of higher education across the country already require the completion of wellness or PE classes in order to graduate.<sup>103</sup> Bryn Mawr College in Pennsylvania, for example, has a fairly substantive requirement specifying that every student “must complete eight credits in physical education, including a swim-proficiency test and a Wellness Issues class” in order to satisfy her degree requirements for graduation.<sup>104</sup> Moreover, first year students at Bryn Mawr are required to attend an eight-week Wellness Seminar that focuses on a variety of issues confronting college women.<sup>105</sup> However, while a number of schools have implemented PE requirements that seem to signal a real commitment towards the development of healthy habits and lifestyles,<sup>106</sup> many programs are simply ineffective.<sup>107</sup>

The PE requirement at Barnard College in New York City—that students need only complete one physical education course over four years in order to graduate—is representative of many of the programs currently in place at private universities across the country.<sup>108</sup> The requirement

101. *Id.* at 17 (“Of parents who reported receiving a child health report, nearly all had read at least part of the report, and most found it to be helpful.”); *see also* UNIV. OF ARK. FOR MED. SCI., FAY W. BOOZMAN COLL. OF PUB. HEALTH, YEAR FIVE EVALUATION: ARKANSAS ACT 1220 OF 2003 TO COMBAT CHILDHOOD OBESITY 4 (2009), *available at* <http://www.policyarchive.org/handle/10207/bitstreams/21319.pdf> (“There is no evidence of increased weight-based teasing, dieting, use of diet pills or embarrassment associated with BMI measurements since the passage of Act 1220.”).

102. UNIV. OF ARK. FOR MED. SCI., FAY W. BOOZMAN COLL. OF PUB. HEALTH, YEAR THREE EVALUATION, *supra* note 96, at 9.

103. 2011-12 *Bryn Mawr College Undergraduate Catalog, Athletics and Physical Education*, BRYN MAWR, <http://www.brynmawr.edu/athletics/physical-education/index.htm> (last visited Feb. 6, 2013).

104. *Id.*

105. *Id.*

106. *See* SHAPE OF THE NATION REPORT, *supra* note 7 (noting how various states have implemented quality physical education into their schools’ curriculums).

107. *See id.* (stating that while the majority of states require students to take physical education, more than half of all states permit schools to allow students to substitute other activities for PE credit. Additionally, more than half of all states allow schools to grant exemptions or waivers for PE credit requirements).

108. *Requirements for the Liberal Arts Degree*, BARNARD, <http://www.barnard.edu/catalogue/curriculum/liberal-arts> (last visited Feb. 6, 2013). Other institutions across the

seems more symbolic than substantive, and falls well short of the “150 minutes of moderate-intensity aerobic physical activity” a week recommended for college-aged adults.<sup>109</sup>

### III. WHERE DOES THE LAW FIT IN OBESITY PREVENTION POLICY?

A number of issues are implicated when considering the implementation of mandated PE programs in schools. Primary areas of contention include the practical inclusion of mandatory PE courses in already cash- and time-strapped school curricula, as well as the ethical, cultural, and legal implications of requiring students to perform physical activities in order to graduate. These are powerful considerations, which must be addressed when developing school-based PE programs, especially for the collegiate population.

#### A. Collegiate Governance Schemes

While the federal government plays an important role in the external governance of higher education, ultimately, the states are the primary outside regulators of colleges and universities.<sup>110</sup> State constitutions typically grant the state express authority to “create, organize, support, and dissolve public higher educational institutions,” under their “general police powers,” and the ability to “charter and license private higher educational institutions and recognize their authority to grant degrees.”<sup>111</sup>

Federalism likely places this type of regulatory action in state hands, because there appears to be no inherent constitutional issues in the pro-

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country have similarly lax physical education requirements. *See Graduation Requirements*, BRANDEIS UNIV., <http://www.brandeis.edu/acserv/advising/gradreq/index.html> (last visited Feb. 4, 2013) (specifying that the general university requirements for graduation include “[t]wo [p]hysical [e]ducation [c]lasses”); *Graduation Requirements*, UNIV. OF CHICAGO, <http://college.uchicago.edu/policies-regulations/graduation-requirements> (last visited Feb. 6, 2013) (stating that students must complete “[t]hree quarter courses in physical education, unless placement credit or exemption is granted” in order to qualify for their degree); *Academic Policies and Procedures for Undergraduate Students Physical Activity/Wellness General Education Requirement*, BINGHAMTON UNIV., [http://www.binghamton.edu:8080/exist8/rest/lists2012-13/4\\_academic\\_policies\\_and\\_procedures\\_undergraduate\\_students/academicPoliciesAndProceduresUndergraduate.xml?\\_xsl=/db/xsl/compose.xsl](http://www.binghamton.edu:8080/exist8/rest/lists2012-13/4_academic_policies_and_procedures_undergraduate_students/academicPoliciesAndProceduresUndergraduate.xml?_xsl=/db/xsl/compose.xsl) (last visited Feb. 4, 2013) (stating that all undergraduate students within the General Education Program must receive two physical education credits which may be fulfilled by combining one-credit physical activities courses with one-credit wellness courses).

109. 2008 PHYSICAL ACTIVITY GUIDELINES FOR AMERICANS, *supra* note 76, at 21.

110. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO APPLICATIONS OF ADMINISTRATIVE DECISION MAKING* 1297 (4th ed. 2006) (“The federal government . . . has only those powers that are expressly conferred by the U.S. Constitution or can reasonably be implied from those conferred.”).

111. *Id.* at 25.

posed PE measures that would directly implicate federal action.<sup>112</sup> However, that is not to say federal and state governments cannot, or should not, work together to address this complex public health problem, as they often do when implementing complicated public policy measures.<sup>113</sup> For example, the PPACA, a federal law, includes a number of provisions allocating funding for wellness and prevention initiatives in the workplace, but the states are charged with implementing much of the new federal health law.<sup>114</sup> The federal government will be best able to support PE initiatives in colleges and universities through its spending power, allotting funds to the states for use at institutions of higher education, conditioned upon implementation of approved uniform PE requirements.<sup>115</sup>

Undoubtedly, the federal and state governments have an important role to play in the establishment and implementation of PE programs in colleges and universities, but the limits of government intervention on institutions of higher education must also be recognized when developing proposed legislation. In any effort, when government involvement is perceived as invasive or paternalistic, the public may recoil from the proposed measures.<sup>116</sup> Accordingly, both the federal and state governments should be careful to avoid a public backlash and any potential consequential legal roadblocks.<sup>117</sup> Given the widely held belief that educators should have ultimate control over academic decision-making, there is a fine line to walk with respect to governmental involvement in institutions of higher education.<sup>118</sup> Additionally, while federal and state regulation is an important tool in encouraging institutions of higher education to adopt

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112. Jess Alderman et al., *Application of Law to the Childhood Obesity Epidemic* 100 (Northeastern Univ. Pub. Law & Theory Faculty Working Paper Series, No. 17-2007, 2007) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=972136](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=972136).

113. *Id.*

114. See 2010 Wellness Legislation, NAT'L CONFERENCE OF STATE LEGISLATURE, <http://www.ncsl.org/issues-research/health/wellness-legislation-2010-state-activity.aspx> (last updated July 2010) (showing how various states have executed the new federal law on insurance policies).

115. For example, the Centers for Disease Control & Prevention (CDC), a federal agency, currently provides twenty-five states with funding to develop both community and school-based obesity prevention programs. *State Programs Funded by CDC*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/obesity/stateprograms/funded-states.html> (last updated Dec. 5, 2012). However, the CDC only funds states that utilize a "social-ecological model" employing "societal, community, organizational, interpersonal, and individual" measures to combat obesity. Hubbard, *supra* note 91, at 211–12.

116. See Alderman et al., *supra* note 112 (arguing that using the law "to address a public health problem like obesity" is particularly tenuous in the current political climate, which disfavors regulation).

117. *Id.*

118. See KAPLIN & LEE, *supra* note 110, at 1313 (discussing how federal government regulation impacts the autonomy of academic instructors over their curriculum).

PE requirements, research has shown that statutory requirements alone are not enough to effectively combat the obesity epidemic,<sup>119</sup> and the overall approach must be multi-faceted. Thus, a combination of federal funding, nationally promulgated guidelines, state implementation, and community, institutional, and organizational involvement would be the most effective means of establishing mandatory PE in colleges and universities as an indispensable element of national obesity-prevention policy.<sup>120</sup>

### B. *Can We Legislate Behavior?*

It is challenging to implement a national obesity prevention health plan, as one of the major hurdles is the belief that weight maintenance is a matter of personal responsibility, and beyond the control of public policy.<sup>121</sup> Some scholars and politicians are skeptical of legislative action as a solution for the obesity epidemic; suggesting that behavioral and lifestyle changes cannot (and perhaps should not) be legislated.<sup>122</sup> Researchers have also suggested that outside factors, such as nutrition, sedentary behavior at home, and lack of community involvement, appear to offset any benefits gained from mandatory PE classes in schools.<sup>123</sup> Former U.S. Surgeon General Richard Carmona has echoed those sentiments, arguing that legislation is an inappropriate solution for a problem that extends deep into the psyches and societal norms of the American population.<sup>124</sup>

However, as obesity becomes better understood, and with the statistics becoming more and more grim, many scholars and politicians acknowledge the unique role the law can play in a multifaceted approach to combating the epidemic.<sup>125</sup> For every public figure or scholar dismissing legal

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119. Cawley et al., *supra* note 92.

120. *Id.*

121. See Adam Larson, *The American Childhood Obesity Epidemic: Probable Causes and the Legislative and Judicial Responses*, 28 CHILD. LEGAL RTS., no. 1, 2008, at 1, 4 (asserting that even politics views obesity as a personal responsibility issue).

122. See Jackson, *supra* note 25 (“The surgeon general offered few specific solutions but said public policy reforms would not be helpful in curbing obesity, explaining that common-sense health decisions cannot be legislated.”); see also Alderman et al., *supra* note 112 (describing the legal analysis on the cause of obesity as narrow).

123. Cawley et al., *supra* note 92, at 18.

124. Jackson, *supra* note 25.

125. See generally David G. Yosifon, *Legal Theoretic Inadequacy and Obesity Epidemic Analysis*, 15 GEO. MASON L. REV. 681 (2008) (critiquing various approaches to resolving the obesity epidemic).

tools as a viable option, there are equally persuasive proponents of legislative action.<sup>126</sup>

Scholar David G. Yosifon argues that conventional legal, theoretical, and social policy assessments of the obesity epidemic fail to properly consider the application of social psychology to law and legal theory.<sup>127</sup> He posits that “human decision-making can be *influenced* in consistent, predictable ways, through exercising influence over the situating of their choosing, to a far greater extent than our intuitions about the sources of our own and other people’s behavior would lead us to appreciate.”<sup>128</sup> That analysis supports the contention that requiring students to participate in PE programs from kindergarten through their college years could ingrain in them healthy lifestyle habits and choices that will extend beyond those early formative years and remain well into adulthood.<sup>129</sup>

Other scholars have raised personal liberty concerns regarding the establishment of mandatory PE programs in schools. For example, at Lincoln University, opponents of the school’s PE program decried a minimum BMI requirement as a distasteful and unwarranted demand for private health information.<sup>130</sup> Other skeptics of mandatory PE empha-

126. *Id.* at 710; see U.S. DEP’T OF HEALTH AND HUMAN SERVS., THE SURGEON GENERAL’S VISION FOR A HEALTHY AND FIT NATION 5 (2010), available at <http://www.surgeongeneral.gov/initiatives/healthy-fit-nation/obesityvision2010.pdf> [hereinafter The Surgeon General’s Vision] (urging that obesity interventions should not focus only on “personal behaviors and biological traits, but also on characteristics of the social and physical environments that offer or limit opportunities for positive health outcomes.”). The Surgeon General emphasizes that circumstances supporting healthy behavior can present themselves in any setting, and encourages the development of effectively structured wellness programs in schools and the workforce. *Id.* at 8–9. The Surgeon General’s vision for effective wellness programs requires that schools and workplaces have access to “physical education specialists, health education specialists, and certified food service staff,” which can be provided for through legislative action. *Id.*

127. Yosifon, *supra* note 125, at 681–82. Mr. Yosifon’s argument is captured by the following: “[T]he general law and economics view [is] that where markets appear to be operating in a robust and competitive fashion, regulation is likely to be inefficient, and make us all worse-off.” *Id.* at 689.

128. See *id.* at 716 (explaining the power of influencing behavior to see positive results when it comes to health choices).

129. See Russell R. Pate et al., *Promoting Physical Activity in Children and Youth: A Leadership Role for Schools*, 114 CIRCULATION 1214, 1215 (2006), available at <http://circ.ahajournals.org/content/114/11/1214> (“Schools could become the central element in a community system that ensures that students participate in enough physical activity to develop healthy lifestyles.”).

130. *College drops mandatory class for obese students*, TRIBUNE DEMOCRAT (Dec. 5, 2009), <http://tribune-democrat.com/local/x546432791/College-drops-mandatory-class-for-obese-students/print>. In 2006, historically black Lincoln University instituted a policy that required overweight students to complete a fitness class in order to satisfy graduation requirements. *Heavy College Students Must Pass Fitness Class*, MSNBC (Nov. 23, 2009, 2:06

size the ethical implications of requiring all students to engage in physical activity at school, noting that participation can prompt emotional reactions in students such as embarrassment and low self-esteem.<sup>131</sup>

However, the ability of physical education professionals to maintain high standards of ethical conduct should not be undervalued, simply because personal discomfort may be inherent in participation by some students in physical activity. NASPE, whose “membership includes a great number of professionals who work in higher education environments[,]” has issued a Code of Ethics specifically tailored for the higher education setting.<sup>132</sup> The Code reinforces the importance of student rights, and specifies that it is the duty of PE professionals to support and respect all students, including those who lack physical fitness, have a disability, or are reluctant to engage in exercise and competition.<sup>133</sup> Specifically, the Code states that PE professionals are responsible for administering programs “in ways that avoid embarrassing or otherwise harmful techniques . . . .”<sup>134</sup> Establishing uniform PE requirements helps ensure that all PE teachers are properly trained and have the ethical background to perform their professional responsibilities with respect.

#### IV. PHYSICAL EDUCATION ON THE COLLEGE CAMPUS: COMBATING A PUBLIC HEALTH CRISIS WITH COMMUNITY AND SCHOOL-BASED TOOLS

For many of the reasons that K-12 schools serve as forums for the battle against obesity, institutions of higher education are a similarly logical

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PM), <http://www.msnbc.msn.com/id/34068877/ns/health-fitness/>. Students had their BMI tested, and those students whose BMI classified them as obese were required to complete the mandatory PE class. *Id.* The University cited its concern with the obesity epidemic in the United States, and “especially [within] the African-American community,” as the impetus for the program. *Id.* The policy caused an uproar among students, who felt that the requirement was singling out overweight students, and it was eventually dropped after social pressure from students and health experts. “Health experts applauded the school’s intent, but some questioned its execution, calling the demand to disclose health information awkward, distasteful and often ineffective.” *Id.*

131. See Jacob Ford, *Should Physical Education Be Mandatory*, HELIUM (June 10, 2010), <http://www.helium.com/items/1858213-why-physical-education-classes-should-not-be-mandatory-in-schools> (expressing the emotional affects physical education has on students struggling with their weight).

132. NAT’L ASSOC. FOR SPORT & PHYSICAL EDUC., NASPE CODE OF ETHICS FOR PROFESSIONALS IN HIGHER EDUCATION 1 (2009), available at <http://www.aahperd.org/naspe/standards/upload/Code-of-Ethics-for-Professionals-in-Higher-Ed-final-10-29-09-2.pdf>. (“Each professional is responsible for achieving and maintaining competency of knowledge and integrity of practice as demonstrated through fair, honest and respectful behaviors toward students, colleagues, the discipline and profession, and society.”).

133. *Id.*

134. *Id.* at 2.

place to extend school-based measures and continue the fight.<sup>135</sup> For example, many colleges and universities have some basic required curriculum that must be completed in order to graduate.<sup>136</sup> Adding a PE requirement would fit within this established framework.

Institutions of higher education also provide an educational environment that is unique from K-12 schools. College campuses are filled with motivated and socially active young adults. Fostering a college campus culture that promotes exercise and physical fitness will create a new generation that embraces those norms. The result: a new generation of healthy students, and the opportunity to influence public health policy for the future.

#### A. *Graduating With Healthy Habits*

Essentially, traditional four-year institutions, and many community colleges are communities unto themselves, making them especially ripe environments for implementation of both school-based and community-based legislative action.<sup>137</sup> Traditional four-year college campuses are home to a diverse and socially active community of students, faculty, and academics, and the modern-day university has become an important setting for social movements and shifts in popular culture.<sup>138</sup> Thus, garnering support for the fight against obesity at institutions of higher learning is a

135. See Pate et al., *supra* note 129, at 1215 (“Schools are potentially attractive settings in which to promote positive health behaviors because students spend large amounts of time in the school environment, elements of the traditional school curriculum relate directly to health, and schools typically provide extracurricular programs that can promote health.”).

136. See, e.g., *Bachelor of Arts Degree Overview*, BOSTON UNIV., <http://www.bu.edu/academics/cas/programs/degree-overview/> (last visited Feb. 12, 2013) (stating that in order to receive an undergraduate degree from the College of Arts & Sciences, students must successfully fulfill, among other things, a math, foreign language, and writing requirement); *University Graduation Requirements*, UNIV. OF MASS. AMHERST, [http://www.umass.edu/ug\\_programguide/academicinfo/universitygraduationrequirements.html](http://www.umass.edu/ug_programguide/academicinfo/universitygraduationrequirements.html) (last visited Feb. 12, 2013) (requiring candidates for a baccalaureate degree to complete a General Education program including basic math, writing, science, and social science courses, in addition to “intensive or specialized work in a particular department or program” for a specific major); *University Undergraduate General Studies Requirements*, ARIZ. STATE UNIV., [http://catalog.asu.edu/ug\\_gsr](http://catalog.asu.edu/ug_gsr) (last visited Feb. 12, 2013) (stating that the “General Studies requirement is composed of courses in five core areas and three awareness areas,” and includes classes in humanities, math, science, and language).

137. See *Student Housing*, UNIV. LANGUAGE SERVS., <http://www.universitylanguage.com/guides/us-student-housing-at-us-colleges-and-universities/> (last visited Feb. 12, 2013) (describing on-campus residence halls as a student’s “first home away from home.”).

138. KAPLIN & LEE, *supra* note 110, at 15. This Article deals primarily with the traditional four-year university. *But see infra* Part IV.B for a brief discussion of non-traditional institutions of higher education, and the possibilities that may exist for physical education initiatives in those environments.

huge step towards making physical activity and obesity prevention national priorities.<sup>139</sup>

With many young adults living on their own for the first time, the college years provide a fresh opportunity for individual growth.<sup>140</sup> This is especially significant with more high school graduates attending college than ever before.<sup>141</sup> Students who were never able to determine their own dietary intake or make physical activity decisions as children are afforded a new opportunity to develop healthy habits once on their own.<sup>142</sup> Thus, institutions of higher education provide a unique environment in which legislative action facilitating physical activity and healthy living would have a deeper impact on students than in the K-12 setting, where children are still living under their parents' roof and rules.<sup>143</sup>

Although originally intended for K-12 schools, many of the PE recommendations proposed by *Let's Move!*, the Shape of the Nation Report, and other national physical activity policy initiatives can be adapted and applied to the higher education setting. For example, *Let's Move!* proposes increased research and progress tracking to provide evidentiary support for legislative action.<sup>144</sup> Frequent reporting and analysis of programs is critical because it enables schools to specifically tailor their cur-

139. Sparling, *supra* note 14, at 581–82 (noting that “only [forty] to [forty-five] percent of college students engage in fitness activities regularly.”).

140. *Id.* at 583–84 (noting that “college physical education is perhaps the last window of opportunity available to shape physical activity habits.”); *see also* Toben F. Nelson et al., *Disparities in Overweight and Obesity Among US College Students*, 31 AM. J. HEALTH BEHAV. 363, 371 (2007) (noting that students may be developing their diet and activity behaviors for the first time in college).

141. BUREAU OF LABOR STATISTICS, COLLEGE ENROLLMENT AND WORK ACTIVITY OF 2009 HIGH SCHOOL GRADUATES 1 (Apr. 27, 2010), *available at* [www.bls.gov/news.release/archives/hsgec\\_04272010.pdf](http://www.bls.gov/news.release/archives/hsgec_04272010.pdf) (“In October 2009, 70.1 [%] of 2009 high school graduates were enrolled in colleges or universities, the U.S. Bureau of Labor Statistics reported today. This was a historical high for the series, which began in 1959.”). The Bureau’s 2010 Release noted that the percentage enrolled in colleges or universities as of October 2010 (68.1%) was only “slightly lower than the record high set in October 2009. . . .” BUREAU OF LABOR STATISTICS, COLLEGE ENROLLMENT AND WORK ACTIVITY OF 2010 HIGH SCHOOL GRADUATES 1 (Apr. 8, 2011), *available at* [http://www.bls.gov/news.release/archives/hsgec\\_04082011.pdf](http://www.bls.gov/news.release/archives/hsgec_04082011.pdf).

142. *See* Sparling, *supra* note 14, at 583–84 (“During the college years, lifestyle choices are explored and tested. Students are impressionable.”).

143. *See, e.g.*, Larson, *supra* note 121, at 3.

144. *See* WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY, *supra* note 5, at 10 (noting that obesity prevention interventions must be regularly monitored, in order to determine the overall progress of the measures, and to identify which elements are successful, and which strategies need to be reconfigured); *see also* UNIV. OF ARK. FOR MED. SCI., FAY W. BOOZMAN COLL. OF PUB. HEALTH, YEAR THREE EVALUATION, *supra* note 96, at 22. Key informants include school principals, superintendents, nurses, and community health promotion specialists. *Id.*

ricula for “the most efficient use of school finances [and] student time.”<sup>145</sup> Therefore, reporting and evaluation guidelines should be an important part of any PE initiative implemented in colleges and universities.

Not only are reporting requirements useful in terms of evidentiary support for broad policy action, but they can also spur more particularized results. BMI measurement and reporting procedures have already been implemented in a number of K-12 school systems, where the results are reported to parents.<sup>146</sup> However, if BMI measurement was required in the collegiate setting, it could be reported directly to the student.<sup>147</sup> BMI reporting has proven to be one of the more successful measures of Arkansas’ Act 1220 because it opened parents’ eyes to the health consequences of childhood obesity and inactivity.<sup>148</sup> The positive response in Arkansas<sup>149</sup> suggests that measuring college students’ BMI and discreetly reporting the results to them could open their eyes to their unhealthy weight and behavior, and ultimately encourage them to take responsibility for their health going forward.<sup>150</sup>

145. Cawley et al., *supra* note 92, at 2.

146. See H.B. 1583, 84th Gen. Assemb. Reg. Sess. (Ak. 2003); see also TENN. CODE ANN. § 49-6-1402(a)(4) (2009) (describing information found in a “health report card” that will notify parents of important health information regarding their child, including their BMI); THE STATUS OF CHILDHOOD WEIGHT IN MASS. 2011: PRELIMINARY RESULTS FROM BODY MASS INDEX SCREENING IN MASSACHUSETTS PUBLIC SCHOOL DISTRICTS, 2009-2011, SCHOOL HEALTH UNIT, BUREAU OF COMMUNITY HEALTH AND PREVENTION & MASS. DEP’T OF PUBLIC HEALTH 9 (2010), available at <http://www.mass.gov/eohhs/docs/dph/com-health/school/status-childhood-obesity-2011.pdf> (stating that Massachusetts schools would take BMI measurements in grades 1, 4, 7 and 10 and the school nurses would be responsible for parent notification). See generally SHAPE OF THE NATION REPORT, *supra* note 7, at 8 (stating that “[t]hirteen states [25%] require schools to measure BMI and/or height and weight for each student . . . [and] [f]ive states require that individual student results are sent to students’ parents.”).

147. See *Heavy college students must pass fitness class*, NBC NEWS (Nov. 23, 2009, 2:06 PM), <http://www.nbcnews.com/id/34068877/ns/health-fitness/#.URqJ-eg1Y1g> (noting the failed Lincoln University wellness curriculum requiring BMI reporting for incoming college students).

148. See UNIV. OF ARK. FOR MED. SCI., FAY W. BOOZMAN COLL. OF PUB. HEALTH, YEAR THREE EVALUATION, *supra* note 96, at 9 (explaining that, as a result of receiving their child’s BMI measurement, and information about its meaning, “[p]arents reported an increased awareness of the association between childhood obesity” and the resultant medical issues like “diabetes, hypertension, asthma, and high cholesterol . . .”).

149. *Id.*

150. *College Students Face Obesity, High Blood Pressure, Metabolic Syndrome*, SCIENCE DAILY (June 18, 2007), <http://www.sciencedaily.com/releases/2007/06/070614113310.htm> (noting the potentially positive impact that increased awareness and education can have in the collegiate setting); see also Tony Moreno, *Physical Education Is Affordable Healthcare*, STRATEGIES, July–Aug. 2011, at 36, 36 available at <http://www.aahperd.org/naspe/advocacy/governmentRelations/upload/Jul-Aug11.pdf> (“One of the most effective

Another promising element of Arkansas' Act 1220 that could be applied to the collegiate setting is a required wellness component designed to provide students with the "skills, opportunities and encouragement to adopt healthy lifestyles."<sup>151</sup> This type of general wellness education is a critical piece of a successful PE curriculum, and should be a component of any mandatory PE scheme developed for institutions of higher education.<sup>152</sup>

Additionally, a successful school-based PE program must include actual physical activity.<sup>153</sup> The *Let's Move!* campaign seeks to "increase the number of high school students who participate in daily PE classes to [forty percent] by 2015 and [fifty percent] by 2030."<sup>154</sup> Schools, including institutions of higher education, can improve the quality and quantity of PE instruction in schools, and tailor their programs to encourage more movement-based programming and actual physical activity, by utilizing the data garnered from improved reporting requirements.<sup>155</sup>

NASPE proposes integrating physical activity and wellness measures throughout the school day in order to reach those benchmarks.<sup>156</sup> Many institutions of higher education already provide a "built environment" that is ideal for implementing a similar integration approach for physical activity and wellness programs.<sup>157</sup> A successful policy for institutions of higher education would encourage students to make use of the resources already developed and available through the institution. Although the

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messages realized from the scholastic experience is to encourage youth that they are ultimately responsible for, and caretakers of, their own health and well-being.").

151. H.R. 1583, 84th Gen. Assemb. Reg. Sess. (Ak. 2003); *see also* Larson, *supra* note 121, at 3 (stating that "Act 1220 goes further than other states . . . it addresses many of the factors known to contribute to childhood obesity.").

152. SHAPE OF THE NATION REPORT, *supra* note 7, at 71 (finding that instructionally aligned physical education, when information gathered is consistent with learning goals, can enhance learning and is the basis of a quality PE program).

153. *See* WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY, *supra* note 5, at 68 (stating that students can get most of their physical activity from a comprehensive physical activity program).

154. *Id.*

155. Cawley et al., *supra* note 92 (criticizing the "[r]oll out the balls and let them play approach," in which there is no organized activity and no assurance that each student is physically active.").

156. SHAPE OF THE NATION REPORT, *supra* note 7, at 74 (advocating for the Fitness Integrated with Teaching Kids Act, the NASPE and AHA want to amend the ESEA in an effort to support physical activity and quality physical education for public school children).

157. *See* Sparling, *supra* note 14, at 584 (stating that tools and opportunities that are generally already available to college students on a traditional four-year college campus include "extensive facilities, intramurals, sports clubs, credit and non-credit exercise classes, pedestrian campuses.").

college or university community should certainly encourage general physical activity throughout the day, structured PE classes remain critical to developing a successful school-based initiative, making the completion of a formal PE requirement essential.<sup>158</sup>

Finally, interested parties like the AHA, NASPE, the American Council on Education (ACE),<sup>159</sup> and the National Association of State Boards of Education (NASBE)<sup>160</sup> should join forces to lobby for federal funding to support PE initiatives in higher education.<sup>161</sup> Groups like ACE and NASBE can also be instrumental by encouraging state boards of education, as well as colleges and universities themselves, to apply for the funding and ultimately implement the specially tailored PE requirements set forth in federally promulgated guidelines.<sup>162</sup> With the country facing significant financial hardships, groups with common interests can extend their influence and maximize limited resources through effective coalition building and unique policy development.<sup>163</sup>

158. See WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY, *supra* note 5, at 68, 70 (noting that, while a quality PE program may be complemented by activities outside the school setting, those initiatives should not replace structured PE programs).

159. “ACE is the nation’s most visible and influential higher education association. . . . represent[ing] the presidents of U.S. accredited, degree-granting institutions which include two- and four-year colleges, private and public universities, and nonprofit and for-profit entities.” *About the American Council on Education*, AMERICAN COUNCIL ON EDUC., [http://www.acenet.edu/AM/Template.cfm?Section=About\\_ACE](http://www.acenet.edu/AM/Template.cfm?Section=About_ACE) (last visited Feb. 12, 2013).

160. “The National Association of State Boards of Education exists to serve and strengthen State Boards of Education in their pursuit of high levels of academic achievement for all students.” *NASBE Home*, NAT’L ASSOC. OF STATE BOARDS OF EDUC., <http://nasbe.org/> (last visited Feb. 12, 2013).

161. See Fely Curva et al., *Coalition Building: Cultivating New Partners for Physical Education*, STRATEGIES, May–June 2010, at 36, 36, available at <http://www.aahperd.org/naspe/advocacy/governmentRelations/upload/May-June-AinA.pdf> (explaining that coalition building has proven to be a powerful tool when used in the context of legislative reform).

162. See *About the American Council on Education*, AMERICAN COUNCIL ON EDUC., [http://www.acenet.edu/AM/Template.cfm?Section=About\\_ACE](http://www.acenet.edu/AM/Template.cfm?Section=About_ACE) (last visited Feb. 12, 2013) (outlining ACE’s efforts on behalf of universities and colleges); *NASBE Home*, NAT’L ASSOC. OF STATE BOARDS OF EDUC., <http://nasbe.org/> (last visited Feb. 12, 2013) (describing NASBE’s functions).

163. See Curva et al., *supra* note 161 (emphasizing that continued budgetary constraints necessitate that “rather than compete with each other for the same resources . . . various groups [must] begin to coalesce around their goal[s].”).

### B. *Building Healthier Leaders for the Future*

Even though more American high school graduates are attending college than ever before,<sup>164</sup> a significant percentage of the population will not have the opportunity to attend college, including a rapidly growing group that will seek post-secondary educational opportunities other than a traditional four-year liberal arts education.<sup>165</sup> Although implementing PE and wellness requirements in traditional four-year universities does not directly address the needs of the above-mentioned populations, the implementation of physical activity initiatives in colleges and universities is still crucial for a number of reasons.

First, one of the biggest stumbling blocks for the implementation of physical activity programs, both in schools and more generally, is lack of data and research.<sup>166</sup> To successfully fight obesity, we need the right weapons; there must be a better understanding of what policies and programs work in order for them to make a significant impact in an effective way. If measures are passed to implement PE requirements in traditional four-year universities, and to track and analyze their progress, adjustments can be made and effectiveness can be gauged. Those findings can then be used to develop well-tailored PE programs for other educational formats like community colleges and for-profit institutions, and perhaps the American workforce at large.<sup>167</sup>

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164. See BUREAU OF LABOR STATISTICS, COLLEGE ENROLLMENT AND WORK OF 2010 HIGH SCHOOL GRADUATES 1 (Apr. 8, 2011), available at [www.bls.gov/news.release/archives/hsgec\\_04082011.pdf](http://www.bls.gov/news.release/archives/hsgec_04082011.pdf) (summarizing information on enrollment and work activity of high school graduates in 2009).

165. MICHAEL PRAIRIE & TIMOTHY GARFIELD, COLLEGE AND SCHOOL LAW: ANALYSIS, PREVENTION, AND FORMS 2–3 (2010). Almost half of the undergraduate students in the United States attend a community college at some point. *Students at Community Colleges*, AM. ASS'N COMMUNITY COLLEGES <http://www.aacc.nche.edu/AboutCC/Trends/Pages/studentsatcommunitycolleges.aspx> (last visited Feb. 12, 2013). There has also been an explosion in enrollment within the for-profit higher education sector, where institutions like the University of Phoenix and Kaplan offer “more flexible schedules . . . than community colleges” as well as distance learning methods, such as online education and off-campus programs. Tamar Lewin, *Scrutiny Takes Toll on For-Profit College Company*, N.Y. TIMES, Nov. 9, 2010, <http://www.nytimes.com/2010/11/10/education/10kaplan.html> (“Such schools enroll about [eleven] percent of the nation’s college students, and get a quarter of all federal student aid.”).

166. Sparling, *supra* note 14, at 585 (positing that future research is needed to determine the effect that required physical education curricula could have in battling the sedentary lifestyle of college students).

167. *Id.* (suggesting that the development of customized courses “to target different segments of the student population” could be an effective means of reaching and truly influencing the entire student body).

Second, college graduates are the policy makers and leaders of tomorrow.<sup>168</sup> Indoctrinating in college students an appreciation for regular physical activity and healthy living casts a broad net for future generations.<sup>169</sup> This is especially true when considered in the context of the modern collegiate student body.<sup>170</sup> Undergraduate universities are home now, more than ever, to large numbers of students who are foreign, racial, and ethnic minorities, disabled, low-income, and adult learners.<sup>171</sup> Thus, while the initial effect of obesity prevention measures in traditional colleges and universities may seem moderate, the implications will inevitably extend to a large number of unique communities.

#### V. CONCLUSION: COLLEGE CAMPUSES ARE THE IDEAL BATTLEGROUND FOR CHANGE

The obesity epidemic in the United States has reached a crucial point.<sup>172</sup> Although the *Let's Move!* campaign and other national school-based initiatives set forth programs and guidelines for K-12 schools, their reach does not extend to institutions of higher education.<sup>173</sup> On the other end of the spectrum, federal legislation like the PPACA and the currently proposed Healthy Lifestyles and Prevention America Act<sup>174</sup> encourage the development of workforce wellness programs, but fail to adequately address the significant population of young adults attending institutions

168. *Id.* (“Today’s college students are our future business leaders and policy makers. Their habits, beliefs, and attitudes will be influential in shaping community norms and values.”).

169. Charles Kupchella, *Colleges and Universities Should Give More Broad-Based Attention to Health and Wellness-At All Levels*, 58 J. AM. C. HEALTH, no. 2, 2009 at 185, 185–86 (examining the solutions college campuses can provide students to mitigate the litany of health issues facing young adults in the United States).

170. KAPLIN & LEE, *supra* note 110, at 12 (noting that immigration law reform, the advent of equal opportunity education, and the creation of federal student aid programs throughout the twentieth century have made colleges exceedingly diverse).

171. *Id.* at 12–13.

172. Toben F. Nelson et al., *Disparities in Overweight and Obesity Among US College Students*, 31 AM. J. HEALTH BEHAV. 363, 363 (2007) (“Overweight and obesity have increased dramatically over the past [thirty] years among both adults and children in the United States.”).

173. See *Physical Education Curriculum Analysis Tool*, CTNS. FOR DISEASE CONTROL & PREVENTION, [www.cdc.gov/HealthyYouth/PECAT](http://www.cdc.gov/HealthyYouth/PECAT) (last updated July 12, 2012) (explaining that the Physical Education Curriculum Analysis Tool (PECAT) is a resource issued by the CDC helping K-12 schools conduct analyses of their PE programs). PECAT does not provide suggestions for institutions of higher education. *Id.*

174. See *generally* Healthy Lifestyles and Prevention America Act, S. 174, 112th Cong. (2011) (died in committee, but was reintroduced as S. 39 on January 22, 2013).

of higher education who are not yet a part of the American workforce.<sup>175</sup> This gap in policy is especially alarming in light of research showing not only that physical activity decreases during the transition from youth to adulthood, but also that college-aged young adults are especially at risk for developing life-long unhealthy habits.<sup>176</sup> In fact, obese teenagers have “a greater than 70% risk” of developing into obese adults.<sup>177</sup>

College students are a unique, yet largely unaddressed, population in the national fight against obesity. Thus, it is crucial to the success of campaigns like *Let's Move!*, as well as our nation's overall public health policy,<sup>178</sup> that future legislation and health initiatives also target institutions of higher education by setting PE and wellness guidelines specifically tailored for that environment, and providing funding for implementation.

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175. The Healthy Lifestyles and Prevention America Act's goal is to support comprehensive workplace wellness programs by providing a tax credit to qualifying businesses, as well as “exclude from an employee's income the fees paid by an employer to an athletic or fitness facility.” *S. 174 CRS Summary*, LIBR. CONGRESS THOMAS, <http://www.thomas.gov/cgi-bin/bdquery/D?d112:1.:/temp/~bdqjkD:@@D&summ2=m&—/home/LegislativeData.php?n=BSS;c=112—> (last visited Feb. 3, 2013). The PPACA provides support for employer wellness programs including, among other things, a national survey to assess employer-based health policies and programs. See generally Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified in scattered sections of 42 U.S.C.).

176. Tomi E. Mäkinen et al., *The Effects of Adolescence Sports and Exercise on Adulthood Leisure-time Physical Activity in Educational Groups*, 7 INT'L J. BEHAV. NUTRITION & PHYSICAL ACTIVITY 1, 1 (2010), available at <http://www.ijbnpa.org/content/7/1/27>; see Hellmich, *Beer, Bad Habits Fuel College Weight Gain*, *supra* note 39 (highlighting recent studies which found that “dramatic increases in beer drinking and significant decreases in physical activity” can lead to significant weight gain during college freshman year, and that the weight gain may continue if students do not curb their unhealthy habits in the following years).

177. U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE SURGEON GENERAL'S VISION FOR A HEALTHY AND FIT NATION 6 (2010), available at <http://www.surgeongeneral.gov/initiatives/healthy-fit-nation/obesityvision2010.pdf>.

178. See CDC's *Healthy Communities Program, Program Overview*, CTRES. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/healthycommunitiesprogram/overview/index.htm> (last updated Feb. 7, 2012) (stating that the CDC's Healthy Communities Program engages communities and empowers national networks to commit themselves to the prevention of chronic conditions like obesity through measures like increased physical activity).