PUBLIC HEALTH & LAW: An Uneasy Alliance

Visiting Professor Fran Miller
University of Hawai`i at Mānoa
Professor Emerita, Boston University School of Law
The Underlying (Political) Problem
Public Health Advocates Think They Know What’s Good for You

THE NANNY STATE
Libertarians Think They Know What’s Good for Their Own Selves
Often They Don’t Play Well Together in the Sandbox
Presentation Roadmap

1. Public Health’s Focus: Population-wide Health
2. Public Health Law’s Focus: Authority to Regulate
3. Inherent Tensions
4. Legal Analysis
   A. Constitutional Law
   B. Administrative Law
      • Jurisdiction to Regulate
      • Grounds for Overturning Agency Action
   C. Standard of Judicial Review
      • Const right implicated
      • “Mere” economic regulation
5. Case Studies: Tobacco & Obesity
1. Public Health’s Focus:
The Health and Well-Being of Populations
The “Old” Public Health
Focused on Eradicating Communicable Diseases
The “Old” Public Health

• Concerned with:
  – Preventing Epidemics & Disease Outbreaks
  – Collecting Statistics
  – & Emergency Response
The “Old” Public Health

Causal Links Relatively Easy to Understand

Example: “China river's dead pig toll passes 16,000, but officials say Shanghai water quality is 'normal’”
The “New” Public Health

Focuses on Eradicating *Chronic* Diseases

Chronic diseases now surpass infectious diseases as primary causes of US morbidity & mortality
The “New” Public Health

Tries to Affect Upstream Behavioral & Ecological Causes of Chronic Disease
The “New” Public Health

• Concerned with:
  – Unhealthy & unsafe
  – Products & behaviors
The “New” Public Health

Causal Links Often More Attenuated
2. Public Health Law

- Law = tool of public health intervention
- Focuses on Appropriate Means of Eliminating Threats to Public Health

- Public health law = more limited in scope than public health science
Limits on Public Health Law: Constitutional Law

Enumerated Rights: 1st Amendment
Freedom of Speech

—Example: Mandated Cigarette Advertising
Limits on Public Health Law: Administrative Law

- Example: Adm. agency action is bounded by the Administrative Procedure Act

“To a lawyer, process is everything.”
Limits on Public Health Law: Political Accountability
Limits on Public Health Law: Political Accountability (cont.)

Example: Prohibition
Limits on Public Health *Law*: Political Accountability (cont.)

< 14 years later . . . .
3. Inherent Tensions
Inherent Tensions (cont.)

US Law: High Respect for Personal Autonomy

US people = Citizens

UK People = Subjects
Inherent Tensions (cont.)

Americans resent being told what to do

No matter how good for them it might be
Public Health Initiatives Can Infringe Personal Liberty

– In ways trivial (mandatory seatbelt laws)

– And not-so-trivial (mandatory school vaccinations)
Legal Analysis of Public Health Initiatives
Constitutional Law

- Enumerated Rights
  - Example: Second Amendment
Constitutional Law (cont.)

Fundamental Rights

—Example: Privacy
Constitutional Law (cont.)

• Due Process
Constitutional Law (cont.)

• Separation of Powers
Administrative Law

Focuses on *How (Public Health) Decisions Are Made*
Administrative Law (cont.)

Agency Jurisdiction to Regulate:

• Must Come From Legislative Branch Executive Branch (see Separation of Powers)
Administrative Law, cont.

Jurisdiction to Regulate (cont): Source of Agency Power = Legislative Enabling Act
Administrative Law (cont.)

• Agency Jurisdiction to Regulate, cont:
  
  Federal – Congress  
  (General Welfare Clause)

  State – State Legislatures  
  (Police Power)

  Local - City Councils  
  (Legislative Charter)
Judicial Review of Agency Action

• Judicial deference to agency expertise

“Win at the Agency level, or not at all”

A breast cancer patient testifies in favor of Avastin during the FDA hearing. (She lost.)
Administrative Law (cont.)

- (Narrow) Grounds for Overturning Agency Action on Judicial Review
  - Violation of Applicable Law
  - Violation of Applicable Procedure
  - Arbitrary & Capricious Agency Action
Std of Judicial Review: Constitutional Right Implicated

Strict Scrutiny (state interest must be compelling, & govt action narrowly tailored to achieve the purpose)
Std of Judicial Review: “Mere Economic Regulation”

“Minimum Rationality” sufficient

(Challenged action must merely be ‘rationally related to legitimate state interest’)
A Tale of Two Crises

• “It was the best of times . . . It was the worst of times . . . ."
Case Study: Smoking

Evidence overwhelming re causal link between smoking and (smoker & bystander) morbidity & mortality
Case Study: Smoking (cont.)

Regulatory toolkit to cut smoking incidence

–Warnings

This is O.K.
Case Study: Smoking (cont.)

Regulatory toolkit to cut smoking incidence

– Warnings: these may not be OK – Why?

FDA Scraps Graphic Cigarette Warnings – WSJ March 19, 2013
Case Study: Smoking (cont.)

Regulatory toolkit: Taxation

NYC average price of cigarettes = $12.50 – city & state tax adds $5.85 to cost of every pack (Hawaii av. price = $7.50, state tax = $3.20)
Case Study: Smoking (cont.)

- **Limit sales:** Flavored Cigars Available to Kids in Every ABC Store on Waikiki

*Cf.*, HB 672 HD2 SD1 Relating to Health (Vapor Product Sale or Purchase to Minors Prohibited).
Case Study: Smoking (cont.)

Regulatory tools: Prohibition

- Honolulu City Council, April 2013
Case Study: Smoking (cont.)

• **Regulatory toolkit:**  Education
Case Study: Smoking (cont.)

Regulatory tools:

- What’s next?
- How far is too far?

“ONLY THOSE WHO WILL RISK GOING TOO FAR CAN POSSIBLY FIND OUT HOW FAR ONE CAN GO.”

T.S. ELIOT
How Far Is Too Far?

Bloomberg’s Plan Would Make Stores Conceal Cigarettes

Monday, March 18, 2013

The New York Times
How Far Is Too Far?

• Prof. Daynard’s proposal would prohibit sale of cigarettes to anyone born after 2000 . . .

*Forever!*
Case Study: Obesity
Case Study Obesity: Hawai`i-Specific

Iz died at age 38 of morbid obesity, adult onset diabetes & renal insufficiency.
Case Study: Obesity

- Causal Links re Obesity and Morbidity & Mortality Not So Clear

Popular support usually depends on proving that causal link
Obesity: Regulatory Tools

• Same old, same old
  – Tax
Hawaii Said No

State soda fee fails to pop

Senators on the Ways and Means Committee table a charge on sugary drinks

By Derrick DePledge
ddepledge@staradvertiser.com

Isle soda drinkers will not have to worry about paying a penalty this year to get their jolt of sugar. State senators have chosen not to advance a soda fee of 1 cent per ounce that would have brought in about $37 million a year to counter obesity. The Abercrombie administration had hoped that the soda fee, as with higher taxes on tobacco, would discourage consumption.

“We decided that we won’t be moving forward with the soda fee this year. Of course, it’s always in play for next year,” said Sen. David Ige (D, Pearl Harbor-Pearl City-Aiea), chairman of the Senate Ways and Means Committee. “In just talking with the members, we didn’t believe that it would be prudent for us to implement that fee this year.”

The soda fee had moved through the Senate Health Committee and the Senate Judiciary and Labor Committee but was not taken up by the Senate Ways and Means Committee in time to meet today’s internal procedural deadline to have bills ready to cross between chambers next week. A bill for a soda fee in the House was not advanced.

Gov. Neil Abercrombie had personally lobbied senators on the legislation, which his administration had described as a priority this session. All of the money collected from the soda fee would have been directed at state programs to combat obesity and chronic diseases such as diabetes. Two years ago lawmakers rejected Abercrombie’s proposal for a soda tax by which some of the revenue would have gone into the state’s

Please see SODA, A20
Obesity: Regulatory Tools

NYC Board of Health Regulation Limiting Portion Sizes of Sugary Drinks
Obesity: Limits on Portion Sizes of Sugary Drinks

Generated stiff Opposition from Many Quarters
Why Was Portion Control Regulation Enjoined & Held Invalid?

N.Y. State Supreme Court judge found rule:

1. Violated separation of powers (improperly asserted a legislative function), &

2. Constituted an arbitrary exercise of power
Water is No. 1 drink in U.S., toppling soda after 20 years

Associated Press

NEW YORK — It wasn’t too long ago that America had a love affair with soda. Now an old flame has the country’s heart.

As New York City grapples with the legality of a ban on the sale of large cups of soda and other sugary drinks at some businesses, one thing is clear: Soda’s run as the nation’s beverage of choice has fizzled.

In its place? A favorite for much of history: plain old H2O.

For more than two decades, soda was the No. 1 drink in the U.S. with per capita consumption peaking in 1998 at 54 gallons a year, according to industry tracker Beverage Digest. Americans drank just 42 gallons a year of water at the time.

But over the years, as soda increasingly came under fire for fueling the nation’s rising obesity rates, water quietly rose to knock it off the top spot.

Americans now drink an average of 44 gallons of soda a year, an 18 percent drop from the peak in 1998. Over the same time, the average amount of water people drink has increased 38 percent to about 58 gallons a year. Bottled water has led that growth, with consumption nearly doubling to 21 gallons a year.

Stephen Ngo, a civil defense attorney, quit drinking soda a year ago when he started running triathlons and wanted a healthier way to quench his thirst.

Ngo, 34, has a Brita filter for tap water and also keeps his pantry stocked with cases of bottled water.

“It might just be the placebo effect or marketing, but it tastes crisper,” said Ngo, who lives in Miami.

The trend reflects Americans’ ever-changing tastes; it wasn’t too far back in history that tap water was the top drink.

But in the 1980s, carbonated soft drinks overtook tap as the most popular drink, with Coca-Cola and PepsiCo putting their marketing muscle behind their colas with celebrity endorsements from the likes of pop star Michael Jackson and comedian Bill Cosby.

Americans kept drinking more of the carbonated, sugary drink for about a decade. Then, soda’s magic started to fade: Everyone from doctors to health advocates to government officials was blaming soft drinks for making people fat. Consumption started declining after hitting a high in the late 1990s.
Why Did NYC’s Artificial Trans-Fat Ban Not Meet the Same Fate?

• **No unlawful delegation issue** because City Council approved the measure

• **Causal connection** between trans-fats & coronary artery disease clearer therefore not arbitrary

• **Impact limited** to restaurants
  – Nothing like the loss of mark-up on soda
  – “Invisible” to patrons – no autonomy restriction
How Far Is Too Far?

Mississippi’s Legislative Ban on Food Bans

Forbids municipalities to place local restrictions on food or drink
Useful References on Public Health Law for Non-Lawyers

• LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW AND ETHICS: A READER (University of California Press and Milbank Memorial Fund, 2002).

• LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT (University of California Press and Milbank Memorial Fund, 2000)