



Perspective

Limiting “Sugary Drinks” to Reduce Obesity — Who Decides?

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When a judge struck down the New York City Board of Health’s partial ban on selling “sugary drinks” in containers of more than 16 fluid ounces, the reaction was swift. The Portion Cap Rule

was widely viewed as a signature accomplishment of Mayor Michael Bloomberg’s third term as the “public health mayor,” and he vowed to appeal, saying, “I’ve got to defend my children, and yours, and do what’s right to save lives. Obesity kills.”¹ But the question before the judge was not about the health risks posed by obesity or even the relationship between obesity and access to large cups of sugary drinks; it was whether the city’s Board of Health (part of the New York City Department of Health and Mental Hygiene) had the legal authority to restrict the serving size of such drinks.

Written in the mayor’s office, the Portion Cap Rule was adopted by the board on an 8-to-0 vote

with one abstention in September 2012 and was almost immediately challenged in court. Judge Milton A. Tingling heard the case and wrote a 36-page opinion striking down the rule.² There was no dispute that obesity is a serious problem; the only issue considered by the judge was whether the board has the power to adopt the rule. The substance of the rule is that “A food service establishment may not sell, offer, or provide a sugary drink in a cup or container that is able to contain more than 16 fluid ounces.” A “sugary drink” is defined as a nonalcoholic drink that is “sweetened by the manufacturer or establishment with sugar or another caloric sweetener; has greater than

25 calories per 8 fluid ounces of beverage; and does not contain more than 50 percent of milk . . . by volume.”

Legislatures make policy, and administrative agencies carry out the policy made by the legislature. The New York City Board of Health is an administrative agency, which can do only what it is authorized to do by legislation. The threshold question was whether the board exceeded its authority “and impermissibly trespassed on legislative jurisdiction.”² The judge relied heavily on a 1987 case involving a successful challenge to the state Public Health Council’s anti-indoor-smoking rules.³ In that case, the Court of Appeals (the highest court in New York State) examined “the difficult-to-define line between administrative rule-making and legislative policy-making.” Four “coalescing circumstances” persuaded the Court of

Appeals that the state administrative agency had crossed the line in that case. The 1987 rules prohibited smoking in a "wide variety of indoor areas that are open to the public" but expressly excluded many venues, including restaurants with fewer than 50 seats, conventions, trade shows, bars, and hotel rooms. The Court of Appeals determined that those rules were based more on economic and social concerns than on public health matters, were written on a "clean slate" rather than simply filling in regulatory gaps left to the agency by the legislature, involved a matter on which the legislature had repeatedly tried and failed to reach agreement, and were developed without the exercise of any special public health expertise.³

Judge Tingling found the indoor-smoking decision to be a controlling precedent in the Portion Cap Rule case. He examined the "coalescing circumstances" to determine whether New York City's board had exceeded its administrative authority. Tingling found first that, like the indoor-smoking rule, the regulation was "laden with exceptions based on economic and political concerns," which are outside the Board of Health's purview. Next, he concluded that the powers granted to the health department by the New York City Charter (from its origin in 1730 through more than a dozen amendments to date) did not grant the board "the authority to limit or ban a legal item under the guise of 'controlling chronic disease.'" Third, the judge found that that city's legislature, the New York City Council, had not passed any laws addressing the subject matter. The judge's bottom line is that the health department violated the separation-

of-powers doctrine by exceeding its authority as an administrative agency and acting like a legislature. Accepting the city's arguments would, the judge concluded, "create an administrative Leviathan" that would give the Board of Health "authority to define, create, mandate and enforce [rules] limited only by its own imagination."²

The judge also adopted a separate basis for striking down the Portion Cap Rule, determining that it was arbitrary and capricious because it does not apply to "all food establishments in the City, it excludes other beverages that have significantly higher concentrations of sugar sweeteners . . . on suspect grounds," and it has many loopholes — for instance, it imposes no limitations on refills, which defeats its purpose.²

The rule and the opinion raise several issues. First, the city's health department has taken other actions without direct authorization by the city council that could now be challenged. For example, in 2005, the Board of Health required laboratories to report to the department the names, dates of birth, addresses, physicians, and blood-sugar levels of people with type 2 diabetes — without patient consent.⁴

Second, the judge's conclusion that the legislative branch is the proper branch to make public health policy is correct. Both the New York City Council and the New York State legislature have the authority to regulate the sale of soda in large containers and to grant this authority to the city or state health department. Should either legislative body do so, it is much less likely that a court would overturn the Portion Cap Rule as arbitrary and capricious. On the other hand, the rule has

been widely ridiculed, which makes its enactment by elected officials highly unlikely. Jon Stewart probably expressed a widespread public sentiment when he joked that he loved the rule because "it combines the draconian government overreach people love with the probable lack of results they expect."

Third, there are reasonable alternatives to the Portion Cap Rule, such as higher taxes on all sales of sodas. Higher prices often discourage consumption, as has been the case with cigarettes. Such taxes tend to be regressive, however, with disproportionate effects on lower-income people, who in this case could not afford to buy fancy bottled water or juice drinks. That may be one reason why some New York communities oppose such taxes.

Some alternatives, however, are not reasonable — in particular, the current proposals to shame people who are overweight.⁵ Such shaming amounts to treating a health risk, whose development may be involuntary, as a moral failure. Any public policy entailing overt discrimination based on physical appearance is simply wrong. People who are obese know it; making them feel worse about themselves encourages bullying, another public health problem, and helps no one.

Perhaps the most important lesson is old news: economics often drives health policy. New York City's efforts to reduce obesity grew with its desire to control its health care costs for its residents, a disproportionate share of whom are obese or have diabetes. Meanwhile, large corporations continue to use their influence and money to derail public health measures that could reduce their profits. Although the

general public shares the goals of public health, many people remain skeptical of government's choice of means for achieving those goals. Agencies that overstep their bounds or adopt rules that are intrusive or just plain silly invite backlash, which can make effective public health regulation impossible. They make fools of themselves and heroes of the opponents of public health.

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