

Leveraging Law as the Principal Instrument of Public Health Policy: Lessons Learned through Michael Bloomberg's Mayorship in New York City

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INTRODUCTION

Michael Bloomberg has been touted as the nation's first "public health" mayor. Mayor Bloomberg's final term as New York City's mayor has now come to a close, and it is important to reflect on the accomplishments and challenges he has faced in leveraging law as a tool to promote public health efforts.

In a 2006 address, Bloomberg boldly stated that law is the principal instrument of public health policy. Throughout his time in office, Bloomberg has been forthright about taking legal measures to improve public health in the city. His initiatives include banning trans fat, forbidding smoking in restaurants, and putting a cap on soda sizes. Bloomberg has received both praise for his work in public health and condemnation for his policies that may place restrictions on individual liberty and create a "nanny state." Some argue that legal coercive measures should be substituted for lesser restrictive alternatives, such as persuasion through public information campaigns. Critics, like Richard Epstein, see modern public health law as overly inclusive, intrusive, and unduly infringing on individual freedom.[1] While less intrusive measures are certainly preferred as the first line of defense in public health, coercive measures such as laws are necessary to ensure the health and safety of the population. As Thomas Friedan posits, "When government fails to protect and improve people's health, society suffers." [2] Accordingly, governments are faced with the challenge of taking the most effective, yet least restrictive, means to maximize health benefit, even if it means taking coercive measures at the expense of individual liberty.

ANALYSIS

Salus Populi Suprema Lex: The Well-Being of the Public Is the Supreme Law

Democratically elected governments have legal authority to protect the public's health.[3] It has been long established through *Jacobson v Massachusetts* that the state has the police power authority to create legislation to protect the health, safety, and general welfare of the population.[4] While public health action is sometimes characterized as inappropriately intrusive, the population's reliance on the state for protection implies an ethical obligation for the government to exercise its authority to ensure health and safety. Individual liberty must be subordinated to protect the common public health good. Accordingly, the state is justified to use public force to achieve this end.[5]

Be that as it may, regulation of individual behavior through laws and other coercive measures is often met with opposition. Under the Millian harm principle, which holds that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others,"

intervention and regulation on individual behavior is justified so long as it prevents harm and risk to others.[6] Liberalism, a dominant philosophy in the United States, centers on the values of freedom, self-determination, personal responsibility, and limited government. Champions of autonomy would argue that competent individuals should be free from controlling interferences. Any infringement on liberty, privacy, individual choice, and economic freedom can be seen as a violation of rights. Similarly, Kantian philosophers would argue that an individual cannot be used to further another's objectives without regard to his own goals, or in other words, a man should not be used as a means to an end. Accordingly, interventions that intrude on individual freedom and do not offer any direct benefit to the individual can be viewed as unethical, regardless of the beneficent intent.

Regardless of these ethical concerns, public health laws are still created and generally accepted with the understanding that people enter into a social contract and willingly forgo some self-interest in exchange for protection, or otherwise face a tragedy of the commons.[7] The tragedy of the commons is a dilemma that arises when multiple individuals, each acting independently and rationally according to their own self-interest, ultimately deplete a shared limited resource even when it is clear that it is not in anyone's long-term interest for this to happen.[8] One case that illustrates public health efforts to avoid the "tragedy of the commons" is the case of mandatory vaccination laws and herd immunity. Herd immunity occurs when a significant portion of a community is immunized against a contagious disease, thereby protecting most members of the community against that disease because there is little opportunity for an outbreak. Once a certain proportion of the community is immunized, those who are not eligible for certain vaccines, including infants, pregnant women, and immunocompromised adults, have some protection because the spread of contagious disease is contained. This is also known as community immunity.

While opinions vary about whether different health behaviors should be regulated, one need only look at the success of the New York City series of anti-smoking laws to understand the success of law-based public health campaigns. While these laws were first seen as an infringement on individual liberty and potentially detrimental to business, they gained wide public acceptance throughout the years as they proved to be efficient, cost-effective, and life saving.

Persuasive and Coercive Measures in Public Health

All public health measures aiming to affect individual behavior lie on the spectrum between persuasion and coercion. Law is essentially an act of coercion, as laws limit, by threat or penalty, individual choice through eliminating, restricting, or burdening an option, thereby diminishing autonomy.[9] On the other hand, acts of persuasion, such as public information campaigns, are intended to change individual action through appeals to reason.[10]

Critics like Epstein argue in favor of a narrower conception of public health and limiting the scope of coercive government intervention.[11] Persuasive measures, such as educational public health campaigns, are certainly less restrictive than laws. However, it is important to consider whether these campaigns are as efficacious or cost-effective. While intervention through public health communications is effective in raising awareness of health risks and promoting the adoption of recommended treatment regimens, interventions alone often do not have enough clout to change health behavior on a mass scale.[12] Furthermore, education-based campaigns in public health are not without ethical concerns. Such campaigns are often sullied by issues of manipulation, stigma, responsibility, and stereotyping, thereby compromising individual autonomy in persuasive health measures.[13]

While persuasion is preferable over coercion from a bioethics and human rights perspective, it is not without ethical concerns. Persuasive public health campaigns may contain elements of manipulation or nonargumentative influence through reason countering or reason bypassing, causing the campaigns to have undue influence on autonomy. Reason-countering nonargumentative influence occurs when methods of manipulation change one's affective state, including playing on social pressures and personal desires. Similarly, reason-bypassing nonargumentative influence occurs when a person's reasoning capacities or awareness through framing (setting up an environment a certain way) is primed using subconscious cues.[14]

Beyond the ethical concerns that accompany persuasive public health campaigns, it is said that persuasion alone through educational public health campaigns is not enough for effective change in health behavior on a mass scale. As Willard Gaylen and Bruce Jennings posit, "Coercion is usually quicker and surer than education." [15] In other words, law is more effective and efficient in achieving public health goals than public health campaigns.

Risk Proportionality, Least Restrictive Means, and Public Trust

The state's fundamental authority to protect the population's safety and welfare is limited by the individual's legally protected rights to autonomy, privacy, liberty, and property. To intrude on individual liberties, the state must first demonstrate a rational and legitimate interest in intervention. Accordingly, one must assess the nature, duration, probability, and severity of the risk at hand. For example, in the case of bioterrorism, there is uncertain risk but potentially high magnitude of harm.[16] In cases where public health risks may be unknown, responses must be swift and bold. In such cases, it is best to adhere to the precautionary principle. In the absence of certainty, coercive action is acceptable to protect the public, so long as the action is proportional to the suspected risk of harm.

According to the principle of proportionality, the least restrictive means should be exercised so as not to unduly compromise the rights and liberties of an individual. While persuasive measures, such as public health campaigns, are certainly less restrictive, it is difficult to demonstrate efficacy or cost-effectiveness compared to coercive measures. Many would argue that if a persuasive measure is proven to be equally effective and cost-efficient as a coercive measure, it should be taken over a coercive measure. Similarly, the principle of proportionality purports that in nonemergency cases, measures should be made voluntary before legal mandates or sanctions are issued. This theory rests on the concept that if a government requires citizens to sacrifice their own liberties for the good of others, then the government has a reciprocal obligation to provide a safe, habitable environment. Moreover, it is essential that public health policies are applied across society equally, in a nondiscriminative fashion.[17] This is essential for maintaining public trust and cooperation.[18] With only 40 percent of Americans reporting trust in public health officials, this will be no easy task.[19] At minimum, authorities should clearly communicate measures and their justifications in a timely fashion and allow for a process of appeal.[20] Low levels of trust translate into low rates of public cooperation, which may make a community more vulnerable to harm during states of public health emergencies. These concerns call for public discourse on coercive measures by the majority affected so that the laws are mutually agreed upon within the community.

CONCLUSION

Achieving a just balance between maintaining individual liberties and ensuring health and safety of the population is an enduring problem for public health authorities. Champions of autonomy see public health law

as an unwarranted violation of one's autonomy and personal liberties. On the other hand, utilitarian thinkers consider law as a way to ensure the health and welfare of the community. As public health threats become increasingly complex, it is important to ensure that new laws keep pace with ethical principles. Trade-offs must be made to ensure that collective benefits of population health warrant infringement on individual rights, while balancing competing ethical, health, economic, and political concerns. As New York City says goodbye to Mayor Bloomberg, we reflect on the progress made in public health policy during his tenure as mayor. Much has changed in the field of public health in the last decade, but it stands that fair and effective law remains the cornerstone of successful public health policy.

References:

- [1] Richard Allen Epstein, "Let the Shoemaker Stick to His Last: A Defense of the "Old" Public Health," *Perspectives in Biology and Medicine* 46 (2003): S138-S159.
- [2] Thomas Frieden, "Government's Role in Protecting Health and Safety," *N Engl J Med.* 368 (2013): 1857-1859.
- [3] Lawrence Gostin, "Jacobson v Massachusetts at 100 Years: Police Power and Civil Liberties in Tension," *Am J Public Health* 95, no. 4 (2005): 576–581.
- [4] *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).
- [5] Epstein, *Perspectives*, S138-S159.
- [6] Gostin, *Public Health Law: Power, Duty, Restraint* (2009).
- [7] Gaylen and Jennings, "The Perversion of Autonomy, Revised and Expanded Edition: The Perversion of Autonomy: Coercion and Constraints in a Liberal Society," (2003).
- [8] Garrett Hardin, "Tragedy of the Commons," *Science* 162, no. 3859 (1968):1243-1248.
- [9] Gaylen and Jennings, "The Perversion."
- [10] Ruth Faden, "Ethical Issues in Government Sponsored Public Health Campaigns."
- [11] Blumenthal-Barby, "Between Reason and Coercion: Ethically Permissible Influence in Health Care and Health Policy Contexts," *Kennedy Institute of Ethics Journal*, 22, no. 4 (2012): 345–366. By The Johns Hopkins University Press.

[12] Gaylen and Jennings, "The Perversion."

[13] Epstein, *Perspectives*, S138-S159.

[14] Nurit Guttman, "Guilt, Fear, Stigma and Knowledge Gaps: Ethical Issues in Public Health Communication Interventions," *Bioethics* 18, no 6 (2004): 531-52.

[15] Ruth Faden, "Ethical Issues," 27-37.

[16] Lawrence Gostin, "Jacobson," 576–581.

[17] Lawrence Gostin, "Ethical and Legal Challenges Posed By Severe Acute Respiratory Syndrome," *JAMA* 290, no. 24 (2003): 3229-37.

[18] RJ. Blendon, "Attitudes Toward The Use Of Quarantine In A Public Health Emergency In Four Countries," *Health Affairs* 25, no. 2 (2006): 15-25.

[19] *Ibid.*

[20] Lawrence Gostin, "Ethical," 3229-37.