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# Adventures in Nannydom: Reclaiming Collective Action for the Public's Health

*Lindsay F. Wiley, Wendy E. Parmet, and Peter D. Jacobson*

Each of us has written about the importance of reframing the debate over public health paternalism.<sup>1</sup> Our individual explorations of the many and varied paths forward from libertarian “nanny state” objections to the “new public health” have been intimately informed by collaboration.<sup>2</sup> This article represents a summary of our current thinking — reflecting the ground gained through many fruitful exchanges and charting future collaborative efforts.

Our starting point is that law is a vitally important determinant of population health, and the interplay among law, social norms, cultural beliefs, health behaviors, and healthy living conditions is complex. Anti-paternalists’ efforts to limit the scope of public health law to controlling only the proximal determinants of infectious diseases are utterly unjustifiable in the face of so much preventable death, disability, and disparity. Equally important, the anti-paternalism push is deeply counter-majoritarian and undemocratic, threatening to disable communities from undertaking measures to improve their own well-being.

Although it may be tempting, we decline to dismiss the “nanny state” slur solely on the grounds that “personal responsibility” and the purported “freedom to choose” unhealthy products are smoke and mirrors designed to hide the profit motive of industry groups and their supporters. Certainly, regulated industries have invested a great deal in framing the public’s response to public health measures. But we cannot

ignore the merits and potency of some of the criticism pointed at public health. At times, public health *has* over-reached, failing to consider the full range of concerns and values of the public it seeks to protect. We must, therefore, recognize that communities may rightly weigh ends other than health more highly than public health experts would, and also that the anti-paternalistic rhetoric resonates with deeply held beliefs about the relationship between the government and its citizens in a pluralistic society.

Even so, this rhetoric must be seen as part of a broader attack by libertarian legal scholars and industry groups on regulation in general, and the new public health in particular.<sup>3</sup> It is percolating into industry-sponsored legal filings and even judicial opinions. It threatens to erode the legal foundation for good public health practice. To counteract these developments, we must articulate a coherent, principled response that reframes the debate on our own terms, rather than remaining on the defensive. We must proactively scan the horizon for the legal and political debates of tomorrow, rather than being caught off guard.

## Responses

In responding to allegations of nanny-statism, we need to be clear about the weak legal basis for the libertarian objection. Otherwise, our counter-arguments threaten to reify a vague, but growing sense among the general public that interventions like the New York City portion rule or the health insurance mandate are being struck down by courts in the name of individual rights.

Despite the objections of so-called constitutional libertarians who seek to “recover” a constitution that never was,<sup>4</sup> it is, in fact, well established that states have a legitimate interest in protecting the health

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and safety of the people, even from threats associated with individuals' own choices and actions.<sup>5</sup> Anti-paternalism does not provide a constitutionally enshrined, counter-majoritarian restraint on governmental authority. Likewise, despite a narrowing of the scope of the federal government's authority under the Commerce Clause in *NFIB v. Sebelius*,<sup>6</sup> it remains the case that the federal government can use its enumerated constitutional powers, including its authority to tax and spend, to protect health and safety. In cases where the courts must apply strict scrutiny because a fundamental right (such as freedom of speech) or suspect classification (e.g., race or

of all kinds. Many of the targeted regulations create inconvenience or require the payment of small fines, but do not involve significant restraints on individual liberty. Others regulate the behavior of manufacturers or sellers for the good of consumers, rather than regulating consumers for their own good. New York City's menu labeling and portion rules regulate how sellers sell, not what patrons can eat or drink. In essence, these laws are similar to prohibitions on the sale of unwholesome food or dangerous drugs. While some may disagree with the need for such laws, they are no more paternalistic than laws that prevent people from assaulting others. Those who are protected by

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Although expertise can and should play an important role in informing public health protections, public health law is most legitimate and secure when it reflects the concerns and values of affected populations, and emerges from their engagement, as occurred when the gay community mobilized around HIV in the 1980s and '90s, or when African-American and Latino communities mobilize around the issue of access to healthy food. When directed at such public health laws, the libertarian critique is exposed for what it is: an attack on the liberty of communities to improve their own health.

religion) is implicated, a purely paternalistic governmental interest may not be sufficiently compelling to justify infringement.<sup>7</sup> But there is no fundamental right to sell or purchase particular products or services in particular configurations.<sup>8</sup>

Even the recent New York Court of Appeals opinion invalidating the portion rule, which undoubtedly contained a nod to the libertarian critique of public health, did not reject the city's authority to regulate portion sizes. Instead, the court determined that the legislature, not the health department, should make the decision.<sup>9</sup> Were such a rule to be adopted by a legislative body, the philosophical anti-paternalism argument would *not* be sufficient to justify a counter-majoritarian constraint on legislative action. We should be careful to specify that the debate over public health paternalism is not about what government *may* do, but rather what government *should* do.

Part of the difficulty in responding to anti-paternalism arises from the fact that the libertarian objection does not confine itself to coercive paternalistic regulations. It is a constantly shifting attack on regulation

such laws could theoretically engage in self-help; the fact that laws reduce their need to do so by regulating those who would endanger them does not make the laws unduly paternalistic.

### Reframings

We need to recast public health law, both in perception and reality, from regulations imposed by out-of-touch bureaucrats to the actions that communities undertake to ensure the conditions in which they can be healthy. Although expertise can and should play an important role in informing public health protections, public health law is most legitimate and secure when it reflects the concerns and values of affected populations, and emerges from their engagement, as occurred when the gay community mobilized around HIV in the 1980s and '90s, or when African-American and Latino communities mobilize around the issue of access to healthy food. When directed at such public health laws, the libertarian critique is exposed for what it is: an attack on the liberty of communities to improve their own health.

## Scanning the Horizon

In addition to responding to the libertarian objection and reframing the debate over public health regulation, public health must be more proactive in identifying and immediately confronting legal and political challenges to public health. These include the development of preemption, non-delegation, First Amendment, Equal Protection, and Due Process doctrines as barriers to commercial regulation, as well as the development of progressive (and not merely libertarian) objections to public health regulation.

Civil liberties, including free speech, have intrinsic value for progressives. Additionally, they play an important role in promoting public health. Indeed, we should remember that public health advocates have supported robust interpretations of the First Amendment in their battles against governmental limitations on speech concerning HIV/AIDS or gun ownership.<sup>10</sup> Even as we object to the use of civil liberties to protect industry interests from regulation, we need to recognize that First Amendment, Equal Protection, and Due Process claims are not trivial; sometimes they are critical to securing health.<sup>11</sup> We need to articulate principles that are supportive of appropriate public health regulations while also being respectful of constitutional protections and are firmly rooted in public health's democratic roots.

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2. Our collaboration has been part of a larger effort of a group of public health law scholars and practitioners to work together to address the challenges facing public health law. L. Beletsky, W. E. Parmet, and S. Burris, "Advancing Public Health Through the Law: The Role of Legal Academics," *Northeastern Public Law and Legal Theory Faculty Research Paper Working Series*, No. 102-2012, available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2148432](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2148432)> (last visited February 17, 2015).
3. See, e.g., R. Barnett, "The Proper Scope of the Police Power," *Notre Dame Law Review* 71, no. 2 (2004): 429-495; R. A. Epstein, "Let the Shoemaker Stick to His Last: In Defense of the 'Old' Public Health," *Perspectives in Biology and Medicine* 64, no. 3, Supp. (2003): S138-S159; M. A. Hall, "The Scope and Limits of Public Health Law," *Perspectives in Biology and Medicine* 64, no. 3, Supp. (2003): S199-S209; M. A. Rothstein, "The Limits of Public Health: A Response," *Public Health Ethics* 2, no. 2 (2009): 84-88; T. M. Pope, "The Slow Transition of U.S. Law Toward a Greater Emphasis on Prevention," in H. S. Faust and P. T. Menzel, eds., *Prevention vs. Treatment, What's the Right Balance* (Oxford: Oxford University Press, 2011).
4. R. E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, N.J.: Princeton University Press, rev. ed. 2014).
5. See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (upholding seatbelt law); *Simon v. Sargent*, 346 F.Supp.277 (D. Mass. 1972), aff'd without opinion, 409 U.S. 1020 (1972) (motorcycle helmet law does not violate due process, notwithstanding claim that "police power does not extend to overcoming right of an individual to incur risks that involve only himself").
6. 132 S.Ct. 2566 (2012).
7. See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (striking down a regulation prohibiting advertisement of alcohol prices on First Amendment grounds, in part because "[i]t is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance" including taxation and direct regulation establishing minimum prices or maximum per capita purchases); *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976) (striking down a "highly paternalistic" regulation prohibiting pharmacists from advertising the prices of prescription drugs, but noting that the state "is free to require whatever professional standards it wishes of its pharmacists" so long as they do not implicate freedom of speech); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion applying strict scrutiny to reject sex discrimination "rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage").
8. See, e.g., *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 495 F.3d 695 (D.C. Cir. 2007) (holding that terminally ill adults had no fundamental right to have access to investigational drugs, after surveying the long history of safety and efficacy regulation of drugs for personal use); *Lange-Kessler v. Dept. of Ed.*, 109 F.3d 137 (2d Cir. 1997) (holding that the right to privacy does not encompass a woman's right to choose a direct-entry midwife to assist during childbirth).
9. *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, 23 N.Y.3d 681 (N.Y. June 26, 2014).
10. See *Agency for Int'l Development v. Alliance for Open Society Int'l*, 133 S.Ct. 2321 (2013); *Wollshlaeger v. Florida* 760 F.3d 1159 (11th Cir. 2014).
11. See, e.g., W. K. Mariner, G. J. Annas, and W. E. Parmet, "Pandemic Preparedness: A Return to the Rule of Law," *Drexel Law Review* 1, no. 2 (2009): 341-382 (arguing that respect for constitutional rights supports efforts to protect the public from pandemics).