

Inquiring Minds Topic – 20 June 2014

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SOCIAL ENGINEERING: YES OR NO?

New York City Soda Fight, in Court, Tests Agency's Power

By Michael Grynbaum – The New York Times - June 4, 2014

ALBANY — New York City's battle over sugary drinks is entering its endgame. But much more than soda is at stake.

A plan to limit the sale of large, high-calorie beverages, championed by former Mayor Michael R. Bloomberg as a novel way to fight obesity, went before the State Court of Appeals here on Wednesday, the city's final recourse after a lower court judge struck down the proposal last year.

But health advocates and legal experts say they are less concerned about the fate of two-liter Coca-Cola bottles than something more consequential: how far local governments can go to protect the health of their citizens.

The American soft-drink industry, in suing to stop the plan, contended that the city's Board of Health — which banned lead paint in 1959 and once cleared slums to prevent the spread of cholera — went beyond its powers in trying to regulate the size of sugary drinks, saying the board should be restricted to narrower concerns, like eradicating diseases.

That argument, if upheld, could limit the role of mayors and public health agencies to influence consumer behavior. And it would rewrite the role of New York City's Board of Health, an obscure but powerful agency that has been a national leader in creating policies intended to encourage healthier habits, like banning trans fats from restaurants and posting calorie counts on menus.

“This case will make law,” said Ross Sandler, a former adviser to Mayor Edward I. Koch who studies the role of urban governments at New York Law School. “It will set the margin for how far a board of health can go.”

As a test case, the soda battle is an unusual one: The arguments here on Wednesday, held in the ornate oak chambers of the state's highest court, touched on the fast-food documentary “Super Size Me” and whether New York City might consider a ban on Himalayan-sized portions of French fries.

In this instance, culinary matters were inextricable from legal ones.

“Where do you draw the line?” Chief Judge Jonathan Lippman demanded of the lawyer for the city, Richard Dearing. If oversize sodas are banned, the judge asked, “Where do we say it's O.K., as opposed to banning hamburgers or frankfurters or whatever it might be?”

Mr. Dearing, who could barely respond before the judges interrupted with new questions, said the Board of Health had broad power to enforce healthy living standards, but it would only act in the face of compelling scientific evidence. He defended the small-portion soda plan as an incremental step — “like a warning label” — that would only discourage New Yorkers from overconsumption, not prevent them from it.

Lawyers for the soft-drink industry countered that the board, made up of medical professionals appointed by the mayor, had waded into legislative territory by attempting to restrict the size of sugary beverages sold from restaurants, carts and bodegas.

“This case has never been about obesity,” the lawyers wrote in a brief. “It is about whether the unelected Board of Health has limitless power to impose on millions of New Yorkers its view of how they should live their lives.”

Judge Lippman, blunt and skeptical with the city’s lawyer, appeared similarly unmoved by the industry’s argument.

“Why is it such a great, terrible government intrusion to make regulations on how to package food?” Judge Lippman asked, his chin perched on his hand.

The industry’s lawyer, Richard Bress, said the case raised “the question of what makes us American, the right to choose.”

“There are different views as to how far the government can go,” Judge Lippman replied. “But clearly whether the government is a factor in our lives is not up for discussion in 2014.”

Chief Judge Jonathan Lippman at the State Court of Appeals in Albany in May. The court is currently hearing arguments on a plan to limit soda sizes. Credit Nathaniel Brooks for The New York Times

It was not clear at the end of the 40-minute proceedings which way the judges were leaning. Two lower courts have already sided against the city, saying the Board of Health overreached on its soda proposal and suggesting that the sale of sugary products did not constitute an urgent risk to public health.

Supporters of the plan insist that the board — whose broad powers date back to 19th-century statutes and have been reinforced by extensive case law — has adapted, throughout its history, to the health challenges of the day.

“Obesity is certainly a public health issue,” Dr. Mary T. Bassett, the city health commissioner and the board’s chairwoman, said in an interview. “The Board of Health has its origins two centuries ago, at a time when causes of death were dominated by infectious diseases. Today, the causes of death are dominated by noncommunicable disease, including the twin epidemics of obesity and diabetes.”

Several judges on Wednesday cited some of the board’s historic actions, like requiring that the city’s water supply be fluoridated and enacting a first-in-the-nation ban on lead paint.

But industry lawyers countered that the Board of Health had more explicit mandates to take those actions, and that the City Council should have been consulted before the soda limits were approved.

The soda plan, proposed by Mr. Bloomberg in his final term as mayor, would limit the sale of many high-calorie beverages to portions of 16 ounces or less, about the size of a medium coffee.

It proved broadly unpopular: About 60 percent of city residents said it was a bad idea. The soft-drink industry mounted a public-relations campaign framing it as an infringement on consumer freedom.

But the plan also prompted worldwide debate over the role of soft drinks in causing obesity, and led some beverage companies to experiment with smaller sizes.

Mayor Bill de Blasio, who took office in January, said he supported the plan as a way to combat New York's runaway obesity rate.

That left Mr. de Blasio, a frequent critic of Mr. Bloomberg's tenure, defending one of his predecessor's signature initiatives, and at odds with two of his allies. The city's public advocate, Letitia James, and the City Council speaker, Melissa Mark-Viverito, are backing the soda industry, members of which contributed to their election campaigns last year.

Several law professors in New York said they had been eagerly awaiting Wednesday's arguments.

"This case is presented as about individual liberty," said Richard Briffault, a law professor at Columbia who filed a brief supporting the city. "In many ways, it's much more about the ability of administrative agencies to use modern regulatory techniques, which include trying to shape consumer behavior in healthier ways."

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Nudge (book)

From Wikipedia, the free encyclopedia - - **Nudge: Improving Decisions about Health, Wealth, and Happiness** is a book written by Richard H. Thaler and Cass R. Sunstein. The book draws on research in psychology and behavioral economics to defend libertarian paternalism and active engineering of choice architecture. **Summary.**

Human behavior

One of the main justifications for Thaler's and Sunstein's endorsement of libertarian paternalism in *Nudge* draws on facts of human nature and psychology. The book is critical of the *homo economicus* view of human beings "that each of us thinks and chooses unflinchingly well, and thus fits within the textbook picture of human beings offered by economists."

They cite many examples of research which raise "serious questions about the rationality of many judgments and decisions that people make". They state that, unlike members of *homo economicus*, members of the species *homo sapiens* make predictable mistakes because of their use of heuristics, fallacies, and because of the way they are influenced by their social interactions.

Soft paternalism

Soft paternalism (also called libertarian paternalism) is the union of two political notions that are commonly viewed as being at odds: libertarianism and paternalism.

Sunstein and Thaler state that "the libertarian aspect of our strategies lies in the straightforward insistence that, in general, people should be free to do what they like-and to opt out of undesirable arrangements if they want to do so".[13] The paternalistic portion of the term "lies in the claim that it is legitimate for choice architects to try to influence people's behavior in order to make their lives longer, healthier, and better".

Choice architecture describes the way in which decisions are influenced by how the choices are presented. It is in arranging the choice architecture in a certain way that individuals can be nudged in a certain way without taking away their freedom of choice. A simple example of a nudge would be placing healthy foods in a school cafeteria at eye level, while putting less healthy junk food in harder to reach places. Individuals are not prevented from eating whatever they want, but the arranging of the food choices in that way has the effect of decreasing consumption of junk food and increasing consumption of healthier foods.

Policy recommendations

Sunstein and Thaler use their notions of nudges within the context of choice architecture to propose policy recommendations that they believe are in the spirit of libertarian paternalism. They have recommendations in the areas of finance, health, the environment, schools, and marriage. They believe these problems can at least be partially addressed by improving the choice architecture.

Retirement saving

Thaler and Sunstein point out that many Americans are not saving enough for retirement. They state that "in 2005 the personal savings rate for Americans was negative for the first time since 1932 and 1933 – the Great Depression years".

One change they offer is creating better default plans for employees. Employees would be able to adopt any plan they like, but, if no action is taken, they would automatically be enrolled in an expertly designed program [such as social security]. They also propose what they refer to as the "Save More Tomorrow" plan. This is to address the issue of people having the desire to save more, yet procrastinating on actually doing so. This program would invite "participants to commit themselves, in advance, to a series of contribution increases timed to coincide with pay raises".

Sunstein and Thaler also propose a way to increase organ donation rates in the United States. They argue that a mandated choice program should be put in place, where, in order for someone to renew their drivers license, they must say whether or not they would like to be an organ donor. They also advocate the creation of websites which would suggest that the wider community supports organ donation in order to nudge people into becoming organ donors themselves.

Elizabeth Kolbert writing for *The New Yorker* held reservations about some of the book's conclusions when she wrote that many of the suggestions in *Nudge* seem like good ideas, and even, as with "Save More Tomorrow," practical ones. The whole project, though, as Thaler and Sunstein acknowledge, raises some pretty awkward questions. If the "nudger" can't be depended on to recognize his own best interests, why stop at a nudge? Why not offer a "push," or perhaps even a "shove"? And if people can't be trusted to make the right choices for themselves how can they possibly be trusted to make the right decisions for the rest of us?