

## *The Role of Gender in the Weight-Disease Relationship, Mandated Weight Control Programs and the Risk of Disparities in Access to Health Care for Women*

As regulatory programs are being developed to deal with the rising cost of health care, the United States sits at a cross roads with the choice to either proceed to promote the health and well-being of the population while promoting and protecting human rights or to enhance public health at the expense of these rights. This Article explores these choices in the context of the “obesity crisis” and concludes that advancing both health and human rights simultaneously is critical to improving overall human well-being. Illustratively, this Article examines two separate programs designed to impact lifestyle choices and encourage healthy food consumption. The first is the West Virginia Pilot Project (the “West Virginia Project”) and the second is the USDA’s Economic Research Service's Program. In early 2007, the federal government approved the West Virginia Project which provides health care for low-income, Medicaid beneficiaries in West Virginia. The West Virginia Project punishes those who do not join, and religiously adhere to, weight-loss or anti-smoking programs, or who otherwise fail to comply with government mandates, by denying important medical services. This type of program reaches out to broadly regulate the behavior of low-income individuals that is self-regarding; in other words, conduct that impacts only the individual. Unlike the situation with nicotine and its addictive properties where health advocates argue that the choice to smoke is not voluntary, health advocates’ position with regard to high fat and sugar foods is that consumers lack the capacity to make a wise and rational decision because consumers are not well enough informed. Does this rationale support the intervention of the government to take the choice to consume high fat and sugar foods away from competent adults? If it is true and there is a capacity problem based on ignorance, isn’t the solution education?

In contrast, USDA’s Economic Research Service's proposed program targets this capacity problem by incorporating findings from decision-analysis, behavioral economics, food marketing and food psychology to provide a series of strategies for informing and influencing individual choice to favor a healthier diet. This type of program seeks to both promote public health while protecting human rights.

Based on an examination of these two Programs, this Essay concludes that there are several measures that must be taken in order to protect human rights while promoting public health. Policymakers should precisely identify the root cause of the public health problem to be addressed, carefully research the current empirical science on behavior and design programs that weigh the degree of the invasion of liberty interests with the benefits to be gained. Any further research which is needed prior to the implementation of programs that impact individual liberties should be conducted. For example, researchers who are investigating the relationship between the status of being overweight or obese and disease are exploring biological characteristics as well as several of the social determinants of health, such as race and location in community. However, little work has been done on the impact of gender. This void in research on the role of gender leads to weight control programs like the West Virginia project. This program is ill-considered as it fails to examine the role of gender as both a determinant of the status of being overweight and as a barrier to access to care. Thus, the West Virginia Project, and other programs like it, are likely to increase the disparity to access to healthcare of low-income women. This Essay proposes that weight loss programs include a gender analysis to avoid these unintended consequences.

This Essay also recommends that judicial review of public health programs that target self-regarding behavior apply 'reasonable-basis review' rather than a 'rational basis review.' Both the West Virginia Program and the USDA’s Program are likely to survive a 'rational basis review.' However, the application of a reasonable basis review reveals that the West Virginia Program will have an expected overall negative impact on access to health care for women while failing to promote the health of any other group.