Commercial Speech and Unhealthy Food Products: Conceptual Foundations

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Abstract: This article provides a critical and philosophical assessment of arguments invoked for and against the constitutional protection of commercial expression and the regulation of commercial speech with a focus on the commercialization of unhealthy food products.

Debates over the role of commercial speech and the permissibility of restrictions to commercial speech have long taken place in academic and non-academic settings. Scholars and caselaw have often claimed that commercial speech plays a vital role in the economic and social fabric. Commercial speech allows individuals to access valuable information to make personal decisions. Advertising provides useful information for making informed choices relevant to us and our close ones;thus, promoting individual self-government.[1] In addition, commercial speech allows the economy to thrive by creating bonds and relationships between producers and consumers.[2] This translates into profits, and ultimately national revenue; and, on the part of the consumer, the fulfilment of their needs. Proponents of robust protection of commercial speech have argued that it is a form of free speech (a cornerstone of liberal democracy), claiming that bans on advertising, promotion, and sponsorship violate their rights to freedom of commerce and freedom of expression. In their view, commercial speech is essential for producers and sellers to communicate information about their products and services. Thus, the restriction of commercial speech could restrain competition and favor some producers and sellers over others.[3] Consequently, the role of commercial speech is arguably vital both to individuals and society.

In recent years, and based on emerging evidence of the impact of marketing and advertising in increasing the consumption of unhealthy products, various governments have adopted measures to restrict commercial speech when it promotes unhealthy food prod-

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ucts.[4] For instance, some countries have regulated the marketing of unhealthy food products to minors. Others have adopted regulations requiring the inclusion of front-of-package labels to help consumers make informed purchase and consumer choices.[5] A global controversy has arisen about whether ultra-processed foods and beverages companies should or should not sponsor the Olympic Games or other major sports events.[6] On the one hand, governments have justified these restrictions as a matter of public health policy on the evidence that marketing of unhealthy food products leads to decisions that can be detrimental to health.[7] On the other hand, the corporate world has frequently questioned and denied such evidence.[8]

In light of these controversies, this piece explores the conceptual foundations of restrictions to commercial speech when it comes to the promotion of unhealthy food products. Firstly, we explore whether commercial speech can be restricted to promote personal autonomy, a fundamental value of liberal democracy, and explain why protecting autonomy requires restricting commercial speech, especially when aimed at children. Secondly, we suggest that, considering the evidence showing bounded rationality, autonomy may require restrictions on unhealthy food products even if not aimed at children. In this sense, we tackle objections that commercial speech restrictions entail impermissible paternalism. Thirdly, we explore why the public health and communitarian perspectives require regulating commercial speech, while addressing the objection that commercial speech regulation would be an impermissible perfectionist measure. The last section concludes.

This piece explores the conceptual foundations of restrictions to commercial speech when it comes to the promotion of unhealthy food products. Firstly, we explore whether commercial speech can be restricted to promote personal autonomy, a fundamental value of liberal democracy, and explain why protecting autonomy requires restricting commercial speech, especially when aimed at children. Secondly, we suggest that, considering the evidence showing bounded rationality, autonomy may require restrictions on unhealthy food products even if not aimed at children.

Commercial Speech and Autonomy

In the classic liberal account of autonomy, the commitment of our societies to personal autonomy entails respect for our life plans, regardless of how others see their value. As the liberal philosopher John Stuart Mill famously put it, "[o]ver himself, over his own body and mind, the individual is sovereign."[9] Economists have developed a similar idea under the concept of the "homo economicus," a hypothetical, perfectly rational individual with complete information about their options and perfect foresight of consequences who makes choices to promote their preferences.[10] To exercise their autonomy, individuals require freedom from external interference by others, including the State; they also need information. In this view, provided that individuals have access to information, they are the best judges of the value of their decisions and governments should remain neutral as to the value of individuals' life plans. Therefore, the only acceptable justification for interference is to prevent harm to others — this is Mill's famous "harm principle," a cornerstone of liberal political philosophy. Of course, defining "harm to others" is not an easy task — it has been argued that "risk" is not a value-neutral concept and that the level of risk each individual is ready to accept is not obvious.[11]

In light of the harm principle, given the absence of potential harm to others and the relevance of information for individual decision-making, restrictions on commercial speech would not be justified, as a rule, in the classic liberal view. Nevertheless, the protection of autonomy may provide reasons to justify the government's legal right to regulate commercial speech when it is misleading or deceptive. In certain cases, governments may even be required to compel speech — for instance, when mandating disclosure requirements — to prevent harm to or exploitation of the otherwise uninformed consumer.[12]

Now, in addition to freedom from external interference, the exercise of autonomy requires an internal capacity for deliberative action.[13] Individuals with insufficient understanding to make informed

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choices to deliberate and act based on their desires and preferences are usually protected by legal systems from decisions that may harm them. This is clear, for instance, in the case of children. Under the assumption that children are not in the best position to judge which courses of action promote their own good, or that they are more likely to make poor choices, legal systems usually protect them from making decisions on their own. That is, they interfere with children's will to advance their good. This interference is often regarded as a form of acceptable paternalism.[14] When acting on behalf of children, adults have a duty to promote childrens' "best interests."[15] This duty usually involves preventing children from exposure to certain risks which, in many countries, has included the requirement for broadcasting companies to establish child protection hours in order to prevent exposure to certain contents.[16]

The duty to promote children's best interests may justify restricting commercial speech that targets them. Although as children grow older, their deliberative capacity becomes stronger and they start to understand the nutritional dimension of food, studies have shown that advertising and marketing continue to affect children's preferences for unhealthy food products. This, in turn, impacts their body weight development and, thus, their health.[17] As a response to the global concern for childhood obesity, countries like Chile, South Korea, the U.K., and Argentina have adopted regulations to reduce children's exposure to the marketing of unhealthy food products — including prohibitions of marketing of unhealthy products in schools, or using fictional characters, like cartoons, to encourage consumption.[18] This shows that, under the liberal framework, the autonomy-defense of commercial speech does not apply to children. The duty to promote children's best interests actually requires governments to restrict commercial speech in these cases.[19]

In contrast, as we have already mentioned, in the liberal framework, given the commitment to neutrality and deference to the individual as the best judge of their interests, overriding a competent adult's preferences for the sake of preventing harm to themselves is a controversial measure.[20] Nevertheless, autonomy could still provide an argument to restrict commercial speech even if not aimed at children.

In our societies, we often accept paternalistic measures for risk regulation, such as the mandating of motorcycle helmets and seat belts or the fluoridation of drinking waters. Other more socially controversial measures, such as taxes on unhealthy products, like cigarettes, are paternalistic because they aim to disincentivize harmful conducts.[21] These measures and regulations acknowledge the centrality of personal autonomy, but recognize the fact that personal behavior is not merely an issue of free will, and that both internal and external constraints also shape it.[22] This is relevant in the context of unhealthy food products particularly due to the way in which these products are purposely engineered to trigger neurotransmitters and manipulate addictive-inducing sensations, as well as practices designed to target mental and emotional processing, such as, for instance, neuromarketing techniques.[23] Accordingly, it can be argued that human beings actually lack complete information and foresight when it comes to harmful products like unhealthy foods, as well as logical and practical omniscience: we cannot have complete knowledge of all that logically and practically follows from our current actions and commitments. Moreover, we may lack the ability to fully understand risks. This is known as "bounded rationality."[24]

Considering the evidence showing people's bounded rationality, autonomy could actually provide reasons in favor of a restriction of commercial speech. Access to appropriate information is a necessary condition to make informed choices and assume risks, but commercial marketing and advertising can skew information consumers receive and heavily influence consumer purchase and consumption choices.[25] In some cases, marketing tactics from the food and beverage industry portray consumption of unhealthy food products as "cool" or use popular fictional characters to associate the products with social recognition and professional success.[26]

It is not possible to speak of full rationality when the marketing and advertising of unhealthy products operate at the most primitive level of our brains, influencing our decision-making processes and, thus, undermining the detailed scrutiny of the advantages and disadvantages of their consumption. Marketing and advertising techniques generate an impulse to consume these unhealthy food products.[27] Thus, measures to restrict commercial speech would be justified in cases in which regulation is intended to neutralize the effects that marketing and advertising have on the consumption of products harmful to health in the face of a rationality deficit.[28]

Commercial Speech, Community, and Perfectionism

Another dimension of the commercial speech restriction debate comes from the communitarian perspective that strives to answer the question of what type of community we want to live in and what kind of rela-

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tionships we want to foster. Communitarians argue that social institutions must promote social and communal values, which build our identity. Of course, individual autonomy and self-fulfillment matters, but they are not the main and only values for life in society.[29] In this view, our societies are not merely a collection of strangers with duties to respect the legal rights of one another arising from a "social contract"; our respect for others is that we owe each other as fellow members of a community. Public health matters because it "encourages connectedness to the community… viewing health risks as common to the group, rather than specific to individuals, helps foster a collective responsibility for well-being."[30] As Dan Beauchamp explained in his seminal article, public health is "communal in nature, and concerned with the well-being of community as a whole and not just the well-being of any particular person. Policy, and here public health paternalism, operates at the level of practices and not at the level of individual behavior."[31] As such, regulators must use the law as a tool for creating conditions for a type of society where individuals can lead healthy and meaningful lives in their communities. According to this view, public health regulations, such as those involving restrictions to the marketing or advertising of unhealthy food products, aim at achieving community well-being. Accordingly, from a communitarian perspective, commercial speech restrictions would be justified as they aim to promote a community where people can lead healthy lives.

It may be argued, however, that communitarian public health measures restricting commercial speech incur in perfectionism. By dictating and promoting certain ideals of human excellence. Perfectionists accept restrictions to autonomy to promote those ideals of excellence. This is a stronger thesis than paternalism because it disregards the agent's interests and only seeks to adjust the agent's behavior to a particular ideal. In that sense, perfectionism is objectionable because it disrespects individuals in a particularly profound way: it does not set precise limits for its demands, and its goals do not have to be shared by its recipients.[32]

However, the perfectionist accusation does not seem to apply to commercial speech restrictions, as these restrictions do not impose, nor aim to impose, an ideal of excellence or a lifestyle. On the contrary, they contribute to promoting an environment in which people can enjoy greater freedom to carry out their life plans by making informed choices or avoiding uninformed ones within their communities. Were the State not to intervene, it would deprive people of real opportunities to choose a healthy way of life. State intervention aims at creating environments that ensure healthy options do not go unnoticed or require a significant investment of time, money, and willpower that few people have. In such contexts, the State could effectively promote life plans that it considers valuable, as long as it does not coercively impose the way of life that it considers correct.[33]

Conclusion

In this article, we have shown that the discussion about regulation of commercial speech, when it comes to the commercialization of unhealthy food products, should not be limited to whether the government interferes with free speech, but should rather consider the government's role in creating conditions for people to pursue their life plans, and ultimately promote their autonomy. We have also discussed a communitarian approach, which leads to public health regulations that invoke societal values.

Note

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