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Open Peer Commentaries

Don't Ban the Sunset in Pharmaceutical Advertising If It Doesn't Darken the Sky

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Biegler and Vargas (2013) offer a case for restricting or banning direct-to-consumer advertising (DTCA) of pharmaceuticals based upon the results of social psychology research allied to a particular conception of autonomy (call it autonomy^{BV}). They posit that the results of the research suggest that DTCA will (likely) compromise autonomy^{BV}; they conclude that DTCA should (likely) therefore be restricted or banned. There are two difficulties with their case. First, their conclusions about the social psychology research are too hasty; it is unclear to what extent, if any, DTCA is deceptive or subversive of autonomy^{BV}. Second, and more importantly, autonomy^{BV} is an unattainable standard; licensing the state to coerce speech as a means to its attainment will inevitably fail—while generating a great deal of unavailing coercion. Regulation of DTCA should continue to be aimed, as it is at present, at consumer welfare, not consumer autonomy.

To begin with the second difficulty, autonomous judgments, per Biegler and Vargas, will direct action in accord with an agent's authentic values if they are based upon justified beliefs about facts material to a decision. Justified beliefs are distinguished both by cognitive grasp on the part of the believer and by the reliability of the belief. Such beliefs issue from a grasp of material facts allied to a reliable belief-forming mechanism. This is a very demanding account of autonomy. We eschew regulation of most kinds of persuasive speech in spite of the potential for persuasion unwarranted by justified beliefs or other rational considerations. We do so on behalf of autonomy conceived not as autonomy^{BV} but as a right to self-determination, in this case a right to consult sources of information as one pleases and think one's thoughts free from government interference. This conception of autonomy is typically an ideal ascribed rather than a concrete reality; whatever the actual coherence of our self-conception or our program for enhancing it, we prefer our own muddling through to someone else's manipulation.[1]

Commercial speech is an exception to the general rule that persuasive speech may not be regulated. The most plausible kind of attempt to found this exception on autonomy is that made by Biegler and Vargas: to appeal to substantive or descriptive autonomy rather than to an ascribed ideal and to suggest that actual self-determination according to one's important values and interests will be furthered rather than threatened by tight reins on commercial speech. There are, however, grave difficulties with founding restrictions on commercial speech on a view of descriptive autonomy, particularly a view as demanding as autonomy^{BV}.[2]

One such difficulty with autonomy^{BV} is that it labels any failure of reliability in our belief forming mechanisms as a failure of autonomy. This seems inconsistent with the inevitable fallibility of our individual belief forming mechanisms, which are prone to error not only through deception from without but through self-deception.[3] And error reached through personal failure to counteract our innate tendencies to error is hardly a failure of autonomy—it is instead an instance of autonomy—of our frequent determination to believe what we wish rather than what is warranted.

Certainly our processing of television often fails the autonomy^{BV} standard. Belief formation has been shown to be highly prone to error in the comprehension of brief communications on television. Twenty to 30% of television brief communications are misunderstood (advertising and nonadvertising) (Hoyer and Jacoby 2000). If autonomy is freedom from error (or from systematic tendencies toward error) in belief formation, it will remain an unattainable ideal. More or less restrictive approaches to advertising regulation will either protect the gullible at the expense of many who could process advertising properly or favor the latter at the expense of the former. Any point chosen on the spectrum

1. On the distinction between ascriptive and descriptive (or formal vs. substantive) autonomy, see Fallon (1994).
2. David Strauss discusses the difficulty of an autonomy rationale for regulating speech that is not false but that may generate ill-considered behavior. See Strauss (1991).
3. Both the potential efficacy and the limitations of human rationality are prominent themes in contemporary work on judgment and decision making. See, for example, Kahneman and Klein (2009).

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of regulatory rigor will represent not a line between autonomy[BV] and heteronomy but between a closer approach to autonomy[BV] for some and a closer approach for others.

Commercial speech regulation and jurisprudence focuses on whether such speech is false or misleading (Beales 2011; Noah 2011). The assessment of falsity, while sometimes difficult, is often clear-cut. Judgments about misleadingness are made not on the basis of the speech itself—as virtually any speech can mislead somebody—but on consumer behavior that results from the speech (Tushnet 2010, 1320–1321). If consumers respond to an ad not obviously false by going out and obtaining goods or services plainly opposed to their own interests or wishes, then the ad may be judged misleading and subject to prohibition. This approach seeks to maximize not consumer autonomy but consumer welfare.

The latter target is preferable not only because autonomy[BV] is unattainable but because regulations seeking to maximize it would not necessarily be welfare-enhancing. In the case of DTCA, even if it moved consumers to reason imperfectly in seeking out their doctor, the eventual effect might still be additional welfare if those seeking out their doctor for the wrong reasons had appropriate drugs prescribed for medical conditions that warranted the drugs, whereas fewer but more autonomous[BV] decisions to seek out a physician under a regime of less, or less effective, DTCA could lead to fewer patients getting drugs from which they would benefit than otherwise. Of course, the less restrictive DTCA regime could lead to overprescribing as well. The point is that autonomy[BV] and welfare (patients getting neither more nor fewer drugs than will benefit them) need not track one another even if restrictions on DTCA increased the autonomy[BV] of those who responded to it.

In the case of DTCA, the appropriate welfare goal of regulation is the use of prescription medications according to medical indication. DTCA clearly has the potential for deception leading to the overuse of prescription medications, as feared by Biegler and Vargas. It also has potential for mitigating underuse. At present, we do not know which of these effects predominates.[4] The most notable study of these potentially competing effects (and the only randomized trial) compared the results of DTCA-stimulated requests for a specific antidepressant with either a general drug request or no drug request in physician offices (Kravitz et al. 2005). The results of the study were striking. A much higher proportion of patients presenting with major depressive disorder who mentioned DTCA and requested a drug received appropriate treatment compared to those who did not. On the other hand, DTCA-associated requests for drugs also markedly increased prescribing for adjustment disorder, for which the benefits of medication are uncertain. These results suggest both helpful and harmful effects from DTCA—more appropriate treatment for patients who would benefit from it, and some overtreatment of patients who might not.

Given an aim of maximizing consumer welfare, the logical goal of DTCA regulation should be the lowest possible total cost of both type I error (error from accepting false claims) and type II error (error from lack of awareness or rejection of true claims) induced by more or less advertising (Rubin 2004). This is consistent with Kravitz's suggestion that DTCA will be more likely beneficial when the target condition is serious and undertreated, and the treatment is relatively safe and inexpensive; whereas harm would be more likely when the target condition is less serious and the treatment is more dangerous or costly (Kravitz et al. 2005).

Such regulation will be a delicate balancing act, informed by careful assessment of the actual effects of given DTCA on consumer behavior. Biegler and Vargas suggest that in fact DTCA will likely prove to be deceptive on balance, due to the evaluative conditioning techniques used in the ads. They are too hasty. They do offer a strong case that advertising often leads to positive attitudes toward advertised goods. And they plausibly suggest that an important mechanism by which advertising achieves that effect might be evaluative conditioning. They rightly point out that consumers might be led through such conditioning to seek out advertised goods that will not satisfy their deeper or more authentic desires and interests. So far, so good; evaluative conditioning is a possible mechanism through which advertising achieves its effects, and such conditioning might lead consumers into error. From these facts very little follows as to what role evaluative conditioning actually plays in the consumer behavior generated through DTCA. And Biegler and Vargas acknowledge this, citing De Houwer (De Houwer, Thomas, and Baeyens 2001) to the effect that evaluative conditioning is one among many persuasive forces acting in real world ads; that being so, attributing the successful persuasion of ads to evaluative conditioning is a hypothesis rather than an observation. Unfortunately, they then go on to make the unwarranted inference from the presence of evaluative conditioning in DTCA to the presumption that evaluative conditioning is *the* mechanism (primary? exclusive?) by which DTCA achieves its persuasive effects, approvingly citing Schachtman, Walker, and Fowler (2011) to this effect.

That such a presumption is unwarranted is underlined by the availability of other plausible mechanisms for the effectiveness of DTCA, including that of its nonpropositional content. That content will be informative rather than misleading if consumers take DTCA as a signal of drug quality. Viewers of DTCA are likely to infer from a company's willingness to mount an expensive television advertising campaign that a drug advertised offers real benefits worthy of their consideration, even if the advertising consists mostly of images. And they will often be correct. As advertising textbook authors point out, consumers

4. Whether DTCA helps or harms is heatedly debated at present. Reviews have produced conflicting results. See, for example, Mintzes (2012) and Capella et al. (2009). It is noteworthy that negative assessments of the health impact of DTCA emphasize advertising of drugs subsequently taken off the market due to side effects not detected in pre-approval clinical trials (e.g., Mintzes 2012). It is unclear that DTCA should be blamed for these adverse effects on health; see Beales (2011, 28).

> will rationally conclude that if a firm does a lot of advertising, it must be because the firm is offering a high-quality product at a reasonable price. This is true even though the explicit content of the advertising may simply be an image and little else. It is the fact of advertising and not its content that signals to the consumer the good deal that the firm is offering. (Pepall, Richards, and Norman 2002, quoted by Berndt and Donohue 2008, XX)

Consumers who interpret DTCA as a signal of potential drug quality are responding to it rationally. Those who are misled by the evaluative conditioning of DTCA are not. Which of the several mechanisms through which DTCA may persuade is actually efficacious and to what degree cannot be determined a priori. Biegler and Vargas presume that patients moved by DTCA to seek out advertised drugs are misled by evaluative conditioning. That remains to be determined. In any event, DTCA presently operates under severe constraints compared to other forms of advertising, and consumers are debarred from responding to it in a spontaneous and ill-considered way by the requirement that they consult physicians before obtaining prescription medications. Regulators should continue to assess its effects carefully and intervene when consumers are clearly misled. Social psychology research does not so far warrant undue suspicion of the nonpropositional content of DTCA; regulators should keep their eye on consumer welfare, rather than being drawn into futile efforts to maximize an impossible standard of autonomy. ■

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