

Giving Liberty Its Due, But No More: Open Peer Commentary on Resnik

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Giving Liberty Its Due, But No More: Trans Fats, Liberty and Public Health

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Abstract: Resnik's argument relies upon an undefended and unjustified overvaluation of liberty. First, he overlooks some important arguments in favour of restrictions to liberty, and his consideration of the two he does review is unfair; second his account grossly overestimates the autonomy of our food choices; and lastly his mechanism for balancing liberty against other concerns involves an illicit double counting of the weight of individual liberty.

Resnik argues that banning trans fats (TFs) from restaurants is unjustifiable at the present time as it is too restrictive of human freedom. We agree with Resnik that liberty is an important value, one that ought to be protected and promoted. However, his argument relies upon an undefended and unjustified overvaluation of liberty. First, he overlooks some important arguments in favour of restrictions to liberty, and his consideration of the two he does review is unfair; second his account grossly overestimates the autonomy of our food choices; and lastly his mechanism for balancing liberty against other concerns involves an illicit double counting of the weight of individual liberty.

1. Resnik on banning Trans Fats

Resnik considers only two arguments in favour of banning TFs, both of which he

describes as consequentialist in form: TF bans promote public health, and a ban would bring about economic cost savings. He claims that these are the ‘main’ arguments in favour of a ban, but provides no reasons for this claim.

Resnik responds to the first argument by pointing out that we have made mistakes in food policy in the past. It is true that regulation – in the case of food as elsewhere – frequently fails to achieve a desired goal. However, this is a general problem with regulation, and we have no reason to think that decisions about the regulation of TFs are any more uncertain than anything else. It is important to note that there are also costs to *not* regulating: if a foodstuff is in fact dangerous, delaying regulating it on the grounds of uncertainty about the exact effects of a ban will mean people will, *with certainty*, be harmed unnecessarily. Given the empirical facts as presented by Resnik himself there is a strong argument for action in this case.

Resnik’s response to his second ‘main’ argument, the economic justification for intervention, is to suggest that the projected cost saving are dubious. We agree that the calculations here are complex and contentious. However, Resnik is hardly fair. Whilst costs *may* provide grounds for a ban, no one (to our knowledge) relies purely upon health cost-savings as an argument for banning TFs. Costs are of course relevant, but policy is not, and ought not to be, based on appeal to cost savings alone. Benefits (and other moral considerations) also need to be weighed in deliberations about policy. If this is done, even if economic costs of a TF ban are higher, there may still be good reasons to act.

More generally, Resnik seems to presuppose that consequentialist grounds will provide the main support for public health regulation. This has two problems. First, it is not true. The most common arguments in favour of a ban are actually

based around harm prevention and reduction (reasons that have bite at both the individual and population level). Whilst these reasons may be considered by a consequentialist, you don't need to be a consequentialist to see their importance. Second, there are also recognisably rights-based justifications for public health regulations. On such views, the state has an obligation to take reasonable steps to protect its citizens from various types of risk to their health, and citizens are wronged *as individuals* if the state fails to do this. Such a moral view is implicit in the claim – signed up to by the vast majority of countries – that there is a human right to the highest attainable standard of health. (CESCR 2000) This type of view would have been important for Resnik to consider, as it implies that it is not just incursions into liberty that we must be able to justify to each individual whose liberty is infringed, but also failures to remove threats to health from the environment.

2. Choices to eat unhealthy food

Many people do have preferences for unhealthy food. But at the same time many people have preferences for an environment in which the food that is easily available for them to buy is healthy. Hence, the first thing to notice here is that *whichever* way we choose to regulate (or refuse to regulate) TFs will involve overriding the autonomous preferences of some citizens. Making policy decisions in circumstances of such disagreement is difficult, but there is no good reason to presume that inaction *per se* is to be preferred (Grill 2009).

How should we interpret choices to eat unhealthy food? Presumably unhealthy foods are rarely considered worthy of choice simply for the reason that they are unhealthy: they are generally chosen *in spite* of the fact that they are unhealthy. Some choices for unhealthy foods are autonomous – choices which are in line with what the person would choose if they were deciding lucidly given their deepest values. Other choices for unhealthy food are not autonomous – for

example where someone is unaware of the risks of TFs, or discounts the risks of future coronary heart disease in a way they would on closer reflection think irrational. Where possible, it is certainly worth trying to address this epistemic deficit by providing relevant information and labelling.

However, it is naive to believe that this alone will address the problem, as our choices about food rarely attain an adequate level of autonomy. Empirical studies draw attention to the power of social and cultural influences upon our choices as well as the role of non-rational situational influences (Mulvaney-Day and Womack 2009). It follows that where we regulate to help ensure that the food people eat is healthy, we will rarely be overriding preferences which are adequately autonomous. So even where the intention of food regulation is paternalistic, this may well be justifiable (Nys 2008). Moreover, the people who are most likely to come to harm through the liberty to eat TFs are those who are already badly off. Hence, pace Resnik, giving citizens the liberty to choose things that we have reason to think bad for them will tend to exacerbate inequality (Arneson 2005).

3. Weighing Liberty Against Health

Resnik argues that we should weigh liberty against public health according to the principles for public health regulation that Childress et al. (2002) lay out, namely: effectiveness, proportionality, necessity, least infringement, and public justification. Resnik allows that banning TFs from restaurants would be effective, proportional, and could be publicly justified. However, he argues that such a ban is nonetheless currently illegitimate because it would not meet either the criterion of necessity or the criterion of the least restrictive alternative. TF bans fail to comply with these criteria, he argues, because there are other less restrictive measures, viz mandatory labelling and public education, which could be effective

in reducing TF intake, and therefore we cannot say that it is necessary to ban TFs from restaurants.

However, Resnik's argument is weak. The necessity criterion simply asks us to consider whether there are other ways of regulating a particular public health risk which have a better balance of moral benefits over moral costs. Costs to liberty are only *one* of the relevant factors. The very probable large costs to human life through waiting and seeing whether education and labelling policies are effective ways of reducing trans fat intake is also a relevant factor. Resnik provides no reason to think that the moral costs associated with these very probable deaths are smaller than those associated with the infringement of liberty.

Moreover, invoking the “principle of the least restrictive alternative” in public health regulation seems to be either almost entirely superfluous, or to involve an illicit form of double counting. If it means that we should adopt the least restrictive alternative out of the ones that have already been singled out as offering the best balance of moral benefits over moral costs, then presumably it can only operate as a tie-breaker, and so will be unable to do the work Resnik requires.¹ But if it is supposed to play a substantive role (as Resnik seems to imagine it will), then it seems to be clearly illicit, given that liberty has already been weighed in the balance against the other goods at the stage of working out which policies are proportional and necessary. Liberty is an important value, but it is not so important that it ought to be counted multiple times.

Conclusion

We have argued that Resnik overvalues liberty in three distinct ways. First, he fails to consider some powerful arguments for thinking that the state ought to

intervene to create a safe environment for its citizens. Second, he overestimates the degree to which food choices are autonomous. Third, he puts his thumb on the scales when he comes to weigh liberty against protection of the health of the public. Giving liberty its due -- but no more than its due -- would allow us to adopt a more sensible policy, in which we ought to weigh the liberty to eat TFs less heavily than the protection of thousands from early death through a simple intervention that no member of the public will even notice.

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ⁱ It is also worth noting, in passing, that it is unclear why we should take liberty to be the

tiebreaker rather than any other important value, such as, say, equality.