

WHERE HAVE ALL THE PARENTS GONE? DO EFFORTS TO REGULATE FOOD ADVERTISING TO CURB CHILDHOOD OBESITY PASS CONSTITUTIONAL MUSTER?

Amanda L. Willette*

INTRODUCTION

According to the American Obesity Association, about 15.5% of adolescents ages 12 to 19 and 15.3% of adolescents ages 6 to 11 are obese.¹ To understand the obesity problem and the food evils facing the children of today, we must look at the world through their eyes. Consider a typical morning in the life of a high school student.

Ian is a typical 17-year-old. He wakes up in the morning with the television set still on from the night before. Immediately, he is bombarded with television advertisements for fast food chains and high caloric fatty foods. He rushes to get dressed and ready for school. On his way out of the house, he grabs whatever ready-to-eat food his parents have in the pantry. These foods typically range from high-sugar cereal bars to Pop-Tarts to granola bars with candy in them. Ian drives to school and passes countless fast food chain restaurants and billboards for restaurants and high caloric food.

Once at school, Ian has the option of choosing to purchase food out of the school's vending machines. At any given time in his high school hallways, one can witness countless students eating junk food from these machines. At lunchtime, Ian can choose to drive off campus or stay in the school cafeteria. His school cafeteria has typical lunchtime options such as pizza or fried chicken sandwiches. Students are also given the option of purchasing candy bars, chips, and a variety of other snack foods at a counter within the cafeteria.

If Ian chooses to go off campus for lunch, the only restaurants near his school are fast food restaurants. Typically, these fast food restaurants offer lunchtime specials for students, none of which include any healthy options.

* Amanda L. Willette is a third-year student at Southern Illinois University School of Law. Address correspondence to Ms. Willette at Southern Illinois University School of Law, Law Journal Office, Lesar Law Building, Carbondale, Illinois 62901.

¹ American Obesity Association, *Obesity in Youth*, May 2, 2005, at http://obesity1.templedomainname.com/subs/fastfacts/obesity_youth.shtml (last accessed Aug. 21, 2007).

Instead, fast food restaurants offer the student multiple hamburgers, french fries, and a drink for a very low price. When Ian returns to class, he is greeted at the door by one of the school's varsity cheerleaders who is selling candy bars to raise money for new uniforms.

At this point in the day, it is only one o'clock and Ian has already been confronted with more than a dozen advertisements, product placements, and products all meant to tempt him into eating something unhealthy. To understand the childhood obesity problem facing this country, we must understand the daily temptations that are contributing to the fattening of America's youth.

We cannot afford, as a nation, to sit silently by and allow our children to slowly kill themselves by consuming high caloric foods. The dangers of these foods, and the culture that advertisers have created around them, must be brought to the public's attention. Recently, the health risks associated with fast food have been brought to our attention in publications such as Eric Schlosser's *Fast Food Nation*.² In his book, Schlosser expresses concern about the bombardment of children with advertisements.³ Because of the growing number of obese children and the increasing influence of advertising on children, many individuals and legislators have called for action. Accordingly, many individuals are calling for the same type of reform that occurred in the tobacco industry several years ago.

This commentary begins with an overview of the childhood obesity epidemic in section I. Then, in section II, the commentary discusses the influence and impact advertisements have on children. The discussion continues in section III with an overview of the progression of the commercial speech doctrine under the First Amendment. Next, in section IV, the commentary examines the tobacco industry and its similarities to the food industry with respect to the obesity epidemic. In section V, differences between the United States and other countries in their regulation of food advertisements are discussed. Finally, section VI outlines a proposal to help resolve the childhood obesity epidemic.

Although federal regulation of food advertisements could have a positive effect on the childhood obesity problem, the legal consequences of allowing such regulation may do more harm than good. The best solution is in the home.

I. BACKGROUND: THE SCIENCE AND SOCIAL IMPACT OF OBESITY

“Overweight” and “obesity” are terms given to ranges of weight that are greater than what is generally considered healthy for a given height.⁴ Obesity

² ERIC SCHLOSSER, *FAST FOOD NATION* (2002).

³ *Id.*

⁴ Centers for Disease Control & Prevention, *Overweight and Obesity: Defining Overweight and Obesity*, May 22, 2007, at <http://www.cdc.gov/nccdphp/dnpa/obesity/defining.htm> (last accessed Aug. 15, 2007).

ranges are determined by using weight and height to calculate a person's body mass index or BMI.⁵ In children, BMI ranges above a normal weight have different labels than those ranges associated with adults: "at risk of overweight" versus "overweight."⁶ These BMI ranges take into account normal differences in the amount of body fat in boys versus girls and differences in body fat depending on age.⁷ After a child's BMI is calculated, it is plotted on a BMI-for-age growth chart where a percentile ranking is determined.⁸ The calculated percentile indicates the relative position of the child's BMI number among children of the same gender and age.⁹

In the past two decades, America has seen a rapid increase in the rate of obesity among the youth. Since the 1970s, childhood obesity has more than doubled for preschool children ages 2 to 5 and adolescents ages 12 to 19, and more than tripled for children ages 6 to 11.¹⁰ Approximately nine million Americans over six years of age are already considered obese.¹¹ Obesity has spread rapidly across race, gender, and class lines but its prevalence has increased disproportionately among African-American, Hispanic, and Native-American children.¹²

While 12% to 13% of Caucasian youth are overweight, 24% of Mexican-American adolescents are overweight.¹³ Obesity is particularly high among Mexican-American boys and African-American girls.¹⁴ Being overweight is more common in boys, around 32.7%, than in girls, around 27.8%.¹⁵ Once children become adolescents, it appears that overweight prevalence is about the same among both the male and female gender.¹⁶

Among Caucasian children, a lower level of parental income and education increases the risk of being overweight. However, higher socioeconomic status does not necessarily protect African-American and Hispanic children against being overweight.¹⁷

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Centers for Disease Control & Prevention, *BMI: Body Mass Index: About BMI for Children and Teens*, Aug. 28, 2006, at http://www.cdc.gov/nccdphp/dnpa/bmi/childrens_BMI/about_childrens_BMI.htm (last visited Aug. 21, 2007).

⁹ *Id.*

¹⁰ Wendy E. Parmet & Jason A. Smith, *Free Speech and Public Health: A Population-Based Approach to the First Amendment*, 39 *Lox. L.A. L. Rev.* 363, 392 (2006).

¹¹ *Id.*

¹² American Public Health Association, *What We Know About Childhood Obesity: Basic Definitions, Trends, Statistics, and Consequences*, 2007, at <http://www.apha.org/programs/resources/obesity/proresobesityknow.htm> (last accessed Aug. 15, 2007).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ American Obesity Ass'n, *supra* note 1.

¹⁶ *Id.*

¹⁷ APHA, *supra* note 12.

There are many risk factors that work together to increase a child's chance of becoming overweight. These factors include: diet, inactivity, genetics, psychological factors, and family and social factors.¹⁸ Although there can be some genetic and hormonal causes of childhood obesity, most excessive weight is caused by children who eat too much and do not exercise.¹⁹

Research has shown that a child's regular consumption of high-calorie foods such as fast food, baked goods, and vending-machine snacks, contribute to weight gain.²⁰ Sedentary children are more likely to gain weight because they do not burn a significant amount of calories through any physical activity, but instead engage in inactive leisure activities such as watching television or playing videogames.²¹ Research also has shown that children under the age of eight spend an average of 2.5 hours watching television or playing videogames daily, while children eight and up spend 4.5 hours in front of the television or playing videogames.²² Those children watching more than four hours of television a day are more likely to be overweight than children who watch two hours or less of television a day.²³ Having a television in a child's bedroom is also linked to an increased likelihood of being overweight, because all of the child's free time is spent in front of the television.²⁴

Some research has indicated that genetics is a contributing factor in determining whether a child will be overweight. Genetics helps determine a person's body type and how a person stores and burns fat.²⁵ If a child comes from a family of overweight individuals, he or she may be genetically predisposed to put on excessive weight.²⁶ Family and social factors that contribute to excessive weight-gain in children include the choice of food a family purchases, the access to food a parent gives a child, and the eating habits of other members of the household.²⁷

There are a wide variety of health and psychological consequences for children and teens that are overweight. These are not only problems children may encounter now, but health problems that could develop later in life.

¹⁸ Mayo Foundation for Medical Education and Research, *Childhood Obesity*, Mar. 31, 2006, at <http://www.mayoclinic.com/health/childhood-obesity/DS00698/DSECTION=2>. (last accessed Aug. 15, 2007).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Nemours Foundation, Kids Health for Parents, *Overweight and Obesity*, Aug. 2005, at http://kidshealth.org/parent/general/body/overweight_obesity.html (last accessed Aug. 15, 2007).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Mayo, *supra* note 18.

²⁷ *Id.*

Overweight children have been found to have increased risks for cardiovascular disease, including high cholesterol, elevated insulin levels, and elevated blood pressure during childhood.²⁸ Other potential health problems include type 2 diabetes and sleep apnea. Some social consequences include poor self-esteem and social discrimination.²⁹ Obese adolescents are more prone to emotional and behavior problems and also more likely to develop psychopathologies during both adolescence and adulthood.³⁰ Overweight and obese children are more likely to be the victims of verbal bullying and physical aggression.³¹ Additionally, obesity in children can disrupt the social development of the child and facilitate the disruption of social relationships and interactions.³²

II. THE ROLE OF THE MEDIA

Today, there are many food-related products advertised on television. Although the number of food-related advertisements is increasing, advertisers are also changing the way they advertise, especially to children. In 2002, it was estimated that annual sales of food and beverages to young consumers exceeded \$27 billion.³³ Advertisers have recognized that young consumers are a valuable market and have begun to advertise directly to them. Food and beverage advertisers collectively spend \$10 billion to \$20 billion annually to reach children and youth, and more than \$1 billion of that is spent on direct media advertising to children.³⁴ Young children are uniquely vulnerable to these types of advertisements because they lack the skills necessary to understand the difference between information and advertising.³⁵

During the same time period in which childhood obesity has increased dramatically, there also has been an increase in media targeted at children, including television shows, specialized cable networks, video games, and computer activities.³⁶ Many of these advertisements promote food products such as candy, soda, and high caloric snacks.³⁷ It is not only during commercial

²⁸ CDC, *supra* note 4.

²⁹ *Id.*

³⁰ Parmet & Smith, *supra* note 10, at 393.

³¹ *Id.*

³² *Id.*

³³ United States Department of Health & Human Services, *Childhood Obesity*, 2007, at http://aspe.hhs.gov/health/reports/child_obesity/ (last accessed Aug. 15, 2007).

³⁴ *Id.*

³⁵ Institute of Medicine of the National Academies, *Advertising, Marketing, and the Media: Improving Messages*, Sept. 2004, at <http://www.iom.edu/Object.File/Master/22/609/fact%20sheet%20-%20marketing%20finaBitticks.pdf> (last accessed Aug. 15, 2007).

³⁶ Henry J. Kaiser Family Foundation, *The Role of Media in Childhood Obesity*, Feb. 2004, at <http://www.kff.org/entmedia/upload/The-Role-Of-Media-in-Childhood-Obesity.pdf> (last accessed Aug. 15, 2007).

³⁷ *Id.*

breaks that children are exposed to marketing; commercial messages also are embedded in the stories, games, and images kids enjoy on a daily basis.³⁸ It is estimated that a typical child sees around 40,000 advertisements a year on television alone.³⁹

What kinds of information do these food advertisements contain? A study conducted by researchers at the University of Illinois at Champaign-Urbana found that nutrient-poor, high-sugar foods dominated nearly 44% of foods advertised during the television programs that children ages 6 to 11 watch the most.⁴⁰ Convenience and fast food commercials made up 34.2% of the advertisements during these shows.⁴¹ This study resulted in many other interesting findings about the types of advertisements targeted at children. For example, the study found snack time eating in television advertisements is depicted more often than breakfast, lunch, and dinner combined.⁴² The child actors used in these advertisements do not have body sizes associated with their eating habits, which presents an image to child viewers that eating and body weight are not related.⁴³

McDonald's presents a prime example of how much time and money corporations are spending on advertising to children. McDonald's is the nation's largest fast food restaurant and spends more money on advertising and marketing than any other brand.⁴⁴ McDonald's was one of the first companies to develop an innovative marketing strategy intended to build a relationship with children that would last a lifetime.⁴⁵ McDonald's creates this relationship with children by linking its food and restaurant with popular cartoon characters and children's movies. It created the Happy Meal, which provides children with toys related to television and movies, but only when they purchase one of these meals. Ronald McDonald is recognized by 96% of all American school children regardless of race or income, and is second only to Santa Claus as the most recognized fictional character.⁴⁶ Obviously, McDonald's advertising efforts have paid off.

American children are exposed to an abundance of advertising besides that on television. It is estimated that 98% of children's websites permit outside

³⁸ Common Sense Media, *Commercialism*, 2006, at <http://www.common sense media.org/resources/commercialism.php> (last accessed Aug. 15, 2007).

³⁹ Henry J. Kaiser Family Foundation, *supra* note 36.

⁴⁰ Andrea Lynn, *TV Ads Market Junk Food to Kids*, Aug. 24, 2005, at http://www.common sense media.org/resources/childhood_obesity.php?id=8 (last accessed Aug. 15, 2007).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Lee J. Munger, Comment, *Is Ronald McDonald the Next Joe Camel? Regulating Fast Food Advertisements Targeting Children in Light of the American Overweight and Obesity Epidemic*, 3 CONN. PUB. INTEREST L.J. 456, 466 (2004).

⁴⁵ *Id.*

⁴⁶ *Id.*

advertising and more than two-thirds of these websites rely on these advertisements as their primary source of income.⁴⁷ “Advergaming” are common features of these websites designed for and frequented by children. These are advertisement-sponsored games that are colorful, fun, and have fast-paced adventures but that also contain embedded brand messages.⁴⁸ Manufacturers and advertisers create these advergaming for the purpose of promoting one or more of their brands.

Studies show that these so-called advergaming are very effective at reaching children of a certain age. According to the United States Department of Education, children are willing consumers of these marketing communications, resulting in 64% of children ages five through 14 accessing the Internet with the goal of playing these games.⁴⁹ It appears advergaming, or branded entertainment, are here to stay and will only increase in popularity. A Price Waterhouse Coopers estimate projects a five-fold increase by 2009 in the current spending levels on such advertisements.⁵⁰

Many experts, including pediatricians, media researchers, and child development professionals, have theorized that media may contribute to childhood obesity in a number of ways. These include: (1) the time children spend using media displaces time that could have been spent on physical activity; (2) food advertisements to which children are exposed cause them to make unhealthy food selections; (3) children snack more excessively when they are watching television and eat less healthy meals while in front of the television; and (4) depictions of body weight and nutrition on television encourage children to develop less healthy diets.⁵¹

III. HOW ADVERTISING IS REGULATED: THE EVOLUTION OF THE COMMERCIAL SPEECH DOCTRINE

Speech plays an important role in our society. In multiple ways, speech influences individual behavior, cultural norms, public policies, and social relationships, all of which make up the environment around us. The environment influences a child’s weight.⁵² The problem that increasingly has been brought to the attention of the public is how to balance regulation of the informational environment to help reduce child obesity against the First Amendment’s guaranty of freedom of speech.⁵³ Through recent court decisions, the protections

⁴⁷ Henry J. Kaiser Family Foundation, *It’s Child’s Play: Advergaming and the Online Marketing of Food to Children*, July 2006, at <http://www.kff.org/entmedia/upload/7536.pdf> (last accessed Aug. 15, 2007).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Henry J. Kaiser Family Foundation, *supra* note 36.

⁵² Parmet & Smith, *supra* note 10, at 363.

⁵³ *Id.*

given to speech have broadened. Subsequently, it may be very difficult to create legislation regulating the advertisements that contribute to obesity.

The First Amendment states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁵⁴ Even with the Supreme Court’s recent recognition of broad First Amendment protections for commercial speech, it may be possible to develop an environment that better safeguards the public health; however, this broadening of protection has also led to some negative effects. The new informational environment includes much information that increases the obesity problem instead of helping it.⁵⁵

The commercial speech doctrine has had a close association with issues related to health care and public health since its inception over 30 years ago.⁵⁶ One of the first cases that dealt with the commercial speech doctrine was *Bigelow v. Virginia*. In finding a Virginia statute unconstitutional, Justice Blackmun stated: “[T]he central assumption made by the Supreme Court of Virginia was that the First Amendment guarantees of speech and press are inapplicable to paid commercial advertisements. Our cases, however, clearly establish that speech is not stripped of First Amendment protection merely because it appears in that form.”⁵⁷ Because the advertisement at issue was for an abortion service, people were uncertain whether the Court was showing a preference for wide-ranging protection of commercial speech, or just providing protection and extra scrutiny for abortion regulations.⁵⁸

The Supreme Court built on its holding in *Bigelow v. Virginia* and the application of the commercial speech doctrine in 1976 in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* The Court there struck down a law limiting the advertisement of health care services and explained that speech should not lose its First Amendment protection simply because there is an economic intent behind the speech.⁵⁹ The Court went on to discuss the difficulties associated with distinguishing among different types of speech and stated: “[C]onsumers may have as keen, if not a keener interest in receiving commercial information than other forms of information.”⁶⁰ Even after extending protection in this case, the Court recognized there were major differences between commercial speech and other protected forms

⁵⁴ U.S. CONST. amend. I.

⁵⁵ Parmet & Smith, *supra* note 10, at 407.

⁵⁶ *Id.* at 408.

⁵⁷ *Bigelow v. Commonwealth of Virginia*, 421 U.S. 809, 818 (1975) (citing *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 367, 384 (1973) and *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964)).

⁵⁸ Parmet & Smith, *supra* note 10, at 409.

⁵⁹ *Id.*

⁶⁰ *Id.*

of speech that required courts to apply different degrees of constitutional protection.⁶¹

A few years after the Supreme Court left open the question of under what circumstances regulation of commercial speech will be upheld, an answer was provided in 1980 in the *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* case.⁶² This case concerned the constitutionality of a New York law banning electric utilities from advertising to promote the use of electricity.

Justice Powell created a four-pronged test to determine the permissible scope of commercial speech regulations. Under this test, the Court begins by asking whether the regulated speech promotes legal activity and, if so, whether the speech is truthful and not misleading.⁶³ If the Court answers “yes” to both questions, it finds the speech worthy of protection and moves on to additional parts of the test.⁶⁴ The second prong of the *Central Hudson* test asks whether the government regulation serves a substantial interest.⁶⁵

Under the third prong, the Court asks whether the regulation directly advances that interest.⁶⁶ Under this prong, the Court requires the proponents of the regulation to show, by empirical data or studies, the relationship between the harm that underlies the state’s interest and the means identified by the state to advance the interest.⁶⁷ The regulation must have the power to produce the desired effect in meeting the asserted goal.⁶⁸

Finally, the fourth prong asks whether the regulation is more expansive or burdensome than necessary.⁶⁹ To pass the fourth prong, the government must prove that the regulation is narrowly tailored to achieve the desired objective by demonstrating that less restrictive means are either unavailable or ineffective to meet the legislative goals.⁷⁰

There has been much debate and criticism of the *Central Hudson* four-pronged test since its inception. In a separate opinion, Justice Blackmun disagreed with the test’s endorsement of the idea that the government could have a legitimate interest in influencing an individual’s personal economic decision.⁷¹ Justice Blackmun argued that the state cannot manipulate individual choices or regulate speech unless there is a clear and present danger because of the

⁶¹ Parmet & Smith, *supra* note 10, at 411.

⁶² *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of New York*, 447 U.S. 557 (1980).

⁶³ *Id.* at 566.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Munger, *supra* note 44, at 471.

⁶⁸ *Id.* at 472.

⁶⁹ *Id.* at 473.

⁷⁰ *Id.* at 472.

⁷¹ Parmet & Smith, *supra* note 10, at 412.

speech's affect on the public.⁷² He believed that bans on truthful advertising keep individuals ignorant.⁷³

Throughout the years, many other justices have joined in the criticism of the *Central Hudson* four-pronged test. Consequently, many litigants have asked the Court to reconsider the test.⁷⁴ Furthermore, the Court's application of the test has proved to be inconsistent over the years.⁷⁵ During certain periods, the Court has applied the test in a relatively loose way suggesting the Court would grant the states considerable leeway in regulating commercial speech.⁷⁶ More recently, the Court has applied the test more strictly, making it more difficult for a state trying to regulate commercial speech to meet the constitutional requirements necessary.⁷⁷

IV. A USEFUL ANALOGY: REGULATION OF THE TOBACCO INDUSTRY

In 1995, the battle against the tobacco industry reached a new frontier when the Attorneys General from various states attempted to certify a nationwide class action against the five largest tobacco companies based on the theory that tobacco is an addictive drug.⁷⁸ Although the proposed class action sought compensation for economic losses based on the injury of nicotine addiction, including emotional distress and funds expected to be necessary for efforts to stop smoking, the tobacco companies had settlement in mind.⁷⁹ The five largest tobacco companies developed a settlement strategy that required the tobacco industry to pay an average of \$10 billion per year to each of the 46 participating states into the indeterminate future, and that also restricted cigarette advertising and marketing.⁸⁰ Settlement followed.

Settlement funds were intended to be used to pay for tobacco related public health messages and to educate children about not smoking.⁸¹ These efforts have not proved successful in light of state budget shortfalls and a lack of legal incentive for states to keep their promises.⁸² The tobacco industry continues to thrive and thousands of Americans die each year from smoking related illnesses.⁸³

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 413.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 414.

⁷⁸ Munger, *supra* note 44, at 456.

⁷⁹ *Id.*

⁸⁰ *Id.* at 457.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

Advertisements for the tobacco industry have proved just as successful as advertisements for the food industry. In 1991, the *Journal of the American Medical Association* reported that Joe Camel was as famous to children as Mickey Mouse.⁸⁴ After this finding, advocates began to challenge the Joe Camel advertising and anti-smoking legal advocates in California brought suit against Reynolds Tobacco Company.⁸⁵ The tobacco company attempted to have the suit dismissed, claiming the plaintiff was preempted by the Federal Cigarette and Labeling Act.⁸⁶ This effort was unsuccessful and the Supreme Court of California held that the legislature had cared deeply about smoking and minors and that it prohibited cigarette sales to them.⁸⁷ Additionally, the Court stated that Congress left the states free to exercise their police power to protect minors from advertising that encourages them to violate the law.⁸⁸ Soon after, defendant Reynolds Tobacco Company settled and said goodbye to Joe Camel.

One important case addressing the tobacco industry and commercial speech is *Lorillard Tobacco Co. v. Reilly*. In this case, the Attorney General of Massachusetts created a comprehensive regulation restricting the advertising and sale of cigarettes, smokeless tobacco, and cigars in specific outdoor locations for the general purpose of combating underage smoking and tobacco use.⁸⁹ Members of the tobacco industry immediately filed suit challenging the regulation claiming preemption by the Federal Cigarette and Labeling and Advertising Act (FCLAA), as well as violations of the First and Fourteenth Amendment.⁹⁰ The Supreme Court found that the FCLAA preempted Massachusetts from regulating outdoor and retail point-of-sale cigarette advertising, but it found the FCLAA did not apply to cigar and smokeless tobacco advertising and, therefore, the regulation required analysis under the *Central Hudson* four-part commercial advertising test.⁹¹

Neither party contested the first two parts of the *Central Hudson* test, that the advertisers were entitled to First Amendment protection and the state had an interest in combating the use of tobacco products by minors.⁹² At issue were the third and fourth prongs of the test, whether the regulation advances the governmental interest asserted and the regulation is not more extensive than is necessary to serve that interest.

The third prong requires the proponents of a regulation to show, by empirical data, the relationship between the harm that underlies the state's

⁸⁴ *Id.* at 467.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 470.

⁹⁰ *Id.*

⁹¹ *Id.* at 471.

⁹² *Id.*

interest and the means identified by the state to advance the interest.⁹³ The tobacco industry questioned the lack of parity between problems caused by cigarettes and smokeless tobacco and challenged the Attorney General's evidence that advertising was causally linked to tobacco use. It also questioned whether limiting advertisements would materially alleviate the problems of underage use of the products.⁹⁴ Justice O'Connor found sufficient evidence to support the Attorney General's position and concluded that the regulation of smokeless tobacco and cigars passed the third part of the *Central Hudson* test.⁹⁵

To pass the fourth part of the *Central Hudson* test, the government must prove that the regulation is narrowly tailored to achieve the desired objective by demonstrating that less restrictive means are either unavailable or ineffective to meet the legislative goals.⁹⁶ While Justice O'Connor, writing for the majority, found that the regulation did not pass the fourth prong, four other justices disagreed, concluding the record did not support the claim that the Massachusetts law overreached.⁹⁷

Although the federal government over the years has increased regulation of the tobacco industry, the effects remain questionable. It is now probably more difficult for underage individuals to purchase tobacco products and the number of tobacco advertisements has decreased, but it is unclear whether the impact on underage smoking has been significant.

V. REGULATION OF ADVERTISEMENTS IN CANADA AND THE UNITED STATES

Thus far, the United States has been hesitant to regulate food and other types of advertisements aimed toward children. Other countries, though, have successfully implemented regulations.

A. Regulation of Advertisements in Canada

Generally speaking, other Western countries are more open than the United States to imposing tighter restrictions on television advertisements targeting children.⁹⁸ The regulation of television advertising aimed at children varies widely among the countries in the European Union.⁹⁹

In Canada, the Quebec ban on advertising aimed at children is particularly interesting because it was the first law of this type in the twentieth

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 472.

⁹⁶ *Id.* at 471.

⁹⁷ *Id.*

⁹⁸ Munger, *supra* note 44, at 465.

⁹⁹ *Id.*

century.¹⁰⁰ The legislative assembly of the province of Quebec amended in 1978 the Quebec Consumer Protection Act.¹⁰¹ Section 248 of the amended Act states, subject to what is provided in the regulations, no person may make use of commercial advertising directed at persons less than 13 years of age.¹⁰² Additionally, section 249 states that, to determine whether an advertisement is directed at persons under 13 years of age, account must be taken of its presentation and: (a) the nature and intended purposes of the goods advertised; (b) the manner of presenting such advertisement; and (c) the time and place it is shown.¹⁰³

The primary purpose behind the ban was to address children's unique vulnerability to deception.¹⁰⁴ Since the ban has been in place, Quebec's obesity rates and soft drink consumption have been among the lowest in Canada.¹⁰⁵ Additionally, its fruit and vegetable consumption rates have been among the highest in Canada.¹⁰⁶

In addition to the legislative ban in Quebec, other codes govern advertising in Canada. Three of those codes are the Canadian Code of Advertising Standards, the Broadcast Code for Advertising to Children, and the Code of Ethics and Standards of Practice.¹⁰⁷ All three of these regulations mention the vulnerability of children to advertising, but none take special account of the incapacity of children to interpret these commercial advertisements.¹⁰⁸

While not all of Canada's efforts to ban or regulate commercial advertisements aimed at children have been successful, it appears that Quebec was successful in its regulation of advertisements to children under the age of 13. If other countries have been successful in regulating commercial advertisements and thereby decreasing rates of obesity among the younger generations, why has the United States been so reluctant to regulate commercial speech?

B. Regulation of Advertisements in the United States

In 1978, the Federal Trade Commission attempted to ban all television advertisements directed at children ages seven and younger.¹⁰⁹ Research had shown that young children were not able to distinguish between a television advertisement and television programming.¹¹⁰ On April 27, 1978, the Federal

¹⁰⁰ Bill Jeffery, *The Supreme Court of Canada's Appraisal of the 1980 Ban on Advertising to Children in Quebec: Implications for "Misleading" Advertising Elsewhere*, 39 *LOY. L.A. L. REV.* 237, 239 (2006).

¹⁰¹ *Id.* at 240.

¹⁰² *Id.*

¹⁰³ *Id.* at 241.

¹⁰⁴ *Id.* at 240.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 245.

¹⁰⁸ *Id.*

¹⁰⁹ Munger, *supra* note 44, at 475.

¹¹⁰ *Id.*

Trade Commission proposed restrictions regarding television advertisements directed at children.¹¹¹ Immediately, advertisers, broadcasters, and the toy and food industries began to protest these regulations through Congressional lobbying.¹¹² These lobbying efforts did not go unnoticed, and on May 28, 1980, Congress passed a law blocking the Federal Trade Commission from preventing advertising targeting children.¹¹³ This prohibition remains in force today.¹¹⁴ The Federal Trade Commission currently has some control over false advertising; however, it remains powerless to control non-misleading advertisements targeting children.¹¹⁵

VI. PROPOSAL

There have been various attempts in the past to pass legislation regulating commercial food advertisements directed at children. These attempts have increased with the rising rates of obesity among Americans, especially children. The attempts to regulate have been confronted by strong opposition by the food industry, claiming the First Amendment protects its freedom to engage in commercial speech. Thus far, attempts to regulate advertisements through legislation have proved unsuccessful. Even in the tobacco industry, where regulations have been implemented, it remains speculative whether the regulatory efforts have actually been successful. Government action alone seems inadequate to resolve the childhood obesity epidemic. Although regulations may prove successful in the future, there is a better solution to the obesity problem, one in which the government is much less involved.

It is common knowledge that children are shaped by their environment and the people with whom they interact. At a young age, children are primarily interacting with other members of their family who reside in the same household. Instead of invading the commercial speech rights of corporations selling food to children, the primary solution to the obesity epidemic lies within the home and school environments. Sweeping legislative actions are not reliably effective enough to counteract this problem and the weight of prior First Amendment precedent goes against such action.

A. Rationale

When children are young, they are extremely susceptible to conditioning. They learn by example. The behavior and patterns displayed within their homes are often the behaviors and patterns the children will themselves display

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 476.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

later in life. Therefore, to begin to solve the obesity epidemic, behaviors need to change in the child's primary environment.

Young children cannot make food choices for themselves. At a certain age, they begin to say they do not like green beans or they prefer chocolate milk to regular milk, but children do not understand the consequences of their decisions nor why they really prefer one food to another. Parents are their children's primary influencers. So, parents should be persuaded that purchasing high caloric snack foods will only result in children preferring these foods because they are accustomed to it. If a parent shapes the way their child eats from the beginning of life and makes healthy food choices for the child, it will become second nature. This, in turn, should lead the child to have fewer struggles in food choices later in life, therefore decreasing the chances of developing obesity.

Government action could be engaged to influence parents to make healthy food choices. Such public service addresses are already a staple of public media. Also, state power is already used to limit the amount of high caloric foods that may be purchased by a household dependent upon welfare programs. Perhaps this strategy could be extended to other programs to increase the number of households affected.

Parents also can help their children by modeling good behavior. Children are more influenced by their parents' behavior than by other individuals in their lives. Young girls watch their mothers apply makeup and are soon begging to be "just like her" and apply makeup. If parents are displaying poor eating habits, children will begin to think this type of eating is appropriate. Watching parents eat snack foods and poorly balanced meals could lead to the belief that this is how one should eat. Children do not always see their parents' efforts in exercising and, therefore, do not understand that a proper balance is required between eating and exercising.

B. Parental and Governmental Involvement

So, how do we help our children? Parents should not tell children, "Do as I say, not as I do." Also, parents should display the type of eating habits they want their children to adopt. Of course, all individuals snack and indulge occasionally, but parents should explain to their children that balanced eating is necessary to stay healthy. Prepare food for one's household that is well balanced. Keep food in the house that is healthy and decrease the amount of snack foods available for children. Set ground rules for eating. Do not allow children to simply say that they do not like a certain food. Make children try different foods.

The government should provide state-funded education classes for parents to equip them with the knowledge necessary to protect and educate their children. To entice individuals to participate, the government could offer incentives to individuals who successfully complete these programs.

How can the government help parents achieve these goals in the home? Instead of regulating the food industry as a whole, the government should make smaller efforts targeted directly at children. State legislatures should increase funding to create more programs within schools. These programs should begin when the child first enters the school system and should focus on nutrition, exercise, and educating children about food in general. Programs should teach children about the differences between advertising and programming. This will help children gain the knowledge necessary to see advertisements for what they are and to become less influenced by advertisements in the future.

Additionally, throughout the child's educational career, state legislatures should mandate school districts to require children to take more classes about nutrition and health. Perhaps instead of giving a class once in middle school and sometimes once in high school, schools should teach health and nutrition as an important ongoing subject. The more children are exposed to the truth about poor eating, the more they will see the importance of their decisions.

The government can also play an important role in regulating the type of food children are exposed to while attending school. The government can pass legislation that makes vending machines illegal on school property. Additionally, the government could monitor the types of fund-raising students conduct. Many student organizations sell candy to raise money. Although it is important for students to raise money for their organizations, with the increasing rate of obesity in America it may be time for students to look beyond food as options for fund-raising. Finally, the government should continue its monitoring and create stronger regulations in regard to the food provided by school cafeterias. Although there have been drastic changes in the types of food offered to students, students are still confronted with a variety of high caloric fatty foods at lunchtime.

C. The Role of Physical Activity

Although food advertisements have a large impact on child obesity rates, it is also important to remember that proper physical activity is a key to combating the obesity epidemic. Many school districts require children to take a physical education class throughout their middle school and high school careers. Unfortunately, many of these physical education programs are poorly funded, poorly organized, and do not provide children with the necessary physical activity. State governments should increase the amount of funding available for physical education programs and revamp the system as a whole.

Additionally, many high schools allow students to be excused from physical education classes for a variety of reasons, including the student taking additional academic classes or being involved in a high school sports program. It is important that high schools reduce the availability of excuses from physical education classes. The government could pass legislation that strictly defines how many physical education classes one must take to graduate. It is

apparent that many children will not exercise on their own, so the school is often their only source of exercise.

All of the above efforts may prove to be more successful than the legislature attempting to regulate food advertisements to children. If parents begin to take a more active role in their child's "eating life," they may be able to prevent obesity in the future. Although attempts have been made in the past to educate children and their parents about proper nutrition and exercise, these efforts have not been very successful. As the sole protectors of their children's interests, parents have a large responsibility in helping their children make good nutritional decisions. Although a parent cannot always be present in their child's life and children will be influenced by outside forces, parents are responsible for laying the foundation. Parents need to arm their children with the proper information and tools necessary to make good decisions.

CONCLUSION

Obesity in the United States has become a widespread epidemic. Countless articles are written weekly about the negative health consequences of obesity. Articles are written ranking the rates of obesity among college campuses.

Every individual and entity has a certain degree of freedom of speech that the government cannot abrogate. Currently, efforts to ban commercial food advertisements targeted at children have been unsuccessful because of the commercial advertisement protections courts interpret as being provided by the First Amendment.

The government has been successful in implementing restrictions on the advertising the tobacco industry is permitted to do. Many remain skeptical about whether these efforts have really accomplished the government's purpose of reducing underage tobacco purchasing and smoking. Other countries have successfully created legislation that targets advertisements to children. Thus far, America has not been successful in its attempts to ban these types of advertisements.

As American children and the American population as a whole continue to become more obese, additional efforts are necessary to end this epidemic. If we cannot develop a solution soon, before we know it, dying from obesity and obesity related illnesses will become the norm. As a country, we must strive to protect our youth from these problems. However, the answer lies not in reducing First Amendment protections of commercial speech to regulate advertising, but in community action. By increasing efforts in the children's primary environments—the home and school—we will be able to better prepare children to deal with the obesity epidemic.

Copyright of *Journal of Legal Medicine* is the property of Routledge and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.