Broadcast Advertising: What Has It Done to the Audience?

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Broadcast Advertising: What Has It Done to the Audience?

Ronald C. Griffin*

I. INTRODUCTION

Commercials are instruments employed by industries to stimulate demand for consumer products. They can be either friendly or vile. This article will examine the vile ones: television commercials directed at children. After examining consequences, coming out of television advertising, this article will offer recommendations as to what can be done to minimize the negative fallout.

II. BACKGROUND

A. The Industry

Advertising agencies, advertisers, and the television networks constitute the industry which stimulates demand for consumer products. Let's begin with advertising agencies, the first institution on the list. Since they hold a subordinate position in the industrial hierarchy, representing themselves to be an informational conduit, they are reluctant to anger top level decision makers, manufacturers of consumer goods, who are the true wielders of power. Important accounts move from agency to agency for no reason other than a desire of a client to try something new. Since professional success is both competitive and mercurial, these agencies are committed to doing many things which promise a profit.

There are the advertisers: conglomerate organizations like the American Brand Company. Each seeks the lowest cost commercial with the broadest demographic appeal. A few businesses use commercials containing emotional statements, calculated to subordinate reason

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I wish to thank Carol Couch and Harlan Gottlieb for their assistance in the preparation of this article.
2. See Cohen, supra note 1, at 104. See also H. Seiden, Advertising Pure and Simple 1-10 (1977).
3. Cohen, supra note 1, at 104.
4. Id.
5. Id.
7. See Cohen, supra note 1, at 94, 96, & 102.
over feeling, to preserve their price leadership in their market.\textsuperscript{8}

All advertisers are driven by a desire to make money. Yet the emphasis on advertising as a means to that end will vary with the item being sold.\textsuperscript{9} If the product is plentiful, advertisers will spend lots of money on advertising.\textsuperscript{10} If the product is scarce advertisers will spend less.\textsuperscript{11} Using data from \textit{The Advertising Age}, which lists the 100 largest United States advertisers for 1975, one can rank eleven product groups by total advertising expenditures for all firms. The table below shows that advertising expenditures by major corporate advertisers are greatest for goods that are plentiful and less for goods that are scarce.\textsuperscript{12}

<table>
<thead>
<tr>
<th>Ranking</th>
<th>Product Group</th>
<th>1975 Advertising Expenditures (Million $)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abundant</td>
<td>Food</td>
<td>1,243</td>
</tr>
<tr>
<td></td>
<td>Drugs</td>
<td>906</td>
</tr>
<tr>
<td></td>
<td>Cars, Gas, Tires</td>
<td>818</td>
</tr>
<tr>
<td></td>
<td>Soaps, Cleansers, Detergents</td>
<td>616</td>
</tr>
<tr>
<td></td>
<td>Beer, Liquor, Soft Drinks</td>
<td>473</td>
</tr>
<tr>
<td></td>
<td>Cigarettes</td>
<td>398</td>
</tr>
<tr>
<td></td>
<td>Cosmetics</td>
<td>236</td>
</tr>
<tr>
<td></td>
<td>TVs, Radios, Appliances</td>
<td>159</td>
</tr>
<tr>
<td></td>
<td>Photographic Equipment</td>
<td>86</td>
</tr>
<tr>
<td></td>
<td>Paper Products</td>
<td>46</td>
</tr>
<tr>
<td>Scarce</td>
<td>Candy, Chewing Gum</td>
<td>46</td>
</tr>
</tbody>
</table>

There are the networks. These businesses sell programs to audiences and their audiences to advertisers for money.\textsuperscript{13} Today’s media owners desire the largest audience plurality possible.\textsuperscript{14} Network broadcasters seek a sequence of programs which assure their advertisers that a large TV audience will tune into network programming, early in the evening, and remain with the station until signoff.\textsuperscript{15}

In the 1950’s network broadcasters offered advertisers the true magazine concept.\textsuperscript{16} Under this scheme broadcasters promised to supply gross numbers of television viewers to advertising clients for a price. The scheme gave broadcasters control over the placement of commercials. They could link commercials to any program they liked, [Vol. 23

\begin{itemize}
\item \textsuperscript{9} Ayanian, \textit{Does Advertising Persuade Consumers to Buy Things They Do Not Need?}, \textit{The Attack on Corporate America} 236-39 (M. Johnson ed. 1978).
\item \textsuperscript{10} \textit{Id.} at 238.
\item \textsuperscript{11} \textit{Id.}
\item \textsuperscript{12} \textit{Id.} at 239. The chart was placed in reverse order to make for easier reading.
\item \textsuperscript{13} See Cohen, \textit{supra} note 1, at 97, 101.
\item \textsuperscript{14} \textit{Id.} at 111.
\item \textsuperscript{15} \textit{Id.} at 101.
\item \textsuperscript{16} \textit{Id.} at 100.
\end{itemize}
free of advertiser interference, until each client received the total number of audience exposures he had purchased.\textsuperscript{17}

Advertisers were quick to reject this arrangement. They felt that they should have some control over the types of programs tied to their products. Beyond that, they wanted to present some of their own programming.\textsuperscript{18} A compromise emerged from their differences. Broadcasters were given responsibility for selecting most television programs, but lost control over the time when commercials would be aired during the day.\textsuperscript{19} Advertisers were given the right to broadcast some of their own programs on the networks and offered the option to sponsor programs outright or co-sponsor one with someone else.\textsuperscript{20}

Advertisers were free to gamble on different types of programs under this arrangement. They could buy expensive time around popular shows or take a chance sponsoring a new program. Smaller advertisers, manufacturers of consumer goods and services, who obtained relatively little television exposure in the past, now found time in the broadcast schedule they could afford.\textsuperscript{21} Some advertisers were literally reborn. They started buying television time much like people now buy groceries. "What can I get on television," they asked, "that I can not secure by some other commercial technique?" Conversations between television broadcasters and advertisers frequently began with "I want women 25 to 34 at $1.50 per thousand" or "[w]hat we need is a male audience, 35 and over, at $2.50 per thousand."\textsuperscript{22}

\section*{B. The Public}

The public has paid a dear price for this arrangement. It is saddled with higher retail prices for goods.\textsuperscript{23} It is forced to wade through TV commercials containing useless information.\textsuperscript{24} It is forced to accept poorer programming for children.\textsuperscript{25} Let us begin with retail prices. Commercials stimulate a demand for inexpensive products. When de-

\begin{itemize}
\item \textsuperscript{17} \textit{Id}.
\item \textsuperscript{18} \textit{Id}. at 99, 100.
\item \textsuperscript{19} \textit{Id}. at 102.
\item \textsuperscript{20} \textit{Id}. at 95, 100, & 101.
\item \textsuperscript{21} \textit{Id}. at 102.
\item \textsuperscript{22} \textit{Id}.
\item \textsuperscript{23} See H. Skornia, \textit{supra} note 1, at 99-102. Network television is not free. The cost of promoting products, like automobiles and food, is passed on to the consumer in the price. \textit{Id}. at 95-97. In a 1962 article, Fred W. Hickle asked: "Did you buy a new car last year? If you did, then between $18.97 and $161.70 of the price went into advertising. The smaller figure was for the Ford while the larger one was for the General Motors Tempest. The average for all cars was $31.70." Hickle, \textit{What the Public Pays for Advertising}, \textit{Sponsor}, Oct. 22, 1967, at 32. Mr. Hickle's figures are now outdated. However the concept of taxing the consumer for advertising by figuring it into the purchase price, is undoubtedly widespread.
\item \textsuperscript{24} See Pitofsky, \textit{supra} note 8, at 664. See also H. Skornia, \textit{supra} note 1, at 103-04.
\item \textsuperscript{25} E.g., \textit{Vast Wasteland: Quality Children's Programs Fade Out}, Dallas Times Herald, Aug. 1, 1982, at J1, col. 1; \textit{As an Educational Tool, TV Generally is a Flop}, Kansas City Star, Nov. 17, 1982, at 2B, col. 1.
\end{itemize}
mand for an item outstrips known inventories, businesses raise prices to accommodate the scarcity. Scarcity unfortunately never goes away. If advertising and distribution costs account for seventy-five percent of the retail price for goods, there is precious little money left in the purchase price to spend on new production. This situation is crippling. When the cost of production goes up, businesses are powerless to eliminate the scarcity through increased production. Prices remain high, due to the continuing scarcity, with no promise that they will drop in the future.

Commercials pose problems beyond their impact on market prices. In a nationwide survey conducted by the General Electric Corporation, fifty-eight percent of more than 1,000 people polled said that most information in commercials could not be believed. Fifty-five percent said that there was insufficient product information upon which buyers could make intelligent decisions. On balance the study revealed that consumers were dissatisfied with the information made available to them. This is borne out by the steady stream of cases pouring out of the Federal Trade Commission.

Television commercials have a negative affect upon the quality of television programming for children. Steve Radcliff, a staff writer for the *Dallas Times Herald*, has written a series of articles on this sub-

26. See H. SKORNIA, supra note 1, at 102-03.

27. Id.


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General Electric Co., in a nationwide survey recently completed, found that 58 percent of the more than 1,000 people polled felt that most information contained in advertising could not be believed. In addition, 55 percent said there was not enough product information in advertising as to which they could make intelligent decisions. On balance the study revealed that consumers were dissatisfied with the information made available to them.

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In one article, he reported on Saturday morning TV fare and the 238 commercials which he was forced to watch. Ninety-two of the commercials, he said, were for breakfast cereals like “Cocoa Pebbles” and “Sugar Smacks.” The networks, he concluded, and the cereal industry had made a contract. The networks had agreed to rot the minds of our young people while the cereal industry had agreed to rot their teeth.

The networks seem to spend too little money on programming which elevates a child’s tastes. Adults’ assumptions about how the television industry works seem to dictate what our children see. Radcliff noted that we use the market mechanism in programming. If a show attracts a large audience, and lots of advertisers, that amounts to market approval of the program. If a show attracts a small audience, and advertisers stay away, that means that the market objects to the program. Broadcasters are free to cancel good programs, under this scheme, if there is no money in it. The trouble with the arrangement, as it relates to children, is that children are less than full market place participants. They have insufficient funds to buy the item advertisers are trying to sell. Further, their loyalty to certain programs, measured in nickels and dimes, falls far short of the gross revenues broadcasters expect from some programs. Whether specific programming receives high or low ratings, the result is always the same: the children’s vote counts for little to nothing in the selection of good programs.

C. Common Working Assumptions

Poor programs for children may give way to better ones if cable television captures a larger share of the broadcasting network market. All one needs is a cable television set and a remote channel selector box. With these one can flip through a hundred channel system, catching “Calliope” and “Nickelodian” without seeing a single commercial.

32. E.g., Children’s Fare Needs a Real Superhero, Dallas Times Herald, Aug. 2, 1982, at B.1, col. 2. In substance, the author says the following: I watched television programs featuring masked men and cute animals leveling ray guns at one another. After watching a few programs like this, one becomes insensitive to the antics of the characters. One spaceship looks like any other and the “zapping rays all look alike.” Id. The story plots seem trite and the morals buried beneath the forced dialogues are worthless.

33. Id.

34. Id.

35. Id.


37. Vast Wasteland, supra note 25, at col. 3.

38. Id. See Robertson, Mandatory Programming Rules for Children’s Television, 3 COMM/ENT L.J. 701, 705-08 (1981) (laying out the disincentives which operate on broadcasters who wish to present quality children’s programming).

Videotex, the use of home television to retrieve late breaking news and shopping tips, may change television more drastically. By siphoning off network advertisers, making them very scarce, the new medium will force the older ones to upgrade the programs it broadcasts.

The prevailing assumption seems to be that quality programming for children can be handled exclusively by public television. They have programs like "Mr. Roger's Neighborhood," "The Electric Company," and "Sesame Street." Unfortunately the working assumption is too fragile to work these days. Money is tight and federal funds for television have been cut back. Public stations have been denied permission to fill deficits in their budgets by selling advertising time on the air. There is no way that public television can do more for children than it does now.

The Better Business Bureau and the National Association of Broadcasters have come forward with several solutions that might upgrade the quality of commercials children watch between TV programs. One suggestion is to insert thirty seconds of dead space between television commercials and children's programming. A second suggestion is to present commercials in clusters before and after airing children's programs. A third is to remove cartoon heroes from commercials when those same heroes appear in shows for children.

These organizations have produced guidelines for advertising food on television. The general statements on food commercials provide:

(a) Representation of food products should be made so as to encourage sound usage of the product with a view towards health development of the child and the development of good nutritional habits.

(b) Given the importance of sound health and nutritional practices, advertisements for edibles shall be in accord with commonly

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43. These organizations have offered guidelines as to how to structure thirty seconds of time. See Lesser & Meringoff, Children's Ability to Distinguish Television Commercials from Program Material, THE EFFECTS OF TELEVISION ADVERTISING ON CHILDREN 31 (1980). See also Lesser & Meringoff, The Influence of Format and Audiovisual Techniques on Children's Perceptions of Commercial Messages, THE EFFECTS OF TELEVISION ADVERTISING ON CHILDREN 43, 45 (1980).
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accepted principles of good eating.\textsuperscript{47}

With regard to food served at mealtimes the guidelines provide:

(a) Advertising representing mealtime in the home should clearly and adequately depict the role of the product within the framework of a balanced diet.

(b) Each commercial for a breakfast type product shall include at least one \textit{audio} reference to and one \textit{video} depiction of the role of the product within the framework of a balanced regiment. It is permissible for the video to be animated and for the audio to be delivered by an animated character. However, a video character superimposed on the screen may not by itself be used to describe a balanced regiment, as some viewers do not read yet.\textsuperscript{48}

With regard to snack foods there is this language:

(a) Commercials for products such as snacks, candies, gum, and soft drinks shall not suggest or recommend indiscriminate and/or immoderate use.

(b) Over-consumption of food products and beverages should be avoided, nor should it be implied that any one food provides all the nutrients in a well designed diet.

(c) Any representation of the relationship between edibles and energy must be documented and accurately depicted.\textsuperscript{49}

These proposals are both praiseworthy and inadequate. First, they do nothing to upgrade the quality of children’s programs. Second, the guidelines are too vague for an industry to follow. “[Depiction of] the role of [a] product within the framework of a balanced diet” is terribly vague. Must an advertiser announce a specific role for his product within the framework of a balanced meal? What is a balanced meal? What does one do when a commercial is out of line with a guideline? Who can file a complaint? Who has time to file a complaint? How are complaints resolved? What is the remedy? What kind of regulation can the National Association of Broadcasters promulgate to deal with commercials which blur the distinction between entertainment and advertisement?\textsuperscript{50}

The British Broadcast System has developed a plan which shelters the public from harmful television commercials.\textsuperscript{51} Advertisers have limited access to television in England. Since the British Broadcasting Company (BBC) decides what is going to be beamed to the public, advertisers are encouraged to submit good programs to the BBC for a promise to mention their name and product when the program is aired.\textsuperscript{52} In Australia, there are public and private broadcasting systems

\textsuperscript{47} Meringoff, \textit{The Effects of Volume and Repetition of Advertising, The Effects of Television Advertising on Children}, 123, 127 (1980).

\textsuperscript{48} Id.

\textsuperscript{49} Id.

\textsuperscript{50} See Hickey, supra note 39, at 38.


\textsuperscript{52} Id.
dominated by public broadcasting. Children can watch high quality publicly funded programs without seeing a single commercial. Private broadcasters, who are licensed by a public broadcasting board, censor commercials to ensure that the balance in programming favors entertainment. Either scheme or some combination of both could be introduced, in this country, under FCC auspices, to upgrade the quality of children's programming. In the alternative, the Federal Communications Commission (FCC) could steer some programming away from audiences containing large numbers of children. Where the programs are indecent, and the objective is to prevent them from reaching the ears of unsupervised children or to channel the broadcast to hours when fewer unsupervised children would be exposed to it, the FCC has the power to act.

III. PROBLEM

If little or nothing can be done about the quality of television programming, what can be done about the quality of the commercials the audience is forced to watch? What are the real dangers faced by children watching television commercials? Who are today's children? How do we eliminate the dangers?

A. The Dangers

Since the 1950's, television has supplanted the family as a socializing institution in ninety-eight percent of all American homes. Television has no code which excludes children. It does not make neat decisions about information fit for sixth graders, high schoolers, and adults. Children, who can neither read nor write their names, find television accessible, informative, and absorbing.

The danger posed by television is its hypnotic effect. Television relaxes the conscious mind and exposes the subconscious faculty to suggestions beamed to it by the networks. When a television commercial links a product with a pleasing feeling, viewers, who experience

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54. Id. at 147-48.
58. Meyrowitz, supra note 57, at 13. Joshua Meyrowitz teaches communications at the University of New Hampshire. The material between footnotes 57 and 58 is pulled from an essay he wrote. The essay is based upon the professor's forthcoming book. See also F. MANKIEWICZ & J. SWERDLOW, supra note 57, at 4-6.
60. J. TAKACS, supra note 59, at 13-14. See also V. PACKARD, supra note 59, at 29.
that feeling apart from the commercial, may be driven to buy something they do not need. The damage sustained by children in this regard is both measurable and alarming. Some of the items advertised do not work. The dimensions of others differ from the ones featured in the advertisement. Still others invite children to ingest food containing large quantities of sugar—a habit that can undermine good health and cause tooth decay.

Few families are unaware of the tooth decay epidemic in the United States. The rise in sugar consumption in this country parallels the rise in the number of people now suffering from tooth decay. Each ingestion of sugar creates mouth acids which attack the teeth. According to one study, the mouth needs roughly thirty minutes of time to neutralize these acids. If sugar is ingested at meals only the tooth has sufficient time to gird itself against the next acid attack. When sugar is ingested at shorter intervals the mouth has little opportunity to neutralize the acids. When the amount of acid in the mouth outstrips the neutralizing agents, tooth decay is the result.

Sugar ingestion threatens good nutrition. Every time a child selects a food coated with sugar he does so at the expense of foods richer in needed vitamins and minerals. Foods containing lots of sugar supply the eater with empty calories. While young children may need these calories, there is no gain in getting them from foods devoid of other nutrients. When a child’s body undergoes dramatic change, as in adolescence, the need for quality food becomes paramount. Food containing large dosages of sugar displaces complex carbohydrates without offering equivalent nutritional value. It improves the prospect for diabetes among those who are genetically prone to it.

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62. E.g., Frazer & Reid, Children’s Use of Television Commercials to Initiate Social Interaction in Family Viewing Situations, 24 J. BROADCASTING 149 (1980).
63. The items do not work because the child overlooked the “voice over” disclaimers like “batteries not included” and “assembly required.” According to one study 64 percent of toy advertising uses some form of disclaimer; 30 percent use voice over audio announcements; five percent use a video only disclaimer, and 17 percent present their qualifiers simultaneously in both audio and video form. The prominence of the disclaimer in the television commercial determines the likelihood that a child will notice it. See Lesser & Meringoff, The Influence of Format and Audiovisual Techniques on Children’s Perceptions of Commercial Messages, The Effects of Television Advertising on Children 47, 48.
64. Id.
65. FTC STAFF REPORT ON TELEVISION ADVERTISING TO CHILDREN 109-13 (Feb. 1978).
66. Id. at 113.
67. Id. at 118-19.
68. Id. at 142.
69. Id. at 143. See also M. ARLEN, THE SCIENCE OF NUTRITION 253 (2d ed. 1977).
70. FTC STAFF REPORT ON TELEVISION ADVERTISING TO CHILDREN 154-55 (Feb. 1978).
71. Id. at 148.
cause of obesity in some.\textsuperscript{72} It is linked with hypertension, lethargy, stomach aches, and colds.\textsuperscript{73} It can interfere with learning in school.\textsuperscript{74}

\textsuperscript{72} Id.
\textsuperscript{73} Id. at 153. \textit{See} Pearson & Long, \textit{Counselors, Nutrition, and Mental Health}, 60 Pers. & Guidance J. 389 (1982). In April, 1982, The Early Child Development Center, Saint Mary's College, South Bend, Indiana, published a short article \textit{Sugar and Your Child's Learning} written by Martha A. Erickson, M.S., R.D. [hereinafter cited as the \textit{ERICKSON REPORT}].

\textit{Sugar and Your Child's Learning}

by Martha A. Erickson, M.S., R.D.

How much does your child weigh? The Surgeon General's Office (U.S. Government) recommends that adults consume no more than 15 teaspoons of sugar a day. If children are 1/2 your weight, then they should not eat more than 7.5 teaspoons (or one soda pop a day).

More than this the body gives off signals of disruption. Some children react with hyperactivity, some become overly tired, some have stomach aches, others have more colds, all of which interferes with their learning in school. Another signal from too much sugar is dental decay. Look inside your child's mouth. Use a small pocketbook mirror to reflect the back of the teeth.

Measurements of sugar in many classrooms have revealed that elementary grade students are eating 45-60 teaspoons of sugar a day. That's as if an adult was eating 90-120 teaspoons or 2-2 3/4 cups. It's worse at Halloween and students are really uncontrollable for 3 days after. A good question to always ask is, "What can this do to help my body?"

Taking sugar out of your house is one thing you can do to improve your child's health and his learning.

Try this for a week:

Fill your grocery cart, refrigerator, and cupboards with fruits and vegetables, with whole grain breads and whole grain cereals. Remove sweet foods by discarding them from your grocery list, your kitchen, your car, your purse. (Otherwise the family members will be tempted to eat them). Read the labels. The first item listed under "ingredients" is the most in amount. Discard those with "sugar," "corn syrup solids," "honey," "molasses," "invert syrup," listed as one of the first 3 items. At the end of the week discuss how much better each person feels and acts. Then if you want to see a reduction in colds and absences from school and many other happy signals, continue in this manner for another six months. You have to experience it to believe it, but once you believe it, it will become your lifestyle forever and your life saver.

\begin{center}
\textbf{Amounts of Sugar in Food Items*}
\end{center}

\begin{itemize}
\item 1/2 cup pudding = 4 tsp. sugar
\item 1 pop tart = 6 tsp. sugar
\item 3/4 cup sugar frosted cereals = 8 tsp. sugar
\item 1/2 cup liquid Hi C, Kool Aid, Tang, Wyler's Lemonade, Funny Face, Orange Plus, Grape Ade = 4 tsp. sugar
\item 1/2 cup Jello = 5 tsp. sugar
\item 1 lollipop = 10 tsp. sugar
\item 1 chewing gum = 1 tsp. sugar
\item 1 chocolate bar = 7 tsp. sugar
\item 1 doughnut, glazed = 6 tsp. sugar
\item 1/2 cup ice cream or sherbet = 6-8 tsp. sugar
\item 1/6th of apple pie = 10-12 tsp. sugar
\item 6 oz. chocolate milk = 6 tsp. sugar
\item 1 T. jam, jelly, honey, etc. = 3 tsp. sugar
\item 1/2 cup fruit in heavy syrup = 4 tsp. sugar
\item 1/4 cup raisins = 4 tsp. sugar
\item 10 oz. shake = 10 tsp. sugar
\item 1 T. coffee creamer = 3 tsp. sugar
\end{itemize}

A teaspoon of sugar contains 16 "empty" calories.

\textbf{REMEMBER:} Bribing a child before he eats gives the child control. Praising the child after he eats gives the parent control.

* Reference—American Dental Journal

\textsuperscript{74} \textit{See ERICKSON REPORT, supra note 73.}
B. Today's Children

Childhood was once a condition celebrated between birth and age seven. In the early days families were responsible for cultivating adult values and skills in young children. Sons matured rapidly in mind and self support. At fifteen young men undertook the physical tasks of life, and obligations owed to family members, as well as they could understand them at forty. All one needed was land and a plow, willing arms and a sense of duty. Young people married early in their lives. They seldom fretted about marital restraints like financial security and permanent settlement. Chastity was indispensable to younger women then. Its loss might bring unprotected motherhood at an early age.

The industrial age changed all of that. Men, women, and children left home and family to work as individuals in factories built for machines. Decade after decade, machines multiplied and became more complex. With each decade, a man's capacity to provide for a family was pushed back; a child's usefulness in that economic setting dwindled to nothing. Women were emancipated, became less child-oriented, and more industrialized. Children multiplied in smaller numbers and the time allotted to childhood, to inculcate adult skills in an industrial setting, was extended somewhat.

Parents acted befuddled then. Bereft of rules governing acceptable adult conduct, they were unable to define adult roles for their children and a child's role in the family. Some parents feared their children outright. Others consigned their child's behavior and their fate to the future.

Television emerged out of this confusion to become the principle socializing institution in the country. While glorifying domestic life as the last haven for childhood, television's emissaries took the position that parents were unable to provide for a child's needs without outside

76. See M. Winn, supra note 75, at 94.
78. Id.
79. Id. at 39.
80. Id.
82. A. Durant & W. Durant, supra note 77, at 39.
83. See M. Winn, supra note 75, at 94, 95; Stern, Smith, & Doolittle, supra note 81, at 112-13. See also Marks, Detours on the Road To Maturity: A View of the Legal Conception of Growing Up and Letting Go, 39 Law & Contemp. Probs. 78, 87 (1975).
84. See D. Riesman, The Lonely Crowd 49 (1967).
85. See M. Winn, supra note 75, at 14-18.
86. Id. at 24.
87. Id. at 44, 45. See Lasch, Role of the Family Usurped, Topeka Capital J., Sept. 13, 1982, at 10, col. 1.
assistance. Television advertisers argued that "the health and safety of children, their intellectual and nutritional needs" depended upon the right vitamins, mouthwashes, cavity preventing toothpastes, and laxatives. By convincing the house spouse to rely on outside experts, television advertisers managed to undermine the parents' capacity to provide their children with coping skills. As a result, children became the sum total of the messages beamed to them by the networks.

C. Solution

Childhood seems to be a condition under which people are denied access to adult secrets: crime and violence, sex, and dishonesty. There is a basic difference between childhood and infancy. Infancy ends when one has acquired speech. Childhood ends when a person can both read and write. When a country imposes important duties upon its membership childhood is invented to cultivate the skills young people need to function as adults. Families are asked to nurture the young and to inculcate desired social values at home. Schools are asked to teach skills children need as adults.

The Constitution shelters adults against the vicissitudes of life. It protects their property, assures them a stable economy, and promises them several opportunities to make money during their lives. Since the Constitution seems to deny children the same explicit protection, adults should do what the Constitution does not, namely, shelter them against the vicissitudes of life. On the other hand, if children are more informed than their parents, and parents are in measurable ways weaker than their forbears, children should be treated like adults.

88. See Lasch, The Role of Family Usurped, Topeka Capital J., Sept. 13, 1982, at 10, col. 1; see also N. Postman, supra note 75, at 150.
89. See N. Postman, supra note 75, at 72-99.
90. See M. Winn, supra note 75, at 59.
91. See N. Postman, supra note 75, at 42.
92. Id.
93. Id. at 28, 29, 37-40.
94. See D. Riesman, supra note 84, at 37.
95. See N. Postman, supra note 75, at 39, 40.
97. Some changes have altered the American landscape making it more difficult for one to raise healthy children. See The U.S.: It's No Place to Raise A Family, Wall St. J., Aug. 23, 1982, at 14, col. 3. Many changes have directly affected what happens in individual families. Others affect the institutions which impinge upon family life and the young. America's precious individualism has been harmed to harmful extremes. Too many families, both parents and children are overly concerned with self-fulfillment at the expense of family life. Id. Formal education presents a special problem. Maturation related responsibilities have been delegated to public schools, and, for a vast number of reasons, they are doing a less than satisfactory job. Id.

Religion has failed to provide its flock with a modern code for their private lives. Id.
Under the second scheme, everyone who could both read and write would acquire a zone of privacy. Within the zone, one could freely formulate his notion of the good life and self-critically decide which desires he wanted to satisfy. Hatching a decision would be protected by the zone. However, implementing a decision outside the zone might not be protected at all. If a decision to do something was rationally based, and unlikely to cause either death or personal injury, it would be sheltered by the zone. If a decision was inspired by rhetoric, which elevated feelings above reasons for doing something, privacy protection might be withheld. Everyone would be entitled to an unrestricted flow of information about the outside world. Poor decisions would probably be the result without it. False,99 dangerous,100 and deceptive101 information would be purged from the informational stream. The state would be free to do whatever it pleased with such information.

In Tinker v. Des Moines School District,102 the United States Supreme Court seemingly applied this notion to resolve a dispute between children and the state. Youngsters who could both read and write decided to wear black armbands to protest the Vietnam War. Since their decision to wear armbands caused neither injury nor death, the Court decided to shelter their behavior under the Constitution. Justice Fortas, writing for the majority, reminded everyone of a child's increased size and centralization of private and public institutions has lessened a sense of accountability in community affairs, and made all citizens and families less willing to expect or demand responsibility. Id.

There is the "hype." Commercials have created needs which are seldom fulfilled. They create new anxieties instead of allaying old ones. By surrounding families with false images of the good life, and associating them with the glamour of celebrity and success, commercials have encouraged ordinary people to cultivate extraordinary tastes. Id. See also C. LASH, THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS 72-73 (1978). Parents, as a result, waste time these days matching what they own with what they believe they need. In the process, they lose time which could be spent profitably with the family.

This turns out to be tragic. If parents have less to tell their children today, and television has supplanted many of the tasks formally carried out by parents, little if any dialogue is now going on between parents and children. These days parents have little information to pass on to their offspring.

99. The notion of privacy sprouts from routine behavior exhibited by humans between sunrise and bedtime. See Griswold v. Connecticut, 381 U.S. 479 (1965). It is one of the first amendment penumbras or, as Justice Goldberg suggested, a right in repose under the ninth amendment. Id. at 491-92. (Goldberg, J. concurring).

100. E.g., Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944).

101. See, e.g., Gelb v. FTC, 144 F.2d 580 (2d Cir. 1944); Aronberg v. FTC, 132 F.2d 165 (7th Cir. 1942). See Mann & Gurol, An Objective Approach to Detecting and Correcting Deceptive Advertising, 54 NOTRE DAME LAW. 73 (1978); Developments in the Law—Deceptive Advertising, 80 HARV. L. REV. 1005 (1967). Compare the above with the Federal Trade Commission Chairman's proposed definition for deception in 45 ANTITRUST & TRADE REG. REP. (BNA) 689 (Oct. 27, 1983).

right to formulate his own views about the world. He suggested that clashes of opinion in a public setting were indispensible to the formulation process. While the state may arrange the settings in which controversial opinions are expressed, or decide what ought to be learned in schools regarding skills development, the Justice reminded the state of its obligation to permit a child to access all sorts of information about the outside world.

In Buckholtz v. Leville, a state court gave a child the power to defend his zone against the state. Plaintiff was sixteen years of age. He was expelled from high school because his long hair was out of compliance with the school dress code. Plaintiff brought an action against the school through his attorney, who was appointed guardian ad litem, seeking reinstatement. At trial the court sided with the school, giving considerable weight to the testimony of the plaintiff's parents who were in favor of what the school had done. On appeal, the court reversed the judgment of the trial court. It noted that what the parents wanted in this case was irrelevant. The plaintiff, said the court, had standing to sue in his own name and to sue anyone in this regard as early as age fourteen.

In Ginzberg v. New York, the United States Supreme Court gave the state the power to screen what a child could examine in his zone. The question presented was whether the state could limit a person's access to information about sex. Access to such information, said the Court, depended upon the quality of the data and the status of the person examining it. If the information was obscene, and the reviewer a minor, the state could shut off the flow.

Justice Douglas believed that the opinion was a throwback to an older age. The hidden motivation, he wrote, was the Victorian belief that inborn tendencies towards wrongdoing were best restrained by old-fashioned fears about death and the after life. Since girlie magazines diffused fears about sex, it was a direct threat to prevailing social mechanisms which kept wrongdoing in check. Girlie magazines had to be purged from the informational mainstream. With regard to children, the right to know such information was given little constitutional protection.

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103. 393 U.S. at 501.
105. Id. at —, 194 N.W.2d at 428.
106. 390 U.S. 629 (1968). The Second Circuit Court of Appeals has placed some restraints around the exercise of this power. If the setting is a school library, and the targeted books are on the shelf, a decision to remove them, on political and religious sensibilities grounds, may run afoul of the first amendment. See Pico v. Board of Educ. Island Trees Union Free School Dist. No. 26, 638 F.2d 404 (2d Cir. 1980).
107. 390 U.S. at 640-43.
108. Id. at 650-52.
109. Justice Douglas makes some biting observations in his dissenting opinion. Id. at 652-55.
In Capital Broadcasting Co. v. Mitchell, a federal court added another item to the list. Six broadcasting corporations brought an action in federal court to enjoin the enforcement of a federal statute banning cigarette advertising on television. Plaintiffs maintained that the advertising was free speech sheltered by the first amendment. The court ruled against the broadcasters. Where an electronic medium generated an audience, including pre-school and elementary school aged children, that could not be generated by print, and the message beamed by the medium had to do with an item which threatened the public health, cigarettes, the state could purge it from the airwaves.

There are two ways to address the advertising problems and childhood. One way, and perhaps the best one, is to invest children with a constitutionally protected privacy zone. The right to acquire information would sprout from this place. The right to study what one has acquired, to discuss it with others, and to exchange opinions about what one sees would originate here. It would be a place where people were free to shape their own lives. Of course, false, dangerous, and deceptive information would be purged from the informational stream. The state would be free to do what it pleased with such information over first amendment objection.

IV. LAW

A. Video

There is a considerable body of law covering commercials in print: The Magnuson-Moss Warranty Act, state consumer protection statutes, and the Uniform Commercial Code. There is less information available when the subject matter is television advertisements. Article I, § 8 of the Constitution gives Congress the power to regulate commerce. In that regard, Congress has the power to regulate businesses which traffic in video communications. The first amendment places restraint on the kind of legislation Congress can promulgate in this area. At the heart of the amendment is the belief that people will make the right choices if they are presented with all points of view on controversial issues. That means that government is free to adopt a point of

111. In Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976), the Court sheltered commercial speech under the first amendment. The Court made a point of saying that the information had to be truthful. Id. at 770, n.24. From this we can infer that false, deceptive, and dangerous information, whether broadcasted electronically or by print, are beyond the first amendment pale. See Baker, Commercial Speech: A Problem in the Theory of Freedom, 62 IOWA L. REV. 1 (1976); Baker, Scope of the First Amendment Freedom of Speech, 25 UCLA L. REV. 964 (1978).
113. U.S. CONST. art. I, § 8, cl. 3.
view, with regard to a controversial issue, but not free to monopolize the debate or suppress opposing points of view by way of statutes.\textsuperscript{115} \textit{Stanley v. Georgia}\textsuperscript{116} and \textit{Griswold v. Connecticut}\textsuperscript{117} make it clear that the state has no interest in what people hear or see in the privacy of their home or in front of their own television sets. People can make up their own minds about what is good for them.

The "clear and present danger test" is an exception to the rule.\textsuperscript{118} Commercials "advocating the use of dangerous substances" is another exception.\textsuperscript{119} If the speech threatens the existence of the state or undermines the state's ability to maintain public order, the state may interpose restrictions on the publication of that speech. If television generates an audience which is far larger than the one generated by print, and the audience includes a large number of school children who rely upon broadcast messages rather than written words, the state may regulate what the medium broadcasts.\textsuperscript{120} If the messages are deceptive, or they invite the audience to use a product which is life threatening, the message can be purged from the airwaves.\textsuperscript{121}

Television commercials which invite children to consume products containing large quantities of sugar are in a sense life threatening. Such consumption linked with obesity is life threatening. It undermines good health, causes tooth decay, contributes to colds and stomach aches. Congress has the power to enjoin television stations from presenting such ads or the power to direct that such ads be coupled with a statement about the hazardous nature of the product being advertised.

Congress has given the Federal Trade Commission (FTC) the authority to purge false, deceptive, and misleading ads from commerce.\textsuperscript{122} If children and adults were lumped together in the same group, a suggestion made earlier, the institutional response to the danger confronting them could be dealt with comprehensively. If the FTC decided to examine a television commercial, its mission would be to reduce the "voice over," pictures, and music to the lowest common claim being

\begin{itemize}
  \item 115. 333 F. Supp. at 590.
  \item 117. 381 U.S. 479 (1965).
  \item 118. \textit{See} Dennis v. United States, 341 U.S. 494 (1951); Schenck v. United States, 249 U.S. 47 (1919). The clear and present danger test has been confined to cases where the state has asserted an overriding interest in its own preservation or in the maintenance of public order. For a general history of the clear and present danger test see McKay, \textit{The Preference for Freedom}, 34 N.Y.U. L. Rev. 1182, 1203-12 (1959).
  \item 120. \textit{Id.} at 586.
made.123 If the claim could not be corroborated by tests, or the claim was one about which many scientists disagreed, the Commission could direct that the claim be coupled with a statement saying, in effect, "the claim being made is a matter of controversy among scientists."124 If the claim was deceptive, that is, the "voice over" created false inferences which the credulous might rely upon when buying something, the Commission could direct that the advertiser abandon the ad.125

In 1980, the FTC proposed a rule on food advertising.126 It covered virtually all promotional materials which could be construed as media advertising to consumers.127 When a claim was made that a food provided "energy" the rule required a disclosure that the claim meant "the food provides empty calories."128 The rule dealt with health claims in which serum cholesterol levels (fatty globules) were linked with heart and artery diseases.129 Some claims were prohibited outright.130 Permissible ones could be broadcast if they had been properly qualified. Claims, for example, had to be coupled with a disclosure about the ingredients in the product, since those substances formed the basis for the health claim.131 Some claims had to be coupled with a statement that what was being asserted was a matter of controversy among scientists.132

The rule addressed weight control claims.133 If a commercial made a weight claim the advertiser was required to disclose the caloric content of the advertised food.134 The rationale for the rule was simple. Weight control claims imply that the advertised food is appropriate for individual diets or that it can be consumed with impunity. Since the caloric requirement of different diets, and the caloric content of foods vary widely,135 the rule forced the food industry to supply critical information which diet conscious consumers needed to make informed decisions about items to be included in their diet.

The Federal Communications Commission (FCC) was given the

123. See Liebeher, No Matter What the Sheepskin Looks Like, It's Still the Same Old Wolf: A Reply to Mr. Kramer, 30 FED. COMM. L.J. 41, 42 (1977). The author refers to Matter of Bristol-Meyers Co., 85 F.T.C. 688 (1975), as an example of a way in which a verbal claim can be limited.
127. Id. at 221.
128. Id. at 222.
129. Id. at 227.
130. Id. at 228.
131. Id.
132. Id.
133. Id. at 224-25.
134. Id. at 224.
135. Id.
power to license television broadcasters.136 Out of that power the commission carved out authority to regulate station practices which lead to an undue number of commercials on television stations.137 When questioned about the legality of specific commercials broadcast by a TV station, the FCC has deferred to the Federal Trade Commission.138 The FCC has taken the position that it is precluded from direct intervention into program practices at individual stations,139 that the FTC has sole authority and expertise to determine the substantive legality of commercials broadcast by a television station.140

Unfortunately, all the rules in the world will change nothing if the will to act is missing. The chairman of the FCC said recently that he would convene proceedings in which he would seek a rule permitting television broadcasters to present as many commercials in an hour as they wished.141

In 1981, the FTC proposed then killed the most controversial project in its history. The Commission attempted to ban or otherwise limit the kinds of commercials shown to children on television.142

What the agency considered was:

- (a) A ban on all commercials linked with shows aimed at very young children;
- (b) A ban on commercials for highly sugared foods including candy and some breakfast cereals, linked with shows seen by older children; and
- (c) A requirement that advertisers devote money to public service messages promoting good dental and nutritional habits.143

With regard to that proposal the FTC said: “We seriously doubt

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136. Communication Act of 1934, § 301, 48 Stat. 1081 (1934) (codified at 47 U.S.C. §§ 303, 307(a), (d), (e), 309(a) (Supp. V 1981)). It may obtain “any new or additional information it deems necessary to make its finding” and it may “make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary 'to carry out its duties.'” 47 U.S.C. § 303(r) (Supp. V 1981).


139. See supra note 138 for contra view; see also Writers Guild of America v. American Broadcasting, 609 F.2d 355 (9th Cir. 1979), cert. denied, 449 U.S. 824 (1980).


143. Id.
whether a total ban should ever be imposed on children's advertising as the end of rule making proceedings. It went on to say that the proceeding was not in the public interest and they were unable to justify the sacrifice of important enforcement priorities for this project.

The mood at the FCC and FTC seems to be against sweeping rules on advertising. With recent congressional attitudes and the Reagan Administration's commitment to budget cuts, the agencies have been forced to change their priorities.

The following chart illuminates the change.

**LEGISLATIVE**

- Activist
- Split
- Non-Activist

**EXECUTIVE**

Figure A

Figure A depicts the opinions of the legislative branch on the top half of the horizontal plane and the executive branch of the lower horizontal plane. An activist's opinion is at one end of the spectrum and a non-activist's opinion is at the other. An activist is defined as favoring

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144. Id.
145. Id.
146. Id. See also New F.T.C. Aid Proposes to Scrap Rule Covering Some Food Advertising Claims, Wall St. J., June 14, 1982, at 8, col. 1.
FTC or FCC intervention. A non-activist is defined as one opposing intervention. The pure activist/non-activist positions are extremes. To be at either of them Congress and the executive must be able to support their position with both budgetary and legislative changes. Extreme positions are rare. Congress, for example, may have negative opinions about an agency's behavior, but lack the power, because of executive posturings, to do anything. If that is the case the political environment is split. The proponents of the dominant view in Congress cannot bend the behavior of the agency by changing the agency's budget or passing new legislation.

The lower plane charts the opinions of the executive branch. As with Congress the behavior plane is the same. If both Congress and the executive branch are split over the behavior they want the agency to exhibit, no agreement can be reached on what the agency should do. In that situation the agency will possess autonomous power. Any movement from the center diminishes that power. The most severe constraints occur when both Congress and the executive branch are non-activists—a political condition under which the FTC and FCC now labor.

B. Statutory

Placing new burdens on the Federal Trade Commission seems to be counterproductive. Since no movement is possible on the federal level, under current political conditions, the states could fill the void by enacting local consumer protection legislation. The following is a sample model statute.

Commercial Advertising

(1) This statute covers commercials, oral and written statements, which package facts and fantasies. All such commercials must be transmitted in plain English.
(2) If a commercial hides or distorts the facts, it is deceptive.
(3) Commercials promoting the sale of tangible personal property should contain the following:
   (a) facts about the quality of construction;
   (b) a statement about the average life of the product;
   (c) facts about the amount and kind of stress the product can withstand (if any);
   (d) a statement about the average costs of repairs (if any can be performed);
   (e) facts about the purposes to which the product can be put safely; and,
   (f) a statement about the services (if any) the manufacturer will supply with the sale of the product.

If four of the above are missing from any commercial, while an accompa-
ning fantasy (pictures and music) remains intact, the commercial is presumed deceptive.

(4) (a) Violation of this statute requires all advertisers to supply additional information, corrective information, or proof for a doubtful claim.

(b) If the desired information is not forthcoming, advertisers, within the jurisdiction of this statute, are subject to a fine of not less than five thousand ($5,000) dollars.

(5) The office of the state attorney general is responsible for the enforcement of this statute.150

As always, there is a danger in enacting a law like this. It means more taxes to pay for the administration of the law and more government. To curb this danger, the law could have a sunset clause. A provision could be inserted requiring the Attorney General to report annually to the state legislature on all cases handled under the statute.

The model legislation forces sellers to stand behind their wares. It relieves buyers (children) of some of their obligations to inspect, and drives the quality of goods up.151 The cost of doing business may rise a fraction, an inevitable result when one is forced to abide by a new rule, but that will be more than offset by customer satisfaction. The statute is a specific repudiation of the idea that buyers must be fully aware of what they purchase.152 It is consistent with recent legislative developments,153 contemporary attitudes, and ideals. The law would attach to goods at rest in a state.154 It would cover commercials, print, and broadcast assertions, linked with goods in the state.155

C. Print

Hunting for warranties is another approach. Both state and federal laws have imposed restrictions on the kinds of promises and assertions one can couple with consumer goods.156 The Magnuson-Moss Warranty Act, for example, subdivides print warranties into two groups, full and limited, and imposes an obligation on vendors to label


151. For a general discussion on a buyer's right to inspect goods see R. BRAUCHER & R. REIGERT, INTRODUCTION TO COMMERCIAL TRANSACTIONS 231-32 (1971); see also J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 96-97 (1972).


155. It would regulate the behavior of vendors who give in to the impulse to assault a consumer's privacy in ways disapproved of by the state. See Breard v. City of Alexandria, 341 U.S. 622 (1951).

the warranties coupled with their consumer goods.\textsuperscript{157}

Under a full warranty a buyer can expect a vendor to repair defective goods "within a reasonable time and without charge;"\textsuperscript{158} to forego the opportunity to limit the duration of the implied warranty of merchantability;\textsuperscript{159} to forego the opportunity to limit or exclude consequential damages for breach of said warranty;\textsuperscript{160} to offer replacements for items the vendor is unable to repair.\textsuperscript{161} If the item cost more than $15.00 the vendor must disclose, in a single document, the identity of the party to whom the warranty has been extended;\textsuperscript{162} offer a clear description and identification of the product subject to the warranty;\textsuperscript{163} supply a statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with the written warranty;\textsuperscript{164} state the point in time when the warranty commences;\textsuperscript{165} and supply a "step-by-step" explanation of the procedure which the consumer should follow to obtain performance of any warranty obligation.\textsuperscript{166}

16 C.F.R. § 702 specifies the behavior expected of a vendor before a sales agreement is made.\textsuperscript{167} He is required to make the text of the written warranty available to the buyer for his review.\textsuperscript{168} The regulation specifies how this can be accomplished. First, the vendor can display the text of the warranty in close conjunction with the item being sold.\textsuperscript{169} Second, the vendor can present binders containing copies of the warranties for the products being sold.\textsuperscript{170} If the sellers' behavior differs from what is required under the federal statute, or the interpretive regulation, a buyer may bring an action for damages and other legal and equitable remedies.\textsuperscript{171}

Printed assertions are treated as expressed warranties under the Uniform Commercial Code.\textsuperscript{172} A statement risks being labeled as a warranty in some cases. If there is an assertion of fact about an article being sold, and the author of that statement intends that buyers rely upon it when buying something, the statement is a warranty.\textsuperscript{173} No par-

\begin{itemize}
\item \textsuperscript{158} Id. at § 2304(a)(1).
\item \textsuperscript{159} Id. at § 2304(a)(2).
\item \textsuperscript{160} Id. at § 2304(a)(3).
\item \textsuperscript{161} Id. at § 2304(a)(4).
\item \textsuperscript{162} See 16 C.F.R. § 701.3(a)(1) (1983).
\item \textsuperscript{163} Id. at § 701.3(a)(2).
\item \textsuperscript{164} Id. at § 701.3(a)(3).
\item \textsuperscript{165} Id. at § 701.3(a)(4).
\item \textsuperscript{166} Id. at § 701.3(a)(5).
\item \textsuperscript{167} 16 CFR § 702.3 (1983). It covers pre-sale availability of written warranty terms.
\item \textsuperscript{168} Id. at § 702.3(a)(1).
\item \textsuperscript{169} Id. at § 702.3(a)(1)(i).
\item \textsuperscript{170} Id. at § 702.3(a)(1)(ii).
\item \textsuperscript{173} E.g., Adrian v. Elmer, 178 Kan. 242, 245, 284 P.2d 599, 602 (1955).
\end{itemize}
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D. Miscellaneous

Children, who behave like adults in the market place, need a legal theory and a forum to overcome unfair advertising. They can use the minority defense in some cases. If a parent gives his child cash to buy something which does not work, the child can rescind that contract by surrendering the item purchased and notifying the vendor of his intention to rescind. This is a simple solution for "advertised-induced" disappointments. It gives children some power over adults. It eliminates costly litigation. It provides parents with a way to retrieve lost money. It forces merchants to be circumspect about what they sell to children.

Resurrecting caveat emptor in other cases is another approach. Requiring a child, with the aid of a parent, to inspect goods before purchasing them would be the rule. Because products are more complex these days, their ingredients being understood by engineers only, some of the information retrieved by inspectors will be meaningless. But if the product is simple and uncomplex, like the "Game of Life" or "Battleship," personal inspection will prove quite useful. Using this technique, children are likely to be satisfied with what they purchase. The need for litigation will shrink and parents will be given a larger role to play in their child's buying decisions.

174. Id.
175. Id.
176. E.g., Farmers Stock Breeding Ass'n v. Scott, 53 Kan. 534, 36 P. 978 (1894). This case and others appear in an article written by Professor Paul Rasor, Washburn University School of Law. See Rasor, supra note 153, at 185.
179. Anthony Fitzherbert is credited with laying down this principle in 1534 when he advised the would-be horse buyer: "If he be tame and have ben rydden upon, then Caveat Emptor." A. FITZHERBERT, BOKE OF HUSBANDRIE § 118 (1534). This phrase means "let the buyer beware." The maxim summarizes the rule that a purchaser must examine, judge, and test for himself. Miller v. Tiffany, 68 U.S. (1 Wall.) 298, 309 (1863).
180. See Pridgen & Preston, supra note 152, at 640-41.
Bailey v. Merrill[181] illustrates how the rule would work. In that case, Bailey agreed to transport a load of wood, a simple task, accepting Merrill’s assertion that his wood weighed 800 pounds. After two of his horses collapsed and later died under the load, Bailey discovered the true weight of the wood was 2,000 pounds. Bailey brought an action against Merrill to recover damages, but the court ruled that the loss had to be shouldered by the plaintiff.[182] Bailey could have avoided a serious loss, said the court, if he had checked the truth of Merrill’s assertion. The court decided that Merrill was blameless for what it acknowledged to be a false statement. It ignored the possibility that Bailey’s natural suspicions might be deflected by Merrill’s personal vows and pleas of honesty. As long as there was a technical opportunity to inspect, where the subject matter was simple and uncomplex, impediments like personal vows were to be ignored.

Local newspapers could do articles on businesses engaged in questionable commercial practices.[183] When a merchant announced that a toy was being sold at a discount, but failed to state that the discount price for the toy was the same as the prevailing market price, that could be reported as deceptive.[184] If the price for a toy truck was determined by forces other than supply and demand, that could be reported in the newspapers as well.[185]

The recent recession has forced businesses to change direction in advertising.[186] Some firms are pouring lots of money into television promotions while others are spending less.[187] The Del Monte Corporation has launched an advertising campaign to tell consumers that its canned vegetables are as nutritious as those freshly cooked.[188] Fleming Companies, Inc. of Topeka, a regional wholesale food distributor, plans to market a line of no-salt added canned vegetables and no-sugar added canned fruits under its private Top Value label.[189] Still others are emphasizing features in their products which correspond with current consumer demands.[190]

If the federal agencies are reluctant to act on advertising matters, and legal battles between vendors and vendees (children) seem point-
less, encouraging businesses, with a tax benefit perhaps, to make foods featuring useful nutritional information makes a great deal of sense.

V. HYPOTHETICALS

A. Item A

John Reed is seven years old. He is an avid watcher of Saturday morning TV programs for children. Sugar Logs, a breakfast cereal, has a commercial before and after three major programs for children on three different networks. John manages to see two of the three programs each week. The commercial begins with a child skating across a pond of ice, at an energetic pace, then slowing down to an apparent crawl. A “voice-over” says: “Running out of energy? Fill up with Sugar Logs.” A new picture is introduced at that point. The “voice-over” says, “Sugar Logs, with toast, milk, and juice, is a nutritious meal.” A picture corresponding with the message is presented on the screen. The “voice-over” then says, “Sugar Logs contains almost no sugar.”

The ad is run by the networks, every weekend, six months out of the year. John Reed happens to catch two of the three programs where the ad is featured. What claims are being made by the ad? Are they false, deceptive, or misleading? Is there something that John Reed or his parents can do about it? Is there anyone who can do anything?

To begin with the ad makes three claims. First, Sugar Logs contains almost no sugar. Second, Sugar Logs is a nutritious meal. Third, the ingestion of Sugar Logs will overcome fatigue. Now if the breakfast cereal contains sugar, something the advertiser admits, the ingestion of Sugar Logs might produce needed calories to overcome fatigue. Whether Sugar Logs is a nutritious meal by itself is a debatable claim. Absent scientific tests, reports and the opinions of experts, the claim is at least unsubstantiated and at worst false. Whether Sugar Logs is nutritious, when consumed in conjunction with toast, juice, and milk,

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191. See Action for Children's Television (ACT) v. FCC, 564 F.2d 458 (D.C. 1977); Action for Children's Television (ACT) v. FCC, 546 F. Supp. 872 (D.D.C. 1982); Children's Television Report and Policy Statement, 50 F.C.C.2d 1, 5 (1974). In 1974, the Federal Communications Commission adopted a policy statement establishing that children were a unique audience whose special needs and interests television broadcasters were obligated to serve. As a result of this policy “ACT” filed a petition for review of the FCC decision in the Court of Appeals for the District of Columbia, 564 F.2d at 461. ACT alleged that the FCC had abused the administrative process by failing to establish a formal rule to implement the guidelines set out in the FCC Policy Statement. Id. at 468. The FCC asserted that since its policy statement was the first comprehensive presentation of the obligation of broadcasters to children, the industry should be allowed to demonstrate whether the promulgation of a rule was necessary. FCC Brief for Respondent at 17-18, ACT v. FCC, 564 F.2d 458 (D.C. Cir. 1977). In 1980 Action for Children's Television brought a mandamus action against the FCC. In a short opinion the district court decided against the plaintiff. See Action for Children's Television (ACT) v. F.C.C., 546 F. Supp. 872 (D.D.C. 1982).
needs corroboration. That claim might suffer the same fate as the second claim under the advertisement.

The ad assaults the senses and, in the process, overwhelms the rational faculty. If it is presented often enough, it, like the experiments with Pavlov's dogs, will elicit the proper emotive response. The fact that the cereal contains sugar is buried beneath the strong impression that consuming Sugar Logs will overcome body fatigue. There might very well be other foods that can do the same job and do it without having the consumer ingest the amount of sugar in Sugar Logs. The point is that emotion is elevated above reason as a result of this ad. Can John Reed or his parents do something about that?

John or his parents could boycott the programs around which the commercial orbits. If John bought the cereal and was disappointed with the results, he could exercise the minority defense. The Federal Communications Commission could play an important role in a case like this. If the total amount of time devoted to commercials exceeded nine minutes plus thirty seconds per hour, on weekends, the FCC could persuade the networks, and network affiliates, to shelve some commercials including the scrutinized ad.

B. Item B

David Smith is twelve years old. Sara, his mother, agreed to buy him a Beginner's Computer, a brand name, for his school work. David and Sara appear at your door to complain about the computer purchased at Best West Home Computer, Inc. David tells you that the computer keyboard sticks and that the viewing screen fails to hold images for more than two minutes after they are "logged in." Although David and his mother have visited with the general manager at Best West about this computer, they have come away from the meeting dissatisfied. They tell you that the general manager told them that the system was sold "as is" and that this statement appeared on the sales agreement Sara Smith signed.

Sara has done some shopping around since the purchase and finds that the going rate for a Beginner's Computer in the area is $250. Sara paid $550 for David's equipment. She put $100 down, promised to discharge the unpaid balance in installments, and executed a promissory note to that effect.

You recall, at that moment, that other people have visited with you about equipment purchased at Best West. One person, William Robie, now resides in South Bend, Indiana. The location of the others

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is unknown. Robie and others complained about computer equipment for which they had paid exhorbitant prices. Robie was overcharged roughly $115. Another person paid $95 over the going market rate.

Sara tells you that Best West has advertised on local television in recent weeks. The home computer company has retained the services of Billy Dawn, a famous rock entertainer who, capitalizing on his notoriety, has become a popular Hollywood star. The ad begins with a "voice-over" saying, "Stupendous Discount." That is followed by a picture of Billy Dawn uttering the following words: "Take it from me, you always get the best at Best West. They really take care of their customers." Another picture is introduced at this point. A list of computers by brand name and price are paraded across the screen. The equipment is identified by make and model. A "voice-over" says, "All of the items are to be sold by Best West at a low price. Every sale is accompanied by a one year service warranty." Sara is anxious to know whether she has a remedy. What result?

This hypothetical covers durable goods and the vicarious pleasure a child will get by prevailing over Best West, Inc. Aside from obvious issues, and there are many, we are confronted with the following: Does the "as is" designation which appears in Sara's sales agreement divest her of any remedy under the U.C.C.? Can the television commercial be labeled false or deceptive under the Federal Trade Commission Act? Is the commercial deficient under the model statute?

In this case Best West has announced a "stupendous discount". Sara has collected evidence, and you have other evidence, which refutes the statement made by the home computer company. Assuming Sara's figures are correct, and the evidence in your possession is reliable, the television commercial is either false or deceptive. The Federal Trade Commission could purge the ad from the airwaves.

The commercial is deficient under the model statute. It does not contain a statement about the average life of the computer. It does not contain a statement about the average cost of repair. With regard to the items being sold, it is devoid of any information about the quality of construction or facts about the amount and kind of stress each product can withstand. Since the statute requires four of six items to be mentioned, and four are missing in this case, this commercial is presumed

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195. See FTC v. Standard Educ. Soc'y, 302 U.S. 112, 116 (1937); Gelb v. FTC, 144 F.2d 580, 582 (2d Cir. 1944); Aronberg v. FTC, 132 F.2d 165 (7th Cir. 1942).

deceptive under the model statute.\textsuperscript{197} If the advertiser cannot carry his burden, under section 4 of the act, he is subject to a $5,000 fine.

None of the solutions discussed thus far provide David and Sara Smith with a private remedy. If there is one, it is to be found under a special state statute.\textsuperscript{198} Some states, like Kansas, invest vendors with limited power to disclaim warranties.\textsuperscript{199} If the subject matter is consumer goods, the vendor attempts to disclaim a warranty, by using a phrase like "as is," is ineffective.\textsuperscript{200} In this case, Sara's remedy would probably be damages under the Uniform Commercial Code.\textsuperscript{201} She might obtain a civil penalty, under a state consumer protection statute, for the broadcast of a deceptive television commercial.\textsuperscript{202}

VI. CONCLUSIONS

The ideas offered in this article are designed to bring about change. Knowing what you want while being bombarded with daily commercials about what you should want makes evaluating these ideas very difficult. Encouraging new ideas, while accommodating oneself to familiar practices, would seemingly make it less difficult.

People will undoubtedly find these offerings flawed or incomplete. My response is that they are seeds—the briefest hint of what must come next. I have looked at people and institutions through what I hope is a clear glass. The glass may be blurred, or worse, a mirror reflecting back personal beliefs which I want people and institutions to have. Nevertheless I offer them up for the reader to digest. They are small contributions to a sane society where adults and children, legislatures and courts, treat one another with respect.

\textsuperscript{197} See supra text accompanying note 150.

\textsuperscript{198} E.g., Deceptive Practices, IND. STAT. ANN. §§ 24-5-0.5-1, 24-5-0.5-2(5)(6), 24-5-0.5-3(b), 24-5-0.5-4(a) (1982); Kansas Consumer Protection Act, KAN. STAT. ANN. §§ 50-627(b)(2), 50-634(b), 50-636(a) (1976).

\textsuperscript{199} E.g., Kansas Consumer Protection Act, KAN. STAT. ANN. § 50-639(a)(1) (1976).

\textsuperscript{200} Id. at § 50-639(c) (1976). See Kansas Comment, 1973, no. 1, at the end of the section.

\textsuperscript{201} Rejection, revocation of acceptances, and money damages are possible remedies under the U.C.C. E.g., KAN. STAT. ANN. §§ 84-2-602, 84-2-608, 84-2-711, 84-2-712, 84-2-713 (1976). For a general discussion of this topic see D. Rothchild & D. Carroll, supra note 172, at 559-63.

\textsuperscript{202} See KAN. STAT. ANN. §§ 50-634(b), 50-636(a) (1976).