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# **ADVERTISING AND THE FOOD SYSTEM**

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**John M. Connor  
and Ronald W. Ward,  
Editors**

**With the assistance of  
Rosanna Mentzer Morrison**

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# TELEVISED FOOD ADVERTISING DIRECTED TO CHILDREN: THE CONSTITUTIONALITY OF RESTRICTIONS

Margaret Ann Metzger  
Action for Children's Television

For almost ten years, Action for Children's Television (ACT) has advocated restrictions on televised food advertising directed to children<sup>1</sup> as one essential step that must be taken in order to improve nutrition habits and information in America. Rather than focus on the practical and political problems that have, to date, prevented implementation of any such restrictions, this article will discuss the framework within which the constitutionality of any such restrictions would be judged and will argue that restrictions could be implemented consistent with the First Amendment.

## THE MESSAGE AND THE AUDIENCE

At no time in the history of this country have American children received the quantity of nutrition messages they are receiving right now. At no time have they been exposed to as many directives to initiate behavior that would affect their dietary habits and dental health. Children are learning about food—what to eat and why—from television, a teaching machine used in over 98% of all American households; but they are learning lessons that are, according to Dr. Jean Mayer, nutritionist and President of Tufts University, "nothing short of nutritional disasters."

Children's television is heavily supported by food advertising. Advertisers spend well over one-half billion dollars a year on television air time in order to reach the child audience (Broadcasting Magazine 1978). Studies indicate that over half of the televised advertising directed to children is for food products and that highly sugared foods account for nearly two-thirds of the edibles advertised to children (Barcus 1978, *FTC Staff Report on Television Advertising to Children* 1978, *Kids, Food and Television* 1977, *Edible TV: Your Child and Food Commercials* 1977). It is not unusual to find sugared products advertised to children as often as four to seven times per half-hour.

The 1980 *Nielsen Report on Television* estimates that preschool children ages two to five view 32 hours and 47 minutes of television per week, while elementary school children ages six to eleven view 29 hours and 3 minutes of television per week. By the time the child graduates from high school, he will have spent more time in front of the television than in the classroom. Preschool children, it is estimated, are exposed to more than 20,000 commercials per year.

The commercials directed to children carry implicit nutrition messages that affect the child's eating habits and preferences. The Senate Select Committee on Nutrition and Human Needs described the significant role television plays as a nutrition educator in its 1974 *National Nutrition Policy Study*, stating that "persuasive commercial forces work unremittingly to encourage unwise eating habits and to nullify sound education." In 1977 the staff of the Senate Select Committee on Nutrition and Human Needs observed that "since World War II, the largest expenditure for public informa-

tion on diet in the United States has been made by the food industry" (p. 75).

Even a quick look at Saturday morning television reveals the extent to which children's television advertising is a nutritional wasteland. Disclosure about the product content or nutritional value is rarely, if ever, provided. Instead, cereals are described as "frosted oats," or "toasted wheat with a smack of honey." Cereal commercials emphasize sweetness. More than 20 cereals advertised to children on television contain over 40 percent sugar (USDA 1979).

Candy commercials present other problems. Dentists, health professionals, and the Food and Drug Administration stress that sticky sugar between meals is the most cariogenic of all foods. When candy is eaten after meals as a dessert, followed by teeth brushing, the dental risks are considerably reduced. Candy ads, however, rarely show the product being consumed in the manner advocated by health care professionals. Indeed, most candy commercials stress precisely the decay-causing attributes of the snacks: "Marathon Bar lasts a good, long time"; "chewy caramel"; "fun on your tongue and made to last"; "between meals, I like Snickers"; "Milky Way at work, rest or play."

Surgeon General Julius B. Richmond, M.D., stresses the seriousness of the problem, stating:

We need to be concerned about the nutritional needs of young people because poor nutrition in youth is a precursor of disabling and fatal diseases in adult life. Eating a poor diet as an adolescent may not be fatal to the young person—but it may kill that person when he or she reaches mid-life (Richmond 1980).

Even the best organized efforts of parents and teachers are of little or no consequence against the powerful barrage of television commercials directed to children, which, nearly 60 percent of the time, promote foods that conflict with one or more of the "Dietary Goals for the United States" established by the Senate Select Committee on Nutrition and Human Needs (Barcus and McLaughlin 1978). Nor can public service nutrition messages repair the damage. Joan Dye Gussow, Ed.D., (1980) chairperson of the Department of Nutrition Education at Teacher's College, Columbia University, comments that television public service nutrition announcements "are no match for the sea of scrumptiousness in which they float."

Commercial television messages designed to persuade viewers to purchase particular products have a legitimate purpose and serve an important informational function when directed to adults; the purpose and function are highly questionable, however, when directed to children. Children, the most impressionable and least experienced members of the audience, are easily manipulated by television advertising because they lack the maturity and judgment required to make informed consumer decisions.

With only limited skills of analysis and judgment, children cannot engage in the complex reasoning that is part of adult consumer decisions. Children generally cannot evaluate, for example, the trade-off between the pleasure of consumption of a highly sugared product and the painful possibility of an eventual cavity. Children cannot even evaluate the more im-

mediate comparisons and trade-offs: Is the product as it appears in the commercials? How does the product compare to other similar products? Is the price reasonable and/or affordable? Children are at a disadvantage at every step of the consumer reasoning process.

Moreover, television commercials directed to children tend to convey very little information about factual qualities of a given product; information about price, durability, size, composition, and nutritional value is rarely included in children's television advertising (National Science Foundation 1977, Atkin and Herald 1977). Instead, the following techniques are used to entice the child audience:

- magical promises that a product will build muscles or improve athletic performance;
- a chase or tug-of-war sequence in which one character tries to take a product away from another;
- music, singing, and dancing;
- superheroes;
- a voice of authority;
- voices of children agreeing with the announcer;
- depictions of children outperforming adults;
- animation;
- peer group acceptance; and
- selling by characters who also appear in programming.<sup>2</sup>

Over the past decade, firms specializing in the child market and product research have used direct testing and observation of children to make the 30-second television commercial "the most effective device yet invented for implanting any relatively simple idea in a child's mind."<sup>3</sup>

Research indicates that children have very different responses to and perceptions of television than do adults (Rydin and Hansson 1970). With limited linguistic ability and slight experience, children have their own way of looking at the world. Young children tend to "center or focus on one aspect of a situation and neglect the importance of other aspects", a phenomenon known as "centration" (Papalia and Olds 1975, p. 278). As a result, "children will respond to and remember fragments of information that are often repeated, spoken by real or animated authority figures, or that satisfy an impulsive need" (Staff of the Office of Child Development 1972, p. 1).

Characteristically, young children have not developed an ability to deal with abstract concepts or to discriminate between fantasy and reality. Children tend to view their environment literally and to accept things at face value (Dorman and Rebelsky 1976, p. 12). What adults consider imagination is just another form of reality to children.

But the "reality" presented to children on television is often more lively, fun, and satisfying than real life. Television becomes an attractive haven for children. Children may not watch television to learn, but they do learn while watching. This incidental learning phenomena and the central focus discussed above allow children to assimilate television advertising without any reference to the "adult reality" of commercials. Children may parrot advertising messages without understanding what the messages mean.

Children lack the capacity to view commercials objectively because they lack an awareness and comprehension of the promotional or selling intent inherent in advertising. Because they do not understand that advertisers have economic motives, children evaluate commercials on the same basis as the entertainment or educational programs they view. Children lack the skepticism that adults bring to bear when evaluating commercial messages.

The 1977 report of the National Science Foundation, *Research on the Effects of Television Advertising on Children: A Review of the Literature and Recommendations for Future Research*, summarized the findings:

Younger children, particularly those below ages 8 or 9, either express confusion or base their discrimination of commercials on effect or on superficial perceptual cues such as a commercial's shorter length . . . A substantial proportion of children, particularly those below 8 years, express little or no comprehension of the persuasive intent of commercials (p. 30-31).

Although children ages nine through twelve exhibit some understanding that advertising messages are qualitatively different from other types of broadcasting, only a small percentage relate to commercials on adult terms. In research conducted at the Graduate School of Business at the University of Texas, less than 15 percent of the fourth through sixth graders questioned differentiated between programs and commercials on the basis that "television commercials sell; make money" (Ferguson 1975, p. 30).

Repeated attempts to reconcile exaggerated advertising with inferior product performance causes some preadolescent viewers to develop a generalized distrust of advertising. The cynicism manifested by some nine- to twelve-year-olds concerning TV advertising may actually reflect a lingering inability to comprehend the true nature of commercials. T. G. Bever, professor of psychology and linguistics at Columbia University, describes his research with ten-year-olds:

Rather than attempt to use skills that they recognize are too limited to differentiate effectively between the subtleties of truth and falsehood, right and wrong, the 10-year-olds resolve the conflict by adopting a rigid moral stance and an overgeneralized view of the world. They simplify the problem by assuming that advertising . . . always "lies". . . Only one quarter of the children through the age of 10 could or would discriminate between truthful and misleading advertising adequately enough to arrive at the balanced judgment that "advertising sometimes tells the truth, but it also sometimes lies" (Bever et.al. 1975, p. 116).

ACT has concluded that televised advertising directed to children <sup>4</sup> must be restricted if dietary habits and nutrition information in this country are to be improved. ACT recognizes that any solution to the problem of televised food advertising directed to children must not violate the First Amendment. ACT argues that restrictions could be implemented without violating the First Amendment rights of broadcast advertisers and their audi-

ence. The second section of this article will discuss the status of commercial speech under the First Amendment.

## THE FIRST AMENDMENT PROTECTION AFFORDED COMMERCIAL SPEECH

For over thirty years prior to 1976, commercial advertising was considered expression outside the scope of traditional First Amendment protection and, therefore, could be subject to government restriction. The critical issue in cases involving government restraints on advertising was whether the expression was "purely commercial."

The United States Supreme Court announced the dichotomy between unprotected commercial speech and other forms of expression in the 1942 case of *Valentine v. Chrestensen*<sup>5</sup> when it upheld the constitutionality of a New York ordinance prohibiting distribution in the streets of commercial and business advertising material. The Supreme Court opined that, while the government was not permitted to unduly burden or proscribe the communication of information and the dissemination of opinions on public streets, the Constitution did permit government restriction of purely commercial advertising.<sup>6</sup> The commercial speech exception was reinforced in a 1951 case in which the Supreme Court upheld an ordinance that prohibited door-to-door solicitation of magazine subscriptions despite precedent declaring that a similar prohibition of religious solicitation was unconstitutional.<sup>7</sup>

Commercial speech was considered to have little or no relation to the principal reasons for adopting the First Amendment prohibition of laws "abridging the freedom of speech." While political speech was considered essential to representative democracy (Meiklejohn 1948); commercial speech was not (Jackson and Jeffries 1979). While free expression of ideas, beliefs, and opinions was considered essential to individual self-fulfillment (Chafee 1954, Emerson 1970); commercial speech was not (Jackson and Jeffries 1979).

The commercial speech exception, therefore, was explicitly limited so as to protect speech containing information relating to public issues or beliefs. Such speech was protected even if it had commercial elements or overtones. In *New York Times Co. v. Sullivan*,<sup>8</sup> for example, the Supreme Court indicated that a paid advertisement that provided information about and solicited financial support for the civil rights movement was not "a 'commercial' advertisement in the sense in which the work was used in *Chrestensen*."<sup>9</sup>

The Supreme Court began to recognize some degree of First Amendment protection for commercial speech in the 1975 case of *Bigelow v. Virginia*.<sup>10</sup> The case involved a newspaper advertisement published in Virginia for an abortion clinic located in New York. Abortion was legal in New York, but was not legal in Virginia. Moreover, Virginia law made it a misdemeanor to encourage or promote by publication the processing of an abortion.<sup>11</sup> In reversing the criminal conviction of the newspaper publisher, the Supreme Court referred to the public interest served by dissemination of the information contained in the advertisement<sup>12</sup> and rejected

the notion that the advertising at issue was not entitled to First Amendment protection.

The Supreme Court refrained from deciding "the extent to which constitutional protection is afforded commercial advertising under all circumstances,"<sup>13</sup> but commented that the "relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."<sup>14</sup> Regardless of the label the state applies to the speech it attempts to regulate, the opinion stated that courts "may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation."<sup>15</sup>

In 1976 the Supreme Court confirmed that commercial speech was no longer wholly outside the scope of First Amendment protection. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>16</sup> the Supreme Court held that a state could not "completely suppress the dissemination of concededly truthful information about entirely lawful activity"<sup>17</sup> when it invalidated a state law banning the advertisement of prescription drug prices. The Court stated that purely commercial speech, as such, was no longer outside the realm of First Amendment protection. The Court concluded that speech that does no more than propose a commercial transaction is not "so far removed from any 'exposition of ideas' . . . that it lacks all protection."<sup>18</sup>

The foregoing discussion makes it clear that the framework within which the Supreme Court analyzes the constitutionality of restrictions on commercial speech has changed since ACT first proposed government restrictions on televised advertising to children.<sup>19</sup> Despite this new approach, however, the *Virginia Pharmacy* case and its progeny indicate clearly that the Supreme Court continues to distinguish between purely commercial advertising and other types of expression when reviewing the constitutionality of restrictions.

The Supreme Court has observed that common sense distinctions permit regulation of commercial speech that the First Amendment would not tolerate with respect to other expression.<sup>20</sup> The Constitution accords "a lesser degree of protection to commercial speech than to other constitutionally guaranteed expression."<sup>21</sup> Commercial speech is afforded "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression."<sup>22</sup>

## **THE CONSTITUTIONALITY OF RESTRICTIONS ON TELEVISED FOOD ADVERTISING DIRECTED TO CHILDREN**

Recognizing that the Supreme Court now accords commercial speech some protection under the First Amendment does not resolve the question of whether restrictions on televised food advertising directed to children would be constitutional. That question raises issues and invokes principles of law that have not yet been considered in commercial speech cases.

First, it is important to consider whether the rationale underlying the recent commercial speech cases is applicable when an immature child audience is the target. First Amendment "concern for commercial speech is based on the informational function of advertising."<sup>23</sup> Commercial speech



is protected in order to serve individual and societal interests in fostering informed and reliable private economic decision-making and an efficient allocation of resources in a free enterprise system.<sup>24</sup> There is an underlying assumption that the "information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open channels of communication rather than to close them."<sup>25</sup>

Such reasoning cannot be extended to children who do not possess the "full capacity for individual choice which is the presupposition of First Amendment guarantees."<sup>26</sup> ACT maintains that the relevant principle is that articulated by Mr. Justice Stewart: "[w]hen expression occurs in a setting where the capacity to make a choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees."<sup>27</sup> Such a principle is essential because children are not capable of evaluating conflicting or potentially harmful food advertising messages or of perceiving their own best interests.

It is also important to note that the facts underlying the existing commercial speech cases limit their impact in certain extremely significant respects. *Virginia Pharmacy* turned on the question of whether Virginia could "completely suppress" the dissemination of truthful product information. In the recent *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*<sup>28</sup> case, the Supreme Court overturned a New York Public Service Commission regulation banning all promotional advertising by electric utility companies. The Court concluded that the complete suppression of all of the utility's promotional advertising was a more extensive remedy than was required to further the state's substantial interest in fostering energy conservation.

Restrictions or a ban on televised food advertising directed to children would have a much more limited impact. Such restraints would leave advertisers free to promote any given product on media other than television and free to advertise that same product on television when children are not the predominant segment of the audience.

As such, restrictions on televised food advertising directed to children would satisfy the requirements of the recognized principle that "time, place, and manner" restrictions on speech are permissible provided that:

. . . they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information.<sup>29</sup>

The type of restrictions that ACT advocates would be based on the age of the predominant segment of the audience rather than on the content of the advertising. As discussed below, the restriction would directly serve several important government interests. Ample alternative methods of communication would remain available to advertisers.

In addition, the Supreme Court has not yet considered a commercial speech case involving television advertising. In *Virginia Pharmacy* the Supreme Court explicitly refrained from considering television advertising, stating that the "special problems of the electronic broadcast media are likewise not in this case."<sup>30</sup> Similarly, the Supreme Court indicated that

"the special problems of advertising on the electronic broadcast media will warrant special consideration"<sup>31</sup> when it held disciplinary rules prohibiting attorney advertising to be unconstitutional.

It is well recognized that different media are subject to different First Amendment treatment and that broadcasting has characteristics that make it especially subject to regulation in the public interest.<sup>32</sup> The Supreme Court has stated that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection."<sup>33</sup> This is, at least in part, directly related to the fact that "broadcasting is uniquely accessible to children, even those too young to read."<sup>34</sup>

Restrictions on televised food advertising directed to children would be constitutional because, for First Amendment purposes, the law recognizes children as a legally distinct and protectable class of people. Children can be shielded from speech and other activities that could not be denied to adults. Professor Thomas I. Emerson explains the rationale for treating children differently in our "system of freedom of expression":

The world of children is not the same as the world of adults, so far as a guarantee of untrammelled freedom of the mind is concerned. The reason for this is, as Justice Stewart said in *Ginsberg*, that a child "is not possessed of that full capacity for individual choice which is the presupposition of the First Amendment guarantees." He is not permitted that measure of independence, or able to exercise that maturity of judgment, which a system of free expression rests upon. This does not mean that the First Amendment extends no protection to children; it does mean that children are governed by different rules (Emerson 1970, pp. 496-7).

In the case cited by Professor Emerson, *Ginsberg v. New York*<sup>35</sup> the Supreme Court upheld a state ban on the dissemination of sexually explicit material to minors even though a ban on the sale of the same material to adults would have been constitutionally infirm. Parents are responsible for the rearing of their children the Court noted, and "are entitled to the support of laws designed to aid discharge of that responsibility."<sup>36</sup> In addition, the Court noted that the "State also has an independent interest in the well-being of its youth."<sup>37</sup> There was no demonstration of a causal link between exposure to sexually explicit material and impaired moral and ethical development in minors, but the Court was unwilling to conclude that the statute had "no rational relation to the objective of safeguarding such minors from harm."<sup>38</sup>

Restrictions on televised food advertising directed to children would certainly support parents' efforts to raise their children and to be responsible for the creation of their children's dietary habits and understanding of nutrition. Such restrictions would also further a substantial state interest in protecting children from commercial speech that can manipulate a child's perceptions and understanding and can inculcate habits that jeopardize good health.

Public policy has traditionally mandated high standards of legal protection for children. The law recognizes that children have limited experiences and cognitive abilities and an inability to evaluate the consequences of

their action. Children and society require protection from the consequences of immature judgment.

On one hand, children have fewer legal rights than do adults. There are legal age limits on the right to vote, to drive, to marry, to work, and to seek and hold public office. On the other hand, children are entitled to, and are assumed to rely on, the efforts of adults to protect them from dangerous conditions and temptations. The attractive nuisance doctrine, for example, changes the customary standard of care and liability of landowners vis-à-vis children. Whereas a landowner is not ordinarily liable for injuries incurred by trespassers, that general rule may not apply when the trespasser is a child. The standard of care will depend on whether the landowner knows or ought to know that children are likely to be in the zone of danger.<sup>39</sup> For example, in order to protect children, adults must erect fences around swimming pools and remove the doors of abandoned refrigerators.

ACT maintains that it is irresponsible and contrary to public policy to allow television advertisers to entice children to consume highly sugared foods, particularly when consumption is promoted in ways that enhance the potential health risks. While parents bear a great responsibility for their children, other adults are required to assume some responsibility for the children with whom they interact.

Consider the legal doctrine that allows minors to void their contracts:

It is well known that the policy of the law is to discourage adults from entering into contracts with minors and incompetents and an adult cannot well complain if he violates what he knows, or should know, is an accepted rule of long standing. The minor is protected against his own improvident acts, as well as the designs of unscrupulous persons. If the adult loses, it is the penalty for having dealt with an infant (Wood 1951, p. 217).

The law disfavors the adult who exploits the recognized inexperience of children in the marketplace. In such cases the burden of care and responsibility is shifted to the adult involved, even when there is a concomitant economic injury.

Advertising to children can be construed as the first step in the process of contract formation. The policies that underlie the traditional protection afforded children in the marketplace justify protecting children from televised advertising proposing that the child initiate a commercial transaction.<sup>40</sup> Restrictions on televised food advertising to children would be analogous to the existing laws administered by the Securities and Exchange Commission to protect adults from being lured into attractive but risky financial ventures. The First Amendment does not prohibit the State from regulating "commercial activity deemed harmful to the public whenever speech is a component of that activity."<sup>41</sup>

Furthermore, ACT maintains that courts could uphold the constitutionality of restrictions on televised food advertising to children because such advertising is deceptive. The Supreme Court continues to be emphatic that there is no First Amendment protection for deceptive or misleading commercial speech. In the *Virginia Pharmacy* case the Court announced that

the new protection afforded commercial speech did not "prohibit the State from insuring that the stream of commercial information flow clearly as well as freely."<sup>42</sup> In the *Central Hudson* case, the Court stated that for commercial speech to be protected by the First Amendment "it at least must concern lawful activity and not be misleading."<sup>43</sup>

Deception can occur by omission as well as by misstatement. The Federal Trade Commission Act indicates that in determining whether an advertisement is misleading, it is relevant to consider:

. . . the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.<sup>44</sup>

An omission can be particularly devastating when personal injury or health risks result. The fact that a commercial contains product claims relating to health has been held to diminish its First Amendment protection due to the enhanced interest of consumers in being assured of receiving truthful information.<sup>45</sup> Similar considerations would lead to the conclusion that there is a heightened government interest in ensuring that commercials for food products neither mislead nor omit information necessary to understand the consequences of consumption.

In determining whether a particular commercial is deceptive or misleading, courts review the effect that the advertising "might reasonably be expected to have"<sup>46</sup> on viewers rather than its literal truthfulness, and they consider the particular characteristics of the audience toward which the advertising is directed.<sup>47</sup> A series of Federal Trade Commission cases has prohibited advertising techniques that, while not deceptive to adults, have the capacity or tendency to mislead children.<sup>48</sup>

While empty, vague, or exaggerated non-informational claims are referred to as puffery and considered harmless when directed to adults unless they contain a literal falsehood, such an approach is not appropriate when the intended audience consists of children. Such empty claims can tend to deceive children. Voices of authority capitalize on a child's credulity and trust in adults. Scenes of happy children exploit a child's desire to conform to his peers and his fear of being excluded. Television advertising directed to children motivates children too young to perceive the commercial purposes behind the message (Robertson and Rossiter 1974) and the economic interest of the advertiser.

When the Encyclopedia Britannica's sales force misrepresented or failed to disclose their sales mission during initial contacts with prospective adult customers, action was taken to protect consumers from being deceived. The Seventh Circuit Court of Appeals upheld a Federal Trade Commission decree requiring disclosures to reveal that the purpose of the contact was to solicit sales.<sup>49</sup> Clear and conspicuous disclosure of the commercial motive was found essential to prevent deception. ACT maintains that children are equally in need of protection each time they misunderstand the commercial motives of the televised food advertising that enters their homes.

## **CONCLUSION**

ACT maintains that televised food advertising directed to children carries nutritional messages that adversely affect the child's dietary habits and understanding of nutritional values. This practice is both unfair and deceptive when the target audience is too young to objectively evaluate the message conveyed or the economic motives of the advertisers. ACT concludes that research documents the need to restrict televised food advertising to children and that the First Amendment poses no impediment to the implementation of such restrictions.

## FOOTNOTES

- <sup>1</sup> See ACT's petition dated March 22, 1972, to the Federal Trade Commission concerning advertisements for edibles on children's television programs.
- <sup>2</sup> Each of the above techniques are listed in the *FTC Staff Report on Television Advertising to Children*, pp. 62-66 (1978). The first eight techniques were described by Dr. William Wells, a former professor of child psychology who has conducted various studies in child psychology for advertising agencies. The 1977 National Science Foundation report entitled *Research on the Effects of Television Advertising on Children* also lists the last two techniques described above.
- <sup>3</sup> Remark cited in the *FTC Staff Report on Television Advertising to Children*, p. 61 (1978) as having been made by Dr. Kenneth O'Bryan, professor of psychology at the University of Toronto and Director of the Child Research Laboratories at the Ontario Institute for Studies in Education and the Ontario Educational Communication Authority during an open meeting of the Federal Trade Commission on December 1, 1977.
- <sup>4</sup> When proposing restrictions, ACT uses the term "advertising directed to children" to refer to commercials designed to be aired when the predominant segment of the viewing audience consists of children under the age of twelve. Such a definition would encompass advertising shown during programs designed for children under the age of twelve as well as many re-runs aired in syndication during after-school hours. Statistics indicate it would rarely, if ever, affect a prime-time program. For further details, see ACT's comments dated January 15, 1979 in the Matter of Second Notice of Inquiry, Children's Programming and Advertising Practices (FCC Docket No. 19142).
- <sup>5</sup> 316 U.S. 52 (1942).
- <sup>6</sup> *Id.* at 54.
- <sup>7</sup> Compare *Breard v. Alexandria*, 341 U.S. 622 (1951) and *Martin v. Struthers*, 319 U.S. 141 (1943).
- <sup>8</sup> 376 U.S. 254 (1964).
- <sup>9</sup> *Id.* at 266.
- <sup>10</sup> 421 U.S. 809 (1975).
- <sup>11</sup> 1977-78 Va. Acts. c. 2, 8 codified at *Va. Code* 18.1-63 (1950) (repealed 1960 V. Acts. c. 358).
- <sup>12</sup> 421 U.S. at 821-22.
- <sup>13</sup> *Id.* at 826.
- <sup>14</sup> *Id.*
- <sup>15</sup> 421 U.S. at 826.
- <sup>16</sup> 425 U.S. 748 (1976).
- <sup>17</sup> *Id.* at 773.
- <sup>18</sup> *Id.* at 762.
- <sup>19</sup> ACT first proposed restrictions on televised advertising to children in a petition to the Federal Communications Commission on February 5, 1970. See *Notice of Inquiry and Notice of Proposed Rulemaking* (Docket No. 19142) 28 F.C.C. 2d 368 (1971).
- <sup>20</sup> *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 69, n. 32 (1976) (upholding a Detroit zoning ordinance which differentiated between theatres showing "adult" movies and other theatres).
- <sup>21</sup> *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557, 563 (1980).
- <sup>22</sup> *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 456 (1978) (upholding disciplinary action brought by the Ohio State Bar Association against a lawyer arising out of his personal solicitation of accident victims for the purpose of representing them on a contingent fee basis).
- <sup>23</sup> *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557, 563 (1980).
- <sup>24</sup> See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-65 (1976).
- <sup>25</sup> 425 U.S. at 770.
- <sup>26</sup> *Ginsberg v. New York*, 390 U.S. 629, 650 (1968).
- <sup>27</sup> *Id.* at 649.
- <sup>28</sup> 447 U.S. 557 (1980).
- <sup>29</sup> *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748, 771 (1976).
- <sup>30</sup> 425 U.S. at 773.
- <sup>31</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977).
- <sup>32</sup> See *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969) (upholding the affirmative obligation imposed on broadcasters to present debate on controversial issues of public importance.) Also see *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom, Capital Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000 (1972) (upholding a prohibition on cigarette advertising on electronic media subject to FCC regulation).
- <sup>33</sup> *FCC v. Pacifica Foundation*, 438 U.S. 726, 747 (1978) (sustaining the FCC's action to channel indecent language on radio broadcasts to times of day when children would be less likely to be in the audience).

- 34 438 U.S. at 749.  
 35 390 U.S. 629 (1968).  
 36 *Id.* at 639.  
 37 *Id.* at 640.  
 38 *Id.* at 643.  
 39 See Prosser, *Law of Torts*, 4th ed., pp. 364-66 (1971).  
 40 For an interesting First Amendment analysis of commercial speech cases based on whether the regulation was aimed at the contractual or the informational function of the speech, see Farber 1979.  
 41 *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 456 (1978).  
 42 *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976).  
 43 *Central Hudson Gas & Electric Corp. Public Service Commission of N.Y.*, 447 U.S. 557, 566 (1980).  
 44 Federal Trade Commission Act 15 U.S.C. 55.  
 45 *National Commission on Egg Nutrition v. FTC*, 570 F.2d 157, 162 (7th Cir.), *cert. den.*, 439 U.S. 821 (1978).  
 46 *Friedman v. Rogers*, 99 S.Ct. 887 (1979), *P. Lorillard Co. v. FTC*, 186 F.2d 52, 58 (4th Cir. 1950).  
 47 See, for example, *FTC v. Standard Education Society*, 302 U.S. 112, 116 (1937); *Feil v. FTC*, 285 F. 2d 879 (9th Cir. 1960).  
 48 See, for example, *ITT Continental Baking Co. v. FTC.*, 83 FTC 865, *mod.*, 83 FTC 1105 (1973), *aff'd.*, 532 F.2d 207 (2d Cir. 1976).  
 49 *Encyclopedia Britannica v. FTC*, 605 F.2d 964 (7th Cir. 1979) *cert. den.*, 100 S.Ct. 1329 (1980).

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