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Advertising of Food and Drugs: Concealing a Truth, Hinting a Lie

Barry S. Donner

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ADVERTISING OF FOOD AND DRUGS: CONCEALING A TRUTH, HINTING A LIE

... today's copywriters avoid clearly false statements. They tend instead to use "those less obvious forms of falsehood which in causitry and law are called suppressio verdi *and* suggestio falsi, *concealing a truth and hinting a lie, methods which certain types of advertising have carried to pitch and skill that leaves us breathless."*[1]

THE FOCUS OF THIS COMMENT is on recent advertisements promoting foods and drugs. Listed below are some representative ads, either recently published in magazines, or broadcast on radio or television. The question is whether they represent practices which, under the Federal Trade Commission Act, are prohibited, or should be prohibited.[2]

(1) The announcer narrates that "in a recent test" of pain relievers, measuring their effectiveness against "pain other than headache," Excedrin was found to be "significantly more effective" than common aspirin. At the end of the ad, the announcer states, "Excedrin—more effective against pain."

(2) The announcer states, "There's not much difference in pain relievers that you can see, but in your bloodstream, the differences are very real." He shows us a graph, which plots the level of pain relief of several remedies, including Anacin. The graph shows that the "peaks" for the "highest level" of pain relief of the other products comes earlier, but that Anacin's peak, though coming later, is the highest. There is also a lower level on the graph, marking what is called "effective level of pain relief." The announcer observes that "while all three products reach an effective level in minutes, in the final analysis, Anacin hits and holds the 'highest' level of pain relief. This difference is the added pain reliever that Anacin provides." He closes the ad by stating, "Anacin relieves pain fast."

(3) An attractive young woman identifies herself as having a Ph.D. She is shown serving Tang to her children. (Tang is a mixture that includes sugar, orange flavorings, vegetable gums, artificial colorings, hardened coconut oil, and vitamins C and A. It is mixed with water, and served in place of fruit juices.) The woman remarks that her children like its taste, and she "like(s) the fact that it has so much vitamin C."

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[1] Pollay, *Deceptive Advertising and Consumer Behavior: A Case for Legislative and Judicial Reform,* 17 KANS. L. REV. 625, 626 (1969) [hereinafter cited as Pollay], citing D. MASTERS, THE INTELLIGENT BUYERS GUIDE TO SELLERS 171 (1965).

[2] Quotations from radio or television ads are based upon notes which were made while the ads were broadcast. The quotes have been re-checked for accuracy. Statistics regarding ingredients and places or method of manufacture come from the package of the product involved.

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(4) The following are representative excerpts from ads for a product called "Sugar in the Raw":

> It contains all of its natural vitamins and minerals because it hasn't been bleached, processed, and stripped of its natural goodness. It's naturally blonde. Nothing is added—no chemicals. No preservatives. Sugar in the Raw is naturally sweet—naturally delicious. Get back to nature.... It's got no refinement, but Sugar in the Raw contains all of its vitamins and minerals. It's naturally more nutritious—

From a printed advertisement: "It's got no refinement! Sugar in the Raw. Organic! Unrefined! Natural! The honest to goodness sugar that contains natural vitamins and minerals."

(5) Euell Gibbons, an author of several books on nature, describes Post Grape Nuts Breakfast Cereal as his "back to nature cereal.... It is a wholesome cereal... made from natural wheat and barley. These natural ingredients are baked into crunchy nuggets and fortified with vitamins. Its naturally sweet taste reminds me of wild hickory nuts."

(6) Television viewers are shown a panorama of the Swiss Alps. The announcer narrates, "From Switzerland, a land where the air is incredibly pure, comes an old recipe" from which Alpen, a "natural" ready-to-eat breakfast cereal, is inspired. He continues by describing the cereal with such phrases as "full of natural goodness... pure and simple ... Alpen: wholesome and satisfying," while viewers are shown a family of attractive, healthy looking blue-eyed blondes in a Swiss chalet-style setting, enjoying their breakfast cereal. The ad does not disclose that the cereal is made in England.

(7) A young wife is home, suffering from a cold. Her husband returns with three different cold remedies. The wife objects, saying that the first two have "an antitussive, an analgesic, and alcohol, not found in Contac." The ad concludes by suggesting that it is preferable to take Contac, instead of the other products, for Contac has to be taken less often.

(8) In another Contac ad, we are advised: "Give your *allergy* to Contac," because one of the capsule's ingredients, an antihistamine, is what doctors prescribe most often for hay fever sufferers.

(9) Two men are shown together in a living room. One of them has a headache, and he asks his friend if he can give him something for it. The friend gives him Arthritis Pain Formula. The suffering man protests, "I have a headache, not arthritis." "Doesn't matter," his friend reassures him, "read the label. A.P.F. is great for headaches, too." Later in the ad the friend states, "A.P.F. has more pain reliever than most headache tablets."

(10) Whitehall Laboratories, makers of Arthritis Pain Formula, also advertise another product, Anacin, as effective in relieving arthritis pain: "Anacin has the pain reliever for arthritis most recommended by doctors."

(11) One friend suggests to another, that since she is "out of sorts,"

and "not in the swing" because she "needs a laxative," she should get Haley's M.O., for it is a "gentle acting laxative blend." The friend, thinking out loud, says, "A laxative blend? I'll try it!"

(12) Sominex, in its latest series of ads, shows a young wife (with her husband, Tom, standing behind her), calling up her mother, thanking her for telling Tom about Sominex. In another ad, a mother and married daughter are shown sitting on porch steps. The daughter has apparently moved to the city; the mother, who lives in the country, has come for a visit. The daughter tells her mother that "[she] did like you said, [and] took Sominex" when she had trouble falling asleep. The mother approves. In a third ad, kindly old "Uncle Ned," seated at a piano, sings a song with a young couple. Gloria, the young woman, is Ned's niece. She thanks her uncle for telling her about Sominex, which she now takes when she has "occasional" trouble sleeping.

(13) An announcer begins an ad with the lines, "If you have trouble falling asleep night after night, then maybe you should see your doctor; but if you have only occasional trouble, then perhaps you'd like to know about Sleep-Eze. It was tested in a hospital. . . ."

An advertisement may violate the Federal Trade Commission Act in one of several ways. It may be an "unfair method of competition in commerce," an "unfair or deceptive act of practice in commerce,"[3] or, in the specific cases of food, drugs, devices, or cosmetics, an ad can be considered "false" if it is "misleading in a material respect."[4]

One author has broken down the jurisdictional requirements, for an advertiser to come under the Act, into three broad categories:[5] (1) *The party to be protected:* this now includes both competitors, when victims of "unfair methods of competition,"[6] and consumers, who can either be victims of "deceptive acts or practices,"[7] or "false" advertising.[8] (2) *In commerce:* this requirement has been held to exist under Section 45.[9] Merely "affecting" commerce has been held to be insufficient.[10] While local activity is not covered under Section 45, it is suggested that when an action is brought under Section 52,[11] interstate advertising without interstate sales provides a sufficient basis for F.T.C. jurisdiction.[12] (3)

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[3] 15 U.S.C. § 45(a)(1) (1963).

[4] 15 U.S.C. § 55(a)(1) (1963). *See also* Slomoff, *F.D.A.-F.T.C. Liaison: Teamwork That Pays Off,* 26 FOOD DRUG COSM. L.J. 439 (1971).

[5] *See* Note, *False Advertising: The Expanding Presence of the F.T.C.,* 25 BAYLOR L. REV. 650 (1973).

[6] 15 U.S.C. § 45(a)(1) (1963).

[7] *Id.*

[8] 15 U.S.C. § 52, § 55 (1963).

[9] 15 U.S.C. § 45(a)(1) (1963).

[10] FTC v. Bunte Brothers, 312 U.S. 349 (1941).

[11] 15 U.S.C. § 52 (1963).

[12] Mueller v. United States, 262 F.2d 443 (5th Cir. 1958); Shafe v. FTC, 256 F.2d 661 (6th Cir. 1958).

Interest of the Public: Section 45(b)[13] limits the Commission's jurisdiction to cases in which "it shall appear to the Commission that a proceeding . . . would be to the interest of the public." This requirement has been called "a prerequisite to the assumption of jurisdiction by the Commission rather than a test of [the] propriety of issuing a cease and desist order."[14] Among the factors demonstrating the public interest in "false" advertising are the substantial volume of the advertiser's business,[15] the presence or absence of a probability of deception of the public,[16] a threat to the health of the public,[17] a diversion of business from those not engaging in "false" advertising,[18] or a violation of Trade Practice Rules.[19]

In addition to what is outlined in the statute, the following general rules have been recognized: It is sufficient that the ad have a "capacity" or "tendency" to deceive.[20] It is not necessary to prove "actual deception."[21] An ad is deceptive, even if it would only deceive those who are careless or gullible.[22] "In adjudging the falsity of advertising representations, regard must be had, not to finespun distinctions and arguments that may be made in excuse, but to the effect which such representations might reasonably be expected to have on the general public."[23] Ambiguous

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[13] 15 U.S.C. § 45(b) (1958).

[14] *See* Barnes, *The Law of Trade Practices: False Advertising,* 23 OHIO ST. L.J. 597, 656 (1962) [hereinafter cited as Barnes]. The author cites Northern Feather Works v. FTC, 234 F.2d 335, 338 (3d Cir. 1956); FTC v. Klesner, 280 U.S. 19 (1929).

[15] International Parts Corp. v. FTC, 133 F.2d 883, 885 (7th Cir. 1943). (Cases cited in notes 15 through 19 can be found in Barnes, *supra* note 14, at 656-7.)

[16] Pep Boys—Manny, Moe, & Jack v. FTC, 122 F.2d 158, 161 (3d Cir. 1951); Irwin v. FTC, 143 F.2d 316, 325 (8th Cir. 1944); Arnold Stone Co. v. FTC, 49 F.2d 1017 (5th Cir. 1931).

[17] Koch v. FTC, 206 F.2d 311, 319 (6th Cir. 1953).

[18] Ford Motor Co. v. FTC, 120 F.2d 175, 182 (6th Cir. 1941), *cert. denied,* 314 U.S. 668 (1941); Alberty v. FTC, 118 F.2d 669, 670 (9th Cir. 1941); FTC v. Winsted Hosiery Co., 258 U.S. 483, 493 (1922).

[19] Prima Products v. FTC, 209 F.2d 405, 407-8 (2d Cir. 1954).

[20] FTC v. Hires Turner Glass Co., 81 F.2d 362, 364 (3d Cir. 1936).

[21] FTC v. Balme, 23 F.2d 615, 621 (2d Cir. 1928).

[22] There have been many descriptions of the standard which should be used: "Laws are made to protect the trusting as well as the suspicious." FTC v. Standard Educ. Soc'y, 302 U.S. 112, 116 (1937). The F.T.C. Act was made for the protection of ". . . the public—the vast multitude which includes the ignorant, the unthinking, and the credulous." Charles of the Ritz Distribs. Corp. v. FTC, 143, F.2d 676, 679 (2d Cir. 1944). In FTC v. Sterling Drug, Inc., 317 F.2d 669, 674, the court cites 1 CALLMAN, UNFAIR COMPETITION AND TRADEMARKS § 19.2(a)(1), at 341-44 (1950) (and cases cited therein):

> The general public has been defined as "that vast multitude which includes the ignorant, and the unthinking, and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions." The average purchaser has been variously characterized as not "straight thinking," subject to "impressions," uneducated, and grossly misinformed; he is influenced by prejudice and superstition; and he wishfully believes in miracles, allegedly the result of progress in science. . . . The language of the ordinary purchaser is casual and unaffected. He is not an "expert in grammatical construction" or an "educated analytical reader" and, therefore, he does not normally subject every word in the advertisement to careful study.

[23] U.S. Retail Credit Ass'n v. FTC, 300 F.2d 212, 219 (4th Cir. 1962).

statements, susceptible of both a misleading and truthful interpretation, will be construed against the advertiser.[24] Failure to disclose a "material" fact will make an ad deceptive.[25] "A statement may be deceptive even if the constituent words may be literally true or technically construed so as not to constitute a misrepresentation."[26] It is not necessary to find a deliberate intent to deceive.[27] It is not necessary to find that the advertiser had knowledge of the falsity of his claim.[28]

The Commission has great discretion in determining the *meaning* of an ad,[29] but it must prove that the meaning is *false*. The evidence usually consists of testimony of Commission experts, surveys, and trade witnesses.[30] While, as a practical matter, courts are hesitant to overturn a decision of the F.T.C. as to what constitutes a deceptive practice (should the advertiser decide to appeal the Commission decision),[31] the advertiser, on

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[24] Murray Space Shoe Corp. v. FTC, 304 F.2d 270, 272 (2d Cir. 1962).

[25] "To tell less than the whole truth is a well known method of deception; and he who deceives by resorting to such method cannot excuse the deception by relying upon the truthfulness per se of the partial truth by which it has been accomplished." P. Lorillard Co. v. FTC, 186 F.2d 52, 58 (4th Cir. 1950).

[26] Kalwajtys v. FTC, 237 F.2d 654, 656 (7th Cir. 1956), *cert. denied,* 352 U.S. 1025 (1957).

[27] Bokenstette v. FTC, 134 F.2d 369, 371 (10th Cir. 1943).

[28] D.D.D. Corp. v. FTC, 125 F.2d 679, 682 (7th Cir. 1942).

[29] In Millstein, *The Federal Trade Commission and False Advertising,* 64 COLUM. L. REV. 439, 470 (1964) [hereinafter cited as Millstein], it is written:

> A review of the cases demonstrates that generally the Commission will find that an advertisement promises what the Commission itself believes it promises, notwithstanding dictionary definitions, the testimony of consumers and experts, or the results of surveys. The Commission always seems able to find one rule or another that can justify its determination of meaning. Furthermore, the courts seem quite willing in most instances to uphold the Commission's view of the promise.

(For further reference, and cases cited, see Millstein at 470-78.)

[30] *Id.* at 478-80; *see also* Gellhorn, *Proof of Deception Before the Federal Trade Commission,* 17 KANS. L. REV. 559, 563 (1969); Note, *Developments in the Law: Deceptive Advertising,* 80 HARV. L. REV. 1005 (1967).

Consumers are, quite predictably, at a disagreement over what constitutes "false" or deceptive advertising. One study concluded that "while it is quite likely that persons are as opposed to misleading advertising as they are to sin, it is equally likely that they have vastly different notions as to what constitutes misleading advertising." Pollay, *supra* note 1, citing Kottman, *A Semantic Evaluation of Misleading Advertising,* 14 J. COMMUNICATION 151, 154 (1964).

Travers, *Foreword to Symposium: Federal Trade Commission Regulation of Deceptive Advertising,* 17 KANS. L. REV. 551, 554 (1969) [hereinafter cited as Travers], cites BAUER AND GEYSER, ADVERTISING IN AMERICA: THE CONSUMER VIEW 331, 333 (1968), which concluded that the majority of those polled "were more favorable than unfavorable toward the institution of advertising. Significantly, the major reason given for these approving attitudes was the informational value of advertising." On the other hand, Anderson and Winer, *Corrective Advertising: The F.T.C.'s New Formula for Effective Relief,* 50 TEX. L. REV. 312, 321 (1972), cite sources in notes 48 and 49, which suggest that most people do not believe the claims made by advertisements.

[31] In FTC v. Colgate Palmolive Co., 380 U.S. 375, 385 (1965), the late Chief Justice Warren wrote: "As an administrative agency which deals continually with cases in the area, the Commission is often in a better position than are the courts to determine when a practice is 'deceptive' within the meaning of the [F.T.C.] Act."

the other hand, is able to delay complying with the Commission order for years, while his case is on appeal.[32] During this time, he is free to continue running his allegedly deceptive ads. The Commission, in the past few years, has devised the remedy of "corrective advertising" to help counteract the effects of prolonged advertising deception.[33]

Materiality: The idea that the representation must be materially deceptive is not directly expressed in Section 45(a),[34] but is mentioned in Section 55(a)(1), in cases of "false" advertising of foods, drugs, devices, or cosmetics.[35] It has been observed that courts have required even "unfair and deceptive practices" under Section 45(a) to stem from material misrepresentations.[36] In *F.T.C. v. Colgate Palmolive Co.*,[37] the

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Courts usually uphold F.T.C. actions unless it is proved that the Commission acted arbitrarily (Carter Products, Inc., v. FTC, 268 F.2d 461, 497 [9th Cir.], *cert. denied,* 361 U.S. 884 [1959]), clearly abused its discretion (Independent Directory Corp. v. FTC, 188 F.2d 468, 470 [2d Cir. 1951]), or failed to make an allowable judgment in its choice of remedies (Carter Products, Inc., v. FTC, 186 F.2d 821, 826 [7th Cir. 1951]).

[32] It took 15 years, for example, for the F.T.C. to take "liver" out of "Carter's Little Liver Pills."

[33] The remedies which the F.T.C. can impose are essentially the following:

(1) Cease and desist order: An order requiring the advertiser to stop publishing or broadcasting those ads, or similar ads, which have been found to be deceptive, unfair, or false.

(2) Affirmative Disclosure: A requirement that, in future ads, certain information be included, without which, the ad's representations would have a material omission.

(3) Corrective Advertising: "To verbalize retractions to the effect that [the advertiser] has falsely advertised in the past, and is now correcting the false impression." (Definition from Note, *False Advertising: The Expanding Presence of the F.T.C.*, 25 BAYLOR L. REV. 650, 653-4 (1973).

For further reference on corrective advertising, *see* Note, *Corrective Advertising,* 85 HARV. L. REV. 477 (1971); Note, *Corrective Advertising and the F.T.C.*, 70 MICH. L. REV. 374 (1971); Anderson and Winer, *Corrective Advertising: The F.T.C.'s New Formula for Effective Relief,* 50 TEX. L. REV. 312 (1972); Note, *Corrective Advertising—The New Response to Consumer Deception,* 72 COLUM. L. REV. 415 (1972).

For a comparison of actions under the F.T.C. Act and the common law, *see* Weston, *Deceptive Advertising and the F.T.C.*, 24 FED. BAR J. 548 (1964).

[34] 15 U.S.C. § 45(a)(1) (1963).

[35] 15 U.S.C. § 55(a)(1) (1963).

[36] *See* FTC v. Royal Milling Co., 288 U.S. 212, 216-7 (1933); Pep Boys—Manny, Moe, & Jack, Inc., v. FTC, 122 F.2d 158, 161 (3d Cir. 1941). *See also* Note, *"Extrinsic Misrepresentation" in Advertising Under Section 5(a) of the Federal Trade Commission Act,* 114 U. PA. L. REV. 725 (1966).

[37] 380 U.S. 374 (1965). This case involved the infamous Rapid Shave sandpaper shaving demonstration. The cream could shave sandpaper, but only after soaking the paper in water for 80 minutes. The demonstration in the ad did not disclose that fact, and indeed, the demonstration did not show the cream actually shaving sandpaper, ostensibly because sandpaper does not photograph faithfully. A "mock-up" using sand and plexiglass was used instead. When is "deception" from a "mock-up" to be considered materially deceptive? Ice cream, for example, cannot be photographed under hot studio lights, and so mashed potatoes are usually substituted. That is not considered to be materially deceptive. The explanation of the holding in the Rapid Shave case is best expressed in Note, *"Extrinsic Misrepresentation" in Advertising Under Section 5(a) of the Federal Trade Commission Act, supra* note 36, at 732, as

United States Supreme Court held that a misrepresentation can be material not only if it relates to the product, but also if it materially induces the purchase of the product.

Public Injury—Public Interest: Although an ad may be deceptive, courts will usually look to see if there exists a "public interest" in stopping the advertising.[38] This sometimes results in the consideration of a different, though related question: what potential injury may result from the deception? While this would usually involve financial injury, courts have also held that there is sufficient injury when a consumer is "tricked" into buying a product.[39]

Defenses: There are certain defenses which an advertiser might plead, when an action is brought against him under the F.T.C. Act. It appears, though, that an advertiser may still find it difficult to prevail against an F.T.C. complaint.[40]

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follows: "Rapid Shave's hypothetical ability to shave sandpaper as portrayed was irrelevant, for only after they were led to believe that this feat was *actually* being performed before their eyes did many persons decide to buy the product."

In Kerran v. FTC, 265 F.2d 246, 248 (10th Cir.), *cert. denied,* 361 U.S. 818 (1959), it was held that a material issue could be raised "at least in part upon ill-founded sentiment, belief or caprice." The case involved an advertiser's failure to disclose, in its ads, that its motor oil was "used" oil that had been re-refined. While the oil was identical, chemically, to "new" oil, the court held that consumers would prefer "new" as opposed to "used" oil, and should be advised in advertisements that the oil promoted was not "new."

Other examples of materiality based upon "popular" consumer preferences include:

L. Heller & Son v. FTC, 191 F.2d 954 (7th Cir. 1951), which held that it was an unfair trade practice not to disclose in advertising that imitation pearls were imported, since Americans were deemed to have a preference for domestically produced goods.

Purofied Down Prods. Corp., 48 F.T.C. 155 (1951), held that a producer of goosefeathers must disclose the fact that they were used, as purchasers were deemed to prefer new feathers.

[38] *See* text accompanying notes 13-19 *supra.*

[39] *See* FTC v. Standard Educ. Soc'y, 302 U.S. 112 (1937); FTC v. Algoma Lumber Co., 291 U.S. 67 (1934); FTC v. Royal Milling Co., 288 U.S. 212, 216-17 (1933); Carter Prods. Inc. v. FTC, 323 F.2d 523 (5th Cir. 1963); Kerran v. FTC, 265 F.2d 246 (10th Cir. 1959), *cert. denied,* 361 U.S. 818 (1959); Pep Boys—Manny, Moe, & Jack Inc. v. FTC, 122 F.2d 158 (3d Cir. 1941); FTC v. Balme, 23 F.2d 615, 620 (2d Cir. 1928), *cert. denied,* 277 U.S. 598 (1928).

[40] (1) Puffing: "'Puffing' refers, generally, to an expression of opinion not made as a representation of fact.... While a seller has some latitude in 'puffing' his goods, he is not authorized to misrepresent them or to assign to them benefits or virtues they do not possess." Gulf Oil Corp. v. FTC, 150 F.2d 106, 109 (5th Cir. 1945).

(2) Truth: "Words and sentences may be literally and technically true and yet be framed in such a setting as to mislead or deceive." Bockensette v. FTC, 134 F.2d 369, 371 (10th Cir. 1943); *See also* P. Lorillard Co. v. FTC, 186 F.2d 52 (4th Cir. 1950).

(3) No prejudice to public:

> The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else.... In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance.... Dealers and manufacturers are prejudiced when orders that would have come to them if the lumber had been rightfully named, are diverted to others whose methods are less scrupulous.

Unfairness: Section 45(a)[41] refers to "unfair" methods, acts, or practices in commerce. Gerald Thain, Assistant Director for National Advertising, Bureau of Consumer Protection, Federal Trade Commission, has observed that the Commission traditionally has attacked only unfair methods of competition, "in the anti-trust sense,"[42] but he urges that "unfairness" under the Act should also be used to attack advertising which is unfair to *consumers.* (Misleading advertising, for example, has been held to be "unfair" in its effect, *but only* in the sense that it puts honest competitors at a disadvantage.)[43]

Thain has also pointed out that actions based on simple deception were adequate in the past, but advertisers, he observes, have become more sophisticated in their techniques of persuasion, requiring the development of new actions and remedies, to protect consumers and competitors.[44] He feels that actions based on "unfairness" may provide the solution. President Kennedy, in his 1962 Consumer Message to Congress, outlined what he referred to as "consumer rights": (1) The right to safety; (2) The right to be informed; (3) The right to choose; (4) The right to be heard. Under the "right to be informed" are included the following significant words of elaboration: "... and to be given the facts [needed] to make an informed

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FTC v. Algoma Lumber Co., 219 U.S. 67, 77-78 (1934) (selling "yellow" pine as "white" pine).

(4) No deceit of the public: "Advertisements are intended not 'to be carefully dissected with a dictionary at hand, but rather to produce an impression upon prospective purchasers.'" Positive Products Co. v. FTC, 132 F.2d 165, 167 (7th Cir. 1942).

(5) Early disclosure: In Carter Prods., Inc. v. FTC, 186 F.2d 821, 822-24 (7th Cir. 1951), it was held that the advertiser could not claim that his product was effective in stopping perspiration for one to three days, but then indicate on the label directions that a person should apply the product as often as necessary—a direction which indicated, as the court found, that the product was not as effective as the representations had claimed.

(6) No cure claimed: Some ads strongly imply that their products will cure an ailment. The advertiser defends by arguing that such a claim was never actually made, but that argument is not strong, in the light of the F.T.C.'s ability to interpret an ad's meaning. *See* Rhodes Pharmacal Co. v. FTC, 208 F.2d 382, 384 (7th Cir. 1953).

(7) Statements of opinion made in good faith: The impression left with viewers, and not the advertiser's good faith, will determine if there is a misrepresentation. *See* Koch v. FTC, 206 F.2d 311, 319 (6th Cir. 1953) at 316-17.

This list is derived from Barnes, *supra* note 14, and is not an exhaustive list of all possible defenses. For a more thorough compilation, *see* 2 TRADE REG. REP. ¶ 7533, and further sections cited therein.

[41] 15 U.S.C. § 45(a)(1) (1963).

[42] Thain, *Drug Advertising and Drug Abuse—The Role of the F.T.C.*, 26 FOOD DRUG COSM. L.J. 487, 495 (1971).

[43] In FTC v. Raladam Co., 316 U.S. 149, 152 (1942), the Court held: "[W]hen the Commission finds as it did here that misleading and deceptive statements were made with reference to the quality of merchandise it is also authorized to infer that trade will be diverted from competitors who do not engage in such 'unfair methods.'"

[44] Thain, *Consumer Protection: Advertising—The F.T.C. Response*, 27 BUS. LAW. 891, 902 (1972) [hereinafter cited as Thain].

choice."[45] The White House Conference on Food, Nutrition, and Health added a fifth "right": The right to proper food and proper nourishment.[46]

The idea of unfairness has thus been described to be a broad concept,[47] and it has been interpreted to mean that advertisers should give consumers adequate information about their products, to enable consumers to make rational choices. This usual lack of information upon which to make a rational decision is also related to the idea that, in many fields (and certainly including food and drugs), advertisers seek to "create" through their ads differences between virtually identical products.[48]

Also condemned are ads which are said to evoke "moods"; ads which are capable of persuading consumers to ignore such "rational considerations as the price, or quality of the thing which is promoted.[49]

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[45] Morse, *A Consumer's View of F.T.C. Regulation of Advertising,* 17 KANS. L. REV. 639, 640 (1969), cites CONSUMERS' PROTECTION AND INTEREST PROGRAMS, H.R. DOC. No. 364, 87th Cong., 2d Sess. 2 (1962).

[46] *See* Thain, *supra* note 44, at 610.

It is ironic to recall FTC v. Sterling Drug, Inc., 317 F.2d 669 (2d Cir. 1963). The F.T.C., in contemplation of bringing actions against various drug manufacturers for their advertising of analgesics, conducted an independent study which suggested that aspirin was as effective as other more elaborate "combination of ingredients" products. The makers of Bayer Aspirin attempted to publish the study, to promote their product. The F.T.C. attempted to stop them, claiming that such a study might be interpreted by some consumers as an official endorsement of aspirin.

[47] *See* Note, *Corrective Advertising,* 85 HARV. L. REV. 477, 495 (1971).

[48] Ralph Nader describes this as "competitive ferocity over profound trivia." *See* Austern, *What Is Unfair Advertising?* 26 FOOD DRUG COSM. L.J. 659, 665 (1971).

It is revealing to examine the advertising/sales ratios of different commodities, as compiled by Greer, *Product Differentiation and Drug Mergers (II),* 4 ANTI-TRUST L. & ECON. REV. 63 (1971):

Advertising/Sales Ratios in Non-Drug Industries (of products capable of "product differentiation"):

Beer	9%	Breakfast cereals	15-18%
Cigarettes	10%	Soft drinks	"about" 10%
Soap	10%	Electrical appliances	13%

In Drugs:

Bristol-Myers (Bufferin)	27.6%	Sterling Drug (Phillips, Bayer)	21.6%
Warner-Lambert (Pharmaceuticals)	16.8%	Miles Laboratories (Alka-Seltzer)	24.0%

In Travers, *supra* note 30, at 555, it is observed:

According to COX, FELLMUTH, AND SCHULZ, THE CONSUMER AND THE F.T.C. App. 3 (1969), the following were the first-quarter television advertising expenditures of 1968 for the following products:

Anacin	$4,618,500
Bayer Aspirin	3,110,500
Bufferin	2,929,500

In 1967, the F.T.C. received an appropriation of $14,378,000. Of this amount, $6,846,000 was allocated to stopping deceptive practices (*Id.* App. 1). This latter figure is less than the combined television advertising budget for Anacin and Bayer during the first *quarter* of 1968.

[49] *See* Thain, *supra* note 44, at 902.

No F.T.C. actions against an advertiser for using "mood" to promote a product have been found, but possible examples of such ads might be:

Sominex (ad number [12]): These ads promote a "mood" of respectability, in

Some "non-rational" ads have been characterized as ads which play on consumers' emotions, needs, and fears.[50] One case which has been cited to show the F.T.C.'s new disposition to attack advertisements which use such techniques is the "Vivarin" decision.[51] J. B. Williams was promoting its caffeine stimulant as a "new" product which housewives should take, to prevent feeling tired, so that they could become more sexually alluring to their husbands. The ads did not even disclose that caffeine was the active ingredient.[52]

In *F.T.C. v. Sperry and Hutchinson Co.*,[53] a case not directly dealing with unfairness in advertising, there is printed, in a note, a set of guidelines for unfairness which seem to be applicable to advertising:

> The Commission has described the factors it considers in determining whether a practice which is neither in violation of the antitrust laws nor deceptive is nonetheless unfair:
>
> (1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of fairness;
>
> (2) Whether it is immoral, unethical, oppressive, or unscrupulous;
>
> (3) Whether it causes substantial injury to consumers (or competitors or other businessmen).[54]

The list of factors, particularly in (2) and (3), might be interpreted as very broad indeed.[55]

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promoting a sleeping aid, a product which many people undoubtedly have negative feelings about.

Alpen: (ad number [6]): An idyllic mood of mountainous Switzerland seems to be stressed as much as the breakfast cereal.

50 *See* Thain, *supra*, note 44, at 902.

51 J. B. Williams Co., 81 F.T.C. 238 (1972).

52 Gerald Thain, in Thain, *Drug Advertising and Drug Abuse—The Role of the F.T.C.*, 26 FOOD DRUG COSM. L.J. 487, 499 (1971), remarks:

> Although the Vivarin complaint proceeds on the theory that the advertising is false and misleading, I personally feel that the use of the challenged ads comes very close to what I would define as an unfair practice. I would question the fairness of any ad which exploits the aspirations of married women by representing that a product such as Vivarin, can and will be effective in making them attractive and exciting to their husbands.

53 405 U.S. 233 (1972).

54 *Id.* at 244-5, n.5.

55 For a less optimistic assessment of the value of the enumerated factors, *see* Note, *Psychological Advertising: A New Area of F.T.C. Regulation*, WISC. L. REV. 1097, 1108 (1972). Thain, *supra* note 44, at 899, argues:

> In the past, the "Unfairness Doctrine" has been used mainly to attack actual *practices*, rather than advertising, and usually these practices have been so blatantly inequitable or coercive as to evince actual intent to defraud consumers. . . . *There is nothing inherent in the meaning of the term "unfair act or practice," however, that limits it to this type of activity. Just as the term "deceptive acts or practices" has been construed to include false advertising, so the term "unfair acts or practices" may be construed to include unfair advertising.* (emphasis added).

Donner: Advertising of Food and Drugs

ADVERTISEMENTS (1) THROUGH (13) IN RELATION TO F.T.C. STANDARDS

Food and drugs, when taken wisely, will promote good health, but misleading or unfair advertising of food and drugs resembles an infectious disease in some ways. Like any other disease, such advertising is all too capable of impairing one's health. Such advertising, with its half truths, incorrect conclusions, enticing pictures and jingles, attractive settings, layouts, models, contagious humor, and exaggerated claims, attacks unwary consumers, with the likely result that they will be persuaded to buy products for the wrong reasons. Advertisers may convince a consumer to buy or take a drug for an "ailment" that needs no treatment with drugs. Consumers, by buying one product, may be precluded from getting something else which would actually be better.[56] Consumers, by "treating only a symptom" which they have been encouraged to self-diagnose, may mask the seriousness of their affliction.[57]

Misleading advertising of food and drugs is also much like a disease in the sense that it constantly appears in new forms. The possibility exists, that with each new advertising campaign for a product, an advertiser can portray the product in some misleading or unfair way. As medical researchers constantly attempt to identify new strains of diseases, and develop new vaccines to immunize against them, so, it seems, that it is necessary constantly to examine food and drug advertising, to see if some new strain of some old advertising malady is present, and to determine what measures are appropriate to deal with the "infection."

One further point should be emphasized: The F.T.C., in its deliberations, is concerned with questions of *fact,* as opposed to questions of *law*. The Commission, in advertising cases, seems to concentrate most

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For criticisms of the idea of an expanded doctrine of unfairness, *see* Austern, *What Is Unfair Advertising? supra* note 48; Austern, *What Is Unfair Advertising? A Discussion of Consumer Advertising from the Point of View of the Consumer, the Government, and Industry,* 27 BUS. LAW. 883 (1972); Charlton, *Food Advertising Yesterday, Today and Tomorrow,* 27 FOOD DRUG COSM. L.J. 226 (1972) [hereinafter cited as Charlton].

[56] *See, e.g.,* Note, *Corrective Advertising and the F.T.C.,* 70 MICH. L. REV. 374 (1971).

For a collection of surveys which suggest how poorly fed Americans are, *see* Baxter, *Nutritional Labeling: An Analysis,* 26 FOOD DRUG COSM. L.J. 82 (1971).

Peterson, *Informative Labeling as a Consumer Guide,* 27 FOOD DRUG COSM. L.J. 70 (1972), offers statistics which suggest that children see only ads for "fun" or "junk" foods. The question which this suggests is whether parents see ads for foods which are nutritionally much better.

Charlton, *supra* note 55, complains, on behalf of the food industry, that the F.T.C. hasn't given the industry any guidelines in the past, and did not even have until recently a nutritionist on its scientific staff.

"The gaps in our public knowledge about nutrition, *along with actual misinformation carried by some media,* are contributing seriously to the problem of hunger and malnutrition in the United States.' Thain, *supra* note 44, at 892, citing WHITE HOUSE CONFERENCE ON FOOD, NUTRITION, AND HEALTH: FINAL REPORT (1969) at 179.

[57] *See, e.g.,* J. B. Williams Co., 68 F.T.C. 481, 549 (1965). Brennan, *Affirmative Disclosure in Advertising and Control of Packaging Design Under the Federal Trade Commission Act,* 20 BUS. LAW. 133 (1964).

on determining the meaning or implication of the representations. It then usually refers to the F.T.C. Act, to hold that the representations violate some portion of the statute. The Commission rarely if ever cites to court decisions, or to prior F.T.C. decisions, for it is unnecessary to cite any precedent to make a factual finding. Questions of law, and the issue of possible abuse of discretion by the Commission, are appealed to the federal courts, if the advertiser wishes to pursue his case. Most of the F.T.C. decisions are not appealed, and thus it would seem that many questions of law that are raised in them are left unanswered.

The discussion of the ads that follow concentrates on finding the meaning or implication of the ads, for that is the way that the F.T.C. would consider them. Unlike in F.T.C. decisions, comparisons are provided with F.T.C. cases dealing with similar advertising problems. The other cases also help to point out that certain kinds of advertising practices have not been, but probably should be considered by the Commission.

Each of the 13 ads described earlier, in this writer's opinion, is either misleading, or is otherwise unfair. Others may not agree with some of the writer's assessments,[58] but this Comment will hopefully offer strong reasons why these ads should be construed as in violation of the F.T.C. Act. The fact that these ads, and similar ads, have been permitted to be published or aired, strongly suggests that the F.T.C. still has much unfinished work ahead of it before food and drug advertising is free of serious improprieties.

Faulty conclusions: In the first two examples, the ads reach, on the basis of information given to viewers, conclusions which hardly seem warranted. Number (1) is just one of several ads in a series which seem to try, consistently, to confuse viewers into believing that the tests concluded that Excedrin was proved to be "significantly more effective" against any kind of pain, compared against any other product. For those who will remember the vague qualification, "pain other than headache," the ad might still be potentially dangerous. A mother, for example, might take the ad to mean that Excedrin is suitable to use to relieve her child's pain from an upset stomach. A product containing aspirin, as Excedrin does, may actually increase stomach pain, rather than relieve it, as aspirin often upsets the taker's stomach, as a side effect. The argument, that the user should read the directions on the label, should be no defense in this instance.[59] A person could conceivably buy the product for stomach upset, only to realize later that it is not the right medication to take.

The Anacin ad (Number [2]) is puzzling on its surface, and becomes even more confusing as it is considered further. It suggests that viewers should not be satisfied merely with a pain reliever which gives them an "effective level of pain relief" in minutes. Instead, we should take Anacin,

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[58] *See* Barnes, *supra* note 14, at 618.

[59] *See* Travers, *supra* note 30.

because it, later on, "hits and holds the highest level of pain relief." Whether that means that it is any more "effective," by Anacin's own definition, is not clear. The reason why Anacin reaches its "higher level," we are told, is apparently because it contains *more* pain reliever per dosage. The difference, then, is one of strength, as opposed to "effectiveness." Presumably, if Anacin is better because it is stronger, we could achieve the same result with the other products, simply by taking more of them.[60] The ad closes, paradoxically, with the old familiar slogan, "Anacin relieves pain fast," but the graph shown in the ad, on the other hand, proved that the other two products reached an "effective level" before Anacin did.[61]

The question not answered is: of what significance is it that Anacin

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[60] *See* Carter Prods. Inc. v. FTC, 323 F.2d 523 (5th Cir. 1963).

[61] After running this ad for several months, it was revised slightly to end "*. . . and* Anacin relieves pain fast." Even with the conjunctive, this statement can hardly be said to follow logically from the data on the graph.

(Anacin recently introduced a new series of ads, which features endorsements from professional people. In one ad, Mrs. Loftus, who identifies herself as a college teacher, says that she takes Anacin when "[she] has a headache . . . [for] *there's something in it that works* [emphasis added]." The announcer interjects, "That's right, Mrs. Loftus!" and he then gives the same confusing explanation for Anacin's "superiority" that was used in ad number [2]. Anacin's supposed "superiority," of course, is due to its greater strength per dosage, and is not due to any "miracle ingredient" which Mrs. Loftus infers is present.)

The most recent, comprehensive action by the Commission against advertisements of pain relievers was taken, astonishingly, over 13 years ago. *See* American Home Products Corp., 67 F.T.C. 430 (1961). The F.T.C. there found that drug manufacturers had made the following false representations:

Speed:

(1) "Anacin acts with such incredible speed as to provide relief of [*sic*] pain faster than any other analgesic preparation available and offered to consumers."

(2) "Bufferin provides relief from pain twice as fast as aspirin."

(3) "St. Joseph Aspirin provides relief of [*sic*] pain faster than any other analgesic preparation available and offered for sale to consumers."

(4) "Bayer Aspirin works faster than any other analgesic preparation available and offered for sale to consumers."

(5) "Bayer Aspirin for Children works faster than any other children's analgesic preparation available and offered for sale to consumers."

Tension:

(1) "Anacin relaxes tension."

(2) "Bufferin relieves tension."

(3) "Excedrin relieves tension."

Depression:

(1) "Anacin helps overcome depression."

(2) "Excedrin acts as an anti-depressant."

Strength:

"Excedrin is an extra-strength pain reliever, is 50% stronger than aspirin, and that two Excedrin tablets equal three ordinary pain tablets."

Relief from Swelling:

"Excedrin will combat the cause of pain by reducing the swelling of tissue."

The Commission decided to withdraw the complaints in 1965, apparently because it felt that the proceedings had become bogged down from delays (*see* 67 F.T.C. at 448-449). The claims made in ads (1) and (2), cited in the text, are much more subtle than the claims made in the ads cited in the Commission's complaint: Excedrin no longer claims that it relieves tension, acts as an anti-depressant, or relieves tissue swelling; Excedrin now simply is claimed to be "more effective" against "pain other than headache." Anacin does not claim now that it works faster than other over-the-counter analgesics, or that it relaxes tension or helps overcome depression; Anacin is promoted simply as "better" because it is "stronger."

is stronger? What the ad really implies, is that a "stronger" medication is a "better" medication. A weak remedy is an inferior remedy. More strength means more relief.[62] (It is worth noting generally, also, that ads which boast of a drug's monumental "strength" per dosage, do not seem

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[62] The F.T.C. apparently does not share this writer's opinion, that drugs should not be advertised as more "effective" because they are stronger. Thain, *Drug Advertising and Drug Abuse—The Role of the F.T.C., supra* note 52, at 491, cites the F.T.C. Proposed Rule of July 5, 1967, for the advertising of non-prescription analgesic drugs. Proposed Rule number (2) seems to say that it is permissible for an ad to claim that a drug is "more effective" because of its greater strength, as long as it is disclosed that its greater "effectiveness" is attributable to the increase in dosage. This position, it is submitted, enables drug advertisers to reenforce the notion, in consumer minds, that "stronger" is always "better."

What then, are the limits which the F.T.C. has imposed on drug advertisers? The answers are found in bits and pieces, in F.T.C. Complaints. In the last ten years, the Commission has decided the following:

(1) *No drug ad should encourage consumers to "self-diagnose" an ailment.* J. B. Williams Co., 68 F.T.C. 481 (1965). The makers of Geritol encouraged people to diagnose tiredness as iron deficiency anemia, when only a physician could accurately determine if a person is suffering from such anemia.

(2) *Ads should not imply that a product will "cure" an ailment, if the product in fact only treats its symptom(s).* Merk & Co., 69 F.T.C. 526 (1966). The makers of Sucrets represented that their lozenges would kill "even staph and strep germs on contact." The Commission decided that statement implied that Sucrets would cure diseases caused by those infections. The Commission found that while the lozenges did kill staph and strep "germs" on contact, the lozenges only killed them on the surface of the throat. Therefore, the preparation could only provide temporary relief.

(3) *Drug ads should not encourage "self-medication."* Bristol Myers Co., 74 F.T.C. 780 (1968). The F.T.C. found that the makers of Bufferin advertised that medical tests showed that Bufferin reduced swelling and inflamation, increased joint movement, and improved grip strength of arthritis sufferers. The ad continued, "If you have arthritis, you should be under a doctor's care, even in the early stages. If your doctor prescribes Bufferin, it's good to know you can take it without the stomach upset other drugs often cause. Bufferin, a leader in arthritis research."

The Commission complained that the ad failed to disclose that, in the tests, the drug was administered in "near toxic doses" (74 F.T.C. at 853) to achieve the results indicated. The Commission went on to conclude,

> Despite its carefully hedged language, there can be little doubt that this advertisement was not intended solely to report the conclusions [of the tests] but was also intended, or at least would tend, to induce arthritis sufferers to purchase Bufferin—that is, to encourage arthritics to engage in self-medication.... The advertisement was published in two magazines of general circulation; and, despite its studied ambiguity, its principal impact is to suggest that costly treatment may be unnecessary since Bufferin, a product available over the counter, is useful for treating the disease.

(4) *Advertisers must be prepared to substantiate all claims made in their ads.* Pfizer, Inc., 81 F.T.C. 23 (1972). For a detailed analysis of this decision, *see* Note, *The Pfizer Reasonable Basis Test—Fast Relief for Consumers but a Headache for Advertisers,* 1973 DUKE L.J. 563 (1973).

(5) *It may be "false" advertising to imply that a product designed to treat one kind of symptom, will bring benefits to the user in other, unrelated ways.* J. B. Williams Co., 81 F.T.C. 238 (1972). The makers of Vivarin, a caffeine stimulant, were found to have represented falsely that their product would "make one more exciting and attractive, improve one's personality, marriage and sex life, and will solve marital and other personal problems." (81 F.T.C. at 242). One F.T.C. official has argued that the ad should have been attacked as "unfair," instead of as "false and misleading." *See* note 52 *supra.*

to emphasize the risk of overdosage as prominently.[63]) The Anacin ad would have made more sense, and would have avoided reinforcing the dangerous myth about "strength" always being desirable, by stating, for example, "Don't buy Anacin simply because they're stronger, but if you find that you need a stronger pain reliever than the type you may presently be using, then try Anacin."[64]

Testimonial: Ad number (3), for Tang Instant Breakfast Drink, involves a very unusual kind of testimonial. The housewife identifies herself as having a Ph.D., and then tells viewers about the supposed virtues of Tang. How should viewers react to the disclosure of her educational status? Would it in any way encourage them to buy the product, and if so, for what reasons? Would those reasons be valid or "rational" ones? Has anything been misrepresented in the ad, assuming that the woman does, in fact, have a Ph.D.? It would seem to be no coincidence that the woman selected to do the ad has an unusual, "esteemed" status.[65]

The endorsement here could not be called a "collective endorsement," for it is not implied, nor would it seem that many viewers would infer, from the ad, that all, or even many Ph.D. holders endorse Tang. On the other hand, the ad is not, in its effect, a personal endorsement, either. Such an endorsement would be made by an individual who is known and respected[66] (*i.e.*, a baseball player,[67] a movie star, or astronauts, as used in

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[63] It is true, that older ads for sleeping aids warned, "Take only as directed. Avoid excessive use." Most products today use a more general warning, such as Bayer's, "As with all medications, take only as directed," or, as Lloyd Bridges would mention on radio ads for Contac, "Take Contac only as directed, and only when you know you need it."

[64] Another "consumer myth" may be involved with drug ads which stress strength: "two tablets are all you should ever take." Drug manufacturers "get around" this myth simply by increasing the dosage per tablet, and then claim that their product is superior because it is "stronger." The consumer stays happy, by taking his two "stronger" tablets, convinced that they are really superior to the "weaker" tablets he had been taking "two of" before.

[65] Recall how the earlier ads stressed how Tang was used in the Apollo Space Program. Since that N.A.S.A. program has now ended, it would stand to reason that the advertisers would try to find a suitable "substitute" for astronauts. In another recent ad for Tang, featuring a woman who appears to be a commercial airlines pilot as well as a mother, the woman says, "When Stan [her young son] heard that Tang went to the moon, he said, 'Let's try it'!"

[66] Readers may be surprised to learn that Eleanor Roosevelt made an ad for Imperial Margarine in the late 1950's! (Recent Imperial ads show husbands or wives wearing huge crowns after tasting the spread's "fit for a king" flavor.) The money Mrs. Roosevelt earned for her testimonial was donated to a United Nations fund, although that was not disclosed in the ad.

[67] The closest, most recent F.T.C. case involving a testimonial of a food product is Beatrice Foods Co. 81 F.T.C. 830 (1972). Baseball player Lou Brock appeared in a series of ads for Holloway's Milk Duds. The Commission decided that the ads were "false, misleading or deceptive" because "the consumption of confectionaries such as 'Holloway's Milk Duds' is not linked to or necessary for the instilling, improving or maintaining of athletic ability or performance. Instead, said endorsements are based upon a monetary relationship... and not upon any nutritional superiority or attribute of said product."

the earlier Tang ads), and whose personal association with a product would prompt consumers to buy it. In the Tang ad, since the woman is not a well known figure, one can only conclude that the advertiser is trying to suggest that a word of approval from a holder of some sort of advanced degree is a valid reason for consumers to buy his breakfast drink.

It may be argued that the ad is "false" under Section 55(a)(1) of the F.T.C. Act, "to the extent to which the advertisement fails to reveal facts material in the light of such representations."[68] By this rationale, the "material omission" would be the undisclosed reason why an otherwise anonymous Ph.D. holder approves of a product. The fact would seem to be a material fact,[69] and not disclosing it simply leaves viewers to draw possibly faulty conclusions that such an endorsement necessarily means that the product is recognized as desirable by an expert in the field, or that it is preferable to other breakfast drinks or juices.[70]

The "Natural" Foods: Numbers (4) through (6) are examples of ads promoting "natural" foods. The most salient point, at least from the advertiser's standpoint, is that to call anything "natural" is to say something good about it; something that, in some mysterious way, registers a positive impression with consumers and apparently motivates them to buy.[71] But what, exactly, does "natural" mean? Different advertisers have different ideas. "Sugar in the Raw" was promoted as "natural" and "organic," because it was claimed that it had no preservatives, and because it was "unrefined."[72] Post Cereals, on the other hand, promotes its Grape Nuts as a "back to nature cereal." A close reading of Euell Gibbons' description in ad number (5) would seem to suggest that since wheat and barley are "natural," that is enough, by implication, to make the cereal natural when those grains are baked. The reference, however, to "fortifying" Grape Nuts with vitamins suggests that there are additional ingredients that are not, indeed, "natural." The Quaker Oats Co. offers, on the side of its package for Quaker 100% Natural Cereal, the following interesting information:

> Natural foods should not be confused with organic foods generally represented to be grown without aid of artificial fertilizers and without pesticides.

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[68] 15 U.S.C. § 55(a)(1) (1963).

[69] *See* FTC v. Colgate Palmolive Co., 380 U.S. 374 (1965), and text accompanying note 37 *supra.*

[70] In Erikson v. FTC, 272 F.2d 318 (7th Cir. 1959), *cert. denied,* 362 U.S. 940 (1960), the advertiser was prohibited from using ads which pictured men "attired in a type of white jacket customarily worn and associated with members of the medical profession." It is arguable that a Ph.D.'s endorsement, to many viewers, might be the equivalent of a medical doctor's approval.

[71] It is amusing to recall that advertisers have not always promoted "natural" as necessarily "desirable." George Washington Hill, in 1931, for example, created a flamboyant ad campaign for Lucky Strike Cigarettes, which claimed that Lucky Strike's "Toasting" process removes "sheep-dip base" found *naturally* in all tobacco leaf. *See* LEWINE, GOOD-BYE TO ALL THAT 72-73 (1970).

[72] Cumberland Packing Co., 81 F.T.C. 352 (1972).

Quaker 100% Natural Cereal is a natural food product, made from conventionally grown foodstuffs to which no artificial additives or preservatives have been added.[73]

No guideline from either the F.T.C. or F.D.A. has been found, covering the term "natural."[74]

Only one F.T.C. complaint has been found which is even remotely connected with "natural" foods: *Cumberland Packing Corporation.*[75] On the basis of ad excerpts number (4), and other similar ads, the Commission found that Cumberland had falsely represented its product, Sugar in the Raw, as:

(1) an organically grown food;

(2) not a processed food;

(3) a significant source of vitamins and minerals;

(4) substantially different from, or superior to, other sugars because it does not utilize or contain any chemicals or preservatives.

The claims made in ads (5) and (6) are more elusive. The Commission, in its discretion, could conceivably interpret the Grape Nuts representations as false, for a "back to nature" cereal might be defined to mean that it is not "adulterated," even with additional vitamins. In order to move against the Alpen Cereal ad (number [6]) the Commission would have to depart from its traditional focus of inquiry, which has been whether the representations are actually "true" or "false," and concentrate on evaluating the very subjective suggestions that are being made.[76] Does this ad play on consumers' needs, fears, or desires in some way? Even if it does, it might be argued, most other ads do the same thing, to some degree. Is there any reason why this particular ad should be singled out for action? The writer believes that it should be, because it probably is difficult for a consumer, viewing an ad such as Alpen's, to be critical about what is being suggested to him. A prospective car buyer, to take another example, would probably not let a glamorous model, or setting, materially influence him in his final decision of which car he will purchase. A housewife will not regularly buy a laundry powder simply on the basis of claims made in ads for it, that the brand advertised will clean clothes

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[73] The definition would seem to dispel some confusion in the minds of consumers. Unfortunately, no advertisement has been found which has attempted to define a "natural food" as comprehensively. It is puzzling to read, in the list of ingredients of Quaker 100% Natural Cereal, that non-fat dry milk has been added. It is best left to experts to argue over whether non-fat dry milk is "a conventionally grown foodstuff," or, if it is an additive, they can then argue over whether it is "artificial," or "natural."

[74] In Wolnak, *Health Foods: Natural, Basic, and Organic,* 27 FOOD DRUG COSM. L.J. 453 (1972), the author does not refer to any official guidelines for the meaning of "natural" and "organic." The inference is irresistible, that no official definitions exist for those terms.

[75] 81 F.T.C. 352 (1972).

[76] *See* Note, *Psychological Advertising: A New Area of F.T.C. Regulation,* WISC. L. REV. 1097 (1972).

better than other products. The housewife, instead, will decide whether to buy the product again on the basis of the results she obtained with it. In both the case of cars and laundry powders, then, the consumer can critically evaluate what is represented. In the Alpen ad, on the other hand, consumers are gently soothed with subtle suggestions, against which they have not developed a high resistance. After eating "adulterated" foods, a food with "natural goodness," which is "pure and simple," "wholesome and satisfying," must appear to be a desirable, healthful change from the old fare. A consumer can easily confuse the ad's incantations with representations suggesting that the product actually contains more nutrients than other foods. There is little for the consumer to objectively verify, after he has tried the product once, to help him decide if he should buy it again. The consumer may not so much be buying a cereal, as much as he is buying an "idea." The ad is unfair, for those people who cannot understand what exactly is motivating them to buy the cereal (*i.e.*, are they buying the cereal because they think that it is nutritionally superior, or are they buying it simply because they approve of the enticing words and pictures in the promotion?), and it is false if the implied promise of nutritional benefits is greater than what the cereal actually provides. These are questions of fact which the Commission, in its discretion, can determine.[77]

Further Drug Advertisements:

The Contac ad number (7) appears to be a very clear-cut violation of the F.T.C. Act. By mentioning ingredients found in competitors' products, and then emphasizing that they are *not* found in Contac, it would seem that there is a failure "to reveal facts material in the light of such representations," as well as a failure to indicate the "consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement."[78]

Ordinary consumers do not know what an antitussive, or an analgesic is.[79] Contac would have us conclude, in our ignorance, that these ingredi-

[77] *See* text accompanying notes 20-48 *supra*. *See also* William Freihofer Baking Co. 81 F.T.C. 921 (1972).

[78] 15 U.S.C. § 55(a)(1) (1963).

[79] An antitussive is a cough suppressant. An analgesic is a pain reliever, and included in that class would be common aspirin.

In Ocean Spray Cranberries Inc., 80 F.T.C. 975 (1972), the F.T.C. complained that Ocean Spray was confusing customers by using the term "food energy" in place of the more precise term, calorie. The best rule, obviously, is to require advertisers to use the terms that will be best understood by consumers. In some instances, it will be a technical term (i.e. "calorie," in place of "food energy"; "aspirin," in place of "pain reliever"). In other situations, it will be a generally descriptive term, such as "cough suppressant," in place of antitussive.

While this Comment was being prepared for publication, Contac has prepared revised ads, which do not use the objectionable technical terms.

For an amusing judicial discussion of the advisability of using the term "sugar pill" in place of the term "placebo," *see* FTC v. Sterling Drug, Inc., 317 F.2d 669, 676 (2d Cir. 1963).

ents are undesirable in a cold remedy. The ad also seems to constitute a clear case of an unfair competitive practice against other manufacturers, since the ad is definitely disparaging competitive products by innuendo.[80]

The second Contact ad (number [8]) is included, to suggest how inconsistent Contac's reasoning about drug ingredients really is. In the cold remedy ad, it was suggested that the identified but unexplained "additional" ingredients of the competitors' products were undesirable. Now, in the allergy ad, we are being told that we should take Contac if we suffer from hayfever, because, apparently, *one* of Contac's ingredients is effective against hayfever symptoms. The fact that seems to be overlooked is that if only one ingredient is effective against the symptoms, the other ingredients in Contac become superfluous. They become, really, much like the competitors' "additional" ingredients in their cold remedies. The second Contac ad would thus seem to be seriously inconsistent with the first. If such a practice is not "false," then surely it is unfair.

Ad number (9) improperly suggests that a drug product which seems to be designed to relieve the symptoms of one kind of ailment, can also be taken to relieve the symptoms of a different ailment. Advertising an arthritis remedy as effective against headache pain, it is submitted, does not "educate" the public in a beneficial way, but may instead encourage many consumers to misuse drugs inadvertently. Some viewers may become convinced that *any* arthritis remedy, even those prescribed by doctors, is effective against headaches; particularly since "Arthritis Pain Formula" could be misconstrued to be a generic term, instead of a brand name. After watching ad number (9), it seems very possible for an uncritical viewer to give a child a prescription drug for arthritis, to relieve the child's headache.[81]

Ad number (10), when compared with (9), involves a situation which is the opposite of that found in the two Contac ads, for we have two "different" remedies, one ostensibly formulated to relieve arthritis pain, while the other is very likely thought of as a headache remedy, now being advertised for "each other's" ailments. The fact that both products come from the same manufacturer reinforces the charges that many manufacturers create the same products, and then make artificial distinctions between them.[82] Here, we go a step further, for the "artificial distinctions" between the products are in effect being destroyed. Such advertising can only contribute to the general confusion that must exist in many people's minds about pain relievers, and should be condemned as "unfair" to consumers under the F.T.C. Act, even if the representations are not found to be factually false.

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[80] *See* text accompanying notes 41-55 *supra.*

[81] *See* note 22 *supra;* Carter Prods., Inc. v. FTC, 186 F.2d 821 (7th Cir. 1951), and text accompanying note 40 *supra.*

[82] *See* text accompanying notes 78-81 *supra; see also* text accompanying notes 43-55 *supra.*

The statement in ad number (9), that "A.P.F. has more pain reliever than most headache tablets," is descriptively vague. In ad number (7) for Contac, product ingredients were identified by name, but their effects were not explained or described. In ad number (10), on the other hand, we are given a description of an ingredient, and left to guess its name. The "pain reliever" referred to, presumably, is aspirin, but advertisers probably avoid identifying it by its most generally understood name, lest viewers be "misled" into buying plain aspirin instead of the advertised "combination of ingredients" product.[83]

There is another potentially dangerous encouragement in ad number (9), and in most of the ads which follow. This ad, as many other drug ads, shows one friend suggesting that another take some kind of drug. In many ads, the friend who is, in effect, "pushing" a certain remedy, may cite statistics or other information to back up his recommendation, such as "Phillips is the kind of laxative doctors recommend most often." Consumers watching television drug ads can generally assume that information which one "friend" is scripted to pass on to another is essentially accurate (unless, of course, we have an outright "false" ad!), but the real danger is that such ads teach consumers to be very uncritical about the source of their information on drugs. Consumers should be encouraged to get their information from more reliable sources than friends. Normally, one would think that a pharmacy would be such a source, but an ad for Phillips Milk of Magnesia makes a mockery even out of that suggestion.[84]

Laxatives: Ad number (11), of course, is objectionable from the standpoint that one friend, again, is "prescribing" a drug to another. But besides that ad number (11) is highly objectionable, for it is descriptively vague about the condition that laxatives are designed to treat. Do euphemisms such as "not in the swing," "out of sorts," "irregular," or "sourpuss" faithfully convey the impression that a laxative is to be taken to relieve constipation? It would seem quite reasonable for some viewers to conclude that such terms also suggest that laxatives are to be taken for the treatment of other ailments; ailments for which laxatives are not

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[83] *See* F.T.C. Proposed Rule of July 5, 1967, *supra* note 61; *see also* note 79 *supra.*

[84] In the ad a young girl, apparently just beginning to work at the drugstore, does not know which laxative to recommend to a customer. A friendly postman walks in, and advises her to recommend Phillips, for "it's the kind of laxative doctors recommend most often." Relieved, the girl walks back over to the customer, and recites what she has just learned. She does not indicate when or how she got the information. The customer, impressed, buys the Phillips.

The implication of that ad is disturbing, for in it an employee at a drugstore hears some unverified information about a drug, literally from a man off the street, and then without attempting to verify it in any way, she passes it on to a customer, without suggesting how potentially unreliable her source of information is. The customer is not as critical as she might be, but it is arguable that she should be able to rely on what she hears about drugs from someone who works at a drugstore.

designed to be used, such as diarrhea, and "sour" stomach.[85] These ads, in effect, dangerously encourage people to self-diagnose a variety of afflictions as treatable with laxatives.[86]

Over-the-Counter Sleeping Aids: The last two ads, numbers (12) and (13), are in the writer's opinion extremely objectionable. They are undoubtedly designed to encourage people who have *not* used drugs to help them get to sleep, to *start* using such drugs. There is a difference between encouraging a person who is already taking a drug for an ailment, to "switch" to another brand, and encouraging a person to introduce an entirely new kind of drug into his "medicinal diet." That difference at times may only be theoretical,[87] but these two ads do not make any pretenses about what they are trying to do: they do not try to persuade sleeping aid users to "switch" from one brand to another, they are trying to get non-users "started" on what really is "a whole new thing."

From the "aspirin age" of several decades ago,[88] this country has become plagued with drug excesses of all kinds. It seems to be quite justifiable to argue that, on account of this, advertisers should not

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[85] Phillips Milk of Magnesia ads at one time stressed that milk of magnesia is not only a laxative, but an antacid as well.

[86] *See* Ocean Spray Cranberries, Inc., 80 F.T.C. 975 (1972), for a case involving the use of the imprecise euphemism "food energy," in place of the term "calorie."

See also J. B. Williams Co., 68 F.T.C. 481 (1965) and Bristol-Myers Co., 74 F.T.C. 780 (1968). In those cases the advertisers were admonished for encouraging "self-diagnosis" and "self-medication."

The sheer number of laxative ads on television may also have the undesirable effect of convincing viewers that, with so much promotion, laxatives are to be used by a great many people fairly often. For example, while in a Phillips ad one friend phones another saying that, "for the first time in years, I need a laxative," there is the highly questionable slogan for Ex-Lax which is currently in use: "Everyone needs help once in a while." Millstein, *supra* note 29, at 492, observes that the F.T.C. does not have the power to "regulate the quantity, taste, social values, blatancy, or frequency of advertising; these are matters with which no federal agency is presently equipped to deal. A full national debate leading to new legislation is necessary if these matters are to be controlled."

[87] Cigarette advertisers and manufacturers have always insisted that through their ads they were not trying to encourage anyone to start smoking cigarettes, but, instead, they were interested in "winning over" people who had already decided to smoke cigarettes.

While that was the theory, it is interesting to recall some of the television programs which were sponsored by cigarette manufacturers. In the late 1950's, Marlboro Cigarettes sponsored *The Many Loves of Dobie Gillis,* a program which obviously appealed to younger viewers. A more callous example is Winston Cigarettes' sponsorship of the popular animated series, *The Flintstones.* On the *Flintstone* shows, unlike the *Dobie Gillis* series, the program characters actually did ads for cigarettes. It is difficult even to begin to imagine what sort of impact animation of "Fred" and "Wilma" shown smoking, and extolling the virtues of Winston Cigarettes, would have on countless young viewers.

In radio days listeners were encouraged to start smoking with such "match-ups" as Camel Cigarettes and Benny Goodman, in the late 1930's, and Frank Sinatra and Chesterfield Cigarettes, in the 1940's.

[88] THE ASPIRIN AGE (M. Leighton, ed. 1949) is a compilation of entertaining articles about America in the 1920's and 1930's. The title faithfully conveys the impression of a nation moving into a "higher gear." As the more frantic pace created new "headaches" for people, they turned more and more to their aspirin bottles to find relief.

be permitted to inundate the airwaves and periodicals with suggestions that people can solve more problems by taking more drugs.

The Sominex ads (number [12]) seem to be trying to sell viewers on the idea that it is not alarming for ordinary people to take drugs in order to get to sleep. The ads seem to stress wholesome people in wholesome surroundings encouraging each other to "pop" a Sominex at bedtime. No individual in any of the recent ads that were viewed had a word of caution to say about the practice, except to mention that Sominex is fine to take when one has "occasional" trouble. In the Sleep-Eze ad (number [13]), it is stated, "If you have occasional trouble [getting to sleep], then perhaps you'd like to know about Sleep-Eze." The dangerous omission in such a statement is, *how often* is occasional? Both ads seem to leave that question for viewers to decide themselves. In effect, the ads are encouraging viewers to self-diagnose what is an "occasional" sleeping problem, and then self-prescribe an over-the-counter drug for its treatment.[89]

The Sominex ad was found objectionable for not explicitly warning viewers that their insomnia might need a doctor's attention. Sleep-Eze, on the other hand, explicitly warns viewers at the beginning of its ad. Is the ad thereby made preferable over the Sominex ad? This writer's answer is that the Sleep-Eze ad ranks among the worst of all the ads considered, for it seems to motivate people to buy out of fear. What the copywriters have cleverly done, is to turn a desirable "affirmative disclosure" about the potential seriousness of a sleeping problem, into a very devious scare tactic.[90] The warning comes at the *beginning* of the ad. It is reasonable to assume that such an alarming statement will immediately draw the attention of a viewer who has been experiencing great difficulty in sleeping; the kind of person who should really see his doctor instead of his pharmacist, for a non-prescription sleeping aid. Once that suffering person's attention has been gotten, on comes the "soft sell" for Sleep-Eze. The ad encourages the viewer to downplay the potential seriousness of his insomnia, by suggesting to him, that if he has only "occasional" trouble, he may not need to see a doctor, after all, for Sleep-Eze is

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[89] *See* J. B. Williams Co., 68 F.T.C. 481 (1965); *see also* Bristol-Myers Co., 74 F.T.C. 780 (1968).

[90] In J. B. Williams Co., 68 F.T.C. 481, 542 (1965), the F.T.C. considered a drug ad which advised "check with your doctor":

> Despite respondent's argument to the contrary, we find that the implication in their advertising that a person can self-diagnose a deficiency of iron from his tiredness symptoms is not dispelled by the phrase "check with your doctor." In the first place the word "check" suggests that the viewer go to the doctor only to verify a condition that he is quite capable of recognizing himself. Moreover, this phrase is usually followed by another statement which completely obscures its meaning, such as "check with your doctor, and if you've been feeling wornout, because of iron-poor blood—take GERITOL." On the interpretation most favorable to respondents, this advertising suggests that the tired viewer have his condition checked by a doctor, and then treat himself according to a television statement. We fail to see how this unlikely suggestion clarifies the meaning of the advertisement.

See also Bristol-Myers Co., 74 F.T.C. 780 (1968).

available without a prescription. If a person is given a choice in diagnosing the seriousness of his problem, will he choose the more or less alarming alternative? It is not very much different from giving an overindulgent drinker the choice of describing himself as an "alcoholic," or as a "social drinker." In the case of an insomniac, the best way for him to reenforce his hope and belief that his problem is not serious, is for him to buy Sleep-Eze.

CONCLUSION

The advertising improprieties discussed in this comment seem to suggest that ads should satisfy four requirements:

(1) *Representations and Disclosures: When an ad makes representations, they must be accurate and complete. Certain disclosures may be required in ads for some kinds of products.*

Representations obviously should be accurate, and they should be complete, to avoid any possible misunderstandings. While it has been suggested that "each consumer be provided not only with the truth, but with enough information on which to base an intelligent and informed decision,"[91] this writer believes that a requirement to disclose such "useful" information should depend upon the kind of product advertised. With some products, it is difficult to imagine what sort of disclosures could be made, to help consumers make "rational" evaluations of them. One example to consider would be the advertising of potato chips. Such a "snack" or "junk" food was never meant to be bought for "rational" or "intelligent" reasons. The advertiser should thus be permitted to use "irrational" promotional techniques in potato chip ads, such as enticing pictures and jingles, attractive settings, layouts, models, and contagious humor, as long as consumers are not misled by the ads (misled, for example, into believing that potato chips are nutritionally valuable), and as long as there are no problems in the ads, as illustrated in the three remaining categories. Ads for products such as drugs, on the other hand, can involve certain dangers, which justify the inclusion of warnings. For example, an ad which would simply state, "Brand-X Sleeping Potion is now available at your favorite drugstore," makes no representations about the product, which might be said to require further elaboration, but it seems appropriate to require such affirmative disclosures as "Check with your doctor," and "Observe label directions."

(2) *Understanding the Representations or Suggestions: The ordinary consumer must be able to understand, from an ad, the meaning or significance of the representations or suggestions.*

An "accurate and complete" representation can be as misleading and

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[91] *See* Thain, *Drug Advertising and Drug Abuse—The Role of the F.T.C.*, 26 FOOD DRUG COSM. L.J. 487, 489 (1971). *See also* Thain, *Food Advertising: The F.T.C. Past Positions, and Signposts on the Road to the Future*, 28 FOOD DRUG COSM. L.J. 617 (1973).

harmful as an outright "false" representation, if the consumer cannot understand its meaning or significance. The distinction between this requirement and the first requirement will not always be well defined, since a consumer may not understand an advertiser's representations, because they are "incomplete." This second requirement covers ads in which the information is provided, but no conclusion from the information is drawn. For example, the breakfast cereal ads "accurately and completely" describe some of their ingredients, but the ads fail to indicate to consumers why it is good for them to eat cereal with such "natural" ingredients. The ad for Excedrin (ad number [1]), however, offers the conclusion that it is "more effective against pain," without providing appropriate preceding representations to warrant such a conclusion. Thus the Excedrin ad, unlike the cereal ads, is not "accurate and complete" in its representations, and it comes under the first category.

(3) *Understanding the Reason for Buying: The ordinary consumer must be able to understand, from an ad, why exactly he may be motivated to buy the product.*

This category deals with subtle suggestions in ads, which consumers may not consciously perceive, which persuade them to buy products. The Alpen ad (ad number [6]) is a good example of this. The Sleep-Eze ad (ad number [13]) seems to qualify, too, with its skillfully understated use of fear, to motivate purchases. The F.T.C. has only begun to explore "psychological advertising," and this field deserves more detailed consideration by legal writers.[92] It is sufficient to say that a consumer has a right to choose freely between products, and in order for him to be able to choose freely, he must be able to understand how advertisers may be attempting to persuade him. A consumer should be able to evaluate ads critically, and should not be victimized by skillful advertisers who may be able to plant persuasive suggestions in his less critical subconscious mind.

(4) *"Fairness and Ethics:" An ad should not use "unfair" practices, nor "encourage" consumers in questionable ways.*

This broad category takes in such things as unfair competitive practices, and questionable encouragements. This comment has found a variety of appalling suggestions made in ads:

(a) A "stronger" drug is a "better" drug (ad [2]).

(b) One can safely rely on friends' advice about drugs (ads [9], [11], and [12]).

(c) One can, in effect, solve more problems by taking more drugs (ad number [12]).

(d) One can safely determine, alone, whether a sleeping problem is serious enough to warrant a doctor's treatment (ad number [13]).

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[92] *See* Note, *Psychological Advertising: A New Area of F.T.C. Regulation,* WISC. L. REV. 1097 (1972). *See also* Pollay, *supra* note 1.

(e) Any vague sort of reference to a hospital, clinical, or university study guarantees that a product is reliable, and is probably preferable to other, similar products (ads [1], and [13]).

In closing, it is worth reiterating that since food and drugs have the potential of injuring health, instead of simply causing financial injury, increased vigilance of food and drug advertising is justified. Consumers have a right to be told more than they have been told about the products they ingest.

BARRY S. DONNER

EXPUNGEMENT IN OHIO: ASSIMILATION INTO SOCIETY FOR THE FORMER CRIMINAL

I. INTRODUCTION

IT HAS ONLY BEEN within the last 50 years that there has been official recognition of the debilitating legal and social consequences that result from a citizen's arrest and conviction. Legally imposed restrictions and the social stigma concomitant with a criminal record effectively operate to penalize ex-convicts even after they have paid their "debt" to society. A person with merely an arrest record suffers damage to reputation, impeachment as a witness, disabilities in acquiring schooling and professional licenses, more intense police scrutiny, and direct economic losses.[1] Consequences of a criminal conviction are more severe.[2]

Most criminal records are available to the general public; which fact gives rise to many of the consequences attendant to conviction of a crime. In recognition of this fact, several state legislatures have enacted laws commonly termed "expungement statutes."[3] These statutes seek to go beyond mere sentence and imprisonment in dealing with the problem of the criminal offender's relationship with society:

> Expungement and annulment are the product of the recent emphasis in corrections on rehabilitation. Both kinds of statutes are designed to restore forfeited rights and uplift the offender's status by

[1] Menard v. Mitchell, 420 F.2d 486, 490-91 (D.C. Cir. 1970).

[2] A concise examination is found in Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status,* 1966 WASH. U.L.Q. 147, 150-62 (1966) [hereinafter cited as Gough]. For an exhaustive study, *see Special Project—The Collateral Consequences of a Criminal Conviction,* 23 VAND. L. REV. 929 (1970) [hereinafter cited as *Special Project*].

[3] The use of the word "expungement" to describe these statutes is somewhat of a misnomer. To expunge "means to destroy or obliterate; it implies ... a physical annihilation." BLACK'S LAW DICTIONARY 693 (rev. 4th ed. 1968). None of the statutes call for actual destruction of records.