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THE SOCIAL WELFARE OF ADVERTISING TO CHILDREN

DENNIS CROUCH†

INTRODUCTION

The declining health of American children in recent years has been linked to television and specifically to advertisements directed at children. The Surgeon General of the United States recently reported that obesity is at an epidemic level in the United States.¹ This epidemic is marked by a doubling in the percentage of overweight children in America since 1968 and an even more significant increase in associated diet and weight-related illnesses.² The most significant illness is type II, or adult onset, diabetes, which has been associated with obesity.³

Researchers have found a number of causes for the dramatic rise in childhood obesity. A frequently cited cause is television. Children who spend more time watching television are more likely to be obese.⁴ Television affects children's health in two ways. First, children who watch television are less physically active and exercise less than children who do not watch television. Second, the

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1. David Satcher, *Foreword* to U.S. Dep't of Health and Human Services, *The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity* xiii (2001) ("Satcher, *Foreword*").

2. Sally Squires, *Obesity-Linked Diabetes Rising in Children: Experts Attending Agriculture Dept. Forum Call for New Strategies to Reverse Trend*, *Wash Post*, Nov 3, 1998, at Z07.

3. U.S. Dep't of Health and Human Services, *The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity* 9t (2001). Obesity is associated with increased risk of premature death, type II diabetes, heart disease, stroke, hypertension, gallbladder disease, osteoarthritis, sleep apnea, asthma, breathing problems, several forms of cancer, high blood cholesterol, complications of pregnancy, menstrual irregularities, hirsutism, stress incontinence, increased surgical risk, psychological disorders such as depression, psychological difficulties due to social stigmatization. *Id.*

4. Squires, *Obesity-Linked Diabetes Rising in Children* (sedentary lifestyle contributes to obesity) (cited in note 2).

more television a child watches, the more likely he is to consume foods advertised on television.⁵ A third, subtler link between television and obesity is that television teaches children to be passive intakers. This dumbing down of society tends to create individuals who will passively take what is offered rather than take charge of their own health. Overwhelmingly, the food advertised to children is “junk food:” high in calories, sugars, and fat and low in nutritional value.⁶ Advertisements promote excess consumption (in the dietary sense as well as in the economic sense) and rarely moderation.⁷

In recent years, advertising to children has become very big business. Billions of dollars are spent each year advertising to kids and a large portion of this advertising is for junk food.⁸ According to James McNeal, a promoter for the child advertising industry, almost every trade targets children in its advertisements.⁹ Consumer advocates, ethicists, and public health researchers have called for government intervention to stop advertisements that target children. These groups cite public health data on obesity as well as psychological research that has found children are unable to understand the context and meaning of the advertisements that they observe.¹⁰ Despite their adamant concern, child-advertising critics often ignore or discount the economic arguments surrounding the issue. The infrequency of these arguments may come from either a feeling that economic arguments fundamentally lack persuasiveness or a fear that the economic arguments will ultimately support child-focused advertising. However, economic analysis of law has become an important policy analysis tool and should be accepted or rejected on its merits.

The aim of this Comment is to approach the issue of advertising to children through an examination of economic incentives and efficiency. The Comment ultimately makes the claim that televised advertisement of products, such as junk food, directed toward children may be inefficient and tend to decrease social welfare. Although they may be compelling, this paper does not rely on the secondary negative externalities often associated with television, such as the cost of treating diabetes and heart disease. Rather, the inefficiency discussed in the Comment involves the informational qualities of advertising. Advertising directed towards young children can be thought of as providing false or misleading information because these children are unable to understand the purpose or underlying context of the advertisement. Although this type of misleading ad-

5. *Id.*

6. Dan Glickman, *Remarks at USDA Symposium on Childhood Obesity: Causes and Prevention* (Oct 27, 1998), at <<http://www.usda.gov/news/releases/1998/10/0445>>.

7. Eric Schlosser, *Fast Food Nation: The Dark Side of the All-American Meal* 42–57 (Houghton Mifflin 2001).

8. *Id.* at 47.

9. James U. McNeal, *The Kids Market: Myths and Realities* 13 (Paramount Marketing 1999).

10. See, for example, Rebecca A. Clay, *Advertising to Children: Is it Ethical?*, 31 *Monitor on Psychology* (Sept 2000), at <<http://www.apa.org/monitor/sep00/advertising.html>>.

vertisement usually happens unintentionally, the trusting naivety of children gives advertisers an incentive to attempt such misinformation.

Some commentators, as well as the Federal Trade Commission ("FTC"), have promoted a ban on some or all television advertising directed toward children. This Comment does not propound such a ban. A number of regulatory and proactive steps could be taken to prevent the inefficiencies. However, such policy analysis has not been attempted within these pages.

The Comment is divided into four parts. Part I introduces the current viewpoints on the issues surrounding advertising to children. These are broken down into ethical, public health, democratic, and first amendment concerns. An examination of advertising to children from an economic perspective is taken up in Part II. Specifically, Part II introduces principles of the economics of advertising and false or misleading advertising, then extends those principles into the area of advertising to children. Current law of unfair competition is examined positively as is the action taken by the FTC in the early 1980s to ban advertising to children. Part III introduces the idea of family economics, paternalism, and the parental shield. Finally, Part IV examines why current norms do not relegate advertising to children as a socially inefficient practice. The comment concludes that advertisers who advertise to children are exploiting a market inefficiency and thus may be decreasing social welfare.

PART I: CURRENT VIEWPOINTS ON THE ISSUE OF ADVERTISING TO CHILDREN

A. ETHICS AND PUBLIC HEALTH

Traditional policy arguments against advertising to children generally take either a public health or an ethical stand on the issue. Child advocates and psychologists have argued that children under the age of twelve years are not able to understand the idea of an advertisement. In other words, young children may be unable to identify the purpose or context surrounding the advertisement and the inherent biases of advertising.¹¹ Many children see advertisements as simply providing information or entertainment rather than as partisan salesmanship.¹² Although marketers are excited by evidence that children as young as twelve months are capable of "brand associations,"¹³ these associations may be the means of exploitation. Consumer advocates, such as Ralph Nader, along with public health experts have called on Congress to protect American children and

11. See Roy F. Fox, *Harvesting Minds* 50 (Westport 1996).

12. *Id.*

13. Sheila Long O'Mara, *Kids: A Powerful Market Force*, *Kids Today*, July-Aug 2001, at 27.

to put the health and emotional values of our children ahead of their economic values.¹⁴ They have asked for a ban on televised advertisements of junk food directed at children. Citing a broadcaster's duty to serve the public, moral advocates have attempted to demand ethical practice by corporate America.¹⁵

The power of television has created hope in educators, who believe that television can play a positive role in educating children. However, this power also makes children vulnerable.¹⁶ Children tend to view television programs as well as commercials simply as "informational programming."¹⁷ They are unable to distinguish between programming and advertising.¹⁸ The educational power of television is greatest among children who do not yet understand the biased purpose of advertising.¹⁹ By targeting children at an early age, advertisers can play upon children's systematic underestimation of long-term health risks to induce children to take irrational health risks. Contemporary bounded-rationality arguments, such as this one, are often discarded when applied to adults. However, the argument is clearly more powerful when applied to children. In addition to its health risks, television helps to instill an ethic of skepticism and commodification. From the advertiser standpoint, advertising to children is an excellent way to create brand recognition and consumer loyalty in a group ignorant of the ways of the market and compulsively impressionable.²⁰ The draw of children as an advertising market is increased by the fact that children have the largest market potential of any segment of consumers.²¹ However, the naivety of children is something to be cherished, not destroyed.

Ethicists have long called for reduced advertising to children. A group of psychologists has called on the American Psychological Association to restrict the use of psychological research by advertisers pitching snack foods and other products to children.²² Studies have shown that children under the age of 12 are unable to comprehend the idea of an advertisement: that it is intended to influence rather than inform.²³ Some groups have taken the position that advertising

14. See, for example, Ralph Nader, *Why is the Government Protecting Corporations That Prey on Kids?* (Sept 22, 1999), at <<http://www.nader.org/interest/092299.html>>.

15. *Id.*

16. Newton N. Minow and Craig L. LaMay, *Abandoned in the Wasteland* 166 (Hill and Wang 1995) ("Of all the research findings about children and television, the one on which there is virtually no disagreement is that small children do not understand the difference between programs and commercials.")

17. Federal Trade Commission, *FTC Staff Report on TV Advertising to Children* (1978), reprinted in *Advertising Age*, Feb 27, 1978, at 73-77 ("FTC, *Staff Report*").

18. Minow and LaMay, *Abandoned in the Wasteland* at 166 (cited in note 16).

19. FTC, *Staff Report* at 74 (cited in note 17).

20. Minow and LaMay, *Abandoned in the Wasteland* at 61 (cited in note 16).

21. James U. McNeal, *Tapping the Three Kids' Markets*, *American Demographics*, Apr 1998, at 37 (Children still have many spending years ahead of them. A brand seared into a child's mind will reap rewards for years).

22. Constance L. Hays, *Group Says Ads Manipulate Children with Psychology*, *Deseret News*, Oct 31, 1999, at M06.

23. FTC, *Staff Report* at 73 (cited in note 17).

to young children is inherently deceptive because children are unable to understand the mechanics of the marketplace.²⁴ Thus, some ethicists argue that advertising is inherently deceptive to children and therefore exploits children.²⁵ A similar commodification argument maintains that manipulative advertising undermines our cognitive faculties and thus our ability to determine our true needs.²⁶

On the other side of the argument are Libertarians, such as Justice Thomas, who see any regulation on advertising as a limitation of the right of free speech, regardless of the harm caused by the advertising.²⁷ Thomas fails to recognize that there are many other limitations on advertising, such as restrictions on false or misleading advertising and copyrights, which limit speech as well. In other words, the question of regulating misleading advertising is a tug-of-war between freedom of speech, strong property rights, and tortious conduct.

Alongside ethics, public health concerns create a strong argument against advertising to children. The actual costs resulting from obesity are great.²⁸ Public health advocates argue that the externalities of television are creating an epidemic in America and that this epidemic outweighs any benefits gained by advertising.²⁹ There has been a weight-gain trend, which took off in the 1980s,³⁰ at the same time as the "deregulatory" changes in Federal Communications Commission ("FCC") and the FTC's advertising policy beginning in the Reagan years. Thus, in the past twenty years, the number of overweight children has nearly doubled.³¹ The effect of obesity on chronic disease risk, morbidity, and mortality are well documented.³² The difficulty in treating obesity suggests that increased preventive measures be employed early in a child's life.³³ Today, eighty

24. *Id.*

25. Clay, *Advertising to Children*, 31 *Monitor on Psychology*, at <<http://www.apa.org/monitor/sep00/advertising.html>> (One harm caused to children has been termed "narcissistic wounding") (cited in note 10).

26. Paul C. Santilli, *The Informative and Persuasive Functions of Advertising: A Moral Appraisal*, 2 *J Bus Ethics* 27, 29 (1983).

27. *Lorillard Tobacco Co. v Reilly*, 1121 S Ct 2404, 2440 (2001) (Thomas concurring).

28. David B. Allison, Raffaella Zannolli, and K.M. Venkat Narayan, *The Direct Health Care Costs of Obesity in the United States* *Am J Public Health* 1194 (1999) (The most thorough estimates of the total cost of health care costs of obesity seem to be between 4.3% and 5.7% of total health care costs. This results in costs of approximately \$50 billion annually). The lower estimates found by the authors of the study are generated when the higher mortality rate of obese people is taken into account. Essentially the authors claim that in some cases obesity reduces health care expenditures because it kills people who would otherwise be alive and potentially spend money on health care.

29. See Schlosser, *Fast Food Nation* at 262 (cited in note 7).

30. David Goldberg, *Super-sized Kids: The trend toward fast food and little exercise is taking a widening toll on children*, *Atlanta J & Const*, Aug 26, 2001, at 1F.

31. Satcher, *Foreword* at xiii (cited in note 1).

32. Marion Nestle and Michael F. Jacobson, *Halting the Obesity Epidemic: A Public Health Policy Approach*, 115 *Pub Health Rep* 12, 12 (2000).

33. *Id.*

percent of commercials directed toward children are for junk food.³⁴ The current social environment generates a pressure to increase energy intake³⁵ in the face of a decline in physical activity.³⁶ The convergence of these factors has allowed researchers to lay a large part of the blame for the declining health of Americans and American youth on advertising.³⁷

B. SHIFTED EFFICIENCY

Free market economists such as Coase have long argued that the current state of television is not efficient relative to viewers; rather it is only efficient within the broadcaster-advertiser relationship.³⁸ The broadcasters and advertisers form a producer-consumer relationship where the broadcaster sells viewer eyeballs to the advertisers. The current system disregards any utility gained or lost by the commodified viewers just as the preference of a head of lettuce is not taken into account at the grocer.³⁹ Obviously, broadcasters must consider consumer interests on some level because consumers must be induced to watch the programming.

Advertisers shift what is seen on television by operating as a censor.⁴⁰ Content desired by advertisers is not the same as that desired by the viewers or media consumers.⁴¹ The financial support provided by advertising subverts the democratic process.⁴² Sunstein has eloquently developed the deliberative democracy justification for the regulation of television.⁴³ Sunstein's argument is that even if broadcasters are producing what consumers "want" at the time of the broadcast, there are other reasons for pushing broadcasters to develop programs that are more edifying. For example, it is conceivable that the market could dictate that it is inefficient to give any time or coverage to political candidates or that the market finds the showing of news to be inefficient. However, the non-coverage of these items would be entirely anti-democratic and perhaps dangerous.⁴⁴

34. Glickman, *Remarks at USDA Symposium on Childhood Obesity*, at <<http://www.usda.gov/news/releases/1998/10/0445>> (cited in note 6).

35. James O. Hill et al, *Introduction*, *Nutrition Reviews* S4, S5 (Mar 2001).

36. Sarah L. Booth, *Environmental and Societal Factors Affect Food Choice and Physical Activity: Rationale, Influences, and Leverage Points*, *Nutrition Reviews* S21, S22 (Mar 2001).

37. Nestle and Jacobson, 115 *Pub Health Rep* at 12 (cited in note 32).

38. Ronald Coase, *Testimony before the FCC* (Dec 1959), reprinted in 4 *Study of Radio & T.V. Broadcasting* (No. 12782) (1959).

39. Edwin Baker, *Advertising and a Democratic Press* 25–87 (Princeton 1994). See also Cass R. Sunstein, *Television and the Public Interest*, 88 *Cal L Rev* 499, 514–15 (1999).

40. Baker, *Advertising and a Democratic Press* at 3 (cited in note 39).

41. Sunstein, 88 *Cal L Rev* at 514 (cited in note 38).

42. See generally Baker, *Advertising and a Democratic Press* (cited in note 39).

43. Sunstein, 88 *Cal L Rev* at 499 (cited in note 39).

44. Jean Dreze and Amartya Sen, *India* 76 (1995) (No famine has ever occurred in a democratic country with a press that keeps the populace informed and criticizes the government).

C. FIRST AMENDMENT CONCERNS

Although this Comment is not about constitutional law, it is useful to have some grasp on the First Amendment issues that would be put forth to challenge any further regulation of television advertising.⁴⁵ In a recent case, *Lorillard Tobacco*,⁴⁶ a Massachusetts law, which regulated advertising of tobacco, was struck down as unconstitutional. The Supreme Court, in a 5-4 split, found that the law banning visible tobacco advertising within 1000 feet of a school or public park was preempted by federal statutes and violated the First Amendment's guarantee of free speech.⁴⁷ Because the sale of tobacco is lawful to adults, the court held the tobacco advertisers have a protected interest in informing potential adult customers.⁴⁸

In his concurrence, Justice Thomas could find "no principle of law or logic" to differentiate between banning tobacco advertising and banning fast food advertising.⁴⁹ He noted that tobacco is "the leading cause of preventable death in the United States" and that "the second largest contributor to mortality rates is obesity."⁵⁰ Thomas found it absurd that fast food advertising could be regulated, and thus concluded that the Massachusetts ban on tobacco could not pass constitutional muster.⁵¹

Despite Thomas's musings, obscene, indecent, and commercial speech all enjoy reduced First Amendment protection from that accorded public or political speech.⁵² A statute can regulate or ban commercial speech if the speech does not concern lawful activity or is misleading and the government has a substantial interest in regulating the speech.⁵³ In addition, any regulation must directly advance the governmental interest asserted and must be narrowly tailored to serve that interest.⁵⁴ The *Lorillard* court, following the *Central Hudson* test, found that the ban on outdoor advertising was more extensive than necessary.⁵⁵

In an aside, Thomas noted that the FCC might have more power to regulate

45. In a showdown between Congress and advertisers, it is possible that the advertisers would choose to take on more responsibility for self-regulation. There is currently a self-regulatory board operating under the auspices of the Better Business Bureau ("BBB"). The BBB sponsors the Children's Advertising Review Unit and the National Advertising Review Council on cooperation with the advertising industry. See *Better Business Bureau: Guidelines for Children's Advertising* (Dec 2001), at <<http://www.caru.org/carusubpgs/guidepg.asp>>.

46. 1121 S Ct at 2404.

47. *Id* at 2439.

48. *Id* at 2430.

49. *Id* at 2440.

50. *Id* at 2439 (internal citations omitted).

51. *Id* at 2440.

52. *Central Hudson Gas & Elec. Corp. v Public Services Commission*, 47 US 557, 563 (1980).

53. *Id* at 566.

54. *Id* at 569-70.

55. *Lorillard Tobacco*, 1121 S Ct at 2425 (The ban would prohibit advertising in about 90% of the useable space in the three largest cities of Massachusetts).

broadcast speech than the state has to regulate print or outdoor advertising because of “special justifications.”⁵⁶ In addition, the Supreme Court has used the protection of children as justification for a shift in the bounds of allowed regulation of speech.⁵⁷ Finally, courts have consistently restrained commercial speech that is false or misleading.⁵⁸

PART II: ECONOMICS OF ADVERTISING TO CHILDREN

An economic analysis of advertising to children reveals that such advertising can be thought of as a form of false or misleading advertising, which creates inefficiencies within the market. This section of the Comment outlines the general economic tools used to analyze false advertising and the current law on false advertising. Those tools are then used to analyze advertising to children.

A. ECONOMICS OF FALSE ADVERTISING

Modern economic theory of the phenomena of the efficient market relies upon a presupposition of the free flow of information to the consumer. In a truly efficient or perfect market, all consumers would have perfect information⁵⁹ and sellers would be able to discriminate between customers according to their valuation of the good. Information allows rational consumers to maximize their utility by selecting goods being sold at or below their individual utility. Of course, perfect information only exists in the minds and models of economists.

For many years, advertising was seen as a waste of resources, providing little if any utility for the consumer.⁶⁰ Instead of providing information, advertising was a force that shaped and changed consumers’ interests and created demands where there were none before.⁶¹ The traditional view changed in the 1970s through the work of Stigler, Nelson, and others.⁶² Nelson found that the infor-

56. Id at 2436 (Thomas concurring in part and in the judgment) (quoting *Reno v American Civil Liberties Union*, 521 US 844, 868 (1997)). See also United States Communications Act of 1934, 47 USC §§ 151, 307 (“Public Interest” responsibility).

57. See *New York v Ferber*, 458 US 747, 747 (1982). Because the state had a compelling interest in protecting children and the value of child pornography was *de minimis*, the protection of children overrode the First Amendment right to access to pornography. Id at 762–63.

58. See, for example, *U-Haul Intl, Inc v Jartran, Inc*, 793 F2d 1034 (9th Cir 1986).

59. This does not imply that consumers would be omniscient, but that they would know all information that they needed. This simplistic solution does not hold for many special cases that are termed market failures. For example, externalities caused by consumers’ choices may cause the consumer to make choices that decrease the efficiency within the system.

60. Henry C. Simons, *Economic Policy for a Free Society* 71 (Chicago 1948) (“Profits may be obtained either by producing what consumers want or by making consumers want what one is actually producing.”).

61. The more conventional view of advertising is that it changes tastes, manipulates consumers, creates brand loyalty, and works on the subconscious to create pleasant associations with the product. Its function is to persuade not to inform. By creating brand loyalty, advertising enables producers to differentiate their products and charge higher, monopolistic prices.

62. See generally Phillip Nelson, *The Economic Consequences of Advertising*, 48 J Bus 213 (1975); Phillip

mational quality of advertising existed even in advertisements that were seemingly devoid of content.⁶³ He argued that the informational quality of commercial advertising increases rather than decreases the likelihood of having an efficient market system.⁶⁴

Today, advertisements are often thought of as providing “search” information, which helps people find their preferred good. In other words, advertising provides information for the consumer to help make a better decision or to spend less time searching for the products that match the consumer’s needs and willingness to pay. In essence, there are two costs to buying any good: the actual cost of the good and the search cost of finding the right good. Even advertisements that do little more than state the name of the product provide information by reminding consumers about favorable experiences with the advertised product.⁶⁵ The reminder advertisement allows a consumer to know which good is favored without having to take the time or energy to perform a self-guided search.

Advertisements can also stimulate the economy by increasing consumption.⁶⁶ Rational consumers who consider both the cost of the good and the cost of finding the good will not make a purchase when the combined cost of these two elements is greater than the individual utility for the good. When advertising reduces the cost of finding the good, the total cost of the good is correspondingly reduced.⁶⁷ A traditional good with elastic demand would see an increase in demand because of the reduced cost. In this sense, the cost of finding the good is akin to an artificial tax on the good and advertising is a method of reducing the tax. When a tax alters consumer behavior, economists say the tax creates an inefficiency and any reduction in the tax will increase market efficiency.

Although advertising can provide information and stimulate consumption, it can also have a “darker side.”⁶⁸ If advertising that provides valuable information

Nelson, *The Economic Value of Advertising*, in *Advertising and Society* 43 (NYU 1974).

63. Nelson, *Advertising and Society* at 47–52 (cited in note 62).

64. *Id.* at 53–55.

65. It can be argued that a person who is choosing a product without any first-hand knowledge of the various products available should purchase the product that is most highly advertised because it is more likely to be the best product. This conclusion comes from the idea that the informational purpose of many advertisements is simply to serve as a reminder of experiences that a consumer may have had with the product. Since it would be counter-productive to remind consumers of bad experiences that they have had with products, firms will only heavily advertise products with which people have good experiences. Finally, if others had good experiences with the product, it is likely that you will also have a good experience.

66. A stimulated economy is not necessarily an efficient economy. If purchases are being made because of false information, consumers and society may be left worse off than if the purchases had not been made.

67. There are several implicit assumptions within this analysis including (1) the purchase price of the advertised good has not been correspondingly increased and (2) the cost to consumers associated with observing and choosing between competing advertisements is not greater than the cost of finding the goods on their own.

68. Baker, *Advertising and a Democratic Press* at 5 (cited in note 39). Baker mentions externalities in particular: “It is telling to note that in 1979, tobacco and liquor companies were the two largest magazine

for the consumer increases the efficiency of the market, deceptive advertising correspondingly decreases market efficiency by taking information away from the consumer.⁶⁹ When a consumer is misled, his search costs needed to find the good he desires may increase and he may purchase goods for prices above his utility or alter his behavior from what it would have been without the deceptive advertising.⁷⁰ In addition, the existence of false advertising causes consumers to become skeptical of advertisements in general or a particular class of goods or advertisements.⁷¹ This skepticism leads to market inefficiency because the truthful content within advertisements is no longer trusted, leaving consumers without the information they need. In addition, it takes energy to act as a skeptic.⁷² Therefore, when consumers become skeptics, advertising in general becomes less valuable.

As with any activity, there is likely to be an "optimal" level of false advertising. False advertising can be over-deterred and under-deterred. While under-deterrence would lead to too much false advertising, over-deterrence can lead to externalities by trying to avoid false advertising. For example, a harsh penalty for false advertising could result in over-precaution by advertisers. In other words, firms will take excessive measures to avoid committing an over-deterred activity. In the context of over-deterred false advertising, a firm may stop advertising altogether or avoid giving any information in advertisements in order to avoid a strict penalty for false advertising.⁷³ The result is a dearth of information in the hands of consumers. Therefore, it becomes a tradeoff between the amount of false advertising that society is willing to tolerate and the amount of information desired. Although consumer skepticism creates inefficiencies, it could be optimal to have some level of consumer skepticism rather than going to the expense of

advertisers." Id.

69. In addition to the problem of taking information away from the consumer, false or misleading advertisement also creates an unnatural discrepancy between the information held by the consumer and that held by the firm. See, for example, Note, *Replacing Skepticism: An Economic Justification for Competitors' Actions for False Advertising Under Section 43(a) of the Lanham Act*, 77 Va L Rev 563 (1991); Nelson, *Advertising and Society* at 43 (cited in note 62); Nelson, 48 J Bus at 213, 214 (1975) (cited in note 62); Ellen R. Jordan and Paul H. Rubin, *An Economic Analysis of False Advertising*, 8 J Legal Stud 527 (1979).

70. The market also seems to realize that false advertising is inefficient. For example, Wall Street recognizes that false ads are inefficient and responds accordingly when a false advertiser is flushed out. See Tamarra L. Brown, *When FTC Balks At Ads, the Market Appears to Listen*, Wall St J, June 7, 1988, at 1 (An FTC study found that stocks of companies who were charged with false advertising dropped an average of 2.5% within five days of a public allegation of false advertising).

71. Nelson, *Advertising and Society* at 60-62 (cited in note 62). Nelson believes that this skepticism is a good thing. He claims that advertisers will know of the potential of creating excess consumer skepticism and would thus avoid creating such skepticism in the public. He misses the free-rider problem that arises because one false ad may benefit a particular firm while the skeptic backlash is directed to advertising in general or advertising within a particular class of advertisements. Id.

72. See Matthew G. Nagler, *Rather Bait than Switch*, 51 J Pub Econ 359, 363 (1993).

73. This assumes that firms or courts would have trouble drawing the line between truth and falsity. If they could easily distinguish between false and true advertising then there would be no reason to link a reduction in false advertising to a reduction in informational or good advertising.

eliminating all false or misleading advertising.

Nelson predicts that the level of false advertising would be reduced if there were no regulation on false advertising at all.⁷⁴ His argument parallels a deliberative democracy framework. When the government prevents false advertising, consumers tend to be less skeptical about advertising because they believe that the government is stopping all the false advertising. This lack of skepticism gives firms more incentive to advertise falsely because, as a whole, consumers are more gullible. Without government protections, consumers know that every advertisement is suspect and should not be believed. Therefore, in a world without false advertising prohibitions, advertisers must build a reputation of reliability with consumers before they would be trusted.⁷⁵

There should be some distinction between purposeful or willful false advertising and merely negligent false advertising or false advertising, which occurs even after taking cost effective precautions. For willful false advertising, we should not require consumers to have any level of skepticism. A coherent system should attempt to prevent all willful false advertising. Willful false advertising could be thought of like other intentional torts. Just as there is no contributory negligence defense in intentional torts, firms that falsely advertise should not be able to avoid sanctions because a consumer could have been skeptical. It is possible that firms will no longer find it profitable to advertise without false advertising. This is like potential criminals who are deterred from committing crimes.

B. CURRENT LAW ON FALSE ADVERTISING

Courts have consistently acted to restrain false or misleading commercial speech.⁷⁶ However, private suits are unavailable, except as competitor suits. The FTC has power to make general rules and take specific actions against false advertising.⁷⁷ Specific actions target specific advertising by companies. General rules set the industry standards for advertisers.⁷⁸ In the wake of a 1978 FTC attempt to ban televised advertising directed at children, Congress amended the statute to block the FTC from making any rules regarding advertising to chil-

74. Nelson, *Advertising and Society* at 58 (cited in note 62)

75. Query whether this is empirically sound.

76. See, for example, *U-Haul Int'l*, 793 F2d at 1034.

77. The Federal Trade Commission Act, 15 USC § 55(a)(1), defines false advertising as follows: The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also 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.

78. 15 USC § 57.

dren.⁷⁹ The FTC can protect adults by promulgating general rules, but it is barred from taking any general action to protect children. The people who may need the most protection cannot be protected.

In 1978, the FTC published a staff report advocating a federal ban on television advertising directed at children who are under eight years old.⁸⁰ The report recognized that young children could not perceive the selling purpose of television advertising and declared advertising directed towards young children to be both unfair and deceptive under § 5 of the FTC Act.⁸¹ Although final FTC action was blocked by Congress after a fierce response by industry,⁸² child advocates continue to hold the report up as a beacon.

Subliminal advertising is illegal as deceptive because this type of advertising attempts to bypass the ordinary defense of skepticism, which adults are presumed to have when advertising is being directed at them.⁸³ Advertising to children could be seen as deceptive since children do not yet have strong skepticism defenses.

C. MARKET FORCES PROVIDE INCENTIVES TO FIRMS TO AVOID SOME FALSE ADVERTISING

Although academics believe the incentives firms have to advertise deceptively are small when compared with the disincentives to advertise falsely,⁸⁴ some firms might benefit from an inefficient system. Economists have shown that under reasonable assumptions, firms have a quite stable and “fully rational equilibrium” that uses a market strategy based upon false advertising.⁸⁵ For example, some firms may profit from false and misleading advertising because such advertising leads to sales that would not have been possible without the misleading advertisements.

The market itself provides some incentives to advertisers to avoid advertising falsely. The disincentives to falsely advertise are based on the notion that an advertiser who is caught misleading the public will lose sales either directly or

79. Federal Trade Commission Act, 15 USC § 5(h).

The Commission shall not have any authority to promulgate any rule in the children's advertising proceeding pending on [May 28, 1980], or in any substantially similar proceeding on the basis of a determination by the Commission that such advertising constitutes an unfair act or practice in or affecting commerce.

80. FTC, *Staff Report* at 73, 77 (cited in note 17).

81. *Id.* at 75.

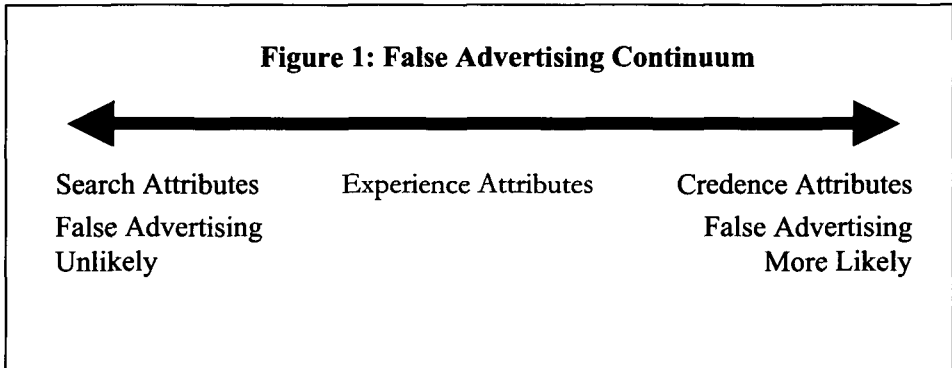
82. See generally FTC, *Staff Report* at 73 (cited in note 17); *Execs call children's tv proposal 'drastic,' Advertising Age*, Dec 11, 1978, at 3.

83. FTC, *Staff Report* at 75 (cited in note 17).

84. Nagler, 51 J Pub Econ at 364–72 (cited in note 72) (Arguing that the disincentives to advertise deceptively are based on unjustified assumptions about consumer rationality). Nagler presents a model where consumers manifest a form of bounded rationality and finds that under these equally cogent assumptions, some firms will have incentive to advertise deceptively, causing a net welfare loss to society. *Id.*

85. See, for example, Edward P. Lazear, *Bait and Switch*, 103 J Pol Econ 813 (1995).

indirectly through a loss of good will. Therefore, the more likely it is the public will realize an advertised claim is false, the less likely an advertiser will make a false claim. As seen on a false advertising continuum, there are some attributes that are less likely to be misrepresented and those more likely to be advertised in a misleading fashion.⁸⁶ Figure 1 shows that this continuum has been divided into three types of attributes; search attributes, experience attributes, and credence attributes.



Search attributes are those attributes that a consumer can easily discern at a low cost before purchase. For example, the color of a product would be considered a search attribute.⁸⁷ Firms are least likely to attempt to mislead the public as to search attributes because they would be easily caught.⁸⁸

Experience attributes are more costly for a consumer to measure and generally cannot be discovered until after the purchase has been completed. For example, the contents of a tin can would be an experience attribute because you cannot be sure of what is inside the can until you purchase the can, take it home, and open it. A firm would still be reluctant to falsely advertise experience goods. A rational consumer could be fooled into purchasing the experience good once, but not twice. Once the consumer has taken the good home, he can determine

86. Philip Nelson distinguished between search attributes and experience attributes. Search attributes are those that can be examined in a short time or otherwise at low cost to the consumer before purchase. In contrast, experience attributes cannot be ascertained until after the purchase. For example, a can of food is an experience good. Philip Nelson, *Information and Consumer Behavior*, 78 J Pol Econ 311, 312 (1970). Darby and Karni introduced an additional category of "credence" goods, whose quality may not be easily determined even after purchase. Michael Darby and Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J L & Econ 67, 68–69 (1973).

87. There are many cases of misleading color brought about by packaging. When there is packaging covering the actual product then many attributes of the product would shift from search attributes to experience attributes.

88. Some misleading advertising will still exist for search attributes in the equilibrium. By exaggerating the quality of a search attribute up to a point, consumers will still purchase the lower quality product rather than spend more transportation and search costs to find the product that they most desire at another outlet. Nelson, *The Economic Value of Advertising*, in *Advertising and Society* at 48–49 (cited in note 62).

that it is not as advertised.⁸⁹

Credence attributes are very costly to measure and might not be measured until after some extended delay, if at all. For example, it is difficult for a consumer to discover whether changing the oil in her car every 3,000 miles extends the life of her car. Credence attributes are at the opposite end of the spectrum from search attributes. Correspondingly, firms have the most incentive to mislead the public about credence attributes because it is unlikely that they would be caught in the act.

The final point is that a rational consumer should realize how the false advertising continuum works and act accordingly. Therefore, rational consumers should be more likely to believe search attribute claims and disbelieve credence attribute claims. In addition, a rational consumer should not believe any advertising coming from a “fly by night” or one-time business. These theories of market-based disincentives to deceptive advertising rely heavily on the premise that consumers are knowledgeable, intelligent, and make full use of their intelligence in all their decisionmaking.⁹⁰

D. ADVERTISING TO CHILDREN IS A FORM OF INEFFICIENT FALSE OR MISLEADING ADVERTISING AND IS MORE LIKELY TO BE ENGAGED IN THAN OTHER TYPES OF FALSE ADVERTISING

This section makes two key points. First, children are more susceptible to false advertising, giving advertisers incentive to advertise falsely to children. Second, regardless of intention, advertising to children is a form of false or misleading advertising. These two points differ in terms of the intention of the advertiser. However, the level of intent to advertise falsely makes no difference in terms of the efficiency of the system. Information failures and the propagation of false information create market inefficiencies regardless of whether the advertiser intends to deceive. The costs of false information, embodied by higher search costs and the consumer skepticism of associated advertising, does not depend upon advertisers’ intent.

As already mentioned, advertisers are more likely to advertise falsely when they can get away with it. Firms are more likely to purposely advertise falsely to children because children are less able to distinguish between false and truthful advertising. Ideas and practices that an adult can judge in a straightforward

89. This rationale works only for repeat purchase goods. A seller of a single purchase good only plans for a consumer to purchase his product once. If the product does not live up to the standard, the seller feels no market based disincentive because he has already met his sales goal.

90. See Nagler, 51 *J Pub Econ* at 362 (cited in note 72). After reviewing Posner’s four mechanisms of market based deterrence and finding that they each rely upon fully rational consumers, Nagler introduces a “rationality cost” is incurred by consumers who chose to be fully rational. *Id.* This rationality cost could be considered the energy needed to be skeptical.

manner may not be as easy for children to judge.⁹¹ Children have less much experience in the commercial world and it is not clear whether they should be introduced to fierce capitalism at such an early age.⁹² Children are less often repeat customers. This is important because the economic theory of advertising depends upon the idea that there are repeat customers. Since children are constantly maturing, it is unlikely they will be repeat players to any large extent. The arguments made by ethicists and psychologists in Part I apply here in a slightly modified form. Rather than being unethical to mislead children, it is inefficient.

An advertiser may genuinely want to impart information to consumers, but may, for some reason, fail to do so or even mislead viewers. Despite the best intentions of the advertiser, the consumer may still be misled. This can be explained by a number of phenomena: mistake, poor skill in creation of advertisements, or poor skill or inexperience on the part of the consumer.

The information failure caused by inadvertent false advertising can also be expected when the viewer is a child. The American Academy of Pediatrics has declared that advertising directed at children is exploitive of children under age eight because it is inherently deceptive.⁹³ It is inherently deceptive not because of the intent of the advertiser but because children are unable to fully realize the nature and quality of advertisements. The market mechanisms that prevent false advertising breakdown when applied to children because children do not fit the assumption of fully rational and skeptical consumers.

Advertising pushes children to make inefficient purchasing choices. Even if we assume, counterfactually, that children fully understand advertising for what it is, there is still the problem of their limited knowledge base and mental construct of the world compared to adults. An advertisement promotes only a limited aspect of the whole picture: the aspect that is most favorable to the advertiser. This bias leaves the children with only a small amount of information. Adults who have had more experience and have more knowledge would be able to fit the information from the advertisement into their mental construct of the

91. Rose K. Goldsen, *Why Television Advertising is Deceptive and Unfair*, Et cetera at 354, 355 (Winter 1978) (We should not expect for children to understand that "Ronald McDonald is a trademarked property, created by a team of employees in an advertising agency paid to act in the interest of the McDonald Corporation."). The FTC's stand is that childhood

is an immature stage of development and children [are] a vulnerable population over whom advertising has an unfair advantage. Since the information children command and the standards of judgment they apply are, by definition, childish, they are inadequate for rational assessment of most advertising claims and appeals. The sophistication needed to realize fully that what television commercials show and tell cannot always be taken at face value develops slowly. It is not a childhood characteristic, so special protection is necessary.

Id.

92. Id. ("It is not reasonable to assume that children at this stage of development possess a sound enough background in nutrition to be able to evaluate the many commercials glamorizing food and food habits which may well involve risks to health and well-being.")

93. American Academy of Pediatrics, *Policy Statement: Children, Adolescents, and Television*, 95 Pediatrics 295, 295 (1995).

world, treating the advertisement as just another grain of information. For children, the advertisement is a much larger percentage of their total knowledge. Biased information without a fixed reference point tends to create a mean information level closer to the bias than any true information point.⁹⁴ The small amount of information available will also increase the variance of the viewpoints held. Decisionmaking under these conditions is suboptimal, resulting in a large number of misled children.

E. IS FALSE ADVERTISING HARMFUL TO CHILDREN?

Economists such as Nelson have doubted the harmful effect of false advertising.⁹⁵ Although not speaking specifically about advertising to children, Nelson argues the deception involved in false advertising causes consumers to make choices they should make anyway.⁹⁶ This is a difficult argument to make when discussing the effects of advertising on children because, at least to some extent, children fail to understand the long-term (and often the short-term) consequences of the actions they take. Like tobacco advertising, junk food advertisements ask consumers to gamble with their health. Children are encouraged by advertising to make decisions detrimental to their future even though they do not have the capacity to avoid such influence. Creating skepticism at such an early age robs them of part of their humanity and creativity before giving them a chance to grow natural defenses.

PART III: ECONOMIC ANALYSIS OF THE FAMILY AS A UNIT INDICATES THAT ADVERTISING TO CHILDREN MAY BE SOCIALLY INEFFICIENT

Gary Becker analyzed traditionally non-market aspects of the family using a traditional economic approach.⁹⁷ Becker introduced “unitary” or “common-preference” models for analysis of intra-family resource allocation.⁹⁸ Such models assume the family members act to maximize a single utility function. In other words, the family can be thought of as a firm. A corporation’s goal to maximize monetary profits “parallels the family’s goal of maximizing the utility, welfare or

94. From what we know about the way that children interpret advertisements, we can hypothesize that children take the information gleaned from the advertisement as a starting point without compensating for the inherent bias in the message received. This will further increase the level of misinformation held by the children viewers. Commentators have argued that this bias is present even within adults and some have called for independently sponsored consumer information services. See, for example, James E. Meade, *The Intelligent Radical's Guide to Economic Policy* 50 (London 1975).

95. Nelson, *Advertising and Society* at 50 (cited in note 62).

96. Id (“Consumers who actually believe paid endorsements are the victims of the most benign form of deception. They are deceived into doing what they should do anyhow.”).

97. Gary S. Becker, *A Treatise on the Family* ix (Harvard 1981).

98. Id.

happiness of its members.”⁹⁹ Becker argued that roles should be (and have been historically) divided within the family to achieve some optimal mix of resource allocation. Individuals who are relatively better at certain tasks should perform those tasks.¹⁰⁰ Children may not be the best fit for doing market research to determine the best allocation of family resources. Children are more self-centered and tend to focus on what is good for them rather than what is good for the whole family.

A. LACK OF INFORMATION BY ONE MEMBER HURTS THE FAMILY AS A WHOLE

If children do not understand advertisements, then advertising will result in family purchases that would not have been made otherwise. This result hurts the family because those purchases, made because of mistaken beliefs, do not meet the family’s utility function. There are two diverging stories about the effects in a family where one member (the child) has false information. The first view sees the family serving as a buffer to prevent the ill informed member from causing damage to the family by acting on misinformation.¹⁰¹ Upon learning of the misinformation, the family could provide the child with better information or deny the child access to family resources. Either choice should serve to limit the number or importance of the decisions made by the misinformed member. This scenario is more likely to play out in a setting where the misinformation is expected and family members have the time to discover and adjust accordingly.

The second view sees the family serving as an amplifier, allowing greater misinformation effects than if the child had not been in such a unit.¹⁰² This scenario is more likely to exist when the purchasing power of the family as a whole is much greater than that of the child, when the other family members are unable to properly educate the child with good information, or where family members choose to act upon the misinformation either through a lack of knowledge or a sense of appeasement. The willingness to appease children has been termed the “nag factor” by marketers.¹⁰³ In fact, the purpose of most advertising to children is to push families to become amplifiers by creating naggers out of the children.¹⁰⁴ These advertisers play upon the profound feeling of helplessness held by many parents and a fear that if they deny their children, the children will become social outcasts or social isolates.¹⁰⁵ Seeking their own best interests,

99. Margaret F. Brinig, *From Contract to Covenant: Beyond the Law and Economics of the Family* 11 (Harvard 2000).

100. Becker, *A Treatise on the Family* at 14–37 (cited in note 97).

101. Id.

102. Id.

103. FTC, *Staff Report* at 74 (cited in note 17).

104. Id.

105. Id at 75.

firms are obliged to go after the children's market. The effect is to undermine the ability of parents to control their children and to teach a preference for foods that provide better nutritional value.¹⁰⁶

B. PARENTAL SHIELD

The very fact that parents allow their children to watch television with commercials may show that parents see nothing wrong with the advertising and that any blame should be directed towards the parents for improperly shielding the children. Relating the argument to the above points, it is the parent's responsibility to ensure that the family serves as a buffer to the child rather than an amplifier. This argument is essentially a policy proposal advocating parental intervention as a solution to the inefficiencies caused by advertising to children. This type of intra-family solution has long been a part of American rhetoric.¹⁰⁷

It is not entirely clear that an intra-family solution is the best solution or that it would fully solve the problem. First, the intra-family solution ignores the fact that many single-parent homes exist where the parent does not have the resources to closely monitor the child.¹⁰⁸ Second, placing the full burden upon parents abandons the idea that the children are the collective responsibility of the nation.¹⁰⁹ Regardless of who is to blame or who should have acted, the responsibility does not fall upon children. However, children feel the brunt of the harm. Therefore, society should ensure the solution is a practical success rather than an ideological success. It appears that many parents object to advertising aimed at children but "are unwilling or unable to take the drastic step of shutting that advertising out of the home by forbidding their children to watch TV."¹¹⁰

C. PATERNALISM

Paternalism is a bad name among contemporary academics. Libertarians tell a story of why the government should not make decisions for people. They believe the government is not in a better position to decide than the people are themselves and concluding paternalistic regulation relegates the people to the role of children. However, children are the subject of this Comment. Children are not merely little adults. They do not make decisions like adults and should not be asked to make them. Although the burden of potential regulation may fall upon advertisers or other industries, the persons being protected are chil-

106. *Id.*

107. See Mary Beth Norton, *Founding Mothers and Fathers: Gendered Power and the Forming of American Society* 57 (Knopf 1996).

108. This can also apply to homes where both parents work. In these situations, the parents are put in the difficult position of choosing between two options that will each lead to lower family welfare.

109. This type of collective responsibility can be justified on moral grounds as well as on the externalities caused when children are harmed.

110. FTC, *Staff Report* at 75 (cited in note 17).

dren. Thus, this type of paternalism may be inoffensive to Libertarians.

There are many instances within the law where children are afforded special protection. The attractive nuisance doctrine in tort law has long protected children from alluring yet hazardous premises by giving owners a stiff financial incentive to "child-proof" their property.¹¹¹ There are age restrictions on the purchase of alcohol, cigarettes, and pornography. In each of these cases, society could have placed the burden on parents to shield their children. However, it chose to allow government to take a role in the protection of children.

PART IV: WHY HAS THE CURRENT SYSTEM NOT FOUND THAT ADVERTISING TO CHILDREN IS INEFFICIENT?

Economists have made much of the fact that societal and common law norms can be explained through economic analysis.¹¹² More generally, common law norms only fit economic analysis when the economic solutions are obvious or intuitive and there is no market failure. Depending upon the relative frequency of unobvious economic solutions and market failures, it may be reasonable to presume a priori that any particular norm is in a state of efficiency.¹¹³ In other words, it is questionable whether a denouncement of the current system as inefficient must explain the inefficiency itself and the reason the current system has tended towards inefficiency.

A. BIG BUSINESS IS TAKING ADVANTAGE OF INEFFICIENCIES IN THE SYSTEM

Advertisers argue that without their support, there would be no media. "[A]dvertising pays the largest part of the bill for [a] free press."¹¹⁴ Advertisers are unlikely to voluntarily take steps to reduce advertising to children without the threat of government intervention because advertising to children pays the bills. A ban on advertising to children would put a squeeze on broadcasters who may already be feeling the pain of competition with other media sources, such as cable. However, why do we care if a few businesses fail or have to restructure if the result is a more efficient system. If the pain felt by the industry is less than the consumers' gain then it is a rational policy for the government to pursue.

The major reason that industry supports advertising to children is that advertising increases consumption. At the same time, industry does not feel the social losses because advertising shifts the costs of information failure to the consumers. A political story can be told of the great political influence of indus-

111. See, for example, *Peters v Bowman*, 115 Cal 345, 47 P 113 (1897).

112. Becker, *A Treatise on the Family* at ix (cited in note 97). Becker asserts economic analysis is "applicable to all human behavior." Id.

113. Any presumption of efficiency can be overcome by a modicum of evidence.

114. Baker, *Advertising and a Democratic Press* at 4 (cited in note 39).

try over congressional action and the relatively small influence of the negatively affected. The FTC's attempted action on this problem is a case in point. Industry was quickly able to rally Congress to shut down the "drastic action" of the FTC.¹¹⁵ Major health problems are associated with television and physical fitness has been found to be inversely correlative with wealth in America.¹¹⁶ This correlation means reduced political influence for those who are most afflicted.

Competitor suits, the traditional form of regulating false advertising and unfair competition, do not work in this area because advertising to children is an industry-wide practice with many players. No one competitor has an incentive to take the self-punishing step of filing suit to stop all competitors from advertising to children. At the same time, others outside the industry have no standing to sue. However, self-regulation is currently taking place to some degree. The Children's Advertising Review Unit, which works under the Better Business Bureau and advertising industry trade associations, monitors advertising directed to children and advertising which it views as likely to suggest that children undertake unsafe activities. Its principal concerns are accuracy and fairness in the depiction of products, undue sales pressure like suggesting a product is necessary in order to be popular, confusing advertising with programming, depictions of children engaged in improper or unsafe activities and data collection from children on the internet.¹¹⁷

B. EUROPEAN SOLUTIONS

Some European countries have taken strong measures against advertising toward children. Sweden and Norway have both banned all television advertisements directed toward children under the age of 12.¹¹⁸ Axel Edling, the Consumer Ombudsman of Sweden, commented that Sweden's position is simply that televised advertising should not be targeted at children.¹¹⁹ From a normative standpoint, this indicates Sweden may have realized the inefficiency associated with advertising to children. However, the fact that only a limited number of countries have accepted this form of regulation may imply that the inefficiency is negligible or at least that its effects have been marginalized.

C. ARBITRARY MARKET DEFINITION AND DISTRIBUTIONAL CONCERNS

This Comment defines and analyzes the market of advertising to children

115. See *Execs call children's tv proposal 'drastic'* at 3 (cited in note 82).

116. Karen Jacobs, *The Pay Gap: Why are some people more fit than others? One answer: Money*, Wall St J R7, R7 (May 1, 2000) (citing a study by professor Shiriki Kumanyika of the University of Pennsylvania Medical School).

117. Richard A. Kurnit, *Advertising and Unfair Competition Issues*, SF74 ALI-ABA 449.

118. Axel Edling, *Speech on TV Advertising to Children* (Nov 23, 1999), at <<http://lists.essential.org/commercial-alert/msg00028.html>>.

119. *Id.*

and shows the current market is inefficient. However, this market definition may be artificial and arbitrary. The market of advertising to children does not sit in isolation. A shift in false advertising to children may result in a rise in false advertising to adults or a drop in children's educational television. These results are market externalities because they occur outside the boundaries set for the market. However, their occurrence indicates that the boundaries have been set only for the purpose of analysis and can cause their own biases.

In addition to the issues created by arbitrary market definition, distributional concerns may also warrant tolerance toward inefficiency. These distributional concerns are not taken into account by traditional economic analysis of efficiency. For example, a system where one person is very happy (100 happiness units) and two people are starving (0 happiness units each) has a greater social welfare than a system where the wealthiest person has a little less (75 happiness units) and the other two are no longer starving (10 happiness units each).

Table 1: Distributional Concerns of Efficient System

	Person A	Person B	Person C	Total
System A	100 Utile	0 Utile	0 Utile	100 Utile
System B	75 Utile	10 Utile	10 Utile	95 Utile

Although distributional concerns are not readily apparent in the case of advertising to children, they become more apparent if we believe strong regulation on advertising to children could prove the downfall of "free" television.¹²⁰ The move here is to shift the focus from children's advertising on television to television in general. This shifting of the market is reasonable because market designations are by their nature arbitrary.

CONCLUSION

This Comment attempts to present a limited economic analysis of the effects of advertising to children. Without resorting to second-order externalities, such as costs of health care for diabetic children and the costs associated with anger disorder initiated by excess television viewing, there are still strong arguments that condemn advertising to children as a socially inefficient practice.

The policy implications of this inefficiency have not been explored. From a policy standpoint, market inefficiency may be a tolerable side effect of other more pressing concerns. In addition, an inefficiency in one segment of the mar-

120. Free means the viewer does not have to pay for the right to watch television. If all children's television was on pay television, then a large number of the children might be unable to afford to watch television.

ket may be offset in another part of the market. Consumer advocates have argued for a ban on advertising that targets children.¹²¹ The likelihood of such a ban being passed in the current political climate is very unlikely.¹²² In order to effect social change, the issue must be perceived as a crisis,¹²³ a level that has not yet been attained for advertising promoting childhood obesity.¹²⁴ Professor Nestle outlined a ban as just one part of a concerted effort to attack the causes of obesity in a preventive manner.¹²⁵ His approach makes sense and certainly demands further action. Economic arguments have a place and can be used to bolster or weaken policy arguments. Regardless of the outcome of this particular debate on the efficiency of advertising to children, there are serious problems affecting our nation's children. These problems are our responsibility and must be addressed.

121. Another interesting policy decision could be taxes. If the true concern is the public health effects, studies have found that the appeal of junk food versus more nutritious food is subject to a highly elastic demand. "For example, sales of fruit and salad increased threefold during a three week 50% price reduction period at a worksite cafeteria and returned to baseline levels when original prices were reinstated." Simone A. French, et al, *Pricing Strategy to Promote Fruit and Vegetable Purchase in High School Cafeterias*, 97 Research and Professional Briefs 1008 (1997).

122. See Schlosser, *Fast Food Nation* at 267 ("The political influence of the fast food industry and its agribusiness suppliers makes a discussion of what Congress should do largely academic.") (cited in note 7).

123. Christina D. Economos, *What Lessons Have Been Learned From Other Attempts to Guide Social Change*, Nutrition Reviews S40, S44 (Mar 2001).

124. Despite obesity having been labeled an "epidemic" by public health officers. See Satcher, *Foreword* at xiii (cited in note 1).

125. Nestle and Jacobson, *Halting the Obesity Epidemic*, 115 Pub Health Rep at 12 (cited in note 32).