

The FTC's Tantrum Against Children's Television

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Author's Note: On February 24, 1978, the Federal Trade Commission published a 346-page staff report advocating, among other things, a federal ban on television advertising directed at children who are less than eight years old. The other proposals included a ban on television advertising of highly sugared foods to children under twelve years of age and (alternatively) a requirement that advertisers of highly sugared foods finance "counter advertisements" prepared by public-interest groups selected by the FTC. The report did not say how, in the absence of advertising, children's television programs would be financed, but some of the petitioners who had instigated the FTC study suggested that children's programs should be considered a "public responsibility" of television broadcasters or of manufacturers of children's products. In any event, on the same day it published the Staff Report, the FTC began a rulemaking proceeding to determine whether it should issue regulations implementing the Report's recommendations.

The idea of doing something about television commercials directed at children had been percolating at the Commission for several years, but it was espoused with such vehemence by the Commission's new chairman, Michael Pertschuk, that in late 1978 he was disqualified from participating in the rulemaking proceeding by a federal court, on the grounds that he had "prejudged" the merits of the case. Outside the Commission the Staff Report and rulemaking proceeding were greeted with considerable enthusiasm by a variety of consumerist organizations—which was surprising, at least on the fact of it, since the proposed bans would be aimed explicitly at reducing the information and hence choices available to consumers, and would almost certainly result in higher prices for children's products. At the same time, however, a number of organizations usually sympathetic to consumer-protection regulation were highly critical of the FTC proceeding. The Washington Post, for example, in an editorial that came to be widely quoted, described the action as "a preposterous intervention that could turn the agency into a great national nanny."

Toward the end of the year I was asked by an executive in the toy industry (which advertises heavily on children's television shows) to address the annual meeting of the industry's trade association on the subject of the proposed ban. They had done most of the research, he told me, on the First Amendment objections to the ban, on the probable effects of the ban on the price of toys and the financing of commercial children's programming, and on other matters necessary to argue their case before the Commission. They did not wish to hear a recitation of the views they already held. What they did wish to hear was some

explanation of why this was happening to them, and of how the FTC's proposal fit into the general trend of increasing government control of the economic life of the nation.

The following is a revised version of my address to the Annual Meeting of the Toy Manufacturers of America on December 17, 1978.

To an executive in the toy business, the Federal Trade Commission's proposed Trade Regulation Rule banning television advertising directed toward children must seem to defy common sense. To an academic, whose business requires him to suspend disbelief for the sake of analysis, what the proposal defies at first approach is categorization and explanation. Perhaps it is impossible to stake out a reasonable view of the subject of children's advertising under which the FTC proposal would be a worthwhile exercise of governmental power. But if so, then why has the subject held such appeal not only for the current Commission chairman, a liberal Democrat, but also for his predecessor, a conservative Republican? And if not, then why has the proposal been held up to such ridicule by both liberal and conservative editorialists? Whose interests would be advanced by the ban, whose would be harmed, at what cost to the public, and why should the FTC staff care?

The study of regulation is preeminently the domain of economists, and of lawyers and political scientists who borrow the tools of economists. When an economist considers the propriety of a government regulation he asks himself, first, whether the market in question is failing to operate properly in some important respect and, second, whether the regulation is likely to improve upon the situation. Of course the idea of the market has wide appeal outside of economics, and many people who have never had a brush with a demand curve approach questions of public policy in a similar though more casual way. The virtues of the market, which usually coincide, are that it tends to maximize the wealth of a society and the freedom of individuals. Most of us tend to believe, what is historically correct, that societies which leave most economic decisions to the market end up being wealthier and more progressive than societies which do not. And most of us also agree in a general way that, as the philosopher Robert Nozick puts in, capitalist acts between consenting adults ought to be allowed.

But we all know of circumstances where these justifications sit uneasily—where we have reason to doubt that wealth is really being maximized, or that mutually consenting action is all that is really involved. A market may be dominated by a natural monopoly, as in the case of electric service, or it may have effects—"external costs"—on those outside the market, as in the case of air pollution. In these situations government regulation may enhance economic efficiency and vindicate personal liberty, although we are today more aware than we used to be that, in practice, government programs themselves are at least as likely as private markets to fail to perform satisfactorily. In a liberal democracy the machinery of government is extremely vulnerable to self-interested manipulation by politically cohesive groups, and the notions of monopoly, externality, and other

varieties of “market failure” are spongy enough that almost any government action undertaken on behalf of private interests can be wrapped appealingly—but only sometimes accurately—in the rhetoric of “the public interest.” This is conspicuously the case in federal transportation regulation, which has enhanced rather than restrained monopoly pricing and greatly retarded the development of an efficient national transportation network. And even if regulation could be assured to operate smoothly and disinterestedly, there would be instances of “market failure” not worth the bother. We shall probably always regulate local utility services, but not the price of newspapers in one-newspaper towns. We may cleanse our urban air and industrial lakes and rivers, and even prohibit smoking in public places, but no government we could be comfortable with could even begin to control every aspect of human behavior annoying to others.

The economic approach to regulation is incomplete because economics takes individual wants as given, while no government can be indifferent to the values of its citizens. The “wealth” that the market maximizes is not always an unambiguous concept, and not everyone is always “adult” enough to give consent worth having. Few people desire to see highly efficient, output-maximizing markets in prostitution, gambling, or heroin. So we sometimes regulate markets to make them less rather than more efficient, and we sometimes prohibit them entirely. Other cases are harder and more controversial, such as handguns and abortion. In some cases it is even unclear whether the purpose of regulation is to enhance or retard a particular market.

Most of the newer regulatory programs present this difficulty. The formal economic rationale of the recent programs of workplace and consumer-product safety regulation is that certain markets fail because of “unequal information.” One party (the employer, or manufacturer) knows far more than the other party (the employee, or consumer) about an important element of the transaction (safety and health risks), so there is no reason to expect that the bargain struck will be a fair one to the less informed party. One problem with this view is that even when one party does possess more complete information about safety risks, the structure of private property and liability rights may be such that he has ample incentive to use the information in the interest of the other party, supervising his workplace or designing his products in as safe a manner as the other party desires. Another problem is that, even if he doesn’t have appropriate incentives, the regulations imposed to correct the situation may go far beyond what any well-informed employee or consumer would demand if left to his own devices: Some recent occupational safety regulations promise only speculative benefits at compliance costs which, if distributed in the form of salaries, would make all of the employees wealthy.

It may be that these regulatory programs are not intended to make labor or consumer-product markets more efficient at all, but rather are intended to proscribe market transactions in which compensation is paid for the assumption of a physical risk—a political expression of cultural conservatism akin to the

prohibition of gambling. It would hardly be surprising if risk aversion were far more widespread today—when income, wealth, and longevity have grown so—than it was 50 years ago. (Even if *individual* risk aversion has not, on net, increased, due to the effect of social insurance programs which spread the costs of accidents and disease around the general population, these same programs have surely made us more averse to the taking of risks by *others*.) Similarly, the increased demand for pollution regulation may be taken as a matter of collective consumption—like an individual buying a bigger home when he gets the money—as well as of increasing the efficiency of production. Forty years ago a sooty skyline was not an “external cost” at all, but rather a welcome sign of industrial progress.

It makes a difference whether a regulatory program is taken as a device to improve upon an imperfect market or as a device to interdict the market. The difference is whether consideration of the program is a debate merely over strategy—how best to obtain what we want—or a debate over values—what we *ought* to want. There is an academic maxim that all questions of economics dissolve ultimately into questions of values, but in many instances the merging of the two issues is only academic. Few people wish to linger over whether we ought to desire energy to heat our homes. The only important public issue is how to obtain the most energy from the resources at our disposal and how to allocate it fairly, and attempts by political officials to moralize over the issue have for the most part been greeted by silence or ridicule. A century ago many thought electronic communications to be the work of the Devil, but I know of no one today who is disposed to have the government decide whether the billions of words exchanged over the telephone network each day are really worthwhile. Even parents infuriated by the telephone habits of their teenaged children realize that the important public issue is what set of legal institutions will provide the best telephone service at the lowest price—not when and for what purposes the telephone will be used.

Issues of values, when they do emerge in the political arena, are far more divisive and dangerous than issues of strategy. Invariably they involve views that are strongly held on all sides and are strongly divergent—that’s why one group or the other turned to political action—and invariably their resolution either leaves some people believing that their natural liberties are being trammelled, or others believing that their society is less just or virtuous than it should and could be. Because all sides have an interest in maintaining channels of persuasion and compromise, political debate over such issues is often couched in the more comfortable language of strategy and efficiency, which masks the more fundamental disagreement over values. Thus, we argue whether capital punishment really deters murder; whether a certain kind of safety regulation will really reduce the rate of workplace accidents; and whether permitting, promoting, or prohibiting advertising in a certain market will really lower consumer prices. It is surely a good thing that public debate is carried on in these terms, not only because it minimizes the threat which all political argument poses to the

cohesiveness of society, but also because evidence on issues of strategy and efficiency helps many people form opinions on questions of values. At the same time, it is important that the leaders of these controversies understand that what is ultimately involved is not just strategy but the values which government will seek to encourage.

The Federal Trade Commission, like most of the older (pre-1970) federal regulatory agencies, was created a decade or so after the emergence of the industry it regulates, the industry of mass advertising. It was, however, the first commission to concern itself formally with regulatory tasks other than the traditional one of controlling the economic effects of business monopolies. In fact, Congress's original purpose in passing the FTC Act in 1914 was to create an agency to administer the antitrust laws that would be more "expert"—and more subject to congressional control—than the federal courts had been in interpreting the Sherman Act of 1890. But the statutory standard was a vague one, simply prohibiting "unfair methods of competition in commerce"; and no sooner was the FTC in business than it began to devote its energies not to antitrust matters, but to policing "deceptive" advertising, often at the behest of the advertiser's competitors. The effort to transform an anti-monopoly program into an advertising-control program proceeded fitfully until 1938, when Congress passed an amendment changing the statutory standard to an explicit prohibition of "unfair or deceptive acts or practices" as well as "unfair competition." Thereafter the Commission was both by statute and in fact an enforcer of advertising truthfulness first, and antitrust violations second.[1] Even its antitrust actions, such as the current proceedings concerning breakfast cereals, lemon juice, and professional advertising, have often been grounded on an asserted relationship between advertising and monopoly. (The relationship shifts with the facts of the case at hand: In the breakfast cereal and lemon juice markets advertising is said to foster monopoly; in the retail drug and medical care markets *lack* of advertising is said to foster monopoly.)

The rationale for the government's regulating advertising truthfulness is that of unequal information: Where a consumer has been deceived about a product's true characteristics, by definition he has less information than the seller; if he is led by this misinformation to purchase the product rather than something else, the market will have failed its duty of matching demands and supplies efficiently. Of course, sellers ordinarily have powerful motives for being truthful in their advertising. If they are not, competitors may correct matters in *their* advertising, or purchasers may sue to collect damages and then some; and a reputation for dishonesty may be financially ruinous. Still, these incentives may be weak or nonexistent in some circumstances, as where all the sellers of a product have a mutual interest in misrepresenting an important characteristic, where the misrepresentation is not readily apparent in the course of purchase and use, and where the individual harm from relying on the misrepresentation is too small to be worth the time and cost of litigation. So there is, at least in theory, a useful role for direct regulation of truthfulness in advertising.

Unfortunately, the practice has fallen well short of the theory. The FTC has spent a good deal of its time harassing, at the behest of competitors, new entrants making aggressive but essentially truthful comparisons of their products with established brands, and discount sellers making perfectly truthful representations of the extent of their products with established brands, and discounts from manufacturer's suggested retail prices. These decisions have been baldly anti-competitive, although their true purpose of serving the interests of established firms has also been plain. A 1973 study by Richard Posner found that very few of the Commission's deceptive-advertising cases have involved claims that were truly inaccurate and where private remedies seemed inadequate.^[2] Most cases involved the protection of established sellers, or else hardcore misrepresentation or fraud where private or criminal sanctions seemed more in order than the Commission's mild administrative remedies.

The FTC has also pursued a third type of inappropriate case, which not only involves no deception in any usual meaning of the word, but also serves no discernible interest, worthy or unworthy, or an identifiable competitor or consumer. Typical is the Rapid Shave case, in which the Commission challenged a television commercial demonstrating that the product could shave sandpaper and pursued the matter all the way to eventual victory in the Supreme Court.^[3] The Commission conceded that sandpaper soaked in Rapid Shave could indeed be shaved clean, but found deceptive use of a mock-up of the procedure in the television studio, made necessary by the heat of studio lights. No one could possibly have been harmed by the commercial and no one could possibly have been helped by its elimination.

One guesses that the Commission's true motive in bringing the case was its feeling that there was no scientific connection between the shaving of sandpaper and the shaving of faces, which is no doubt correct. The Commission missed the point: The purpose of the demonstration was to grasp the viewers' attention with a memorable visual pun on the simile men use to describe a rough beard. In this case and countless others, the FTC has exhibited a dullard's incomprehension of the simplest devices of visual and verbal metaphor, which is not really incomprehension at all, but rather a technique of opposition to popular culture. Since the Commission has no mandate to stamp out commercialism, it relies on contortions (persuasive only to lawyers) of the meaning of deception. The result is to circumscribe efficient conduct, since metaphor is an important means of economizing on communications, including those between sellers and prospective buyers conducted through the expensive medium of television. Imagine the tedium of a commercial devoted entirely to itemizing the clinical properties of shaving cream! Yet the Commission and those who approve of its suppression of advertising language and methods are most unlikely to be impressed by the efficiency argument. Their aim is to make communications not more efficient, but more pure.

An amusing example of this attitude appears in an article on children's advertising by the current FTC chairman, Michael Pertschuk—one of the articles that got him into trouble with Judge Gesell and disqualified from the children's-advertising case.[4] The article relies for its view of the problem on...an advertisement!—one from *Broadcasting* magazine, which, we are told, appeared under the headline "Kid Power" printed in "bold block letters." In read in part:

If you're selling, Charlie's mom is buying. But you've got to sell Charlie first...

When Charlie sees something he likes, he usually gets it. Just ask General Mills, McDonald's or Mattel.

Of course, if you want to see Charlie, you have to catch him when he's sitting down...Lucky for you, Charlie's into TV. And just waiting for the WXNE-TV 25 to hit the air this Fall...[5]

Mr. Pertschuk does not say that this ad is deceptive, although if the Commission were disposed to bring a complaint the claims "When Charlie sees something he likes, he usually gets it," and "[He's] just waiting for the WXNE-TV25 to hit the air this Fall," could easily be proven false. Surely, of all the wants children press upon their parents, not more than *50 percent* are granted, and surely children *dosomething* other than wait for WXNE's new TV shows. In any event, there is room to doubt whether WXNE fulfilled the Commission's "prior substantiation" requirement in its advertisement.

But Mr. Pertschuk seems to assume that this advertisement is strictly accurate in every respect, and he holds it up as a "Graphic example of the moral myopia of children's television advertising." Permit me to say that Charlie himself could read this ad with more discrimination than Mr. Perschuk, no doubt in part because of the precocious skepticism with which television advertising itself fosters. The issue, however, is indeed the morality, not the accuracy, of children's television advertising.

It is true that the *FTC Staff Report on Television Advertising to children* takes a stab at what I have called a strategic, market-failure-correction argument—an argument tied to the Commission's primary legal mission of policing consumer deception and addressed to those who would not easily agree to a broader role for government supervision of advertising. This argument is that all television advertising directed at children under eight years old is *inherently* deceptive, because such children are too naïve to understand the commercial nature of advertisements or even to distinguish them from television programming. Twice in its report the FTC staff explains:

The classical justification for a free market, and for the advertising that goes with it, assumes at least a rough balance of information, sophistication and power between buyer and seller...It is the subversion of that balance that makes

practices such as subliminal advertising, or advertising that is not identified as such, repugnant to public policy. In the present situation, it is ludicrous to suggest that any such balance exists between an advertiser who is willing to spend many thousands of dollars for a single 30-second spot, and a child who is incapable of understanding that the spot has a selling intent, and instead trustingly believes that the spot merely provides advice about one of the good things in life.[6]

The deception argument is unpersuasive, however. The Staff Report is festooned with references to scientific-sounding reports finding that young children do not comprehend the true nature of advertising; but when you think about it, no research is necessary to know that there must be some point in cognitive growth when a child understands substance without appreciating motive. It's just that it doesn't follow that children are deceived—that they are gullible robots, easily tricked into asking for things they really don't need or want. George Will recently cited Saint Augustine for the proposition that "the virtue of children resides not in their wills, but in the weakness of their limbs." Twain and Dickens and Carroll and every parent know that children are natural skeptics, insatiably curious, with a taste for hard facts and a nose for dishonesty. Presumably for this reason, television advertisements for toys consist mainly of straightforward demonstrations of the toys in use, usually in settings of harmonious play with family or peers, which hardly seems corrupting. It is adult advertising, not children's, which seeks to manipulate by stimulating envy, insecurity, and sexual longing. One cannot imagine a commercial promising a boy that if he acquires a particular toy, girls will be powerfully attracted to him, or boys will realize he's made it to the top. If the FTC is strictly interested in protecting people against inherent psychological vulnerabilities, it should ban advertising to adults and leave children's advertising be.

But of course the FTC's principal argument is not that children are actually deceived about the true characteristics of advertised products (at least outside the advertising of highly sugared foods). The argument is rather that advertising directed toward children is, to use the statutory term, "*unfair*," *regardless* of any element of deception. It's just wrong, or as Mr. Pertschuk puts it, "*immoral*," for people to be doing these things, and they ought to be stopped. Thus the government's mission is not to fine-tune certain market transactions, but to abolish them. One of the staff's favorite authorities, Joan Ganz Cooney, puts the matter forthrightly:

[If] we, as a total society, put the interests of children first, then we are led to the inescapable conclusion that it is terribly wrong to be pitching products—even high-quality, worthwhile products—at the young.

...even if the program content that is sandwiched in between the commercial pitches were of positive value—and that, at best, is debatable—those who put

children first would still have to take the position that trying to sell them anything is dead wrong...[7]

Now Mrs. Cooney produces children's television shows for the government network, the Public Broadcasting Service. Her shows, which apparently are the only ones on the air whose positive value is beyond debate, do not have to be sandwiched between pitches; so her arguing that others should be forbidden to sandwich shows between pitches is akin to a trucker arguing to the Interstate Commerce Commission that no one else is fit enough to offer service on its assigned routes. Mrs. Cooney is obviously in a poor position to be taking such a dogmatic stand against self-interest pitches on behalf of high-quality, worthwhile products. But the impulse she expresses is, in more moderate forms, widely shared.

It appears to be characteristic of the successful commercial society that many of its most comfortably situated citizens become deeply discouraged about the commercial basis of their prosperity. There is no point in scorning this attitude; few if any of us do not share it, some of the time, in some of its manifestations. The "system of natural liberty," as Adam Smith called what we call capitalism, is emphatically not a system that leaves the individual naturally to himself. The nature of the competitive order is rather to assault the individual at every turn, imploring his assent to tear down what is real and true today and replace it with something new tomorrow. The process generates enormous material progress, but it can also be wearying, and—more important—it can also undermine the authority of the order itself. Having worked as hard as we have and having come as far, it is only natural that we should, on occasion, wish to rest on our oars. But we have surely not come so far that we have arrived in a different kind of world, where we can continue to enjoy our wealth, or even know what wealth is for, without any of the risks and intrusions of competition. The prosperous life brings with it the constant danger of utopianism, which romanticizes human nature—believing it can be purged of its self-interestedness—and which therefore is more naïve than a child about the possibilities of collective action, and comes to resent other people's liberties. *This* impulse is also all around us in America today. Among other things it takes the form of anger against (in Lewis Lapham's phrase) those in business who "go around making things without permission"—and also against (as Paul Weaver has added) "the mass of Americans who go around doing and enjoying things without permission."

What has happened in the children's advertising case is that this impulse has come to light on a "target of opportunity" (to use a military term now aptly in vogue in the rest of the government, and increasingly in business). The target is opportune for two reasons. First, because children are concerned, the usual defenses are weakened. The acts of "consenting adults" are not even involved; and since the wants of young children are just beginning to be formed, it is easier to construct an appealing argument that the "wealth" advertising helps maximize

is merely the fulfillment of “artificially created” demand. Second, the marketplace in which the advertising takes place is a peculiar one where the primary product, television programming, is financed not by consumers directly, but by others who desire access to consumers. Interruptions for advertising, even for clever advertising of products we are interested in, can be extremely irritating if we are caught up in the show; when the advertising is neither clever nor for something we care about, we resent even more our lack of control over the situation. But for the Federal Communications Commission’s long-standing hostility to cable and subscription television, we might have today a better organized market where television viewers could compete with advertisers in support of programs suitable for their very different purposes. Conceivably there would be no television advertising at all in such a market, just as there is seldom much advertising shown with movies anymore. More likely, commercial television would survive, but in competition with enough subscription television that practically anyone could see programs to his liking without the nuisance, if he considered them a nuisance, of commercial interruptions. As things stand, the very ubiquity of television advertising bolsters the FTC’s case.

One can respond to the arguments for banning children’s television advertising with strategic, efficiency-based defenses. One can show that, without support from sellers of children’s products, the quality and amount of commercial children’s television will be seriously reduced. One can show that, with a diminished market for children’s toys, and less competition within it, the price of toys will surely increase. Arguments such as these are important ones, and they may even carry the debate, in court if not at the Commission.

But the battle should be joined at the level of values as well. It is best to assume that the Commissioners do not care very much about the price of toys, and do not care at all about the fate of commercial children’s television—the FTC Staff Report does not concern itself with these matters at all. The deeper issue is the unplanned, imperfect, sweaty reality of the market itself, especially its open acquiescence in the self-interestedness of the individual: whether its range should be constricted one little bit further, here as in a thousand other proceedings in Washington, giving way to the government’s higher claim to provide a more planned, disinterested, “rational” order. In response to the Commission’s view that the market itself is “unfair” in the case of television advertising to children, one cannot rely axiomatically on the market; one must defend the values it actually promotes.

In a recent case involving a state prohibition of advertising of prescription drug prices, the Supreme Court affirmed the presumption in favor of a free market in ideas, including commercial ideas:

What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information’s effect upon its disseminators and its recipients. Reserving other

questions, we conclude that the answer to this one is in the negative.[8]

To show that this holding should govern the present case as well, one might acknowledge at the outset that the FTC proposal does involve special circumstances, and then demonstrate why they do not require a different result. The defense would emphasize the essential role of parental authority in disciplining the habits and desires of children—a role as easily weakened as strengthened by regulatory “support.” It would also show that the market serves the interests of children directly—that “those who put children first should take the position that trying to sell them anything can be deadright.” This is a matter of demonstrating the value of play in the development of children and the accomplishments of toy makers—with the assistance of television advertising—in making play more stimulating, more educational, and more fun. If the courts are convinced these accomplishments are real, then it is difficult to imagine, all other issues aside, that the advertising ban can possibly prevail.

[1] Edmund W. Kitch and Harvey S. Perlman, *Legal Regulation of the Competitive Process*, The Foundation Press, 1972, pp. 138-141.

[2] Richard A. Posner, *Regulation of Advertising by the FTC*, American Enterprise Institute, 1973.

[3] *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

[4] *In Association of National Advertisers, Inc. v. Federal Trade Commission*, District Court of the District of Columbia, Civil Action 78-1421 (November 3, 1978).

[5] Michael Pertschuk, “Capitalizing on Kid-Power,” *the New Leader*, January 30, 1978, p. 13

[6] *FTC Staff Report on Television Advertising to Children*, Federal Trade Commission, February 1978, pp. 29, 225-6.

[7] *FTC Staff Report, supra.*

[8] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 773 (1976).