

THE PROBLEM OF BLACK CONSUMERS AND COMMERCIALS: A PROPOSED LEGISLATIVE SOLUTION

*Ronald C. Griffin**

At least 150 million whites and twenty-two million blacks reside in the United States.¹ These people are divided by ignorance, religion, and superstition. As the general population grows larger, and particular groups grow further apart, it will become increasingly difficult for members of different groups to talk sensibly about common problems.

One way to overcome this communications impasse is to resegment the population. Each ethnic group could select a leader to represent its interests on such topics as good nutrition, shoddy products, and the misuse of commercial television. If minorities start down this path again, they will have to practice self-help in consumerism, business, and education.²

True integration is another option. It is the incorporation of minorities into the economic mainstream through employment and the use of their outlooks in shaping business and government policies.³ For ex-

* Professor of Law, Washburn University of Topeka. B.S., Hampton University, 1965; J.D., Howard University, 1968; LL.M., University of Virginia, 1974. Visiting Associate Professor of Law, Notre Dame Law School, 1981-82.

Ms. Carol Couch served as research assistant for this article.

1. Malcolm X alludes to this in his book, *THE AUTOBIOGRAPHY OF MALCOLM X* (1965). The number of black and white Americans has risen significantly since the publication of this work. See, e.g., U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, *SOCIAL AND ECONOMIC STATUS OF NEGROES IN THE UNITED STATES* (1971). There are now 188 million white and 26 million black Americans in the United States. U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES* (10th ed. 1981).
2. American racism made black institutions necessary. The continuation of this racism, now more subtle than overt, prompts one to think that black institutions should be retained and revitalized. Jackson, *Being Black in an Uncivilized Society—The Need for Social Justice*, 51 *NOTRE DAME LAW* 15, 19-20 (1975). The tragedy is that blacks are inadequately prepared for such action. They are without plans for a program for educating children regardless of where they live, a scheme for insuring socially useful work at decent wages, or a plan for housing the ill-housed.
3. Jackson, *supra* note 2. The old civil rights coalition is dead. One reason for its demise was paternalistic attitudes exhibited by liberal whites before powerless blacks. White Americans often expressed their moral outrage at public meetings, but they seldom shared their power with blacks. While blacks joined civil rights organizations in droves, few rose to positions of authority. *Id.* at 20.

Boundless liberalism is another reason for the coalition's collapse. Under its influence personal discipline declined in both homes and schools. Boundless liberalism, says Jesse Jackson, was as much a roadblock to social progress as inflexible conservatism. *Id.* at 21. If a new coalition is to emerge it must be free of these defects. Its goals must be simple and limited. It must:

- (a) *merge* social groups where they share common attitudes, habits and ideals;
- (b) *plan* for the education of children, good nutrition, healthy work habits, respect for learning, and;
- (c) *implement* schemes promising socially useful work at decent wages for all adults.

ample, the national scheme drafted to aid in the selection of nutritional foods should give substantial consideration to the viewpoints of those minority groups which would be most affected.⁴

Sadly, neither segregation nor integration of minority groups will solve the problems originating with commercials. White Americans, as well as their black counterparts, are victimized consumers. They drive automobiles that are unsafe,⁵ eat foods riddled with harmful chemicals, and purchase food at supermarkets without adequate information concerning its nutritional value.⁶ Of course, children are not spared: television commercials pour into their heads a need for cereals and sweets of questionable nutritional value. Blacks and whites alike purchase gimmicks, games, gadgets, and dangerous toys.

In this article I will examine the consumer landscape as a black person and recommend some ideas which may improve our economic system. Of course, the black experience is merely an exaggeration of the current economic problems faced by all Americans.⁷ This exaggeration results from the need for blacks to spend a greater percentage of their incomes on consumer goods.⁸ This article recommends some steps black consumers might take to cope with commercial advertising, and offers a model statute which might be adopted by the States to regulate advertising. Before considering the possible solutions to these problems, we ought to consider how the problems arose.

See generally N. GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY (1975); H. HENDERSON, *The Great Economic Transition*, CREATING ALTERNATIVE FUTURES: THE END OF ECONOMICS 119-121 (1980); B. RUSTIN, *The Role of the Negro Middle Class*, THREE ESSAYS BY BAYARD RUSTIN 17-18 (1969); Bell, Book Review, 92 HARV. L. REV. 1826 (1979).

4. *See* Stokes, *The Consumer Research Institute's Nutrient Labeling Research Program*, 27 FOOD DRUG COSM. L.J. 249 (1972); Johnson, *Nutrition Labeling—A Foremost Concern*, 28 FOOD DRUG COSM. L.J. 108 (1973).
5. *See* R. NADER, UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE (1965). An interesting case study is *United States v. General Motors Corp.*, 518 F.2d 420 (D.C. Cir. 1975).
6. J. TURNER, THE CHEMICAL FEAST (1970).
7. The average income of blacks should have improved in the decade of the 1970s. The statistics tell us that their real income remains marginally smaller than the average income for whites and may have eroded by three percent. *Seduced and Abandoned: America's New Poor*, Wall St. J., Oct. 5, 1982, at 30, col. 3. With multipliers like 18% unemployment among black males, 45% unemployment among black teenagers, and single parent households plunged into poverty in significant numbers, *id.*, it is easy to visualize how difficult it is for blacks—when compared with whites—to manage their affairs in hard times. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT FOR THE UNITED STATES 383 (1981); *Black Community Reviews Life with Reagan*, Wall St. J., Sept. 4, 1981, at 16, col. 4; *Blue Collar Workers, Blacks, Teens Hit Hardest By Slump's Joblessness*, Wall St. J., May 5, 1982, at 27, col. 4. *See Situation for Blacks in the Reagan Years*, Wall St. J., Sept. 10, 1981, at 25, col. 4; *Noble Crusade Against Illiteracy*, K.C. Times, Sept. 27, 1982, at A-14, col. 3; *Black Owned Farms Shrink in Number, Victims of Small Size, High Cost and Bias*, Wall St. J., Oct. 20, 1982, at 29, col. 4. *But see* Gilder, *The Myth of Racial and Sexual Discrimination*, NAT'L REV., at 1381 and 1385 (1980).
8. *Progress by blacks reported: But few emerge in middle class, new study finds*, K.C. Times, Dec. 14, 1982, at A6, col. 1. P. BLUMBERG, INEQUALITY IN THE AGE OF DECLINE 180-87 (1981).

THE MARKET PLACE

The Industrial Revolution and the advent of mass production required new markets for commodities produced by fledgling industries. Products once produced locally came to be produced and distributed nationally. Many companies produced standardized items, with the brand of a product becoming more important than the quality of the product itself. Over-supply soon replaced over-demand as the typical feature of the market place.⁹

A new problem confronting the merchant was how to differentiate substantially indistinguishable goods.¹⁰ Factual information was useless, since brands differed insignificantly. False claims were a good marketing technique until courts started punishing those responsible for making false statements.¹¹ Sellers eventually discovered a third alternative—non-factual information. Emotional claims could distinguish a brand from its competitors when facts about tangible product attributes could not distinguish similar goods. Sellers turned more and more to subjective appeals, which were less often restricted by law than obvious falsehoods.¹²

Our industrial system has created a treacherous consumer environment. The worker-consumer is in the unenviable position of having less bargaining power than sellers of consumer goods. Since consumer behavior conforms to competitive rules, and vendors seldom follow such rules, a severe imbalance in economic power often results.¹³ Contracts negotiated between the two are skewed in favor of the vendor.¹⁴

Consumer prices fluctuate in response to what people are willing to pay for goods. Two people may purchase the same item in the same market at different prices. If a merchant catalogues the items purchased, the types of purchasers, and the prices people are willing to pay, he can exploit unstable prices by charging amounts close to what consumers will tolerate. Because businessmen are motivated by profits, and consumers are driven by physical and emotional needs, it is easy for the businessman to squeeze the highest price possible from a sale.

9. See C. LASCH, *THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS* 72-73 (1979). See also S. EWEN, *CAPTAINS OF CONSCIOUSNESS* (1976).

10. See, e.g., P. PACKARD, *THE WASTE MAKERS* 58-66 (Cardinal ed. 1963).

11. Rasor, *The History of Warranties of Quality in the Sale of Goods: Contract or Tort? A Case Study in Full Circles*, 21 WASHBURN L.J. 175 (1982). A recognition of the problem may be glimpsed in British history. *Pasley v. Freeman*, 100 Eng. Rep. 450, 453 (K.B. 1789) and *Vernon v. Keys*, 104 Eng. Rep. 246 (K.B. 1810). Opinion statements were legally nonfraudulent when spoken with a conscious intent to deceive. *Medbury v. Watson*, 47 Mass. (6 Met.) 246 (1843).

12. Pridgen & Preston, *Enhancing the Flow of Information in the Market Place: From Caveat Emptor to Virginia Pharmacy and Beyond at the Federal Trade Commission*. 14 GA. L. REV. 635, 642 (1980) [hereinafter cited as Pridgen & Preston]. See C. LASCH, *supra* note 9, at 72-73.

13. Kornhauser, *Unconscionability in Standard Forms*, 64 CALIF. L. REV. 1151, 1172-77 (1976).

14. Agreements supply vendors with additional economic power while reducing the remedies available to dissatisfied consumers. Griffin, *Standard Form Contracts*, 9 N.C. CENT. L.J. 158, 172 (1978).

A typical sales transaction will illustrate this point. In theory the consumer is a free agent. He strolls through the market place unconcerned about formal rules and regulations. He meets others, confers with them, and makes contracts. A writing is drafted to memorialize the advantage he has acquired by shrewd bargaining. Of course, the contract he actually signs is quite different. The contract price may be higher than the market price.¹⁵ The contract itself is usually a form contract which is non-negotiable and difficult to read.¹⁶ The consumer generally surrenders more commercial rights than he acquires in exchange.¹⁷

Some people point to contracts as the cause of all buying distress.¹⁸ Others insist that commercial advertising is the real culprit.¹⁹ Still others cite additional causes for the consumer's plight: Narcissism and a change in our educational emphasis surface frequently in scholarly conversations.

Narcissism is self-indulgence of the worst sort. It is an ineffective attempt to arrest fear and loneliness—tragic anxieties produced by modern industrial life—by replacing people with things.²⁰ If narcissism is on the rise, as one author suggests, this form of self-indulgence might help explain the seemingly mindless consumption of consumer goods in an age of diminishing resources.²¹

A change in our educational emphasis is a further factor contributing to the consumer's plight.²² When enlightenment (a sense of history and a familiarity with the reasoning process)²³ was abandoned for the basic educational objectives such as reading, writing, and arithmetic, the supposed beneficiaries of education became susceptible to pure rhetoric.²⁴ We are awed by intellectuals and cowed by demagogic speech. We are unable to distinguish fact from fantasy.

15. D. CAPLOVITZ, *THE POOR PAY MORE*, 90-91, 147-50 (1967).

16. Kaufman, *The Resurrection of Contracts*, 17 WASHBURN L.J. 38, 40 (1977).

17. *Id.* at 42.

18. Slawson, *Mass Contracts: Lawful Fraud in California*, 48 S. CAL. L. REV. 1-11 (1974).

19. C. LASCH, *supra* note 9, at 72-73. See Smith, *Brand Advertising and Price Performance Labeling: A Modest Proposal*, 7 ANTI-TRUST L. AND ECON. REV. 29-30 (1975) [hereinafter cited as Smith]; and Reed, *The Psychological Impact of TV Advertising and the Need for FTC Regulation*, 13 AM. BUS. L.J. 171, 172 n.5 (1975).

20. C. LASCH, *supra* note 9, at 31-33, 72-73.

21. J. K. GALBRAITH, *THE NEW INDUSTRIAL STATE* 53-54 (2d ed. rev. 1971).

22. C. LASCH, *supra* note 9, at 132-135.

23. In the Middle Ages the Catholic Church imposed a moral obligation on sellers to stand behind the claims they made about their wares. In the 16th century that stance was reversed. The buyer was expected to take full responsibility for the consequences of a sale while the seller was not required to accept any. Buyers were urged to rely upon nothing more than their personal inspection of good and to discount claim made by the seller. This approach was based upon the assumption that buyers and sellers were equal in their ability to establish the value of things. The western world then believed in the intelligence of the common man. Pridgen and Preston, *supra* note 12, at 637-638.

If the average person were capable of participating in self-government, he was presumed competent to handle his personal affairs. Education was the key. It helped him to sort out the information he needed to make knowledgeable personal decisions. One had to be a skeptic in the marketplace of ideas and trinkets to be a good citizen. *Id.* at 639 n.13.

24. See C. LASCH, *supra* note 9, at 75-76, 130-132.

Of course, the black experience has been even more tragic. Blacks have had to travel a greater educational distance than whites, and have had to make their own economic mistakes along the way.²⁵ Black buying habits occasionally reflect an uncritical acceptance of commercial appeals.²⁶ In a few cases, family composition, in terms of the number of children and the number of parents in residence, dictates what is ultimately purchased:²⁷

THE COMMERCIAL

For many people, commercials project a world driven by illusions and profits. Since profits advance quickest by stimulating the cheapest desires in us, arousal of these desires push people into a world driven by narcissistic values.²⁸ Commercials define the "good life." Insofar as commercials succeed in influencing people's buying habits, they condition buyers to lunge for things that are unreal.²⁹

Commercials are inherently flawed. Some convey vague messages.³⁰ The difficulties precipitated by inserting the word "natural" on food labels is an example.³¹ By definition, the word "natural" refers to substances derived from nature and free of additives. If a person relies on "natural" to make a buying decision, and he subsequently discovers that the substance he purchased contained unwanted additives, the buyer has misunderstood the message the label attempted to convey. More importantly, buying expectations will be dashed, and the good reputation of the business will be destroyed.

Another shortcoming is the outright lie.³² Businesses occasionally make false statements which inflate demand for their product and un-

-
25. See F. DOUGLAS, *NARRATIVE OF THE LIFE OF FREDERICK DOUGLAS AN AMERICAN SLAVE* (Signet ed. 1968); Bullock, *Consumer Motivation in Black and White*, 39 HARV. BUS. REV. 89 (1961). [Hereinafter cited as Bullock].
 26. "Nonwhite low-income families, particularly Negroes, are doubly disadvantaged; their poverty is compounded by racial discrimination, and they have comparatively few opportunities to improve their social standing in the community. Since the sphere of consumption is one of the few that is open to them—even Southern racists respect the Negro's dollar—they turn to it with the result that greater income leads to greater consumption, rather than greater savings. Such families may see little point in deferring gratifications." See CAPLOVITZ, *supra* note 15, at 13 n.1, 127 n.3.
 27. Bullock, *supra* note 25, at 92-93.
 28. Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 15-16 (1976).
 29. C. LASCH, *supra* note 9, at 72-73.
 30. Everyone has cravings brought on by exposure to a commercial. If a consumer's reasoning process is relaxed so that he uncritically accepts TV advertisements, the advertisers can condition him to positively react to emotional symbols. See GALBRAITH, *supra* note 21, at 315. See also Brock, *Communication Discrepancy and Intent to Persuade as Determinants of Counterargumentation Production*, 3 J. EXPERIMENTAL SOC. PSYCHOLOGY 296 (1967); Reed and Coalson, *The Eighteenth Century Legal Doctrine Meets Twentieth Century Marketing Techniques: FTC Regulation of Emotionally Conditioning Advertising*, 11 GA. L. REV. 733, 750 (1977) [hereinafter cited as Reed and Coalson].
 31. See, e.g., *New FTC Aide Proposes to Scrap Rule Covering Some Food Advertising Claims*, Wall. St. J., June 14, 1982, at 8, col. 1.
 32. D. ROTHSCHILD AND D. CARROLL, *CONSUMER PROTECTION: TEXT AND MATERIALS* (2d ed. 1977) [hereinafter cited as ROTHSCHILD].

justifiably enhance profits.³³ If a business can reduce its supply of unproven wares and simultaneously raise the price for what remains, it can reap huge profits without subjecting itself to serious legal scrutiny. An additional consequence is that these lies hurt honest businessmen who strive to place high quality goods on the market without making false claims.

Another commercial device is emotionally based advertising.³⁴ In recent years, businesses have paired products with psychologically gratifying experiences.³⁵ The purpose of this advertising method is to have an experience associatively trigger a desire for a product. The advertisement teaches, through repetitive lessons, that joy and affection can be purchased in a bottle. It invites people to make emotional choices, and promotes the sale of products whose equivalents are less expensive.

There are remedies. If a product is paired with an unlikely emotional experience, the advertisement could be condemned as deceptive. If a decision to forego the use of a product is paired with an unsatisfied and unlikely emotional need, that could be declared deceptive.³⁶ Commercials should contain useful as well as truthful information. Many commercials are cast in overly technical language which obliterates a buyer's ability to establish which product will best serve his needs. If an advertisement makes a claim which cannot be corroborated by a test, or makes broad claims most of which clash with the opinions of experts, it is deceptive.³⁷ If an advertisement describes a product in technical language which few understand, the advertisement should be removed from the market place.

SOLUTIONS

Legally, a number of things can be done. First, legislation banning deceptive commercials can be enacted. Second, commercials which are vaguely deceptive can be controlled under carefully drafted statutes. Unfortunately, attempts to do either have been disappointing. *United States v. Parkinson*³⁸ is an illustration. In that case, the Food and Drug Administration (FDA) dealt with a brief advertising campaign leveled

33. *See id.* § 11.02.

34. Reed and Coalson, *supra* note 30, at 735-37.

35. *Id.* at 738-41.

36. *Id.* at 775.

37. The Federal Trade Commission issued a complaint alleging that Pfizer, Inc., had violated Section 5 of the Federal Trade Commission Act. In its opinion the commission said that manufacturers are under a duty to substantiate the claims they make about their wares. Data, it said, must exist to corroborate what the manufacturer has decided to say; and it must be in the manufacturer's possession before the claim is broadcast anywhere. In re Pfizer, Inc., 82 FTC 23 (1972). *See Williams, Through the Looking Glass—The FTC's Advertising Substantiation Exclusion and Rule*, 27 AM. U.L. REV. 76 (1977). The Firestone Rubber Company published a claim about the stopping quality of its "Super Sports Wide Oval" tire. The broad claim was based upon a limited test which could not corroborate the claim of the company. *Firestone Tire and Rubber Company v. FTC*, 81 FTC 398 (1972), *aff'd* 481 F.2d 246 (6th Cir. 1973), *cert. denied* 414 U.S. 1112 (1973).

38. 240 F.2d 918 (9th Cir. 1956).

at a small and vulnerable group.³⁹ The campaign touted the virtues of a cheap product at a noticeably high price, without regard for advertising truth. At the time, the FDA thought that its weapons against such advertising were ineffective: disbursed shipments made seizure of the questioned goods impractical and jailing the advertisers was unrealistic. In summary, the FDA believed it was impotent to regulate potentially deceptive advertising.

The Oregon Consumer Protection Agency is an illustration of the ineffectiveness of state action in this area.⁴⁰ The enforcement philosophy of that agency was to resolve as many complaints as possible. This posturing produced several negative results. First, the agency was forced to allocate more time than desired to counseling. Second, the agency was forced to take a conservative position in many cases, filing complaints only when the law and facts were overwhelmingly on their side. The agency possessed the authority to make administrative rules and regulations. Unfortunately, the time allocated for such rule-making was consumed by less productive activity.

These difficulties can be overcome by giving the Federal Trade Commission (FTC) more responsibility to protect consumers. Legislation specifying the type of commercials to be policed would allow the FTC to use its limited resources more effectively. Television commercials would be good targets for FTC regulations.⁴¹ The usual television commercial touts carefully selected aspects of a product out of a multitude of relevant characteristics. This distortion creates misunderstandings which surface when the disclosure interests of a vendor collide with the informational interests of his buying audience.⁴²

The FTC could promote counter-advertising.⁴³ In response to commercials for small automobiles, for example, the public could be advised of the view that such cars are considered less safe under certain conditions than larger ones. Commercials for larger cars, emphasizing safety and comfort, could be answered with counter-advertisements covering the greater amount of gas consumption and pollution generated by such vehicles.⁴⁴

39. Brief for Government at 51, *United States v. Parkinson*, 240 F.2d 918 (9th Cir. 1956). See also ROTHSCHILD, *supra* note 32, at § 11.02, nn.119 & 120 (1977).

40. Mooney, *The Attorney General As Counsel for the Consumer: The Oregon Experience*, 54 OR. L. REV. 117, 132-33 (1975).

41. Kozyris, *Advertising Intrusion: Assault on the Senses, Trespass on the Mind—A Remedy through Separation*, 36 OHIO ST. L.J. 299, 303-04 (1975); see also Grimes, *Control of Advertising in the United States and Germany: Volkswagen has a Better Idea*, 84 HARV. L. REV. 1769, 1771 n.19 (1971).

42. See Smith, *supra* note 19, at 29, 37, 38.

43. Affirmative disclosure is the television (newspaper) presentation of deficiencies linked with products made available for sale. Such disclosure is required where the failure to reveal certain facts could mislead consumers. The FTC may require the manufacturer to disclose unfavorable facts, as in *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 759 (D.C. Cir. 1977). See Thain, *Advertising Regulation: The Contemporary FTC Approach*, 1 FORDHAM URB. L.J. 349, 390-92 (1973).

44. Note, *Fairness and Unfairness in Television Product Advertising*, 76 MICH. L. REV. 498, 524 n.150 (1978).

The FTC could also broaden the scope of its fairness doctrine.⁴⁵ It could declare a commercial unfair, perhaps even remove it from the market place, if it collided with prevailing business practices evidenced by usage, custom, common law, or statute.⁴⁶ If a commercial suggested that drugs alone were a means of coping with social diseases, such as loneliness, frustration, and tension, it could be purged from the airways.⁴⁷ If a commercial led children to believe that consuming "superman" vitamins would make them instant supermen, it too could be banned from the television screen.⁴⁸ These efforts by the FTC would require public officials to make the most careful of judgments. The matters before them will border on moral judgments.⁴⁹ Absent convincing scientific proof of harm, or congressional exhortations, the FTC would be powerless to act.

Assuming active involvement of the FTC on the federal level, the states could play a supportive role. They could enact a statute covering local commercials. The following is a proposed model statute:

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

45. Unfairness relates to community standards of ethics and morality not encompassed by the term "deception." The earliest case applying the unfairness standard, *FTC v. R.F. Keppel & Bros., Inc.*, 291 U.S. 304 (1934), involved a candy manufacturer who sold candy assortment packages commonly known as "break and take." The market technique was akin to gambling—with each purchase there was a chance for a child to win a prize. Some pieces of candy were wrapped with pennies, some were wrapped with price tags of varying amounts, and for others the prize was determined by the color of the candy center. The Court recognized the absence of fraud and deception in the marketing practice. Nevertheless it went on to hold that the sales technique was outrageous. It exploited children who were unable to protect themselves. *Id.* at 313.

There have been rumblings in Congress to roll back the scope of the fairness doctrine. Senator Bob Kasten, (R-Wis.) has introduced a bill, FTC Amendments Act of 1982, which defined unfairness as:

Acts or practices that have caused or are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumer or competition.

42 ANTITRUST & TRADE REG. REP. (BNA) 1025 (May 13, 1982).

46. *FTC v. Sperry & Hutchinson*, 405 U.S. 233, 244-45 (1972). See Thain, *Consumer Protection: Advertising—the FTC Response*, 26 FOOD DRUG COSM. L.J. 609, 616-623 (1971).

47. Note, *supra* note 44, at 527 n.167.

48. *Id.* at 528 n.168.

49. *Id.* at 529-30.

(e) facts about the purposes to which the product can be put safely; and,

(f) a statement about the services (if any) the manufacturer will supply with the sale of the product.

If three of the above are missing from any commercial, while an accompanying fantasy remains intact, the commercial is presumed deceptive.

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

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

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

As with any law, there is a danger in enacting this model statute. It would entail more taxes to pay for the administration of the law. To curb these expenses, the law should contain a sunset clause, and a provision requiring the State Attorney General to report annually to the state legislature on all cases handled under the statute.

The model legislation forces sellers to stand behind their wares. It relieves the buyers of some of their obligations of inspection and improves the quality of goods.⁵⁰ The cost of doing business may rise a fraction, an inevitable result when one is forced to abide by a new rule, but that will be more than offset by customer satisfaction. The statute is a specific repudiation of the idea that buyers must be *fully* aware of what they purchase.⁵¹ It is consistent with recent legislative developments, contemporary attitudes, and ideals.⁵²

On a more local level, citizens could initiate a referendum petition covering business activities to which many citizens object.⁵³ Local newspapers could do articles on businesses engaged in questionable practices.⁵⁴ When a merchant, for example, announces that a product is being sold at a discount, but fails to state that the discount price for the item is the same as the prevailing market price, that advertisement could be reported as deceptive.⁵⁵ If the price for goods is determined

50. R. BRAUCHER & R. REIGERT, INTRODUCTION TO COMMERCIAL TRANSACTIONS 231-32 (1977). See U.C.C. §§ 2-316(3)(b) and 2-315.

51. Pridgen & Preston, *supra* note 12, at 637.

52. See Razor, *The History of Warranties of Quality in the Sale of Goods: Contract or Fact? A Case Study in Full Circle*, 21 WASHBURN L.J. 175 n.3 (1981). The statute I have outlined parallels recent developments in Kansas on this subject. Products liability claims arising out of both tort and contract have been merged under one statute. The jurisdictional reach of the statute has been explicitly delineated—i.e., damages to property, physical injury, attendant mental anguish and emotional harm. See also Pridgen & Preston, *supra* note 12, at 640-42.

53. See, e.g., KAN. STAT. ANN. §§ 19-101b(a) and (b) (1981); OKLA. STAT. ANN. 34 § 2 (1976).

54. Hannigan, *Newspaper Ombudsman and Consumer Complaints: An Empirical Assessment*, 11 LAW AND SOC. REV. 679, 681 n.1 (1977).

55. See, e.g., *People v. Minjac Corporation*, 4 N.Y.2d 320, 175 N.Y.S.2d 16 (1958). See also

by forces other than supply and demand, this too could be reported in the newspapers.⁵⁶

All of the above proposals need to be analyzed according to protections provided by the First Amendment.⁵⁷ Since commercials are subject to quick and easy verification, through, for example, scientific tests, reports, and the opinions of experts, only some qualified protection is accorded to them.⁵⁸ This means that states can ban false and deceptive advertisements, regulate the time, place, and manner for the distribution of commercials, and require advertisements to contain warnings and disclaimers which lay persons can understand.

The cases interpreting the First Amendment do not protect commercials containing emotionally based claims.⁵⁹ The First Amendment is predicated upon objective facts. In the *Virginia Pharmacy* case,⁶⁰ the Supreme Court said that the public was entitled to a free flow of commercial information, that is, *factual* information which permits people to make an informed decision about things they wish to purchase.⁶¹ In the absence of a new statute suspending activity in this area,⁶² national agencies can promulgate regulations banning emotionally based claims, provided, of course, that the audience at whom the commercial is directed is incapable of making informed decisions.⁶³

Black Americans might adopt these ideas when evaluating commercials. The Black Code⁶⁴ might be employed to clarify their views about new ideas like these. Its ingredients are:

- (1) Rights and responsibilities should be distributed equally;
- (2) (a) Social and economic inequalities are justified only if everyone is made better off; and the least well situated members of society are made noticeably better off.
 - (b) The least well situated members of society are made noticeably better off if:

Dole, *Merchant and Consumer Protection: The New York Approach to the Regulation of Deceptive Practice*, 53 CORNELL L. REV. 749, 759 (1968); and Dole, *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act*, 76 YALE L.J. 485, 490-93 (1967).

56. See CAPLOWITZ, *supra* note 15, at 16-20.

57. U.S. CONST. amend. I.

58. Roberts, *Toward a General Theory of Commercial Speech and the First Amendment*, 40 OHIO ST. L.J. 115, 130-31 (1979).

59. Pridgen & Preston, *supra* note 12, at 656-64. The cases deal with the right to present factual information. See Comment, *Commercial Speech and the Limits of Legal Advertising*, 58 OR. L. REV. 193-98 (1979).

60. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748 (1976).

61. *Id.* at 765.

62. FTC Improvements Act of 1980, TRADE REG. REP (CCH) 440, at 17 (June 2, 1980).

63. Note, *Fairness and Unfairness in Television Product Advertising* 76 MICH. L. REV. 498, 505-06, 528 n.168 (1978).

64. The "Black Code" is a product of ongoing discussions about Houstonian Jurisprudence initiated at Howard University Law School. Charles Hamilton Houston was the Vice Dean of Howard Law School from 1929-1935. See, e.g., Smith, *In Memoriam: Professor Frank D. Reeves*, 18 HOW. L.J. 1, 3, 5 (1974); and Griffin, Book Review, 57 NOTRE DAME LAW, 741, 743 (1981). Recent discussions have been inspired by the publication of J. RAWLS, *A THEORY OF JUSTICE* (1971).

- (1) Social experiments or industrial developments promote jobs;
 - (2) Social experiments or industrial developments promote educational opportunities; or
 - (3) Social experiments or industrial developments "free-up" income for personal spending.
- (3) Everyone is entitled to liberty. An individual may do, act or possess a thing, provided, he wants it; the community tolerates it; and those who might be adversely affected escape injury.

Under the Black Code, the administration of the model statute might siphon off some income in taxation. However, the taxes seized by the state should be less than the disposable income which would become available for personal spending due to consumer savings. The ideas in this article heighten one's appreciation for the amount of liberty one has as a businessman and the constitutional boundary beyond which a businessman may not go. As enacted laws, these ideas would make the economic struggle between buyer and seller an even match. They restrain what the parties may do in the bargaining process and dampen the desire to make vague and misleading claims in the pursuit of profit.

CONCLUSION

The ideas offered in this article are designed to bring about change. However, knowing what you want while being bombarded with daily commercials about what you should want, makes the task of evaluating the above ideas very difficult. Perhaps inviting new ideas while accommodating oneself to familiar business practices, would make it less difficult.

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