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## Introduction

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# FOOD MARKETING TO CHILDREN AND THE LAW: AN INTRODUCTION

*Michele Simon\**

For some time, experts and consumer groups have drawn attention to the problem of excessive marketing of unhealthful food and beverages to children.<sup>1</sup> In recent months, the national debate about the causes of the childhood obesity epidemic has focused on advertising to children. Several prominent national health organizations, including the American Academy of Pediatrics,<sup>2</sup> the American Public Health Association,<sup>3</sup> and the American Psychological Association (APA)<sup>4</sup> have called for restrictions on junk-food marketing to children.

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\* Adjunct Professor, University of California, Hastings College of the Law, and Director, Center for Informed Food Choices. Professor Katherine Pratt of Loyola Law School was the catalyst for this symposium and provided invaluable guidance and leadership throughout the process, for which I am eternally grateful. Many thanks also to the incredibly talented editorial team at *Loyola Law Review* for making both the live event and a publication of superior quality. Lastly, I am honored to have brought together many of the brightest thinkers and most dedicated experts in the field for this project and am thrilled to count them among my colleagues. The live event was held on October 21, 2005; the video is archived at <http://events.lls.edu/food-marketing-lr.html>.

1. E.g., CTR. FOR SCI. IN THE PUB. INTEREST, PESTERING PARENTS: HOW FOOD COMPANIES MARKET OBESITY TO CHILDREN 38 (2003), available at <http://www.cspinet.org/reports/index.html> (follow link to "Pestering Parents—Part III) (summarizing conclusions drawn from various studies).

2. See Am. Acad. of Pediatrics, Comm. on Nutrition, *Policy Statement: Prevention of Pediatric Overweight and Obesity*, 114 PEDIATRICS 424, 426 (2003), available at <http://aappolicy.aappublications.org/cgi/reprint/pediatrics;112/2/424.pdf>.

3. Am. Pub. Health Ass'n, *Food Marketing and Advertising Directed at Children and Adolescents: Implications for Overweight*, in 2003 POLICY STATEMENTS, at 31 (No. 2003-17, 2003), available at <http://www.apha.org/legislative/policy/2003/2003-017.pdf>.

4. BRIAN WILCOX ET AL., AM. PSYCHOLOGICAL ASS'N, REPORT OF THE APA TASK FORCE ON ADVERTISING AND CHILDREN 7 (2004), available at [http://www.apa.org/releases/childrenads\\_summary.pdf](http://www.apa.org/releases/childrenads_summary.pdf).

The conclusions of the APA Task Force on Advertising and Children, along with its recommendations for action, are particularly compelling. They state,

Considerable research has examined advertising's cumulative effect on children's eating habits. Studies have documented that a high percentage of advertisements targeting children feature candy, fast foods, and snacks and that exposure to such advertising increases consumption of these products. . . . Several studies have found strong associations between increases in advertising for nonnutritious foods and rates of childhood obesity. . . . We believe that the accumulation of evidence on this topic is now compelling enough to warrant regulatory action by the government to protect the interests of children, and therefore offer a recommendation that restrictions be placed on advertising to children too young to recognize advertising's persuasive intent.<sup>5</sup>

In addition, the Institute of Medicine (IOM), a congressional advisory body, issued its own recommendations on the same topic.<sup>6</sup> In July 2005, the Federal Trade Commission (FTC) and Department of Health and Human Services (HHS) co-hosted a workshop entitled "Perspectives on Marketing, Self-Regulation, and Childhood Obesity."<sup>7</sup> FTC Chairperson Deborah Platt Majoras set a stark tone in her opening remarks to the event when she said, "We are well aware that some already are calling on government to regulate rather than facilitate. . . . From the FTC's perspective. . . we believe a government ban on children's food advertising is neither wise nor viable."<sup>8</sup>

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5. *Id.* at 5–6, 7.

6. See J. MICHAEL MCGINNIS ET AL., INST. OF MED., FOOD MARKETING TO CHILDREN AND YOUTH: THREAT OR OPPORTUNITY? (2006).

7. Press Release, FTC, HHS Announce Workshop on Childhood Obesity (May 11, 2005), available at <http://www.ftc.gov/opa/2005/05/childobese.htm>.

8. Deborah Platt Majoras, Chairperson, FTC, Keynote Address at the FTC Workshop: Perspectives on Marketing, Self-Regulation, and Childhood Obesity 16 (July 14, 2005) (transcript available at [http://www.ftc.gov/bcp/workshops/foodmarketingtokids/transcript\\_050714.pdf](http://www.ftc.gov/bcp/workshops/foodmarketingtokids/transcript_050714.pdf)).

By characterizing such a ban as unviable, Majoras meant that the First Amendment serves as an impenetrable barrier to regulation; this myth was perpetuated throughout the two-day workshop.<sup>9</sup> Perhaps because a full two-thirds of the panelists at the workshop had financial ties to the food or advertising industries,<sup>10</sup> the event turned into a public relations opportunity.<sup>11</sup> The take-away message was that industry self-regulation is working just fine; there was little room for dissenting voices.<sup>12</sup>

Much of the policy discussion that surrounds food marketing to children has focused on the marketing of more healthful foods.<sup>13</sup> This narrow framing of the issue conveniently ignores the 800-pound gorilla in the room. We cannot discuss eating the right food unless and until we talk about reigning in an industry that spends billions of dollars a year on luring children to the wrong food. Government programs to promote fruits and vegetables pale in comparison to the marketing budgets of most corporations.<sup>14</sup> Even recent announcements that proclaim that cartoon characters such as SpongeBob SquarePants will appear on packages of spinach and carrots cannot make up for all the ways that those same characters are used to market junk foods.

The food marketing to children dilemma has inspired debates, meetings and reports, but has yet to spur sound legal scholarship that questions assumptions, critically analyzes current policy strategies, and aims to turn the dialogue into workable solutions. Filling this void was this Symposium's main goal. We gathered fifteen of the brightest scholars, practitioners, and advocates to do exactly that.

The Symposium articles fall generally into three categories: (1) articles describing the extent of the problem of junk-food marketing to children; (2) articles assessing past regulatory attempts and currently available legal strategies; and (3) articles critiquing

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9. Michele Simon, *Government Abandons Children to Big Food*, ALTERNET, July 22, 2005, <http://alternet.org/story/23648>.

10. *Id.*

11. *See id.*

12. *Id.*

13. Indeed, this was how much of the time was spent at the FTC/HSS workshop. *E.g., id.* (observing that although Nickelodeon will use its popular cartoon character Spongebob to sell vegetables, the company will not stop using Spongebob to sell junk food).

14. *See* MARION NESTLE, *FOOD POLITICS* 131 (2002).

accepted legal doctrine and forging new paths for future strategies.

#### MARKETING TO CHILDREN IN THE 21ST CENTURY

Susan Linn, author of *Consuming Kids*, was the keynote speaker at the live symposium on October 21, 2005. Her contribution to this written symposium,<sup>15</sup> co-authored by Josh Golin, starkly describes how technological advances—such as the Internet and cell phones—are designed to bypass parents and directly target children. The authors explain how ubiquitous marketing techniques such as product placement (e.g., Coca-Cola on *American Idol*), cross-promotions and movie tie-ins (e.g., *Star Wars* toys at Burger King), brand licensing (e.g., SpongeBob SquarePants selling Pop Tarts), and marketing in schools make television commercials seem tame by comparison. As Linn stated at the live event: “What [the food and marketing] industries want to do is insinuate their brands into the hearts and minds of children.”<sup>16</sup> The authors conclude that this rise in unfettered marketing of junk food to children and the related childhood obesity epidemic provide ample evidence that self-regulation has failed.<sup>17</sup>

In their article, Ed Palmer and Lisa Sofio expand exponentially on the part of Linn and Golin’s article that specifically relates to the problem of in-school marketing.<sup>18</sup> The authors describe how “[i]n virtually every aspect of the education day—from the classroom and the hallways to the lunch room and the athletic field—children are targets for marketing of high fat, highly-sugared junk food and beverage products.”<sup>19</sup> Marketing techniques include product sales through exclusive soda contracts and fundraising activities, direct advertising on school grounds and book covers, and indirect advertising such as “textbook branding,” in which math problems

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15. Susan Linn & Josh Golin, *Beyond Commercials: How Food Marketers Target Children*, 39 LOY. L.A. LAW REV. 13 (2006).

16. Susan Linn, Harvard Med. Sch., Keynote Address at the Loyola of Los Angeles Law Review Symposium: Food Marketing to Children and the Law (Oct. 21, 2005) (video recording available at <http://av.lls.edu/ramgen/programs/foodmktg/rv-kp-keynote.rm>).

17. Linn & Golin, *supra* note 15, at 31-32.

18. Ed Palmer & Lisa Sofio, *Food and Beverage Marketing to Children in School*, 39 LOY. L.A. LAW REV. 33 (2006).

19. *Id.* at 35.

require students to count M&Ms or Tootsie Rolls.<sup>20</sup> The authors also offer model commercialism guidelines and analyze both past and emerging legal strategies to address the problem.

#### ASSESSING PAST AND CURRENT REGULATORY ATTEMPTS

Tracy Westen, former deputy director of the Bureau of Consumer Protection at the FTC (1977–1981), spoke at the live symposium. Thankfully, his wonderful talk is transcribed for this volume.<sup>21</sup>

In the late 1970s, Westen was charged with initiating “Kid-Vid,” an FTC rule-making procedure that aimed to address the problem of junk-food marketing to children. Unfortunately, the initiative ultimately failed.<sup>22</sup> Westen provided an in-depth, first-hand look at a three-year process that came to a dramatic halt in 1981. The advertising industry raised \$16 million to lobby against the rulemaking, an amount equal to one-quarter of the FTC’s budget at the time.<sup>23</sup>

Unlike his current FTC counterparts, Westen does not think the First Amendment is a barrier to regulation. Rather, he believes that ads aimed at young children are inherently deceptive and hence not protected speech. Finally, Westen challenges us to read FTC’s final report, based on 60,000 pages of written comments and 6,000 pages of testimony. The hope at the time was that regulators would leave a “high-water mark” for future efforts.<sup>24</sup> Westen characterizes the report as a gold mine of testimony from psychologists and child experts, designed to support future litigation and rulemaking to create efforts to protect children. Too often issues are discussed without proper historical context. Westen’s contribution is a valuable reminder that we have been here before and should take full advantage of previous knowledge and experience as we move forward.

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20. *Id.* at 41.

21. Tracy Westen, CEO, Ctr. for Governmental Studies, Government Regulation of Food Marketing to Children: The Federal Trade Commission and the Kid-Vid Controversy, Remarks at the Loyola of Los Angeles Law Review Symposium: Food Marketing to Children and the Law (Oct. 21, 2005) (video recording available at <http://av.lls.edu/ramgen/programs/foodmktg/rv-kp-keynote.rm>).

22. *Id.*

23. *Id.*

24. *See id.*

Over the years, the regulatory model left in the wake of the federal government's failed intervention has been industry self-regulation. For example, the Children's Advertising Review Unit (CARU) came into being in the mid-1970s; it is funded and partially directed by industry members.<sup>25</sup> Ellen Fried's article is a case-study assessment of the effectiveness of this model.<sup>26</sup> Her analysis focuses on National Geographic Kids, which contains numerous ads for sugary cereals, snack cakes, candy, and other foods low in nutritional value.

While Fried worked for the Center for Science in the Public Interest (CSPI), she filed several complaints with CARU, in which she challenged specific Kraft ads that were inconsistent with CARU guidelines. Although CARU agreed with Fried's allegations, Kraft and other companies continued to run similar ads (and still do).<sup>27</sup> The apparent lack of positive effect on industry behavior leads Fried to conclude that industry self-regulation was not, and never will be, an effective tool for regulating junk-food advertising aimed at children.<sup>28</sup> Given how much stock the Federal Trade Commission has placed in industry self-regulation, Fried's analysis is sobering.

The United States is not the only country grappling with the parallel problems of junk-food marketing and childhood obesity. To reflect what is truly a worldwide movement, this Symposium includes two articles from international authors. The first is by Janet Hoek and Ninya Maubach, who write about the effectiveness of self-regulation in New Zealand.<sup>29</sup> Just as in the United States, corporations in New Zealand have successfully fought off government regulation. Prominent in this self-regulation battle is New Zealand's Advertising Standards Authority, which outlines codes for advertising food to children.<sup>30</sup> The authors analyze the multitude of ways that junk food is currently marketed to children

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25. See CARU, Support, <http://www.caru.org/support/index.asp> (last visited Jan. 15, 2006).

26. Ellen Fried, *Assessing Effectiveness of Self-Regulation: A Case Study of the Children's Advertising Review Unit*, 39 LOY. L.A. L. REV. 93 (2006).

27. *Id.* at 93-94.

28. *Id.* at 136-37.

29. See Janet Hoek & Ninya Maubach, *Self-Regulation, Marketing Communications and Childhood Obesity: A Critical Review from New Zealand*, 39 LOY. L.A. L. REV. 139 (2006).

30. See *id.*

and review a new initiative drafted jointly by industry and government.<sup>31</sup> The authors agree with Fried's conclusion that self-regulation has not provided adequate protection to children.<sup>32</sup> They also suggest that the food industry's increasingly sophisticated promotions will only be adequately controlled by government interventions that restrict the type and range of promotions allowed.<sup>33</sup>

Next, Michele Simon's article asks the simple question: can food companies be trusted to self-regulate?<sup>34</sup> Through a series of case studies, she examines the numerous states where trade groups such as the Grocery Manufacturers' Association and major companies such as Coca-Cola have lobbied hard to prevent legislation that would remove junk food and soda from schools from passing.<sup>35</sup> Even though legislation is an important legal tool to address the problem of targeting children in schools, it is impossible to ignore the tremendous amount of corporate opposition.

The second half of Simon's article focuses on the numerous ways that food companies make misleading statements about their own self-regulatory measures. For example, Kraft has stated that it is no longer *advertising* its products in schools, and yet the company also admits it is still *selling* its products in schools.<sup>36</sup> These self-serving statements, where corporations claim that they are "part of the solution" are meant to deflect government regulation. Simon concludes that the food industry cannot be trusted to self-regulate and cautions advocates to be wary of industry claims of responsible practices because a corporation's fundamental drive for profit will always trump children's health.<sup>37</sup>

The other international perspective comes from the north. Bill Jeffery's article analyzes the legal limitations on advertising directed at children in Canada.<sup>38</sup> He focuses on the Quebec Consumer

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31. *Id.* at 151-67.

32. *See id.* at 148-50.

33. *Id.* at 168.

34. *See* Michele Simon, *Can Food Companies be Trusted to Self-Regulate? An Analysis of Corporate Deception and Lobbying to Undermine Children's Health*, 39 LOY. L.A. L. REV. 169 (2006).

35. *Id.* at 171-86.

36. *Id.* at 203-04.

37. *Id.* at 235-36.

38. *See* Bill Jeffery, *The Supreme Court of Canada's Appraisal of the 1980 Ban on Advertising to Children in Québec: Implications for "Misleading"*

Protection Act,<sup>39</sup> which codified the twenty-five-year-old comprehensive legislative ban on advertising to children under age thirteen in the Province of Québec.<sup>40</sup> Jeffrey draws upon the fact that children have a limited cognitive capacity and various Canadian legal norms relating to the age of reason to conclude that existing statutory restrictions on misleading advertising *already* prohibit advertising directed at children.<sup>41</sup> Jeffrey's analysis raises the interesting question: can a similar argument be made in the United States, that current law already prohibits junk-food marketing to children (or at least does not present significant barriers to regulation) and that what is lacking is the political will to implement and enforce the law? The articles in the next section seek to answer this question.

#### FORGING NEW PATHS FOR FUTURE STRATEGIES

When all else fails (e.g., federal regulations, state legislation, and self-regulation), consumer advocates are often left with only one legal option: litigation. This Symposium contains two perspectives on the feasibility of litigation to address junk-food marketing to children. The first comes from two defense attorneys, Joseph Price and Rachel Bond, who take the position that litigation is not a desirable strategy to solve this problem.<sup>42</sup> The authors discuss the application of state consumer protection statutes (the preferred litigation strategy for misleading advertising).<sup>43</sup> They argue that these laws vary widely in their application and often dilute certain traditional tort law requirements, such as proof of reliance.<sup>44</sup> The authors conclude that because litigation tends to be driven by the individual interests of the specific plaintiff, rather than broad social interests, the legislative and executive branches of government are more suitable to the task of addressing junk-food marketing to children.<sup>45</sup>

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*Advertising Elsewhere*, 39 LOY. L.A. L. REV. 237 (2006).

39. Consumer Protection Act, R.S.Q., ch. P-40.1 (1980) (Can.).

40. Jeffery, *supra* note 42, at 239.

41. *Id.* at 245.

42. Joseph Price & Rachel Bond, *Litigation as a Tool in Food Advertising: Consumer Protections Statutes*, 39 LOY. L.A. L. REV. 277 (2006).

43. *Id.* at 279-84.

44. *Id.* at 280.

45. *Id.* at 290.

Writing in response to the Price and Bond piece, Stephen Gardner, litigation director for the advocacy group, Center for Science in the Public Interest (CSPI), not surprisingly, disagrees.<sup>46</sup> Before launching his counter-attack, however, Gardner explains at great length the justification for litigation by describing the policies of deregulation by federal agencies over the past two decades. This government inaction has given rise to the current free-for-all in corporate advertising and the related childhood obesity epidemic. Gardner concludes that “[l]awsuits are not the best way to resolve a dispute, but sometimes they are the only way.”<sup>47</sup>

In her article, Gail Javitt suggests that nutrition labeling should be used as a tool to help parents make healthy choices for their children.<sup>48</sup> She proposes amending the Nutrition Labeling and Education Act of 1990,<sup>49</sup> so that it accounts for a child’s unique physical needs. As she points out, children are not simply small adults and yet this obvious point has thus far been virtually ignored by FDA’s rulemaking on nutrition labeling. Javitt’s proposal is particularly compelling because of the notion that once companies are forced to provide particular nutrition information, they are often motivated to reformulate their products, removing the offending substance. The new requirements for trans fat labeling provide an illustrative example.<sup>50</sup> Although nutrition labeling typically falls outside the usual realm of how we think about advertising, it can serve as a useful antidote to the aggressive ways packages are used to market to children. This reform also provides an excellent response to the industry’s claim that parents need to take more responsibility for what their children eat.

The next set of articles offer perspectives on the commercial speech doctrine, which is often held up as a barrier to government regulation of marketing. An important goal of this Symposium was

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46. Stephen Gardner, *Litigation as a Tool in Food Advertising: A Consumer Advocacy Viewpoint*, 39 LOY. L.A. L. REV. 291 (2006).

47. *Id.* at 309.

48. Gail Javitt, *Supersizing the Pint-Sized: The Need for FDA-Mandated Child-Oriented Food Labeling*, 39 LOY. L.A. L. REV. 311 (2006).

49. Pub. L. No. 101-535, 104 Stat. 2353 (codified as amended in scattered sections of 21 U.S.C.).

50. See, e.g., Mike Pehanich, *Trans-Fat Transitions*, FOODPROCESSING.COM, <http://www.foodprocessing.com/articles/2005/459.html> (last visited Apr. 5, 2006).

to illuminate the role of the First Amendment in this debate, thereby dispelling myths and demystifying concepts. These authors rose to the task with a healthy combination of theory and application.

First up, Wendy Parmet and Jason Smith outline the historical context of a public health approach to the law in general, as well as the political origins of the First Amendment.<sup>51</sup> The authors argue that if the Supreme Court applied a population-based approach to regulating commercial speech, the First Amendment would not stand as a barrier to such legislation. Moreover, this approach would encourage courts to appreciate that in an information age, rights of free speech can co-exist with the state's interest in protecting public health. An especially compelling feature of the article is how it questions the usual industry prediction that the constitutional sky will fall if we attempt to regulate junk-food advertising. As Smith asked at the live event, does it make good sense to equate the interests of Coca-Cola and General Mills with those of newspapers and individuals for whom the right to free speech was originally envisioned?

Next, Angela Campbell's article addresses two specific forms of junk-food marketing to children: the use of characters and product placement.<sup>52</sup> She argues that these techniques are inherently deceptive, thus undeserving of First Amendment protection, and that Congress should pass legislation to prohibit them. Campbell cites social science research as justification; for example, the ample evidence that children under eight years old cannot understand persuasive intent. She also discusses how her proposal is consistent with the First Amendment because: (1) these types of ads contain no substantive information about the product; (2) such a ban would only apply to deceptive ads; and, (3) information intended for adults would not be effected.

Next, in an impressive balance of the theoretical and practical, David Yosifon's article questions the Supreme Court's assumptions about free agency, as well as paternalism, arguing that a near total ban on junk-food advertising could and should withstand consti-

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51. Wendy Parmet & Jason Smith, *Free Speech and Public Health: A Population-Based Approach to the First Amendment*, 39 LOY. L.A. L. REV. 363 (2006).

52. Angela J. Campbell, *Restricting the Marketing of Junk Food to Children by Product Placement and Character Selling*, 39 LOY. L.A. L. REV. 447 (2006).

tutional scrutiny.<sup>53</sup> Notably, the article does not distinguish between children and adults; instead, it argues that the Supreme Court's commercial speech jurisprudence rests on false presumptions about human behavior that leave all consumers vulnerable to manipulation through advertising. However, the article also suggests that the Court could apply the lessons of the social sciences to its current framing of commercial speech in order to uphold a qualified ban on junk-food advertising. Especially appealing is how this idea would address the problem in one fell swoop; unlike the piecemeal approach of ineffectual federal agency oversight, state-by-state legislation, and consumer protection litigation. While Yosifon's proposal may seem overly broad and thus only worthy as an academic exercise, we should remember that just thirty-five years ago, tobacco was advertised on television.

The article written by Randolph Kline, Samantha Graff, Leslie Zellers, and Marice Ashe<sup>54</sup> discuss some lessons from tobacco control that can be applied to junk-food marketing. The authors explain the limitations posed by recent U.S. Supreme Court jurisprudence, but offer hope by outlining a number of areas that are still ripe for legal action. For example, they recommended regulating the actual product, because doing so does not implicate the First Amendment. One such idea would ban the use of toys to sell food. At first blush, this may seem like restricting marketing, but in fact it is a form of product regulation. Encouragingly, such a ban could be accomplished at the local level, where most tobacco policies have had the most success.

Most instructive in their analysis is the manner in which the authors question the commonly held assumption that it would be harder to regulate food than tobacco. However, food is currently marketed to kids in all kinds of ways that tobacco is not. Consequently, nutrition advocates indeed have many more regulatory options at their disposal than tobacco control advocates do. This also suggests that advocates should not take at face value the notion that

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53. David G. Yosifon, *Resisting Deep Capture: The Commercial Speech Doctrine and Junk-food Advertising to Children*, 39 LOY. L.A. L. REV. 507 (2006).

54. Randolph Kline et al., *Plotting a Course for Nutrition: Steering Clear of the First Amendment in the Tradition of Tobacco Control*, 39 LOY. L.A. L. REV. 603 (2006).

the Supreme Court would not uphold laws restricting junk-food marketing to children. As these and other authors point out, relying completely upon *Lorillard* for guidance on how the Court might rule is limited because the Massachusetts law at issue there also barred advertising aimed at adults. In contrast, many ads are aimed at children alone. Laws to restrict food ads to kids simply have not yet been tested.

Finally, the Urban and Environmental Policy Institute's Amanda Shaffer, Mark Vallianatos, Andrea Azuma, and Robert Gottlieb, offer a number of local strategies for limiting both the sale and advertising of junk food.<sup>55</sup> These authors discuss the importance of gathering community input and grassroots support. In their article, they describe Los Angeles' Project CAFÉ (Community Action on Food Environments). CAFÉ is a collaborative project of three community-based organizations. Its goals include understanding and overcoming the barriers to healthful food in schools and neighborhoods by applying tools such as food mapping. The authors describe how this approach can serve as a model that combines research with organizing and exemplifies how utilizing grassroots input can result in more effective solutions.

#### BEGINNING OF A NEW DIALOGUE

This Symposium's authors have thoroughly achieved the goal of expanding the discussion around food marketing to children beyond its usual parameters. Hopefully, this is just the beginning of a new dialogue that continues to question assumptions and the status quo. A dialogue that says it is unacceptable for the government to continue to allow corporations unfettered access to children's minds just for the sake of profits, at the very real cost of their health and well being. May these ideas serve as inspiration for positive policy change.

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55. Amanda Shaffer et al., *Changing the Food Environment: Community Engagement Strategies and Place-Based Policy Tools that Address the Influence of Marketing*, 39 LOY. L.A. L. REV. 647 (2006).