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The Problem of "Issue" in the Administration of the Fairness Doctrine

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Through the FCC's enforcement of the fairness doctrine, the federal government monitors and regulates radio and television coverage of controversial public issues. This Article examines the FCC's regulatory role and points out the confusion and inconsistencies surrounding this poorly administered policy. The author demonstrates the damaging effects of these problems on both the broadcasters and the viewing public, and recommends several immediate changes in the administration of the fairness doctrine.

The fairness doctrine is the name given to a two-part requirement imposed by the federal government on radio and television licensees throughout the United States.¹ Under the first part, each broadcast

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1. For a concise, layman's explanation of the doctrine, see A. SHAPIRO, *MEDIA ACCESS* 107-217, 247-54 (1976). For an early history of the doctrine and its original purpose, see Simmons, *Fairness Doctrine: the Early History*, 29 *FED. COM. B.J.* 207 (1976). Key fairness documents include: FCC, *Fairness Doctrine and Public Interest Standards, Fairness Report Regarding Handling of Public Issues*, 39 *Fed. Reg.* 26,372 (1974) [hereinafter cited as *Fairness Report*]; FCC, *Broadcast Procedure Manual*, 39 *FED. REG.* 32,288, 32,290 §§ 12-14 (rev. ed. 1974) [hereinafter cited as *Broadcast Procedure Manual*]; FCC, *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 *Fed. Reg.* 10,415 (1964) [hereinafter cited as *Fairness Primer*]; FCC, *Report on Editorializing by Broadcast Licensees*, 13 *F.C.C.* 1246 (1949) [hereinafter cited as *Editorializing Report*]. Although it is beyond the scope of this Article to fully explore the thorny constitutional questions raised by the fairness

licensee must devote a reasonable percentage of its programming to the coverage of controversial issues of public importance. The second part requires that this coverage be fair in the sense that it provides an opportunity for the presentation of contrasting points of view.

The Federal Communications Commission (FCC) is responsible for enforcing the fairness doctrine. Rather than screen radio and television broadcasting itself to assure compliance, the FCC relies on complaints from the public about a particular licensee's broadcasts.² A complainant must demonstrate that a licensee in its overall programming has not abided by the doctrine. That is, a licensee need not present contrasting views on any individual show if the total broadcast output presents differing viewpoints. A licensee must seek out and air these viewpoints,³ however, even if the opposing speakers cannot pay for broadcast time.⁴ In reviewing the broadcaster's behavior, the "government's role is limited to a determination of whether the licensee has acted reasonably and in good faith."⁵ If the licensee is judged to have acted unreasonably, the Commission may consider this behavior in deciding whether to renew the broadcaster's license.⁶

doctrine, for an excellent contemporary analysis see Bazelon, *F.C.C. Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213. See also Schneekkan, *Power in the Marketplace of Ideas: The Fairness Doctrine and the First Amendment*, 52 TEX. L. REV. 727 (1974).

2. See *Broadcast Procedure Manual*, *supra* note 1.

3. See *Fairness Report*, *supra* note 1, at 26,376 ¶ 35.

4. *Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963). The broadcaster does retain, however, the power to choose the opposing speakers and to arrange the format in which they appear. See *Fairness Report*, *supra* note 1, at 26,374 ¶ 18.

5. *Fairness Report*, *supra* note 1, at 26,375 ¶ 21. See Norman A. Proffitt, 36 RAD. REG. 2d (P & F) 445 (1976).

6. *Broadcast Procedure Manual*, *supra* note 1, at 32,289 ¶ 6. Only one refusal to renew a license was based in part on fairness doctrine considerations: *Brandywine-Main Line Radio, Inc.*, 24 F.C.C.2d 18 (1970), *petition for reconsideration denied*, 27 F.C.C.2d 565 (1971), *aff'd*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973). Short-term renewal of a license may also be imposed. See *Springfield Television Broadcasting Corp.*, 21 RAD. REG. 2d (P & F) 327 (1971); *Butte Broadcasting Co.*, 18 RAD. REG. 2d (P & F) 817 (1970). Outright revocation of a license is theoretically possible, 47 U.S.C. § 312(a) (1970), but has never occurred for fairness doctrine violations. For violation of the personal attack-political editorial rules, a subcategory of the fairness doctrine, (47 C.F.R. §§ 73.123(a)(b) (AM radio), 73.300(a)(b) (FM radio), 73.598(a)(b) (noncommercial educational FM radio), 73.679(a)(b) (TV stations), 76.209(b)(c) (origination cablecasting over cable TV systems)), monetary forfeitures of up to \$1,000 per day may be imposed. 47 U.S.C. § 503(b)(1)(B), (E) (1970). If the general fairness doctrine is considered specifically enacted in the Communications Act by the 1959 Amendment to that Act, 47 U.S.C. § 315(a)(4) (1970), then similar monetary forfeitures may be imposed for violations of the fairness doctrine. In *Straus Communications, Inc. v. FCC*, 530 F.2d 1001, 1007 n.11 (D.C. Cir. 1976), the court stated that the doctrine has received "explicit recognition" from Congress. The FCC, however, has refused to impose forfeitures for fairness doctrine violations, *Fairness Report*, *supra* note 1, at 26,378 ¶ 45, and intends to continue this policy in

Over the last decade there has been an explosion of litigation and administrative activity involving the fairness doctrine. With the doctrine specifically approved by Congress for the first time in 1959,⁷ the increasing reach of television, and the rise in public interest group activism, the number of fairness complaints and rulings has soared in comparison with previous years.⁸

Almost all of this increased activity has concerned the second part of the doctrine, requiring a licensee who has aired views on one side of an issue to air contrasting views. Resolution of these complaints has focused on the problem of "issue," and two key questions: What issues have been raised in a broadcast? Are these issues controversial and of public importance? Complainants, licensees, the FCC, and the courts have wrestled with the problem of interpreting programs to isolate and define the issues raised. Once it is determined that a particular issue has been raised in a broadcast, and that it is a controversial issue of public importance, the fairness doctrine's balancing requirement applies.⁹

Only a handful of FCC rulings have dealt with the first part of the doctrine, requiring a broadcast licensee to devote a reasonable percentage of its programming to the coverage of controversial issues of public importance. The problem of issue is also critical to the resolution of part one complaints, since the complainant attempts to define the issue ignored by the licensee and describe its importance and controversiality in the community. If a complainant can demonstrate both that a particular issue is critically important and controversial and that the licensee has failed to cover it, the licensee has violated its obligation under part one of the fairness doctrine.

This Article first examines the difficult threshold question faced in the typical part two fairness cases: what issue is raised in a broadcast? Part II explores the FCC's inquiry into whether an issue is controversial and of public importance. Case law, the 1974 *Fairness*

the future. *Id.*; interview with Larry Secrest, former Administrative Assistant to Chairman Richard Wiley and now FCC Deputy General Counsel (Sept. 4, 1975).

7. 47 U.S.C. § 315(a)(4) (1970). Prior to 1959, FCC fairness doctrine enforcement was based entirely on the broad "public convenience, interest, or necessity" language of the 1927 and 1934 Communications Acts. 47 U.S.C. § 303 (1970).

8. Until the early 1960's, there were few fairness complaints, and even fewer fairness rulings. It was only in 1963 that the Commission first decided to rule on complaints when they were received instead of holding them for review every 3 years at license renewal time. Letter to Oren Harris, 3 RAD. REG. 2d (P & F) 163 (1963). In fiscal year 1969, 1,632 fairness complaints were filed with the Commission. 36 FCC ANN. REP. 62 (1970). By fiscal year 1975, the number of fairness doctrine complaints had more than doubled to 3,590. And by 1976, 41,861 fairness doctrine complaints were received by the Commission. Interviews with Milton Gross, Chief of the FCC's Fairness Political Broadcasting Branch, Complaints and Compliance Division (Sept. 3 & 9, 1975; Dec. 8, 1976).

9. See *Fairness Report*, *supra* note 1, at 26,376-77 ¶ 36.

Report,¹⁰ and the Commissioners' own comments are critically analyzed to understand how the FCC determines whether a licensee has been reasonable in its decision on an issue's controversiality and importance. *Accuracy in Media, Inc.*, the *Pensions* case,¹¹ is then discussed at length in Part III to illustrate the problems experienced by the FCC and the courts in the administration of the fairness doctrine.

Part IV discusses the problem of issue in part one fairness cases. The alternate standard developed by the FCC in part one cases is examined as are the problems and dangers inherent in enforcing the part one obligation.¹² Finally the issue problems hampering the administration of the fairness doctrine are reviewed and several recommendations for policy changes are offered.

I

WHAT ISSUE IS RAISED?

Determining what issues have been raised in a contested broadcast involves "one of the most difficult problems . . . in the administration of the fairness doctrine"¹³ Controversial public issues may be raised in programming ranging from newscasts and documentaries to commercials and entertainment shows. The ultimate issue being addressed will not always be clearly labelled or explicitly discussed. There may be several perfectly reasonable opinions as to which issue requires a response. In addition, the parameters of the issue may not be readily apparent. Most major issues involve a multiplicity of sub-issues, and the decision as to which subissues require a response is not always easy.

The FCC precedent in this complex area can best be viewed as focusing on the reasonableness of a licensee's treatment of "explicit" and "implicit" issues. Where controversial issues of public importance have been explicitly discussed in programming, cases have centered on

10. *Fairness Report*, *supra* note 1.

11. 40 F.C.C.2d 958, *application for review denied*, 44 F.C.C.2d 1027 (1973), *rev'd sub nom.* *National Broadcasting Co. v. FCC*, 516 F.2d 1101, *reversal vacated & rehearing en banc granted*, 516 F.2d 1155, *rehearing en banc vacated*, 516 F.2d 1156, *second reversal vacated as moot & remanded with direction to vacate initial order & dismiss complaint*, 516 F.2d 1180 (D.C. Cir. 1974).

12. See Representative Patsy Mink, 59 F.C.C.2d 987 (1976).

13. *Fairness Report*, *supra* note 1, at 26,376 ¶ 31. Much reliance is placed upon the issue set forth in the initial complaint. Interviews with Milton Gross, *supra* note 8; interview with Commissioner Glen Robinson (Sept. 3, 1975); interview with Larry Secrest, *supra* note 6.

The Commission must often pinpoint the specific issue or issues involved without the aid of a transcript or tape of the relevant program. This necessitates reliance on the memories of listeners and station employees. *Fairness Report*, *supra* note 1, at 26,376 ¶ 33.

whether the subissues addressed or the brief references made to other issues require separate treatment under the fairness doctrine. Implicit controversial issues of public importance—issues not clearly discussed yet implied by a broadcast—have generated precedent focusing on commercial advertising, entertainment shows, and broadcasts which track arguments made in the community.

A. Explicit Issues: Subissues and Passing References

The case most frequently cited by the FCC as precedent in determining whether a broadcast raises a subissue worthy of fairness doctrine application is *National Broadcasting Co.*¹⁴ In that case, the Aircraft Owners and Pilots Association (AOPA) complained that a three-part presentation of the nightly Huntley-Brinkley news show entitled, "Air Traffic Congestion and Air Safety," had raised the subissue of whether private pilots are a major safety hazard. The Broadcast Bureau of the FCC, after reviewing the three shows, agreed that the issue of private pilots' contributions to mid-air collisions and near misses had been explicitly raised in the first night's presentation. The Bureau pointed to the fact that the show had actually "focused" on one private pilot with little flying time, who related his experiences flying over Kennedy Airport without a radio and over Shea Stadium during the World series. The NBC commentator had added that the pilot was "'a potential danger to passenger jets and himself when and if he flies in the congested airspace around airports.'"¹⁵ In comparison, a commercial pilot was presented, described as a family man with 25 years experience and 14,000 hours of flying time. The staff concluded that the "clear import of the presentation was that both pilots were typical examples of their class: the private pilot was depicted as inexperienced and ill-trained, with a somewhat carefree attitude . . . the commercial pilot was depicted as responsible."¹⁶ NBC, according to the Bureau, would have to program pro-private pilot views on the issue to counter the anti-private pilot statements made in the Huntley-Brinkley shows.

The full Commission reversed the Bureau, finding the "*thrust of the program* is the congestion over large airports."¹⁷ The Commission declared: "If every statement, or inference from statements or presentations, could be made the subject of a separate and distinct fairness

14. 19 RAD. REG. 2d (P & F) 137, *petition for reconsideration granted and complaint denied*, 25 F.C.C.2d 735 (1970).

15. 19 RAD. REG. 2d (P & F) at 139.

16. *Id.*

17. 25 F.C.C.2d at 737 (emphasis added). The Commission also inexplicably appeared to redefine the subissue to be "that the private pilot is a hazard because of the nature of his training." *Id.*

requirement, the doctrine would be unworkable.”¹⁸ The Commission added the caveat that a licensee “could not cover an issue, making two important points in his discussion of that issue; afford time for the contrasting viewpoint on one of these two points; and on the other point, reject fairness requests on the ground that it is a ‘subissue.’ ”¹⁹

In *David I. Caplan, Ph.D.*,²⁰ the Commission continued its refusal to recognize the raising of subissues. It held reasonable a licensee’s judgment that an editorial stating that Governor George Wallace was shot by a “cheap, Saturday Night Special” did not raise a separate issue as to which type of gun should be banned under proposed legislation. Rather, the type of gun question was “part and parcel to the real issue of gun control.”²¹

More troublesome is the Commission’s judgment that the program, “Hunger: A National Disgrace,” could reasonably be said not to raise the issue posed by its very title—whether hunger in America is indeed a national disgrace.²² The Commission, stating that it was looking at the thrust of the program, offered no rationale for its decision, and seemed to be deliberately ignoring an obvious point.²³ In *Bernard T. Callan*,²⁴ the Commission ruled that even though the majority of total time over a series of eight broadcasts had been devoted to discussion of a famous New York adoption case, it was reasonable to assume that the broadcasts in their entirety had not raised the issue of the adoption case for fairness doctrine purposes.²⁵ The “thrust” doctrine of *National*

18. *Id.* at 736.

19. *Id.* at 737.

20. 38 F.C.C.2d 1027 (1973).

21. *Id.* at 1031. It should be noted that in this case, as in *National Broadcasting*, the Commission was doing exactly the opposite of what one law journal writer suggested was its practice. Rather than revealing a “tendency to limit the ‘issue raised’ as narrowly as possible,” Note, *The FCC Fairness Doctrine and Informed Social Choice*, 8 HARV. J. LEGIS. 333, 337 (1971), it expanded the issue greatly in order to encompass the alleged subissue, and thereby declare the licensee’s judgment reasonable. The Commission would have done better to analyze the *Caplan* decision as a “passing reference” case. See text accompanying notes 29-34 *infra*. The Commission, however, chose to focus on whether the subissue of the types of guns which are the subject of proposed legislation is separable from the issue of gun control, and not the brevity of the initial remark.

22. *American Conservative Union*, 23 F.C.C.2d 33 (1970).

23. The Commission concluded that “the thrust of the programs and the overwhelming majority of views expressed were on the subject of how to end hunger, rather than discussing whether hunger is a national disgrace.” *Id.*

24. 30 F.C.C.2d 758 (1971).

25. For other cases where the Commission ruled that subissues were not raised or had a differing interpretation of the broadcast than a complainant, see *Metromedia, Inc.*, 23 Rad. Reg. 2d (P & F) 610 (1972) (proper role of public officers as part of a series entitled “Criminals and the Courts”); *National Sportsman’s Club, Inc.*, 30 F.C.C.2d 636 (1971) (role of hunting in wildlife management as part of a program on the extinction of animal species).

Broadcasting apparently had little relevance in *Callan*, at least if time devoted to a topic has anything to do with "thrusting" towards that topic.

It is difficult to reconcile these holdings with *Accuracy in Media, Inc.*²⁶ *Accuracy in Media, Inc.* complained that a program entitled "Justice," aired over the Public Broadcasting Service (PBS), had raised the trials of Angela Davis and of the Soledad Brothers as an issue, and provided unfair coverage of those trials. PBS responded that the only issue raised by "Justice" was the functioning of the American "law enforcement system, including courts and prisons,"²⁷ an issue on which its overall programming was balanced. The Commission, after reviewing the program, rejected the contentions of both sides. Instead, it concluded *sua sponte* that the program had raised two subissues: (1) whether blacks can receive justice in American courts, prisons, or in postprison life; and (2) what the penal institutions and the correctional system are doing to rehabilitate those that society has judged to be wrong.²⁸ The Commission offered neither a rationale nor a supportive program text to justify this conclusion.²⁹

These cases illustrate the difficulty in determining whether subissues are raised by broadcasts. The Commission has talked of the "thrust" of a program to ascertain whether the subissue is really

26. 39 F.C.C.2d 416 (1973), *aff'd on other grounds*, 521 F.2d 288 (D.C. Cir. 1975). See also *Brandywine-Main Line Radio, Inc.*, *supra* note 6, where the Commission lists seven topics under headings such as "Issue—The Vietnam War," and then lists various subissues such as "the United State should do everything in its power to achieve a triumphant military victory" which needed a balancing of broadcast viewpoints under the fairness doctrine. 24 F.C.C.2d at 35. Other headings use the plural "issues" such as "Issues Relating to the Loyalty of Federal Officials," and list separate issues, essentially subissues of the topic heading, such as the allegation that "many high ranking federal officials . . . were . . . disloyal to the United States." *Id.* at 36.

27. 39 F.C.C.2d at 418.

28. *Id.* at 422. It went on to find the overall programming of PBS balanced on both of these subissues. *Id.* at 423.

29. The conflict with precedent is even more glaring when one considers that in such cases as *National Broadcasting* and *Callan*, complainants had asked for subissue division and had been rejected. In *Accuracy in Media, Inc.*, however, the Commission created subissues *sua sponte*.

It is also difficult to square precedent with *Tri-State Broadcasting, Inc.*, 3 RAD. REG. 2d (P & F), which focused on a 30-minute dramatization of the "Communist threat." In response to a complaint that the program was only a vehicle for "ultra rightist dogma," the Commission found that the film raised the issue of "the most effective and proper method of combating Communism and Communist infiltration." *Id.* at 176. Rather than airing the "communist viewpoint," the licensee would have to air other views on how to combat communism. *Id.*

Assuming that the issue raised was how to combat communism, why was this not considered a subissue of the broader issue of communism? If a specific method of combating handgun proliferation was part and parcel of gun control in *Caplan*, and an alleged contributing factor to unsafe air conditions was a subissue of air congestion in *National Broadcasting*, it seems inconsistent to isolate methods of combating communism from the overall issue of communism.

subordinate to the main theme of a particular program. It has asked whether an asserted subissue is just "part and parcel" of the broader issue covered by a broadcast. These terms are vague, offering little guidance. Not surprisingly, the precedent is inconsistent and lacks a clear rationale. This inconsistency does not suggest that the Commission was wrong in any of its individual decisions. Rather, the lack of clear guidelines only underscores the inability of both the licensee and a potential complainant to predict the Commission's attitude toward the subissues allegedly raised in a broadcast.

Although the FCC has failed to develop a reasoned line of precedent when dealing with major subissues, it has been more consistent in its treatment of passing references to issues made in programs. For its "passing reference" policy, the FCC usually cites the language of *National Broadcasting*: "[E]very statement, or inference from statements or presentations," cannot require fairness balance, for this "would involve this agency much too deeply in broadcast journalism."³⁰ The "statements" at issue in *National Broadcasting* were certainly not passing; they involved a substantial part of one show's programming.

In attempting to follow *National Broadcasting*, however, the Commission has effectively removed passing references from fairness doctrine treatment. In *Gary Lane, Esq.*,³¹ it was held to be reasonable for NBC to conclude that David Brinkley's brief remarks about the Subversive Activities Control Board during a commentary on the retirement of Mr. Otepka, a member of the Board, did not raise the Control Board issue under the fairness doctrine. Similarly, in *Clinton R. Miller*,³² three sentences discussing fluoridation during a 60-sentence discussion of dental care did not raise the fluoridation issue. A passing reference to school prayers in a Red Skelton record did not raise the issue of school prayers in *Martin-Trigona*.³³ As the Commission stated in its 1974 *Fairness Report*, "a fairness response is not required as a result of offhand or insubstantial statements."³⁴

30. 25 F.C.C.2d at 736.

31. 26 RAD. REG. 2d (P & F) 1185 (1973).

32. 26 F.C.C.2d 920 (1970).

33. Anthony R. Martin-Trigona, 17 RAD. REG. 2d (P & F) 704 (1969), *reconsidered and relief denied*, 18 RAD. REG. 2d (P & F) 989 (1970). See also Stambler & Shrinky, 33 RAD. REG. 2d (P & F) 931 (1975) (mention of broadcast properties to be acquired in purchase of Washington Star); Elsie Bradberry, 21 RAD. REG. 2d (P & F) 379 (1971) (mention of God); Robert H. Scott, 25 F.C.C.2d 239 (1970) (mention of "God is great," and "God is good," and "under God").

34. *Fairness Report*, *supra* note 1, at 26,376 ¶ 35. Even with passing references, however, there may be difficult problems of linedrawing. See Boalt Hall Student Ass'n 20 F.C.C.2d 612 (1969), where the complainant Association asserted that in a 30-minute broadcast California Governor Reagan had talked not only about the issue of student unrest, as the licensee asserted, but also about subissues such as the faculty's alleged permissiveness toward obscenity and an allegedly unfit instructor. The Commission was

In essence, the passing reference policy is a part of the subissue doctrine. Passing references are subissues that do not cross the threshold of becoming an important point requiring fairness balancing. They are merely "junior subissues," not worthy of treatment. Although a passing reference may address a distinct and controversial issue of public importance, the Commission has chosen to ignore the content of brief references in favor of a quantitative measurement. The Commission has focused on the broadcast time or script space devoted to the reference in terms of the relevant program. This analysis has been applied consistently, resulting in a predictable line of precedent.

B. Implicit Issues: Arguments, Advertising, and Entertainment

Ultimate issues or subissues need not be explicitly discussed in a broadcast to be subject to the fairness doctrine. Rather, they might be depicted in a fictional setting, or be present only by process of viewer association.³⁵ In its 1974 *Fairness Report*, the FCC set forth guidelines for dealing with a broadcast that avoids explicitly mentioning the ultimate issue in controversy, yet clearly makes arguments supporting one side or the other. According to the Commission, the licensee should:

exercise his good faith judgment as to whether [a broadcast] had in an obvious and meaningful fashion presented a position on the ultimate controversial issue . . . whether [a] statement in the context

unclear as to why it ruled that the licensee's definition of the broader issue was reasonable, but among the reasons it set forth were that the statements complained of "were of extremely brief duration." *Id.* at 616. Apparently, however, they were major points made by the Governor. Compare this decision with Phillip H. Schott, 25 F.C.C. 2d 729 (1970), where, on a complaint involving another broadcast by Governor Reagan about student unrest and the closing of college campuses, the Commission apparently reached a contrary and inconsistent conclusion. It listed in an appendix to the decision seven subissues (six of which were based on short Reagan statements) that were covered in the Governor's address, and found the fairness doctrine "applicable to the issues." *Id.* at 730.

35. At least one licensee has also suggested that viewpoints on issues have been raised and balanced under the fairness doctrine by balancing commentators with different political philosophies. But the Commission stated:

The fairness doctrine is applicable to specific controversial issues of public importance, and therefore, in the absence of a showing as to the specific viewpoints presented, reliance on the general philosophy or bent of a commentator does not adequately answer the question whether a licensee has discharged its affirmative duty to encourage and implement the broadcast of opposing viewpoints on such specific issues.

Lamar Life Broadcasting Co., 5 RAD. REG. 2d (P & F) 205, 212-13 (1965). Just as the Commission will look beyond philosophies to specific issues, so it will look beyond broadcast formats. Thus, whether a broadcast raises a controversial issue of public importance "is determined by the content of the presentation, and not upon the placing of any label such as 'editorial,' or 'commentary,' or 'opinion,' on that presentation." WNCN Listener's Guild, 33 RAD. REG. 2d (P & F) 1231, 1238 (1975).

of the ongoing community debate is so obviously and substantially related to the [ultimate] issue as to amount to advocacy of a position on that question.³⁶

When substantial arguments have clearly been made in a program, and these arguments are obviously linked to a position on one side of an ultimate issue being debated in the community, the Commission has consistently found the ultimate issue to be raised. For example, in *Thomas M. Slaten*,³⁷ an editorial that was critical of judges raised the issue of the quality of local judges; and in *John Birch Society*,³⁸ a specific description of abuses by and criticism of the John Birch Society raised the issue of the radical right. These programs "obviously and substantially" related to an ultimate issue being debated in the community.³⁹

The difficulty of determining the implicit issues raised by a broadcast are acutely seen in the advertising area.⁴⁰ In most standard product commercials and institutional advertisements there is no explicit discussion of a controversial issue of public importance. Even where there is some commentary which arguably presents views being expressed in the community regarding an issue, it is extremely difficult to determine whether the commentary is "obviously and substantially" related to that issue. Nonetheless, prior to 1974 the FCC found that implicit issues were raised in certain standard product commercials. The lack of guidelines in this area allowed the Commission to conclude that cigarette commercials raised the issue of the desirability of smoking and related health hazards.⁴¹ Fairness balancing was therefore required. In contrast, car ads were not found to raise the issue of the desirability of using cars and related air pollution health hazards.⁴²

The FCC recognized that it was opening a Pandora's Box by reading issues into standard product commercials that were not explicitly

36. *Fairness Report*, *supra* note 1, at 26,376 ¶ 34.

37. 28 F.C.C.2d 315 (1971).

38. 11 F.C.C.2d 790 (1968).

39. See also *Richard B. Wheeler*, 6 F.C.C.2d 599 (1965) (program clearly criticizing abuses in debt-adjusting business raises issue of debt-adjusting business).

40. The FCC's treatment of broadcast advertising has been extensively analyzed elsewhere by this author. See *Simmons, Commercial Advertising and the Fairness Doctrine: The New F.C.C. Policy in Perspective*, 75 COLUM. L. REV. 1083 (1975).

41. *WCBS-TV*, 8 F.C.C.2d 381 (1967).

42. *Friends of the Earth*, 24 F.C.C.2d 743 (1970). This decision was reversed by the District of Columbia Circuit Court of Appeals, in large part because of its inconsistency with the decision on cigarette advertisements. *Friends of the Earth v. F.C.C.*, 449 F.2d 1164 (D.C. Cir. 1971). See also *David C. Green*, 24 F.C.C.2d 171 (1970), *aff'd*, 447 F.2d 323 (D.C. Cir. 1971); *San Francisco Women for Peace*, 24 F.C.C.2d 156 (1970) (reasonable to conclude that armed forces recruitment commercials aired during Vietnam war do not raise a controversial issue of public importance).

discussed and reversed this policy in the 1974 *Fairness Report*.⁴³ Ordinary product and service advertisements are now exempt from fairness doctrine obligations. The first amendment implications, economic consequences, and administrative difficulties involved in policing commercials render inadvisable any attempt to apply the fairness doctrine in this context.⁴⁴

Entertainment programming⁴⁵ may also present controversial issues of public importance. The programming may depict an incident or story that relates to a recognized issue; or it may contain dialogue that actually discusses the issue. Suppose, for example, there is an ongoing community debate over the safety of nuclear reactors, and the potential for terrorist attacks on such reactors is a principal point made by those favoring expenditures to make reactors more secure. In the middle of this debate, a TV movie portrays a fictional terrorist attack on a nuclear reactor. In realistic fashion the drama depicts terrorists taking over a reactor and holding a city hostage. Has the show, a pure adventure drama containing no explicit discussion of any issues, raised the issue of nuclear reactor safety for the purposes of the fairness doctrine? Suppose further that several minutes of the film are devoted to a town meeting prior to the terrorist takeover at which community leaders adamantly present a series of arguments for increasing expenditures to protect the reactor. Does this explicit discussion of the nuclear safety issue within the confines of an entertainment show raise the issue under the fairness doctrine?

The Commission, perhaps realizing the drastic implications of a contrary path, has avoided ruling that a fictional, satirical, comical, or other entertainment presentation raises a controversial issue of public importance. The FCC has declared that if entertainment programming merely depicts an issue, as in the first version of the terrorist attack TV movie, it does not raise that implicit issue under the fairness doctrine. Although it has proclaimed that entertainment programming can raise an issue subject to fairness doctrine application if, as in the second version of the movie, the program explicitly discusses that issue,

43. *Fairness Report*, *supra* note 1, at 26,380-82 ¶¶ 60-76. The Commission reaffirmed this change of mind in FCC, *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Reconsideration of the Fairness Report*, 58 F.C.C.2d 691, 697-99 ¶¶ 26-30 (1976).

44. See Simmons, *supra* note 40, at 1108-20.

45. For purposes of this discussion, entertainment programming includes all television (or radio) programming other than news, documentaries, interview shows, other programming focused on public affairs, commercial advertising, public service announcements, and religious, agricultural, and other such specialized programming. Thus, fictional series, movies, dramatic presentations based on fact, comedies, musical shows, satires, game shows, and sports may be considered the standard fare of such entertainment programming.

the Commission has always found licensees to have been reasonable in concluding that fairness doctrine issues were not raised by entertainment programming.

In a 1975 case, the National Organization for Women (NOW) challenged the renewal of a TV license based in part on the licensee's alleged portrayal of women in stereotyped female roles, including being dependent on men and valued only as a sex object.⁴⁶ NOW asserted that the TV station had thereby raised the important and controversial issue of the role of women in society, and had failed to present diverse views on the issue. The FCC rejected the licensee's rejoinder that entertainment programming could never raise a fairness issue. But it did side with the licensee against NOW because "fairness doctrine obligations are rooted not in the mere depiction of any role by a women [sic], but rather in the discussion—the dialogue—that occurs. . . . [The] programming NOW identifies contained no true *discussion* of the role of women in society."⁴⁷

An Alabama complainant received the same treatment when he declared that ABC in presenting the movie, "The Gun," an episode of "That's my Mania" series, and an episode of "Streets of San Francisco," had raised the issue of gun control.⁴⁸ The programming had shown the tragic events which followed purchase of a gun, and the complainant thought that this demonstrated one side of the gun control issue which needed fairness balancing. The Commission disagreed, stating that many TV police dramas portray crime involving handguns. The complainant had simply not shown that the programs in question had "addressed the issue of 'handgun control' in such an 'obvious and meaningful fashion.'" ⁴⁹

In a 1972 case, the Commission received a complaint that three Boston television stations were, by airing programs containing violent scenes, raising the issue of the effect on children of violence in television programming.⁵⁰ Discounting the analogy to cigarette commer-

46. American Broadcasting Co., 52 F.C.C.2d 98 (1975).

47. *Id.* at 115 (emphasis in original). See also Rudolph P. Arnold, 52 F.C.C.2d 405 (1975); National Broadcasting Co., 52 F.C.C.2d 273 (1975).

48. Thomas E. Mitchell, 54 F.C.C.2d 593 (1975).

49. *Id.* at 395. One legal justification the FCC might have asserted for excluding much entertainment programming from fairness treatment would rely on the language of section 315. Under the statute, licensees must "afford [a] reasonable opportunity for the *discussion* of conflicting views on issues of public importance." 47 U.S.C. § 315 (a)(4) (1970) (emphasis added). Mere depiction of an event, as in the first terrorist-atomic plant hypothetical, arguably does not constitute "discussion" of that issue.

50. George D. Corey, 37 F.C.C.2d 641 (1972). Corey asked that the stations broadcast the following public service announcement or its equivalent in order to comply with the fairness doctrine: "Warning: Viewing of violent television programming by children can be hazardous to their mental health and well being." *Id.* at 641.

cials and their effect on health,⁵¹ the FCC rejected the complaint for failure to point out how violent programming in and of itself raises a controversial issue of public importance.⁵²

The FCC was confronted with entertainment dialogue that actually discussed a viewpoint on a controversial issue of public importance in a case involving the comedy series "Maude."⁵³ Following the discovery that Maude, a middle-aged mother, was pregnant, a family discussion about an abortion took place during which family members expressed various proabortion arguments. Faced with a complaint demanding that the "prolife" viewpoint be presented, the FCC neatly escaped answering whether the Maude dialogue had raised the abortion issue for fairness doctrine purposes; "assuming *arguendo* that the program did so," the Commission ruled that the complainants had nonetheless failed to show that in its overall programming the television station had not presented contrasting views on abortion.⁵⁴

The FCC's efforts to shelter entertainment from scrutiny under the fairness doctrine is commendable because of the administrative chaos and the infringement of first amendment rights of broadcasters that would result from application of the fairness doctrine. Entertainment programming constitutes the bulk of radio and television time;⁵⁵

51. Commissioner Johnson's dissent convincingly refuted the Commission's attempt to distinguish cigarette commercials from violent programming and its effect on children *Id.* at 644.

52. "It is simply not an appropriate application of the fairness doctrine to say that an entertainment program—whether it be Shakespeare or an action-adventure show—raises a controversial issue if it contains a violent scene and has a significant audience of children." *Id.* at 643. The Commission correctly pointed out: "[W]ere we to adopt your construction that the depiction of a violent scene is a discussion of one side of a controversial issue of public importance, the number of controversial issues presented on entertainment shows would be virtually endless." *Id.* at 643-44. The same fate awaited complainants charging that implicit controversial issues of public importance were raised by how Indians were treated in the "Daniel Boone" series, David Hare, 35 F.C.C.2d 868 (1972), and by "depictions of 'Indians, Latinos, Blacks, Jews, and others' in motion pictures," Flower City Television Corp., 57 F.C.C.2d 112, 116 (1975). In *Flower City*, the fairness issue came up in a challenge to renewal of a television station's license. The Commission, after admitting that entertainment programming could raise a fairness issue, declared that the "Fairness Doctrine does not enter the picture unless the program contributes to or constitutes a discussion. The petitioner has failed to show us that any of the dialogues of the cited motion pictures could reasonably be considered 'discussions' of an on-going community debate such that they would amount to advocacy." *Id.* at 117 (citations omitted). See also Rose Sodano, 40 F.C.C.2d 972 (1973) (complaint alleging reference to Al Capone in Alistair Cooke's "America" series disparaged Italian-Americans); Robert S. Gelman, 29 F.C.C.2d 34 (1971) (complaint alleging references in "All in the Family" disparaged New York Jewish attorneys and asking reply under the personal attack doctrine).

53. Diocesan Union of Holy Name Societies, 41 F.C.C.2d 297 (1973).

54. *Id.* at 298-99.

55. See, e.g., *Types of network TV shows and their audiences*, 1976 BROADCASTING YEARBOOK C-300.

because many programs depict controversial issues, the broadcast schedule of licensees would be subject to constant readjustment to allow for balanced programming.⁵⁶ The problems connected with the application of the doctrine to conventional public affairs programming would be magnified and expanded in the area of entertainment programming. The question of which issue and possible subissues are raised would be particularly complex since "successful controversial fictional characters are often different things to different people."⁵⁷ Broadcasters might well avoid airing any entertainment programs containing potential controversial issues of public importance; if self-censorship did not occur, the FCC would have to play an unprecedented role as a fairness adjudicator, creating a serious risk that the editorial and creative freedom of the broadcaster would be reduced. In either event, the critically important right of the public to receive an unfettered, robust supply of diverse views of controversial public issues would suffer.⁵⁸

The FCC's declaration that dialogue in entertainment shows can raise fairness issues is ominous. The Commission would do well to treat issues presented in entertainment programming as it does passing references and avoid applying the fairness doctrine. At the very least, this rule should be strictly construed in future decisions and applied only to the most blatant cases.

II

IS THE ISSUE CONTROVERSIAL AND OF PUBLIC IMPORTANCE?

Once the issues raised in a broadcast have been identified, it still must be determined whether the issues are "controversial" and of "public importance." The 1949 *Report on Editorializing*⁵⁹ left these

56. The almost unlimited potential for such application is asserted by one law review writer who sees fairness issues implicit not only in the portrayal of violence in televised westerns, movies and football games, but also in the FBI series' favorable treatment of the Bureau. Comment, *The Fairness Doctrine and Entertainment Programming: All in the Family*, 7 GA. L. REV. 554, at 561-62 (1973). The author argues: "In general, any position which might reasonably be inferred from an entertainment program, whether through outright statement or through innuendo, would trigger the application of the doctrine." *Id.* at 502. As another commentator points out, such application would place the Commission "in a position of drama critic." Rosenfeld, *The Jurisprudence of Fairness: Freedom through Regulation in the Marketplace of Ideas*, 44 FORDHAM L. REV. 877, 902 (1976).

57. Rosenfeld, *supra* note 56, at 904.

58. Many of the other arguments against the application of the doctrine to commercial advertising made in Simmons, *supra* note 40, are relevant to entertainment programming. Thus there would also be an adverse economic effect on broadcasting if the doctrine were applied to entertainment shows, although possibly not as severe as in the advertising context. The first amendment concerns would also be magnified.

59. *Editorializing Report*, *supra* note 1.

terms completely undefined. The 1964 *Fairness Primer*⁶⁰ provided some help, but only by offering brief synopses of cases illustrating isolated examples of controversial issues of public importance. No decisional rationale was offered. The 1974 *Fairness Report* represented the first policy statement by the FCC designed to provide some guidance to the Commission, its licensees, and potential complainants.⁶¹ The report reaffirmed the FCC's reliance on licensees' reasonable, good faith judgment, and rejected the idea of issuing detailed criteria in favor of suggesting guidelines in the form of "general observations."⁶² Dividing the definitional task into two separate questions, the Commission first focused on how to determine "public importance." It pointed to three factors: the degree of media coverage; the degree of attention given the issue by government officials and other community leaders; and the principal test, a "subjective evaluation of the impact that the issue is likely to have on the community at large."⁶³

The Commission asserted that the controversiality of an issue can be determined in a more objective manner, apparently because there is no need to evaluate the issue's impact on the community. The less significant factors in defining "public importance"—the degree of media coverage, and attention given the issue by government officials and community leaders—become critical in defining "controversial." The licensee should be able to tell whether the issue is the subject of vigorous debate with substantial elements of the community in opposition to one another.

The Commission's "general observations" are general indeed. As with the question of what issues are raised, the FCC's most important

60. *Fairness Primer*, *supra* note 1.

61. Various commentators have urged that the FCC develop more definite standards in determining the reasonableness of a licensee's judgment on controversy and public importance, and have even suggested decisional criteria. See Comment, *The Regulation of Competing First Amendment Rights: A New Fairness Doctrine Balance after CBS?*, 122 U. PA. L. REV. 1283, 1320-22 (1974); Note, *The FCC Fairness Doctrine and Informed Social Choice*, 8 HARV. J. LEGIS. 333, 345-46 (1971). Others have disagreed. Interview with John Goldhammer, Program Director for television station WTOP-TV, Washington, D.C. (Sept. 8, 1975); Interview with Ben Raub, Vice President and Assistant General Attorney who oversees legal responses to all fairness matters for NBC (Aug. 26, 1975). See also Barrow, *The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillar in the Forum of Democracy*, 37 U. CIN. L. REV. 447, 490 (1968).

62. *Fairness Report*, *supra* note 1, at 26,376 ¶ 30. The Commission states that: [G]iven the limitless number of potential controversial issues and the varying circumstances in which they might arise, we have not been able to develop detailed criteria which would be appropriate in all cases. For this very practical reason, and for the reason that our role must be one of review, we will continue to rely heavily on the reasonable, good faith judgments of our licensees in this area.

Id. ¶ 29.

63. *Id.* ¶ 30.

decisionmaking principle is deference to the reasonableness and good faith of the licensee.⁶⁴ The vagueness in standards and deference to licensee judgment do not create problems where, as is often the case, the proper judgment as to an issue's controversiality and public importance is obvious.⁶⁵ It is hard to find fault with the FCC's conclusions that bullfighting in Spain,⁶⁶ the theories of curved space,⁶⁷ and electronic speech compression⁶⁸ did not present controversial issues of pub-

64. The lack of definitional standards is well illustrated by the Commissioners' own words. Commissioner Charlotte Reid candidly admitted that whatever "controversial-public-importance" guideposts exist "are pretty nebulous. It's a matter of feeling and reaction." Interview with Charlotte Reid (Sept. 16, 1975). Commissioner Hooks has declared that it's "almost like pornography, I may not be able to define it, but I know it when I see it." Interview with Benjamin Hooks (Sept. 14, 1975). The Commissioner added, "It just seems to me that a controversial question of public importance is a question that apparently a great deal of people have some concern about and not a unanimous viewpoint. I don't have any fixed or pat answer, its just a matter of recognizing it." *Id.* Commissioner Wells told one interviewer that he "had no clear standard," although there were some indicia. Swartz, *Fairness for Whom? Administration of the Fairness Doctrine, 1969-70*, 14 B.C. INDUS. & COM. L. REV. 457, 461 (1973). The indicia were "coverage by other media, legislative or executive action, and the existence of concerned community organizations." *Id.*

Other commissioners have commented on the lack of standards. Commissioner Robinson asserted, "There are no guidelines. . . . Its pretty murky." Interview with Glen Robinson (Sept. 3, 1975). The Commissioner indicated that the Commission generally handled complaints by indicating that the complainant has not met the "burden of proof."

Commissioner Quello does not "know of any yardstick I'd provide." Interview with Commissioner James Quello (Sept. 8, 1975). The Commissioner added that coverage by television, newspapers, and magazines as well as whether the issue was to be voted on by the public are factors he considers. *Id.*

Commissioner Robert Lee has suggested "a great deal of visceral reaction on my part." Interview with Robert Lee (Sept. 15, 1975). And Chairman Wiley, while pointing to the 1974 *Fairness Report's* guidelines, has referred to judges' disagreement over a famous and complicated torts case:

You look at the *Palsgraf* case and see how these guys wrangled around on what a reasonable man is, or a zone of danger—anything you put to a microscope when you come right down to it—they all have certain difficulty seeing it all the way through . . . you have to make some common sense judgments. Everybody defines it slightly differently.

Interview with Chairman Richard Wiley and Administrative Assistant Larry Secrest (Sept. 14, 1975). Mr. Secrest continued: "That's why the reasonableness standard is so important in here, because there is so much of a subjective element in judgment. It's necessary that the Commission avoid any close second guessing because the standards just aren't that mechanical." *Id.*

65. It should also be noted that fairness complainants will frequently fail to provide any information, even of media coverage of officials' comments, to substantiate whether an issue is controversial or of public importance. Complaints are very frequently returned to the complainants by the FCC staff for further information, often never to reemerge.

66. The *Clarín*, 28 F.C.C.2d 313 (1971).

67. Morton Schwartz, 52 F.C.C.2d 596 (1975).

68. Christopher S. Riley, 53 F.C.C.2d 190 (1975).

lic importance, while the Vietnam War,⁶⁹ racial integration,⁷⁰ and sex education in the public schools⁷¹ did.⁷² Where the determination has not been so obvious, however, the FCC has decided cases inconsistently and has often failed to offer an explanatory rationale for its decisions, relying instead on conclusory statements and boiler plate language.⁷³

69. American Friends of Vietnam, Inc., 6 RAD. REG. 2d (P & F) 126 (1965). See also Accuracy in Media, Inc., 39 F.C.C.2d 558 (1973); Horace P. Rowley, 39 F.C.C.2d 437 (1973); Richard B. Kay, 24 F.C.C.2d 426 (1970), *aff'd*, 443 F.2d 638 (D.C. Cir. 1970).

70. Lamar Life Broadcasting Co., 38 F.C.C.2d 1143 (1965).

71. Accuracy in Media, Inc., 39 F.C.C.2d 416 (1973), *aff'd*, 521 F.2d 288 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 934 (1976).

72. In many of those cases (e.g., *American Friends*, *Lamar Life*, and *Accuracy in Media*), however, the Commission simply assumed that the issue was a controversial issue of public importance without offering any explanatory rationale. If the Commission is simply to take "administrative notice" of an issue as being controversial and of public importance, it should at least state that it is doing so.

73. One sequence of inconsistent cases commenced with *Living Should be Fun*, 33 F.C.C. 101 (1962). Listeners complained to the FCC that a daily radio program offering discussions on diet and health matters had presented one-sided views on controversial issues of public importance. Among these issues were the fluoridation of water, the value of Krebiozen in the treatment of cancer, the nutritive qualities of white bread, and the use of high potency vitamins without medical advice. The FCC agreed that these issues did deserve treatment under the fairness doctrine, and that the licensee would have to air contrasting viewpoints. No explanation of why the issues were controversial and of public importance was given beyond the assertion that the program's narrator had "emphasized the fact that his views were opposed to many authorities in these fields." *Id.* at 1070.

In 1975, the FCC was confronted with a complaint alleging that discussion of the hotly debated drug Laetrile, used in the treatment of cancer, raised a controversial issue of public importance. Thomas N. Lippitt, 53 F.C.C.2d 1195 (1975). Despite the submission of newspaper articles on Laetrile, court cases concerning its licensing and use, and controversy about it within the medical profession, the Commission ruled that the complainant had not shown that it was a controversial issue of public importance. There seems to be no rational reason for concluding that Krebiozen use in treatment of cancer should be any more controversial or important in *Living Should be Fun* than Laetrile should be in *Lippitt*. If anything, Lippitt demonstrated more controversy and importance in his complaint, even describing media coverage and official action as the *Fairness Report* suggests. The difference of opinion among expert authorities that seemed to be dispositive in *Living Should be Fun* had little effect in *Lippitt*.

Living Should be Fun also seems to conflict with *American Vegetarian Union*, 38 F.C.C.2d 1024 (1972), in which the complainant alleged that disparagement of a vegetarian diet and advocacy of an all-animal protein diet, including statements that vegetarians lack vitamin B-12, raised a controversial issue of public importance. Despite the complainant's description of a pending Food and Drug Administration ruling on antibiotics injected into animal foods, relevant congressional bills on meat products, and a considerable divergence of opinion among nutritionists on the effects of meat diets, the Commission ruled that the issue did not involve a public controversy. No rational distinction was expressed to explain why the nutritional value of white bread and the use of vitamins in *Living Should be Fun* presented controversial issues of public importance, while the nutritional value of animal products and lack of vitamins in a vegetarian diet in *American Vegetarian Union* did not.

Cases focusing on employee-employer relations also present a conflicting line of precedent. Compare National Ass'n of Gov't Employees, 41 F.C.C.2d 965 (1973),

A. Giving Content to Fuzzy Guideposts

Despite the substantive inconsistency of some FCC decisions, and the lack of explanatory rationale in a great many, there are certain discernible trends in the cases. The most important guideposts in determining whether an issue is controversial and of public importance remain those enumerated in the *Fairness Report*: media coverage, attention by government officials and community leaders, and a subjective evaluation of community impact. In a case decided just 6 months after the *Fairness Report* was issued, however, the Commission stated that there are no "quantitative standards against which one could measure the applicability of any or all of these three factors to any particular issue." According to the Commission, these factors did not "constitute an absolute test of the importance of any issue," but instead were to be "some of the factors which could be considered on a case-by-case basis in evaluating the importance of an issue."⁷⁴

Although the Commission has often failed to mention media coverage and official attention, these factors have played a part in many FCC opinions. In examining the media factor, the FCC has rejected arguments that media coverage alone makes issues controversial and of public importance.⁷⁵ Similarly, the Court of Appeals for the District of Columbia has held, in affirming a Commission decision, that media coverage by itself does not determine whether an issue is a controversial issue of public importance.⁷⁶ Media coverage may, however, help make an issue controversial and of public importance.

The kind of coverage that has been most persuasive with the Commission is that which reports on actual debate in the community over the issue. Thus, articles in Seattle newspapers which described

with Communication Workers of America, 31 F.C.C.2d 841 (1971); and Big Bend Broadcasting, 20 RAD. REG. 2d (P & F) 93 (1970), with Retail Store Employee's Local 880, 436 F.2d 249 (D.C. Cir. 1970).

74. Public Communications, Inc., 50 F.C.C.2d 395, 400 (1974).

75. In the 1974 *Fairness Report*, the FCC declared that it is "obvious that an issue is not necessarily a matter of significant 'public importance' merely because it has received broadcast or newspaper coverage." *Fairness Report*, *supra* note 1, at 26,376 ¶ 30.

76. Healey v. FCC, 460 F.2d 917 (D.C. Cir. 1972). "Our daily papers and television broadcasts alike are filled with news items which good journalistic judgment would classify as newsworthy, but which the same editors would not characterize as containing important controversial public issues." *Id.* at 922. The Court reasoned that a "57-year old Communist housewife and her PTA activities, her children, and their friends" did not qualify as a controversial issue of public importance, and reaching an opposite decision in such a case would "swamp" the FCC with fairness complaints. *Id.* at 923. Television and radio would be discouraged from commenting on any newspaper editorials or items, and the robust public debate that the doctrine was designed to foster would thereby suffer. *Id.*

organized community opposition to a school levy proposition were used by the Commission to determine whether the levy was a controversial issue.⁷⁷ Similarly, newspaper and broadcast coverage of the conflict between a variety of interest groups over the United Appeal Campaign in Dayton, Ohio, was considered by the FCC as evidence that the Appeal was a local controversial issue of public importance.⁷⁸ A major newspaper story about a communist housewife,⁷⁹ a sports commentator's mention of a private pension dispute between retired and active football players,⁸⁰ and even letters to the editors discussing a licensee's programming on evolution,⁸¹ however, were held to be insufficient evidence of controversial issues of public importance.

Whether attention is given to an issue by community leaders has been an important and sometimes critical factor in determining whether that issue requires fairness balancing.⁸² If an issue is the subject of a public election, this will be relied on by the FCC in calling it a controversial issue of public importance.⁸³ Federal legislative and executive issues, such as the National Fair Employment Practices Commission,⁸⁴ and unemployment compensation laws,⁸⁵ have required fairness treatment, and various actions of state and local government, such as

77. Ted Bullard, 23 F.C.C.2d 41, 43 (1970). The community controversy plus the levy being the subject of an election made the issue a controversial issue of public importance. Typically, however, the conclusion as to controversy has not been separated from the conclusion as to public importance.

78. United People, 32 F.C.C.2d 124, 125-27 (1971). See also Thomas M. Slaten, 28 F.C.C.2d 315 (1971).

79. Dorothy Healey, 24 F.C.C.2d 487 (1970), *aff'd*, 460 F.2d 917 (D.C. Cir. 1972).

80. National Football League Players Ass'n, 39 F.C.C.2d 429 (1973).

81. Mrs. H.B. Van Velzer, 38 F.C.C.2d 1044 (1973). See also Douglas J. Allam, 36 RAD. REG. 2d (P & F) 443 (1976) (local newspaper article discussing broadcast); Thomas W Lippitt, 53 F.C.C.2d 1195 (1975) (newspaper articles and other publications discussing laetrile "battle"); Thaddeus L. Kowalski, 46 F.C.C.2d 124 (1974) (news coverage of complaint to FCC); Illinois Citizens Comm., 26 F.C.C.2d 373 (1970) (newspaper coverage of license renewal controversies in other cities). Note that the alleged bias of the news media may itself be a controversial issue of public importance. See Brandywine-Main Line Radio, Inc., *supra* note 6, 24 F.C.C.2d at 36 n.6.

82. The Commission's reliance on government attention to tell it when an issue is important seems alien to a doctrine attempting to create a free marketplace of ideas. Debate in a community may concern whether the government should take action on a particular issue. To exclude such an issue from fairness doctrine obligations because it has not been stamped with the seal of government attention in the form of a ballot measure or legislative proposal seems contrary to the doctrine's stated purposes.

83. See text accompanying notes 90-94 *infra*.

84. *Fairness Primer*, *supra* note 1, at 10,416-17.

85. See Brandywine-Main Line Radio, Inc., *supra* note 6, 24 F.C.C.2d at 36 n.2. In the *Editorializing Report*, *supra* note 1, at 1256 ¶ 18, the FCC offers the example of a "controversial bill pending before the Congress of the United States" to exemplify when fairness balancing would be necessary.

the tax and planning policies of a state legislature and county board,⁸⁶ have also been considered controversial issues of public importance.

The 1974 *Fairness Report* indicated that the most important factor in determining an issue's public importance (although not its controversiality) was a subjective evaluation of its impact on the community.⁸⁷ Impact on the community, however, from either a subjective or objective perspective, is almost never discussed in the case law but is simply assumed. Because there is no impact rule that can be divined from the precedent, use of impact as a guidepost in new situations is difficult.

A serious problem with using the guideposts provided by the *Fairness Report* is that the separate questions of controversiality and public importance have been merged by the cases into a single question. With one exception,⁸⁸ cases decided after the issuance of the 1974 *Report* ignore its two-step definitional approach. The Commission often determines only that an issue is controversial and concludes that it is thus a controversial issue of public importance; occasionally it will determine only that an issue is important to the public, and reach the same result. There will often be no discussion of either question; the Commission will simply declare that an issue is or is not a controversial issue of public importance.⁸⁹

B. Public Elections and Private Disputes

FCC and judicial case law substantiate the conclusion of Milton Gross, the person in charge of the initial review of all fairness complaints brought to the FCC, that "practically . . . anything that's on the ballot would be a controversial issue of public importance."⁹⁰ In a case in-

86. Senator Florian W. Chmielewski, 41 F.C.C.2d 201 (1973). See also Democratic State Cent. Comm., 19 F.C.C.2d 833 (1968).

87. See note 63 *supra* and accompanying text.

88. Public Media Center, 59 F.C.C.2d 494, 514-15 ¶ 37 (1976). In discussing public importance, however, the Commission failed to mention either media coverage or comment by community or government spokesmen as suggested in the 1974 *Fairness Report*. Rather, the social choice involving public safety, potential environmental harm, and insurance considerations made nuclear power and nuclear power plants an issue of public importance. The Commission relied on debate between significant community groups, a petition signature drive to place the issue on a state-wide referendum ballot, and congressional concern to establish controversiality. *Id.* at 495 ¶ 3.

89. See, e.g., Committee to Elect Jess Unruh Our Next Governor, 25 F.C.C.2d 726, 727 (1970).

90. Interview with Milton Gross, *supra* note 8 (Sept. 3, 1975). In its 1974 *Fairness Report*, the Commission states: "If the issue involves a social or political choice, the licensee might well ask himself whether the outcome of that choice will have a significant impact on society or its institutions." *Fairness Report*, *supra* note 1, at 26,376 ¶ 30. This language appears to temper the case law discussed in notes 91-94 *infra* in which the FCC declares that if a political choice involves a voting situation, the issue should be presumed to be controversial and of public importance. The quoted language may mean that where a measure is subject to popular vote an inquiry is necessary only

volving a vote for increased school funds in Seattle, the Commission stated: "The existence of an issue on which the community is asked to vote must be presumed to be a controversial issue of public importance, absent unusual circumstances not here present."⁹¹ Issues that have been considered controversial issues of public importance because they have been the subject of an election include such items as a town charter,⁹² party primary elections for the United States Senate,⁹³ and an initiative on the death penalty.⁹⁴ The Commission has yet to find those "unusual circumstances" in an election situation that would negate fairness doctrine application.

In contrast, the FCC has declared that purely private disputes or other private matters do not require fairness doctrine balancing.⁹⁵ Termination of a licensee's employee,⁹⁶ a dispute over ownership of a radio station's sign,⁹⁷ and conflict over whether retired professional football

to rule out unusual situations, and must run upstream against the presumption of controversy and public importance.

91. Ted Bullard, 23 F.C.C.2d 41, 43 (1970). The Commission continued: "It is precisely within the context of an election that the fairness doctrine can be best utilized to inform the public of the existence of and basis for contrasting viewpoints on an issue about which there must be a public resolution through the election process." *Id.* No explanation is given of the "unusual circumstances" in which an election issue would not require fairness treatment. Since the Commission in *Bullard* goes on to discuss controversy in the community over the school levy, presumably one such circumstance might be where no controversy surrounded a ballot issue. Another might be found where the issue involved had no significant impact on the community. See note 90 *supra*. These circumstances both directly negate what is presumed when an issue is reflected in a ballot measure—that the issue is controversial and important because of its significant impact on the community.

92. Lincoln Smith & Earl J. Ormsby, 23 F.C.C.2d 45 (1970). See also *Citizens for Responsible Gov't*, 25 F.C.C.2d 73 (1970) (vote on a city charter is a controversial issue of public importance); Dowie A. Crittenden, 18 F.C.C.2d 499 (1969) (assumed sub silentio that advocating placing voter district incorporation issue on ballot is advocacy of controversial issue of public importance).

93. Richard B. Kay, 24 F.C.C.2d 426 (1970), *aff'd*, 443 F.2d 638 (D.C. Cir. 1970).

94. Timothy K. Ford, 57 F.C.C.2d 1208 (1976) (assumed sub silentio to be a controversial issue of public importance). See also *Public Media Center*, 59 F.C.C.2d 494, 514 (1976) (signature petition effort to place nuclear power issue on state-wide referendum cited to indicate issue a controversial issue of public importance); *Miami Beach Betterment Ass'n*, 27 F.C.C.2d 350 (1971) (advisory referendum on legalized gambling).

95. The 1974 *Fairness Report* states that the fairness doctrine was not created to provide "a forum for the discussion of mere private disputes of no consequence to the general public." *Fairness Report*, *supra* note 1, at 26,376 n.11. The linedrawing between public and private disputes can become difficult, however.

96. *Women Strike for Peace*, 25 F.C.C.2d 890 (1970).

97. *Lincoln County Broadcasters, Inc.*, 51 F.C.C.2d 65 (1975). This case is unusual in that the licensee claimed that the matter it broadcast was of public interest and not a private dispute. *Id.* at 68. It claimed to have offered reply time on the issue, and to have thereby obeyed the fairness doctrine, but the Commission disagreed,

players should share in a pension program⁹⁸ were all considered private matters, and thus not controversial issues of public importance.

C. National and International Issues

The Commission has ruled that in addition to the basic obligation of balancing contrasting views on issues that are controversial and of importance in the local service area, licensees must balance differing opinions on national controversial issues of public importance. The Commission has failed to adequately explain this policy, however. It has implied that if an issue is controversial and important nationally, it simply would be unreasonable to conclude that it was not so in the local service area despite local evidence to the contrary,⁹⁹ but it has also asserted that there is an obligation to inform the local community on national controversial issues, regardless of the extent of local debate of such issues.¹⁰⁰ Whatever the rationale, the FCC has indicated that if one side of an important, nationally debated issue is presented by a local licensee, contrasting sides must be presented.¹⁰¹ The licensee cannot escape this obligation by arguing that the issue is not controversial or important locally.¹⁰² A corollary doctrine is that if a licensee presents one side of an issue which is controversial and of importance

ruling that the licensee had used its station to further its private interests in the dispute. *Id.* at 69.

98. National Football League Players Ass'n, 39 F.C.C.2d 429 (1973).

99. Mary Sinclair, 26 F.C.C.2d 594 (1970).

100. Spartan Broadcasting Co., 33 F.C.C.2d 765 (1962). See also Cullman Broadcasting Co., 40 F.C.C. 576 (1963). Note that with respect to national issues the job of determining which issues need balanced treatment may become particularly difficult. If the licensee cannot exclude such issues from fairness treatment due to the lack of controversy and debate in his local service area, then it must presumably look to controversy and debate on the national level. In all likelihood every national issue will have received media coverage and be the subject of comment by national leaders or government officials. Does every national issue then require balancing? Does the decision come down to the question of impact on the local service area, or does impact on the national polity satisfy the "community impact" requirements of the 1974 *Fairness Report*? The Commission has not supplied answers to such questions. In fact, the Commission has added to the confusion by making the remarkable statement that a licensee could not avoid his fairness obligations "on the ground that members of the general public had little knowledge of the subject and hence were not engaged in any discussion of or debate on that issue." Accuracy in Media, Inc., 40 F.C.C.2d 958, 966 (1973). What relevance does the precedent and 1974 *Fairness Report* have in helping to define controversy in terms of vigorous debate and news media coverage if "discussion or debate" on the issue is immaterial?

101. For cases indicating that a fairness complainant may show an issue to be controversial and of public importance either in the local service area or nationally, see Honorable M. Gene Snyder, 49 F.C.C.2d 493 (1974), and Diocesan Union of Holy Names Societies, 41 F.C.C.2d 297 (1973).

102. See cases cited in notes 100-01 *supra*. Of course, if an issue is controversial and important locally but not nationally, contrasting viewpoints must still be presented. See United People, 32 F.C.C.2d 124 (1971).

on a statewide basis, it must also present contrasting sides regardless of the extent of local service area debate.¹⁰³

With respect to broadcast coverage of events occurring in foreign countries, the FCC has qualified the fairness requirement. For the doctrine to apply, a foreign event must not only constitute a controversial issue of public importance in this country, but it must also involve "the question of United States relations or involvement."¹⁰⁴ If a complainant can show that there is controversy about the foreign event in this country, and that the event directly involves the United States, fairness balancing is necessary. Thus, coverage of the struggle for minority rights in Northern Ireland¹⁰⁵ and internal development problems and plans in Israel¹⁰⁶ could reasonably be said not to directly involve United States policy and thus not require fairness doctrine balancing.¹⁰⁷

The problem here, of course, is attempting to demarcate those foreign events which involve United States relations. Internal Irish and Israeli events today may have a major impact on United States policy tomorrow. Such events are indeed carefully monitored by the American foreign policy apparatus. To conclude that the Vietnam War¹⁰⁸ or the nuclear test ban treaty¹⁰⁹ were controversial and involved United States relations in an important manner appears eminently reasonable. To deny the same conclusion with respect to the overthrow of President Allende and subsequent military control of the Chilean government seems questionable.¹¹⁰ Programming that does not cover an "event," but contains background information on a foreign internal situation that

103. Committee to Elect Jess Unruh Our Next Governor, 25 F.C.C.2d 726 (1970). See also Media Access Project, 44 F.C.C.2d 755 (1973).

104. J.F. Branigan, 31 F.C.C.2d 490, 491 (1971).

105. *Id.*

106. Miss Geri Tully, 6 RAD. REG. 2d (P & F) 123 (1975). In this case, however, the FCC fails to indicate whether it has concluded that United States policy is not directly involved, or that the licensee has adequately balanced its Israel coverage. Compare J. Allan Carr, 30 F.C.C.2d 894 (1971), where the Commission stated, without further explanation, that "when the Arab-Israeli conflict involves the question of U.S. relations with respect to Israel and the Arab countries, that question is clearly a controversial issue of public importance in this country." *Id.* at 896; accord Federated Orgs. on Am.-Arab Relations, 30 F.C.C.2d 892 (1971).

107. Branigan and Tully, discussed in notes 105-06 *supra*, apparently conflict with at least one part of Brandywine-Main Line Radio, Inc., *supra* note 6, 24 F.C.C.2d at 36 n.4, in which the Commission held that a broadcaster's "favoring the separatist government of Rhodesia" involved a controversial issue of public importance. The Commission did not note any connection between the internal Rhodesian problems and United States foreign policy.

108. See cases cited in note 69 *supra*.

109. Cullman Broadcasting Co., 40 F.C.C.2d 576 (1963).

110. Accuracy in Media, Inc., 51 F.C.C.2d 219 (1974) (complainant had not satisfied his burden of showing that a controversial issue of public importance existed at the time of broadcast, a little more than a month after the Allende overthrow).

may be relevant to domestic United States problems raises a similar problem. The fairness doctrine obligation apparently does not apply, despite the doctrine's avowed purpose of informing the American public on vital public issues.¹¹¹

D. The Exclusion Problem

In attempting to define a controversial issue of public importance, the Commission has looked to vigorous debate between substantial elements in the community, thus excluding the ideas of the small minority. Obviously there is a tension between the 1949 *Editorializing Report's* command that licensees ignore the "possible unpopularity" of a viewpoint,¹¹² and the case law and 1974 *Fairness Report* which look to debate among a community's "substantial elements."¹¹³ Ideas must be popular to some degree to merit the doctrine's application. If a lone pariah's ideas or those of a small group are scoffed at by the rest of the community, there is no debate and therefore no fairness requirement.

Because fairness issues must be the subject of ongoing debate, they must also be current. No matter how far ahead of his time an advocate may be, if his ideas are not currently controversial and important, the fairness doctrine does not apply. Thus, if 3 years before the energy crisis a party had demanded fairness doctrine reply time to dispute a program which discussed America's boundless supply of energy, he would have been denied by the FCC. The energy supply would not have been the subject of a current controversial debate in the community.

These restrictions seem antithetical to the fairness doctrine's principal purpose of generating debate on issues vital to American democracy. Yet currency and substantial debate are necessary cutoff points in light of the significant first amendment and administrative problems that would arise in requiring broadcasters to foresee issues of future concern to society and to master every idea's potential public importance regardless of controversy. To penalize a broadcaster for failing to possess such foresight or understanding would be tantamount to imposition of government thought on the licensee as well as the public. Nonetheless, the limitations of the fairness doctrine caused by these cutoff points should be recognized and understood.

111. For further discussion of the foreign affairs dilemma, see Comment, *The Regulation of Competing First Amendment Rights: A New Fairness Doctrine Balance after CBS*, 122 U. PA. L. REV. 1283, 1300-01 (1974).

112. *Editorializing Report*, *supra* note 1, at 1250 ¶ 7.

113. *Fairness Report*, *supra* note 1, at 26,376 ¶ 31.

III

Pensions: A CASE IN POINT

A recent case, *Accuracy in Media, Inc.*¹¹⁴ (*Pensions*), illustrates well the problems involved in isolating the issues raised in a broadcast and determining whether those issues are controversial and of public importance. *Pensions* further demonstrates the potential inhibiting effects of the doctrine on the broadcasters it seeks to regulate.

A. The Case and the Decisions

The case centered around a one-hour documentary, "Pensions: The Broken Promise," presented by NBC and narrated by NBC correspondent Edwin Newman. The documentary began with statements by men and women about troubles they had encountered with their own private pension plans and comments on problems with the private pension system in general.¹¹⁵ Newman's narration then began at the Department of Labor, where the annual pension reports required by law are filed. He stated:

There are millions of hopes and dreams in these files. If experience is any guide, very many of the hopes will prove to be empty and dreams will be shattered and the rosy promises of happy and secure retirement and a vine covered cottage will prove to be false.¹¹⁶

Interviews with various public officials who criticized the operation of private pension funds followed.¹¹⁷ Toward the end of the program several critics recommended changes in the private pension system. Ralph Nader declared: "I think time is running out [on the private pension systems]. And [if] its abuses continue to pile up . . . it might collapse of its own weight, and social security will have to take up the slack."¹¹⁸

In concluding the program, Mr. Newman remarked:

This has been a depressing program to work on but we don't want to give the impression that there are no good private pension

114. 40 F.C.C.2d 958 (1973), *application for review denied*, 44 F.C.C.2d 1027 (1974), *rev'd sub nom.* National Broadcasting Co. v. FCC, 516 F.2d 1101, *reversal vacated & Rehearing en banc granted*, 516 F.2d 1155, *rehearing en banc vacated*, 516 F.2d 1156, *second reversal vacated as moot & remanded with direction to vacate initial order and dismiss complaint*, 516 F.2d 1180 (D.C. Cir. 1974).

115. *E.g.*, "The pension system is essentially a consumer fraud"; "I think it's a terrible thing in this country where men who work forty-five years have to eat yesterday's bread." 516 F.2d at 1134.

116. *Id.* at 1135.

117. During a discussion of specific plans, individuals also made statements of a more general nature: "Pensions in the private area are a mockery. They're a national disgrace." *Id.* at 1141. "Pension funds have outgrown the laws regulating them." *Id.* at 1144.

118. *Id.* at 1145.

plans. There are many good ones, and there are many people for whom the promise has become reality. That should be said.

There are certain technical questions that we've dealt with only glancingly . . . [portability, vesting, funding, and fiduciary relationship].

These are matters for Congress to consider and, indeed, the Senate Labor Committee is considering them now. They are also matters for those who are in pension plans. If you're in one, you might find it useful to take a close look at it.

Our own conclusion about all this, is that it is almost inconceivable that this enormous thing has been allowed to grow up with so little understanding of it and with so little protection and such uneven results for those involved.

The situation, as we've seen it, is deplorable.¹¹⁹

Accuracy in the Media, Inc. complained to the FCC that NBC had violated the fairness doctrine by presenting "a one-sided documentary that created the impression that injustice and inequity were widespread in the administration of private pension plans," and that emphasized "the need for new regulatory legislation."¹²⁰ NBC countered by arguing that it had only presented a "broad overview of some of the problems involved in some private pension plans."¹²¹ Since there was no question that some problems existed with some private pension plans, it declared that it had not presented a documentary which raised a controversial issue of public importance.

The full Commission affirmed its staff's ruling that NBC was being unreasonable when it contended that the "program was confined in scope to only some problems in some pension plans."¹²² The documentary's "overall thrust was general criticism of the entire pension system, accompanied by proposals for its regulation."¹²³ Since NBC also

119. *Id.* at 1146.

120. 40 F.C.C.2d at 963. The complainant also alleged that the documentary had omitted various facts, thus presenting "distorted" and "inaccurate" information. The FCC rejected these allegations of "deliberate distortion and slanting," indicating that without extrinsic evidence of such activity it would not investigate or consider such complaints. *Id.* at 962.

121. *Id.* at 963.

122. *Id.* at 965. This was the "first case" in which a broadcaster had "been held in violation of the fairness doctrine for the broadcasting of an investigative news documentary that presented a serious social problem." 516 F.2d at 1125. Some feared that "Pensions may well mark the beginning of a more interventionist stance by the FCC in the area of program content." Note, *Radio and Television—Fairness Doctrine—Network Documentary Presenting Only One Side of a Controversial Issue of Public Importance Violates the Fairness Doctrine*, 52 TEX. L. REV. 797, 805 (1974). See also Bagdikian, *Pensions: The FCC's Dangerous Decision Against NBC*, 12 COLUM. JOURNALISM REV. 16, 18 (March/April 1974).

123. 40 F.C.C.2d at 966.

indicated that it had not broadcast any other programming dealing with this issue, and did not plan to do so, it was held to be in violation of the fairness doctrine; a reasonable opportunity to present the contrasting view would have to be presented.¹²⁴ NBC's contention that the program itself was balanced because of two allegedly pro-pension plan statements was rejected.¹²⁵

Responding to this intrusion into its programming prerogatives, NBC moved for and was granted an expedited appeal and stay in the District of Columbia Circuit Court of Appeals after its petition for a stay of enforcement *pendente lite* was refused by the Commission.¹²⁶ Initially the court of appeals reversed the FCC ruling. Judge Leventhal, writing for the court, indicated that the Commission's major error was to substitute its judgment on the question of what issue was raised by the pensions documentary for that of NBC. He reasoned that even though the Commission admitted that NBC was reasonable in viewing the subject of the program as "some problems in some pension plans," the Commission had found the network in violation of the fairness doctrine because the FCC staff had formed a different opinion of what issue the program had in fact addressed.¹²⁷ The FCC had thus violated the applicable law that licensee judgments are not to be disturbed unless unreasonable or in bad faith, and that licensees are to be given wide discretion in their primary responsibility for enforcing the fairness doctrine.¹²⁸

124. *Id.* at 967. The Commission did not elaborate on its remarkable statement that a licensee could not avoid his fairness obligations "on the ground that members of the general public had little knowledge of the subject and hence were not engaged in any discussion of or debate on that issue." *Id.* at 966. Such statements complicate the application of the fairness doctrine by suggesting that an issue need not be controversial on a local or a national basis, *i.e.*, not controversial among the "general public," to require fairness balancing. See note 100 *supra*.

125. 40 F.C.C.2d at 967.

126. 44 F.C.C.2d at 1045.

127. 516 F.2d at 1117-18. The FCC staff had made the mistake of saying that because it had found that the program raised the entire pension plan issue, NBC's contrary judgment could not be reasonable. The Commission recognized the broadcaster's discretion to make reasonable good faith judgments as to its fairness doctrine responsibilities, but it indicated that such discretion is not unlimited. 44 F.C.C.2d at 1034-35.

128. 516 F.2d at 1117-22. The court summarized the legal standard to be utilized by the FCC in reviewing a licensee's "issue raised" decision:

A substantial burden must be overcome before the FCC can say there has been an unreasonable exercise of journalistic discretion in a licensee's determination as to the scope of issues presented in the program. Where, as here, the underlying problem is the thrust of the program and the nature of its message, whether a controversial issue of public importance is involved presents not a question of simple physical fact, like temperature, but rather a composite editorial and communications judgment concerning the nature of the program and its perception by viewers. In the absence of extrinsic evidence that the licensee's characterization to the Commission was not made in good faith, the burden of demonstrating that the licensee's judgment was un-

The court went on to state that in light of first amendment considerations and congressional concerns about the public's right to know, it had a greater responsibility in reviewing agency action in fairness doctrine cases than in more ordinary matters. It would have to take a "hard look" when engaging in such judicial review.¹²⁹ In taking that hard look, the court concluded that the record sustained NBC's judgment as reasonable and made in good faith.¹³⁰

B. A Critique

Several problems with Judge Leventhal's opinion underscore the confusion surrounding the fairness doctrine and the tension between the courts and the FCC in the enforcement of the doctrine's requirements. First, as Judge Bazelon and Judge Tamm point out in powerful dissents,¹³¹ the court simply misread the legal standard applied by the Commission. The Commission did not ignore the standard of reasonableness or substitute its judgment for NBC's; the FCC had to look at what "in fact" was presented in the documentary in order to determine whether NBC's judgment on the issue was reasonable. Only after reviewing the broadcast did the FCC conclude that the licensee's

reasonable to the point of abuse of discretion requires a determination that reasonable men viewing the program would not have concluded that its subject was as described by the licensee.

Id. at 1121 [footnote omitted]. The court added that where specific personal attack and political editorializing rules are involved, the Commission has a "more ample role." But in reviewing the "general obligation concerning controversial issues of public importance," the FCC had to rely on a licensee's journalistic discretion and correct only for "abuse of discretion." *Id.* at 1120 (emphasis in original).

129. *Id.* at 1122.

130. *Id.* at 1125-32. After the case was initially decided on September 27, 1974, the court ordered on December 13, 1974, that the case be reheard en banc and that the decision of September 27 be vacated. *Id.* at 1155. After considering the FCC's suggestion of mootness, on March 18, 1975, the court vacated its December 13 order for rehearing en banc and reinstated the initial decision. The court then referred the question of mootness to the panel of judges that had rendered the initial decision. *Id.* at 1156. The panel, per Judge Fahy, remanded the case to the FCC on July 11, 1975, and ordered the FCC to vacate its original order and dismiss the complaint. *Id.* at 1180. The three judges on the panel, however, did not agree on the grounds for remanding the case. Judge Fahy based his vote for remand on the equity powers of the court, *id.*, and Judge Tamm, noting that the relevant congressional pension legislation had already been passed, based his vote on mootness. *Id.* at 1184. Judge Leventhal dissented from the order to remand the case. However, he agreed that if the case was to be remanded, then remand should not be based on mootness, as Judge Tamm suggested, but on the equitable principles suggested by Judge Fahy. *Id.* at 1201.

131. Chief Judge Bazelon was not a member of the panel of three judges that originally heard the case; his thorough and incisive dissent was actually made in reaction to the court's order vacating its decision to hear the case en banc. *Id.* at 1156. Judge Tamm was a member of the panel, and did dissent from its decision. *Id.* at 1153. But the bulk of his views were contained in an expansion of his opinion on remanding the case to the Commission. *Id.* at 1184.

judgment strained "the most 'permissive standard of reasonableness' past the breaking point."¹³²

The court also misread its own legal standards for review of agency action. If the Commission had not applied the correct legal test of reasonableness, as the court believed, the proper course of action would have been for the court to remand the case to the Commission for application of the correct legal test.¹³³ Instead, the court proceeded to rule on the case *de novo*. Furthermore, the court departed from precedent, without explanation or justification, when it applied a "hard-look" strict scrutiny standard in a fairness doctrine case.¹³⁴

The court seemed to enter an Alice-in-Wonderland world in its analysis of explicit comments made on the overall performance of private pension plans;¹³⁵ it simply ignored numerous comments in the documentary that were adverse to the overall performance of private pension plans, including the critically important opening and closing narratives by Newman.¹³⁶ In looking at favorable comments on overall performance, it took statements out of context, making them seem more favorable than they really were.¹³⁷ Its strained view of the facts was undoubtedly related to the court's desire to conclude that a reasonable balance of pro and con views was presented on the issue of overall performance.¹³⁸ A quick perusal of the documentary transcript con-

132. 44 F.C.C.2d at 1040.

133. See Judge Bazelon's excellent discussion of this point and the precedent cited therein. 516 F.2d at 1158-59.

134. As stated by Judge Tamm:

[T]he majority refused to follow decades of consistent application of the standards used by courts to review determinations of administrative agencies. The function of the reviewing court has been and still is to ensure that the agency's determination is supported by substantial evidence, that the agency has not exceeded its powers, and that it has engaged in reasoned decision making.

Id. at 1187 (citations omitted). Judge Tamm went on to note that the majority failed to give "any weight" to the experience of the Commission. *Id.* at 1188.

135. As an analytical aid, the court also gave much weight to the comments of print media columnists who reviewed the documentary. The court utilized a few brief excerpts from reviewers characterizing the program as a study of problems with "some pension plans" to indicate that NBC was not unreasonable in its description of the issue raised. *Id.* at 1126-27. Thus, print media comment, in addition to helping define whether an issue is controversial and of public importance, now may play a part in defining what issue is raised by a broadcast. Judge Tamm expressed skepticism about the court's reliance on such excerpts prepared by a licensee. *Id.* at 1189. If the excerpts were to be relied upon, it should be noted that there were even more excerpts that described the program as focusing on problems with the overall pension industry. See, e.g., excerpts from the *Chicago Sun-Times*. *Id.* at 1147.

136. See *id.* at 1160-62 (Bazelon, C.J., dissenting opinion).

137. *Id.* at 1163.

138. The court's distortion is further exemplified by its discounting of comments made by various people which went to overall performance. The court stated that these comments were really comments on subissues of overall performance, subissues which

tained in the Appendix to the opinion,¹³⁹ however, strongly indicates that the unmistakable thrust of the documentary was criticism of the private pension system generally.

The court also concluded that the issue of whether reform legislation should be enacted was not controversial. This conclusion was based principally on the Commission's asserted failure to document that a controversial issue existed as well as a letter from NBC that all of the groups testifying in Washington hearings had supported some form of remedial legislation. The Commission had indeed failed to document extensively the controversial nature and public importance of the issue. There was no mention of news media coverage, for example. Such a failure of documentation has been a consistent FCC pattern, and the Commission was finally caught. But the issue itself presented a classic situation of a controversial issue of public importance, a situation that FCC precedents repeatedly have held to involve a controversial issue of public importance: the need for passage of a statute pending before a legislature. Despite the fact that the complainant had submitted documents indicating that various major interest groups opposed legislation in the area,¹⁴⁰ the movement for legislative reform was found not to present a controversial issue.

Finally, the court failed to answer the question raised by its own conclusion that the issue raised was some problems with some pension plans. Why was this not a controversial issue of public importance? Lack of dispute over the general fact that problems do exist with respect to some plans does not mean that there are not divided and hotly debated viewpoints on those particular plans under discussion. Indeed, there were very partisan views expressed about these problems throughout the documentary. Why was the case not remanded to the Commission to see if fairness doctrine balancing was necessary on this more limited issue. In previous cases the court had divided issues into

had not been shown to be controversial or of public importance. But the Commission had explicitly refused to break the overall performance issue into subissues, and these comments should have been seen as comments on the issue of overall performance. *See id.* at 1162-63. The court's treatment of these comments as subissues was inconsistent with the FCC precedent which had consistently refused to recognize the raising of subissues. Chief Judge Bazelon remarked: "Once this concept of inseparability is recognized, all the statements in the broadcast relating to the overall need for reform must be considered as comments on the controversial issue defined by the Commission." *Id.* at 1166.

139. *See id.* at 1147-51.

140. 44 F.C.C.2d at 1034 n.3. The court's reliance on NBC's assertion that there was no meaningful opposition to reform legislation seems misplaced since it is a standard legislative practice for interest groups opposed to legislative action to support weak legislation as an alternative to a statute that will bring significant reform. Also, hearings are often arranged so that only supporters of legislation will testify.

subissues to see if fairness doctrine balance was achieved.¹⁴¹ It must have been a surprise for the producers of this hard hitting investigative documentary, winner of the Peabody and other awards, to learn that according to their network and the court of appeals, it could reasonably be said that they had not produced a documentary on a controversial issue of public importance.

In the final analysis, NBC was clearly unreasonable in concluding that "Pensions: The Broken Promise" did not raise the issue of the overall performance of the private pension industry and the need for legislative reform of that industry. The Commission's decision that this was the issue raised and that NBC had not provided a reasonable balance on the issue was justified by more than substantial evidence. It would appear to be an open and shut fairness case based on precedent and existing policy. But the court's tortured interpretation of the legal standard applied by the Commission, its departure from traditional standards of judicial review, its failure to remand the case for application of the proper standard, its distorted view of the balance of comments made on overall performance, its tenuous justification for why the need for reform legislation is not a controversial issue, and its failure to recognize the controversial nature of the more limited issue of the problems with some pension plans can only serve to further undermine predictability in the judicial handling of fairness doctrine cases. One is inclined to agree with Judge Tamm's observation that the court was stalking "bigger game" with "an obvious antipathy to the fairness doctrine suggesting that, given a free hand, it would have struck down the doctrine as unconstitutional."¹⁴²

C. *The Impact on the Broadcaster*

One cannot help but think that the result of the court's *Pensions* decision in terms of its meaning for NBC was correct,¹⁴³ despite the mis-

141. See *Healey v. FCC*, 460 F.2d 917, 921-22 (D.C. Cir. 1972). In this case, however, the court did not rule that the broadcast specifically raised the three subissues suggested in the pleadings; it only indicated that even if two of the three subissues had been raised, there was no substantiation of whether the licensees' overall programming was unfair with respect to those two. See also *Green v. FCC*, 447 F.2d 323, 329-32 (D.C. Cir. 1971). This case may be distinguished in that it dealt with subissues that were "implicit" in military recruitment ads which could only be raised by a process of viewer association with the ad, as opposed to subissues that are "explicitly" raised in a broadcast. But for purposes of analysis the court did consider the five implicit subissues separately, and for four of them ruled that unfair overall programming coverage had not been demonstrated.

142. 516 F.2d at 1191.

143. The decision considerably limits the ability of the Commission to rule unreasonable under the fairness doctrine licensees' judgments on the issue raised and whether it is controversial and of public importance. Although the decision of the panel to vacate its initial judgment, see note 130 *supra*, means that the decision tech-

application of existing law. NBC had invested time and money in a first-rate, award-winning job of investigative journalism. It informed the American people about a pressing social problem affecting millions of persons. This investment and effort by NBC appears especially laudable given the financial burden of the program; public affairs documentaries receive notoriously low Nielsen ratings and are comparative money losers for the networks. Undoubtedly, NBC could have made more money by showing a police story or a game show.

For its efforts, the network became the defendant in a major lawsuit requiring legal expenditures of over \$100,000 and hundreds of hours of network personnel time.¹⁴⁴ If the Commission's ruling had not been disturbed, contrasting views to those presented in "Pensions: The Broken Promise" would in all likelihood have had to be presented free of charge by the network, inflicting still further financial damage.¹⁴⁵ How could such a sequence of events help but create a disincentive against future public affairs documentaries? Such documentaries deserve encouragement designed to offset commercial pressures; instead the fairness doctrine's balancing requirements, as interpreted by the FCC, discourage television networks from presenting controversial public issues. This disincentive is magnified for a local licensee who desires to locally produce a public affairs documentary. The burdens on financial resources and personnel time have a far more drastic disincentive effect on the less profitable local stations.¹⁴⁶

In the context of scarce airwave frequencies, the Supreme Court has held that the public has a right to be informed about important and controversial public issues by each individual licensee.¹⁴⁷ But licensees also have first amendment rights which must be respected.¹⁴⁸ It is in the delicate balance of licensees' first amendment speech and press rights and the rights of the public to be informed that the public interest is best served. Assuming that broadcasters are required to present a minimum percentage of public issue and news programming,¹⁴⁹ the public can be best informed by ensuring that professional broadcast

nically is not binding precedent, it does indicate the thinking of at least two judges on the court of appeals, and will undoubtedly influence the FCC.

144. Interview with Marshall Wellborn, Assistant General Attorney, and Russell Tornabene, Public Relations, NBC (Aug. 26, 1975).

145. See Cullinan Broadcasting Co., 40 F.C.C. 576 (1963).

146. In one fairness case which the local TV licensee eventually won, it reported spending \$20,000 in legal expenses in addition to other expenses such as travel. Even more detrimental in the licensee's view was the estimated 480 man-hours of executive and supervisory time spent on the matter. See H. GELLER, *THE FAIRNESS DOCTRINE IN BROADCASTING* 40-43, 133-34 (Rand R-1412 FF) (Dec. 1973).

147. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

148. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

149. See text accompanying notes 195-216 *infra*.

journalists have maximum editorial freedom over how that programming is handled. Government encroachment on such editorial freedom poses a far greater danger to the public good than an occasional broadcaster who may incorrectly determine the issue raised by a broadcast, and government encroachment is precisely what occurs when the FCC must determine what issue is raised by a broadcast and whether or not it is controversial and of public importance. Such decisions may be difficult to make, as there may be several reasonable interpretations; but deciding what issues to cover, and how to cover them, is uniquely within the training of a journalist. The increasing involvement of government in a powerful mass communications system may well prove intolerable.

IV

THE PART ONE OBLIGATION

The fairness doctrine's part one obligation demands that licensees devote a reasonable amount of their programming time to controversial issues of public importance. The question of issue in this context relates to determining which issues must be covered by a licensee under this mandate.

As both the courts and the FCC have recognized, "the essential basis for any fairness doctrine . . . is that *the American public must not be left uninformed*."¹⁵⁰ In achieving this goal, the doctrine's part one obligation should theoretically be of immense importance, since the part two obligation, calling for the balancing of contrasting views, can only be triggered if there is an initial presentation of views on an issue. Until 1975, however, the part one obligation had "never been enforced."¹⁵¹ In not a single case had the FCC held that a licensee had violated the part one obligation. In fact, numerous stations have had their licenses routinely approved without proposing any public issue programming for their broadcast schedule.¹⁵² The part one obligation had become "The Forgotten Half of the Fairness Doctrine."¹⁵³

150. *Green v. FCC*, 447 F.2d 323, 329 (D.C. Cir. 1971) (emphasis in original), quoted in Representative Patsy Mink, 59 F.C.C.2d 987, 993 (1976). See also *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 129-30 (1973); *Editorializing Report*, *supra* note 1, at 1249 ¶ 6.

151. Interview with Commissioner Glen Robinson (Sept. 3, 1975).

152. See, e.g., *Renewal of Standard Broadcast Station Licenses*, 7 F.C.C.2d 122 (1967). See also *Broadcast Licenses for Arkansas, Louisiana, & Mississippi*, 42 F.C.C.2d 3, 16-22 (1973); *Renewal of Standard Broadcast & Television Licenses for Oklahoma, Kansas, & Nebraska*, 14 F.C.C.2d 2, 12-13 (1968); *Herman C. Hall*, 11 F.C.C.2d 344 (1968).

153. Kurnit, *Enforcing the Obligation to Present Controversial Issues: The Forgotten Half of the Fairness Doctrine*, 10 HARV. C.R.-C.L. REV. 137 (1975).

A. Development of the Issue Double Standard

Despite the lack of enforcement, the FCC had nonetheless outlined the part one requirement in its decisions prior to 1975. The obligation was implied in *Great Lakes Broadcasting*¹⁵⁴ in 1929, and was made explicit in *Mayflower Broadcasting Co.*,¹⁵⁵ *United Broadcasting Co.*,¹⁵⁶ *The Blue Book*,¹⁵⁷ and the *Editorializing Report* in the 1940's. Since then, court and Commission decisions have routinely referred to the part one obligation.¹⁵⁸

Although the same standard of reasonableness and good faith that applies to the part two obligation had been assumed to apply to the part one obligation, dicta in *Friends of the Earth*¹⁵⁹ appeared to undermine that assumption. In *Friends of the Earth*, the Commission ruled that broadcast commercials for large engine cars and leaded gasolines did not implicitly raise the issue of air pollution and did not require balanced programming under part two of the fairness doctrine. The Commission emphasized, however, that in light of the part one obligation it would be unreasonable, and therefore improper, for licensees not to air programming which covered the "burning issues of the seventies,"¹⁶⁰ or issues of "great importance"¹⁶¹ such as air pollution, Vietnam, or racial unrest.¹⁶² The Commission thus appeared to hold that the issues that must be covered under the part one obligation must be of greater significance than those required to activate fairness balancing under part two, where the Commission had only spoken of a controversial issue of public importance. Thus, an issue that would require balancing under part two might reasonably escape coverage altogether under part one if it did not reach a sufficient level of importance.

Although in the 1974 *Fairness Report* the Commission characterized the part one obligation as the "most basic requirement of the fair-

154. 3 FED. RADIO COMM. ANN. REP. 32 (1929).

155. 8 F.C.C. 333 (1941).

156. 10 F.C.C. 515 (1945).

157. FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES (1946).

158. See, e.g., *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 111, 129-130 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 369, 377 (1969); 1974 *Fairness Report*, *supra* note 1, at 26,375 ¶¶ 23-26. However, the Commission has contributed to the lack of awareness about the part one obligation and caused confusion by occasionally speaking about the doctrine only in terms of part two obligations. See, e.g., the unclear description in the introduction to the important 1964 *Fairness Primer*, *supra* note 1, at 10,416.

159. 24 F.C.C.2d 743 (1970), *rev'd on other grounds*, 449 F.2d 1164 (D.C. Cir. 1971).

160. 24 F.C.C.2d at 750 (emphasis added).

161. *Id.* at 747 (emphasis added).

162. *Id.* at 750-51.

ness doctrine,"¹⁶³ it nonetheless declared that the individual broadcaster is the party responsible for choosing which news items and issues to cover. Referring to *Friends of the Earth*, the Commission stated:

We have, in the past, indicated that some issues are so *critical* or of such *great public importance* that it would be unreasonable for a licensee to ignore them completely. . . . But such statements on our part are the rare exception, not the rule, and we have no intention of becoming involved in the *selection of issues* to be discussed, nor do we expect a broadcaster to cover each and every important issue which may arise in his community.¹⁶⁴

In *Public Communications, Inc.*,¹⁶⁵ decided a few months after the 1974 *Fairness Report* was released, the Commission made good on its pledge to avoid involvement with licensees' initial selection of issues. The Complainant maintained that the three commercial networks and various Los Angeles television stations had not given adequate coverage to broadcasting license renewal legislation then before the United States Senate. In a well-researched complaint,¹⁶⁶ Public Communications, Inc. demonstrated the impact that the legislation would have on the American public by pointing out the significant effect of the proposed law on the "allocation of what may be the country's most valuable resource—the airwaves," and "our most influential private institution—our broadcasting system."¹⁶⁷ Attention paid to the legislation by numerous government officials, community leaders, public interest groups, and the broadcast industry press was also documented, as was the substantial controversy surrounding the legislation.¹⁶⁸ The issue, if measured under the 1974 *Report's* three factors for judging part two complaints,¹⁶⁹ certainly would have required balancing. But the Commission rejected the complaint, despite the admission by the networks and local television stations that they had broadcast no programming whatsoever on the license renewal legislation. The FCC stressed that the complainant "apparently fails to recognize the essential distinction which must be drawn by the Commission in enforcing these two

163. 1974 *Fairness Report*, *supra* note 1, at 26,375 ¶ 23 (emphasis added).

164. *Id.* at ¶ 25 (emphasis added).

165. 49 F.C.C.2d 27, *application for review denied*, 50 F.C.C.2d 395 (1974).

166. Fairness Doctrine Complaint: License Renewal Act of 1974, submitted by Marsha Lynn Jones & Tracy A. Westen, for Public Communications, Inc., to William B. Ray, Chief of the FCC's Complaints and Compliance Division (Aug. 29, 1974). [Ed.] The *California Law Review* was unable to obtain a copy of this document.

167. *Id.* at 29.

168. The complaint noted the lack of coverage by non-broadcast industry media, but emphasized the self-interest motivations of "many licensees, the networks, and the many newspaper owners with television holdings" in not covering the legislation, and argued that lack of such media coverage by itself is not determinative. *Id.* at 26-27.

169. See text accompanying notes 62-63 *supra*.

separate requirements"¹⁷⁰ of the fairness doctrine. According to the Commission, the part one obligation "imposes a general obligation on licensees to carry [programming on controversial issues of public importance] and it has only a very limited application to the programming of specific issues."¹⁷¹ The FCC left to the broadcasters the discretion to choose which issues they will cover, and held "there is no requirement that a licensee address any particular issue merely because the issue is controversial and of public importance."¹⁷²

The three factors pointed to in the 1974 *Fairness Report* as indicators of whether an issue is controversial or of public importance under part two, could, indeed, also be used to demonstrate that an issue was critical and of great public importance, therefore requiring coverage under part one of the doctrine. But these factors, the Commission believed, do not constitute an absolute test of an issue's importance, and they are to be considered on a case-by-case basis. In the view of the FCC, a "large number of issues" exist which a licensee could readily classify as "important and controversial enough in their initial presentation to require subsequent presentation of contrasting views, but which could not be said to be 'so critical or of such great public importance' as to justify Commission intrusion on the discretion afforded the licensee in the selection of issues to cover."¹⁷³ The Commission concluded that it must "very sparingly invoke the 'critical issue' responsibility of licensees if we are not to take over their rightful programming function."¹⁷⁴

The double standard for part one and part two complaints thus became firmly entrenched.¹⁷⁵ For a licensee to be judged unreasonable in not covering the issue, that issue must be far more important than an issue requiring balanced presentation under part two. The Commission, after *Public Communications*, was much more hesitant to order issue coverage under part one than to order issue balancing under part two, and as of April 13, 1976, there still had not been a case in

170. 50 F.C.C.2d at 399.

171. *Id.*

172. *Id.* at 400.

173. *Id.* The Commission continued:

If the complainant's argument on this point were correct, any issue which might be controversial and important enough to require presentation of contrasting viewpoints *once the licensee had made the initial decision to present programming on the issue*, would also automatically be 'so critical or of such great public importance' that the licensee would have had an obligation to present initial programming on that issue.

Id. (emphasis in original).

174. *Id.*

175. For a later case, see Council on Children, Media, & Merchandising, 59 F.C.C. 2d 448 (1976) (children's advertising and its effects are not critical nor of great public importance).

which the Commission had ruled against a licensee on a part one complaint. The double standard insulating a licensee's part one decisions stood as a formidable barrier.

B. *The Patsy Mink Decision*

The Commission took an initial step toward changing its hands-off treatment of part one cases in its decision in *Representative Patsy Mink*.¹⁷⁶ The case developed in the summer of 1974, when Representative Patsy Mink wrote to a number of broadcast stations asking them to air an 11-minute tape containing her views on pending strip mining control legislation. She said the tape would provide contrasting opinions to those expressed in a United States Chamber of Commerce program, which had been aired by hundreds of stations. Among those stations responding to Mink was station WHAR in Clarksburg, West Virginia. WHAR rejected her request, claiming that it had not broadcast the chamber's program, or any other programming, on the strip mining controversy.¹⁷⁷

Representative Mink, joined by two other complainants and represented by lawyers from the Media Access Project, developed a strong case, including extensive documentation to demonstrate that the issue of strip mining was of "‘extraordinary controversiality and public importance to WHAR's listeners,’"¹⁷⁸ and that strip mining legislation then being debated in Congress "‘was *probably the single most important issue to arise in several decades*’"¹⁷⁹ in the county. WHAR admitted that it had not originated any local programming on strip mining.¹⁸⁰

The FCC agreed with the complainants that the strip mining issue was an issue of such importance to the licensee's service area that the station was, under the part one obligation, required to provide coverage.¹⁸¹ The Commission cautioned that it had "no intention of intruding on licensees' day-to-day editorial decision making."¹⁸² Instances requiring such remedial action would be "rare," intervention being reserved for "vital issues of public importance;"¹⁸³ issues which have a "tre-

176. 59 F.C.C.2d 987 (1976).

177. Although the station did broadcast a tape from another congressman who was opposed to uncontrolled strip mining, the Commission found that neither strip mining legislation nor the environmental impact of strip mining were discussed on the tape. *Id.* at 996.

178. *Id.* at 987-88.

179. *Id.* at 991 (emphasis in original).

180. *Id.* at 989.

181. *Id.* at 995.

182. *Id.* at 994.

183. *Id.*

mendous impact within the local service area," or a "significant and possibly unique impact on the licensee's service area."¹⁸⁴

In concluding that strip mining was such an issue, the Commission relied on the documentation supplied by the complainants. The complainants had shown the "extreme importance" of the strip mining issue by supplying congressional testimony, numerous newspaper and magazine articles, and even a research study which demonstrated the "enormous impact" of strip mining on the air and water quality and the economy of the region. These materials also revealed that Clarksburg and its vicinity had the highest percentage of strip-mined land of any county in the state. Long-range environmental and employment developments were shown to be directly linked to strip mining legislation being debated in Congress. Moreover, WHAR had admitted that strip mining was important to many people in Clarksburg. The "highly controversial nature" of the strip mining issue was shown by reference to citizen protests, numerous front-page stories in the local newspaper, and the lengthy debate in Congress.¹⁸⁵ The complainants had also demonstrated the great amount of attention paid to the issue by community leaders and government officials.¹⁸⁶ Clearly, some programming on strip mining would have to be aired.¹⁸⁷

If the FCC was not to have completely abdicated its role and responsibility in the part one area under the present enforcement structure, WHAR had to be found in violation of its part one obligation. Strip mining was obviously a critical issue in Clarksburg and WHAR's programming was woefully inadequate on that issue.

The Commission's decision in *Patsy Mink* represents a first step toward significant change in enforcement of the part one obligation. Several unsolved problems remain, however.

Patsy Mink illustrates the timing problems encountered when enforcement is carried out through responses to specific complaints. Such a system risks overlooking an issue until the time for public action on the issue is past. For example, the original complaint against WHAR was filed on September 25, 1974.¹⁸⁸ It made specific reference to strip mining legislation then being debated in Congress, and charged that the licensee had failed "for at least a four-month period when Congress was considering strip mining legislation to air any programming on the strip mining controversy."¹⁸⁹ The Commission's rul-

184. *Id.* at 997.

185. *Id.* at 995.

186. *Id.* at 991-92.

187. *Id.* at 995-97.

188. *Id.* at 987.

189. *Id.* (emphasis in original).

ing on the complaint was adopted on June 8, 1976—more than 1 year and 9 months later. During that period, the strip mining legislation was passed by Congress and vetoed by the President. Since similar legislation had been introduced in late 1975, the Commission ultimately concluded that the “issue of reclamation of strip mined land has continued to be controversial up to the present date.”¹⁹⁰ Had the legislation not been vetoed, however, but had become law—or had similar legislation not been introduced at the later date—the Commission’s order would have come a year after the critically important strip mining legislation issue had become moot. The time for informed public discussion about the issue among citizens is before and during legislative debate—not after the question has been resolved.

The part one cases reemphasize the administrative problems, tinged with first amendment considerations, evident in fairness doctrine disputes. The Commission speaks of issues which are “burning,” “critical,” “vital,” “rare,” of “great importance,” of “great public importance,” of “extreme importance,” or which have a “tremendous” or or “unique” impact within the licensee’s service area. What do these terms mean? How is a licensee to distinguish between such issues and other issues which are merely controversial and of public importance? And what if an issue is “burning” and “critical” on a national level—but not within the local service area. Are such national issues automatically ruled out of the part one requirement?

The “issue raised” question becomes particularly troublesome in part one cases. Neither the 1974 *Fairness Report* nor FCC case law provide any guidance. If it is difficult to determine the issue raised when an initial broadcast has triggered a part two obligation, it is much more difficult to determine the specific issue which needs addressing when there has been no previous broadcast. In *Patsy Mink*, the Commission failed to clarify whether the specific issue which must be covered is the strip mining legislation being considered in Congress, the local ramifications of strip mining, or the issue of strip mining generally.

Finally, the question of how much programming on the issue must be aired comes into play. The Commission offered absolutely no instruction on how much broadcast time on the strip mining question must be presented. No precedent exists on the matter, and *Patsy Mink* gives no guidance.

These general and more particular problems are perhaps unavoidable under present enforcement procedures. From this perspective, the development of the issue double standard and the reluctance to en-

190. *Id.* at 996 n.2.

force the part one obligation can be viewed as attempts to differentiate the Commission's role in part one and part two situations. As Commissioner Robinson stated in *Patsy Mink*: "[E]nforcement of the first obligation constitutes a somewhat greater degree of government interference than enforcement of the second inasmuch as it is not triggered by the licensee's program choice."¹⁹¹ In part two cases, the licensee has already exercised its first amendment choice by airing programming on an issue. It has already decided that an important and controversial topic is involved which needs coverage. The government, if it finds the licensee's programming wanting, asks that the licensee give more coverage on the topic that the licensee has already chosen to air.

In the part one situation, the licensee has chosen not to cover the issue at all. Many factors may have prompted this decision, ranging from an editorial choice based on time limitations to the licensee's judgment that the issue simply does not merit coverage. Federal government action forcing a broadcaster to cover a particular issue therefore involves a more intrusive first amendment infringement than part two enforcement in that it does not parallel a broadcaster's initial issue decision. Part one intervention thus raises the spectre of a government using the media to cover issues that the government deems important, *i.e.*, in its interest.

Under the "double standard" procedure, the Commission gets involved in precisely those circumstances in which its involvement is least necessary. In those communities where issues are "burning," and of "critical importance," those issues will most likely receive thorough coverage by other organs of the media. In fact, intense coverage by the media and attention by community and government leaders is necessary to show that the issue is critical enough to break through the part one portion of the double standard and gain FCC remedial action. One cannot help but wonder if the significant interference with broadcasters' first amendment rights and the potential for government abuse is worth whatever marginal advantage might be gained by FCC action on part one complaints.

This analysis suggests that the Commission should evaluate a licensee's part one performance on an overall rather than an issue-by-issue basis—whether annually or as part of the license renewal procedure. The FCC might ask several questions as part of such review.

191. *Id.* at 998 n.1 (concurring statement of Commissioner Glen O. Robinson) (emphasis in original). Robinson concludes, however, that "the first and second obligations differ more in degree than in kind. Enforcement of either obligation requires us to scrutinize licensee judgment, . . . compelling a licensee to carry some program which it has chosen not to air." *Id.* Yet, the part one cases offer no rationale for evaluating licensee treatment of issues differently than is done in part two cases.

What has been the average percentage of time the licensee has devoted to news and public affairs? Have a certain number of important issues been covered? How has the licensee ascertained the important issues in the community? Such questions would provide a more satisfactory basis for the assessment of a licensee's performance under part one of the fairness doctrine.

V

CONCLUSION

A. The Problems Reviewed

As the preceding discussion has demonstrated, severe problems have developed under part two of the fairness doctrine in determining what issue is raised by a broadcast, and whether that issue is controversial and of public importance. In defining the issue raised, the FCC usually works from written documents, ignoring the television image. The Commission's use of a "thrust doctrine" to determine what sub-issues are raised in a broadcast has resulted in a string of inconsistent precedent, offering little rationale for the conclusions it makes. It has been more consistent in refusing to apply the fairness doctrine to passing references and entertainment programming, although entertainment shows have not been completely exempt from the doctrine's coverage.

In determining whether an issue is controversial and of public importance, the FCC has offered some guidelines by pointing to media coverage, attention by government and community leaders, and impact on the community. But this guidance is vague indeed, as the Commissioners' own words substantiate, and the FCC has decided cases inconsistently, generating confusion as to what is required of licensees. The case law has been marked by the Commission's failure to provide any rationale for its decisions that an issue is or is not controversial and of public importance. The FCC has virtually ignored its own suggestion that the definitional task be divided by determining controversy and public importance separately. Moreover, the definition of the controversial-public importance standard excludes views that are "ahead of their time" and not currently controversial.

It must also be emphasized that the issue problems are just part of the difficulties that inhere in applying the fairness doctrine's second part. The critical problem of how to ensure a reasonable opportunity for presentation of contrasting views must ultimately be faced. The FCC must determine the reasonableness of the balance of the frequency and total air time given to views on each side of the issue. In judging what is a fair presentation of contrasting viewpoints, it must also

weigh the reasonableness of the time of day for each side's presentations. As with the issue raised problems, the Commission has set forth a series of inconsistent rulings, with little supporting rationale, and confusing guidelines.¹⁹²

In applying the part one requirement of the fairness doctrine, the Commission has in recent years given licensees additional protection from government interference. Under part one, licensees are only obligated to cover "critical," "vital" issues of "great importance." They need not cover all those issues which would ordinarily need balancing under part two.

Welcome as the additional part one licensee protection is, one wonders whether that protection goes far enough. Any activist enforcement of part one on an individual complaint basis would magnify the issue problems presently existing in the part two situation. With no previous broadcast to guide the licensee or the Commission, a cacophony of conflicting voices in the community would have to be deciphered to determine exactly which issues require broadcast coverage. Once an issue is isolated, it still must be decided whether the issue is "critical," "vital," or of "great importance." What do these terms mean? How does a licensee meaningfully distinguish between such issues and ones which are merely controversial and of public importance? The Commission offers little guidance.¹⁹³ Beyond this, an

192. Compare, e.g., *National Broadcasting Co.*, 16 F.C.C.2d 956 (1969), where a 5 to 1 total time ratio was considered reasonable and the Commission emphasized the importance of large-audience, prime-time broadcasts, with *Public Media Center*, 59 F.C.C.2d 494 (1976), where a total time ratio of approximately 3 to 1 was considered unreasonable, *id.* at 507-08, 522-23, and where prime time versus non-prime time audience considerations were ignored, *id.* at 509, 523. Incredibly lopsided frequency of broadcast ratios have been considered reasonable, including 34 to 1, *id.* at 499-500, 518; 14 to 1, *id.* at 505-06, 520; and "4 or 5" to 1 *Wilderness Society*, 31 F.C.C.2d 729, 735 (Chairman Burch, concurring) (1971). See also *Committee for Fair Broadcasting*, 25 F.C.C.2d 283 (1970), where NBC's total prime time ratio on the Vietnam War issue of approximately 4.4 "pro" to 1 "con" and its prime time frequency of broadcast ratio of 5 to 1 were considered unreasonable; the imbalance was due to not having adequately balanced President Nixon's war addresses. This total time ratio is lower than in *National Broadcasting*, and the frequency ratio is far lower than those in *Public Media Center*, yet the opposite result is reached. Chairman Burch, summing up the difficulties in determining what is a reasonable balance of contrasting views, has stated that "both licensees and the public can only fall back on prayer to divine the Commission's intent." *Wilderness Society*, 31 F.C.C.2d 729, 737 (1971).

193. In large part, the issue problems noted above are the inevitable result of the government's attempt to second-guess broadcasters' editorial judgment. What is needed is a delicate balancing between the rights of broadcast journalists to exercise their rights of press and speech as they see fit, and the right of the public to a diversity of opinion on important public matters. This right of the public to hear a diversity of views is crucial. Ultimate good, according to Justice Holmes, "is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which

issue-by-issue part one enforcement policy is effective exactly when additional coverage of that issue is least necessary.

Even with the double standard protection, present part one issue enforcement threatens encroachment on the journalistic judgment of the broadcast press. Despite the irresponsibility of WHAR in *Patsy Mink*, the concept of the federal government telling a West Virginia licensee what issue to cover smacks of government interference alien to a free press. The licensee has chosen not to cover that issue, and the government should hesitate to instruct it otherwise because of the enormous potential for abuse.

B. Future Policy Steps

The House Communications Subcommittee will be examining the 1934 Communications Act during the 95th Congress. The Subcommittee will consider recommendations for revision of the Act, and as part of its study, will scrutinize the continued viability of the fairness doctrine.¹⁹⁴ Regardless of what Congress does, however, the FCC may act on its own to alter fairness doctrine administration.

One way to meet the concerns addressed in this Article would be to drop the fairness balancing requirement of part two and require that a relatively high minimum percentage of programming be devoted to news and public affairs. The federal government would then be out of the business of telling broadcasters which issues to cover and how to cover them. There would be no part two intervention to determine which issue was raised by a broadcast, whether it was controversial or of public importance, and whether a proper balance had been presented. There would be no part one intervention to force a broadcaster to cover a particular issue because it is "vital" and "burning." These questions would be left to the journalistic practices of the broadcast press. But at license renewal time, every 3 years, licensees would be required to demonstrate that they had broadcast a certain amount of public issue programming as part of their news and public affairs coverage.¹⁹⁵

their [man's] wishes may safely be carried out. That at any rate is the theory of our Constitution." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Presently, however, the field upon which the airwave marketplace transacts business is walled. The large networks and powerful television licensees determine the list of ideological players. Other countries have kept this scarce broadcasting privilege and power under government control. In the United States, this power has been granted free of charge to private entities for private profit.

194. BROADCASTING, Nov. 22, 1976, at 20.

195. An exception to dropping the part two balancing requirement should be made for explicit licensee editorials. Thus, when a licensee has chosen to use its broadcast monopoly specifically to urge viewers to assume its point of view, it should be required

Under present procedures, the FCC does require licensees to report on the percentage of news and public affairs they have broadcast.¹⁹⁶ The Commission has recently delegated authority to its staff to automatically renew network-affiliated television licensees who have proposed more than 5 percent "informational (news plus public affairs)" programming, assuming the renewal is otherwise uncontested and proper.¹⁹⁷ If a licensee has included less than 5 percent news and public affairs in its broadcast schedule, then the renewal must be referred to the full Commission for review.

Although these new percentage requirements are an improvement over the ones previously utilized by the Commission,¹⁹⁸ they are still extremely low. The Commission has emphatically declared that broadcasters have been allocated a portion of the frequency spectrum only in recognition of the "great contribution" broadcasters can make to the "development of an informal public opinion through the public dissemination of news and ideas concerning the vital public issues of

to air a contrasting speaker. In this situation the licensee is unquestionably using the frequency to further its private viewpoints. There are no journalistic processes working in the sense that a broadcast journalist tries to fairly cover a story in a newscast or news documentary. In fact, it is the licensee's intention to slant the information given to support its point of view. Administratively, such editorials are easier to handle than other news shows. The issue raised is usually clearly labelled. The time devoted to the issue is easily ascertained, and there is no need to count lines as there is when an issue is an integral part of a documentary. A response opportunity to editorials provides access for other community spokesmen in a most direct and easily facilitated way. There would be no fairness part one requirement to editorialize on particular issues, only a part two requirement to balance views already aired. Licensees should be given wide reasonableness-good faith discretion in determining what issue was raised in the editorial and could choose the reply spokesman. But they should be required to air a contrasting view within 30 days of the original editorial, and during the same time period (*i.e.*, within 90 minutes), unless they can demonstrate that an extensive, good faith effort could not produce a reply spokesman. Such limitations would ensure that a high percentage of the original audience would be likely to see the reply editorial. The reply would therefore be more likely to make a meaningful contribution to ongoing debate.

196. By the first of February of each year, commercial television licensees are required to file with the FCC an annual Programming Report (FCC Form 303-A) indicating the amount of total and local news, public affairs, and other nonentertainment, nonsports programming broadcast during a randomly selected composite week.

197. *Amendment to Section 0.281 of the Commission's Rules: delegations of authority to the Chief, Broadcast Bureau*, 59 F.C.C.2d 491 (1976) [hereinafter cited as *Amendment, 0.281*]. The rule also delegates renewal authority for AM and FM proposals for "less than eight and six percent, respectively, of total non-entertainment programming" and for TV proposals excluding unaffiliated UHF stations for less than "five percent total local programming." *Id.*

198. Under the previous rule, AM, FM, and television proposals had to be referred to the Commission for review if they contained less than 6, 8, and 10 percent, respectively, nonentertainment material. There was no percentage for local or informational (*i.e.*, news and public affairs) programming. Nonentertainment broadcasts included everything from agricultural to religious programming. *Id.* at 492.

the day." Indeed, it is the "right of the public to be informed" which is supposed to be the "foundation stone of the American system of broadcasting."¹⁹⁹ Yet a major VHF television station can be deemed to have acted in the public interest if it devoted 4.75 percent of its total programming to news, and .25 percent to other public affairs broadcasts.²⁰⁰ That the renewal guidelines are too low is demonstrated by the results of a recent questionnaire of 86 VHF network-affiliates in the top 50 markets, each with revenues of over \$5,000,000. The median figure for news and public affairs aired was 15.5 percent, more than three times the Commission's delegated renewal standards.²⁰¹

The percentage guidelines also suffer from a failure to distinguish news from public affairs. News, especially local news, has often become a profitable endeavor²⁰² in recent years. But presentations such as documentaries, round-table discussions, interview shows, and live coverage of legislative hearings are often unprofitable.²⁰³ By lumping public affairs programming with news in the 5 percent category, these educational shows may be virtually eliminated.

Perhaps even more striking than the low percentage figures is the Commission's failure to enforce a news public affairs obligation. As the Commission itself acknowledges, the new delegation guidelines "do not identify a quantity—much less a quality—of programming below which no application will be granted. The amount and kind of programming is left largely to the reasonable, good-faith judgment of the individual licensee."²⁰⁴ If a licensee's proposed programming falls below these low percentage figures, it is subjected to further review by the Commission. But as one FCC official recently stated: "To my knowledge the Commission has never failed to renew a license for

199. *Editorializing Report*, *supra* note 1, at 1249.

200. In fact, the automatic renewal percentages are based on prospective programming. The Commission has also ruled that the staff, after a retrospective look at what was programmed over the preceding 3 years, need not regard a variation of under 15 or 20 percent as "substantial" requiring further examination of the licensee's variance explanation. Thus a variation of 15 percent less than the promised 5 percent informational programming would seemingly not be a cause for concern. *Amendment, 0.281*, *supra* note 197, at 492-93.

201. *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, Docket No. 19154, Third Further Notice of Inquiry*, 43 F.C.C.2d 1043, 1047 (1973) [hereinafter cited as *Third Further Notice of Inquiry*].

202. See F. WOLF, *TELEVISION PROGRAMMING FOR NEWS AND PUBLIC AFFAIRS* 133 (1972).

203. Indeed, this commercial pressure against public issue programming represents the key obstacle to assuring an adequate supply of information on controversial public issues to the American public. This economic disincentive combines with the balancing requirement of part two of the fairness doctrine to strongly discourage the broadcasting of programming on controversial issues.

204. *Amendment, 0.281*, *supra* note 197, at 491.

falling below the percentage standard." The worst that has happened is that a license renewal "has been delayed" for a few months.²⁰⁵ Indeed, many television and radio stations have had their licenses renewed after airing little or no news or public affairs.²⁰⁶

In 1971, the Commission initiated proceedings to establish performance standards covering news and public affairs presentations by television stations.²⁰⁷ Its goal was to tell television licensees what constituted "substantial service" which would give them a preference in any comparative hearing against newcomer applicants for their frequencies. The Commission's proposed figures for news were "8-10% for the network affiliate, 5% for the independent VHF station" (including figures of 8-10% and 5%, respectively, in the prime time period), and for public affairs a tentative figure of "3-5%, with . . . a 3% figure for the 6-11 p.m. time period."²⁰⁸ The Commission wisely separated news and public affairs, providing the latter with a needed special emphasis. It issued specific figures for the all important prime-time periods, something totally lacking in the Commission's delegation authority percentage instructions. The FCC also proposed a range of guideline categories where the stations with higher revenues in the top markets would be required to provide additional information service.²⁰⁹ Such a range seems to be sound policy. News and especially public affairs are not as profitable as many other types of programming; stations earning more from their government-licensed frequency can be expected to do more.²¹⁰ The Commission's proposal had the dual advantages of pro-

205. Interview with James J. Brown, Assistant Chief, Renewal and Transfer Division of the Broadcast Bureau (Dec. 24, 1976).

206. See note 152 *supra*.

207. FCC, *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process*, Docket No. 19154, *Notice of Inquiry*, 27 F.C.C.2d 580 (1971) [hereinafter cited as *Notice of Inquiry*]; FCC, *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process*, Docket No. 19154, *Further Notice of Inquiry*, 31 F.C.C. 2d 443 (1971) [hereinafter cited as *Further Notice of Inquiry*]; *Third Further Notice of Inquiry*, *supra*, note 201. See also *Broadcast License Renewal: Hearings Before Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 93rd Cong., 1st Sess., Part 2, at 1121-24 (1973) (Statement of Chairman Dean Burch).

208. *Notice of Inquiry*, *supra* note 207, at 582 ¶ 5.

209. [W]e propose, for the most part, a range in these categories. The high end of the range would apply to the station in the top 50 markets with revenues over \$5,000,000, while the low end would apply to the station with revenues below \$1,000,000; a station with revenues between these figures would fall appropriately within the range (with, we stress, no specification of a precise, decimal-point figure but rather a general or "ball-park" figure). The appropriate revenue bracket would be denoted on the renewal or annual form, by checking a box.

Id. at ¶ 4.

210. It also seems appropriate, in light of the far greater number and diversity of radio stations than TV stations in most markets, the greater availability of radio fre-

viding some additional security to licensees that meet certain standards, while assuring the public that it would receive more informational programming.

Despite the major step forward represented by the Commission's proposal, its percentage guidelines were too low. Even the upper end of its 10-15 percent figures for news and public affairs combined was below the median of 15.5 percent for the 86 top VHF network affiliates in the 50 largest markets.²¹¹ Its 5 percent news figure for independent VHF stations was below the 5.5 percent median figure of polled VHF independents.²¹² Its prime-time news figures were below the median prime-time news figures for all VHF and UHF affiliates as well as VHF independents registered in the same poll.²¹³

On April 7, 1977, the Commission announced that it had concluded its inquiry and decided to reject the proposals it had made for percentage guidelines to judge licensee performance.²¹⁴ The two key justifications for its decision were that such guidelines would represent

quencies for new applicants, the presence of all news radio stations in many markets, and the lower revenue intake of most radio stations, to require far different standards in the AM-FM radio market.

211. See note 201 *supra* and accompanying text.

212. *Third Further Notice of Inquiry*, *supra* note 201, at 1045.

213. *Id.*

214. FCC, *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process*, Docket No. 19154, Report and Order, FCC 77-204, Apr. 7, 1977 (mimeograph) [hereinafter cited as *Renewal Policies*]. In its *Further Notice of Inquiry*, *supra* note 207, the Commission reacted to the decision in *Citizens Communication Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971), in which the court held in violation of the Communications Act the Commission's policy statement indicating that a licensee with a record of "substantial" community service would be entitled to renewal despite promises of better performance by a challenger and that a full comparative hearing would be granted a challenger only after the Commission refused to renew an incumbent's license for failure to provide substantial service. The court stated: "Insubstantial past performance should preclude renewal of a license. . . . [A]t the same time, *superior* performance should be a plus of major significance. . . ." *Id.* at 1213 (emphasis in original). The court urged the Commission to clarify what constitutes "superior performance." *Id.* at 1213 n.35. The Commission in its *Further Notice* stated that the percentage guidelines it had proposed were indeed suggested as standards to judge superior service and were not meant to illustrate "minimal service meeting the public interest standard." Rather, meeting of the guideline percentages would "*prima facie* indicate the type of service warranting a 'plus of major significance' in the comparative hearing. . . . the type of service which, if achieved, is of such nature that one can ' . . . reasonably expect renewal.' " *Further Notice of Inquiry*, *supra* note 207, at 444 ¶ 4 (emphasis in original). If these percentage guidelines were indeed to represent "superior service," then they were extremely low. As indicated in the text, the upper limits of many of the guideline ranges fall below present median performances of broadcasters. How can a broadcaster who falls far below the median performance of his fellow licensees be considered a superior performer? The *Citizens* case also reemphasizes the need for the FCC to focus on past performance in license renewal proceedings, not proposed performance by incumbents.

an intrusion into broadcaster discretion, and would not significantly improve the comparative renewal process.

The Commission's decision can be faulted for at least three reasons. First, the Commission's major concern was to streamline and make more predictable for existing broadcasters the license renewal process. It did not adequately emphasize the public benefit to be derived from increased public issue coverage.²¹⁵ Second, it did not consider percentage guidelines and their effect on broadcaster discretion in the context of the fairness doctrine repeal. Percentage bloc requirements for news and public affairs programming is far less intrusive on broadcaster discretion than issue-by-issue fairness doctrine intervention. Broadcaster discretion would be enhanced by imposition of the former and dropping of the latter. Finally, given that some standards must be applied in comparative renewal hearings, the FCC should not throw up its hands and say that the public interest determinations it will make in such hearings "cannot be foreshadowed today"²¹⁶ The lack of adequate guidelines leaves licensees uncertain as to what is expected of them, provides no indication to potential challengers as to how they might fare in a comparative renewal proceeding, and provides no answer for the public as to whether a licensee is adequately performing its duties. Such guidelines should not be the sole determining factors in a comparative renewal, but they could play an extremely useful role along with other indicators. Congress or the Commission would do well to reconsider such guidelines in the context of fairness doctrine revision for television, and to reevaluate the proposed percentage figures.

A second major future policy step involves licensee ascertainment activities. Licensees should be required to continue ascertainment of the "problems, needs and interests" of the public in their community throughout the 3-year license term.²¹⁷ The interview survey of various

215. The Commission admitted that the guidelines would "result in increased levels of local, news, and public affairs programming" *Renewal Policies*, *supra* note 214, at 13 ¶ 15. Broadcasters, wanting to secure some advantage in any possible license challenge, would strive to surpass the guidelines. But the Commission questioned whether the quality of such programming would be improved. One would think that, with significantly more news and public affairs programming being produced, there is much public benefit to be gained from increasing the opportunity for the public to be exposed to informational programming at more convenient hours, and in greater quantity and range.

216. *Id.* at 17 ¶ 23.

217. FCC, *Ascertainment of Community Problems by Broadcast Applicants Primer, First Report and Order*, 41 Fed. Reg. 1371, 1381 app. B at Q. 3 (1976) [hereinafter cited as *Ascertainment Primer*]. See also FCC, *Ascertainment of Community Problems by Noncommercial Educational Broadcast Applicants Permittees, and Licensees*, 41 Fed. Reg. 12423 (1976); FCC, *Primer on Ascertainment of Community Problems by Broadcast Applicants, Report and Order*, 27 F.C.C.2d 650 (1971).

community leaders²¹⁸ and the random sample survey of the general public²¹⁹ should continue to reveal a variety of important and controversial public issues.²²⁰

The Commission determines if a licensee's programming accords with ascertainment results by requiring that a "list of no more than ten significant problems, needs and interests ascertained during the preceding twelve months" be placed in the station's public inspection file on an annual basis.²²¹ Programming which has been aired concerning each problem, need, or interest listed must be documented; news inserts of breaking events and public service announcements may not be included.²²²

218. *Ascertainment Primer*, *supra* note 217, at 1381 app. B.

219. *Id.* at 1382 app. B at § C.

220. Some licensees have already used the ascertainment survey to aid them in fulfilling their obligations under the fairness doctrine in determining what is a controversial issue of public importance. Thus, in countering a complaint that it had failed to balance a broadcast which presented views supportive of Darwinian evolution, WSPA-TV stated that the theory of evolution was not a controversial issue of public importance based on its "diligent ascertainment of its service area, including formal community leader interviews and surveys of the general public. . . . [T]he station . . . has not encountered a single person who has identified the theory of evolution as being an important public issue." Mrs. H.B. Van Velzer, 38 F.C.C.2d 1044 (1973). The former General Counsel of the National Association of Broadcasters (NAB) has stated: "I think, to a great extent, the ascertainment process requirement fulfills this aspect [part one] of the Doctrine. . . . [T]he broadcaster, in meeting the ascertainment requirements, has to connect issues with programming that he proposes to do." Interview with John B. Summers (Sept. 11, 1975). However, the Commission has indicated that the "matters cited by a licensee in its ascertainment survey as the problems, needs and interests of the residents of the community which it serves do not necessarily correspond to local, state-wide or nationwide controversial issues of public importance. Moreover, not even the most thorough of ascertainment methods would guarantee that the licensee would identify all those issues which are matters of controversy and public importance." Public Media Center, 59 F.C.C.2d 494, 515-16 (1976).

The Commission is undoubtedly correct. If the procedural requirements of ascertainment as set forth in the *Ascertainment Primer* are effectively followed and enforced, however, the survey will inevitably uncover a very substantial number of important and controversial issues. The requirement to air a minimum percentage of news and public affairs will cause licensees to focus on issues even more. By emphasizing procedural reporting and quantitative standards, the FCC removes itself from the difficult and delicate involvement in determining the problem of issue. Licensees are given greater journalistic freedom, yet the public receives greater public affairs information. The Commission would do well to revise its ascertainment wording of "problems, needs and interests" to include "controversial issues of public importance." This would clarify the importance of uncovering issues of concern to the community.

221. *Id.* at 1383 app. B at Q. 33.

222. *Id.* The Commission does not clarify the status of "mini-documentaries" included within newscasts, as opposed to "news inserts of breaking events." These should, however, be classified as part of the programming counted against the issue listing requirement. In such documentaries, an in-depth look at a particular problem is usually undertaken. Often they are strung together as part of a series. Being part of the evening news, they ordinarily have a far greater prime-time audience than other

The major change must occur in the review process. First, the FCC must begin to take this enforcement responsibility seriously and sanction broadcasters who do not air programming that reflects ascertained problems. Second, the Commission should require licensees to list *at least* ten significant problems covered annually. By stating that "no more than ten significant problems" should be listed, the Commission implies that a licensee may reasonably present programming on only three or four issues throughout the year.²²³

Finally, at renewal time, public groups and other parties should continue to challenge licensees' operations, especially as to the airing of the minimum percentage of public issue programming and as to conforming with ascertainment obligations.²²⁴ The FCC should also continue to expose licensees to investigation and the potential of sanction at any time during the license period if "substantial extrinsic evidence or documents" which "on their face" reflect "deliberate distortion" of news reporting²²⁵ are presented.

It should be stressed that the foregoing policy recommendations merely serve the short term goal of improving a doctrine that presently accomplishes little and has the potential for serious abuse. The long range goal should be to supply the American people with diverse view-

non-news, public affairs programming. They should be encouraged by quantitative and reporting standards, not discouraged by the fairness doctrine as in the *National Broadcasting* case, see note 14 *supra*, which involved a three-part, "mini-doc" series on airport congestion, safety hazards, and private pilots' flying habits.

223. The Commission might also at least emphasize the importance of prime-time broadcasts, something it fails to do when examining the question of what time of day broadcasts should be aired in the *Ascertainment Primer*, *supra* note 217, at 1383 app. B at Q. 31.

224. Henry Geller has suggested that public interest groups and others should be able to challenge a licensee at renewal time for a continuing, flagrant abuse of fairness principles. H. GELLER, *THE FAIRNESS DOCTRINE IN BROADCASTING* 51 (Rand R-1412 FF) (Dec. 1973).

225. 1974 *Fairness Report*, *supra* note 1, at 26,380 ¶ 58. See *The Selling of the Pentagon*, 30 F.C.C.2d 150 (1971) ("lacking extrinsic evidence or documents that on their face reflect deliberate distortion, we believe that this government licensing agency cannot properly intervene." *Id.* at 152); *Hunger in America*, 20 F.C.C.2d 143 (1969) ("Rigging or slanting the news is a most heinous act against the public interest—indeed, there is no act more harmful to the public's ability to handle its affairs." *Id.* at 151 ¶ 22); *Mrs. J.R. Paul*, 26 F.C.C.2d 591 (1969) ("[T]he Commission does act appropriately to protect the public interest . . . where we have received extrinsic evidence of such rigging or slanting (for example, testimony, in writing or otherwise, from 'insiders' or persons who have direct personal knowledge of an intentional attempt to falsify the news). We would be particularly concerned were the extrinsic evidence to reveal orders to falsify the news from the licensee, its top management, or its news management." *Id.* at 591-92). See also *Shady Wall*, 31 F.C.C.2d 484, 485 (1971); *Inquiry Into WBBM-TV's Report on a Marijuana Party*, 18 F.C.C.2d 124, 131-40 (1969); *Network Coverage of the Democratic Nat'l Convention*, 16 F.C.C.2d 650, 656-60 (1969).

points on public issues by increasing the available electronic sources of information. With the full development of such communications outlets as cable television, UHF television, an additional VHF network, and public television, there will be little need or justification for any governmental intervention to assure adequate public issue coverage.